

**CJC Costs Working Group – Consultation – Housing Lawyers Practitioners' Association ('HLPAs') response**

FRC will largely render guideline hourly rates, pre-action costs and costs budgeting irrelevant and so we have no comments at this stage on those questions. We respond to the FRC questions as follows;

***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 enclosed report and below summary*

***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.***

*Yes there are other costs issues – please see enclosed report and below summary*

***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

**Summary**

We continue to believe that FRCs are an existential threat to access to justice for those who require legally aided and/or CFA funded legal services in all areas of housing law, because we think the disastrous financial impact of FRCs will drive providers out of the sector.

We refer to and rely primarily on the enclosed report and data gathering dated 1 June 2022. The report is co-signed by Generation Rent, Shelter, Law Centres Network and Legal Aid Practitioners' Group. The housing legal aid sector relies for financial sustainability on the ability to recover reasonable assessed or agreed *inter partes* costs from opponents, given the low level at which legal aid rates are paid at.

This includes;

1. Where a legally aided litigant is successful in a case and the opponent is ordered to pay their costs, the solicitor is entitled to recover such costs from the opponent at *inter partes*/market rates rather than at legal aid rates from the LAA. This is in relation to the areas of housing still within scope of legal aid – possession claims including counterclaims, ASB injunctions, illegal eviction/harassment claims.

2. Housing disrepair claims conducted under CFAs given disrepair damages claims were removed from scope of legal aid in 2013.

The impact of fixed recoverable costs will be that there will be far fewer providers doing housing work under legal aid and CFAs. This will result in renters ultimately bearing the brunt and not being able to secure legal advice and representation. Renters in housing law cases are often vulnerable with physical and/or mental health problems and reliant on a low income. The housing legal aid sector has operated for many years on the basis that important work paid at lower rates (such as legal help homelessness) can be done and subsidised due to the recovery of *inter partes* costs in possession and disrepair cases. Fixed fees are likely to be the final nail in the coffin for the already fragile housing provider base. Legal aid rates are paid at £63 per hour for certificated cases (London) and I/P rates are £200-300 per hour. Legal aid rates were set in 1994, increased by £1 in 1996 and then cut by 10% in 2011. The indemnity principle was disapplied in 1994 to allow providers to supplement low legal aid rates with I/P costs.

We understand, astonishingly, there has been no impact assessment by the MOJ and LAA in relation to the impact of FRC on the housing legal aid provider base. Our data gathering concluded that the reduction in viability caused by FRCs would lead to solicitor firms and not-for-profit organisations closing their housing departments. This in turn would reduce economies of scale, so that central overheads would not be able to be absorbed by other departments. This could lead to some legal aid providers ceasing to practice altogether.

Since our enclosed report there have been 3 developments;

1. Where the litigant is a legally aided Defendant in possession proceedings FRC will not apply until April 2025.
2. There will be an uplift where the litigant is vulnerable.
3. There will be a further uplift for specific performance (for example where repair works are ordered).

We submit the above will have limited impact and will not alleviate the impact of FRC on the housing provider base.

1. The possession delay is a delay only and not an exemption. This is simply a stay of execution and may simply delay some providers closing for 2 years. Also it does not apply to other areas of legal aid including ASB injunctions and illegal eviction/harassment claims.
2. We understand the vulnerability uplift will apply at the end of the case and so providers will not be able to assess the risk of taking on such cases if the likely costs are so unclear. We also rely on our enclosed vulnerability consultation response.
3. We do not consider the specific performance uplift will have the expected impact and make FRC viable. Most disrepair claims settle pre issue and so any uplift will be minimal. It is also not appreciated by those drafting the rules how difficult it will be to settle a case and get the landlord to agree to (by way of agreement or Consent Order) the repairs being done. FRC will be a disincentive to settlement in many disrepair cases which is surely perverse to the scheme's aims. We expect landlords will refuse to agree formally by way of written agreement to do the repairs, knowing that doing so would make them liable for increased costs. We expect they instead they will do the repairs urgently following the letter of claim or claim/counterclaim and allege they would have done so anyway without the litigation pressure.

HLEPA executive



Housing Law Practitioners' Association  
 Legal Aid Practitioners' Group  
 Law Centres Network  
 Generation Rent  
 Shelter

1 June 2022

**FIXED RECOVERABLE COSTS IN HOUSING CASES - AN EXISTENTIAL THREAT TO ACCESS TO JUSTICE**

*In this paper the organisations named above argue, and provide evidence by way of the attached 'Hawke Report', that in respect of housing cases the Fixed Recoverable Costs proposals represents an existential threat to the organisation delivering legal advice and representation to renters and borrowers in possession proceedings, housing conditions, unlawful eviction, homelessness and beyond. This cuts across key government priorities on levelling up, early advice and access to justice. It also undermines successive governments' previous justification for legal aid reforms because it makes CFA work for quality providers unfeasible.*

*FRCs are therefore an existential threat to access to justice in across housing law matters. We call for all housing cases to be exempted from FRCs, and for further detailed research to be carried out before costs reforms are considered in this area.*

The delay to FRCs in possession cases announced in [Housing Legal Aid: the way forward](#) (31.05.2022) is welcome as far as it goes – but assuming it is accepted that FRCs represents a threat to sustainability, the logic is that the exemption should apply to all housing cases (including all CFA housing cases). It is fixed costs in housing disrepair counterclaims and standalone claims, also unlawful eviction claims and others which will hit firms and organisations the most, and consequently threaten in a very real and very practical sense the welcome early advice innovations represented by HLPAS. FRCs



need to be re-evaluated for all housing cases if there is to be a housing advice and representation sector to deliver the government's commitments to access to justice.

Extending early advice improves access to justice for tenants but does not improve financial sustainability of providers. Housing providers will continue to rely on *inter partes* costs recovered in possession claims under any extended duty possession scheme.

We are not sure we understand the reference to possession proceedings being the only 'no choice' litigation for defendants. A family living in a home which is unfit for human habitation or facing unlawful eviction has 'no choice' but to litigate if they are to preserve their health or their home.

1. Under the Ministry of Justice's (MoJ's) proposed Fixed Recoverable Costs (FRCs) regime, (*Extending fixed recoverable costs in civil cases: the Government response* (September 2021)) it is proposed that in civil cases allocated to the fast track, or vastly extended multi-track, the winning party will recover fixed costs in respect of the litigation. Regardless of how many hours were done to conclude the cases, the winning party will be limited to prescribed, fixed amounts. The prescribed amounts are considerably less than the *inter partes* costs litigators would expect to recover in most cases on the current standard basis paid at hourly rates, and, we fear, may even bring about circumstances where, almost unbelievably, the fixed costs would be lower than the hours charged at legal aid rates.
2. The housing legal aid sector relies for financial sustainability on the ability to recover reasonable assessed or agreed *inter partes* costs from opponents, given the low level legal aid rates are paid at. Where a legally aided litigant is successful in a case and the opponent is ordered to pay their costs, the solicitor is entitled to recover such costs from the opponent at *inter partes*/market rates rather than at legal aid rates from the LAA.
3. The next legal aid contracts are due for May 2023 for the housing possession court duty scheme and September 2023 for face to face housing legal aid contracts. Our membership i.e. housing legal aid providers, are likely to have to seriously consider whether such contracts are financially viable and worth applying for in light of fixed recoverable costs.
4. The Government is reviewing the sustainability of civil Legal Aid. We submit that this process is futile unless it is confirmed fixed recoverable costs will not apply to housing cases, given the reliance of the housing legal aid sector on the recovery of *inter partes* costs from opponents in successful cases. We are very surprised and concerned that it appears the MoJ has not realised the link between the impact of fixed costs and legal aid sustainability.

## **Renters**

5. The impact of fixed recoverable costs will be that there will be far fewer providers doing housing work under legal aid and CFAs. This will result in renters ultimately bearing the brunt and not being able to secure legal advice and representation. Renters in housing law cases are often vulnerable with physical and/or mental health problems and reliant on a low income. We would request the Government consider the wider impact on society if renters are unable to secure advice and representation in cases where they face eviction or poor housing conditions.
6. Under fixed recoverable costs tenants will end up being illegally evicted and homeless, or evicted despite having had a Defence, or having to live in terrible housing conditions.

## **Hawke Report**

7. We commissioned a report from Hawke Legal, an independent costs consultancy, on the impact of fixed recoverable costs on housing providers. A copy is attached. 19 organisations took part in the data gathering including law centres and firms in private practice. Data from 131 housing cases (including both legal aid cases and CFAs) was analysed as was organisational financial data. This found inter alia;

- A. The overall effect of the change from *inter partes* costs under the current scheme to FRCs would significantly reduce the income of legal aid providers.
- B. In 43% of the legal aid housing cases analysed legal aid rates would be higher than the FRC costs.
- C. In cases where Counsel was not used average fees would fall 47%. In cases where Counsel was used there would be a fall in fees of 87-89%.
- D. 17 of the matters analysed would be undertaken at a loss for the provider once counsel is paid.
- E. The average income of a Law Centre or other not-for-profit housing legal aid provider would fall by 20% as a result of these proposals.
- F. The average income of a private practice housing legal aid provider would fall by 23% as a result of these proposals.
- G. It appears likely that the reduction in viability caused by FRCs would lead to solicitor firms and not-for-profit organisations closing their housing departments. This in turn would reduce economies of scale, so that central overheads would not be able to be absorbed by other departments. This could lead to some legal aid providers ceasing to practice altogether.
- H. The provision of legal aid housing under the FRC proposals would become unsustainable if the proposals are implemented unamended.

## Background

8. To date the Government's response to our concerns has been on the basis that unless we, the housing sector, provide it with 'concrete' (para 24.3, page 79), 'statistical' (para 22.1, page 78), 'detailed evidence' (para 3.8, page 25) that housing cases are not suited to FRC, they will be subject to this regime because there is no good reason why they should not be.

9. This is what we do know:

- a) The sector is highly sensitive to changes in its funding. The number of providers of specialist housing legal advice has fallen dramatically since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The number of housing and debt provider offices fell from 537 in April 2012 to 397 in September 2021 (Hansard Written Question UIN 51685, 20 September 2021; answered 23 September 2021).
- b) The number of cases where legal aid was provided for initial advice fell by more than 75 per cent in the first year of LASPO's implementation and the number of grants for legal aid for representation fell by 30 per cent in the same period (Legal Aid, Sentencing and Punishment of Offenders Act 2012: post-legislative memorandum, MoJ, October 2017, Figure 6, page 46). The number of civil legal aid providers also nearly halved, from 4,253 providers in 2011/12 to 2,824 in 2017/18, including solicitor firms and not-for-profit organisations.

- c) Across civil legal aid as a whole, the number of provider offices completing work fell by almost a quarter over the five years to March 2020 (Legal aid statistics quarterly, England and Wales January to March 2020, MoJ/LAA, 25 June 2020, page 19).
- d) There has been no increase in legal aid rates since 2007. As has been explained previously in Legal Action magazine by the Legal Aid Practitioners Group:
  - (1) In October 2007, the fixed fee for community care legal help cases was £290. The hourly rate for preparation and attendance in civil certificated cases was £70 in London and £66 outside (Community Legal Service (Funding) Order 2007 SI No 2441 Schedule Tables 1 and 10(a)). These fees were subject to a 10 per cent cut in 2011 and have not been adjusted since. Enhancements in county court claims have been capped also at 50%.
  - (2) If the contracts contained mechanisms to uprate fees in line with the RPI, the rates would have increased by 2019 to £406, £98 and £92 respectively. These increases would have done nothing more than ensure that fees kept up with the rising cost of delivering services, which, according to the RPI, cumulatively increased by anywhere between 40 and 50 per cent in those 12 years. Without that mechanism, lawyers are being continuously asked to provide the same level of high-quality service for, in real terms, an ever-decreasing fee (July/August 2020 Legal Action 22).
- e) There are few incentives left for legal aid providers to continue to provide a service. Legal aid rates are significantly lower than the market private rates charged by high-street firms and work on these rates alone would be unsustainable. The fixed fee for housing legal help cases is £157, having been cut by 10% in 2011.
- f) Counsel are, contrary to the assumptions made, regularly instructed on Band 1- and 2-type cases that last for one day. Although such bands are unlikely to apply to housing cases.

