

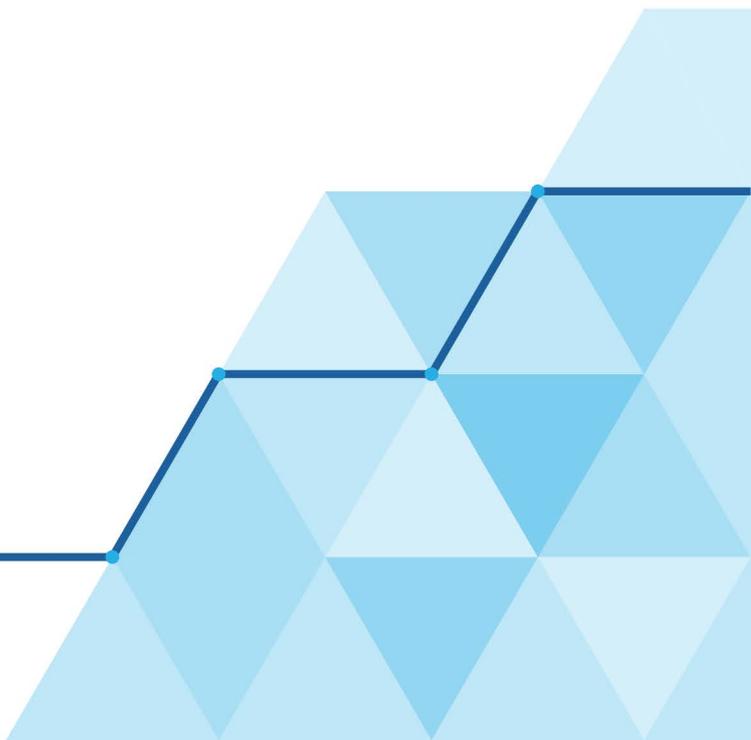


Ministry  
of Justice

# **Extending Fixed Recoverable Costs in Civil Cases:**

## **The Government Response**

September 2021





Ministry  
of Justice

## **Extending Fixed Recoverable Costs in Civil Cases: The Government Response**

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available at <https://consult.justice.gov.uk/>**

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# Ministerial Foreword



We are rightly proud of the civil justice system in England and Wales which, in its largely unspoken way, does so much to underpin what we are as a society. It underpins the rule of law which allows for a civil society and for business to flourish. It has, in substance, withstood the tests of the pandemic and will play its part in our recovery. As we build back a better justice system, we continue with renewed vigour to modernise the courts and how users interact with them. One area in need of further reform is costs, and particularly those that a losing party has to pay the winner. This is especially true in lower value claims which people and businesses are most likely to face, either as claimants or defendants. These cases, while no doubt important to the parties themselves, are for relatively low damages and there is currently no certainty as to the costs that may be recovered or paid. Without being able to predict what the costs may be, it is difficult for either side to take an informed decision on the appropriate way forward. If cases are to be litigated, then we want them to be resolved as early as possible, with costs as proportionate and as fair to both sides as possible.

Fixed recoverable costs will deliver this, with the way forward set out in this response. I am very grateful to Sir Rupert Jackson for paving the way for these reforms: his 2017 report provided the detail for a proposal first seriously put forward a quarter of a century ago by Lord Woolf as part of his 'Access to Justice' reforms. We have carefully considered the way forward in the light of responses to the consultation and developments since, including the Government's desire to extend the use of fixed recoverable costs in other cases not covered here, such as clinical negligence claims and immigration judicial reviews.

The case for extending fixed recoverable costs remains strong: uncertainty of costs hinders access to justice, while certainty of costs set at a proportionate and fair level enhances it.

## **Lord Wolfson of Tredegar QC**

Parliamentary Under-Secretary of State for Justice

# Introduction and Contact Details

This is the Government response to the 2019 consultation paper, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals*.<sup>1</sup> The Government's conclusions are set out below; this response has been delayed, principally due to the COVID-19 pandemic.

This response will provide:

- an executive summary;
- the background to the consultation;
- a summary of the responses to the consultation;
- a detailed response to the specific questions and issues raised in the consultation;
- the way forward following this consultation.

The Government consulted on extending Fixed Recoverable Costs (FRC) in civil cases between 28 March and 6 June 2019. A total of 149 responses were submitted, with respondents using the online response tool, the written letter format, and email (FRCconsultation@justice.gov.uk) to give their views on the proposals (see Chapter 3 below for a summary). The Government held meetings with several leading stakeholders and interested parties to discuss the FRC proposals.

An updated Impact Assessment, Equality Statement and Welsh language summary have been published alongside this response, and are available at <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>

Further copies of this response and the consultation paper can be obtained by contacting the **Civil Litigation Funding and Costs Policy Team** at the address below:

## **Civil Litigation Funding and Costs Policy Team**

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102 Petty France  
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This report is also available at <https://consult.justice.gov.uk/>

Alternative format versions of this publication can be requested by contacting FRCconsultation@justice.gov.uk

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<sup>1</sup> <<https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>>; Ministry of Justice Consultation Paper, published 28 March 2019.

## **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.

# Glossary

The following definitions/abbreviations are used in this document:

|       |  |
|-------|--|
| ADR   | Alternative Dispute Resolution                             |
| CFA   | Conditional Fee Agreement                                  |
| CJC   | Civil Justice Council                                      |
| CMC   | Case Management Conference                                 |
| CPR   | Civil Procedure Rules                                      |
| 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  |
| PL    | Public Liability   |
| QOCS  | Qualified One-Way Costs Shifting                           |
| RTA   | Road Traffic Accident                                      |
| SPPI  | Services Producer Price Index                              |

# Chapter 1: Executive Summary

## 1. Extending Fixed Recoverable Costs (FRC)

- 1.1 In 2019, the Government consulted on implementing the proposals in Lord Justice (Sir Rupert) Jackson's report<sup>2</sup> on extending FRC in civil litigation cases in England and Wales, published on 31 July 2017. The consultation took place from 28 March to 6 June 2019; this is the Government response to that consultation.
- 1.2 In civil litigation in England and Wales, the winning party is generally entitled to recover their costs from the losing party. Over the last ten years, the Government has introduced various reforms that have helped to control the costs of civil litigation; these reforms followed Sir Rupert's major 2010 report, *Review of Civil Litigation Costs*.<sup>3</sup> Sir Rupert's 2017 report on extending FRC built on the recommendations that he made in his 2010 report. The recommendations within Sir Rupert's 2010 report 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> However, despite the success of the costs reforms of the last decade, summarised by Sir Rupert in Chapter 1 of his 2017 report, work on extending FRC remains outstanding. This response sets out the way forward.
- 1.3 FRC set out the amount of legal costs (in £) that can be recovered by the winning party at different stages of litigation, from pre-issue to the court hearing. They help to ensure that legal costs remain both certain and proportionate, and promote access to justice. FRC were first implemented for road traffic accident (RTA) cases up to £10,000 damages in 2010.
- 1.4 A fundamental principle of FRC is that the recoverable costs are 'fixed', so that parties have certainty as to the amount of costs they may recover, at different stages of litigation, when a judge allocates a claim to a particular band. In cases where FRC does not apply, parties can be encouraged to spend more to win, as Sir Rupert recognises in Chapter 4, 3.23 of his 2010 report:

*'Sometimes the consequence of the costs shifting rule is that while each party is running up costs, it does not know who will be paying the bill. In some instances a litigant may believe that the more he or she spends in costs, the less likely he or*

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<sup>2</sup> <<https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>>.

<sup>3</sup> <<https://www.judiciary.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: <<https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo>>.

*she is to foot the ultimate bill because the costs liability will be shifted. If both parties take this view, then costs escalate upwards without any proper control and ultimately result in one or other party picking up an enormous and disproportionate bill.'*

It is the Government's view, therefore, that FRC provide parties with the certainty necessary to make more informed choices throughout the litigation process, and that it is right that they should now be extended.

- 1.5 Reflecting his expertise in the area of civil costs, on 11 November 2016, Sir Rupert was commissioned by the (then) Lord Chief Justice and the Master of the Rolls to carry out a supplemental review of FRC and develop proposals for extending their use. This, as Sir Rupert noted, was opportune, given that the reforms recommended in his 2010 report had had some time to bed in.
- 1.6 In his lecture on fixed costs in January 2016,<sup>5</sup> Sir Rupert originally said that FRC should be put in place for all civil cases up to £250,000 in damages. In his 2017 report, however, Sir Rupert recommended introducing FRC regimes for civil cases up to £100,000, as costs management was already working well in higher-value cases. In summary, Sir Rupert recommended:
- i. The extension of FRC to all civil claims across the fast track, including a new process and separate grid of costs for noise induced hearing loss (NIHL) claims valued below £25,000;
  - ii. The introduction of a new, intermediate track and corresponding FRC for less complex claims from £25,000–£100,000. As noted in Chapter 5 of our consultation paper, the Government has carefully considered the practicalities of introducing a new FRC track, but has chosen to proceed with an expanded fast track that will cater for simpler 'intermediate cases' (to which FRC would apply);
  - iii. The extension of the 'Aarhus' rules across all judicial review (JR) cases,<sup>6</sup> 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 of up to £25,000;
  - v. A voluntary pilot of capped costs in business and property cases up to £250,000.

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<sup>5</sup> <<https://www.judiciary.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>>.

<sup>6</sup> The 'Aarhus' rules are an optional, means-tested costs regime currently used in certain 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 variation.

1.7 The Government has already implemented Sir Rupert's recommendation on clinical negligence cases up to £25,000 by commissioning a report from the CJC; thus, clinical negligence cases were excluded from our consultation paper. Sir Rupert's recommendation followed a Department of Health consultation on extending FRC for clinical negligence cases in 2017.<sup>7</sup> Similarly, business and property cases were excluded from our consultation in the light of the pilot on capped costs in such cases (January 2019 to January 2021).

## 2. Access to Justice

2.1 Access to justice at proportionate cost for all parties has been at the heart of the Government's civil litigation costs and funding reforms over recent years, notably in Part 2 of the LASPO Act 2012. It is the Government's view that FRC will not only preserve access to justice, but will enhance it, by making recoverable costs both certain and proportionate. FRC enable parties to plan their litigation more effectively, helping them to consider in a more informed way:

- whether it is appropriate (and how) to litigate;
- what costs may be recovered (or paid to the winning party); and
- how work on a case can be more proportionate.

Certainty and proportionality are particularly important: at present, the costs of civil litigation can be very unpredictable, which can discourage people from enforcing their rights. Proportionality of costs has been a central theme throughout Sir Rupert's reforms: it is right, especially in lower value cases, that costs should be proportionate to the issue, which means, in turn, that the legal work to be undertaken should be tailored to those proportionate costs.

2.2 The need for courts to consider the proportionality of funding arrangements was further emphasised by the decision of the Supreme Court in *Coventry v Lawrence*, which sets out the relevant legislative history in some detail.<sup>8</sup> Although the judgment in *Coventry v Lawrence* is predominantly concerned with the proportionality of funding arrangements in a pre- and post-LASPO context, it is alive to the importance, in future legislation, of striking the right balance between the needs of both claimants and defendants in terms of controlling costs, whilst also promoting access to justice. It is the Government's view that extending FRC is the most

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<sup>7</sup> <<https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims>>.

<sup>8</sup> The Supreme Court's judgment is available here: <<https://www.supremecourt.uk/cases/uksc-2012-0076.html>> (*Coventry v Lawrence* [2015] UKSC 50, [2015] 1 WLR 3485). The legislative history is set out at paragraphs 12-41 and 65-69. Key paragraphs, which emphasise the difficulty of finding an approach to civil litigation funding that strikes the best balance between the interests of claimants and defendants, are cited in the judgment of a JR brought by Ms Esther Leighton against the MoJ in 2020: <<https://www.bailii.org/ew/cases/EWHC/Admin/2020/336.html>> (*Leighton, R v The Lord Chancellor* [2020] EWHC 336 (Admin)). See, in particular, paragraph 114 ('[The] majority of the Supreme Court observed that there is no perfect solution to the problem of how best to enhance access to justice [in civil cases]').

effective way of controlling civil costs, whilst also ensuring that parties achieve the certainty necessary to plan their litigation. There is no perfect solution, but we believe that, as long proposed by Sir Rupert, FRC offer an important part of the way forward on this complex issue.

- 2.3 It is important to recognise that most cases settle and relatively few go through all the stages to trial. It is necessary for the efficient planning of litigation to know the maximum exposure in adverse costs – that parties will recover if they win, or pay out if they lose – should a case progress to trial. But the reality is that most cases will settle, at much lower costs, at earlier stages. Knowing the costs in advance and at each stage of litigation can only lead to greater discipline and certainty in controlling costs, and encourage earlier settlement by offering clear costs savings.
- 2.4 The case for extending FRC follows the success of the existing personal injury (PI) FRC regimes, brought in alongside other LASPO reforms between 2010 to 2013, which have succeeded in controlling civil costs while also promoting access to justice. In paragraph 6.29 of his 2016 review of the Civil Courts Structure, commonly known as the Briggs Review, Lord Justice Briggs (as he then was) comments:
- [A] fixed or budgeted recoverable costs regime, backed by Qualified One-way Costs Shifting ('QOCS') plus uplifted damages has, in the sphere of personal injury (including clinical negligence) litigation been a powerful promoter of access to justice, in an area where the playing field is at first sight sharply tilted against the individual claimant, facing a sophisticated insurance company as the real (even if not nominal) defendant.<sup>9</sup>*
- 2.5 In addition, it is the Government's view that the existing PI FRC regimes have also promoted access to justice for defendants, by enabling them to defend a case according to its own merits, rather than settle for fear of high costs. As such, for the reasons cited above, FRC can be said to balance carefully the interests of both claimants and defendants by providing appropriate access to justice at proportionate cost.
- 2.6 The recent independent analysis of the costs of civil litigation, by Professors Paul Fenn and Neil Rickman (2019), is also worth highlighting.<sup>10</sup> Fenn and Rickman analysed substantial samples of PI (excluding clinical negligence) claims over £25,000 in damages, and clinical negligence claims under £250,000 in damages, which concluded within two years both pre- and post-LASPO. This is the most comprehensive data source for the changes in civil costs pre- and post-LASPO.

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<sup>9</sup> <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>>.

<sup>10</sup> The report is available here: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3326665](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326665)>.

Their data analysis shows that real recovered base costs have reduced by just under 8% for PI cases and just under 10% for clinical negligence cases. This provides a strong indication that the FRC schedules for low-value PI, alongside other LASPO reforms, have played a significant role in reducing the costs of civil litigation in recent years.

- 2.7 Thus, for good reasons supported by sound experience, the Government believes that it is right for FRC to be extended across civil cases generally. Sir Rupert proposed a four-band structure for both the fast track and intermediate cases, with which the Government agrees (see below). These proposals seek to balance the advantages of a relatively simple and straightforward scheme of costs with the need for appropriately enhanced costs in exceptional cases.
- 2.8 The costs will, in most cases, be dependent on the amount of damages recovered, which supports the FRC objective of proportionality. However, our proposals recognise that the importance and complexity of a case will not always be determined by its value alone, and such cases will be allocated to a higher band as appropriate.
- 2.9 In summary, then, FRC as we propose will enhance access to justice by (i) being set at a level reflecting the importance of a given case (which can, if appropriate, be beyond its monetary value in damages); and (ii) by making appropriate allowances between different types of case.

### **3. Our Proposals**

- 3.1 In the consultation, the Government agreed with Sir Rupert's FRC recommendations, as set out in 1.5 above, with the following exceptions:
- i. The Government agreed with the principle of extending FRC to all the cases recommended by Sir Rupert 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. Instead, we consulted on assigning these intermediate cases to an expanded fast track (meaning that certain simpler 'intermediate' cases, as identified by Sir Rupert, will also be allocated to a fast track regime, where appropriate). This should bring greater consistency and simplicity.
  - ii. The Government does not propose to pursue the extension of the 'Aarhus' rules across all JR cases, for the reasons set out in Chapter 6, 2.4 of our consultation paper.
- 3.2 In his 2017 report, Sir Rupert set out the case and method for extending FRC. In considering the existing fast track FRC regime in Chapter 5, 2.4 of his report, he noted: 'Overall 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’.

- 3.3 The Government agreed with this assessment and, given the continuing high costs of civil litigation more widely and the particular issue of disproportionate costs in other low-value civil claims, considered that it is right that FRC should be applied more widely and consulted on this basis.
- 3.4 In summary, then, the Government consulted on the following proposals:
- i. Extending FRC to all other civil cases in the fast track, up to a value of £25,000 in damages (see Chapter 3 of our consultation paper);
  - ii. A new process and FRC for NIHL claims (see Chapter 4 of our consultation paper);
  - iii. Expanding the fast track to include simpler ‘intermediate’ cases valued between £25,000–£100,000 in damages (see Chapter 5 of our consultation paper);
  - iv. The introduction of costs budgeting in ‘heavy’ JRs (see Chapter 6 of our consultation paper).
- 3.5 The Government also asked for: views on the proposals in the consultation paper not covered by previous questions (see Chapter 8); further evidence/data which the Government ought to consider as part of its consultation response (see Chapter 9); and, views on the equalities impacts of the proposals (see Chapter 10).
- 3.6 The proposed figures for FRC were devised by Sir Rupert based on data submitted by Taylor Rose (a firm of solicitors and costs lawyers) that was analysed by Professor Paul Fenn.<sup>11</sup> Sir Rupert then consulted with his team of fourteen assessors, drawing on a breadth of views and experience (from both claimant and defendant perspectives), and brought his own considerable expertise to bear in finalising the figures. As such, we consider that the figures have been devised with appropriate rigour. As we set out later in this response (see Chapter 5, paragraph 20.1), these figures will be uprated for inflation before implementation, as Sir Rupert originally intended.

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<sup>11</sup> See Jackson (2017), Chapter 3, 3.1. Professor 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.

3.7 In reading this response, interested parties will need to familiarise themselves with both the detail of Sir Rupert's report,<sup>12</sup> and the Government's consultation;<sup>13</sup> only some of which is repeated here.

#### 4. The Way Forward

4.1 Having taken into account all of the consultation responses, the Government intends to implement the extension of FRC.

4.2 The Government will work with the Civil Procedure Rule Committee (CPRC) to ensure the smooth delivery of these reforms. As outlined below and in the main response, we are clear in our objectives as to what we want to achieve through FRC in principle, but we will need to engage with the CPRC on the detail of implementation.

4.3 As we outline in paragraphs 4.4 and 13.2–3 of Chapter 5, the Government does not consider it appropriate, at present, to give further guidance on band allocation for the fast track and for intermediate cases. Rather, it is for the parties and judges to come to sensible conclusions on banding in light of the criteria set out. Despite general calls from respondents, from both claimant and defendant perspectives, for further detail, neither Sir Rupert nor respondents to the consultation were able to outline what this might constitute. Further clarity will emerge over time in the light of experience. Should it become clear that the Government can give further guidance, then we will do so.

4.4 It is worth restating the fundamental principles of FRC, which aim, as Sir Rupert writes in Chapter 1, 1.3 of his FRC report:

- i. 'to modify the procedural rules with the aim of reducing actual costs so far as possible;
- ii. to restrict recoverable costs to that which is "proportionate" as defined in the new proportionality rule;<sup>14</sup> and
- iii. to control the recoverable costs in advance.'

Following Sir Rupert's recommendation, the Government believes that a simplified scheme of costs, such as FRC, has the advantages of (i) reducing actual costs (through a simpler procedure); (ii) ensuring that costs are proportionate; and (iii) controlling costs in advance, which promotes both certainty and discipline and

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<sup>12</sup> <<https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>>.

