



House of Commons
Constitutional Affairs
Committee

**Compensation culture:
*NHS Redress Bill***

Fifth Report of Session 2005–06



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Report, together with formal minutes

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The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

Current membership

Rt Hon Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chairman)
James Brokenshire MP (*Conservative, Hornchurch*)
David Howarth MP (*Liberal Democrat, Cambridge*)
Barbara Keeley MP (*Labour, Worsley*)
Mr Piara S Khabra MP (*Labour, Ealing Southall*)
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Mr Andrew Tyrie MP (*Conservative, Chichester*)
Keith Vaz MP (*Labour, Leicester East*)
Dr Alan Whitehead MP (*Labour, Southampton Test*)
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Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the internet at www.parliament.uk/conaffcom

Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr John Gearson (Second Clerk), Richard Poureshagh (Committee Assistant), Alexander Horne (Legal Specialist), Anne Woolhouse (Secretary), Tes Stranger (Senior Office Clerk) and Jessica Bridges-Palmer (Committee Media Officer).

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1 Introduction

1. The Constitutional Affairs Committee published its Third Report of Session 2005-06 on Compensation Culture on 1 March 2006, as HC 754-I. The Government response has not yet been published. Following an oral evidence session on 31 January 2006, Rt Hon Jane Kennedy MP, Minister of State for Quality and Patient Safety at the Department of Health, promised to return to the Committee and provide some further details about the proposed *NHS Redress Bill*. A letter from the Minister was subsequently received on 12 March 2006. The letter is printed as an appendix to this Report.

2. The particular areas of concern expressed to the Minister at the session on 31 January 2006 were as follows:

- Whether the Department of Health had a current list of medical experts who were able to provide medical reports;
- Whether doctors and lawyers would be willing to work for fixed fees and the proposed level of those fees;
- The expected number of additional claimants under the Redress procedure.

3. The Minister's letter dealt with each of these issues and we take them in turn.

Independent Medical Experts

4. In answer to the question as to whether the Department had a current list of experts, the Minister wrote:

I think it may be helpful to clarify this point. Under the Clinical Negligence Scheme for Trusts, there is currently a list of medical experts prepared to provide independent medical reports for clinical negligence claims under the Clinical Negligence Scheme for Trusts. In my oral evidence, I suggested that it was possible this practice would also apply under the redress scheme. This remains an option but we will be working closely with stakeholders when consulting on the secondary legislation to determine how medical reports may best be commissioned, with flexibility being very important.

5. The Clinical Negligence Scheme for Trusts (CNST) is a mutual pooling pay-as-you-go arrangement for NHS trusts in England, designed to assist trusts in meeting the costs of clinical negligence claims.

6. Details of the Clinical Negligence Scheme for Trusts are available on the NHS Litigation Authority website. It states that:

The Clinical Negligence Scheme for Trusts handles all clinical negligence claims against member NHS bodies where the incident in question took place on or after 1 April 1995 (or when the body joined the scheme, if that is later). Although membership of the scheme is voluntary, all NHS Trusts (including Foundation Trusts) and Primary Care Trusts (PCTs) in England currently belong to the scheme. [...]When a claim is made against a member of CNST, the NHS body remains the

legal defendant. However, the NHSLA takes over full responsibility for handling the claim and meeting the associated costs. Until April 2002, trusts handled claims within their chosen excess themselves. Such claims were then “called-in” and all CNST claims are now handled centrally regardless of value. The scope of the scheme is set out in the CNST rules, while our Clinical negligence reporting guidelines and CNST claim report form set out how claims should be reported by trusts to the NHSLA. A Guide to clinicians on how claims are handled is also available.¹

7. The Minister has not set out details of whom she intends to consult about the list of doctors who will provide medical reports and what questions she intends to raise with “stakeholders”. There is a clear difficulty about ensuring that claimants are not disadvantaged by the use of experts in the pay of the NHS.

