



## **Islington Law Centre response to CJC costs consultation**

We reply at this stage to the questions on FRC only. This is because FRC will largely render the other issues (pre action costs, hourly rates, budgeting) moot/irrelevant to most housing cases.

***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?***

*See below*

***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.***

*See below*

***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.***

*No*

One of the main issues arising from FRC is the impact it will have on the housing legal aid provider base. We understand there has not been an impact assessment in relation to the impact on the legal aid provider base.

Legally aided housing cases are not suited for an FRC regime due to their complexity. Often the home is at stake (as in possession matters) or the client's home is in disrepair and an injunction is required. The client may have been illegally evicted without a court order and need an injunction for re-entry. Housing clients are further often vulnerable with mental and/or physical health problems resulting in longer attendances. Housing cases are document heavy often with considerable disclosure including repair and housing files. Cases often involve expert evidence from surveyors and medical experts. Attendances are longer due to there being multiple documents

to take instructions on. Attendances can also include interpreters, social workers or other support for the client and which lengthens appointments.

Recovery of *inter partes* costs from opponents gives housing legal aid a modicum of sustainability given there has been no increase in rates since around 1996 and there was a 10% cut in rates in 2011. To be clear, these are cases where the tenant is legally aided and succeeds in the case and so costs are paid by the landlord at market rates rather than the LAA at legal aid rates. Limiting *inter partes* recovery would mean housing would no longer be sustainable financially as an area of legal aid and the housing legal aid sector will collapse. These are cases where for example (1) the tenant successfully defends a possession action or (2) the tenant brings a successful disrepair claim and is granted an injunction for repairs and damages are awarded (3) the tenant successfully defends an anti-social behaviour injunction claim (4) the tenant successfully claims for damages and an injunction after being illegally evicted by their landlord without a court order. It is important to remember these costs are assessed by the court (if costs are not settled) and only a proportionate/reasonable amount is allowed by the court.

There are multiple issues to consider in relation to FRC and legal aid;

- (a) How will the Government ameliorate the financial impact on legal aid providers of the significant reduction in *inter partes* income? Will legal aid rates (£63 per hour for certificated cases - London) be increased to *inter partes* rates (£200-300 per hour)?
- (b) If costs at legal aid rates will exceed fixed recoverable costs will providers be able to choose not to enforce a costs order and seek payment from the LAA instead? Can the provider advocate for the Court to make no order for costs even though they have succeeded on a case?
- (c) Will the contractual duty on legal aid providers to recover costs from opponents and protect the legal aid fund be removed? Especially given legal aid rates will on our calculation in a significant number of cases exceed FRC. In a sample of 10 of our cases where costs were recovered from the opponent, in 70% of the cases costs at legal aid rates would astonishingly exceed FRC. It would be perverse to expect providers to pursue opponents for fixed costs where these are lower than legal aid rates (see Standard Civil Contract Specification 2018 para 6.57).
- (d) If Counsel is used in a legally aided case where an *inter partes* costs order is obtained, will the solicitor be paid nil if Counsel's fee takes up the fixed costs allowable?
- (e) If legal aid rates exceed fixed recoverable costs will the statutory charge still apply to damages recovered? If so what steps will the Government take to stop a conflict of interest between solicitor and client arising. In damages claims funded under legal aid, such as disrepair Counterclaims in possession proceedings, it is in the client's best interest to recover costs from the landlord and so to ensure the statutory charge does not apply and the client can keep the net damages. If legal aid rates will exceed FRC, there will be a conflict of interest between solicitor and client. Solicitors would in that situation rather pursue no order for costs in order to claim from the Legal Aid Agency, whereas the client will need the solicitor to recover costs from the opponent to prevent the statutory charge from arising and attaching to the damages. There will therefore be a significant conflict of interest between solicitor and client in relation to recovery of costs.

Vulnerable tenants will suffer under these proposals. Housing legal aid providers will exit the sector as housing legal aid will no longer be financially sustainable under FRC. Vulnerable tenants will not be able to access solicitors and will become homeless due to being evicted or have to live in terrible housing conditions.

This would result in increased homelessness and poor health for renters due to tenants being evicted or having to live in poor housing conditions.

Two-thirds of our clients have some form of ill-health or disability.

The clear solution is legally aided litigants should be excluded from FRC. There is no cost to the Government by excluding legal aid cases from FRC, in fact not doing so will cost the Government more taxpayer money. Under an FRC regime housing providers will seek in numerous cases payment from the LAA instead of opponents due to the Legal Aid costs being higher. Even if FRC costs are slightly more in some cases, providers will still be inclined to seek payment from the LAA rather than spend the associated time and costs of pursuing an opponent for a fraction more in costs.

The Government has announced recently that there will be a 2 year delay in relation to fixed costs applying to possession claims where the Defendant is legally aided. The Government clearly now recognises there will be an impact on housing legal aid providers and renters. Legally aided housing possession cases (and other legally aided housing cases) should however be fully exempt indefinitely and not only possession claims.

We understand mesothelioma/asbestos, complex PI, professional negligence, actions against the police and child sexual abuse cases will be excluded from fixed costs. We would submit the same access to justice considerations clearly apply to housing cases (equally or in some cases more so) and which involve stopping loss of the home and homelessness and ensuring safe housing conditions and so housing cases should also be excluded.

Sir Rupert Jackson in 'Supplemental Report Fixed Recoverable Costs' recommended no cutbacks in legal aid;

*"Many people assert that the 2013 cutbacks in legal aid were based on my recommendations. Indeed, a very senior Queen's Counsel, who has held public office, suggested that at the Cardiff seminar. As can be seen from the above summary, that is not correct. **In fact, I recommended in forthright terms that there should be no cutbacks in legal aid.**"*

FRC would be a cut to legal aid given it would reduce inter partes income which providers rely on and accounts for around £10-12.5 million per annum on LAA figures. The impact of a reduction in this income and the resulting impact on providers and then vulnerable renters has not been considered by the Government.

We consider the proposed vulnerability uplift will be of limited effect. We expect opponents to oppose vigorously the uplift applying in any situation. We further understand the uplift will only be decided at the end of the case and so assessing the risk of taking on a case will be impossible as the likely costs will be too uncertain.

We further consider the proposed specific performance uplift will be of limited effect. This will not apply to possession claims where there is no counterclaim. Further even in relation to counterclaims, we expect opponents will refuse to agree in writing to do repairs due to the costs consequences and will instead do the repairs and allege they would have been done anyway.

We would strongly urge that legal aid and vulnerable litigants be now given full consideration as to date they have not been. With vast housing advice deserts across the country FRC would likely be the final nail in the coffin for housing legal aid as a sector and with vulnerable renters bearing the brunt.

We are a not for profit organisation and recovery of inter partes costs in housing cases allows us to help fund crucial services that are no longer within scope of legal aid such as debt, welfare benefits and education. The impact of the loss of this income would be devastating on our services and clients.

We also rely on and refer to the response to this consultation from HLPAs of which we are a member.