Government Response to the
Constitutional Affairs Select Committee's Reports:
Compensation culture
And
Compensation culture: *NHS Redress Bill*

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CORRECTION

Please note the following correction to the cover and title page:

On the front cover and title page, "April 2006" should read "May 2006"

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Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: *NHS Redress Bill*

Presented to Parliament
by the Secretary of State for Constitutional Affairs and Lord Chancellor
and by the Secretary of State for Health

By Command of Her Majesty
April 2006

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Introduction

1. The Government is grateful to the Constitutional Affairs Select Committee (CASC) and to all those who gave evidence on a wide and complex range of issues.
2. The Select Committee's Third Report: *Compensation Culture* reached conclusions and made recommendations on Conditional Fee Arrangements; The Compensation Bill [Lords] and Risk Aversion; and The NHS Redress Bill [Lords]. In its Fifth Report: *Compensation Culture: NHS Redress Bill*, the Select Committee made further observations on the NHS Redress Bill.
3. The Government's response to both Reports is below.

Summary

4. The Government welcomes the Committee's conclusion that it is evident from the statistical evidence that the UK is not moving towards a "compensation culture" driven by a significant increase in litigation.

5. The Committee concludes that there are no easy answers to the difficulties exposed on the compensation system during the inquiry. However, as the Committee recognises, the Government has made clear its determination to tackle excessive risk aversion and mistaken perceptions and has announced a wide programme of work. Its core objectives are to:

   - Prevent a compensation culture from developing;
   - Tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour;
   - Find ways to discourage and resist bad claims;
   - Improve the system for those with a valid claim for compensation.

6. Many of the issues identified by the Committee are being taken forward through this work, which is being delivered through a cross Government Ministerial Steering Group, and with the involvement of a wide range of stakeholders.

7. The Government welcomes the Committee's conclusion that CFAs have generally widened access to justice. We agree that they play an important role in defamation and privacy cases but that proportionality of costs in these cases can be difficult to achieve. We are working with the Civil Justice Council, media organisations and claimant representatives to ensure cost control measures are adequate.

8. The Government agrees that more must be done to promote understanding that sensible risk management is about controlling risks so as to protect people, not attempting to eliminate risk altogether, and that health and safety should not be used as an excuse to justify decisions taken wholly, or mainly for other reasons. Much work is already underway, including research that will provide evidence to help identify where action needs to be targeted to have greatest effect.

9. The Government does not agree with the Committee's conclusion that clause 1 should not be in the Compensation Bill. The clause will have a range of different benefits and forms a valuable part of the Government's wider programme of work. It will reassure those concerned about possible litigation about how the law in this country works, and will help counter the view that organisations should cease activities because of a fear of litigation. It will also ensure that all courts are fully aware of the guidance given by the higher courts which is reflected in the clause.

10. Part 2 of the Bill provides a deliberately broad definition of claims management services to avoid loopholes. However we acknowledge that the degree of flexibility provided for has caused some concern. We have addressed this by making a number of amendments to the Bill in the House of Lords, in particular to deal with the concerns raised by the Delegated Powers and Regulatory Reform Committee. We have also published and placed in the library of both Houses a policy statement and draft model rules.

11. In the Committee's conclusions, with regard to the NHS Redress Bill [Lords], the main areas of concern focus on the detail of how the scheme, as established under the powers taken in the Bill, will work in practice, and the cost implications of the scheme.

12. The Government acknowledges that leaving the main detail of the scheme to secondary legislation has caused some concern. Broad powers have been taken in the Bill to establish a scheme but when those powers are exercised for the first time, the affirmative resolution procedure will apply and this will lead to full Parliamentary scrutiny of the new scheme. We have also committed to the secondary legislation being published in draft with a formal three-month consultation period during which time stakeholders will be consulted. We will also review the scheme after three years to check if it has met its policy objectives and also to consider whether the scope of the scheme should be extended.

13. By including the detail of the redress scheme in secondary legislation, we can respond more easily not just to a changing NHS but also to how successful the scheme is and how it works in practice to help patients.

14. The Government envisages that once the redress scheme is established the number of patients coming forward to make claims will increase and this is to be expected as access to justice increases. The precise number depends to a large extent on human behaviour. However, we are certainly not complacent

about the costs involved. The scheme will be subject to the current law of tort and opportunistic claims will be rejected.

Response to Conclusions and Recommendations

Conditional Fee Agreements

The introduction of CFAs was designed, in part, to widen access to justice. The evidence appears to show that it has had some success in meeting that aim, although perversely some cases which previously would have received legal aid funding may not receive CFA funding because the chances of success are not high enough. Conditional fee agreements have not directly caused the perception of a compensation culture. The statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims. Nonetheless, we agree with the conclusions drawn by Citizens Advice, that the introduction of CFAs (and with it a class of unregulated intermediaries acting as claims managers) has adversely affected the reputation of legal service providers, whether professional lawyers or not. The increased awareness of the public that it is possible to sue without personal financial risk, when combined with media attention to apparently unmeritorious claims being brought, has contributed to a widely held opinion that we do indeed have a compensation culture. (paragraph 17)

15. The Government welcomes the Committee's conclusion that CFAs have widened access to justice. The reforms introduced by the Access to Justice Act 1999 were designed to make justice affordable for all, encourage early settlement, discourage weak claims and help ensure those with genuine claims retain more of their awards. There is little evidence that cases previously eligible for legal aid funding may not receive CFA funding because of lower chances of success. CFAs are a good mechanism for filtering out weak claims as they make the lawyer share in risk of taking the case on, so should encourage them to pursue only those claims which they think are genuine and have a 50% or higher chance of success.

16. The recent research report published by DCA evaluating the effect of the introduction of recoverable success fees on personal injury claims concluded that "Our findings … show on the whole (and not withstanding the satellite litigation that characterised the period directly after the introduction of recoverability) that the legal services market has adapted quite smoothly to the new developments. Personal injury claims arising from road traffic or work

accidents do not appear to be very different in nature or outcome from those run under the previous rules"[1].

17. The Government welcomes the Committee's conclusion that CFAs have not directly caused the perception of the compensation culture. While the Access to Justice reforms were significant the Government does not accept that CFAs have in themselves adversely affected the reputation of legal service providers. The CFA is a 'product', which as the Committee acknowledges the Government has recently simplified, that providers can offer to clients to act for them to help them resolve most types of civil legal disputes irrespective of means. The way in which providers conduct themselves in relation to using CFAs and handling claims generally is something they are responsible for. If a professional body or another regulator regulates the provider it is also a matter for that regulator to police and deal with poor conduct. The introduction of the regulation of claims management services will help close a key regulatory gap and improve consumer safeguards – the protection of consumers being the most important objective of regulation.

