Response of the Law Society to the consultation on Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s proposals

June 2019
**The Society’s position**

The Society’s long established position is that it is not opposed to the principle of fixed recoverable costs (FRCs) provided that:

- the recoverable fixed costs should usually only apply to 'low value' and non-complex claims where the issues are straightforward;
- the costs must be fixed at a reasonable rate for the work done and to allow for the work to be carried out effectively, efficiently and competently by properly regulated professionals, such as solicitors;
- there must be scope for exemption for complex or unusual cases;
- there must be strong empirical evidence and research undertaken to justify the initial setting of the rates as well as the level of thresholds;
- the rates and thresholds must be regularly reviewed and adjusted by reference to appropriate indices and to take account of changing processes and developments in technology;
- court procedures and rules should be properly aligned with their introduction;
- appropriate and efficient IT in the court system should be introduced to support the fair and effective delivery of any new fixed costs regime.

The Society has actively engaged with government and the Civil Justice Council in processes to investigate applying FRCs where these principles apply, for example in the mediated Noise-induced Hearing Loss (NIHL) proposals which form a part of this consultation. What this experience shows however is that there are no quick fixes. Specific fields of practice need in depth review by specialists on both sides rather than blanket imposition of figures that may have no application to the way that practitioners and courts operate in those fields of practice.

We have applied the above conditions to the proposals set out in the consultation and found that they do not align.

For this reason, the Society does not support the extension of FRCs in civil litigation at this time, either horizontally across the existing fast track, or vertically to intermediate cases. Further detail on the Society’s position on FRCs can be found in our submission to Sir Rupert’s call for evidence prior to the release of his report in 2017.

It should be noted that we may be willing to support the extension of FRCs at a future date, subject to steps first being put in place which address our fundamental concerns. These concerns can be summarised as follows:

1) the proposals do not have due regard to the fundamental transformation in process that is occurring, such as through the HM Courts and Tribunals Service (HMCTS) reform programme;
2) the data on which the proposals are based is not of a sufficient quantity and quality to assure the appropriateness of the FRCs to be applied across almost the entire spectrum of civil litigation;
3) the assumptions made in the consultation, and the resulting justifications for the proposals, are flawed, and the conclusions as to the likely consequences of making these changes do not stand up to scrutiny;
4) the risk of unscrupulous litigants using the FRC regime as a tool to deny their opponents a just remedy has not been adequately addressed;
As a result, the Society considers that the proposals pose a substantial risk to access to justice and therefore cannot support them.

Points 1-4 are explained in more detail below.

**Key Concerns**

1) **The process and cost of conducting litigation**

As quoted in the consultation, Sir Rupert Jackson has stated that ‘the holy grail pursued by every civil justice reformer is a system in which the actual costs of each party are a modest fraction of the sum in issue and the winner recovers those modest costs from the loser’. The Society agrees with this sentiment but fixing the costs recoverable from the losing side does not equate to fixing the actual costs incurred. If our legal system is to deliver Sir Rupert’s holy grail then the actual costs of conducting civil litigation must be addressed before recoverable costs are prescribed. The actual costs can only be reduced by streamlining the processes involved.

The Society is of the view that FRCs should take account of changing processes and developments in technology, and that court procedures and rules should be properly aligned with the introduction of FRCs.

There are numerous projects currently underway which will significantly alter the process under which civil litigation is conducted in future. HMCTS is currently undergoing a comprehensive programme of change, based on recommendations by Lord Justice Briggs, which are anticipated to be delivered by 2023. To quote the latest HMCTS update, ‘in the civil jurisdiction, existing processes can be protracted, inefficient and costly. We will create a system that enables people to manage and resolve a dispute fairly and speedily. This will involve more mediation and fewer hearings. It will involve simpler processes and online routes into and through the courts – providing good quality digital systems to support the civil system, which at present is very paper-heavy, and allowing the kind of digital working in civil courts that legal professionals and others have become used to in the criminal court’. As noted in the Society’s 2017 submission, LJ Briggs had stated that ‘digitisation is the label for an ambition that, by the end of the Reform Programme all the processes for issue of civil proceedings, non-oral communication with the civil court, case handling, progression, management and trial of civil proceedings will be digital (and mainly online) rather than paper-based’.

There are more than 50 projects now being rolled out across the entire court system which were not in place when Sir Rupert carried out data gathering for his 2017 report. Examples include digital case management, e-filing, online claims reform, electronic working, video hearings, and digital systems for possession claims. Coupled with pilots such as the disclosure reforms and capped costs in the business and property courts, and potential reforms to witness statements, these changes are intended fundamentally to change the way in which the courts operate. The proposed establishment of an Online Procedure Rules Committee adds further complexity: would the FRC regime apply to cases governed in whole or in part by the new Online Procedure Rules (OPR)? If so, then the data underpinning the FRCs proposed would be automatically invalid because they relate to a different process. If not, then as ever more cases fall under the OPR, the proposed FRCs would become wholly otiose, which would mean that the cost and effort expended in trying to implement this scheme would be wasted.

