

**THE RECOVERY OF HEALTH
SERVICES COSTS IN CASES
INVOLVING PERSONAL INJURY
COMPENSATION:**

A CONSULTATION

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Chapter 1: A proposal by the Law Commission and current position in GB

Introduction

1.1 For over seventy years Northern Ireland road traffic legislation provided that where, under the terms of compulsory motor vehicle insurance, personal injury compensation was paid to the casualty of a road traffic accident (“RTA”) the insurer paying compensation would also be liable to meet the costs of any hospital treatment the accident casualty may have needed.

1.2 Today health services hospitals still recover the costs of treatment given to RTA casualties in cases where the accident casualty claims personal injury compensation. The health services costs are met by the insurer, not the casualty, and the scheme is administered by the Compensation Recovery Unit, a part of the Department for Social Development’s Social Security Agency, on behalf of the health and personal social services (“HPSS”).

1.3 The legislation governing the recovery of these health services charges, with effect from 2 April 2001, is contained in Part II of the Health and Personal Social Services Act (Northern Ireland) 2001 (“2001 Act”). Part II of the 2001 Act is very similar to the Road Traffic (NHS Charges) Act 1999 and, in essence, any reference in the forthcoming paragraphs to the 1999 Act or the National Health Service (“NHS”) apply equally to Northern Ireland.

1.4 Similarly, whilst the proposal made by the Law Commission for England and Wales (“Law Commission”), which is the underlying subject matter of this consultation, is strictly relevant only to those parts of the UK it is also being applied in Scotland and is considered to be equally applicable to Northern Ireland.

1.5 This consultation paper concerns the Law Commission’s proposal that the above process of recovery should take place not just following RTAs but in all cases where people claim and receive personal injury compensation in respect of accidents or illnesses which require treatment by the NHS (HPSS in Northern Ireland). (Personal injury compensation payments are payments made to, or in respect of, the person suffering the injury.)

1.6 The Law Commission has already conducted public consultation on the legal merits of such a scheme and this paper does not reopen ground which has already been covered on the assumption that overall any comments made in Northern Ireland would not be significantly different to those in GB. The basic argument involved and which was sustained by the consultation exercise, is that by providing medical treatment under legal compulsion the NHS is, in effect, discharging part of the liability of the party which caused the accident. (Information on the Law Commission's consultation and its outcome is contained in Appendix A.)¹

1.7 The Department of Health, Social Services and Public Safety ("DHSSPS") considers that accepting the Law Commission's conclusions would be an important development in the evolving clarification of the rights and responsibilities of individuals and organisations with regard to the provision of comprehensive health services.

Position in Great Britain

1.8 The Department of Health in England and the Scottish Executive Health Department issued a consultation document similar to this one in September 2002. Following consultation and taking account of the views expressed during the exercise, the Government decided to include the provisions necessary to put into effect the proposals on which they consulted in a Health and Social Care (Community Health and Standards) Bill. The Bill is currently going through the legislative process at Westminster.

¹ The Law Commission proposal was contained in consultation paper 144 and report no 262 both available from the Law Commission's website at www.lawcom.gov.uk

Chapter 2: Issues to consider

2.1 The Law Commission concluded that the NHS should have the right to recover its costs but suggested that there remained some major issues to consider before deciding whether or not to proceed with a practical scheme to undertake such recoveries.

An existing template for the scheme?

2.2 In GB, since April 1999 the Compensation Recovery Unit (“CRUGB”), a part of the Department for Work and Pensions, has acted to recover costs following RTAs on behalf of the Secretary of State for Health (for England and Wales) and Scottish Ministers. The Unit is based in Washington, Tyne and Wear, and has extensive links with all authorised insurers in the UK as a result of its primary business which is to recover state benefits in cases involving personal injury compensation. In Northern Ireland, since April 2001, the Compensation Recovery Unit (“CRUNI”) based in Belfast has undertaken the recovery work for the HPSS and it too has extensive links with the insurance industry.

2.3 The Road Traffic (NHS Charges) Act 1999 (the 2001 Act in NI) included provision for NHS costs to be recovered according to a very simple tariff of charges. For claims in respect of accidents after 31 March 2003 the health services recover £452 for every person who was treated without admission to hospital and £556 per day for anyone who is admitted to hospital. There is a ceiling of charges in any one case, which is currently set at £33,000.

2.4 The tariff levels are based on treatment profiles for RTA casualties and as charges do not have to be individually calculated in each case it reduces the administrative cost of the system and allows insurers to know in advance roughly what the costs in any one case will be.

