

# **THE RECOVERY OF NHS COSTS IN ALL CASES INVOLVING PERSONAL INJURY COMPENSATION**

**A CONSULTATION ON THE DRAFT REGULATIONS**

24 September 2004

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# THE RECOVERY OF NHS COSTS IN ALL CASES INVOLVING PERSONAL INJURY COMPENSATION

## A CONSULTATION ON THE DRAFT REGULATIONS

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## SECTION 1: INTRODUCTION AND BACKGROUND

- 1.1 Hospitals have for more than 70 years been able to recover the costs of treating those injured in road traffic accidents who have gone on to make a successful claim for personal injury compensation. A revised system of collection was introduced in April 1999 under the provisions of the Road Traffic (NHS Charges) Act 1999 (“the 1999 Act”), which centralised the recovery procedure making it more efficient and simple to administer. In addition amounts recovered and paid direct to National Health Service (NHS) hospitals providing treatment increased from around £20m to £100 m per year. The revised road traffic scheme is administered by the Compensation Recovery Unit (CRU), which is part of the Department for Work and Pensions (DWP), on behalf of the Secretary of State for Health and Scottish and Welsh Ministers.
- 1.2 The Law Commission for England and Wales consulted in 1996 on whether this process of recovery should take place not just following road traffic accidents but in all cases where people claim and receive personal injury compensation for injuries that require NHS hospital treatment. The basic argument is that those causing injury to others should pay the full cost of their actions, including associated health care costs. More than three quarters of the people who responded to the Law Commission’s consultation agreed with the Commission’s view that the NHS should be able to recover its costs from the liable party.
- 1.3 A public consultation on how such a scheme might operate was undertaken in the Autumn of 2002. The responses in the main supported the expanded scheme and proposals for its administration. Following on from that consultation, the proposal was taken through Parliament, and the legislative framework for an expanded scheme is now contained in Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 (“the 2003 Act”). The 2003 Act can be found on the internet at: [www.hmsa.gov.uk/acts/acts2003/20030043.htm](http://www.hmsa.gov.uk/acts/acts2003/20030043.htm)
- 1.4 The expanded scheme is due to commence on 1 April 2005, subject to Parliamentary approval of the Regulations to support the legislative framework. From that date NHS hospital and ambulance service costs will be recoverable in all cases where personal injury compensation is paid, so it will include things like accidents at work (employers’ liability claims) or claims that fall under public liability such as trips over loose paving stones. The intention is that the scheme will operate as far as possible in the same way as the current road traffic scheme, with a few exceptions, which are highlighted further on in this consultation paper.
- 1.5 This consultation is concerned with explaining the Regulations that will govern the new scheme. During the passage of the Health and Social Care (Community Health and Standards) Bill, the Government committed itself to a full public consultation on these Regulations before they were submitted to Parliament.
- 1.6 The House of Lords Delegated Powers Committee (DPC) recommended that regulation making powers under section 150(12) and section 153(2) of the 2003 Act be subject to affirmative resolution procedures. This means that

before they can be made they must be debated and approved by both Houses of Parliament. In addition any future changes to regulations made under section 150(12) must be similarly debated. As a result of the DPC's recommendations, the Bill was amended so that all regulations made under section 150(12) and the first set of regulations made under section 153(2) are subject to affirmative resolutions procedures. Other regulation-making powers in Part 3 of the 2003 Act are subject to the negative resolution procedure and do not need to be approved by each House before being made. It is therefore necessary to split the Regulations into two separate documents. Furthermore, it seems sensible to continue the practice under the 1999 Act of having the Regulations governing the procedures for reviews and appeals under the expanded scheme separate from the other "operational" Regulations. This consultation is therefore divided into three areas:

draft Personal Injuries (NHS Charges) (Amounts) Regulations (section 2 and Annex A);  
draft Personal Injuries (NHS Charges) (General) Regulations (section 3 and Annex B);  
draft Personal Injuries (NHS Charges) (Reviews and Appeals) Regulations (section 4 and Annex C).

- 1.7 Specific questions will be asked at relevant points throughout the document and will also be summarised at the end in Annex D. The main differences between the existing road traffic accident scheme and the expanded scheme are set out in Annex E. The Regulatory Impact Assessment which accompanied Part 3 of the 2003 Act during its progress through Parliament is reproduced at Annex F, and the key points of the Code of Practice on public consultations are set out at Annex G.

## **SECTION 2: REGULATIONS DEALING WITH MATTERS RELATING TO THE AMOUNTS TO BE PAID**

- 2.1 The draft text of these Regulations is contained at Annex A as the Personal Injuries (NHS Charges) (Amounts) Regulations. In many respects they mirror the corresponding provisions of the Regulations governing similar arrangements in the 1999 Act scheme<sup>a</sup>. This reflects the Government's intention to keep the new scheme as closely aligned as possible to the successful operation of the 1999 Act scheme. There are, however, some changes, and some new elements of the scheme, which are discussed below. Not every part of the regulations is covered, only those parts where there is something new or different from the 1999 Act scheme.

### **Regulation making powers under section 150(12) of the 2003 Act**

- 2.2 Section 150(12) of the 2003 Act states that:

*Regulations may amend Schedule 10 by omitting or modifying any payment for the time being specified in that Schedule.*

- 2.3 Schedule 10 to the Act lists the types of payments of compensation that are exempt from the scheme, for example compensation orders against criminals. The Government accepted the DPC's view that to remove any of the exempted categories could widen the scope of the scheme and so any proposals to use these powers will be subject to a full debate in Parliament.
- 2.4 As we currently have no plans to make use of regulatory powers in section 150(12) no regulations for this are to be drafted at this time.

### **Regulation making powers under section 153(2)**

- 2.5 Section 153 is concerned with information contained in certificates. Subsection (2) states that:

*The amount (or amounts) to be specified is (or are) to be that (or those) set out in, or determined in accordance with regulations, reduced if applicable in accordance with subsection (3) or regulations under subsection (10)*

- 2.6 Sections 153(5), (7), (8) and (12) further specify a whole range of matters which regulations made under section 153(2) can cover. So these regulations cover not just the setting of the tariffs for the scheme, but also several matters of technical and administrative detail of the scheme's operation.
- 2.7 Section 195(5)(b) requires that the first set of Regulations made under section 153(2) to be subject to affirmative resolution procedures. Thus, all the matters covered by this first set of regulations under s153(2) must be debated in Parliament. However, future regulations, which will probably only deal with up-rating the tariffs (see below) will be subject to negative resolution procedures.

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<sup>a</sup> The Road Traffic (NHS Charges) Regulations 1999, SI 785/1999.

## Amounts set out in the tariff (Regulation 2)

- 2.8 This regulation sets out the tariff and ceiling of charges. Our intention is to apply the same figures as for the existing 1999 Act scheme. As of 1 April 2004 these are set at £473 flat rate, one-off fee for treatment without admission, a daily rate fee of £582 for treatment with admission and a ceiling of charges (cap) set at £34,800. We did not consider it practical to apply different tariffs for different types of injury. This method had not been applied to the 1999 Act as it was realised that to do so would cause administrative burdens for insurers and the CRU. We consider that, with the exclusion of diseases from the scheme, most of the treatment provided would be for bodily trauma such as broken bones, cuts or back injuries. The cost of treating this type of injury is the same regardless of whether the accident occurred as a result of a motor accident or, say, an accident at work. Furthermore, compensators are already familiar with this means of levying charges and it makes sense to keep a system which is familiar and works well.
- 2.9 As with the existing 1999 Act scheme, the in-patient charge will supersede the out-patient charge, so that if someone receives both in-patient and out-patient treatment, only the in-patient charge will be recoverable. This is because the in-patient charge has been calculated to include an element for subsequent out-patient treatment, so that to apply both charges would in fact mean that compensators were paying twice for out-patient treatment.

*Q1. Do consultees agree with using the same tariff and ceiling of charges system for the expanded scheme as is currently used for the road traffic scheme? If not, please give your reasons for disagreeing.*

- 2.10 An agreement was reached under the current road traffic scheme following a public consultation that the tariff and cap would be automatically up-rated at 1 April each year to take account of Hospital and Community Health Services (HCHS) inflation. We propose applying this automatic method of amendment to the expanded scheme and have agreed with key stakeholders that we will give as much notice as possible each year of the inflation figure to be used for the following year's increase. One implication of this is that the figures given in paragraph 2.8 above and currently in the draft regulations are unlikely to be the actual figures used in the final version as we are not yet in a position to calculate the up-rated figures for April 2005.

*Q2. Do consultees agree that the tariff and cap for the expanded scheme should be automatically amended each year in line with HCHS inflation as was agreed for the road traffic recovery scheme? If not, please explain your reasons for disagreeing.*

- 2.11 One of the new elements of the expanded scheme is that it allows for the costs of ambulance services to take the injured person to hospital, or transfer them between hospitals if necessary, to be recovered. The regulations therefore need to set out the circumstances under which ambulance charges are recoverable and the amount per journey that can be recovered. During the passage of the Bill it was estimated that an average journey cost would be around £150 and the draft regulations use that amount for the tariff. As with the existing tariffs, we envisage uprating this tariff annually.
- 2.12 Charges will be recoverable for each ambulance journey to hospital, or transfer between hospitals, that is needed for treatment of the injuries for

which compensation is awarded. So for example if a patient is taken by ambulance to Accident and Emergency at hospital A, transferred and admitted to hospital B and then transferred again to a specialist unit in hospital C then 3 ambulance journey charges would be recoverable (ie £450).

- 2.13 It is also our intention that the ambulance journey costs should not be allowed to exceed the overall ceiling of charges. Regulation 2(6) covers this. Thus, a patient who is in hospital for more than 3 months (which will attract the full £34,800 charge) and has also received ambulance services, will attract no more than the maximum amount. Where there is only out-patient treatment however, in practice both the treatment charge and the ambulance journey charge will be payable because they would not normally be sufficiently high to reach the cap.

*Q3. Do consultees agree with the level of and proposed arrangements for calculating the ambulance journey charge? If not, please explain your reasons for disagreeing.*

### **Amount of NHS charges: further provision (Regulation 3)**

- 2.14 Regulation 3 makes provision for where multiple compensation payments have been made. It allows a certificate to take into account any earlier payment of NHS charges following an earlier payment of compensation, allowing the certificate to be reduced accordingly. There is however a specific provision for Regulations to be made to cover these types of lump sum payments in section 163 and so it could be argued that this provision should be in the General Regulations. However as section 153(2) of the 2003 Act requires the amounts to be specified to be determined in regulations which must be subject to the affirmative resolution procedure, this provision must be included in the Amounts Regulations.
- 2.15 There is still provision covering lump sum payments in the General Regulations which is different from the provision provided in the Amounts Regulations explained above. Regulation 7 of the General Regulations provides for the Secretary of State to pay back any excess owed to a compensator should a further certificate be issued that has not reflected an earlier amount paid (and allows this overpayment to be recovered from the relevant NHS Trust).

### **Treatment to be taken into account (Regulation 4)**

- 2.16 Regulation 4 ensures that the liability on the part of compensators to pay NHS costs is limited in individual cases, by specifying that certificates can only take into account treatment or services provided to the injured person up to the date when the certificate is issued or, if the claim has been settled and compensation paid when the certificate is issued, up to the date of settlement. This mirrors exactly the existing arrangements under the 1999 Act scheme.

### **Apportionment of NHS costs between 2 or more compensators (Regulation 5)**

- 2.17 Section 153(5)(e) of the 2003 Act allows regulations to be made for cases where liability is apportioned between 2 or more compensators. Although similar provisions were contained in the 1999 Act, the powers were never used, with the result that informal *ad hoc* arrangements developed over time, usually involving one compensator paying the full NHS costs on behalf of the

other compensators. Regulation 5 imposes an obligation on the Secretary of State to apportion NHS hospital and/or ambulance costs due between multiple compensators if one or more of them requests that this be done. The compensator must provide sufficient evidence of the extent of the apportionment, that is evidence of what each compensator has paid in compensation, or the extent to which the settlement apportions liability. If a certificate has already been issued, or a payment of NHS costs has already been made, then a fresh certificate must be issued and any under- or over-payment rectified.

- 2.18 The regulation has currently been drafted so that compensators can ask for apportionment to be considered at any time, including before a compensation payment has actually been made. It has been suggested that this is not practical because until the compensation claim is settled and compensation is actually paid, compensators will not be able to provide adequate evidence of apportionment. However, it does seem that there may be circumstances in which multiple compensators are clear from the outset, or from very early on in a claim, as to the extent of their liability and can provide adequate evidence to allow a certificate(s) to be issued at that stage.

