

Consultation on extending fixed recoverable costs (FRC): how vulnerability is addressed

Summary

1. This consultation considers how vulnerability should be addressed in FRC cases. MoJ is keen to ensure that those who are vulnerable (either as parties or witnesses) are not disadvantaged in bringing or defending claims which are within the scope of FRC. This issue was highlighted by the report by HHJ Cotter QC (as he then was) for the Civil Justice Council (CJC) in 2020, which was published after both Sir Rupert Jackson's FRC report in 2017 and MoJ's consultation on it in 2019. The Cotter report¹ led to changes in the Civil Procedure Rules (CPR) in 2021 to allow for additional protections for vulnerable parties and witnesses, without defining the term 'vulnerability'.
2. The MoJ set out the way forward on vulnerability as part of its response on FRC in September 2021. We proposed that there should be an uplift for those parties who met the vulnerability criteria under the legal aid Family Advocacy Scheme (FAS).
3. We have done further work since then as part of the process of drafting rules for consideration by the Civil Procedure Rule Committee (CPRC). As set out below, we now propose new provisions on vulnerability in FRC cases so that vulnerable parties and witnesses are not disadvantaged while FRC can apply in as many cases as possible.

Background

4. Aside from the exclusion of protected parties (PPs), vulnerability is not explicitly addressed in existing FRC cases (low value personal injury (PI), typically where damages are under £25,000). The cases which fall within existing FRC are by their nature relatively straightforward, and it does not seem that problems have arisen in catering explicitly for more vulnerable claimants. Existing FRC cover vulnerable claimants too, and the figures of recoverable costs can be taken to include a small element for vulnerability, on the 'swings and roundabouts' basis of FRC in high volume low value cases.
5. The personal characteristics of a party in existing FRC cases was considered by the Court of Appeal in *Aldred v Cham* [2019] EWCA Civ 1780,² where the court drew the distinction between a feature of the claim and a feature of the claimant. The Court held that the costs required for advising on a child settlement were a feature of the child as a claimant, not a feature of the claim, and were therefore not recoverable: the personal characteristics of a child claimant did not give rise to the recoverability of (necessarily incurred) additional costs.
6. Sir Rupert Jackson's 2017 report on extending FRC, and the MoJ's 2019 consultation based on this report, did not refer to new or additional measures in respect of vulnerable parties. That said, some respondents to the MoJ consultation on FRC stated that certain claimant characteristics may increase the cost of litigation, therefore warranting an uplift or an escape from FRC due to a party's vulnerability.

¹ <https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1.pdf>

² <https://www.bailii.org/ew/cases/EWCA/Civ/2019/1780.html>

7. At the time of the MoJ consultation in 2019, the CJC was considering vulnerability more widely in a working group, chaired by HHJ Cotter QC. The CJC report *Vulnerable Witnesses and Parties Within Civil Proceedings*, published in February 2020, argued for changes to the CPR to allow for additional protections for vulnerable parties and witnesses.
8. In April 2021, the CPR were amended following the Cotter report to take account of vulnerability and ways to ensure the effective participation of vulnerable parties in proceedings. This included changes to the overriding objective and a new Practice Direction 1A (PD1A) - *Participation of Vulnerable Parties or Witnesses*, which outlines a non-exhaustive list of factors that may cause vulnerability in a party or witness. Beyond these amendments, the CPRC agreed that vulnerability should not be defined more generally.
9. In our September 2021 FRC consultation response, MoJ agreed with the CPRC position and similarly did not define vulnerability with relation to FRC.
10. MoJ has been considering this issue further as we have developed the rules on FRC for the CPRC. We have discussed the proposed rules, and the policy which underpins them, with the CPRC costs sub-committee which is overseeing the drafting of the rules.
11. While it remains the MoJ position that it is not appropriate to define vulnerability further, that does not mean there should not be clearer explanation of the exceptional circumstances in which it can lead to an increase in recoverable costs. This is in recognition of the changes to the overriding objective and the introduction of PD1A, both of which have taken place since our consultation on FRC. At the same time, as a result of our ongoing consideration of the drafting of the rules with the CPRC costs sub-committee, we accept that the FAS guidance may overlap too much with PPs and may be drawn too narrowly with respect to an undefined vulnerability to be a useful metric for determining whether a party would qualify for an uplift. Rather, we believe it would better to build on the existing exceptionality provisions that are already in place in the rules.
12. FRC are not intended to reflect the precise costs of every case, and there is an inevitable element of 'swings and roundabouts'. While there will be many cases where vulnerability is an issue and may require extra work compared with an average case, the vulnerability in itself does not automatically generate exceptional extra work to require an uplift. It will depend in part on the vulnerable person (the extent of vulnerability) and in part on the claim and the extent to which the vulnerability affects the pursuit or defence of that claim.
13. Vulnerability appears to have a minimal impact in existing (low value PI) FRC regimes because the cases covered are mainly straightforward low value claims where the presence of a vulnerability has little bearing on the case or the amount of time or work that is required. Furthermore, those cases that are not of this type are typically excluded from existing FRC altogether.
14. MoJ considers that (i) any vulnerability mechanism should only allow for an uplift in those exceptional cases in which it is clearly merited, and (ii) any new arrangements should not provide an opportunity to circumvent the principles of FRC in allowing inappropriate additional costs.