<sup>13</sup> <<https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>>.

<sup>14</sup> CPR rule 44.3 (5), the new proportionality rule, was proposed in Sir Rupert's 2010 report at Chapter 3, paragraph 5.15: <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>>. The new proportionality rule was adopted on 1<sup>st</sup> April 2013.

encourages earlier settlement. In principle, then, this is what our new FRC schemes seek to deliver, and in doing so, they will enhance access to justice. That being said, the Government remains mindful that a successful FRC scheme needs costs to be set at the right level, within an overall structure that strikes the right balance between simplicity and ensuring it accounts for the nuances of individual cases.

- 4.5 The Government can also clarify that the new FRC schemes, for both the fast track and for intermediate cases, will be kept under general review. The extension of FRC will be implemented as follows.

## 5. Question 1: The Fast Track

- 5.1 **The Fast Track:** We will implement our proposals on extending FRC to all other civil cases in the fast track up to a value of £25,000 in damages, as originally proposed by Sir Rupert.
- 5.2 **Banding:** All fast track cases will be allocated to one of the four bands of complexity, as set out in existing FRC regimes. Details of these complexity bands are outlined in Chapter 3 of our consultation paper.
- 5.3 **Counsel's fees:** Sir Rupert recommends that fees for counsel should only be ring-fenced in Band 4 and in NIHL cases. The Government agrees with this, and will implement Sir Rupert's proposal on counsel's fees.
- 5.4 **Costs liability:** Sir Rupert recommends that an unsuccessful band challenge should incur a costs liability of £150. We will implement this proposal, and keep it under review.
- 5.5 **'Escape clause':** As proposed by Sir Rupert in Chapter 5, 5.20 of his 2017 report, the current provision in CPR 45.29J, enabling a party to exit FRC in the fast track in exceptional circumstances, will continue to apply.
- 5.6 **Package holiday sickness/credit hire:** Consistent with Sir Rupert's recommendation, the Government agrees that package holiday sickness claims will fall within Band 2. We can also confirm that credit hire claims will fall into Band 1.
- 5.7 **Fortifying the rules:** The Government does not propose any amendments to the rules to reinforce the role of judicial discretion in this process, as this would risk being too prescriptive, but would welcome the views of the CPRC as to whether further strengthening is necessary.
- 5.8 **Part 36 offers:** The Government will implement an uplift of 35% of FRC; this would apply to the stage during which and those after the relevant period under a Part 36 offer expires.

- 5.9 **Unreasonable behaviour:** We have concluded that the appropriate penalty for unreasonable behaviour during litigation is a percentage uplift on FRC of 50%.
- 5.10 **Uplift for additional claimants:** The Government has decided to implement a 25% FRC uplift for each additional claimant, in claims that arise from the same set of facts.
- 5.11 **London weighting:** The Government can clarify that the existing provisions for London weighting in fast track FRC regimes, which ‘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 practices in the London area’<sup>15</sup>, will apply to the new FRC regimes.

## 6. Question 2: NIHL

- 6.1 **Fast Track for NIHL claims:** The Government will implement a new process and separate grid of FRC for NIHL claims in the fast track valued below £25,000 in damages, as set out in our consultation paper.
- 6.2 **Pre-litigation process and draft letters of claim:** We will implement our consultation proposals to require certain mandatory actions to be taken by both claimants and defendants in NIHL letters of claim and response.
- 6.3 **Standard directions:** While the Government agrees with the CJC in its 2017 report that standard directions would create a more streamlined approach, and would help parties and courts manage NIHL cases more efficiently,<sup>16</sup> we consider this should be taken forward by the industry.
- 6.4 **Separate preliminary trials:** We recognise that there may be scope for preliminary trials to assist in deciding issues in dispute. It is the Government’s view that preliminary trials should be encouraged where they serve this purpose, but should otherwise be discouraged where they would be superfluous.

## 7. Question 3: Intermediate Cases

- 7.1 **Intermediate Cases:** As set out in our consultation paper, the Government will expand the fast track to include ‘intermediate’ cases valued between £25,000–£100,000 in damages (see paragraphs 1.6 and 3.1, above).

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<sup>15</sup> This is set out in CPR rule 45.29C (2), rule 45.29F (5) and Practice Direction 45 paragraph 2.6.

<sup>16</sup> The CJC’s 2017 report on fixed costs in NIHL claims is available here: <<https://www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf>>.

- 7.2 **Court fees:** We intend to retain the existing multi-track court fees for new intermediate cases, but will keep this under review.
- 7.3 **Exclusions:** The Government can confirm that mesothelioma/asbestos, complex PI and professional negligence, actions against the police, child sexual abuse, and intellectual property will be excluded from intermediate cases, as Sir Rupert originally proposed.
- 7.4 **Banding:** The Government intends to retain the four-band structure as proposed by Sir Rupert. This structure will allow for greater flexibility, to ensure that particular cases are matched to appropriate bands.
- 7.5 **Allocation criteria:** We do not propose to be more prescriptive in allocation criteria for intermediate cases beyond those proposed by Sir Rupert. Despite respondents arguing for the need to provide further details, it is notable that no specific suggestions were given for the Government to consider. We maintain that it will be the role of judges to exercise their discretion and ensure that intermediate cases are appropriately allocated, in accordance with the criteria set out in Chapter 5, 2.1 of our consultation paper. It is the Government's view that no intermediate case should be allowed to exit from the proposed FRC regime, unless there are exceptional circumstances.
- 7.6 **Practice Direction:** The Government notes Sir Rupert's recommendation that a new Practice Direction may be helpful, similar to CPR 26.8, to (i) give guidance on allocation, and (ii) indicate the information the court needs in order to make an appropriate band allocation. The Government will consider this with the CPRC, in due course, to determine whether such a Practice Direction is helpful.
- 7.7 **Costs liability:** We agree with Sir Rupert's recommendation that an unsuccessful challenge to allocation should incur a costs liability of £300, and will keep this under review. However, it is the Government's view that challenging band allocation (or resisting a challenge) without sufficient basis could amount to unreasonable behaviour, incurring further costs penalties.
- 8. Question 4: Judicial Review**
- 8.1 **Costs budgeting in 'heavy' JRs:** The Government intends to go forward with its proposals on introducing costs budgeting to all 'heavy' JRs, as outlined in our consultation. We have carefully considered procedural steps to accompany this proposal.

## 9. Question 5: Next Steps

- 9.1 **Inflation:** The Government will uprate the figures for FRC on which we consulted, which were based on Sir Rupert's 2017 report, for inflation, in line with the Services Producer Price Index (SPPI).
- 9.2 **Operable Date:** We are keen that, when implemented, FRC should apply to as many cases as reasonably possible, within the cohort of cases covered. This will mean those cases where the accident or cause of action arises after the implementation date, or in disease and equivalent cases where no letter of claim has been issued before the implementation date.

## 10. Questions 7–10: Equalities Statement

- 10.1 **Equalities Statement:** We have considered the equalities impacts of our proposals carefully. In particular, we have given consideration to the CJC report, *Vulnerable Witnesses and Parties within Civil Proceedings*, issued in February 2020 after our consultation had concluded, which makes a number of recommendations to improve the experience of vulnerable parties within civil cases.<sup>17</sup> The impact of extending FRC on vulnerable claimants was also raised by respondents (see Chapter 4, paragraphs 25.2–5), who argued that vulnerable claimants would produce additional costs that would not have been incurred without certain protected characteristics of disabilities, and that this would need accounting for in the proposed FRC regimes. Although we do not propose to define vulnerability generally, as this would risk being too prescriptive, we accept that there may be grounds to make limited exceptions to FRC for specific vulnerabilities, rather than more expansive allowances that would be contrary to the objectives of FRC. As such, we make the following proposals:
- i. We propose that the new fast track FRC regime could cover the specific vulnerabilities set out in the guidance to the legal aid Family Advocacy Scheme, and that a specified, percentage uplift of FRC (25%, in keeping with the 25% bolt-on that is currently available under the Family Advocacy Scheme to those who '[have] difficulty giving instructions' as a result of a verified mental impairment) could be available in respect of parties who meet these criteria, upon judicial certification. We will consider with the CPRC as to how the Directions Questionnaire could be amended to incorporate this percentage uplift.
  - ii. We recognise that additional disbursements may be needed for specific vulnerabilities (such as where a sign language interpreter may be required).

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<sup>17</sup> The CJC's February 2020 report on vulnerable witnesses and parties within civil proceedings is available here: <VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf (judiciary.uk)>.

We will consider with the CPRC what arrangements are appropriate for disbursements and consistent with the aims of FRC.

- iii. In drafting the rules for consideration by the CPRC, we will consider whether the arrangements for settlements for protected parties (adults lacking mental capacity and children, as under RTA cases) should be extended to the new FRC regimes.

## Chapter 2: Background

### 1. Fixed Recoverable Costs (FRC)

- 1.1 FRC are the legal costs which can be recovered by the successful party from the losing party at a prescribed rate, at different stages of the civil litigation process. They ensure that the costs of civil litigation remain both certain and proportionate, as it is known in advance what costs will be recoverable. FRC also help parties make informed decisions about whether to litigate or settle.
- 1.2 FRC are already working well in England and Wales, and have been introduced successfully for most low-value PI cases over the last ten years.
- 1.3 Extending FRC is a necessary way of controlling the costs of civil litigation. The best way to control costs is to do so in advance, which is possible through such measures as costs budgeting and FRC. However, the Government believes that FRC are the most effective way to ensure certainty for both parties as to what costs will be – thereby ensuring access to justice (see Chapter 1). As Sir Rupert notes, in the Executive Summary, 2.10 of his 2017 report:  
  
*‘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.’*
- 1.4 The Government’s policy intention over recent years has been to extend, on an incremental basis, the categories of civil cases covered by FRC, as recommended by Sir Rupert in his 2017 report. Separately, DHSC are setting the way forward on extending FRC in clinical negligence cases, and the Home Office are considering expanding FRC to cover immigration and asylum tribunal JRs. However, as discussed above in this consultation response, the MoJ’s proposals on extending FRC are confined to lower-value civil claims.

### 2. Sir Rupert Jackson’s Reforms

- 2.1 Sir Rupert Jackson’s July 2017 report was the culmination of at least 20 years work on controlling the costs of civil litigation. Sir Rupert 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 costs of litigation, and remove unnecessary complexity. One recommendation, which this response takes forward, was to implement a regime of FRC for fast track cases.<sup>19</sup>

- 2.2 Following Lord Woolf's 1996 report, substantial reforms were made to the civil justice system, not least through the introduction of the CPR.<sup>20</sup> However, in the following years, there were continuing concerns about the disproportionate 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, as he notes in Chapter 1, 1.1 of his 2010 report *Review of Civil Litigation Costs*, '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'.
- 2.3 Sir Rupert's 2010 report led to the statutory reforms in the LASPO Act 2012 and other changes in the handling of civil cases, which came into force together in April 2013. Sir Rupert's 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.
- 2.4 Following the publication of Sir Rupert's 2010 report, the Government focused its efforts on introducing (between 2010 and 2013) FRC for low-value (fast track) PI claims, specifically: RTA, employers' liability accident (ELA), and public liability (PL) cases.
- 2.5 Sir Rupert's intention was that, once the initial FRC reforms had become properly embedded in the legal system, it would be possible to look into extending FRC more widely, including for civil claims of higher value. The Government agrees with this, and consulted on extending FRC in 2019, in order to control the costs of civil litigation and thereby improve access to justice.
- 2.6 As is outlined in this consultation response (see Chapter 4 below), some interested parties – particularly some from claimant perspectives – see FRC as compromising access to justice. The Government does not agree, as we have outlined above. Instead, we wish to re-emphasise what Sir Rupert said in 2010:

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

<sup>19</sup> <<https://webarchive.nationalarchives.gov.uk/20090117172103/http://www.dca.gov.uk/civil/final/sec2b.htm#c4>>; page 58, '[there] should be a regime of fixed recoverable costs for fast track cases'.

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

‘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.’<sup>21</sup>

- 2.7 In January 2016, Sir Rupert gave a lecture – entitled *Fixed costs – the time has come* – which enlivened the debate about extending FRC more widely.<sup>22</sup> Later in the same year, in a joint statement heralding an ambitious reform programme to modernise Her Majesty’s Courts and Tribunals Service, the then Lord Chief Justice, Lord Chancellor, and Senior President of Tribunals asserted:
- ‘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.’*<sup>23</sup>
- 2.8 In light of the above statement of reform, on 11 November 2016, the Lord Chief Justice and the Master of the Rolls commissioned Sir Rupert to carry out his long-anticipated review of FRC; specifically, they asked Sir Rupert to consider the areas in which FRC could be extended and to what value of claim. Sir Rupert published this report on 31 July 2017, and the Government’s consultation paper on extending FRC, which was based on Sir Rupert’s recommendations, followed in March 2019.
- 2.9 This consultation response has been delayed by the COVID-19 pandemic, but the need to extend FRC, first proposed by Lord Woolf a quarter of a century ago, is as important and relevant now as ever.
- 2.10 What follows in this response provides the next step in the Government’s programme of reform to control the costs of civil litigation. It provides (i) a summary of consultation responses; (ii) an overview and analysis of responses to specific questions in the consultation; and (iii) the way forward on extending FRC in civil cases.

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<sup>21</sup> See Jackson (2010), Chapter 4, 2.8.

<sup>22</sup> <<https://www.judiciary.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>>.

<sup>23</sup> <<https://www.judiciary.uk/wp-content/uploads/2016/09/narrative.pdf>>.

# Chapter 3: Summary of Responses

## 1. Summary of Responses

- 1.1 The consultation ran for 10 weeks between 28 March and 6 June 2019. A total of 149 responses were submitted, with 57 of these submitted through the online response tool. The remaining responses were in written letter format. The Government also met with several leading stakeholders and interested parties to discuss suggestions and contributions around our reforms.
- 1.2 We received a varied set of responses from those with an interest in lower value civil claims, including solicitors' firms (representing claimants, defendants and both); barristers; legal representative bodies; insurance companies; charities; and the judiciary. Not all respondents answered every question, and some provided select responses based on interest and/or their individual competency on a given subject.
- 1.3 In some areas of law, responses were clearly divided between claimant and defendant respondents. Broadly speaking, those from defendant perspectives were generally supportive, while claimant respondents tended to disagree with the proposals. There were clear exceptions to this trend, as well as instances where both categories of respondents generally agreed, and others where, despite disagreement, suggestions were offered to improve or make the policy proposals more workable.
- 1.4 An overview of the 149 responses and the category of respondents is provided below:
  - 60 responses were received from claimant respondents;
  - 44 responses were received from defendant respondents;
  - 68 solicitors' firms and 13 barristers responded to the consultation;
  - 24 professional and representative bodies responded to the consultation.
- 1.5 We are grateful to everyone who took the time to respond, and to share their insight and expertise regarding the proposals. All the responses have been carefully analysed, and used to inform the way forward in this consultation response. Inevitably, not every single point raised by respondents has been referenced or addressed in this response, but what follows documents the main points. More detailed analysis of each question is provided in the following section.

# Chapter 4: Responses to Specific Questions

## 1. Analysis of Responses

- 1.1 Each section below presents analysis of stakeholder responses to the specific proposals and questions outlined in the Government's consultation on extending FRC. Following a brief synopsis of overall support for, or disagreement with, a given proposal, specific issues raised by respondents that are relevant to each question are identified and, where appropriate, examined in more detail.

## Question 1: The Fast Track

### 2. Overview: The Fast Track

- 2.1 FRC are currently in place for most fast track PI cases, such as RTA, ELA, and PL cases. The Government indicated its agreement with Sir Rupert's recommendation that FRC should now be extended to all other civil cases in the fast track, and consulted on that basis. The consultation asked stakeholders to consider the Government's proposals to implement a grid with four bands of complexity, and to provide input on how cases should be allocated to each band. Views were also sought on what, if any, steps could be taken to prevent inappropriate allocation to the multi-track as a means of escaping FRC.

### 3. Analysis of responses to Question 1: Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out?

- 3.1 Question 1 allowed respondents to make general comments on our proposals without having to be constrained to a specific question. We found this useful to gain insight into the overall thoughts around our proposals to extend FRC across all fast track cases.
- 3.2 Over 70% (105) of respondents answered this question, of which roughly 40% (42) were in favour of the general fast track proposals set out, and 52% (55) against. The majority of those representing defendants, including law firms, insurers and others, were supportive of the proposals, while many representing claimants were opposed. Both claimant and defendant respondents, as well as those who did not explicitly state whether they supported or opposed the proposals, made helpful suggestions as to how they could be improved.

### **Question 1: Arguments in favour**

- 3.3 Many respondents who supported the proposals noted that the costs of civil litigation can be disproportionate to the value of a claim, and often exceed estimated costs. Those who agreed with the proposals stated that extending FRC would be the most appropriate way to control litigation costs, providing certainty as to the costs and risks to all parties. It was also suggested that the proposals would require parties to focus on the central issues in dispute, rather than on expensive and time-consuming satellite issues which increase the costs unnecessarily. For that reason, many respondents also agreed with the allocation of cases to bands as a means of differentiating between types of cases, stating that this would act, in effect, as a system of signposting the time and work required.
- 3.4 Some respondents commented that extending FRC would lead to an improvement in the quality of claims presented, thereby discouraging unmeritorious or spurious claims and providing a realistic opportunity for early settlement. These views were put in general terms, without elaboration. It was also argued that extending FRC would curb the 'claims farming' that is currently taking place in some housing cases, where claims are being pursued by claimant solicitors in order to obtain excessive costs, rather than because they are of any benefit to the claimant themselves.
- 3.5 Some respondents commented that the extension of FRC would have a positive effect on small businesses, enabling them to evaluate the potential risks and benefits of litigation more accurately.

### **Question 1: Arguments against**

- 3.6 Of the respondents who disagreed with the proposals, most were claimant lawyers or other claimant representative groups. A number of barristers, professional bodies, and charity organisations also generally disagreed with the proposals. Many respondents who disagreed nonetheless offered suggestions for improvement.
- 3.7 Respondents who disagreed shared the view that FRC should not be a 'one size fits all' model, which could have the opposite effect to that intended by limiting access to justice. Another common theme among some respondents was the risk of satellite litigation arising from potential band allocation disputes. As a result, it was argued that greater certainty would be needed around the criteria for allocation to certain bands.
- 3.8 Another theme among those who disagreed with the proposals was the potential effect of extending FRC on legal representation. Some respondents expressed concern that the proposed costs would not be economically viable for certain firms. They suggested that this would squeeze some legal firms out of the market, drive legal wages down, and jeopardise the provision of legal aid. According to some respondents, the impact of this would be to particularly disadvantage vulnerable

groups, who would no longer be able to secure legal representation. These concerns were put by respondents in general terms, without detailed evidence – including as to what levels of FRC they considered would be more appropriate.

- 3.9 A point of agreement between claimant and defendant respondents was around the need for greater clarity in dealing with complex and exceptional cases. However, a point of disagreement, here, was on the band allocation of complex or exceptional cases. Suggestions from respondents varied between either recommending more bands in order to capture complex cases properly, or a prescriptive allocation to a specific dedicated band for cases deemed complex.
- 3.10 Most respondents, whether they agreed or disagreed with the proposals, were wary of the risk of banding disputes and subsequent satellite litigation, if there was insufficient clarity. Most respondents also recognised the role of judicial discretion in case banding, but there was disagreement as to its scope in determining what constituted a complex or exceptional case, and in how cases should be banded.