2.5 There is a right of appeal against the charges throughout the United Kingdom. In Northern Ireland appeals are heard by Appeal Tribunals Northern Ireland.

2.6 We therefore agree with the Law Commission that the current scheme could be relatively easily extended to include recovery of costs in all cases of personal injury compensation. In this paper “we” means the DHSSPS but also indicates that the statement made concurs with

the Department of Health in England and their equivalents in Wales and Scotland.

The link to insurance

2.7 Motor vehicle insurance (or the holding of a security or deposit) is compulsory in the UK and the NHS or HPSS right to recover their costs following RTAs is therefore inextricably linked to compulsory insurance. If the recovery of health services costs was extended beyond RTAs there is no logical reason why it should continue to be linked with only those payments of compensation which result from compulsory insurance. The Government already recovers state benefits which have been paid to accident casualties or people with industrial illnesses in most cases where payments of personal injury compensation are made and there is no link to insurance, as such, at all.² When and if a payment of compensation is made then it triggers potential recovery of state benefits. If no payment of compensation is made then there is no recovery of state benefits.

2.8 Payments of personal injury compensation can be made in many different circumstances. Three fifths of them are made following involvement in a RTA, around one fifth involve accidents in public places, just under one fifth involve accidents or illnesses at work and a very small proportion involve clinical negligence or other types of liability including product liability³. Although many of these claims will involve compulsory insurance, such as third party motor vehicle insurance and employer's liability insurance, many will be met through voluntary insurance policies and some, a very small minority, by direct payment from the liable party. Those paying compensation will therefore include private citizens (overwhelmingly through motor vehicle insurance policies), employers, holders of public responsibilities such as local and central government departments, schools, colleges etc, manufacturers and so on.

2.9 There can be no recovery or attempted recovery in those cases where the liable party either cannot or will not pay compensation. Whilst the problem of people failing to meet their liabilities is one of general social concern it should not prevent the recovery of appropriate costs in the vast majority of relevant cases. We therefore support the Law Commission's proposal that any new scheme should not be restricted to compulsory insurance.

² The Social Security (Recovery of Benefits) Act 1997 or the Social Security (Recovery of Benefits) (NI) Order 1997

³ Source: The Compensation Recovery Unit (NI)

Contributory negligence

2.10 The Law Commission suggestion is that where the injured party is partly responsible for his (or her) own injury and the degree of liability has been apportioned between him and the other party (the compensator) accordingly, then the compensator should only be responsible for the same proportion of any health services costs. There are currently two Government schemes to recover costs in cases of personal injury compensation. Neither The Social Security (Recovery of Benefits) Act 1997 nor The Road Traffic (NHS Charges) Act 1999 (or their NI equivalents) take into account such findings of contributory negligence and to do so, as suggested by the Law Commission, would be a new departure and would be out of line with existing recoveries. In both schemes there is already a limit to the recoveries which can be made in individual cases and so compensators, even in cases where there is 100% liability, are not always required to meet the full costs in the more expensive cases.

2.11 The Commission reported that there was no general consensus following consultation on this issue. Some people thought not taking contributory negligence into account was a form of “rough justice” as many potential claims are never brought. Others however thought it unfair that someone who was only partly liable for the casualty’s injuries could be made to meet the treatment costs in full.

2.12 The Law Commission suggests that any new scheme should take into account findings of negligence or bona fide agreements thereon. There will only be an official finding of negligence where there has been a court decision on the case and the vast majority of insurance claims are settled privately without court involvement. Therefore, the calculation of personal injury awards does not always, or even in the majority of cases, include an agreed proportionment of liability. There is also no definition of what would constitute a “bona fide agreement” made outside a court.

2.13 To insist that the apportionment of liability was taken into account in all cases would therefore impose a new requirement in the settlement of claims for personal injury compensation. This would not only increase the administrative burden and therefore cost of processing such claims but would also delay the payment of compensation to the injured party whilst liability was calculated and agreed. If the new scheme took account only of liability which had been decided by the courts then it could possibly lead to increased pressure on the courts as people sought official confirmation of liability through that route and payments to individuals would be delayed. It has been the experience

of the RTA scheme that not taking negligence into account simplifies recovery to the advantage of all parties.

2.14 However, whilst we do not entirely agree with the Law Commission observation on contributory negligence it has been conceded in GB, in acceptance of representations made on the matter, that in cases where a court has ordered a reduction in damages because of contributory negligence the health services charge should be reduced by the same proportion. It is estimated in GB that only 5% of all cases will be affected. It was decided not to concede in respect of other cases because this would have required the Compensation Recovery Unit to assess the merits of each case and this is outside their simple recovery function. It would be difficult to sustain an argument in support of a different approach in Northern Ireland so we propose to take contributory negligence into account in the same way.

