Fixed recoverable costs: consultation on issues relating to the new regime (July 2023)

1. Summary

1. Fixed recoverable costs (FRC) will be extended to a much wider range of civil cases on 1 October 2023. The new rules were laid before Parliament in May 2023, and references in this consultation are to the rules as thereby amended.[1] This follows the original report on FRC by Sir Rupert Jackson in 2017, the MoJ consultation in 2019, and the MoJ response in 2021.[2] MoJ worked closely with the Civil Procedure Rule Committee (CPRC) on the drafting of the rules. With the CPRC's support, the draft rules were first published in April 2023 so that stakeholders had as much notice as possible of the detail of the reforms.[3]

2. This consultation considers various issues raised by stakeholders in response to the publication of those rules. The extension of FRC in civil cases is a substantial reform, which will ensure access to justice at proportionate cost across wider categories of civil case. MoJ is keen to ensure that the extension of FRC in civil cases works as effectively as possible. In light of this, and following various submissions from stakeholders in recent months, MoJ is now consulting on the following issues. We will consider the responses and decide on any amendments to the Civil Procedure Rules (CPR) which may be required.

3. In particular, this consultation focuses on the following issues:

(i) whether costs on assessment should be fixed;
(ii) whether there should be fixed costs for Part 8 (costs only) claims;
(iii) the recoverability of, separately, (a) inquest costs and (b) restoration proceedings, and how this should be dealt with in the CPR;
(iv) the issue of providing for the recoverability of advocates' preparation in the CPR, in cases which (a) are settled late or (b) are vacated; and
(v) whether the fixed trial advocacy fees now in Practice Direction (PD) 45 of the CPR should be further uprated for inflation, and by how much;
(vi) whether to make explicit in CPR 26.9(10)(b) in respect of clinical negligence claims, that an early admission of liability must be made in the pre-action protocol letter of response.

---

[1] The standalone FRC SI was laid on 24 May 2023: < The Civil Procedure (Amendment No. 2) Rules 2023 (legislation.gov.uk)>. The new regime will come into force on 1 October 2023.

[2] Jackson's 2017 report on FRC: <fixed-recoverable-costs-supplemental-report-online-2-1.pdf (judiciary.uk)>; MoJ's 2019 consultation on FRC: <Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals (justice.gov.uk)>; MoJ's 2021 consultation on FRC: <Extending Fixed Recoverable Costs in Civil Cases: The Government Response (justice.gov.uk)>.

[3] The draft FRC rules were published on the Civil Procedure Rule Committee (CPRC) website on 20 April 2023: <About us - Civil Procedure Rule Committee - GOV.UK (www.gov.uk)>.

4. Respondents to this consultation are invited to provide their views generally on any of the issues set out below, as well as to respond to the specific questions at the end of individual sections.

5. It is proposed that, assuming agreement by the CPRC by December 2023, amendments could be included in the CPR SI for implementation in April 2024.

Inflation

6. MoJ can also announce that, while inflation remains high, we will provide a further exceptional uprating to the FRC figures. The FRC figures which have been included in PD 45, which were based on those finalised by Lord Justice (Sir Rupert) Jackson in his 2017 supplemental report on FRC,[4] were inflated using the quarterly Services Producer Price Index (SPPI) at January 2023 for implementation in October. MoJ propose to inflate further to cover inflation since January. This increase requires revision to new Practice Direction (PD) 45; we propose to do this so that the new figures are in place for April 2024. As previously stated in paragraph 13 of the MoJ's public notice on the FRC reforms, the FRC figures will be reviewed generally every 3 years.[5]

Future review

7. The FRC reforms will only affect new cases from October 2023.[6] MoJ propose to review the extended FRC more generally in 3 years' time, as proposed by Sir Rupert. The reforms will, of course, be kept under review as they bed in.