### **Question 1: Specific issues raised by respondents**

#### *Inflation*

- 3.11 Both claimant and defendant respondents argued that the figures for the banding in the fast track would need to be updated with inflation, as the figures reflected in Sir Rupert's report, published in July 2017, were based on data analysis of cases settling between 2012 and 2017.
- 3.12 Furthermore, some respondents commented that the figures should be updated for inflation up to the point of implementation. However, one respondent also suggested that a four per cent uplift for inflation, and the use of SPPI, would be inadequate – although they did not give any reasons for this. Instead, they suggested that the figures should be kept under review and should be updated in line with the Retail Price Index.

#### *Counsel and specialist lawyer fees*

- 3.13 One defendant respondent questioned why counsel fees are included as an addition to the FRC for a claim, suggesting that they should be dealt with as a disbursement. However, if such fees are to be included, the respondent contended that they should include 'counsel fees' only, with clear rules that they should only be used where needed and proportionate. In these circumstances, the respondent suggested that an explanation as to what makes a case exceptional and thus necessitating the use of counsel should be a requirement.
- 3.14 Another respondent noted that counsel or specialist lawyer fees will only be payable if those undertaking these responsibilities are instructed to draft a statement of case. They suggested that there should be clear rules, stating that this part of FRC

is only recoverable if and to the extent that it is confirmed that the client is obliged to pay at least that amount to counsel or the specialist lawyer responsible for the drafting.

3.15 This respondent suggested that this would, theoretically, remove any incentive to agree lower fees than those specified by the extended FRC regime, while entrusting the market to dictate what fees are agreed without increases or reducing the overall recoverable fees.

**4. Analysis of responses to Question 1 (i): We seek your views, including any alternatives, on: the proposals for allocation of cases to Bands (including package holiday sickness);**

4.1 Around 60% (90) of respondents answered this question, with 35% of those who responded disagreeing with the proposals on band allocation. Nonetheless, many of these comments provided helpful suggestions for how the proposals could be strengthened or improved.

4.2 Respondents who were against the proposed banding figures argued they may be too low, and that as a result, there could be a risk of claimants' firms not taking on cases that may have a lower chance of success. They suggested that the effect of this would be to hinder access to justice.

4.3 Around 18% of responses were supportive of the Government's proposals, arguing, for example, that introducing FRC to housing disrepair claims would curb the 'claims farming' currently occurring in that sector. These respondents also noted that the proposed banding would help to provide certainty in claims, and reflect the costs, benefits and consequences of an early liability admission in line with the current Pre-Action Protocols (PAPs).

4.4 There was also some variation in the degrees of support or disapproval for this proposal. Some respondents who disagreed with the proposal on band allocation did so because they felt that (i) no new bands were required, preferring the current system; (ii) the proposals did not go far enough and should include additional bands; (iii) and that more bands were needed to account for any potential confusion or overlap.

**Question 1 (i): Specific issues raised by respondents**

*Banding clarity and satellite litigation*

4.5 Respondents who supported the banding proposals said that this would streamline the claims process, thereby speeding up compensation and removing unnecessary costs. However, both claimant and defendant respondents argued that the proposals were too vague to have their intended effect. Some respondents

suggested that greater clarity would be needed in order to outline which cases either qualify for or are exempt from FRC; how cases would be allocated to certain bands; and what provisions would be in place for a case to switch bands. These respondents argued that this would enable parties to agree which band is the most appropriate, rather than leaving this open to interpretation, and would avoid banding disputes. It was noted that guidance, with practical examples, would also ensure that there is a consistent and accurate approach to banding, reducing the likelihood of poor decision making or unnecessary and costly satellite litigation around allocation. A few respondents also said that the proposals must remove any financial incentive to raise disputes about which band applies.

#### *Complex cases*

- 4.6 Both claimant and defendant respondents recognised that some cases may be more complex than others. However, they diverged on how these cases should be allocated, and on the level of prescription required in determining that a case is complex.
- 4.7 Many respondents said that clear markers as to what ‘complex’ means, encapsulating the various types of cases captured by FRC, would be necessary to avoid disagreement. Some went further, suggesting that clear definitions would be needed specifically outlining which cases are expected to fall into which band. Some defendant respondents argued that failure to do so would risk parties gaming the system, with cases being pushed into a higher band in order to secure greater costs, while claimant respondents argued that a fixed costs regime may provide ‘insufficient remuneration’ for work undertaken in these types of cases. According to some claimant respondents, this could lead to certain cases being declined as they are not financially viable, hindering access to justice, and potentially disadvantaging vulnerable people.
- 4.8 Solutions for how to manage cases that were deemed complex, or that were found to be ‘exceptional’, ranged from moving into a different band to being taken out of the fast track. While some respondents suggested that certain types of cases should be exempt from FRC altogether, one defendant respondent argued that there should be no exit from FRC, except where it was obvious to all parties involved that the circumstances of the case were clearly exceptional.
- 4.9 It was argued that one category of complexity is where the value of the claim does not reflect the seriousness, or the circumstances surrounding it, or the people involved. Several claimant respondents reiterated this point, noting that even in cases where money judgments are modest, complex claims of any kind are not just about securing redress for financial loss, but can also be concerned with addressing or correcting a complex issue. According to these respondents, similar consideration should be given to cases involving minors, and other child abuse

cases. It was argued that these cases are sensitive in nature, especially considering the vulnerability of those involved, and are therefore both time and labour intensive.

- 4.10 Respondents noted that issues of complexity could also apply to cases that are low value but raise issues of wider importance that could lead to policy changes. It was argued that such cases can be legally complex, meaning they are not suitable for the fast track. Some respondents suggested that categorising these types of claims based on their financial value would ultimately undermine the delivery of justice.

#### *Housing claims*

- 4.11 A key theme among respondents to this question was housing claims. Respondents who were generally supportive of introducing FRC to housing claims commented that in these cases, the costs of litigation are largely disproportionate to the value of the claim, and for the most part costs exceed estimates. They argued that, rather than incentivising early settlement, this could lead to unnecessary concessions simply to avoid significant costs. On the other hand, respondents in favour noted that FRC could enhance access to justice by encouraging quicker resolutions to disputes, ensuring that costs are controlled, and providing upfront certainty as to what costs parties would face in litigation. They argued this would benefit claimants who would have otherwise been discouraged from bringing a claim due to the potential for high costs.
- 4.12 A number of defendant respondents argued that legal firms practising within the PI and clinical negligence market have now moved into the social housing sector, leading to an increase in housing disrepair claims of little or no merit, for which excessive costs are sought. One respondent commented that they have seen an increase of 110% in such claims between 2015 and 2018. They explained that their options were either to litigate on a proportion of claims with unknown costs consequences, or to settle inappropriately in order to avoid incurring further costs. The respondent contended – and was supported by others – that the new FRC proposals would allow them to dispute those claims of no merit with certainty of costs, while also discouraging claimant solicitors from pursuing those claims. It was argued that complex housing disrepair claims are rare, and that the most straightforward cases of this type should be allocated to Band 2.
- 4.13 Respondents who were generally against housing claims being subject to FRC suggested that FRC may not be appropriate in these cases due to the unique position of housing law. They argued that the value of housing claims can be low, but they can be complex and of profound importance to the client, many of whom are highly vulnerable, especially when a claim may result in a client losing their home. These respondents suggested that, in housing disrepair claims, often relatively low damages are being sought, as the primary importance of these claims is in obtaining an injunction or specific performance of the contract so that repairs

can be carried out. They argued that, in terms of the value of the claim and the percentage of damages being awarded by way of costs, this must include both the compensation being awarded, as well as the value of the injunction, or similar relief.

- 4.14 Some respondents noted the risk that, if FRC are introduced at unworkably low levels, this could have a mutually reinforcing adverse impact on both the supply of and demand for legal services, which could disadvantage the most vulnerable housing claimants. As a result, they argued that it could become unaffordable to run certain types of housing claims, potentially unreasonably penalising legal aid lawyers for taking on these cases. Respondents noted that this could, in turn, leave tenants who could be facing homelessness or who are otherwise vulnerable unable to obtain legal representation. According to one respondent, these potential negative effects are evidenced by the significant decline over the last few years of the number of firms representing tenants in housing disrepair claims, and the inability of tenants who need it to find qualified legal representation as a consequence.
- 4.15 Another respondent pointed out that, although most housing disrepair cases would be suitable for FRC, other types of housing claims such as homelessness and unlawful eviction may not be suitable due to their complexity and sensitivity. Multiple respondents said that the consultation lacked clarity as to what would constitute a 'particularly complex' tracked possession or disrepair claim. Possession cases, for example, were cited as frequently more complex than other cases in county courts, and could involve a series of issues, including contract law, trusts, the Equality Act 2010, and human rights. Others suggested that FRC would hinder a tenant's ability to bring forward a claim, as either a well-resourced landlord could simply run down the clock on a tenant's resources and force a lower settlement, or claimant firms would not take on cases which have a lower chance of success. However, one solution proposed by respondents was to consider a bespoke scheme for housing cases, such as with clinical negligence cases.

#### *Credit hire*

- 4.16 Several insurance and defendant respondents noted that credit hire in relation to RTA claims is an area of recurring and costly dispute, which requires greater attention. Most respondents who raised this point argued that any guidance on band allocation should expressly state that credit hire claims should be allocated to Band 1. It was argued that this would eliminate any ambiguity that could lead to litigation around whether these claims fall under the definition of 'bent metal' or 'damages to vehicles only'.

*Fraud and fundamental dishonesty*

- 4.17 Some respondents argued that cases where fundamental dishonesty or fraud are legitimately raised should either be exempt from FRC or allocated to a higher band (i.e. a Band 3 case should be moved to Band 4). One respondent explained that greater attention needed to be paid to where such allegations are made in PI claims. It was noted that these allegations frequently arise at a very late stage in the proceedings (even at trial). Some respondents suggested that, where such allegations are made at an early stage of the case, this is a factor which should – normally – lead to the case being assigned to Band 4 or being removed from the fast track. However, it was noted that where they surface at a later stage, it is vital that the rules retain sufficient flexibility to allow cases to be re-allocated or re-assigned as appropriate: an ‘exceptionality’ based test would not achieve this. It was argued that the test for re-allocation or re-assignment should, instead, require there to have been a ‘significant development’ in the case, such as an allegation of fraud or fundamental dishonesty.

*Package holiday sickness claims*

- 4.18 A number of defendant respondents and insurers suggested that package holiday sickness claims should fall under Band 2 rather than Band 3. They noted that Sir Rupert’s recommendation of Band 2, in Chapter 5, 5.2 of his 2017 report, is based on the similarity of costs to other types of cases in this band. Conversely, claimant respondents argued that the complexity of some of these claims, including those that arise overseas, and those that require extensive documentation and disclosure, make them more suitable for Band 3 given the difficulty and workload.

**5. Analysis of responses to Question 1 (ii): We seek your views, including any alternatives, on: the proposals for multiple claims arising from the same cause of action;**

- 5.1 Around 65% (98) of respondents answered this question, which addressed the rise in claimants making multiple claims arising from the same cause of action (for example in package holiday sickness claims). Roughly 38% of those who responded to this question disagreed with the proposal, arguing that 10% was too low a figure to be able to do the amount of work needed for additional clients. Around 16% of respondents were supportive of the proposal, arguing that in many of these claims arising from the same cause of action there is a fair amount of duplicate work. The remaining 46% of respondents suggested workable changes to the proposal, which are elaborated on further below.
- 5.2 There is generally less work to be done for additional claimants where the claim arises from the same set of facts. For this reason, some respondents argued it would be inappropriate to provide equal FRC for each additional claimant, as doing

so would lead to over-remuneration and perverse incentives to add more names to claims.

- 5.3 However, other respondents noted that there are differences in types of cases that involve multiple claims arising from the same cause of action, and that each case stands on its own merits. They argued that this is especially true for accidents where multiple claimants may have separate injuries which require additional work. These respondents suggested that there may be some duplication, but each claimant will have been affected in different ways, and there remains a duty to seek instructions and advise each claimant individually. It was noted that there can also be a wide range of special damages being claimed as personal to each individual. These respondents suggested, therefore, that a reasonable and proportionate amount of costs must be recoverable in each individual case. It was argued that this refutes the perverse incentive reasoning, as it is legitimate to make a claim for an accident involving multiple injured people.
- 5.4 A question was raised as to the definition of 'principal claimant', and how costs would be apportioned for additional claimants if the principal claimant's case fails. Conversely, there was some concern from respondents that linking the costs payable to the principal claimant could inflate the damages sought to prolong litigation and maximise costs payable on linked claims.

**Question 1 (ii): Specific issues raised by respondents**

*Ten per cent uplift for additional claims arising from the same cause of action*

- 5.5 Both claimant and defendant respondents noted that the proposed 10% FRC uplift for multiple claims arising from the same action would be too low to facilitate the performance of all necessary tasks. In RTA cases, for example, it was stated that the injuries may vary depending on where the person was sitting in the vehicle, and thus more work may be needed to issue a sufficient claim.
- 5.6 Some respondents argued that limiting additional costs to only 10% could act as a deterrent to litigators to act on behalf of multiple claimants, or cause delays in pursuing multiple claims arising out of the same cause of action – thus limiting access to justice. There were additional concerns that vulnerable and protected parties would need extra care in order to pursue their claims. It was argued that a 10% uplift would be insufficient reimbursement for the additional work, and that an uplift of around 45% – 50% would be more appropriate.
- 5.7 One unintended consequence of a 10% uplift was cited as the potential for additional claims to become commodities, whereby individual claimants would be referred to different solicitors in order to benefit from the full fixed costs, or where the same firm would litigate separately for each client. An increased fee of around

25% per additional presented claimant was cited by respondents as one way to avoid this.

**6. Analysis of responses to Question 1 (iii): We seek your views, including any alternatives, on: 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;**

- 6.1 Responses to this question were connected to themes raised in Question 1 (i), with respondents providing additional detail on the measures necessary to encourage appropriate band allocation and reduce satellite litigation.
- 6.2 Nearly 67% (99) of respondents answered this question, with around 25% of those who responded outlining their opposition to the proposal. These respondents reiterated that a 'one size fits all' model would be inappropriate, and that complexity must be accounted for when deciding on band allocation. As has been mentioned in previous sections of this consultation response, respondents re-emphasised the point that the value of a claim does not necessarily reflect its importance, or the complexity of the issues involved.
- 6.3 Around 7% of respondents were supportive of the proposal. The remaining 68% offered suggestions and workable changes to the policy that would ensure it would meet its intended function, which are expanded on below. This included allowing for judicial discretion in the allocation process.

**Question 1 (iii): Specific issues raised by respondents**

*Guidance on unnecessary challenge and unreasonable behaviour*

- 6.4 A number of respondents argued for varying degrees of judicial discretion in determining appropriate allocation and, as a corollary, what may be considered an unnecessary challenge. They argued that this is because there may be cases that reasonably need to move between bands as the case progresses. According to these respondents, these instances should not be considered unnecessary challenges, but a prerequisite to ensuring access to justice and appropriate allocation. It was noted that this should either be left entirely up to the individual judge, or it would require training for judges generally to make appropriate and consistent decisions based on a clear set of rules.
- 6.5 Several respondents pointed out that clear guidance is needed as to what might constitute an unnecessary challenge, as well as similar guidance for unreasonable behaviour, as this would assist all parties and the judiciary.

*Fortifying the rules*

- 6.6 Some respondents suggested that the proposed costs sanction for an unsuccessful challenge of £150 was too low – not simply as a disincentive for making a challenge, but also because it would be insufficient to cover the successful party's application costs. A figure of £500 was proposed instead.
- 6.7 Others suggested that a more effective way of avoiding unnecessary challenges would be to provide clear, detailed guidance, with examples of the types of claims that would fit into each band. However, these comments were caveated with the suggestion that too rigid a set of rules or an exhaustive list may not be appropriate; this could serve to be too prescriptive, and the court should instead retain discretion to decide what is unreasonable.

*Case law*

- 6.8 Many respondents helpfully pointed to several recent court decisions which would help define unnecessary challenges. Examples of these cases included *Ferri v Gill* and *Hislop v Perde*.<sup>24</sup> One respondent noted that the consultation paper assumes fixed costs apply when costs are allowed on the standard basis. This point was before the Court of Appeal in *Adelekun v Lai Ho*, which held in November 2019 that claimant solicitors should settle for fixed costs.<sup>25</sup> The respondent added that the consultation assumes counsel's fees are included within FRC, and considers whether in some circumstances an element should be ring-fenced. However, they noted that the current FRC rules do not say that counsel's fees are ordinarily included and there may be attempts to claim them as disbursements: this point was considered by the Court of Appeal in *Aldred v Cham*, which held that in cases where items are claimed as disbursements for work already included within the FRC in Part 45 of the CPR, then no additional sums for these disbursements are recoverable.<sup>26</sup>

**7. Analysis of responses to Question 1 (iv): We seek your views, including any alternatives, on: 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.**

- 7.1 Around 67% (99) of respondents answered this question. Roughly a quarter of those who did so noted that the current risk of indemnity costs provides a better incentive to settle than paying an additional 35% of FRC. It was also suggested that

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<sup>24</sup> *Ferri v Gill* [2019] EWHC 952 (QB); *Hislop v Perde* [2018] EWCA Civ 1726.

<sup>25</sup> *Adelekun v Lai Ho* [2020] EWCA Civ 517.

<sup>26</sup> *Aldred v Cham* [2019] EWCA Civ 1780.

courts should stick firmly to the existing Part 36 rules, which should be strengthened.

- 7.2 Around 14% of the total respondents were supportive, commenting that an FRC uplift provides a clear incentive for defendants to make realistic Part 36 offers. It was argued that Part 36 offers need to have greater meaning, so an uplift to FRC, where a Part 36 offer is beaten, would be welcome. Some respondents supported this point by noting the decision to award an uplift on FRC, rather than indemnity costs, seems sensible. Many also commented that an unlimited percentage of indemnity costs has the potential to encourage satellite litigation.
- 7.3 The remaining respondents offered no opinions of support or opposition, but suggested changes that, in their view, would make the proposals around Part 36 offers, unreasonable behaviour, and incentivising early settlement more workable. These are elaborated on further below.

**Question 1 (iv): Specific issues raised by respondents**

*Part 36 offers and appropriate percentage uplift*

- 7.4 Many respondents agreed that Part 36 should be strengthened to act as a genuine deterrent and to incentivise reasonable settlement offers at an early stage in litigation. Part 36 was also seen by respondents as a crucial tool in ensuring that cases are kept within the scope of FRC, where they would fall out of the fixed costs regime due to defeating a Part 36 offer at trial.
- 7.5 A number of respondents preferred a percentage uplift on FRC over indemnity costs. One response suggested that a percentage uplift on Part 36 offers ensures such costs will be proportionate and consistent, whereas indemnity costs would not always necessarily be so – given their variable nature. However, it was noted that the percentage should be assessed against the value of the settled claim, rather than the estimated claim, to ensure that claims are not inflated to end up in a higher value.
- 7.6 Respondents suggested a variety of different uplift percentages to incentivise early settlement, with many agreeing that the 35% uplift proposed in the consultation paper would be the appropriate amount. However, some respondents felt that 35% would be too high, suggesting a cap between 20–25%, as this would be sufficient to redress the failure to accept an offer. These respondents stated that a higher percentage would be disproportionate and punish the losing party, which may have had reasonable grounds to pursue a claim; it would also risk encouraging satellite litigation. Others, however, felt that the proposed 35% figure was too low to provide a sufficient deterrent, preferring instead 50% that would better reflect the importance of early settlement and drive reasonable behaviour.