Fixed fees

8. When we took oral evidence from the Minister, the Committee was concerned about whether doctors and lawyers would be willing to work for fixed fees. In evidence, the Minister stated that:

I have seen figures that we anticipate figures of £200-500 for different [medical] reports. This is not a new field that we are operating in. There are already given costs but we expect that the operation of this scheme will reduce the amount of money paid in legal fees. We expect it will increase the amount paid in compensation but we anticipate there will be a reduction in the amount that we pay in fees.²

9. In her letter of 12 March 2006, the Minister wrote:

To avoid any misunderstanding, I would like to clarify that my response during the oral hearing related to fees for independent medical reports. Figures supplied by the NHS Litigation Authority show that these fees could range between £200 and £500. As regards legal fees, by way of example, information provided by the NHS Litigation Authority shows that the agreed rate for defence panel firms who have approved offices in London, ranges between £85 and £185 per hour. Figures published by the Supreme Court Costs Office show that London claimant fees can range from £100 to £342 per hour.

10. Unfortunately, the figures provided by the Minister confirm our initial fear that the Department of Health does not seem sufficiently focused on the detail of the proposals and has not given detailed consideration to the potential cost. While it is perfectly reasonable that the cost of medical reports should vary according to the type of injury sustained, the cost differential cited by the Department of Health is in excess of 100 percent. The figures cited about the range of legal fees are even more variable. If the Minister is seeking to bear down on this type of cost, this should be made plain, so that the impact on independent provision could be assessed. This is important, since we have no evidence that doctors and lawyers would be willing to provide high quality independent advice for low fixed fees.

¹ <http://www.nhsla.com>

² Constitutional Affairs Committee, Third Report of Session 2005-06, *Compensation Culture*, HC 754-II, Q288

Number of additional claims under the Redress Scheme

11. The Minister has indicated in her correspondence that “we do expect more people to come forward” and goes on to indicate that modelling based on patient survey data suggests that making it easier for a patient to make a claim “may cause claims to rise by anything from 2,200-19,500 a year”.

12. Again, these differentials make it appear that the statistics have been plucked out of the air. This goes to support our initial recommendation that this scheme should be piloted prior to a national roll out, since it is impossible to predict the upsurge of claims and associated cost. It should be remembered that money that is paid in compensation is money that will then not be able to be used by the NHS for the provision of patient care.

2 Conclusion

13. Given the difficulties identified in our previous report *Compensation Culture*³ and the issues raised in the Minister's letter, when this Bill comes before the House the Minister might be asked:

- How the Department of Health will satisfy claimants that NHS funded experts will be demonstrably independent, whom the Department has consulted on this issue and what progress the Department has made in identifying independent medical experts?
- Whether the Department of Health has decided upon the level of fixed fees to be paid to doctors and lawyers under the scheme and whether they have consulted to ensure that there are professionals who would be willing to work for those fees;
- Given the level of uncertainty as to the number of additional claimants who could come forward under the scheme, and the fact that for each additional claimant money would be diverted from the provision of patient care, whether the Department of Health is willing to run a pilot of the Redress scheme to test the level of claims.

³ HC 754-I

Appendix

Letter from Rt Hon Jane Kennedy MP, Minister of State, Department of Health to Rt Hon Alan Beith MP, Chairman of the Constitutional Affairs Committee

I should like to thank the Constitutional Affairs Select Committee for the opportunity to explain in more detail the Government's thinking behind the *NHS Redress Bill*. During my evidence, I offered to write to the Committee on a few of the points raised.

Independent Medical Experts

Under the Clinical Negligence Scheme for Trusts, administered by the NHS Litigation Authority, claimants and defendants have lists of the experts in different specialties who prepare independent medical reports on request. The experts assert their independence by signing a statement on every report to the effect that they acknowledge their duty to the court, not to either of the parties.

At Report stage, a government amendment was made to clause 6(1)(b) of the *NHS Redress Bill* that will, in appropriate cases, enable the scheme to provide for the services of medical experts or other relevant services at any stage of the proceedings under the redress scheme. We would not wish there to be any restriction on when these services may be used. However, it is our intention to work closely with stakeholders when consulting on the secondary legislation to determine the circumstances in which it may be appropriate to commission a jointly instructed independent medical expert.

During oral evidence, I referred to a current list of experts being available to provide medical reports in the event of a claim for redress. I think it may be helpful to clarify this point. Under Clinical Negligence Scheme for Trusts, there is currently a list of medical experts prepared to provide independent medical reports for clinical negligence claims under Clinical Negligence Scheme for Trusts. In my oral evidence, I suggested that it was possible this practice would also apply under the redress scheme. This remains an option, but we will be working closely with stakeholders when consulting on the secondary legislation to determine how medical reports may best be commissioned, with flexibility being very important.

