



Department of Health and Social Care Consultation:

*Fixed recoverable costs in
lower value clinical negligence
claims*

A Response by CILEX (The Chartered Institute of Legal
Executives)

[April 2022]

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1. Introduction

- 1.1 CILEX (The Chartered Institute of Legal Executives) is one of the three main professional bodies covering the legal profession in England and Wales. The 20,000-strong membership is made up of CILEX Lawyers, paralegals and other legal professionals. Our members are judges, advocates, partners in law firms and specialist lawyers working across every aspect of the law.
- 1.2 As of March 2022, CILEX recorded that 1593 members identify as working within the 'Personal Injury' legal sector. This total equates to nearly 10 per cent of our total membership (8.68%). CILEX felt it important not only to respond but to ensure that the voice of our members was heard within our response. As such CILEX conducted quantitative and qualitative research with our members working in this sector. We will refer either by theme or direct member quotes to applicable areas of evidence submission.
- 1.3 CILEX previously responded to Government's 2017 consultation on *"Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims"*. CILEX expressed concerns for considerations regarding a fixed recoverable costs scheme for such an area. We previously felt that such a scheme would limit the public's access to justice, work against Government's desire to improve patient safety and limit meaningful learning exercises for healthcare providers in the wrong, which highlighted possible safeguarding issues.
 - 1.3.1 Additionally, CILEX was hesitant to agree to such proposals stating that the evidence base was lacking¹. More so that previous reforms had not been taken fully into account when designing the previous consultation and that data sets from The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 had not fully provided a well-rounded picture of clinical negligence claims after the Act had been instated.
- 1.4 Therefore, CILEX is responding on the principal points raised by our practitioners whilst considering our previous responses provided in 2017.

2 General Points

- 2.1 CILEX continues to support our original thinking from 2017 that an FRC scheme for lower value clinical negligence claims is not suitable
- 2.2 Standard and Light Track routes risk missing redress and justice for claimants due to evidence requirements. However, timeline of a standard track was seen as possible to resolve a lower value claim.
- 2.3 Template letters and expert report models offer industry standardisation but should not be onerous beyond current methods used.
- 2.4 Mandatory Neutral Evaluation offers a singular agreed position on liability but contains possibly unfair advantages as well as fee setting concerns.
- 2.5 Exclusions were welcomed by CILEX members however certain sanctions place claimants at a possible disadvantage.
- 2.6 Beyond impacts to protected characteristics, CILEX members indicate a worrying concern for claimants' access to justice and law firms' appetite to continue offering services within this sector.

¹ [CILEX consultation response Section 2 General Points](#)

3 Levels of Compensation

- 3.1 CILEX previously argued that due to the complex case-by-case nature of clinical negligence cases a FRC is not suitable.
- 3.2 CILEX continues to support the position that such measures are not suitable for this area of claims. Members' feedback noted that such boundaries penalised victims, which through no fault of their own had been involved in such a case of negligence.
- 3.3 Members echoed CILEX's previous response regarding the complexity of cases, acknowledging that even lower value claims can require a significant amount of resources, which can extend beyond the top claims value of £25,000.
 - 3.3.1 Additionally, to this point the upper limit of £25,000 indicates potentially serious injuries, which could have long term impact for the claimant that this scheme would not be created to support. One member showed concern regarding the top end of the bracket, indicating that firms may not be able to take on the work due to the possible severity of the claim².
- 3.4 CILEX was keen to understand if members supported our thinking during our response to the soft tissue injury whiplash reform (in which we argued that small claims limits should not be raised). Most agreed with our original stance however, those that indicated an interest in reviewing limits felt that such a task should be carried out annually.