*Q4. Do consultees agree that it is right to allow compensators to ask for apportionment before compensation has been paid, so long as they can provide sufficient evidence of the extent of the apportionment? If not, please explain why you disagree.*

#### **Compensation payments made under both the England and Wales and the Scottish scheme (Regulation 6)**

- 2.19 Part 3 of the 2003 Act was drafted, with the consent of the Scottish Parliament, so as to encompass both England and Wales and Scotland within the expanded scheme. However, because of devolution, there are technically two schemes under the 2003 Act, one covering England and Wales administered by the Secretary of State, the other covering Scotland and administered by the Scottish Ministers. In practice, of course, both schemes will be administered by the CRU on behalf of the Secretary of State and the Scottish Ministers.
- 2.20 This means that there may be cases where someone is injured in England, spends some time in hospital being stabilised but is then transferred to a hospital in Scotland because that is where they live, or vice versa. In law the compensator would be liable for the costs of the stay in the English hospital under the English and Welsh scheme and for the stay in the Scottish hospital under the Scottish scheme. The combined value of the certificates or joint certificate issued might exceed the ceiling of charges specified in regulation 2. We are clear that this is not appropriate, and s153(5)(g) gives powers to regulate to ensure that certificates issued under one scheme can be adjusted to take account of certificates issued under another.
- 2.21 Regulation 6 puts these powers into effect and specifies that where a joint certificate has been issued under both schemes in accordance with s152(5) (which is what the usual practice will be rather than two separate certificates being issued), and the aggregated amounts exceed the ceiling of charges, the Secretary of State may adjust the certificate to ensure the cap is not exceeded. Separate regulations covering the Scottish scheme are being

prepared by Scottish Executive officials and will make similar provision for Scottish certificates. In practice, the CRU will make payments in sequential order until the cap is reached. For example if a patient stays in hospital A in Scotland for 20 days then is admitted to hospital B in England for a further 50 days, giving a total of 70 days in-patient treatment, then hospital A will have first priority for payment and will receive 20 days worth of in-patient charges. Hospital B however will receive 40 days worth of in-patient charges, not 50 days as the current cap is reached at 60 days and 20 days worth of payments had already been made to hospital A.

*Q5. Do consultees agree with the method (as set out in regulation 6) of ensuring that the ceiling of charges is not breached in these cases? If not, please explain why you disagree.*

### **Over- and underpayments following review and appeal (Regulations 7, 8, 9 and 10)**

2.22 These regulations reflect existing provisions in the 1999 Regulations. They provide for cases in which –

- a person's liability to pay NHS charges has been re-determined or adjusted under regulation 5 or 6; or
- a certificate of NHS charges has been revoked following a review and replaced with a fresh certificate showing a reduced amount. A certificate can only be revoked and replaced with a fresh certificate showing an increased amount where the person to whom the certificate is issued has supplied CRU with incorrect or insufficient information; and
- a certificate of NHS charges has to be revoked following an appeal and replaced with a fresh certificate showing either an increased or reduced amount as appropriate.

2.23 In those circumstances refunds can be made or payments for shortfalls can be claimed and the Secretary of State is required to provide statements, detailing the changes, to the compensator and the NHS body providing treatment or services. None of this is any different from the arrangements already in place for the 1999 Act scheme, apart from having references added to cover ambulance services.

## **SECTION 3 - REGULATIONS DEALING WITH OTHER OPERATIONAL MATTERS**

- 3.1 With the exception of those matters discussed in section 2 of this document, all the regulation-making powers in Part 3 of the 2003 Act are subject to negative resolution procedures. This section covers the draft regulations setting out the remaining operational matters for the expanded scheme. These are set out in Annex B as the Personal Injuries (NHS Charges) (General) Regulations. As with the amounts regulations, many of the provisions in these regulations simply mirror those in the 1999 regs. Again detailed discussion below concentrates on those areas where changes from the existing provisions are proposed.

### **Application for a certificate of NHS charges (Regulation 2)**

- 3.2 Regulation 2 details what information the compensator must provide to CRU when applying for a certificate of NHS charges. It also specifies the time limit for applying for a certificate if one is not already in force at the time a qualifying compensation payment is made. The application should be made within 14 days of the compensation payment being made. The only exception is if an application for a certificate had already been made during the 28 days immediately preceding the date on which the compensation payment is made. This allows for the possibility that the compensator may have applied for a certificate recently but it is still being processed by the CRU at the time the compensation payment is made. All the provisions in this regulation reflect exactly those already in force under the existing 1999 Act scheme with the exception of additional paragraphs ((g) and (h) which provide for circumstances where there is a reduction in NHS charges to take account of contributory negligence (see paragraph 3.3 below which explains contributory negligence further). These additional paragraphs request that evidence is supplied by the compensator about the proportion of reduction including a copy of the court order, judgement or mediation report.

### **Reduction of NHS charges in cases of contributory negligence (Regulation 3)**

- 3.3 One of the new features of the 2003 Act scheme is that, for the first time, contributory negligence can be taken into account when calculating NHS costs liability. Contributory negligence arises where the injured person has some responsibility for the incident that caused their injury. For example, someone who suffers an injury at work while using a piece of equipment that was later found to have been inadequately maintained by the employer, may be found to have contributed to the injury if they failed to wear safety gloves or goggles provided. The compensation award may be reduced to reflect that the compensator was not wholly to blame for the injury. Under the 1999 Act scheme, there is no capacity for NHS costs recovery to take any account of contributory negligence, so even if a compensator is found to be only 10 per cent liable and consequently makes only a small compensation payment as a result, they still have to pay the full NHS costs due.
- 3.4 Section 153(3) of the 2003 Act embeds into the new scheme a requirement for contributory negligence to be taken into account where it has been determined by means of a court order, or by other specified means. Because it is on the face of the Act, there is no need to make regulations about this new requirement. However, s153(9) and (10) allow regulations to be made relating to how contributory negligence is to be taken into account where the

matter is settled through a process of mediation. Regulation 3 sets out the type of mediation that will be acceptable for this purpose, and the circumstances in which a mediated contributory negligence settlement is to be taken into consideration.

- 3.5 As currently drafted, regulation 3 requires that to be a qualifying claim:
- the mediation must be carried out by a person who has been trained by, or holds a qualification from an approved body, or has been recognised by an approved body as qualified to conduct mediations; and
  - such training, qualification or recognition is in the Secretary of State's opinion satisfactory evidence to the Secretary of State of the person's ability to conduct mediations.

*Q6. Do consultees agree that only mediations carried out by mediators that meet the criteria set out in regulation 3(3)(a) should be accepted for the purposes of establishing whether a claim is a qualifying claim? If not, please explain why you disagree.*

*Q7. Are there other criteria in relation to the person conducting the mediation that we should consider?*

3.6 An "approved body" for the purposes of establishing a person's mediation credentials is described in regulation 3(4) as any body or organisation considered suitable to determine whether a person is qualified to carry out mediations. Regulation 3(6) allows (but does not require) the Secretary of State to publish a list of such bodies. The intention is that the CRU could hold a list of approved bodies which would be made available to anyone who asked for it. It will be important, however, to ensure that the list is as comprehensive as possible, taking account of the increased use of mediation in personal injury claims over recent years.

3.7 There is, however, another option for dealing with the need to ensure that only mediations carried out by a suitably qualified mediator are counted for the purposes of contributory negligence calculations. Rather than giving the Secretary of State powers to create a list of approved bodies, the list could appear on the face of the Regulations, together with a similar list of acceptable qualifications. This would allow the parties to a claim to establish easily whether their mediation was being carried out by an acceptable mediator. There would, of course, be issues around the need to keep the list up to date, which would mean amending the regulations at regular intervals, but that will be necessary anyway in order to update the tariffs. Either way, we need to compile as comprehensive a list as possible of mediation providers and relevant qualifications.

*Q8. What are the key organisations providing mediation services in personal injury claims at the present time?*

*Q9. What training is available for those wishing to become mediators, and what qualifications does such training lead to?*

3.8 Regulation 3(7) sets out the information that will be required in the mediation report in order for contributory negligence to be taken into account. This

includes confirmation that the parties to the claim have reached agreement on the issue of contributory negligence, the amount of the settlement, and the amount or proportion by which it has been reduced because of that agreement, as well as sufficient information to show that the mediation meets the criteria for a qualifying claim.

*Q10. Do consultees agree that these matters should be specified in the mediation report? If not, please explain why you disagree. Are there other matters that should be included?*

#### **Particulars as to amounts specified in certificates (Regulation 4)**

3.9 Regulation 4 sets out the information that a compensator is entitled to ask for in relation to how the amount on a certificate has been calculated. With the addition of information about the provision of ambulance services, it reflects exactly provisions already in place in the 1999 regulations, and is operating satisfactorily. We do not envisage the need for any substantive alterations.

#### **Information to be provided about an injured person (Regulation 5)**

3.10 Regulation 5 sets out the time scales for the provision of information to the CRU by different categories of informant, and specifies what information must be provided. Again, this reflects the requirements for the existing scheme, with the addition of new requirements for information about ambulance services that may have been provided and a requirement for compensators to provide evidence of the proportion of their liability to pay NHS charges where they have requested that apportionment be taken into account under regulation 5 of the Amounts Regulations.

*Q11. Is the information concerning ambulance services contained in regulation 5(3)(f) and 5(5) sufficient, or are there other matters that should be included here?*

#### **Payments to hospitals and ambulance trusts (Regulation 6)**

3.11 Regulation 6 replicates existing requirements in the 1999 Act scheme, with only the addition of references to ambulance trusts so that payments can be made to them. No alterations to these provisions are planned.

#### **Multiple compensation payments (Regulation 7)**

#### **Structured settlements (Regulation 8)**

#### **Interim payments repaid under court order (Regulation 9)**

#### **Payments into court (Regulation 10)**

3.12 Regulations 7 to 10 detail how certain types of compensation payment are to be treated for the purposes of NHS costs recovery. They mirror in every respect the arrangements in the 1999 Act scheme, and there are no plans to change any of these.

#### **Liability of insurers (Regulation 11)**

3.13 Section 164 of the 2003 Act is a new addition to the arrangements for the NHS costs recovery scheme. It ensures that where a person's liability to pay compensation is covered to any extent by an insurance policy, their liability to pay NHS costs is also covered. Such a provision was not necessary under the 1999 Act scheme because the 1999 Act defined a compensation payment

as one made under certain specified insurance policies or securities. Section 164 also makes clear that insurance policies may not restrict or exclude the level of NHS costs covered. This means, for example, that insurers carrying corporate insurance policies with high excesses will no longer be able to claim that there is no liability to pay NHS costs because a compensation payment has not exceeded the excess.

- 3.14 Section 164(4), however, does permit regulations to be made limiting the liability for NHS costs in certain prescribed circumstances. This was included because we recognise that there may be some cases (other than where an excess is in place) where an insurance policy may not cover the full extent of the compensation liability, so that it would be unfair to require that it should cover the full extent of the NHS costs liability.
- 3.15 Regulation 11 deals with the one possible instance of this that has been brought to our attention, that is, where the insurance policy has an upper limit on the amount of cover provided (as opposed to a lower limit or excess). So, for example, if compensation of £100,000 is awarded, but the relevant insurance policy has an upper limit of £80,000 per claim, the insurer will only be liable for 80% of the compensation payment. The insured person will be personally liable for the remaining 20%. Regulation 11 allows for this to be taken into account in relation to NHS costs recovery. In this example, the insurer would only be liable for 80% of the NHS costs, with the insured person liable for the remainder. Obviously, if the compensation payment does not exceed the upper limit of the insurance policy, then the insurer will be liable for the full amount of NHS costs.

*Q12. Are there any other types of insurance policy where full cover is not provided and is written into the policy (excluding cases of voluntary or mandatory excesses)?*

### **Exempted payments (Regulation 12)**

- 3.16 Regulation 12 specifies certain types of payment that are not to be treated as compensation payments for the purposes of NHS costs recovery that are not included in schedule 10 of the 2003 Act. They include payments made to injured persons by the Criminal Injuries Compensation Scheme and payments made under the terms of the Vaccine Damage Payments Act 1979. This is because both of these are centrally funded schemes where the underlying principle of making the person who caused the injury pay the full cost of their actions cannot be brought into play. Another point to make here is that an addition has been made to the list of exemptions from the scheme in line with the benefit recovery scheme, that is claims that fall under Fatal Accident Claims will no longer be subject to NHS cost recovery.

*Q13. Are there any other similar compensation schemes not covered elsewhere in the legislation (ie in schedule 10) that we should consider exempting from NHS costs recovery?*

### **Treatment at non-health service hospitals**

- 3.17 Section 165 of the 2003 Act gives powers to make regulations to extend the NHS costs recovery scheme to cover NHS treatment provided at non-NHS hospitals. At present there are no plans to use these powers.

## **SECTION 4: REGULATIONS DEALING WITH PROCEDURES FOR REVIEWS AND APPEALS**

- 4.1 This section deals with the third set of Regulations in connection with the expanded NHS costs recovery scheme, those dealing with reviews and appeals. These are set out in Annex C as the Personal Injuries (NHS Charges) (Reviews and Appeals) Regulations. In this section, references to the 1999 Regulations mean the Road Traffic (NHS Charges) (Reviews and Appeals) Regulations 1999.
- 4.2 We have adopted a slightly different approach with these Regulations, as compared with the equivalent ones currently in place for the 1999 Act scheme. Section 158(1) of the 2003 Act requires that appeals against both certificates and waiver decisions must be considered by an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998. There are Regulations that support that Act, the Social Security and Child Support (Decisions and Appeals) Regulations 1999, which cover, among other things, the procedures to be followed by appeals tribunals in the hearing of appeals. Rather than repeat these in the NHS costs recovery Regulations, as was done in large part in the 1999 Act version, the new draft simply specifies which parts of the Social Security regulations are to apply in relation to hearing appeals under the 2003 Act scheme. This makes the Regulations shorter and more compact, and able to focus specifically on those matters which need to be different from, or are not covered at all in, the Social Security Regulations. This is discussed further in paragraph 4.12 below.