## Objections

10. We object to the FRC proposals, and ask for housing law work to be exempted from the regime for the reasons that follow.
11. It is vitally important that we make it clear that access to justice in the housing field is at threat from these proposals. And justice for renters, borrowers and leaseholders could not be more important than at the current time.
12. Possession proceedings are opening up and huge rent deficits built up during the pandemic sit behind that. The media and the Housing Ombudsman are highlighting the poor condition of rented housing stock. The mood music around the cladding scandal and remediation may be moving in a more positive direction but there is still much to do in the legal arena to ensure that just outcomes are reached.
13. At the same time the renters' reform agenda proceeds alongside proposed reform to possession proceedings, there are consultations on a new early advice service in possession proceedings, intentional homeless decision reform for those fleeing domestic violence, as

well as proposals to make it easier for those people to remove perpetrators from tenancy agreements. We don't presume to say that lawyers are the only stakeholders in these issues but lawyers are needed and will continue to be needed to ensure justice and that the rule of law is maintained.

14. Housing Possession Court Duty Scheme providers are at risk. Organisations and firms that litigate cases for tenants with health threatening disrepair are also at risk. And yet as the [Law Society has been reporting since 2018](#) England and Wales desperately needs *more* quality housing law providers to protect housing rights.

15. FRCs are apt to drive providers out of the sector. We are concerned that the 2021 report on FRCs and those before it fail to grasp the extent to which the legal aid sector, and housing law in particular works like an ecosystem, with each individual activity that an organisation undertakes being reliant on the sum of its activities. So loss-making activities at low remuneration rates are supported by the possibility of litigation which can bring in *inter partes* costs.

16. We are certain that FRCs will drive out of business the majority of organisations, including both private practice and not-for-profit currently doing legally aided housing law work and housing law work under CFAs. On 24 September 2021, Islington Law Centre wrote to Lord Wolfson giving some examples of the impact that FRC will have. It analysed figures in its cases involving recovery of *inter partes* costs from opponents in successfully defended legal aid possession claims, and found that under FRC Band 3 recovery of profit costs would only be between 31 and 38 per cent of the costs recovered under the current costs regime. It even argues that perverse incentives will occur whereby the legal aid provider may decide not to pursue *inter partes* costs because payment, even at paltry legal aid rates, will outstrip FRC.

17. It is important to reiterate that organisations that currently deliver court duty advice, and legal help for early advice to tenants rely on *inter partes* fees from successfully suing landlords in order to subsidise the duty and legal help work.

18. Housing possession (including Counterclaims for disrepair) is one of the main areas of work left within scope of housing legal aid and most housing possession cases are allocated to the fast track.

19. Recovery of *inter partes* costs (at market rates in successfully defended possession cases for example) from opponents gives housing legal aid a modicum of sustainability given there has been no increase in rates for a significant period and there was a 10% cut in rates in 2011. To be clear, these are cases where the tenant is legally aided and successfully defends the possession claim 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.

20. The housing legal aid sector has operated for many years on the basis that important work paid at lower rates (such as legal help homelessness) can be done and subsidised due to the recovery of *inter partes* costs in possession and disrepair cases. A solicitor dealing with a housing legal aid case does not have the option of charging the client a success fee or

recovering from the client the costs not recovered from the opponent. In many cases legal aid rates will now exceed fixed costs and so result in a disincentive to seek costs orders against opponents. This will mean providers are unable to fulfil the contractual duty to protect the legal aid fund and recover costs from opponents. There will be a conflict of interest between solicitor and client in legally aided damages cases (such as Counterclaims) – the client will want (need) their solicitor to recover costs from the opponent due to the statutory charge whereas providers will be inclined to seek costs instead from the LAA as they are likely to be higher. The MoJ is clearly on one hand concerned about legal aid sustainability but has failed to grasp the impact of fixed rates on legal aid providers or explain how the significant loss of income to legal aid providers will be ameliorated.

21. Fixed fees are likely to be the final nail in the coffin for the already fragile housing legal aid sector. The importance of *inter partes* fees to the legal aid sector has been recognised by the Supreme Court;

*Governing Body of JFS and others* [2009] UKSC 1 at para 25:

*“It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. **If that were to become the practice, their business would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work.**”*

22. The following types of housing case will be affected by fixed recoverable costs;

- (i) Possession proceedings.
- (ii) Counterclaims within possession claims including disrepair Counterclaims.
- (iii) Anti-social behaviour injunction claims.
- (iv) Claims for illegal eviction/harassment.
- (v) Disrepair/nuisance/housing conditions claims.
- (vi) Discrimination claims under the Equality Act 2010 involving housing issues, for example as Counterclaims in possession proceedings.

23. Legal aid is available for all the above types of housing case although disrepair claims are now usually dealt with under CFAs due to disrepair legal aid not covering damages claims unless as Counterclaims. Disrepair claims were taken out of legal aid scope in 2013 with the justification that they could be run under CFAs. It will not be possible for disrepair claims to be run under CFAs under fixed costs proposals, save for possibly very cheaply and poorly by claims farmers, with poor outcomes for tenants.

24. The housing legal aid sector has had to adapt to significant changes in recent years. Disrepair was virtually taken out of scope of legal aid by LASPO. Now only cases where there



is a serious risk of harm to health and safety are within scope and this is only in relation to the injunction element, legal aid will not fund the damages claim. Disrepair cases are therefore basically unworkable under legal aid and are now dealt with under CFAs. Some firms and in particular law centres do not however offer CFAs due to the risk involved of no payment. Many firms and law centres have had to adapt to the loss of *inter partes* income from freestanding disrepair claims. There was also the 10% cut in legal aid fees in 2011. Firms also had to adapt to changes for legal aid in relation to judicial review claims, where there is now no payment unless permission to claim for judicial review is obtained from the court.

25. Legal aid providers have had to adapt and one such way has been pursuing opponents more vigorously for costs in successfully defended cases such as possession claims and anti-social behaviour injunctions. Legal aid providers will not be able to adapt further and will not survive if there is a significant reduction in *inter partes* income, in particular when there has been no discussion in relation to a significant increase in legal aid rates.

26. There are multiple issues the Government has failed to consider in terms of the interplay between legal aid and a possible fixed recoverable costs regime;

- (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) 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 to recover costs from opponents and protect the legal aid fund be removed? Especially given legal aid rates may 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 as this will create a conflict of interest between solicitor and client.
- (f) Where a litigant is legally aided their costs cannot be summarily assessed by the Court (PD 44) and so this conflicts with a fixed costs regime. What consideration has been given to this by Government?

27. Other jurisdictions with no costs recovery such as the US have huge damages awards in comparison to the UK, enabling DBAs. UK courts have deliberately limited damages partly due to the fact that legal costs can be recovered. Limiting costs to a fraction of what they were previously will limit justice and undermine the global reputation of courts in England and Wales.

28. The FRC regime would prevent lawyers working under legal aid and CFAs from being properly remunerated in cases that they win (against bad landlords) by which they subsidise poorly paid legal aid work and duty scheme work. The concern rightly held by the MoJ that early advice in housing and related matters should be more widely available is at grave risk from the FRC regime because providers will not be there to deliver that early advice.

29. The Means Test Review and possible expansion of the availability of legal aid will also be futile if there are no housing providers to undertake the work.

30. While FRCs are thought to be costs neutral to Government, in fact the costs to Government arising from the loss of an already chronically depleted housing law advice sector will be found in the costs of homelessness, health outcomes and social care outcomes.

31. Housing cases are further 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.

32. FRC is based mainly around damages awarded. This fails to consider for example the potential loss of a secure/assured tenancy to a council/housing association tenant, and therefore the importance to the tenant of defending the possession claim and all the related complexities. The 'value' of such a social housing tenancy is too considerable for a fixed fee regime.

33. Landlords have said they are concerned about the claims handler model of disrepair litigation and that FRC is a panacea to those concerns. That is short-sighted to say the least. Far from discouraging them, FRCs will encourage and cause a proliferation of claims handler type organisations who do this work cheaply and with dubious results. We have seen an increase in unsolicited approaches by referrers since the FRC announcement last year.

34. But FRCs discourages (in fact will eradicate) quality housing lawyers who do a proper job for their clients either under legal aid or by CFAs. Access to justice will be curtailed as tenants facing disrepair will have no choice but to engage low quality claims handler organisations. See Giles Peaker – Inside Housing 14.03.2022  
<https://www.insidehousing.co.uk/home/home/lobbying-for-fixed-recoverable-costs-on-housing-condition-cases-takes-chutzpah-74663>.

35. We also contend that FRCs dispose of a right and proper sanction against landlords found not to have complied with the law. The standard *inter partes* costs order, as well as remunerating the tenant's solicitor for work done, is a quite proper sanction against a defaulting landlord on the "polluter pays" principle. It should be recalled that all such orders are subject to detailed assessment if not agreed.

36. The scheme, despite its extraordinarily long gestation, further fails to take into account the fact that housing claims often have other, non-money related remedies such as orders for repairs, injunctions against unlawful eviction, declarations. These remedies are vitally important to tenants, often securing their health and safety along with other housing-based rights. But the scheme makes no provision for the facts that pursuing a non-money remedy adds to (i) the workload generally, (ii) the issues that need to be resolved before settlement can be contemplated and, relatedly (iii) the length of time that the litigation is in train.

37. Essentially we respectfully contend that Sir Rupert Jackson and the Government have failed to adequately (or at all) take into account the specific performance element of a disrepair case;

- Repair works at a property can be complicated and difficult for parties to resolve. This means the case can drag on and is something not within the control of the claimant.
- Therefore how can we reasonably offer a CFA in disrepair cases under a fixed fee? The risk would be too high as we would not be able to reasonably assess how long or how much work would be needed to complete the case.
- Liability is ongoing and issues of disrepair can easily arise after the case has started. E.g. a simple case of mould in a property could, after further inspection, be discovered to be chronic rising damp. What could easily follow is a protracted argument involving experts as to the extent of the works needed to resolve the problem and consequently the extent of the Landlord's liability.
- Damages are historically low as they are based on rent values. They do not reflect the value to the client in getting the disrepair resolved. Therefore it is wrong to base the FRC on ratio around the value of damages.

38. See the example of client E below from HLP co-chair Simon Mullings. This case is not part of the data set.

#### **Case of Client E**

There is nothing unusual or excessive about the details of the case study below. Any housing disrepair practitioner would recognise the details as being common in such cases.

On 29.01.2020 I first saw client E. She complained of disrepair in her council flat. The disrepair was affecting her and her children's health. Client E signed a Legal Help form so that we could commence the housing disrepair/conditions pre-action protocol.

On 05.02.2020 I wrote to the council setting out the disrepair under the relevant pre-action protocol. On 14.07.2020 an expert's report was sent to the council. The council failed to agree a joint expert.

No works were done and on 03.09.2020 legal aid was granted to seek an order for the repairs to be carried out.

A draft copy of the particulars of claim were sent to the council on 08.10.2020.

Repairs were still not done. As time had passed, a need for further repairs had become apparent and the council disputed the existence of any repairs (contradicting their own expert's report), it was advised that a further expert's report should be obtained which we did. That was served on 05.01.2021. Still no repairs were carried out.

Proceedings were issued on 16.03.2021. We hope it will be appreciated that every step we have taken prior to, at the point of and after proceedings being issued was communicated to the council landlord.

We also signed a CFA agreement with client E so that we could pursue the money claim for damages.

The council argued that the matter should be allocated to the small claims track knowing that if it was then legal aid funding would not be available to client E. However at a hearing on 27.09.2021 the claim was allocated to the fast track.

