

April 2022

MPS submission to the Department of Health and Social Care consultation on Fixed recoverable costs in lower value clinical negligence claims

Executive summary

MPS fully supports the principle of fixed recoverable costs (FRC) for claims of clinical negligence. We have long called for such reforms to be introduced and have played an active role in influencing the proposals.

Over the last 10 years the annual cost of clinical negligence to the NHS in England has increased by 156%; £2.2bn was paid out in 2020/21 and legal costs accounted for £600m (27%) of that bill. This is compared to £863m paid in 2010/11¹. At a time when the NHS budget is under huge financial pressures, savings such as those that a FRC scheme would facilitate are more important than ever.

The rising cost of clinical negligence also has a very significant impact on healthcare professionals not covered by a state-backed scheme, including doctors working in private healthcare and dentists. Responsible and well-managed defence organisations such as MPS have an obligation to protect the interests and, just as importantly, the reputations of their membership but also to reflect the rising costs of clinical negligence in membership subscription fees that healthcare professionals pay so we can be in a position to defend members' interests long into the future. Given the impact that legal costs have on the price that healthcare professionals pay to protect themselves against claims, it is important that the FRC regime introduced has a positive impact. We will have instances where the member will have evidence that an injury occurred for reasons other than any negligence on their part. In those circumstances they should not be precluded from pursuing a defence on liability notwithstanding the claim is one that by way of its value falls within the scheme.

We believe that FRCs increase transparency and proportionality for all parties, and this will help ensure more informed decision making in regard to a legal action. It would also benefit both parties financially, as it would hopefully lead to more claims settling without legal proceedings and therefore avoid the need for the costs management process. However, while we support the consultation proposals in principle, we do not think that they go far enough, and we continue to strongly urge the government to reconsider setting the threshold for FRCs at £250,000. Otherwise, while this is a step in the right direction, it would be a wasted opportunity.

While we accept that in time damages and hence the potential small claims threshold will increase due to issues of inflation, we believe that there needs to be a mechanism other than the FRC threshold that can be used by parties to provide costs protection in relation to what turns out to be a reasonable or well-placed offer. The lack of an equivalent Part 36 style deterrent could lead to

¹ <https://lordslibrary.parliament.uk/negligence-in-the-nhs-liability-costs/#:~:text=The%20costs%20of%20clinical%20negligence,are%20forecast%20to%20continue%20rising.>

increased damages and more claims running their course in the hope an increased offer will be made eventually.

We also advocate for a wider package of reforms including a small claims track, a limit on future care costs and future earning, and a minimum threshold for cash compensation. But most of all, we believe that in order to actually reduce the high cost of litigation, the first step is to stop litigation from happening in the first place, with a key part of this being a move away from the current blame-oriented system towards a more open system which fosters learning from mistakes without the fear of repercussions.

Questions

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

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 6: Claims that would fall within the scheme' and Figure A of Annex C in the consultation document and give any reasons for your answer.

MPS broadly agrees with the definition of claims that will fall under the scheme; however, it will be important to establish who will determine the value of the claim and that claims valued above £25,000 but are ultimately resolved for a lower sum, are retrospectively captured within the scheme.

The scheme would benefit from certainty regarding claims that fall immediately above or below the threshold to prevent parties from "taking a punt" on getting claims that might fall just below in value, above the threshold (or vice versa).

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**
- Disagree
- Don't know

Why? Please refer to 'Chapter 7: A twin track approach' and Figure A of Annex C in the consultation document and give any reasons for your answer.

MPS would agree in principle to a twin track approach. This would be cost effective and ensures that focus would be given to early settlement in matters of lower complexity on the light track and would enable handling processes to be aligned to that objective.

Within the criteria, there is reference to a Serious Incident Report identifying care below a reasonable standard as a feature of claims needing to progress in the light track: we suggest that it should be an added obligation that this lack of care was causative in respect of the injury suffered.

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

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 7: A twin track approach' in the consultation document and give any reasons for your answer.

As outlined above, MPS agrees with the proposals of a light track option and the proposed criteria for claims being allocated to the right track. We also advocate that this track be extended to cover all dental claims. Dental claims are largely less costly than medical claims due to the fact that there is usually only one expert; they often settle more quickly and the average damages settlement is lower. However, there are often arguments around causation which would ordinarily take matters outside of the light track and there are often multi party elements to the claim. We would suggest that additional thought should be given as to how dental claims should be distinguished in the scheme, given that they need to be handled in a significantly different manner to medical claims given that they generally attract significantly lower costs.

