

Fixed recoverable costs (FRC): consultation on issues relating to the new regime (July 2023) – the way forward.

Overview

This is the Ministry of Justice (MoJ) response paper to the July 2023 consultation on issues relating to the new FRC regime. This paper (a) outlines the number of responses received to the consultation; (b) summarises the main points received in the responses; and (c) sets out the Government's way forward in light of the consultation. The consultation ran from 21 July 2023 to 8 September 2023. The publication of this document coincides with the Civil Procedure (Amendment) Rules 2024, which, together with other amendments to the Civil Procedure Rules (CPR) generally, give effect to the changes we consulted upon, and which were laid before Parliament on 1 February 2024 to come into force on 6 April 2024.

For completion, this response paper also (d) summarises various other changes to the FRC regime in the Civil Procedure (Amendment) Rules 2024, in response to issues which have been raised outside of the consultation process.

In respect of further inflating the FRC figures, the Jackson FRC figures will be further inflated in line with the Services Producer Price Index (SPPI) for the 9 months between January and October 2023 (covering the fast track, intermediate track, and NIHL cases) (as set out at paragraph 44 of the MoJ consultation). The updated figures will also come into force in April 2024.

This response paper also (e) confirms the position for future review of the FRC regime.

The consultation

The consultation considered 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;
- (v) whether the fixed trial advocacy fees now in Practice Direction (PD) 45 of the CPR should be further updated for inflation, and by how much; and
- (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.

(a) Number of respondents

We received 74 responses to the consultation.

We received responses from, among others, individual barristers; solicitors' firms; legal representative bodies; and government departments. Responses to the consultation varied in terms of how supportive respondents were, depending on the issue.

Around a third of responses (24 responses; 32.4%) focused solely on clinical negligence claims in the extended FRC regime.

(b) Summary of responses

Respondents to the consultation did not always consider every issue, and there was variation in how frequently the different issues were addressed. Each of the issues is addressed in turn.

The new fixed costs provisions (issues (i) and (ii)), in general, attracted less commentary than the other issues and were not addressed in much detail. Some respondents, particularly from claimant perspectives, were not convinced that there was a problem that needed addressing. Where these issues were addressed in detail, including by the Forum of Insurance Lawyers (FOIL), draft rule changes were provided for consideration.

On issue (iii), inquest costs and restoration proceedings, there was general support for the way forward outlined in the consultation paper, although some respondents proposed some modifications (particularly on the way that the recoverability of inquest costs should be addressed). There was broad consensus that these issues should be addressed in the extended FRC regime.

Issues (iv) and (v), providing for the recoverability of advocates' preparation in the CPR for cases which are settled late or vacated, and whether the fixed trial advocacy fees in PD 45 should be further updated for inflation, were both initially raised by the Bar Council and the Personal Injuries Bar Association (PIBA). Many respondents, particularly those from claimant perspectives, deferred primarily to the views of the Bar Council and PIBA and supported their proposals. However, some defendant respondents – whilst accepting that the points made by the Bar Council and PIBA in respect of late settlement and vacation have some merit in principle – proposed some modifications, including to the amounts that should be recoverable by advocates. Concerns were raised by defendant respondents about the additional costs that would result from this, which would be payable by the paying party and not (in respect of vacation at least) dependent on the case itself.

Issue (iv), on clinical negligence, generated by far the most commentary, being the principal focus of a third of respondents. The most common view expressed was that clinical negligence claims should be taken out of the extended FRC regime altogether. Some respondents, particularly those from defendant perspectives, were supportive of the policy aims that simpler, less contentious clinical negligence cases should be subject to FRC. Some respondents emphasised that there needed to have been a 'full' admission of liability for clinical negligence cases to be suitable for FRC, and that this should be reflected in any new rule.

(c) The Government's way forward

Having carefully considered the points raised by respondents, including with the Civil Procedure Rule Committee (CPRC) and its costs sub-committee, the Government's way forward on the issues raised in the consultation is as follows. The new rules, as set out below, will be in force from April 2024 and will become available on the CPR website in the usual way.

In addition to the points below, the Government is uprating the FRC figures in Tables 12, 14, and 15 of Practice Direction 45 (PD 45), which came into force in October 2023, for inflation in line with the SPPI.¹

(i) Fixing costs on assessment (paragraphs 8 to 13 of the consultation):

For the reasons set out in the consultation, particularly at paragraph 9, and in light of broad support from stakeholders, the Government will amend the extended FRC regime to fix the costs of assessment of FRC cases (to be known as 'Fixed Costs Determination'). The Government's proposals are based on the proposal of Sir Rupert Jackson in his 2017 report, at Chapter 5, 5.22, with further modifications to ensure that the procedure works in the context of the extended FRC regime. The CPRC is still considering the rule drafting on this issue, which we hope will be implemented in October 2024.

(ii) Fixing the costs of Part 8 (costs only) claims (paragraphs 14 to 18 of the consultation):

For the reasons set out in the consultation, particularly at paragraph 16, and in light of support from stakeholders, the Government will fix the costs of Part 8 (costs only) claims. The Government considers that this will supplement the proposal in respect of fixing costs on assessment. As above, the CPRC is still considering the rule change on this issue, alongside 'Fixed Costs Determination', which we hope will be implemented in October 2024.