Difficulties in Libel cases

Proportionality of costs in defamation cases is difficult to achieve. It is not easy to design a system whereby a claimant without funds is allowed access to justice without exposing the defendant to the chance that he will not recover the costs of the action if the claimant is unsuccessful. Given the power of the press, it is right that people should have a remedy when have been defamed; and because of the high level of costs inherent in bringing a claim it is likely that those with modest means will continue to have to rely on CFAs. (paragraph 29)

The uplifts that claimant's solicitors receive should reflect the risk that they bear. Reassessment of risk as the claim proceeds may go some way to ensuring proportionality, but only for that stage of the proceedings. This would require a clearly staged process. Further use of cost capping orders may prove useful in some circumstances. The courts need to ensure that

[1] The funding of personal injury litigation: comparisons over time and across jurisdictions by Paul Fenn, Alastair Gray, Neil Rickman and Yasmeen Mansur University of Nottingham, University of Oxford and University of Surrey (February 2006)

appropriate case management takes account of proportionality, preferably before the costs are actually incurred. (paragraph 30)

18. The Government considered the impact of CFAs in defamation cases as part of the CFA review carried out in 2004/05 that resulted in the simplification referred to above. The media organisations, many claimant lawyers and others contributed fully to the debate at time. The former argued that CFAs have a 'chilling' effect on freedom of speech and the latter emphasised the role CFAs have played in providing access to justice for those people who otherwise would not be able to afford legal representation and play an important role in discouraging irresponsible journalism.

19. The Government stated in the August report on CFAs[2] that there were no plans to introduce new legislation to restrict the use of CFAs and that the existing powers at the courts disposal could deal with cases where costs were considered by the costs judge to be unreasonable and/or disproportionate.

20. The Government agrees with the Committee that CFAs play an important role to give people access to a remedy if they have been defamed or their privacy invaded and that disproportionate costs should be able to be addressed by the courts through appropriate costs control measures. The Government also agrees with the Committee's suggestions where these controls might be improved to help make costs more proportionate more of the time. This includes the more stringent exercise of current case management measures, in particular the further use of costs capping orders for appropriate cases and the development of staged recoverable success fees.

21. DCA is working with the Civil Justice Council to try to secure agreement on next steps with both the claimants firms and the media organisations to maintain access to justice at reasonable and proportionate costs.

[2] New Regulation for CFAs (DCA August 2005)

The Compensation Bill [Lords] and Risk Aversion

Excessive Risk Aversion

We believe that the question of how to set targets for the HSE is an important one, since it may well affect the culture of the organisation. If the targets are set in terms of a reduction in the number of accidents, rather than in terms of ensuring that reasonable measures are taken to reduce risk, the likely outcome is that activities will be stopped altogether rather than being better managed. We believe that the basis of these targets should be reviewed. (paragraph 49)

22. The Government agrees that setting public service agreement (PSA) targets can have an important impact on the culture of organisations like the Health and Safety Commission and the Health and Safety Executive (HSC/E). Indeed, over the last couple of years, HSE has reprioritised and reorganised itself in order to implement HSC's "Strategy for Workplace Health and Safety to 2010 and Beyond" and deliver the PSA set.

23. The Government set the PSA, as part of the Spending Review 2004 process, to "improve health and safety outcomes in Great Britain through progressive improvement in the control of risks in the workplace". HSE will measure progress towards the PSA using a number of different indicators, which measure health and safety outcomes, 'precursor incidents' in key major hazard industries and the control of work-related risk.

24. The Government is satisfied that HSE's approach to delivering reductions in injuries, ill health and working days lost (as stated clearly in HSC's Strategy) is about controlling risks rather than eliminating them. As the wording of the PSA suggests, the Government believes there is a clear link between managing risks better and improving safety outcomes (e.g. reducing the number of accidents). They are two different points along the same chain of cause and effect - sensible risk control measures should lead to improved health and safety outcomes and enable, rather than proscribe, potentially hazardous activities to the benefit of the UK economy.

25. The Government will consider the basis of new targets for HSC/E as part of Spending Review 2007, due to begin later this year.

The HSE admitted that it was unable to conduct risk-balancing exercises looking at the dangers of different risks. We do not accept this and believe that the HSE should find ways of doing so. (paragraph 49)

26. We do not accept the construction put on HSE's comments. It can be very complex to balance one type of risk against another. HSE, like other government regulators and departments, does carry out such comparisons on the risks it regulates. The point being made was twofold.

27. First, there are particular difficulties in comparing risks that are taken involuntarily and over which the general public have little control (eg from living near a fuel storage depot or travelling on a train) with risks which people enter into voluntarily and over which they have some direct control (eg from driving a vehicle). Whilst on a purely statistical basis it would appear logical to seek an entirely level playing field, in practice people do expect greater levels of protection from risks over which they have no control. This is supported by authoritative social research.

28. Second, there are issues about the comparison of risks regulated by different parts of government (e.g. rail safety, which has been regulated by HSE, and road safety, which is overseen by DFT). In response to this need for a more joined-up approach, in June 2005 HM Treasury published a supplement to the "Green Book" entitled "Managing risks to the public: appraisal guidance". The guidance was produced in co-operation with a range of departments and regulators and aims to spread consistency of approach across government. There is a growing awareness of the guidance and over time that should increasingly feed through to improved practice.

It has also been suggested that authorities and other bodies fall back on health and safety arguments when they are unable to provide a service for financial or other reasons. Such practices should be identified and eradicated. (paragraph 50)

29. The Government agrees that health and safety should not be used as an excuse to justify decisions taken wholly, or mainly for other reasons.

30. Present knowledge suggests that examples are infrequent, but very damaging where they do occur. Research into disproportionate decisions, commissioned by the Health and Safety Executive is due to report in April 2006. The use of health and safety as a false excuse is one of the specific areas being examined; it will provide key intelligence on the scale and scope of the issue.

31. Research will not in itself solve the problem, but will provide much-needed evidence allowing Government to focus action where it can have the greatest effect. An announcement on the actions proposed is planned for Summer 2006.

While we accept that health and safety issues can be an easy scapegoat for many problems, far more has to be done to educate the public that responsible risk management does not equate to the avoidance of all risk. (paragraph 51)

Methods of stemming current levels of risk aversion go to the heart of the compensation culture debate. While the number of people claiming compensation may not have risen in recent years a contrary perception remains. The fear of prosecution by the Health and Safety Executive is likely to combine with the exaggerated fear of being sued to discourage people from planning or undertaking activities which require risk management and may also impact on the competitiveness of business. (paragraph 52)

32. The Government agrees that more must be done to promote understanding that sensible risk management is about controlling risks so as to protect people, not attempting to eliminate risk altogether. This applies to organisations with duties in law and the media as well as to the general public. It is just such an approach for which the Prime Minister called in his speech to the IPPR in May 2005.

33. Where serious risks that lead to real harm and suffering are concerned, people should have a healthy respect for both civil and criminal law. Government is keen to maintain a level of deterrence against irresponsible management that exposes people to real risk. However, we share the Committee's concern that an unfounded fear of being sued or prosecuted over trivial risks or needless bureaucracy is damaging.

