NHS Litigation Authority Industry Review

Department of Health Response

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NHS Litigation Authority Industry Review

Department of Health Response

Prepared by Policy, Strategy and Finance Directorate

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Introduction

The NHS Litigation Authority (NHSLA) has been administering the NHS indemnity schemes on behalf of the Secretary of State since the schemes were established in 1996. Given the scale of change that has occurred within the NHS and the indemnity market since then, it was right that the Department of Health commissioned a review of the NHSLA to seek assurance that the organisation was operating optimally, and that administration of the schemes offers the public and the NHS good value. The Review was undertaken by Marsh Ltd between February and April 2011

This response should be read alongside the report of the Review. The Department welcomes the report by Marsh, which highlighted the positive role of the NHSLA and the effective contribution it has made since its establishment in 1995. Marsh also made the case for retaining the NHSLA, although it is clear that this does not mean maintaining the status quo. We have been reflecting with the NHSLA on the report, its conclusions, and recommendations, which we broadly accept. This response document sets out clearly the actions that will be taken forward as a result of the Review. The publication of our response will begin a process of engagement with stakeholders by the NHSLA and the Department to look at how particular recommendations will be implemented or where further policy development needs to be undertaken.

The Annex details each recommendation and our response, as well as the organisation that is leading on implementation for that particular recommendation.

Further information about implementation will be available from the NHSLA's website at http://www.nhsla.com/home.htm in due course.

Annex: Recommendations and Responses

	Recommendations and Response	Lead Organisation
1.51	**General**	
1.51a	Re-focusing the NHSLA's role and mission to incorporate a learning based open and transparent organisation that delivers high value added claims advice, technical guidance, risk management, training / education, incident reporting and drives collaboration between clinical and related bodies. Consideration should be given to changing the name of the NHSLA to NHS Claims &Risk Management (or similar) and aligning the culture to an organisation with a more customer centric approach. **Response: Accept The NHSLA's role and mission will be re-evaluated as part of the Department reviewing and republishing its Framework Document now that the Industry Review has concluded. It is not clear what benefit there would be to re-branding the NHSLA. However, we do agree that the NHSLA needs to be fully customer-focused and it will explore branding with its scheme members.**	DH
1.51b	The risk pooling arrangements administered by the CNST should remain intact and continue to be administered by the NHSLA - subject to proposed changes in relation to culture and transparency. **Response: Accept. Whilst the Department is committed to retaining central clinical negligence arrangements and the NHSLA, we are currently considering how CNST needs to change to take account of the changing NHS landscape. We remain committed to opening up such arrangements to all providers of NHS secondary and tertiary care.**	DH / NHSLA
1.51c	The current scheme actuaries have been appointed since 1995 and as such this contract should be tendered for governance reasons. **Response: Accept. The NHSLA has re-tendered this contract on a number of occasions and is currently considering how to improve value for money for actuarial services.**	NHSLA

	Recommendations and Response	Lead Organisation
1.52	**Claims management, Legal & IT**	
1.52a	Communications booklets on service standards and coverage should be produced for members including scheme rules, reporting requirements, rights of appeal, exit rules etc. NHSLA should develop a set of Service Level Agreements (SLAs) for Trusts and be monitored against these. **Response: Accept. The NHSLA will in future provide accessible information to current and prospective members about how it operates, and we agree that introducing SLAs will help foster a more customer-centred organisation.**	NHSLA
1.52b	Consideration should be given to having more members' forums (e.g. similar to the Acute RM forum), an annual Trust conference and a Trust representative on the governance board of the NHSLA. **Response: Accept. The NHSLA will engage with its membership to determine the level of involvement the membership actually wants.**	NHSLA
1.52c	Selective commercial involvement in the non-clinical claims handling could be beneficial and Marsh recommends further investigation based upon our benchmark data. **Response: Accept. The NHSLA will explore how commercial involvement or engagement can improve non-clinical claims handling.**	NHSLA
1.52d	Claims settlement culture. A balance needs to be found between meeting KPIs around quicker cost based settlements and ensuring that the NHSLA are not seen as a 'soft touch' for claimant solicitors. Adopting a tougher stance on non-conforming Trusts (e.g. around improvement actions, reporting deadlines, auditing) should be institutionalised at the NHSLA e.g. imposing excesses, limiting coverage, downgrading Trusts if there is non- compliance with reporting of claims, provision of information etc. **Response: Accept. The NHSLA will undertake additional work to develop its Key Performance Indicators. We have already asked the NHSLA to review levers and incentives within the operation of its schemes in order to improve performance.**	NHSLA

