Written evidence submitted by Medical and Dental Defence Union of Scotland (MDDUS) (NLR0065)

The Medical and Dental Defence Union of Scotland (MDDUS) is a medical defence organisation that represents the professional interests of more than 53,000 doctors and dentists across the UK, offering access to indemnity, legal advice, and support.

We welcome the opportunity to submit to the House of Commons Health and Social Care select committee's call for views on NHS Litigation reform. This response outlines MDDUS proposals for reform that we believe would help to address the unsustainable rise in costs in clinical negligence claims.

Background and summary

It is vital that the Government sets out a coherent strategy to tackle the rise in clinical negligence costs, whilst ensuring fair, proportionate, and affordable redress for affected patients.

We know that clinical practice is safer than ever before. The National Audit Office (NAO)[1] reported in 2017 that there is no evidence of doctors and dentists' practice deteriorating in standard. It found that "it is unlikely that the increase in indemnity costs is reflective of the safety of care being provided."

It is our experience, in working on behalf of our members, that there is now an overwhelming 'culture of blame' that discourages people from admitting that mistakes were made and therefore prevents anyone learning from them. In our opinion, only by creating a fairer and more affordable clinical negligence litigation system will we be able to reduce the unsustainable costs to the NHS and individual healthcare professionals. Doing so will also encourage a positive learning culture in which incidents are thoroughly investigated, with lessons learned and shared.
At a time when the NHS is attempting to build back from the peak impact of the pandemic, facing tough financial pressures and must make difficult decisions about how it allocates its limited resources, it is imperative the Government does more to reduce overall compensation costs for clinical negligence, whilst ensuring the money which is spent more quickly reaches those whose needs are greatest.

In our submission we set out five reforms MDDUS believes must be made to aspects of the clinical negligence process. Taken as a whole, if these reforms were made it would bring a net benefit to the NHS amounting to millions of pounds each year in saved costs.

In addition, it would end the perverse incentive to seek compensation when the case is weak or non-existent, reduce stress on our clinicians and spare patients a legal ordeal that may end without the promised settlement, but with high legal costs.

Introduction

[1] National Audit Office (2017) Managing the costs of clinical negligence https://www.nao.org.uk/report/managing-the-costs-of-clinical-negligence-in-trusts/

The cost of clinical negligence in the NHS has been rising exponentially over recent years, placing enormous financial pressure on an already stretched health system. These unsustainable costs will continue to rise in the absence of legal reform and changes to the incentive structure that encourages law firms to advance unmeritorious cases

There is a grave need for concerted action by Government to fundamentally reform the clinical negligence process, as it is now one of the biggest drivers of increasing costs across healthcare. That pressure is felt also in the private sector and by those clinicians responsible for funding their own indemnity.

The principal objective of clinical negligence litigation is that patients who are harmed by the negligence of regulated healthcare professionals can access appropriate compensation.

But we believe that current uncapped compensation levels are not appropriate when compared, for example, to the far lower, capped sums parliament has judged fair in relation to criminal injuries compensation - £70,000. Nor do we believe that the system operates fairly in relation to meritorious cases given that judicial resources and court and legal time are spent dealing with cases where no payment is made (81% of claims against our members in 2020)[2], often delaying settlement in others where the case is overwhelming.

Data from the most recent NHS Resolution annual report shows that more than £8bn of costs were settled in 2020/21 alone[3], also stating "the evidence suggests that the total cost of resolving claims will continue to rise, largely due to factors beyond our control", not least owing to the likelihood of Covid-19 claims for which NHS Resolution has forecast a £0.5 billion increase to its estimate of future claims.

There have been some welcome changes in the field of clinical negligence following the reforms under part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), principally a reduction in the size of claimants' bills of costs as a result of the abolition of the recovery of success fees and After the Event (ATE) premiums for legal costs. But these have not gone far enough to halt the rising costs of claims on the NHS and clinicians.

Implementation of the wider reforms we set out in our submission would ensure a fairer system all round. It would stop millions of pounds leaving the NHS each year and allow it to be redirected to fund the NHS and local authority care.