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

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 8: Streamlined processes for standard track and light track claims', and Figure B of Annex C in the consultation document and give any reasons for your answer.

MPS agrees with the proposals for streamlined processes subject to the detail and guidance which sits behind the suggested process.

We note that the consultation is silent on the position around Insurance Premiums. Presently, a proportion of matters settle without medical evidence, however the obligation to provide expert evidence with the letter of claim, whilst important in enabling clarity around the detail of the claim, will potentially come at an added cost. We often observe, particularly in dental claims, that a significant number of matters which settle prior to litigation, do so without Claimant expert evidence and without an ATE Insurance Policy being required. If more medical reports are being obtained, there would also be the need for the Claimant to take out an Insurance Premium at a significant added cost to the paying party to protect against the cost of this, potentially offsetting the cost benefits of this scheme (particularly in dental claims). All low value dental and medical claims being handled in the light track would be one potential solution to this issue. Claimant's solicitors will be compelled to "go to market" to obtain these ATE Policies and they are unlikely to take the Small Claims track costs into consideration when offering a Premium. This could eat significantly into Claimant's costs/Damages or prove to be a barrier to accessing justice in these Claims.

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

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 8: Streamlined processes for standard track and light track claims', and Figures C and D of Annex C in the consultation document and give any reasons for your answer.

MPS would agree to this, subject to guidance around how a joint expert is to be instructed where there may be disagreement over suitability.

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?

Please refer to 'Chapter 8: Streamlined processes for standard track and light track claims', in the consultation document, with particular regard to stages ST(A), ST(B), (LT(A) and LT(B), when answering.

MPS agrees with the proposed requirements.

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**
- Disagree
- Don't know

Why? Please refer to the 'Template letters' section of 'Chapter 8' and Annex B in the consultation document, giving any reasons for your answer, and providing any views or suggestions you may have for the format and content of the letter templates or expert reports.

MPS agrees with these proposals, as the use of template letters and expert report elements can be useful to both parties ensuring consistency.

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?

- Agree
- **Disagree**
- Don't know

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Why? Please refer to 'Chapter 9: Fixed costs' and Tables 1 to 3 in the consultation document and give any reasons for your answer.

MPS has concerns that the present proposals may not necessarily lead to a saving in costs being observed in dental claims specifically. Due to the nature of dental claims, causation is often disputed with partial admissions due to heads of damages being sought for multiple teeth. In such claims, they would likely be handled in the standard track based on this criterion.

With the added obligation to obtain medical evidence and potentially thereafter, be liable for an ATE Insurance Premium, the average cost may well be higher than our present outlay in such claims. On that basis we would repeat previous comments that an alternative solution should be considered, which may include these claims being handled in the light track. Please also consider the comments made in response to question three.

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?

- Agree
- **Disagree**
- Don't know

Why? Please refer to 'Chapter 10: Mandatory neutral evaluation' in the consultation document and give any reasons for your answer.

MPS considers that the fees suggested for Counsel are high in comparison to the fixed fees. We would also welcome clarity on how these barristers will be selected as oftentimes certain barristers have a background where their instructions are heavily weighted towards either Claimant or Defendant work.

MPS would also support periodic assessment of those counsel carrying out mandatory neutral evaluations to consider but not limited to how their assessment compares with ultimate court findings in those claims where the MNE result is not accepted by the parties. We would suggest analysis of data from the scheme such as Expert Instruction Levels/Outcomes, Claims which start outside the scheme and fall back in, and other key metrics to understand whether the scheme is having the intended impact.

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?

- Agree
- **Disagree**
- Don't know

Why? Please refer to 'Chapter 11: Excluded claims' in the consultation document and give any reasons for your answer.

MPS partially disagrees with the proposals on claims to be excluded from the FRC scheme.

We disagree with proposals that claims requiring more than two liability experts would be excluded from the scheme. In our view, these claims should be included but there should be an additional fixed fee for additional expert which would have to be assessed by the court or agreed by the parties.

If following the outcome of this consultation it remains the view that claims with more than two liability experts should be excluded then further consideration may be required as to the types of experts. A Claimant may tactically look to avoid the scheme by introducing a psychiatric element to the claim requiring an extra causation report from either a psychiatrist or psychologist.

