

A RESPONSE BY
THE CHARTERED INSTITUTE OF LEGAL
EXECUTIVES

Extension of the RTA Scheme: Proposals on
Fixed Recoverable Costs

January 2013

1. This response represents the views of the Chartered Institute of Legal Executives (CILEx) an Approved Regulator under the Legal Services Act 2007.
2. CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of its members, the profession as a whole and the public interest. Given the role played by Chartered Legal Executives, CILEx considers itself well placed to inform policy and law reform discourse relating to justice issues.
3. As it contributes to policy and law reform, CILEx endeavours to ensure adequate regard is given to human rights and equality considerations and to ensure justice is accessible to those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness within Government and advocate for reform.
4. This consultation response follows a working group meeting comprising of Council Members specialising in personal injury cases, together with a call for evidence issued to members. This submission has drawn heavily on the day to day experience of our members and this is reflected in this response, where appropriate, by anonymised verbatim comments from practitioners who responded to our call to evidence.
5. We welcome the recent announcement by the Ministry of Justice (MoJ) that the implementation date of the extended road traffic accident (RTA) claims process is to be reconsidered by the Secretary of State for Justice. CILEx now looks forward to working with the MoJ, alongside other stakeholders, in ensuring the setting up of a realistic timescale for implementation. The transition process is critical and if pushed through without full consideration of the impact on firms, consumer provision will be undermined with long term harm to consumers.

General Comments

6. CILEx has real concerns about the impact the proposed fixed recoverable costs will have on access to justice for the consumers of legal services.

The concern is fourfold:

- Consumers will not have access to independent legal advice (this concern is amplified below);
- The proposals are a detriment to consumers who are some of the biggest losers as a result of the proposals and stand to be in an even worse position if there is no acceptance of the need to properly reflect their interest in the consultation process;
- The changes will create an inequality of bargaining power between the consumer and defendant insurer (thereby compounding the detrimental impact on the consumer); and
- The proposals will see a rise in self-represented litigants creating equality of arms issues.

7. The proposed changes, if not handled sensitively, with care and having regard to the abundance of practitioner evidence available highlighting the consumer detriment, will cause irreparable harm to access to justice issues arising from low level personal injury cases falling within the remit of the Portal.

8. There is no evidence that the costs are too high. The current fixed costs regime was developed through protracted negotiation with relevant representative bodies. The current proposals do not have the benefit of this two way process. Further cost erosion will inevitably result in a reduction in the quality of service provision, quality of case handlers and potentially result in a reduction in claimant damages.

9. There has been no impact assessment of the proposed fixed recoverable fees. As a result, there is a lack of transparency over how the proposed

figures have been calculated. This has been compounded by the lack of any real and meaningful consultation with the professions.

10. Consideration should be given to the geographical diversity of firms running Road Traffic Accident, Employers' Liability and Public Liability cases. There is a danger that big businesses will succeed at the expense of smaller firms, damaging access to justice and choice for the consumer. The proposed reduction in costs is likely to put small firms out of business.

Consumer Detriment

11. Consumers will be some of the biggest losers as a result of the proposed changes to fixed recoverable costs and stand to be in an even worse position if there is no acceptance of the need properly to reflect their interest in the process.

12. CILEx does not object in principle to changes which speed up and improve the civil justice system for the benefit of consumers. However, access to justice will be seriously affected by these proposals. It will simply not be economical for many lawyers to deal with these cases and the consumer will lose out by not having access to independent legal advice (which will be compounded by an increase in third party capture). Relatedly, there will be an increase in self-represented litigants and an increase in court time and resource implications.

13. For example, typical practitioner verbatim comments included:

"This price squeeze of the RTA fees will undoubtedly prevent access to justice by preventing independent solicitors from acting for Claimant's without making a loss.

This inevitably will result in insurers controlling the entire civil justice system for injury claimants without any guarantee that premiums will go down. In fact, I have been led to believe that

premiums have been increased due to insurers' losses on the stock market and not increased claims?"

14. Another practitioner commented:

"One thing stands out to me which I do not think has been considered by the government is the access to justice for claimants as they would not be able to log onto or have access to any of the portals to be able to be litigant in person even if they wanted to run their own claim and therefore that is restricting their access to justice, as is really the case now for RTA's although I think there is a lot more third party capture going on; there certainly are more pre-med offers being put forward since April 2010"

15. Similarly, other verbatim comments from members were as follows:

"Access to Justice will be seriously affected by these proposals. It will simply not be economic for many lawyers to deal with these cases and the public, who at the moment I suspect have not realised the importance of these changes, will lose out. I have no objection in principle to fixed fees, but they must be based on proper research into the actual cost of bringing a claim"

"The proposed slashing of fees is the death knell for claimants who will be doubtless forced into the hands of the insurers to pick up the scraps of what the insurers deem to be a reasonable settlement. The Public will be left unrepresented and with no voice at all"

16. In order to provide true access to justice, the consumer must have access to professional and independent legal advice. If costs are driven down further, legal representation for the accident victim will be inadequate, in an industry where there is such a clear need for independence and representation. This may also increase the unpalatable practice exemplified with third party capture as evidenced above.

