

Responses of the ACL to the Department of Health Consultation – Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims.

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(iv) Option 4 - Costs Analysis Approach - do you agree with the percentage of damages and/or the percentage for early resolution?

(v) Another proposal

(vi) Please explain why

CHAPTER 1 – Our Background and Introduction

The Association of Costs Lawyers (ACL) is a membership organisation representing students, Lawyers & retired practitioners in the field of Legal Costs.

ACL was founded in 1977, as the Association of Law Costs Draftsmen (ALCD) with the aim of promoting the status and interests of its members.

In 2007, Fellows of the ALCD were granted rights to conduct costs litigation and rights of audience under the Legal Services Act.

In 2011 the ALCD was re-named as the Association of Costs Lawyers and, in compliance with the requirements of the Legal Services Act; ACL delegated regulatory work to the Costs Lawyer Standards Board (CLSB).

There are currently 892 members of the ACL who represent both paying & receiving parties. Many act for Litigants in Person, some on a Pro-bono basis and we, as an association have recently been working closely with the Bar Pro-Bono Unit (BPBU) and Litigants-In-Person Support Strategy (LIPSS) to help deliver better access to justice in costs related matters.

All of our members have experience in costs issues and the vast majority deal with costs on a day-to-day basis, as well as using the Courts either in person or on paper regularly.

We are a membership organisation recognise the need for reform and, therefore we invited the membership to put themselves forward to form a working party with a view to responding to the proposed consultations in this area. The resultant working party comprised 6 qualified Costs Lawyers from a cross section of the profession. This document is as a result of their work. It is neither meant to represent their personal opinions or those of the ACL Council but is intended to reflect the anticipated views of the membership who, with their wide-ranging experience in all matters relating to costs and the Courts, will be able to add substantial context to the consultation.

We have only sought to answer the questions posed which we believe the ACL can provide a meaningful and informed answer to.

CHAPTER 2 – Question 1: Introducing Fixed Recoverable Costs

(i) Do you agree that Fixed Recoverable Cost for lower value clinical negligence claims should be introduced on a mandatory basis?

No

(ii) If not, why not.

There is a strong argument to suggest that any extension of the Fixed Recoverable Costs Regime at this time, would be undertaken before the impact of the existing regime – which is barely 3 years old – has been assessed.

Active case and costs management is proving successful in prospectively restricting many of the excesses of litigation that lead to high legal costs and

the post-LASPO test of proportionality, with its increased stringency, is retrospectively penalising parties who present unreasonable costs claims.

Our members accept that extensions to the Fixed Recoverable Costs Regime may follow over time, however, we believe that it is vital for the fees implemented to provide fair and proportionate remuneration for the work done if access to justice is to be maintained. If a FRC regime is introduced at the wrong level and without fair remuneration, there must be a real concern that litigants will not be able to access the correct level of legal expertise without bearing much of the cost themselves, thus potentially creating an inequality of arms. It is a point which will be made by many, but Access to Justice is one of the cornerstones of the legal system of England and Wales.

Finally, it is our view that the various levels of fixed recoverable costs are not something which can be produced by an academic exercise without reference to the legal profession as a whole, to ensure that any extension is applied to the correct categories of cases and that the quantum of the fees is appropriate - a data collation exercise is essential from across the legal professions.

(iii) If you prefer a voluntary scheme instead, please explain how this would fulfil the same policy objectives as a mandatory scheme?

As an Association we do not have a preference for one scheme or another. We would however comment that it may be beneficial to the profession and the public alike if any fixed fee regime implemented could be by way of a voluntary pilot scheme.

CHAPTER 3 – Question 2: Fixed Recoverable Costs Ranges

(i) Do you agree that Fixed Recoverable Costs should apply in clinical negligence claims?

No. We believe that clinical negligence is unsuited to any type of FRC because of the inherent difficulties associated with this type of case.

The ACL's view is that fixing costs in clinical negligence cases is problematic and any introduction of FRC should be viewed with caution. Most Clinical Negligence cases have differing facts and circumstances and breach of duty and causation is often disputed. It is accordingly difficult to predict average costs in any given basket of cases where breach of duty, causation and quantum issues may be in issue between the parties.

