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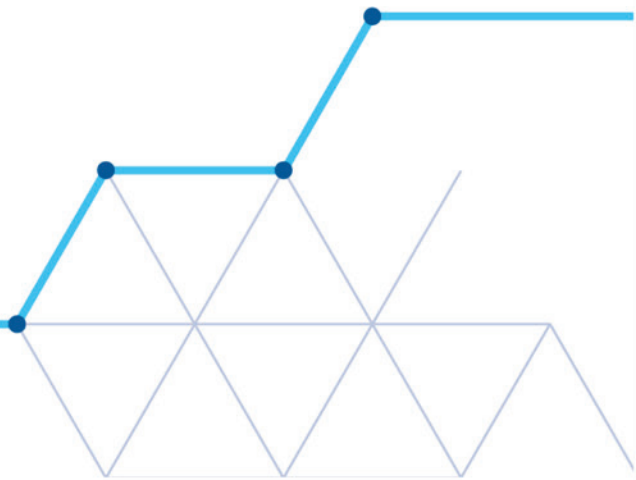
# Extending Fixed Recoverable Costs in Civil Cases:

## Implementing Sir Rupert Jackson's proposals

This consultation begins on 28 March 2019

This consultation ends on 6 June 2019

Protecting and advancing the principles of justice





Ministry  
of Justice

## **Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals**

A consultation produced by the Ministry of Justice. It is also available at  
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## About this consultation

- To:** All those with an interest in the costs of civil litigation in England and Wales
- Duration:** From 28 March 2019 to 06 June 2019
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[consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation](https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation)
- Response paper:** A response to this consultation exercise is due to be published within three months of the consultation ending at:  
[consult.justice.gov.uk/digitalcommunications/fixed-recoverable-costs-consultation](https://consult.justice.gov.uk/digitalcommunications/fixed-recoverable-costs-consultation)

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## Ministerial Foreword

A fair and accessible justice system lies at the heart of our democracy. Ensuring that every citizen has recourse to civil litigation, where appropriate, is part of a just society. One of the major concerns about embarking on litigation is the fear of adverse costs: the requirement by a losing party to pay the other side's costs. It is important that these costs are proportionate to the sums in issue. In order to ensure that ordinary people can engage in civil litigation without fear of incurring ruinous costs, where possible we must control legal costs in advance. This provides certainty and transparency for all involved. This paper sets out how that can be delivered.

Sir Rupert Jackson was commissioned by the former Lord Chief Justice and the Master of the Rolls to draw up recommendations for extending fixed recoverable costs. After some months of consultation and consideration, he published his report in July 2017. Since then we have been considering his report, including the practical implications of implementing his recommendations. This paper seeks views on the details of how we propose to do that.

Making sure that legal costs are proportionate is important to all of us in promoting a just society. As Sir Rupert says:

*"... [a]t the heart of both reviews has been the same objective of promoting access to justice. Controlling litigation costs (while ensuring proper remuneration for lawyers) is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work."*

Fixed recoverable costs prescribe the amount that can be claimed back from a losing party in litigation. The UK justice system has historically had a 'loser pays' model, whereby the unsuccessful party covers the costs of the successful party. This can lead to extremely high costs for the unsuccessful party, even in lower-value claims. Fixed recoverable costs give both parties certainty as to the maximum amount they may have to pay if unsuccessful. They have been a part of our justice system in most low-value personal injury claims since 2010, and have become widely accepted. It is sometimes suggested that fixed recoverable costs favour defendants at the expense of claimants. But it is generally just as much in claimants' interests to control the costs that they might have to pay. Access to justice is enhanced if claimants are able to contemplate legal proceedings with an informed assessment of the likely costs, rather than to avoid them altogether due to a fear of a high but uncertain liability.

Given their success in making costs proportionate and improving access to justice for many, we are now looking to extend fixed recoverable costs. As Sir Rupert says in his report, the intention was always to wait until previous reforms had had the chance to bed in before widening their scope. This entails extending the regime for cases in the fast track (i.e. those up to a value of £25,000 that will last no longer than a day) and a new regime for cases between £25,000–£100,000. I am pleased to say that two of Sir Rupert's recommendations are already in progress: the Civil Justice Council's ongoing work in devising a bespoke process and grid of fixed recoverable costs for clinical negligence claims up to £25,000 damages; and the capped costs pilot in the Business and Property Courts. The government understands that a 'one-size fits all' approach does not work for

all types of claim, and this is reflected in our proposals for different treatment of these cases.

I would like to pay tribute to Sir Rupert's expertise, industry and efficiency in delivering his report. It supplements his major 2010 review, the recommendations of which were implemented in 2013. This report concludes his recommendations. As he says, the baton now passes to others. But we are very grateful to him for all his work in getting us to this stage. It is now your turn to give us your views.

The Rt. Hon. David Gauke

Lord Chancellor and Secretary of State for Justice

## Glossary

The following definitions/abbreviations are used in this document:

CJC	Civil Justice Council
CMC	Case Management Conference
CPRC	Civil Procedure Rule Committee
ELA	Employers' Liability Accident
ELD	Employers' Liability Disease
FRC	Fixed recoverable costs
JR	Judicial review
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
NIHL	Noise induced hearing loss
PAP	Pre-Action Protocol
PI	Personal Injury
RTA	Road Traffic Accident



## Chapter 1: Executive summary

### 1. This consultation

- 1.1 In this consultation, we are seeking views on implementing the proposals in Lord Justice (Sir Rupert) Jackson's<sup>1</sup> report<sup>2</sup> on fixed recoverable costs (FRC) in civil litigation cases in England and Wales, published on 31 July 2017.
- 1.2 In civil litigation in England and Wales, the winning party is generally entitled to recover their costs from the losing party. Civil legal costs, however, have for a long time been too high and too uncertain, making litigation riskier and less accessible than it should be and thereby undermining access to justice. Sir Rupert prepared a major report<sup>3</sup> on the costs of civil litigation in 2010. His recommendations have substantially been implemented, including reforms to 'no win, no fee' agreements in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.<sup>4</sup>
- 1.3 FRC prescribe the amount of money that can be recovered by the winning party at set stages of litigation, from pre-issue to the trial itself. They help to ensure that legal costs remain proportionate and thereby promote access to justice. FRC were first implemented for road traffic accident (RTA) cases up to £10,000 damages in 2010.
- 1.4 Now that the reforms recommended by Sir Rupert in his 2010 report have had time to bed in, it is opportune, as Sir Rupert notes, to consider the extension of FRC. Reflecting his expertise in this area, on 11 November 2016 Sir Rupert was commissioned by the Lord Chief Justice and the Master of the Rolls to carry out a supplemental review of FRC and develop proposals for extending their use.
- 1.5 In his lecture of January 2016,<sup>5</sup> Sir Rupert said that FRC should be put in place for all civil cases up to £250,000. In this report, however, he recommended regimes up to £100,000, as costs management was currently working well in higher-value cases. He recommended:
  - i. The extension of FRC across the fast track, including a new process and separate grid of costs for noise induced hearing loss (NIHL) claims valued below £25,000.

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<sup>1</sup> Sir Rupert retired from the Court of Appeal on 8 March 2018.

<sup>2</sup> [www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf)

<sup>3</sup> [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf)

<sup>4</sup> A Post Implementation Review of Part 2 of the LASPO Act was published on 7 February 2019: [www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo](http://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo)

<sup>5</sup> [www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf)

- ii. The introduction of a new, intermediate track<sup>6</sup> and corresponding FRC for less complex claims from £25,000–£100,000.
  - iii. The extension of the ‘Aarhus’ rules across all judicial review (JR) cases, as well as costs budgeting in ‘heavy’ JR cases.
  - iv. A Civil Justice Council (CJC) working group to be commissioned to devise a bespoke process and FRC regime for clinical negligence cases up to £25,000.
  - v. A voluntary pilot of capped costs in business and property cases up to £250,000.
- 1.6 We have already implemented his recommendation on clinical negligence cases up to £25,000 by commissioning a report from the CJC (and therefore clinical negligence cases are generally excluded from the FRC proposals made in this consultation paper<sup>7</sup>). Similarly, the two-year capped costs pilot in business and property cases commenced in January 2019.
- 1.7 This consultation paper seeks views on how to implement the proposals from the list in 1.5, above: (i) the extension of FRC across the fast track, (ii) the extension of FRC to intermediate cases, and (iii) costs budgeting in ‘heavy’ JR cases.
- 1.8 The government agrees with Sir Rupert’s recommendations, with the following important exceptions:
- i. We agree with the principle of extending FRC to all the cases he recommended for his proposed intermediate track. However, we do not consider it necessary to introduce a new track, with the costs and complexity that that would involve. Rather, we propose to assign these intermediate cases to an extended fast track, where all cases will be subject to FRC. This should bring greater consistency and simplicity. For this reason, we refer in this document to ‘intermediate cases’ rather than a new intermediate track.
  - ii. We do not propose to pursue the extension of the ‘Aarhus’ rules across all JR cases for the reasons set out in chapter 6 below.
- 1.9 In his 2010 report, Sir Rupert recommended that ‘the recoverable costs of cases in the fast track be fixed’: he set out his proposed basis for doing so.<sup>8</sup> As he put it:<sup>9</sup>
- ‘There are several advantages to the fixing of costs in lower value litigation. One is that it gives all parties certainty as to the costs they may recover if successful, or their exposure if unsuccessful. Secondly, fixing costs avoids the further process of costs assessment, or disputes over recoverable costs, which can in themselves generate further expense. Thirdly, it ensures that recoverable costs are proportionate. There is a public interest in making litigation costs in the fast track both proportionate and certain.’*

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<sup>6</sup> As discussed in chapter 5 of this consultation, we are considering the practicalities of introducing a new track. For consistency, we refer to these cases as intermediate cases (to which FRC would apply).

<sup>7</sup> But see chapter 5, 2.2 below.

<sup>8</sup> Jackson (2010), chapter 15.

<sup>9</sup> Jackson (2010), Executive Summary, 2.10.

