



Department of  
**Justice**

An Roinn Dlí agus Cirt  
Máinnystrie O tha Laa

## **Court approval of minor settlements**

**(Compensation settlements agreed for  
personal injuries in respect of children  
where legal proceedings have not issued)**

## **Summary of consultation responses**

**January 2022**

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## 1. Introduction

- 1.1 This paper provides a summary of responses received by the Department of Justice to a public consultation on whether or not, and if so how, Government ought to legislate to require court approval of compensation settlements to children for personal injuries (minor settlements) in cases in which legal proceedings have not issued.
- 1.2 The consultation opened on 7 July 2021. A consultation paper, a young persons' consultation paper, an equality screening, a rural needs impact assessment and an initial regulatory impact assessment were published on the Department's web site, as well as on Citizen Space on the nidirect web site.<sup>1</sup> The consultation closed on 24 September 2021. Fifty-four responses were received, four of which were from individuals. One solicitor's firm submitted three separate responses and these have been treated individually. Twenty-nine responses were submitted anonymously. A list of the organisations that responded is at the Appendix.
- 1.3 The Department is grateful to all respondents for their interest in this consultation.
- 1.4 The responses were collated and carefully considered. This paper summarises the responses.

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<sup>1</sup> Available at <https://www.justice-ni.gov.uk/consultations/consultation-minor-settlements>.

## 2. Summary of consultation responses

### **CONSULTATION QUESTION 1**

**Should Government legislate to compel court approval of settlements of compensation for children in cases in which legal proceedings have not issued? Please answer 'yes' or 'no'. Please give reasons.**

53 agreed.

1 thought legislation was only required in two circumstances.

None disagreed.

- 2.1 Of the fifty-four respondents who answered this question, fifty-three agreed that Government should legislate to compel court approval of settlements of compensation for children in cases in which legal proceedings have not issued.
- 2.2 In support of this view, nearly half of the respondents stated that legislation was important to protect children's rights. Several respondents were of the view that not to legislate would be a breach of Article 4 of the United Nations Convention on the Rights of a Child, which provides that: 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'. Other respondents noted that children were unable to represent themselves and rely on adults and the law to represent their best interests and protect their rights.
- 2.3 Over one third of respondents considered that legislation was necessary to ensure that children received a fair award of compensation for the injuries that they had sustained. Several respondents were of the view that the current system is open to abuse, with some noting that some compensators wish for a quick settlement so that files can be closed thus preventing a proper analysis of

the appropriate amount of compensation. Others noted that parents may accept a lower amount than that to which the child was entitled as they would be unlikely to know what a fair settlement would be for the injury sustained and are being directly advised by insurance companies, which is a conflict of interest; whereas, in contrast, judges will assess what a fair sum should be after reading medical notes, assessment of any scars, and considering current and future prognoses. It was also noted that judges are independent of all the parties in the case and will act in the child's best interests.

2.4 Over one third of respondents also considered that court protection and proper investment of the award until the child reaches 18 years of age was an important safeguard to ensure that the child receives the money to which he or she is entitled. Some also suggested that the courts were more knowledgeable on how to invest money to achieve the best returns, whereas some parents did not know how to invest money properly. While it was noted that compensation paid without court approval was generally for low-value claims, it was considered that what may be considered a small amount by some may be of significance to others, particularly as they reach adulthood. Similarly, the low number of cases settled without the issue of legal proceedings was considered to be irrelevant, as children are one of the most vulnerable groups in society, and therefore, all minor settlements, regardless of number and value, should be protected by the court.

2.5 The five organisations representing the interests of compensators were all supportive of legislation. While noting that the number of cases involving minors settled without the issue of legal proceedings was a very small percentage of overall cases, and the nature of the injuries were generally not serious, they considered that there were disadvantages to such settlements for both claimants and defendants. They noted that there was no guarantee that the compensation would be used for the benefit of the child. They also advised that, while some defendants may seek to obtain an indemnity from the parent or guardian in the event that a claim is re-opened, a court-approved settlement would bring certainty and finality to the claim as the child could not reopen his or her case a number of years later.

- 2.6 While supporting legislation, compensators urged that any process put in place to obtain court approval should be simple and efficient, and not lead to significantly increased costs and delay through disproportionate layers of bureaucracy. It was also noted that, at present, insurers may deal with minor petitions directly rather than incurring the cost of instructing a solicitor. Therefore, mandatory court approval would add to the costs borne by insurers and other compensators in settling claims as they would have their own legal costs from instructing solicitors, as well the costs incurred by plaintiffs, which are usually met by defendants. It was cautioned that these additional legal costs may place inflationary pressure on insurance premiums for liability policies in Northern Ireland.
- 2.7 While the majority of respondents considered that legislation was the only effective way to manage the risks of a child being under-compensated and of compensation not being used for the benefit of the child, one individual respondent suggested that primary legislation was not essential and that court rules would suffice.
- 2.8 The Children's Law Centre was of the view that a voluntary procedure (as described in paragraphs 3.9 to 3.11 of the consultation document) was suitable for the majority of cases. It considered, however, that there are two circumstances – looked-after children and children residing with someone who does not have parental responsibility for them (such as a grandparent) – in which legal representation of the child should be required and the compensation should be paid into the Court Funds Office.

**CONSULTATION QUESTION 2(a)**

**Should legislation place a duty to obtain court approval (in cases in which legal proceedings have not issued) on one of the parties (a compensator or a parent) and invalidate compensation paid to a child without court approval? Please give reasons, including which of the parties and why.**

52 agreed.

1 disagreed.

1 did not specifically answer.

