health and safety

SHUTTERSTOCK

The NHS Litigation Authority hopes changes to the CNST will incentivise safety and cut the cost of clinical negligence. Seamus Ward reports

Each year there are lurid headlines about the amounts the NHS pays out in clinical negligence damages, with the totals climbing every 12 months. Last year was no exception, with £1.4bn paid out compared with £1.1bn in 2014/15.

So it's not surprising the NHS Litigation Authority (NHSLA), which administers the risk pooling clinical negligence scheme for trusts (CNST), is exploring ways of reducing the negligence bill. There are three main elements of the work – supporting trusts to learn from errors; changing the way member contributions are calculated to better reflect their recent safety record; and tackling costs, including legal fees.

Helen Vernon, the NHSLA chief executive, says the number of new claims are levelling off – now around 850 a month compared with a historic high of 1,100 a month – but they are still too high.

A number of drivers are increasing the cost of clinical negligence. These include a rise in claimant legal costs, which are often paid by the NHSLA. Claimant costs have risen disproportionately to the value of claims, particularly in relatively low value claims.

'There is some excessive charging by claimant lawyers and we are challenging them robustly,' Ms Vernon says.

The amount of compensation given in high-value claims has gone up. She adds that the rise in NHS activity in recent years has potentially contributed to the increase in numbers of cases. With the NHS treating more patients, the number of claims would be expected to rise proportionately.

Ms Vernon says the authority has shifted its emphasis to helping members reduce incidents of negligence. Historically under the CNST, trusts were assessed against risk management standards. In return for achieving these standards, they received a discount on their contribution – 10% for level one, 20% for level two and 30% for level three.

'We found the assessment was creating a large bureaucratic burden on the member trusts. It involved a lot of investment of their time and resources to achieve the standards. And there wasn't a great progression through the levels – many trusts got to level one and stayed there rather than investing to get to a higher level.'

There was also concern about a lack of evidence of a correlation between the achievement of the risk management standards and improvement in a provider's claims history.

Learning from claims

In place of the risk management standards, Ms Vernon says the NHSLA has chosen to support members so that they learn from incidents and focus on the causes of their claims to reduce claim volume and value.

'We are also encouraging candour and transparency. Clearly, when something goes wrong, these are critical and if you do this, you are more likely to prevent a claim,' she adds.

'We are working closely with trusts to help them get to grips with their claims. The rising cost of claims, combined with our closer working relationship has seen many trusts getting to grips with their claims data in a way that perhaps hadn't previously been the case.'

Scorecards, distributed to members over the last year, have highlighted where claims are coming from in terms of numbers and value for each organisation. These are interactive tools that allow members to drill into their claims data. 'It allows them to focus on high-value and high-volume areas, because we need to tackle both,' Ms Vernon adds.

It is also moving to early reporting of very-high-value claims, allowing

the NHSLA to help the trust learn from the incident and help manage the legal process.

The NHSLA has also brought trusts together to examine their ideas to address the causes of claims. Last year it distributed more than £18m to support the national *Sign up to safety* campaign. It approved 67 bids – trusts were able to bid for a one-off payment of up to 10% of their CNST contribution to fund a safety scheme. The NHSLA intends to publish the outcomes of these initiatives in the new year.

It's also changed the pricing methodology for CNST following a consultation this year. The changes seek to support the objective of incentivising service improvement, she says.

In its consultation response, the NHSLA signalled a shift to a pricing approach that is more focused on recent experience (see box). For 2017/18 the focus of the changes is on maternity – the area with the highest claims value, hence the greatest impact. 'We are looking at the available maternity outcome measures, working with the royal colleges, NHS Improvement and others to see the potential to link some of these outcome measures to pricing so we can incentivise improvement.'

Work has already begun, with CNST prices published in October – two months earlier than in previous years to aid planning for 2017/18. With work ongoing on outcome measures in maternity, the maternity figures were provisional and the NHSLA will produce final prices this month. It has promised to cap changes in the provisional maternity component to +/-5%.

