Civil Justice Council
Ministry of Justice
Post Point 10.24
102 Petty France
London SW1H 9AJ

11 October 2022

Dear Sir/Madam,

RESPONSE TO THE CJC COSTS WORKING GROUP CONSULTATION – JUNE 2022

The Association of Consumer Support Organisations (ACSO) welcomes the opportunity to respond to the Civil Justice Council (CJC) consultation on costs, with specific reference to costs budgeting, Guideline Hourly Rates (GHR), costs under pre-action protocols/portals and the digital justice system and consequences of the extension of Fixed Recoverable Costs (FRC). This letter constitutes ACSO's response.

ACSO represents the interests of consumers in the civil justice system and the reputable, diverse range of organisations who are united in providing the highest standards of service in support of those consumers. Its role is to engage with policymakers, regulators, industry and the media to ensure there is a properly functioning, competitive and sustainable civil justice system for all. The review of civil litigation legal costs and the mechanisms through which they are calculated, ordered and processed is therefore of direct relevance to our members and to our work.

ACSO is pleased to read that the CJC intends to have specific focus in its work on digitisation, the needs of vulnerable court users and the economic significance of the civil justice system as a whole. As a result, we intend to reflect on these three important factors throughout our response.

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

Our members are broadly of the view that costs budgeting has been a useful endeavour in costs control and clarity for the parties. Examples given in support of costs budgeting include an increased, early inter-partes focus on the costs involved in litigation and an opportunity for the judiciary to give an early indication of which disclosure, expert evidence or other preparatory endeavours will be considered reasonable in the context of a given case and the appropriate level of legal costs that should be expended on each.

However, our members raise specific criticisms of the budgeting process in its current form.

1. Some argue that the budgeting process is **too adversarial**, setting the wrong tone for the handling of the matter between the two opposing parties at an early stage. It could be re-worked to bring the parties closer together on such issues.

2. Similarly, it has been suggested that budgeting **invites a pursuit of the defending party to hinder the claimant's case** by undermining legal costs in certain phases, and therefore attempting to trivialise or game access to justice for the consumer.
3. ACSO members have expressed dissatisfaction with the **unpredictability of court outcomes**. Anecdotally, many had seen a range of outputs from similar budgets approved as requested to being cut down by half across all phases. This uncertainty around outcomes impacts a representative's ability to advise a consumer pre-action, as it is not possible to say with any confidence which investigations it will and will not be possible to pursue. Similarly, Counsel fee recoverability can experience the same range in outcome, even among similar cases.
4. Our members note instances of decisions made by seemingly **underequipped judges**, inexperienced at dealing with costs in civil cases and therefore exacerbating the issues described in point 3 above.
5. **Costs phasing being too rigid** has been a common theme, as described in more detail in our answer to question 1.5.
6. **Court delays** are a known concern right across the UK's justice systems, with ACSO research, undertaken in partnership with Express Solicitors, revealing earlier this year that delays are substantial and that a regional 'postcode lottery' exists when it comes to hearing centres. Many see costs budgeting as a significant burden on the courts in its current format, and therefore requiring of streamlining, and a matter of significant delay for consumers waiting for a listing hearing. It is hoped the digitisation and refinement of the process described below could go some way to unburdening the court system, reducing delays and unifying the court system.
7. Some of our members see budgeting as an **operationally expensive** process which has the potential to be streamlined. There could be benefit in the introduction of more universal and online systems of budgeting, with a level of automation to assist.
8. However, as a proposition currently, ACSO doubts the **ability for costs budgeting processes to be digitised easily**. The forms are still completed via spreadsheet and document preparing software and without any proprietary, streamlined service to assist. Many of the adjustments described below could assist here.

1.2 What if any changes should be made to the existing costs budgeting regime?

We provide examples of changes which could benefit the consumer and their representatives below, though the common theme throughout our member and stakeholder engagement has been that refinement of the process is the preferred outcome.

1.3 Should costs budgeting be abandoned?

As stated above, our general view is that the alternatives to costs budgeting either provide a lack of certainty (revert back to a reliance on detailed assessments) or have historically been implemented in such a way as to overly restrict recoverable costs (fixed recoverable costs).

Our view is that costs budgeting works, but could be improved with a combination of some of the suggestions detailed below. With a specific focus on digitisation, it is our view that the

current process is not conducive to uniform and efficient digital processes and will require adaptation and investment to reach its full, online potential.

1.4 If costs budgeting is retained, should it be on a "default on" or "default off" basis?

Whether costs budgeting should be default on or default off in certain cases is not an area of focus for our members. What is important is that it is refined and used in cases which benefit from costs management the most.

ACSO members, like many of those attending the CJC Conference in London in July, have a range of ideas on which cases benefit from budgeting the most, but do overall see the benefit in careful management of costs at an early stage in proceedings and focusing minds on the important issues between the parties. Consumers benefit from regular costs updates and the budget allows them to understand how their solicitor-own client cost liability is being spread throughout the phases.

1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

We make the following suggestions regarding how the costs budgeting process could be improved from its current proposition.