Even after proceedings were issued and the case allocated to the fast track, no adequate works of repair were done. The council sent workmen and some minor works were done but they were not works that brought the property to fitness for human habitation and were often done to an appallingly low standard.

Trial was fixed for 10.03.2022.

There have been two expert reports on our side and one on the council's. Each report found there was still disrepair and unfitness, meaning the council failed to carry out adequate repairs over a period of 24 months and more.

The council moved our client to new accommodation in January 2022 at a time when repairs were still not completed – however that dealt with the claim.

Just to reiterate that the claim could not settle until the removal of the risk of harm to the occupiers.

We settled on a modest amount of damages - £1,500 but the costs of the case are estimated to be £23,000.00 including profit costs, disbursements, Counsel's fees and VAT.

Just to put the work we did in perspective, our estimate (pre-assessment) amounts to 4 hours per month done by a grade C fee earner. Any less work on a case would be borderline negligent. We are making the point that we are not intending to charge for excessive amounts of work. Those costs will either be agreed or subject to detailed assessment by the Senior Courts Costs Office. The most likely outcome is that we will settle on around 75% to 80% of the costs as drawn.

The work over 24 months was necessary because the council did not carry out works of repair that experts had said needed to be carried out to make the premise fit for human habitation.

At best under a FRC regime, assuming band 3, and assuming we undertook the hours that Counsel spent on the case, we would be being paid for this case £5,192 which would amount to an hourly rate of £47.20 per hour. My firm would not be able to do this work at those rates.

39. FRCs will also include proceedings that have a quasi-criminal law element such as possession proceedings based on alleged anti-social behaviour and anti-social behaviour injunction claims. Again it is quite clear that such cases are highly unsuitable for a fixed fee regime which caps the work to be done on them and the effect of FRCs is that there will even less providers with the expertise to take on this work and so alongside the civil justice system, an element of the criminal justice system will have an access to justice problem.

40. The same is true of cases which involve housing and discrimination law, and housing and debt matters. Moreover, in the case of discrimination cases there must be an overriding concern that the various reports including that from September 2021 did not take into account the changing conditions under which discrimination law and debt matter legal advice and representation is accessed by the public. Where previously these cases were behind the Legal Aid Agency 'gateway' and it was not possible to get advice face to face without going through the gateway first, that was changed in May 2020. It would be retrogressive to say the least if the Government opened up access to discrimination and debt cases with one hand and then closed a significant number of them down again with the other.

41. Landlords of poor quality housing will know that under a FRC regime, the longer they delay doing any repair works, the more unsustainable it is for reputable quality lawyers to bring claims against them. The landlord community will have a mechanism to prevent themselves from having to face high quality litigation claims. They will use the same tactics against claims handler organisations and that will lead to settlements being recommended to clients which will leave them with significantly less damages than they would be entitled to in the usual run of litigation and other remedies not being pursued to a satisfactory conclusion.

42. In circumstances where the fixed costs would be lower than the hours charged at legal aid rates there may arise significant conflict of interest depending on what the MoJ proposes. Cases occur, particularly where there are non-financial remedies, where there are settlements available to tenants in which it is in the best interests of the tenant themselves to not seek the costs from the opponent but to let the public fund meet the costs. In damages claims however 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 want 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 conflict of interest between solicitor and client in relation to recovery of costs.

43. We see circumstances where FRCs could have the unintended consequences of causing a great draw on the public fund and the scheme would not be cost neutral to Government.

44. Even in cases where base legal aid costs are less than fixed recoverable costs, they may still be more once an up to 50% enhancement is applied on assessment of costs by the Court or LAA.

45. Further in cases where fixed recoverable costs are more than legal aid costs, but not by a significant extent, it is unlikely to be worth the time and costs associated with pursuing an opponent in terms of assessment of costs and recovery. Providers are far more likely to in that situation simply seek to submit a claim to the LAA.

46. Given all the above we consider fixed recoverable costs are likely to result in a higher legal aid expenditure and which has also not been considered by the Government.

47. The Government is in possession of the relevant data and which has not been considered by the Government as part of the fixed recoverable costs process. Providers have to submit a report to the LAA once costs have been recovered from an opponent (these were previously known as Claim2s but are now submitted under CCMS). The Government therefore has the figures going back multiple years in relation to sums recovered from opponents rather than the LAA and therefore knows the importance of these sums to providers.

## Data

48. What is abundantly clear from the September 2021 report is that decisions made in relation to FRCs are based on a paucity of information about the way in which housing law cases in their variety of forms are conducted. There is little or nothing that deals with the issue of damages plus specific performance disrepair cases, nothing on counterclaims where again work consists of defending a claim plus one or more remedies being sought, including injunctions, declarations and others.

49. It is well known that data across the civil justice system in E&W is inadequate for planning (see eg. Dr Natalie Byrom's October 2019 report, [Digital Justice: HMCTS data strategy and delivering access to justice: Report and recommendations.](#))

50. It is submitted that FRCs should not have been nor should they now be contemplated without a proper data gathering exercise building on the data we have gathered and using the department's infinitely greater resources to ensure that any review of the costs regime is properly led by data and evidence rather than the current proposal to proceed in the absence of data and evidence.

51. Figures obtained from the Legal Aid Agency for legal aid housing cases closed during the below financial years show the total of what providers have reported for costs recovered from opponents per year;

Year	Costs housing
2008-09	10,402,100.89

2009-10	10,195,787.42
2010-11	10,270,254.13
2011-12	10,831,401.93
2012-13	9,201,209.36
2013-14	10,862,345.71
2014-15	12,468,619.05
2015-16	11,607,056.03
2016-17	11,193,801.17
2017-18	10,504,662.17
2018-19	11,823,354.33
2019-20	10,901,887.08
2020-21	8,271,571.82

52. These are clearly substantial sums (around £10-12.5 million per year). There will be a significant reduction in these sums following the introduction of fixed recoverable costs. Housing legal aid providers rely on *inter partes* costs recovered from opponents for financial sustainability and to subsidise lower paid work. No consideration has been given by the Government to how the provider base will survive following a substantial reduction in *inter partes* income. There has been no analysis by the Government on the impact on the housing legal aid sector of FRC.

53. These issues have been raised in meetings and in correspondence with the MoJ and LAA by HLPAs and the Law Centres Network and others, however there has been no substantive response to the impact on the housing legal aid sector. The Government has to engage with this issue and reply substantively.

### **Disrepair and Levelling Up**

54. Poor housing conditions is especially at present a significant problem faced by renters.

55. The Grenfell tragedy exposed the dangerous living conditions and fire safety issues faced by renters. The BBC and ITV have further reported recently and extensively on the terrible living conditions faced by renters including severe mould and damp.

56. As a part of Levelling Up the Government is keen to spread opportunity more equally across the UK. We do not see how this can be achieved if renters will not be able to access

legal advice and representation as a result of the reduction in housing providers due to fixed recoverable costs. If renters are living in terrible housing conditions or homeless/evicted due to an inability to access legal advice, it will be difficult for the Government to achieve their agenda especially given the link between having a secure/safe home and being in employment.

### **Access to justice**

57. The Government is clearly aware there are access to justice consequences of fixed recoverable costs. 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 considerations clearly apply to housing cases and which involve stopping loss of the home and homelessness and ensuring safe housing conditions and so housing cases should also be excluded.

### **Summary**

58. We consider that the proposals are deleterious to access to justice and would have unintended consequences:-

- 1) As the Hawke Report shows, it will drive quality providers who are dedicated to their clients' interests out of the legal aid and CFA housing law sector as the work will no longer be sustainable. Further housing legal aid deserts will occur.
- 2) 'Claims handler' type organisations may fill the gap but with worse consequences for clients and their damages.
- 3) Landlords will have little incentive to carry out works of repair or refrain from other breaches of tenancy as tenants will have even less ability to find quality providers by whom to seek legal redress.
- 4) There will be an increase in homelessness due to tenants being evicted due to not being able to defend possession claims due to the lack of housing legal aid providers.
- 5) The Government's early advice projects and the housing possession court duty scheme are at grave risk from these proposals.
- 6) Other adjacent areas of law such as discrimination will be adversely affected.
- 7) The importance of recovery of *inter partes* costs to financial sustainability of legal aid providers has not been considered by the Government at all. Many firms are likely to exit the housing legal aid sector.



8) All of the above means that housing law should be excluded from the FRC regime unless and until a proper data study shows that access to justice for tenants and homeless people will not be adversely affected.

59. We request an urgent meeting with the relevant Government ministers on this issue.

60. Given the Government has acknowledged that concerns have been raised about the impact on legal aid and has committed to 'continue to bear this in mind' (para 26.3 – Extending Fixed Recoverable Costs in Civil Cases: The Government Response) it is incumbent on the Government to engage with this issue and respond substantively to these submissions before any extension of fixed recoverable costs.

**01 June 2022**

**Serdar Celebi (executive member) and Simon Mullings (co-chair) for HLP**

**Chris Minnoch (CEO) for LAPG**

**Nimrod Ben-Cnaan (Head of Policy and Profile) for Law Centres Network**

**Alicia Kennedy (Baroness Kennedy of Cradley) (Director) for Generation Rent**



**Hawke Legal**  
Expertise through Experience

# **Housing Legal Aid Provision - the Impact of Extending Fixed Recoverable Costs**

**Rupert Hawke and Vicky Ling for the Legal Aid Practitioners Group**

**April 2022**

## Contents

Introduction.....	2
About Hawke Legal .....	3
Executive summary.....	3
Data collection .....	5
The sample.....	8
Impact on income if Housing legal aid is replaced with FRCs.....	9
Effect on income at each stage under FRC band 3 .....	11
Impact on the sustainability of Housing Legal Aid providers .....	12
Summary of conclusions .....	14
Appendix 1 .....	16
Appendix 2 – Questionnaire used in this report .....	17
Appendix 3 – Table of respondents – Total incomes and proportions affected by FRCs .....	19
Appendix 4 .....	20
Appendix 5 - Analysis showing the stage of the case where the fee reduction would have most impact.....	22

## Introduction

The cost of litigation raises barriers to accessing justice. In civil litigation in England and Wales parties to civil litigation need to budget to fund at least their own legal costs, unless they meet the scope, means and merits tests and are eligible for legal aid. In addition, the winning party is generally entitled to recover their costs from the losing party (although people in receipt of legal aid are protected from this to a significant extent). Legal aid fees are set by the government and are considerably lower than the fees lawyers can charge private paying clients which are set at market rates. To date, when a legally aided client is successful, their lawyers do not make a claim on the legal aid fund; but are entitled to recover their fees from the losing party at market rates (known as ‘inter partes’ costs). This represents an important source of income, particularly to organisations providing legal advice and representation on housing cases.

For some time it has been Government policy to try to control the costs of civil litigation in order to promote access to justice. In March 2019, the Ministry of Justice (MOJ) opened a consultation on its proposals to extend fixed recoverable costs (FRCs). FRCs 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. This would replace inter partes costs referred to above. The aim of FRCs is to ensure that legal costs remain both certain and proportionate. In September 2021, the MOJ published a consultation response<sup>1</sup> proposing to extend FRCs to legal aid cases; but which was based on very little empirical evidence in relation to the impact on legal aid providers.

---

<sup>1</sup> <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>

This report has been commissioned by the Legal Aid Practitioners Group (LAPG) to provide a detailed analysis of the MOJ's response to the consultation 'Extending Fixed Recoverable Costs in Civil Cases: The Government Response'<sup>2</sup> (the response) and specifically the effect the proposals will have on the ability of organisations to deliver housing legal aid on behalf of the government.

The government acknowledged that the impact on Housing Legal Aid has been raised by respondents in the consultation; but commented that this was in general terms and supporting data was not provided<sup>3</sup>. We welcome the government's acknowledgement of practitioners' concerns and that they would continue to bear them in mind<sup>4</sup>. In order to assist the government by providing more information, LAPG commissioned this survey and analysis of the impact of FRCs on legal aid Housing practitioners.