- 1.10 His 2010 report set out the prospect of extending FRC beyond the fast track.<sup>10</sup> While FRC have not yet been introduced beyond fast track personal injury (PI) cases, his 2017 report sets out the case and method for doing so. He considers the existing fast track FRC in chapter 5 of his 2017 report and says of it:<sup>11</sup> '[o]verall it is working satisfactorily, as many of the respondents to my recent consultation paper accept. I do not propose any changes to it, apart from uprating for inflation.'
- 1.11 We agree with that assessment and, given the continuing high costs of civil litigation generally and the particular issue of disproportionate costs in other low-value claims, we consider that it is right that they should be applied more widely. Accordingly, our intention is to take forward recommendations (i) and (ii) as set out in chapters 3, 4, and 5 below. This means, in summary, that we are consulting on:
- i. extending FRC to all other cases valued up to £25,000 in damages in the fast track as set out in chapter 3 below;
  - ii. a new process and FRC for NIHL claims, as set out in chapter 4 below; and
  - iii. expanding the fast track to include the simple 'intermediate' cases valued £25,000–£100,000 in damages.
- 1.12 There might be particular cases where the application of FRC may either be considered inappropriate or prove difficult to implement and, in that regard, we welcome your views, supported by evidence, and, in respect of the latter in particular, suggestions that might assist in overcoming any difficulties.
- 1.13 The proposed figures for FRC were devised by Sir Rupert based on data submitted by Taylor Rose<sup>12</sup> (a firm of solicitors and costs lawyers) that was analysed by Professor Paul Fenn.<sup>13</sup> Sir Rupert consulted with his team of fourteen assessors,<sup>14</sup> drawing on a breadth of views and experience, and brought his own expertise to bear in finalising the figures. As such, we consider that the figures have been devised with appropriate rigour and intend to implement them as he recommends. There are consultation questions on which we would welcome responses, including evidence in support.
- 1.14 Consultees will need to familiarise themselves with the detail of Sir Rupert's report, only some of which is repeated here.
- 1.15 We are also publishing, alongside this consultation, an impact assessment and equalities statement, so that the predicted impact of our proposals is clear.

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<sup>10</sup> Jackson (2017), chapter 1, 1.7.

<sup>11</sup> Jackson (2017), chapter 5, 2.4.

<sup>12</sup> Jackson (2017), chapter 3, 3.1.

<sup>13</sup> Professor Paul Fenn, an assessor to Sir Rupert's 2010 and 2017 reviews, is emeritus professor at Nottingham University Business School and policy adviser on costs issues to the government, the judiciary and the legal profession. Taylor Rose TTKW are solicitors and costs lawyers.

<sup>14</sup> Jackson (2017), chapter 1, 2.5: his assessors included both claimant and defendant solicitors, academics, members of the judiciary and costs lawyers.

## 2. **Next Steps**

- 2.1 Subject to consideration of the responses we receive, our intention is to implement these reforms as set out in this consultation paper. We will keep them under review once implemented. It remains our intention to extend the areas in which costs are controlled in due course: such an extension could include extending FRC to further categories of claims, including claims of higher value, and controlling costs incurred before the first costs and case management conference (CCMC), where cases are not otherwise subject to FRC.
- 2.2 The government will publish a response to the consultation in due course. The extension of FRC will take effect by amendment to the Civil Procedure Rules 1998.<sup>15</sup>

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<sup>15</sup> S.I. 1998/3132.

## Chapter 2: Background

### 1. Fixed recoverable costs (FRC)

- 1.1 This consultation focuses on the extension of FRC. FRC prescribe the amount of costs the winning party can recover from the losing party in civil litigation. FRC are relatively new in England and Wales but are firmly established in other jurisdictions.<sup>16</sup>
- 1.2 Extending FRC is an important aspect of controlling the costs of civil litigation more generally. As Sir Rupert says in his July 2017 report, ‘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’.<sup>17</sup> The best way to control costs is to do so in advance, which can be done through measures such as costs budgeting or FRC. However, FRC are the only way to provide certainty to both parties as to what costs will be. As such, we believe they are key to ensuring access to justice.
- 1.3 Sir Rupert Jackson’s July 2017 report is the culmination of at least 20 years work on controlling the costs of civil litigation. He was an assessor to Lord Woolf’s seminal report,<sup>18</sup> ‘Access to Justice’, published in 1996. That report recommended significant reforms to the civil justice system to improve access to justice, reduce the cost of litigation, and remove unnecessary complexity. One recommendation, on which work remains outstanding, was to implement a regime of FRC for fast track cases.<sup>19</sup>

### 2. Sir Rupert Jackson’s reforms

- 2.1 Substantial reforms were made to the civil justice system following Lord Woolf’s report, not least the introduction of the Civil Procedure Rules.<sup>20</sup> However, in the following years there were continuing concerns about the costs of civil litigation, primarily due to the Access to Justice Act 1999 reforms to ‘no win no fee’ Conditional Fee Agreements (CFAs). This led to the appointment, by the then Master of the Rolls, of Sir Rupert ‘to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost’.<sup>21</sup>

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<sup>16</sup> Germany, for example, has a system which keeps costs down very effectively by limiting disclosure and oral evidence. In Germany, a successful party does not have complete indemnity for their costs, but rather a statute dictates that legal costs are covered by a non-linear scale, using multipliers that vary per the value of the dispute. German legal fees are relatively low, compared to the rest of Europe, and they rank well for the ease of enforcing contracts.

<sup>17</sup> Jackson (2017), chapter 1, 1.2.

<sup>18</sup> <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm>

<sup>19</sup> <http://webarchive.nationalarchives.gov.uk/20060214041355/http://www.dca.gov.uk/civil/final/sec2b.htm#c4>

<sup>20</sup> Under s. 1, Civil Procedure Act 1997.

<sup>21</sup> Jackson (2010), chapter 1, 1.1.

- 2.2 Sir Rupert's report was published in 2010, and led to statutory reforms in the LASPO Act 2012 and other changes to the handling of civil cases, which came into force together in April 2013. His recommendations included fixing the recoverable costs of fast track cases in principle, although further detailed work was needed to specify most of the FRC to be applied.
- 2.3 Following the report, the government concentrated its efforts on introducing (between 2010 and 2013) FRC for low-value (fast track) personal injury (PI) claims: road traffic accident (RTA), employers' liability accident (ELA) and public liability (PL) cases.
- 2.4 Sir Rupert's intention was that once these FRC reforms had become embedded in the legal system, it would be possible to look at extending FRC more widely, including to claims of higher value. With the current regime of FRC working well, we agree with him that the time is right to extend FRC in order to control the costs of civil litigation and improve access to justice.
- 2.5 It is worth emphasising the access to justice point, as some see FRC as compromising access to justice. We do not agree. Rather, we agree with what Sir Rupert said in 2010:<sup>22</sup>
- 'It has sometimes been suggested during the Costs Review that there is an antithesis between controlling costs and promoting access to justice. I accept that if litigation becomes uneconomic for lawyers, so that they cease to practise, there is a denial of access to justice. But, for the most part, achieving proportionate costs and promoting access to justice go hand in hand. If costs on both sides are proportionate, then (i) there is more access to justice and (ii) such funding as the parties possess is more likely to be sufficient.'*
- 2.6 In January 2016, Sir Rupert gave a lecture entitled 'Fixed costs – the time has come'.<sup>23</sup> That lecture rekindled the debate about extending FRC much more widely.
- 2.7 Later that year, in a joint statement heralding an ambitious programme of reform to modernise Her Majesty's Courts and Tribunals Service, the Lord Chief Justice, Lord Chancellor and Senior President of Tribunals stated:<sup>24</sup>
- 'More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.'*

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<sup>22</sup> Jackson (2010), chapter 4, 2.8

<sup>23</sup> [www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf)

<sup>24</sup> *Transforming our justice system*, [www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf)

- 2.8 On 11 November 2016, the Lord Chief Justice and the Master of the Rolls commissioned Sir Rupert to carry out a review of FRC. He was commissioned<sup>25</sup> to develop proposals for the extension of FRC, as well as consider the areas in which they could be extended and to what value of claim. He published his report on 31 July 2017 and this consultation paper discusses how his recommendations can be implemented.

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<sup>25</sup> [www.judiciary.gov.uk/announcements/senior-judiciary-announces-review-of-fixed-recoverable-costs/](http://www.judiciary.gov.uk/announcements/senior-judiciary-announces-review-of-fixed-recoverable-costs/)

## Chapter 3: The Fast Track

### 1. The different tracks

- 1.1 In his 1996 report,<sup>26</sup> Lord Woolf called for the introduction of case management with different tracks, whereby all defended claims are allocated to either the small claims track, the fast track or the multi-track.
- 1.2 These tracks are essentially for judicial and court management purposes, so that cases of varying complexity can be considered appropriately: they divide cases from the simplest to the most complex.
- The small claims track is for straightforward claims, for which legal representation is not considered necessary and legal costs are not generally recoverable.
  - The fast track is typically for claims for up to £25,000 damages, although technically it covers cases where the trial is unlikely to last longer than one day and where oral expert evidence is limited to one expert per party in any field and no more than two expert fields.
  - The multi-track is typically for claims for more than £25,000 damages, although technically it covers cases which are too complex for the fast track.

### 2. The current position

- 2.1 FRC are now in place for most fast track personal injury (PI) cases: road traffic accident (RTA), employers' liability accident (ELA) and public liability (PL) cases. Although there are separate calls for modifications from claimant and defendant representatives, we agree with Sir Rupert that the focus should now be on extending FRC, rather than amending the existing regime.

### 3. Sir Rupert's recommendation

- 3.1 Sir Rupert recommends extending FRC to all other cases in the fast track. He recommends a grid with four bands of complexity, incorporating the existing FRC regimes. He says that the current provision in CPR 45.29J,<sup>27</sup> which enables a party to escape fast track FRC in exceptional circumstances, will still apply; it will, however, still be rare as fast track cases are not usually so complex as to engage this provision.