First, many ACSO members agree with the idea of decoupling the case management and costs budgeting hearings. This is considered to have a number of potential benefits, including: a) making this early court management process easier to digitise; b) allowing judges with specific expertise to lend their specialism to the case management exercise that would most benefit from it; and c) as a result of the second benefit, budget outcomes should become more consistent and predictable and the judiciary should have increased specialist knowledge and experience to advance the subject matter. It is notable that some courts have already chosen to make this change to their own processes.

Second, the idea of separating costs budgets so that the trial and trial preparation phases are budgeted at the Pre-trial Review (PTR) stage. Some ACSO members note that these concluding stages in each budget have the greatest potential to be forecast inaccurately. The focus of the litigation can take many twists and turns as directions are met, and by the time that the parties are preparing for trial, a very different case may lie before them than was anticipated at the case management hearing. It is for this reason that budgeting for trial at the PTR stage may benefit reasonableness and certainty. Additional benefits could also be seen in encouraging voluntary Alternative Dispute Resolution (ADR) between the parties before trial. However, some detriment may be experienced by defendant insurers in relation to their ability accurately to reserve for trial, but would suggest that any initial uncertainty in reserving costs for trial should shortly be resolved by the predictability that experience affords.

Third, increased flexibility between phases in a costs budget. Some ACSO members believe that the phases in each budget are too rigid, and in being inflexible they fail to reflect the natural unpredictability in the progression of litigation. Should the costs assessment instead be concerned with the 'bottom line' total of the budget, allowing flexibility between phases,

the budgeting process may instead encourage more efficient and appropriate practices and may help to draw resolution between the parties away from the court room. Similarly, some stakeholders saw benefit in a reduction of the phases to just a few easily identifiable phases, such that 'unlocking' the next phase of budgeting is not a distracting focus for the parties where settlement is possible.

Finally, many of our members are concerned with the time and expense burden of the current costs budgeting process, the 'cost of costs', with some estimating that completion of the budgets and budget discussion reports takes more than 14 hours. One suggestion is a digital streamlining of the budgeting processes, ensuring only the important information is input through portal processes, stripping away unnecessary operation expense.

Overall, the above suggested changes could represent a suite of improvements, refining the current process in pursuit of a more accessible, efficient and easily digitised process.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

Of the ACSO members that represent claimants directly in litigation, the vast majority are concerned with damages claims (i.e. litigation in pursuit of monetary remedy). We received mixed feedback on the success of GHRs since their advent.

The main concerns regarding GHRs are with the methodology through which they were originally set, and with the adjustment mechanisms for uplifts set thereafter. It is noted that GHRs are found useful within the wider civil justice market, including in family law, criminal law and the Court of Protection.

The view more generally is that GHRs remain useful, particularly in guiding costs judges at assessment to rates that are at least in the correct region of reasonable recovery. However, they can be seen as too rigid, often applied universally without due regard for the type of case, complexity of the individual case, location of the litigation or specialism of the file handler. It is suggested that costs judges have become too readily reliant on the guidelines where before they would have carefully considered and justified the awarded rates.

The GHRs have also been considered useful between solicitor and their own client, particularly in assisting with the justification for the rates they claim by referring the client to the GHRs for a market comparator. This is of particularly pertinence in a legal market where there is often a lack of online transparency on legal costs.

2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?

As stated in our answer to question 2.1, it is acknowledged that GHRs have a wider role in providing certainty to consumers, law firms and judges across a wide range of case types.

However, it is because of the importance of the role they play in civil litigation that they should be carefully calculated and managed over time, such that no parties are misled in relation to the fairness of fees charged. The present economic climate, particularly in relation to inflation

in business costs, is the perfect example of one such shift in external factors that can very quickly leave GHRs unfit for purpose.

2.3 What would be the wider impact of abandoning GHRs?

The wider impact of abandoning GHRs would be a removal of the benefits described above, causing detriment to those legal service users and providers who rely on them. An alternative system would be required to allow consumers a comparator between an average chargeable rate and the one being offered to them by a specific service provider.

Should the transparency of legal costs and pricing be optimised, and third parties therefore able to assist consumers in comparing the charging mechanisms between legal representatives in contentious and non-contentious business (noting the latter is likely more widely available already than the former), the impact of abandoning GHRs may not be quite so great. As things stand, however, it is our view that GHRs are an important tool to ensure consumers are confident that they are paying appropriately for the service provided, and for courts to assess the same and inter-partes costs.

In relation to the judiciary, 'abandoning' GHRs, at least in the short term, is not a workable solution. At least in the short term, we foresee judges and other legal stakeholders would simply rely upon the last iteration of the GHRs, possibly applying their own inflationary adjustments. In effect, GHRs would not be abandoned but would be frozen in time, awaiting a more suitable replacement. Outcomes from assessments would likely become less predictable and more disparate, increasing the need for detailed assessments and therefore the cost of costs.

2.4 Should GHRs be adjusted over time and if so how?

As has been apparent in ACSO's published work regarding existing fixed costs mechanisms, it is our view that costs, court fees, damages guidelines, discount rates and any other prescribed monetary standards that relate to civil claims should no longer be considered and adjusted independently of each other.

There must instead be a mechanism to ensure that these intrinsic parts of civil justice continue to work in synergy, in recognition that each impact another. Many FRC have no mechanism for regular adjustment at all, while court fees are uplifted regularly, as are damages guidelines and discount rates. Meanwhile claims track limits have often been altered sporadically and for policy reasons, not economic ones.