We believe the report demonstrates that the reforms would result in significant reductions in income for legal aid providers with a resulting detrimental effect on their ability to deliver legal aid. We hope that this data will assist the government to review its proposals and ask the Rules Committee to provide an exemption from FRCs in respect of legal aid housing cases.

## About Hawke Legal

Hawke Legal consultancy is headed by Rupert Hawke who leads a team of legal management experts working in the legal sector. Rupert is a qualified accountant and prior to starting Hawke Legal spent 12 years as FD/MD with a national law firm with significant legal aid contracts. Rupert has undertaken numerous projects on the effects of changes to legal aid fees and structures and the resulting effects on the provision of criminal and civil legal aid. Vicky Ling has worked on several previous reports into the impact of policy changes on legal aid practitioners with Andrew Otterburn.

We were assisted in producing this report by many legal aid practitioners and would like to thank them and staff at LAPG for their support.

## Executive summary

The Government plans to extend FRCs to all civil cases in the fast track up to a value of £100,000. That would include legally aided housing cases and disrepair cases conducted under conditional fee arrangements (CFAs). Whilst the Government's intention is an attempt to extend access to justice via the implementation of FRCs to limit legal costs for both claimants and defendants, we believe that, despite its previous consultation, the government is unaware of the potentially catastrophic financial effect the proposed FRC structure would have on legal aid providers that could lead to a collapse of legal aid in the housing category of law.

The response noted that there was little in way of detailed evidence to support adverse effects of FRCs on legal aid providers<sup>5</sup>. This report is based on empirical data and illustrates the adverse impact the proposed changes would have on organisations delivering housing legal aid. The consequence

---

<sup>2</sup> Ibid

<sup>3</sup> Op Cit para 3.8

<sup>4</sup> Op Cit para 26.3

<sup>5</sup> Ibid

would be that many citizens who would be eligible for legal aid would be denied access to justice due to lack of legal aid practitioners.

We found that:

- The overall effect of the change from inter partes costs under the current scheme to FRCs would significantly reduce the income of legal aid providers.
- On average around a quarter of income of legal aid providers who undertook the survey would be affected by the change to FRCs.
- On a sample of 131 typical cases, we identified a fall in average fees (excluding counsel's fees) from £10,583 per case to £5,588 – a fall of 47%.
- The average income of a Law Centre or other not-for-profit housing legal aid provider would fall by 20% as a result of these proposals.
- The average income of a private practice housing legal aid provider would fall by 23% as a result of these proposals.
- Under the extended FRC scheme, in many typical cases, no additional fee would be payable for Counsel's fees.<sup>6</sup> It is unlikely that legal aid solicitors firms and not-for-profit agencies would be able to change the traditional approach to representation required to manage this change because the reduction in their fees would make the work unviable as their profit margins are too small.
- It should be borne in mind when considering the findings of this report that impacts are likely to be magnified as the Court system works through the backlog of cases and higher volumes of work are processed.
- It appears likely that the reduction in viability caused by FRCs would lead to solicitors firms and not-for-profit organisations closing their housing departments. This in turn would reduce economies of scale, so that central overheads would not be able to be absorbed by other departments. This could lead to some legal aid providers ceasing to practise altogether.
- In a minority of cases under the FRC proposals, legal aid fees could exceed inter partes fees. In this situation legal aid providers would choose to be paid from the legal aid fund rather than defraying cost to the fund by claiming from the opponent. This would also create a conflict between solicitor and client in some cases, as unless the legal aid provider can recover their fees, the statutory charge applies and the client will not keep all their damages.
- The provision of legal aid housing under the FRC proposals would become unsustainable if the proposals are implemented unamended.
- Legal aid Housing cases are not simply damages cases. None of the cases reviewed in the report were pure damages claims and 56% of cases resulted in repairs being ordered by the Court. We believe that this distinguishes Housing legal aid cases from other cases where FRCs may be appropriate.

---

<sup>6</sup> Under FRC band 3 (the band for possession claims and disrepair claims unless particularly complex) counsel's fees would not be claimable in addition to the FRC, they would have to be paid from the fixed figure. An additional fee would only be payable if a case went to trial. There is no provision for payment to counsel if a case were to settle prior to trial when counsel had been appointed. The instructing organisation would still be obliged to pay counsel's fees and their overall income in these cases would reduce by 85%-87%.

## Data collection

### England and Wales data

The minutes of the Legal Aid Agency Civil Contracts Consultative Group on 19 January 2022 provided the following overall statistics on costs claims in Housing disrepair cases. It should be noted that the Covid-19 pandemic had a significant impact on Housing cases coming to Court as the Court system was badly affected by the pandemic during 2020 and 2021.

It should be borne in mind when considering the findings of this report that impacts are likely to be magnified as the Court system works through the backlog of cases and higher volumes of work are processed.

Financial year	Number of cases where costs were met by the opponent	Value of payments where costs were met by the opponent
2018-19	1,130	11,823,354
2019-20	997	10,901,887
2020-21	674	8,271,572

The Law Society analysed data from the [Legal Aid Agency directory of providers](#) (February 2021) and the [Office of National Statistics](#) (2021) and found that in England and Wales:

- almost 40% of the population of England and Wales do not have a housing legal aid provider in their local authority area, a figure that has grown by around 2% since 2019
- only 39% of the population have access to more than one provider in their local authority area

### Data from our survey

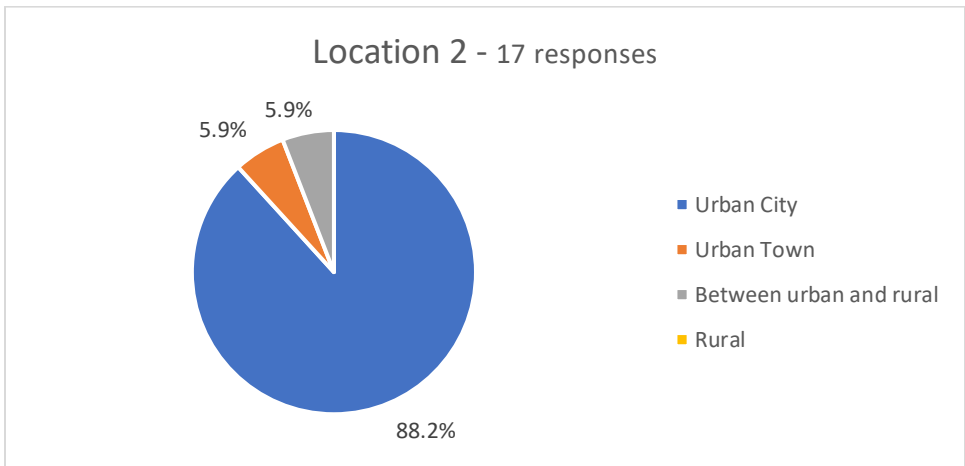
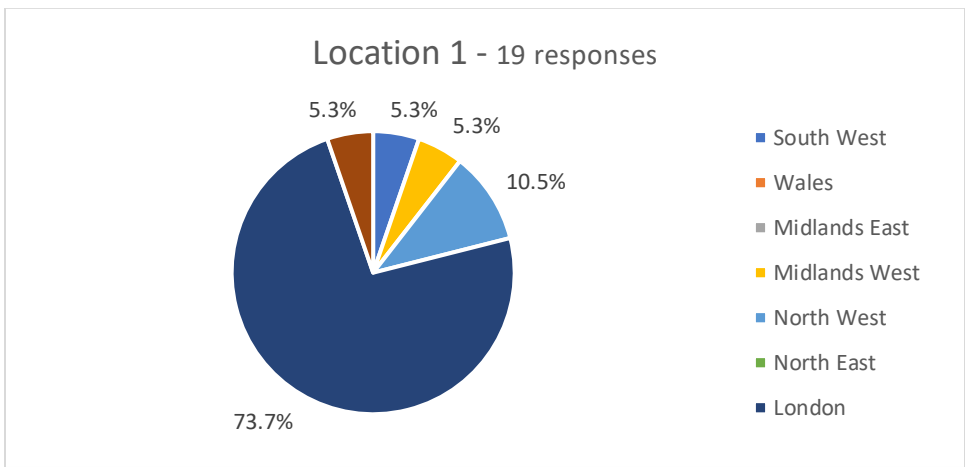
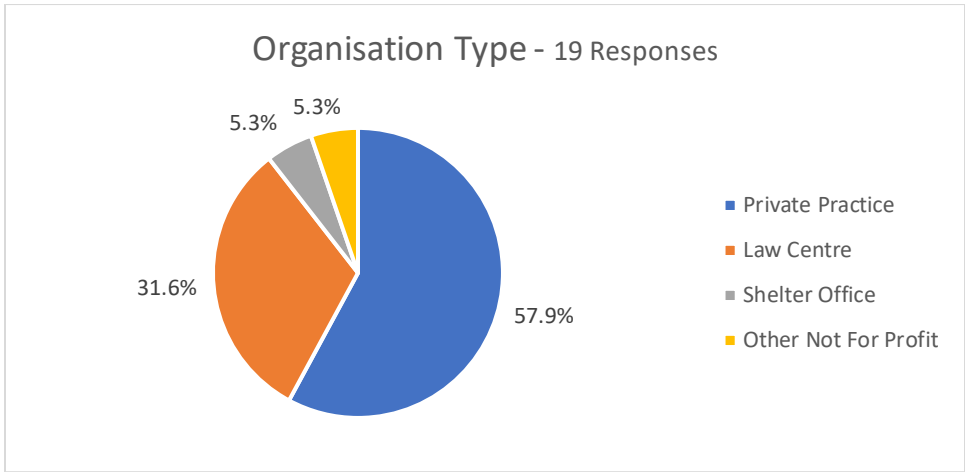
In order to demonstrate the impact at individual firm/not-for-profit provider level via a sizeable sample, we invited 30 such providers to complete a questionnaire regarding their organisation (provider type, location, turnover), and financial information on up to 10 housing cases undertake through legal aid or as a CFA. 19 organisations responded, a response rate of 63%.

In our survey nearly 3 out of 4 respondents were situated in London, which is consistent with Law Society research<sup>7</sup> showing that most legal aid housing providers are in London. 84.2% of all respondents to our survey were London and North West based organisations.

19 respondents provided information on the amounts of work undertaken that would be affected by the proposed changes with FRCs compared to turnover as a whole (see Appendix 3).

---

<sup>7</sup> <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts/housing>



**Aggregate data – all respondents**

The tables below shows the total turnover for organisations that provided turnover information, analysed by type of organisation (Law Centres / NFPs – 6, Private Practices – 5).

On average around a quarter of the income of legal aid providers who undertook the survey would be affected by the changes to FRCs proposed.

<b>Organisation type - all</b>	<b>Organisation Turnover</b>	<b>Housing Department</b>	<b>Estimated income affected by FRCs</b>	<b>% income affected by FRCs</b>
Law Centres / Other Not For Profits (Total)	2.6m	1m	614,000	20%
Private Practices (Total)	19m	7.5m	4.9m	23%

#### **Ranges and average inter partes fees of respondent organisations**

- Inter partes Solicitors fees range: £667 - £40,000 (average £10,583)
- Inter partes Counsel fees range: £0 - £20,000 (average cost where Counsel used £4,476)



## The sample

The 19 respondents provided 131 cases with the required information which allowed comparison of current fees against fees under the FRC proposals.

<b>Case Type</b>	<b>Number analysed</b>
Legal Aid	96
CFA	35
<b>Total</b>	<b>121</b>

Overall damages in the 131 examples ranged from £0 - £29,383

### **The importance of additional remedies in Housing legal aid cases**

In order to qualify for legal aid, disrepair must be causing a serious risk of harm to the claimant and/or their family. It is important to note that legal aid Housing cases are not simply damages cases, they frequently include additional remedies. In the sample of 131 cases, none of them were pure damages claims and 56% of cases resulted in repairs being ordered by the Court. We believe that this distinguishes Housing legal aid cases from other cases where FRCs may be appropriate.

