



The Bar Council

Bar Council response to the consultation paper entitled Fixed Recoverable costs in lower value clinical negligence claims published by the Department of Health & Social Care

1. This is the response of the Remuneration Committee of the Bar Council of England and Wales (“the Bar Council”) to the Department of Health’s & Social Care’s consultation paper entitled Fixed Recoverable costs in lower value clinical negligence claims published by the Department of Health & Social Care (“the Consultation”).
2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview of the Bar Council’s position

4. Patients injured by negligent medical care are amongst the most vulnerable in society. Clinical negligence claims, even low value claims, are often detailed, complex and difficult. They require specialist and experienced legal advice and expert evidence. The facts upon which such claims are based, the injuries involved, and patients’ individual circumstances are all highly variable; more so than in other areas of litigation where FRC schemes exist. The value of damages

recovered can be a poor predictor of the extent of the legal and expert input required to establish liability and ensure that such patients receive proper compensation for their injuries.

5. Claims with a value of up to £25,000 represent a substantial proportion of successful claims against the NHS. The proposed for a regime of Fixed Recoverable Costs (FRC") will affect a high proportion of clinical negligence claimants.
6. The proposal for an FRC scheme has been under consideration for lower value clinical negligence claims some time. The Bar Council made submissions to Sir Rupert Jackson's Review of Civil Litigation Costs, responded to the Department of Health's 2017 consultation "*Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims*" in which it opposed an FRC scheme for lower value clinical negligence claims.¹
7. That remains the Bar Council's overarching position, notwithstanding its engagement with and representation on the Civil Justice Council's working group which considered the development of a bespoke process for clinical negligence claims up to £25,000 in value.
8. *If*, contrary to the Bar Council's position, an FRC regime is to be introduced for lower value clinical negligence claims:
 - (a) Many of the procedural elements in the proposed FRC regime are welcome, particularly those designed to ensure early resolution of claims.
 - (b) The policy aim expressed in the Consultation in proposing implementation of the FRC regime is to ensure that low value clinical negligence claims are processed quickly, fairly, and cost-effectively, at a cost that is more proportionate to the value of the claim.
 - (c) It is assumed that the policy aim also includes maintaining the ability of injured claimants to access justice. This should be the first and foremost aim, but regrettably receives little attention as opposed to the desire to cut claimant costs.
 - (d) For any FRC regime to be fair and effective, the fees involved must be sufficient to allow claimants representation by appropriately specialised and experienced solicitors and counsel.
 - (e) The Bar Council has concerns that allowances in the proposed grid of costs set out in Section 9 of the Consultation are too low, making this complex

¹ [Adrian, are you able to insert the necessary hyperlink?]

and specialised area of litigation financially unviable for solicitors and counsel.

9. Consequently, the Bar Council has grave concerns that proposal, as currently framed, will prevent vulnerable claimants of access to justice.

10. Without prejudice to that overarching position, the Bar Council responds to the Consultation Questions as follows:

Question 1: Do you agree or disagree with the proposed definition for claims falling within the FRC scheme?

Disagree.

The Consultation has not set out the complete definition or done so with clarity.

For instance, the definition does not specify that it applies only to those where damages are claimed for personal injury and consequential loss as opposed to damages or another remedy under the Human Rights Act 1998.

The consultation appears to indicate that the overarching definition of claims to be included in the FRC scheme are those that settled at between the small claims track limit and not exceeding £25,000, or those where the judgment falls within that bracket. Sections 6 and 11 suggest that claims with damages expected “to marginally exceed the £25,000 band” should be managed prudently from the outset as if they will be subject to FRC.

It is unclear whether the intention is that if a claim which proceeds outside the FRC processes but where the claimant recovers £25,000 or less on settlement or judgment will automatically be entitled to recover costs at a level equivalent to those under the FRC.

If that were the intention, the Bar Council would oppose such a proposal.

The following example illustrates the issue: A claimant’s solicitor completes liability and quantum investigations for a claim with the assistance of a single expert. If breach and causation are established, the value of the claim can reasonably be anticipated to be £60,000. A Letter of Claim is sent under the Pre-Action Protocol for the Resolution of Clinical Disputes. The Letter of Response denies liability both on breach but also arguing that part of the injury was inevitable in any event. Disputes are also raised not just on causation but the reasonableness of some of the heads of loss. The claim is issued and case proceeds to exchange of evidence and expert meetings as directed by

the Court. A compromise is reached at £25,000 taking account of the litigation risks on each of the contested issues: breach, causation and quantum.