14 said a duty should be placed on compensators.

8 said a duty should be placed on parents.

2.9 Fifty-three of fifty-four respondents answered this question, all but one of whom agreed that legislation should place a duty to obtain court approval on one of the parties and invalidate compensation paid to a child without such approval.

2.10 Five respondents (one legal firm, one individual and three anonymous) said that a duty to obtain court approval by one of the parties would avoid the potential abuse of the law. One anonymous respondent said that compensation paid to a child without approval should be invalidated, as this places a burden on guardians who, in some instances, may not have the experience to deal with the management of funds for a child. Three anonymous respondents said that such a duty and invalidation would ensure compliance, one of which said this would be the only way to ensure compliance. A further anonymous respondent said that, at common law, it is already the case that a settlement in relation to a minor is not binding until a court approves it, while another said that any monies already paid without approval ought to be recalled and rectified through court approval.

2.11 Of the twenty-two respondents who gave a view about which of the parties a duty should be placed upon, fourteen said the compensator and eight said the parent.

- 2.12 Various reasons were given for favouring the compensator, the most common (put forward by five) being that parents lacked the knowledge and understanding of how to seek court approval. Other reasons were that: the duty should be on the party paying the money; it is reasonable for the payer, having accepted liability, to obtain the approval; putting the duty on the compensator would discourage the practice of not seeking court approval (by parents who may be economically compromised and view unapproved compensation as attractive to ease a family financial position); and it would be the most reliable manner in which to ensure that a formal process is adhered to.
- 2.13 A solicitors' firm suggested that the Financial Conduct Authority could be asked to insist that insurance companies must ensure that no claim involving compensation to a minor should be made without independent legal advice being obtained by the minor's parent or guardian; and, in turn, the Law Society could be asked to make regulations requiring its members to seek court approval 'in the situation where an insurance company wishes them to evade same'. A judicial organisation suggested that insurers should not be allowed to release money until formal court approval had been obtained.
- 2.14 Several reasons were given by those favouring the duty being placed on the parent instead. The most common (both suggested by four respondents) were that it would be more cost-effective or less expensive; and that parents were the party holding the relevant evidence and documentation required by the court, or best placed to make representations to the court. Three respondents said that compensators cannot compel plaintiffs to obtain legal representation and so it would not be fair or reasonable for any legal duty to rest with the compensator. Two respondents cited the precedent of the current voluntary procedure, under which the onus is on the plaintiff. Other reasons given were: that it would be a conflict of interest for the compensator to make the application; to protect the children; that parents have the vested interest; that legal representatives cannot compel their clients to seek court approval; that compensators cannot compel plaintiffs to seek legal representation, but in the event of legislation plaintiffs would be obliged to do so and this would assist them in seeking approval; and that compensators lack a sufficiently proximate relationship with the parent.



- 2.15 The Association of British Insurers and an insurance company said that compensators should only be required to make payments of settlements to the court on receipt of a court order provided by the parent or guardian of the plaintiff, and that compensators should not be fixed with interest penalties when such an order is not provided in a timely manner.
- 2.16 The Law Society said that whichever of the parties should seek approval is not the important issue.
- 2.17 The one anonymous respondent who disagreed, said that a duty to obtain court approval and the invalidation of compensation would cause a litigious minefield for the court, litigants and parents.

## **CONSULTATION QUESTION 2(b)**

**How could or should such a duty be enforced?**

48 answered.

2.18 Forty-eight of fifty-four respondents answered this question.

2.19 Thirteen respondents made suggestions involving some form of mandatory registration of compensation claims for minors. Seven (six anonymous and one solicitors' firm) said that all insurance companies must register claims for minors (presumably with the court) and seek approval from the court; and one anonymous respondent suggested a duty to notify the Courts and Tribunals Service. Another anonymous respondent, an insurance company and the Association of British Insurers said that there should be a mandatory online portal for seeking court approval of settlements. Three respondents – the Association of Personal Injury Lawyers, a judicial organisation and a solicitors' firm – all referred to the Compensation Recovery Scheme (under which compensators are under a statutory duty to register claims for personal-injury compensation in Northern Ireland). The former two cited it as an example of how a similar registration scheme for approval of minor settlements could work, while the latter suggested that the scheme itself could be used by 'linking' it to the courts system, to confirm whether or not a case involving a minor had been approved.

2.20 Seven respondents (two insurance companies, the Forum of Insurance Lawyers, a solicitors' firm, a parent, an anonymous respondent, and the Association of Consumer Support Organisations) said that compensation paid in the absence of approval should be invalid. This would allow a minor to bring a fresh claim upon becoming an adult with previous unapproved compensation disregarded. An individual said that personal-injury settlements with parties under a legal disability (i.e. including children) without court approval are already not enforceable.