34. As indicated in HSE's written evidence to the Committee, action is already underway. Research to scope the extent of, and drivers for, apparently disproportionate risk aversion will be completed in April 2006. Early findings from the research, together with feedback from various consultations and a web forum, is helping to identify where action needs to be targeted to have the most effect.

35. DCA has brought together a wide range of stakeholders from both inside and outside Government in working groups to support the Ministerial Steering Group that is co-ordinating a wide programme of work across Government. The objectives are to prevent a compensation culture from developing; tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour; find ways to discourage and resist bad claims; and to improve the system for those with a valid claim for compensation.

36. There are specific stakeholder groups on key strands of work, including one that is focussing on public awareness and communications and another focussing on risk and insurance. These groups involve a wide range of stakeholders, including the voluntary sector, consumer groups, legal profession, insurers, trade unions, business and employer organisations, and local authorities.

37. As a contribution to the groups, HSE is developing a set of principles of sensible risk management. These intend to highlight in simple terms what risk management is, and is not, about. They are due to be launched in the summer together with specific actions designed to put each one into practice.

Clause 1 of the Compensation Bill [Lords]

We agree with the majority of the evidence that we have received that clause 1 to the Compensation Bill [Lords] is unnecessary. We have concluded that it should not be in the Bill. While it is undoubtedly well meaning, it satisfies neither those who wish to reduce risk aversion in society, nor those requiring legal certainty. It is impossible to encapsulate the law of negligence in a single sentence. (paragraph 67)

If clause 1 were implemented, it would undoubtedly, at least in the short term, lead to an increase in costly satellite litigation to define what is a "desirable activity". Moreover, the wide breadth of that term (or any alternative proposed such as "social value" or "utility") could have unforeseen consequences, since while the Government states that it is not intended to change the law, it is likely that interested parties will seek to rely upon the clause before the courts in order to improve their shield against liability. This could result in possibly inconsistent decisions where judges try to refine further the concept of "desirable activity". (paragraph 68)

38. The Government does not agree with the Committee's conclusion that clause 1 should not be in the Compensation Bill. This is based upon certain misconceptions about the nature and purpose of the clause, and does not adequately recognise the benefits it will bring.

39. The Government believes that the clause will have a range of different benefits. It will reassure those concerned about possible litigation about how the law in this country works, and will help counter the view that organisations should cease activities because of a fear of litigation. It forms a valuable part of the work the Government is undertaking to tackle perceptions that lead to risk averse behaviour and fear of litigation, and to improve the system for those with valid claims. And it will support the other initiatives being developed as part of that work to improve public awareness and promote better risk management. It will also ensure that all courts are fully aware of the guidance given by the higher courts which is reflected in the clause.

40. The clause is not intended to encapsulate the whole of the law of negligence. It is intended to reflect the existing law in one specific and important way – the ability of the courts, when considering what amounts to reasonable care, to take into account not only the likelihood and seriousness of possible injury, but also the nature of the activity from which the risk arose and the impact of the preventative measures which it is argued should have been taken. Reflecting the existing law in this way addresses a misperception of how the law works, which has taken hold to such an extent that it affects behaviour. It is a legitimate function of legislation to do this.

41. The Government does not believe that the Committee's concerns about the term "desirable activity" and satellite litigation are justified. There will of course be some early judicial discussion of the new provision, as is the case with any legislation. However, various factors will substantially reduce the possibility of increased litigation.

42. For example, the clause will not create any new cases – it simply identifies a factor which the courts can already take into account as part of a process they already undertake in cases of negligence and breach of statutory duty. Also, the clause is permissive, not mandatory – it does not require the court to consider the desirability of an activity in every case. The court can decide whether it is relevant in any particular case, as it does now. In addition, the court is not required to give the factor in clause 1 any greater weight than the many other factors that will be relevant in an individual case. So while defendants may wish to argue that the activity to which the claim relates is a desirable one, the decision the court will reach on the claim does not depend on its view on that point.

43. The clause does not affect the standard of care which will apply or constitute a defence against liability, as some of the evidence quoted by the report mistakenly believes. The desirability of an activity does not provide a defence against carelessness, and a defendant cannot use the argument that the activity he or she engaged in was desirable to avoid having to show that he or she took a reasonable degree of care. This considerably diminishes the likelihood of appeals based on the question of whether an activity was or was not desirable.

44. The Government believes that the clause, far from generating large volumes of ill-founded and misconceived argument around the concept of a "desirable activity", will in fact help to reduce the number of ill-conceived, speculative or frivolous claims, and will influence the basis on which settlements are reached. It will discourage the bringing of claims based on the proposition that reasonable care involves all steps required to prevent accidents in any conceivable circumstances, regardless of the effect of requiring those steps.

45. The report quotes concerns expressed by the TUC that clause 1 will create a two-tier system with workers in occupations deemed a "desirable activity" being denied access to the courts. These concerns are also unjustified. The factor in clause 1 may be relevant in employers' liability cases now, both in the public and the private sectors, and providing otherwise would be more restrictive than the current law. Clause 1 reflects the current law and the approach taken by the courts in cases such as *Tomlinson v Congleton Borough Council*.

46. In *Tomlinson*, the court did not rule out the possibility that the factor, which is now reflected in clause 1, could be relevant to claims by an employee against his or her employer. But it made clear that another factor which the courts can also consider is the extent to which the claimant was freely and voluntarily undertaking the activity in question. One example, which the court gave, was that of an employee, who might have no genuine or informed choice if their work required them to take particular risks. The court in *Tomlinson* clearly accepted that the factor which is now in clause 1 could be outweighed in the court's balancing assessment by the lack on the part of the claimant of a genuine and informed choice to run the risk.

47. It is important that the courts are able to consider the balance between these factors, and all the other factors involved, in reaching an appropriate decision in each individual case. Clause 1 does not affect the court's ability to do this, or to reach the view that the factor in clause 1 might be outweighed by other relevant factors. The clause therefore does not change the law in a way which would lead to the courts treating one type of worker any differently from another or which would disadvantage employees generally.

48. The report indicates that the Government should make plain whether it wishes to provide volunteers with a defence against negligence. The Government has

consistently made clear that it has no intention of changing the law in a way which would put claimants injured through the negligence of volunteers or others at a disadvantage.

49. The report then suggests that if this were the Government's view, participants in activities would have to take out some form of first party insurance against being injured. It also suggests that one option could be to allow adults undertaking risky activities to opt out of the Unfair Contract Terms Act 1977 where they had arranged the necessary insurance, but that this approach would not be suitable in respect of children. The Government would not support either course of action. This would mean that participants in activities run by volunteers would be put at a disadvantage by having to bear the cost of insuring themselves (or exposing themselves to risk uninsured) while allowing volunteers to be negligent. This would be likely to have the effect of reducing people's willingness to participate in activities.