### **Review of certificates (Regulation 2)**

- 4.3 By section 156(1) of the 2003 Act, a certificate must be reviewed if an agreement on contributory negligence is made through a specified procedure and if the finding is notified to the Secretary of State. This regulation sets out how much notification is to be given for this purpose. It also makes provision for cases where the contributory negligence settlement is made through an acceptable process of mediation. In both cases, a time limit of 3 months is set for giving the notification, either from the date on which the finding is confirmed, or from the date the mediation report is sent to the compensator. This is in line with the time limits for making appeals.
- 4.4 Regulation 2(3) reflects Regulation 2 of the 1999 Regulations, and covers the circumstances in which a certificate may be reviewed in accordance with section 156(4). Regulation 2(4) sets, for the first time, a time limit for applying for a review under this section. This puts right an omission in the 1999 Regulations. The 1999 Act gave powers to set a time limit for applying for a review, but the 1999 Regulations never put those powers into effect. Again, the time limit is 3 months, this time from the date of the certificate or the date of the compensation payment, whichever is the later.

*Q.14 Do consultees agree that 3 months is a reasonable period of time for compensators to seek a review of a certificate of charges? If not, please explain your reasons for disagreeing, and indicate what you would consider to be an acceptable period.*

### **Manner of making appeals and time limits (Regulation 3)**

4.5 In almost all respects Regulation 3 simply reflects the provisions of the corresponding Regulation, also Regulation 3, in the 1999 Regulations. But some additions have had to be made. In normal circumstances, the amount of NHS charges due must be paid before an appeal against a certificate can be made. The 2003 Act, however, allows compensators to apply for a waiver of this requirement in circumstances where payment of the charges would cause exceptional financial hardship. This recognises the possibility that for a small business or individual compensator, payment of the NHS charges on top of the compensation payment may represent a catastrophic drain on their resources. If they are unable to pay the charges, then they would be automatically excluded from making an appeal against them if the waiver had not been introduced. The 2003 Act also provides for the compensator to appeal against a decision not to grant a waiver using the same mechanisms as for making an appeal against a certificate. This Regulation therefore also includes provisions dealing with appeals against waiver decisions.

4.6 In particular the Regulation sets time limits for making an appeal against a waiver decision, and for making an appeal against a certificate following the outcome of an application for a waiver or an appeal against a waiver decision. In both cases these are 4 weeks. Someone who has made an application for a waiver could prepare for the appeal against a certificate while awaiting the decision on the waiver. We nevertheless recognise that since the appeal has to be made on an approved form, there will nevertheless need to be some time allowed following the outcome of the application, or an appeal against a refusal to grant a waiver, for the proper paperwork to be submitted. In the case of making an appeal against a waiver decision, however, it seems unlikely that there will be much more in the way of evidence gathering that needs to be done, so that 4 weeks seems a reasonable period of time in which to complete the necessary paperwork.

*Q15. Do consultees agree that 4 weeks for making an appeal against a waiver certificate and for making an appeal against a certificate following the outcome of an application for a waiver (or an appeal against the refusal of a waiver) is reasonable? If not, please give your reasons for disagreeing and indicate what you think would be a reasonable period.*

4.7 We have also made one other change to this part of the Regulations. Under the 1999 Regulations an appeal against a certificate had to be made “not later than 3 months after the date the compensator discharged the liability” to pay NHS charges. It has subsequently come to light that worded in that way the time limit is open to abuse, because a compensator could delay making payment for several weeks or months (notwithstanding the setting of a time limit for making payment within the 1999 Act), and then still have 3 months to make an appeal because the appeal “clock” only begins to count down once payment of the charges has been made. The delay could be even longer under the 2003 Act scheme, because compensators could delay making payment and then invoke their right to apply for a waiver, thus further postponing the point at which they have to pay up.

4.8 To close this loophole, we are proposing to keep the period of 3 months as the time limit for making an appeal, but to change the point at which the “clock” starts ticking. Thus Regulation 3(3)(a) now specifies that an appeal must be made not later than 3 months after the date on which the

compensation payment which creates the liability to pay NHS charges is made. Thus, there will be no incentive for compensators to, for example, delay making the payment of NHS charges for 4 months and then apply for a waiver because the time limit for making an appeal will already have expired. If, of course, there are genuine reasons why the application could not have been made sooner, then they will be able to go through the process set out in the Regulations for seeking an extension of the time limit for making an appeal.

*Q16. Do consultees agree that this is a sensible revision of the Regulations to minimise the scope for abuse of the appeals process? If not, please explain why you disagree.*

- 4.9 It has been suggested that we should consider changing the time limits for making an appeal against a certificate to one month, with the absolute deadline for any extension to the time limit reduced from 6 years to 1 year. This would bring time limits for appeals within the NHS costs recovery scheme in line with those for other types of appeals considered by the Appeals Service. Whilst the consistency of approach argument is undoubtedly a valid one, we are also concerned not to act unreasonably in terms of how compensators are treated in our scheme. We need to take account of the fact that under the expanded scheme it will not only be big insurance companies who might want to make appeals but also small businesses or even individuals with little or no experience of how the scheme works. There is an equally valid argument that suggests that reducing the time limit for making an appeal to one month could seriously disadvantage such compensators.
- 4.10 The same is not necessarily true for the extension deadline, where it could reasonably be argued that the position of small scale compensators in terms of extenuating circumstances won't actually be any different from those making other types of appeal. There is nothing about being a compensator *per se* which might warrant special treatment in this regard. Our proposal, therefore, would be to keep the time limit for making an appeal against a certificate at three months, but reduce the overall deadline for extending the time limit to 1 year instead of the current 6 years.

*Q17. What are consultees views on the proposal to keep the time limit for making an appeal against a certificate at 3 months, but reduce the overall deadline for an extension of that time limit to 1 year?*

#### **Application to extend time for appealing (Regulation 4)**

- 4.11 Regulation 4 allows for the time limit for making an appeal, as set out in Regulation 3, to be extended where the appellant is able to provide reasons that are considered to be exceptional by the chairman of the tribunal. The chairman of the tribunal would also have to be satisfied that it would be in the interests of justice for the application to be granted and that there should be reasonable prospects that the appeal, if granted, would be successful.

#### **General provisions relating to the procedure for appeals (Regulation 5)**

- 4.12 Regulation 5 is the Regulation which puts into effect the changed approach mentioned in paragraph 4.2 above. Rather than repeat all the relevant regulations from the Social Security Regulations, they are simply specified here as applying equally to an appeal against a certificate or a waiver

decision as they would to any other appeal. Regulations 5(3) and 5(4) make a couple of amendments to ensure that they can be applied properly. This does away with the current situation where there are some parts of the 1999 Regulations which are clearly intended to have the same effect as parts of the Social Security Regulations but are worded differently, leaving scope for confusion and misinterpretation. In essence it leaves the appeal tribunal free to conduct its business as it sees fit.

*Q18. Do consultees agree with the approach taken in Regulation 5? If not, please explain why you disagree.*

#### **Consolidation of appeals (Regulation 6)**

- 4.13 Section 157(7)(c) of the 2003 Act gives powers for regulations to cover the situation where appeals made separately to the Secretary of State and to the Scottish Ministers in relation to the same injury may be consolidated and treated as a single appeal. Such powers were not included under the 1999 Act scheme because it pre-dated Scottish devolution. It is the case now, however, that where an injured person receives hospital treatment in both an English (or Welsh) and a Scottish hospital the compensator could be issued with two certificates, or with a joint certificate. Technically an appeal against such a certificate (or certificates) would need to be made to both the Scottish Ministers and the Secretary of State. It would be a waste of time and effort on everyone's behalf to hear the two appeals separately, so Regulation 6 gives effect to the provisions of section 157(7)(c) and allows the chairman of the appeal tribunal to direct that the appeals can be consolidated and treated as one.
- 4.12 Similarly, there may be cases where two or more compensators have been issued with certificates in respect of the same injury (eg because they have requested apportionment) and two or more of them decide to appeal. The wording of Regulation 5 also allows for these appeals to be consolidated if considered appropriate.
- 4.13 This provision does not however extend to appeals against a hardship waiver decision – these appeals would always be heard separately.

*Q19. Are consultees able to give any other examples where it might be desirable to be able to consolidate appeals?*

## **SECTION 5: CONTACT ARRANGEMENTS**

Answers to the questions in this consultation and any other comments consultees wish to make should be addressed to:

Tracy Morton  
Department of Health  
4W04 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

Responses can also be sent by e-mail to: [Tracy.Morton@dh.gsi.gov.uk](mailto:Tracy.Morton@dh.gsi.gov.uk)

All replies must be received by **17 December 2004**

**Please note that all responses to this consultation may be made public unless you request that your response be kept confidential.**

The document relating to the consultation in Scotland can be found at:  
[www.scotland.gov.uk/nhsCostsRecoveryConsultation](http://www.scotland.gov.uk/nhsCostsRecoveryConsultation)

Answers to the questions in the consultation and any other comments consultees wish to make should be sent by e-mail to [NHSCosts@scotland.gsi.gov.uk](mailto:NHSCosts@scotland.gsi.gov.uk) or by post addressed to:

Mrs Anna Armes  
Scottish Executive Department  
Basement Rear  
St Andrew's House  
Regent Road  
Edinburgh EH1 3DG

Fax 0131 2442371

## CONSULTATION DRAFT

*Draft Regulations laid before Parliament under section 195(5) of the Health and Social Care (Community Health and Standards) Act 2003, for approval by resolution of each House of Parliament*

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 DRAFT STATUTORY INSTRUMENTS
 

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2005 No. [ ]

**NATIONAL HEALTH SERVICE, ENGLAND AND  
WALES**
**Personal Injuries (NHS Charges) (Amounts) Regulations 2005**

<i>Made</i>	- - - -	2005
<i>Coming into force</i>	- -	1st April 2005

Whereas a draft of this instrument, which contains the first Regulations made under section 153(2) of the Health and Social Care (Community Health and Standards) Act 2003(a), has been laid before Parliament in accordance with section 195(5) of that Act, and approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State for Health, in exercise of the powers conferred by sections 153(2), (5)(a) to (h) and (7), 168 and 195(1) and (2) of the Health and Social Care (Community Health and Standards) Act 2003 and of all other powers enabling him in that behalf, and having consulted the National Assembly for Wales(b), hereby makes the following Regulations:

**Citation, commencement, application and interpretation**

1.—(1) These Regulations may be cited as the Personal Injuries (NHS Charges) (Amounts) Regulations 2005 and shall come into force on 1st April 2005.

(2) These Regulations apply to England and Wales.

(3) In these Regulations—

“the Act” means the Health and Social Care (Community Health and Standards) Act 2003;

“certificate” means a certificate issued under section 151;

“hospital” means a health service hospital within the meaning of section 168;

“relevant NHS body” has the meaning given to it in regulation 8(4).

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(a) 2003 c. 43 (“the 2003 Act”). By section 167(1), the powers are exercisable in relation to England and Wales by the Secretary of State. Section 168 is cited for the definition of “prescribed”.

(b) By section 195(3) of the 2003 Act, the Secretary of State must consult the National Assembly for Wales before making any regulations under Part 3 of that Act.

(4) A reference in these Regulations to a numbered section is a reference to that section of the Act.

### **Amount of NHS charges**

**2.**—(1) These Regulations apply in relation to any certificate relating to an injury which occurs on or after 1st April 2005.

(2) Subject to the following paragraphs of this regulation and regulation 3, a certificate shall, for the purpose of section 153(2), specify—

- (a) the sum of £150 for each occasion on which, as a result of his injury, the injured person was provided with NHS ambulance services<sup>(a)</sup> for the purpose of taking him to a hospital for NHS treatment<sup>(b)</sup>; and
- (b) either—
  - (i) where the injured person received NHS treatment at a hospital in respect of his injury, but was not admitted to hospital, the amount of £473; or
  - (ii) where the injured person received NHS treatment at a hospital in respect of his injury and was admitted to hospital, the sum of £582 for each day or part day of admission.

(3) For the purposes of paragraph (2)(a), the reference to taking a person to a hospital includes taking him from one hospital to another.

(4) Where the injured person was admitted to hospital on one day and discharged on another day, the day of discharge shall be disregarded for the purposes of paragraph (2)(b)(ii).

(5) The amount which a certificate may specify under paragraph (2)(a), (2)(b)(i), or (2)(b)(ii) respectively must not exceed £34,800 (“the maximum”).

(6) Where—

- (a) amounts fall to be specified under both paragraph (2)(a) and paragraph (2)(b); and
- (b) the aggregate of those amounts would, apart from this paragraph, exceed the maximum,

the amount to be specified under paragraph (2)(b) is to be reduced by the difference between the maximum and the aggregate of those amounts.

### **Amount of NHS charges: further provision**

**3.**—(1) This paragraph applies where a person liable to pay relevant NHS charges<sup>(c)</sup>—

- (a) makes a compensation payment in the form of a lump sum (an “earlier payment”); and
- (b) subsequently makes another such payment in respect of the same injury (a “later payment”).

(2) Where paragraph (1) applies, the amount, for the purpose of section 153(2), to be specified in the certificate in respect of the later payment shall be the amount determined under regulation 2 reduced by the amount paid in satisfaction of any liability to pay relevant NHS charges in connection with the earlier payment.

(3) Where the person to whom the certificate is to be issued is a person whose liability to pay the relevant NHS charges has been determined or re-determined under regulation 5(4), the certificate shall, in addition to the amounts to be specified under the foregoing provisions of this regulation, specify the amount of relevant NHS charges that the person is liable to pay in accordance with that determination or re-determination.

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(a) See section 168 of the 2003 Act for the definition of NHS ambulance services.

(b) See section 150(7) of the 2003 Act for the definition of NHS treatment.

(c) See section 150(10) of the 2003 Act for the definition of relevant NHS charges.

### **Treatment to be taken into account**

4.—(1) A certificate issued under section 151(2) shall only take into account treatment received, or ambulance services provided, before the date the certificate is issued.