- 2.21 Six respondents suggested fines or 'sanctions' as a means of enforcing non-compliance with any duty. An anonymous respondent said that failure of a compensator to comply with a duty should be a criminal offence, while another suggested compensators should receive a 'punitive fine, increased with each infringement', and two others suggested a fine and another 'sanctions'. A further anonymous respondent suggested sanctions on compensators and the revocation of unapproved payments, while another said that, in addition to fines, insurance companies should be prohibited from providing insurance services and the payment 'overturned'. A different anonymous respondent said that both the parent and the compensator should be fined.
- 2.22 A solicitors' firm and an individual said that it should be illegal to send money directly to a parent but instead it must be sent to the court. The Ulster Unionist Party said that compensators should be required to pay money directly to the court. An anonymous respondent said that unapproved damages should not be allowed to be paid to a parent or solicitor. Another anonymous respondent said that the parent should be denied access to compensation in the absence of seeking approval. None explained how these requirements could be enforced.
- 2.23 One anonymous respondent said that compensators should not be allowed to release funds to adults acting for minors, but only directly to the Court Funds Office. The same respondent said that there should also be a duty on banks to report funds being lodged into accounts by insurers.
- 2.24 An anonymous respondent said that insurers should be required to refer unrepresented children to independent legal advisers. Another said that children should have a court-appointed solicitor.
- 2.25 The Association of Personal Injury Lawyers said that the Financial Conduct Authority should place sanctions on insurers who do not seek court approval.
- 2.26 A solicitors' firm and the Association of Personal Injury Lawyers said that the Law Society could discipline any member who failing to seek court approval. An insurance company suggested penalties for solicitors who sought settlement by means of parental indemnity or discharge.

2.27 Three respondents suggested non-statutory means: an anonymous respondent suggested awareness raising and professional standards; an insurance company suggested that paying funds only once confirmation of approval had been provided to the compensator would serve as incentive for the claimant to seek approval; and the Law Society said that the insurance industry should amend its voluntary code of practice.

**CONSULTATION QUESTION 2(c)**

**Should such legislation apply to all such settlements or only those above a financial threshold? Please give reasons for your answer.**

52 said the legislation should apply to all settlements.

1 said the legislation should only apply to settlements above a financial threshold.

1 did not answer the question.

2.28 Fifty-two of fifty-four respondents were of the view that legislation should apply to all settlements.

2.29 In support of this view, several respondents considered that, if the amount of damages is capped at a level below which court approval was not required, that could incentivise compensators to settle cases under that figure to avoid court approval and scrutiny, which would be an 'abuse' and create a real risk of under-compensation contrary to the best interests of the child. It was also suggested that, if the duty were on parents to apply for court approval of the settlement, they may be content to settle for an amount below the threshold to avoid what may be considered as an unwelcome imposition. It was argued that putting a threshold on the amount of settlement would miss the objective of new legislation, which would be to protect children.

2.30 A judicial organisation said that the purpose of a settlement approval is not simply to rubber-stamp an agreed figure, but to consider the issues in the case, the medical evidence and the appropriate level of compensation. It observed that often a settlement figure represents a compromise and the issues need to be explored and examined carefully to ensure that the overall figure and the level of compromise are appropriate in the particular circumstances of each case.

2.31 Respondents also considered that the absence of a threshold would ensure that all settlements were fair and commensurate to the injury, and that the rights of all children were equally protected. It was also noted that the

compensation belonged to the child and should be managed and protected for his or her benefit, no matter how big or small the settlement. As in some responses to question 1, several respondents said that the value of a settlement is subjective and it is not for the courts, legal profession or compensators to decide how valuable a sum of money is for one child or another as this can vary significantly based on the child and his or her circumstances. One respondent said that compensation cases should come under one law; another said that a threshold would be discriminatory; another that a financial threshold is not a fair and appropriate way to resolve a minor's case; and a further considered that the value of the settlement was irrelevant if an efficient system for obtaining court approval was put in place.

- 2.32 FOIL pointed out that the initial regulatory impact assessment indicated that, if claims worth less than £3,000 were excluded from the new provisions, the annual overall costs saving would only be £18,831. The ABI noted that a number of settlements in the consultation analysis were valued at lower than £1,000 and so a financial threshold set at this level could exclude a significant volume of future cases.
- 2.33 One anonymous respondent, while saying that the legislation should apply to all settlements, suggested that there may be an argument for a 'de minimis principle' if the system was 'clogged up' because of these approvals, albeit such an arrangement should be for review after implementation and not a pre-determined issue.
- 2.34 It was also suggested by another anonymous respondent that the legislation should apply to all cases, regardless of the age of the child.
- 2.35 One solicitors' firm said that the legislation should only apply to settlements above a financial threshold of £1,000. It added that smaller awards could be dealt with through the discretion of the parties but should be subject to a parental discharge completed after appropriate legal advice is obtained.

## **CONSULTATION QUESTION 2(d)**

**If there were to be a financial threshold, at what level should it be set?**

8 suggested a financial threshold.

1 suggested £100.

2 suggested £500.

3 suggested £1,000.

1 suggested £2,000.

1 suggested £2,500.

2.36 While ten respondents thought that the legislation should apply to all settlements, eight suggested financial thresholds if it were decided that there should be one. One suggested £100, two £500, three £1,000, one £2,000 and one £2,500. A further respondent suggested that it depends on the injuries and another said an 'adequate amount'.

2.37 An anonymous respondent who was opposed to a threshold noted nonetheless that, in Scotland, there is a threshold of £5,000 below which a direction cannot be given as to its management: it suggested that it could be argued that, where the cost of seeking approval outweighs the value of settlement, legislation could allow a voluntary process for awards below that threshold.

**CONSULTATION QUESTION 2(e)**

**Would a new paper-based procedure for seeking court approval for settlements encourage more court approvals? Should such a procedure be introduced?**

50 answered the question.

35 supported a new paper-based procedure.