	Recommendations and Response	Lead Organisation
1.52e	Legal panel KPIs should be adjusted. Appropriate KPI's need to be used to measure not just the speed of settlement, nor the proportion of claims settling out of court, but quality metrics based on reaching appropriate resolutions e.g. consistent ratio of cost to savings in damages by solicitor and increased use of mediation. **Response: Accept. The NHSLA will undertake additional work to develop its Key Performance Indicators. We have already asked the NHSLA to review levers and incentives within the operation of its schemes in order to improve performance.**	NHSLA
1.52f	Detailed review of claims causation codes including adequate training and advice around which are the appropriate codes to use for a given incident. Greater links between clinicians, RM and claims would facilitate this. **Response: Accept. We agree that improvements can be made to claims coding.**	NHSLA
1.52g	Consider establishing a personal injuries assessment type board (PIAB). The PIAB was setup by the Irish Government as an independent statutory body to process claims for personal injuries where the question of liability is not contested. Where it is contested, the claim must still go to court. The Injuries Board awards the same level of compensation as the Courts but within a faster time frame and without associated litigation costs (these costs are a major factor in the cost of insurance premiums). **Response: We do not accept this recommendation. The Government is already exploring the extension of the 'fixed stage, fixed cost' system for road traffic accident claims to other personal injury claims. This should bring greater efficiency, especially where liability is not contested, and does not require the establishment of a statutory body.**	N/A
1.52h	Consider a claims e-portal and review the effectiveness of the recent fixed legal fee approach for small claims. **Response: Accept. The NHSLA is now developing a low value clinical negligence claims pilot with a range of stakeholders. If successful, the Coalition Government will look at how it could be rolled out for all low value clinical negligence claims alongside wider reforms for personal injury claims.**	NHSLA

	Recommendations and Response	Lead Organisation
1.52i	Analysis, analytics and the application of claims data should be a key role for the NHSLA. This should provide material benefits to Trusts in respect of learning lessons. Detailed analysis of claims by speciality / geography / procedure et al, would be an attractive and valuable proposition for scheme members if it enabled and facilitated improved outcomes. **Response: Accept. The NHSLA has already begun to produce learning reports from claims in order to improve outcomes and this should be developed so learning becomes systemic and routine.**	NHSLA
1.52j	Promote the option of participating in a delegated authority scheme whereby Trusts handle their own claims up to a limit of £25,000. Participation could be improved by offering a 5% discount (feasibility to be assessed) for those adopting a delegated authority protocol (reflecting the reduced workload on the NHSLA). This could allow greater self funding of medico-legal departments. Only 10 Trusts currently take this option. **Response: Accept. The NHSLA will work with scheme members to understand and assess the appetite for delegated authority, and whether incentives should be developed to promote it.**	NHSLA
1.52k	Feedback is obtained from the Trusts with a view to issuing one procedure document with specific procedures for Clinical Negligence and RPST. **Response: Accept**	NHSLA
1.52l	Financial penalties to the Trusts for non-compliance with reporting criteria should be considered to attempt to reduce reporting delays. This would need to include a requirement for the quality of the data provided (set template) and not just the speed. **Response: Accept. We have already asked the NHSLA to review levers and incentives within the operation of its schemes in order to improve performance.**	NHSLA
1.52m	Reasons for the Legal Panel being used relatively quickly to be investigated in more detail with a view to cost savings and increasing / re-assigning internal resourcing on clinical negligence cases. **Response: Accept**	NHSLA

	Recommendations and Response	Lead Organisation
1.52n	Expert fees and success fees to be capped at an agreed percentage (this may require a separate Legal Services Commission review). Marsh acknowledges that the Justice Secretary has proposed wider reforms related to these areas. **Response: We do not accept this recommendation. The Coalition Government has already announced how civil litigation funding and costs will be reformed. Success fees will cease to be recoverable from defendants, and will be broadly limited to 25% of damages excluding damages for future care and loss. Some of these reforms are being taken forward in the Legal Aid, Sentencing and Punishment of Offenders Bill.**	N/A
1.53	**Risk Management and Incentivisation**	
1.53a	There should be a stronger link between the risk management team and the claims handling team, for example with more sharing of data (the RM team currently use Microsoft Excel due to data access issues). This may require greater investment in IT to allow sharing of data, a change to patient confidentiality rules allowing the RM team to access patient records and the recoding of the claims causation codes in order to deliver more rigorous analysis. **Response: Accept**	NHSLA
1.53b	Aligned to our calculations the NHSLA should limit the number of clinical negligence claims that can be handled by one case handler to a maximum of 250 and be allowed to recruit additional staff to fill the gap (current workload 262). This will avoid inconsistency in service levels and the unnecessary passing of work to panel solicitors. **Response: Accept. We agree that more effective workload management could reduce the use of the Legal Panel and therefore reduce costs.**	NHSLA