- 7.7 Some respondents pointed out that unreasonable behaviour can be a far more serious matter than failure to beat a Part 36 offer. They argued that having a similar penalty for each is unfair in relation to Part 36 failures, advocating a lower uplift of 25% for the latter. Among such responses, a further issue centred around the tactics of claimant solicitors in not accepting a Part 36 offer pre-litigation, commencing proceedings, and then lodging notice of acceptance – it was argued by one defendant respondent that such behaviour would need to be disincentivised through an appropriate penalty. It was noted that such behaviour is, presumably, to secure the much higher level of FRC applicable on issue.
- 7.8 Many respondents had similar views that Part 36 offers already work well to encourage early settlement, whilst disincentivising intransigence or unreasonable behaviour. It was suggested that a 35% uplift on FRC would be too low to have the intended effect, and would be especially problematic in lower bands. Others argued in favour of either (i) awarding indemnity costs connected to Part 36 offers, or (ii) a 60% uplift of FRC in cases of late acceptance.
- 7.9 Conversely, some respondents argued that replacing the current indemnity costs enhancements with fixed costs would fail to incentivise early settlement. They stated that strong incentives would need to be in place to comply with the PAP.

*Indemnity costs vs multiples of FRC*

- 7.10 Some respondents suggested that indemnity costs are a more effective way to ensure unnecessary challenges are avoided and cases remain within the FRC regime where appropriate. One respondent commented that indemnity costs are an effective measure to control expenditure, and the threat is likely to give defendants reason to pause before acting in an unreasonable manner. It was argued that in relation to unreasonable behaviour, the court should award indemnity costs. Another respondent commented that where indemnity costs are awarded due to unreasonable behaviour, which will have caused the other party to incur additional legal expense, it is only fair and proper that such indemnity costs are based on the actual costs incurred by a party – otherwise, the unreasonable party benefits at the detriment of the other party. This respondent suggested that this approach also encourages proper behaviour during litigation.
- 7.11 Another respondent who supported indemnity costs said that an FRC uplift could potentially reduce the costs that parties would have to pay. They stated that if the FRC are less than the previous costs of the case, then an uplift has failed in its purpose. It was argued that indemnity costs orders, on the other hand, provide stronger incentives to early settlement.

*Qualified One-Way Costs Shifting (QOCS)*

- 7.12 A few respondents suggested that the interplay between Part 36 and QOCS should be reconsidered. However, they did not provide details of specific concerns or how these might be addressed.

## **Question 2: Noise Induced Hearing Loss (NIHL)**

### **8. Overview: NIHL**

- 8.1 Following a significant rise in NIHL claims, the Government commissioned the CJC to make proposals to improve the handling of claims and for a regime of FRC. The CJC issued its report in September 2017; however, this report had been seen in advance by Sir Rupert, and his 2017 report included recommendations which supplemented the CJC's.
- 8.2 The consultation paper asked respondents to consider the CJC's recommendations, including its proposals to:
- i. Introduce a new pre-litigation process that would involve greater transparency between parties, including a new letter of claim and approved audiograms;
  - ii. Improve the post-litigation process, such as an agreed template for standard directions, and tighter controls on the criteria applied when listing cases for separate trial or preliminary issues such as limitation;
  - iii. Extend FRC for pre- and post-litigation costs.

### **9. Analysis of responses to Question 2: Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out?**

- 9.1 Of the 149 responses, around 38% (56) chose to answer this question, with roughly a third of those agreeing and 28% disagreeing with the proposals.
- 9.2 Multiple respondents commented that expanding the scope of FRC to include NIHL claims would bring more certainty to the overall costs of civil litigation and introduce more proportionality. Furthermore, it was argued that streamlining the process through mandatory rules should increase cooperation between parties. According to some respondents this should, in turn, lead to a higher proportion of claims being resolved pre-litigation.
- 9.3 Some defendant respondents also welcomed the requirement to provide information from the outset via a new letter of claim process. They argued that compliance should be mandatory, and – where parties fail to do so – it was suggested that courts should be permitted to impose a penalty, such as a percentage reduction of FRC.

- 9.4 A few respondents, while recognising the reasonableness of controlling costs, suggested that NIHL claims require more work than other PI claims, and that the FRC rates should be set to account for all necessary work. There was also concern that the proposals to extend FRC to NIHL claims would effectively treat all cases as the same, rather than recognising the varied nature of individual cases.
- 9.5 Some respondents argued that NIHL claims above £25,000 in damages should automatically move to the multi-track, rather than be assigned as an intermediate case.

## **Question 2: Specific issues raised by respondents**

### *Mandatory actions prior to serving a letter of claim*

- 9.6 One respondent stated that the requirement for mandatory actions to be taken prior to serving a letter of claim will benefit all parties to NIHL proceedings. It was argued that this will enable parties to undertake a more detailed assessment of a proposed claim, which, in turn, should lead to more timely resolution of NIHL claims. It was also noted that the inclusion of a checklist stipulating what must be included will help claimants ensure they have provided the necessary information for defendants to quickly assess a claim and identify any deficiencies. The respondent suggested that the requirement for a declaration by the solicitor and claimant would ensure that a letter of claim is taken sufficiently seriously, given that both solicitor and claimant would be accountable for its contents. It was also argued that the time period for a defendant to respond to a letter of claim should not start until a compliant letter of claim is received.

### *Claims in and out of the Portal*

- 9.7 One defendant respondent drew attention to the fourth exclusion in the consultation paper, which states, in Chapter 4.9, that in cases with a single defendant, 'the defendant may elect for the claim to go through the Portal'. They stated that a claim against a single defendant is currently required to go through the Portal, unless the regime is changed going forwards. It was also noted by the same respondent that defendants can only remove claims from the Portal by denying liability, or by failing to meet certain procedural requirements. This respondent pointed out that the consultation paper states, also at Chapter 4.9, that where liability is denied and the case succeeds, the FRC will be those of the fast track. They suggested that it is, therefore, not clear where these claims would sit, as the criteria for the fast track bands set out in Chapter 3, 3.2 of the consultation expressly excludes NIHL claims from Band 4, where other Employers' Liability Disease (ELD) claims sit. It was noted that these types of NIHL claims could attract higher costs in the fast track, thereby encouraging gaming, limiting the impact of the new regime, and increasing costs.

**10. Analysis of responses to Question 2 (i): We seek your views, including any alternatives, on: the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response.**

- 10.1 Around 21% (31) of respondents to the consultation answered this question. Of those who responded, around 39% were supportive of the proposals. They argued that FRC would introduce more proportionate costs in NIHL claims, increase cooperation between parties, and lead to more claims being solved pre-litigation due to the streamlined, mandatory rules process.
- 10.2 Around 22% of respondents were against the proposals, arguing that:
- The Impact Assessment (IA) states there is no data on the legal fees for NIHL, so it is inappropriate to impose costs regimes in this area;
  - Requiring a search from the Employers' Liability Tracing Office is unnecessary and time consuming;
  - Requiring full disclosure of all medical records rather than just relevant ones would increase delays and spending;
  - The reform would be too prescriptive and would increase court time and costs;
  - The link between claimant solicitor and audiologist will lead to expert selection to achieve a favourable opinion, which is likely to drive an increase in claims frequency.
- 10.3 One claimant respondent said that the pre-litigation process places significant emphasis on the front-loading of work in the preparation of cases. They argued that early settlement or defendant behaviour could risk these cases becoming uneconomic – either requiring claimant lawyers to make up a shortfall elsewhere, or not pursue them at all.
- 10.4 One respondent suggested that in the letter of response, stronger language should be introduced to ensure, as far as possible, that in cases where there are multiple defendants, the defendants make a timely decision on who will lead in the case. It was argued that this will avoid delay and the costs associated with duplication. This respondent also suggested that the list of those signed up to the agreement is made readily available, so that claimant lawyers will know when to expect adherence to it.

**Question 2 (i): Specific issues raised by respondents**

*Audiologist accreditation scheme*

- 10.5 Both claimant and defendant respondents suggested that an audiologist accreditation scheme that is independent of the claims process should be created. They argued that, as an accreditation scheme does not currently exist, this would help to cut down on abuse or the falsification of audiologists' reports. These

respondents suggested the following factors to create an effective accredited system:

- Random and independent re-testing of audiology undertaken by the accredited provider; the audiologist to have good knowledge of the Coles, Lutman and Buffin (CLB) and Lutman, Coles and Buffin (LCB) papers;<sup>27</sup>
- Ensuring accurate audiometer calibration and ambient testing conditions (the room where the testing is carried out should have ambient noise levels of no higher than 35dB throughout the testing period);
- Auditing each accredited audiologist regularly;
- Ensuring that each audiologist is trained and audited against the correct fitting of earphones and transducers;
- Ensuring repeat testing at each audiometric frequency with any variability in excess of 10 dB noted in accordance with the British Society of Audiology recommended Procedure (2012);
- Any significant asymmetry or poor hearing in the lower frequencies to be flagged.

## **11. Analysis of responses to Question 2 (ii): the contents of the proposed standard directions, and the listing of separate preliminary trials.**

- 11.1 Around 20% of respondents answered this question. Some expressed reservations, arguing that the proposed standard directions would be too prescriptive and would increase court time and costs, and that our proposal on preliminary issue trials in NIHL cases was at odds with the recommendation of the committee (in fact, there was no agreement by the CJC working party as to whether FRC should apply if disputed limitation is listed as a preliminary trial issue). Around a third of respondents welcomed these proposals, commenting that these directions will streamline the NIHL claims process.
- 11.2 One respondent suggested that the standard directions should stipulate a sanction in cases where the claimant fails to provide the information required for the proposed draft letter of claim.
- 11.3 Some claimant respondents expressed concern that there was no clarification about what would happen if a defendant unnecessarily seeks repeat audiograms. The Government acknowledges this point and agrees that it does not want to create an

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<sup>27</sup> <<https://www.semanticscholar.org/paper/Guidelines-for-quantification-of-noise%E2%80%90induced-loss-Lutman-Coles/e942284039188fc8297374d63d813e4cf39685d2>>, recent LCB paper on NIHL guidelines, published in 2016; <<https://www.semanticscholar.org/paper/Guidelines-on-the-diagnosis-of-noise-induced-loss-Coles-Lutman/facdadf4190b032f2e893a872c8e1d4b09a3b443?p2df>>, original CLB paper from 2000, upon which the more recent paper is based.

environment where defendants seek repeat audiograms in order to limit the resources a claimant can dedicate to a claim.

## **Question 2 (ii): Specific issues raised by respondents**

### *Preliminary issue trials*

- 11.4 Several defendant respondents and insurers advocated the retention of preliminary issue trials on limitation within FRC. These respondents argued that these trials are frequently used and are a quick and inexpensive way of resolving disputes at the earliest opportunity. Others expressed similar views, noting that preliminary issue trials reduce rather than increase costs. However, other respondents supported the proposal for tighter controls on listing NIHL cases for preliminary issue trials on limitation. They argued that NIHL claims are generally low value, and that these trials are an unnecessary and disproportionate way of dealing with issues that could be resolved in one day.

## **Question 3: Intermediate Cases**

### **12. Overview: Intermediate Cases**

- 12.1 Chapter 5 of the consultation paper outlined the Government's proposal not to introduce a whole new intermediate track within FRC, as this would involve a complex and costly implementation process. Instead, it asked respondents to consider an expansion of the fast track to include 'intermediate' cases, with accompanying criteria identified by Sir Rupert outlining the categories of case that would be considered intermediate cases.
- 12.2 As with the proposals relating to the extension of the fast track, our consultation asked for views on a grid of FRC with four bands of complexity and the relevant procedures for allocation.

### **13. Analysis of responses to Question 3 (i): 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: the proposed extension of the fast track to cover intermediate cases;**

- 13.1 Around 62% (93) of respondents provided views on this question, with around 23% of those agreeing with the proposals regarding intermediate cases. Many respondents stated that the extension of FRC is the most appropriate way to ensure litigation costs are controlled, while also providing greater certainty to all parties. Another common reason for agreement was the degree of certainty and proportionality that a new category of intermediate cases would bring.

- 13.2 Around 55% of those who responded to this question disagreed with its proposals. Those opposed were mainly claimant respondents. Arguments against the proposals included:
- The rates suggested are too low to be workable, and will reduce the quality of advice;
  - The rules are too opaque, and will add to confusion;
  - Claims which currently attract FRC tend to be balanced by higher value claims outside of the FRC structure, meaning that solicitors can take on lower value claims without losing out. It was argued that the proposed reforms would alter that balance;
  - These types of cases are usually more complex than, for example, a case worth less than £25,000 in both liability and quantum which would be unsuitable for FRC. These cases often require specialist work and as a result cannot be confined to a given band.
- 13.3 A number of claimant respondents emphasised their concerns that the extension of FRC to intermediate cases would provide insufficient remuneration, making certain cases financially unviable. It was argued that this could lead to a reduction in the quality of legal representation, or limit access to justice for particularly complex cases. Other respondents were concerned about the impact on the legal market as a whole, suggesting that small and medium sized firms would move away from litigating these types of claims, while larger firms would be able to spread costs.
- 13.4 Some claimant and defendant respondents argued that a common set of rules would need to be agreed, to ensure that intermediate cases are allocated consistently and accurately. Others suggested extending the fast track to intermediate cases in stages, which would allow the new system to bed in properly.
- 13.5 It was noted, as in responses to our questions about the fast track, that the proposed banding figures suggested by Sir Rupert are some years old and will require uprating for inflation.
- 13.6 Many respondents who disagreed did not reject the proposed extension of the fast track to cover intermediate cases outright; rather, their reservations were caveated with suggestions for improvement, which have been outlined below.

### **Question 3 (i): Specific issues raised by respondents**

#### *Clarity on intermediate case criteria*

- 13.7 Several respondents, from both claimant and defendant perspectives, elaborated on their concerns that there would need to be more clarity as to which cases would qualify to be intermediate cases. For instance, one respondent commented that guidance will be required as to what is expected of practitioners should they be subject to FRC. They noted that one of the most significant areas that requires

clarity is disclosure obligations – given potential changes to disclosure beyond the pilot in the Business and Property Courts.

- 13.8 Other respondents observed that Sir Rupert’s existing guidance provided a framework for the types of cases that would qualify as intermediate cases, but thought more detail would be helpful. These arguments pointed out that allocation is often based on length of documents and the number of witnesses and experts, rather than actual work required on specific types of case. It was argued that providing additional details as to the criteria of intermediate cases would be especially useful with regard to the distinction between Bands 2 and 3; however, respondents were unclear as to what this further detail may constitute. Other comments focused on the need for specific clarity as to when a case can move from one FRC band to another, and what the criteria would be for cases to be considered exceptional and fall outside the scope of FRC altogether.
- 13.9 A number of defendant respondents, including insurers and travel companies, commented that, while the rationale used to define what may qualify as an intermediate case is sound, it may be misused by claimants seeking to exit FRC. They noted that this could be through such tactics as using more than two expert witnesses or indicating a trial length of more than three days. Others argued along similar lines, stating that rigidity can run counter to the needs of justice, and that scope for discretion should be built into the rules to account for anomalous cases. By contrast, it was also argued that the discretion to allocate as an intermediate case is sensible and will discourage satellite applications and preliminary issue trials; respondents noted that the streamlining of ‘statements of case’, witness evidence, and suggested trial times are all consistent with FRC aims.
- 13.10 Some respondents argued that providing greater clarity could also risk being overly prescriptive, and would therefore need to be accompanied by greater flexibility in how cases would be allocated to specific bands. However, one respondent suggested that where there are prescriptive rules and guidelines, this does not hinder judicial discretion in allocating cases to a different track.

#### *Complex cases*

- 13.11 The issue of complex cases, and exceptionality more broadly, was raised by a significant number of both defendant and claimant respondents and is closely linked to the above comments on guidance and band allocation. Similar points were raised as to those about the fast track – namely that complex cases cannot be determined simply by their monetary value. One respondent commented that intermediate cases are, by their nature, more complex, and therefore unsuitable for an accelerated timetable and require more tailored directions. Given a wide range in value and types of intermediate cases, several respondents were concerned that

the extension of FRC would disincentivise lawyers to act for litigants whose cases would cost more than the fixed reward.

- 13.12 Some respondents were concerned about the possibility of satellite litigation on the allocation of cases to bands. It was noted, in reference to Chapter 3, 3.2 of the consultation, that Band 4 is intended for ‘particularly complex tracked possession claims or housing disrepair claims’, whereas Band 3 covers other claims in those categories, with no clear definition as to what might constitute ‘particular complexity’. Respondents argued that this could lead to gaming by claimant solicitors who will assert that any given case is ‘particularly complex’, in order to push the case into Band 4.

#### *Costs budgeting*

- 13.13 Some respondents commented that the extension of FRC is the most suitable way for litigation costs to be controlled. They argued that, whilst costs management through costs budgeting is appropriate in larger cases, it has not worked well for those with a value of up to £100,000. Furthermore, one respondent explained that, in those cases, the introduction of costs budgeting has increased costs: first through adding layers of work as parties prepare then negotiate on budgets before attending Case Management Conference (CMC) hearings; and second, as conservative estimates of the costs to be incurred mean that budgets are set (and costs awarded when the bill presented is within the budget) at levels greater than would have been payable were costs scrutinised through Detailed Assessment at the conclusion of claims. They argued that there is a real benefit in FRC being extended in order to control the costs of litigation in cases where the value of the claim is less than £100,000.
- 13.14 Others, particularly claimant respondents, said they preferred costs budgeting as an alternative to FRC, as this enables costs to be controlled while also allowing for recovery based on whether costs have been reasonably and proportionately incurred. They suggested a more robust costs budgeting process would protect against disproportionate and rising costs.

#### *Exclusions*

- 13.15 In Chapter 7, 3.3–6 of his 2017 report, Sir Rupert outlines several types of case that should be excluded from FRC. Sir Rupert’s recommendations for exclusion were as follows:
- i. *Mesothelioma and other asbestos related lung diseases*: Sir Rupert noted that such cases are case managed in specific courts in specialist Asbestos Lists by judges experienced in this work. Furthermore, he argued that the Asbestos Lists are well used, operate very efficiently and have been the subject of few complaints from either claimants or defendant insurers; it would inevitably cause

inefficiencies if some of these claims were removed from the specialist management provided by Practice Direction 3D, and case managed differently from other mesothelioma claims.

- ii. *Some complex PI and professional negligence claims*: Sir Rupert stated that the criteria for allocation as an intermediate case, as outlined in Chapter 7, 3.2 of his FRC report, would exclude those complex PI and professional negligence cases which the Personal Injuries Bar Association and the Professional Negligence Bar Association maintain are unsuitable for FRC.
- iii. *Clinical negligence cases*: Sir Rupert recommended that most clinical negligence claims (above £25,000 in damages) will be unsuitable for fast track FRC, unless both breach of duty and causation have been admitted at an early stage.
- iv. Sir Rupert also recommended the following categories of case for inclusion, due to their inherent complexity: (a) some *multi-party cases*; (b) *actions against the police*; (c) *child sexual abuse claims*; and (d) *intellectual property cases*.