- 2.38 Of the four respondents who did not answer the question, the Association of Consumer Support Organisations advised that, as this question related to procedure rather than policy, providing a view was outside the scope of its role.
- 2.39 Nine respondents answered 'yes', one 'no' and one 'unsure' to both questions, and one answered 'yes' to the first question and 'maybe' to the second without providing further comment.
- 2.40 Of the thirty-one respondents who thought that a paper-based procedure would encourage more court approvals, nine provided reasons for their views. One anonymous respondent suggested that parents were often unwilling to come to court. Several commented that a new, efficient, simple procedure would make it easier for parents to seek court approval and would reduce costs, which are ultimately borne by the compensator. Others said that the procedure would be quicker, reducing delay.
- 2.41 An anonymous respondent who supported a paper-based procedure said that there should be a choice between that and attending court, and that the legal adviser could advise the child which would be best, depending on the circumstances of the case.
- 2.42 Several respondents did not consider that the current process was a barrier to parties seeking court approval for settlements. The Law Society considered that it is relatively straightforward to engage a solicitor, who arranges the appropriate medical examination, engages with the third party's insurer and takes a settlement to court for the approval of a judge. One solicitors' firm was



of the view that any 'burden' was on the victim's legal representative and that legal costs are extremely modest in the county courts.

2.43 Thirty-five respondents considered that a paper-based procedure should be introduced, although many added the caveat that judges should have a power to direct an oral hearing in appropriate cases, for example where there is a more complex injury or scarring resulting in more than a minor cosmetic disfigurement. The Law Society suggested that a legal representative could have the option of indicating why an oral hearing was required. The Society added that the judge would have the final say on whether or not an oral hearing was needed and that guidance from the Lady Chief Justice's Office may be required due to the element of judicial discretion. A number of respondents noted that the paper-based procedure had worked effectively during the current pandemic and had reduced costs. The Law Society considered that paper-based approvals had been timely and almost seamless, adding that this type of procedure has a permanent place in the justice system going forward and that the process could be streamlined for standard cases. A solicitors' firm noted that, during the pandemic, the courts were more flexible about approving some children's settlements without all parties attending court and some were facilitated by remote SightLink hearings, with all other documents submitted in advance. The firm suggested that this option could be developed in cases where there are short-lived injuries evidenced by detailed expert medical examination and reports with the same professional standards applied.

2.44 An individual respondent said that a paper-based procedure would be better from an administrative perspective and an insurance company commented that the simpler the process, the greater the incentive to seek approval. FOIL noted that the majority of claims that currently come before the court are low-value and the information required by the judge to consider these applications is minimal. A solicitors' firm said that a paper-based procedure for minor settlements was in place in England and Wales (Civil Procedure Rules, Part 8, Alternative Procedure for Claims) and recommended similar for Northern Ireland.

- 2.45 Respondents representing the interests of defendants, while supporting a paper-based procedure, called for any new procedure to be developed in consultation with insurers and other compensators before it would be introduced. Some also said that any new process should not include any additional costs. For example, FOIL suggested that, in most cases, there should be no need for counsel's opinion to be obtained on quantum, and that a declaration from the claimant's legal representative that the settlement is appropriate and has been recommended for acceptance should be sufficient. The Children's Law Centre commented that a paper-based procedure could have benefits but there needed to be carefully drawn parameters around how such a process would operate.
- 2.46 While supporting a paper-based procedure, several respondents, representing the interests of defendants, were of the view that this may not be suitable for commercial settlements where there is no liability attaching to the defendant but the compensator decides that there is merit in a nuisance-level award. In this situation, they suggested that it is important that the minor plaintiff's solicitor is able to set out the basis of the proposed settlement to the judge. They added that a paper-based procedure would not be suitable in cases where contributory negligence substantially reduces the level of the minor plaintiff's proposed damages settlement, again meaning that it would be important that the child's solicitor is able to set out the basis of the proposed settlement to the judge.
- 2.47 While also supporting a paper-based procedure, several respondents called for 'online', 'electronic' and 'paperless' procedures. An insurance company suggested that secure email would assist in delivering an efficient outcome. An individual respondent suggested that there would be IT and data-protection issues to be considered when designing a secure, paper-based procedure that would be processing personal sensitive information on physical and mental health. One solicitors' firm said that if a paper-based procedure were introduced, the judge must process the award.
- 2.48 Many respondents expressed the view that there should not be a financial threshold in relation to a paper-based procedure. An insurance company suggested that the procedure should be introduced as part of a wider raft of

reforms, such as the introduction of a compulsory pre-action protocol similar to that in England and Wales, which was thought to encourage quicker and easier access to justice in such claims.

- 2.49 Thirteen respondents were of the view that a paper-based procedure should not be introduced. One anonymous respondent stated that a paper-based procedure would not provide the same levels of expertise (in terms of being brought by experienced counsel and analysed by experienced judges) which would be to the detriment of the minor plaintiff. APIL said that it was not appropriate for minor approvals to be dealt with on the papers rather than an in-person hearing, which are important to ensure that the judge can properly form a view in relation to the appropriateness of the award for the child.
- 2.50 In relation to the experience during the Covid-19 pandemic, one respondent said that a paper-based procedure was trialled for a while but that judges have deferred to their original practice of having the matter heard in chambers. The respondent said that this process provides more closure on the issues for the next friend and also allows the judge the proper opportunity to assess the medical records and speak with the next friend to ensure that the proposed figure is adequate.
- 2.51 A judicial organisation also referred to next friends in its response. It said that a paper-based procedure would inevitably lead to a two-tier system and that a uniform approach was required. It added that an important safeguard is to hear directly from the next friend as to the history of symptoms, level and extent of recovery before a final determination is made.
- 2.52 Some respondents, however, seemed to be opposed to such a procedure due to a misunderstanding of what was meant by 'paper-based'. For example, one solicitors' firm did not support the introduction of a paper-based procedure as they considered that it should be mandatory for all settlements to be approved by a judge. An accident management company suggested a new procedure, not necessarily paper-based, without elaborating. An anonymous respondent added that a digital procedure would suffice and that moderate cases could be dealt with on an administrative or remote basis. An individual respondent suggested a web-based procedure, which would be efficient. Another

anonymous respondent was opposed to such a procedure 'to ensure the protection of the correct figure for the minor plaintiff'. One anonymous respondent was opposed to the 'paper' aspect of the procedure, suggesting that technology should be used rather than paper. Several respondents understood the procedure would mean that parents had not received legal advice, with one saying it would be a 'form-filling exercise'.