Regulation of claims management companies

We are pleased that the Government is now moving to regulate claims "farmers" who act as intermediaries referring cases to solicitors. This work is undertaken by a range of organisations including not only commercial companies but also trade unions and voluntary bodies. The system of regulation and redress needs to ensure that claimants are protected and that enforceable codes of practice apply. Regulation is long overdue and we hope that it will assist in restoring the reputation of the many legal professionals and others in the field who fulfil a necessary function ensuring that deserving claimants receive adequate compensation. (paragraph 81)

The Compensation Bill [Lords] lacks detailed proposals on how the Government intends to regulate claims management companies. There are a number of important issues that need addressing, including advertising, potential mis-selling of insurance products and the quality standards that an authorised person needs to meet. Self-regulation of claims management companies would be insufficient and undesirable. The market is relatively new, too diffuse and many different services can be offered to consumers, from financial products to quasi-legal advice. (paragraph 82)

We favour a system whereby claims managers would be subject to the same type of overarching supervision that is being proposed by the Government for the legal profession. We also believe that all persons involved in the claims management process should meet minimum standards. Finally, we suggest that some limits need to be placed on the nature and placement of advertisements by claims management companies. Given the obvious benefits that all of these changes would bring, we do not see any benefit to consumers in granting organisations exemptions from regulation. (paragraph 83)

General approach

50. The Government welcomes the Committee's support for the introduction of the regulation of claims "farmers". Regulating the sector will re-assure the public, giving them confidence in using such services. Statutory regulation will protect consumer's interests and will also be of benefit to those intermediaries who want to provide genuine customer services. It will curb inappropriate and misleading information and those trying to operate outside this mechanism will be subject to prosecution.

51. Part 2 of the Compensation Bill includes a deliberately broad definition of claims management services to avoid loopholes. Within the wide definition regulation will be targeted only at areas where there is the greatest risk of consumer detriment. These areas will be brought into regulatory net (or indeed removed) by Order of the Secretary of State – subject to affirmative resolution procedure. We have already announced the proposals that initially regulation would cover claims for personal injury, housing disrepair, employment, criminal injuries compensation and complaints against the mis-selling of financial products.

52. Two key points that need to be taken into account when deciding how to deliver regulation are speed and flexibility. Speed, because the Government wants to tackle the abuses and get additional safeguards in to protect consumers as soon as possible. Flexibility, because we want a regulatory mechanism that can respond in this relatively unknown sector to contraction and expansion in the areas regulated. We need to consider what would work best now, which could be a different solution for what is appropriate for the longer term. The initial months of regulation are likely to be the most crucial, having the most far

reaching impact on the providers in the market and what they are up to. That is why the Bill provides the range of options it does for delivering regulation – a responsive, flexible set of provisions that can be focused precisely and exactly what we want them to.

53. We acknowledge that lack of detail (in the version of the Bill introduced to the House of Lords) and the degree of flexibility provided for has caused some concern. We sought to address this by making a number of amendments to the Bill at Report stage in the House of Lords, in particular to deal with the concerns raised by the Delegated Powers and Regulatory Reform Committee.

54. We have specified on the face of the Bill the minimum criteria for those persons seeking authorisation to provide claims management services. We have amended the Bill to provide for a Claims Management Services Tribunal to clarify arrangements for hearing appeals against decisions of the Regulator, to ensure any decisions which determine an individual's civil rights are subject to safeguards guaranteed by Article 6(1) of the European Convention on Human Rights. We will utilise existing structures of the Financial Services and Markets Tribunal to make best use of existing judicial and administrative resources to hear a relatively small number of appeals.

55. We have also published and placed in the library of both Houses a policy statement with details about the proposed secondary legislation and draft model rules that would apply to authorised persons.

<u>The regulator</u>

56. The Government is continuing to explore the short term and long term options for regulator. We investigated the option of designating the Claims Standards Council (CSC) as the Regulator but concluded that it could not be given statutory responsibilities.

57. While the CSC has considerable expertise in the claims management market, for example in highlighting bad practices, we concluded that it was not in a position to be considered as a potential effective statutory regulator. The Select Committee commented, "Although the existing CSC might seem a credible

candidate as an organisation to be named as regulator … a more professional solution is required if regulation is to be effective".

58. We continue to encourage the CSC to consider options for further involvement and to contribute to identifying abuses, raising standards and helping shape implementation. It is important that the claims industry develops a strong trade body to provide proper representation for the claims management sector and a body we can work with to ensure that regulation is applied effectively and sensibly. The CSC could provide that role, although that is a matter for the industry to decide.

59. There are two other options for introducing regulation– designating an existing regulator or regulating directly. We will exhaust the possibilities of an existing regulator before taking the option to regulate directly.

60. As drafted the Bill will place the Secretary of State under a duty to deliver regulation directly if there is no designated regulator. We are finalising the specification for this. The core elements of direct regulation would be:

- The Secretary of State as the regulator, supported by a senior 'official' with specific responsibility for carrying out regulation.
- A monitoring and compliance function provided by a suitable external unit responsible to the regulator for carrying out day to day authorisation procedures, monitoring, enforcement and general administration support.
- A non-statutory advisory committee made up of representative stakeholders (financial services, legal professions, consumer groups, insurance and the claims sector).
- A tribunal to consider appeals against decisions of the Regulator (as provided for in the Bill)

<u>Authorised persons conduct rules and advertising</u>

61. An essential part of the claims management regulatory framework will be the rules governing the conduct of authorised persons. Compliance with these rules will be a condition of authorisation. The rules will also provide a benchmark for those providers of regulated claims management services exempted from the requirement to be authorised – to help ensure a level

playing field and that everyone who is providing claims management services is meeting the same high standards.

62. Advertising and sales is a crucial area. The key issue regarding advertising is that it should not be misleading. This is covered by the Advertising Standards codes and the authorised person's responsibilities can be reinforced in the rules, with explicit reference to the codes. The ASA is responsible for ensuring that all advertising, wherever it appears, is legal, decent, honest and truthful.

63. The conduct rules will help ensure providers adhere to high standards across all their marketing activities, which will be enforceable by the regulator. The model rules we have already issued set out what we think the standards applied to authorised persons would look like.

64. That is advertising must –

- Not make misleading or exaggerated statements.
- Not use expressions such as 'no win, no fee' without qualification unless there is no possibility of the client having to meet any costs he may have incurred in connection with the claim, including the purchase of an insurance policy or interest on a loan taken out to fund the purchase of an insurance policy.
- Clearly identify the name of the advertiser.
- Not offer an immediate cash payment or a similar benefit as an inducement for making a claim.
- Not seek to imply that compensation may be used in a way that is inconsistent with the cause of the claim.
- Not seek to imply a relationship with any official or other organisation where no such relationship exists.
- In the case of all written advertising and promotional material state that the business is regulated by the Claims Management Regulator (and give the authorisation number).

