Bar Council and PIBA response to the Civil Justice Council Working Group Consultation on Civil Costs

About us

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) and the Personal Injuries Bar Association (PIBA) to the Civil Justice Working Group Consultation paper on Civil Costs published in June 2022.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality, and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of Criminal and Civil Courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The General Council of the Bar is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Scope of response

This submission has been drafted by the Bar Council's Remuneration Committee and Members of the PIBA Executive Committee with input from other Specialist Bar Associations. This response addresses questions posed in the consultation paper in relation to Costs Budgeting, Guideline Hourly Rates, Costs and the Pre-

[1] https://www.judiciary.uk/wp-content/uploads/2022/07/CJC-Costs-consultation-paper-FINAL-June-2022.pdf

Action Protocol, and the expansion of Fixed Recoverable Costs. In summary the position of the Bar Council is as follows:

Costs Budgeting: The Bar Council is in favour of retaining costs budgeting with modifications. Some changes to the Civil Procedure Rules may improve the budgeting process and reduce costs. The Bar Council considers that there should be provision for an opt-out of budgeting, but the default position should remain as it is for all cases between £100, 000 and £1 million after the changes that came into effect in April 2023. In addition, the Bar Council also considers that there is a case for lowering the "default off" level from £10 million to £1 million.

Guideline Hourly Rates: The Bar Council supports the continuation of Guideline Hourly Rates, subject to a robust process being put in place to ensure that they are properly updated. The Bar Council is concerned that the abolition of Guideline Hourly rates would create huge uncertainty and inconsistency in the assessment of costs. The Bar Council does not consider there is a case for Counsel's fees to be included.

Costs and the Pre-Action Protocols: The Bar Council is concerned that any far-reaching reform of the CPR linked to budgeting or fixed costs is not appropriate at this time. The Bar Council considers that the current system of FRC and the expanded FRC that will come into effect in April 2023 must be subject to proper review and scrutiny before there are any further changes. Costs in the pre-action protocol phase can either be assessed or made part of Fixed Recoverable Costs. In relation to the former, the Bar Council agrees with other legal representatives at the CJC Conference on 13 July 2022 that a simplified process for summary assessment in cases which settle pre-action is a sensible way forward. The Bar Council is opposed to any reform that would limit costs recovery to a certain point in the proceedings, such as the service of the letter of claim. The Bar Council believes that such a change would have a serious detrimental impact on access to justice and could create perverse incentives/disincentives.

Expansion of Fixed Recoverable Costs: The Bar Council does not support any further expansion of Fixed Recoverable Costs. The reforms in 2023 will create the biggest expansion of Fixed Recoverable Costs since 2013. The Bar Council does not consider that any further changes should be made until the impact of the expanded Fast Track is properly understood and subject to independent review. The Bar Council opposed any further expansion of fixed costs in personal injury or clinical negligence cases where the effects of fixed costs are likely to directly impact on the claimant's damages. The Bar Council and the Personal Injuries Bar Association have worked for a number of years on problems with the current fixed costs regime: the failure to update advocacy fees, the late vacating of trials, the absence of any costs provision where cases settle late, and the different and

inconsistent rules in relation to the recovery of disbursements in the Fast Track. This experience suggests that considerable caution should be exercised before fixed costs are expanded further. Any attempt to extend fixed costs must be accompanied by a rigorous process in setting fees which has the support of the professions and a suitable procedure being in place to update fees.

ANSWERS TO THE QUESTIONS

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

Yes.

Our members have extensive experience of Costs Budgeting and generally consider that it is a valuable and proportionate way of managing and controlling costs, at least for lower-level claims that are above the Fixed Recoverable Costs limit. Additionally, the focus on costs budgets at a relatively early stage of proceedings assists in parties' efforts to settle at or shortly after the Costs and Case Management Conference. The Bar Council is, however, concerned about the absence of comparative data to inform a 'cost-benefit' analysis of Costs Budgeting. The information about its effectiveness is, in substantial part, anecdotal.

The Bar Council's view is that costs budgeting should be retained. We note that this was the majority view of the delegates at the CJC conference on 13 July 2022. The 'consensus' view is that budgeting should be retained with some changes to make it more efficient.

The Bar Council is concerned that in April 2023 there will be a significant change when Fixed Recoverable Costs ['**FRC**'] are introduced in cases worth up to £100, 000. This will have a substantial impact and should ease the current pressures on the court service caused by budgeting in most multi-track cases.