Meetings with the Legal Profession

I agreed to provide you with Information regarding legal stakeholder involvement.

In June 2003, the CMO published his consultation document *Making Amends*, which set out recommendations for clinical negligence reform. Of the 170 responses received, over 40 came from legal organizations. These generally supported reform, but the other issues raised focused around the logistics of the redress scheme and the impact on patients—for example, the need to ensure individuals retain the right to legal advice and litigation.

The Law Society and the Law Reform Committee of the Bar Council supported the need for an alternative, to the current system and their feedback focused on issues concerning patients. The Bar Council also wanted to see reform adding value to the current system of complaints and compensation.

We have continued to liaise with the legal professions during the passage of the Bill through Parliament and we will consult them on the secondary legislation.

Independent Legal Advice

We remain committed to protecting patients' rights. The NHS Redress Scheme provides an alternative to the courts, and gives patients another way of getting the explanations, apologies and offers of redress they say they want. To gain patient confidence, it is important patients receive support and advice throughout the redress process and we have taken powers to ensure this is able to happen.

We have taken on board the concerns raised during Committee stage of the Bill that access to legal advice without charge prior to settlement should be an immutable requirement of the scheme. Prior to these concerns being raised, it had been our intention that legal advice on an offer of settlement would be available to enable patients to have the offer of redress independently evaluated without charge to them. This would enable them to assess whether or not the offer is reasonable and equivalent to what they would have received through the courts, and to explain the implications of signing a waiver.

However, In light of concerns raised, a government amendment was made at Report to clause 8 to strengthen the wording of the Bill to require the Secretary of State to make such provision as she considers appropriate to ensure that all persons making claim under the scheme have access to free legal advice in relation to offers and settlement agreements. I believe this will clarify the position and provide reassurance that under the scheme, patients will have the opportunity to be fully and appropriately advised about the offer and the consequences of waiving the right to bring civil proceedings.

The existing clause 8(1) will continue to enable the scheme to make such provision as the Secretary of State thinks fit for the provision of legal advice without charge in connection with proceedings under the scheme. This may be used in appropriate circumstances to provide legal advice without charge. at earlier stages of the proceedings; for example, where the joint instruction of a medical expert may be required. We Intend to consult on the circumstances in which it may be appropriate.

Fixed Fees for Medical Experts and Lawyers

To avoid any misunderstanding, I would like to clarify that my response during the oral hearing related to fees for independent medical reports. Figures supplied by the NHS Litigation Authority show that these fees could range between £200 and £500.

As regards legal fees, by way of example, information provided by the NHS Litigation Authority shows that the agreed rate for all defence panel firms who have approved offices in London, ranges between £85 and £185 per hour. Figures published by the Supreme Courts Costs Office show that London claimant fees can range from £100 to £342 per hour.

Reduction in compensation payable

The NHS Redress Scheme does not seek to reduce the amount of compensation paid to eligible patients. It is intended that offers will be equivalent to awards which would have been made by the courts. This will be checked through the legal advice made available to the patient or individual eligible for redress once an offer has been made. There would therefore be no advantage in knowingly offering less compensation than would be received through the courts because, following legal advice, the offer would be rejected and more expensive court action taken. This would be counterproductive. To be successful, the offer of redress under the scheme will have to be equivalent to that granted by the courts.

Number of additional claims under the Redress Scheme

The numbers I provided in oral evidence relate to claims under the Clinical Negligence Scheme for Trusts scheme. Whilst the expected numbers of additional claims under the redress scheme may be similar, I think it will be helpful to avoid any misunderstanding and to provide the committee with additional information.

Over the past three years (from the financial year 2001-02 to 2003-04), the average number of claims settled under £20,000 under Clinical Negligence Scheme for Trusts was around 4,100. This represents approximately 75% of claims settled during that period. Precise numbers of expected new claims under the redress scheme are hard to predict because it involves modelling human behaviour. As I explained, the scheme seeks to make redress more straightforward, and we do therefore expect more people to come forward.

Over the past few years (from the financial year 2001/02 to 2003/04), the NHSLA received on average around 7,000 new claims a year. Modelling work within the Department of Health based on patient survey data suggest that making it easier for a patient to make a claim may cause claims to rise by anything from 2,200 - 19,500 a year. However, it is important to remember that the scheme will be subject to the current law of tort. This will ensure that only genuine cases will be eligible for the scheme and we expect the vast majority of opportunistic claims to be easily rejected.