GHRs are a standard in civil justice that is considered separately to others. This very consultation is one such example. ACSO advocates for exploration of a more rounded adjustment process, with an independent oversight body that can ensure the integrity of the system is not eroded by a failure to adjust these standards uniformly or, in some cases, at all. We would support a system similar to that suggested by HHJ Bird in the most recent CJC webinar on costs, with a 5 – yearly overarching review of GHRs and other linked costs, but supported by automatic, index-linked yearly adjustments.

2.5 Are there alternatives to the current GHR methodology?

There is criticism of the methodology through which GHRs were originally set. For example, that they were originally based on an analysis of Road Traffic Accident (RTA) cases and were never fit for purpose for alternative claim types.

One suggestion relates to the creation of an expense of time survey for law firms representing parties on both sides of litigation, with responses submitted confidentially and under privilege. Responses could be made mandatory and with the support of overarching regulators or organisations, such as the Law Society or SRA, who could distribute and collect responses efficiently and at a relatively low cost.

Such anonymised data could then assist regulators to consider properly the appropriateness of GHR levels at any point in time, with mechanisms then used to adjust the levels according to the appropriate inflationary rate. Conducting this process at multiple points over a set period would then assist allow for the capturing of changing market conditions or trends. The Covid-19 pandemic and the lasting changes it has had on agile working, remote hearings and the digitisation of many firms' processes are such changes that are without consideration in the current GHR, and would be further missed by simply tying aligning the rates with an inflation index.

Overall, we feel strongly that any methodology used to review and adjust GHRs should not be processed independently of a wider review of all costs, rates, fee, damages and discount rate levels.

A further suggestion relates to the application of GHR at assessment. Some ACSO members see benefit in a mechanism being created for GHR which distinguish between case types and with an objective scoring system for complexity of a case, with the output of these assessments setting an appropriate level on a prescribed scale. While this would be a substantial project to complete, it is one that would better serve market stakeholders, including consumers and judges, were it to be completed.

Finally, we additionally see benefit in the suggestion that the guideline rates should each be a range, with the appropriate rate agreed in advance or set at the costs management hearing. Where the matter would sit in the range would be effected by factors such as case complexity and the seniority of the file handlers.

Part 3 – Costs under pre-action protocols/portals and the digital justice system

3.1 What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

A review of pre-action costs is necessary where dispute resolution is increasingly digitised. It is noted that, even with the imminent extension of fixed costs, prescribed costs within the pre-action phase can often be a blunt instrument, ignorant to the realities and complexities of work done in this phase.

It would be of great benefit to consumers to allocate costs more effectively to the pre-action phase, particularly in pursuit of incentivising early use of ADR mechanisms and appropriately

to reimburse pre-action evidence gathering and a narrowing of the issues to be put before the courts.

In conjunction with the above, there needs to be a tightening of the sanctions for non-compliance with pre-action protocols for all parties. Examples include a failure of a party to detail effectively their case pre-issue, hindering and pre-litigation negotiation to settle issues. The remedy for this is too often full litigation. Some ACSO members consider costs sanctions to be appropriate where parties do not conform with prescribed timelines, or fail to do so with detail or candour.

Another suggestion is the inclusion within the claim form or defence to alert the court to alleged failings of one party in relation to the pre-action phases, and possibly any applicable costs sanctions as a result. Any applied sanctions must be clear and unambiguous, as with any new elements of the pre-action protocol.

The above are suggested in the interest of early resolution of issues within a case, and are intended to draw case negotiation away from the tightening corridor of litigation.

3.2 What is the impact on costs of pre-action protocols and portals?

The addition of new elements of pre-action protocols and portals inevitably have the potential to alter the litigation landscape and, therefore, a detailed review of the applicable costs in the relevant area should always follow.

One such example is the introduction, as proposed in the pre-action protocols consultation (the final report for which is still anticipated), of stocktaking in the pre-action phases which introduces the potential for a greater instance of early resolution of the issues between the parties but potentially without the fairness of recoverable costs for each party.

3.3 Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?

ACSO sees benefit in providing a streamlined assessment process for resolving costs disputes, either between consumer and representative or between adversaries in the litigation. However, few see this as a serious area of dysfunction.

3.4 What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?

Within the wider legal market, the distinction between contentious and non-contentious business can neatly describe different types of legal service and create certainty for the consumer. Those areas that are often non-contentious, such as residential conveyancing or will drafting, can be more predictable and process driven, with costs to the consumer easier to predict.

Consumers may derive benefit from having such a distinction available to them. It is important that they are aware of any risk of adversarial litigation in the service being provided.

Any grey area between the definitions of contentious and non-contentious business would have the adverse effect, and its perceived existence has created uncertainty in the legal market. The existence of this question within the consultation being evidence of such. We are of the view that a distinction should be retained between the two business types, but each must have clear and obvious boundaries such that consumers and their representatives have certainty when reaching agreements.

A harsh removal of the distinction would have a profound effect on existing working agreements between solicitors and their clients, and have a significant economic impact.

