Response to Ministry of Justice Consultation on Extending Fixed Recoverable Costs in Civil Cases

Implementing Sir Rupert Jackson's proposals

June 2019

Introduction

The Birmingham Law Society is the largest provincial local law society with a membership of some 5,000 representing solicitors, barristers and paralegals working in the West Midlands area.

This response has been prepared by the Society's Dispute Resolution Committee in relation to the questions posed in the Ministry of Justice's consultation, "Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals".

Contributions to this response have been received from our members of small, medium and large firms from across the West Midlands region.

Whilst we agree with the implementation of fixed recoverable costs in some instances, we do not agree that the proposed procedures will provide sufficient clarity.

We have serious concerns with the proposal to roll out FRC without taking any steps to pilot or trial the proposed changes before they take effect. Our concerns not only have a direct impact on the quality of support clients receive from lawyers, but will also have a direct impact on lawyers (both solicitors and barristers).

Many firms will have no choice but to seek to operate their relationships with their clients within the parameters provided for in the FRC. If the proposed fees are set at uneconomic levels, there is a serious risk of firms ceasing to practice in areas affected with the consequent impact on not only jobs in the profession but also access to and administration of justice. For firms continuing to operate in the areas, in order to undertake the work in an economically viable way (within the FRC fee structures provided for), there is a real risk that this will result in corner-cutting and the lowering of standards. It is accepted that paying parties may face increased handling difficulties and expense if standards drop. Indeed, this is recognised in the MoJ's impact assessment:

"There is a potential risk that claimant settlements might be lower in future. This risk might materialise if claimant lawyers reduce the time and resource they spend on cases in response to FRC, and if as a result, settlement negotiations lead to worse outcomes for claimants. Whether this risk materialises would depend upon the behaviour of defendants in such settlement negotiations."

Whilst we have directly responded to the relevant questions asked in the consultation, this does in no way indicate our agreement or acceptance to FRC.

Chapter 3: The Fast Track:

1. **Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out?**

We appreciate that the Government has a desire to bring certainty to adverse costs. There is no perfect way in which to address recoverable costs – a flexible system that assesses the appropriate amount of costs by reference to the complexity and conduct of a case lacks certainty; and a FRC system that provides greater certainty is a blunt instrument that makes minimal allowance for the circumstances of each case. When considering what the best (or least-worst) option is, one must consider not only the potential benefits but also the potential downsides.

The concern we have is that the introduction of FRC at the rates proposed means that this will have the impact of lowering, suppressing and reducing the hourly rates that clients are charged by their lawyers. In turn this will mean that clients will not have access to the right lawyers, because the right lawyers might not be prepared to do work at the low FRC rates proposed.

The consultation says that introducing FRC will not impact on access to justice. For the reasons we have stated here, if the rates are as low as currently proposed (particularly for disputed and complex disputes) we disagree.

On the point of the commercial aspects of the FRC, there has not previously been an incentive to increase the estimated value of a claim. With FRC and the way the stages work, this will now be the case.

Where FRC (and therefore potentially the fees firms charge to their clients) are defined by stages, there is incentive for claims to be prematurely issued, so as to move into the next FRC stage. To mitigate against this practice this from occurring, it is vital that the level of FRC is high enough.

Further, at the FRC levels proposed we anticipate that litigants who are represented (particularly larger corporate clients) will perceive that there is less discouragement (i.e. reduced costs consequences), indeed possibly an incentive, for pursuing weak claims/defences and engaging in unreasonable behaviour. In turn, that will exacerbate the problem of inequality of arms.

We seek your views, including any alternatives, on:
(i) the proposals for allocation of cases to Bands (including package holiday sickness);

The information currently provided with regards to Bands is too vague. Whilst it is clear what "bent metal or damage to vehicles" entails, it is not entirely clear what "defended debt claims", "other money claims" and "other claims at the top end of the fast track" mean.

"O*ther claims at the top end of the fast track*" suggests that this might cover all civil litigation claims pursued in the Business and Property Courts. However, this is inconsistent with the specified types of cases cited for each band.

We do not agree that all types of "defended debt claims" should be banded together. Moreover, we do not agree that "defended debt claims" should be placed in Band 1 – the simplest (and lowest value) track.

This broad classification, if kept as proposed, would capture some of the most complicated types of claims.

Whilst we acknowledge that defended debt claims can be simple (in some instances being based on little more than unpaid invoices), it is inevitable that a term as 'broad' as a "debt claim" encompasses a wide spectrum of potential claims.

