Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims

A submission by
The Chartered Institute of Legal Executives

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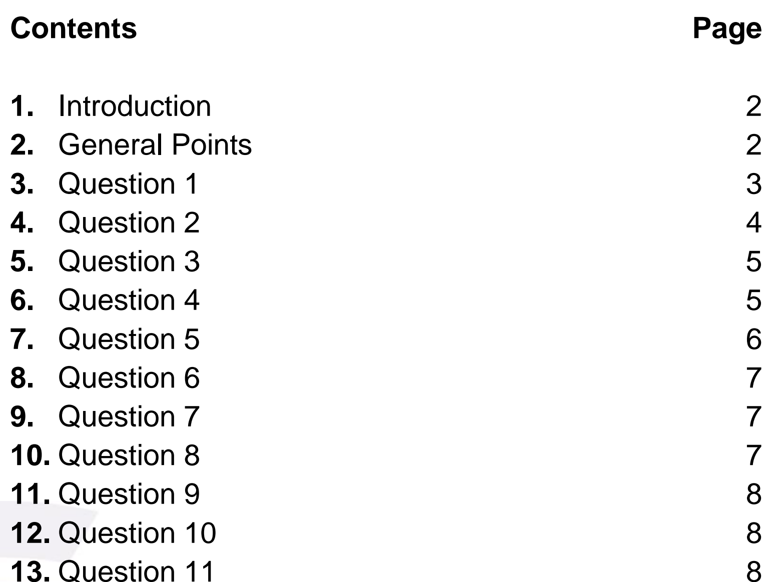

Contents	**Page**
1. Introduction	2
2. General Points	2
3. Question 1	3
4. Question 2	4
5. Question 3	5
6. Question 4	5
7. Question 5	6
8. Question 6	7
9. Question 7	7
10. Question 8	7
11. Question 9	8
12. Question 10	8
13. Question 11	8

1. Introduction

1.1. 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:

   1.1.1. Approximately 7,500 fully qualified Chartered Legal Executive lawyers.

   1.1.2. Approximately 3,700 members of all grades who work in personal injury, for both claimants and defendants.

1.2. 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 inform policy and law reform.

1.3. 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.

2. General points

2.1. CILEx is very concerned over the Government's plans to implement a Fixed Recoverable Costs (FRC) scheme in cases of clinical negligence where damages are under £25,000.

2.2. We believe that the consultation not only lacks suitable evidence in key areas of intended reform, but it is likely that the Government's efforts to save costs and subsequently improve front-line healthcare services will prove unsuccessful.

2.3. An FRC scheme, like the one proposed in this consultation, will likely limit the ability for individuals to access justice.

2.4. Access to Justice is a principle that should be prioritised, and FRC schemes such as this will almost certainly prevent those who have been seriously harmed as a result of clinical negligence from seeking justice.

2.5. As a result, individuals who are affected by clinical negligence may never receive reparations from those at fault.

2.6. This will subsequently have a knock on impact on the Government's aims of improving patient safety.

2.7. Currently, access to justice in cases of clinical negligence ensures that individuals have the ability to point out mistakes their healthcare providers have made. This acts as a safeguard for healthcare providers in England and Wales since they are able to learn from their mistakes and act accordingly in order to ensure the same mistakes are not made again.

2.8. Limiting access to justice by implementing a FRC scheme may subsequently result in healthcare providers not being made aware of their mistakes, and as a result the same mistakes are more likely to occur in the future.

2.9. CILEx is also concerned that the Government has not taken previous reforms into full account, and as a result the proposals put forward are not only based

in very little evidence, but they are in danger of rendering previous reforms obsolete.

2.10. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 bought a number of changes to the way in which clinical negligence claims are carried out in an effort to reduce the burden healthcare providers' face when compensating victims for damages and legal costs.

2.11. These changes have only been in use for a short time. As a result, much of the evidence provided by the Government in this consultation is still largely based on the results of cases that have been settled using pre-LASPO procedures.