ACSO do not wish to make suggestions on how the distinction should most effectively be defined, save to request that any changing in the definition be conducted with the consumer, their representatives and with access to justice at its core.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

4.1 To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

In relation to costs budgeting, it is our view that the extension of fixed costs will inevitably erode the need for costs budgeting in some cases. That is not to say that FRC ought to be applied to all cases, and ACSO would instead recommend that the extension of fixed costs is restrained to the cases for which it will be extended to next year (up to £100,000). In those where costs budgeting will remain the default costs management process, and in the absence of any preferable alternative means of costs management, the process should be refined using some of the suggestions detailed above.

Similarly, fixed costs deplete the need for assessment of costs at the conclusion of a case, reducing the available and empirical data available with which to set GHRs. It is for this reason that we reiterate our suggestions made above at 2.5.

In relation to pre-action protocols and portals, in the case of the extension of FRC that are appropriately set and regularly adjusted, it is our view that these can assist with the ability to digitise the litigation process both pre and post-action and could have minimal economic impact while also focusing minds away from costs and towards the important matters in contention. However, for reasons we have detailed extensively in a letter to the Master of the Rolls and others of 10 May 2022 (as attached), we do not believe that the current proposals to extend the FRC regime to £100,000 meet the objectives of providing clarity and assurance, being set at an appropriate level (particularly in the case of quantum-only personal injury cases) or having an adjustment mechanism to sustain their effectiveness. We would suggest that they require significant further review and are not fit for purpose in current draft. Should the extension of FRC be implemented as drafted, we foresee a dramatic and continued reduction in the legal service providers available to consumers, a substantial commercial impact on supplementary services and a resulting access to justice crisis.

Additionally, we have responded to the proposals to introduce FRC in lower-value clinical negligence cases in the response that we have also attached.

Of most importance is that, as with the extension of FRC, many existing FRC, some of which have been implemented for decades, have no mechanism for adjustment over time. Through research ACSO conducted early this year, we found that fixed costs set in 2013 in personal injury should have been uplifted by up to 25% by the second quarter of 2022, and with a conservative estimation that could be over 40% by 2023. Such a persistent depletion of recoverable costs will only serve to impact the consumer in the long run, with some estimating damages deductions will increase to 50% between the consumer and their representative. Those hardest hit by these changes will inevitably be those who are most in need of justice and representation, being the vulnerable and those in the poorest personal economic situation. An adjustment process must be implemented immediately, and ideally with the breadth of civil justice fees, rates, damages, limits and other costs taken into account.

4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.

Outside of solicitor-client representation, legal counsel and their chambers and medico-legal practitioners and their agencies are all concerned with the present and proposed regimes of FRC.

In relation to counsel, they are as concerned as other ACSO members about the lack of an adjustment mechanism for the currently implemented FRC regimes, and those proposed for the extension of FRC.

In relation to the proposals, numerous counsel concerns with the extension of FRC to £100,000 are detailed within our letter of 10 May 2022 to the Master of the Rolls, and we are deeply concerned that the provisions for counsel assistance in these cases are insufficient to sustain the availability of such informed, independent opinion for consumers.

In addition, the medico-legal sector is increasingly challenged by low-level and static FRC. For an initial medical report in a fast-track RTA personal injury case, the fixed costs were set at £180+VAT in 2014. Including inflation at RPI, we estimate that the report should have recovered costs of just under £225 by the second quarter of 2022, nearly £45 more than the current rate. By the end of 2023, the shortfall could be as much as £80 per report. Such FRC are unsustainable. Agencies and experts are already exiting the market. With medico-legal experts providing the foundation on which justice for injuries is resolved, their reducing number is of great concern in terms of availability and consumer choice.

Counsel and medico-legal sectors are not the only key (to litigation) service providers concerned with the issues that the current, proposed and future FRC do or can cause. We would encourage large-scale, cross-industry engagement at each step when reviewing current or introducing new FRC regimes. It is vitally important that the many foundational blocks holding up access to justice are each considered and properly maintained.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

We have not received any suggestions for other areas not currently in contention where FRC or other costs capping arrangements would be beneficial.

If you require further detail on any of the points raised above, or require any further information at all, please do not hesitate to get in touch.

Yours faithfully,

Matthew J Maxwell Scott
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The Association of Consumer Support Organisations (ACSO)
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ATTACHMENT 1 of 1

LETTER TO THE MASTER OF THE ROLLS REGARDING THE EXTENTION OF FIXED RECOVERABLE COSTS UP TO £100,000

The Rt Hon Sir Geoffrey Vos, QC
Master of the Rolls and Head of Civil Justice
c/o The Civil Procedure Rule Committee
The Rolls Building (Royal Courts of Justice)
Fetter Lane
London
EC4A 1NL

10 May 2022

Dear Master of the Rolls,

The implementation for the extension of fixed recoverable costs (FRC) and of the fast track in civil claims with a value up to £100,000 will have a significant impact on those who operate within the civil justice system and those consumers who depend on it, both as claimants and defendants.

The Association of Consumer Support Organisations (ACSO) represents the interests of those consumers and the reputable, diverse range of organisations who are united in providing the highest standards of service in support of them.

ACSO's Litigation Reform Working Group has carefully considered the government's 6 September 2021 response and the 2019 consultation paper on the extension of FRC.