13.16 Several respondents mentioned types of cases they believed should either be excluded from FRC, or receive additional attention or alternative provisions within FRC:

- i. *International PI*: Respondents argued that cases involving an accident or injury abroad (outside of the gastric illness protocol) should be excluded from the intermediate track or in Band 4. These claims can be complex, and involve additional costs above those claims occurring within the jurisdiction – for example, translation costs for evidence and witness statements, the engagement of agents to investigate the locality, and the engagement of experts to consider foreign legal aspects and give views on local standards.
- ii. *Claims against public bodies*: A claimant respondent recommended that actions against the police should be excluded from FRC, and argued for extending this to claims against other public authorities relating to the exercise of executive powers. This would include claims for issues such as false imprisonment or Human Rights Act damages. It was argued that these claims have a wider value to society, involving serious issues relating to unlawful detention and treatment. They argued that clients that are not eligible for legal aid are likely to be deterred by the adverse costs risk even under FRC; there are also often difficulties around disclosure due to unreasonable behaviour.
- iii. *Child sexual abuse*: A number of respondents commented that all child abuse cases should be excluded from the FRC regime, noting that Sir Rupert indicated in Chapter 7, 3.6 of his 2017 report that they would ‘seldom be suitable’ for the intermediate track. It was suggested that the exclusion should apply to all cases of child abuse and neglect, and should not be limited to sexual abuse. This

exclusion would apply even where such cases may otherwise fall within the criteria outlined at paragraph 2.1 of the consultation paper. These respondents explained that this area of litigation is extremely sensitive and complex, arguing that it is essential that appropriately trained and experienced lawyers are involved throughout the process, and that fixed costs may jeopardise this, leading to a downgrading of expertise and increased commoditisation. It was noted that the complexity and sensitivity of these cases has historically been recognised by judges.

- iv. *Media cases*: One respondent argued that media cases are too complex to be allocated to any track other than the multi-track. As with other complex cases, the monetary value of the case does not reflect the value of non-monetary relief. The respondent explained that, where there is a defence of truth or a public interest defence in defamation proceedings, limiting disclosure to documents upon which a party relies could lead to serious injustice. It was also noted that disputes about what further documents the court should require to be disclosed are inevitable.
- v. *Product liability*: One respondent argued that product liability cases should not be suitable for FRC. They stated that this is because, generally, there is a significant amount of money and time spent at the pre-issue or investigation stage to identify the correct defendant, the appropriate cause of action, and the evidence relating to the defect. The correct defendant will be more complex to identify than in other PI claims due to the complex corporate structures, and the involvement of multiple parties such as the retailer, manufacturer, importer, and the consideration of the correct jurisdiction where the potential defendant is abroad. They argued that the appropriate cause of action is also complex, as it must be considered whether the claim should be brought under the Consumer Protection Act 1987, negligence, or breach of contract. Disclosure in product liability claims can also be considerable.

**14. Analysis of responses to Question 3 (ii): We seek your views, including any alternatives, on: the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;**

14.1 Nearly 56% (84) of respondents answered this question. Around 42% of the responses to this question disagreed with this proposal, echoing many of the arguments already mentioned regarding the need for clarity on guidance and band allocation. This includes comments that:

- It can be difficult for claimants to determine the appropriate band early on;
- Certain cases are not suitable for FRC, as set out above;
- Expert reports and the number of experts could be artificially limited, impacting on appropriate band allocation.

- 14.2 Around 15% of the respondents to this question were supportive of the Government's proposal, stating that the proposed criteria for allocation as an intermediate case would make the process simpler and control costs of the types of claims that would qualify.

**Question 3 (ii): Specific issues raised by respondents**

*Allocation and banding of intermediate cases*

- 14.3 As with the fast track, both claimant and defendant respondents agreed that the allocation criteria would capture a sufficiently broad number of cases. Some, however, raised concerns that this could lead to difficulties in distinguishing between Bands 2 and 3 and the cases suitable for each.
- 14.4 A number of respondents supported the proposals, saying they would ultimately simplify FRC. However, some respondents expressed concerns that the criteria outlined by Sir Rupert were too rigid, and could lead to some cases falling outside the intermediate bands for procedural reasons, such as needing an additional expert or because a trial would last longer than three days. Others similarly observed that document length limitations may lead to gamesmanship, where documents are deliberately drafted to exceed those limits to take them out of the intermediate bands. It was argued that catch-all criteria would be preferred, meaning that even if not all criteria are met, a case could still be considered in the intermediate bands.

*Expert witnesses and evidence*

- 14.5 One respondent was concerned that the streamlined intermediate cases procedures would place an artificial limit on the length of expert reports. They argued experts should be free to say what they need, in a relevant and proportionate way. Another respondent advised against any rule or prescription that the number of experts in itself should determine allocation. As noted earlier, other respondents were also concerned that written evidence could deliberately exceed limits in order to avoid being classified as an intermediate case.

*Judicial expertise and suitability*

- 14.6 A respondent noted that fast track trials are almost always heard in one day and are frequently heard by District Judges (DJs) and, increasingly, Deputy District Judges (DDJs). They added that the increase in the number of cases heard by the latter indicates their flexibility, and is an attraction in terms of staffing the courts. The proposal to include cases of up to £100,000 within the fast track, including hearings of up to three days, raises a question as to which judges would hear these cases: Circuit Judges or DJs, or DDJs.

**15. Analysis of responses to Question 3 (iii): We seek your views, including any alternatives, on: how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;**

- 15.1 Responses to this question generally focused on the suitability of the proposed procedures for allocation as an intermediate case, and the degree to which penalties should apply for unsuccessful challenges to allocation. As with previous questions, a number of respondents who disagreed with the proposals suggested modifications that, in their view, would make them more workable.
- 15.2 Around 54% of respondents (80) answered this question. Some said that the band structure was too vague, and would need more bands to cover more eventualities. Others said that both quantum and liability should be considered, rather than just the former. Expecting agreement on the track pre-action was also deemed unrealistic by some respondents. Those who were supportive of our proposals around provisional allocation commented that requiring the parties to state their position at the pre-action stage encourages the parties to reach an agreement.

**Question 3 (iii): Specific issues raised by respondents**

*Allocation procedure and challenges*

- 15.3 A few claimant respondents were critical of the proposal to allocate claims at the outset, saying this would not guarantee that cases are assigned to the correct band, but possibly have the opposite effect and cause more disputes and unnecessary costs later on. One suggestion was to assess a claim for allocation at different stages such as when causation is known, which is not possible to do solely at the pre-action stage. Respondents also pointed out that the onus seemed to be on the parties to decide and agree upon the allocation of a case, which could be challenged for a costs liability of £300. They raised concerns that defendants could challenge every allocation, as the benefits of succeeding in an application far outweigh the risks of paying £300. However, it was suggested that claimants would spend far more than £300 in persuading the court they have allocated the claim correctly, which will not be recoverable from the defendant.
- 15.4 A few respondents acknowledged that there would be instances where a party has reasonable grounds to argue that a claim should be allocated to a different band, particularly if there is a change in the nature of the case since the pre-action stage. They argued it should remain open to the parties to challenge the allocation, but, if they are unsuccessful, they should bear a costs liability, to prevent speculative challenges to allocation.
- 15.5 Other respondents argued that costs penalties would be necessary to deter unsuccessful challenges, otherwise the courts could face a significant volume of

challenges which would increase costs, cause delays, and contribute to uncertainty. The proposed penalty of £300, however, was seen as too low, with a few respondents advocating higher penalties between £500 and £1,000 to deter against speculative challenges.

*Judicial discretion in allocation*

- 15.6 Some claimant respondents were concerned that defendants would routinely challenge all allocations in order to move to lower bands. A remedy for this would be strong judicial control over allocation, a proposal supported by both claimant and defendant respondents. This would also apply to the awarding of penalties for unsuccessful challenges to allocation.
- 15.7 Others argued for the need for the Rules of Court on allocation to include the full criteria outlined by Sir Rupert to assist the Court in resolving the question of allocation, where parties are in dispute about track allocation; they suggested that some disputes of particular complexity could not be fairly accommodated in the fast track even if the monetary value aligned.
- 15.8 One respondent argued that there is a risk that parties will seek to have claims allocated to the multi-track in order to avoid FRC, and that parties will seek to present inflated claims in order to maximise their solicitors' costs recovery. They proposed that the rules should apply sanctions for deliberate or cynical attempts to avoid FRC. Another respondent suggested requiring the parties to state their position at the pre-action stage will encourage the parties to reach agreement; if they fail to do so, the court could allocate the case as it deemed appropriate, taking the decision out of the hands of the parties.

*Case Management Conference (CMC)*

- 15.9 One respondent was sceptical that the issues that emerge at trial can be fully or properly anticipated at the CMC stage. Moreover, they argued, full consideration of the range of issues and experts may make CMC unduly contentious and prolonged. It may be difficult to conclude evidence, submissions, and judgment in three days if the court has heard from multiple expert witnesses. They argued intermediate cases, should they last more than three days, should be automatically excluded from FRC.

- 16. Analysis of responses to Question 3 (iv): We seek your views, including any alternatives, 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;**
- 16.1 This question and its subsets were tied to issues raised in earlier sections of the consultation paper, specifically around how certain aspects of FRC would work in practice. Slightly less than half of respondents (70) answered this question, with over 40% of those supporting the proposed four-band structure. Those in favour of the proposal argued that it would increase engagement and cooperation between parties, while also leading to more early settlements and greater flexibility where necessary, so that the nuances of individual cases could be matched to the appropriate band. Furthermore, as most claims would fall into Bands 2 or 3, it would be clear which cases would fall into the extremities of the structure at Bands 1 and 4. Other respondents, while agreeing with this in principle, argued that this was partly contingent on parties recognising that Band 4 should be reserved for cases with clear and exceptional differentiators. Nonetheless, for these respondents, the proposed four-band structure was preferable to the merging of Bands 2 and 3, as that would inevitably drive up the FRC for cases which should have been dealt with under Band 2.
- 16.2 Roughly a third of those who responded to this question disagreed with the proposal around band structure. Common reasons for disagreeing included:
- The band structure proposals are too vague, and greater certainty is needed;
  - Information on the bands for intermediate cases gives little detail on the specific differences between them and how to decide complexity with relation to each;
  - On the proposed thresholds, there is a risk this would drive incorrect behaviours towards litigating in order to secure higher costs. Fees would need to reflect either the need to frontload claims or to remove pre-action costs from the regime altogether.
- 16.3 Some respondents argued that it seemed logical that removing one band would reduce the possibility of dispute and remove additional complexity. It was suggested that three bands may, in rather broad terms, properly accommodate complex claims at the highest band; simple claims which will be allocated to the lowest band; and a middle band which would effectively deal with cases falling in between.
- 16.4 Some opposition to the proposed four-band structure was caveated by the recognition that there were, nonetheless, positive aspects to it. It was noted that having fewer bands could resolve disputes, but by the same token could also lead to more acute disagreements over appropriate banding. Respondents argued that

there will always be cases which are borderline, and reducing the number of bands will not resolve this.

**17. Analysis of responses to Question 3 (v): We seek your views, including any alternatives, on: whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.**

- 17.1 This question allowed respondents to expand on their observations, made earlier in the consultation, regarding how much detail is required in determining the bands into which intermediate cases will fall. 61% of respondents (41) answered this question, with some 31% of those respondents suggesting more certainty was needed about banding. A common critique was that without additional clarity as to which band applies, more time would be wasted, and more costs incurred. It was suggested this would be especially true when it comes to distinguishing between Bands 2 and 3, where more guidance would be needed as to the features of a case for each band. One respondent commented that if court fees are retained at multi-track levels, cases should have access to the same level of case management and flexibility as multi-track cases.
- 17.2 Roughly 20% of respondents to this question were supportive of the way in which cases would be allocated within the proposed four-band structure. Many nonetheless acknowledged that additional clarity would be helpful as to how claims should be banded. The remaining respondents who neither directly agreed nor disagreed made similar observations and offered workable changes to improve the policy proposals, which are outlined below.
- 17.3 Respondents noted that the crucial element in determining the distinction between bands hinges on clarity around complexity and exceptionality. Many respondents felt that if this is not properly defined, it would be unclear which cases would be considered more standard, and therefore fall into Bands 2 and 3, and which cases would need to be in Band 4. It was suggested this could become especially challenging with complex PI and professional negligence claims; this would, furthermore, make it harder for parties to agree where a case should sit, meaning fewer claims would be settled pre-issue and satellite litigation would rise. Respondents reiterated previous arguments that band allocation should not simply be determined based on monetary value, but also by the nature and complexity of a case, reinforcing the need for a clear definition, along with the possibility to move bands as questions of causation and quantum become more evident, for example in cases of serious injury. It was argued that clarity would not only be needed in terms of what falls into each band, but also regarding when each stage starts and finishes, and on how Part 8 claims will tie in with the proposals for multiple claimants.

- 17.4 One respondent suggested that a clear definition could be achieved through a checklist of factors, including: value, novelty of legal issues, and likely time estimate for trial, among other potential factors. At the same time, respondents also felt that being too prescriptive would lead to a system that is inflexible and unnecessarily rigid. This could be counterbalanced by a wide discretion of judges to consider all the circumstances of the case in determining the suitable band, provided that the way this discretion was exercised followed broadly consistent patterns.

### **Question 3 (v): Specific issues raised by respondents**

#### *Standard disclosure removal*

- 17.5 One respondent highlighted the importance of disclosure in a case's progression to trial. However, they suggested the proposal that standard disclosure be removed (save in PI cases) and replaced by an obligation to disclose only the documents upon which a party relies, together with any other documents specifically ordered by the court, is a significant change that may need further consideration. The respondent contended that the requirement to disclose documents which are unhelpful is a cornerstone of a fair trial. To remove this obligation – in cases that could be worth as much as £100,000 – would be a significant reform designed to cut costs, but which may have other unintended consequences that need to be further examined.

## **Question 4: Judicial Review**

### **18. Overview: Judicial Review**

- 18.1 Chapter 6 of the consultation paper considered proposals relating to the costs of litigation in JR cases, based on two of Sir Rupert's recommendations: the extension of the 'Aarhus' rule across all JR cases in which caps are placed on both claimant and defendant liability; and the introduction of costs budgeting for 'heavy' JR cases.
- 18.2 In the consultation, the Government had already indicated its agreement with the recommendation of costs budgeting, but decided not to extend the 'Aarhus' rule across all JRs. It is on that basis that the Government sought views on Sir Rupert's recommendation of the introduction of costs budgeting for all 'heavy' JR cases.

### **19. Analysis of responses to 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?**

- 19.1 Around 44% of respondents (65) answered this question. Of those who responded, a third were supportive of the proposals to introduce costs budgeting in JRs, arguing that costs budgeting has generally worked effectively to create greater

costs predictability for losing parties. It was suggested that JR cases should not be exempt from the same approach, especially given the success of costs management in other areas of civil litigation.

- 19.2 Around 43% of the responses were in opposition to the proposal. Some argued that the adverse effects would outweigh the potential benefits; for example, rather than reducing overall costs, it could instead lead to earlier disputes. Another objection was based on principle, in that costs barriers limit the redress available to marginalised groups for unlawful decision-making by public bodies. There were additional concerns that, whilst costs budgeting is intended to control the costs paid, introducing it to JR proceedings may drive higher costs than are currently incurred. Inflated costs budgets may allow parties to avoid the scrutiny afforded by a Detailed Assessment of their costs.
- 19.3 Some claimant respondents argued that costs budgeting would not produce the desired outcome and may create new problems. One explained that costs budgeting can only be undertaken in respect of future costs, that is the costs to be incurred after the court considers the budgets at a costs management hearing. A large part of the costs and the direction of the case will have been settled before that can arise, meaning much of the work would have been frontloaded but may not have been otherwise done. Others said that costs budgeting is a costly exercise with the parties trying to include all eventualities, which can often lead to costs being inflated to allow for this. Some defendant respondents approached the issue from a different angle, but arrived at the same conclusion that costs budgeting could increase costs. These respondents said that claimants will include contingencies in their budgets to reflect the possible defences which may be raised, in turn resulting in an increase to the sum claimed in the costs budget.
- 19.4 Other respondents noted that JRs are typically brought against the state, which theoretically has unlimited means: this could create an inequality of arms. This would have a particular impact on legal aid firms who do legally aided JRs, as they are already subject to stringent costs control by the Legal Aid Agency once likely costs exceed £25,000, via High Cost Case Contracts.
- 19.5 One claimant respondent noted that relatively few cases would be affected, and asked for additional practical guidance on how the proposals would work. They noted that parties would be required to submit a simpler form of Precedent H at an early stage of the proceedings and the court could make a costs management order at the stage of granting permission. This respondent queried when the Precedent H would need to be filed and what the position would be in urgent cases where interim relief would be required and there is limited time to issue a claim or provide estimates of likely costs. They further questioned whether there would be provisions for costs management orders at a later stage in cases that were initially likely to be

less than £100,000 when costs estimates were first made, but then increased over the threshold.

## Question 5: Next Steps

### 20. Overview: Next Steps

20.1 This question in the consultation paper provided respondents with an opportunity to consider the future of FRC once reforms had bedded in, and what additional issues they believe may need to be examined.

### 21. Analysis of responses to Question 5: We seek your views on the proposals in this report otherwise not covered in the previous questions throughout the document.

21.1 Around 30% of respondents (45) answered this question. Nearly half of the responses to this question were opposed to the Government progressing with the FRC proposals as laid out. However, roughly a quarter supported progressing with these proposals, and the remaining respondents offered additional suggestions and workable changes to improve the proposals, which are outlined below.

#### Question 5: Specific issues raised by respondents

##### *Review of inflation uprating*

21.2 As noted above in the analysis of responses on both the fast track and on intermediate cases, many respondents said that FRC would need to be uprated for inflation, and this would need to be regularly reviewed. One insurer said a review should occur every three years, and that FRC should be uprated for inflation in line with Sir Rupert's suggestion. However, they also proposed that any subsequent uprating should only apply to cases starting after the review date and not be applied retrospectively to prevent ambiguity. Other defendant respondents suggested a review after two years to assess the degree to which access to justice has been advanced and proportionate costs maintained.

21.3 Another respondent argued that reviews must reflect inflation, but also consider evidence of the actual time and costs spent on litigating certain types of claims so as to adjust FRC accordingly.

##### *Alternative Dispute Resolution (ADR) fees and translation services*

21.4 An insurance respondent said consideration should be given to creating a fixed costs framework to cover other disbursements such as ADR fees and translation services. They suggested fixed costs for disbursements will ensure that there is

consistency, certainty and some control over the costs not covered by the FRC regime.

*Claimant premium*

- 21.5 One respondent suggested the proposed FRC rates do not draw any distinction between claimants and defendants, arguing that costs are higher for the former because of the additional work required in investigating the claim, the liability for court fees, and the responsibility for trial bundles. It was suggested that this is almost invariably recognised by the judge in cases where costs are being budgeted. The respondent argued that the proposed costs grids should be adjusted to make a modest additional allowance for claimants.

*Access to justice for defendants*

- 21.6 A defendant respondent argued that the proposed changes would penalise defendants and encourage them to settle, irrespective of a claim's merits, shifting the balance away from defendants to defend against these and other exaggerated claims. This defendant did not provide additional rationale for this.

*Experts and length of documents*

- 21.7 A few respondents recommended a schedule of fixed fees for the most common experts in future; this would be in line with other FRC schemes. They argued if fees are claimed in excess of the set fees then, provided there is 'good reason' (as opposed to the test of exceptionality), these disbursements should be recoverable. However, to account for unpredictability in high value cases, disbursements would need to be somewhat flexible. Another respondent suggested that clearer rules on length of documents and relevant evidence would lead to more timely resolutions of claims, agreeing with Sir Rupert's recommendation of appending core documents to a party's statement of case.