2.53 One anonymous respondent, who did not think that a new paper-based procedure would encourage more court approvals and who did not support its introduction, however, then went on to state that oral applications added very little to the paper petition.

**CONSULTATION QUESTION 2(f)**

**What should be the parameters of such a procedure (e.g. should it be restricted to cases where liability is admitted, cases below a financial threshold, cases involving only certain types of injury, etc.)?**

14 said all cases.

11 said where liability is admitted.

4 said for certain type of injury.

2 said below a financial threshold.

3 indicated that there should be parameters but did not indicate what these should be.

1 did not know.

3 did not think that there should be a paper-based procedure, therefore parameters were not applicable.

16 did not answer.

2.54 Fourteen respondents said that there should be no restrictions regarding a new paper-based procedure. An insurance company was of the view that parameters would be unfair and too restrictive. It added that to insist on an open admission of liability would only serve to delay matters, for example compensators may wish to pay damages to a minor plaintiff even though responsibility for a related adult action had yet to be clarified. This company was of the view that the petition submitted on behalf of the minor plaintiff should indicate whether or not settlement is proposed 'in full'. An anonymous respondent noted that the judge should have the discretion to require a hearing for difficult or unusual cases. FOIL considered that, in the majority of claims, a paper-based procedure would provide a simple, workable solution, minimising costs and the use of court resources. It added that such an approach makes the best use of judicial time but that, in exceptional cases, in which the judge considers that a hearing is required, normal judicial case management powers would enable the application to be listed. An individual respondent commented

that given the priority was to protect vulnerable parties, it would be difficult to select robust parameters.

2.55 Eleven respondents considered that a paper-based procedure should apply where liability is admitted (although one respondent suggested that it was unusual for liability not be admitted in minor plaintiff cases) mainly due to the fact that the judge would wish to have a hearing (virtual or in-person) where there is a dispute.

2.56 Four respondents suggested that a paper-based procedure should apply to a certain type of injury, for example, very minor soft-tissue injuries where the figure for approval is less than £500, or where there is no scarring.

2.57 Two respondents (a solicitors' firm and an anonymous respondent) considered that a paper-based procedure should be restricted to cases below a financial threshold.

2.58 A judicial organisation, which was not in favour of the introduction of a paper-based procedure, said that to introduce a differentiated approach whereby some settlements can proceed on a paper-based procedure and others with a hearing may inadvertently introduce a perceived hierarchy of cases by category. It said that cases in which liability has been admitted do not necessarily translate to straightforward assessments of damages, and that some settlements are complex and not amenable to a paper-based procedure irrespective of the value of award. It concluded that the potential complexity of cases is not directly related to the category of injury and that judicial supervision is essential so that appropriate independent oversight is maintained in all cases.

**CONSULTATION QUESTION 3(a)**

**If no, are you content with the status quo, which includes voluntary regulation?**

3 answered.

2.59 Three respondents answered this question, none of whom had answered 'no' to question 1. A solicitors' firm said that it was 'vehemently opposed to the continuation of voluntary regulation, which it considered to be a misnomer as there are no regulations for compensators. An individual similarly said that 'voluntary regulation' is an oxymoron and also mentioned consumer research that indicated that for every person who makes a complaint there are twenty-six dissatisfied others who do not. The Law Society said that there were human rights issues at stake: the law and the courts need to protect minors and legislation is required.

**CONSULTATION QUESTION 3(b)**

**If no, would a new paper-based procedure for lower-value settlements encourage greater uptake of voluntary court approval? Should such a procedure be introduced?**

2 answered.

2.60 Two respondents answered this question, neither of whom had answered 'no' to question 1. A solicitors' firm referred to its answer to question 3(a), while an individual referred to the potential adverse incentives of financial thresholds and the possibility that lower-value settlements may most warrant judicial enquiry to guard against inadequate compensation.



**CONSULTATION QUESTION 3(c)**

**If no, what should be the parameters of such a procedure (e.g. should it be restricted to cases where liability is uncontested, cases involving only certain types of injury, etc.)?**

2 answered.

2.61 Two respondents answered this question, neither of whom had answered 'no' to question 1. A solicitors' firm referred to its answer to question 3(b), while an individual referred to her answer to question 2(f).

**CONSULTATION QUESTION 3(d)**

**If no, what other means of requiring or encouraging court approval of settlements of compensation to children arrived at outside court proceedings can you identify?**

4 answered.

2.62 Four respondents answered this question, none of whom had answered 'no' to question 1. A judicial organisation suggested a public information campaign to advise and encourage parents with a particular focus on the recoverability of legal costs. The Law Society said that there should be an obligation on insurers to make it clear to parents that they should engage a legal representative to ensure that legal advice is obtained and the proper procedure is followed. A solicitors' firm said that it should be compulsory for all compensators to negotiate settlement of children's cases with an independent legal representative acting for the child; unapproved settlements should be revoked; solicitors should be regulated; and the Compensation Recovery Scheme database should be used to ask personal-injury victims from the last decade what happened with their claims and then take or recommend action as appropriate. An individual said that she considered the concept of 'settlements to children arrived at outside court proceedings' and without judicial scrutiny to be unsound in law, such settlements being unenforceable.

