



**A RESPONSE BY
THE CHARTERED INSTITUTE OF LEGAL
EXECUTIVES**

**Extension of the RTA Scheme to include
employers' and public liability claims up to the
value of £25,000**

November 2012

1. This response represents the views of the Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the Legal Services Act 2007 (hereinafter “the 2007 Act”).
2. CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and in the public interest. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely 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. The submission follows consultation with CILEx members specialising in personal injury (PI) work and has drawn heavily on their day to day professional experience which is reflected in this submission.

General Comments

- The Government’s timescale is compromising the process. There is a feeling amongst practitioners of a hasty development which will undermine the scheme and consequently the draft Pre-Action Protocols;
- There is no guarantee in the letter dated 22 October 2012 to stakeholders that the underlying technology will be ready in time – which practitioners consider unlikely;

- Pre-Action Protocols without a fully functioning IT Portal will not deliver the objectives or efficiencies envisaged in the extended scheme;
- There should be a greater focus on improving the Portal's fall out rate in respect of the current eligible claims before pressing ahead with extension and the Draft Pre-Action Protocols;
- A full evaluation of the process which was promised in Professor Fenn's report has not been delivered;
- There is no fund of last resort in respect of Public Liability (PL) and Employers' Liability (EL) claims where the defendant is uninsured. We are not convinced the Employers' Liability Tracing Office will be fit for purpose to trace uninsured defendants in the same way as the Motor Insurance database (MID); and
- Any increase in the small claims limit will have an impact on portal cases.

Draft Pre- Action Protocols

- Protocols without a fully functioning IT Portal will not deliver the efficiency that the Ministry of Justice envisages;
- It is important that the court uses its case management's powers in a robust but fair way in order to make the Pre-Action Protocols workable;
- Subject to the proposed changes below, the Pre-Action Protocols are clear and easy to follow and the public liability and employers' liability cases largely mirror the Pre Action Protocol on Road Traffic Accident (RTA) cases;
- The burden on a litigant in person in paragraph 6.1 appears to be disproportionate and may bring out equality of arms issues;

- The staged fixed costs associated with both Protocols have not been specified and are excluded in the consultation.

The Consultation

5. The Civil Procedure Rule Committee (CPRC) has set out for consultation the Draft Pre-Action Protocols on the handling of low level RTA claims and low level EL and PL Claims. These seek to give effect, in formal procedure rules, to the Government's intended policy to extend the current RTA claims to EL and PL claims up to £25,000.
6. The two Pre-Action Draft Protocols consist of an adapted version of the existing RTA protocol and a new combined protocol applying to EL and PL claims. CILEx expresses concern about the time period for tendering consultation submissions. We understand this was in view of the proposed implementation of the extension of the scheme in April 2013. This will also coincide with the implementation of Lord Justice Jackson's package of cost reforms, much of which are contained in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Time Scale

7. The Government time scale for April 2013 implementation of the reforms will compromise the process. It does not allow for sufficient time for development of the required IT system and inadequate build and testing time for the scheme to successfully work in the interest of claimants and all relevant parties. CILEx is concerned that not only will this rushed implementation undermine the objectives of the scheme, but the carefully Drafted Pre-Action Protocols. We call on Government to review its time scale for implementation. Relatedly, we also feel that the time scale is too short for stakeholders and lawyers (whether claimant or defendant) to adapt their business models to cater for this significant change.

8. Exit rates continue to be high in respect of the RTA scheme. The evidence of Professor Fenn appears to suggest that around half of personal injury claims which enter the RTA Portal quit the process¹. CILEx feels that there should be a greater focus on improving the Portal's fall out rate in respect of eligible claims before pressing ahead with extension and the Draft Pre-Action Protocols. Professor Fenn observed:

“The high exit rate observed from the Portal indicates that any extension of the process to other types of claim, such as clinical negligence and public liability, where proof of liability is often an issue, could result in only a minority of these claims settling within the process”

9. Evidence appears to suggest that the Government's plan for extension of the RTA scheme to cover PL and EL cases would have a minimal effect on claims, as the majority of such claims are contested. This would undermine the very objectives of a fixed-costs regime. Relatedly, Professor Fenn's evidence suggests that 97% of claims which settle in the Portal are settled for under £3,500. This, taken together with the proposed increase to the small claims limit (which will effectively empty Portal claims) reinforces the view that the proposed extension will have a minimal effect on claims, thus defeating the intended objectives.
10. Government's haste in implementation also ignores an important part of the RTA Portal's streamlining process, which appears to be at odds with EL/PL cases. Compulsory insurance and the Motor Insurance Database (MID) has helped to streamline RTA portal cases. The information created by MID was developed to allow victims of road traffic accidents to trace an insurer quickly.
11. In light of the European Communities (Rights Against Insurers) Regulations 2002 (implementing a European Directive), there is a direct

¹ Solicitors Journal 12 July 2012

right of action against an insurer. This is an important factor in the streamlining of RTA cases. It allows claims against the insurer without involving their insured. It is important that a direct right of action is also extended to cover PL and EL cases.

12. Although there is a requirement for employers to have EL insurance², there is no such requirement in PL cases. The Employers' Liability Tracing Office is in its infancy, and there is no guarantee that it will be fit for purpose. The practitioner evidence appears to suggest that it is not working as anticipated. Without the above factors and safeguards, we find it difficult to envisage EL and PL cases working in the same way as the RTA portal.

The Draft Protocols

13. It is imperative to avoid a piecemeal approach to implementation. Pre-Action Protocols without the necessary fully operational IT portal will not deliver the objectives or efficiencies envisaged by the proposals. Although implementation of the scheme is running full steam ahead, there has been no guarantee in the letter dated 22 October 2012 to stakeholders setting out the draft Protocols that the underlying technology will be ready in time – which practitioners consider unlikely.

14. The preamble (paragraphs 2.1) for both draft Protocols, emphasises the need to follow the Protocols and the behaviour expected of the parties. It also sets out that the Civil Procedure Rules 1998 enable the court to impose cost sanctions where the Protocol is not applied. It is important that the court uses its case management's powers robustly but in a fair way in order to make the Pre-Action Protocols workable and have 'teeth.'

² Employer's Liability (Compulsory Insurance) Act 1969

15. Communication between the parties is through the electronic Portal. The Portal and the Protocol combined deliver strict time limits and efficiencies beneficial to both parties. The defendant is defined in the RTA Protocol as the “insurer of the person who is subject to the claim under this Portal” and the entire process is based on knowing who the insurer is and dealing with the insurer as the defendant. The RTA Protocol stipulates that the Claim Notification Form will be sent directly to the defendant’s insurer. However, there may be access to justice issues in EL /PL cases where the defendant is not known or where there may be multiple defendants, particularly where the claimant is a litigant in person. The burden on a litigant in person in paragraph 6.1 appears to be disproportionate and may bring out equality of arms issues.

16. The staged fixed costs associated with both Protocols have not been specified and are excluded in the consultation. This needs to be rectified as a matter of urgency.

17. Subject to the above observations, the Pre-Action Protocols appear to be expressed in a clear and understandable manner and the PL and EL cases largely mirror the Pre Action Protocol on RTA cases. The question is whether they are workable in the absence of a fully operational IT portal.