The Bar Council recognises that this consultation is concerned with the longer-term, and in particular the consequences of the digitisation of the civil justice system. However, the Bar Council is concerned that any further expansion of FRC or reform of the civil procedure rules, including budgeting, must be evidence-based.

The appropriate time to consider further and more radical reform of the civil justice system is when a proper period of time has elapsed, when consideration can be given to how procedures are working, and proper

independent assessments can be made of the effects of the reforms due to take place in 2023.

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

The Bar Council has approached the issue of potential changes to the budgeting system as a procedural question. We recognise that there are significant issues about how incurred costs and hourly rates are dealt with in the budgeting process, but these are substantive matters of law and policy upon which views differ.

The Bar Council does not agree with those who advocate the abolition of costs budgeting and does not consider that the costs incurred in the budgeting process are unnecessarily incurred or wasted. The judicial approval of budgets is a valuable means of reducing costs, and the budgeting process itself helps control costs.

A valuable consequence of budgeting is that all parties and their representatives, in particular, have to be extremely sensitive to the costs implications of the conduct of litigation. Whether a consequence of the party's own initiative or by the court's order of approval, costs budgeting imposes a 'discipline' on the parties conducting litigation which reduces costs. As a result, costs-budgeting is a direct and indirect means by which the costs of civil litigation are reduced.

These benefits are particularly apparent in cases of medium-sized value (and complexity) of, up to, say, £1,000,000, where proportionality of costs is of greatest concern. Our experience is that it is in these cases that the strongest effects on bearing down on party costs are most acutely and beneficially felt.

The Bar Council also recognises that the costs incurred in the budgeting process are an additional burden on the parties, but that Costs Budgeting has now been part of civil litigation for nearly ten years. The procedures are well established and understood by practitioners and judges alike. Those conducting costs budgeting have considerable expertise in the process, and the experience of our members is that Costs and Case Management Conferences are increasingly efficient, many matters are agreed by the parties and issues in dispute are readily identified. The recoverable costs of budget drafting and process are capped at 1% and 2% respectively. Budgeting can and should be conducted in a reasonable time and at proportionate expense, and further reform may assist in achieving this goal.

There is an argument that Costs Budgeting has a counter-intuitive effect in the context of larger claims, in which the concern is to ensure that recovery is not restricted in the event of success. This can result in both parties putting in, and then agreeing, very high budgets which exceed what would have been allowed on assessment. It would be useful to check with the experience of judges sitting in the Commercial Court and the TCC to see if the anecdotal experience of some members of the Remuneration Committee matches with their broader experience of budgeting cases in the range from £1m - £10m.

The Bar Council's view is that any further recommendations to be made by the Working Party should aim to create a simplified procedure which reduces delay and is less costly. We have set out our suggestion in answer to question 1.5 below.

1.3 Should costs budgeting be abandoned?

It is not clear to the Bar Council that there is any case for the abolition of costs budgeting either across or the board or for any specific category of cases.

The Bar Council sees the issue as being whether or not there are certain categories of cases which are not suitable for budgeting which should be excluded from the process.

The Bar Council's view is that, subject to modifications, a system should continue to provide that all cases between the FRC limit and £10 million should be budgeted. There might be scope for considering whether claims between £1m and £10m are treated as "default off" (see below).

A related consideration is whether or not parties should have the option to opt-out of budgeting.

The Bar Council considers that for cases of a value over £1,000,000 parties should have the ability to opt out of budgeting by agreement. We suspect that parties will be unlikely to agree to disapply budgeting, so we do not consider that such a provision will have a significant effect on the work of the court, however, it will have a substantial benefit for those parties who are not required to undertake the costs-budgeting exercise, see further under § 1.5 below.

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

The Bar Council understands that the default "on" and "off" provisions would apply to certain categories of cases where either provision might apply. Such a provision already exists as a default "off" provision that budgeting should not apply in cases worth more than £10 million.

As set out above, the Bar Council does not consider that there is any specific category of cases between the FRC limit (assuming it is increased to £100, 000) and the current limit of £10 million where budgeting is unsuitable and for cases where the Claimant has a limited life expectancy (PD 3E §1) and cases involving children. There is an argument as to how useful it is for cases between £1m and £10m, as to which the Bar Council is neutral.

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

As set out above, the Bar Council's view is that the Working Group should consider practical recommendations that will reduce cost and delay.