#### **CONSULTATION QUESTION 4**

**Do you agree with the outcome of the screening exercises? If not, please provide comments.**

26 agreed.

11 disagreed.

- 2.63 Of the thirty-seven respondents who answered, twenty-six agreed with the outcome of the screening exercises and eleven did not.
- 2.64 One anonymous respondent did not believe that the correct analytic framework was used and that the screening exercises were subjective.
- 2.65 A solicitors' firm noted, in relation to the equality screening, that a child who already suffers from a disability could be involved in an accident resulting in injury; and, in relation to the rural needs impact assessment, remoteness from court as a result of rural location could be dealt with by remote or virtual hearings. The Law Society made the same points.
- 2.66 An individual referred to sections 4A and 2C of the rural needs impact assessment (which noted that requiring court approval for all minor settlements may impact persons in rural areas if they have difficulties travelling to court) and said that this issue must extend to issues beyond court approval of minor settlements and cannot robustly weigh in the balance when assessing the outcome of the consultation. The same individual questioned the sincerity 'of this whole project' in contemplating a further impact assessment in the event of legislation subsequently being introduced as 'kicking the can down the road' rather than tackling the acknowledged mischief in a timely manner.
- 2.67 In relation to the equality screening, the individual referred to the comment about dependants at section 2.1 that 'the payment of children's compensation into court rather than directly to parents may be considered by some as a negative impact', and suggested that it either required further elaboration or, if

it lacked evidence, should be discounted as a hypothetical concern to which no weight should be attached. The individual also referred to the list of main stakeholders at paragraph 13 on page 7 and expressed surprise that injured children were not listed; and the statement at paragraph 14 that there were no other policies with a bearing on this policy, arguing that matters involving retained EU law are relevant.

## **CONSULTATION QUESTION 5**

**Do you agree with the outcome of the initial regulatory impact assessment? If not, please provide comments.**

38 answered.

22 agreed.

14 disagreed.

2 commented without agreeing or disagreeing.

2.68 Thirty-eight of fifty-four respondents answered this question.

2.69 Twenty-one said that they agreed with the outcome without providing any comments or explanation, while one (the ABI) said that they agreed on the basis that a full assessment be carried out should legislation proceed.

2.70 Of those who did provide comments, some did not relate to the assessment, but to the wider policy questions.

2.71 APIL said that there did not appear to be any evidential basis for the figures used in the assessment, and that the presentation of figures in section 4 was misleading and said the total identified costs should include the cost of compensation and not only professional costs and fees. It also said that the assessment was 'one-sided' because it did not assess the risk or cost to minors of not having their cases approved.

2.72 A judicial organisation queried some of the assumptions upon which the assessment was based, in particular, at paragraph 4.10, the assumption that the additional legal costs for a compensator would be greater without explanation as to how the figure was reached or the practical arrangements that insurers already have in place with legal representatives. It also commented that focus on average costs deflects attention from the primary objective of ensuring that the best interests of children are met.

2.73 The Law Society said that it was unclear how the financial calculations had been made, and that there were erroneous statements about the position in England and Wales and the Republic of Ireland: pointing to Part 21 of the procedural rules in the former jurisdiction and a recommendation about court approval in the latter.

2.74 A solicitors' firm made the same claim about erroneous statements about other jurisdictions, and also made a number of other points:

- a. that the extent of additional legal costs would be limited to disbursements such as the court stamp and barrister's fee at most;
- b. that it is a 'fundamental error' to assume that a cost-benefit analysis should be undertaken at all;
- c. that insurance companies should price insurance premiums based on the assumption that all claims involving protected parties will be subject to court approval and thus the associated costs will be incurred;
- d. that county court scale costs are based on the 'swings and roundabouts' principle, meaning that some cases will be conducted at a loss by the legal representatives, and some at a profit, but overall costs recovered will be sufficient, and so extracting the costs only of minor approvals is an irrelevance;
- e. that settlements not being brought to court for approval, and thus not incurring a court fee, creates a risk that court fees will have to rise 'to plug the gap in the finances caused by fewer court approved cases';
- f. that there can only be a net benefit in mandatory court approval of minor settlements, and the costs, difficulty or additional administrative or operational burden of achieving the outcome would be minimal in relation to the overall benefit.

2.75 An individual said that the range of options was greater than the six considered in the assessment and challenged the statement that there is no equivalent policy in other UK jurisdictions or the Republic of Ireland, arguing that – under EU law (still applicable to the interpretation of legislation providing EU rights

until such legislation is repealed or amended) relating to uninsured drivers and road traffic accidents– children involved in motor accidents in Northern Ireland are accorded less protection than their counterparts in England and Wales.

- 2.76 The same individual (albeit in answer to Question 4) commented that the assessment did not take into account as part of the benefits the potential for enhanced compensation to injured parties; and referred to a statement that there was no policy requiring approval of minor settlements in the UK or Republic of Ireland and said that it needed to be corrected, as there was such a requirement in England and Wales (referring to Part 21 of the Civil Procedure Rules) and the Republic. The individual also said that an inference in Option 1 ('do nothing') that current minor settlements outside legal proceedings are enforceable was not correct, and that it was wrong to suggest that primary legislation is necessary to require court approval in all cases as other jurisdictions have done so via civil procedure, there being no reference in any of the relevant case law to the necessity for primary legislation to uphold the principle in *Deitz v Lennig Chemicals Ltd* [1969] 1 AC 170 that settlements that have not secured court approval are not enforceable by or against either party.
- 2.77 Six respondents said that they disagreed without providing any comments or explanation, one of whom had not accessed the assessment, and a seventh said that the assessment was limited by its form.

