Fixed Recoverable Costs (FRC): MoJ consultation on vulnerability (May 2022) – the way forward

Overview

This is the Ministry of Justice (MoJ) response paper to the May 2022 consultation on how vulnerability is addressed in the extended FRC regime, which was held as part of the process of finalising the new Civil Procedure Rules (CPR). This paper (i) outlines the number of responses received to the consultation; (ii) summarises the responses; and (iii) sets out the way forward in light of the consultation. The consultation lasted from 9 May 2022 to 20 June 2022. The publication of this document coincides with the Civil Procedure (Amendment No. 2) Rules 2023, which give effect to the changes we consulted upon and which were laid before Parliament on 24 May to come into force on 1 October 2023.

(i) Number of respondents

We received 38 responses to the consultation.

Of these respondents, 15 were broadly supportive of the proposals (39.5%), and the desire to reconsider additional vulnerability measures.

Of the remaining 23 respondents, 16 engaged constructively with the proposals (42.1%), to say how they could be improved.

(ii) Summary of responses

In responding to the Government's proposal on vulnerability, as outlined in paragraph 15 of the consultation paper, respondents focused on the following issues:

- The 20% threshold - particularly (i) the level and (ii) clarity over what might constitute 'additional work alone'.

- That the additional payment for vulnerability should be made as a fixed 'bolt on' cost that should be a percentile uplift to the FRC that would otherwise be payable (one defendant respondent suggested that a 5% uplift would appear reasonable and proportionate, in this regard).

- PD1A - particularly how the Government's proposal would interact with this.

- Consistency with the provisions for vulnerability in the DHSC consultation on FRC for clinical negligence claims worth <£25k.

- Whether vulnerability should be considered at the start of the case ('prospective') to ensure greater certainty for both parties, or instead at the end of the case ('retrospective').

- 'Exceptionality' - particularly:

i. that the rule should ensure that a party can only claim either the 'vulnerability' uplift or the 'exceptional circumstances' uplift, and not both;
ii. whether 'exceptionality' should be included in the draft rule (i.e., as some defendant respondents suggested, that the vulnerability uplift should be contingent on 20% additional work *and* exceptionality);
iii. whether the Civil Procedure Rules (CPR) already contain an adequate provision for dealing with a case on an 'exceptional' basis (e.g., at CPR 45.13 and 49.29J) and therefore any additional provision is completely unnecessary; and
iv. that respondents did not think that vulnerability should be considered on an 'exceptional' basis (i.e., that there should only be a requirement of establishing vulnerability and that this materially caused the need to incur additional work or expense, and that once the (for e.g., 20%) threshold has been reached, there should be no requirement to prove 'exceptionality'.

- Exemptions - particularly whether (i) all housing legal aid cases should be exempted from FRC on the grounds of vulnerability, or (ii) other categories of cases (e.g., abuse cases) should be exempted.

- Whether vulnerability is already appropriately accounted for in existing (low value PI) FRC regimes, or whether this new regime should apply to existing regimes also.

    i. Defendant respondents were (generally) of the view that vulnerability had already been appropriately considered in existing FRC rates (as part of the 'swings and roundabouts' of litigation), and that this would generate an unnecessary 'windfall' for claimant solicitors. It was argued that this would undermine the principle of 'fixed costs' and drive a 'trojan horse' through existing FRC regimes.
    ii. By contrast, claimant respondents were supportive of the recognition that vulnerable claimants might generate additional costs due to necessary work. One claimant trade body suggested, for example, that the current 'exceptional circumstances' uplift in existing FRC regimes is 'not sufficient' to cater for vulnerability, as the threshold is too high. Case law, e.g. *Ferri v Gill*, was provided in support of this point (i.e., that it is difficult to demonstrate that a case is 'not of the general run'). *Aldred v Cham*, and the irrecoverability of counsel's opinion on quantum for a child's case, was also cited. They suggested that the vulnerability rule should apply to all fixed costs cases, and not just to those in the extended regime, to provide a suitable framework to ensure that extra costs generated by vulnerability are recoverable.

- Whether there should be a cap on the additional costs generated due to vulnerability.

- The lack of adequate data on this issue.

(iii) Proposed way forward

Having carefully considered the points raised by respondents, the Government proposes to implement the rule changes on vulnerability as set out in the consultation as part of the extension of FRC, without further amendment, for the reasons specified in the consultation. These rule changes are included at **rule 45.10 of the revised Part 45**.

Going forward, claims that, but for the extension of FRC, would have been subject to the FRC regimes for personal injury cases in the current Part 45 will be subject to the new vulnerability provision.

The Government does not propose to make any changes to the arrangements for disbursements for vulnerability in FRC cases, and will monitor this as the new regime beds in.

Ministry of Justice

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