Council meeting 5 & 6 April 2005 OPEN BUSINESS

CHRE: Claiming Costs in Section 29 Referrals

Purpose
To consider adopting a position on the claiming of costs in proceedings brought by the Council for Healthcare Regulatory Excellence (CHRE) under Section 29 of the National Health Service Reform and HealthCare Professions Act 2002 ("Section 29 referrals").

Recommendation
It is recommended that Council agree the following response to the consultation:

i) that in cases where a Section 29 referral is upheld, CHRE should not seek to fetter its discretion but should consider, on a case by case basis, whether or not to seek costs.

ii) that in cases where the Regulator has from an early stage not contested the referral, CHRE should not seek to claim its costs.

1. Background

At its Council meeting on 18 January 2005, CHRE discussed the claiming of costs of Section 29 referrals to the High Court, and that it should seek costs both in cases in which CHRE's referral was upheld, and in those cases where a compromise was reached with the regulator.

CHRE considered that this matter should be discussed by the individual Councils of the health care regulators, before any decision was taken by the CHRE. A position paper subsequently circulated by CHRE is annexed to this document.

1.1 The procedure for awarding costs

The procedure for the award of costs in the High Court is governed by the Civil Procedure Rules ("CPR").

Under Rule 43.2(1), costs include fees, charges, disbursements, expenses and remuneration. The largest item under this heading will be legal fees.

Under Rule 44.3(1), the Court has a discretion whether or not to
a) award costs to a party in the proceedings;
b) if so, the amount of costs to be awarded; and
c) when the costs should be paid.

The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the Court may make a different order (Rule 44.3(2)).

Under Rule 44.3(4), when deciding whether or not to make an order for costs, the Court must have regard to all the circumstances of the case. These include
a) the conduct of all the parties;
b) whether a party has succeeded on part of the case (even if he was unsuccessful on the entirety of the case);
c) any payment into Court or admissible offer to settle which is made by a party and drawn to the Court's attention.

Under Rule 44.3(5), the "conduct of the parties" includes —
a) conduct before, as well as during, the proceedings;
b) whether it is reasonable for a party to raise, pursue or contest a particular allegation or issue;

c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
d) whether a claimant who has succeeded in the whole or part of his claim, exaggerated the claim.

1.2 Legal Advice received by CHRE

The CHRE has received advice to the effect that it should avoid seeking to set a "formal fixed policy" on the issue. Three reasons are given

a) the need for decisions relating to costs to be flexible to take into account the circumstances of each case;
b) the fact that any such policy will not command the respect of the Courts; and
c) the risk that such a policy might be unlawful on the grounds that it would fetter the discretion of the CHRE.

1.3 Cases in which compromises are reached with the Regulator

Where a Regulator decides not to contest the referral, the matter will be dealt with by way of a Consent Order. Under this procedure, both the Regulator and the CHRE will sign an Order to the effect that the decision of the Committee being referred should be quashed, and the matter sent back for fresh consideration. Once agreed and signed, the Order is placed before the Judge for approval, and sealed. The matter is simply dealt with on the papers, and the parties are not required to attend at Court.

In terms of legal costs therefore, there are not usually likely to be costs incurred over and above the Court fees for initiating the proceedings, and time incurred by the CHRE lawyers in drafting the Consent Order. However, where agreement is only reached "at the door of the Court", and the parties have therefore already fully prepared for trial, considerable legal expenses may have been incurred by the CHRE in terms of holding conferences, and lawyers preparation time.

2. Risk and Resource Implications

Should the CHRE adopt an aggressive policy on reclaiming costs-there might be significant resource implications arising from even a single referral. Should a small regulator be unfortunate enough to be the subject of a number of referrals, such a policy might well have a significant financial impact on that regulator.

It must be remembered that the discretion to award costs is that of the Court. In any proceedings, Counsel acting for a Regulator would be able to address the Court and argue that costs should not be awarded.

3. Recommendation

It is recommended that Council adopt the following position:

i) that in cases where a Section 29 referral is upheld, CHRE should not seek to fetter its discretion but should consider, on a case by case basis, whether or not to seek costs.

ii) that in cases where the Regulator has from an early stage not contested the referral, CHRE should not seek to claim its costs.

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Council for Healthcare Regulatory Excellence

Claiming costs in "successful" CHRE appeals under Section 29

Our legal advice suggests that where the practitioner and/or the regulator opposed the successful appeal, the principle the Court will generally apply is that the unsuccessful party (or parties if both the registrant and regulator oppose the appeal) will be ordered to pay the costs of the successful party.

Where both the regulator and the registrant do not oppose the appeal, the general rule is that there is no order as to costs and each party will remain responsible for its own costs. In certain circumstances, however, the Court may exercise its discretion in a different manner and may be willing to award costs against the regulator even if they do not oppose the appeal. In all circumstances the Court has a wide discretion regarding what costs order it may make, taking into account the conduct of the parties.