The costs of such a claim should continue to be determined in accordance with the current position under CPR Part 44. The defendant will be protected against abuse by the existing discretion on costs. In a particularly egregious case the Court's discretion could be exercised to award costs equivalent to the FRC regime if the assessment at the outset of the case the it fell outside the FRC regime was an assessment that no responsible representative could have made on the information then available.

The Bar Council contends that the definition should include those cases where the claimant reasonably expects to recover damages at between the small claims track limit and not exceeding £25,000.

Question 2: Do you agree or disagree that the proposed scheme should incorporate a twin track approach, following the CJC model, to enable simpler, less contentious cases to progress more quickly to resolution?

Agree.

Question 3: Do you agree or disagree with the proposed criteria for claims being allocated to the light track?

Agree.

Question 4: Do you agree or disagree with the proposals for streamlined processes in the standard track?

Agree.

Question 5: Do you agree or disagree with the proposals for streamlined processes in the light track?

Agree.

Question 6: What are your views on the evidentiary requirements applying to both standard and light track claims, that should be set out in the Civil Procedure Rules to support this FRC scheme?

The evidential requirements at pp.29 and 30 of the Consultation should be included in the CPR.

Question 7: Do you agree or disagree in principle that template letters and expert report model elements should be used as part of the streamlined processes in both the standard and light tracks?

Agree.

Question 8: Do you agree or disagree with the proposed fixed costs framework based on the CJC Working Group 'defendant group' costs proposals, including the suggested bolt-on cost for protected party claims?

The Bar Council strongly disagrees with the proposed fixed costs framework based on the CJC Working Group 'defendant group' costs proposals.

The CJC Working Group 'defendant group' figures were not acceptable to the 'claimant group' because *all* members considered that it would not be viable to manage claims with such limited costs recovery.

At p.39 of the Consultation, it is stated that

"Following the publication of the [CJC] report, the department has engaged with representatives of both claimant and defendant groups and with other interested parties on the work involved in bringing and processing claims and on the suitability of the fixed costs proposed.

We have considered in detail the relative merits of the costs proposed by the claimant group and the defendant group. We have also examined the work on reasonable costs conducted by Professor Paul Fenn to inform the CJC working group and conducted further analysis of claims, claims costs and of the potential cost reductions under a fixed costs regime."

These statements lack transparency about (1) the nature and extent of the engagement with claimant and defendant groups; (2) the substance of their responses; (3) which other interested parties were consulted; (4) the substance of the interested parties' responses; and (5) the details and outcome of the further analysis of claims, claims costs and of the potential cost reductions under a fixed costs regime.

What is particularly telling is the lack of analysis in the Consultation or indeed the impact assessment about whether it will remain sustainable for specialist clinical negligence firms to take on claims with a value of less than £25,000.

The Bar Council's has grave concerns that the overall figures are simply too low. There is a clear danger that the figures in the proposed FRC grid will result in claimant firms withdrawing from representing claimants where the value of the claim is below £25,000, or ceasing business.

Such an outcome would deprive thousands of injured patients of the ability to access justice.

Any fee paid to counsel is not a disbursement but paid out of the fixed fee. The Bar Council contends that it would not be wise to disincentivise the use of counsel. The benefits which specialist counsel can bring to a case include:

- independent advice - the 'fresh pair of specialist eyes';
- acting as 'quality control', helping weed out weak cases and identifying those with merit;
- focused analysis and formulating and/or pleading the case;
- testing the evidence with the forensic skill and experience of a trial advocate;
- a cost-effective service.

In his Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs, Sir Rupert Jackson recognised the merit of using counsel: see e.g. (§5.2-5.3) *"The involvement of counsel at an early stage, both in advising and drafting, brings substantial benefits. Independent counsel bringing a fresh eye to the case can focus the litigation and sometimes bring about settlement."*

A scheme which does not properly provide for the involvement of counsel

- risks more cases being poorly prepared and analysed, more cases under-settling and more cases being pursued when they should not be;
- would have a substantial negative impact on the junior Bar and imperil the pool of advocates for both claimants and defendants in higher value claims in the future.