2. Consultation issues

(i) Fixing costs on assessment

8. MoJ have been considering making further amendments to the FRC rules on the issue of a shortened assessment procedure for FRC disputes. Although the extended FRC regime will simplify costs, making assessment unnecessary in many circumstances, there may be areas of discretion and 'reasonableness' within the new regime. Disputes may be likely to arise over points of detail in the rules, for example, in which stage a claim has settled, or over the exact figure for damages. MoJ highlight Sir Rupert's recommendation in Chapter 5, 5.22 of his 2017 report:

[4] The table of recoverable costs for the fast track is at Jackson, 2017, Chapter 5, 5.4; the table of recoverable costs for the intermediate track is at Chapter 7, 5.3; and for Noise Induced Hearing Loss (NIHL) claims at Chapter 5, 5.1.
[5] The MoJ's public notice on the FRC reforms is available to read here: <frc-public-notice-updated.pdf (justice.gov.uk)>.
[6] The position on transitionals is set out at rule 2 of: <The Civil Procedure (Amendment No. 2) Rules 2023 (legislation.gov.uk)>. It is also covered in the MoJ public notice at paragraph 10.

"In most cases, the assessment of recoverable costs should be a straightforward exercise, not requiring judicial input. In so far as there is any dispute, the court will assess costs. If the case goes to trial, the judge will summarily assess costs at the end of the hearing. In cases which do not go to trial, there should be a shortened form of detailed assessment, of the kind described in the last sentence of Practice Direction 47, paragraph 5.7, with a provisional assessment fee cap of – say – £500."[7]

9. MoJ's position is that this issue should be addressed, in line with Sir Rupert's recommendation above, so that FRC operates as effectively as possible. Recent case law has also confirmed that assessment is not available for fixed costs.[8] MoJ consider that, if no further changes on detailed assessment are made, the costs and effort for the detailed assessment could become unreasonable and disproportionate for what was in dispute. There is a risk that unnecessary detailed assessments are commenced to augment FRC revenue.

10. Disputes about costs on assessment typically fall into two camps: (i) disputes that can be wholly determined in a fixed costs determination, and (ii) those which may result in an order for detailed assessment. MoJ consider that there is some variety as to the types of dispute, but that one process could capture all of them.

11. MoJ's view is, as Sir Rupert indicated in his 2017 report at Chapter 5, 5.22, that any rule to address this issue would preserve the basic structure of Part 47 but shorten it. One stakeholder proposed the following framework for the rule, with which we provisionally agree, subject to some modifications:

    (a) Parties should first attempt to agree costs informally.
    (b) The receiving party would produce a short form claim for FRC and disbursements in a proposed new FRC bill precedent, including a brief summary of the claim, a statement of what was in dispute and the receiving party's succinct submissions.
    (c) Upon service, the paying party would have 21 days to serve a reply. Replies must be short and to the point.
    (d) An application would then be made to the court (by N244 or in Part 8 costs-only proceedings claim form as appropriate) for determination on the papers.
    (e) The court would serve its decision on the parties.

[7] Jackson, 2017, Chapter 5, 5.22.
[8] See: *Solomon v Cromwell* [2011] EWCA Civ 1584 (at paragraph 19) and *Broadhurst v Tan* [2016] EWCA Civ 94 (at paragraph 30) establish that fixed costs are not assessed costs; *Ivanov v Lubbe* (County Court at Central London, 17 January 2020) (at paragraph 29) and *Nema v Kirkland* [2019] EWHC B15 (at paragraph 53) establish that Part 36 precludes detailed assessment and requires an application; and the judgment in *Doyle v M&D Foundations & Building Services Limited* [2022] EWCA Civ 927 (at paragraph 44) establishes that an agreement for assessment ousts FRC.

(f) Costs of the fixed costs determination would follow the event. Those costs would be capped at £500, the cap to include any additional costs awarded pursuant to rule 36.24(5).[9]
(g) A challenge to any part of the assessment would be by oral hearing.
(h) A party who requests an oral hearing, will pay the costs of and incidental to that hearing unless–
  (i) they achieve an adjustment in their favour by 20% or more of the sum assessed; or
  (ii) the court otherwise orders.[10]

12. MoJ endorses Sir Rupert's proposal of fixed costs for this process.[11] This will save judicial time in making summary assessments. MoJ consider that £500 plus VAT and court fees, along the lines of Sir Rupert's proposal, would be appropriate.