The following suggestions are worthy of further consideration:

(1) Opting Out. For cases of a value of £1 Million to £10 Million, parties should have the option to opt out of budgeting, but only where all participating parties agree. A question could be added to the Directions Questionnaire, asking the parties if they wish to opt out of budgeting. The opt-out would only be effective if the parties agree. In circumstances when the parties opted out of the budgeting process, the rules could provide for estimates to be provided which would be considerably less detailed than a Precedent H budget such as being limited to page one of Precedent H.

(2) No need for Defendant's budgets in some cases. In personal injury and clinical negligence cases, when Qualified One-Way Costs Shifting applies, the court should dispense with the need for the Defendant to file a budget. There may be exceptions to this rule, if there are circumstances when either the court or the Claimant may consider that the service of a budget is necessary, and the rules should provide for this. In all other cases a similar provision should apply in relation to the filing of an estimate as in (1) above. This would have a significant effect in reducing the costs of budgeting in these cases.

(3) Simplified Precedent H. Consideration should be given to simplifying the current Precedent H.

(4) Uncoupling budgeting from directions hearings. "Uncoupling" budgeting from case management is a matter of judicial discretion. Most judges already deal with all case management directions first, before moving on to budgeting the costs arising from that timetable, even if this is done as part of the same hearing. Other judges formally 'uncouple' case management directions hearings from the budgeting process. Directions are given at the Case Management Conference and a short budgeting hearing is then listed with an indication being given to the parties only to return to court if there are significant issues in the budget. Currently, this is a procedure followed by some judges, but a question in the directions questionnaire could ask the parties if they consider this to be an appropriate approach. If the parties are in agreement, then it would be appropriate to 'uncouple' directions and budgeting unless the court were to consider that there were exceptional reasons not to do so. This would also address the difficulty of preparing budgets where making assumptions is not workable as multiple permutations provide too many variables to be accommodated via contingencies. For instance, where there are disputes over which expert disciplines are reasonably required and whether all or only some disciplines should be permitted from the outset; or where there are disputes over whether to have a split trial and/or over the trial duration. Sometimes all those disputes and more arise in one case. The benefit of resolving those case management issues first is that the parties can then prepare budgets based on the actual case management rather than assumptions about what it might be, which can miss the target or result in a mismatch between the parties' budgets if they are prepared on significantly different bases.

(5) Staggering directions and budgeting hearings. An alternative to (4) above is having a staggered process in the CPR by which directions are dealt with at the CMC and budgeting at a later stage. A staggered process would allow the parties to consider the option of budgeting after directions have been given. If it is decided to proceed with budgeting, then the case can proceed to a hearing on the full budget or limited to those phases which are still in dispute. Alternatively, if the parties agree not to proceed with a budget, estimates can be provided and there is no need to prepare full budgets.

(6) The use of technology. An important consideration in relation to (4) and (5) is that the prospect of virtual hearings gives the court greater flexibility to list shorter hearings with less delay.

(7) Lack of Consistency. The problem of a lack of consistency in the approach between judges and regional disparities are difficult to resolve. One practical step that may help is to have generic guidance like the *Guide to the Summary Assessment of Costs*. If such a Guide was to be commissioned, the Bar Council would be pleased to offer its assistance.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

The Bar Council does not respond to the issues in relation to Guideline Hourly Rates ['**GHR**'] but defers to others who have greater knowledge and expertise in these matters.

The Bar Council notes the views expressed by senior members of the judiciary and others that the 'abolition' of GHR would give rise to significant uncertainty and inconsistency in the assessment of costs. Although there are criticisms that can be made of the use of GHR, there is no obvious alternative, and the detrimental consequences of their abolition would greatly outweigh any potential benefit.

The Bar Council agrees with others who spoke at the CJC conference on 13 July 2022, that there must be a proper system in place for ensuring that GHR are updated on a proper and regular basis.

The Bar Council notes that at the conference there was some discussion about Counsel's fees and whether these could be included in GHR. We note that historically Counsel's fees have not been included. The Bar Council would welcome the opportunity to consider this matter in more detail if the Working Party considered that this would be useful, however, our provisional view is that Counsel's fees range vary widely and are less amenable to commercial comparison as solicitor's fees. In January 2021 the CJC opened a consultation on GHRs.[2] Proposed changes in GHRs ranged from 6.8% to 34.8%, reflecting geographical location and grade of fee earner. Comparison with fees fixed for Counsel specifically or advocacy generally is not easy as hitherto the rules have not taken either seniority, geographical

[2] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf

location, or specialism into account in setting such fees. We also cannot see the purpose or benefit of inclusion of Counsel's fees which make up a small proportion of overall litigation costs.