4 FRC Standard and Light track

- 4.1 CILEX members hold mixed views towards the use of a standard track and light track claims route. Some feel that keeping it as a singular track would ensure processes were kept simple as well as mitigating against possible claimant/defendant attempts to either exaggerate or downplay events to be moved between what is seen as a two-tiered system.
- 4.2 General tentative agreement towards the time allotment for the standard track system of 44 weeks to resolve a lower value claim was demonstrated by members, with most stating that it was 'Possible' within this timeframe.
- 4.3 However, members either 'agreed' or 'strongly agreed' that an FRC for lower cost clinical negligence claims risked missing redress for claimants due to investigation requirements.
 - 4.3.1 Feedback noted how shorter claims processes/evidence submission could create a harder claims process due to a lack of evidence. Others argued that claims should be fully investigated to ensure defendants are not advantaged. The collation of evidence as well as thorough assessment was seen to possibly span multiple areas, which indicated a time-consuming effort on practitioners' behalf. A further risk arises with claims seen as non-profitable within the scope of a FRC, which may not therefore be investigated, leading to a disparity for claimants impacting their ability to seek redress and justice as well as for the NHS's to learn important care lessons.

² CILEX Member response: "The bracket should be £1,000 to £10,000 or £1,000 to £5,000. General damages of £25,000 in a clinical negligence claim would indicate a serious injury and this will mean firms won't be able to afford to take these cases on."

5 Introduction of template letters and expert report model elements

- 5.1 Both templated letters as well as expert report models are widely accepted by CILEX members as a positive step. Members indicated that such templates provided standardisation as well as time saved ³however, it was acknowledged that legal representatives are capable of structuring letters for their cases and that some will likely amend the structure of the letters provided.
- 5.2 CILEX asked respondents to our survey about the types of evidence collected by them for clinical negligence claims. Whilst these varied between each respondent certain elements such as medical reports and witness statements were routinely mentioned. As such CILEX feels relatively confident in the draft templates issued within the consultation. However, as mentioned above evidence collection for lower cost cases can be complex and resource intensive, and while CILEX appreciates the extensive list of requirements within the template, we also stress the importance of this not causing legal professionals to spend further time and resources beyond what they currently must.

6 Neutral Evaluations

- 6.1 CILEX recognised the benefit of a single joint expert in helping parties establish and agreed position on liability previously. Such services should remain independently appointed⁴.
- 6.2 A mandatory neutral evaluation stage including its framework and arrangements divides opinion among CILEX members. Members that agreed with the use of mandatory neutral evaluation in a FRC scheme for lower value clinical negligence claims felt that it would help “narrow issues”. Furthermore, those in favour mentioned that the mandatory measure would help ensure a “neutral objective” is reached by both claimant and defendant parties.
- 6.3 However, those in disagreement raised concerns over possible conflicts of neutrality, balance and costs⁵.
- 6.3.1 Members responding felt that claimants should not be responsible for payment of expert fees in cases where they are successful. Furthermore, it was noted that defendants should be responsible for covering this payment in most cases. Additionally, concern for such processes prohibiting a claimant’s rights to pursue a higher end settlement was expressed as well.
- 6.3.2 A key concern indicated by some respondents was the cost framework not reflecting the actual expenses claimed by barristers currently in practice.
- 6.4 Whilst CILEX continues to recognise the potential benefit of this scheme in helping to resolve claims, we also express that such mandatory mechanisms should be effective in case resolution as well as cost. Furthermore, CILEX is interested in understanding the select use of Barristers for the mandatory neutral evaluation position and why this role could not be fulfilled by experienced CILEX Practitioners within this field.

³ CILEX Member response: “It could save some preparation and reading time if all correspondence on both sides is standardised”

⁴ [CILEX consultation response Paragraphs 8.1 & 8.2](#)

⁵ CILEX Member response: “This adds extra fees - barristers are not usually necessary or involved in claims of this value at all, so most are not experts at valuing lower value claims. As with cost budgeting, it simply introduces an extra layer of costs.”