#### 3.2 The four bands

Sir Rupert recommends that the four bands should comprise the following cases:

- Band 1 for RTA non-PI claims (i.e. 'bent metal' or damage to vehicles only), defended debt claims;

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<sup>26</sup> <http://webarchive.nationalarchives.gov.uk/20060214041355/http://www.dca.gov.uk/civil/final/sec2b.htm#c4>

<sup>27</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#45.29J](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#45.29J)



- Band 2 for RTA PI claims (within the Pre-Action Protocol (PAP));
- Band 3 for RTA PI claims (outside the PAP), ELA, PL, tracked possession claims, housing disrepair, other money claims;
- Band 4 for ELD (excluding noise induced hearing loss (NIHL)), particularly complex tracked possession claims or housing disrepair claims, property disputes, professional negligence claims and other claims at the top end of the fast track.

In addition, there would be a band for NIHL claims, which is set out in Chapter 4, below.

- 3.3 Sir Rupert recommends that the pre-action protocols (PAPs) be amended to require parties to endeavour to agree pre-action the appropriate track for cases, and in respect of fast track cases, the appropriate band. Claimants should state their proposals in this regard in the letter of claim, and defendants should do the same in the letter of response. On allocating a case to the fast track, the judge will specify the band if that is in dispute. Parties may challenge that decision by an application on paper under CPR rule 3.3(5)–(6): Sir Rupert recommends that the unsuccessful party on such an application should incur a costs liability of £150.<sup>28</sup> We agree with this recommendation.
- 3.4 Although the types of cases suitable for each band are specified above, Sir Rupert recommends that the court must have discretion at the allocation stage to move individual claims between the bands depending on the nature of the individual case. Judges should exercise this discretion sparingly and bearing in mind the proportionality factors set out in CPR 44.3(5). Please see also paragraph 4 below in relation to the appropriate band for holiday sickness claims.
- 3.5 There is a wider issue about how to ensure that all cases<sup>29</sup> which should be subject to FRC do not escape from FRC by being inappropriately allocated to the multi-track. This is essentially a matter of judicial discretion, and the issue may currently arise with low value PI cases where FRC apply. The current rules require the court to assess objectively the financial value of a claim by disregarding any amount not in dispute, any claim for interest costs, and any contributory negligence. Claimants and defendants can submit additional information to assist in the allocation of a track. It is also possible for the court to hold allocation hearings if it deems necessary.<sup>30</sup> We would be grateful for views on whether, and how, the rules should be strengthened to make sure that (i) unnecessary challenges are avoided, and (ii) cases do stay within FRC where appropriate.

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<sup>28</sup> Jackson (2017), chapter 5, 5.19.

<sup>29</sup> Whether existing FRC cases, or other cases proposed for FRC within the fast track (including NIHL) or intermediate cases.

<sup>30</sup> Civil Procedure Rules, *Part 26 - Case Management – Preliminary Stage*, 26.5- 26.10, and Civil Procedure Rules, *Practice Direction Supplements*, Part 26.  
[www.justice.gov.uk/courts/procedure-rules/civil](http://www.justice.gov.uk/courts/procedure-rules/civil)

#### 4. Package travel claims

- 4.1 Sir Rupert acknowledged<sup>31</sup> the government's then very recent announcement<sup>32</sup> to extend FRC to package travel claims,<sup>33</sup> in response to concerns about increasing numbers of package holiday sickness claims. He recommended that such claims should be subject to Band 2 FRC (in other words, at the same level as RTA PI claims).
- 4.2 The Government issued a call for evidence regarding package travel claims in October 2017.<sup>34</sup> We proposed setting the FRC for such claims at a higher level, in line with employers' liability (EL)/public liability (PL) claims, as they would be if the cause of action occurred in England and Wales. We also proposed amending the EL/PL Pre-Action Protocol (PAP) to bring these claims within its scope and sought further information from respondents regarding the detail and drafting of the PAP on behalf of the Civil Procedure Rule Committee (CPRC).
- 4.3 The Government has now extended FRC to package travel claims from 7 May 2018. We have implemented a bespoke PAP for these claims,<sup>35</sup> and amended Civil Procedure Rule 45.29 to bring them into scope of the existing FRC regime.<sup>36</sup> Several respondents suggested instead using either a bespoke PAP or the general PI PAP for package travel sickness claims. On reflection, we agreed that a bespoke PAP, rather than an amended EL/PL PAP, would better address package travel claims, allowing the appropriate application of FRC. The Government's response on the way forward for these claims has been published.<sup>37</sup>
- 4.4 We stated in the call for evidence that we would consider the appropriate FRC rate for package travel sickness claims alongside Sir Rupert's wider recommendations. As we have already said, Sir Rupert favours Band 2 for holiday sickness claims, based on data he gathered whilst compiling his report. He sets out this evidence at Appendix 4.<sup>38</sup> However, as package holiday sickness claims are a form of PL claim and thus would normally fall into Band 3, this would mean that different FRC would apply depending on whether an incident occurred within England and Wales or within another jurisdiction. Additionally, as several respondents pointed out in the call for evidence, there can be extra work (such as translating documents) required in making a claim for an incident that has taken place abroad adding to its

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<sup>31</sup> Jackson (2017), chapter 5, 3.2.

<sup>32</sup> <https://www.gov.uk/government/news/crackdown-on-fake-holiday-sickness-claims>

<sup>33</sup> These are referred to as package travel claims in accordance with the wording of the Pre-action protocol for resolution of package travel claims, which applies to new claims from 7 May 2018

<sup>34</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652419/gastric-illness-call-for-evidence.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652419/gastric-illness-call-for-evidence.pdf)

<sup>35</sup> [www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-resolution-of-package-travel-claims](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-resolution-of-package-travel-claims)

<sup>36</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#IIIA](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#IIIA)

<sup>37</sup> [www.gov.uk/government/consultations/personal-injury-claims-arising-from-package-holidays-call-for-evidence](http://www.gov.uk/government/consultations/personal-injury-claims-arising-from-package-holidays-call-for-evidence)

<sup>38</sup> [www.judiciary.gov.uk/wp-content/uploads/2017/07/Appendix\\_04\\_Review-of-Civ-Lit-Costs-Supp-Report-FRC.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2017/07/Appendix_04_Review-of-Civ-Lit-Costs-Supp-Report-FRC.pdf)

complexity, suggesting that these claims are appropriate for a higher band than for RTA claims.

4.5 Given the points set out in paragraph 4.4 above, and the opposing opinions of claimant and defendant representatives, we would therefore be grateful for views on whether package holiday sickness claims should be in Band 2 or 3.

## 5. The FRC for the four bands

5.1 We propose to apply the FRC in Table 1 below to all cases in the fast track to which, going forward, FRC extend. Our proposed FRC in Bands 1 and 4 are as recommended by Sir Rupert. They are based on analysis of a sample of closed cases by Professor Fenn,<sup>39</sup> and have been adjusted to take account of efficiency savings from fixed costs. Bands 2 and 3 are the current fast track pre-trial fixed costs in PI, with a 4% uplift to take account of inflation.<sup>40</sup> All the figures for FRC throughout this paper are exclusive of VAT. It is important to read the table subject to the rules he sets out.<sup>41</sup>

Table 1: Fixed recoverable costs in the fast track

Stage:	Complexity Band			
	1	2	3	4
Pre-issue £1,001 – £5,000		<i>The greater of £572 or<sup>42</sup> £104 + 20% of damages</i>	£988 + 17.5% of damages	£2,250 + 15% of damages + £440 per extra defendant
Pre-issue £5,001 – £10,000		£1,144 + 15% of damages over £5,000	£1,929 + 12.5% of damages over £5,000	
Pre-issue £10,001 – £25,000	£500	£2,007 + 10% of damages over £10,000	£2,600 + 10% of damages over £10,000	
Post-issue, pre-allocation	£1,850	£1,206 + 20% of damages	£2,735 + 20% of damages	£2,575 + 40% of damages + £660 per extra defendant
Post-allocation, pre-listing	£2,200	£1,955 + 20% of damages	£3,484 + 25% of damages	£5,525 + 40% of damages + £660 per extra defendant

<sup>39</sup> Jackson (2017), Appendix 9.

<sup>40</sup> He recommends a new grid for noise induced hearing loss (NIHL), based on the Civil Justice Council's recommendations: see chapter 4, below.

<sup>41</sup> Jackson (2017), chapter 5, 5.2

<sup>42</sup> The italicised element was not included in Sir Rupert's original table, but it follows from CPR 45.29C, Table 6B where the figure of £550 has been uprated in this table to £572 in line with the inflation uprating of other figures in this table.

Stage:	Complexity Band			
	1	2	3	4
Post-listing, pre-trial	£3,250	£2,761 + 20% of damages	£4,451 + 30% of damages	£6,800 + 40% of damages + £660 per extra defendant
Trial advocacy fee <sup>43</sup>	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £1,380 b. £1,380 c. £1,800 d. £2,500

N.B. The figures in all boxes are cumulative and therefore include prior stages in the figure for that stage, except for the trial advocacy fees shown in the bottom line (i.e. aside from the trial advocacy fee, the maximum FRC for a Band 1 case is £3,250).

## 6. Interim applications and preliminary issues

- 6.1 Sir Rupert recommends FRC for interim injunction applications in Band 4 and NIHL cases and preliminary issues.<sup>44</sup> He also strongly discourages the use of preliminary issue trials in the fast track.<sup>45</sup> If there is a preliminary trial, followed by a subsequent trial, two trial advocacy fees will be recoverable. No other fees will be recoverable. The two trials need not be in the same band.
- 6.2 Sir Rupert strongly discourages applications in NIHL cases and in Band 4 of the fast track, as well as in preliminary issue trials.

## 7. Uprating for inflation

- 7.1 The figures above reflect existing FRC uprated for inflation.<sup>46</sup>

## 8. Some specific issues

- 8.1 Aside from the bands and grid, a few issues arising from the extension of FRC are worth setting out separately. These issues may apply equally in respect of intermediate cases (see chapter 5) and we propose to treat them on the same basis. For the sake of simplicity they are set out here, without being repeated in chapter 5.