The use of counsel in clinical negligence claims with a value of less than £25,000 is more common than might be thought. The only data set available to Professor Fenn which separately identified the costs of counsel was provided by SCIL. Out of 283 cases, counsel was instructed in 142 (50.2%) of those cases. Of the 142 cases, 73 settled pre-issue. Professor Fenn identified the mean cost of counsel in the 142 cases at £3,382, which averaged out at just under £1,700 per case for the full basket of 283 cases.

The Bar Council considers that costs at the level of the defendant group's figures will inevitably disincentivise the use of counsel, all the more so when the figures will imperil the sustainability of specialist claimant clinical negligence firms.

Irrespective of the precise level of fixed costs, it is imperative to prevent erosion by inflation, that fixed fees on the Standard and Light Track will need to be reviewed on a regular basis or linked to a suitable index.

Question 9: Do you agree or disagree with the proposed arrangements for mandatory neutral evaluation, including the costs framework for evaluations and how these are funded?

Mandatory Neutral Evaluation should be of assistance in reducing the number of claims in this bracket with progress to the issue of proceedings.

However, for the scheme to work, it is imperative to use evaluators of suitable experience and calibre. Such practitioners are more likely to be senior juniors with already busy mixed claimant and defendant practices. Whether they apply to become an evaluator is a matter of genuine choice rather than a necessary part of the 'day job'.

The fee needs to recognise

- the quasi-judicial responsibilities involved;
- fact that it is likely only to be the most complex or difficult cases in the value bracket that reach MNE, and such cases are likely to be most time-consuming for the evaluator;
- the fact that counsel will need to bear the burden in time and potentially cost in applying to and remaining on any panel.

Unless the fees for the evaluator are sufficiently attractive, the scheme will simply not attract evaluators of sufficient experience and calibre.

The fees for liability and quantum, and liability-only, evaluations should meet those aims.

Regrettably, the fee for a quantum only evaluation falls well short.

It should be unusual that quantum-only evaluation is required. If so, there is likely to be a particular feature of the case which takes it out of the ordinary, whether that be additional complexity, difficult issues of disputed fact, or a point of law.

The Bar Council contends that a fee of no less than £1,250 is appropriate.

The scale of evaluator's fees will need regular review post-implementation or linkage to an appropriate index to ensure that the real value of the figures is eroded by inflation.

The Consultation does not invite proposals on the eligibility criteria for the panel of specialist barristers who may be called upon to conduct the evaluations. Barristers will need to apply to be on the panel and satisfy the Ministry of Justice that they are sufficiently specialised, experienced, and competent for appointment. There is

currently no 'accreditation' or membership of a professional organisation (such as the Personal Injuries Bar Association or the Professional Negligence Bar Association which could be used as a proxy measure to demonstrate the necessary specialism, experience or competence. The Bar Council is willing to engage with the Ministry of Justice in identifying the appropriate eligibility criteria.

The proposals as to which party pays the evaluator's fees appear reasonable.

The Bar Council agrees that there should be consequences for a party who chooses not to accept the outcome of the mandatory neutral evaluation. For cases where the 'losing' party on liability and/or quantum accepts the evaluator's decision and the claim is compromised accordingly, the consequences set out in Section 10 are not unreasonable. If, however, the party does not accept the evaluator's decision and the case proceeds to trial, where the costs of the evaluator fall should form part of the costs of the case in the usual way.

Question 10: Do you agree or disagree with the proposals on claims to be excluded from the FRC scheme and on the approach to protected party claims?

The Bar Council agrees with the following exclusions:

- Claims requiring more than 2 liability experts;
- Claims with genuine multiple defendants (where allegations against each defendant are different).
- Claims involving stillbirths or neonatal deaths.
- Claims where limitation is raised by the defendant as an issue.

In addition, the Bar Council contends that *all claims involving a fatality* should be excluded. Such claims usually involve particular sensitivities in client handling, which is more time-consuming. Furthermore, if the level of recoverable costs deters claimant firms from acting in such cases, that would have significant implications for the ability of the state to fulfil its investigatory obligations under Article 2 of the ECHR.