(2) A certificate issued under section 151(10) shall only take into account treatment received, or ambulance services provided, before the settlement date<sup>(a)</sup>.

### **Apportionment of liability to pay NHS charges**

5.—(1) This regulation applies where each of two or more persons (“the compensators”)—

- (a) has made a compensation payment<sup>(b)</sup> to or in respect of a person in consequence of any injury suffered by him; or
- (b) is, or is alleged to be, liable to any extent in respect of the injury.

(2) This paragraph applies where—

- (a) one of the compensators applies for a certificate under section 151 and, at the time of making the application, requests that the liability to pay the relevant NHS charges be apportioned between the compensators; and
- (b) before he issues the certificate, the Secretary of State receives sufficient evidence to enable him to determine how that liability is to be apportioned.

(3) This paragraph applies where—

- (a) a compensator to whom a certificate has been issued, requests that the liability to pay the relevant NHS charges be apportioned between the compensators; and
- (b) the Secretary of State receives sufficient evidence to enable him to determine how that liability is to be apportioned between the compensators.

(4) Where paragraph (2) or (3) applies—

- (a) the Secretary of State shall determine or, in the case of a compensator to whom a certificate has been issued, re-determine, the liability of each compensator to pay the relevant NHS charges;
- (b) in the case of a compensator to whom a certificate has not been issued, the certificate when issued to him shall specify the liability to pay the relevant NHS charges and the share of that liability that has been apportioned to him;
- (c) in the case of a compensator to whom a certificate has been issued, when the Secretary of State re-determines his liability to pay the relevant NHS charges, subsections (5) and (7) of section 156 (Secretary of State’s power to confirm or revoke certificate or issue a fresh certificate with variations) shall have effect as if the re-determination were a review under that section.

### **Adjustment of amounts where certificates issued by Secretary of State and Scottish Ministers**

6.—(1) This paragraph applies where—

- (a) in accordance with—
  - (i) a certificate issued by the Secretary of State; and
  - (ii) a certificate issued by the Scottish Ministers, or jointly by the Secretary of State and the Scottish Ministers,a person is liable to pay relevant NHS charges in respect of the same injured person in consequence of the same injury; and
- (b) when aggregated, the amounts specified in the certificates exceed the maximum amount mentioned in regulation 2(5).

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<sup>(a)</sup> See section 154(3) of the 2003 Act for the definition of settlement date.

<sup>(b)</sup> See section 150(3) of the 2003 Act for the definition of compensation payment.

(2) Where paragraph (1) applies, the Secretary of State may adjust any amount specified in the certificate issued by him having regard to—

- (a) the amounts that may be specified in the certificate in accordance with regulation 2(5) and (6); and
- (b) any amount specified in the certificate issued by the Scottish Ministers and any adjustment to that amount that the Scottish Ministers notify him that they propose to make.

### **Overpayments by compensators**

7.—(1) This paragraph applies where—

- (a) either—
  - (i) the Secretary of State has made a re-determination of the relevant NHS charges in accordance with regulation 5(4); or
  - (ii) the Secretary of State has adjusted the amount of the relevant NHS charges in accordance with regulation 6; or
  - (iii) as a result of a review under or by virtue of section 156, or an appeal under section 157 or 159, a fresh certificate has been issued or a certificate has been revoked; and
- (b) in consequence of the re-determination, adjustment, review or appeal it appears that the amount of any relevant NHS charges paid by any person is more than the amount that the person ought to have paid.

(2) Where paragraph (1) applies—

- (a) subject to sub-paragraph (b), the Secretary of State shall pay to the person who made the payment the difference between the amount that has been paid and the amount that ought to have been paid; and
- (b) where the Secretary of State has (under section 162) made the payment to an ambulance trust or responsible body<sup>(a)</sup>, the Secretary of State—
  - (i) may deduct the difference between the amount that has been paid under section 162 and the amount that ought to have been paid from any future payment due to that trust or body under that section; or
  - (ii) may require that trust or body to pay the difference to him or the person who made the compensation payment.

### **Underpayments by compensators**

8.—(1) This paragraph applies where—

- (a) either—
  - (i) the Secretary of State has made a re-determination of the relevant NHS charges in accordance with regulation 5(4); or
  - (ii) as a result of a review under or by virtue of section 156, or an appeal under section 157 or 159, a fresh certificate has been issued or a certificate has been revoked; and
- (b) in consequence of the re-determination, review or appeal it appears that the amount of any relevant NHS charges paid by any person is less than the amount that the person ought to have paid.

(2) Where paragraph (1) applies—

- (a) the person who made the payment shall pay to the Secretary of State the difference between the amount that has been paid and the amount that ought to have been paid; and
- (b) the Secretary of State shall pay that difference to the relevant NHS body.

(3) Where any payment to be made under paragraph (2)(a) relates to—

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<sup>(a)</sup> See section 160(4) of the 2003 Act for the definitions of ambulance trust and responsible body.

- (a) treatment received at more than one hospital; or
- (b) treatment received at one or more hospitals and the provision of NHS ambulance services,

the Secretary of State shall divide the difference among the relevant NHS bodies concerned in such manner as he considers appropriate.

(4) For the purposes of this regulation, the relevant NHS body is the relevant ambulance trust<sup>(a)</sup> or responsible body<sup>(b)</sup> to which the Secretary of State is required by section 162(1) to pay the amount of any relevant NHS charges paid to him.

#### **Provision of statements to person making compensation payments**

9.— Where the Secretary of State makes a payment under regulation 7(2)(a), or a payment falls to be made under regulation 8(2)(a), the Secretary of State shall send a statement to the person who made the compensation payment showing—

- (a) the name and address of the injured person to whom the statement relates;
- (b) the total amount already paid to the Secretary of State;
- (c) the amount that ought to have been paid to the Secretary of State; and
- (d) the amount of the difference between the amount already paid and the amount that ought to have been paid, and whether a repayment by him or further payment to the Secretary of State is required.

#### **Provision of statements to ambulance trust or responsible body**

10.—(1) Where the Secretary of State requires a payment under regulation 7(2)(b)(ii), or makes a payment under regulation 8(2)(b), the Secretary of State shall send the ambulance trust or responsible body concerned a statement showing—

- (a) the name and address of the injured person to whom the statement relates;
- (b) the total amount already paid by the Secretary of State;
- (c) the amount that ought to have been paid by the Secretary of State; and
- (d) the amount of the difference between the amount already paid and the amount that ought to have been paid, and whether a repayment to, or further payment by, the Secretary of State is required.

(2) Where the Secretary of State makes a deduction under regulation 7(2)(b)(i), he shall send the ambulance trust or responsible body concerned a statement showing—

- (a) the name and address of the injured person to whom the statement relates;
- (b) the total amount already paid by the Secretary of State;
- (c) the amount that ought to have been paid by the Secretary of State; and
- (d) the amount of the deduction.

Signed by authority of the Secretary of State for Health

2005

Department of Health

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(a) See section 162(6) of the 2003 Act for the definition of relevant ambulance trust.  
(b) See section 160(4) of the 2003 Act for the definition of responsible body.

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 provides for a scheme for the recovery of charges in cases where an injured person receives National Health Service treatment or ambulance services. The charges are specified in certificates issued by the Secretary of State, and are payable by persons who pay compensation to the injured person.

These Regulations make provision for—

- (a) the amount of NHS charges which a person is liable to pay and which is to be specified in a certificate (regulations 2 and 3);
- (b) the treatment to be taken into account by the certificate (regulation 4);
- (c) the apportionment of the amount of NHS charges where more than one person pays compensation (regulation 5);
- (d) the amount of NHS charges where certificates are issued both by the Secretary of State and the Scottish Ministers (regulation 6);
- (e) overpayment and underpayment of NHS charges (regulations 7 to 10).

## CONSULTATION DRAFT

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 STATUTORY INSTRUMENTS
 

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2005 No. [ ]

**NATIONAL HEALTH SERVICE, ENGLAND AND  
WALES**
**Personal Injuries (NHS Charges) (General) Regulations 2005**

<i>Made</i> - - - -	2005
<i>Laid before Parliament</i>	2005
<i>Coming into force</i> - -	1st April 2005

The Secretary of State for Health, in exercise of the powers conferred by sections 150(3), 151(9), 153(9) to (11), 160(1) to (3), 162(3), 163, 164(4), 168, and 195(1) and (2) of, and paragraph 8 of Schedule 10 to, the Health and Social Care (Community Health and Standards) Act 2003<sup>(a)</sup>, having consulted the National Assembly for Wales<sup>(b)</sup>, and of all other powers enabling him in that behalf, hereby makes the following Regulations:

**Citation, commencement, application and interpretation**

1.—(1) These Regulations may be cited as the Personal Injuries (NHS Charges) (General) Regulations 2005 and shall come into force on 1st April 2005.

(2) These Regulations apply to England and Wales.

(3) In these Regulations—

“the Act” means the “Health and Social Care (Community Health and Standards) Act 2003;

“certificate” means a certificate issued under section 151;

“Compensation Recovery Unit” means the Compensation Recovery Unit of the Department for Work and Pensions;

“hospital” means a health service hospital within the meaning of section 168.

(4) A reference in these Regulations to a numbered section or Schedule is a reference to that section of, or that Schedule to, the Act.

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(a) 2003 c. 43 (“the 2003 Act”). By section 167(1), the powers are exercisable in relation to England and Wales by the Secretary of State. Section 168 is cited for the definition of “prescribed”.

(b) By section 195(3) of the 2003 Act, the Secretary of State must consult the National Assembly for Wales before making any regulations under Part 3 of that Act.

## **Application for a certificate of NHS charges**

2.—(1) An application for a certificate shall be made to the Compensation Recovery Unit and shall include the following particulars or documents—

- (a) the full name and address of the injured person;
- (b) the date of birth, and where known, the national insurance number of that person;
- (c) the date on which the injury occurred;
- (d) the nature of the injury;
- (e) the name and address of any hospital at which the injured person received NHS treatment<sup>(a)</sup> in respect of his injury;
- (f) where the applicant has made a compensation payment in respect of the injury, the date on which the payment was made;
- (g) where the certificate applied for relates to a claim made by or on behalf of an injured person, and any of the circumstances specified in paragraphs (a) to (g) of section 153(3) (reduction of NHS charges in cases of contributory negligence) applies in relation to the claim—
  - (i) a statement of the proportion by which the damages payable in respect of the claim are to be reduced to reflect the injured person's share in the responsibility for the injury in question;
  - (ii) particulars of the provisions of the order, judgement, minute or document which provide for the reduction;
  - (iii) a copy of that order, judgement, minute or document;
- (h) where—
  - (i) the certificate applied for relates to a qualifying claim<sup>(b)</sup>; and
  - (ii) the qualifying claim is settled by mediation of a description specified in regulation 3(3),the report referred to in regulation 3(1)(c).

(2) In a case to which section 151(7) applies (compensation payment made in circumstances where no certificate in force and no application made in prescribed period prior to date of making compensation payment) an application for a certificate must be made not later than 14 days after the date on which the compensation payment is made.

(3) The prescribed period for the purposes of section 151(8)(b) (circumstances in which section 151(7) applies) is 28 days.

## **Reduction of NHS charges in cases of contributory negligence**

3.—(1) Where—

- (a) a certificate relates to a qualifying claim;
- (b) the qualifying claim is settled by mediation of a description specified in paragraph (3);
- (c) the person who conducted the mediation provides to the Secretary of State a report which contains the information specified in paragraph (7),

the amount to be specified in the certificate is to be that which would be specified apart from this regulation, reduced by the agreed proportion of contributory negligence.

(2) In this regulation, “agreed proportion of contributory negligence” means the proportion by which the damages payable under the settlement are to be reduced to reflect the injured person's share in the responsibility for the injury.

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(a) See section 168 of the 2003 Act for the meaning of NHS treatment.

(b) See section 153(9) of the 2003 Act for the meaning of qualifying claim.

(3) For the purposes of section 153(9) (a claim is a qualifying claim if settled by mediation of a prescribed description and the damages under the settlement are to be reduced to reflect the injured person's share in the responsibility for the injury), mediation is of a prescribed description where, subject to paragraph (5), it is conducted by a person who—

- (a) has been trained by an approved body;
- (b) holds a qualification which has been awarded by an approved body; or
- (c) is recognised by an approved body as a person who is qualified to conduct any mediation, or a mediation of a particular description,

and the training, qualification, or recognition, as the case may be, is in the opinion of the Secretary of State satisfactory evidence that the person is qualified to conduct the mediation.

(4) In this regulation, “approved body” means any body or organisation which in the opinion of the Secretary of State is a suitable body or organisation to determine whether a person is qualified to conduct a mediation.

(5) If, in relation to the person who conducts the mediation—

- (a) paragraph (3) is satisfied on the day on which the mediation commences; and
- (b) after that day—
  - (i) the approved body ceases to be approved; or
  - (ii) the recognition of the person by the approved body is withdrawn,

that provision is to be treated as satisfied in respect of the whole mediation.

(6) The Secretary of State may from time to time publish a list of approved bodies and shall make any such list available to any person on request<sup>(a)</sup>.

(7) For the purposes of paragraph (1)(c) the following information is specified—

- (a) a statement that it was agreed by or on behalf of the injured person and the person who proposed to make a compensation payment that the damages payable under the settlement were to be reduced to reflect the injured person's share in the responsibility for the injury in question;
- (b) the amount of damages payable under the settlement, and the amount or proportion by which it was agreed that the damages were to be reduced;
- (c) the names of the parties to the mediation in so far as they were concerned with the claim made by or on behalf of the injured person;
- (d) sufficient information to show that the mediation is a mediation of a prescribed description.