The capacity these changes have for positive consumer outcomes is to be commended. This includes the simplified claims process, faster and more efficient routes to redress, increased certainty on costs from the outset of a matter, the potential to remove needless costs litigation and the creation of a track more conducive to early dispute resolution processes. However, it is our view that a literal implementation of the structure as proposed would not necessarily fulfil this capacity.

Our group is now seeking to assist the Civil Procedure Rule Committee (CPRC) with its work towards implementation by providing insight on the anticipated issues within and consequential to the proposals. It is ACSO's hope that the following detailed matters will assist the CPRC's ongoing consideration and formulation of the rules and procedures and result in a more rounded extended fast track from the outset and for all parties. In addition, and where noted, ACSO seeks clarity on certain areas identified as providing uncertainty by our members and other stakeholders.

Excluded Cases

Jackson LJ's original proposals confirmed that the most complex cases would be excluded from the FRC regime altogether. However, ACSO is concerned that these 'excluded' cases have been confused with cases considered too complex to be suitable for the FRC regime, in other words, the exceptional cases discussed in the point below.

Jackson LJ's example was 'complex personal injury cases' which is unhelpful in itself as it again pertains to the complexity of a case which is often but not always immediately apparent on its facts. Rather, we would consider that certain types of cases should be excluded.

One example of a case type which should be automatically excluded that currently is not could be accident claims where the incident occurred outside of jurisdiction but is pursued inside of jurisdiction. These cases require increased work and a more complex investigation procedure. One of our members, who is experienced in travel claims, pointed out that these claims are often more complex, time consuming and difficult to progress than a 'standard' domestic personal injury case. That includes claims against tour operators, airlines, cruise companies, and especially claims against foreign insurers. There are, invariably, issues regarding jurisdiction, the applicable law, liability, 'local standards' and enforcement procedures to name a few. This is of particular pertinence when considered in the post-Brexit and UK divorce from the Lugano Convention context within which our civil justice system finds itself.

Exceptionality

ACSO is concerned over the lack of definition for exceptionality. Exceptionality in this context is considered to be a mechanism through which the extended FRC regime will be disapplied to claims that would otherwise have been included, but for which it is felt it is appropriate to do so.

We note that a number of references are made within the government papers to an extension of scope for CPR 45.29J, the existing provision that disapplies FRC in the current fast track. However, and by design, this CPR provision refrains from drawing any definitions or guidelines for exceptionality itself and instead directs the burden of the assessment of those boundaries on to the court.

While the government has been clear that the persisting intention is not to provide any additional guidance on what type of claim would be considered exceptional, our concern is that the resulting satellite litigation that will be required before any analysis can be made early in a claim on what is - or is not - exceptional in these cases conflicts with the government's overall objection for early consumer clarity on costs.

As is presently being experienced with so-called 'hybrid' claims within the remit of the Civil Liability Act 2018, for which a guiding judicial decision is still only anticipated, undefined rules require a body of cases to mature through the court process and reach determination to allow consumers certainty. Without this, litigious practices are necessary and add a considerable burden to a court system which is already under significant pressure.

It is our view that provision of guidelines setting out what is and is not likely to be considered 'exceptional' will draw overall implementation of the extended FRC regime closer to the government's defined objectives. However, ACSO also recognises that the provision of any guidelines on exceptionality must be carefully implemented. At different stages of the proposals, mention has been made of the number of medical reports (over 2), or the number of days required at a trial (3 or more) being indicative of case complexity. We recognise that each of these potential solutions have a simultaneous potential to be problematic. In relation to medical reports, for accident claims it is not unusual for 3 or more medical experts to be required on a single case on the claimant side but there may not necessarily be equal provision for the defendant. Each side would likely have opposing arguments as to complexity, therefore. A similar view can be taken of trial dates, with the potential for a hard threshold to encourage poor behaviours. ACSO would welcome further consultation or engagement with the committee on this matter.

Quantum-only Personal Injury disputes

The government consultation confirmed that quantum-only personal injury disputes are to be treated as Band 1, despite the original intention for the lowest band appearing to be for so called 'bent metal' claims and single issue debt claims.

We are particularly concerned that categorising quantum-only disputes as Band 1 for the extended FRC regime in personal injury would significantly undermine the true complexity of such claims. It would also appear not to be in-keeping with the costs regimes already in place which do not make such a distinction. As an ACSO member has pointed out:

"Even under the current fast track costs matrix, where a road traffic accident claim settles pre issue and with a value of 'more than £10,000', the fixed recoverable costs are £1,930 plus 10% of damages over £10,000, which is all that is currently being proposed in Band 1, Stage 1 for these much more complex cases."

ACSO wishes to be quite clear that it would not be appropriate to categorise quantum-only personal injury disputes as the lowest band for complexity. It could conversely lead to more aggressive litigation behaviours in pursuit of a higher FRC that better reflects the work required for these cases to be properly and effectively handled for consumers.

Bands 2 & 3 and Banding Challenges

We note the lack of clear boundary between bands 2 and 3 within the proposed FRC matrix, and the government's commitment against clarifying the boundary further.

Bands 2 and 3, according to the government and Lord Justice Jackson in his original proposals, will be the bands within which the majority of cases will sit. However, we are concerned that these bands are defined only by reference to one another. The present proposal at paragraph 4.2 of the government's 2019 paper is to have the cases in these bands defined as follows:

Band 2: along with Band 3 will be the 'normal' band for intermediate cases, with the more complex claims going into Band 3.