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Whiplash reforms and the raising of the small claims limit for personal injury are expected to be implemented by April 2020. This will move a large volume (at least tens of thousands) of personal injury road traffic accident claims from the existing fast track to the small claims track. After April 2020 the average value of personal injury claims left in the fast track will be far higher than it currently is. It is not clear whether the data that underpins the FRCs in the current civil procedure rules (CPR) for personal injury would still be valid. Analysis should be undertaken on the existing data excluding cases that will fall below the new small claims limits, in order to test what impact excluding those cases may have on the costs matrix. If that is not possible, then only after any new process has been fixed so cases can be run more efficiently should the grid of fees be constructed on the back of robust data collection and analysis of cases which are in the system.

As a minimum, the Society asserts that the HMCTS reform programme and whiplash reforms should have bedded in for a couple of years and must be properly evaluated before consideration is given to the extension of FRCs. To fix costs before the new process is defined is irrational and makes the FRCs proposed in the consultation redundant before they are even implemented. We strongly urge the MoJ to look holistically at changes across the civil justice system when considering, and certainly before implementing, any further changes to cost recovery.

2) Data

The Society acknowledges the difficulties that Sir Rupert Jackson had in securing adequate data sets from which to draw on to reach an appropriate grid of FRCs. However, the Society cannot support FRCs which are not based on strong empirical evidence and research. We had previously stated in our 2017 submission that we had expected the government consultation document to set out the detailed evidence base underpinning its final proposals. For non-personal injury claims, this hasn’t been achieved at all, and for personal injury claims the data is already out of date. The data used in the consultation is the same data as used by Sir Rupert in his report published two years ago, and the data gathered for that report would have been even older. A lag of several years between the cases occurring that the data is based on, and likely implementation of FRCs is unacceptable.

Changes in technology over the relevant period have been rapid. This has led to changes both in the way litigation is conducted and in the nature and volume of evidence that arises in cases, and how litigators must handle that evidence. Furthermore, the consultation acknowledges that the costs of the proposals cannot be monetised because the volume of cases where FRCs would apply is not known. The Society does not hold enough data in a format to be usable for the purposes of setting FRCs, but we would not expect the government to take forward FRCs without carrying out its own research to plug the gaps in Sir Rupert’s report and until all other concerns have been addressed.

The main dataset relied on for personal injury cases is from Taylor Rose TTKW. It would be much better if this was supplemented by comprehensive data from other sources, particularly claimant sources, before proceeding on fundamental reforms based on it. It is already out of date and Professors Paul Fenn and Neil Rickman should be asked to recalibrate the figures as at the date of proposed implementation. This personal injury data has been used as a proxy for non-personal injury work and there is no evidence that this use is correct. In particular, the split between phases looks questionable for some fields of practice which may not progress in the same way as a personal injury claim. Notwithstanding the difficulty in obtaining it, better data is required.
3) **Assumptions made in consultation**

The impact assessment attached to the consultation makes some important assumptions about the reasons for extending FRCs; these are copied in bold below.

“The policy objective is to make legal costs proportionate in low-value civil litigation (cases up to £100,000 damages)...FRC would ensure that costs are proportionate and predictable, so helping to increase access to justice as potential litigants would not be prevented from bringing their cases for fear of excessive costs.”

The Society fundamentally disagrees that the issue of the proportionality of legal costs can be dealt with by controlling what lawyers can charge or what one party can recover from another, without reducing the amount of work that is necessary and reasonable on a case. If the amount of work a lawyer must do results in disproportionate costs, then the system must be changed to reduce the amount of work a lawyer must do. This is what the HMCTS reform programme is attempting to deliver.

Mechanisms already exist to ensure that costs are proportionate, as set out in the CPR and determined by the judiciary. The CPR states that costs incurred are proportionate if they bear a reasonable relationship to the sums in issue in the proceedings, the value of any non-monetary relief in issue in the proceedings, the complexity of the litigation and any additional work generated by the conduct of the paying party. Introducing a grid of FRCs does not cover all the factors that are currently considered when assessing proportionality. We suggest that introducing FRCs may potentially do the opposite by applying fixed recoverable costs to ALL claims regardless of complexity or workload. This may lead to situations where FRCs are far higher or lower than the proportionate costs.

In order to reach the policy objective above, several assumptions have been made, as set out below, with which the Society does not agree, specifically:

- “Claimant lawyers would set their legal fees equal to the FRC being proposed for each case type”
- “Proposed FRC are assumed to reflect the amount of work which an efficient and effective provider would undertake”
- “There would be no change in the number of litigants in person”
- “Claim settlement outcomes would remain the same”.

Undoubtedly there will be some cases where solicitors will be able to charge their client the exact figure as set out in the proposed FRC matrix, but for the majority of cases there will be a difference in the actual, and reasonable, costs incurred and the FRCs.