65. DCA does not plan to legislate on advertising but will ensure that the rules governing the activities of persons authorised to provide claims management

services place those persons under a duty to market their services responsibly. To breach the rules would be a conduct issue (as it would be for solicitors). If the ASA upheld complaints about advertising placed by an authorised person this would be likely to lead to a disciplinary investigation by the regulator.

66. The question of whether consumers are misled by this sort of advertising has been explored in new market research commissioned by DCA with the ASA's support and published on 27 March (*Effects of advertising in respect of compensation claims for personal injuries – Millward Brown March 2006*).

67. The findings include:

- Although a minority of adults admit that they "might be tempted to make an exaggerated claim for a personal injury", findings do not suggest that exposure to advertising is driving this.
- Some advertisements are actively reinforcing mis-perceptions of the claims process. For instance, a belief, held by many, that claiming is comparatively easy to do and could involve just a single phone call is being actively encouraged by advertisements whose prime objective is to generate phone calls from potential claimants.
- The lack of certainty, even amongst stakeholders, of what 'no win, no fee' means and whether it protects consumers from disbursements. Consumers are, by and large, taking the term at face value
- Some advertisements do not mention the need for someone to be at fault for a compensation claim to be possible – a high proportion of consumers are not clear on the issue of blame.

68. The ASA and DCA are considering the research findings. The research will be presented to the Code owning bodies (the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice) so that they can judge whether changes to the advertising Codes are necessary or appropriate.

Scope and exemptions

69. The Committee rightly identifies that a range of organisations provides claims management services. This includes commercial claims companies, solicitors, trade unions, legal expense insurers and voluntary charitable agencies. Some of these entities and individuals are already fully regulated, for example, the Law Society regulates solicitors that provide claims management services as part of their practice. Others may be regulated in respect of only part of what they do, for example the FSA regulates legal expense insurers in relation to their insurance activities but not their claims management services.

70. Regulation needs to be flexible enough to be able to adjust to the different types of organisations that provides claims services, to the evolving nature of the claims industry and to the impact of introducing new regulation. The initial aim is to regulate the activities of commercial claims management companies in certain sectors, to tackle bad practices and improve consumer safeguards. Regulation can also be a positive development if applied in a risk related manner as it helps force up standards across the regulated sector and associated sectors.

71. The Government wishes to avoid subjecting persons to double regulation, where they are already regulated adequately in the provision of claims management services by their professional or other body. However, existing regulatory bodies do not necessarily regulate the provision of claims management services by their members. Where professionals offer regulated claims management services as part of their business separately from professional practice and outside the regulatory ambit of professional bodies, they would need to be authorised. To ensure that no regulatory gaps exist, dual regulation will in some circumstances be needed; for example, where a person or entity is regulated by different regulators for different activities.

72. Exemptions will be provided for in secondary legislation and the Government has set out its initial plans for exemptions and circumstances where an exemption should apply. We plan to consult on this and other areas covered by secondary legislation in May.

    - Members of the Law Society, the General Council of the Bar and the Institute of Legal Executives, where they are already regulated in the provision of claims management services by those bodies.

- Those who are subject to 'full' regulation by the Financial Services Authority. This is intended to cover insurance brokers and companies dealing with their customers in the normal course of business.
- Individuals who provide advice to friends and those who work in a voluntary capacity for advice centres.
- Charitable organisations which provide claims advice.
- Statutory organisations such as ombudsmen as already exempted on the face of the Bill.

73. Where trade unions provide claims management services within a regulated sector, for example personal injury, they would be subject to regulation unless explicitly exempted. We have indicated the intention to exempt trade unions, subject to the views of both Houses during the Bill's passage. We will take full account of any concerns and other comments made before coming to a final decision on this issue.

74. In exempting a particular class, the Secretary of State would be required by ordinary public law principles to take into account relevant criteria, ignore irrelevant criteria, and give proper procedural consideration to each candidate or class of candidates for exemption.

The NHS Redress Bill [Lords]

It is surprising that the Department of Health has brought forward an ambitious Redress scheme without setting out in detail how it would be run. (paragraph 94 of the 3rd report)

75. The NHS Redress Scheme is not just a compensation scheme – it is intended to be much more than that. The Department wants to change the way the health service responds to patients who are unhappy with the healthcare they have received - to find a way of ensuring that when mistakes are made, the NHS responds in the right way, at the right time, to deliver what patients tell us they want: an explanation, an apology, help dealing with the consequences of what has happened to them, and financial compensation where appropriate. The Department wants patients to know that some good will come from their experience in that the NHS will learn from its mistakes to improve services in the future. The NHS Redress Scheme aims to deliver these important objectives.

76. In terms of how the scheme will work in practice, in NHS legislation generally, the detail is left largely to secondary legislation to be made by the Secretary of State. This is to ensure flexibility to adapt the legislation to cater for the way that NHS services are organised and provided and to limit the technical and administrative detail, which appears in the primary legislation.

77. The intention is to work closely with stakeholders when drafting the secondary legislation. It is intended that there will be a single scheme scheduled to the regulations made under the powers in the Bill. The regulations and the scheme will be published in draft for formal consultation. The formal consultation period will last for three months and the responses will be considered before the regulations are finalised. This is to ensure that the scheme works effectively on the ground. When the scheme is first established, the regulations and scheme will be subject to affirmative resolution procedure in order to allow full parliamentary scrutiny.

78. The Delegated Powers and Regulatory Reform Committee considers that the delegations relating to England are appropriate and subject to an appropriate level of scrutiny.

79. In addition, explanatory notes have been prepared and published which are intended to assist the reader in understanding the Bill and a published Statement of Policy is available at www.dh.gov.uk/actsandbills to explain the rationale behind the NHS Redress Scheme and how it is intended that the scheme will be put into practice.

During the course of our inquiry the NHS Litigation Authority was still unaware as to whether it would definitely be responsible for running the scheme. (paragraph 94 of the 3rd report)

80. The Statement of Policy, published in November 2005, makes clear the intention that the NHS Litigation Authority will perform the role of the scheme authority.

81. It is not specified on the face of the Bill that the scheme authority *must* be the NHS Litigation Authority as this would remove flexibility and would require an amendment to be made to the primary legislation should it be decided in the future that a different Special Health Authority should have this role. However, clause 11 of the Bill requires the scheme to make provision for a specified Special Health Authority to be the scheme authority and it has been made clear in both the published Statement of Policy and in the explanatory notes to the Bill that it is the Government's intention that the NHS Litigation Authority will have this role.

We were informed that contact had not been made, either with lawyers or medical experts, about whether they would work for fixed fees and to the timetables envisaged. These lapses [in paragraph 94] appear to threaten the viability and effectiveness of the scheme. (paragraph 94 of the 3rd report)

We have no evidence that doctors and lawyers would be willing to provide high quality independent advice for low fixed fees. (paragraph 10 of the 5th report)

82. Extensive consultation has taken place with stakeholders to develop the policy behind the NHS Redress Scheme. Its principles have received broad support from a wide range of stakeholders, including representatives from the medical and legal professions, NHS organisations and patient groups. Many organisations acknowledge the need for change and support these reforms as a way to deliver a better response to patients.