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

The Bar Council does not consider that GHR should have a broader role in costs assessment than they do at present.

2.3 What would be the wider impact of abandoning GHRs?

The abandonment of GHR would lead to huge uncertainty and lack of consistency in the assessment of costs.

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

It is essential that a proper system is in place for updating GHR on a regular basis. Prior to 2010 GHR were increased annually. The extent to which those rates had fallen behind practice was noted by the courts in *Ohpen v Invesco* [2019] EWHC 2504 (TCC) and *Cohen v Fine* [2020] EWHC 3278 (CH). In the latter case the rates awarded were 35% higher than GHR.[3] The CJC considered that GHR ought to be reviewed "on a very regular basis" but recognised that this was "currently impracticable". In the short term it proposed GHR be increased annually in accordance with an appropriate index.

2.5 Are there alternatives to the current GHR methodology?

The Bar Council favours retaining GHR for the reasons and on the basis set out above.

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

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

The Bar Council recognises that there is a specific issue about how pre-action costs can be brought into alignment with further digitisation of the court service.

The current rules for FRC in the CPR deal with recoverable costs prior to the issue of proceedings. However, the Bar Council note that the level of fees in FRC for low value personal injury cases was fully considered by the

[3] https://www.lawgazette.co.uk/news/court-grants-35-uplift-on-guideline-rates-as-a-starting-point/5106652.article

stakeholders with support from Sir Rupert Jackson's advisers prior to implementation of the rule changes in 2013.

FRC in low value personal injury cases are designed to deal with high volume cases when there will be 'swings' and 'roundabouts': some cases in which the Claimant's representatives will make full costs recovery and others when it is not. Moreover, these are cases when there are clear and identifiable Defendants who will be the paying party in successful cases: motor insurers, employers' liability insurers, and public liability insurers. For reasons we set out in further detail in section 4 bellow although the 'swings and roundabouts' approach to FRC may work in theory for those legal organisations dealing with a high volume of cases, it works out less well for Counsel providing advocacy services in the Fast Track.

The Bar Council note that the experience of its members who deal in other types of case, including professional and clinical negligence claims higher value personal injury claims, is that the current system involves significant costs being incurred pre-action. The introduction of fixed pre-issue costs in these cases is problematic for a number of reasons, but in particular the significant time taken to gather evidence and prepare the case due to large amounts of documentation, the need for expert evidence, and the complexity of the legal arguments that may be involved.

Taking those issues into account, FRC in relation to the pre-action protocol stage should only be expanded into new areas with considerable caution and should be evidence based. The Bar Council notes that the approach taken by the Ministry of Health in relation to clinical negligence claims was to limit the scope for FRC to claims up to £ 25, 000.

In relation to those areas of practice where FRC currently cover the pre-action protocol phase, the Bar Council is not aware of how current fees impact upon legal services provided, but that in itself is a matter for others. There is an urgent need to carry out an independent review of all schemes for Fixed Recoverable Costs and how they have impacted on the provision of legal services, and there should be no further expansion of FRC to the pre-action protocol until such a review has been completed, particularly in light of the reforms due to be implemented in Spring 2023.

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

There are two different systems in place: protocols and portals where FRC apply and those where they do not.

As stated above the Bar Council is concerned that there is no objective evidence how the current FRC is working, and, in particular to what extent it provides access to justice for court users. The Bar Council is certainly aware of deficiencies within the current FRC which are addressed in greater detail in relation to part 4.

The Bar Council notes that the use of Pre-Action Protocols will be radically changed following the expansion of FRC in April 2023 which will amend the rules to require parties to agree the appropriate track for cases pre-action. Parties can challenge allocation via the directions questionnaire. Allocation will then be reviewed and determined by the judge at the allocation stage. These reforms are likely to have a further and significant impact on pre-action costs. The extent to which the proposed fees are appropriate, and the impact on the court system, will require significant review before any further changes should be made.

The Bar Council is concerned that the current system of FRC has failed to engage with issues of vulnerability and welcomes the Working Party's Commitment to prioritise this important issue. One of the reasons why careful consideration must be given to the further expansion of FRC, particularly in the pre-action protocol stage, is the time and costs that are required when dealing with clients who have vulnerabilities. Proper provision must be made for the extra time required and the costs of additional expert advice and evidence. The issue of whether or not FRC should apply in the circumstances of vulnerable clients is one that should be considered by the court at an early stage.