What should be recovered?

2.15 The Law Commission proposal refers to the recovery of health services costs. We have considered whether or not to propose recovery of all such costs, including those incurred by general practitioners, ambulance services, hospital services and those relating to longer term rehabilitation. We have concluded, however, that a system which could identify primary care treatment and cater for long term care needs would be most difficult to establish. For example, the number of general practitioners would be difficult to accommodate and would render any scheme bureaucratic and costly to administer. We are therefore, as Chapter 3 goes on to explain, proposing a scheme which, as for the recovery of costs following RTAs, would continue to recover any health services treatment given in a hospital, for a limited period, and, for the first time, the costs of ambulance transport. We consider that the benefits of a simple system along already established lines outweigh the practical difficulties of maximising full health services recovery.

2.16 Personal injury compensation can be claimed when a person has suffered a trauma, such as a wound or bodily injury, or where they have contracted or developed an illness. In terms of total figures the number of claims following trauma is considerably greater than those involving illness. Within employer liability alone there are many more claims as a result of accident than illness and this latter category of claim is therefore relatively insignificant (less than 10%). There are also some difficulties associated with the recovery of costs in cases of illness. For example:

- the profile of health services costs may be weighted towards the period after compensation has been paid and will therefore not be recovered;
- many of the costs are likely to occur within the primary care sector and, as indicated in the last paragraph, are not proposed for recovery;
- there may be practical difficulties in identifying the treatment received at hospital especially if treatment has been largely out-patient based;
- because of the time period involved there may well be co-morbidities, i.e. the patient may be being treated for more than one illness at the same time;
- point of diagnosis may not be clear cut and costly investigations may be needed to establish a diagnosis.

2.17 These issues revolve around practicality, materiality and whether an additional burden will be placed on the information systems of health services providers which could potentially and ultimately outweigh the benefits of the scheme. However, these issues make no difference to the legal underpinning of the right to recover health services costs from those wrongdoers whose actions have resulted in an industrial illness. Nevertheless, it has been decided in GB, where the ratio of claims in respect of illness is much higher to those involving accidents than in Northern Ireland, that the potential benefits of including industrial illness cases are outweighed by the disadvantages and, accordingly, that such cases should not be included. Apart from the obvious benefits of excluding industrial illness cases, it would be very difficult to sustain a case for adopting a different approach in Northern Ireland.

The administrative costs

2.18 When, in 1996, the Law Commission first proposed an extended scheme of NHS recovery there was concern that the administrative costs of collection could outweigh any arguments in favour of the principle. Since that time the revised scheme for the recovery of these costs following RTAs has been introduced and both the Department of Health and ourselves have a much better appreciation of the dynamics of centralised recovery and the costs.

2.19 In 1999/2000, the first year of the RTA charges scheme's operation, the NHS in England, Scotland and Wales recovered £30m with the money being returned directly to the hospitals providing treatment. The corresponding figures for 2001/2002, 2002/2003 and 2003/2004 are £76m, £98m and £105m respectively. The

administrative costs of this centralised scheme are met, proportionately, by the health departments of the three countries. At present the costs are around £1.9m per year or just under 2% of the amounts being recovered.

2.20 In Northern Ireland, however, the situation is slightly different. Because the population is so small in comparison with GB, administration of the scheme will cost proportionately higher in relation to the level of income. In the first year of the scheme's operation (2001/2002) just over £600k was recovered and paid to HSS Trusts. This figure was £3.5m in 2002/2003 and should exceed £4m in subsequent years. This follows the trend in GB. Administration costs, which are being met by DHSSPS, are around £100k and will represent around 3% of income.

2.21 If the new extended scheme was administered in the same way as the RTA scheme (i.e. with direct links to insurers and HSS Trusts and costs calculated using a simple tariff of charges) then the costs of collection can be safely assumed to be favourable in relation to the amounts recovered.

Chapter 3: Outline proposal for a new scheme

Proposal

3.1 The Law Commission suggested that the administrative arrangements for the new scheme could easily be based on an extension of the existing schemes to recover social security benefits and NHS recoveries following RTAs. Using those schemes as a template our proposal for a new scheme is as follows.