The Society argues that the value of the case alone is not a sufficient factor in determining whether FRCs should apply. Value is not a good proxy for the amount of work involved and claimants with low value, but complex claims, would suffer in these cases. Complex cases may require more experienced (expensive) practitioners.

Sometimes the difference between actual and reasonable costs incurred and FRCs may be minimal, but for cases where the difference is large the options for solicitors will amount to:
- Charging the client any shortfall in cost recovery. The client would either have to pay out of their own pocket or from their award which would be in direct conflict with the 100% compensation principle. As noted in the Society’s 2017 response ‘The imposition of a fixed recoverable cost regime where the costs are not set at a reasonable level will result in a fundamental departure from the principle, as a matter of system design. If claimants are no longer able to recover 100% compensation, they may be unable to pay, for example, for their care/rehabilitation needs that have been caused by a third party’s negligence, or may be unable to meet financial liabilities because they have lost wages, and now are also losing some of the compensation that should replace those wages. Similarly, under contract law, you are required to put the other party in the position they would have been in had you performed the contract. Again, this principle will be breached if FRCs are introduced at an inadequate level’. In cases funded by before the event (BTE) insurance, another possible outcome is that BTE insurers will be required to meet the shortfall. This could have a profound impact on the BTE insurance market that does not appear to have been considered or assessed.

- Firms carrying out unpaid work. Even the most efficient and effective practitioner might be unable to recover all of their actual costs under the FRC regime. If FRCs are not fixed at a reasonable rate for the work done, and rules and systems are not already in place that allow for the work to be carried out effectively and efficiently, by a suitably experienced solicitor, then there is a very real risk that firms that continue undertaking the work will delegate it to cheaper, less experienced staff, which could result in inefficiencies, the under or inappropriate settlement of cases or incorrect decisions.

- Solicitors no longer taking on cases that are subject to FRC. This could result in advice deserts in areas of law in which solicitors have no financial incentive to operate. Unregulated and/or unqualified operators may take their place and be able to operate with lower costs, but at greater risk to the client, or there may be an increase in litigants in person pursuing their own claims, which would have a knock on effect on the court system. Genuine litigants may be deterred from pursuing just claims or defending improper ones. Furthermore, there may be a knock on effect on diversity of practitioners. Black, Asian and minority ethnic (BAME) solicitors are more likely to practice in small law firms, and if these firms cease to operate then a disproportionate number of firms offering linguistic and cultural empathy for BAME members of the community will be affected.

- Solicitors providing the minimum service possible whilst still meeting their professional and regulatory requirements on client care. We have already seen this unintended consequence in response to the changes brought in by the changes to Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Professors Paul Fenn and Neil Rickman conducted a study for the government on the impact of LASPO Part 2 and their findings were alarming: damages recovered in clinical negligence claims under £250,000 have reduced by 22% and in personal injury claims over £25,000 by 17%2. This is before success fees were deducted.

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Furthermore, in July 2012 the Ministry of Justice published a report which they had commissioned Professor Fenn to prepare and which was an evaluation of the road traffic accident (RTA) portal process at that time. The findings in the report were subject to caveats due to difficulties in finding a comparator sample from the previous regime against which to evaluate the process, as well as other factors. In that report Professor Fenn concluded that there was some evidence that the overall mean level of costs recovered on low value RTA claims had reduced and that the overall mean time to settlement in those cases had also reduced. However, he also concluded that there was evidence that the overall mean level of damages agreed on low value RTA claims had reduced in the period after the RTA process was introduced with both claimant and defendant datasets showing evidence of around 6% reduction in mean damages, which was of course an unintended consequence of the fixed cost regime.

Clear guidance is required as to what is expected of practitioners should they be subject to FRCs. A clear and robust set of court rules to provide clarity on what is expected to prepare a case is important. One of the most significant areas that requires clarity is disclosure obligations – given the potential (and most probably likely) changes to disclosure beyond the pilot that is running at present.

The only certainty brought by the proposals is that losing parties will know their exposure to adverse costs. Neither side will be certain about solicitor and own client costs unless specifically limited to the FRC. There is no suggestion in the consultation that these should replace freedom of contract and apply to solicitor and own client costs – instead, the consultation merely assumes, without any clear rationale, that the market will naturally respond in this way.

An efficient and effective provider cannot account for the efficiency or effectiveness of the opposing side, the client’s characteristics, or the demands of the courts. Inefficient courts penalise litigants and solicitors unfairly and could potentially do so to a greater extent in a FRC environment. A properly resourced and funded court system is at the heart of efficient civil litigation conduct and it is a common concern amongst our members that the courts are not functioning as they should be. Delays, mistakes and inefficiencies caused by the courts, as well as the impact of court closures, all lengthen the time it takes to resolve a case, which is not a reflection on the work of the solicitor. The concept of proportionality should reflect not just the cost of work involved – but that the court process and interaction with it is also proportionate. Many factors are not within the control of practitioners and the current service provided by the courts would not deliver the outcomes sought by the reforms. The court system may suffer further if an FRC regime is imposed on solicitors which does not consider the unpredictable nature of the court process for any given case, as solicitors may be under a professional obligation to seek compensation from the courts in these scenarios, through claims for maladministration or such other routes as may be available.

