



## **CJC response to consultation on independence in medical reporting and expert accreditation**

The Civil Justice Council (the CJC) welcomes the opportunity to respond to this consultation, and continues to endorse the government's overall objective of developing a more streamlined procedure for soft tissue injury claims – and one which is both transparent and proportionate.

The CJC has always felt that the details of the accreditation scheme for medical experts would be central to ensuring the independence and impartiality of experts – and believes that moves to ensure their independence will build further on the need for certainty in cases of this kind.

The CJC would like to make some broad points relating to the new scheme. First, the costs of accreditation for the medical experts should be built with close regard to the level of the new fixed fees for medical reports, in order to ensure that a sufficient number of individuals are ready, able and available to carry out the work. The system of accreditation must not be unduly cumbersome or time-consuming for the same reasons.

As to the new IT hub 'MedCo', the CJC is firmly of the view that any such scheme should not be unduly restrictive or risk any perception of anti-competitive practice, and welcomes the government's stated aim of allowing the market to continue to evolve. It is important as well that the IT hub deals effectively with the involvement of MROs in the overall system and must accommodate those claimant solicitors who prefer – for reasons outlined further in the response to question 3 – not to approach individual medical experts.

Finally, while the CJC endorses the efforts to address the question of links between the claimant lawyer and the expert or MRO – and the range of these is touched on in the answer to question 5 – it believes that, while important, these are not limited to financial links, and that it would be equally undesirable for a selected MRO to be run by a member of the solicitor's family, for example, even if no financial benefit ensued.

The CJC's responses to the specific questions are set out below.

### **Question 1: Do you agree that the proposed amendments to paragraphs 7.1A(1) and 7.32A of the Pre-Action Protocol and miscellaneous amendments**

**to the CPR in annex C are sufficient to ensure that claimant representatives comply with the requirement to commission an initial fixed costs medical report from an accredited expert via the MedCo Portal?**

While agreeing with the broad thrust of these amendments, the CJC notes a discrepancy between the language used in the body of the consultation and the term used in the amended Rules and Pre-Action Protocol. While the consultation describes enabling a claimant or their firm to 'receive a list of appropriate experts and/or MROS from which they may obtain the required medical report' the amended wording used in the Annexes (in, for example, paragraph 7.1A(1) of the amended PAP and the miscellaneous amendments in the draft Rules contained in Annex C, e.g. 6.1A of PD8B and 4.3A(1) of PD16) describes a 'new system of **allocating** medical experts to claims' (emphasis added).

The difference, in the CJC's view, is between the allocation of a single expert or MRO, and the presentation to the claimant of a small selection, or limited choice, of experts. This is a point touched on again in the response to question 3 which details the reasons for the Council's concern that the claimant should be given a small random selection of say three experts with sufficient background information to enable a choice to be made, rather than one individual.

To the immediate, practical reasons included in the response to question 3, the Council would also wish to point to the ramifications of any change in emphasis from 'obtaining' an expert to having one 'allocated' in other parts of the Rules and pre-action protocols, which are predicated on the basis that the claimant will be making some sort of selection – even a restricted one – of medical expert. For example, paragraph 2.14 of the Pre-Action Protocol for Personal Injury Claims 'the protocol provides for nomination of the expert by the claimant in personal injury claims because of the early stage of the proceedings and the particular nature of such claims'.

**Question 2: It is anticipated that access to the MedCo portal will be available to litigants in person. Do you have any views on whether use of the MedCo portal should be mandatory for litigants in person?**

The CJC agrees that the MedCo portal should also be available to litigants in person for the sake of consistency in cases in which one or more litigant is representing themselves. It will be important to ensure, however, that the portal includes clearly worded and concise guidance for all users, and particularly for those pursuing their own claims, in the proper use of the new IT hub.

**Question 3: The results of a search in the MedCo portal can be displayed in different ways. Do you have any views on whether the MedCo search results should offer commissioning practitioners a choice of named medical experts.**

The CJC believes that this question boils down to the issue of whether or not claimants should have (even a restricted) choice of experts or whether they should simply be allotted a single one.

The first concern that the CJC has is that a claimant should have a choice between directly instructing an individual expert or using a MRO, and that this choice should be one of the criteria selected by the claimant or their lawyer when using the new system. As the government will already be aware, many firms simply would not consider it viable to pursue a claim if it involved the extensive liaison and administration made necessary by the exchange of medical records and most now operate by using medical agencies.

The CJC also agrees that, once those with any financial interest in the outcome of the claim have been removed (and the necessary medical specialisms taken into account), the main indicator in the choice of expert is likely to be geography, and believe that claimants should ideally not have to travel for more than an hour (or alternatively more than 10 miles) in order to have their medical assessment. That area should only be extended if there are no suitable experts available in that immediate vicinity.

Finally, the CJC welcomes the intention to run a 'significant programme of user testing' prior to the launch of MedCo.