(ii) Option A- above £1,000 and below £25,000 (preferred)

This would be the ACL's default position if we believed that FRC should be introduced.

(iii) Option B - another proposal

(iv) Please explain why

The ACL are more than willing to draw upon the considerable expertise our members have in order to assist and support the consultation by seeking to gather appropriate data. We have been in contact with Professor Fenn and are currently in the process of collating data in line with his requirements.

We view this as being of vital importance to ascertain patterns of expenditure in the above categories of litigation, before any consideration can be given to fixing the quantum of fees.

It is envisaged that this exercise could also assist in identifying patterns which can be utilised in the assessment of fixed fee amounts as well as identifying any further categories of litigation that are not appropriate for the fixed recoverable scheme as they do not follow a standard pattern of expenditure/process.

It is also envisaged that the collation of such data could assist in identifying appropriate exclusions for any proposed scheme, whether it be denials of liability in clinical negligence cases or whether there are additional amounts payable in certain circumstances.

Any exclusions/additional amounts in relation to the fixed recoverable costs regime must be clear and unambiguous in order to ensure that the Courts are not bombarded with satellite litigation.

Chapter 4 – Question 3: Implementation - which option do you agree with

(i) Option 1 - all cases in which the letter of claim is sent on or after the proposed implementation date.

(ii) Option 2 - all adverse incidents after the date of implementation.

(iii) Another proposal.

(iv) Please explain why

Option 2 would be the ACL's default position, if it is decided that FRC should be introduced, as this seems to be the most logical and uncomplicated.

Chapter 5 – Question 4: Fixed Recoverable Costs Rates - looking at the approach (not the level) do you prefer:

(i) Option 1 - Staged Flat Fee Arrangement

(ii) Option 2 - Staged Flat Fee Arrangement plus% of damages awarded: do you agree with the percentage of damages?

(iii) Option 3 - Early Admission of Liability Arrangement - do you agree with the percentage of damages for early resolution?

(iv) Option 4 - Costs Analysis Approach - do you agree with the percentage of damages and/or the percentage for early resolution?

(v) Another proposal

(vi) Please explain why

The ACL believe that, if FRC are to be introduced at some point, any of the above models could work, the key factor is making sure that, whichever model is used, the level of fixed costs provides adequate remuneration to allow practitioners to undertake the work necessary to afford Claimants access to justice.

Chapter 6 – Executive summary

Is this the right time for FRC in Clinical Negligence Claims?

As an Association, we do not believe this is the optimal time given the fact that there are so many other changes afoot which will, without doubt, impact on consumers and the legal profession at some level.

When will be the right time?

We believe that time to be: -

When the exit strategy from the EU is known and an appropriate impact assessment has been undertaken to determine what the effect will be on the economy, the legal profession and consumers.

When the reforms into the Court Service have been implemented, their efficiency assessed (and a reasonable period must be allowed for this), and any difficulties which presented have been overcome.

When a full and detailed consultation of members of the legal profession and consumers has been undertaken, and it is clearly shown that a Fixed Costs Regime is desirable, workable and equitable to both lawyers and consumers – i.e. that consumers are getting “quality” and are their lawyers fairly remunerated.

Timeframe for collation of data

We have indicated above that the Association is happy to investigate the harnessing of the data held by our members in an attempt to assist the consultation. In theory this is not an issue. However, any timeline set for such a process to support this consultation must be realistic to allow sufficient time for helpful, accurate and comprehensive data to be collated and analysed

We would strongly recommend that, should such an exercise be considered to be of use, a reasonable timeframe be adopted to ensure that what could prove to be a vital element to this exercise is undertaken properly.

In addition the ACL Council’s Policy Officer has direct communication with her counterparts in the Law Society and other organisations and it has already been suggested that there be a pooling of data between these bodies. If that proves to be the case, and fruitful, we believe that in a realistic timeframe the data that could be gathered could prove to be invaluable to the Consultation.