Band 3: along with Band 2 will be the 'normal' band for intermediate cases, with the less complex claims going into Band 2.

As a result, we consider there to be a significant potential for parties to disagree on the relevant banding for costs, particularly until there is a body of case law which each party can analyse. This is likely to lead to a tranche of banding challenges, in turn adding burden to the courts and delay to case progression. Where early and initial disagreement around banding becomes commonplace, the sector could see frequent delays to the initial letter of claim being submitted until and after further evidence is collected and investigation complete by the claimant representative, delaying progress and rehabilitation provisions. If left, ACSO anticipates a significant tranche of satellite litigation that will burden the slowly recovering court system.

We consider that implementation of these bands should take one of two forms. Either Band 2 and 3 should be more clearly defined by reference to key indicators of case complexity within the extended fast track, or the bands should be merged to avoid confusion and the need for otherwise avoidable litigation.

In addition, ACSO asks for clarity on what provisions are planned or in place for allocated banding being changed as the case progresses and new complexities emerge mid-claim.

Stage 1

We note that Stage 1 of the proposed FRC matrix encompasses the whole of the pre-action process for civil claims. A single FRC fee within each band covers legal work ranging from the moment of instruction to a legal representative to the drafting of statements of case and issuing of proceedings. We consider that the pre-action phase of a claim is often the longest phase and is arguably the most important. It can include:

1. the notification of a claim to a third party;
2. the initial response of that party to the claimant;
3. the gathering and disclosure of liability evidence for both parties;
4. additional case-specific investigations that are required by either party, such as a site inspections or accident reconstruction;
5. engagement and negotiation between the parties in relation to liability;
6. the gathering and disclosure of medical evidence for one or both parties;
7. engagement and negotiation between the parties in relation to medical evidence;
8. rehabilitation and/or the case management of treatment needs;
9. any alternative dispute resolution engagement between the parties; and
10. settlement negotiations, including the careful consideration of any pre-action settlement offers.

Cases can run through a few or all of the above steps before reaching settlement and no two cases are the same. We appreciate that within the government's proposals are multiple bands of complexity, and that the more complex the case, the higher the fee for Stage 1 FRC.

However, it is our view that this rigid interpretation of the pre-action phase of each case within a given band fails to appreciate fully the level of work that can be required within that phase.

Within the existing fast track Ministry of Justice (MoJ) Portal regime, prescribed FRC fees are different for 'Stage 1' and 'Stage 2' of each case. The first stage is the initial notification of the claim to the defendant, and the second is the disclosure of medical evidence, details of the financial losses and the provision of an initial settlement offer. In other words, there is an acknowledgement within the MoJ Portal FRC that the pre-action phase of a claim is multi-faceted, even if provision is only made for 2 phases.

We think it more reasonable and practicable to include 2 or more pre-action phases within the FRC matrix proposals. In effect, this would prevent unscrupulous practitioners seeking early (and possibly under-) settlement for the same reward, potentially impacting the consumer's ability to access expert medical opinion, rehabilitation and reasonable dispute resolution based on a sound evidential basis. By the same token, these changes would encourage the defendant to seek early engagement and settlement negotiations with the consumer by allowing a lower FRC fee within an earlier phase.

Stage 3

It is striking upon considering the proposed FRC matrix that the relevant stages omit to include a stage for the issue of proceedings. As drafted presently, the stages for FRC levels for a representative shift from 'pre-issue or pre-defence investigations' to 'up to and including CMC'.

A substantial quantity of work is undertaken in order to issue and serve proceedings in a compensation claim which could perhaps be unrecoverable where a CMC has not been very quickly listed by the courts, or the claim has been stayed immediately post-issue. ACSO seeks clarity on whether Stage 3 is intended to be the appropriate FRC level in those circumstances. If not, ACSO seeks clarity on whether an additional stage that accounts for the issue of proceedings should be introduced to the matrix.

Claim Types

FRC in clinical negligence claims is a matter of ongoing review and analysis in the market, particularly as a result of the recently closed consultation on that subject. ACSO notes that such claims where valued over £25,000 will not be subject to this regime. However, our members are unclear about whether clinical negligence cases worth less than £25,000 will fall within the boundaries of this FRC regime. ACSO believes the market would benefit from prompt clarity on this point and recommends that all clinical negligence matters are handled as a discreet case type and outside of the scope of these changes.

Additionally, we seek clarity on whether or not claims for assault against the police are included within this FRC regime, and ask that the CPRC considers carefully the implementation of these rules in this regard. Claims for assault against the police appear to sit in a grey area, being claims against a police force (which are specifically excluded from this regime) but also personal injury claims in their own right. Claimants and defendants alike require clarity on this point.

ACSO notes that actions against the police are a specific exclusion to this extended FRC regime between £25,000 and £100,000 but seeks clarity on whether the same exclusion is to be implemented for these cases with a value of less than £25,000. Also, cases involving unlawful detention are presently allocated by default to the multi-track and heard in the High Court. Will the same provision be mirrored in your extended FRC rules?