## **CONSULTATION QUESTION 6**

**Please provide any other comments you have in relation to this consultation.**

15 provided comments.

2.78 Fifteen of fifty-four respondents answered this question.

2.79 Of those who did provide comments, some repeated comments that had already been made in answer to previous questions. Some of the comments discussed here were not recorded directly in response to this question, but nonetheless were considered to be 'other comments'.

2.80 An anonymous respondent said that the requirement for court approval of settlements arising out of legal proceedings did not apply to proceedings in the Industrial Tribunal and that this was a major gap in the law.

2.81 A solicitors' firm said that the data supplied by the ABI was challengeable because the ABI does not represent all insurers and was not able to secure responses in all cases, and that the government should exercise caution in analysing data 'from the very source of the potential wrong doer'. The same firm said that the proposition at paragraph 3.7 that any settlement could be achieved in the absence of medical examination of a child is at odds with the 2019 Judicial Studies Board guidelines for the assessment of personal injury quantum in Northern Ireland (the 'Green Book'), which emphasises the importance of expert medical evidence in the assessment of personal-injury quantum and in the prevention of fraud.

2.82 APIL said that it was concerned that there may be a 'theme', consistent with a previous consultation about court funds, that small amounts of compensation are not deemed worthy of court protection. The same organisation also said that the Department had dismissed figures provided to illustrate the scale of the issue, and that there were several inaccuracies in the consultation paper. It said that it was inaccurate to state that approval hearings of minor settlements take place in open court (paragraph 2.7 of the consultation paper), and that court



approval was not mandatory for all minor settlements in England and Wales (paragraph 2.9). It also said that the consultation paper (paragraph 3.7) appeared to 'actively encourage' direct settlement between the insurer and plaintiff by describing this as a relatively quick and straightforward process that does not necessarily require a medical examination of the child; it argued such practice 'flies in the face' of the principle in the Green Book that evidence relating to whiplash claims requires careful scrutiny, and that paragraph 3.7 seemed to suggest that settlements without court approval were not compensation for injuries, but simply money for 'being involved in an accident'. The same organisation did not believe that parents could or should be trusted to manage compensation for the benefit of the child and that it should not be a parent's decision to seek court approval of a settlement reached with a compensator, pointing out that parents' requests for access to court funds for holidays and household items indicates that their decisions may not always be in the best interests of the child. Finally, it objected to references in the consultation paper to the 'hassle factor' associated with obtaining court approval, querying whether or not a parent choosing not to obtain approval for such reasons has the child's best interests at heart.

2.83 An insurance company referred to the 'gross disparity' between the level of general damages awards in Northern Ireland compared to the other UK jurisdictions and the Republic of Ireland, and measures in those other jurisdictions to reduce the level of such awards, which have created an environment for businesses to prosper and benefit from reduced insurance premiums. The company said that a wholesale review of the Green Book should be actively encouraged.

2.84 The Law Society said that legislation should require that compensation must be paid to the court on foot of a court order, and that a settlement should not be capable of being actioned unless it goes through the courts, and that this would protect insurers as well as children against issues that may arise in the future. The Society also noted that the statement at paragraph 2.7 – that an approval hearing takes place in open court – is incorrect, and that paragraph 3.7 suggested that the [current] process does not necessarily involve a medical examination of the child and contradicted what is stated elsewhere, when in

most cases a report is required and the Green Book emphasises the importance of expert medical evidence in the assessment of personal injuries and the prevention of fraud. The Society also said that the data relied upon in the consultation paper emanated from the ABI, which does not represent all insurers.

2.85 A judicial association referred to Article 3 of the UN Convention on the Rights of the Child, which sets out a clear obligation to maintain the best interests of the child as a primary consideration. The association, referring to paragraph 2.2 of the consultation paper, said that it was a 'vast assumption', particularly in cases in which no medical evidence is sought, to suggest that settlements not submitted for court approval were likely to be for relatively small sums of compensation for relatively minor injuries. It also said that the paper did not address those children with disabilities, who require special consideration and protection.

2.86 Referring to the reference at paragraph 2.5 to settlements reached with parental discharge agreements in place, the association commented on the absence of discussion of arrangements reached when the parents may themselves be the defendants and thus there is a conflict of interest.

2.87 The same association, referring to the description of the procedure in Scotland at paragraph 2.10, noted the Scottish Law Commission's intention, as part of its Tenth Programme of Law Reform, to consider 'whether arrangements need to be put in place to protect awards of damages made to children' and its observation of 'instances where parents or guardians have sought to exploit a child's misfortune for financial gain'.

2.88 The association also said that, while the settlement figures noted on page 12 of the consultation paper were relatively low, without appropriate oversight there is no way of knowing if they represent the true value of the claims, and that the estimated 6% of settlements not submitted for court approval is not insignificant. It also noted a pending application for judicial review in which the applicant is seeking to challenge the Motor Insurance Bureau procedure providing for minor settlements to be concluded without a court approval process.