Proposed way forward

15. MoJ now considers that vulnerability in respect of parties and witnesses under the extended FRC regime should be addressed on the following basis:
- (i) It is a judicial decision to determine whether or not the vulnerability gives rise to sufficient extra work to justify, exceptionally, an additional amount of costs;
 - (ii) There needs to be a threshold, which is proposed to be 20% in line with existing provisions, of additional work caused by the vulnerability;
 - (iii) The procedure by which people can establish a vulnerability uplift needs to be clear and simple; and
 - (iv) The process needs to be retrospective (as with the assessment of costs generally), not prospective: the judge needs to be satisfied that sufficient extra work has been incurred, not that it may need to be.
16. There are various existing CPR provisions which would allow for this already. Rules 45.13-15 and 45.29J-L set a minimum threshold of 20% additional costs to trigger additional recovery and provide for the challenging party to pay the costs of challenge if the court does not consider the claim to be appropriate or, on assessment, the minimum 20% threshold is not met.
17. MoJ invites views on the following draft 'vulnerability rule' to deliver the principles set out above at paragraph 15. We believe that these proposals provide the requisite judicial control over the recognition of and remedy for vulnerability consistent with existing rules. In this way, additional costs incurred due to the vulnerability of a party or witness can be recoverable. The amount of additional recoverable costs would have a minimum of 20%, but would not be capped at a maximum: it would be subject to assessment by a judge to determine reasonable and proportionate costs.
18. This approach would maintain the integrity of FRC, retaining fixed costs as far as possible, while enabling access to justice for cases that genuinely require additional funding.

Other issues

19. A question arises as to whether these provisions should apply to existing FRC (the 2021 MoJ response having said that the proposed new vulnerability provision should not). As indicated above, MoJ's approach that vulnerability provisions should not apply to existing FRC cases was because:
- (a) those cases already implicitly allow for vulnerability in that the recoverable costs allowed cover vulnerable cases, and vulnerability is therefore generally captured within the 'swings and roundabouts' of FRC; and
 - (b) this could encourage vulnerability to be claimed more frequently in existing FRC regimes where it previously was not an issue, which would increase costs and undermine the principle of FRC.
20. That said, the current 20%+ exceptionality route already applies in existing FRC and it may be that this should continue with this new proposal which has a similar basis. However, the impact of this would need monitoring. Given that existing FRC already cater for vulnerability to some extent, it may be that, if vulnerability uplifts are allowed in

existing FRC cases other than exceptionally, the FRC may need to be reduced somewhat to account for this.

21. In our 2021 FRC consultation response we said (at Chapter 5, para 1.6) on vulnerability that we would consider with the CPRC what arrangements are appropriate for vulnerability disbursements, consistent with the aims of FRC. In certain cases already subject to FRC only specified disbursements are recoverable. Those will remain, but we do not propose to amend the rules to impose restrictions on recoverable disbursements in other cases – or to make any changes in relation to disbursements for vulnerability – at this time. This will be kept under review once the reforms are implemented. However, we will consider representations on this point now.

Questions for respondents: please give reasons for your response

22. We invite views generally on the rule changes at Annex A, including the questions below:

- i. Do you agree that the Government's proposal (as outlined in paragraph 15) is the right way to address vulnerability within FRC?
- ii. If not, do you have an alternative proposal?
- iii. Do you have any drafting comments on the draft new rules?
- iv. Should any new provision in respect of vulnerability apply to existing FRC, which generally cover lower value PI (please consider in the context of paragraph 20 above)?
- v. Do any changes need to be made to the arrangements for disbursements for vulnerability in FRC cases?

Ministry of Justice
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ANNEX A: DRAFT NEW VULNERABILITY RULE

NEW RULE 45.XX

Claims for an amount of costs exceeding fixed recoverable costs - vulnerability

(1) The court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules X to Y where—

- (a) a party or witness for the party is vulnerable;
- (b) that vulnerability has required additional work to be undertaken; and
- (c) by reason of that additional work alone, the claim is for an amount that is at least 20% greater than the amount of fixed recoverable costs.

(Rule 1.6 and Practice Direction 1A make provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses).

(2) If the criteria in paragraph (1) are met, the court may—

- (a) summarily assess the costs; or
- (b) make an order for the costs to be subject to detailed assessment.

(3) If the criteria in paragraph (1) are not met, it will make an order for the fixed recoverable costs and any permitted disbursements only.

NEW RULE 45.XY

Failure to achieve costs greater than fixed recoverable costs

(1) This rule applies where—

- (a) costs are assessed in accordance with rules 45.XX(2); and
- (b) the court assesses the costs (excluding any VAT) as being an amount which is in a sum less than 20% greater than the amount of the fixed recoverable costs.

(2) The court will make an order for the party who made the claim to be paid the lesser of—

- (a) the fixed recoverable costs; and
- (b) the assessed costs.

Drafting Note: As currently provided in rules 45.15 and 45.29L (*costs of the costs-only proceedings or the detailed assessment*), if the criteria are not met or, on assessment, the minimum 20% threshold is not achieved, the rules will provide for the court to make no order for costs in favour of the challenging party; or for the challenging party to pay the costs of the defending party.