The Bar Council is concerned that in those cases where FRC do not apply, there should be provision for the parties to share information about costs at an early stage.

The Bar Council does not consider that it would be appropriate to limit pre-action costs to a fixed point in the proceedings, for example on service of the letter of claim. Such a reform would deny many litigants access to appropriate legal and expert advice prior to making a claim and would effectively restrict access to justice.

Further, insofar as what may be proposed is a Fixed Recoverable Cost for the pre-action stage only, the Bar Council is concerned that this might cause perverse incentives, such as pushing claimants to issue proceedings in order to come within a more generous costs regime.

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

The Bar Council restricts its comments to party and party costs.

The Bar Council considers that consideration should be given to a simplified or summary costs procedure when a claim settles before issue.

Any rule change could usefully expressly provide that the judge would be able to decide the issue of the liability for costs in circumstances where parties have settled pre-issue, but not settled the liability for costs.

A simplified costs procedure could also deal with the issue of vulnerability and whether or not to disapply FRC (if applicable) at an early stage.

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

At the CJC Costs Conference on 13 July 2022, several speakers said that the distinction between contentious and non-contentious business was out of date and artificial. Many cases which are technically "non-contentious" are in reality very contentious, disputes in the Employment Tribunal being perhaps the best example. The Bar Council has not developed policy proposals in this area, but would be happy to engage with the Working Group in giving further consideration to this issue.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

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

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.

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.

The Bar Council respond to questions 4.1 to 4.3 as set out below.

<u>Expansion of FRC</u>

The Bar Council's view is that there is no case for any extension of FRC beyond the proposals currently before the Civil Procedure Rules Committee

and due for implementation in April 2023. The Government's proposed extension of FRC is very wide in its content and scope. All of these proposals will be implemented through the drafting of new rules. These rules are likely to be complex.

Application to specific cases, but no need in others

FRC has been introduced in relation to specific cases where there is a recognised benefit to having a systemic approach to costs because of the volume of cases and the burden on the paying party, the most notable example is personal injury claims. FRC can work in low value personal injury claims because the number of cases allows legal representatives to adapt their working practices to a swings and roundabouts approach: the cases they win and recover costs will set off those which fail or where limited costs recovery is made. The Bar Council does not accept that there are comparable benefits to be had from FRC in other cases and is concerned that the expansion of FRC in higher value personal injury cases and in other areas of work will result in undersettlement, dissatisfaction with the legal process, and restrict access to justice.

No further extension in Personal Injury and Clinical Negligence cases

The Bar Council opposes and further extension of FRC in personal injury and clinical negligence cases. The intellectual basis of Sir Rupert Jackson's advocacy of fixed costs is that the FRC will 'contribute' to the successful party's case; there is an expectation that the shortfall in costs is payable to the legal representatives either by the client directly or out of their damages. Personal injury damages are assessed on the basis of the Claimant's need and what will put them back in the position they would have been in had the accident/negligence not happened. Further procedural reform which makes increasing demands on the client's damages must be avoided, the damages that personal injury victims receive should be protected.

Current FRC rules are complex and contradictory

The rules that apply to the current Fast Track are unnecessarily complex and in places contradictory. In general, the rules in relation to Protocol and Fast Track claims are overly long and complicated. While it is undeniable that detailed rules are required to ensure that there is sufficient clarity to allow parties to apply the rule without resource to the court, it is equally true that there are overlapping procedures for different types of claims that reflect historic developments rather than a holistic strategy. The process is about to become further complicated by the new rules due to come into force in 2023. There are significant examples of these complexities and contradictions set out below, particularly in relation to the approach to disbursements and the case of *Aldred v Cham* in particular.

Setting Fees at an Appropriate level

Fixed costs can work if fees are set at an appropriate level. The current rules for FRC in low value personal injury claims deal with recoverable costs prior to the issue of proceedings. However, the Bar Council note that FRC fees in low value personal injury cases were fully considered by the stakeholders with support from Sir Rupert Jackson's advisers prior to implementation of the rule changes in 2013. Fixed fees can only succeed if they command the respect of the legal representatives who carry out the work. The failure to provide fees at an appropriate level will have a significant detriment to access to justice as legal representatives will simply not do the work if there is inadequate remuneration.