**Comparisons**

The consultation also uses comparisons with current FRC regimes as a justification for the proposals. We question the validity of some of these comparisons:

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a) **Intellectual Property Enterprise Court (IPEC)**

There are significant distinctions between cases brought in IPEC and elsewhere. Often, the significant reason for taking a case in IPEC is to obtain a declaration as to the validity of a party’s intellectual property rights. That issue goes beyond the immediate litigation and can establish the legitimacy of a right that can be used against others that a court has, in effect, ‘rubber stamped’ as being legitimate. On that basis a party is more likely to take a wider view as to the fact that it recovers less of the costs it has actually incurred in those proceedings (ie the party will reap the rewards later on). Further, the fact that a party has often registered an intellectual property right on which the later litigation occurs reflects the fact that it will, probably, have taken advice from a patent attorney or solicitor as to whether it can claim that right, and those costs are not part of the IPEC regime. The work carried out at this stage will no doubt be of significant assistance and save time in preparing for the case before IPEC. In contrast, the proposed FRC cases that will fall under the fast track and intermediate cases may often be cases in which it is the only time that parties come into contact with the court and the legal dispute often comes as a surprise to the parties. The application of FRCs in the IPEC is not a good example on which to base the roll out of FRCs as proposed.

b) **Germany**

It is unfair to compare the legal system in England and Wales with that of Germany. A key part of control in Germany is in the procedures rather than the restrictions on recovery. Germany has an inquisitorial system and is far more reliant on the judge, whereas we have an adversarial system, which places the heaviest burden on the parties and their lawyers, and rely on the CPR.

c) **Current FRC in personal injury**

The consultation notes that current FRCs are working well ("**with the current regime of FRC working well, we agree with Jackson that the time is right to extend FRC in order to control the costs of civil litigation and improve access to justice**") and uses this as a justification for further roll out. We argue it is hard to justify just how well current FRCs are working. Considering that there is no uncertainty for the claimant in personal injury cases about liability for opponent’s costs due to Qualified One-Way Costs Shifting (QOCS) (unless they fail to beat the defendant’s Part 36 offer), the assumption that the current application of FRCs will improve access to justice in areas where QOCS does not apply is unsubstantiated.

4) **Access to Justice**

The Society is of the view that FRCs do not always promote access to justice, for the reasons already stated. Except for straightforward cases, it is often not known how much work is going to be undertaken at the start of a case and it is therefore hard to predict what costs will be incurred. It may not be clear at the initial stage what the value or complexity of the claim will be, which may have consequences for the client as the case progresses. Particularly if there is a dispute between the parties on value or exceptionality, the parties may only understand which track the case is in at case management stage when the case is allocated. In the meantime much work may have been done by both sides to bring the case to that stage. We suggest the court should have a continuing obligation to hear applications from either party about significant developments which would necessitate the case moving out of the FRC scheme.
Claimants may not find it economically viable to pursue a case where their damages may be wiped out by irrecoverable solicitor and own client legal costs. In some cases, a claimant may not end up recovering any damages at all. This could result in a two-tier justice system where litigants who are more economically powerful may be able to absorb extra costs, and smaller clients may not be able to. Indeed, some such litigants may do so as a matter of strategy in order to ensure that all litigation against them proves fruitless, however well-founded. Some may be able to obtain a streamlined ‘fixed fee only’ service but there are concerns of the impact this will have on aspects of case management such as disclosure (especially retained standard disclosure in personal injury, the costs of which are significant). If it is not economically viable to pursue a legitimate claim, or defend a claim improperly made, then there is a denial of access to justice.

Reducing court costs, issue fees and waiting times would increase access to justice but these are not being dealt with in this consultation; these are part of the wider HMCTS reform programme mentioned. Instead the proposals in the consultation may actually increase the numbers of litigants in person which could cause further inefficiencies in the courts.

Response to the specific questions in the consultation

The Fast Track

Q: Given the Government’s intention to extend FRC to fast track cases, do you agree with these proposals as set out?
No. The Law Society does not support the extension of FRCs at this time.

The Society helped to facilitate the mediated settlement between claimant and defendant interests for NIHL and, subject to our fundamental concerns on the first page on this response being addressed including the validity of the data underpinning the level of FRC, we would support the proposed structure.

Q: We seek your views, including any alternatives, on:
(i) the proposals for allocation of cases to Bands (including package holiday sickness)
Many members have raised the issue that disputes over which track or band a case falls into may lead to longer case management conferences and prolonged processes. Clarity is needed from an early stage about band allocation in order to limit satellite litigation and costly precedents having to be set by case law. We would recommend that rules should be prescriptive enough to assist with allocation, whilst allowing for a degree of flexibility. The same can be said for the ‘escape clauses’ that Sir Rupert refers to.