### *Indemnity costs*

- 8.2 Most costs are awarded on the 'standard basis', and this is what would be reflected in the grid of FRC. However, in certain circumstances, a successful party can be awarded higher costs on the 'indemnity basis' where it has been put to additional expense, either in relation to Part 36 offers to settle or as a result of unreasonable litigation conduct by the other party.

<sup>43</sup> a. claim value up to £3,000; b. claim value £3,001 to £10,000; c. claim value £10,001 to £15,000; d. claim value £15,001 to £25,000.

<sup>44</sup> Jackson (2017), chapter 5, 5.13.

<sup>45</sup> Jackson (2017), chapter 5, 5.14.

<sup>46</sup> Jackson (2017), chapter 5, 2.9.

*Part 36 offers to settle*

- 8.3 Offers to settle are a critical part of the litigation process, particularly in encouraging early settlement of damages claims; the 2013 Jackson reforms to the ‘Part 36’<sup>47</sup> procedure to encourage early settlement were welcomed by both claimants and defendants. Part of this process is to require a higher costs award where an offer to settle is made by one side but not beaten by the other at trial. The question is on what basis these higher costs should be awarded in an FRC regime – an uplift of FRC, or on the traditional indemnity costs basis, based on a detailed assessment of hourly rates. This issue is highlighted by the 2016 Court of Appeal case of *Broadhurst v Tan*.<sup>48</sup> Sir Rupert’s assessors were divided: Sir Rupert recommends an uplift on FRC of 30% or 40%, rather than indemnity costs.
- 8.4 The uplift would apply only to the stage(s) of FRC covered from the time of the Part 36 offer.
- 8.5 We agree with Sir Rupert that an uplift on FRC is preferable, as indemnity costs undermine the principle of FRC by requiring detailed costs assessment (and the keeping of records to inform an assessment should it arise). As with FRC more generally, this approach would also provide more certainty for litigants.
- 8.6 Taking the mid-point of Sir Rupert’s suggestions, we therefore propose an uplift of 35% on the FRC for the purposes of Part 36.
- 8.7 We are keen that the Part 36 regime should continue to work well in encouraging reasonable early settlement; we would be particularly interested in views as to whether a 35% uplift would alter the incentives to settle early. If you consider that 35% is too high or too low, or that another approach is preferable, please give reasons.

*Unreasonable litigation conduct*

- 8.8 The courts can order that the costs be assessed on the indemnity basis (rather than the standard basis) where unreasonable litigation conduct on the part of one party causes the other party to incur additional expense. Sir Rupert recommends that where costs are subject to FRC, the court should be able to either award a fixed percentage uplift on costs (as for Part 36 offers, above), or to make an order for indemnity costs in cases of unreasonable litigation conduct. In exercising this power, the court should have regard to the seriousness of the conduct in question.<sup>49</sup>
- 8.9 The government agrees that there is a distinction between not accepting an appropriate offer and seriously unreasonable behaviour. It is therefore reasonable to make a distinction and to allow higher costs to be awarded under these circumstances in more serious cases, including in cases subject to FRC. Apart from anything else, this addresses the concern that FRC can disadvantage a less well-resourced party against a deep pocketed opponent who, for example, makes repeated vexatious applications.<sup>50</sup> However, there may be practical issues in

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<sup>47</sup> Of the Civil Procedure Rules.

<sup>48</sup> [www.lawgazette.co.uk/law/fixed-costs-trumped-by-part-36-offer-rules-court-of-appeal/5053809.article](http://www.lawgazette.co.uk/law/fixed-costs-trumped-by-part-36-offer-rules-court-of-appeal/5053809.article)

<sup>49</sup> Jackson (2017), chapter 5, 2.7 and chapter 7, 5.14.

<sup>50</sup> Jackson (2017), chapter 7, 4.10.

allowing indemnity costs to be paid (as Sir Rupert suggests) as this would require a detailed explanation of the incurred costs so that they could be determined on the indemnity basis. Clearly, unreasonable litigation conduct should be a rarity, and the question arises whether it is practical or reasonable to require detailed records of costs incurred for every FRC case. An alternative may be to allow a – perhaps unlimited – higher percentage uplift on the FRC at the discretion of the judge depending on the seriousness of the behaviour. The threat of a potentially substantial costs award should go some way to ensuring proper conduct. We propose that the party or the legal representative in question should have a reasonable opportunity, whether orally or in writing, to explain why such an order should not be made.<sup>51</sup>

- 8.10 We therefore welcome views as to whether, in the case of unreasonable litigation conduct, the court should award: (i) an uplift (perhaps unlimited) of FRC; (ii) indemnity costs (depending on the seriousness of the conduct); (iii) either (i) or (ii); or (iv) some other penalty.

#### *Counsel's fees*

- 8.11 Sir Rupert noted that many calls had been made for the ring-fencing of fees for counsel.<sup>52</sup> The arguments had been put that such ring-fencing is necessary in order (i) to protect the junior Bar and (ii) to recognise that counsel's specialist input at an early stage is beneficial for the client and for the efficiency of litigation. Sir Rupert notes that it is not his duty to 'protect' one part of a profession: the professions exist to serve the public, not vice versa. He saw force in the second argument in relation to more complex fast track cases, but says that this ring-fenced work may appropriately be done by solicitors or fellows of the Chartered Institute of Legal Executives with appropriate expertise.
- 8.12 He concludes that, in Bands 1, 2 and 3, where there is very little ring-fencing of fees, the present rules should remain the same. However, he recommends specific amounts that can be recovered by 'counsel or specialist lawyers' in NIHL and Band 4 cases:<sup>53</sup>
- Post-issue advice or conference – £1,000
  - Settling defence or defence and counterclaim – £500
- 8.13 We agree that it is necessary to ring-fence fees for counsel or specialist lawyers only in Band 4 and NIHL, as counsel is rarely instructed in cases outside of Band 4, but would welcome views.

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<sup>51</sup> *The Senior Courts Costs Office Guide* (2018), Part C – Applications Section 25, 'Applications concerning misconduct or wasted costs', 25.1 'Misconduct by litigants or legal representatives', p. 90.

<sup>52</sup> Jackson (2017), chapter 5, 5.8-11.

<sup>53</sup> Jackson (2017), chapter 5, 5.11.

*London Weighting*

- 8.14 Sir Rupert notes that current FRC rules in the fast track 'provide for a 12.5% uplift on fixed costs payable to a party who lives in the London area and instructs a legal representative who practises in the London area'.<sup>54</sup> Uplifts already exist in the Guideline Hourly Rates.<sup>55</sup> Such provisions would remain under the new FRC regimes.

*Multiple claims arising from the same cause of action*

- 8.15 In considering the appropriate FRC regime for package travel claims, it has become apparent that many claims (both PI and non-PI) are made where a legal representative acts for more than one claimant and the claims arise from the same set of facts, such as a family who have all suffered the same illness whilst abroad, or groups who are involved in the same road traffic accident. In this context, the question arises as to how all such claims (not limited to package holiday claims) should be dealt with, in fairness to all parties. Where the cause of action is the same and the claim itself is either similar or subsidiary to the principle claim, there is less work to be done for each claim after the first, such that it would not be appropriate to provide equal FRC for each additional claimant. It is a feature in holiday sickness claims, for example, that the booking details, facts, alleged illness, and resort are usually identical in multiple claims. If full FRC are allowed for each claim, this would clearly lead to over remuneration and perverse incentives to add more names to claims. Although this was not addressed by Sir Rupert, we therefore propose that the FRC for each additional claimant should be set at 10% of that for the principal claimant (as prescribed in Sir Rupert's grid), however we also welcome suggestions as to what proportion would be appropriate for additional claimants. The 10% amount would be the standard position in any case, not just package holiday sickness claims, where a legal representative acts for more than one claimant and the claims arise from the same set of facts.

*Assessment of costs*

- 8.16 Sir Rupert notes that in most cases the assessment of recoverable costs will not require judicial input. In the event of 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 £500.<sup>56</sup>
- 8.17 We agree that it is important to cap assessment fees, as not doing so would be out of keeping with the effort to ensure costs are proportionate.

**Our intention is to extend FRC in the fast track, in accordance with the proposals set out above.**

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<sup>54</sup> This is set out in CPR rule 45.29C(2), rule 45.29F(5) and Practice Direction 45 paragraph 2.6.

<sup>55</sup> [www.gov.uk/guidance/solicitors-guideline-hourly-rates](http://www.gov.uk/guidance/solicitors-guideline-hourly-rates)

<sup>56</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part-47-procedure-for-detailed-assessment/practice-direction-47-costs-special-cases2#5.7](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-47-procedure-for-detailed-assessment/practice-direction-47-costs-special-cases2#5.7)

**QUESTIONS:**

- 1. Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out? We seek your views, including any alternatives, on:**
  - (i) the proposals for allocation of cases to Bands (including package holiday sickness);**
  - (ii) the proposals for multiple claims arising from the 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; and**
  - (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.**



## Chapter 4: Noise Induced Hearing Loss

### 1. Background

- 1.1 In 2015, the Association of British Insurers (ABI) published a report<sup>57</sup> highlighting its concern at the rise in the number and costs of noise induced hearing loss (NIHL) claims (also known as industrial or occupational deafness claims). They noted that between 2011 and 2014 NIHL claims notified with insurers increased by 189%. The ABI asserted that this was driven by spurious and frivolous claims, stating that 70% of NIHL claims are unsuccessful. While the overall costs of NIHL cases can be high due to multiple defendants and disputes on liability, causation and limitation, the damages in individual cases are low (typically under £5,000).<sup>58</sup>
- 1.2 This increase in claims, and their high and disproportionate costs, led the government to commission the Civil Justice Council (CJC) to make proposals (i) to improve the handling of these claims, and (ii) for a regime of FRC.