Some of these are simple (the classic unpaid invoice), others can be factually (where defended on, for example misrepresentation/frustration) or legally complex (most obviously in the context of a complex statutory background such as the Consumer Credit Act 1974).

Such claims require detailed pleading (see below), as well as considerable preparation for and presentation at trial.

Our experience of trials concerning technical arguments under the CCA regularly involve a couple of days preparation and detailed skeleton arguments (the CCA being something with which Courts usually require considerable assistance).

However, such claims are distilled to their essence, mere simple debt claims, being based upon a debt (usually credit card balance) owed by debtor to creditor.

That it would be inappropriate to treat such claims as 'simple' actions is further demonstrated by the proposal of setting the defence or defence and counterclaim (paragraph 8.12) at £500 (no more than 3 hours work). We accept that this fee might be realistic for a simple debt action based upon unpaid invoices, which gives rise to little by way of legal argument.

But where complicated matters of statute are raised, for example a claim defended under compliance with the Consumer Credit Act 1974 s61, or where arguments of unfair relationship (CCA74, s140A) are to be raised which requires considerable engagement with the law and particularity of fact, the pleadings are often of substantial length, regularly exceeding 10 pages in length. That being the case, a £500 fee for the work is wholly unrealistic and has no bearing on the time (and therefore) cost that it would take to complete it.

In the specific context of the Consumer Credit Act, the limitations placed upon the recoverability of fees for such claims will have a profound and damaging effect on access to justice.

The reality of the matter is that large companies and financial institutions will continue to pay their legal representatives (both solicitor and counsel) substantial fees, ensuring that such representatives are free to devote as much time to a particular matter as they wish. The banks are more than content to absorb the discrepancy between recoverable fees and charged fees. Indeed, the reality is that banks hardly notice the difference.

This is patently not the position for individual litigants who, again often in the context of actions under the CCA, are already in considerable financial difficulties. Such people will simply not be in a position to pay fees any greater than those recoverable under the proposed fixed costs scheme. The instructed solicitor/advocate will only be in a position to charge that which they can recover. Placing complex consumer litigation within the general 'debt claim' severely limits such recoverability and therefore limits time/resources that can be committed to the case.

This creates an inevitable imbalance between the representation afforded to the individual/consumer and that afforded to the financial institution and the current proposal being far from placing parties on an equal footing, 'bakes in' the imbalance.

Whilst we acknowledge, and concur, with the notion that a defended debt claim at its simplest ought properly to be regarded as band one. It is suggested that the term "debt claim" in that context ought to be better defined to encompass the simplest of debt actions.

By contrast, more complex contractual/consumer claims, and particularly those based upon statutory regimes (explicitly the CCA) are considerably more complicated and do not belong in band one. Such claims belong in either band three or more properly in band four.

In summary, our view is that the undefined term "defended debt claims" is far too broad a term. A more specific definition, carving out more complex consumer matters, amongst others ought to be formulated.

Our concerns equally apply to the suggested "other money claims" (proposed as Band 3) and "other claims at the top end of the fast track" (proposed as Band 4). On the issue of "other claims at the top end of the fast track", what does that mean? At what point would a claim for restitution (as an example) trigger the necessary monetary amount for it to fall within FRC.

Moreover, is it the case, that every civil litigation claim that falls within the "top end of the fast track" will be captured by FRC.

Significantly more definition and guidance must be given so that it is clear from the outset which cases fall within FRC and which do not.

The more certainty provided means the less scope for argument. It also means that lawyers will be able to provide accurate advice to their clients as to the expectations of the civil litigation process. One of the concepts of FRC was to introduce certainty. However, on the basis of the Bands as currently scoped and defined, this will be far from the case.

On the pricing aspect of each Band, it is essential that further modelling is carried out on the impact of the proposed Bandings, FRC figures and comparing them with current spend on similar cases requires accurate data. It is insufficient to rely upon the data provided by a single contributor (Taylor Rose). For changes as widespread and important as what is being proposed, we would expect to see data being analysed by a few contributors.

The FRC fails to take into account regional variances, where hourly rates can vary dramatically (particularly in comparison with city rates such as Birmingham).

The current Bandings do not allow enough flexibility to enable lawyers to be able to carry out such works within current charge rates.

(ii) the proposals for multiple claims arising from the same cause of action;

On the face of it appears sensible to have provision to cater for multiple claims arising out of the same cause of action. However, we do not consider that an uplift of 10% is sufficient to cover the amount of work that lawyers will need to do when acting for multiple parties. Whilst the claim might arise out of the same cause of action, this does not mean only 10% of work will be invested in each additional party.