- It should apply to all payments of personal injury compensation where the injured person received health services treatment in respect of the same injury giving rise to compensation.
- The recovery should be limited to the cost of any health services treatment in hospital and associated ambulance costs.
- The payment of health services costs should be made by the person or organisation paying compensation and not the person receiving treatment.
- The payment of health services costs would be additional to the payment of compensation, i.e. the amount of personal injury compensation would not be reduced to take account of the costs.
- It should be administered by the CRUNI on behalf of the HPSS.
- It should follow the general pattern of the Social Security (Recovery of Benefits) legislation on which the RTA charges scheme legislation was based. This would involve:

compensators including details of any health services hospital at which treatment was given when notifying CRUNI when a claim for compensation is made;

CRUNI would then check the details of treatment with the relevant HSS Trust;

CRUNI would then calculate the charges due according to a simple tariff and issue a certificate of charges to the compensator;

the compensator would either pay the charges to CRUNI when the claim was settled or notify CRUNI if the claim was withdrawn for any reason;

CRUNI would pass the money to Trusts on a monthly basis.

- There would be a right of appeal against the recovery in any one case.

Proposed timescale

3.2 If, following this consultation, it is decided to proceed with development and introduction of the proposed new scheme the aim would be to have the necessary legislation in place by mid 2005. The actual commencement of the scheme would take place afterwards at a time to be decided taking account of factors such as the outcome of the review of Employers' Compulsory Liability Insurance, which is mentioned in Chapter 4, and progress with the scheme in GB.

Chapter 4: Likely effects of new scheme

Purpose and intended effect of proposal

Introduction

4.1 The proposal as described in Chapter 3 is the introduction, through primary legislation, of a system for the recovery of charges (dependent on the payment of compensation) based on a simple tariff system of health services charges, with central collection by the CRUNI. This section deals with some of the issues in shortened form and where necessary some of the points made are further developed either later in the Chapter or elsewhere.

4.2 At present, except for cases involving compulsory motor vehicle insurance, where a person has agreed to pay compensation for personal injury suffered by another person the compensator does not meet the costs of any health services hospital treatment, or ambulance transport, which has been necessary. The cost to the taxpayer of meeting these costs has been estimated at approximately £3m, based on the RTA scheme tariff (regarded as a useful proxy for the costs of trauma treatment in general although based on the treatment profile of RTA casualties). In GB the corresponding costs have been estimated as being in the range of £120m to £150m.⁴

Scoping study

4.3 After the Law Commission proposed that the RTA scheme should be extended to include cost recovery in all cases where a person receives compensation, an internal scoping study by GB health departments assessed the potential for the NHS to recover the costs of accidents/diseases other than those involving motor vehicles. In summary, this found:

- employer liability for accidents and diseases and public liability for accidents are the most common types of claims where persons receive compensation for their injuries;
- employer and public liability are therefore the areas where the taxpayer is currently providing the most significant subsidy for

⁴ These estimates are based on the numbers of claims for all types of compensation recorded by both Compensation Recovery Units. They assume treatment costs for RTA casualties apply to all types of accidents and that a similar pattern of severity will apply, i.e. the proportions of patients who are treated as either in-patients or out-patients.

the costs of any necessary medical treatment for injuries sustained in accidents;

- the estimated amount that could be recovered by hospitals each year for employers liability accidents was then: £42m for in-patient treatment; £12m for out-patient treatment and £4m for the cost of ambulance transport;
- potential revenue for public liability accidents was likely to be on a similar scale;
- for a number of reasons it would be difficult to quantify the cost of diseases (as opposed to accidents) to the NHS.

4.4 Research in Northern Ireland has indicated pro rata a relatively similar set of findings although employer liability cases are lower numerically in relation to public liability than in GB and both together are appreciably lower than motor liability cases. The amount which would be recovered in respect of both liability types and by including ambulance costs for all liability types, is estimated at just over £3.2m.

Issues of equity and fairness

4.5 The proposal is based on the legal arguments advanced by the Law Commission of avoiding unjust enrichment of those liable for causing accidents if they do not have to repay all the costs associated with their actions and it would have the effect of addressing a number of inequities. Those being treated more fairly would be:

- the general population benefiting from improvements in health and safety;
- the taxpayer by not subsidising wrongdoers;
- the HPSS by not having to bear the cost of treating injuries caused by wrongdoers;
- Northern Ireland residents, by seeing income that is currently being denied being recouped and directed to improving health services in hospitals.

4.6 It could be argued, as the Law Commission has done, that the liable party should only pay health services costs in proportion to their liability. In the vast majority of cases however no exact apportionment of liability takes place. If one was required it would add to the bureaucracy of claims and would need to be verified and agreed. This additional cost and delaying factor across all claims might outweigh any perceived gains in respect of fairness. However, in an effort to address issues of equity and fairness, where there was a finding in a court of

contributory negligence and an exact apportionment was decided which could be provided as proof of apportionment then the health services costs would be reduced accordingly.