### 2. The CJC working group

- 2.1 The CJC established a working group of stakeholders representing claimant, defendant and judicial interests. Although its report was published on 6 September 2017,<sup>59</sup> Sir Rupert saw the final recommendations before they were formally published, including areas on which the working group could not agree. Sir Rupert endorsed the working group's proposals and made further recommendations in Chapter 5 of his report. We agree with Sir Rupert's recommendations and with the CJC's reasons<sup>60</sup> and recommendations,<sup>61</sup> which take into account both claimant and defendant interests, as well as wider views, in devising their new process and FRC regime. Unless otherwise stated, we are proposing to implement the CJC recommendations as, in some instances, supplemented by Sir Rupert in his 2017 report.<sup>62</sup>
- 2.2 Consultees will need to familiarise themselves with the detail of the CJC's report (and annexes), as supplemented by Sir Rupert's report, only some of which is repeated here. In considering these issues, consultees may also wish to bear in mind the questions which the CJC working group identified at Annex H of their report.<sup>63</sup>

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<sup>57</sup> [www.abi.org.uk/globalassets/sitecore/files/documents/consumer-guides/tackling-the-compensation-culture.pdf](http://www.abi.org.uk/globalassets/sitecore/files/documents/consumer-guides/tackling-the-compensation-culture.pdf)

<sup>58</sup> CJC Report, 3.8- 3.17.

<sup>59</sup> [www.judiciary.gov.uk/publications/establishing-fixed-costs-and-better-procedures-for-noise-claims/](http://www.judiciary.gov.uk/publications/establishing-fixed-costs-and-better-procedures-for-noise-claims/)

<sup>60</sup> CJC Report, 4.2-4.6.

<sup>61</sup> CJC Report, from 10.3.

<sup>62</sup> Jackson (2017), chapter 5, 4.1-3, 5.1-14, 5.17, 5.21

<sup>63</sup> CJC Report, Annex H

### 3. The CJC recommendations

- 3.1 The CJC report makes the following recommendations for NIHL claims which are allocated to the fast track: this will be the majority of NIHL claims. Claimant representatives may seek to have the case allocated to the multi-track in order to avoid the fast track FRC, but this should be resisted except where necessary, and the rules would need to be drafted accordingly.
- 3.2 At present, most<sup>64</sup> pre-litigation NIHL claims are handled under the Pre-Action Protocol for Disease and Illness claims ('D PAP'), first introduced in 2003. D PAP is designed to cover all types of non-single event disease claims. The CJC acknowledged that D PAP works well generally, but they considered that its use in NIHL claims could be significantly improved. The sheer volume of NIHL claims may have led to (i) generic rather than specific letters of claim, often lacking in detail and (ii) standard defendant requests for additional information which may already have been provided; denials of liability are almost standard. Further, the majority of NIHL claims involve multiple defendants and multiple insurers. In the light of these features, improvements were suggested to streamline the process.
- 3.3 The report recommends a much-improved exchange of information in the early stages of a claim in order to narrow the issues, through a new letter of claim process.

### 4. New pre-litigation process

- 4.1 The proposal is to introduce a new pre-litigation process involving greater transparency between the parties for the more straightforward majority of NIHL claims. The principal aspect of this is new letters of claim<sup>65</sup> and response.<sup>66</sup> The proposed letters of claim and response require certain actions by claimants and defendants to be effective. It is important to note that while the language in pre-action protocols (PAPs) tends to encourage rather than require certain actions, in order to be effective, there will need to be some mandatory actions, including what is to accompany the letter of claim. This would be done by adding an annexe to the current Disease Protocol as the procedures and timings of that protocol would still apply. Experience of the protocols drafted for the existing FRC regime for low value personal injury claims suggests that such an annexe would also need to include provisions making compliance mandatory.<sup>67</sup>

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<sup>64</sup> Single defendant NIHL claims fall within the [EL/PL Protocol], which makes separate provision for FRC where liability is admitted within the response period.

<sup>65</sup> CJC report on fixed costs in noise claims (henceforth CJC report), 4.27 and Annex B.

<sup>66</sup> CJC report, 4.30 and Annex C.

<sup>67</sup> CJC Report, 4.27-4.29.

4.2 It is proposed that the letter of claim is to be accompanied by:

- An audiogram produced by a suitably experienced and approved provider;<sup>68</sup>
- A Schedule of employment from HM Revenue and Customs (HMRC), to be obtained *after* the audiogram to avoid unnecessary work collecting employment schedules in HMRC;<sup>69</sup> and
- (Where necessary) search results from the Employers' Liability Tracing Office (ELTO).<sup>70</sup>

4.3 It should be noted that only an audiologist's report (on hearing loss) should be obtained in the first instance. However, where liability is denied and litigation is anticipated, the claimant would be expected to obtain an Ear, Nose and Throat (ENT) consultant's report.<sup>71</sup>

4.4 Defendants are encouraged to co-ordinate their position in accordance with ABI guidelines<sup>72</sup> and must provide a letter of response setting out their position on breach of duty, containing meaningful information on their general position. Pre-medical offers are discouraged.<sup>73</sup>

4.5 Views are sought on these proposals and, in particular, on the contents and clarity of the draft letters of claim (and accompaniments) and response.

## 5. Post-litigation process improvements

5.1 The two recommendations for the post-litigation phase are:

- i. a largely agreed template for standard directions.<sup>74</sup> The CJC agreed that it would be helpful to have standard case management directions for the judiciary, but could not agree on the content. In particular, standard directions should be used to control the number and use of experts;<sup>75</sup> and
- ii. tighter controls on the criteria applied when listing such cases for separate trial of preliminary issues such as limitation (as currently occurs in some court centres).

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<sup>68</sup> CJC report, 4.11, chapter 5 and Annex F. Members of the CJC Working Group were exploring a 'minimum quality standard' and it is hoped that this work can continue.

<sup>69</sup> CJC report, 4.19 and Appendix E2. In September 2016, Helen Blundell of the Association of Personal Injury Lawyers (APIL) published an article urging claimant solicitors to notify HMRC upon receipt of an audiogram if the claim will no longer proceed. This it was felt would greatly reduce the queue, allow HMRC to reduce the backlog and ease pressure on new claims.

<sup>70</sup> CJC report, 4.22.

<sup>71</sup> CJC report, 5.11.

<sup>72</sup> CJC report, Appendix D.

<sup>73</sup> CJC report, 4.31.

<sup>74</sup> CJC report, 6.8-6.45, and Appendix G1.

<sup>75</sup> CJC report, 6.18.

- 5.2 The CJC could not agree on the applicability of the proposed FRC regime if disputed limitation is listed as a preliminary trial issue. However, they did agree that the following wording could assist:<sup>76</sup>

*‘Any request for a preliminary trial on limitation should be made with the Allocation Questionnaire. The defendant must identify the evidence and legal argument that give the defendant a real prospect of success on the issue of limitation and must demonstrate that there is a prima facie case for a trial of any preliminary issue.’*

- 5.3 They did, however, agree that, if a decision were made to apply FRC to preliminary issue trials, it should be on the basis set out in the report.<sup>77</sup>
- 5.4 Sir Rupert makes clear his views on (ii): ‘The costs of any preliminary issue trials should be recovered separately. Having said that, absent special circumstances, I strongly discourage the ordering of preliminary issue trials in the fast track.’<sup>78</sup>
- 5.5 Our proposal therefore is strongly to discourage the ordering of preliminary issue trials (e.g. on limitation) in fast track cases, as we do in the rest of the fast track. At present there is an inconsistent approach taken by the judiciary which means that these trials may be ordered without the request of either party or without a hearing. Rather, there should be tighter controls on the criteria applied when ordering such a trial. If such a preliminary trial goes ahead, FRC should apply also to the preliminary trial.<sup>79</sup>
- 5.6 Views are sought on the contents of the proposed standard directions,<sup>80</sup> and the listing of separate preliminary trials.

## 6. FRC

- 6.1 The CJC recommend the introduction of FRC for pre- and post-litigation costs at rates set out in table 2 below, along with the principle of an increase in the fixed fast track trial advocacy fees applicable to NIHL cases (see chapter 3, above, for exact figures). The FRC proposed by the CJC were agreed by claimant and defendant representatives following a mediation organised as part of its process.
- 6.2 The report also includes agreed exclusions from the FRC regime (see Table 2, below).

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<sup>76</sup> CJC report, 6.29.

<sup>77</sup> CJC report, 9.13.

<sup>78</sup> Jackson (2017), chapter 5, 5.14.

<sup>79</sup> CJC report, 6.25-6.30.

<sup>80</sup> Suggested examples are given in the CJC report, Appendix G1.

Table 2: FRC for NIHL claims

Stage	1 Defendant	2 Defendants	3 Defendants
<b>Pre-litigation</b>			
2A	£2,500	£3,000	£3,500
2B	£3,000	£3,500	£4,000
3A	£3,500	£4,000	£4,500
3B	£4,000	£4,500	£5,000
<b>Post-litigation</b>			
L1	£1,650	£1,980	£2,310
L2	£1,656	£1,987	£2,318
L3	£1,881	£2,257	£2,633
<b>Max possible (3B+L1+L2+L3)</b>	£9,187	£10,724	£12,261

6.3 The pre-issue costs are split into three stages:<sup>81</sup>

**Stage 1** up to and including the letter of claim; these costs are subsumed into the agreed costs that settle at Stage 2 or Stage 3.

**Stage 2** cases where liability is admitted: cases will proceed to Stage 2A or 2B (or to litigation on quantum, but this is rare);<sup>82</sup> the FRC are lower where liability is admitted.

**Stage 3** liability not admitted: cases will proceed to Stage 3A, 3B or to litigation

**Stage 2A/3A** represent cases where papers have not been prepared to issue proceedings

**Stage 2B/3B** contain an additional allowance for the cost of preparing papers to issue where incurred.

6.4 A few points should be noted in respect of the proposed FRC:

- A sum of £500 is included at Stage 2B and 3B for the preparation of papers.
- In addition to the above, a fee of £1,280 is recoverable for restoring a company to the register,<sup>83</sup> and reasonable disbursements.<sup>84</sup>
- Pre-action disclosure applications are excluded from the FRC regime.<sup>85</sup>

<sup>81</sup> CJC report, chapter 8.