We are also concerned that the proposals are overly simplifying some areas of civil litigation which are extremely complex.

Each individual's claim turns on its own facts and merits. Each party has their own separate obligations under the CPR which need to be met. Each party will need to provide separate witness evidence (which may require covering multiple issues, which are distinct from the other parties to the litigation) and in some instances separate quantum calculations. Moreover, lawyers owe professional duties in respect of each party separately. It is imperative that the professional obligations are not restricted or curtailed, so as to ensure that fees are kept within FRC levels.

In our view 10% is woefully low and is not a realistic figure. It does not properly reflect the work that will need to be carried out for each additional claimant.

An uplift in the region of 50% or more would be appropriate.

(iii) whether, and how, the rules should be fortified to ensure that (a) unnecessary challenges are avoided, and (b) cases stay within the FRC regime where appropriate; and

If fixed recoverable costs are eventually implemented across all areas of civil litigation, as proposed, it is essential that the rules are fortified to ensure that unnecessary challenges are avoided and to ensure cases stay within the FRC regime where appropriate. There are two ways in which this can be achieved.

The first is to ensure the FRC system is accepted as being fair and reasonable, so that litigants – both paying and receiving - willingly accept the financial consequences. That requires the bandings and fees to be set by reference to figures that realistically relate to the costs parties incur in litigation. If they are not set at or close to reasonable sums, the number of challenges will increase as parties seek to chase what they perceive to be a 'fairer' outcome.

If those figures are set correctly, then sanctions for unreasonable challenges are likely to be accepted. In terms of how the rules should be fortified, in some instances to provide a sanction of £150 fine in some cases is far too low. We do not believe that a fine at this level will act as a sufficient or indeed any deterrent.

We consider that the level of fine should be linked to the value of the claim being pursued, or a fine plus a percentage reduction in the FRC.

With regard to ensuring that cases are not being inappropriately allocated to the fast track, it is clear that to escape FRC that there will be an incentive to increase/escalate the value of the claim (if this increases the costs amount to outside the scope of FRC). We believe that making the sanction more severe, should assist in ensuring that parties are not unreasonably making applications to challenge applicability of FRC or the allocation to the Fast Track (or intermediate track if introduced).

We agree that parties should state proposals with regards to the applicability of FRC in the letter of claim.

It is suggested in the consultation that Sir Rupert has recommended FRC for interim injunction applications in Band 4 and NIHL, along with preliminary issues. "Interim Injunction Applications" needs to be properly defined, particularly as Sir Rupert has recommended that the FRC for those types of applications is £750.

With regard to interim applications, it is noted that Sir Rupert recommends that costs in respect of those applications should be recovered separately. We agree. It is vital that sufficient provision is provided for in the framework for interim applications. There should be provision to recover costs from an opponent, in a successful application.

We disagree that such FRC is linked to "two thirds of the applicable Type A and Type B costs" (CPR 45.29H). The amount of FRC is woefully low and has no bearing on the work that is carried out in making, or defending an application. Parties must file an application notice and support this with evidence. At the current rates proposed, we have concerns that this will have a significant impact on the quality of the content of applications being issued. This ultimately will also place more weight and burden on limited Court resource.

FRC for interim applications, must be set at a level to act as a deterrent for parties who unreasonably make or oppose such applications. At the levels currently proposed we consider that there is no such deterrent, which in turn could lead to an increase in applications.

We disagree that the FRC for interim applications should include advocates costs. Given the separate and distinct nature of the work required by an advocate, in comparison to the work required by a lawyer to prepare an application, it is important that advocate's costs should be separate.

Finally, it is suggested that there is an active discouragement of preliminary issue trials in the fast track. We urge caution in pursuing this route as in limiting options open to parties will have an impact on limiting parties' rights to a fair hearing.

Before any decision is reached with regards to what FRC should be applied for applications, we recommend that further discussion and consultation takes place so as to ensure that whatever framework is implemented has been properly analysed, considered and thought through. It does not appear, on the face of the information provided at present, that this is the case.

(iv) Part 36 offers and unreasonable litigation conduct (including, but not limited to, the proposals for an uplift on FRC (35% for the purposes of Part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement.

We agree that Part 36 is a crucial part of the litigation process. In fixing costs as a percentage of FRC, we believe, would undermine the entire risk involved with making, or receiving, Part 36 offers.

There are constantly attempts to circumvent the current FRC that have been introduced for PI.