	Recommendations and Response	Lead Organisation
1.53c	Standards alignment. Monitor requires NHSLA risk management level 1 to apply for Foundation trust status. Consideration should be given to whether this should be moved to level 2, to enforce an increased level of risk management. In addition, where appropriate alignment of the NHSLA standards with CQC's 'Essential standards of quality and safety' should be introduced. Marsh recognises that the CQC has used some elements of the NHSLA RM standards in their assessments since 1 October 2009. **Response: Accept. The NHSLA will discuss with both Monitor and CQC how their assessments will support the future regulatory architecture, including taking into account any recommendations or actions emerging from the current Mid Staffordshire inquiry.**	NHSLA
1.53d	Evaluate the benefits of introducing specific risk management standards for specialities such as A&E and surgery, thereby introducing greater clinical application. **Response: Accept. However, the potential addition of standards for specialities needs to balanced against the Department's commitment to reduce the burden of bureaucracy on NHS providers.**	NHSLA
1.53e	The frequency of assessment should be every two years at a minimum. Currently members at L2 and 3 are re-assessed only every three years, which is a long period in an ever changing NHS environment. **Response: Accept. We have already asked the NHSLA to review levers and incentives within the operation of its schemes in order to improve performance. However, this needs to be balanced against the Department's commitment to reduce the burden of bureaucracy on NHS providers.**	NHSLA
1.53f	NHSLA to identify any failure criterion when awarding a RM rating of 2 or 3. The reasons for this failure rating to be shared with the member and re-visited within 6 months (dependant upon the specifics) in order for the score to be maintained. **Response: Reject. The NHSLA already highlights to members the reason why any criterion is failed, and introducing more frequent re-assessments for Level Two or Three trusts may be considered burdensome.**	N/A

	Recommendations and Response	Lead Organisation
1.53g	Assessments should be proportional to the size of Trust – currently every assessment lasts the same amount of time (two days) irrespective of the size and complexity of the organisation. Marsh understands that the NHSLA is looking at the standards and considering a more proportional based assessment. **Response: Accept.**	NHSLA
1.53h	The RM standards should be increased to 4 levels (and potentially a level 5 over time – in line with commercial RM maturity models). Level 3 & 4 should be more around proving lessons learned, incident reporting, linked to actual claims experience, alignment with other hospital quality standards (e.g. patient care) and show the practical application of RM standards in a clinical environment. **Response: We will consider this.**	NHSLA
1.53i	The current discount level for attaining Level 1 of 10% should be removed. In turn a level 4 discount should be introduced at a rate of 35%. **Response: We will consider this.**	NHSLA
1.53j	Consideration should be given to the accreditation of the RM standards (once enhancements complete). This could be offered as a fee paying service to overseas healthcare providers or UK private practice operators. **Response: Accept. The NHSLA will engage more widely with the industry to consider whether this should be adopted, but the primary focus of the NHSLA will remain its responsibility to provide risk pooling for the NHS**	NHSLA
1.53k	The claims discount formula (+/-10% based on claims experience) to be re-worked so that more members receive adjustments (both good and bad). At present only 5% of Trusts receive any adjustment. The formula for greatest discount and penalty to be changed to +/-25% of projected claims (not 50% as now) and next level to be changed to +/-10% from the current +/-25%. **Response: We will consider this. We have already asked the NHSLA to review levers and incentives within the operation of its schemes in order to improve performance.**	NHSLA

	Recommendations and Response	Lead Organisation
1.53l	Solicitors' Risk Management Reports on Claims' (articulating the causes of the incident and links to the risk management standards) should be distributed more widely and results aggregated into a quarterly publication. Over 1,600 reports have been submitted since 2010. **Response: Accept. The NHSLA will work with scheme members to identify how it can support its membership improve risk management.**	NHSLA
1.53m	An on-line premium allocation tool should be developed so that members can see how their contribution is calculated and what variables will influence their allocation portion and hence allow them to analyse the cost / benefit decisions around changing working practices. This should be placed on the NHSLA website. In addition, more openness in the legal process is desirable e.g. when a trust asks for evidence, expert testimony, reasons for settlement etc **Response: Accept. We will ask the NHSLA to explore ways in which they can be more open and transparent. However, we do acknowledge that an online premium allocation tool may not provide realistic estimates of future contributions as the 'pay as you go' nature of the schemes means that contributions are based upon the estimated risk to the whole pool rather than the risk to individual members.**	NHSLA
1.54	**Strategic & Cultural**	
1.54a	Reducing the overlap and duplication between the CQC, Monitor and the NHSLA risk management standards. A more Integrated / Ombudsman type approach should be taken for overall hospital standards including risk management. This may be lead through the Commissioning Board or another body. **Response: The NHSLA already works closely with CQC and Monitor in order to reduce overlap and duplication. It will continue to work with organisations to reduce unnecessary burdens on scheme members.**	NHSLA

