

Equalities Statement

Introduction

1. This Equalities Statement considers the impact of the Government's plan to extend Fixed Recoverable Costs (FRC) in civil cases against the duties in the Equality Act 2010, in light of the responses to the consultation. This is a matter to which we have given much thought; see also our above response to Questions 7-10 (Chapter 5, paragraphs 24.1-7). The Equalities Statement has been revised in the light of the responses to the consultation, and other developments since then including the Civil Justice Council's (CJC) report, *Vulnerable Witnesses and Parties within Civil Proceedings*, issued in February 2020 after the consultation had concluded, and the judgment in *Leighton, R v The Lord Chancellor*, a judicial review (JR) which was heard in 2020, after the MoJ consultation.¹

Policy Summary

2. The Government's consultation response, *Extending Fixed Recoverable Costs in Civil Cases: The Government Response*, sets out the background to, and rationale for, extending FRC in civil cases. As is set out in the response (Chapter 1, paragraph 1.3), by setting in advance the amount of legal costs that can be recovered by the winning party at different stages of litigation, FRC ensure that legal costs remain both certain and proportionate; this promotes access to justice for all parties in civil cases. While the Government regards the control of civil costs as important in itself, it is of course particularly relevant for those with fewer resources, who will need to consider more carefully the financial implications of litigation.
3. In summary, the way forward on extending FRC is as follows:
 - FRC will be extended to all civil claims across the fast track, up to a value of £25,000 in damages;
 - A new process and separate grid of FRC will be implemented for all Noise Induced Hearing Loss (NIHL) claims in the fast track valued below £25,000 in damages;
 - The fast track will be expanded, meaning that simpler 'intermediate' cases valued between £25,000-£100,000 in damages will be subject to FRC;
 - Costs budgeting will be introduced for all 'heavy' JRs;
 - The figures for FRC on which the Government consulted, which were based on Sir Rupert Jackson's 2017 *Review of Civil Litigation Costs: Supplemental Report*, will be updated for inflation, in line with the Services Producer Price Index (SPPI).
4. By extending the use of a simplified scheme of costs, such as FRC, the Government will (i) reduce actual costs (through a simpler procedure); (ii) ensure that costs are proportionate; and (iii) control costs in advance, which promotes both certainty and discipline in litigation.

¹ <<https://www.bailii.org/ew/cases/EWHC/Admin/2020/336.html>> (*Leighton, R v The Lord Chancellor* [2020] EWHC 336 (Admin)).

Equality Duties

5. Section 149 of the Equality Act 2010 ('the Act') requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:
 - Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
 - Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
 - Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).
6. In carrying out this duty, Ministers and the Department must pay 'due regard' to the nine 'protected characteristics' set out under the Act, namely: race, sex, disability, sexual orientation, religion or belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.
7. The Ministry of Justice (MoJ) has a legal duty to consider how the proposed policy proposals are likely to affect those people with protected characteristics and, in particular, to take proportionate steps to mitigate or justify the most negative effects and advance the most positive ones.

Summary

8. The Government is mindful of its duties under the Equality Act 2010, and has carefully considered the equalities impacts of the extension of FRC on all civil court users. As stated in our original Equalities Statement, our proposals on extending FRC will also affect claims that do not go to court, but it is difficult to make a judgment on the equalities impacts for such cases, as we do not possess sufficient data on their characteristics. Based on the limited data that is available, it remains the Government's assessment that the proposals will not result in any unlawful discrimination for civil court users. The Government considers it likely that the proposals may, in fact, be of general benefit in advancing equality of opportunity, by making it easier for parties to bring and defend claims regardless of their protected characteristics. This view was shared by some respondents (see Chapter 4, paragraph 25.4 of the consultation response). That said, the Government has considered the responses to the equalities questions (Questions 7-10) in its consultation paper, and has made the following updated assessments.
 - **Direct discrimination:** Our assessment is that the planned extension of FRC across civil cases is not directly discriminatory within the meaning of the Act, as it will not apply to anyone differently, regardless of their protected characteristics. We do not consider that the proposals will result in people being treated less favourably because of any protected characteristic.
 - **Indirect discrimination:** Indirect discrimination occurs when a policy applies equally to all individuals but would put those sharing a protected characteristic at a particular disadvantage compared to those who do not.

In regard to the nine protected characteristics set out above in paragraph 6, the Government does not think that civil court users possessing any of the protected

characteristics, with the exception of disability (see below paragraph 8), will suffer a particular disadvantage as a consequence of the extension of FRC. Although we recognise that some civil court users with specific protected characteristics are likely to be over-represented in the civil courts when compared to the general population (see table 1 below), the Government considers the proposed changes to be a proportionate means of achieving the legitimate aim of extending FRC across fast track claims and for 'simpler' intermediate cases, as set out in the consultation response. The Government does not consider that the possession of one of the above protected characteristics may lead to extra costs in bringing a civil claim, and thereby warrant additional costs provisions or bolt-ons within FRC.