One issue that has arisen is the impact of being awarded indemnity costs and whether that entitles a party to avoid FRC. Currently an award of indemnity costs arising from a Part 36 offer entitles a party to a detailed assessment of those costs. However, the proposal made by this consultation is to award a penalty of 30-40% instead, which would in effect avoid a scrutiny of the work actually undertaken.

We urge care in amending the current benefits afforded by Part 36. Part 36 must remain effective, given its fundamental role in the litigation process. We do not believe that an uplift of 30-40% would be sufficient in some cases to act as the incentive to settle.

Chapter 4: Noise Induced Hearing Loss:

2. **Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:**

   (i) the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response.

   (ii) the contents of the proposed standard directions, and the listing of separate preliminary trials.

   The Dispute Resolution Committee do not have a view on this chapter as this is outside our practice area.

Chapter 5: Intermediate Cases:

3. **Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:**

   (i) the proposed extension of the fast track to cover intermediate cases;

   Given the concerns we have raised above, we do not agree with the extension of the fast track to cover intermediate cases. We consider it appropriate for the FRC to be trialled/piloted (at the very least) at fast track level before such wide-ranging changes are introduced to claims with a value of up to £100,000.

   Whilst we accept that there is an arguable case to introduce cases within the fast track, we do not agree that it is appropriate to extend such proposals (particularly where they are yet untested for fast track cases) to cases beyond the fast track.

   We believe that the fixed costs pilot currently being undertaken in Manchester and Bristol should be analysed and properly considered before the step is taken) to make such dramatic changes to "debt, damages or other monetary relief" claims.

   If despite our opposition to the proposal it is decided to proceed with introducing FRC to such claims up to £100,000, then proper definition needs to be provided to the types of cases that will be captured by FRC. This is required for certainty for lawyers and clients, which in turn will reduce the risk of dispute as to whether a case is captured by FRC.

"Debt, damages or other monetary relief" claims effectively covers the majority of all civil litigation cases worth £100,000 or less (save for exclusions).

What criteria are used to classify "complex professional negligence claims"? Does this mean that all cases where a trial will last no longer than 3 days, with no more than 2 expert witnesses giving evidence for each party?

There is no limit on the number of lay witnesses. This should be considered. Complex cases could often require multiple lay witnesses giving evidence.

To aid with certainty, there seems little point in keeping such "intermediate cases" within the fast track. Either create a new track, or extend the fast track. It cannot be a hybrid of the two, as this will create uncertainty and confusion.

On the pricing aspect of each Band, it is essential that further modelling is carried out on the impact of the proposed Bandings, FRC figures and comparing them with current spend on similar cases requires accurate data. We repeat that it is insufficient to rely upon the data provided by a single contributor (Taylor Rose).

We believe that the amount provided for in respect of ADR/mediation is too low and fails to reflect the amount of time/work involved in such mediations. Given the important role ADR/mediation plays to resolve cases before trial, it is important that the amount provided for sufficiently covers the costs in embarking on ADR/mediation. Perhaps further clarity needs to be given as to the type of ADR, along with the expected time the parties will be engaged in ADR. For example, some meditations last for half a day, whereas others often last a full day, if not much longer.

We are concerned that introducing FRC for cases up to £100,000 – especially at the low levels currently proposed - diminishes a negative consequence of pursuing or defending matters unreasonably. In many instances, to include interim applications, the view taken with adverse costs being as low/limited as they are, that parties will be willing to take the risk – that, for example, it is worth 'taking a punt' on a weak defence if the additional cost of doing so and losing is relatively modest compared to a relatively high value claim. This is behaviour that we already witness in Small Claims Track civil cases and Employment Tribunal claims where the default costs recovery position is limited to low figures.

(ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;

With regard to Band 1, what limit should apply to claims "just over the current fast track limit"? Moreover, what does "simple" mean? Is the only criterion for this to be for cases where trial lasts for a day or less?

It is believed that counsels' fees are generally low. In particular, our view is that the fees permitted for handing down are far too low.

There is no reflecting in the bandings which allows for complexity.

As outlined above, we are also concerned about the fees currently proposed in respect of mediation.

(iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;

Please see comments above regarding gaining consent to FRC by utilisation of fair figures.

If, contrary to our views, FRC were to be introduced in such a way, then it is essential that the types of cases to be captured by the FRC are defined with precision. If the framework is sufficiently clear from the outset, this should mitigate against cases being incorrectly allocated. The directions questionnaires will need to be amended (this will apply to the fast track changes as well) so as to enable information regarding allocation and Banding to be given. Potentially, this would also need to be supplemented by a statement/short evidence.