	Recommendations and Response	Lead Organisation
1.54b	The pooling arrangement is an appropriate structure. However, Marsh recommends that further consideration is given to a 'claims made' scheme and to increasing the contribution levels to include outstanding losses in addition to paid losses. This would require an adjustment to the tariff mechanism. In addition, exit barriers should be reviewed to allow greater competition from commercial insurers. **Response: We reject the first part of the recommendation relating to a 'claims made' scheme. We have considered the impact of moving the scheme to a 'claims made' basis and our view is that this would remove the cash flow benefits the current scheme provides the NHS i.e. keeping as much money as possible available for patient care. However, we will review the exit barriers, exploring the potential impact of greater competition from commercial insurers.**	DH / NHSLA
1.54c	The NHSLA role in relation to improving patient safety could be increased. The NHSLA could assume the responsibility for Incident Reporting from the NPSA. **Response: Subject to passage of the Health and Social Care Bill, the NHS Commissioning Board will have responsibility to ensure the delivery of the National Reporting and Learning System (NRLS). It will be for the NHS Commissioning Board to determine how NRLS will be provided in future, either directly by the NHS Commissioning Board or commissioned from an another organisation, which could be the NHSLA. Interim arrangements have been agreed on continued delivery of the NRLS until the NHS Commissioning Board is established.**	NHSLA
1.54d	The cultural outlook and demeanour of the NHSLA could become in general more outward looking and less introspective. The NHSLA has been largely left to its own devices in the past 15 years and this is deemed to have fostered a culture that manifests in the organisation being relatively autonomous. Formalising the relationship between the NHSLA, and scheme members would improve perceptions, relationships and potentially reduce costs. Consider appointing a Senior Relationship Manager (SRM) at the NHSLA to oversee high level contacts and address service issues with members. **Response: Accept. Working with scheme members should be one of the NHSLA's key priorities as it effectively operates in the interests of its membership. The NHSLA will work with scheme members to identify how they want the relationship to be developed.**	NHSLA

	Recommendations and Response	Lead Organisation
1.54e	A broader review of governance and the constitution of the existing NHSLA board should be reviewed in light of NHS decentralisation and the Any Willing Provider (AWP) [now referred to as Any Qualified Provider (AQP)] agenda e.g. consideration given to appointing a 'patient interest' or clinical specialist to the board. **Response: Accept. The Department will work with the NHSLA to identify which skills / experience are missing within the Board and to appoint further members if appropriate.**	NHSLA
1.54f	Clear succession plans should be put in place for key staff. Tight control at the top of the organisation with a small management team, technical team and Governance board results in key person dependencies. **Response: Accept. It is essential that the NHSLA has sufficient plans in place to ensure business continuity in the event that key staff are absent or leave the organisation.**	NHSLA
1.54g	Dashboard / performance metrics – re-work the NHSLA dashboard to include reputation metrics, technical excellence and performance metrics with Trust members, e.g. delivering data analysis and trends, response times, customer satisfaction, training courses, incident reporting and lessons learned papers. **Response: Accept. The NHSLA will undertake additional work to develop its Key Performance Indicators.**	NHSLA
1.54h	Marsh recommends that insurers are invited to comment of the insurability of the CNST scheme as part of an 'open invitation' to comment. **Response: Accept**	DH/NHSLA

	Recommendations and Response	Lead Organisation
1.54i	Greater involvement and presence by the NHSLA in how apologies are handled by Trusts should be considered. How apologies are presented (timeframe, delivery, format etc) to patients has a significant influence on the likelihood of a patient pursuing a claim against the NHS. Apologies and complaints handling should be a powerful method in reducing the numbers of claims made against the NHS. **Response: We agree that effective complaints handling at local level has the potential to reduce the number of claims, but do not accept that the NHSLA should become more generally involved in the handling of individual complaints. We are clear that complaints are best handled locally by the organisations involved in the complaint. However, the NHSLA should consider whether incentives or penalties are applied to scheme members that do not comply with its Apologies and Explanations circular.**	N/A
1.54k	The calculation of the contributions, distribution of the invoice letter and collection of the contributions takes significant amount of time and resource. Marsh would recommend that this area is reviewed to identify if any efficiencies can be achieved through streamlining the system or through greater centralised automation **Response: Accept.**	NHSLA