It seems reasonable that protected parties should remain within the FRC with an appropriate bolt-on cost. Claimant solicitor's representatives will be best placed to identify the appropriate level of bolt-on. Given that the proposed fee of £650 is intended to cover the costs of issuing proceedings for court approval, preparing the documents for court, seeking advice from Counsel and attending the approval hearing, the Bar Council does not accept that the figure is a reasonable estimate of the additional work and costs involved.

Question 11: Do you agree or disagree with the proposals on sanctions to be considered and implemented by changes to the Civil Procedure Rules?

The Bar Council agrees that it is imperative that a defendant response to the FRC letter of claim within the 6-month time limit in the standard track. The claim falling out of the FRC regime in the event of non-compliance by the defendant is a realistic and appropriate sanction. So too with the sanction for the defence for non-compliance with 8-weekd deadline for a FRC letter of response on the light track, namely that the claim will recommence in the standard track.

It is agreed that there is a need to incentivise the parties' adherence to the timescales within the FRC. However, the Bar Council does not agree with the proposal for a fixed percentage reduction in costs applicable under the FRC or standard costs whichever results in the lower amount following the reduction:

There is logic in a reduction in FRC costs. But there is no logic in reducing standard costs, as the costs incurred in that phase of the litigation will not have been affected by FRC delays. If the delay falls within the FRC phase of the litigation, the sanction should also fall within those costs.

The Bar Council considers that the approach to sanctions for not complying with FRC timescales (other than the letter of response) should be more nuanced than the current proposal. There is simplicity in applying a fixed percentage reduction in recoverable FRC costs (claimant breach) or increase in damages (defendant breach).

Question 12: Do you agree or disagree that the proposals on FRC should apply to claims where the FRC letter of claim (or FRC claim notification letter) was submitted on or after the implementation date of the scheme?

It is important for solicitors to be aware when they first investigate a claim what level of fees will be recoverable. That process often begins several months before a Letter of Claim is submitted. Provided that sufficient notice is given for the implantation date (no less than 9 months), the proposal that FRC should apply to claims where the FRC letter of claim (or FRC claim notification letter) was submitted on or after the implementation date of the scheme is a reasonable one.

Question 13: Do you agree or disagree that the £25,000 upper limit for scheme claims should be reviewed post-implementation, and at regular intervals thereafter, specifically to take account of the effects of claims inflation?

The Bar Council disagrees that the £25,000 upper limit for scheme claims should be reviewed post-implementation, and at regular intervals thereafter *if* that proposal is individual to clinical negligence alone.

The new FRC regime for lower value clinical negligence claims will be part of the landscape of fixed costs in the CPR.

Claims inflation (or, putting it more accurately - increases in the level of damages to meet the restitutionary principle) is common to *all* personal injury claims, and affected by factors such as the increase in PSLA awards in line with the RPI, the prevailing discount rate, wage inflation etc, none of which are caused by inappropriate behaviour by claimant lawyers.

The Bar Council submits that any review of the £25,000 limit should only be part of a wider review of the limits for the other fixed costs regimes.

Question 14: What are your views on how the proposals in this consultation might impact businesses involved in handling and processing lower value clinical negligence claims?

See the Overview and answer to Q9.

Question 15: What are your views on how the proposals in this consultation might differentially or disproportionately impact small and micro businesses such as:

- *law firms*
- *other small or micro businesses involved in supporting the handling or processing of lower value clinical negligence claims?*

See the Overview and answer to Q9 for a general response. The Bar Council has grave concerns that the proposed FRC regime will make it unviable for such law firms or other small or micro business to represent claimants in low value clinical negligence claims.

Question 16: What are your views on how the proposals in this consultation might impact:

- *people with protected characteristics as defined under the Equality Act 2010*
- *health disparities;*
- *vulnerable groups?*

The Bar Council is not best placed to answer this question but does not have specific concerns that the proposal FRC regime breaches the Equality Act 2010.

Bar Council Remuneration Committee

1 May 2022

(This document was regrettably submitted after the deadline due to a cyber attack on the Bar Council which required the Bar Council's IT systems to be taken off line <https://www.barcouncil.org.uk/resource/update-on-our-current-technical-difficulties.html>)

*For further information please contact:
Anastasia Kostaki, Policy Analyst, Legal Practice and Remuneration
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Email: AKostaki@BarCouncil.org.uk*