We do not agree with the proposal to allocate before the parties have had the opportunity to complete the directions questionnaires.

A costs liability of £300 is insufficient to add as a deterrent with regard to disputes on assignment of allocation to the “intermediate track” and Banding.

(iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done; and

We have no particular views with regards to combining bands, although having more Bands may assist when further clarity and definition is provided with regards to the case types/complexity.

(v) **whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.**

Yes. It is vital that there is clarity and certainty surrounding this. The current proposals do not do so.

Chapter 6: Judicial Review:

4. **Do you agree with the proposal for costs budgeting in JRs with a criterion of 'whether the costs of a party are likely to exceed £100,000'? If not, what alternative do you propose?**

   Cost budgeting has been a feature within civil litigation now for some time. Presently the determining factor with regard to whether cost budgeting applies, is linked to the value of a claim.

   First and foremost, we consider that Sir Rupert's original recommendation to introduce qualified one-way costs shifting ('QOCs') for all JRs, as set out in his 2010 review, should be adopted. There is clear merit in this proposal and the introduction of QOCs in all JRs would significantly enhance access to justice.

   Typically, JRs are brought by citizens of the state, against the state itself. Whilst those who bring JRs are likely to be of limited means and uncertain of the potential exposure to costs that they may face, their opponent is unlikely to be phased by any potential costs risk. Prima facie, there is an inequality of arms in JR cases.

   The suggestion in the current consultation that there is no evidence that there are access to justice issues in JRs is nonsensical.

   Take for example complaints made to the Financial Ombudsman Service ('FOS'). Complainants to the FOS are typically private individuals, many of whom have lost the entirety of their pensions and/or life savings. Such complainants may choose to use the FOS (as opposed to the courts) owing to the fact that the FOS is free to use, is informal in nature and avoids any potential costs risk. The FOS has wide decision-making powers and rather than being obliged to make a decision that is sound in law, the FOS is only required to make decisions that are considered 'fair and reasonable' in all the circumstances of the case. This has led to increased scrutiny of the FOS in recent years, with allegations of inconsistency, most recently culminating in a damning investigation by Channel 4's 'Dispatches'. This has subsequently led to a review of the FOS and intervention by Parliamentarians. The consensus is that there have been serious flaws within the FOS' processes. However, whilst respondent firms of FOS complaints may be able to afford to challenge the FOS through JR proceedings, or defend a JR, by virtue of their own asset position, or through the benefit of an insurance policy, complainants are not so fortunate, and may well have already lost all of their assets. To such potential applicants for judicial review, how may they get their access to justice? We contend this is only possible through the introduction of QOCs.

   The above is just one illustration of many others that could be provided of the potential risks to access to justice. If, contrary to our concerns, our preferred option of QOCs were not to be adopted in all JRs as the most appropriate way forward, then it is plain that Sir Rupert's recommendations to extend the 'Aarhus' rules across all JR cases, as well as by introducing costs budgeting in 'heavy' JR cases, is the next best thing. The introduction of costs budgeting should only be introduced alongside an extension of the Aarhus rules to all

JRs. We consider that an extension of the Aarhus rules is necessary to ensure access to justice, for the same reasons as we have already set out in our QOCs submissions above.

Thus, if the Aarhus rules are extended to all JRs, it is agreed that the proposals to introduce costs budgeting to 'heavy' JR cases would be appropriate.

For JRs, if the principle of recoverable costs is to remain in JRs, particularly where they typically involve the challenge of a state citizen against the state in some for, then we agree with the principle of introducing cost budgeting in JRs where the costs of a party are likely to exceed an agreed figure.

We agree with the terms of the proposals as to how this would work in practice (paragraph 3.3). Such a framework is already in operation for civil litigation claims worth in excess of £50,000 and it would be consistent were costs budgeting to apply to JRs where a party's costs are likely to exceed £50,000".

Chapter 8: The Next Steps:

5. **We seek your views on the proposals in this report otherwise not covered in the previous questions throughout the document**

   None provided.

Chapter 9: Impact Assessment

6. **Do you have any evidence/data to support or disagree with any of the proposals which you would like the government to consider as part of this consultation?**

   None available.

Chapter 10: Equalities Statement

7. **What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.**

8. **Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.**

9. **Do you agree that we have correctly identified the extent of the impacts under each of these proposals? Please give reasons and supply evidence as appropriate**

10. **Are there forms of mitigation in relation to impacts that we have not considered?**

    With regards to questions 7-10, we have set out our views and concerns above.