*Trials adjourned at short notice*

- 21.8 A professional body noted that the number of trials being adjourned at short notice has increased dramatically, with a particular impact on the PI market. They argued that neither the current nor proposed FRC regimes would offer any safeguard to provide for the payment of advocacy fees when cases are adjourned either at court or shortly before the trial date. They suggested that in circumstances when a trial is removed from the list with less than 48 hours' notice, the advocate's fee for the adjourned trial should be payable *inter partes* at 100% if the matter does not proceed on the day of the trial, and 75% if it is removed from the list within 48 hours of the day listed for trial.

*Disposal hearings*

- 21.9 An insurer respondent commented that careful consideration should be given as to how disposal hearings are dealt with under FRC, to ensure that they are appropriately catered for and the recoverable costs reflect their more straightforward nature. It was noted by this respondent that, currently, they are considered to be a trial and FRC are payable at the pre-trial level even though very little work has been necessary by the claimant's solicitor, as often these cases settle shortly after proceedings are issued.

## **Question 6: Impact Assessment**

### **22. Overview: Impact Assessment**

- 22.1 As part of the consultation paper, the Government asked respondents to provide further data and input regarding the various proposals on extending FRC.

### **23. Analysis of responses to 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?**

- 23.1 Around 30% of respondents (45) provided additional data and input regarding various proposals in the consultation paper. Some felt that the data set used was small in relation to the significance and detail of the FRC bands proposed, and that it did not come from a wide enough cross-section of sources.

### **Question 6: Specific issues raised by respondents**

*Access to justice*

- 23.2 One insurer stated that FRC should promote access to justice, arguing that claimants are more likely to initiate proceedings if they have greater certainty over what their likely total exposure will be if they were to be unsuccessful. Furthermore, they argued that the introduction of FRC would address the inequity brought about by the introduction of QOCS, which allows genuine PI claimants to litigate without fear of having to pay the defendant's costs. They maintained that defendants rarely have a choice about whether they should be party to proceedings, and have to respond to the claim as brought.
- 23.3 Other respondents agreed that prohibitive costs, in principle, prevent access to justice, but were concerned with the assumption inherent in any FRC regime that if the damages paid are low, the costs of bringing such claims can be low. This position is predicated on the belief that in a low damages claim there is less work involved, echoing comments from a variety of respondents about the disparity between the value of claims and their overall importance. Extending FRC to all civil

claims with low damages creates the impression of access to justice through the certainty of costs risk being known in advance. However, it was argued that many clients, especially in claims against the state where there could be an inequality of arms, are not deterred by uncertainty over the amount of risk, but by any risk at all, disincentivising otherwise meritorious claims. This would have a particularly adverse effect on claimants who are not motivated by monetary gain, but are seeking to change the law and practices of state agencies.

*Costs controls*

- 23.4 One insurer said that the proposed figures for FRC would require downward revision in order to produce reasonable and proportionate outcomes, as its own data suggested that costs reductions based on the FRC proposals would not be seen in all bands. They argued that this is, in part, due to a lack of clarity on how complexity and exceptionality would result in certain intermediate cases being banded, meaning that most costs controls would likely only take place in Bands 2 and 3. Conversely, they stated, due to the fact that fast track cases and allocation criteria in the fast track are more clearly defined, it is easier to see where and how the desired costs controls would materialise.

*Stages of trial*

- 23.5 An insurance firm noted that the stages of trial would be out of date with FRC. They argued that the stages that are used in the proposed table were determined by identifying the payment of various fees within the datasets as the case progressed towards trial. They stated that those in the proposed table became the triggers for a change of stage as the case progressed. The current stages are:
- i. Post-issue, pre-allocation;
  - ii. Post-allocation, pre-listing;
  - iii. Post-listing, pre-trial.
- 23.6 This respondent argued that these stages have worked well in the past, but are no longer working appropriately because of a practical change implemented by the majority of county courts in England and Wales. Currently, they stated, the courts allocate cases to track at the same time that they list the case for trial; thus, in effect, the triggers of 'allocation' and 'trial listing' occur simultaneously. They explained that this means that a defendant is unjustly deprived of any opportunity to settle the case within the 'post-allocation, pre-listing' stage. Accordingly, this respondent proposed that the trial listing trigger to the change of stage is amended, so it is consistent with Stage 6 of the proposed FRC intermediate case stages to '14 days before Trial'. This would change the stages to the following:
- i. Post-issue, pre-allocation;

- ii. Post-allocation up to 14 days before date of trial;
- iii. Less than 14 days before trial.

*Inequality of arms*

- 23.7 A professional body expressed its concern over the impact that the FRC proposals would have in exacerbating the existing inequality of arms for claims against public authorities. They argued that, while this would force a cap on the claimant's costs and limit what work their legal team could do, it would have no impact on the way that a state body could and would litigate. A public authority defendant would not have to limit their expenditure on a case to the cap imposed, given the substantial resources it can access.
- 23.8 Furthermore, this same respondent argued that the proposal for provisional allocation of intermediate cases to be based on agreement between parties would disadvantage individual claimants. They stated it would usually be in a defendant's interest to refuse to agree that a case should be allocated to a higher band, or to the multi-track and outside the FRC regime. It was suggested where that defendant is a public authority, with substantial funds and the ability not to have to limit their work to a costs cap, they will almost always refuse to agree, and the possibility of a costs liability of only £300 will not provide any disincentive to a public authority. Where the monetary value in cases is low, this will almost always be in issue. This will result in many more allocation hearings and additional work for all parties and the courts.

## Questions 7–10: Equalities Statement

### 24. Overview: Equalities Statement

- 24.1 The final four questions in the consultation paper offered respondents a chance to comment on the equalities impacts of the proposals, particularly on individuals with protected characteristics, and to offer their views on how such impacts might be mitigated.
- 25. Analysis of responses to Question 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.**
- 25.1 30% of respondents (44) answered this question. Around 20% of these respondents were positive, and believed that the proposed options for reform were in line with the Equality Act 2010, while 72% believed the proposals ran contrary to it (see below). The remaining 10% suggested that the proposals would be more in line with the Equality Act if slight adjustments were made.

## **Question 7: Specific issues raised by respondents**

### *Impact on vulnerable and protected parties*

- 25.2 Claimant respondents argued that the consultation paper does not appear to consider how an extension of FRC could result in discrimination, or how it would impact on vulnerable claimants with certain protected characteristics who may require interpreters, or those with disabilities such as the deaf or the blind. It was argued these claimants may require specific forms of communication to enable them to navigate a legal claim, which would inevitably produce additional costs that would not otherwise have been incurred without such characteristics or disabilities. It was stated that this additional work would not be recoverable under the FRC proposals.
- 25.3 Other respondents were concerned that the impact of the proposals would be felt disproportionately by those on lower or with no incomes, leading to potential discrimination based on earnings. A few respondents argued this is because costs set by reference to damages would impede the ability of those receiving lower damages to find solicitors willing to take on claims and pursue them, given that solicitors may be less likely to take on cases deemed to be less profitable. Accordingly, it was suggested the proposed FRC reforms would disproportionately affect those on lower incomes (e.g. women, children, the elderly, part-time workers), as the pool of solicitors that may be called upon to take a case may become more inaccessible to them (given that solicitors may be interested in taking on more profitable cases subject to FRC). Respondents also reinforced previous arguments that there would be an adverse effect on vulnerable clients in social housing and poor privately rented accommodation, who often have underlying issues that contribute to their need for legal representation in the first place.
- 25.4 A number of defendant respondents noted that the proposals would apply to all court users, and therefore claimants with certain protected characteristics, as well as those without, should see their claims being resolved more quickly. They argued that the transparency over recoverability of costs and a standardised and streamlined process with more accurate information at the outset would be an asset to all court users, regardless of their personal qualities, thus improving access to justice.
- 25.5 One defendant respondent identified that people with mental impairments would likely require more assistance to bring a claim, increasing the costs of representation more than those relating to a claimant without a mental impairment. It was noted that this may require persons under a mental impairment sufficient to render them without capacity within the meaning of the Mental Capacity Act 2005 to be excluded from the FRC proposals. However, the respondent also emphasised that, in such circumstances, the onus must be on the claimant's representatives to

assert a lack of capacity and to do so at the outset of the claim. This exception would only apply to mental incapacity predating the accident which is the subject of the claim – any incident causing mental incapacity is highly likely to exceed £100,000 in value and, therefore, to be outside of the proposals in any event.

**26. Analysis of responses to Question 8: Do you agree that we have correctly identified the extent of the impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.**

26.1 Of the 149 respondents to the consultation, around 31% (46) answered this question, with 76% of those who responded arguing that the range of impacts were not correctly identified under each of the proposed reforms, with many focusing specifically on the potential impact on vulnerable people. Around 22% of responses to this question were positive, and argued the Government had correctly identified the range of impacts.

26.2 The impacts outlined below are those that were raised specifically in relation to this question, and which have not already been or will not subsequently be addressed in detail elsewhere in this response.

**Question 8: Specific issues raised by respondents**

*Adherence to the CPR as a means to control costs*

26.3 One professional body cautioned that FRC only affects costs that a successful party can recover from the unsuccessful party; the actual costs a party must incur in commercial litigation are dictated by the steps required by the CPR to take a case to trial, not by the costs it might expect to recover. They said that removing the additional costs introduced by costs budgeting, determining in advance the level of recoverable costs, or altering the costs recovery regime in other ways will not control the costs of litigation. They added that the costs of litigation will only be controlled if the underlying steps required by the CPR are addressed.

*Extra assistance and protected characteristics*

26.4 Claimant respondents highlighted that the Equalities Statement did not address suggestions that FRC does not allow for the additional costs involved for clients who require extra assistance. One respondent acknowledged that the statement's findings on indirect discrimination recognise the potential disproportionate impact on individuals with regards to age, sex, or employment status, but contends that it did not consider whether that impact is justified.

26.5 Other claimant respondents said there was a failure to consider access to justice implications for people with protected characteristics who bring claims against the state or against private organisations under the Equality Act 2010. This is in keeping with those who argued, in response to Question 7, that the extension of

FRC might have a particular impact on vulnerable claimants (see above paragraphs 25.2–5). One respondent suggested the range of impacts that could additionally be considered include, among others: inability to receive advice to resolve claims at an early stage; inability to secure expert legal representation to bring claims through the court system; inability to enforce rights to non-discriminatory treatment; and, inability to challenge unlawful acts by the state.

- 26.6 Respondents further elaborated that it is incorrect to assume that either the overall willingness of claimants to bring a claim will remain unchanged, or that there would be no aggregate impact on the willingness of claimant lawyers to take on cases. They contended that there is insufficient evidence to support the idea that others would enter the market or that existing providers would expand to meet claimant demand.

*Timing of proposals*

- 26.7 One claimant representative group queried the timing of the proposals. They argued that this would be premature, as it would first be necessary to ensure the application of fixed costs in existing FRC regimes is complete.

**27. Analysis of responses to Question 9: Do you agree that we have correctly identified the extent of the impacts under each of these proposals?**

- 27.1 Around 32% of respondents (48) answered this question. Of those who answered, around 55% were in opposition and argued that the extent of the impacts under each of the proposals were not correctly identified. Around 43% of responses were positive, and believed the Government correctly identified the extent of the impacts under each of the proposed reforms. As above, this section only considers additional points raised specifically in relation to this question which have not already been addressed in detail elsewhere in the response.

**Question 9: Specific issues raised by respondents**

*Impact on legal aid*

- 27.2 A number of claimant respondents were concerned about the impact of extending FRC on legal aid practices, arguing that many would close as a result. They said that this, in turn, would make it harder for claimants to find a legal aid solicitor to take on a case, exacerbating what they saw as a growing problem of legal aid ‘advice deserts’, particularly in housing cases. They argued that potential recipients of legal aid are already more likely to be vulnerable, and cautioned that the proposals would have a disproportionate and discriminatory effect on those with protected characteristics. They suggested that this problem, while most pronounced in areas of law where legal aid has been reduced, would extend to other areas too, undermining the quality of representation or eliminating it altogether.

- 27.3 Highlighting the potential impacts in the area of housing cases, claimant respondents argued that extending FRC would result in firms being unable to take on disrepair claims under CFAs. They noted that the level of compensation in disrepair claims tends to be low, although the importance is often not reflected in the claim's monetary value. FRC, however, would only be viable to run where the levels of damages being sought are relatively high, since a large proportion of recoverable costs are based on a percentage of damages. It was argued that this would have an acute impact on the most vulnerable, as they tend to be the types of tenants who bring disrepair claims. In turn, they suggested, there is a link between the vulnerability of the client and the likely higher costs of a claim, meaning that as the vulnerability of a client increases, the likelihood of being able to find a solicitor to take on a case will decrease.
- 27.4 There was an additional concern, amongst some respondents, that claimant lawyers would not set their legal fees equal to the proposed FRC levels. As a result, some respondents argued it would not be financially viable to run housing cases at these levels, as this would mean running cases at a substantial loss.

*Litigants in person*

- 27.5 A few claimant respondents pointed to the rise in litigants in person (LiPs), and aired the possibility of an increase in LiPs if the extension of FRC leads to barriers in obtaining legal representation. They argued this would lead to additional costs and administrative burdens. These respondents contended that this issue was not sufficiently considered in the consultation paper. Some also commented that it was unclear whether LiPs would be covered by the proposals, arguing that consideration should be given to whether a LiP's costs should be fixed, and to what should happen if a party is represented for part of the proceedings and acts in person for the remainder. There was recognition, however, that the current system does make some accommodations for extra time that may be needed. They suggested an allowance for an uplift where an individual would inevitably have to put more work into a claim.

*ADR practitioners*

- 27.6 One arbitrator argued that the impact of these proposals on ADR practitioners has not been considered either in the consultation or IA. They pointed out that the IA acknowledges a possible risk that claimant settlements might be lower in future if lawyers reduce the time and resource spent on cases in response to FRC and settlement negotiations lead to worse outcomes for claimants; it was suggested that this is largely dependent on the behaviour of defendants. The arbitrator also queried how these proposals might impact on how parties engage with ADR, and highlighted that ADR could be another means through which to achieve costs savings and efficiencies within the courts.

**28. Analysis of responses to Question 10: Are there forms of mitigation in relation to impacts that we have not considered?**

- 28.1 Like the previous question, around 30% of respondents (48) provided an answer. Around half of the responses to this question were opposed to the proposals, and argued that there were forms of mitigation in relation to impacts that the Government did not consider, repeating previous arguments about the risks to vulnerable claimants and concerns about band allocation, among other comments. Around 36% of responses were positive and believed the forms of mitigation in relation to impacts were correctly identified, stating that the extension of FRC would promote access to justice and cut down on open-ended costs.
- 28.2 As above, this section considers only additional points raised specifically in relation to this question which have not already been addressed in detail elsewhere within the response.

**Question 10: Specific issues raised by respondents**

*Regular review*

- 28.3 A number of respondents suggested that a regular review of FRC would need to take place. One respondent argued that consumers and their representatives would benefit from additional detail about the specific proposals, as well as reassurance about the periodical review processes of FRC that will be undertaken, what indexation will be taken into account, and how the risks of both a loss of access to justice and any impact on the legal services market and its ability to meet consumer needs would be offset.

*Failure to comply*

- 28.4 One respondent highlighted that there is an ongoing problem of unreasonable behaviour or failure to comply with the CPR, with generally few or no sanctions being applied. According to the respondent, this is a problem because the actions of an uncooperative party could render a case uneconomic without fear of consequences, hindering access to justice by deterring claims from being issued. They recommended that FRC should be expanded to introduce fixed and transparent costs for failure to comply with Rules or Orders, either to ensure compliance or to compensate the other party for the losses incurred as a result.

# Chapter 5: The Way Forward

## 1. Extending FRC: The Way Forward

- 1.1 Having carefully analysed the responses to our consultation paper, the Government can now outline the way forward on extending FRC in civil cases.
- 1.2 What follows will, with specific reference to the questions asked in our consultation paper, set out the way in which the Government intends to implement the extension of FRC.
- 1.3 The Government does not address every point raised by respondents in this consultation response. Where a point is not reflected in the proposed way forward, this is because the Government was not satisfied that this point needed to be included.
- 1.4 The next formal step in the process of implementation will be for the Government to submit draft rules for consideration by the CPRC. While the formal response from the Government is as set out below, there are a number of issues which will require further consideration, by the Government with the CPRC and others, before the precise way forward can be finalised.
- 1.5 **On Vulnerability:** The Government has carefully considered the arguments raised by respondents in favour of additional costs provisions due to the general vulnerability of a party (see Chapter 4, paragraphs 25.2–5). We have also given consideration to the CJC report, *Vulnerable Witnesses and Parties within Civil Proceedings*, issued in February 2020 after our consultation had concluded, which makes a number of recommendations to improve the experience of vulnerable parties within civil cases.
- 1.6 Although we do not propose to define vulnerability generally, as this would risk being too prescriptive, the Government accepts that there may be grounds to make limited exceptions in FRC for specific vulnerabilities, rather than more expansive allowances that would be contrary to the objectives of FRC. As such, we make the following proposals (which are set out in more detail within paragraphs 24.1–7 of this chapter):
  - i. We propose that the new fast track FRC regime could cover the specific vulnerabilities set out in the guidance to the legal aid Family Advocacy Scheme, and that a specified, percentage uplift of FRC (25%, in keeping with the 25% bolt-on that is currently available under the Family Advocacy Scheme to those who '[have] difficulty giving instructions' as a result of a verified mental

impairment) could be available in respect of parties who meet these criteria, upon judicial certification. We will consider with the CPRC as to how the Directions Questionnaire could be amended to incorporate this percentage uplift.

- ii. We recognise that additional disbursements may be needed for specific vulnerabilities (such as where a sign language interpreter may be required). We will consider with the CPRC what arrangements are appropriate for disbursements and consistent with the aims of FRC.
- iii. In drafting the rules for consideration by the CPRC, we will consider whether the arrangements for settlements for protected parties (adults lacking mental capacity and children, as under RTA cases) should be extended to the new FRC regimes.

## Response to Question 1: The Fast Track

### 2. Overview: Response to Question 1

- 2.1 As our consultation paper made clear, it is the Government's intention to extend FRC to all fast track cases (of up to £25,000 in damages) in the county court, as originally proposed by Sir Rupert in his 2017 report.
- 2.2 Based on the responses to our questions about the fast track, the Government has drawn the following conclusions.

### 3. Government response to Question 1: Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out?

- 3.1 The Government agrees with Sir Rupert's recommendation that FRC should be extended to all other cases in the fast track and consulted on that basis. It is the Government's view, in line with Sir Rupert's recommendations, that all cases in the fast track are suitable for FRC, and their proposed allocation to the fast track means that they will be covered by FRC. It is the Government's intention that all fast track cases will be allocated to one of the four bands of complexity, as set out in existing FRC regimes. Details of these complexity bands are outlined in more detail within Chapter 3 of our consultation paper.
- 3.2 The consultation paper also considered the issue of ring-fencing counsel's fees. It recognised the argument that, when called upon early on in litigation proceedings, counsel's specialist knowledge can be beneficial both to clients and the efficiency of litigation. However, as we noted in our consultation paper, counsel is rarely instructed in cases outside of Band 4. In Chapter 5, 5.11 of his 2017 report, Sir Rupert recommends that fees for counsel should only be ring-fenced in Band 4 and in NIHL cases; Sir Rupert suggests that, '[in] relation to Bands 1, 2 and 3... [it] is for

solicitors to decide whether to do items of pre-trial work themselves or instruct counsel'. Given that few respondents engaged on this issue to offer any viable alternatives, it is the Government's intention to implement Sir Rupert's proposal.