(iii) The recoverability of, separately, (a) inquest costs and (b) restoration proceedings (paragraphs 19 to 24 of the consultation):

(a) Inquest costs

The Government's position is that the costs of inquest proceedings should be recoverable, but only to the extent that they would be anyway, outside of FRC. The Government will amend Part 45 to address this, for which there was broad support amongst stakeholders. The rule change will be inserted at **CPR 45.1(9)**.

¹ The FRC figures currently in the CPR were based on the Jackson figures, inflated in line with the SPPI to January 2023. The CPR figures will be inflated in line with the SPPI for the 9 months between January and October 2023. This amounts to a further uplift of 3.2% (the percentage has been rounded to one decimal place). The uprated figures will be rounded to the nearest pound.

(b) Restoration proceedings

The Government will amend the extended FRC regime to make the costs of restoring a company to the Register recoverable in either the fast track or the intermediate track. This extends the existing provision for Noise Induced Hearing Loss (NIHL) in the fast track, and addresses any inconsistency. As with inquests costs, there was widespread support for addressing this issue. The changes will be included at **rule 45.15A** and **Table 15A** of **PD 45**.

(iv) The recoverability of advocates' preparation in cases that are (a) settled late and (b) vacated (paragraphs 25 to 36 of the consultation):

In light of representations from stakeholders, and particularly those of the Bar Council and PIBA, the Government will amend the extended FRC regime to provide for the recoverability of fixed trial advocacy fees when cases (a) are settled late or (b) vacated by the court shortly before trial.

At present, 100% of the advocacy fee is recoverable for late settlement on the day of trial in the fast track. The Government will amend the CPR so that, in the fast track, 100% of the advocacy fee should be recoverable where a claim is settled or vacated on the day of trial or the day before trial, and that 75% of the applicable advocacy fee should be recoverable where a claim is settled or vacated not more than two days before the trial date. This is considered an appropriate period, taking account of the preparation that may be required of advocates in these relatively less complex cases.

The Government will also amend the CPR so that, in the intermediate track, the appropriate amount should be 100% on the day of, or the day before, trial, and 75% where a claim is settled or vacated not more than five days before the day of trial. The Government consider that it is appropriate to provide for something more extensive, given the greater complexity of intermediate cases in the FRC regime, and the longer preparation that will generally be required of advocates.

The Government's reforms on this matter go somewhat further than the principal request of the Bar Council and PIBA in their consultation response, in that the Bar floated the additional recovery (of 50%) for up to five days prior to trial in the intermediate track. The Government's view is that 75% is more appropriate, given the greater complexity of intermediate track cases and work which the advocate might accordingly be required to undertake in that period.

In a post-consultation letter, the Bar also asked for the additional recovery of 25% of the advocacy fee when a claim is settled or vacated more than five clear days before the date listed for trial, but we do not consider that there is sufficient evidence to justify this proposal.

The changes will be at **Table 12** and **Table 14** of **PD 45**.

(v) Whether there should be further inflationary uprating for the fixed trial advocacy fees now in PD 45 (paragraphs 37 to 44 of the consultation):

The Government does not intend to move from its position in the consultation on further inflationary increases, or use a different inflationary index to calculate advocacy fees. This has all been considered as part of the process of extending FRC, using the same index to

inflate all of the FRC figures: MoJ's proposals on inflation are based on Sir Rupert Jackson's 2017 report, and have been discussed with academic experts and the CPRC.

In addition to the general position on inflation (see footnote 1, above), we are proposing an additional SPPI uprating to the trial advocacy fees in Table 12 of PD 45, for complexity bands 1-3, to take into account the period between 2013 and 2016 and remedy an apparent gap in Jackson's 2017 report. We previously calculated this gap (in our consultation at paragraph 44) as 4%. The exact method used by MoJ to calculate the final figures is as follows:

- (i) The fast track trial advocacy fees, for complexity bands 1-3, which are set out in Jackson's 2017 report, were uprated in line with inflation using the SPPI for the period from 2013 to January 2023. This amounts to an uplift of 20.3% (rounded to 1 decimal place) from the 2017 Jackson figures. This includes the additional uprating for the period between 2013 and 2016 and replicates the uplift for the period 2016 to January 2023. This was done to incorporate the additional uplift request for 2013 to 2016 and maintain consistency across the figures published in April 2023.
- (ii) These uprated figures were then rounded to 2 significant figures, to bring them in line with the rest of the fast track costs which were published in April 2023 (and which came into force in October 2023).
- (iii) This new set of fast track trial advocacy fees were then combined with the remaining fast track, intermediate track, and NIHL costs published in April 2023, and uplifted by 3.2% (rounded to one decimal place) in line with inflation for the additional 9-month period from January 2023 to October 2023.
- (iv) These figures were then rounded to the nearest pound.