Setting Costs

17. There is no evidence that the costs are too high.
18. The current costs regime was developed through careful and protracted negotiation in collaboration with relevant stakeholders, including claimant groups and insurers. There was stakeholder consensus in the implementing of these costs. However, the current proposals set out in the consultation are lacking in stakeholder involvement, openness and transparency.
19. The fixed recoverable costs that were introduced for the standard personal injury portal in October 2003 have not increased since. Further, the current RTA scheme has only been in operation since April 2010 and the fixed fees were effectively reduced by up to 50%. However, there has been 'no reduction in insurance premia to reflect the saving achieved since the introduction of the low value personal injury protocol'¹. Allegations that costs are too high are largely dictated by the insurance industry. In any event, the scheme is still in its infancy² and needs further time to bed in to assess its effectiveness.
20. If, indeed, the current scheme places an excessive costs burden on the defendant insurer, the evidence suggests that this is the insurance industry's own doing. For example, in the report of the Senior Court Costs Office (SCCO), the Cost Masters *Campbell, Haworth and Leonard* made the point that they had dealt with many bills in which the costs had been significantly, but avoidably, increased by the conduct of the defendants. The costs judges collectively said:

"In some cases the litigation is conducted with hostility, thereby requiring claimants to address each and every point. In others, defendants delay thereby causing unnecessary additional costs. In

¹ RTA Portal costs: a tale of dishonesty; Learmonth, A., The Law Society Gazette 07 December 2012.

² Pointless portals; Regan, D., New Law Journal, 31 May 2012.

others still, settlements are left until the last minute thereby often triggering the third stage of a three-stage success fee (always 100%) whereas had the defendants opened the negotiations earlier, the figure would have been significantly less.”³

21. It is also important to note that an insurer has no duty to a victim, only shareholders. A lawyer’s primary duty is to the client. The fact is that there is no objective evidence indicating that the costs are too high. Indeed, one practitioner made the comment:

“I was dismayed when the portal costs were set at £1200.00 plus vat. With inflation this figure should have been £3000.00 plus vat. Two years on we have now been advised the proposed figure is £500.00 plus vat”

Legal firms will not be able to take cases at the fee level proposed. This will be compounded by the increase in complexity with cases valued up to £25,000.

Transparency

22. The absence of reliable data does not inspire any confidence as to how the proposed fixed costs, as set out in the consultation, were reached or if data relating to the processing of each claim has indeed been looked at or considered.

23. For example, it has been estimated by the Association of Personal Injury Lawyers (APIL) that the average time taken to resolve a low value RTA case varies between 6 to 14 hours depending on the complexity and speed of offer from the insurer⁴.

³ <http://www.lawgazette.co.uk/opinion/comment/rta-portal-costs-a-tale-dishonesty>

⁴ <http://files.apil.org.uk/pdf/ConsultationDocuments/2384.pdf>

24. Application of the proposed fees system as set out in the consultation would mean firms would receive as little as £36 per hour for such work. This is simply not economically viable for firms who will also have to bear their own marketing/advertising costs (see below). There is a danger that some firms will simply stop doing the work which will mean that accident victims will not have ready access to independent advice in respect of their rights.

25. Practitioner evidence also supports the lack of data and transparency in the process: For example, verbatim practitioner evidence was as follows:

“There is no evidence of how the government have calculated the fees reduction although I am certain they will mean such work cannot be carried out properly or at all. This will inevitably stop people making claims or at the very least refer them to an insurer backed and non-independent panel lawyer purchased under an insurer bought-ABS who will be the only type of firm able to do this work.”

“No Impact assessment has been considered if these changes were implemented”.

26. Practitioner feedback also suggests that costs to firms in terms of marketing and advertising will be substantial and will cause considerable burden to firms. For example, the following comments were made:

“Out of £500.00 a firm has to pay a salary, overheads, stationery, marketing, PPI insurance etc. An advertisement in our local free newspaper (for a very small ad) is £3600.00 plus vat for 12 weeks.

The insurance industry argument is that claimant solicitors have paid £700.00 plus vat for files in the last few years to Accident Management Companies whether this is correct for some companies it is not our company's practice however if this argument is believed are national and local newspaper firms going to give us free advertising space?

The result of these reforms will be most experienced solicitors and legal executives will lose their jobs and the money saved by insurance firms will not be passed on to their policyholders but be added to the burgeoning record profits the insurance companies make year on year”

27. Similarly, another practitioner commented:

“The basis for the reduction is on the basis that Solicitors can’t pay referral fees but this basis is fundamentally flawed. Referral fees are a form of marketing. Marketing is a business expense and not a case by case expense. All businesses, legal and otherwise, incur marketing expenses.

Just because referral fees are being banned doesn’t mean that firms will not incur marketing costs in other forms”

28. Another comment was:

“The new structure does not even cover the cost of running the straight forward cases”.

29. As mentioned elsewhere, the current fixed fees were agreed following extensive stakeholder involvement. They were developed with costs being fixed according to the appropriate level of fee earner and the time spent completing each element of the process. That time was then cross referenced with guideline hourly rates and a blended hourly rate applied to reflect the rates applicable at that time. There was no reference made to referral fees or marketing costs during the negotiation period. It would be manifestly unfair to take into account their abolition in the reduction to the fixed recoverable costs.

30. Importantly, not all claimant lawyers pursuing RTA claims on behalf of injured people pay referral fees. For example, from the Legal Services Consumer Panel research, less than half of all PI lawyers pay referral

fees⁵. As mentioned above, the fees were fixed at an appropriate level for the work involved and to ensure that there was no shortfall in costs to be recovered from the claimant. A proper evaluation is urgently required, together with a full impact assessment in order to avoid long term consumer detriment.

31. CILEx acknowledges that improvements can be made to the current system. It is understandable that the Government has to analyse ways of improving and speeding up the civil justice system for the benefit of all parties. However, there are important principles at stake which must be preserved, specifically access to justice, and proper compensation to accident victims. The consumer detriment of the proposed changes is very real and the Government appears to have paid scant regard to the impact the proposals will have on access to justice for the accident victim. We urge the Government to reflect, rethink and re-evaluate.

⁵ The Legal Services Consumer Panel, Referral arrangements, May 2010, page 13.