We would also welcome clear guidance on what would constitute "genuine multiple Defendants". We are often faced with claims arising from treatment over a sustained period of time (e.g. dental treatment) by different practitioners where not all of the treatment would have contributed or been causative to the claim. This is very common in Periodontal Claims where the condition is chronic and treatment occurs over a significant period of time with multiple clinicians involved in the treatment.

We support proposals that claims with damages expected to marginally exceed the £25,000 band be managed prudently as if they were subject to FRC.

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

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 12: Sanctions to encourage adherence to the scheme' in the consultation document and give any reasons for your answer.

MPS agrees with the proposals and we believe that sanctions should be implemented robustly for the rapid resolution of claims to be successful. However, we are concerned with proposals that nonadherence to the deadlines would result in a standard track claim falling outside of the clinical negligence FRC scheme and therefore being processed as the claims above the upper limit for the scheme would. This can result in significant cost implications for both parties and would not help with the implementation of the FRC scheme. We would be of the view that an alternative modest fixed sum cost penalty may be a more proportionate sanction. The key has to be to obtain the right result and it is important that all the focus is not on deadlines. There needs to be a Part 36 style sanction where Claimant's or defendants are rewarded in costs and or damages for making a well-placed offer at a period in the Claim where it should promote swift and mutually acceptable settlement.

MPS also suggests that costs sanctions should be applied where Claimants fail to bring a claim within the FCR where the damages awarded are less than £25,000. Costs in those cases should be limited to that recoverable under the FCR.

We need some form of consistency with Claims that fall just under or over the £25,000 to ensure that the true value of the Claim, and not a desire to push that value above or below the fixed costs limit, is the driver in Claims where the respective valuations fall close to either side of that line. There is likely to be a significant amount of satellite litigation in the event the £25,000 limit itself becomes the sole focus of the parties. The focus should be on the right result rather than getting a result within or outwith the fixed costs limit.

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?

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 13: Implementing the FRC scheme' in the consultation document and give any reasons for your answer.

MPS agrees with this proposal.

We believe that implementation needs to be smooth, and as soon as is practical and therefore it is important that the transitional period for cases where the letter of claim was submitted prior to the implementation date is not substantial.

Consideration must be given to mitigating the risk that there may be a large number of claims brought by claimants' solicitors just prior to the introduction of any reforms. This was behaviour that we saw just prior to the new rules on recoverability of additional liabilities being introduced on 1 April 2013 where claimant solicitors aggressively marketed for clinical negligence claims to take advantage of the more generous pre-April 2013 costs rules. Avoiding a long lead-in time to implementation is likely to help avoid this.

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?

- **Agree**
- Disagree
- Don't know

Why? Please refer to 'Chapter 14: Reviewing the upper limit for claims' in the consultation document and give any reasons for your answer.

MPS agrees with this proposal. We not only believe that this should be reviewed to reflect inflation, but also extended to apply to higher value clinical negligence claims up to a value of £250,000.

NHS data demonstrates that disproportionate claimant legal fees are still a significant issue in higher cases. When looking at claims with damages payments between £50,001 and £100,000 in 2015/16, the total defence costs were 19% of the damages - whereas the claimant costs were 99%. For claims between £100,001 and £250,000 the total defence costs were 15% of the damages, whereas the claimant costs were 72%.

Whilst we understand the arguments for not introducing FRCs for the most expensive and complex of claims, in our experience it would remain appropriate and viable to include claims up to £250,000. It is important for such a scheme to be supported by data and analysis to drive a more cost-effective scheme fit for the future and not entirely based on average historical costs settlements which in many instances were considered to be disproportionate.

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? Please refer to 'Chapter 15: Impact on businesses, including small and micro businesses' in the consultation document, when answering.

MPS has no comment on this question.

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?

Please refer to 'Chapter 15: Impact on businesses, including small and micro businesses' in the consultation document, when answering.

MPS has no comment on this question.

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 or
- vulnerable groups?

Please refer to 'Chapter 16: Equalities impact' in the consultation document and the accompanying 'Equalities Impact Assessment', when answer ring.

MPS values the efforts of the Department of Health and Social Care to ensure that the policymaking process takes consideration of health disparities and how different groups are affected by the policies the Government implements.

MPS believes that everyone should have equal access to health and justice and therefore we welcome the analysis from the government that concludes that the scheme would not have a direct effect on the unemployed preventing them from accessing justice and therefore seeking justice and redress. However, we believe there will be other organisations better placed to address how any groups with protected characteristics may be affected by the proposals on this consultation.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

Contact

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

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