Civil Liability Act report on savings provision: consultation on implementing regulations

A Response by

The Chartered Institute of Legal Executives (CILEx)

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1. Summary of Recommendations

1.1. Insurance sector leaders are already trying to make fools of the Government by saying that savings from the Civil Liability Act are already being passed on to consumers before the reforms have even been implemented. The reported drop in premiums since the Act's passing only shows that the reforms were unnecessary in the first place. (Para 3.1 – 3.3)

1.2. Nonetheless, the Government must satisfy itself that any savings achieved once the reforms are implemented are passed on in full to the consumer. For the Government to achieve its stated intentions, the resulting savings must be those achieved after implementation, and for a direct causal link to be drawn between the Act's implemented reforms and reductions in premiums then, independent of other factors. (Para 3.4)

1.3. If some insurers are to avoid the requirement to report their data, this should be determined by a rigorous methodology, and not an arbitrary threshold of how many policies they sell. Every effort should be made to ensure that insurers, particularly larger insurers, are not able to escape reporting requirements because of a technicality. (Para 4.1 – 4.3)

1.4. Rather than requesting that insurers opt-in to reporting their data, without defining the punitive measures for failure to do so, we would recommend that insurers can only forgo the requirements if they can provide sufficient evidence that they do not fall within whatever thresholds are ultimately determined. (Para 5.1 – 5.4)

1.5. The public would rightly expect the analysis to be based on complete data sets for premiums and settlements, and not on what insurers report as their averages alone. Furthermore, the average for all settlement values either above and below £100,000 are not specific enough to be used as reliable indicators for how the personal injury discount rate (PIDR) or the new whiplash tariff are operating as the Government are suggesting. (Para 6.1 – 6.2)

1.6. Further data should be required from insurers to be able to meaningfully assess the implementation of the Act, particularly insurers' legal costs and whether these will fall in line with the loss of legal support for injured persons. (Para 6.3)

1.7. The success of the Government's reforms will be determined by whether a direct causal link can be drawn between the implemented reforms and reductions in premiums, independent of other factors. We would therefore welcome a commitment that HM Treasury (HMT) will make use of independent economic analysis to determine if this link can be reliably asserted, in addition to the counterfactual information insurers will supply. (Para 7.1)

1.8. Insurers who were in operation and providing third party personal injury cover in the lead up to the implementation of the reforms should be mandated to provide relevant information to enable HMT to make a more informed assessment of the impact of the reforms.

2. Introduction

2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. This includes more than 3,700 members of all grades who work for both claimants and defendants in personal injury work.

2.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to contribute to policy and law reform.

2.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

3. General Points

3.1. The Government has good reason to be sceptical of the way the insurance industry reports their figures. The Association of British Insurers have recently stated that; *"Although the personal injury reforms within (the Civil Liability Act) do not come into effect until 2020 and the revised discount rate may not apply until August 2019, the effects are already being felt by customers. The industry has promised that any cost savings for insurers as a result of the Act will be passed on to consumers. The signs are that this is already happening - after reaching a peak of £496 in the final quarter of 2017, motor premiums fell £24 through the first three quarters of 2018."*[1]

3.2. If insurers are claiming that the reforms included in the Civil Liability Act are having an effect before they have come into force, to the extent that two-thirds of the suggested savings have already been passed onto the consumer (£24 representing 68.6% of the promised £35 savings), this would confirm what has long been asserted by CILEx and others; that the reforms were mostly unnecessary to begin with.

3.3. We are more concerned though that this narrative may be used to justify not passing on the full savings insurers make following the implementation of the Government's reforms. This would be to make a mockery of the promises the Government made during the Act's passage through Parliament.

3.4. For the Government to achieve its stated intentions, the resulting savings must be those achieved after implementation, and for a direct causal link to be drawn between the Act's implemented reforms and reductions in premiums, independent of other factors. We are not convinced that the proposals contained within this consultation will mean this can be evaluated with confidence.

4. Question 1: Do you agree with the overall approach of providing a minimum threshold in order to limit the number of firms ultimately in scope? Question 2: Do you agree that relevant policies sold is an appropriate metric? Question 3: Do you agree that 10,000 relevant policies sold is an appropriate limit? If not, is there a figure you think would be appropriate?

4.1. We recognise that it may be more burdensome for some of the smallest insurers to provide this information, but given the total package of proposed restrictions we would recommend any threshold is applied on the basis of a more rigorous methodology than simply an arbitrary figure or relevant policies sold.

4.2. Without a rationale behind setting the threshold it is difficult to determine if this approach is correct, and the opacity of insurer data makes it difficult for us to determine if a substantive part of the market, or indeed a particular group of consumers or policy-types, would be under-sampled if the proposed threshold were applied.

4.3. In lieu of a more robust methodology, the Government could use more than one criterion to ensure the right insurers are guaranteed to fall within the exercise. This could be a combination of; a threshold based on turnover to ensure that all but the smallest insurers who may struggle with providing this information would do so even if the number of relevant policies they provide was currently low, and; a threshold based

[1] Association of British Insurers; 'UK Insurance and Long Term Savings – The State of the Market report 2019.' Published 27 February 2019 https://www.abi.org.uk/globalassets/files/publications/public/data/abi_bro6778_state_of_market_2019_web.pdf

on number of relevant policies sold. If either threshold is exceeded then the insurer would need to report their data.