However, having carefully considered the views raised by respondents to Questions 7-10 in the consultation paper, alongside the recommendations in the CJC report *Vulnerable Witnesses and Parties within Civil Proceedings*, issued in February 2020 after the consultation had concluded, the Government accepts that there are grounds to make limited exceptions in FRC for specific 'vulnerabilities' that may require further costs provisions, rather than more expansive allowances that would be contrary to the objectives of FRC. Specifically, the Government acknowledges that the extension of FRC may have an indirect impact on parties with certain protected characteristics that may render them vulnerable; specifically, those with mental disabilities, who may incur further costs when bringing a civil claim. As we summarise at Chapter 1, 10.1 of the response, we make the following proposals to mitigate any potential negative equalities impacts:

- i. We propose that the new fast track FRC regime could cover the specific vulnerabilities set out in the guidance to the legal aid Family Advocacy Scheme (FAS), and that a specified, percentage uplift of FRC (25%, in keeping with the 25% bolt-on that is currently available under FAS to those who '[have] difficulty giving instructions' as a result of a verified mental impairment) could be available in respect of parties who meet these criteria, upon judicial certification. We will consider with the Civil Procedure Rule Committee (CPRC) as to how the Directions Questionnaire could be amended to incorporate this percentage uplift.
- ii. We recognise that additional disbursements may be needed for specific vulnerabilities (such as where a sign language interpreter may be required). We will consider with the CPRC what arrangements are appropriate for disbursements and consistent with the aims of FRC.
- iii. In drafting the rules for consideration by the CPRC, we will consider whether the arrangements for settlements for protected parties (adults lacking mental capacity and children, as under Road Traffic Accident cases) should be extended to the new FRC regimes.

In particular, our choice of the FAS as a model for extra provisions within FRC for specific vulnerabilities has been endorsed by discussions with (i) the Legal Aid Agency, who noted that the scheme has been working effectively over the last ten years, and (ii) judicial stakeholders, who acknowledged the suitability of FAS for

these purposes. We will consider arrangements for the above with the CPRC in due course, and will keep the new arrangements under review once implemented. Taking the above into account, the Government considers its proposals on extending FRC to be a proportionate means of achieving the legitimate aims of the policy objectives set out above and in the consultation.

- **Discrimination arising from disability and duty to make reasonable adjustments:** See our above comment on the provisions we are making within FRC for parties with specific vulnerabilities (e.g. mental disabilities). The Government has made these provisions to ensure that the proposals on extending FRC are not likely to result in any indirect discrimination for clients with disabilities, and will keep these provisions under review to ensure they are working effectively. We will continue to ensure that reasonable adjustments are made for civil court users with disabilities.

As we noted in our original Equalities Statement, by introducing a new pre-litigation process involving greater transparency between parties for the more straightforward majority of NIHL claims, we will make the NIHL claims process more streamlined and accessible for people with disabilities.

Further to the above, following Sir Rupert's original recommendation and the agreement of respondents, we have decided to exclude mesothelioma and other asbestos related lung disease claims from the extension of FRC. We have concluded that civil claims regarding mesothelioma and related diseases, involving parties who may be disabled as a consequence, would not be suitable for inclusion within the proposed FRC regimes, given (i) the inherent complexity of these cases and (ii) that the current Asbestos Lists are operating very effectively.

- **Harassment and victimisation:** We do not consider there to be a risk of harassment or victimisation as a result of these proposals.
- **Advancing equality of opportunity:** Careful consideration has been given to how these proposals may impact on the duty to advance equality of opportunity by meeting the needs of those bringing proceedings who share a particular protected characteristic, where those needs are different from the needs of those who do not share that particular characteristic (see our above comment on provisions for specific vulnerabilities within FRC). Given that the extension of FRC will apply to all civil court users, regardless of their possession of a particular characteristic, it is the Government's assessment that the proposals will be of general benefit to all civil court users, by ensuring that the costs of civil litigation remain both certain and proportionate. We therefore consider it likely that the proposals should enhance equality of opportunity for all users of the civil courts, by ensuring that users can make better decisions about whether to litigate or to settle, regardless of their possession of a particular characteristic.
- **Fostering good relations:** Consideration has been given to this objective, and we do not consider that there is scope within the policy of extending FRC to promote measures that foster good relations. For this reason, we do not consider our proposals to be relevant to this objective.

Table 1: Data from the 2015/16 Civil Court User Survey

Please note, this data is for 2015/16 and the characteristics of court users may have changed since then; however, this is the most recent data available. In addition, this data is for all users of the country courts, and our FRC proposals will only affect claims in the fast track which do not currently have FRC, and some of the claims in the multi-track.

	Claim type			All claimants %	All adults (population) [†] %
	Specified money %	Unspecified money %	Possession/ rent arrears %		
Gender					
Male	62	55	55	56	47
Female	38	45	45	44	53
Age					
16 to 24	2	3	*	2	15
25 to 34	12	17	11	15	15
35 to 44	18	20	18	20	18
45 to 54	25	25	21	25	17
55 to 64	23	18	28	20	15
65 to 74	15	12	19	14	11
75 and over	5	5	3	5	9
Highest qualifications					
Degree level or above	41	25	45	32	
A-level	11	11	16	13	
GCSE Grades A-C/O-levels	20	25	19	24	
Other qualification	18	17	14	16	
No formal qualifications	10	22	5	15	
Married or co-habiting					
Yes	66	69	74	68	58
No	34	31	26	32	42
Dependent children					
Any aged < 16	30	39	30	35	43
Any aged 16-18 in FTE	9	12	7	10	
None	66	57	68	69	61
Ethnicity					
White	86	78	69	80	90
Asian/Asian British	7	16	18	14	5
Black/Black British	4	3	9	4	2
Mixed/Chinese/Other	3	3	4	3	3
<i>Bases: All claimants</i>					
Gender	1,455	412	204	2,105	
Age	1,456	409	204	2,101	
Qualifications	1,409	404	200	2,045	
Cohabitation	1,444	412	200	2,090	
Dependent children	1,433	406	198	2,070	
Ethnicity	1,384	398	197	2,009	

Source: Civil Court User Survey 2014/15 – Individual claims

[†] Ethnicity, marital status, age from <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-289713>; Dependent children from http://www.ons.gov.uk/ons/dcp171778_332633.pdf