<b>Additional Remedy other than damages?</b>	<b>Number</b>
Yes - Declaration	7
Yes - Other Injunction	10
Yes - Works of Repair	73
No	41
<b>Total</b>	<b>131</b>

## Impact on income if Housing legal aid is replaced with FRCs

Appendix 4 (p.20) provides a table with the costs information on 131 legal aid cases compared to the changes in costs based on the FRC proposals.

The overall effect of the change from inter partes costs under the current scheme to FRCs would significantly reduce the income of legal aid providers. When considering the effect on each case in the sample, of the 131 cases, there were only 8 instances when costs would be higher under the FRC proposals (6%).

In addition, we believe it is clear that overall, the FRC proposals are not designed to cover legally aid Housing cases which can be legally complex and frequently require use of counsel before and at trial. The response from the government suggested solicitors would adapt and have less reliance on counsel. However, in our experience and that of the respondents to the survey, this is often not feasible in terms of technical expertise. We believe counsel would not be available to undertake the work at rates offered (likely to have to be in the region of a 5<sup>th</sup> of what is currently paid). In addition, the impact of FRCs on solicitors firms and not-for-profit organisations would mean that they would have to withdraw from the work altogether.

### **Impact on the legal aid fund and solicitor/client conflict**

In the sample of 131 cases, there were 96 legal aid cases. Of these there were 41 (43%) where the notional legal aid fees were higher than the FRC costs under band 3 (after counsel fees are considered). Legal aid providers are under a contractual duty to preserve the legal aid fund and recover fees from opponents<sup>8</sup>. If legal aid fees exceed inter partes fees, then legal aid providers will choose to be paid from the legal aid fund rather than defraying cost to the fund by claiming from the opponent.

This would also create a conflict between solicitor and client in some cases, as unless the legal aid provider can recover their fees, the statutory charge applies and the client will not keep all their damages.

We consider that the evidence we have gathered below demonstrates that provision of legal aid housing under the extended FRC proposals would become unsustainable.

### **Fees reductions (excluding counsel)**

In order to show whether there was any reduction in the income of legal aid organisations, average income was analysed under the current scheme. We used the sample of 131 cases and excluded the cost of using external counsel (whose expertise is required in most cases).

We also show the same cases re-analysed and substituting the income which would be generated if FRCs are implemented as proposed:

Average - current fees	10,583
Average – fees FRC proposals	5,588
Reduction	4,995

<sup>8</sup> Standard Civil Contract Specification 2018 para 6.57

% fall	47%
--------	-----

### Fees reductions (including counsel)

The government is continuing to implement Sir Rupert Jackson's recommendations, published in July 2017<sup>9</sup>, by extending FRC in civil litigation cases in England and Wales. The proposals for FRCs allocate cases into four bands. Under FRC band 3 (the band for possession claims and disrepair claims unless particularly complex) counsel's fee would not be claimable in addition to the FRC, it would be deducted from the fixed figure. If a band 3 case goes to trial, an extra advocacy fee would be payable. In many cases this would traditionally be paid to counsel instructed to provide advocacy rather than a solicitor doing their own advocacy. Under FRC there is no provision for payment to counsel if a case settles prior to trial when counsel has been appointed. The organisation instructing counsel would be obliged to pay their fees even though they would receive no additional payment.

Appointing counsel at current rates (per the sample) and comparing all fees received currently against fees under FRCs (including advocacy for trials), would not be financially viable for organisations providing housing legal aid. The government believes that FRCs would drive behaviour change in both solicitors and counsel to deliver services at lower cost. However, our findings in relation to the reduction in fees for solicitors' firms and not-for-profit organisations indicate that they will have to withdraw from this area of work altogether.

Cases where counsel appointed - sample size 87	
Average current fees including fees for counsel	16,284
Average fees - FRC proposals after counsel costs	2,018
Reduction	14,266
% fall	88%

The advocacy fees included for trials is far less than counsel would historically have charged as shown below:

Average counsel fee per sample vs trial counsel fee under Band 3 FRC - sample size 19 cases	
Average current counsel fee	6,443
Average costs - FRC proposals after counsel costs	946
Reduction	5,497
% fall	85%

<sup>9</sup> <https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>

## Effect on income at each stage under FRC band 3

It may be useful to consider the effect at each stage under Band 3 of the FRC in terms of reductions, to identify where the largest reductions are. We provide a summary below. See [appendix 5](#) for a full analysis.

	Sample Size
Pre-Issue £1,001 - £5,000	16
Pre-Issue £5,001 - £10,000	2
Pre-Issue £10,001 - £25,000	4
Post-Issue, Pre-Allocation	18
Post-Allocation, Pre-Listing	19
Post-Listing, Pre-Trial	53
Trial	19

### Summary of % fall in costs at each stage of Band 3

Stage Reached under FRC Band 3	% fees reduction excluding Counsel costs	% fees reduction including Counsel costs
Pre-Issue £1,001 - £5,000	65%	
Pre-Issue £5,001 - £10,000	49%	
Pre-Issue £10,001 - £25,000	63%	71%
Post-Issue, Pre-Allocation	18%	63%
Post-Allocation, Pre-Listing	24%	64%
Post-Listing, Pre-Trial	45%	80%
Trial		92%

The overall fall in inter-partes fees being reduced under FRC's without considering counsel fees is **47%**.

Counsel often need to be appointed because of legal complexity and it is not possible to tell at an early stage whether a matter will go to trial. When considering the cost of counsel fees, assuming external counsel is used as is usual in typical cases, the total drop in fees for solicitors firms and not-for-profit organisations is **88%**.

Under the proposed FRC's, where counsel is appointed in the sample used here, 17 out of 87 matters would be undertaken at a loss for the provider once counsel is paid.

## Impact on the sustainability of Housing Legal Aid providers

Our analysis has been able to identify the proportion of income of participating providers that would be affected by the introduction of FRCs. We can couple this with the data demonstrating the reduction in income for providers per the proposals to gain an overall view on the affect the changes would have on the ability for legal practices to deliver legal aid.

The Law Society’s Management Section Benchmarking Survey 2021 found that its members produced a profit of 6.9% once all overheads had been deducted<sup>10</sup>. The firms which belong the to the Law Management Section are those which are run along more commercial lines and there is low representation of legal aid firms. We can reasonably suggest that legal aid providers make even less profit or surplus from the work as shown by recent studies, for example the Westminster Commission on Legal Aid<sup>11</sup> and Sir Christopher Bellamy QC’s independent review of criminal legal aid<sup>12</sup>. Even assuming a 6.9% profit or surplus, we can show that application of FRCs to legal aid Housing work would produce significant losses.

The tables below illustrate the effect on the profitability (or surplus) on legal aid providers if the external costs of counsel used and the advocacy fees paid under FRC’s (where applicable) were not changed by provider behaviour.

<b>LAW CENTRE</b>	(£'000)
Average turnover	444
Assumed margin 6.9%	31
Income affected by FRCs	102
Reduction caused by FRCs (76%)	82
Amended margin with FRCs	-51

<b>PRIVATE PRACTICE FIRM</b>	(£'000)
Average turnover	3,802
Assumed margin 6.9%	262
Income affected by FRCs	989
Reduction caused by FRCs (80%)	791
Amended profit with FRCs	-529

<sup>10</sup> LMA Benchmarking Survey 2021, The Law Society and Hazlewoods LLP

<sup>11</sup> Inquiry into the Sustainability and Recovery of the Legal Aid Sector, October 2021 [https://lapg.co.uk/wp-content/uploads/The-Westminster-Commission-on-Legal-Aid\\_WEB.pdf](https://lapg.co.uk/wp-content/uploads/The-Westminster-Commission-on-Legal-Aid_WEB.pdf)

<sup>12</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1041117/clar-independent-review-report-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf)

The government response suggested further utilisation of solicitors and in-house counsel to replace the cost of external counsel. In our experience, and that of the respondents to the survey, this is often not feasible and does not consider additional resource required (and hence additional cost) for the work external counsel would have done. Even if such difficulties and related costs were not considered in the equation, FRCs would still have severely adverse consequences as the tables show below, where external counsel costs are omitted:

<b>LAW CENTRE</b>	(£'000)
Average turnover	444
Assumed margin 6.9%	31
Income affected by FRCs	102
Reduction caused by FRCs (88%)	90
Amended margin with FRCs	-59

<b>PRIVATE PRACTICE</b>	(£'000)
Average turnover	3,802
Assumed margin 6.9%	262
Income affected by FRCs	989
Reduction caused by FRCs (88%)	870
Amended margin with FRCs	-608

#### **Analysis excluding Counsels fees**

<b>LAW CENTRE</b>	(£'000)
Average turnover	444
Assumed margin 6.9%	31
Income affected by FRCs	102
Reduction caused by FRCs (47%)	48
Amended margin with FRCs	-17

<b>PRIVATE PRACTICE</b>	(£'000)
Average turnover	3,802
Assumed margin 6.9%	262
Income affected by FRCs	989
Reduction caused by (47%)	465
Amended margin with FRCs	-203

## Wider implications for the legal aid sector

It appears likely that the reduction in viability caused by FRCs would lead to solicitors firms and not-for-profit organisations closing their housing departments. This in turn would reduce economies of scale, so that central overheads would not be able to be absorbed by other departments. This could lead to some legal aid providers ceasing to practise altogether.

## Summary of conclusions

- The overall effect of the change from inter partes costs under the current scheme to FRCs would significantly reduce the income of legal aid providers.
- On average around a quarter of income of legal aid providers who undertook the survey would be affected by the change to FRCs.
- On a sample of 131 typical cases, we identified a fall in average fees (excluding counsel's fees) from £10,583 per case to £5,588 – a fall of 47%.
- The average income of a Law Centre or other not-for-profit housing legal aid provider would fall by 20% as a result of these proposals.
- The average income of a private practice housing legal aid provider would fall by 23% as a result of these proposals.
- Under the extended FRC scheme, in many typical cases, no additional fee would be payable for Counsel's fees.<sup>13</sup> It is unlikely that legal aid solicitors firms and not-for-profit agencies would be able to change the traditional approach to representation required to manage this change because the reduction in their fees would make the work unviable as their profit margins are too small.
- It should be borne in mind when considering the findings of this report that impacts are likely to be magnified as the Court system works through the backlog of cases and higher volumes of work are processed.
- It appears likely that the reduction in viability caused by FRCs would lead to solicitors firms and not-for-profit organisations closing their housing departments. This in turn would reduce economies of scale, so that central overheads would not be able to be absorbed by other departments. This could lead to some legal aid providers ceasing to practice altogether.
- In a minority of cases under the FRC proposals, legal aid fees could exceed inter partes fees. In this situation legal aid providers would choose to be paid from the legal aid fund rather than defraying cost to the fund by claiming from the opponent. This would also create a conflict between solicitor and client in some cases, as unless the legal aid provider can recover their fees, the statutory charge applies and the client will not keep all their damages.

---

<sup>13</sup> Under FRC band 3 (the band for possession claims and disrepair claims unless particularly complex) counsel's fees would not be claimable in addition to the FRC, they would have to be paid from the fixed figure. An additional fee would only be payable if a case went to trial. There is no provision for payment to counsel if a case were to settle prior to trial when counsel had been appointed. The instructing organisation would still be obliged to pay counsel's fees and their overall income in these cases would reduce by 87%-89%.

- The provision of legal aid housing under the FRC proposals would become unsustainable if the proposals are implemented unamended.
- Legal aid Housing cases are not simply damages cases. None of the cases reviewed in the report were pure damages claims and 56% of cases resulted in repairs being ordered by the Court. We believe that this distinguishes Housing legal aid cases from other cases where FRCs may be appropriate.



## Appendix 1

The extracts below have been taken from the Government's response to the consultation to extending FRCs, which indicate that the MOJ lacks important data. Emphasis added.

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.