Finally on claim types, some concerns have been raised on non-personal injury consumer claims which are within the remit of these proposals, particularly where such claims are not covered by the Qualified One-way Costs Shifting (QOCS) protections. In these matters, the ordinary position is, where a claim is brought and then withdrawn pre-issue, no costs are payable to either party. However, the introduction of FRC to these claims under the proposals could cause costs to become payable on cases which start under the pre-action protocol and are then withdrawn without proceedings. This would represent a substantial change to the structure of these claims processes and could have significant implications for access to justice and the relevant After-the-Event (ATE) insurance market. ACSO asks that caution is taken and that the implemented rules avoid shifting market dynamics and consumer access to justice where they were not intended to do so.

Fixed Costs Levels

We are concerned that the FRC matrix for fees remains as it was when Jackson LJ made his most recent proposals in 2017. These fees were based on the analysis of data provided by a single firm and that is now at least five years old.

We would therefore ask the CPRC to indicate that more market analysis will be required as to what the appropriate FRC for each specified stage and band should be, considering cross-industry data and insights.

Effect on the existing Fast Track

The 2021 Consultation Response paper causes some confusion in relation to the existing fast track rules. The paper appears to reiterate elements of Jackson LJ's original proposals that were not subsequently implemented as drafted or have since evolved.

One example is the distinction between certain accident types by means of distinct FRC fee matrices, namely public liability (PL) and employers' liability (EL) cases, which are boxed together within Jackson LJ's original proposals. There is a need for clarity on whether the government's proposition includes changing the existing fast track as detailed in its papers, or whether the intention is to make no structural changes to the existing fast track aside from the extension of its scope, as suggested elsewhere in the proposals.

Effect on Legal Aid Cases

In England and Wales, the winning party is generally entitled to recover its costs from the losing party in civil claims. Where the winner is legally aided, the loser will be liable for the costs, thereby eliminating or reducing the need to make a claim to the Legal Aid Agency (LAA).

At present, save for some exceptions to counsel's fees in fast track cases, the winner's reasonable costs are recoverable from the other party and are not 'fixed'. Those costs are at

'inter partes rates' (or costs paid by the other party, usually at private rates), which are significantly higher than legal aid rates. The wider benefits are twofold. First, legal aid providers are sustained by the higher fees, which in turn subsidise further legal aid work. Second, public money is preserved. It is unclear whether the implications that these proposals have for legal aid funded cases have been fully considered and negotiated.

Portal Systems

We also seek clarity on whether there is intention for the extended fast track to utilise existing or prospective digital claims portal systems for the pre-action phase, as is currently the case in the existing fast track. There is very little mention of the use of any portal systems within the government papers, though we anticipate that the digitisation of claim processes is likely to persist through higher-value cases.

We are concerned that the existing MoJ Portal may be too simplistic to manage more complex cases of a higher value effectively. While we can appreciate the benefits of pre-action process digitisation, we would ask for caution in simply applying existing mechanisms without careful deliberation and consultation on whether it is possible or appropriate.

Formal Review Mechanisms

There is presently no commitment to implement a formal review mechanism, for both the research, analysis and feedback of technical and practical issues during the initial implementation phase of this new regime and for the continuing suitability of FRC fee levels.

From day one of implementation, there will inevitably be technical and practical issues experienced across the industry. In order for the FRC structure to evolve into its most effective form, ACSO recommends that a cross-industry working group (CIWG) is established which captures and analyses such issues before feeding these back to the MoJ, CPRC and other relevant committees. Some issues may require urgent CPR and Practice Direction amendments or clarification and the sector would undoubtedly be willing to assist the legislature via a CIWG.

In relation to the suitability of FRC levels, it is our view that inflation will naturally cause FRC fee levels to diminish in real terms over time. What is considered reasonable this year ought to remain reasonable through the lifetime of the regime, otherwise consumers will suffer a year-on-year decrease in access to justice.

The government has confirmed its intention to uplift the 2017 proposed FRC fee matrix using the SPPI standard of inflation. We welcome this commitment and consider it an acknowledgment of the impact inflation has.

We are therefore concerned that there is neither a formal review process for the proposed extended fast track FRC fee level after implementation, nor has there been such a process for the existing fast track fee levels which have not been altered since July 2013.

It is imperative that such a review mechanism is implemented, such as that which is in place for the Ogden Rates for seriously injured consumers, and at least as frequently as every five years but preferably annually or bi-annually. It is also notable that Guideline Hourly Rates

were recently inflated to acknowledge the passing of time since their last update. The long-term impact of failing to review the FRC fee levels is significant on the consumer.

Part 36 offers and 'Unreasonable Behaviour'

We have considered carefully the government proposals regarding FRC uplifts for Part 36 offers and unreasonable behaviour, being 35 per cent and 50 per cent respectively. We believe there has been little to no provided analysis of data or insights which justifies these substantial changes to the structure of civil claims below £100,000.

That is particularly the case with the 35 per cent Part 36 offer uplift, which removes the greater incentive for early settlement that indemnity costs provide. The reduction in incentive appears to contradict the very purpose of these proposals and of the introduction of the Part 36 offer mechanism itself. Incentivising Part 36 offers has its benefits for all parties, including the courts.

For these reasons it can only be appropriate for indemnity costs to be maintained as the consequence of a party falling foul of a well-pitched Part 36 offer and ask that the CPRC consider this when preparing its rule structure.