- 2.89 The association commented that the observation at paragraph 3.2 (that there is no precedent for a statutory requirement to obtain legal representation) overlooked the fact that, in essence, the parents represent the child in any settlement negotiations, despite not being bound by any professional obligation or code of conduct, and blurs the distinction between the child as the injured party without representation and the parent's choice not to seek independent legal advice. The association stated that, as the settlement relates to a child's claim, it should be subject to additional safeguards irrespective of the parents' choice not to seek legal representation.
- 2.90 It also referred to the case of *Dunhill v Bergin and another case* [2014] UKSC, which noted that 'children and protected parties require and deserve protection, not only from themselves but also from their legal advisers', observing that the approval process is 'not simply a rubber stamp exercise', but 'a means of independent oversight designed to protect the interests of the minor plaintiff and secure appropriate protection of the settlement monies'.
- 2.91 The Ulster Unionist Party said that it recognised the possibility of increased costs leading to an increase in insurance premiums, but that change was still necessary.
- 2.92 An anonymous respondent said that ethnic minorities could be negatively affected by language and a lack of understanding of the law.
- 2.93 The Northern Ireland Commissioner for Children and Young People noted that the consultation paper focused heavily on 'parents' without that term being defined explicitly as those with statutory parental responsibility, that this raises questions as to what consideration was given to looked-after children or those living in informal fostering arrangements, and that this must be factored into any new arrangements. The Commissioner also drew attention to cases involving motor accidents involving untraced drivers, in which the compensating body can decide whether or not to place awarded funds under the supervision of the court, and urged the Department to review this as part of any legislative reform so as to avoid differential treatment.

2.94 The Children's Law Centre said that the consultation should not focus solely upon road traffic accidents.

## 3. Conclusions

- 3.1 The current mandate of the Northern Ireland Assembly is due to end and a new Assembly will be elected in May. The current Minister believes that legislative intervention would be appropriate, particularly in light of the consultation responses. However, any decision will fall to a new Minister of Justice and a new Assembly.
- 3.2 In the meantime, however, we can address some points of fact arising from the consultation.
- 3.3 In respect of the initial regulatory impact assessment (RIA), a number of points arise<sup>2</sup>:
- it is Northern Ireland Executive policy that, if a policy has an impact (positive or negative) on the wider business community (or section thereof) in Northern Ireland then an RIA must be considered as part of policy development;
  - it is accepted that the range of policy options is greater than the six assessed options: six options were considered to represent a proportionate analysis and to give a reasonable understanding of potential costs and benefits;
  - the identified costs included legal costs, the cost of medical reports and court fees, and did not include the cost of compensation; no assumptions were made about alterations to settlement amounts;
  - the assessment did identify the risk 'that settlements not approved by the court may involve under-compensation and may not be used for the benefit of the child';
  - the assessment also identified as a non-monetised benefit of all options except Option 1 the removal of the risk of under-compensation of children;
  - the assumption that placing a duty on the compensator would incur additional legal costs on the compensator is explained at pages 22–23 of the initial assessment;

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<sup>2</sup> Some organisations said that they were not able to access the initial regulatory impact assessment. It is available at <https://www.justice-ni.gov.uk/consultations/consultation-minor-settlements>.

- the ‘swings and roundabouts’ principle in relation to the prescribed level of county court scale costs is not relevant to the assessment of the impact on businesses of the proposed policy;
- the calculation of court fees is based on existing business levels and the continuation of business outside court does not create a shortfall in court revenue;
- the suggestion that children involved in motor accidents in Northern Ireland are accorded less protection than their counterparts in England and Wales (and thus there is a breach of still extant EU rights) is based on the premise that there is a requirement in the latter jurisdiction for court approval of minor settlements reached in the absence of legal proceedings, which is not the case.

3.4 Having considered all the points raised in the consultation, the Department is content to finalise the regulatory impact assessment.

3.5 A number of points raised as further comments in response to question 6 can be addressed:

- several respondents said that it was incorrect to say (paragraph 2.9) that the procedure in England and Wales for settlements agreed without the issue of legal proceedings is a voluntary one, referring to rule 21.10 of the Civil Procedure Rules: however, that rule does not appear to mandate court approval of a settlement reached prior to the issue of proceedings; similarly, there is no requirement in the Republic of Ireland for settlements arrived outside legal proceedings to be submitted for court approval (and, indeed, as noted in paragraph 2.16 of the consultation paper, the report of a recent review of the administration of civil justice there recommended that legislation ought to be introduced to require such approval)<sup>3</sup>;
- as this is also the case in Northern Ireland, it follows that primary legislation would be required to compel court approval in all cases;
- paragraph 3.7 did not suggest that the court process did not necessarily involve a medical examination of the child, but rather that a settlement

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<sup>3</sup> Available at [https://www.justice.ie/en/JELR/Pages/Review\\_of\\_the\\_Administration\\_of\\_Civil\\_Justice\\_-\\_Review\\_Group\\_Report](https://www.justice.ie/en/JELR/Pages/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report).

reached in the absence of a court process may not require such an examination;

- we accept that primary legislation is not required to uphold the principle that unapproved minor settlements are not enforceable: the consultation relates to the question of whether or not court approval should be required in all cases;
- regarding the data used to inform the consultation, while some data was supplied by, and credited to, the ABI, the data used to estimate the current volume of unapproved settlements was supplied by the Department for Communities and the Northern Ireland Courts and Tribunals Service.

### List of organisations that responded to the consultation

Association of British Insurers  
Association of Consumer Support Organisations  
Association of Personal Injury Lawyers  
Aviva Insurance Limited  
AXA Insurance  
Breen Rankin Lenzi Limited  
Children's Law Centre  
Crash Services Limited  
Forum of Insurance Lawyers  
JMK Solicitors  
John Ross and Son Solicitors  
Law Society of Northern Ireland  
NFU Mutual  
Northern Ireland Association of District Judges  
Northern Ireland Commissioner for Children and Young People  
Ulster Unionist Party