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.**

# FRC Questionnaire

Email

Organisation Information

Organisation type

Private practice  
Law centre  
Shelter office  
Other not for profit

Location 1

South West  
Wales  
Midlands East  
Midlands West  
North West  
North East  
London  
Other South East

Location 2

Urban - city  
Urban - town  
Between urban and rural  
Rural

Total income/turnover of organisation/branch

Total income/turnover attributable to the department that does housing law?

Total income/turnover attributable to cases that would be affected by FRC (est.)

Optionally, please let us have any general comments you wish to share about FRCs as they would affect your organisation

## Case 1

Case type

Legal Aid

CFA

Damages (£amount or N/A)

Was there an additional remedy other than damages?

No

Yes - works of repair

Yes - other injunction

Yes - declaration

I/P Profit Costs net

I/P Csl Fee net

LA profit costs net

Stage reached (pre-issue split by damages amount)

Pre-issue £1001- £5000

Pre-issue £5001 - £10,000

Pre-issue £10,001 - £25,000

Pre-issue no damages

Post issue/pre allocation

Post issue/pre listing

Post listing/pre-trial

Trial

Any brief case comments (optional)

APPENDIX 3 – Table of respondents – Total incomes and proportions affected by FRCs

Organisation Type	Organisation Turnover (£'000)	Housing Department (£'000)	Estimated income affected by FRC's (£'000)
Law Centre	No response	No response	No response
Law Centre	250	150	50
Other Not For Profit	1,131	255	250
Law Centre	477	287	119
Private Practice	No response	No response	No response
Private Practice	No response	No response	No response
Private Practice	4,000	3,800	3,300
Private Practice	11,000	1,400	700
Private Practice	No response	2,169	723
Private Practice	1,731	513	No response
Private Practice	1,210	1,058	121
Private Practice	1,300	1,100	800
Law Centre	479	105	65
Law Centre	67	55	10
Private Practice	No response	No response	No response
Law Centre	262	200	120
Private Practice	1,500	163	25
Shelter Office	No response	No response	No response

## APPENDIX 4 – Summary of cost information sample cases compared to costs under FRC proposals

Case Type	Damages (£)	Additional Remedy other than damages?	I/P profit costs net (£)	I/P Counsel fees net (£)	Total I/P fees net (£)	Legal Aid Profit Costs net (£)	Stage Reached	Fixed Costs (under Band 3) (£)	London rate (£)	Damages proportion allowed (£)	Total Costs before counsel fees (£)	Reduction for Counsel Fee (£)	Advocacy Fee (£)	Final Costs (after counsel costs) (£)	% change in fees under FRC's
Legal Aid	250	No	11,000	5,000	16,000	500	Trial	4,742	5,335	75	5,410	-5,000	533	943	-94%
Legal Aid	5,000	Yes - works of repair	7,500	0	7,500	150	Pre-issue £1,001 - £5,000	1,053	1,185	875	2,060	0	0	2,060	-73%
Legal Aid	0	Yes - declaration	30,000	10,000	40,000	1,500	Post-issue / pre trial	4,742	5,335	0	5,335	-10,000	0	-4,665	-112%
Legal Aid	5,500	Yes - works of repair	6,500	0	6,500	0	Pre-issue £5,001 - £10,000	2,055	2,312	63	2,374	0	0	2,374	-63%
Legal Aid	4,309	Yes - works of repair	5,078	1,075	6,153	2,529	Post-issue / pre listing	3,712	4,176	1,077	5,253	-1,075	0	4,178	-32%
Legal Aid	7,500	Yes - works of repair	23,280	7,191	30,471	6,007	Post-issue / pre trial	4,742	5,335	1,875	7,210	-7,191	0	19	-100%
Legal Aid	0	No	5,788	900	6,688	2,205	Post-issue / pre allocation	2,914	3,278	0	3,278	-900	0	2,378	-64%
Legal Aid	4,392	Yes - works of repair	17,280	3,272	20,552	5,581	Post-issue / pre trial	4,742	5,335	1,318	6,652	-3,272	0	3,381	-84%
Legal Aid	0	No	2,475	2,025	4,500	633	Post-issue / pre allocation	2,914	3,278	0	3,278	-2,025	0	1,253	-72%
Legal Aid	0	No	4,321	1,179	5,500	1,175	Post-issue / pre trial	4,742	5,335	0	5,335	-1,179	0	4,156	-24%
Legal Aid	12,000	Yes - works of repair	15,388	0	15,388	5,235	Post-issue / pre trial	4,742	5,335	3,600	8,935	0	0	8,935	-42%
Legal Aid	9,000	Yes - works of repair	21,160	7,580	28,740	5,508	Trial	4,742	5,335	2,700	8,035	-7,580	756	1,211	-96%
Legal Aid	3,250	Yes - works of repair	6,109	2,800	8,909	3,138	Post-issue / pre trial	4,742	5,335	975	6,310	-2,800	0	3,510	-61%
Legal Aid	10,000	No	7,596	2,039	9,635	3,749	Post-issue / pre trial	4,742	5,335	3,000	8,335	-2,039	0	6,296	-35%
Legal Aid	5,701	Yes - works of repair	15,985	3,456	19,441	4,777	Post-issue / pre trial	4,742	5,335	1,710	7,045	-3,456	0	3,589	-82%
Legal Aid	7,500	Yes - works of repair	10,184	4,530	14,714	2,823	Post-issue / pre trial	4,742	5,335	2,250	7,585	-4,530	0	3,055	-79%
Legal Aid	4,058	Yes - works of repair	8,082	560	8,642	6,184	Post-issue / pre trial	4,742	5,335	1,217	6,552	-560	0	5,992	-31%
Legal Aid	3,535	No	5,690	4,287	9,977	2,791	Post-issue / pre listing	3,712	4,176	884	5,060	-4,287	0	773	-92%
Legal Aid	5,800	Yes - works of repair	5,818	2,940	8,758	3,171	Post-issue / pre listing	3,712	4,176	1,450	5,626	-2,940	0	2,686	-69%
Legal Aid	0	No	4,493	2,898	7,391	3,327	Post-issue / pre listing	3,712	4,176	0	4,176	-2,898	0	1,278	-83%
Legal Aid	0	No	3,274	4,323	7,597	1,551	Post-issue / pre allocation	2,914	3,278	0	3,278	-4,323	0	-1,045	-114%
Legal Aid	5,800	Yes - works of repair	3,699	2,430	6,129	3,037	Post-issue / pre trial	4,742	5,335	1,740	7,075	-2,430	0	4,645	-24%
Legal Aid	0	No	14,886	6,914	21,800	4,742	Post-issue / pre trial	4,742	5,335	0	5,335	-6,914	0	-1,579	-107%
Legal Aid	0	No	1,691	1,165	2,857	1,708	Post-issue / pre trial	4,742	5,335	0	5,335	-1,165	0	4,169	46%
CFA	12,650	Yes - works of repair	18,194	2,683	20,876	0	Post-issue / pre trial	4,742	5,335	3,795	9,130	-2,683	0	6,447	-69%
CFA	4,500	Yes - works of repair	12,366	0	12,366	0	Post-issue / pre trial	4,742	5,335	1,350	6,685	0	0	6,685	-46%
CFA	970	Yes - works of repair	9,781	0	9,781	0	Post-issue / pre trial	4,742	5,335	291	5,626	0	0	5,626	-42%
CFA	8,500	Yes - works of repair	14,475	4,956	19,431	0	Post-issue / pre trial	4,742	5,335	2,550	7,885	-4,956	0	2,929	-85%
CFA	6,500	Yes - works of repair	11,730	1,648	13,378	0	Post-issue / pre trial	4,742	5,335	1,950	7,285	-1,648	0	5,637	-58%
CFA	6,500	Yes - works of repair	13,132	651	13,783	0	Post-issue / pre allocation	2,914	3,278	1,300	4,578	-651	0	3,927	-72%
CFA	17,500	No	16,287	0	16,287	0	Post-issue / pre listing	3,712	4,176	4,375	8,551	0	0	8,551	-47%
CFA	10,000	Yes - works of repair	20,422	0	20,422	0	Post-issue / pre trial	4,742	5,335	3,000	8,335	0	0	8,335	-59%
CFA	23,800	Yes - works of repair	14,556	275	14,831	0	Post-issue / pre listing	3,712	4,176	5,950	10,126	-275	0	9,851	-34%
CFA	5,500	Yes - works of repair	15,772	0	15,772	0	Post-issue / pre trial	4,742	5,335	1,650	6,985	0	0	6,985	-56%
Legal Aid	9,400	Yes - works of repair	16,500	786	17,286	5,000	Post-issue / pre trial	4,742	5,335	2,820	8,155	-786	0	7,369	-57%
CFA	2,000	Yes - works of repair	3,364	0	3,364	0	Post-issue / pre allocation	2,914	2,914	400	3,314	0	0	3,314	-1%
CFA	0	Yes - works of repair	4,799	0	4,799	0	Pre-issue £1,001 - £5,000	1,053	1,053	0	1,053	0	0	1,053	-78%
CFA	1,500	Yes - works of repair	2,664	0	2,664	0	Pre-issue £1,001 - £5,000	1,053	1,053	263	1,316	0	0	1,316	-51%
CFA	1,250	Yes - works of repair	3,229	0	3,229	0	Pre-issue £1,001 - £5,000	1,053	1,053	219	1,272	0	0	1,272	-61%
CFA	800	Yes - works of repair	2,556	0	2,556	0	Pre-issue £1,001 - £5,000	1,053	1,053	140	1,193	0	0	1,193	-53%
CFA	1,300	Yes - works of repair	2,306	0	2,306	0	Pre-issue £1,001 - £5,000	1,053	1,053	228	1,281	0	0	1,281	-44%
CFA	1,000	Yes - works of repair	3,431	0	3,431	0	Pre-issue £1,001 - £5,000	1,053	1,053	175	1,228	0	0	1,228	-64%
CFA	500	Yes - works of repair	1,996	0	1,996	0	Pre-issue £1,001 - £5,000	1,053	1,053	88	1,141	0	0	1,141	-43%
CFA	1,400	Yes - works of repair	4,973	0	4,973	0	Pre-issue £1,001 - £5,000	1,053	1,053	245	1,298	0	0	1,298	-74%
CFA	3,500	Yes - works of repair	4,048	0	4,048	0	Pre-issue £1,001 - £5,000	1,053	1,053	621	1,674	0	0	1,674	-59%
Legal Aid	0	Yes - declaration	7,962	1,900	9,862	2,849	Post-issue / pre listing	3,712	4,176	0	4,176	-1,900	0	2,276	-77%
Legal Aid	16,300	Yes - works of repair	23,986	19,500	43,486	8,981	Trial	4,742	5,335	4,890	10,225	-19,500	1,816	-7,459	-117%
Legal Aid	17,144	Yes - works of repair	26,000	11,500	37,500	8,315	Post-issue / pre trial	4,742	5,335	5,143	10,478	-11,500	0	-1,022	-103%
CFA	7,000	No	7,496	4,875	12,371	0	Post-issue / pre listing	3,712	4,176	1,750	5,926	-4,875	0	1,051	-92%
Legal Aid	0	Yes - declaration	10,850	4,416	15,266	3,153	Post-issue / pre trial	4,742	5,335	0	5,335	-4,416	0	919	-94%
CFA	9,000	Yes - works of repair	25,684	10,424	36,108	0	Post-issue / pre trial	4,742	5,335	2,700	8,035	-10,424	0	-2,389	-107%
Legal Aid	6,750	No	5,481	3,720	9,201	2,369	Post-issue / pre allocation	2,914	3,278	1,350	4,628	-3,720	0	908	-90%
CFA	15,000	Yes - works of repair	21,661	5,262	26,923	0	Post-issue / pre listing	3,712	4,176	3,750	7,926	-5,262	0	2,664	-90%
CFA	4,800	Yes - works of repair	4,151	0	4,151	0	Pre-issue £1,001 - £5,000	1,053	1,185	0	1,185	0	0	1,185	-71%
CFA	11,500	Yes - works of repair	23,099	0	23,099	0	Post-issue / pre trial	4,742	5,335	3,450	8,785	0	0	8,785	-62%
CFA	10,147	Yes - works of repair	11,669	0	11,669	0	Post-issue / pre listing	3,712	4,176	2,537	6,713	0	0	6,713	-42%
CFA	4,600	Yes - works of repair	10,097	0	10,097	0	Pre-issue £1,001 - £5,000	1,053	1,185	805	1,990	0	0	1,990	-80%
Legal Aid	8,700	Yes - works of repair	15,008	1,215	16,223	253	Post-issue / pre trial	4,742	5,335	2,610	7,945	-1,215	0	6,730	-59%
CFA	6,500	Yes - works of repair	14,846	0	14,846	0	Post-issue / pre trial	4,742	5,335	1,950	7,285	0	0	7,285	-51%
CFA	3,000	Yes - works of repair	6,698	0	6,698	0	Pre-issue £1,001 - £5,000	1,053	1,185	525	1,710	0	0	1,710	-74%
CFA	3,000	Yes - works of repair	6,315	0	6,315	0	Pre-issue £1,001 - £5,000	1,053	1,185	525	1,710	0	0	1,710	-73%
Legal Aid	3,700	Yes - works of repair	5,204	0	5,204	204	Post-issue / pre listing	4,742	5,335	1,110	6,445	0	0	6,445	24%
CFA	6,000	Yes - works of repair	4,262	0	4,262	0	Pre-issue £5,001 - £10,000	2,055	2,312	750	3,062	0	0	3,062	-28%
Legal Aid	0	No	5,354	0	5,354	0	Post-issue / pre trial	4,742	4,742	0	4,742	0	0	4,742	-11%
Legal Aid	0	No	6,758	0	6,758	0	Trial	4,742	4,742	0	4,742	0	533	5,275	-22%
Legal Aid	0	No	7,993	0	7,993	0	Post-issue / pre trial	4,742	4,742	0	4,742	0	0	4,742	-41%
Legal Aid	24,775	Yes - other injunction	22,426	0	22,426	4,281	Trial	4,742	4,742	7,433	12,175	0	1,816	13,991	-38%
Legal Aid	8,700	Yes - other injunction	32,315	0	32,315	7,846	Trial	4,742	4,742	2,610	7,352	0	756	8,108	-75%
Legal Aid	4,500	Yes - other injunction	3,300	0	3,300	823	Post-issue / pre allocation	2,914	2,914	900	3,814	0	0	3,814	16%
Legal Aid	1,000	Yes - other injunction	11,997	0	11,997	4,120	Post-issue / pre trial	4,742	4,742	300	5,042	0	0	5,042	-58%
Legal Aid	4,500	Yes - other injunction	7,513	0	7,513	2,593	Trial	4,742	4,742	1,350	6,092	0	756	6,848	-9%
Legal Aid	0	No	822	0	822	490	Post-issue / pre allocation	2,914	2,914	0	2,914	0	0	2,914	255%
Legal Aid	0	No	3,900	0	3,900	0	Post-issue / pre trial	4,742	4,742	0	4,742	0	0	4,742	22%
Legal Aid	0	Yes - declaration	4,000	10,000	14,000	0	Post-issue / pre trial	4,742	4,742	0	4,742	-10,000	0	-5,258	-138%
Legal Aid	0	No	1,527	2,293	3,820	0	Post-issue / pre listing	3,712	3,712	0	3,712	-2,293	0	1,419	-63%
Legal Aid	0	No	2,500	7,560	10,060	0	Post-issue / pre trial	4,742	4,742	0	4,742	-7,560	0	-2,818	-128%
Legal Aid	0	Yes - declaration	5,332	6,872	12,204	3,252	Post-issue / pre trial	4,742	4,742	0	4,742	-6,872	0	-2,130	-117%
Legal Aid	0	Yes - declaration	780	1,166	1,946	0	Post-issue / pre allocation	2,914	2,914	0	2,914	-1,166	0	1,748	-10%
Legal Aid	0	No	10,934	9,741	20,675	1,072	Post-issue / pre trial	4,742	4,742	0	4,742	-9,741	0	-4,999	-124%
Legal Aid	1,000	No	2,795	1,296	4,091	0	Post-issue / pre allocation	2,914	2,914	200	3,114	-1,296	0	1,818	-56%