13. We would welcome views from stakeholders on this proposal, as well as on how this issue might be dealt with in the rules, including drafting suggestions.

(ii) Fixing costs for Part 8 costs only claims

14. The MoJ is also considering the issue of FRC for Part 8 costs only claims, which has not yet been dealt with in the rules which will implement the extended FRC regime. Our view is this is a gap that needs addressing within the FRC regime, as outlined at Chapter 7, paragraph 6.3 of his 2017 report:

"Costs only proceedings are brought under CPR Part 8. The receiving party files short particulars of claim referring to the settlement agreement, the defendant files an acknowledgement of service and the court makes an order for assessment of costs. I recommend that the FRC for a claimant in such proceedings should be £300 and for a defendant in such proceedings £150."[12]

15. In giving judgment in *Tasleem v Beverley* [2013] EWCA Civ 1805, Sharp LJ said that '[the] problems which this may give rise to (that is, that there is no fixed costs regime for Part 8 costs-only proceedings) is a matter which may merit examination by the Civil Procedure Rule Committee in due course'.[13]

16. MoJ's provisional view is that, if Part 8 costs only proceedings are not addressed, there will be an intermediate stage of work between conclusion of the damages claim and assessment of any residual costs disputes which will still be subject to hourly rates, with the potential for this to be exploited. Sir Rupert's recommendation remains a pragmatic way to reduce incentives for costs building and premature litigation. MoJ also consider that fixing Part 8 costs so as to discourage commencement of proceedings would relieve some administrative pressure on the courts and save judicial time.

---

[9] As inserted by the Civil Procedure (Amendment No.2) Rules 2023, rule 12(10), so adopting the approach in *Portsmouth and Company Ltd v Lowin* [2017] EWCA Civ 2172.
[10] Which adopts the approach in CPR 47.15(10).
[11] Jackson, 2017, Chapter 5, 5.22.
[12] Jackson, 2017, Chapter 7, 6.3.
[13] *Tasleem v Beverley* [2013] EWCA Civ 1805, at 22-23.

17. MoJ consider that there is merit in this proposal: fixing the costs of Part 8 costs only claims would support the implementation of the wider FRC reforms. One possible way forward on this issue would be to amend rule 46.14, which might provide that the application for fixed costs determination can be included in the claim form. MoJ are of the view that any amendment should provide for FRC (plus VAT and the applicable court fees) for the costs only proceedings. It may be that the FRC may be in (i) the sums proposed by Sir Rupert, or (ii) might adopt the interim application costs in PD 45, Table 1.

18. MoJ would be grateful for views on this proposal, as well as general views on whether Part 8 costs only claims should be fixed. MoJ also invite alternative propositions from stakeholders to address this issue.

(iii) Providing for the recoverability of (a) inquest costs and (b) restoration proceedings

Inquest costs

19. MoJ has also been considering making amendments to the FRC rules regarding the recoverability of inquest costs in Fatal Accident Act (FAA) cases. MoJ recognises that, as part of any proper investigation process, an inquest will typically pre-date, and may (to an extent at least) enable the litigation. In particular, in the multi-track where FRC do not apply, the costs involved in an inquest would be recoverable, whereas no such provision is currently available in the fast track or the intermediate track. As such, in the extended FRC regime, those dealing with FAA cases will no longer recover any inquest costs as they can do now, as the only recoverable costs will be the FRC.

20. MoJ acknowledges that, without the addition of a new rule in the CPR to provide for the separate recoverability of inquest costs in FRC cases – this could mean that the level of costs involved in the inquest will make the pursuit of any claim for compensation uneconomic, or that, if a bereaved individual's claim is pursued, they will need to fund most of (if not all) of the costs involved in the representation at the inquest.

21. MoJ consider that this issue needs addressing. MoJ's provisional view is that a new rule should provide, for both the fast track and the intermediate track, that the costs of the inquest should be separately recoverable (and subject to assessment) to the FRC if these costs were reasonable and proportionate. It would be helpful to receive general views on this proposal, as well as on what the rule should say.