It is notable that reference is made to the court having a discretion, to be exercised sparingly, to move claims between bands, but how would this work in practice? We require more detail about this proposal.

It is also noted that the proposed Band 4 would capture many of the more complex claims (including property disputes, professional negligence claims and other claims at the upper end of the fast track). In such cases it is not uncommon for there to be a series of incidents or a more complex set of facts relevant to liability, as well as issues relevant to quantum involving legal and factual disputes. It is not accepted therefore that such cases of greater complexity are appropriate for the fast track, even if their monetary value is £25,000 or lower. At the very least, such an extension should not happen without a proper evidential underpinning.
Housing

Housing law is in a unique position. As noted in our 2017 submission, ‘the value of housing claims can be low but they can be complex and of profound importance to the client, especially when they may result in a client losing their home. Illegal eviction and housing disrepair matters over £1,000 but below £5,000 have not been allocated to the small claims track for the simple reason that those drafting the CPR were aware of the very real complexity of housing matters. Whilst some forms of housing disrepair cases can be relatively straightforward, many cases arise by way of counterclaim in possession proceedings and the issues become far more complex. Equally, homelessness appeals are very difficult pieces of litigation which are invariably handled by specialists. Costs are driven by a variety of factors including defendant conduct and the vulnerability of a claimant which can not be generalised. Many of these clients will be unable to pay any shortfall in cost’.

For housing disrepair claims, often relatively low damages are being sought as the primary importance of these claims is in obtaining an injunction or specific performance of the contract in order that repairs can be carried out. In terms of the value of the claim and the percentage of damages being awarded by way of costs, this must include both the compensation being awarded, as well as the value of the injunction, or similar, relief. FRCs may not be appropriate in housing cases at all due to the complexity and importance to tenants, many of whom are highly vulnerable; however, if FRCs are to be introduced, it may be beneficial if a bespoke scheme is considered, such as with clinical negligence cases. If FRCs are introduced at unworkably low levels, then it could simply be unaffordable to run disrepair claims, leaving vulnerable tenants unable to obtain representation. The Society supports the extension of QOCS for housing disrepair, but even then the levels of FRC proposed must be set at a rate that makes it affordable to carry out the work. There are already housing advice deserts. Proposals to fix costs without analysis of data and process may exacerbate this leading to denial of access to justice.

Sir Rupert had also proposed that where a case includes a claim for a declaration or injunction, that should be treated as the equivalent of a claim for £10,000, with the court having the power to vary that figure upwards or downwards. The consultation paper is silent on this and we require more information regarding this point.

Solicitors representing both tenants and landlords would welcome further clarification around ‘particularly complex cases’, and where rental possession claims would sit in the banding. There should also be clarity on whether the banding includes the specific performance element and take note of the ongoing nature of disrepair claims, as opposed to other types of civil case such as a personal injury claim.

Consideration also needs to be given to the potential impact of recent government proposals to abolish the right of landlords to seek possession in the absence of fault. This will inevitably change the nature, mix and complexity of cases appearing in the courts.

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

We understand that these proposals, although not in the Jackson report, have been developed in response to the holiday sickness claims scheme.

The Society does not support this proposal. There is no evidence for it. A solicitor’s obligation to the client, and liability, is the same, no matter how many clients there are. 10% is far too low to provide an economical reason to take on multiple clients seeking remedy from the same cause of action. It cannot be assumed that the paperwork is able to be replicated across all clients and it is likely that this would add another layer of unnecessary complexity. The assumptions made in the consultation
about holiday sickness claims should not be applied to other examples of multiple claimants, such as RTA claims and multiple tenancy cases, where claimants may have been affected in different ways. If the proposal is to be introduced then there would need to be evidence to back this up and a very clear definition of ‘same cause of action’.

(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

There are likely to be challenges if it is considered that cases of complexity that require substantial investigative resource are, on the face of it, allocated to the fast track when that is inappropriate. Accordingly, proper consideration needs to be given to the suitability of cases to enter the fast track in the first place, and to remain there.

(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.

The concept of unreasonable litigation conduct needs to be clearly defined, to justify proper applications and disincentivise improper applications. Ideally there would be sufficient powers and mechanisms in the CPR to define and address poor behaviour at an early stage. More information is required on this point regarding what constitutes unreasonable litigation conduct.

Changes to the costs system could well impact existing behaviours. If the better resourced party believes that there is significant doubt that the other party will pursue a good claim or defence then that party may decide not to settle it, but instead choose to put as many legal obstacles in the way of resolving the matter as possible. If one party does choose to run up costs to a level significantly beyond the FRC then this could render valid claims or defences uneconomic to proceed with. Mechanisms are needed in the CPR to control this sort of behaviour.