#### **Particulars as to amounts specified in certificate**

4. A person to whom a certificate is issued is entitled, on application to the Secretary of State, to the following particulars—

- (a) in respect of NHS ambulance services<sup>(b)</sup> counted for the purposes of determining any amount in the certificate—
  - (i) the name of the ambulance trust<sup>(c)</sup> which provided those services;
  - (ii) the date on which the services were provided;
  - (iii) the name and address of any hospital to which the injured person was taken;

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<sup>(a)</sup> Any list of approved bodies published under regulation 3 will be obtainable from the Department for Work and Pensions, Compensation Recovery Unit, Durham House, Washington, Tyne and Wear, NE38 7SF.

<sup>(b)</sup> See section 168 of the 2003 Act for the definition of NHS ambulance services.

<sup>(c)</sup> See section 160(4) of the 2003 Act for the definition of ambulance trust.

- (b) in respect of treatment counted for the purposes of determining any amount in the certificate, the name of the responsible body<sup>(a)</sup> of any hospital at which that treatment took place;
- (c) where regulation 2(2)(b)(ii) of the Personal Injuries (NHS Charges) (Amounts) Regulations 2005<sup>(b)</sup> applies in respect of that treatment, the number of days of admission counted at that hospital.

### **Information to be provided with respect to an injured person**

5.—(1) A person specified in section 160(1)(a) shall send to the Compensation Recovery Unit the information set out in paragraph (3) not later than 14 days after the date on which the claim is made in respect of the injury by or on behalf of the injured person.

(2) A person specified in section 160(1)(b) to (e) shall send to the Compensation Recovery Unit such information set out in paragraph (3) as the Secretary of State may request not later than 14 days after the date on which the Secretary of State asks that person for that information.

(3) The information referred to in paragraphs (1) and (2) is—

- (a) the full name and address of the injured person;
- (b) the date of birth or national insurance number of that person;
- (c) the date on which the injury occurred;
- (d) the nature of the injury;
- (e) in respect of NHS treatment received at a hospital in respect of the injury—
  - (i) the name and address of the hospital; and
  - (ii) where known, whether the injured person was admitted to hospital and if so the date of admission and discharge;
- (f) in respect of NHS ambulance services provided to the injured person as a result of his injury—
  - (i) the name and address of the ambulance trust which provided those services;
  - (ii) the date on which the services were provided;
  - (iii) the name and address of any hospital to which the injured person was taken;
- (g) the full name and address of —
  - (i) the person against whom the claim is made;
  - (ii) anyone acting on behalf of that person.

(4) The responsible body of each hospital at which the injured person received NHS treatment in respect of his injury shall send the following information to the Compensation Recovery Unit not later than 14 days after the date on which the Secretary of State asks for it—

- (a) the date the treatment began;
- (b) whether and, if so, the date on which NHS ambulance services were provided to the injured person, as a result of his injury, for the purpose of taking him to a hospital in relation to which it is the responsible body (including taking him from one such hospital to another such hospital);
- (c) whether the injured person was admitted to a hospital in relation to which it is the responsible body and, if so, the date of admission and discharge;
- (d) where known, the name and address of any other hospital at which the injured person received treatment;
- (e) whether there is likely to be further treatment in respect of the injury.

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<sup>(a)</sup> See section 160(4) of the 2003 Act for the definition of responsible body.

<sup>(b)</sup> S.I. 2005/ .

(5) Any ambulance trust which provided NHS ambulance services to the injured person in respect of his injury shall send the following information to the Compensation Recovery Unit not later than 14 days after the date on which the Secretary of State asks for it—

- (a) the date on which those services were provided to the injured person in respect of his injury; and
- (b) the name and address of any hospital to which the injured person was taken for treatment in respect of his injury.

### **Payments to hospitals and ambulance trusts**

6.—(1) The Secretary of State—

- (a) shall make any payment under section 162(1) (payment to responsible body or relevant ambulance trust) not later than 40 days after the day he receives a payment of relevant NHS charges<sup>(a)</sup>;
- (b) may make more than one such payment at the same time; and
- (c) may do so by direct credit transfer.

(2) In respect of each payment the Secretary of State shall send to the responsible body or relevant ambulance trust<sup>(b)</sup> a statement showing—

- (a) the name and address of the injured person in respect of whom the payment is made;
- (b) the amount of the payment; and
- (c) the date of the incident in respect of which the payment is made.

(3) Where—

- (a) the Secretary of State receives a payment of relevant NHS charges; and
- (b) the responsible body of the hospital (“the old body”) or the relevant ambulance trust (“the old trust”) concerned has ceased to exist,

the Secretary of State shall pay the amount received to the body to which the property, rights and liabilities of the old body or the old trust have been transferred.

(4) If the property, rights and liabilities of the old body or the old trust have been transferred to more than one body, the Secretary of State, may, for the purposes of paragraph (3), divide the payment among those bodies in such manner as he considers appropriate.

### **Multiple compensation payments**

7.—(1) This paragraph applies where—

- (a) a person liable to pay relevant NHS charges—
  - (i) makes a compensation payment in the form of a lump sum (an “earlier payment”); and
  - (ii) subsequently makes another such payment in respect of the same injury (a “later payment”);
- (b) a payment made in satisfaction of the liability to pay relevant NHS charges in connection with an earlier payment is not reflected in the certificate in force at the time of the later payment; and
- (c) in consequence, the total amount of the payments of relevant NHS charges exceeds what it would have been had the earlier payment been so reflected.

(2) Where paragraph (1) applies—

- (a) subject to sub-paragraph (b), the Secretary of State shall pay the person an amount equal to the excess;

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<sup>(a)</sup> See section 150(10) of the 2003 Act for the definition of relevant NHS charges.

<sup>(b)</sup> See section 160(4) of the 2003 Act for the definition of responsible body and section 162(6) of that Act for the definition of relevant ambulance trust.

- (b) where the Secretary of State has (under section 162) made the payment to an ambulance trust or responsible body, the Secretary of State—
  - (i) may deduct the excess from any future payment due to that trust or body under that section; or
  - (ii) may require that trust or body to pay an amount equal to the excess to him or the person who made the compensation payments.

### **Structured settlements**

- 8.—**(1) This regulation applies where a person—
- (a) in final settlement of a claim, enters into an agreement—
    - (i) for the making of periodical compensation payments (whether of an income or capital nature); or
    - (ii) for the making of such payments and lump sum payments; and
  - (b) apart from the provisions of this regulation, those payments would fall to be treated for the purposes of Part 3 of the Act as compensation payments.
- (2) Where this regulation applies—
- (a) the person making the payment shall be taken to have made on the day of agreement a single compensation payment;
  - (b) payments under the agreement referred to in paragraph (1)(a), and any other payment made after the day of agreement in respect of the same incident, shall be taken not to be compensation payments.
- (3) In this regulation, “the day of agreement” means—
- (a) if the agreement referred to in paragraph (1)(a) is approved by the court, the day on which that approval is given; and
  - (b) in any other case, the day on which the agreement is entered into.

### **Interim payments repaid under court order**

- 9.—**(1) This regulation applies where—
- (a) a person has made a payment of relevant NHS charges to the Secretary of State under section 150(2);
  - (b) that payment relates to a compensation payment which is an interim payment of damages in respect of the injury, the whole amount of which a court orders to be repaid; and
  - (c) no other compensation payment under section 150 has been made in respect of the same injury.
- (2) Where this regulation applies, the Secretary of State shall pay to the person making the compensation payment the amount of the payment in paragraph (1)(a).
- (3) Where this regulation applies and the Secretary of State has (under section 162(1)) made the payment to a responsible body or relevant ambulance trust, the Secretary of State may—
- (a) deduct the amount paid to that body from any future payment due under section 162(1); or
  - (b) require the responsible body or relevant ambulance trust to pay that amount to him.
- (4) Where the Secretary of State makes a deduction under paragraph (3)(a) or makes a demand for payment under paragraph (3)(b), he shall (with the demand or the payment from which the deduction is made) send the responsible body or relevant ambulance trust a statement showing—
- (a) the name and address of the injured person to whom the statement relates;
  - (b) the amount of the deduction or demand.

## Payments into court

**10.**—(1) Subject to paragraph (2), where a payment into court is made which would, had it been paid directly to a party to an action (“the relevant party”), have constituted a compensation payment, the making of the payment shall be treated for the purposes of the Act as a compensation payment made—

- (a) where the payment into court is accepted by the relevant party in the initial period, on the date on which the payment into court was made (subject to paragraph (4));
- (b) where, after the initial period, the payment into court is accepted in satisfaction of the relevant party’s claim by consent between the parties, on the date on which the application to the court for payment is made;
- (c) where, after the initial period, payment out of court is made wholly or partly to or for the relevant party in accordance with a court order and in satisfaction of the claim, the date of the court order.

(2) In paragraph (1), “the initial period” means the period of 21 days after the receipt by the relevant party to the action of notice of the payment into court having been made.

(3) Where a payment into court is paid out wholly to or for the person making the payment (otherwise than to or for the relevant party) the making of the payment into court shall not be regarded as the making of a compensation payment.

(4) Where paragraph (1)(a) applies—

- (a) the person making the compensation payment shall apply for a certificate (under section 151(7)) not later than 14 days after the date on which he is notified that the payment into court has been accepted;
- (b) section 154(3) of the Act shall be modified so that the “settlement date” means the date on which the person making the payment into court is notified that it has been accepted.

## Liability of insurers

**11.** Where—

- (a) a policy of insurance is treated under section 164(1) (insurance policy to be treated as covering a person’s liability under section 150(2)) as covering a person’s liability under section 150(2)(liability to pay NHS charges);
- (b) under the policy of insurance the amount of cover in respect of the injury is limited to, or by reference to—
  - (i) a maximum sum; or
  - (ii) a proportion of the compensation for which the injured person is liable in respect of the injury; and
- (c) in consequence of the limitation, a proportion of the compensation for which the injured person is liable in respect of the injury is not covered by the policy,

the liability imposed on the insurer by section 164(1) shall be reduced by the proportion referred to in paragraph (c).

## Exempted payments

**12.**—(1) Any payment specified in paragraph (2) which, but for this regulation, would be a compensation payment, is prescribed for the purposes of paragraph 8 of Schedule 10 (payments excluded from definition of compensation payment in section 150(3)).

(2) The following payments are specified—

- (a) an award of compensation made to or in respect of the injured person under the Criminal Injuries Compensation Act 1995(a);

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(a) 1995 c.53.

- (b) any payment made under the Vaccine Damage Payments Act 1979<sup>(a)</sup> to or in respect of the injured person;
- (c) any payment made in respect of an incident occurring before the day these Regulations come into force.

Signed by authority of the Secretary of State for Health

2005

Department of Health

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<sup>(a)</sup> 1979 c.17.

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 provides for a scheme for the recovery of charges in cases where an injured person receives National Health Service treatment or ambulance services. The charges are payable by certain persons who pay compensation to the injured person.

These Regulations make provision as to the following matters in connection with the scheme—

- (a) applications for certificates as to the amount of NHS charges payable by the applicant (regulation 2);
- (b) reduction of the amount of NHS charges in cases of contributory negligence (regulation 3);
- (c) particulars as to amounts specified in a certificate (regulation 4);
- (d) information to be provided (regulation 5);
- (e) payments of NHS charges to hospitals and ambulance trusts (regulation 6);
- (f) application of the scheme in respect of multiple compensation payments (regulation 7), structured settlements (regulation 8), interim payments (regulation 9) and payments into court (regulation 10);
- (g) liability of insurers (regulation 11);
- (h) payments exempted from the scheme (regulation 12).

## CONSULTATION DRAFT

## STATUTORY INSTRUMENTS

2005 No. [ ]

## NATIONAL HEALTH SERVICE, ENGLAND AND WALES

## Personal Injuries (NHS Charges) (Reviews and Appeals) Regulations 2005

<i>Made</i> - - - -	2005
<i>Laid before Parliament</i>	2005
<i>Coming into force</i> - -	1st April 2005

The Secretary of State for Health, in exercise of the powers conferred by sections 156(1), (2) and (4), 157, 168 and 195(1) and (2) of the Health and Social Care (Community Health and Standards) Act 2003<sup>(a)</sup> and of all other powers enabling him in that behalf, and having consulted the National Assembly for Wales in accordance with section 195(3) of that Act and the Council on Tribunals in accordance with section 8 of the Tribunals and Inquiries Act 1992<sup>(b)</sup>, hereby makes the following Regulations:

**Citation, commencement, application and interpretation**

1.—(1) These Regulations may be cited as the Personal Injuries (NHS Charges) (Reviews and Appeals) Regulations 2005 and shall come into force on 1st April 2005.

(2) These Regulations apply to England and Wales.

(3) In these Regulations—

“the Act” means the Health and Social Care (Community Health and Standards) Act 2003;

“appeal” means an appeal against a certificate or an appeal against a waiver decision;

“appeal against a certificate” means an appeal, under section 157(1), against a certificate;

“appeal against a waiver decision” means an appeal, under section 157(6), against a waiver decision;

“appeal tribunal” means an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998<sup>(c)</sup>, and any reference to a chairman is a reference to—

(a) the chairman of such a tribunal; or

<sup>(a)</sup> 2003 c.43. By section 167(1), the powers are exercisable in relation to England and Wales by the Secretary of State. Section 168 is cited for the definition of “prescribed”.