Targets

As I explained during the oral hearing, I do not see targets as being appropriate for the NHS Redress Scheme. The scheme is about creating a culture of openness and encouraging learning within the NHS. It will put the patient at the heart of the process.

This would be difficult to quantify; the scheme needs to retain the flexibility to respond to local environments and patient needs.

However, post-implementation review, expected to be after three years, will cover two aspects: whether the scheme is meeting its policy objectives and whether the scope of the Scheme ought to be extended. To meet its policy objectives, the scheme will need to demonstrate increased patient satisfaction in their dealings with NHS providers over clinical negligence issues, a reduction over time in the number of cases falling within the scheme (i.e. evidence of local learning) and a shift towards a reduction in legal costs for handling clinical negligence claims of small monetary value.

The cost of the NHS Complaints Procedure

The Department does not collect these figures centrally. However, we do envisage close links between redress and complaints. In each instance, there will be a full investigation to determine the facts. This applies whether it is a clinical negligence case or dissatisfaction with, for example, a delay in being given an appointment. Where appropriate, complainants should be offered an explanation and apology. This is good practice.

The redress scheme then takes this a step further. For those clinical negligence cases where financial compensation is appropriate, and the patient wants that compensation, an offer will be made.

Guidance on Complaints

We are currently reviewing the NHS complaints system with the aim of shifting from a system that is driven by process and organisation. It is important for complaints to have a patient-focus; to ask what a patient is looking to achieve when making a complaint. When complete, the new approach will be supported by guidance/good practice.

Statistics on numbers of complaints officers

The Department does not collect this information centrally.

Keith Vaz raised a question specifically about the number of complaints managers in the University Hospitals of Leicester NHS Trust and I will reply to him personally on this.

Statement by the 16 charities

In terms of a guarantee of an independent assessment of the case, it is intended that the scheme authority will have the overview of the scheme, will monitor the scheme for consistency, and will issue guidance to scheme members. A separate complaints procedure for the redress scheme will be established in secondary legislation and this will enable a patient to complain about maladministration of the scheme.

We envisage that most complaints will be resolved informally at local level. The intention is that formal complaints will be considered by the scheme authority. However, if still dissatisfied, a complaint of maladministration may be made to the Health Service Commissioner.

It is also intended that consideration of the effectiveness of the operation of the NHS Redress Scheme, including investigations carried out under the scheme, will be included as part of the Healthcare Commission's annual review of the provision of health care by and for NHS bodies. The intention is that the Secretary of State for Health will include a new standard relating to redress and that the Healthcare Commission will include new criteria against which operation of the scheme will be reviewed.

I hope this is helpful in clarifying further the issues raised during my evidence to the Committee.

Jane Kennedy
Department of Health

Formal minutes

Tuesday 21 March 2006

Members present:

Mr A J Beith, in the Chair

David Howarth
Barbara Keeley
Mr Piara S Khabra

Keith Vaz
Dr Alan Whitehead

Draft Report [Compensation culture: *NHS Redress Bill*], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 13 read and agreed to.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

A paper was ordered to be appended to the Report.

Ordered, That the Appendix to the Report be reported to the House.

[Adjourned till Tuesday 28 March at 4.00pm]

Reports from the Constitutional Affairs Committee

Session 2005-06

First Report	The courts: small claims <i>Government response</i>	HC 519 <i>Cm 6754</i>
Second Report	The Office of the Judge Advocate General	HC 731
Third Report	Compensation culture	HC 754
Fourth Report	Legal Services Commission: removal of Specialist Support Services	HC 919

Session 2004-05

First Report	Freedom of Information Act 2000 — progress towards implementation <i>Government response</i>	HC 79 <i>Cm 6470</i>
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [<i>Lords</i>]: the Government's proposals <i>Government response</i>	HC 275 <i>Cm 6488</i>
Fourth Report	Family Justice: the operation of the family courts <i>Government response</i>	HC 116 <i>Cm 6507</i>
Fifth Report	Legal aid: asylum appeals <i>Government response</i>	HC 276 <i>Cm 6597</i>
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee) <i>Government response</i>	HC 243 <i>Cm 6647</i>
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates <i>Government response</i>	HC 323 <i>Cm 6596</i>