**4. Government response to Question 1 (i): We seek your views, including any alternatives, on: the proposals for allocation of cases to Bands (including package holiday sickness);**

4.1 It is the Government's view that cases should be allocated as soon as is practicable to the appropriate band. In Chapter 5, 5.19 of his 2017 report, Sir Rupert sets out the procedure through which cases will be allocated to bands, with which the Government broadly agrees. This procedure includes amending the PAP to require pre-action agreement between parties as to (i) the appropriate track for a case, and (ii) the appropriate band. Both claimants and defendants should state their proposals in their respective letters of claim and response; both parties can either agree or set out the case for a different band, giving their reasons for doing so. At the allocation stage, a judge will then specify the band if the parties are unable to agree.

4.2 The Government believes that it is important for parties to be able to plan their litigation strategy with as much certainty as is reasonable, so parties should know the allocated band as soon as possible. Once a case is allocated to a band, the band should be revisited only in exceptional circumstances: for example, if substantial unfairness would be caused were the case to remain in its allocated band. In Chapter 5, 5.19 of his 2017 report, Sir Rupert recommends, and the Government agrees, that an unsuccessful band challenge should incur a costs liability of £150. In analysing the responses to the consultation, the Government has considered whether a higher figure, such as £300, might be more appropriate. While recognising that challenging band allocation without good reason to do so could amount to unreasonable behaviour incurring further costs penalties, which is expanded on further below, the Government intends to implement a costs liability of £150 as originally proposed, although this will be kept under general review.

4.3 The Government appreciates, as noted by both claimant and defendant respondents in their answers to this question, that cases will vary in their complexity, including within cases of a similar type. After careful consideration of the various views expressed in the consultation responses, the Government believes that the best way to deal with cases in the fast track that are sufficiently complex is to allocate them to a higher band. This will allow for an appropriate degree of flexibility, to ensure that the complexity of a case is considered where necessary, while also maintaining the principle of certain and proportionate costs. The Government does not believe that any additional measures, such as uplifts or bolt-ons, would be appropriate or beneficial for complex cases which otherwise fit

within a band of FRC: this would only complicate things further, and would tend to undermine the premise of a fixed costs regime.

- 4.4 Further to this, the Government does not consider it would be appropriate for it to provide any further guidance on case complexity. The Government has considered this issue carefully, as it was raised, with some force, by respondents acting for both claimants and defendants. Firstly, it is one thing to call for greater guidance, it is another to set it out: it is notable that neither Sir Rupert (and his assessors) nor respondents to the consultation were able to provide further detail specifying what this guidance might constitute. Secondly, and related to this first point, further guidance would risk being unnecessarily restrictive. That said, it may be that the courts will be able to give more guidance in the light of experience. As with other matters in this response, the Government will keep this issue under review. In any event, as indicated by Sir Rupert in Chapter 5, 5.20 of his 2017 report, the current provision in CPR 45.29J, enabling a party to exit FRC in the fast track in exceptional circumstances, would continue to apply.
- 4.5 Some respondents raised concerns about the banding of housing claims, suggesting that Bands 3 and 4 may not sufficiently capture the complexity of a case, or that these proposals may prevent the pursuit of meritorious claims. It is the Government's view that FRC would facilitate more appropriate resolution of housing disputes, to the benefit of all parties. The upfront certainty and transparency of costs that parties would face if a claim were to proceed to trial would encourage settlement where appropriate. At the same time, FRC ensures that costs remain proportionate, while disincentivising behaviours that would unnecessarily draw out a case. This means that barriers to making a claim and reaching a timely resolution are removed or lowered. Furthermore, the Government has not been presented with data showing why Bands 3 and 4 would be inappropriate for dealing with the types of housing cases suggested by Sir Rupert. As with all cases in the fast track, it is the Government's view that particularly complex cases of a certain type could be moved to a higher band.
- 4.6 The Government acknowledges the points made by various respondents about fundamental dishonesty, and has taken these on board. In particular, we have considered whether a case may go to a higher band of FRC if fundamental dishonesty is raised at a late stage. The Government does not think that it is necessary to provide any further detail on this at this stage, as it will be important for judges to exercise their discretion on the matter. Furthermore, the Government does not consider it appropriate to stipulate that a case may go to a higher band if fundamental dishonesty is raised at a late stage, as this may simply encourage more allegations of fundamental dishonesty from defendants earlier in proceedings. Rather, the timing and merits of raising fundamental dishonesty will be factors to be considered by the judge.

- 4.7 Consistent with Sir Rupert's 2017 recommendation, the Government believes that package holiday sickness claims should fall within Band 2. This is to reflect the fact that these claims are largely non-complex and involve standard information, with the costs mostly consistent with other claims that would fall within Band 2 (such as RTA claims). While some respondents have argued that incidents that occur abroad may incur additional costs, the Government does not believe these costs are sufficient or significant enough to warrant allocation to a higher band of complexity at the outset. The Government can also clarify that credit hire claims will fall into Band 1.
- 5. Government response to Question 1 (ii): We seek your views, including any alternatives, on: the proposals for multiple claims arising from the same cause of action;**
- 5.1 The clear view from stakeholders (including defendant respondents) in their consultation responses to this question is that a 10% FRC uplift for each additional claimant, in claims that arise from the same set of facts, is too low. In the light of representations from respondents, the Government has concluded that 25% FRC for each additional claimant is an appropriate figure.
- 5.2 Many respondents acknowledged that a duplication of work is involved for additional claimants, and that in many instances, multiple claimants share commonalities. However, the Government recognises that different claimants on the same claim might be affected in different ways. A 10% uplift may be insufficient to take into account these factors, or to properly remunerate claimant representatives in a way that reflects the level of additional work involved in taking on additional claimants. Furthermore, it is the Government's view that 10% may be too low to discourage referrals for additional claims to alternative solicitors, an issue that is avoided with a higher percentage that ensures client retention on such claims.
- 6. Government response to Question 1 (iii): We seek your views, including any alternatives, on: 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;**
- 6.1 Our consultation recognised that ensuring cases stay within the FRC regime and are not inappropriately allocated to the multi-track is a matter of judicial discretion. There is further scope for both claimants and defendants to submit additional information to assist in track allocation, and courts can hold allocation hearings if necessary. The Government is not currently persuaded that any revisions need to be made to the CPR to reinforce the role of judicial discretion in this process, but will discuss this with the CPRC in due course.

- 7. Government response to Question 1 (iv): We seek your views, including any alternatives, on: 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.**
- 7.1 As noted in Chapter 3 of the consultation paper, offers to settle are a vital component in litigation, and efforts to encourage early settlement continue to be welcomed by those from claimant and defendant perspectives, predicated on a penalty of higher costs where an offer to settle is made by one side but not beaten by the other at trial. Options for doing so include an uplift of FRC, or the awarding of indemnity costs. In Chapter 5, 2.6 of his 2017 report, Sir Rupert recommended an uplift on FRC of 30% or 40%, rather than indemnity costs. The Government agreed with this recommendation in principle and proposed a 35% uplift on FRC as a compromise between those two figures.
- 7.2 It is the Government's view that a percentage uplift on FRC is in keeping with the objectives of a fixed costs regime, in that it provides parties with certainty as to possible costs exposure, acts as an incentive for early settlement, and drives good behaviour. Establishing the right percentage uplift is, therefore, crucial to ensuring that Part 36 offers are effective both as an incentive to early settlement and as a deterrent to unreasonable behaviour. It is for this reason that the Government intends to implement an uplift of 35% of FRC, as proposed in the consultation. This would apply only to those stages after a Part 36 offer.
- 7.3 As mentioned in the analysis of responses, some respondents felt that an uplift of 35% would be too high. However, the Government believes that too low a penalty would be ineffective, in practice, to provide the necessary incentive for parties to make and/or accept reasonable offers to settle while insufficiently deterring poor behaviour. At the same time, it is the Government's view that too high a percentage uplift would be disproportionate, and unduly punish losing parties which may have had reasonable grounds to pursue a claim.
- 7.4 The Government does not propose to define further what amounts to unreasonable behaviour. In Chapter 5, 2.7 of his 2017 report, Sir Rupert refers to the judgment in *Dammermann v Lanyon Bowdler LLP* as providing sufficient direction on how to define and handle the issue of unreasonable behaviour. The judgment in *Dammermann* is clear that the court did not consider that it could 'usefully give general guidance in relation to the circumstances in which it will be appropriate for a court to decide whether a party "has behaved unreasonably"'.<sup>28</sup> The Government

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<sup>28</sup> *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269.

does not consider it appropriate to put forward a better definition, and considers that this issue is best left to the courts to determine.

- 7.5 As indicated in Chapter 3 of the consultation paper, the Government has carefully considered what sanctions should be imposed for unreasonable behaviour. This has included whether to award an uplift on FRC, indemnity costs (depending on the seriousness of the case), or some combination of the two. Having taken into account the various responses received on this issue, the Government has decided that the appropriate penalty for unreasonable behaviour is a fixed percentage uplift on FRC of 50%. The stages to which this uplift would apply would be decided by a judge on the basis of the nature and extent of the unreasonable behaviour. This will provide certainty as to the penalty that might be incurred, which is consistent with the objectives of FRC. It is right that the penalty for unreasonable behaviour should be higher than that which is given for not beating a rejected Part 36 offer (which is proposed to be 35%); the former is designed to encourage reasonable behaviour, while the latter is ill-judged.
- 7.6 The Government does not believe that awarding indemnity costs would be proportionate, as this may result in an award of costs which is significantly higher than FRC. Indemnity costs are typically 25–33% higher than standard costs. Based on these calculations, it is the Government's view that the 50% figure is a reasonable substitute to be applied to FRC.

## Response to Question 2: Noise Induced Hearing Loss (NIHL)

### 8. Overview: Response to Question 2

- 8.1 As indicated by Chapter 4 of the consultation paper, it is the Government's intention to implement a new process and separate grid of FRC for NIHL claims in the fast track valued below £25,000 in damages. This was initially proposed by Sir Rupert in his 2017 report and was based on the CJC's recommendations (see above).<sup>29</sup> As is also noted in our consultation paper, a minority of complex NIHL cases (such as test cases) are likely to be allocated to the multi-track for complexity and will therefore fall outside the FRC regime.
- 8.2 Based on the responses to our questions about NIHL, the Government has come to the following conclusions.

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<sup>29</sup> The CJC's 2017 report on fixed costs in NIHL claims is available to read here: <<https://www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf>>.

- 9. Government response to Question 2 and 2 (i): 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: the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response.**
- 9.1 The views expressed by respondents, whether supportive or not of these reforms, were constructive in highlighting issues to be considered in the introduction of a new pre-litigation process and draft letters of claim. While welcome and helpful, however, these suggestions would ultimately be both procedurally and operationally impractical. For instance, the independent audiologist accreditation scheme, which was recommended by respondents to assist with the claims process, would require a fully worked up scheme to be designed before implementation; this would be a time-consuming exercise for those designing the scheme. These suggestions could also, if implemented, potentially increase both court time and costs. As a result, the Government has concluded that these suggestions would not be appropriate to pursue.
- 9.2 The Government’s proposal to require certain mandatory actions to be taken by both claimants and defendants in letters of claim and response, as well as the proposed accompaniments to letters of claim, will facilitate more detailed assessments, enable more effective case management, and provide greater transparency and accountability. For these reasons, it is the Government’s view that the proposals set out in the consultation paper should be adopted, as they will be of overall benefit to NIHL claims.
- 10. Government response to Question 2 (ii): We seek your views, including any alternatives, on: the contents of the proposed standard directions, and the listing of separate preliminary trials.**
- 10.1 In considering post-litigation process improvements, the CJC noted, and the Government agrees, that standard directions would create a more streamlined approach and help parties and the courts manage NIHL cases more efficiently. However, despite this agreement on the benefits of standard directions in principle, the CJC could not reach a conclusion as to their content. Instead, it argued that this is an issue for the judiciary, with consideration being given to examples adopted by DJs in the county court as an initial starting point. As such, the Government considers that the industry may wish to convene a working group in order to explore these issues further.
- 10.2 The Government had previously indicated that there should be tighter controls on listing NIHL cases for preliminary issue trials, and originally took the view that they should be discouraged, apart from in the rarest of circumstances. After reviewing

the responses to this question, the Government has recognised that there may be scope for preliminary trials to assist in deciding issues in dispute. It is the Government's view that preliminary trials should be encouraged where they serve this purpose but should otherwise be discouraged where they would be superfluous, as holding two separate trials runs the risk of being disproportionate and creating additional costs, rather than reducing costs. In the event that a preliminary trial does take place, the FRC set out in the CJC's report should still apply to that trial.

## Response to Question 3: Intermediate Cases

### 11. Overview: Response to Question 3

11.1 In Chapter 5 of our consultation paper, the Government asked respondents to consider the proposed extension of the fast track to cover the 'intermediate' cases identified by Sir Rupert. As we have previously outlined, the Government does not see the need for introducing a new track, given the costs and complexity that this would involve. Instead, we proposed that these intermediate cases would be allocated to an expanded fast track and would be subject to FRC.

11.2 Based on the responses to our questions about intermediate cases, the Government has drawn the following conclusions.

### 12. Government response to Question 3 and 3 (i): 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;

12.1 After careful consideration of responses both for and against this proposal, it remains the Government's intention to proceed with the proposed expansion of the fast track to include intermediate cases. The creation of a new track would involve considerable complexity and a costly implementation process, which the Government does not believe would be justified when an expansion of the fast track would be simpler and more consistent. Instead, an expanded fast track would satisfy the objectives of encouraging greater efficiency, retaining proportionate costs, and providing upfront clarity on costs. As a result, all parties would be able to make informed decisions about whether to pursue or defend a claim, as well as control costs in simpler cases, which would prove especially helpful to small and medium enterprises (SMEs) and others who would otherwise be unable to litigate. The Government would also like to re-emphasise that allocation as an intermediate case subject to FRC will not just be subject to monetary value, but also to a range of other factors, as set out in Chapter 5 of our consultation paper. We can also

confirm that the allocation of an intermediate case to a given band of complexity will be subject to the factors outlined in Chapter 5 of our consultation.

- 12.2 The proposed intermediate cases will remain subject to the framework outlined for the intermediate track, as set out by Sir Rupert at Chapter 7, 3.2 of his 2017 report. This means, for example, that a trial of an intermediate case in the expanded fast track could last up to three days.
- 12.3 As indicated in the consultation paper, the Government intends to retain the existing multi-track court fees for new intermediate cases until the reforms have had time to bed in.
- 12.4 The consultation paper outlined Sir Rupert's proposals to exclude certain types of cases that would not fit the criteria for allocation as an intermediate case. As we have already seen, a significant proportion of respondents agreed with these proposals, expressing views that are recognised and shared by the Government (as to the inherent unsuitability of certain cases as intermediate cases, for reasons such as complexity). In short, the Government will adopt Sir Rupert's proposals (as outlined in Chapter 7, 3.3–6 of his FRC report) and agrees, at least for the time being, that the following cases should be excluded from FRC, either (i) as a class, or (ii) because the case is a particularly complex example of a class which is otherwise suitable for FRC. The below list is not set in stone, and may be reviewed in the light of experience or further developments in Government policy. It is the Government's intention that low value clinical negligence cases, for example, should be subject to FRC when a bespoke regime has been confirmed by DHSC. Further to this, it remains the Government's intention to broaden the scope of cases covered by FRC, but this is best done in an incremental way.
- 12.5 The Government can confirm that the following categories of case will be excluded, as categories, from the expanded fast track at this stage:
- i. Mesothelioma and other asbestos related claims;
  - ii. Clinical negligence cases;
  - iii. Actions against the police;
  - iv. Child sexual abuse claims;
  - v. Intellectual property cases.
- 12.6 Sir Rupert also recommended that certain cases would fall outside of FRC by reason of complexity, such as some multi-party actions and complex PI and professional negligence claims. The Government agrees that there will be cases, of whatever category, which are particularly complex and, while for under £100,000 in damages, do not therefore comply with the criteria for intermediate cases.

**13. Government response to Question 3 (ii): We seek your views, including any alternatives, on: the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;**

- 13.1 The criteria proposed by Sir Rupert for allocation as an intermediate case are designed to ensure that only appropriate cases are included in the expanded fast track, without being unduly prescriptive. Concerns were raised by respondents, from both defendant and claimant perspectives, that if the proposed criteria are followed too rigidly, this could have the opposite effect of forcing otherwise suitable cases out of the track. Some respondents also asked the Government to provide further detail as to the proposed criteria for allocation. The Government acknowledges these concerns, but does not consider it appropriate to provide further details on allocation criteria at this stage. The reasons for this, as set out immediately below, are similar to those given in relation to complexity, as set out above (at paragraph 4.4 of this chapter).
- 13.2 Despite various respondents arguing that the details provided by Sir Rupert to assist with allocation needed to be supplemented with further detail, no specific, workable suggestions were given for the Government to consider. We maintain that it is the role of judges – who are accustomed to dealing with such cases – to exercise their discretion and ensure that intermediate cases are appropriately allocated, in accordance with the criteria set out in Chapter 5, 2.1 of our consultation paper. It is the Government’s view that no intermediate case should be allowed to exit from the proposed FRC schedule, unless there are exceptional circumstances – indeed, making provisions for more cases to exit FRC, or receive specialist treatment upon judicial allocation, would work to undermine the principles of certainty and proportionality by which FRC operates. In addition, the Government notes Sir Rupert’s recommendation, in Chapter 7, 3.12 of his 2017 report, that a new Practice Direction may be helpful, similar to CPR 26.8, to (i) give guidance on allocation, and (ii) indicate the information the court needs in order to make an appropriate band allocation. The Government will discuss this proposal with the CPRC, in due course, to determine if such a Practice Direction is the most appropriate way forward.
- 13.3 As we noted in our analysis of responses to Question 3, some respondents said it would be necessary to provide greater certainty as to which types of case fall into the expanded fast track. This, they argued, is because unsuitable cases could end up being included, or conversely, otherwise suitable cases risked being excluded. However, as we stated above, respondents did not provide further detail as to which cases may be unsuitable, and focused instead on their general objections to the principle of FRC. There were also some suggestions from respondents that it may not be possible to distinguish between the lower value fast track and intermediate cases. However, it is the Government’s view that the suitability of intermediate

cases for the expanded fast track would be predicated on satisfying specific criteria and adhering to the clear set of procedures outlined by Sir Rupert in Chapter 7, 3.2 and 4.1–11 of his 2017 report. It is our view that these procedures establish sufficient parameters to ensure that appropriate cases are included as best as possible, while also delineating the difference between intermediate cases and lower-value fast track cases. As such, the Government does not consider it appropriate to provide any additional details as to which types or categories of cases should be included in the expanded fast track, as this would be overly prescriptive, and risk undermining the objectives of a FRC regime in providing both (i) certainty and (ii) proportionality (and thereby ensuring access to justice). We believe that there is a need for a workable balance to be struck between a clear and straightforward costs regime which is certain and predictable, and one which caters for the nuances of each individual case (which would become inherently complex and uncertain). In seeking to strike the right balance, while retaining the generic advantages of FRC, the Government is mindful of the need to ensure appropriate access to justice in individual cases, which will be overseen by the judiciary in allocating cases to an appropriate band.