Additional Remedy other than damages?	I/P profit costs net (£)	I/P Counsel fees net (£)	Total I/P fees net (£)	Legal Aid Profit Costs net (£)	Stage Reached	Fixed Costs (under Band 3) (£)	+ London rate (£)	Damages proportion allowed (£)	Total Costs before counsel fees (£)	Reduction for Counsel Fee (£)	Advocacy Fee (£)	Final Costs (after counsel costs) (£)	% change in fees under FRC's
No	4,045	2,250	6,295	0	Post-issue/ pre trial	4,742	4,742	0	4,742	-2,250	0	2,492	-60%
Yes - declaration	2,361	1,439	3,800	0	Post-issue/ pre listing	3,712	3,712	0	3,712	-1,439	0	2,273	-40%
Yes - works of repair	9,961	1,290	11,251	0	Post-issue/ pre trial	4,742	4,742	3,675	8,417	-1,290	0	7,127	-37%
Yes - works of repair	10,011	1,727	11,738	0	Trial	4,742	4,742	450	5,192	-1,727	533	3,998	-66%
Yes - works of repair	17,651	2,970	20,621	0	Trial	4,742	4,742	1,050	5,792	-2,970	756	3,578	-83%
Yes - works of repair	6,444	955	7,399	0	Post-issue/ pre trial	4,742	4,742	1,020	5,762	-955	0	4,807	-35%
Yes - works of repair	21,099	2,878	23,977	0	Trial	4,742	4,742	1,200	5,942	-2,878	756	3,820	-84%
Yes - works of repair	7,678	2,882	10,560	0	Post-issue/ pre listing	3,712	3,712	2,250	5,962	-2,882	0	3,080	-71%
Yes - other injunction	6,070	3,750	9,820	0	Post-issue/ pre listing	3,712	3,712	625	4,337	-3,750	0	587	-94%
No	9,583	1,972	11,555	0	Post-issue/ pre allocation	2,914	2,914	600	3,514	-1,972	0	1,542	-87%
Yes - works of repair	12,700	3,023	15,723	0	Post-issue/ pre listing	3,712	3,712	7,346	11,058	-3,023	0	8,035	-49%
	7,469	5,531	13,000	0	Trial	4,742	4,742	0	4,742	-5,531	533	-256	-102%
Yes - works of repair	9,026	4,127	13,153	3,509	Post-issue/ pre trial	4,742	5,335	2,100	7,435	-4,127	0	3,308	-75%
Yes - works of repair	10,740	2,210	12,950	4,255	Post-issue/ pre trial	4,742	5,335	971	6,306	-2,210	0	4,096	-68%
Yes - works of repair	10,035	2,841	12,876	3,330	Post-issue/ pre trial	4,742	5,335	795	6,130	-2,841	0	3,289	-74%
No	4,403	1,716	6,119	1,952	Post-issue/ pre allocation	2,914	3,278	0	3,278	-1,716	0	1,562	-74%
Yes - works of repair	11,500	3,300	14,800	4,372	Post-issue/ pre trial	4,742	5,335	1,500	6,835	-3,300	0	3,535	-76%
Yes - works of repair	8,190	1,798	9,988	2,821	Post-issue/ pre trial	4,742	5,335	900	6,235	-1,798	0	4,437	-56%
Yes - works of repair	9,851	3,660	13,511	3,621	Post-issue/ pre trial	4,742	5,335	2,839	8,174	-3,660	0	4,514	-67%
Yes - works of repair	9,851	2,715	12,566	2,211	Post-issue/ pre allocation	2,914	3,278	1,240	4,518	-2,715	0	1,803	-86%
Yes - works of repair	6,643	2,526	9,169	3,035	Post-issue/ pre listing	3,712	4,176	530	4,706	-2,526	0	2,180	-76%
Yes - works of repair	6,745	2,911	9,657	2,132	Post-issue/ pre allocation	2,914	3,278	1,345	4,623	-2,911	0	1,712	-82%
Yes - works of repair	5,150	3,518	8,668	2,000	Post-issue/ pre listing	3,712	4,176	2,209	6,385	-3,518	0	2,867	-67%
Yes - works of repair	2,450	0	2,450	1,023	Pre-issue £1,001 - £5,000	1,053	1,185	875	2,060	0	0	2,060	-16%
Yes - works of repair	6,000	2,500	8,500	4,257	Post-issue/ pre allocation	2,914	3,278	3,600	6,878	-2,500	0	4,378	-48%
Yes - works of repair	20,000	8,000	28,000	10,000	Post-issue/ pre trial	4,742	5,335	1,350	6,685	-8,000	0	-1,315	-105%
Yes - works of repair	34,700	11,300	46,000	0	Trial	4,742	5,335	1,800	7,135	-11,300	756	-3,409	-107%
No	22,700	3,480	26,180	0	Post-issue/ pre trial	4,742	5,335	6,900	12,235	-3,480	0	8,755	-67%
Yes - other injunction	14,600	6,800	21,400	0	Trial	4,742	5,335	8,580	13,915	-6,800	1,816	8,931	-58%
No	2,234	3,309	5,543	5,543	Trial	4,742	4,742	1,802	6,544	-3,309	756	3,990	-28%
No	34,208	7,813	42,020	42,020	Trial	4,742	4,742	3,467	8,209	-7,813	1,140	1,536	-96%
Yes - works of repair	10,000	2,000	12,000	0	Pre-issue £10,001 - £25,000	2,770	3,116	500	3,616	-2,000	0	1,616	-87%
Yes - other injunction	25,000	10,000	35,000	0	Trial	4,742	5,335	4,500	9,835	-10,000	1,140	975	-97%
Yes - works of repair	10,000	0	10,000	0	Pre-issue £10,001 - £25,000	2,770	3,116	0	3,116	0	0	3,116	-69%
Yes - other injunction	24,000	9,000	33,000	1,000	Trial	4,742	5,335	4,500	9,835	-9,000	1,140	1,975	-94%
Yes - works of repair	7,500	0	7,500	0	Pre-issue £10,001 - £25,000	2,770	3,116	0	3,116	0	0	3,116	-58%
No	24,000	9,000	33,000	0	Trial	4,742	5,335	3,600	8,935	-9,000	1,140	1,075	-97%
Yes - works of repair	8,000	0	8,000	0	Pre-issue £10,001 - £25,000	2,770	3,116	0	3,116	0	0	3,116	-61%
Yes - other injunction	25,000	10,000	35,000	0	Post-issue/ pre trial	4,742	5,335	3,600	8,935	-10,000	0	-1,065	-103%
No	40,000	20,000	60,000	0	Trial	4,742	5,335	0	5,335	-20,000	533	-14,132	-124%
Yes - works of repair	25,000	8,000	33,000	0	Post-issue/ pre trial	4,742	5,335	4,500	9,835	-8,000	0	1,835	-94%
No	6,856	2,304	9,160	3,266	Post-issue/ pre trial	4,742	5,335	3,000	8,335	-2,304	0	6,031	-34%
No	8,671	3,413	12,083	2,080	Post-issue/ pre trial	4,742	5,335	0	5,335	-3,413	0	1,922	-84%
No	3,600	0	3,600	1,446	Post-issue/ pre allocation	2,914	3,278	1,000	4,278	0	0	4,278	19%
No	7,904	6,671	14,575	1,995	Post-issue/ pre trial	4,742	5,335	0	5,335	-6,671	0	-1,336	-109%
No	10,159	6,560	16,719	4,826	Post-issue/ pre trial	4,742	5,335	0	5,335	-6,560	0	-1,225	-107%
No	2,750	2,038	4,788	1,963	Post-issue/ pre allocation	2,914	3,278	0	3,278	-2,038	0	1,240	-74%
No	6,180	4,228	10,408	3,071	Post-issue/ pre trial	4,742	5,335	0	5,335	-4,228	0	1,107	-89%
No	1,620	1,713	3,333	1,549	Post-issue/ pre listing	3,712	4,176	0	4,176	-1,713	0	2,463	-26%
No	667	0	667	649	Post-issue/ pre allocation	2,914	3,278	1,000	4,278	0	0	4,278	542%
No	861	0	861	71	Pre-issue £1,001 - £5,000	1,053	1,185	424	1,609	0	0	1,609	87%

Appendix 5 - Analysis showing the stage of the case where the fee reduction would have most impact

**Pre-Issue £1,001 - £5,000**

Pre-Issue £1,001 - £5,000 Sample of 16 cases (exc Counsel costs)	
Average current fees	4,255
Average fees - FRC proposals	1,486
Reduction	2,769
% fall	65%

No matters in this category required counsel.

