

Ministry of Justice

MedCo Framework Review Call for Evidence

Response from Thompsons Solicitors

September 2015



Introduction

In the consultation document, Lord Faulks states that the government is committed to greater independence in the way that medical evidence in support of whiplash claims is obtained. It is concerned that 'new business practices' have developed in the personal injury sector which stifle competition and increase opportunities both for cosy relationships between the commissioners of medical reports and those who write them, and for fraud.

Our concern – as significant commissioners of medical reports on behalf of over 10,000 clients a year – is to understand where is the evidence that the sector has a major (or indeed any) problem with the issues this consultation purports to address? In relying unquestioningly on ABI figures (in the executive summary), the government lays bare its relationship with an industry in whose interest it is to keep the issue of fraud uppermost in the minds of legislators and the public. We do not know of any other area of business the government is so keen to regulate to solve a problem which they have failed to adequately identify.

In order to reduce so called 'unhealthy business practices' - which the MOJ apparently believes are endemic in expert selection - additional regulation has been introduced to prevent claimant representatives from selecting those medical experts and agencies they are confident can provide high quality reports in an appropriate timeframe, and who are able to provide an appointment in a location which is reasonably close to the claimant's home. Now, claimant representatives have to go through an expert selection lottery, frequently being compelled to select agencies or experts of which they have little or no knowledge and with which they have no agreed business terms. What other business is compelled to select suppliers of which they have little or no knowledge on terms that they have no opportunity to negotiate?

Rather than address problems with identified experts or agencies known to have behaved inappropriately or understood to have terms of business that are in some way anti-competitive – a surgical approach to a targeted concern the government have chosen to introduce wide-ranging and over prescriptive regulation.

If fraud has been identified this should be investigated and prosecuted through the courts to make a public example of those involved. The fact that the current number of prosecutions for allegedly fraudulent behaviour is minute in comparison to the number of reports commissioned across the UK every year, it would suggest that the level of fraud is in fact far too low to require major intervention.

The lack of evidence to support the government's plans for MedCo makes one question why they are being proposed. Given the ABI and individual insurance firms' obvious self interest in having the personal injury market - and the justice system generally – tilted in its favour, observers might be suspicious that the latest Framework review is to help deliver a system more favourable to the government's friends in the industry and to further perpetuate an industry-driven narrative about an insurance fraud 'crisis'.

If the government is really interested in refining a system to the benefit of the consumer - the claimant - not the corporate entities in the market it should outlaw pre-medical offers with immediate effect. Instead the consultation paper talks merely of 'discouraging pre-medical offers to settle'.

Surely it is for the benefit of both claimant and insurer representatives for the claimant to be examined by an independent medical expert who can test the veracity of the claimant's evidence, particularly if fraud is as big an issue as the insurance industry would have everyone accept. And yet we are seeing a noticeable increase in offers made before any such examination. The only conclusions we can draw from that is either that fraudulent activity is not as widespread as alleged or the 'prize' of costs and compensation savings override all other concerns and ethical considerations.

We hope this will be a more realistic and meaningful consultation than that recently carried out on court fees and costs, which appears to have been simply an excuse to confirm the government's established position and to support insurers.

1: Are the qualifying criteria for all MROs and the additional criteria for high volume providers appropriate to ensure that the data suppliers registered on MedCo have sufficiently robust systems, procedures and financial protections in place?

No.

- i. If you agree, please explain why and provide evidence to support your argument.**
- ii. If you disagree, please explain why and provide evidence to support your argument as to what changes to the criteria would be necessary to achieve the aim.**

As claimant lawyers our responsibility is to provide our clients with the best possible medical expertise for any given type of claim. However, given that it is neither practical nor realistic for us to audit the quality of over 200 (Tier 2) agencies and agree separate service level agreements with each one. We need to see evidence that agencies providing medical experts are being properly audited by the Ministry of Justice to ensure the quality and scope of service.

Instead of having to deal with over 200 different agencies, it would be far preferable to procure services from a refined pool of four or five agencies who we are confident can provide quality medical reports in a reasonable timeframe.

2: Are there any aspects of the current qualifying criteria which you feel would benefit from further guidance or clarification?

Yes.

If yes, please provide details of the criteria and any supporting evidence/suggestions for improvement.