83. The British Medical Association, Royal College of Nursing and Independent Healthcare Forum have indicated their support for the broad principles behind the Bill. The Medical Defence Union and Medical Protection Society were also consulted. The Patients Association is “encouraged by the Chief Medical Officer's commitment to reform of the present arrangements”, and the charity SCOPE has welcomed the scheme as “a clear indication of the determination of the Government to have a more open and fairer NHS”. The NHS Litigation Authority believes that "the scheme should enable [them] to deliver access to justice even faster and more economically in future", and the NHS Confederation welcomes the Bill “if it can succeed in its aim to make the cumbersome compensation process more effective”.

84. Consultation has also taken place with representatives from the legal profession. Responses to *Making Amends*, consultation meetings on *Making Amends*, and specific meetings about the Bill’s proposals undertaken more recently by the Department, have provided views from individual solicitors, the Bar Council, the Association of Personal Injury Lawyers (APIL) and Action against Medical Accidents (AvMA). During the consultation period for Making Amends (30 June – 17 December 2003), the Law Society expressed support for providing “a package of measures concentrating on access, openness and improving patient safety”. A meeting with the Law Society took place on 7 March 2006 to discuss progress of the Bill through Parliament.

85. Discussions with stakeholders from the legal profession have explored fixed fee structures and stressed the importance of cases being handled swiftly under the Redress Scheme to give a better patient experience than is often the case under the legal system. Advice at the end of the Redress process will generally be in the nature of one-off advice and is well suited to a fixed fee approach. Fixed fees are already in place for legal aid advice funded out of the Community Legal Service Fund by the Legal Services Commission. Such fees are currently fixed by the Legal Services Commission on a firm by firm basis but are likely to be replaced by national or regional fixed fees from April 2007. Lord Carter is currently reviewing legal aid and will be considering expanding the use of standard or graduated fees over a wider range of services. His report is due in May.

86. A small claims pilot scheme, the RESOLVE pilot, provided some useful data on timescales, indicating that handling cases within six months should be achievable in the significant majority of cases under the NHS Redress Scheme.

As stated, solicitors work to a fixed fee structure for legal aid, so the use of fixed fees and timescales has precedents. Specific proposals on timescales and fees have not yet been discussed with the legal and medical professions in advance of the passage of the primary legislation, but will form part of the discussions with stakeholders when the secondary legislation is being drafted.

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. (paragraph 7 of the 5th report)

87. The Bill provides flexibility for the scheme to make provision for services other than legal advice without charge in connection with proceedings under the scheme. It is intended that further consultation with stakeholders will take place to identify what services, for example, the services of independent medical experts, might be most appropriate and effective in certain circumstances for cases eligible under the scheme. If in determining the facts of a case, the scheme member or the scheme authority considers that evidence from an independent medical expert is necessary, it is intended that they will also seek to ascertain the wishes of the patient to reach agreement on an acceptable person. It is envisaged that independent medical experts would be jointly selected and jointly instructed by the scheme authority and solicitors for the patient. The joint selection and instruction of medical experts will ensure that the patient is not disadvantaged in any way.

88. It is envisaged that the expert will report simultaneously to both parties, and any supplementary questions put to them are also shared, as are their replies. It is also envisaged that the scheme authority would pay the costs of the independent medical expert. This is another benefit of the scheme for patients.

Given the particular concerns which have been expressed about the potential expenditure and difficulties inherent in the Redress Scheme, it is essential that it is piloted, and that the pilot be comprehensively assessed, to ensure that the benefits that it will bring are sufficient to outweigh the costs. (paragraph 103 of the 3rd report)

89. Whilst the Department has found data from previous piloting informative, it does not believe that additional piloting would be helpful. The scheme is intended to bring significant benefits to patients without any effect on their legal rights to pursue a claim if they are unhappy with any offer made under the scheme, and those benefits should be available as soon as possible.

90. A small claims pilot scheme, the RESOLVE pilot, was undertaken and provided some useful data to inform the development of the proposals for the NHS Redress Scheme. For example, it indicated that handling cases under the redress scheme within six months should be achievable in the significant majority of cases, and that running a "small claims" scheme improved access to justice for some people who would not otherwise have received redress because they would not have pursued a claim in the courts. The Department also used data from existing clinical negligence claims to support the costings for the redress scheme.

91. Consideration was given as to whether a redress scheme pilot should be run. However, difficulties in running a "live" pilot include:

    - extra cost (estimated to be at least £2 million), over and above the projected costs of the scheme factored into Departmental budget provisions;

    - logistical difficulties, in as much that in order for the pilot data to be statistically viable, it would have to be run over a suitably large geographical area to encompass a range of trusts, hospitals, specialities, etc, otherwise regional health inequalities and differences in adverse incident reporting practices / risk management strategies would skew the figures;

    - time difficulties, in as much that the pilot would need to be run for sufficient time that people became aware of it and had time to submit a claim to give a realistic impression of take up of the scheme; running a pilot for such a period would delay implementation substantially;

    - difficulties in piloting the scheme comprehensively prior to taking new primary powers. The Secretary of State has existing powers that could be used to meet some, but not all, of the policy intentions behind the NHS Redress Bill, enabling a redress scheme to be created contained in a mixture of regulations, directions and contractual terms. However, there are

limitations on these powers. For example, there is no power to direct NHS foundation trusts or independent providers to participate in the scheme. The Department does not regard reliance on contractual terms requiring participation in the scheme as a sufficient means of ensuring that the redress scheme would be consistently and uniformly provided to all NHS patients when the commissioning of NHS services is complicated, diverse and may be sub-contracted.

92. The scheme as established under the powers in the NHS Redress Bill will cover hospital services, or other specified qualifying services. The Department intend to evaluate the scheme three years after implementation. If it is successful in delivering a better response for patients, improved learning for the NHS and a more open culture, the Department will want those benefits to be available for all NHS patients and will consider extending the scheme. Evaluation will also ensure that any lessons from the hospital sector are taken on board when the Department looks to extend the scheme. Given that commitment to learning from the hospital care sector, formal pilots are considered unnecessary.

We are alarmed that the Department of Health is "relaxed" about the possible cost implications of the scheme, since we believe that it is difficult to forecast the potential demand accurately. (paragraph 103 of the 3rd report)

These differentials [the potential rise in claims by anything from 2,200 to 19,500 a year] make it appear that the statistics have been plucked out of the air. (paragraph 12 of the 5th report)

93. The Department of Health has undertaken financial modelling of the scheme but the exact amount it will cost depends to a great extent on human behaviour. During oral evidence, the Minister of State for Delivery, Quality and Patient Safety, Rt. Hon Jane Kennedy MP, said she was "relatively relaxed about an increase in the number of cases". [3] This means the Department envisages that the number of cases will increase as access to justice improves. However, it should **not** be inferred from this that the Department is "relaxed" about the cost implications of the scheme. When estimating the cost of the scheme, the

[3] Question reference Qq 291, 296 and 297

Department has used information on the likely number of potential patients using the scheme from research conducted by independent experts, commissioned by the Department.