Restoration proceedings

22. MoJ also acknowledge that there is, currently, no provision in the new FRC rules to ensure the recoverability of the costs involved with applying to restore a company to the Register within the new intermediate track. Such

restoration proceedings are provided for in respect of fast-track NIHL claims at new rule 45.56 and in respect of the related disbursements at the new rule 45.61(2).

23. Our provisional view is that there is merit to making further changes to the rules to address any inconsistency. An option would be to make provision similar to that which is found in rule 45.56 (which ensures that the FRC may include the costs of restoration proceedings).

24. We invite stakeholder views on this point, including on whether any alternative solutions may be preferable.

(iv) Providing for the recoverability of advocacy fees in cases which (a) are settled late or (b) are vacated

25. The MoJ has received representations from the Bar Council and the Personal Injuries Bar Association (PIBA) concerning the absence, in the draft FRC rules, of a rule to provide for the recoverability of advocacy fees when (a) cases are settled in the two working days prior to the day of trial, and (b) when a trial is vacated by the Court shortly before trial. This was not covered in Sir Rupert's 2017 FRC report, and therefore subsequently not taken forward in the 2019 MoJ consultation or 2021 consultation response.

26. The Bar Council and PIBA propose that in cases settled or removed from the list on the day of trial, the full trial advocacy fee should be recoverable; and in cases settled or removed from the list within two working days of the date fixed for trial, 75% of the full trial advocacy fee should be recoverable.

27. The Bar Council and PIBA proposed that such a change could be achieved, in the new FRC rules, by further amendment to Table 12 in CPR 45.44 D. Trial advocacy fees, by inserting a new sub-rule (5) 'If the trial is disposed of or is removed from the list on the day of trial', and (6) 'If the trial is removed from the list or is settled in the two working days prior to the day of trial'.

(a) Rule change for late settlement

28. MoJ consider that there may be merit in this suggestion. It is acknowledged that the lack of such a provision for cases that are settled late may be significant, particularly in higher value cases in the extended FRC regime. We are also mindful of the fact that one policy benefit of extending FRC is in encouraging earlier settlement.

29. However, MoJ are also of the view that it would be helpful to have evidence for this change, and comments on the detail of any rule, including the likely impacts of making this change. Whilst these proposals have been made by the Bar Council and PIBA, it is the case that trial advocacy fees apply to all advocates, including solicitors' firms who may undertake their own advocacy.

30. The behavioural impacts of making a change in this space are also uncertain, and we would be grateful for the views of stakeholders on this point. For example, we would welcome views on whether this would, conversely, delay settlement if a higher fee becomes available at a later stage.

(b) Rule change for vacated hearings

31. MoJ also consider that there may be merit in this suggestion, and that the impact of vacated hearings might be significant in higher value cases.

32. However, in respect of vacated hearings in particular, MoJ is mindful that this may introduce a new factor for awarding FRC, which is not based on the case itself. As above, MoJ is of the view that consultation is merited to determine the evidence for change, and the detail of any new rule, including the likely impacts of making this change.

33. MoJ's provisional view is that, if such a proposal is adopted for late settlement and vacation, there are arguments for restricting this to the intermediate track (for higher value claims between £25,000 to £100,000), rather than the existing fast track personal injury (PI) FRC regime, but we recognise there may be opposing arguments and would welcome views. MoJ notes that, FRC has been working well in existing fast track PI claims since 2013, and MoJ is not aware of particular concerns other than those put forward by the Bar Council and PIBA. It is worth remarking on what Sir Rupert said about the existing fast track costs regime in his 2017 report (at 5.2.4 p 79):

"How is the current fixed costs regime working? Overall it is working satisfactorily, as many of the respondents to my recent consultation accept. I do not propose any changes to it, apart from uprating for inflation."

34. The final sentence of this quotation is worth emphasising. The point on inflation is addressed below.

35. Accordingly, Sir Rupert's review provided an opportunity to consider the structure of the existing fast track costs regime; that structure remains in place following his review and the changes being implemented in October. However, the position for the new intermediate track may be different. As stated above, the sums involved in intermediate track cases will be greater, and the issues will be more complex, which may lead to a greater need for earlier preparation. We would welcome views on this.