Who will be affected?

4.7 The person paying compensation, or buying insurance against paying compensation, is affected. The proposal is not restricted to payments made as the result of compulsory insurance but even so the majority of payments are likely to come through insurance companies which will therefore incur additional administration even if the actual costs are passed on to those buying insurance.

Discussion of the benefits

4.8 The benefits are that those causing accident and injury to others will be bearing the full cost of their wrongdoing, the relief to the taxpayer of the costs of providing treatment and the added impetus to potential compensators to prevent accidents happening. The money raised is returned directly to the hospitals providing treatment and can therefore be used to provide better hospital services for all Northern Ireland residents.

4.9 Implementation of the proposal would see liable parties meeting the health services costs, estimated at around £3m per year, over and above the current recoveries made following RTAs. The recovery of costs would be limited to the amount of treatment received from the date of accident to the date that compensation is paid to the individual. Because there is a ceiling of charges (currently set at £33,000 for the RTA scheme which equals around 59 days inpatient treatment) and, once a claim is settled no further costs can be recovered, the scheme will be time and cost limited, and will not encompass the costs of longer term rehabilitation. The average time from accident to payment of compensation in Northern Ireland is around three years and it will therefore be rare that a claim would be settled before the ceiling of charges is reached. The recovery is also limited to a fixed amount in any one individual case. The proposal will also support a reduction in workplace accidents if employers have to pay the full cost of accidents they have caused.

Compliance costs for business

Business sectors affected

4.10 Any business with potential liabilities for personal injury compensation as either an employer, a producer of goods or transacting business in a public place – in other words, essentially all businesses - would be affected. Insurance companies providing cover in these areas would also be affected by the administrative costs and by the need to apportion costs amongst holders of policies.

Compliance costs for a typical business

4.11 For businesses in general the costs would either be the direct costs of paying any health services charges or the increases in any insurance premiums taken out to cover against these costs. The costs would be similar for any organisation paying personal injury compensation. Other costs that businesses may incur as a result of the scheme are the costs of implementing improvements to health and safety procedures, which could result in changes to working practices.

4.12 For insurance companies, as well as exposure to claims made against them in their own right, there will be additional costs of processing recoveries for those purchasing insurance. However, as all claims for personal injury compensation currently have to be notified to the CRUGB or CRUNI and all motor claims already attract additional questions about health services treatment, the additional administration to extend the RTA scheme to all claims will be relatively small. We do not expect the inclusion of ambulance costs to have any implications for insurers, other than meeting the costs, as all the information, which is required to administer these costs, should be available through the HPSS.

4.13 The additional costs for insurers will comprise:

- i. the need to identify the hospital providing treatment in all cases when notifying claims to CRUNI;
- ii. alterations to IT and any forms to capture the additional data;
- iii. any retraining of staff required.

Of these (i) is a recurring cost, whereas (ii) and (iii) should be one-off costs.

Total compliance costs for insurers

4.14 The charges payable to the HPSS will account for the overwhelming majority of compliance costs for insurers. Information obtained in GB in 1998, as part of the regulatory appraisal accompanying the Road Traffic (NHS Charges) Act 1999, suggested

that the work involved in identifying an NHS hospital added approximately 30 minutes to the handling time of an insurance claim – equivalent to a financial increase of 7- 8% on then current processing costs.

4.15 Again, based on experience gained in the implementation of the Road Traffic (NHS Charges) Act, the one-off costs for IT and staff training are not expected to be high. Insurers will already have administrative processes in place for the handling of RTA claims and as the scheme will just be an extension of that system training and other costs are not expected to be significant.

4.16 Enquiries about these costs have indicated that the position in Northern Ireland would not be significantly different from that in GB.

Impact on businesses other than insurers

4.17 Any business, large or small, which could be the subject of a claim against it for personal injury compensation – through, for example, its liability as an employer, or producer of goods or organiser of public events – may be affected by these proposals. Some, but not all, business liabilities are the subject of compulsory insurances. Where insurance is not compulsory most responsible businesses will have obtained adequate cover through the voluntary purchase of insurance. Many combined insurance packages (for example contractor's all risk insurance) also include an element of public liability cover.

4.18 If the costs of NHS treatment in GB do reach around £150m per year then if insurers simply divided that cost amongst all holders of relevant insurance it would suggest an increase of around 6% in public liability and employer insurance premiums. It is understood, however, that premiums for liability insurance have risen steeply in recent months, by around 50% on average, for reasons unconnected with the recovery of NHS costs. Therefore, the percentage increase directly attributable to the recovery of NHS charges would fall below 5% and be comparatively small to overall premium costs. We consider any increase in premiums in Northern Ireland would be at around the same level.