94. In 2001, the Chief Medical Advisory Group on Clinical Negligence Reform commissioned Alastair Gray (University of Oxford), Paul Fenn (University of Nottingham), Neil Rickman (University of Surrey) to undertake research on the costs of existing and alternative patient compensation schemes.

95. This research analysed the reasons why or why not patients who had experienced an adverse event sought financial compensation. Part of the research included a survey of patients conducted by MORI. The survey indicated that patients who had been harmed by their healthcare were predominantly seeking an explanation, an apology and that the NHS should learn from their experience to improve patient care in the future.

96. The conclusion of the research was that the number of patients seeking redress following an adverse event depended strongly on cost, awareness of options and accessibility and that the range of patients using a new scheme could be large.

97. The scheme has therefore been modelled and costed based on all available information and research, with regard to recognised assumptions about human behaviour.

98. The Department of Health is not introducing this scheme in an attempt to save money. In the short-term it may cost more because more patients will receive compensation as scheme members take a more active approach to identifying eligible cases and providing redress. However, it is expected that these costs will be offset over time by a reduction in the amount of money spent on legal fees for litigated cases.

99. Department of Health modelling suggests the increase in the number of cases may be as high as 43%. However, crucially the scheme will be subject to the current law of tort and opportunistic claims will be rejected. In the longer term,

savings on legal work are expected. The small claims pilot, the RESOLVE pilot, found that substantial savings could be made in this area. Departmental modelling suggests that saving on legal fees for the Redress Scheme would be up to £7.6m in the first year.

100. Departmental Economists have assessed the financial implications of the scheme and estimate that if payments are capped at £20,000 (as currently planned), and a fixed fee structure is introduced to control legal costs, the financial effect of the scheme would range between a saving of £7m and a cost of £48million in the first year**,** depending on the number of new cases that are brought into the system. As stated previously, financial modelling can provide indicators of expected costs but the true cost of the scheme depends to a large extent on human behaviour.

101. The Department of Health has included in its spending review calculations an element for the funding and administration of the NHS Redress Scheme. This element forms part of the whole spending review settlement, as agreed by HM Treasury, which will in turn be part of the NHS allocation. NHS Redress Scheme funding is not a separate item.

Where a mistake, or more seriously, a series of mistakes has occurred, we believe it is unlikely that the person will be more likely to step forward as a result of the introduction of this scheme. (paragraph 92 of the 3rd report)

102. For the scheme to deliver all that it can deliver, it must be supported by culture change.

103. The beginning of a shift in NHS culture is already apparent as evidenced by senior doctors admitting mistakes as part of a campaign to encourage other doctors to report incidents. The September 2005 edition of the British Medical Journal reported that more than a dozen senior British medical figures have admitted clinical errors[4]. The aim is to encourage other doctors to do the same, in order to address the root causes of incidents and improve patient safety.

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[4] BMJ 2005;330:1219-1220

104. This is a major change in NHS culture and the focus needs to be on creating the right environment in which healthcare professionals can speak out and provide open explanations. Under the redress scheme it is intended that scheme members will be under a duty to actively identify cases that may be eligible as a result of considering complaints, adverse incident reports or cases identified through the organisation's corporate governance procedures, and to trigger the scheme.

105. The NHS Redress Scheme will also require each scheme member to appoint an appropriate member of staff (e.g. a director) to take responsibility for overseeing the scheme and identifying lessons that can be learnt from cases arising under the scheme. The Department expects that scheme members will want this person to take responsibility for ensuring that cases are referred to the scheme appropriately. It is also envisaged that scheme members will be required to prepare and publish annual reports about cases under the scheme and lessons learnt.

It is difficult to see how the Redress Scheme will make a difference to overall costs, since it would not (at least initially) apply to claims deemed to be worth more than £20,000. In those circumstances, it would only have an effect if it were subsequently extended to all claims against the NHS. (paragraph 96 of the 3rd report)

The Government has modified the proposals for a redress scheme and restricted the scheme to low value cases. There is a danger that the scheme will not be cost-effective. (paragraph 104 of the 3rd report)

106. The NHS Redress Scheme is not intended to be a cost saving measure. As explained earlier, the financial effect of the scheme would range between a saving of £7m and a cost of £48million**,** depending on the number of new cases that are brought into the system. If the scheme is initially limited to claims worth £20,000 or less and a fixed fee arrangement is introduced to control legal costs, Department of Health estimates suggest that savings on legal costs will be up to £7.6m, depending upon the number of cases coming into the scheme. Small increases are expected in the administrative costs of handling the scheme, but the saving in legal costs is fully in line with the Government's aim of using the scheme to ensure that money is spent on compensating patients with a genuine claim of clinical negligence, rather than on the disproportionate

legal costs that come with litigated cases. As stated in relation to paragraph 103, in paragraph 85 above, this scheme is not being introduced in an attempt to save money. Greater access to justice for those harmed during the course of their healthcare remains an important aspect of the scheme.

We were particularly surprised that if a claim made under the Redress Scheme subsequently turns out to exceed £20,000 it will be rejected. This appears to us to be a potential waste of resources if both the claimant and the NHS Litigation Authority are happy to continue under the scheme. (paragraph 97 of the 3rd report)

107. It is considered vital to the successful operation of the scheme that an upper limit on financial compensation is set. Concentrating on the lower value claims will do the most to reduce disproportionate legal costs. The Department arrived at the figure of £20,000 as the proposed upper limit on the amount of financial compensation that may be included in an offer under the scheme, after examining existing legal claims.

108. Low value cases settled by the NHSLA in 2002/03 and 2003/04 (about 4090 and 5690 cases respectively) show that legal costs were disproportionately high for cases where the level of settlement was up to £20,000. Cases settled where the award of damages was above £20,000 show a significant reduction in the percentage of legal costs to damages.

109. Setting an upper limit supports the scheme's aim of offering a swift response to the more straightforward (and therefore lower value) cases and allows scheme resources to be focused on cases where such an approach would be of most benefit to patients. It is felt that complex cases should continue to be dealt with outside of the scheme. It is intended that offers made under the scheme will be broadly equivalent to an offer that would be made in a successful claim before a court.

110. However, where during the course of the proceedings under the scheme it becomes clear that a case will fall outside the scheme as a result of exceeding the £20,000 threshold, that case will, if it is otherwise appropriate, be referred

to the Clinical Negligence Scheme for Trusts run by the NHSLA, and resolved outside of the scheme.