**Question 4: Do you agree that the proposed amendments to paragraphs 1.1(A1), and 1.1(10A) of the pre action protocol, rules 45.19, 45.29I of Part 45 and miscellaneous amendments to the CPR in annex C are sufficient to ensure that only accredited medical experts are instructed to provide fixed cost medical reports in whiplash cases? Do you agree that the transitional provisions in paragraph 4.7 are appropriate?**

The CJC agrees that all of these amendments meet their aim.

**Question 5: The Government is working closely with stakeholder representatives to develop a proportionate accreditation process; we would welcome any views or suggestions relating to standards, criteria or training./or medical reporting organisations?**

This is an area in which the CJC would defer to medical agencies with a better understanding of the training and professional development of the medical professions. The only broad suggestions that the Council would make is that the standards should be in line with the criteria used in training and continuing professional development throughout the medical professions.

Additional, specialist criteria would be likely to include an up-to-date knowledge and understanding of the diagnosis and prognosis of soft tissue injuries, as well as skills relating to the production of medical reports.

The accreditation should include an annual update and disclosure of any potential conflict of interest financial involvement with practitioners or instructing parties. As part of the scheme of accreditation, experts might also be invited to make an annual

declaration of their sources of instruction with more than 50% of an expert's work coming from one source being a possible indicator for further investigation.

Medical experts will also need to fulfil the requirements contained in the revised 2014 *Guidance for the instruction of experts in civil claims*.

It will also be necessary however for the MROs appearing on the MedCo selection system to also meet a set of reasonably rigorous qualifying criteria, which will be different from the standards for individual experts. The MRO will need to demonstrate, for example, an ability to manage the process and to provide the necessary management information (MI) to MedCo. Again, the CJC would defer to the medical agencies themselves for suggested criteria for a properly-run, independent MRO though they are likely to include minimum service standards for IT capability, financial security, a commitment to pay experts irrespective of outcome, data security (possibly by reference to ISO 27001 – an information security standard dated 2013) and provision of management information (MI) returns.

While the CJC understands the need to defer the deadline for completing the accreditation process to after the launch of the MedCo website, it is uncertain from the wording of the consultation whether that same timetable will apply to individual experts as well as MROs but believes that it is important to have MROs judged as meeting the qualifying criteria from day one. MROs should be expected to operate immediately on the launch of MedCo and be able to provide the necessary MI from the start, enabling the whole process of the accreditation and re-accreditation of experts to function and the system as a whole to meet its objectives.

The CJC does believe that it is important however that there should be no unnecessary restriction on the ability of individuals and business to set up a medical reporting organisation – something that would infringe rules on restriction of trade and prevent the market from continuing to evolve.

It is of fundamental importance to the scheme that there is no 'financial link' – in particular between MROs, solicitors and claims management companies – and the definition of 'financial link' as well as further details on the way in which it will be policed are of particular interest to the CJC. Any breaches should be a matter for the professional regulators, such as the Solicitors Regulation Authority. This is a complicated field in which the nature of different possible business relationships – both direct and indirect - are varied and complex with links often not only with the commissioning party or intermediary but also with the subsequent treatment provider, e.g. a physiotherapy company or CBT provider. The CJC's concerns that 'links' are not confined to 'financial links' has already been touched on in the introduction to this response, and might usefully be reiterated here.

**Question 6: Do you agree that the proposed new paragraph 6.3A in the Pre-Action Protocol is sufficient to ensure that claimant representatives undertake a 'previous claims' data search prior to accepting new claims?**

The CJC suggests that further measures should be considered within the Protocol, to allow the objective of ensuring searches are carried out as a means of combating fraud to be met.

In cases where the claimant lawyer fails to undertake the check, the new paragraph should create a mechanism to enable the defendant to decline the CNF and require the claimant to resubmit the claim, as though never presented, rather than simply allowing the claim to drop out of the portal with the consequent risk of higher costs.

There should additionally be some prohibition in the Rules to prevent a claimant from bypassing this requirement by issuing proceedings immediately, rather than following the Protocol route, in line with the approach adopted by the new provisions for use of fixed cost medical reports earlier this year.

**Question 7: Do you consider that the amendments contained in this consultation will impact on people with protected equality characteristics? If so, please give details.**

The CJC would reiterate the need for litigants in person to have the support necessary to be able to find a suitable medical expert using the new MedCo IT hub. Otherwise, the Council cannot see that the amendments contained in the consultation would have any impact on those with protected characteristics.

**Question 8: We would welcome any further comments you may have in relation to the amendments covered by this consultation.**

The Council would emphasise the overriding importance of the proper maintenance of a secure system for that data, and clear guidance on who will have access to it in order to meet proper data protection standards.

It would also wish to highlight, however, the opportunities presented by the gathering of the data to help the department monitor and review the workings of the new scheme, to ensure that it is working properly to the overall objective of developing a more streamlined procedure for claims of this kind and to help inform any future reforms in the area. That data will be a valuable and unequivocal source of management information for all sides of the debate to use; early thought should be given to the best and most useful ways of making use of its availability and using it to further develop and improve the scheme.

1<sup>ST</sup> October 2014