<sup>82</sup> CJC report, 6.6.

<sup>83</sup> CJC report, 1.18.

<sup>84</sup> CJC report, 8.19.

<sup>85</sup> CJC report, 1.19.

- The pre-litigation FRC cover the involvement of counsel<sup>86</sup> which is acknowledged can be helpful in these claims.
- The CJC agreed with the principle of a trial advocacy fee but not on the amount. Sir Rupert proposes – and we agree – a trial advocacy fee for counsel and specialist lawyer of £1,380, the same as he proposes for Band 4 fast track cases (the most complex).

6.5 As stated above, the FRC regime will apply to NIHL claims in the fast track. A minority of complex cases (such as test cases) are likely to be allocated to the multi-track for complexity, and will therefore fall outside the FRC regime.<sup>87</sup>

## 7. Counsel or specialist lawyer

7.1 The pre-litigation FRC cover the involvement of counsel. Post-litigation, use of counsel counts as a disbursement.<sup>88</sup> counsel or specialist advocate should only be involved where it is justified.<sup>89</sup> The use of Queen’s Counsel (QC) would not generally be justified in fast track cases. If, however, a defendant instructs a QC for a fast track case, the claimant may exceptionally recover the reasonable fees of instructing their own QC (including the relevant brief fee for trial) if so advised.<sup>90</sup>

## 8. Multiple defendants and unilateral settlements

8.1 Multiple defendants and unilateral settlements are considered at 9.16–19 of the CJC report. It is anticipated that the ABI will oversee arrangements which will usually cover multiple insurers.

## 9. Exclusions from FRC regime:<sup>91</sup>

- More than three defendants<sup>92</sup>
- All military claims
- Multi-track claims
- In the case of a single defendant, the defendant may elect for the claim to go through the Claims Portal. If liability is admitted the FRC will be what already applies under the EL/PL PAP. Where liability is denied, and the claim succeeds, the FRC would be those proposed by Sir Rupert for the fast track generally (see chapter 3, above).

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<sup>86</sup> CJC report, 1.12.

<sup>87</sup> It is not proposed to devise a definition of test case, as it will be open for the parties to argue allocation to the multi-track in appropriate cases.

<sup>88</sup> CJC report, 9.6.

<sup>89</sup> CJC report, 7.41, 9.6.

<sup>90</sup> CJC report, 9.10-11.

<sup>91</sup> CJC report, 8.21-27.

<sup>92</sup> The number of defendants being actively pursued and which are either active companies or have insurance to meet a claim: CJC report, 8.25.

- Where the defendant:
  - Alleges that the claimant's occupational hearing loss is *de minimis*;
  - seeks a further audiogram or an examination of the claimant; or
  - the case is considered by either party to be a 'test case'.<sup>93</sup>

NB the raising of any of these issues by the defendant will put this case out of scope of FRC.<sup>94</sup>

**Our intention is to introduce a new process and FRC for NIHL claims, in accordance with the proposals set out above.**

#### **QUESTIONS:**

2. **Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:**
  - (i) **the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response.**
  - (ii) **the contents of the proposed standard directions, and the listing of separate preliminary trials.**

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<sup>93</sup> CJC report, 5.21.

<sup>94</sup> CJC report, 8.24.

## Chapter 5: ‘Intermediate’ Cases

### 1. Background

- 1.1 Sir Rupert has long advocated FRC in ‘the lower reaches’ of the multi-track, that is for claims for more than £25,000. While costs budgeting is generally working well in the multi-track, as he says in his report: “a fixed costs regime will eliminate the process of costs budgeting and assessment. In lower value cases, there is a greater risk that those process costs will themselves be disproportionate.”<sup>95</sup> The introduction of FRC for these cases “will promote access to justice for some individuals and SMEs [small and medium-sized enterprises], who may otherwise be unable to litigate.”<sup>96</sup>
- 1.2 It is worth noting that Sir Rupert’s July 2017 report makes the case for extending FRC on a more modest basis than in his January 2016 lecture. He acknowledges that costs management is working in the multi-track, and that recent improvements in this reduce the need for FRC. However, he notes that there remain cases where the costs of litigation are disproportionate to the value of the case, particularly for lower value multi-track cases.
- 1.3 The government agrees that there is a need to act in order to keep litigation costs proportionate in lower value multi-track cases. FRC for these cases will provide a transparent costs structure as well as encouraging efficiency and reducing the work required, including by removing the need for budgeting and costs assessment on an individual basis. We agree with Sir Rupert that upfront clarity over costs will enable parties to make informed decisions as to whether to pursue or defend a claim. This will be particularly valuable for litigants of modest means, including SMEs.
- 1.4 Sir Rupert recommends establishing a new and separate ‘intermediate track’<sup>97</sup> to handle the cases to which the new FRC apply.
- 1.5 Having considered the issue carefully, not least the implementation aspects, we do not see the need for introducing a new track, with the costs and complexity that would involve. Indeed, there is simplicity and consistency in retaining the existing tracks, while expanding the fast track so that all its cases have FRC. Accordingly, our preference is to expand the fast track to include the ‘intermediate’ cases, that Sir Rupert identified. These intermediate cases would therefore be allocated to an expanded fast track and would be subject to FRC. We propose to proceed on this basis, although we welcome representations on this point. For the sake of clarity, this document will refer to intermediate cases rather than to the intermediate track. It should be noted that intermediate cases will not be suitable for the High Court owing to their relatively low value and complexity.

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<sup>95</sup> Jackson (2017), chapter 6, 4.5.

<sup>96</sup> Ibid.

<sup>97</sup> Jackson (2017), chapter 7, 3.2.



## 2. Allocation of intermediate cases

2.1 Sir Rupert identifies the following criteria for intermediate cases:<sup>98</sup>

- i. The case is not suitable for the small claims track or the fast track.
- ii. The claim is for debt, damages or other monetary relief, no higher than £100,000.
- iii. If the case is managed proportionately, the trial will not last longer than three days.
- iv. There will be no more than two expert witnesses giving oral evidence for each party.
- v. The case can be justly and proportionately managed under an expedited procedure (described in section 3 below).
- vi. There are no wider factors, such as reputation or public importance, which make the case inappropriate for allocation as an intermediate case.
- vii. The claim is not for mesothelioma or other asbestos related lung diseases.
- viii. Alternatively, even if none of criteria (i)–(vii) are met, there are particular reasons to allocate it as an intermediate case (of the kind prescribed in paragraphs 3.7–3.8 of his report).

2.2 He identifies certain types of case that would not usually fit the criteria, and therefore are not suitable for FRC as intermediate cases:

- mesothelioma cases, which are subject to specific statutes and case law beyond that which is normally applicable for PI claims
- some complex PI and professional negligence claims
- clinical negligence cases<sup>99</sup>
- some multi-party cases, actions against the police, child sexual abuse cases and intellectual property cases.

2.3 Sir Rupert recommends that the pre-action protocols (PAPs) be amended to require parties to endeavour to agree the appropriate track for cases pre-action, as well as the appropriate band for intermediate cases<sup>100</sup> (see section 4 below). Claimants should state their proposals in this regard in the letter of claim, and defendants should do the same in the letter of response.

2.4 We propose that provisional allocation of intermediate cases will be carried out first and foremost on the basis of any agreement between parties regarding the track. If such agreement has not been reached, cases will instead be provisionally allocated according to the value of the claim, with claims for debt, damages, or other monetary relief under £100,000 provisionally so allocated. Parties can challenge allocation via the directions questionnaire, giving their reasons. Allocation will then

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<sup>98</sup> Ibid.

<sup>99</sup> Unless, Sir Rupert says, both breach of duty and causation have been admitted at an early stage.

<sup>100</sup> Jackson (2017), chapter 7, 3.10.

be reviewed and determined by the judge at the allocation stage. Should a party wish to challenge this further, they may then request a hearing on payment of the appropriate fee. We agree with Sir Rupert that '[i]f the only reason for holding a Case Management Conference (CMC) is the dispute about assignment, the unsuccessful party on that issue should incur a costs liability of £300 to the successful party',<sup>101</sup> but would welcome views on this.

- 2.5 In addition to the criteria stated above, Sir Rupert recommends that the court should have a residual discretion to allocate *any* case as an intermediate case, where it is considered advantageous in promoting access to justice. This may be on the application of a party of modest means, requiring his or her adverse costs risk to be limited. Alternatively, it may be on the determination of the judge in cases 'where emotions are apt to run high' and parties need to be 'protected from their own enthusiasm for the fray': examples include disputes about family businesses or neighbour boundary disputes where the disputed land has no great value.<sup>102</sup>
- 2.6 It may be necessary, where the nature of a case changes fundamentally, for the court to re-allocate a case. Sir Rupert recommends that the court should only be permitted to do so with intermediate cases after the first CMC 'in exceptional circumstances', as is the case in the fast track.<sup>103</sup>
- 2.7 Views are sought on these proposals and, in particular: the proposed extension of the fast track to cover intermediate cases, the proposed criteria for allocation as an intermediate case, whether greater certainty is required as to the scope of the track, how to ensure that cases are correctly allocated and whether there should be a financial penalty for unsuccessful challenges to allocation.

### 3. Procedure for intermediate cases

- 3.1 Sir Rupert notes that for FRC to work in intermediate cases there needs to be a streamlined procedure, including:<sup>104</sup>
- statements of case no longer than 10 pages.
  - written witness statements as evidence in chief, with a party's statements limited to 30 pages.
  - standard disclosure in PI cases; in non-PI cases each party will disclose the documents upon which it relies, as well as documents that the court specifically orders.
  - oral evidence limited to one expert witness per party (two, if reasonably required and proportionate), with each expert report limited to 20 pages (excluding photographs etc). Oral evidence will be time-limited and directed to the matters identified at the CMC.
  - applications to be made at the CMC, as much is possible.