4.19 We also acknowledge that there has been a review of Employers' Liability Compulsory Insurance⁵ led by the Department for Work and Pensions in GB and its findings, together with the ongoing work stemming from it, will be taken into account when decisions on

⁵ Available at the Department for Work and Pensions website – www.dwp.gov.uk

proceeding with the proposals contained in this consultation document are being taken.

4.20 As these costs directly relate to the provision of health services treatment where liability has been accepted by the payment of compensation an organisation with a good record of no, or few, claims against it might not expect to see its insurer pass on these costs without adequate weighting in its favour. Indeed, it is very difficult to assess the actual effect of this provision on individual businesses as different insurers will offer quite different premiums to the same business reflecting the size of the business, the nature of the risk, its previous claims history and overall market conditions. In GB, the Department of Health is discussing with the insurance industry what measures may be in place or are being planned to allow the pricing system to be fairer to firms with good health and safety records. The outcome of this will have an effect in Northern Ireland.

Impact on small businesses

4.21 The vast majority of businesses in the United Kingdom employ fewer than 50 people and are therefore classed as small businesses. More than two thirds of these small businesses are sole proprietorships and partnerships comprising only the self employed owner manager(s) and companies comprising only an employee director. In Northern Ireland over 80% of businesses have less than 10 employees.

4.22 There is evidence in GB on the relative impact on small business which suggests that accident rates are lower amongst smaller workplaces (under 50 employees). The exception is for fatal injuries where the rate is higher for smaller workplaces. There is also evidence that injury rates are lower for very large workplaces (over 500 employees). It is construed from this that medium-sized businesses have the highest accident rates and, therefore, will undergo the greatest impact. We would welcome consultees' views on whether this assessment would apply equally in Northern Ireland.

4.23 Where a small business is run on a tight margin the impact of any increase in either compulsory or voluntary insurance premiums will be unwelcome. However the small business attracts responsibilities for the safety and well being of people who come into contact with it in just the same way as any other business and should be encouraged to both reduce that risk wherever possible and to make sensible and prudent provision for meeting the costs of any accidents should they nevertheless occur. The principal risk to small businesses is if the insurance sector does not make use of health and safety management information in setting premiums for smaller firms. A lack of variations in

premiums would greatly reduce the incentives to reduce risk for such firms.

4.24 The type of risks to which such small companies are exposed are not changed by the proposed extension of the RTA charges recovery scheme and there should be no question of additional costs for revised risk assessments or other financial services. We would be interested to know if consultees agreed with this assessment.

Impact on charities and voluntary organisations

4.25 The impact of these proposals on charities and voluntary organisations would be exactly the same as for businesses and small businesses. If the charity or voluntary organisation made a payment of personal injury compensation (either directly or through the medium of an insurance policy) then they would also be required to repay (either directly or through the medium of an insurance policy) the costs of any associated hospital treatment.

Other costs

Costs to NI Departments, local government and other public bodies

4.26 It is intended that all compensators will be required to repay health services costs so that the body responsible for the injury meets the full costs of reparation. The only potential exception will be a health services hospital where it is both the compensator and provider of healthcare services. Departments and other public bodies will therefore be subject to the same provisions as other businesses and will be required to repay costs in relevant cases. Although there is an element of financial circularity in such an arrangement, repayment by all such organisations ensures that money allocated to the HPSS to provide health services for everyone is not diverted to subsidise other parts of government.

4.27 There would be additional administrative costs for the DHSSPS in extending the recovery from RTAs to all accidents. The Department paid the Department for Social Development just over £100k to recover £3.5m in 2002/2003 (expected to rise to over £4m in the current year). Assuming a similar rate of cost to recovery this payment could rise to about £220k for an extended scheme. There will be some modest nonrecurring set-up costs. HSS Trusts would also see the number of

claims they must verify rise with a consequent impact on staff time. Consideration is being given to introducing electronic communication between CRUNI and all relevant HSS Trusts, which should produce efficiency savings within CRUNI and those Trusts.

Costs to citizens

4.28 Private citizens are involved in payments of personal injury compensation most often as a result of private use of a motor vehicle. In these cases insurance cover is compulsory and the recovery of health services costs already takes place under the provisions of the 2001 Act. In the much rarer event of a private citizen making some other form of payment of personal injury compensation to a third party it is possible that that person may have insurance cover as part of their domestic, or if appropriate, travel insurance. However, as the recovery of costs is dependent on the payment of such compensation a private citizen will only have to pay health services costs if compensation is also paid.