<sup>(b)</sup> 1992 c.53.

<sup>(c)</sup> 1998 c.14.

(b) in the case of an appeal tribunal which has only one member, that member;

“certificate” means a certificate issued under section 151;

“Compensation Recovery Unit” means the Compensation Recovery Unit of the Department for Work and Pensions;

“compensator” means a person to whom a certificate has been issued;

“waiver application” is to be construed in accordance with regulation 3(3)(d).

(4) A reference in these Regulations to a numbered section is a reference to that section of the Act.

### **Review of certificates**

**2.—**(1) For the purposes of subsection (1) of section 156, notification of an order, judgement, minute or document referred to in that paragraph is to be given to the Secretary of State by the compensator sending to the Compensation Recovery Unit, not later than 3 months after the day on which the order, judgement or document was made, or the minute executed—

- (a) a copy of the order, judgement, minute or document concerned;
- (b) particulars of the proportion by which the damages payable in respect of the claim are to be reduced to reflect the injured person’s share in the responsibility for the injury in question; and
- (c) particulars of the provisions of the order, judgement, minute or document which provide for the reduction.

(2) Where—

- (a) a certificate relates to a claim which, after the certificate is issued, becomes a qualifying claim (as defined in section 153(9)(a)); and
- (b) not later than 3 months after the mediation report containing the information required by regulation 3(1)(c) (production of report) of the Personal Injuries (NHS Charges) (General) Regulations 2005 is sent to the compensator, the compensator sends the report to the Compensation Recovery Unit,

the Secretary of State must review the certificate.

(3) Subject to paragraph (4), the Secretary of State may review a certificate under section 156(4) where he is satisfied that—

- (a) a mistake (whether in computation of the amount specified or otherwise) occurred in the preparation of the certificate;
- (b) the amount specified in the certificate is in excess of the amount due to the Secretary of State;
- (c) incorrect or insufficient information was supplied to the Secretary of State by the person to whom the certificate was issued and in consequence the amount specified in the certificate was less than it would have been had the information supplied been correct or sufficient; or
- (d) it appears to the Secretary of State that, under section 157, a ground for appeal is satisfied.

(4) An application for a review under section 156(4) must be in writing on a form approved by the Secretary of State<sup>(b)</sup> and sent to the Compensation Recovery Unit not later than 3 months after—

- (a) the date of the certificate; or
- (b) the date on which the compensation payment is made,

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<sup>(a)</sup> See regulation 3(3) of the Personal Injuries (NHS Charges) (General) Regulations 2005 (SI 2005/. ) as to the prescribed description of mediation for the purposes of section 153(9)(a).

<sup>(b)</sup> The approved form is obtainable from the Department for Work and Pensions, Compensation Recovery Unit, Durham House, Washington, Tyne and Wear, NE38 7SF.

whichever is the later.

### **Manner of making appeals and time limits**

**3.—**(1) Where the Secretary of State issues a certificate to any person, he shall at the same time send the person a notice as to—

- (a) the grounds on which the person may appeal against the certificate;
- (b) the requirements under section 157(2) that are to be satisfied before an appeal may be made;
- (c) the person's right to apply for the requirement in section 157(2)(b) (payment of amounts specified in certificate) to be waived.

(2) Where the Secretary of State makes a waiver decision<sup>(a)</sup>, the person who made the application for a waiver—

- (a) shall be given notice of the decision; and
- (b) if the application for a waiver is refused—
  - (i) shall be given notice of his right of appeal against the decision; and
  - (ii) shall be informed that, if the notice of the decision does not include a statement of the reasons for the decision, he may, within one month of the date of notification of that decision, request that the Secretary of State provide him with a written statement of the reasons for the decision.

(3) Any appeal against a certificate shall, subject to paragraph (7), be in writing on a form approved by the Secretary of State<sup>(b)</sup> and shall be sent or delivered to the Compensation Recovery Unit—

- (a) not later than 3 months after—
  - (i) the date of the certificate; or
  - (ii) the date on which the compensation payment is made, whichever is the later;
- (b) where the certificate is reviewed by the Secretary of State in accordance with paragraph (4), not later than 3 months after the date the certificate is confirmed or, as the case may be, a fresh certificate is issued;
- (c) where an agreement is made under which an earlier compensation payment<sup>(c)</sup> is treated as having been made in final discharge of a claim made by or in respect of an injured person and arising out of the injury or death, not later than 3 months after the date of that agreement;
- (d) where the compensator makes an application ("a waiver application") under section 157(4) for a waiver of the requirement in section 157(2)(b) that payment of the amount or amounts specified in the certificate be made before making an appeal, not later than 4 weeks after—
  - (i) the date of the waiver decision; or
  - (ii) if the compensator appeals in accordance with paragraph (5) against the refusal of the waiver application, the date on which the appeal is determined or abandoned.

(4) The Secretary of State may treat an appeal against a certificate as an application for review under section 156(4).

(5) An appeal against a waiver decision shall be in writing on a form approved by the Secretary of State and shall be sent or delivered to the Compensation Recovery Unit not later than 4 weeks after the date of the waiver decision.

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<sup>(a)</sup> See section 157(4) of the 2003 Act for the meaning of waiver decision.

<sup>(b)</sup> The approved forms referred to in this regulation are obtainable from the Department for Work and Pensions, Compensation Recovery Unit, Durham House, Washington, Tyne and Wear, NE38 7SF.

<sup>(c)</sup> See section 150(3) of the 2003 Act for the definition of compensation payment.

(6) Any appeal under this regulation or any application under regulation 4(1) shall contain the following particulars—

- (a) in the case of an appeal against a certificate, the date of the certificate or review decision of the Secretary of State against which the appeal is made, the question under section 157 to which the appeal relates and a summary of the arguments relied on by the person making the appeal to support his contention that the certificate is wrong;
- (b) in the case of an appeal against a waiver decision, the particulars required under sub-paragraph (a) in relation to the appeal which it is proposed to bring, together with particulars of the special reasons on which the application for a waiver is based and of the exceptional financial hardship that would be caused by payment of the amount (or amounts) specified in the certificate;
- (c) in the case of an application under regulation 4(1) for an extension of time for making an appeal, the particulars required under sub-paragraph (a) in relation to the appeal which it is proposed to bring, together with particulars of the special reasons on which the application is based.

(7) Where an appeal is not made on the form approved for the time being, but is made in writing and contains all the particulars required under paragraph (6), the Secretary of State may treat that appeal as duly made.

(8) Where it appears to the Secretary of State that an appeal or application does not contain the particulars required under paragraph (6), he may direct the person making the appeal or application to provide such particulars or such document.

(9) Where paragraph (8) applies, the Secretary of State may extend the time specified by this regulation for making the application by a period of not more than 14 days.

(10) Where further particulars of a document are required under paragraph (8), they shall be sent or delivered to the Compensation Recovery Unit within such a period as the Secretary of State may direct.

(11) The date of an appeal shall be the date on which all the particulars required under paragraph (6) are received by the Compensation Recovery Unit.

#### **Application to extend time for appealing**

4.—(1) The time specified by regulation 3 for the making of an appeal may be extended, even though the time so specified may already have expired, provided the conditions set out in paragraphs (2) to (6) are satisfied; and any application for an extension of time under this paragraph shall, subject to regulation 3(6), be sent to the Compensation Recovery Unit and shall be determined by a chairman of an appeal tribunal.

(2) Where the time specified for the making of an appeal has already expired, an application for an extension of time for making an appeal shall not be granted unless the applicant has satisfied the chairman considering the application that—

- (a) if the application is granted there are reasonable prospects that such an appeal will be successful; and
- (b) it is in the interests of justice that the application be granted.

(3) For the purposes of paragraph (2) it shall not be considered to be in the interests of justice to grant an application unless the chairman considering the application is satisfied that—

- (a) special reasons exist which are wholly exceptional and which relate to the history or facts of the case;
- (b) such special reasons have existed throughout the period beginning with the day following the expiry of the time specified, as the case may be, by regulation 3(3) or (5) for the making of an appeal and ending with the day on which the application for extension of time is made; and
- (c) such special reasons manifestly constitute a reasonable excuse of compelling weight for the applicant's failure to make an appeal within the time specified.

(4) In determining whether there are special reasons for granting an application for an extension of time for making an appeal under paragraph (1) the chairman considering the application shall have regard to the principle that the greater the amount of time that has elapsed between the expiry of the time specified for the making of the appeal and the making of the application for an extension of time, the more cogent should be the special reasons on which the application is based.

(5) In determining whether facts constitute special reasons for granting an application for an extension of time for making an appeal under paragraph (1), no account shall be taken of the following—

(a) that the applicant or anyone acting for him or advising him was unaware of or misunderstood the law applicable to his case (including ignorance or misunderstanding of any time limits imposed by regulation 3(3) or (5));

(b) that a court has taken a different view of the law from that previously understood and applied.

(6) Notwithstanding paragraph (1), no appeal may in any event be brought later than 6 years after the beginning of the period specified in, as the case may be, paragraph (3) or (5) of regulation 3, or, if more than one such period is relevant, the one beginning later or latest.

(7) An application under paragraph (1) for an extension of time which has been refused may not be renewed.

### **General provisions relating to the procedure for appeals**

**5.**—(1) Subject to paragraphs (3) to (5), where an appeal is made against a certificate or waiver decision, the provisions specified in paragraph (2) shall apply in relation to the appeal as they apply to an appeal to an appeal tribunal under section 12 of the Social Security Act 1998(a).

(2) The following provisions are specified: regulations 2, 34 to 38, 39, 40, 42, 43, 46 to 51 and 53 to 57A of, and Schedule 3 to, the Social Security Regulations.

(3) The provisions specified in paragraph (2) shall have effect in relation to an appeal as if any reference in any of those provisions to a party to the proceedings were a reference to the Secretary of State and to any person entitled under section 157(1) to make an appeal.

(4) Regulation 2 of the Social Security Regulations shall have effect in relation to an appeal as if the reference to “these Regulations” included these present Regulations.

(5) Regulations 56(1) and 57(1) of the Social Security Regulations shall have effect in relation to an appeal as if the reference to a relevant enactment were a reference to section 158.

(6) Where the Secretary of State refers an appeal to an appeal tribunal under section 158(1), the clerk to the tribunal shall give notice of it to the person to whom the certificate to which the appeal relates was issued.

(7) In this regulation, “Social Security Regulations” means the Social Security and Child Support (Decisions and Appeals) Regulations 1999(b).

### **Consolidation of appeals**

**6.** Where two or more appeals against certificates (whether issued by the Secretary of State or Scottish Ministers) relate to the same injury, the chairman may direct that the appeals be consolidated.

Signed by authority of the Secretary of State for Health

2005

Department of Health

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(a) 1998 c.14.

(b) S.I.1999/991. Relevant amending instruments are S.I. 1999/1466, 1999/2570, 1999/2677, 2000/127, 2000/1596, 2000/3185, 2002/1379.

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 provides for a scheme for the recovery of charges in cases where an injured person receives National Health Service treatment or ambulance services. The charges are specified in certificates issued by the Secretary of State, and are payable by persons who pay compensation to the injured person. A person to whom a certificate is issued may appeal against the certificate, provided he pays the amounts specified in the certificate or the Secretary of State waives the requirement to pay. The person may also appeal against the Secretary of State's decision whether to waive the requirement to pay ("the waiver decision").

These Regulations make provision—

- (a) as to reviews by the Secretary of State of certificates as to the charges payable (regulation 2);
- (b) as to the manner in which, and the time within which, an appeal may be made against a certificate or against a waiver decision (regulation 3);
- (c) for the purpose of enabling an appeal against a certificate to be treated as an application for a review (regulation 3(4));
- (d) as to applications to extend the time for making an appeal (regulation 4);
- (e) as to the procedure to be followed if an appeal is made against a certificate or waiver decision (regulation 5);
- (f) for consolidation of appeals against certificates (regulation 6).

## SUMMARY OF CONSULTATION QUESTIONS

### SECTION 2: REGULATIONS DEALING WITH MATTERS RELATING TO THE AMOUNTS TO BE PAID

#### Amounts set out in the tariff (Regulation 2)

Q1. Do consultees agree with using the same tariff and ceiling of charges system for the expanded scheme as is currently used for the road traffic scheme? If not, please give your reasons for disagreeing.

Q2. Do consultees agree that the tariff and cap for the expanded scheme should be automatically amended each year in line with HCHS inflation as was agreed for the road traffic recovery scheme? If not, please explain your reasons for disagreeing.

Q3. Do consultees agree with the level of and proposed arrangements for calculating the ambulance journey charge? If not, please explain your reasons for disagreeing.

#### Apportionment of NHS costs between 2 or more compensators (Regulation 5)

Q4. Do consultees agree that it is right to allow compensators to ask for apportionment before compensation has been paid, so long as they can provide sufficient evidence of the extent of the apportionment? If not, please explain why you disagree.

#### Compensation payments made under both the England and Wales and the Scottish scheme (Regulation 6)

Q5. Do consultees agree with the method (as set out in regulation 6) of ensuring that the ceiling of charges is not breached in these cases? If not, please explain why you disagree.

### SECTION 3 - REGULATIONS DEALING WITH OTHER OPERATIONAL MATTERS

#### Reduction of NHS charges in cases of contributory negligence (Regulation 3)

Q6. Do consultees agree that only mediations carried out by mediators that meet the criteria set out in regulation 3(3)(a) should be accepted for the purposes of establishing whether a claim is a qualifying claim? If not, please explain why you disagree.

Q7. Are there other criteria in relation to the person conducting the mediation that we should consider?