Updating Fees

The success of any FRC regime depends on fee levels being increased at a reasonable rate at appropriate times. The position of the Bar Council is that all fixed costs should be subject to fixed periodical review. It is entirely consistent with the views expressed by Sir Rupert Jackson in both his *Final Report* into Civil Litigation Costs and his *Supplementary Report on Fixed Costs*:

(i) In the *Final Report* on p.150 at (ii) the Law Society recommended that there must be an annual review of fixed costs;

(ii) The summary of PIBA's submissions on this point at p.152 § 3.7 (iii) is that: "*There should be provision for regulatory inflationary increases in any fixed costs regime. The length of time that advocates' fees on the Fast Track were unchanged is unacceptable*."

(iii) Sir Rupert's summary of responses at p.154 §3.15 includes: "*Need for Regular Review. A large number of submissions emphasise the need for regular review of any fixed costs set for the Fast Track. Many respondents drew attention to the failure to review the FRC Part 45 Section II and delays in reviewing the fixed Fast Track trial costs in CPR Part 46*."

(iv) At §5.31 on p.163 Sir Rupert recommended the establishment of a Costs Council that "*should review the fixed costs for personal injury cases every year and set revised figures if appropriate*."[4]

(v) In the *Supplementary Report*, Sir Rupert dealt with the need for periodic review of fixed recoverable costs at §2.9 p.81: "*Many submissions make*

[4] The recommendation of the establishment of such a costs council was not taken up by the government, see https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

the point that FRC must be updated for inflation: I agree and recommend that FRC in the Fast Track be adjusted periodically by reference to the Services Producer Price Index. It is constructed from quarterly surveys measuring the price received from selected services. Annual Increases will generate too much complexity and confusion in ongoing cases. I therefore recommend every three years."[5]

(vi) In his lecture on 28 January 2016, Sir Rupert recognised that there had to be regular reviews of an expanded fixed costs regime, possibly some figures could be index-linked or a review of fixed costs could become an annual item of the Rule Committee's agenda.[6]

(vii) It is also worth noting that in the current consultation on Extending Fixed Costs the MoJ propose increasing Fixed Costs in the Fast Tack by 4% to take inflation into account from 2017 when the figures were initially proposed, see pp. 16-17 of the consultation.

The Failure to increase FRC: the Fast Track Advocacy Fee

A particular example of the failure to increase FRC is the Fast Track Trial Advocacy Fee. These have not been increased since 2013 in relation to Protocol Claims and since 2009 for other Fast Track advocacy fees. In 2019 PIBA and the Bar Council wrote to the Ministry of Justice supporting an update to these fees. The fees remained as they were and a further updated paper was submitted in July 2021. A further paper was submitted in July 2022. A meeting has been arranged with the Ministry of Justice in October 2022.

This is not an acceptable process for updating fees. Significant time and costs have been incurred, including three significant papers in order only to achieve a meeting. Moreover, the process of updating these fees has to be seen in the context of an economic environment which has changed significantly since 2019 when the original paper was sent, but also since the previous paper in July 2021. The current level of Fast Track advocacy fees lags significantly behind the rate of inflation and is a huge source of concern and frustration to the personal injury Bar, and junior practitioners in particular.

[5] see https://www.judiciary.uk/wp-content/uploads/2017/07/fixed- recoverable-costs-supplemental-report-online-2-1.pdf

[6] see para 5.13: https://www.judiciary.uk/wp- content/uploads/2016/01/fixedcostslecture-1.pdf

Vulnerable Clients

The Bar Council also notes the recent research done by the Legal Research Board and the needs for costs to be 'transparent' in cases involving vulnerable litigants.[7] The potential costs consequences involved in such litigation should be managed from an early stage.

There are only three basic means by which increased costs caused by vulnerability can be taken into account under FRC: appropriately drafted rules allowing for 'escape' from the FRC by transfer to the multi-track; discrete rules allowing for necessary disbursements in relation to vulnerable parties and witnesses; and a fixed increase in FRC cases involving vulnerable parties or witnesses.

The Bar Council's view is that rules drafted in such a way, acting in combination, are likely to be the best means by which the specific issues in relation to vulnerability can be addressed. New provisions are necessary in the existing FRC to ensure that vulnerable parties and witnesses[8] are not disadvantaged in bringing cases.