36. It would be helpful to receive general views from stakeholders on these points, as well as on the following questions:

    i. Do you consider there is merit in the proposals put forward by the Bar Council and PIBA? If yes, what would any rule change on the above points look like?
    ii. Do you possess any helpful data around the incidence of late settlement and vacation?

iii. Should there by any exceptions? For example, what should happen where (a) the same advocate undertakes the advocacy at a later hearing; (b) a different advocate is instructed to deal with the vacated case at a later stage; or (c) a case is vacated more than once? MoJ is mindful of any potential unfairness to the losing party through paying additional costs when a claim is vacated through no fault of their own.

iv. What behavioural changes could result?

(v) Uprating the fixed trial advocacy fees for inflation

37. The MoJ has also received submissions from the Bar Council and PIBA concerning the fixed trial advocacy fees which will be in PD 45 of the CPR; the Bar Council and PIBA suggest that these figures should be uprated further for inflation from July 2013.

38. The Bar Council and PIBA argue that there has been no uprating of the fixed trial advocacy fees since July 2013, and that the fixed trial advocacy fees in complexity bands 1-3 of the fast track (Table 12, CPR 45.44) should be uprated from then using the SPPI index. It is also proposed that the trial advocacy fees in complexity band 4 of the fast track should be uprated by around 20%.

39. The Bar and PIBA also argue that it follows that the advocacy costs on the intermediate track (Table 14, CPR 45.50) should be adjusted by around 20%, and that the same should happen for the trial advocacy fees for Noise Induced Hearing Loss (NIHL) claims, at Table 15 CPR 45.53.

40. MoJ's view is that there is merit in uprating the trial advocacy fees in complexity bands 1-3 of the fast track by an extra 4%. Sir Rupert fixed all the FRC figures at July 2016 (see Chapter 5, 5.6 of his 2017 report). MoJ has adopted those figures with that starting point as the baseline of its work on implementing the extension of FRC. In particular, Sir Rupert based the figures in the fast track bands 2 and 3 (including trial advocacy fees) on 'the existing figures for fast track pre-trial fixed costs in personal injury cases', for which he explicitly inflated the solicitor (litigation) figures between 2013 and 2016 (by 4%), but not the trial advocacy fees.[14] MoJ has not sought to go behind any of these figures as part of the wider FRC implementation.

41. MoJ acknowledge that, in the light of the matters set out in the preceding paragraph, there is a fairness case for further increasing the trial advocacy fees in bands 1-3 of the fast track by 4%, given that this was applied to the solicitor (litigation) figures. We would be grateful for views on this.

42. However, we do not consider that there is a case for a more substantial 20% inflationary increase now. As stated, this would involve unpicking the Jackson figures, on which MoJ has consistently relied: MoJ has accepted all of the Jackson figures (and has inflated equally), without unpicking any of them.

[14] See Jackson, 2017, Chapter 5, 5.6, and paragraphs 5.5-5.7 for how the figures were finalised generally.

43. Regarding the Bar Council's and PIBA's separate case for further increases in the trial advocacy fees for band 4 and the intermediate track, MoJ is not persuaded that there is a case for this, as these figures were set separately by Jackson. It may be that all of this could be looked at in a post-implementation review (PIR) in due course.

44. Subject to the outcome of this consultation, we envisage that the various inflationary increases would apply as follows:

- MoJ has already uprated all of the figures in Table 12 of PD 45 using the quarterly Services Producer Price Index (SPPI) at January 2023, for implementation in October 2023;
- subject to views, we propose that the trial advocacy fees in Table 12, for complexity bands 1-3, will be increased via the SPPI to take into account inflationary increases between 2013 and 2016 (by 4%);
- MoJ propose to inflate further for the 9 months between January and October 2023 on all of the FRC figures covered by Sir Rupert, which would include the uprated fixed trial advocacy fee figures in complexity bands 1-3.