Chapter 5: Equality of opportunity and human rights issues

Equality

5.1 When determining its policy on any matter for which it is responsible, the Department is required by section 75 of the Northern Ireland Act 1998 to have due regard to the need to promote equality of opportunity:

- between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

5.2 The Department has already looked at the proposed policy as regards the recovery of health services charges and there should not be any adverse or differential effect on equality of opportunity as between the groups listed above. There is certainly no indication that the RTA recovery scheme has had any such impact. However, we will in making final decisions on the policy screen it against the four criteria set out in the Equality Commission's guidance to identify if there are any significant implications for equality of opportunity. It should also be pointed out that the Department carries out a review of existing policies for the purposes of testing for equality of opportunity.

5.3 We would wish to have consultees' views on the proposed policy to inform the screening process.

Human rights

5.4 The Department aims to ensure compliance with the European Convention on Human Rights ("ECHR") in any proposal to make new legislation. The ECHR guarantees a range of fundamental individual rights and freedoms, such as the right to a fair trial and the right to life. The Human Rights Act 1998 also requires legislation to be interpreted as far as possible in a way which is compatible with the ECHR. The Department considers that the proposals for a new extended recovery scheme for health services costs are not incompatible with the ECHR and would welcome the views of consultees.

Chapter 6: The questions

Should the Law Commission findings apply in Northern Ireland?

6.1 The findings of the Law Commission developed from a review of the law on damages, during which a public consultation exercise was carried out. The Law Commission's recommendations and suggestions about the recovery of health services costs when personal injury compensation is awarded take account of the existing schemes, which in effect are UK wide, for the recovery of benefits and RTA charges. Whilst acknowledging that the Law Commission's remit and therefore its review extends only to England and Wales, we consider that its findings are equally applicable in Northern Ireland, as has been determined to be the case in Scotland.

Q1: Do consultees agree that the Law Commission's findings have application in Northern Ireland?

What should be recovered?

6.2 In Chapter 2 we provided a case in support of a scheme which, as for the recovery of costs following RTAs, would continue to recover the costs of any treatment given in a hospital and introduce the recovery of ambulance transport costs. We consider that the benefits of a simple system along already established lines outweigh the practical difficulties of maximising full health services recovery.

Q2: Do consultees agree that restricting recovery to hospital and ambulance costs provides sufficient restitution to the HPSS whilst retaining simplicity of administration and therefore reduced costs of recovery?

6.3 The case for the exclusion of industrial illness from the proposed recovery scheme is detailed in Chapter 2. In essence, we take the view that because of the relatively small number of cases involved and for other practical reasons the costs of treatment in industrial illness cases should not be recovered.

Q3: Do consultees agree that recovery of costs should exclude cases involving industrial illness?

6.4 The Law Commission suggested that a new scheme should take account of any findings of, or bona fide agreements on, contributory

negligence. The Department considers, for the reasons outlined in Chapter 2, that whilst this would complicate the scheme, contributory negligence should be taken into account where a court has ordered a reduction in damages because of it.

Q4: Do consultees agree that, whilst the costs and practicalities outweigh the principle that the negligent party should have to pay costs in proportion to their liability, a finding of contributory negligence by a court should be reflected in a proportionately similar reduction in the health services charge?

Who should pay?

6.5 We would not envisage any exemptions from the requirement to reimburse the costs of hospital treatment. Where personal injury compensation is paid then the compensator should also reimburse the costs of health services treatment. This would include all businesses, large and small; all public bodies such as Education and Library Boards, District Councils, schools, police or Government Departments; all employers etc. There are arguments that such a requirement would be unfair to small businesses or would simply represent paper transactions between, for example, government departments. One of the main influences in adopting such a scheme, however, is to ensure that bodies which do not ensure the safety of all people who come into contact with their work have to meet the full costs of their shortcomings. Such a message is as relevant to businesses of any size as it is to central and local government both as employers and providers of services.

Q5: Do consultees agree that all payments of compensation should attract the potential for repayment of health services costs regardless of the nature or size of the parties involved? If not, should this be for insured cases only?

Any impact on equality?

6.6 As indicated in Chapter 5, the Department will be screening the policy to identify any significant implications for equality of opportunity. We are of the view that the proposed scheme for the recovery of health services costs will not have an adverse impact on equality of opportunity as between any of the groups listed in section 75 of the Northern Ireland Act 1998.

Q6: Do consultees consider that the RTA charges recovery scheme in Northern Ireland has had any impact, adverse or otherwise, as between the listed groups?

Q7: Do consultees agree that the proposed recovery scheme should not have any adverse impact as between the listed groups?

Any human rights issues?