Our submission addresses the five key measures we consider capable of having the biggest impact on the costs of clinical negligence litigation, namely:

1. Repeal of S2(4) of the Law Reform (Personal Injuries) Act 1948
2. Abolition of QOCS and the re-introduction of legal aid
3. Introduction of fixed recoverable costs in clinical negligence claims up to £100,000
4. Cap on future earnings and earning capacity cost
5. Full review and early increase of the personal injury discount rate

MDDUS Proposals:

[2] MDDUS Annual Report 2020 https://www.mddus.com/-/media/files/mddus-corporate-documents/2021/mddus-ar2020-online.pdf

[3] NHS Resolution Annual report and accounts 2020/21 https://resolution.nhs.uk/wp-content/uploads/2021/07/Annual-report-and-accounts-2020-2021-WEB-1.pdf

1. Repeal of S2(4) of the Law Reform (Personal Injuries) Act 1948

Section 2(4) of the Law Reform (Personal Injury) Act 1948 provides that defendants who pay for the future healthcare and treatment of damaged patients must do so on the presumption that such care will be provided by the private sector. We believe this presumption is mistaken and therefore this section should be repealed.

Over recent years, concerns have been raised about the substantial cost of care packages factored into damages awards, specifically via the provision of S2(4). We have long maintained that the outdated provision of S2(4) leads to the demonstrably false assumption that all – or even the majority of - care will be provided by the private sector. This does not reflect the reality of how such care can or should be provided. Many claimants who receive damages for future healthcare continue to utilise the excellent and readily accessible NHS services.

The current system creates the diversion of significant sums of money from the to the small number of individuals who are then able to obtain their own care and rehabilitation arrangements on a private basis. This is to the detriment of both NHS treatment providers, who may have seen funding reduced due to the impact of litigation costs on the NHS, and also those individuals who are reliant on state services, but are not able to attribute their injury, illness or disability to a negligent act.

The repeal of Section 2(4) would allow the retention of additional funds within the NHS due to the reduction in compensatory sums payable by NHS Resolution and other public bodies for future healthcare and treatment. These sums would allow the NHS and local authorities to extend the provision of their services, benefitting not only the injured party but also those who not subject to a negligent act. Furthermore, medical defence organisations like ourselves and other personal injury defendants such as employers, insurers and public bodies would be able to fund a package of NHS and local authority care as part of any compensatory award, effectively further funding the NHS.

The repeal of Section 2(4) is essential if we are to reduce the pressure on our members and the NHS from inflated claims and to ensure that the size of awards reflect the availability of NHS services, both directly provided and indirectly commissioned. Likewise, assessments of social care need should start from a presumption of local authority provision and/or commissioning unless there is some specific demonstrable reason, unique to the facts of the case, which clearly renders that unreasonable. Indeed, there seems no reason in principle why courts could not seek to commission assessments and specify the precise packages of care to be delivered.

By doing so, this would help restore balance to the claims system and allow the harms that have arisen to be addressed through health and social care provision, rather than being treated and potentially unnecessarily expensive way.

2. Abolition of QOCS and the re-introduction of legal aid

Qualified one-way costs shifting (QOCS) was introduced for personal injury claims in 2013 with the aim of ensuring claimants had access to justice and can pursue claims without concerns they will have to repay costs if unsuccessful.

This means that defendants are generally ordered to pay the costs of successful claimants but, subject to very narrow exceptions, are not able to recover their own costs if they successfully defend the claim.

The presence of QOCS tends to encourage cases, which otherwise might have settled without court action, to progress further. This delay in settlement and resolution hurts claimants as well as defendants. The introduction of QOCS has also resulted in increased costs for defendants, particularly the NHS, and has placed a greater burden on the court system.

A recent Civil Justice Council (CJC) report[4] called for an "active review" of the QOCS regime, which remains unfair to clinicians and the NHS, without providing the most vulnerable claimants with any real benefit. The report outlined three main areas of concern as: the working of QOCS where there was late discontinuance of a claim; the definition of 'fundamental dishonesty'; and the definition of 'substantial injustice'.

We believe the Government must abolish QOCS in clinical negligence cases - and to ensure continued access to justice for the most vulnerable reintroduce legal aid for more categories of clinical negligence claims. As a central part of wider reforms, this action would contribute to the Government's desire to "level up" more widely as well as reduce the burden on the NHS and court system of unjustified claims.

3. Introduction of fixed recoverable costs in clinical negligence claims up to £100,000

MDDUS has previously welcomed Government plans to limit fixed recoverable costs (FRCs) in clinical negligence cases against the NHS and clinicians in England. However, to have any significant effect, we believe a realistic limit must be set. The present FRC proposals run the risk of being positively counter-productive as they effectively incentivise needless expenditure.