Firstly, in our experience, a number of agencies advise that they are able to provide appointments in a location in reasonable proximity to the claimant when in fact, having been selected, it then becomes apparent that the expert is located many miles from the claimant making it totally unfeasible for the claimant to attend. The rules as they currently exist effectively prevent the claimant lawyer in those circumstances from making a further expert search and it is unclear as to what steps can be taken to select an alternative expert in closer proximity to the claimant. Qualifying criteria should therefore include a guarantee that the agent can attend appointments within an agreed distance. There should also be a function available to report on the MedCo Portal an expert's failure to comply with this.

Secondly, qualifying criteria should require that all agencies are able to demonstrate a minimum level of experience and solvency. We recommend that the MoJ require MedCo to carry out a financial audit of MRAs based on a minimum of three years' audited accounts or practice history for all new independent agencies or of the 'sister' agency where agencies are connected before they can join MedCo.

We note that when joining MedCo Tier 1 and Tier 2 agencies have to provide a financial bond as evidence of their solvency. We would seek full disclosure of the sums held and the intended use of these funds as, on our calculation, MedCo has profited to the tune of several £million with no evidence as to its necessity or intended use. Will MedCo use these funds to assist experts and firms where an agency becomes insolvent for example?

3: There have been specific questions raised by stakeholders about the definition and scope of national coverage and we would be interested in stakeholder views on how 'national coverage' could be defined - for example should it be a minimum of x% of postcodes.

- i. **If you have views on this aspect of the system please explain how/why the definition could be improved.**
- ii. **We would also be interested in your views and suggestions on what proportion of postcodes a 'national' MRO should be able to service; or whether an alternative such as 'regional coverage' should be considered.**

'National' should mean that an MRO is able to provide a service within 20 miles of every postcode in England and Wales.

4. **If you are a MRO, please provide evidence of the volume of reports you have been handling on a monthly basis since April 2014, i.e. before and after the introduction of MedCo on 6 April 2015.**

Not applicable.

5. **What factors/data (if any) should the MoJ take account of when consideration is given to the number and type of MROs presented to users following a search? Please provide details of the relevant factors you believe should be considered and why.**

There are several factors the MoJ should consider.

Claimant representatives and law firms select agencies and experts on the basis of the quality of the reports and the service levels agreed between the expert, MRO and law firm. Given the fixed costs regime, claimant firms and representatives cannot hope to be able to put in place systems to monitor the over 200 agencies which are available for selection. Firms can only monitor four or five MROs to ensure that they are providing the claimant with an appropriate service and are adhering to agreed terms of business.

For each case we run, we have to follow certain professional duties and have an obligation to our clients to conduct their case in a professional manner. These duties, summarised below, are important and the current MedCo system fails to allow us to comply with them.

The Solicitors Regulation Authority (SRA) Code of Conduct 2011 sets out 10 mandatory principles which apply to all solicitors. Principle 4 requires us to "act in the best interest of each client". Principle 5 requires us to "provide a proper standard of service to [our] clients". The notes accompanying the Code of Conduct also suggest that Thompsons should provide a proper standard of client care and work, including exercising competence, skill and diligence taking into account the individual needs and circumstances of each client.

We might not be able to comply if we are left instructing an expert through an agency where we have no knowledge of either a client's needs or circumstances. We are unable to address the specific needs of the individual client and we are not able to advise on a suitable expert for the case in hand due to the limitations currently imposed upon us by MedCo.

The SRA's 'Outcomes Focused Regulation' (OFR) requires us to achieve certain outcomes. For example, O(1.2) requires us to provide services to our clients in a manner which protects their interests and O(1.5) requires that our service takes account of the client's needs and circumstances. This is an elaboration of the general principles. We will struggle to say we achieved these outcomes when the medical agency and expert is not someone we know - who we recommend and who we know can be relied upon to prepare an objective and accurate report in accordance with the rules.

OFR (5.5) requires us to inform clients of circumstances in which our duties to the court, such as using the MedCo arrangements, outweigh our obligations to that client.

The use of third parties, including expert witnesses, is governed by OFR(6). In particular O(6.1) requires that, when we recommend a client uses a particular person or business, the recommendation is in the best interests of the client. By O(6.3) we should be ensuring that our clients are in a position to make informed decisions about how to pursue their matter. We appreciate that the CPR require that the expert's duty is to the court but we cannot be satisfied that will happen where we have insufficient knowledge of the experts involved. The random nature of experts through MedCo therefore presents inherent obstacles to full and effective compliance with professional standards.