**14. Government response to Question 3 (iii): We seek your views, including any alternatives, on: how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;**

- 14.1 It is the Government's intention that the allocation of intermediate cases should follow the same pre-action process as that which is outlined above for the fast track. As in the fast track, the Government proposes that once an intermediate case has been allocated to a band, the band should only be revisited in exceptional circumstances; for example, if substantial unfairness would be caused if the case were to remain in its allocated band.
- 14.2 In Chapter 7, 3.11 of his 2017 report, Sir Rupert recommends, and the Government agrees, that an unsuccessful challenge to allocation should incur a costs liability of £300. The Government will keep this under review to ensure that challenges are not being made irresponsibly. In any event, the Government considers that challenging band allocation (or resisting a challenge) without sufficient basis could amount to unreasonable behaviour, incurring further costs penalties.

**15. Government response to Question 3 (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;**

- 15.1 The Government intends to retain the 4-band structure as proposed by Sir Rupert. We agree with the arguments raised by a number of respondents that this structure will allow for greater flexibility, to ensure that particular cases are matched to appropriate bands. Most cases will fall into either Band 2 or 3, and the Government has not been persuaded that merging them to have fewer bands would yield sufficient benefits or any additional clarity than that already provided in the proposals. Instead, this would risk increasing FRC for cases which otherwise should have been dealt with under Band 2, and conversely reduce FRC for Band 3 cases. Moreover, costs have been calculated on the basis of four bands; unpicking these would require recalculating, for which there is not adequate justification. The Government will keep this issue under review.
- 15.2 Some respondents have also indicated that more guidance may be necessary to differentiate between the higher bands, especially with reference to what should be included in Band 4. The Government does not propose to define which specific factors would contribute to a case being allocated to Band 4, as this would risk being overly prescriptive.

**16. Government response to Question 3 (v): whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.**

- 16.1 As outlined in our responses to Questions 3 (ii) and 3 (iv), and in line with our overall position on this matter set out in paragraphs 13.2–3 of this chapter, the Government does not consider it appropriate to provide additional details or define which cases belong in each band in further depth. Providing further detail could also result in some cases that are suitable as intermediate cases not being able to meet such strict criteria, or these criteria being used as a way to exit FRC altogether. It is, therefore, the Government's view that it will be for judges to use their discretion to ensure that such cases are appropriately banded.
- 16.2 The Government can also confirm that it will implement Sir Rupert's proposals on the disclosure of documents, as discussed in Chapter 7, 4.5 of his report.

## Response to Question 4: Judicial Review

### 17. Overview: Response to Question 4

- 17.1 In Chapter 6 of the consultation paper, as we have already seen, the Government sought views on Sir Rupert's recommendation, outlined in Chapter 10, 4.4 of his 2017 paper, that costs budgeting ought to be introduced for all 'heavy' JR cases.
- 17.2 In Chapter 8 of our post-implementation review (PIR) of Part 2 of LASPO, we noted that costs budgeting was introduced successfully 'with many of the other Jackson reforms' on 1 April 2013, but that some legal practitioners '[believed] that the process could be [further] improved'.<sup>30</sup> It is the Government's view that, now this reform has had the opportunity to bed in, costs budgeting has been working effectively in practice, and might be introduced across other areas of civil litigation.
- 17.3 Based on the responses to our question about costs budgeting in 'heavy' JRs, the Government has come to the following conclusions.

### 18. Government response to 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?

- 18.1 Having considered the views of respondents, the Government notes that costs budgeting has worked effectively to create greater costs certainty for all parties, including losing parties, in other areas of civil litigation. Given this, the Government intends to go forward with introducing costs budgeting to all 'heavy' JRs (outside of those which are settled as subject to 'Aarhus' costs caps). As outlined in the consultation paper and recognised by respondents both in favour and opposed to this proposal, a key feature of this proposal is that courts will have the discretion to make a costs management order, either on their own or upon the application of either party involved. The Government acknowledges concerns raised by some respondents that costs may be 'frontloaded' earlier on, prompting a concern of higher costs. This concern was also noted in the 2019 PIR of LASPO Part 2, which refers to 'some concern on the defendant side that costs budgeting does not deal with incurred costs sometimes leading to "frontloaded costs"'.<sup>31</sup> However, it is the Government's view that this forces parties to think more carefully about costs from the beginning and ensures that applications will be made based upon objective criteria, rather than variable costs specific to particular parties.

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<sup>30</sup> This is found on page 34 of our 2019 PIR of LASPO Part 2: <<https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo>>.

<sup>31</sup> See paragraph 147 of our 2019 PIR of LASPO Part 2, on costs budgeting.

- 18.2 A number of respondents argued that the success of costs budgeting in ‘heavy’ JRs would be dependent on how it would work in practice. The Government agrees and has carefully considered procedural steps to accompany this proposal. The Government has also carefully considered how this proposal would be framed in the CPR.
- 18.3 It is the Government’s intention that the JR Claim form (in respect of ‘non-Aarhus’ JRs) will ask claimants the following question: ‘Do you consider that the costs of the claimant are likely to exceed £100,000?’, with space to provide the claimant’s reasoning either way. Similarly, the JR Acknowledgement of Service form will be amended to ask the same question of defendants, further enquiring whether the defendant agrees with the claimant’s costs and requiring an explanation for both answers. The intention is that, if either party answers ‘yes’, or the other party disagrees with their opponent’s answer, this should be taken by the judge considering permission to comprise an application for costs budgeting. In Chapter 6, 3.4 of our consultation paper, the Government outlined a number of criteria that should be considered by judges in assessing whether costs are likely to exceed £100,000, such as: the length of the hearing; the size and complexity of background materials; and, the nature and extent of witness evidence, including that of experts, although it is not intended that this list is exhaustive.

## Response to Question 5: Next Steps

### 19. Overview: Response to Question 5

- 19.1 In the consultation, the Government also sought views from respondents on issues around the proposals which were not covered in previous questions. The Government sets out the way forward on the following two issues below.
- 20. Government response to Question 5: We seek your views on the proposals in this report otherwise not covered in the previous questions throughout the document.**
- 20.1 As noted previously in the responses to various questions, a number of respondents made the point that FRC should be uprated for inflation, a view shared by both Sir Rupert, in Chapter 5, 2.1 of his 2017 report, and the Government. It is the Government’s view that the appropriate inflation index for these purposes should take into account a range of similar service activities and should not be disproportionately composed of sectors it seeks to capture. The Government has considered all available relevant indices against these criteria and agrees with Sir Rupert’s recommendation that an uprating for inflation in FRC should be by reference to the SPPI. The SPPI measures the quarterly change in the price received for services provided by UK businesses to other UK businesses and

Government, and, as such, captures the expenditure of a range of relevant similar services. In so doing, the SPPI meets the above criteria, in that legal services represent a small component of the services captured by the index, while it is not subject to unexpected market fluctuations in costs from sectors within it. It is the Government's intention that the figures for FRC in Sir Rupert's report, on which we consulted, will therefore be updated in line with the SPPI.

- 20.2 The Government is keen that, when implemented, FRC should apply to as many cases as reasonably possible, within the cohort of cases covered. This will mean those cases where the accident or cause of action arises after the implementation date, or in disease and equivalent cases where no letter of claim has been issued before the implementation date.

## **Response to Question 6: Impact Assessment**

### **21. Overview: Response to Question 6**

- 21.1 As we have seen, the Government sought evidence and/or data from respondents to support or disagree with any of the proposals, for consideration as part of the consultation. The Government sets out its response to this question below.

### **22. Government response to 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?**

- 22.1 The Government has considered the limited additional data/evidence that it was presented with in responses to the consultation, and is grateful to respondents for this. However, based on the evidence received, which was limited in nature and based upon broad suppositions rather than statistical data, it does not judge that it needs to make any amendments to the proposals on extending FRC at this stage. The Government notes that a revised IA on the FRC proposals has been prepared, for publication with this response.

## **Response to Questions 7–10: Equalities Statement**

### **23. Overview: Response to Questions 7–10**

- 23.1 In the final chapter of the consultation, the Government asked a number of questions about the equalities impact of the proposals on individuals with protected characteristics. Having taken into account the responses from both claimant and defendant respondents, the Government has come to the following conclusions.

- 24. Government response to Question 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.**
- 24.1 As we have seen, some respondents suggested that certain protected characteristics may increase the costs of civil litigation. They argued that this is because certain disabilities, such as deafness or blindness, or other factors arising from the general vulnerability of a claimant (such as the need for an interpreter), may adversely affect a claimant's effective participation in proceedings; and that these factors may require increased investment in time and resources on the part of legal representatives, thereby warranting additional costs provisions beyond those currently proposed.
- 24.2 The Government has carefully considered the arguments raised by respondents in favour of additional costs provisions due to the general vulnerability of a party. In particular, it has assessed these arguments against the degree to which claimant characteristics may lead to substantial and continued extra work for legal representatives beyond the normal range for certain types of civil cases. The Government has also given consideration to the CJC report, *Vulnerable Witnesses and Parties within Civil Proceedings*, issued in February 2020 after our consultation had concluded, which makes a number of recommendations to improve the experience of vulnerable parties within civil cases.<sup>32</sup> At paragraph 233, the report recommends the Government '[to] consider whether there should be a provision within every fixed or scale costs regime for a discretion to consider a claim for an amount of costs which is greater than the fixed recoverable costs to cater for the consequences of specific, identified measures which have been necessary to cater for vulnerability'.
- 24.3 Although respondents to our consultation argued that additional costs provisions may be needed due to the vulnerability of a party, little concrete evidence was presented to support the idea. This may in part be because both the existing and the proposed FRC schemes implicitly cover vulnerability: a point reinforced by the judgment of Coulson LJ in *Aldred v Cham*.<sup>33</sup> There is also standing judicial discretion, under CPR 45.13, to exceed FRC where there are 'exceptional circumstances'.
- 24.4 Despite the relative lack of evidence, the Government accepts that there may be grounds to make limited exceptions in FRC for specific vulnerabilities, rather than

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<sup>32</sup> The CJC's February 2020 report on vulnerable witnesses and parties within civil proceedings is available here: <VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf (judiciary.uk)>. Costs issues are considered between paragraphs 222 and 233.

<sup>33</sup> The judgment of the Court of Appeal in *Aldred v Cham* is available here: <<https://www.bailii.org/ew/cases/EWCA/Civ/2019/1780.html>>.

more expansive allowances that would be contrary to the objectives of FRC – which, as we have already outlined, seeks to provide certainty and proportionality (whilst controlling costs) for all parties in litigation. As such, the Government has considered the case for additional remuneration in the following scenarios:

- i. Additional general work, i.e. in taking instructions from a claimant with limited communication;
- ii. Disbursements, i.e. for an interpreter – these will usually cost a set amount for costs to be paid to a third party;
- iii. Specific additional work required (by law) in a particular case, i.e. protected parties in preparing papers seeking the required judicial agreement to a settlement.

24.5 Although the Government does not propose to define vulnerability generally, legal aid provisions relating to the Family Advocacy Scheme (FAS) provide one example of a possible framework that could be applied to FRC in regard to specific vulnerabilities. Under this scheme, a percentage bolt-on is applied for ‘representation of a person who has difficulty in giving instructions’. The FAS guidance states: ‘The bolt on is available to the advocate where:

- i. Their client has difficulty giving instructions or understanding advice;
- ii. This is attributable to a mental disorder (as defined in section 1(2) of the Mental Health Act 1983) or to a significant impairment of intelligence or social functioning; and
- iii. The client’s condition is verified by a medical report from either a psychologist or psychiatrist.’<sup>34</sup>

The Government proposes that the new FRC regimes could cover the specific vulnerabilities set out in the FAS guidance, as outlined above. One possible option is that a percentage uplift on FRC of 25% (in keeping with the 25% bolt-on that is available under FAS to those who ‘[have] difficulty giving instructions’ as a result of a verified mental impairment) could be available in respect of parties where the criteria are met, upon judicial certification. This could be done at an early stage through the Directions Questionnaire (DQ), ensuring that cases are appropriately allocated (i.e. to a lower band, with an appropriate percentage uplift) as a result. The Government will discuss arrangements for this with the CPRC in due course.

24.6 Furthermore, while the judgment in *Aldred v Cham* establishes that ‘[limiting] recoverability of sums over and above the fixed costs to disbursements due to the specific features of the dispute... is consistent with the overall purpose of the fixed

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<sup>34</sup> The Family Advocacy Scheme (FAS) guidance is available here: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/867264/ex506-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/867264/ex506-eng.pdf)>.

costs regime', the Government recognises that more work is required to consider whether to limit the number of vulnerability-related disbursements, and will discuss this further with the CPRC.

24.7 The Government has also considered whether the existing settlement eligibility for 'protected parties' (a term which can refer (i) to children and/or (ii) to the mentally incapacitated) should be extended to the new FRC schemes. The Government notes that, while mentally incapacitated claimants are currently excluded from existing FRC schemes, settlements for such claimants are allowed under RTA (NB, children are no longer excluded from FRC under RTA). In such cases, there can be additional work involved in proving and assessing that an individual is a protected party and in obtaining a court-approved settlement; this additional work attracts a bolt-on fee. One option, then, with regard to the proposed new FRC scheme, would be to extend settlement eligibility for protected parties (including children), in keeping with what is currently in place in RTA claims. However, we will consider further whether existing FRC allowances for protected parties should be extended or increased.

**25. Government response to Question 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.**

25.1 Based on the consultation responses to this question, the Government considers that it has correctly identified the range of impacts under each of the proposed reforms set out in the consultation paper. Our response to concerns about access to justice implications for claimants with protected characteristics is set out in greater detail above.

**26. Government response to Question 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.**

26.1 As we have seen in the analysis of responses to Question 9, and to other questions in our consultation paper, some respondents expressed concern that the extension of FRC could lead to the withdrawal from the market of some legal aid practices that would no longer be able to cross-subsidise their work through the recovery of higher costs. This, they argued, could adversely impact the ability of claimants to find a legal aid solicitor, which could in turn adversely affect certain groups that disproportionately bring certain categories of cases, such as housing claims.

26.2 It is the Government's view that, in controlling and reducing costs per claim, FRC would drive beneficial behaviour changes among legal services providers. The time and effort expended on a case would more closely correspond to the fixed costs attached to it, incentivising the more efficient allocation of appropriate resources.

Furthermore, the Government has not been provided with any concrete evidence to suggest that the FRC as proposed would have any adverse effect on a particular party's ability to obtain legal representation for certain categories of cases.

26.3 The Government acknowledges the concerns raised in the responses about the potential impact on the legal aid provider base, and will continue to bear this in mind. The Government is currently considering the sustainability of the legal aid market, looking at a range of factors. The Government is committed to ensuring that the legal aid provider base can continue to deliver services into the future.

**27. Government response to Question 10: Are there forms of mitigation in relation to impacts that have not been considered?**

27.1 The responses to this question did not provide much detail for consideration.

# 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 Cabinet Office Consultation Principles 2018:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf)

## Annex A – List of Respondents

Respondents to our consultation on extending FRC included individual members of the judiciary, individual solicitors and barristers, representative bodies, academics, members of the general public, and the following organisations:

5RB Barristers

ABTA – The Travel Association

Action Against Medical Accidents (AvMA)

Advice for Renters

Allianz Insurance plc

Anthony Gold Solicitors

Arkas Law

Association of British Insurers (ABI)

Association of Child Abuse Lawyers (ACAL)

Association of Consumer Support Organisations (ACSO)

Association of Costs Lawyers (ACL)

Association of Her Majesty's District Judges (ADJ)

Association of Personal Injury Lawyers (APIL)

Atkins Thomson

Aviva plc

AXA Insurance

Bar Council

Barlow Robbins LLP

Bevan Brittan LLP

Birmingham Law Society

BLM Law

Brabners LLP

Bristol Law Society

Burton & Burton Solicitors

Capsticks Solicitors LLP

Carnival UK  
Carter-Ruck Solicitors  
Centre for Women's Justice (CWJ)  
CFG Law  
Chartered Institute of Arbitrators (CIArb)  
Chartered Institute of Legal Executives (CILEx)  
Chief Vehicle Rentals Ltd  
Chubb Ltd  
City of London Law Society (CLLS)  
Civil and Commercial Costs Lawyers Ltd  
Civil Court Users Association (CCUA)  
Clarion Housing Group  
CMS Cameron McKenna Nabarro Olswang LLP  
Cobden House Chambers  
Coleman Coyle Solicitors  
Constitutional and Administrative Law Bar Association (ALBA)  
Costs Lawyer Standards Board (CLSB)  
DAC Beachcroft LLP  
Deighton Pierce Glynn Law LLP  
Dnata Travel UK Ltd  
DWF Law LLP  
esure Insurance  
First Choice Homes Oldham Ltd  
FirstGroup plc  
Forum of Insurance Lawyers (FOIL)  
Foster & Foster Solicitors  
Garden Court Chambers  
Graham Coffey & Co. Solicitors  
Graystons Solicitors  
Herbert Smith Freehills  
Higgs & Sons Solicitors

Hill Dickinson LLP  
Hodge Jones & Allen Solicitors  
Hopkin Murray Beskine Ltd  
Horwich Farrelly Solicitors  
Housing and Property Law Solicitors  
Ibbotson Brady Solicitors  
Immigration Law Practitioners' Association (ILPA)  
Imran Khan and Partners Solicitors  
International Underwriting Association (IUA)  
Irwin Mitchell LLP  
Josiah Hincks Solicitors  
Kennedys Law LLP  
Keoghs LLP  
Kings Chambers  
Knights Solicitors  
Lamb Chambers  
Leeds Law Society  
Leicestershire Law Society  
Leigh Day Solicitors  
Liberty (The National Council for Civil Liberties)  
Liverpool Law Society  
London Solicitors Litigation Association (LSLA)  
LV Insurance  
Manchester City Council  
Manchester Law Society (MLS)  
Midland Heart Homes  
Motor Accident Solicitors Society (MASS)  
National Farmers Union Mutual Insurance Society (NFU Mutual)  
National Pharmacy Association (NPA)  
NewLaw Solicitors  
News Media Association

NHS Resolution  
Onward Homes  
Osbornes Law  
Partners in Costs Ltd  
Personal Injuries Bar Association (PIBA)  
Planning and Environment Bar Association (PEBA)  
Police Actions Lawyers Group (PALG)  
Prima Group  
Professional Negligence Bar Association (PNBA)  
Property Litigation Association (PLA)  
Public Law Project (PLP)  
Pure Legal Costs Consultants  
RSA Insurance Group  
Sanctuary Housing Association  
Shelter  
Simpson Millar Solicitors  
Society of Clinical Injury Lawyers (SCIL)  
Southwark Law Centre  
Stephensons Solicitors LLP  
Stewarts Law LLP  
Switalskis Solicitors  
The Asbestos Law Partnership LLP  
The Chancery Bar Association (ChBA)  
The Commercial Litigation Association (CLA)  
The Community Law Partnership (CLP)  
The Federation of Small Businesses (FSB)  
The Law Society  
The Legal Costs Experts  
The Riverside Group Ltd  
Thomas Cook Group plc  
Thompsons Solicitors

Torus Homes

Total Legal Solutions

True Solicitors LLP

TV Edwards LLP

TUI Group

Underwood Solicitors LLP

Union of Shop, Distributive and Allied Workers (USDAW)

UNISON – The Public Service Union

Unite – the Union

Walsall Housing Group Ltd

Weaver Vale Housing Trust Ltd

Weightmans LLP

Wilson Solicitors LLP

Winn Solicitors

Womble Bond Dickinson LLP

Zurich Insurance Group



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