In addition, we note that 'unreasonable behaviour' lacks any definition, the burden for which is again with the courts to consider.

Without 'unreasonable behaviour' being further defined, it is entirely possible that complex arguments about a party's behaviour that require judicial analysis will become commonplace, with each party seeking a 50 per cent uplift on their FRC levels against the other. As noted with other guidance-light proposals above, it will take years for any meaningful case analysis to be possible and reliable marking of where the threshold lies, such that consumers can make early and informed decisions. Additionally, setting the uplift for unreasonable behaviour at a single figure limits judicial discretion to penalise lesser or more severe behaviours appropriate to their egregiousness.

We believe there is a clear need for a more definitive outline of what unreasonable behaviour entails and see benefit in implementation of a percentage range of uplift as opposed to a single rigid uplift.

Disbursements

In the existing fast track, it is notable that some recoverable disbursement costs are fixed, particularly the medico-legal report disbursements which are the most frequently claimed and least divergent in content. Jackson LJ indicated that a subsequent review of medico-legal disbursements should take place after implementation of the extended FRC regime, with a view to further fixing recoverable disbursement costs within its scope.

The government has not committed to a review of this nature, nor has it dismissed it. We would be pleased to assist with any forthcoming review of the appropriateness of fixing the recoverable costs for medico-legal disbursements and are open to facilitating any such market engagement as the CPRC or the MoJ see fit.

Counsel Provision

We have significant concerns over how the proposals will affect the core market structure for Counsel involvement in civil cases over £25,000.

The new FRC matrix is quite specifically focused on specialist Solicitor work from instruction to outcome, with little provision for Counsel costs. Where Counsel's assistance is provided throughout the case, based on the new matrix they will largely be doing so in the hope the case succeeds at trial, at which point the advocate can reclaim their outlay through the relevant fee (Stage 10 & 11 of the fixed fee matrix).

We are concerned that fewer cases of this nature reach trial and that many cases require a significant amount of preparatory work before trial only for the case to settle at the doors. To this end, there is no ringfencing of Counsel fees within the proposals (other than a limited amount in Band 4) or any allowance for abated brief fees. The latter would resolve the issue of Counsel preparatory work being undermined by settlement before trial, of particular importance as early settlement negotiations and dispute resolution mechanisms are two of the dedicated cornerstones of these proposals.

We note the government claim that Counsel is rarely instructed part-way through a case outside of the most complex cases that will reside in Band 4, but have a quite different view. We have a market where the availability of Counsel is crucial to the reasonable progression of certain matters, to the benefit of all parties. Furthermore, the £25,000 to £100,000 market provides a fruitful space for the most junior Counsel to gain experience. We consider the lack of Counsel involvement in the existing fast track to be a precursor to the potential landscape of the extended fast track. We also consider that there will be a significant knock-on effect across civil justice cases, destabilising the current model for Counsel Chambers in that field and redirecting the more junior civil justice Barristers and prospective Barristers into other fields.

We are therefore concerned about the lasting consequences on the consumer and on the economic stability of the civil justice market for Counsel and chambers by failing to make sufficient FRC available for the adequate provision of Counsel. The role that Counsel plays in the effective progression of civil claims should not be underestimated. Consumers rely upon the expertise of Counsel at numerous junctures throughout the claim, not least in quantifying and settling their claim.

The benefits of Counsel to civil claims (particularly above £25,000 in value) include:

- Provision of an independent unbiased opinion on the prospects of a claim or defence at an early stage;
- Provision of expertise and skills honed through an ability to span case types, instructing parties, claimant and defendant work, complexity and case values in their submissions to the courts;
- An expertise in narrowing the issues to be put before a court, including in directing away from irrelevant but potentially lengthy documentary evidence, medical evidence or witness evidence submissions;
- An effective advocate for reasonable early settlement; and
- An effective provider of dispute resolution services.

We are concerned that the government has failed to assess the overall impact that the proposals have on the provision of Counsel in cases worth up to £100,000 and therefore on the consumer's access to informed, independent opinion and on the overall objectives of the proposals themselves.

The best course would be to ringfence Counsel fees across all Bands within the matrices. Should that not be feasible at this stage, the alternative would be a greater FRC provision for Counsel's fees and the recoverability of abated trial brief fees. This will lighten the impact for consumers on the availability of Counsel in cases worth up to £100,000 and lessen the possibility of a substantial destabilisation of Counsel provision across the entire civil justice system.

Conclusion

We welcome the introduction of FRC into an extended fast track and can foresee significant consumer, defendant and court benefits in a well-implemented regime. However, we caution against a direct implementation of the regime as proposed, and asks that the CPRC carefully considers the areas of concern described within this letter.

ACSO and its members would be very pleased to assist the CPRC and the MoJ with any further market engagement identified as beneficial for the appropriate and effective implementation of the extended FRC regime. For their information I will also send this letter to the Lord Chancellor, the clerk of the House of Commons Justice Select Committee and Robert Wright at the MoJ.

Yours sincerely,

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cc The Rt Hon Dominic Raab MP, Secretary of State for Justice and Lord High Chancellor
Robert Wright, Head of Civil Litigation and Costs, Ministry of Justice
Robert Cope, Clerk to the House of Commons Justice Select Committee