Q8. What are the key organisations providing mediation services in personal injury claims at the present time?

Q9. What training is available for those wishing to become mediators, and what qualifications does such training lead to?

Q10. Do consultees agree that these matters should be specified in the mediation report? If not, please explain why you disagree. Are there other matters that should be included?

**Information to be provided about an injured person (Regulation 5)**

Q11. Is the information concerning ambulance services contained in regulation 5(3)(f) and 5(5) sufficient, or are there other matters that should be included here?

**Liability of insurers (Regulation 11)**

Q12. Are there any other types of insurance policy where full cover is not provided and is written into the policy (excluding cases of voluntary or mandatory excesses)?

**Exempted payments (Regulation 12)**

Q13. Are there any other similar compensation schemes not covered elsewhere in the legislation (ie in schedule 10) that we should consider exempting from NHS costs recovery?

**SECTION 4: REGULATIONS DEALING WITH PROCEDURES FOR REVIEWS AND APPEALS**

**Review of certificates (Regulation 2)**

Q.14 Do consultees agree that 3 months is a reasonable period of time for compensators to seek a review of a certificate of charges? If not, please explain your reasons for disagreeing, and indicate what you would consider to be an acceptable period.

**Manner of making appeals and time limits (Regulation 3)**

Q15. Do consultees agree that 4 weeks for making an appeal against a waiver certificate and for making an appeal against a certificate following the outcome of an application for a waiver (or an appeal against the refusal of a waiver) is reasonable? If not, please give your reasons for disagreeing and indicate what you think would be a reasonable period.

Q16. Do consultees agree that this is a sensible revision of the Regulations which minimises the scope for abuse of the appeals process? If not, please explain why you disagree.

Q17. What are consultees views on the proposal to keep the time limit for making an appeal against a certificate at 3 months, but reduce the overall deadline for an extension of that time limit to 1 year?

**General provisions relating to the procedure for appeals (Regulation 5)**

Q18. Do consultees agree with the approach taken in Regulation 5? If not, please explain why you disagree.

**Consolidation of appeals (Regulation 6)**

Q19. Are consultees able to give any other examples where it might be desirable to be able to consolidate appeals?

**KEY DIFFERENCES FROM THE ROAD TRAFFIC SCHEME****The scheme is not restricted to motor claims**

The key change is that the scheme is not restricted to personal injury claims following motor accidents but will apply to all payments of personal injury compensation. The 1999 Act will however still be in force up until 31 March 2005, therefore any claims relating to motor accidents up until and including that date will still be captured by the 1999 Act with associated NHS charges being recoverable. The new Act will relate to all personal injury claims occurring on or after 1 April 2005. Throughout the 2003 Act and the draft Regulations, any references relating to road traffic accidents have been changed, for example “traffic casualty” is referred to as “injured person”.

**The scheme is not restricted to injuries occurring in the UK**

The definition of the word “road” in the 1999 Act had the effect of restricting the NHS costs recovery scheme to those injured in road traffic accidents occurring in England, Wales or Scotland. The 2003 Act contains no such restrictions. An injury occurring abroad for which the injured person receives compensation will attract NHS costs recovery if the injured person receives treatment for their injury in England, Wales or Scotland. So, for example, if someone is injured while on holiday in Spain and after being stabilised is flown home to England and spends three weeks in an English hospital, costs for that three week stay will be recoverable if the injured person makes a successful compensation claim against the person responsible for causing the injury.

**Recovery of NHS ambulance service costs**

The expanded scheme includes the recovery of NHS ambulance service costs for each case where the injured person is transported to or between hospitals for treatment of the injury for which compensation is paid.

The 2003 Act requires the Secretary of State (in practice the CRU) to designate each ambulance trust to a particular NHS trust or primary care trust. Each ambulance trust will receive payments for any NHS ambulance transportation made to its main feeder NHS trust or Primary Care Trust (PCT) regardless of whether or not that ambulance trust provided the transportation. This system was adopted to allow the administration of the scheme to be kept simple and to minimise administration costs. Ambulance trusts will, in the main, receive payments for journeys they have undertaken and any gains or losses should balance out over time for most trusts.

**Contributory negligence**

Taking into account contributory negligence under certain circumstances is also a new power within the 2003 Act. The Act allows for a reduction in contributory negligence in cases where a court has ordered a reduction, a court endorsed agreement has been reached or a settlement on this issue has been reached through a recognised mediation process. Liability for NHS costs recovery will be reduced by the same proportion as the overall reduction made for the finding of contributory negligence. So, for example, if there is a finding of 50% contributory negligence against the injured person (ie the injured person has been found to be 50% liable for their injury) then the NHS costs will be reduced by 50%.

The onus will be on compensators to provide adequate evidence of a contributory negligence finding of a qualifying type. A letter from a solicitor will not be sufficient.

### **Hardship waiver**

The 2003 Act also introduces a new right to apply for a waiver of the requirement that compensators must pay any NHS charges deemed due before they can appeal against the level of those charges. The reason for the requirement that charges be paid up front was to minimise spurious appeals intended only to delay payment of charges due. As the current road traffic scheme only takes into account payments made by insurers, there was never likely to be a case where paying NHS charges might cause severe financial hardship to the compensator. Under the new scheme, however, NHS charges could be deemed payable by small businesses or individuals for whom large payments of NHS charges on top of the compensation payment itself could cause exceptional financial hardship. Given that inability to pay the charges would, in effect, deny such compensators the right of appeal against them, Ministers agreed that the power to waive payment prior to appeal in exceptional cases should be included in the Act.

Compensators will also have the right of appeal against a decision not to grant a waiver and The Appeals Service will be able to hear such appeals, as will the Social Security Commissioner on a point of law. It is envisaged however that the waiver will only be granted in truly exceptional cases, such as where the raising of money might, for example, put an individual's home at risk or bankrupt a small business.

### **Liability of Insurers**

Another addition to the scheme can be found in Section 164 of the 2003 Act. This ensures that where a person's liability to pay compensation is covered to any extent by an insurance policy, their liability to pay NHS costs is also covered. It is also made clear that insurance policies may not restrict or exclude the level of NHS costs covered. This means, for example, that insurers carrying corporate insurance policies with high excesses will no longer be able to claim that there is no liability to pay NHS costs because a compensation payment has not exceeded the excess.

Regulations can also be made limiting the liability for NHS costs in certain prescribed circumstances as it is recognised that there may be some cases (other than where an excess is in place) where an insurance policy may not cover the full extent of the compensation liability, so that it would be unfair to require that it should cover the full extent of the NHS costs liability. For example if compensation of £100,000 is awarded, but the relevant insurance policy has an upper limit of £80,000 per claim, the insurer will only be liable for 80% of the compensation payment. The insured person will be personally liable for the remaining 20% and so this would be taken into account in relation to NHS costs recovery. In this example, the insurer would only be liable for 80% of the NHS costs, with the insured person liable for the remainder. Obviously, if the compensation payment does not exceed the upper limit of the insurance policy, then the insurer will be liable for the full amount of NHS costs.

### **Claims under the Fatal Accidents Act 1976**

Consultees' attention is also drawn to another change introduced by the 2003 Act, which is that claims under the Fatal Accidents Act 1976 that may have attracted NHS charges will no longer be recoverable. This exemption can be found under Schedule 10 of the Act.

## REGULATORY IMPACT ASSESSMENT

### RECOVERY OF NHS TREATMENT AND AMBULANCE COSTS WHERE PEOPLE CLAIM AND RECEIVE COMPENSATION FOR INJURIES

#### Issue

1. At present, except for cases involving compulsory motor vehicle insurance, where a person has agreed to pay compensation for an injury suffered by another person the compensator does not meet the costs of any NHS hospital treatment, or ambulance transport, which has been necessary. The estimated cost to the taxpayer of meeting these costs is approximately £150m in Great Britain per year, based on the road traffic accident tariff as set out below.

#### Objective

2. For people to be more aware of their responsibilities and to take active steps to reduce the risk of causing injury to third parties and to reduce the cost to the taxpayer of subsidising the wrongdoer by meeting part of the costs of his or her wrongdoing.

#### Background

3. The Law Commission for England and Wales proposed<sup>a</sup>, following a public consultation, that the that the system of recovery of NHS costs following road traffic accidents should be extended to include cost recovery in all cases where a person receives compensation. An internal scoping study by the health departments' economists assessed the potential for the NHS to recover the costs of accidents/diseases other than those involving motor vehicles. This found:
  - employer liability for accidents and diseases and public liability for accidents are the most common types of claims where a person receives compensation for their injuries;
  - employer and public liability are therefore the areas where the taxpayer is currently providing the most significant subsidy for the costs of any necessary medical treatment for injuries sustained following accidents;
  - the estimated amount that could be recovered by hospitals each year for treating injuries following employers liability accidents is £57 million for in-patient treatment; £15 million for out-patient treatment and £4 million for the cost of emergency ambulance transport;
  - potential revenue for treating injuries following public liability accidents is likely to be on a similar scale, however more information would be required on the type of accidents to give a more accurate estimate;

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<sup>a</sup> 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](http://www.lawcom.gov.uk)

- it would be difficult to quantify the cost of diseases (as opposed to accidents) to the NHS due to the complexity of the treatment path and the period of time over which a patient with an occupational disease would need treatment. If diseases were included in the scheme then much more work would be required to assess the patterns of treatment and the practicalities of running a scheme which includes more chronic conditions.
- further work is required on the type of injuries, cost to the NHS and the appropriate tariff.

## Risk Assessment

4. The risks of not taking this regulation forward are:
  - the taxpayer subsidising those liable for causing injury to others;
  - unjust enrichment of those liable for causing injury to others;
  - the NHS continuing to bear the cost of treating injuries that have been caused by wrongdoers;
  - an increase in accidents and injuries if wrongdoers are not made to pay the full cost of their actions or negligence.
5. The total cost to the NHS in dealing with these cases is estimated to be in the region of £140 - £150 million. This figure has been calculated using data supplied by the Health and Safety Executive (2000/01 numbers of accidents at work); and the Department of Health's Hospital Episode Statistics (HES) data (2000/01 average length of stay) and the road traffic accident tariff from April this year (which will increase to £556 per day for in-patient treatment and £452 per day for out-patient treatment).
6. Apart from motor insurance, there are three other main areas of insurance that could be used to cover NHS treatment costs:
  - **Employers' Liability Compulsory Insurance (ELCI)** is mandatory for most employers and covers accidents (and industrial diseases).
  - **Public Liability** insurance provides cover against accidents to the general public in locations open to them; whilst not mandatory, it is relatively common amongst reputable providers of services to the public.
  - **Product Liability** provides cover against the adverse impact of any product. This insurance is not mandatory.

## Employer Liability

7. The HES data shows an average length of stay in hospital following an accident at work to be 3.5 days. It is assumed that this represents the total length of stay for an accident. There will however be a large variation around this average. The scheme will have a ceiling of charges (the cap) which is currently set at £30,000 for the road traffic scheme. Statistics from the Compensation Recovery Unit show that approximately 500 cases per year would have reached this cap under the road traffic scheme which represents 0.25% of claims.
8. The road traffic accident tariff of £556 per in-patient day and £452 for out-patients (figures to apply from April this year) has been used with the estimated number of in-patient and out-patient cases to assess the likely revenue as shown in the table below. Note that the in-patient charge includes provision for subsequent out-patient treatment.

**Table 1: Revenue Generation (Accidents at Work)**

Service Provided	Cost	Number of Cases	Potential Amounts Recoverable
Cost per in-patient day	£556 (multiply by 3.5 days average length of stay)	28,230	£55m
Out-patients	£452 (one off charge regardless of number of appointments)	36,227 single out-patient appointments	£16m
Ambulance Costs	£150	28,230	£4m
Total			£75m

Source: Health and Safety Statistics 2000/01, HSE

9. The number of cases in table (1) above is based on a combination of data provided by the HSE and the CRU (the CRU data used is shown in table 2 below). The data supplied by the HSE includes all accidents at work and not all of these will lead to a claim for compensation. The data supplied by CRU only includes cases where a claim for compensation has been made, however this cannot be broken down by in-patient and out-patient treatment. To arrive at figures that will show in-patient and out-patient treatment that relates to a claim for compensation it is assumed that the number of serious accidents provided by HSE (28,230) will result in a claim for compensation and that these cases will also require in-patient treatment. The number of out-patient appointments (36,277) assume that half of the remaining cases where a compensation claim has been made (CRU data) will seek hospital treatment and the remaining half will seek treatment in primary care. The scheme does not extend to primary care costs.

## Public Liability

10. Data from the HSE and the Compensation Recovery Unit suggest that the number of accidents under public liability are similar to those under employers liability (see Compensation Recovery Unit data in table 2 below). Therefore it is possible that cost recovery from public liability accidents could be in the same ball-park as employer liability accidents, ie £75 million. This would mean that recovery NHS costs for hospitals in England, Scotland and Wales would be in the region of £150 million. However this amount would probably be reduced, possibly by a maximum of 5% as NHS costs will be reduced in cases where there is a court finding of contributory negligence (see the paragraph below on "Issues of equity and fairness). We would therefore estimate the recovery of NHS costs to be in the region of £140 - £150 million.

## Product Liability

11. At this stage, due to the absence of data for product liability, no consideration has been given to the potential cost of recovery for this area. However data from CRU (see table 2 below) suggests that the number of claims for product liability are likely to be very small (less than 4% using the numbers of claims in the "other" and "not known" categories in the CRU table below) compared to employer and public liability. This would suggest that recovery of NHS costs in this area would be far less significant than for employer and public liability.