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<sup>101</sup> Jackson (2017), chapter 7, 3.11

<sup>102</sup> Jackson (2017), chapter 7, 3.8.

<sup>103</sup> Jackson (2017), chapter 7, 3.13.

<sup>104</sup> Jackson (2017), chapter 7, 4.1-4.11.

- control by the court of the scope and number of interim applications or procedural gamesmanship.

#### 4. The four bands

4.1 As in the fast track, Sir Rupert lays out a grid of FRC for intermediate cases with four bands of complexity (see table 3 below):

- Band 1: the simplest claims that are just over the current fast track limit, where there is only one issue and the trial will likely take a day or less, e.g. debt claims.
- Band 2: along with Band 3 will be the 'normal' band for intermediate cases, with the more complex claims going into Band 3.
- Band 3: along with Band 2 will be the 'normal' band for intermediate cases, with the less complex claims going into Band 2.
- Band 4: the most complex, with claims such as business disputes and ELD claims where the trial is likely to last three days and there are serious issues of fact/law to be considered.

4.2 For PI cases, the bands will be used as follows: straightforward, quantum-only cases will generally go into Band 1. Where both liability and quantum are in dispute, either Band 2 or Band 3 will be used. Band 4 will be used for cases where there are serious issues on breach, causation, and quantum (but which are still intermediate cases).

4.3 Most non-PI intermediate cases will go into Band 2 or Band 3. Band 1 will be used for straightforward cases with only one issue in dispute (such as proving a debt), and Band 4 will be used for more complex cases.

4.4 Sir Rupert recommends that the pre-action protocols (PAPs) be amended to require parties to endeavour to agree the appropriate allocation for cases pre-action, as well as the appropriate band for intermediate cases.<sup>105</sup> Claimants should state their proposals in this regard in the letter of claim, and defendants should do the same in the letter of response.

4.5 In the same way that the current CPR rule 26.8<sup>106</sup> gives guidance on allocation, there will be a new practice direction with specific guidance on allocation to bands. In order for the court to elicit the information needed for this task, a new directions questionnaire will also be required.<sup>107</sup>

4.6 On allocating an intermediate case, the judge will (either by agreement or by reference to the directions questionnaire) assign it to one of four bands. While in the fast track cases will be assigned to bands according to the type of case, for intermediate cases there will be more discretion. Either party may then challenge the assigned band at the subsequent case management conference (CMC). We agree with Sir Rupert's suggestion that if this dispute is the only reason for the CMC,

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<sup>105</sup> Jackson (2017), chapter 7, 3.10.

<sup>106</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part26#26.8](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part26#26.8)

<sup>107</sup> Jackson (2017), chapter 7, 3.12.

then the unsuccessful party should incur a costs liability of £300 to the successful party.<sup>108</sup>

- 4.7 Views are sought in particular on whether greater certainty is required regarding which cases are suitable for each band of intermediate case.

## 5. The FRC for the four bands

- 5.1 Sir Rupert concludes that the grid of FRC for the four bands should be as set out in Table 3. It is important to read the table subject to the rules he sets out:<sup>109</sup> in particular the shaded boxes are cumulative totals, while the unshaded boxes are separate sums for those items, if carried out.

Table 3: Fixed recoverable costs for intermediate cases

<b>Stage (S)</b>	<b>Band 1</b>	<b>Band 2</b>	<b>Band 3</b>	<b>Band 4</b>
S1 Pre-issue or pre-defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed)	£1,750	£1,750	£2,000	£2,000
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damages	£17,400 + 18% of damages
S6 Up to PTR, alternatively 14 days before trial	£5,100 + 15% of damages	£12,750 + 16% of damages	£13,950 + 16% of damages	£21,050 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500
S8 Up to trial	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages
S9 Attendance of solicitor at trial per day	£500	£750	£1,000	£1,250

<sup>108</sup> Jackson (2017), chapter 7, 3.11.

<sup>109</sup> Jackson (2017), chapter 7, 5.3.

<b>Stage (S)</b>	<b>Band 1</b>	<b>Band 2</b>	<b>Band 3</b>	<b>Band 4</b>
S10 Advocacy fee: day 1	£2,750	£3,000	£3,500	£5,000
S11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750
Total: (a) £30,000 (b) £50,000 (c) £100,000 damages	(a) £19,150 (b) £22,150 (c) £29,650	(a) £33,250 (b) £37,250 (c) £47,250	(a) £39,450 (b) £43,450 (c) £53,450	(a) £53,050 (b) £57,450 (c) £68,450

5.2 Sir Rupert's report considers in detail how the figures in the table have been derived, including the use of Professor Paul Fenn's analysis of data on PI cases from Taylor Rose TTKW, conversations with his assessors, other submissions and data received, and his own view on how to apply proportionality in intermediate cases.<sup>110</sup> For non-PI cases in particular, given the absence of a large volume of evidence on costs, the proposed figures represent an attempt to convert the proportionality rules into hard figures.<sup>111</sup> On balance, he concludes that his figures are more 'generous' than a strict derivation from Professor Fenn's graphs.

5.3 We consider that the figures have been devised with sufficient rigour and, as such, our proposal is to implement them as recommended by Sir Rupert. However, we welcome views and, in particular, on 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.

## 6. Part 8 claims

6.1 Sir Rupert considers that claims under CPR Part 8<sup>112</sup> should not be allocated as intermediate cases until these new reforms have had time to bed in. The conclusion that he and his assessors reached was that it would be premature to include these

<sup>110</sup> Jackson (2017), chapter 7, 5.5-5.7.

<sup>111</sup> Jackson (2017), chapter 7, 5.10.

<sup>112</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part08](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part08)

claims. We agree with Sir Rupert and propose to defer the question of extending FRC to Part 8 claims for future consideration.

**7. Court fees**

7.1 We propose to retain the existing multi-track court fees for the new intermediate cases, at least until the reforms have had time to bed in.

**8. Some specific issues**

8.1 Some specific issues are addressed in respect of fast track cases which would apply equally in intermediate cases. These are addressed in chapter 3, above, and are not repeated here.

**Our intention is to introduce FRC for intermediate cases, in accordance with the proposals set out above. However, these cases will be allocated to an expanded fast track, not a separate intermediate track as he recommended.**

**QUESTIONS**

- 3. Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:**
- (i) the proposed extension of the fast track to cover intermediate cases;**
  - (ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;**
  - (iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;**
  - (iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done; and**
  - (v) whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.**

## Chapter 6: Judicial review

### 1. Background

- 1.1 Sir Rupert also considered the costs of litigation in Judicial Review (JR) cases. He noted that JR tends to be less costly than other forms of litigation for several reasons: there is a permission requirement (removing some 80% of cases); no disclosure, less elaborate pleading; written (rather than oral) evidence and streamlined procedures.<sup>113</sup> The government, as the principal defendant in JRs, has a particular interest in the issue.
- 1.2 Sir Rupert made two principal recommendations: the extension of the 'Aarhus' rules<sup>114</sup> across all JR cases, and the introduction of costs budgeting for 'heavy' JR cases. For reasons set out below, the government agrees with his recommendation in respect of costs budgeting, but not with that in respect of the 'Aarhus' rules.
- 1.3 Sir Rupert also considered the introduction of FRCs in JR cases. His conclusion was that costs in JRs 'are too variable to permit the introduction of a grid of FRC'. Immigration and asylum JRs, which are the most common form of JR, are, however, relatively uniform, and represent a great cost to the Home Office and the Government is considering whether a bespoke FRC regime can and should be developed for these cases in the Upper Tribunal. We will set out the way forward on this in due course, and are not seeking views on this at this stage.

### 2. Extension of the 'Aarhus' rules

- 2.1 The 'Aarhus' rules are an optional, means-tested costs regime currently used in environmental JRs. The regime provides for caps on both claimant and defendant liability for costs; these are provisional or default figures and may be subject to later variation.
- 2.2 Sir Rupert recommends extending this regime to all JR cases on an opt-in basis, and including the use of means-testing. He proposes using the existing default figures of £5,000 (individual claimant), £10,000 (claimant group) and £35,000 (defendant). These figures could be varied upwards or downwards at the start of a case, depending on the claimant's means.<sup>115</sup>

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<sup>113</sup> [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf) and <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>

<sup>114</sup> [www.unece.org/env/pp/welcome.html](http://www.unece.org/env/pp/welcome.html)

<sup>115</sup> Jackson (2017), chapter 10, 3.3.

- 2.3 Sir Rupert's recommendation is intended primarily to enable access to justice, rather than to control costs. The Government Legal Department (which oversees most government litigation, including JRs), queried what the evidence base was that had given rise to this concern and urged caution when they met Sir Rupert during his review.
- 2.4 As both costs capping orders and legal aid are available for JRs (as well as the 'Aarhus' rules for environmental claims), we do not consider there to be an access to justice issue in respect of non-Aarhus JRs. Extending cost capping increases the risk of less meritorious JRs coming forward with increased costs to the government and other public-sector defendants. We therefore do not propose to extend costs capping in this way, and are not seeking views on this proposal.
- 3. Introduction of costs budgeting for 'heavy' JRs**
- 3.1 Costs budgeting is set out in Part 3 of the Civil Procedure Rules, and is the process by which budgets are agreed ahead of the trial, following budget submissions by both parties.
- 3.2 Sir Rupert recommends costs budgeting for 'heavy' JR cases. This suggestion was floated by one of the assessors at a seminar on 13th March 2017, which was specifically dealing with judicial review.<sup>116</sup> The Government Legal Department agree that this would be a useful and targeted way of controlling costs.
- 3.3 Sir Rupert recommends that there should be a new simpler form of Precedent H for JR claims, in any JR where the costs of a party are likely to exceed £100,000 or the hearing length is likely to exceed two days, the courts should have a discretion to make a costs management order at the stage of granting permission. The court could do so, either of its own motion or upon the application of either party. If the court makes such an order, then:
- i. The parties must (if they have not already done so) serve their budgets in the new form H within 21 days.
  - ii. The parties must discuss and seek to agree each other's budgets.
  - iii. Insofar as the budgets are not agreed, the court will resolve any disputes at a costs management hearing.
  - iv. The court will not have discretion to override agreed budgets.
- 3.4 We consider that there should simply be one criterion for defining a 'heavy' JR: whether the costs of a party are likely to exceed £100,000. Factors which will influence whether this criterion is met will naturally include matters such as the likely length of the hearing, the size and complexity of background material required to be reviewed by the parties in order to satisfy themselves that they are complying with the duty of candour, and the nature and extent of witness evidence including that by experts.