**Pre-Issue £5,001 - £10,000**

Pre-Issue £5,001 - £10,000 Sample of 2 cases (exc Counsel costs)	
Average costs - current fees	5,381
Average costs - FRC proposals	2,718
Reduction	2,663
% fall	49%

No matters in this category required counsel.

**Pre-Issue £10,001 - £25,000**

Pre-Issue £10,001 - £25,000 Sample of 4 cases (exc Counsel costs)	
Average costs - current fees	8,875
Average costs - FRC proposals	3,241
Reduction	5,634

% fall	63%
--------	-----

Pre-Issue £10,001 - £25,000 Sample of 4 cases (inc Counsel costs and any advocacy fee under FRC)	
Average costs - current fees	9,375
Average costs - FRC proposals (less counsel fees paid by supplier)	2,741
Reduction	6,634
% fall	71%

#### **Post-Issue, Pre-Allocation**

Post-Issue, Pre-Allocation Sample of 18 cases (exc Counsel costs)	
Average costs - current fees	4,712
Average costs – FRC proposal	3,875
Reduction	837
% fall	18%



Post-Issue, Pre-Allocation Sample of 18 cases (inc Counsel costs and any advocacy fee under FRC)	
Average costs - current fees	6,264
Average costs - FRC proposals (less counsel fees paid by supplier)	2,324
Reduction	3,940
% fall	63%

#### **Post-Allocation, Pre-Listing**

Post-Allocation, Pre-Listing Sample of 19 cases (exc Counsel costs)	
Average costs - current fees	7,877
Average costs - FRC proposals	6,001
Reduction	1,876
% fall	24%

Post-Allocation, Pre-Listing Sample of 19 cases (inc Counsel costs and any advocacy fee under FRC)	
Average costs - current fees	10,227
Average costs - FRC proposals (less counsel fees paid by supplier)	3,651
Reduction	6,576
% fall	64%

#### **Post-Listing, Pre-Trial**

Post-Allocation, Pre-Listing Sample of 53 cases (exc Counsel costs)	
Average costs - current fees	12,406
Average costs - FRC proposals	6,804
Reduction	5,602
% fall	45%

Post-Allocation, Pre-Listing Sample of 53 cases (inc Counsel costs and any advocacy fee under FRC))	
Average costs - current fees	16,036
Average costs - FRC proposals (less counsel fees paid by supplier)	3,173
Reduction	12,863
% fall	80%

#### **Trial**

Post-Allocation, Pre-Listing Sample of 19 cases (inc Counsel costs and any advocacy fee under FRC)	
Average costs - current fees	26,449
Average costs - FRC proposals (less counsel fees paid by supplier)	2,158
Reduction	24,291
% fall	92%



Housing Law Practitioners' Association

**HPLA RESPONSE TO "Consultation on extending fixed recoverable costs (FRC): how vulnerability is addressed"**

Sir Rupert Jackson in 'Supplemental Report Fixed Recoverable Costs'

*"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.**"*

- i. *Do you agree that the Government's proposal (as outlined in paragraph 15) is the right way to address vulnerability within FRC?*

No. We think the government's thinking in this context on the issues of vulnerability is unlikely to be genuinely helpful to vulnerable people. The main issue which is skirted by this consultation document is that a very large proportion of defendants in the housing law cases have some kind of vulnerability and indeed are almost always vulnerable in proceedings due to the power imbalance between landlords and tenants, where the landlord's interest is generally financial and the tenant/borrower's interests concern their home and their well-being. Vulnerability is contextual and often complex.

**Threat to tenant/borrower facing housing law sector and therefore to vulnerable tenants and borrowers**

As we have set out extensively [here](#) we consider that the FRC proposals are going to remove a great deal of the current housing law advice available to tenants and borrowers which will have a disproportionate impact on vulnerable people generally. Recovery of *inter partes* costs from opponents gives housing legal aid a modicum of sustainability given the low levels at which legal aid rates are paid and which were cut by 10% in 2011. To be clear, these are cases where the tenant is legally aided and succeeds in the case (such as a successfully defending a housing possession claim) 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 CFA work, and the tenant/borrower facing housing legal aid/CFA sector will collapse. Renters will suffer including losing their homes and living in terrible conditions. For further detail we refer to the submissions linked above in this consultation response.

The proposals at paragraphs 15 exacerbate rather than alleviate the problems we have set out. The threshold cap is perforce arbitrary and there is no explanation for the amount suggested. It appears to plucked out of the air and the whole concept of a cap seems to speak

to convenience rather any sense of justice between the parties or proper consideration of how vulnerability impacts litigation and the party who vulnerable.

The proposal as to the determination of whether any allowance is made for vulnerability is disastrous. How is any organisation supposed to plan legal services for potentially vulnerable clients when they have no idea how they will be remunerated when they win the case, save that it will be at a low level whatever the outcome? This, and the complexity of proving vulnerability, simply creates a perverse incentive on organisations to avoid cases where issues of vulnerability may be borderline<sup>1</sup>. In fact this particular issue is simply an extreme example of the whole problem with FRCs across the board. Organisations delivering vital legally aided and CFA legal services to tenants will be put to the wall by these proposals because they will not be able to survive the drop in income. We do not recognise the “swings and roundabouts” of this and previous FRC documents (to use a more useful metaphor, we see only snakes and no ladders) but even if there were compensations, this retrospectivity proposal would make planning services for vulnerable tenants impossible.

**Real life example**

*A client sought advice within the last month from HLPAs co-chair who was duty adviser at court. This client has depression with some psychotic symptoms. The client was so distressed that he was effectively debilitated by a two hour long panic attack that saw him sobbing, unable to speak and literally clawing at the wall of the duty room at court. Security attended and it was considered whether an ambulance should be called. We managed to get sufficient instructions to get an adjournment for a defence and counterclaim for disrepair and we hope we will save his home. The judge on the day had no idea about any of this because the case was listed for 5 minutes in a busy possession list. If, as is most likely, we settle this case with set off against arrears, works being done and a conditional order to clear any remaining arrears while he and his family remain in his home, then no judge will have had cause to have any idea of his vulnerability. Nevertheless we can confirm that working with this client is a difficult and time consuming as his vulnerability suggests.*

**The judiciary is not in the best position to decide on the vulnerability of a represented party – see example on the left**

Putting the burden of the decision on to the judiciary as to whether vulnerability in a case gives rise to an allowance seems to be moving against the aims of the FRC in the first place. While we can see the superficial attraction of clear rules and guidance to manage the burden, that flies in the face of the nature of vulnerability it itself which is rarely clear or simple, and is often opaque and complex.

It is also the case that judges dealing with a case may not be given any clear idea of the extent of the vulnerability of a party, particularly if the case settles. Part of the hard work of representing vulnerable clients is mitigating the vulnerability in the conduct of the case, particularly at hearings. A judge at an interim hearing mostly does not need to know the details and it would be perverse if parties were to be incentivised to make detailed representations to judges in interim hearings as vulnerability *simply to engage an uplift to the FRC if the matter does not go to trial*. And yet that is what is being proposed. Even at trial the judge may not need to know the details of vulnerabilities which made it difficult to obtain instructions if it not

relevant to the matters at hand – and a judge would rightly criticise representations which

---

<sup>1</sup> In reality quality organizations doing this work will do the best job for their clients regardless but the point is that this is likely to put them at serious financial risk of going under.

were not relevant to the issues in the trial. In disrepair cases it is usual to settle with the case having had no judicial involvement save for the making of directions. Evidencing vulnerability would be a fresh piece of work to do at the end of the case, possibly necessitating written representations, witness statements and/or medical evidence which you may not hold and which the client would have little interest in cooperating with. In addition the costs of making such representations would likely outweigh the 20% uplift. Even more importantly it does harm to a client's dignity and to client/solicitor relations for the representative to have to elucidate vulnerabilities that are not relevant to the issues at hand. Such a practice will undoubtedly create conflicts of interest. Some vulnerabilities are such that the client has little or no insight into them but they are onerous to deal with nevertheless. Is a representative to seek permission to make representations about issues that a client may be unaware of or in denial about because they are issues that should give rise to an uplift?

Even without those kinds of complications, it must be the case that no-one wants an oral hearing or even extraneous written representations on vulnerability as it relates to the work done for client. But otherwise who is justice going to be done on such an issue? And if a case settles pre-issue will we have to issue a part 8 claim to have vulnerability assessed to get an uplift?

#### **FRCs, discrimination and data**

The harm to vulnerable people from FRCs has been acknowledged by way of this consultation but the proposal is not supported by evidence and will not ameliorate the harm. This is a breach of the PSED. There has not been 'due regard' of the need to eliminate discrimination but a tick box exercise has been carried out. In particular:

- S149 (1) (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This has not been done.
- S 1(1) EA 2010 says "An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage." This has also not been carried out. This duty is applicable to a Minister of the Crown.

The MoJ's thinking on vulnerability is, with all due respect to the work that has been done, still incomplete. In 2019 Dr Natalie Byrom's report) 'Digital Justice: HMCTS data strategy and delivering access to justice' (Byrom, N (2019) was produced. The report, while directed primarily at court reform and digital agenda contained important recommendations for HMCTS (and by extension MoJ) for understanding vulnerability in the civil justice system and ensuring access to justice. There is no evidence of those recommendations being followed in this document or previous FRC documents and we are doubtful that the full range of data gathering that was recommended has been carried out. Indeed, the Cotter Report referred to in the document stated:

*Surprisingly, there is no data as to the number of vulnerable parties or witnesses (or those who perceive themselves as such) who appear before the civil courts across the range of jurisdictions and types of case, or in relation to any steps taken to assist any vulnerable party or witness.*

It is clear that these FRC proposals are being introduced at a time when the MoJ has no proper idea of the impact on vulnerable litigants, and where in housing law we see a disproportionately large number of vulnerable litigant tenants, we consider that there is no adequate evidence base to provide any confidence whatsoever that access to justice will be maintained.

*ii. If not, do you have an alternative proposal?*

Our alternative proposal is to exempt all housing law cases which include a remedy other than money from Fixed Recoverable Costs on the basis that many housing law litigants on the tenant side are vulnerable to varying degrees and to ensure access to justice. We commend this proposal not least for the reason that it is genuinely “clear and simple”.

*iii. Do you have any drafting comments on the draft new rules?*

Our only comment is that we do not see how this can be drafted to ensure that access to justice is maintained for all tenants and particularly for vulnerable tenants. The proposals themselves do damage to this group and no drafting techniques can mitigate that.

*iv. Should any new provision in respect of vulnerability apply to existing FRC, which generally cover lower value PI (please consider in the context of paragraph 20 above)? v. Do any changes need to be made to the arrangements for disbursements for vulnerability in FRC cases?*

Nothing to add.

We continue to urge government to exempt housing law cases from the FRC regime. A failure to do so will cut across and threaten many of the government’s current policy priorities around a fair deal for tenants, early advice and the sustainability of the housing law sector.

**Housing Law Practitioners’ Association**

20 June 2022