There are undoubtedly strong arguments in favour of the approach that CHRE should seek its costs in relation to an appeal from the regulator, even if the regulator does not oppose or even supports the appeal. These would include that CHRE has had to make the appeal because a relevant committee of the regulatory body has failed to deal with the case properly and that the profession rather than the public purse should pay for this to be put right.

It is suggested, however, that we should maintain some flexibility and that we should not have a formal fixed policy for the following reasons:

i) the need for decisions relating to costs to be flexible to take into account the circumstances of each case;

ii) the fact that any such policy will not command the respect of the Courts; and

iii) the risk that such a policy might be unlawful on grounds that we would be fettering CHRE's discretion.

In this argument it follows we should retain flexibility so that any request for costs is made only in appropriate circumstances. If we have a policy to seek the costs of an appeal in every case, even when unopposed, this might result in the regulators opposing more appeals. If so the policy might even be counter-productive in financial terms in the long term. We would also lose the negotiating tool of being able to threaten to seek costs or agree to forbear from seeking costs (as the facts dictate) as a lever for achieving appropriate compromises of litigation whenever desirable. A fixed policy of always seeking costs could also increase the number of registrants who oppose, as they might perceive this as strengthening their opposition.

The Court has a wide discretion as to how it decides what costs order to make. Any application for costs, in inappropriate cases, because of a fixed CHRE policy may not be viewed favourably by the Courts. We would risk losing the goodwill CHRE has created and, in

Counsel's terms, would not command the respect of the Court.

An inflexible policy relating to costs would also result in more disputes solely concerning the issue of costs. In some circumstances, this may result in the substantive appeal being settled with Court time being taken up (with the associated cost) purely on the issue of costs.

The risk with adopting a policy of seeking costs, in every case, regardless of the regulator's position, is that the Court will take into account the circumstances of each case when deciding to grant such an order and will refuse to make such an order if it is not appropriate. This will result in jurisprudence where CHRE has sought its costs from the regulator and the Court refused.

On the other hand, if CHRE applies to recover its costs only where the circumstances are appropriate, it is more likely to be successful in establishing the precedent that in the right cases it can receive its costs in unopposed hearings.

It might help if I were to outline some possible scenarios and what we understand to be the Courts likely approach.

Scenario 1
The Regulator acknowledges from the outset the Committee's decision was wrong and actively supports CHRE's appeal. The registrant agrees to a remittal and the Court sanctions this.

The general position is that the Court will make no order as to costs. However, the Court may exercise its discretion to award costs in appropriate cases. For example, this might be where CHRE would incur irrecoverable expense in asserting its rights as a result of an error by a Committee.

Scenario 2
As scenario 1 except the registrant opposes the appeal all the way to a hearing.

The general rule is that the unsuccessful party (i.e. the registrant) would pay the costs of the successful party (CHRE). CHRE might find it difficult to obtain a costs order against the regulator unless the conduct of the regulator merited it. The registrant may also have to pay the regulator's costs.

Scenario 3
The Regulator does not support CHRE's appeal from the outset; instead an opposing skeleton argument is served. The registrant also opposes the appeal. At some stage during the period before the hearing, the regulator withdraws its opposition and actively supports the appeal (or is neutral). The possibility of a costs order arises either (a) because the registrant agrees to a remittal and this has to be approved by the Court or (b) the registrant fights the case to a full hearing and loses.

Again, the general rule is that the unsuccessful party (i.e. the registrant) would pay the costs of the successful party (CHRE). However, the conduct of the regulator in initially opposing the appeal would be taken into account by the Court. Accordingly, the Court might make a costs

order against the regulator for some or all of the costs incurred by CHRE as a result of the regulator's initial opposition. CHRE might weigh up a number of factors in deciding whether to seek these costs from the regulator.

Scenario 4
The regulator and registrant actively oppose the appeal up to losing at a Court hearing.

CHRE would have grounds for asking for all its costs to be met but in most cases would not have to say how these should be divided between the regulator and the registrant. It would then be for the Court to decide how to apportion those costs between the respondents based on the conduct of the parties and the arguments they make on costs.

Scenario 5
The regulator remains neutral throughout the appeal, neither opposing it nor accepting that the decision made by its Committee is wrong. The costs order arises because the registrant agrees the case should be remitted to the Committee.

If the case is remitted, the general rule is that the Court will make no order as to costs. Again, the Court has the discretion to vary this general principle if it deems it appropriate, and therefore CHRE may have arguments in appropriate circumstances to seek a costs order against the regulator. This also illustrates the basis for why it appears preferable for CHRE to retain the flexibility to assess in each individual case what is the appropriate approach to whether or not to seek costs (either in whole or in part).

CHRE
24 January 2004