7 Exclusions & Sanctions

- 7.1 CILEX had not previously provided evidence regarding possible exclusions to an FRC scheme for lower value clinical negligence claims. In general, both CILEX and our responding members agreed that the exemplified claims excluded seemed fair. One member noted that suggested claim areas suitable for exemption would require significant further evidence, which was not suitable for an FRC scheme. Members also raised the following areas that would be appropriate for an FRC exemption:
- All claims where liability is denied by the defendant;
 - All Fatal Accident claims and;
 - Claims with more than one liability expert
- 7.2 Bolt-on fees for protected parties are welcomed by CILEX however, our members responding either 'agreed' or 'strongly agreed' that the fee provided should be higher than £650.
- 7.3 CILEX observed that most respondents were in favour of the sanctions proposed within the consultation. Those that did state concern towards the sanctions were predominantly focused on defendant investigation periods (particularly standard tracks 6 months), which were felt to be too long. Additionally, the sanctions surrounding evaluators quantum advice were seen to disadvantage the claimant and empower the defendant, which some respondents indicated as an unfair advantage.
- 7.4 In conclusion CILEX calls for such sanctions to be carefully tested to ensure that no particular party is given an advantage over the other. CILEX is mindful to ensure that claimants are able to access redress as well as justice for clinical negligence caused to them. Such schemes should not be designed to dissuade claimants through the use of potentially biased sanctions, especially those facing a possible wide ranged spectrum of changes to their life as an impact of another's negligence.

8 Impacts of the scheme

- 8.1 When discussing the possible impacts of an FRC scheme for lower value clinical negligence claims, CILEX looked both at protected characteristics under the Equality Act and broader implications. While there is a great degree of uncertainty regarding the extent of any impact on different sizes of law firms, it is widely accepted that any impact will be negative with the greatest burdens placed on smaller firms.
- 8.2 Most concerningly, members expressed the view that all claimants will be disadvantaged in pursuing a clinical negligence claim through a FRC scheme, directly impacting their access to justice.
- 8.2.1 This includes recognition that law firms' appetites⁶ to continue supporting restricted cost cases through such a scheme will be lessened, which results in a direct impact for claimants as well as possible employment impacts for the firms⁷.

⁶ CILEX Member response: "This will decrease access to justice because firms will be less willing to take on small clinical negligence claims as the recoverable fees are unlikely to cover those costs actually incurred. With Claimant's receiving lower damages, there is less scope to ask for contribution."

⁷ CILEX Member response: "It will impact vulnerable Claimants who will lose even more of their damages as a result of more government reforms, and potentially lead to redundancies in some firms for younger or less experienced fee earners who deal with this level of case"

8.3 Whilst CILEX and our members have not been able to make direct links previously and currently to possible impacts on those with protected characteristics, members were asked to reflect on existing FRC schemes and what issues they have witnessed with them.

8.3.1 Members note how a loss of appetite from firms towards lower value claims has limited individuals' access to existing schemes. Furthermore, this lack of appetite impacted not only a claimant's ability to access representation but also legal advice as well⁸. One member also noted how poor technology had made existing FRC schemes difficult to use and differed from the proposals previously put forward.

8.4 One member summarised their thoughts regarding the use of FRC in clinical negligence claims as follows:

"In summary, fixed recoverable costs are unnecessary in clinical negligence claims. Firms that specialise in this area are already well aware that if costs are disproportionate to damages, then they are unlikely to be recovered. By introducing a rigid way for these cases to be dealt with, instead of it being decided by a specialist lawyer on a case by case basis, cases will slow down, costs will increase, clients will become unhappy - the whole thing is just a recipe for disaster, that will ultimately reduce access to justice for the most vulnerable Claimants, and potentially cause redundancies of lower-paid junior fee earners."

9 Conclusion

9.1 CILEX expressed concern in our 2017 response to an initial consultation on introducing an FRC scheme for lower value clinical negligence claims. Both CILEX and our members appreciate that within the consultation certain considerations towards improving and empowering claimants' access to compensation are explored and considered. However, CILEX remains concerned as to the wider impacts on claimants, law firms and legal professionals through the introduction of such a scheme. Evidence presented by our members highlights the risks of fallings of justice as well as potentially dangerous disadvantages faced by those who have endured trauma due to clinical negligence. As such we advise Government to not continue with the implementation of a FRC for lower value clinical negligence claims.

For further details

Should you require any further information, please contact;

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and whose firms decide to further restrict what cases they take on."

⁸ CILEX Member response: "Claimants cannot access legal advice/representation due to the disproportionate costs able to be recovered compared to those incurred."