The Bar Council suggests that the parties should be required to set out any issues in relation to vulnerability in the Directions Questionnaire, so that these factors can be taken into account at an early stage in the management of the claim and will be relevant issues to take into account when listing and estimating the length of trial.

Escape

The Bar Council has considered the issue of 'escape' in the particular circumstances of vulnerable clients, but there may be other categories of case in which specific consideration should be given to 'escape'. The current position is that 'escape' is only considered when there is an issue about the costs which have been incurred in excess of FRC.

The existing scope for 'escape' from FRC is limited: for example, CPR 45.29J allows a party to apply for an amount greater than FRC, but will award fixed costs or the assessed amount of costs if the sum assessed is less than 20% above that of the FRC (r. 45.29K) When costs are assessed at less than 20% above the amount of FRC the court can make an order that the party

[7] https://legalservicesboard.org.uk/news/lsb-research-highlights-the-need-for-the-legal-sector-to-provide-better-support-to-vulnerable-consumers

[8] In this paper we will use the term 'vulnerable litigants' to cover witnesses, parties, and interested parties.

making the claim not be awarded costs, or an order that they pay the defending party's costs, CPR 45.29I.

Solicitors' representatives and the judiciary will be best placed to comment on how often applications under this rule and similar provisions have been made. The Bar Council's understanding is that this is a rule that is effectively never used as the costs provisions are such a significant disincentive to make such an application as it involves balancing a reasonable estimation of the costs likely to be recovered, the costs of making the application, the defending party's costs, and the prospects of achieving more than 20% costs recovery. Taking all those factors into account it is understandable that this is not a provision that has been widely used. Its primary purpose is to act as a disincentive to parties to challenge FRC even when the costs incurred have been considerably greater than those recoverable under FRC.

The Bar Council questions the use of this rule but recognises that a rule must be in place which allows a degree of flexibility to make an application but does not undermine the FRC or flood the courts with costs applications. The answer to this is probably to provide a limited costs sanction if the application fails.

The Bar Council submits that new rules should have regard to the following:

(i) in determining when FRC should be disapplied the court should be satisfied that exceptional circumstances apply;
(ii) in determining whether or not expectational circumstances apply the court should have regard to all the circumstances of the case, including vulnerability;
(iii) the parties should set out any issues in relation to vulnerability in their directions questionnaires;
(iv) the court's case management powers should be amended to consider the needs of vulnerable litigants at any stage of the claim;
(v) at allocation the needs of vulnerable litigants should be a specific factor taken into account.
(vi) the Bar Council does not support the current proposed rule change for the reasons set out above, however, if such a rule were to be introduced it should be amended as follows:
(a) at the end of the case a party may apply for FRC to be disapplied: in considering such an application the court should have regard to all the circumstances of the case, including vulnerability and the following

should apply when the court finds that there are exceptional circumstances:

(b) if the costs incurred are greater than 20%of the amount of FRC then FRC shall be disapplied;

(c) if the costs assessed are more than FRC but less than 20% more than FRC the court shall have a discretion either to apply the sum assessed or FRC;

(d) in either (a) or (b) the defending party shall pay the applicant's costs subject to assessment;

(e) if the court finds that the case is not one to which exceptional circumstances apply or where the Claimant cannot show that additional costs have been incurred over FRC, the party making the application shall pay the defendant a fixed amount of £ x: such an amount to be determined by the Rules Committee.

FRC and Disbursements

The CPR sets out a number of different provisions in relation to the recovery of disbursements under FRC. These vary from the highly specific to the very broad. The first fixed costs regime which was introduced in 2010 concerned road traffic accident claims ['RTAs'] up to a value of £ 10, 000. In large part, these rules have been superseded by the expanded fixed costs rules introduced in 2013, but they remain in force and continue to be of relevance in RTA claims brought by protected parties. CPR 45.11 sets out the amount of fixed recoverable costs. CPR 45.12 provides for certain disbursements to be recovered, including CPR 45.12(2)(b) where disbursements "*are necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in CPR 21 – (i) fees payable for instructing counsel; or (ii) court fees payable on application to the court…"* However, Section IIIA of CPR 45 does not contain any similar provision for the recovery of advice, see CPR 45.19 and 45.29I

Disbursements under r. 45.29I are limited to specific costs, not including the provision in respect of children and protected parties but including "*(h) any other disbursement reasonably incurred due to a particular feature of the dispute."*