(vi) Clinical negligence claims at CPR 26.9(10)(b)

45. Following representations from stakeholders, such as APIL, MoJ has been considering whether further amendments should be made to CPR 26.9(10)(b) in respect of clinical negligence claims.

46. MoJ's consideration of clinical negligence claims in respect of the extended FRC regime originates from Sir Rupert's 2017 report at Chapter 7, 3.5:

"What about clinical negligence cases? As discussed in chapter 8 below, there is reason to believe that a bespoke process for clinical negligence claims up to £25,000 (including claims where breach and causation are in issue) with an accompanying grid of FRC, will result from the work which is in hand. Clinical negligence claims above £25,000 will seldom be suitable for the intermediate track, unless both breach of duty and causation have been admitted at an early stage. The multi-track will be the normal track for clinical negligence claims above £25,000."

47. As Sir Rupert mentions, work on a separate FRC scheme for clinical negligence claims up to £25,000 is being taken forward by DHSC, with a consultation being published in January 2022.[15] In order to avoid duplication, and allow for finalisation of the new DHSC scheme, the amended CPR for implementation in October 2023 provide[16] that clinical negligence claims must be allocated to the multi-track, unless:

[15] DHSC's 2022 consultation on FRC for clinical negligence claims valued up to £25,000: <Fixed recoverable costs in lower value clinical negligence claims - GOV.UK (www.gov.uk)>.
[16] CPR 26.9(10)(b)

"(i) the claim is one which would normally be allocated to the intermediate track and

(ii) both breach of duty and causation have been admitted."

48. This means that, under the new rules from October, the only clinical negligence claims that can be subject to FRC are intermediate track claims where "both breach of duty and causation have been admitted." Given the transitional provisions, the cause of action of the clinical negligence claim would have to accrue on or after 1 October 2023.[17] It will therefore take some time before clinical negligence claims are allocated to the intermediate track.

49. This policy approach is consistent with Sir Rupert's 2017 report at Chapter 7, 3.5 (see above), and with Chapter 5, 2.2 of MoJ's 2019 consultation on FRC.

50. However, MoJ propose that, following Sir Rupert's intention at Chapter 5, 5.15 and Chapter 7, 3.5 of his 2017 report, the rules on clinical negligence at rule 26.9(10)(b) should be tightened to make explicit that the early admission of liability must be made in the pre-action protocol letter of response. The overall position on clinical negligence will be looked at again when the CPR are amended to allow for the new DHSC scheme, and to ensure that that scheme aligns seamlessly with the extended FRC regime.

51. Subject to views on this, we propose that this amendment should be included in the CPR SI for implementation in April 2024. Although the current rules will apply to cases from 1 October, it is unlikely that any new clinical negligence claims, where the cause of action accrues on or after 1 October, will be subject to early admission and allocation to track in advance of 1 April 2024.

Questions for respondents: please give reasons for your response

52. We invite views generally on the issues outlined above, as well as on the following questions:

i. **Fixing costs on assessment**: Do you have views on the proposal outlined at paragraphs 11-12 above, as well as on how any rule might be drafted?

ii. **Fixing costs in Part 8 claims**: Do you have views on the proposal outlined at paragraph 17 above, as well as how any rule might be drafted?

iii. **Inquest costs / restoration proceedings**: Do you have views on the proposals outlined above on these issues (at paragraphs 21 and 23 respectively)? What should any potential rules to address the issues look like?

[17] See provision 2 in: <The Civil Procedure (Amendment No. 2) Rules 2023 (legislation.gov.uk)>.

iv. **A potential rule to provide for the recoverability of advocacy fees in cases that are (a) settled late and (b) vacated**: Please give your views generally on these proposals, as well as on the questions on these respective issues, which are at paragraph 36.

v. **Uprating the fixed trial advocacy fees in the extended FRC regime**: Do you have views on the proposal outlined above at paragraph 41?

vi. **Clinical negligence claims at 26.9(10(b):** Do you have a view on the proposed way forward at paragraph 50?

Ministry of Justice

July 2023