111. The intention is that the scheme will initially specify an upper limit on the total amount of compensation that may be included in an offer under the scheme of £20,000 but the limit will be reviewed after three years, with a view to considering whether it would be appropriate to alter the limit, or apply a limit on the pain and suffering element only.

Some of the objectives which the Government has set out for the scheme could be achieved by other means, such as more open and transparent handling of claims and the willingness to admit mistakes of health professionals on a more extensive basis than has previously been the case in the Health Service. (paragraph 104 of the 3rd report)

112. The Secretary of State has existing powers that could be used to a certain extent to meet some, but not all, of the policy intentions behind the Bill. There are limitations on these powers; for example, there is no power to direct NHS foundation trusts or independent providers. New primary powers enable the Secretary of State to directly require participation in the scheme by these bodies rather than seeking to rely upon participation via the imposition of contract terms.

113. By taking new powers the NHS Redress Scheme will be a single accessible scheme providing clarity and coherence for patients rather than being contained in a mixture of regulations, directions and contract terms. It will also ensure consistency of Parliamentary scrutiny of the scheme as a whole (affirmative resolution procedure for the establishment of the scheme and negative resolution procedure for amendment of it).

114. The confidence to openly admit clinical mistakes requires a major change in NHS culture and the focus needs to be on creating the right environment in which healthcare professionals can speak out and provide open explanations. As stated previously, the NHS Redress Scheme is intended to help to create an open environment by requiring each scheme member to appoint an appropriate member of staff (e.g. a director) to take responsibility for overseeing the

scheme and identifying lessons that can be learnt from cases arising under the scheme. It is also envisaged that scheme members will be required to prepare and publish annual reports about cases under the scheme and lessons learnt.

Another concern is that claimants may be ineligible for legal aid if they fail to use the Redress Scheme. This would arise if it became a requirement for obtaining Legal Aid that the scheme be used first. The impact of this would be greater if, as seems possible, the threshold of £20,000 were to be increased in the future. Where so much is to be done by secondary legislation, it is unfortunate that such issues have not been adequately addressed in the main body of the Bill. (paragraph 104 of the 3rd report)

115. In *Making Amends*, the Chief Medical Officer recommended that the Legal Services Commission (LSC) should be able to take into account whether someone had used the NHS Redress Scheme when making a decision on an application for Legal Aid. The Department supports this recommendation (as do the Department for Constitutional Affairs and the LSC). It supports the overall aims of Legal Aid by ensuring that funding is awarded to the right cases and that people are expected to explore other ways of getting redress before turning to the courts. There would be no 'blanket ban' on Legal Aid for clinical negligence cases falling within the scope of the redress scheme – as now, decisions would be made on a case-by-case basis.

116. The Civil Legal Aid Scheme has recently been reformed in order to encourage early and effective dispute resolution through appropriate systems and re-emphasises the point that litigation need not be seen as a first and only option.

117. The NHS Redress Scheme is intended to provide a genuine alternative to litigation for cases that fall within the scheme by providing patients with the investigations, explanations and apologies that patients tell the Department they want and by addressing the delays and legal costs that are inherent in the current legal system.

118. The LSC already requires most patients to pursue any available complaints system before legal aid can be considered for potential litigation. Similarly it will generally be right for the redress scheme to be pursued, where appropriate,

before legal aid can be granted for court proceedings. In due course, the LSC will prepare and consult upon guidance on how the discretion to refuse funding on this ground should operate.

119. Where a patient does not accept an offer under the NHS Redress Scheme, legal aid will remain available to pursue a claim through the courts, subject to the applicable means and merits criteria.

It seems implicit in the Redress proposal that the right to claim private remedial treatment may be indirectly removed by an offer of a care contract. If this is the case, the issue should be fully debated since claimants may not wish to be treated by the same health professionals who caused the original injury. (paragraph 107 of the 3rd report)

120. The NHS Redress Bill will not affect the right to claim private remedial treatment in respect of litigated cases. Neither will the Bill remove the option of remedial treatment under the redress scheme being provided by an independent or private healthcare provider. The Bill merely provides (in clause 3(3)(a)) that the redress scheme may provide for the compensation offered to a patient to take the form of a contract to provide care or treatment (either with or without an offer of financial compensation). The care or treatment may be provided by the scheme member or commissioned by the scheme member from any type of provider, including independent or private healthcare providers. The aim of the scheme is, where appropriate, to offer swift remedial care for low monetary value cases in an inclusive and open environment. The scheme is intended to encourage on-going dialogue between the patient and scheme member in order to establish the best way to meet the patient's needs.

121. It is intended that financial compensation offered under the scheme will be broadly equivalent to the level of compensation that would be provided in a successful claim before a court, including pain and suffering and loss of earnings. An offer of settlement in a litigated case might include a contract to meet a remedial care need; the NHS Redress Bill therefore enables provision to be made in the scheme for settlements under the scheme to include such contracts where appropriate. Taking powers to enable contracts for care or treatment to be included as part of an offer of redress under the scheme does not indirectly remove the right of an individual to seek to claim for private remedial treatment.

122. Immediate care based on clinical need, as determined by appropriate clinicians, will be provided as a matter of course under the NHS. Clause 3(3)(a) is not intended to cover such immediate care, which will be provided as a matter of course.

We recommend that further consideration be given to the proposal in clause 3(3)(a) of the NHS Redress Bill [Lords] to offer a 'contract to provide care or treatment' as part of the Redress scheme. On the basis of the evidence that we have received, we believe that relatively little attention has been paid to this area of reform, although we accept that this may be because the relatively low threshold of £20,000 means that patients in need of a significant period of remedial care are unlikely to be affected by the Redress Scheme. (paragraph 110 of the 3rd report)

123. During the development of NHS Redress Scheme policy, Department of Health policy officials held a series of meetings to identify whether contracts for remedial care should be part of the offer of redress, and what could and should fall within a contract for remedial care under the scheme, if the decision were made to make such contracts part of an offer of redress. Amongst those at the meetings were care commissioners from Primary Care Trusts, social services staff, staff from charities who support individuals with complex care needs and care managers. The Department also used the expertise of a senior NHS manager who had been involved in establishing and monitoring packages of care within a local area.

124. After careful consideration, it was decided that it would be appropriate for an offer of redress under the scheme to include, where appropriate, a contract for remedial care or treatment, to provide what a patient could be entitled to if the case went to court. It is intended that care may be provided directly by the scheme member, or commissioned by the scheme member from a different service provider, including an NHS or independent service provider. This will form part of the offer of redress.

125. Given that the cases falling within the scope of the scheme will be relatively straightforward, less severe cases, it was decided that contracts for remedial care and treatment would be restricted to clinical care only, rather than encompassing other forms of care (for example, social care). It is not intended

that contracts for remedial care will involve long-term care or complex packages of care under the scheme, as the cases falling within the scope of the scheme are anticipated to be relatively straightforward, involving relatively minor or straightforward injuries.

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