## **Who is affected?**

12. 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.
13. The figures shown below provided by the Compensation Recovery Unit (CRU) shows the number of accident claims by liability.

**Table 2: Accident claims by liability, 2001/02**

Employer	100,685
Public	105,818
Clinical negligence	11,598
Other	2,141
Liability not known	776
<b>Total</b>	<b>221,018</b>

Source: Compensation Recovery Unit

14. Industries with the highest risk of non-fatal injuries at work are: construction, transport and communications and manufacturing. Occupations in transport and construction along with food, drink and tobacco operatives are the 'riskiest' occupations in terms of reportable injury relative to all other occupations.

15. The pattern for public liability is very different. HSE data suggests that the sector responsible for the largest number of non-fatal accidents is education. This is likely to be mainly public sector. Other high accident sectors are wholesale and retail trade, transport and 'other community'. It should be stressed though that the claims for compensation may not match the pattern of accidents seen in the HSE statistics. Consequently the cost implication for industry, the public sector and insurers is difficult to assess.

### **Options**

16. This is not a regulatory measure in the sense of one which is intended to adjust a system to work correctly through the imposition of rules. It has more in common with a non-regulatory economic instrument but does bring with it responsibilities for business. Those responsibilities are meeting the cost of the NHS treatment plus the administrative costs associated with payment. Four options have been identified:

#### Option 1

Do nothing. Doing nothing does not address the issue raised by the Law Commission that by providing healthcare free of charge the NHS in effect discharges part of a wrongdoer's liability.

#### Option 2

Withdraw NHS services where liability accepted. Withdrawing NHS services once a person or institution had accepted liability would not reduce the costs of immediate/short term care to the NHS as liability would be unknown at that stage. At a later stage, whilst it would remove the cost from the NHS it would place an equal or, more likely, greater burden on the compensator of having to pay for private sector treatment. It is not known if there would be sufficient capacity available outside the NHS to provide the needed treatment or whether people entitled to use the NHS would be willing to be transferred to the private sector.

#### Option 3

Improve health and safety regulation. Health and safety regulation is already comprehensive in the UK and whilst continuous efforts are made to improve regulation it is unlikely that this would reduce the burden to the NHS in either the short or medium term.

#### Option 4

Introduce, through primary legislation, the recovery of NHS charges following payment of compensation based on a simple tariff system of NHS charges with central collection by the Department for Work and Pensions Compensation Recovery Unit (CRU).

This option meets concern that those who are liable should not be subsidised by the taxpayer. It also reinforces the duty to prevent accidents happening. Accident victims are not being required to pay for their own treatment – those responsible for the accidents are being asked to refund the NHS and the taxpayer for the cost of the treatment of people injured as a result of their actions.

These benefits need to be offset by the costs to the Exchequer. There will be reduced tax receipts on business profits and in the future productive capacity of the economy. Businesses can pass the additional insurance and other costs on to consumers through price rises and so the impact on business profits is likely to be reduced. Even if the costs are not passed on, the reduction in taxation elsewhere that will result from these savings to the Exchequer may lead to increases in economic growth and tax receipts.

### **Issues of equity and fairness**

17. This measure 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 current inequities. Those being treated more fairly would be:
  - the general population benefiting from improvements in health and safety;
  - the taxpayer by not subsidising wrong doers;
  - the NHS by not having to bear the cost of treating injuries caused by wrongdoers;
  - UK residents by seeing income that is currently being denied being recouped and directed to improving health services;
18. If insurers do not weight insurance premiums in favour of those with few or no accidents then this could create a situation of inequity whereby employers who take positive action to improve the health and safety of their employees are subsidising those that do not or are negligent. However this inequity would be created by insurance providers and would not be an inequity caused by this scheme. Firms and individuals would have the right to search for an insurer that would recognise their responsible attitude to health and safety and thus offer them discounted premiums.

### **Contributory Negligence**

19. It could be argued, as the Law Commission has done, that the liable party should only pay NHS 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 NHS costs would be reduced accordingly.
20. The current road traffic scheme does not take into account a reduction in recovery of NHS costs where there has been an apportionment of blame. As the new scheme would take account of contributory negligence where there was a court finding, the amount of NHS cost recovery would be reduced by an unknown factor. However, judicial statistics show that in 2001 there were 2,280 small claims and 7,480 trials involving a claim where someone receives compensation where contributory negligence was involved. In 2001/02 there were more than 200,000 claims against employers and public liability insurance. These figures therefore suggest therefore that a reduction for

contributory negligence would be taken into account in less than 5% of claims.

## **Benefits**

21. The benefits are: those causing accident and injury to others bearing the full cost of their wrongdoing resulting in:
- added impetus to potential compensators to prevent accidents happening and a likely reduction in such accidents;
  - the relief to the taxpayer of subsidising those liable for causing accident or injury to others;
  - preventing unjust enrichment of those liable for causing accidents an injury to others;
  - the NHS not having to bear the cost of treating injuries that have been caused by wrongdoers;
  - the money raised would be returned directly to the hospitals providing treatment and could therefore be used to provide better hospital services for all UK residents.

## **Quantifying and valuing the benefits**

### Option 1

Would have no benefit to the taxpayer or the NHS user but would relieve the liable party of the full costs of his or her actions.

### Option 2

Would have some benefit to the taxpayer and the NHS but only where the accident victim was still receiving care after liability had been accepted.

### Option 3

Would have a benefit for the taxpayer and the NHS only if it could result in tangible and identifiable falls in the rate of accidents.

### Option 4

Would see liable parties meeting NHS costs probably in excess of £150 million per year, over and above the current recoveries made following road traffic accidents. This estimate is made using the tariff of charges developed for road traffic accident recovery. Whilst that tariff was based on the treatment profile of road traffic accident victims it acts as a useful proxy for trauma treatment in general. The recovery of costs is limited to the amount of NHS 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 £30,000 for the road traffic scheme which equals around 50 days in-patient treatment) and, once a claim is settled no further costs can be recovered, the scheme will be time and cost limited, and will not, in most cases, encompass the costs of longer term rehabilitation. The average time from accident to payment of compensation is around 18 months and it will therefore be rare that a claim would settle before the ceiling of charges was reached. The recovery is also limited to a fixed amount in any one individual case. This option will support a

reduction in workplace accidents if employers are forced to pay the full cost of accidents they have caused.

### **Compliance costs for business**

22. Of the options explored option 1 has no associated costs for those who cause accidents or insurers. The cost of NHS care would however continue to be met by the taxpayer including businesses. Option 2 would have minimal benefit and the administrative costs are likely to be positive. It is also questionable whether the accident victim could be deprived of his or her right to opt for NHS treatment. The benefits of option 3 are uncertain. Additional regulation would be required and result in variable costs across the business sector. There would be additional compliance costs for the public sector in implementing improvements in health and safety which would have to be met through the public purse. This leaves option 4 as the only option open to worthwhile compliance cost assessment.

### **Business sectors affected**

23. Any business with potential liabilities for people who receive compensation as either an employer, a producer of goods or transacting business in a public place – in other words, essentially all businesses – will 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**

24. For businesses in general the costs would either be the direct costs of paying any NHS charges or the increases in any insurance premiums taken out to cover against these costs. These costs would be similar for any organisation paying a claim where people receive compensation. Other costs that businesses may incur at a result of the scheme are the costs of implementing improvements to health and safety procedures, which could result in changes to working practices and possibly the cost of fighting compensation claims longer and harder. However there will be many instances where the cost of fighting a claim harder in the courts will be higher than the actual NHS charges, which will deter firms from taking this action.
25. 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 a claim where people receive compensation currently have to be notified to the Compensation Recovery Unit and all motor claims already attract additional questions about NHS treatment the additional administration to extend the NHS scheme to all claims will be relatively small.
26. The additional costs for insurers will comprise:
- i. the need to identify the hospital providing treatment in all cases when notifying claims to CRU;
  - 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**

27. Information obtained 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.
28. 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 and insurers will already have administrative processes in place for the handling of road traffic claims and the scheme will just be an extension of that system, therefore training and other costs are not expected to be significant.

### **Impact on businesses other than insurers**

29. Any business, large or small, which could be the subject of a claim against it for a claim where someone receives 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.
30. The Department of Health is aware that there are currently difficulties with Employers' Liability Compulsory Insurance (ELCI) and that the Department for Work and Pensions is leading on a review of this. The Department of Health would not want to miss an opportunity to include recovery of NHS costs in this Bill as this would mean denying hospitals this income well into the second half of the decade. Introducing cost recovery will never be popular with those that have to pay and it is likely that there will never be a "good" time to proceed. The Department of Health will be taking into account the review of ELCI and, while not wanting to miss this opportunity to put recovery of NHS costs on the statute book, would delay commencement of introduction of these provisions in the Bill should this be necessary.
31. As these costs directly relate to the provision of NHS treatment where there has been a 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 some weighting in their favour. 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.

### **Impact on small businesses**

32. 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.

33. Evidence on the relative impact on small business 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). Thus, medium-sized businesses have the highest accident rates and will thus undergo the greatest impact.
34. 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 variation in premiums would greatly reduce the incentives to reduce risk for such firms.
35. The type of risks to which such small companies are exposed are not changed by the proposed extension of NHS recovery and there should be no question of additional costs for revised risk assessments or other financial services.

### **Impact on charities and voluntary organisations**

36. 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 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 NHS hospital treatment.

### **Other costs**

#### Costs to local and national government

37. It is intended that all compensators will be required to repay NHS costs so that the body responsible for the injury meets the full costs of reparation. The only potential exception will be an NHS hospital where it is both the compensator and provider of healthcare services. Local and national government bodies will therefore be subject to the same provisions as other businesses and will be required to repay NHS costs in relevant cases. Although there is an element of financial circularity in such an arrangement, repayment by all local and central government organisations ensures that money allocated to the NHS to provide a health service for everyone is not diverted to subsidise other parts of Government.
38. There are additional administrative costs for the Department of Health in extending the recovery from road traffic to all accidents. Currently the Departments of Health in England, Scotland and Wales pay the Department

for Work and Pensions £1.9 m per year to recover £100m per year. The Department of Health is currently discussing the costs administering the extended scheme with the DWP and an estimate is expected shortly. NHS trusts will also see the number of claims they must verify rise with a consequent impact on staff time. A scheme to introduce electronic communication between the Compensation Recovery Unit and all relevant NHS trusts was completed in the summer of 2002. This has produced efficiency savings within CRU and within all NHS trusts.

#### Costs to citizens

39. Private citizens are involved in compensation payments most often as a result of private use of a motor vehicle. In these cases insurance cover is compulsory and the recovery of NHS costs already takes place under the provisions of the Road Traffic (NHS Charges) Act 1999. In the much rarer event of a private citizen making some other form of compensation payment 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 follows the payment of compensation, where a private citizen fails to make a payment of compensation then the recovery of NHS costs will not take place.

#### **Competition Assessment**

40. We consider that options 1,2 and 3 have no (or no appreciable) effects for competition. Option 4 is a wide-ranging policy proposal which would impact on all undertakings whose operations create a potential liability, to employees or third parties, in the event of an accident caused by those operations. The effect of the proposal, if implemented, would be to increase the potential costs of such liability for all relevant undertakings and, where covered by insurances taken out by the relevant undertakings, to increase the actual costs of such insurances. However we were unable to identify any markets in which this could be anticipated to have any appreciable consequences for competition. Implementation of policy proposal number 4 would have consequences for the insurance market in raising levels of risk for which insurers provide cover, and also in raising administrative costs of handling claims. Such increases are, however, likely to be recouped by insurers through increased insurance premiums. We did not identify any competition concerns arising out of the proposal other than those currently being examined by the Office of Fair Trading in its study of the liability insurance market and consequently we considered it unnecessary to carry out a detailed competition assessment.

#### **Summary of Outcome of Consultation**

41. The Department of Health received 64 replies in total. Responses are summarised below:
- The majority of respondees supported the need for the scheme to be simple to operate and to restrict it to the recovery of hospital and ambulance costs and commented that this is the most effective option;
  - Three quarters of respondees either agreed or had no opinion that all payments of compensation should apply to all parties involved. Most thought that there should be no opt out for small business and the TUC commented

that small businesses have higher accident rates than larger businesses. HSE argued strongly that all organisations have a responsibility to ensure the safety of their employees;

- Overall the response was positive with many respondees (although not asked as part of the consultation), indicating they were generally in favour of recovering NHS cost in cases where people receive compensation. There were, however, a couple of expressions of concern about backdoor taxation;
- Concerns were raised by businesses, organisations representing businesses and the insurance companies about the timing of introducing these charges because of the problems currently being experienced in the Employers' Liability Insurance Market mainly the high rise in premiums and difficulties in obtaining insurance.

42. Option 4 is therefore the recommended option. This would:

- see liable parties meeting NHS costs in the region of £140 - £150 million per year, over and above the current recoveries made following road traffic accidents;
- prevent increases in accidents and injuries if wrongdoers are made to pay the full cost of their actions or negligence.
- relieve the taxpayer of the burden of subsidising those liable for causing accident and injury to others;
- stop unjust enrichment of those liable for causing accidents and injury to others;
- stop the NHS having to bear the cost of treating injuries that have been caused by wrongdoers;
- see the money raised returned directly to the hospitals providing treatment and could therefore be used to provide better hospital services for all UK residents.

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## **CODE OF PRACTICE ON WRITTEN CONSULTATIONS**

This consultation is being carried out in accordance with the Cabinet Office Code of Practice on Written Consultation. The consultation criteria are:

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.