2.12. Therefore, we believe that the additional efforts proposed in this consultation that have been based upon this inaccurate evidence will prove to be too-much, too-soon, since the real impact of previous reforms has not been fully understood or analysed.

2.13. We therefore ask the Government to delay the implementation of a FRC scheme in order to fully assess the impact of previous reforms.

3. Question 1: Do you agree that FRC for lower value clinical negligence claims should be introduced on a mandatory basis? If you prefer a voluntary scheme instead, please explain how this would fulfil the same policy objectives as a mandatory scheme

3.1. CILEx does not agree that FRCs for lower value clinical negligence should be introduced on a mandatory basis, and is inappropriate considering that clinical negligence claims, including those that are of lower value, can often be highly complex and require a significant amount of time and resources in order to carry out the litigation procedures.

3.2. It is not always within the powers of litigators to reduce or minimise these factors. It is therefore far from guaranteed that introducing fixed costs would necessarily lead to more streamlined litigation.

3.3. We therefore believe that the introduction of a broad and mandatory FRC model would be highly unsuitable as it would fail to take into account the complex nature of clinical negligence claims, and could unfairly punish the claimants in lower value clinical negligence cases as a result of a significant depreciation in the legal costs they will be able to reclaim.

3.4. We believe that this would likely result in claimants being deprived from accessing justice and receiving the compensation they deserve.

3.5. A reduction in claims lessens one of the incentives to improving standards for patients. Legitimate claims, regardless of their size or complexity, highlight incidents where healthcare providers have fallen short, and without which such incidents may go unnoticed and unchallenged. Therefore we are concerned that the FRC model may directly conflict with the consultation's aims of delivering improved frontline care.

3.6. We are also concerned that these reforms are being considered prematurely. Previous reforms, including the changes made to Civil Procedure Rules (1998) and the LASPO reforms, have only worked in combination since 1 April 2013. This is not nearly enough time to suitably assess the impact of previous reforms, and cases prior to this date will have been included in the evidence used to inform the proposals.[1]

3.7. As a result, more research and evidence is necessary before further reforms are introduced.

3.8. In the event that the Government chooses to proceed with introducing a scheme, CILEx believes that complex cases should be exempt from the FRC scheme in order to avoid issues associated with access to justice highlighted previously.

3.9. The scheme could instead be considered for non-complex, low value clinical negligence cases in which the claim is relatively straight-forward.

3.10. We believe that a FRC scheme should work alongside the reforms introduced in the LASPO Act that provided judges and parties with provisions to consider what would constitute a reasonable and proportionate cost to be given to the claimant when claiming back legal costs, and could protect access to justice which is paramount.

4. Question 2: Do you agree that FRC should apply in clinical negligence claims:

Option A: above £1,000 and below £25,000 (preferred)
Option B: another proposal

4.1. Clinical negligence cases are more often than not highly complex and claimants can require additional legal support as a result when compared to other areas of litigation. Applying FRCs to complex legal cases is entirely unsuitable and inappropriate.

4.2. Even when one considers cases under £25,000 in value, the variety of complexities from case-to-case are highly significant, and claims for just £1,000 can prove to be more complex and time consuming when compared to other cases within the bracket preferred by the consultation.

4.3. As a result, if FRCs were to be introduced, we believe it should be applied to cases based on a measure of their complexity, and not the cost of damages the claimant is seeking.

[1] As highlighted by The Law Society, of the cases included in the NHSLA's 2015/16 accounts, less the 20% of cases closed in those years fell within the regime introduced in April 2013 that altered Conditional Fee Agreements. This quite clearly demonstrates that the impact of previous reforms and the savings they were intended to provide were far from reflected in the NHSLA's 2015/16 accounts.