Most cases settle. Defendants know that claimants will be vulnerable to incurring a large solicitor and own client costs bill if they don’t settle quickly. As a result, the Part 36 offers made may be much reduced. Effectively, the changes proposed may impact adversely on the claimant’s bargaining position and claimants may receive less compensation than they should do.

Given the choice between an uplift on FRCs or the award of indemnity costs, we would support the outcome of Broadhurst v Tan and prefer indemnity costs are awarded for failing to beat a Part 36 offer as well as for unreasonable litigation conduct. Although an uplift on FRC would be a simpler system in the event that there is a failure to beat a Part 36 offer, the award of indemnity costs already works well. However, further consideration should be given to the use of ADR. To date, the threat made against a party is that if they refuse to mediate, this will be drawn to the attention of the court at trial when considering the question of costs. As so few cases actually proceed to trial this is something of a hollow threat. Even in such cases the number of times when a party actually makes such application, or where the court makes a costs order based on a party’s failure to mediate, is small. There is the possibility of the court rules giving more teeth to such a costs penalty if a failure to enter into ADR is more capable of being classed as ‘unreasonable litigation conduct’.

It should also be noted that the consultation only covers half of the issue. If the claimant makes a Part 36 offer which the defendant fails to beat then the penalty for the defendant is to pay indemnity costs. However, it is not clear from the consultation what would happen where the defendant makes a Part 36 offer which the claimant fails to beat. Would the claimant lose QOCs protection and also be subject to indemnity costs (or an uplift), therefore leaving the claimant doubly prejudiced? We require clarity around this issue.
Intermediate Cases

Q: Given the Government’s intention to extend FRC to intermediate cases, do you agree with the proposals as set out?
Not at this time. We query the practical implications of including intermediate cases in what will effectively be a two-tier fast track, and including almost the entire spectrum of types of civil litigation within these four new bands. On both liability and quantum there will be cases unsuitable to be classed as intermediate cases but without clear guidance all claimants whose cases fall within the criteria are likely to seek a Band 4 allocation. Would the court system as it stands support this proposal? Would case management conferences become longer? Would there be a knock on impact on court fees? We note that multi track court fees are being retained for intermediate cases moving to the fast track.

Claimants may seek to make their cases more complex (such as seeking more experts) to move them out of the extended fast track and into the multi-track where they would not be subject to FRCs. As noted previously, a complex case doesn’t necessarily mean a high value of damages. So there could be a simple case with a high value in Band 1, and a low value case falling within Band 4 for complexity. It may be that there will be cases that meet all the criteria for the existing fast track except that the value happens to be slightly above £25,000, rather than slightly under £25,000, and it may be reasonable to treat such cases similarly to the treatment for existing fast track cases, once all of our fundamental concerns have been addressed. If the extension of FRCs does go ahead, this ought to be a second stage development after having first tried out the new approach on lower value cases.

Q: We seek your views, including any alternatives, on:
(i) the proposed extension of the fast track to cover intermediate cases
Similar points apply as set out above when considering FRC in existing fast track cases. The allocation criteria set out in the consultation captures many cases, but potentially does not distinguish between those cases where a large amount of evidence, review and input from clients is required. Again, clear definitions and guidance need to be produced in order to limit satellite litigation.

One issue that potentially flows from the extension of the fast track in dealing with these cases will relate to the availability and suitability of judges to hear such trials. To date, fast track trials are almost always heard in one day and are frequently heard by District Judges and, increasingly, Deputy District Judges (DDJs). The increase in the number of cases heard by the latter is no doubt reflective of their flexibility and is an attraction in terms of staffing the courts. The proposal to include cases of up to £100,000 within the Fast Track, including hearings of up to 3 days, raises a question as to which judges would hear these cases? Is it anticipated that Circuit Judges will continue to hear these cases (as would be expected now)? Or, is it anticipated that District Judges will hear more of these cases? There is no reference in the consultation to cover this point and it may be assumed that, in the absence of anything to the contrary, Circuit Judges / Recorders will continue to hear the cases that they would have done previously. However, we require clarity around the allocating of judges to these new intermediate cases.

(ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track
We do not agree with having different criteria for whether a case should be classed as intermediate, because by definition that is bringing more complex and higher value cases into a scheme that is supposed to only target low value cases.
The allocation criteria in the consultation refers to the value of the dispute, the fact that up to four experts can give evidence, the trial will last no more than three days, and that the case can be justly and proportionately managed under an expedited procedure. These criteria would capture many different sorts of cases.

Sir Rupert suggests that the parties should attempt to agree the allocation of the case and the appropriate banding during the pre-action phase. However, in many cases at this level this will be impossible to predict accurately at such a stage, and we suggest it is very unlikely that the parties will agree for the very reason that these are intermediate cases: some cases between £25,000 and £100,000 may be much more difficult to value than cases that obviously fall outside of this banding. We envisage that in the majority of these intermediate cases the claimant will only know on allocation whether the case is a fast track case or not, and if so the appropriate band. However much work may have been done (on both sides) before the case is seised by the court at CMC. It is grossly unfair (to both parties) to only know the basis upon which between the parties costs can be claimed at that relatively late stage in the proceedings.