At present there is no limit on legal fees, even if the compensation claim is for a small amount. In our experience, it is very common for claimant costs to be more than five-fold greater than the costs we incur. Additionally, cases where costs are greater than the settlement achieved – or, in some cases, even claimed – are not isolated occurrences. With the need to tackle ever increasing costs in mind, we strongly urge Government to take a more balanced and ambitious action by extending the system of fixed recoverable costs to cases of up to £100,000.

In 2019, a Civil Justice Council (CJC) Working Group produced a report on FRCs in low value clinical negligence claims[5], proposing FRC for less complex claims from £25,000-£100,000. It is disappointing that these recommendations have not advanced in any significant manner since then, and we strongly believe that it is imperative the Government revisit its intention to extend FRCs in clinical negligence cases.

Making these changes has the potential to save the NHS and clinicians millions of pounds each year and will benefit patients who have been harmed whilst also ensuring that legal fees are proportionate in relation to the compensation received by the patient.

4. Cap on future earnings and earning capacity costs

There is currently no limit on future loss of earnings that can be recovered by a claimant in clinical negligence claims, which has resulted in a significant issue of fairness relating to future earnings of claimants as high earning claimants are often able to claim more in damages than lower earners.

Other jurisdictions around the world carry a cap on what can be recovered as loss of earnings in a clinical negligence context, for example in Australia awards are capped, typically, at a multiple of two or three times the national average wage. This ensures that awards for high earning claimants are reduced by way of a formula that is not susceptible to manipulation.

The recent Health and Social Care committee report into the safety of maternity services[6] also recommended that future earnings are calculated from the national average wage to prevent unjust variability in pay-outs.

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[4] Civil Justice Council (2020) Low value PI working group report https://www.judiciary.uk/wp-content/uploads/2020/12/20201218-FINAL-CJC-Low-Value-PI-Working-Group-Report.pdf

[5] Clinical Justice Council (Oct 2019) 'Fixed Recoverable Costs in Lower Value Clinical Negligence Claims' https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/archive/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims/

[6] House of Commons Health and Social Care Committee (2021) The safety of maternity services in England

The current system in England is outdated and unjust, and we believe it is possible to award financial compensation on a more equitable basis by introducing a limit on future earnings and earning capacity.

Placing a cap on future earnings would be an important tool for lowering costs in the system and introduce greater parity in the size of awards claimants receive. If carefully implemented, this would help to control costs whilst still providing a full and appropriate remedy for patients who have received long-term detriment.

5. Full review and early increase of the personal injury discount rate

In 2016, the growing crisis in clinical negligence claims was further exacerbated by the action of the then Lord Chancellor, who reduced the personal injury discount rate (PIDR) by 3.75% to -0.75% in March 2017. The then Government then passed the Civil Liability Act 2018, which brought in a new methodology for calculating the discount rate based on a low-risk portfolio of investments, and as of August 2019 the discount rate is set at -0.25%.

We have long been vocal in our opposition to the unrealistic decision to significantly cut the discount rate which has increased the incentives to claim at often unrealistic levels, generated a significant increase on costs of damages settlements and produced awards higher than providing 100% compensation. The damaging impact on the NHS and clinicians is continuing and has inflated damages awards substantially. We are not aware of any empirical evidence which shows that claimants invest lump sums to ensure negative returns, nor are we aware of any financial advisers who would consider that advice on those terms met their regulatory obligations.

The Government must take immediate action to correct the unjustified discount rate and return rationality to the system. Doing so would have a huge impact on the cost of clinical negligence litigation and help safeguard the NHS against spiralling costs.

<u>Conclusion</u>

The current clinical negligence claims environment cannot be allowed to continue on its current trajectory. Expenditure on clinical negligence claims by NHS Resolution has increased exponentially over recent years. Not only does it risk becoming unsustainable for the NHS, but it is also placing undue burden on doctors and dentists.

We have outlined a number of reforms in this submission that we believe are vital to promote a fair system which resolves clinical negligence claims quickly by ensuring prompt, proper and just compensation for those wrongly harmed, whilst also encouraging a culture of learning to ultimately improve patient safety.

It is crucial that the government act now, before we see the annual NHS bill increase any further and these increasing costs become unsustainable.

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https://committees.parliament.uk/publications/6578/documents/73151/default/