5. **Question 3: Which option for implementation do you agree with:**
   Option 1 - all cases in which the letter of claim is sent on or after the proposed implementation date
   Option 2 - all adverse incidents after the date of implementation
   Option 3 – Another proposal

5.1. If FRCs were to be implemented according to the Government's preferred option (Option 1), it risks creating an adverse incentive for potential litigants to rush their letter of claim in order to ensure their submission is made before the cut-off date.

5.2. This may lead to the submission of rushed and potentially sub-standard letters of claim.

5.3. An increased number of submissions of letters of claim will place significant strain on healthcare providers and the NHSLA in particular who, along with claimants will have to carry out the compulsory Pre-Action Protocols[2] which include up to four months of defendant investigation.

5.4. Following the completion of the Pre-Action Protocols, the courts of England and Wales will then likely suffer increased pressures as a result of an influx of clinical negligence claims which will require significant time and resources.

5.5. The legal costs associated with these claims and the delays that will inevitably ensue as a result of the rush of letters of claim will likely increase. Since these cases will fall outside of the remit of the FRC scheme, these costs will have to be compensated by defendants in cases where claimants are successful.

5.6. As a result, CILEx believes that Option 2 would be a more suitable method of implementation despite the concerns the consultation raises. We believe Option 1 could prove more problematic and may exacerbate the issues the Government's consultation hopes to tackle.

6. **Question 4: Looking at the approach (not the level of fixed recoverable costs), do you prefer:**
   Option 1: Staged Flat Fee Arrangement
   Option 2: Staged Flat Fee Arrangement plus % of damages awarded: do you agree with the percentage of damages?
   Option 3: Early Admission of Liability Arrangement: do you agree with the percentage of damages for early resolution?
   Option 4: Cost Analysis Approach: do you agree with the percentage of damages and/or the percentage for early resolution?
   Option 5: Another Proposal. Please explain why.

6.1. CILEx believes that options 1 through 3 that have been proposed are somewhat flawed in their attempts to provide an approach to the FRC

[2] Pre-Action Protocol can be found here: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd

scheme. As the consultation highlights, the legal costs used to inform these options were not only estimated, but were adjusted for a new streamlined approach.

6.2. It's quite clear that implementing Options 1, 2 or 3 will be the result of estimations, not evidence. Ensuring policies and reforms are based in evidence is vital to constructing effective public policy, and as a result we see these options as unsuitable since they do not have enough evidence to support their potential implementation.

6.3. Option 4 on the other hand is based on the evidence provided by Professor Fenn which uses current market costs, as opposed to estimates, to provide an approach for calculating FRC rates.

6.4. However, as mentioned previously, the current market costs are largely reflective of clinical negligence cases that do not make use of the new procedure rules introduced under the LASPO Act.

6.5. Since the cost analysis approach only takes into account about 20% of cases that are impacted by previous reforms, CILEx is concerned that the option provided by the consultation is fundamentally flawed and would be inappropriate to use as an approach for the FRC scheme.

6.6. Instead, we believe that before further reforms like the FRC scheme proposed by the Government can be introduced, more time and subsequently greater evidence is required concerning the impact of the LASPO reforms, in fear of rendering previous reforms somewhat outdated, and making the reforms proposed by the Government potentially unnecessary.

6.7. As a result of the evidence available and the options presented by the consultation, CILEx is asking the Government to take more time to consider the available options, and in particular, to wait until more evidence is readily available showing the impact of the LASPO reforms on clinical negligence cases.

7. Question 5: Do you agree that there should be a maximum cap of £1,200 applied to recoverable expert fees for both defendant and claimant lawyers?

7.1. We are concerned that no evidence at all has been presented that informs the setting of this figure, nor how it would be adjusted in line with inflation or other environmental changes. Other areas where fixed recoverable fees have been set for expert witnesses, such as when fees are paid by the Legal Aid Agency, have been the subject of detailed analysis and public consultation.

7.1.1. Such considerations include the difference for varying fields of expertise and geographic area, and often focus on fixed hourly fees,

rather than an overall cap, in recognition of the varying complexities of cases that expert evidence may be valuable for.[3]

7.2. The introduction of a FRC scheme for expert witnesses may place economic pressures that reduce the number, and potentially quality, of expert witnesses available to claimants and defendants. This could have serious implications on case outcomes.