The inflated FRC figures will be included in **Table 12** (fast track), **Table 14** (intermediate track), and **Table 15** (NIHIL claims) of **PD 45**.

Further information about future reviews of the FRC figures will be set out in due course. MoJ has committed to reviewing the extended FRC regime in three years.

(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 (paragraphs 45 to 51 of the consultation):

It is the Government's view, following consideration of the responses to the consultation on this issue, that the rules on clinical negligence claims subject to FRC should make explicit that in the circumstances in which a claim for clinical negligence may be allocated to the intermediate track rather than the multi-track, an early admission of liability should be made in the pre-action protocol letter of response. The Government has also determined that the new rule should only capture such cases where there has been an admission of liability in full, as defined. This will ensure, following Sir Rupert Jackson's recommendation at Chapter 5, 5.15 and Chapter 7, 3.5 of his 2017 report, that only appropriate clinical negligence cases will be allocated to the intermediate track. The rule change will be included at **CPR 26.9(10)(b)**.

(d) Other changes to the FRC regime in the Civil Procedure (Amendment) Rules 2024

In recent months, the Government have been considering various other FRC issues, together with the CPRC and its costs sub-committee, which have been raised outside of the consultation process. The following rule changes have been agreed with the CPRC, and have been taken forward in the Civil Procedure (Amendment) Rules 2024.

- **Rules 26.7, 28.2 and 28.12** have been revised, to provide, amongst other matters, that the court shall give directions when it allocates a claim to the fast track, unless it fixes a case management conference (CMC), and may give directions or fix a CMC when it allocates a claim to the intermediate track.
- **CPR 26.9(10)(f)** is inserted to provide that a claim against a public authority for trespass to the person must be allocated to the multi-track, unless, having regard to rule 26.13(1), the court considers that it would not be in the interests of justice to do so. This draws on the criterion for 'actions against the police' in rule 26.9(10)(f), but provides a new criterion in respect of claims for trespass to the person (assault, battery and false imprisonment) against public authorities. The interests of justice test is intended to ensure that less complex and/or lower value claims, such as low-level assaults and negligent late release cases, which might otherwise be suitable for the fast track or intermediate track, and so be subject to FRC, are not allocated to the multi-track by default. MoJ will keep the operation of this definition under review to ensure that it is working as intended.
- A revised version of **CPR 28.14(3)(c)**, which provides clarity about what is, and is not, included within the '20-page limit' for expert reports.
- **Rule 31.5** on disclosure has been revised, to provide clarity as to which case management tracks the rule applies to.
- A revised version of **CPR 45.1(3)**, which clarifies that in claims to which Sections IV, VI, VII or VIII of that Part apply, parties may expressly agree that Part 45 shall not apply.
- **CPR 45.5(6) (entitlement to costs – more than one claimant)** has been revised, to change the wording from 'amounts' to 'costs'.
- **Rule 45.5(8) (entitlement to costs – more than one claimant)** has been revised to address the situation where one or more claimants, jointly entitled to one set of costs under rule 45.5, might be entitled to both additional costs under Part 36 and increased costs under rule 45.13(2), rather than only additional costs or increased costs.

(e) Future review of the FRC regime

The extended FRC regime came into force on 1 October 2023. As set out above, most rules covered in this response paper will come into force in April 2024. FCD will likely come into force in October 2024, together with some other potential rule changes which remain subject to consideration and agreement by the CPRC.²

The Government will review the extended FRC regime in October 2026 (i.e., 3 years after implementation, as originally proposed by Sir Rupert Jackson). That review will include consideration of the tables of costs. More information about the nature and scope of the review will be set out nearer the time.

We are not currently minded to propose other changes to the rules beyond those set out in this paper, although we are conscious that the courts are yet to determine many cases under the new regime. We will, of course, keep the new FRC regime and its operation under review. We will consider with the CPRC whether suggestions for change can be dealt with as part of the review in 2026, or whether more urgent action is required.

Ministry of Justice

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² The proposed changes are to—

- **rule 3.7A1(7) and (8)** (sanctions for non-payment of the trial fee by the claimant) and **rule 44.9(1)** (cases where costs orders are deemed to have been made) to ensure that a defendant's entitlement to costs will be determined in accordance with Part 27 or Part 45, where applicable.
- **rules 45.2, 45.8 and 45.15A**, and, in the interim, **Tables 1 and 15A in PD 45**, to respectively clarify and ensure the recoverability of VAT, where appropriate, in addition to the FRC under rule 45.8 and the FRC and disbursements in restoration proceedings under rule 45.15A.
- **rules 45.48 and 45.51** (preliminary issues and separate trials in the fast track and intermediate track respectively) to address the situation where a costs order is made in favour of the claimant following the preliminary issue, but, because part of the claim is for a monetary remedy, the costs cannot be calculated at that stage as the damages will not have been quantified.
- **rules 45.58, 45.59 and 45.61**, to align with the wording in **rule 45.57(2)(a)**, to ensure that the approach to recoverable disbursements is consistent across the new FRC rules, and that the court's broad discretion in respect of allowing the recovery of disbursements is preserved.