In *Aldred v Cham* [2019] EWCA Civ 1780 the Court of Appeal drew a distinction between "a feature of the dispute" and a "feature" of the claimant. The costs required for advising on a child settlement were a feature of the child as a claimant, not a feature of the claim, so where not recoverable disbursements under r. 45.29I. This problem would have been avoided had r 45.19 included the same provision as CPR 45.12 (2)(b) specifically allowing for such a disbursement. *Aldred v Cham* is a controversial decision and although the Supreme Court refused the

Claimant's appeal, their view was that this was a matter that should have been considered further by the Rules Committee. The position of PIBA and the Bar Council is that CPR 45.19 should be amended to allow for the cost of advice for settlement in cases involving children to be recovered as a disbursement.

The Role of Counsel as a Disbursement

The issue of disbursements is particularly important to Counsel as any advisory work that counsel does will either be paid as a disbursement pursuant to the rules or will be a cost which a solicitor will have to deduct from fixed costs. In any expansion of the FRC counsels fees for drafting and advisory work should not be included within FRC, or if it is, to be included as a ring-fenced item within fixed costs, following the precedent used in claims involving Noise Induced Hearing Loss. There is another reason why the further expansion of FRC should await some independent scrutiny is to allow some time for data to be made available on how these rules work in practice.

The Role of Counsel for Trial

In the overwhelming majority of cases on the current Fast Track Counsel is instructed for trial. In some instances, counsel may be asked to advise on prospects in relation to an upcoming trial. A conference with the client will not usually occur until attending court on the morning of the trial. The move to remote working for Fast Track trials means that pre-trial conferences have moved online. Inevitably Counsel gives advice about substantive matters at a late stage: for example, advice on evidence, quantum, contributory negligence, and settlement offers. In a case that is vacated there is no rule entitling Counsel to payment for this valuable work. In many cases Counsel will go unpaid when a vacated hearing subsequently settles on the basis of advice given but this is of real benefit to the parties. The Court also benefits by the reduction in the pressure on lists, reducing backlogs: however, there are two specific problems that counsel encounter on a daily basis that deserve further consideration: trials coming out of the list at short notice and the late settlement of claims.

Vacated Hearings: The late vacation of hearings is a recurrent and nationwide problem. In many cases notice of vacation may be given in advance, but the court may also contact the parties on the morning of the hearing itself. While the pressures on the resources of the court and judicial availability are well understood, it is important to emphasise the impact the late vacation of hearings has on advocates. Invariably hours of preparation time will have been wasted, travel plans will have been made, non-refundable tickets purchased, and accommodation costs incurred. Under

the current system, in most instances, individual barristers have to bear the costs thrown away. This state of affairs impacts primarily on junior barristers at the outset of their careers. There is no mechanism for the recovery of fees incurred a result of a trial being vacated at short notice either under Section VI or Section IIIA. In contrast to Section VI and IIIA, there is provision under Section III that when a Stage 3 or settlement hearing is adjourned the court does have discretion to award the Stage 3 advocacy fee pursuant to r. 45.27.

On the basis that there is no clear entitlement to payment where the trial is vacated under the rules, it is highly unlikely that Counsel will have a realistic ability to recover incurred fees from the client under a CFA. In effect if there is no mechanism to recover costs from the Defendant, Counsel will not be paid for any work undertaken. This undermines an integral part of civil litigation: if junior counsel are reluctant to enter into CFAs for trials as there is a distinct likelihood that they will not be paid, clients will be left without appropriate representation and there is a potential for a funding "gap": cases in which CFAs are not used and no alternative form of funding exists for an impecunious claimant.

Late Settlement. In circumstances when settlement is achieved "at the door of the court" Counsel is entitled to recover the brief fee for trial: *Mendes v Hochtief (UK) Construction Ltd* [2016] EWHC 976 (QB).[9] A rule which limits recovery of trial fees to cases which settle on the day of trial is neither logical nor fair. If costs can be recovered at the door of the court at 0930 on Friday, then why not if compromised over the phone at 1645 on Thursday? Limiting the rule of recoverability of advocacy fees to cases which settle on the day of trial is clearly arbitrary and inequitable.

Bar Council **Personal Injuries Bar Association**

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For further information please contact
Anastasia Kostaki, Policy Officer: Legal Practice & Remuneration
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 02076111311 Ext: 229
Email: AKostaki@BarCouncil.org.uk

[9] https://www.bailii.org/ew/cases/EWHC/QB/2016/976.html