6. If you are a MedCo user (e.g. claimant solicitor), how many different MROs/experts did you typically instruct before the introduction of MedCo?

Typically three or four per case.

Please provide details of the number and type of MRO/expert you commonly instructed to provide medical reports in a typical year and please specify whether they are MROs or experts.

In a typical year, Thompsons works on a very wide range of personal injury case types and instructs agencies to provide medical reports in many different case types. In the 12 months to July 2015 we obtained reports in nearly 20,000 cases including asbestos, CICA, clinical negligence, Road Traffic Accident, strain, stress, Vibration White Finger and workplace accident cases at a cost of over £15m.

7. If you are seeking a medical report, what is your principal consideration when deciding which MRO/expert to select from the options provided in the search return? For example describe the factors that affect your choice such as, whether you have used them before, standard terms and conditions or location in relation to claimant?

When choosing a medical expert, our primary consideration is to make a selection that is appropriate for our client, their circumstances, and the nature of their case. In particular we seek to secure an expert who is independent, experienced and has an excellent reputation and credentials, who is appropriately specialised, and who can provide an agreed level of service at an appropriate cost, and in a particular location.

Our knowledge of experts is accrued over many years of working with them. Part of Thompsons' offer to our clients, one of the reasons why we are a respected and effective firm, is our knowledge of the best expert for any given case. In the vast majority of cases we receive no complaints from our clients about the experts we instruct.

Unfortunately, the random way MedCo operates means we no longer have true freedom of choice and this undermines an important aspect of the value we add to our clients. If the selection of an expert is random, our ability to exercise our own expertise in finding an appropriate expert for any given client is reduced.

8. What changes, if any, should be made to the current offer of one high volume national and six low volume MROs? Please explain and/or supply evidence to support your view.

Thompsons recommends that users of the MedCo Portal should be able to select from a limited pool of four or five agencies with which a claimant law firm has comprehensive service level agreements. This would greatly simplify the process and vastly improve users' ability to monitor the performance and effectiveness of experts. We would have no problem sharing our terms of business with Med Co for them to reassure themselves that they place the doctor in no conflict and creates no partiality.

9. Do you feel that the current declaration meets the Government’s objectives of enhancing independence in medical reporting through the breaking of unhealthy relationships between organisations operating in the personal injury sector?

Yes.

i. If yes, please explain with evidence why the current declaration is sufficient and should not be extended.

We agree that the independence of medical examiners is of utmost importance. If a medical examiner can be shown to be independent of the commissioning law firm then we have no concerns. Where there is a lack of independence, conflicts of interest could arise which would promote ‘unhealthy’ and impartial relationships. However, we have seen very little evidence to suggest that there is a problem. We therefore believe the current declaration is sufficient.

ii. If no, please explain with evidence how it should be extended and why.

Not applicable.

10. Do you have any other views or evidence relating to whether the MedCo Portal is currently achieving the Government’s stated policy objective to tackle dysfunctional behaviour in the personal injury sector?

This question and the guidance in the consultation document make assumptions that are not based in evidence. The MedCo Portal is not a solution to this problem, because ‘dysfunctional behaviour’ in the personal injury sector has been neither properly explained nor identified. All we have had is a bland assertion that such behaviour exists and is causing significant problems.

The statement that the government’s objectives include ‘providing a more robust evidence base for those who are genuinely injured (emphasis added)’ insinuates that there is a concomitant problem with non-genuine or ‘fraudulent’ injuries. This is yet another example of the government regurgitating the insurance industry’s line, one that has no basis in fact and that relies upon classifying claimants unfortunate enough to be involved in more than one accident as suspicious and potentially fraudulent.

What (if any) further suggestions for reform would assist the operation of the MedCo portal, in particular, to address the behaviours exhibited by some MROs since the MedCo portal was introduced?

We call on the MOJ to list the behaviours it believes are dysfunctional and provide (appropriately anonymised) evidence of where they operate. On receipt of this we will be happy to provide suggestions for reform.

11. Do you have any other feedback in relation to the operation of MedCo that you think should be considered as part of this Call for Evidence?

No.

For further information

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