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<sup>116</sup> Jackson (2017), chapter 4, 9.1.



- 3.5 Sir Rupert questioned whether costs budgeting in ‘heavy’ JRs should be piloted. We consider that it is a sensible recommendation that builds on experience elsewhere and will affect relatively few cases in any event. It is unlikely to apply to many JRs (less than two dozen per annum) and we will keep it under review. We therefore do not propose a pilot but will apply it to JRs that meet the criterion.

**We intend to introduce costs budgeting for ‘heavy’ JRs, as set out above.**

**QUESTION:**

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

## Chapter 7: Sir Rupert's other recommendations

### 1. Background

- 1.1 Sir Rupert also made recommendations in respect of clinical negligence claims and business and property disputes. The government has accepted these recommendations, and no views are sought on them as part of this consultation. A brief summary of the position is given below.

### 2. Clinical Negligence

- 2.1 Due to the complex and variable nature of clinical negligence claims, they have been considered by some as unsuitable for a FRC regime. However, Sir Rupert notes that there is now considerable optimism among both claimant and defendant representatives that FRC may be possible for lower value clinical negligence claims.
- 2.2 The Department of Health proposed a grid of FRC for clinical negligence claims up to £25,000 and consulted on this in 2017,<sup>117</sup> however a common theme among the responses received was that an FRC regime would need to be accompanied by a streamlined process. Sir Rupert therefore recommended commissioning a Civil Justice Council (CJC) working group to devise both a FRC regime and a bespoke process for clinical negligence claims up to £25,000. The government has already accepted this recommendation and the work of the CJC is underway: we look forward to receiving their recommendations. The terms of reference of this working party have been published on the CJC website.<sup>118</sup>
- 2.3 The work of the CJC working group is made more urgent by the findings of a 2017 National Audit Office (NAO) report into the costs of clinical negligence in trusts.<sup>119</sup> The report found that the costs of clinical negligence claims to the NHS had risen to £1.6 bn in 2016/17, and was set to reach £3.2 bn (around 4% of the budget) by 2020/21. It found that in 61% of successful claims the legal costs outweighed the final damages payout. This is a particular problem in low value claims (i.e. the claims within the CJC's remit). The CJC's work is therefore key in both reducing the costs of clinical negligence and in making the costs of litigation more proportionate.

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<sup>117</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/586641/FRC\\_consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586641/FRC_consultation.pdf)

<sup>118</sup> [www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/clinical-negligence-fixed-costs-working-group/](http://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/clinical-negligence-fixed-costs-working-group/)

<sup>119</sup> *Managing the costs of clinical negligence in trusts*, 17 September 2018  
[www.nao.org.uk/report/managing-the-costs-of-clinical-negligence-in-trusts/](http://www.nao.org.uk/report/managing-the-costs-of-clinical-negligence-in-trusts/)

### 3. Business and Property Courts

- 3.1 Sir Rupert considered the prospects of FRC in the Business and Property Courts (B&PC).<sup>120</sup> Supporters of FRC in these cases included the Federation of Small Businesses (in giving more confidence for smaller businesses to defend their interest in the courts where necessary) and an international law firm (which had reacted to its clients' demands for fixed costs). Barrister and solicitor representative groups opposed FRC in commercial cases, although the City of London Law Society wondered whether a pilot might be appropriate for cases under £250,000.
- 3.2 The Intellectual Property Enterprise Court (IPEC) is a niche area of business which already has a very streamlined procedure with capped costs for cases up to £250,000. IPEC cases are robustly case managed and must pass a cost/benefit analysis. Feedback on the IPEC capped costs regime is very positive. Sir Rupert recommends a pilot for B&PC cases that mirrors the IPEC and some of the case management provisions of the Shorter and Flexible Trials Pilot Scheme.<sup>121</sup> There are similarities between IPEC and B&PC work, including that it is specialist work done by a relatively small group of lawyers who may equally act for a claimant or defendant in a claim.
- 3.3 This will be a voluntary, two-year pilot of capped costs for B&PC cases in the London Mercantile Court and the Mercantile, Technology and Construction Court, and Chancery Courts of the Manchester and Leeds District Registries. The pilot will only be run in the High Court, so the value of cases will in practice be £100,000 – £250,000. The pilot will be monitored by an academic; if successful, the regime could be made available at the judge's discretion, for any suitable cases in B&PC, in both the High Court and the County Court.
- 3.4 Capped costs work slightly differently to FRC. As the names imply, FRC fix the amount that is recoverable in relation to stages of work for different cases. Capped costs set maximum amounts for particular stages or overall. Sir Rupert considers that the types of cases caught by this regime 'form a vast and inhomogeneous mass' and considers that capped costs are more suitable than fixed costs for this type of litigation.
- 3.5 The government has agreed that this voluntary two year pilot should take place, and it commenced on 14 January 2019.

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<sup>120</sup> From June 2017, the Commercial Court, the Technology and Construction Court, and the courts of the Chancery Division came under the umbrella of the Business and Property Courts of England and Wales.

<sup>121</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51n-shorter-and-flexible-trials-pilot-schemes](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51n-shorter-and-flexible-trials-pilot-schemes)

## Chapter 8: Next Steps

- 1.1 The government welcomes engagement with stakeholders during the consultation period, and will start engagement with the Civil Procedure Rule Committee at an early stage to discuss potential rule changes necessary to implement our proposals. The government will publish a response to this consultation, and set out the way forward later in the year.
- 1.2 We agree with Sir Rupert that his recommendations should be regarded as an incremental next step. Once the reforms have bedded in, it will be for consideration whether and how FRC should be extended to cover more cases: higher value claims, Part 8 claims as intermediate cases, and the costs incurred before the first costs and case management conference in cases which are not otherwise subject to FRC.<sup>122</sup>

### QUESTION

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

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<sup>122</sup> Jackson (2017), chapter 6, section 3.

## Chapter 9: Impact Assessment

A substantial amount of data was provided to Sir Rupert who was able to rely on the expertise of Professor Paul Fenn, one of the leading academics on civil costs, as one of his assessors. As set out in this paper, the Government agrees with the rationale for extending fixed recoverable costs and the proposals for doing so.

Our assessments of the potential impact of these proposals have been published alongside this Consultation Paper as an impact assessment. We would welcome your views on whether we have correctly identified the range of impacts of the proposals.

In the Impact Assessment, we acknowledge there are some gaps in the data needed to fully understand the potential impact of our proposals.

### QUESTION

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

## Chapter 10: Equalities Statement

The government is mindful of the importance of considering the impact of these plans on different groups. We have therefore considered the impact of all the measures in the package in line with our duties to groups who share a relevant protected characteristic under the Equality Act 2010. The Equality Act 2010 identifies the nine protected characteristics of race, gender, disability, gender identity, pregnancy and maternity, marriage and civil partnership, religion or belief, sexual orientation and age. Our assessment of the potential impact of these proposals on these groups has been published alongside this Consultation Paper.

### QUESTIONS

- 7. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.**
- 8. Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.**
- 9. Do you agree that we have correctly identified the extent of the impacts under each of these proposals? Please give reasons and supply evidence as appropriate**
- 10. Are there forms of mitigation in relation to impacts that we have not considered?**

## Questions

### Chapter 3: The Fast Track:

1. Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out? We seek your views, including any alternatives, on:
  - (i) the proposals for allocation of cases to Bands (including package holiday sickness);
  - (ii) the proposals for multiple claims arising from the 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; and
  - (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.

### Chapter 4: Noise Induced Hearing Loss:

2. Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:
  - (i) the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response.
  - (ii) the contents of the proposed standard directions, and the listing of separate preliminary trials.

### Chapter 5: Intermediate Cases:

3. Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:
  - (i) the proposed extension of the fast track to cover intermediate cases;
  - (ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;
  - (iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;
  - (iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done; and
  - (v) whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.

### **Chapter 6: Judicial Review:**

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

### **Chapter 8: The Next Steps:**

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

### **Chapter 9: Impact Assessment**

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

### **Chapter 10: Equalities Statement**

7. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.
8. Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.
9. Do you agree that we have correctly identified the extent of the impacts under each of these proposals? Please give reasons and supply evidence as appropriate
10. Are there forms of mitigation in relation to impacts that we have not considered?



## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

Please send your response by 06/06/2019 to:

**Jake Exton**  
**Ministry of Justice**  
**Civil Litigation and funding**  
**Floor 10, Access to Justice**  
**102 Petty France**  
**London SW1H 9AJ**

**Tel: 07892724537**

**Email: [FRCconsultation@justice.gov.uk](mailto:FRCconsultation@justice.gov.uk)**

## Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

## Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

A Welsh language version can be found at:  
[consult.justice.gov.uk/digitalcommunications/fixed-recoverable-costs-consultation](https://consult.justice.gov.uk/digitalcommunications/fixed-recoverable-costs-consultation)

Alternative format versions of this publication can be requested from:  
[FRCconsultation@justice.gov.uk](mailto:FRCconsultation@justice.gov.uk)

## Publication of response

A paper summarising the responses to this consultation will be published within 3 months of the consultation ending. The response paper will be available on-line at [consult.justice.gov.uk/digitalcommunications/fixed-recoverable-costs-consultation](https://consult.justice.gov.uk/digitalcommunications/fixed-recoverable-costs-consultation).

## Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

[www.gov.uk/government/publications/consultation-principles-guidance](http://www.gov.uk/government/publications/consultation-principles-guidance)



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