Ms Vernon says the new system is 'less backward looking'. 'In very-high-value claims, such as brain damage at birth, it can take several years from the incident to the claim being reported to the NHSLA.

'So, when assessing a trust's contribution, the high-value claims will probably have happened years ago and is not necessarily representative of their current efforts on safety. We are trying to make the scheme more forward-looking, so we can incentivise and respond to improvements organisations are making.'

Concerns over the cost of claimant legal fees led the Department of Health to announce its intention to consult on introducing fixed recoverable costs for low-value clinical negligence claims. It is understood the consultation is imminent.

"We are trying to make the scheme more forward-looking, so we can respond to improvements"
Helen Vernon, NHSLA

The Litigation Authority backs fixed costs, pointing to its experience in employers' and public liability indemnity (the Liabilities to Third Parties Scheme, LTPS), where fees are fixed. Ms Vernon says the reduction in non-clinical legal costs contributed to a 10% cut in its LTPS contributions this year.

In 2015/16 the greatest number of resolved clinical negligence claims were in the damages range of £25,000-£50,000. But these 2,500 claims generated disproportionately high claimant legal costs – 135% of the value of damages in this range in 2015/16.

The same is true for lower value claims. Is there an opportunity to resolve these claims quicker to minimise the legal costs?

'It's a key objective for us to resolve claims as quickly as we can and ensure that where damages are due to be paid that we do so promptly. But at the same time, where there is no liability, we repudiate claims robustly and we have seen an increasing number of claims where we don't pay damages.'

Appropriate payments

Sometimes claims are higher than the NHSLA valuation of damages, she adds, and negotiations on this can take time. 'Clearly, the quickest way to resolve a claim is to pay out what's being asked for, but that's not necessarily the right outcome. We have to ensure we are making appropriate payments because we are dealing with NHS funds.'

Equally, the NHSLA will not seek to avoid paying damages where a member has been negligent. 'We have an obligation to the taxpayer to ensure we are repudiating cases of no merit. But we also have an obligation to make payments where compensation is due, and act fairly in relation to the patient.'

Given the rise in CNST fees, is she concerned that foundation trusts may leave the scheme and seek a commercial insurer? She mounts a robust defence of the scheme, saying it is the best possible value in clinical negligence indemnity. It's underwritten by the state and costs are low because it does not attract insurance premium tax and brokers' fees.

'We don't have to collect money up front to hold as a reserve to fund future claims, so money is not diverted from the frontline of the NHS – we only collect what we need to pay out.'

CNST calculation

The CNST is by far the largest of four schemes that the NHSLA manages to resolve clinical negligence liabilities in England. A not-for-profit membership scheme, it aims to spread and smooth the cost of post-1995 liabilities over time. It provides indemnity cover to 536 members – NHS trusts, foundation trusts, clinical commissioning groups and 89 independent sector providers.

The CNST is funded through member contributions on a pay-as-you-go basis. Members pay a contribution towards the estimated costs of claims each year.

A member's CNST overall payment is determined by splitting the total to be collected between members according to their relative size, activity levels, recent contributions and claims history.

Maternity contributions are calculated separately and new safety indicators may be introduced for 2017/18, adjusting the maternity element of the price by no more than +/-5%.

First, contributions are calculated as a weighted average of three elements:

- **A risk-based exposure element based on staff and activity levels, with each speciality allocated a risk weighting. The NHSLA is to review whether staffing levels are an appropriate measure of risk next year. The risk-based contribution for maternity is based mainly on number of births, though staffing levels can adjust the contribution by +/-10%**
- **A contribution based on paid claims experience for the previous five years**
- **A contribution based on known outstanding claims.**

In the new method, incidents older than 10 years have been stripped out, rebalancing the weighting to recent safety improvements rather than past claims. Each member's contribution is adjusted to limit the percentage change in contribution from the previous year, to help stabilise prices.