6.7 As stated in Chapter 5, the Department considers that the proposals for a new extended recovery scheme are not incompatible with the ECHR.

Q8: Do consultees agree that the proposed recovery scheme is compatible with the ECHR?

Summary of issues to be considered:

Q1: Do consultees agree that the Law Commission's findings have application in Northern Ireland?

Q2: Do consultees agree that restricting recovery to hospital and ambulance costs provides sufficient restitution to the HPSS whilst retaining simplicity of administration and therefore reduced costs of recovery?

Q3: Do consultees agree that recovery of costs should exclude cases involving industrial illness?

Q4: Do consultees agree that, whilst the costs and practicalities outweigh the principle that the negligent party should have to pay costs in proportion to their liability, a finding of contributory negligence by a court should be reflected in a proportionately similar reduction in the health services charge?

Q5: Do consultees agree that all payments of compensation should attract the potential for repayment of health services costs regardless of the nature or size of the parties involved? If not, should this be for insured cases only?

Q6: Do consultees consider that the RTA charges recovery scheme in Northern Ireland has had any impact, adverse or otherwise, as between the listed groups?

Q7: Do consultees agree that the proposed recovery scheme should not have any adverse impact as between the listed groups?

Q8: Do consultees agree that the proposed recovery scheme is compatible with the ECHR?

Chapter 7: Contact details

Answers to these questions and any other comments consultees wish to make should be addressed to:

Stephen Popplestone
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All replies must be received by 28 November 2003.

The Law Commission - Consultation and Conclusions

1. In 1996 the Law Commission issued a consultation document⁶ as part of their work reviewing the law of damages. The paper dealt with the damages that are awarded, in a personal injury claim, for the casualty's medical, nursing and other expenses. Amongst other things the paper asked whether, in cases where the person claiming compensation had received treatment from the NHS, there should be a mechanism for the NHS to recover the cost of the treatment which had been given.

2. The Commission recognised that the recoupment of costs by the NHS could be said to touch on questions "of a party political nature" and asked for views from consultees on four questions:
 - (1) Do consultees agree with our provisional view that, as a matter of legal principle, the NHS should have a claim to recover from tortfeasors (or other legal wrongdoers) the costs of NHS care resulting from a tort (or other legal wrong)?**

 - (2) Do consultees consider that there are policy or practical reasons and if so what are these reasons, that mean no such right of recoupment should be introduced?**

 - (3) Do consultees agree with our provisional view that if a recoupment scheme were to be introduced, it should take the form of the NHS having a direct claim against the tortfeasor (or other legal wrongdoer) which is parasitic on the victim having recovered damages?**

 - (4) Do consultees agree with our provisional view that, if a recoupment scheme were introduced, it would be sensible to adopt similar administrative arrangements to those used for the recoupment of social security benefits?**

The Law Commission

3. The consultation drew strong views with 48% of respondents being generally in favour of recoupment and 32% generally against it. 20% of

⁶ "Damages for personal injury: Medical, nursing and other expenses" Law Commission consultation paper No 144

those responding did not express any firm position. For each of the four questions posed there was majority support for the Commission's provisional views.

4. The Commission, having taken these responses into account, reiterated in its published position paper⁷ that it considered the recoupment of costs by the NHS could fairly be said to touch on questions of a party political nature. It did not think it appropriate to draw up detailed recommendations as the shape of any scheme would depend on a cost/benefit analysis and policy choices which were beyond their remit.
5. The Commission concluded by offering the following observations to those in Government charged with deciding how to proceed on this issue:
 - (1) **Subject to a cost-benefit analysis pointing to a contrary conclusion, it is our view, from a legal perspective, that the NHS should have the right to recover from tortfeasors (or other legal wrongdoers) the cost of NHS care resulting from a tort (or other legal wrong).**
 - (2) **We see no compelling reason why the scope of that recoupment should be confined to where the wrongdoer is compulsorily insured (that is, we see no compelling reason why the scheme should be limited to road traffic or employer's liability).**
 - (3) **The scheme implemented in the Road Traffic (NHS Charges) Act 1999 (including collection by the Compensation Recovery Unit, a tariff of medical expenses and an appeals procedure) is one that could relatively easily be extended to recoupment by the NHS in areas beyond road traffic accidents.**
 - (4) **Contrary to the 1999 Act, we think that any finding of, or bona fide agreement on, contributory negligence should govern the percentage liability of the wrongdoer to the NHS just as it does to the immediate tort victim.**

The Law Commission

⁷ "Damages for personal injury: Medical, nursing and other expenses; Collateral benefits"
Law Commission paper No 262