5. **Question 4: Do you agree with the approach taken to allow firms to self-determine whether they meet the conditions to be in scope of the reporting requirements, and to declare to the FCA which report years they are in scope?**
   Question 5: Do you agree that the SI in Annex A achieves the aim of exempting insurers who fall below the limit from the reporting requirement, except providing confirmation to this effect to the FCA?

5.1. We would recommend that insurers should automatically be considered in scope unless they declare to the Financial Conduct Authority (FCA) that they fall out of scope. In doing so they should provide evidence that they have not met any thresholds set.

5.2. This would have the benefit of capturing insurers who, for whatever reason, do not declare to the FCA, and would reduce the need for punitive measures for those who should declare but fail to do so.

5.3. If the Government wishes to proceed with self-determination, then the FCA should be transparent from the outset on what punitive measures will be applied for insurers who fail to declare, in accordance with their newly issued approach to enforcement.[2]

5.4. The SI should be amended in line with the above proposals.

6. **Question 6: Do you agree with the overall approach to requiring information from insurers?**
   Question 7: Do you agree with the approach to require totals to be separated with respect to settlement value? If so, is a settlement value of £100,000 appropriate?
   Question 8: Does the SI in Annex A achieve the aim of requiring information that will enable the Treasury and the FCA to make a reasoned assessment of whether benefits arising from the act have been passed on to consumers?

6.1. We are concerned that restricting the information to average, or mean, information only will significantly limit the FCA's ability to assess trends and advise HM Treasury appropriately. This information is being gathered and stored digitally by providers, and so we see no reason why the details of individual settlements and premium fees of relevant policies should not be provided in full, absent of any individual's personal data. This will enable the FCA to stratify their analysis as appropriate, rather than pre-determining how this should be stratified.

6.1.1. In particular, we are concerned that expecting settlement value means for two aggregated bands of settlement values (below and above £100,000) will serve as a proxy measure for PIDR and whiplash tariff reforms risks the illusion of more detailed data analysis, when these are in reality a poor proxy for what the Government is seeking to evaluate. The more granular the data, the better this can be assessed in a meaningful way.

6.1.2. If the Government insist on only requiring mean data, then this should be as granular as possible to maximise the opportunity for analysis, such as providing

[2] Financial Conduct Authority; 'FCA Mission: Approach to Enforcement' Published 24 April 2019. https://www.fca.org.uk/publication/corporate/our-approach-enforcement-final-report-feedback-statement.pdf

means for all settlement values that fall within bands set at the proposed new tariff levels, and every £1,000 interval thereafter.

6.2. We would recommend that once the threshold has been passed then data should be provided for all subsequent years. We acknowledge the principle that it would be unfair for smaller firms who fall below whatever threshold is set from the outset to be expected to complete the data collection and analysis, which may require new administrative systems. However, if a firm is above the threshold at one point, and subsequently falls below it during the reporting window, they would already have the mechanisms and administration in place that should enable relatively straightforward data collection and processing.

6.3. One of the central points of contention around the passage of the Civil Liability Act was that unrepresented injured persons would now need to go up against lawyer-represented insurers without legal assistance. It would therefore be appropriate for the regulations to require insurers to disclose their spending on legal costs in defending claims, both for instructions of external lawyers and in-house legal costs. This would allow for assessment of any corresponding falls in legal costs for defending claims compared with those for bringing them.

6.4. The SI should be amended in line with the above proposals.

7. Question 9: Do you agree with the approach to calculating counterfactual information? If not, do you have a view on how counterfactual information could be calculated?
Question 10: Does the SI in Annex A achieve the aim of requiring counterfactual information that is consistently calculated according to a uniformly-applied methodology? If not, what factors do you think should be taken into account to ensure a more consistent calculation of this data?

7.1. We broadly agree with the proposed approach for insurers to take when calculating counterfactual information. We would nonetheless welcome an explicit commitment that HMT will utilise independent economic analysis to determine if counterfactual information has been fairly calculated, and that a direct causal link can be drawn between the Act's implemented reforms and reductions in premiums, independent of other factors.

8. Question 11: Do you agree with the proposed approach to enable firms to provide additional information if they choose?
Question 12: Does the SI in Annex A meet the aim of allowing firms to include this information if they choose?
Question 13: Do you agree with the proposed approach to requiring insurers to disclose information about intermediary costs and fees, and information about reinsurance premiums?

8.1. We agree that nothing should prevent insurers from supplying additional information that will assist the FCA/HMT in assessing the impact of the reforms. Nonetheless, if the data is readily available and one would reasonably expect it to be supplied, then it should be required to be reported along with other mandated information/data, such as with intermediary and reinsurance information.

8.1.1. We particularly feel this should be the case for information from the two preceding years ahead of implementation (from 1 April 2018 and 1 April 2019) where the relevant insurer was in operation and at the time exceeded whatever thresholds are set.

8.2. As stated above (para 7.1) we expect that the Government will want to assure itself of the reliability of data used to determine counterfactual information through rigorous independent analysis.

8.3. The SI should be amended in line with the above proposals.

9. Question 14: Do you agree that the 1 November 2023 is sufficient time to collect information and provide to FCA?

9.1. We would propose that data is supplied annually and in a prescribed manner to facilitate comparison and tracking. A single submission date for multiple data sets runs the risk of magnifying any errors in data reporting that would otherwise be ameliorated through having it collected on a regular basis.

For further details

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