7.3. If a cap were introduced however then it would only be right that it applied equally to both sides.

8. Question 6: Expert fees could be reduced and the parties assisted in establishing an agreed position on liability by the instruction of single joint experts on breach of duty, causation, condition and prognosis or all. Should there be a presumption of a single joint expert and, if so, how would this operate?

8.1. There can be a place for the use of single joint experts, particularly in cases of relatively low-complexity, and where both parties agree to their use.

8.2. Critically, the expert should be independently appointed rather than proposed by one side or the other. That being so, court-appointed joint experts can provide impartial assessment of the matters of the case, and it may therefore be necessary for a list to be created if one does not exist already.

8.3. In more complex cases, single joint experts may be less suitable, and consideration should also be made for how a joint expert can be challenged or replaced in circumstances of poor performance or partiality.

9. Question 7: Do you agree with the concept of an early exchange of evidence? If no, do you have any other ideas to encourage parties to come to an early conclusion about breach of duty and causation? Please explain why.

9.1. In principle, CILEx welcomes efforts to introduce a process for Early Exchange of Evidence in order to speed up clinical negligence procedures whilst providing greater transparency for both the claimant and the defendant.

9.2. However we feel the protocol could benefit from greater information on the process that would follow on from missing a deadline, particular as in clinical negligence cases evidence may be complex or dependent upon tests.

10. Question 8: Do you agree with the proposals in relation to:
Trial Costs

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420106/expert-witnesses-fees-guidance.pdf

Multiple Claimants
Exit Points
Technical Exemptions
Where the number of experts reasonably required by both sides on issues of breach and causation exceeds a total of two per party.
Child Fatalities
Interim Applications

10.1. We agree with the proposals put forward by the Government in these areas of the consultation. We would however appreciate being provided with greater clarity in regards to the procedures concerning multiple claimants and how FRCs would apply.

11. Question 9: Are there any further incentives or mechanisms that could be included in the Civil Procedure Rules or Pre-Action Protocol to encourage less adversarial behaviours on the part of all parties involved in lower value clinical negligence claims, for example use of an Alternative Dispute Resolution process (ADR)? This would include both defendant and the claimant lawyers, defence organisations including NHS LA, the professionals and/or the organisation involved.

11.1. We have no advice or evidence to propose in regards to this question.

12. Question 10: Please provide any further data or evidence that you think would assist consideration of the proposal, particularly for other than NHS provision. In particular, we are interested to gather data from private, not-for profit and mutual organisations delivering healthcare. Please identify your organisation in your response. We would be interested in hearing views on: the scale of expected savings if Fixed Recoverable Costs outlined is introduced; the expected growth in the number of claims received and settled over the next 10 years to help in modelling the impact of the proposals; any details on the number and size of legal firms involved in clinical negligence (primarily as claimant lawyers), any information on the likely administrative savings and set up costs due to introduction of Fixed Recoverable Costs. Please indicate whether your organisation would be willing to work with DH in providing more details on the impact for future IA analysis. This would be provided in confidence and anonymised in any future analysis.

12.1. We have no evidence to provide for the purpose of this consultation.

13. Question 11: Equalities, Health Inequalities and Families

13.1. There are risks associated with the introduction of FRCs that would unequivocally impact upon claimants who are the most vulnerable in society to a great degree, including the elderly and those with disabilities whose cases may be more complex and as a result challenging.

13.2. Those who are most vulnerable are more likely to need specialist legal advice in order to ensure they receive the compensation they deserve. However the introduction of a FRC scheme would limit their ability to do so since they may not be able to afford the costs of adequate legal advice.

13.3. Therefore CILEx believes that a FRC scheme risks limiting access to justice to the most vulnerable in society to a greater degree than the current system already in place.

For further details

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