In non-personal injury cases each party is required to disclose the documents on which it relies as well as documents that the court specifically orders. There is therefore a lack of clarity on disclosure obligations in such cases. The way in which the court would ‘specifically order’ documents is unclear. Would this involve a case by case consideration of the scope of disclosure? It would be surprising if that was envisaged as that would create more work for the parties in making requests and more court time to make the order.

If not, is it intended that the requirement on a party would be different to the obligations on parties in the disclosure pilot that is currently running in the Business and Property Courts? Would a party be under an obligation to disclose ‘adverse’ documents? As already noted, this is an area where there should be joined up thinking on other procedural developments in civil justice and clarity on the process to be followed.

Sir Rupert’s report identified certain types of cases that are not suitable for allocation as intermediate cases. In the personal injury context, this includes mesothelioma, clinical negligence and child sexual abuse cases (we would also add that adult sexual abuse cases should be included on this list). However, Band four extends to cases that may have a three day trial period, two experts on each side, and witness statements up to 30 pages long. Any personal injury case involving these features would be complicated and easily on a par with those three categories that Sir Rupert has excluded. If intermediate cases are to proceed then it may be best to limit it to the first two bands, at least as a pilot to see how fixed costs in relation to this type of case works in practice.

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

The proposal is again to place responsibility on the parties to seek to agree allocation in pre-action correspondence. Again, it is not always the case that parties will enter into protocol compliant pre-proceedings correspondence and it may well be that parties will not have legal representation.

In cases where there is a debate as to the appropriate band, there may be a tendency for parties to agree a higher band to seek to maximise costs recovery in any event (in fact to do otherwise would risk criticism from a client in the event that their claim is successful and their recoverable costs are limited by a lower band).
The proposed costs of challenges to allocations are £150 and £300 for fast track and intermediate cases respectively. The risk is that the defendant will routinely challenge every allocation in an effort to move to a lower band or throw up more obstacles to prevent having to pay this ‘losers fee’ (the consultation notes that for intermediate cases the cost is only payable if it is the only reason for holding a case management conference). Strong judicial control would be needed not to encourage perverse incentives here.

(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

The details of the bands for intermediate cases gives little detail as to the four bands and how to decide the complexity between them. In non-personal injury cases there seems to be ‘single issue’ cases at Band 1 (an example is given of a debt claim, but there is frequently a defence to such a claim of goods or services as being sub-standard – presumably that takes such a claim out of Band 1 and into another band once that issue becomes known). There is mention in Band 4 of the most complex claims ‘with claims such as business disputes’. Again, that is unclear and seems to categorise all business disputes into this category. The lack of clarity about which band applies, the more time and cost will be wasted. For simplicity, we could welcome a combination of Bands 2 and 3, subject to fixing the costs at an appropriate level and with due regard to current changes in process.

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

Yes. For the reasons stated above, the more clarity the better and for that reason greater certainty is required. Set against that, there is a risk of inflexibility in being too prescriptive, and so it is a balancing act.

Cross-cutting issues

a) Pre-action costs

For both grids, the pre-trial proposed costs are particularly low. Much personal injury work is front loaded and done at the early stages. By the time proceedings are issued, statements have been gathered, expert evidence collected and the case would be almost ready for trial. The proposed FRCs would encourage the commencement of proceedings in order to try and secure a reasonable amount of costs. One option would be to remove pre-action stages from the FRC grid and leave this for agreement or assessment (as with costs budgeting).

Likewise, in non-personal injury claims work carried out pre-action routinely includes: meeting with the client, studying the client’s papers, corresponding and obtaining the professional’s file, considering those client papers and potentially instructing and obtaining input from an expert, as well as then entering into pre-action correspondence with an opponent. The involvement of an expert in such cases would often be more complex than the instruction and involvement of an expert in personal injury cases. For example, in the existing fast track, the table states that the FRC in a professional negligence claim would be £2,250 plus 15% of the damages. Such a sum would be unlikely to cover the amount of work undertaken to that stage which are invariably heavily front-loaded.

Again, in the intermediate cases, the fact that there is a need to ‘front load’ work pre-proceedings does not appear to be properly reflected in the S1 costs. Litigation is supposed to be seen as the last
resort to resolve a dispute, and therefore the initial stages of the case involve not only a thorough review of likely available evidence (documents and witnesses in some cases), but also pre-proceedings correspondence, advice to client and consideration of ADR.

b) Alternative Dispute Resolution (ADR)

The fixed costs regime as set out for Band 4 fast track cases gives no allowance for ADR (or settlement meetings) and therefore perversely gives no encouragement for this to be followed. The parties are of course required to consider methods of ADR under the CPR.

It should be noted that much dispute resolution work goes on without court input and supervision. It is impossible to know how many cases, but the workload of dispute lawyers often involves advisory work, negotiation and use of ADR in disputes that never reach the court.

For the intermediate cases, costs are inadequate for the amount permitted for ADR in the four bands. It is expected that ADR is most likely to occur in Band 4 cases (it is, for example, frequently used by businesses in relation to their disputes, where it makes sense to avoid costs risks, save management time, and on occasion preserve trading relationships). Proper preparation for mediation, travel to a meeting (often parties in dispute are some geographical distance apart), and usually a full day attendance at mediation (8 hours or more) is not adequately covered by the rates set out in the table.

c) Counsel/advocate’s fees

We would welcome clarification around ring-fencing of fees for ‘solicitor-advocate/specialist lawyers/counsel’. We believe it should be whomever is the best person for the job and not necessarily a barrister. Suitably qualified solicitors including solicitor-advocates should be able to access the ring-fenced fees. However, this ring fencing could build in perverse incentives – and if cases are complex enough to need these services we would question whether they should even have FRCs applied.

d) Implementation

We would like further information about the date from which FRCs would be applied and whether they would apply to cases where the cause of action occurs prior to the changes. Solicitors and clients must be aware of which costs regime their case would be subject to, to avoid the scenario where a client is taken on and given costs information based on the current system, then moved to the new FRC system where different costs may apply.

e) Client Characteristics

Client characteristics are not considered in the consultation. A practitioner may be required to spend more time on a particular client, for example an individual with learning difficulties or other disabilities, or where English is not their first language. It is also reasonable to assume that an individual involved in a road traffic accident – possibly an unsophisticated user of legal services who may have sustained a serious, traumatic injury - is likely to require a different level of solicitor time and involvement than a professional entity like an insurance company. There are obvious access to justice issues here, just as there would be if the other party is a Litigant in Person. Bolt ons or enhancements might address this.
f) **Geographical uplift**

If FRCs are to be extended, we would support the uplift on fixed costs payable to a party who lives in the London area and instructs a legal representative who lives in the London area. We would also support consideration being given to an uplift in other cities or geographical areas where costs may be higher.

g) **Adjustment of costs**

If FRCs are to be extended, it is critical that a review of the costs is carried out on a regular basis, so costs adjust by reference to the Services Producer Price Index (as suggested by Sir Rupert), or inflation. The data in the consultation already requires at least two years (possibly four) worth of inflation to bring it up to today’s rates. A review of costs on a regular basis must also take account of changes in the practice and procedure of litigation.

h) **Evaluation**

If FRCs are to be extended, then the process as a whole should also be evaluated to assess the impact across the whole sector, including numbers of cases and damages claimed. We would like more information on how a successful evaluation will be carried out when there is lack of data in the consultation, and therefore a lack of baselines from which to measure levels of success or failure in achieving the required outcomes.

Any changes to the CPR would need to be assessed in parallel with an evaluation of the new OPR supporting the court reform programme.

**Noise-Induced Hearing Loss**

**Q. Given the Government’s intention to extend FRC to NIHL cases, do you agree with the proposals as set out?**

The Society helped to facilitate the mediated settlement between claimant and defendant interests and, subject to our fundamental concerns on the first page on this response being addressed, we would support the proposed structure.

**Summary**

As already stated, the Society is supportive, in principle, of fixed recoverable costs for low value and straightforward cases. However, we do not support the extension of FRCs across the existing fast track in the absence of adequate consideration of the current costs involved in conducting litigation and before the current processes have been overhauled. If FRCs are to be applied to the existing fast track, then a reasonable amount of time should be allowed for bedding in and evaluation before considering vertical extension for cases up to £100,000. Not least, the ability of the court system to accommodate these changes, and the practical implications of the reforms, should be assessed on a step-by-step basis.

If FRCs are to be rolled out across the board, and eventually higher than £100,000, then genuine pilot schemes should be considered in order to understand the impact on the justice system. Similar to bespoke systems for NIHL and clinical negligence, further consideration should be given to
tailored FRCs for categories such as housing. We would support incremental change based on robust evaluation and assessment of the outcomes of any pilots.

Currently there are only high costs for an unsuccessful party if they pursue or defend a claim that should never have been brought or defended, or which they should have settled. The current system, where it is not known what the losing side will need to pay in costs, acts as a deterrent to committing civil wrongs. We therefore wonder whether proposals in this consultation will actually increase the amount of unmeritorious civil cases brought, as well as increasing uncertainty around incurred costs and solicitor and own client costs. They may, in addition, lead to unmeritorious defending of claims properly advanced.

The Society would prefer to see these changes brought about only after parliamentary debate, rather than changes to the CPR which receive a much lower level of scrutiny. If the government decides to press ahead with the extension of FRCs, then we would urge that this should not happen while the process of conducting civil litigation is being fundamentally transformed by the HMCTS reform programme, and the data used to set the costs must be comprehensive and robust.