

<b>Title: Extending fixed recoverable costs (FRC)</b>  <b>IA No:</b> <b>RPC reference Number:</b>  <b>Lead department or agency: Ministry of Justice</b>  <b>Other departments or agencies: N/A</b>	<b>Impact Assessment (IA)</b>				
	<b>Date: 08/02/2019</b>				
	<b>Stage: Consultation</b>				
	<b>Source of intervention: Domestic</b>				
	<b>Type of measure:</b>				
<b>Contact for enquiries:</b> general.queries@justice.gsi.gov.uk					
<b>Summary: Intervention and Options</b>					<b>RPC Opinion: N/A</b>

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2014 prices)	In scope of One-In, Three-Out?	Measure qualifies as
Unknown	Unknown	Unknown	N/A	Not a regulatory provision

**What is the problem under consideration? Why is government intervention necessary?**

In England and Wales, the winning party in civil litigation is generally entitled to recover costs from the losing party. This creates an incentive for both sides to a dispute to over-invest in legal advice and may explain why the costs of litigation in the UK are among the highest in the world. Government intervention is required to control the costs of litigation.

One way of doing this is to fix in advance the amount that the winning side can recover from the losing party before the parties have run up excessive bills. Fixed recoverable costs (FRC) do this, and provide both sides with certainty as to the costs of a case. Since 2010, FRC have been successfully introduced in most personal injury (PI) cases up to £25,000. Now that those reforms have bedded in, the Government believes it is opportune to consider extending the scope of FRC.

**What are the policy objectives and the intended effects?**

The policy objective is to make legal costs proportionate in low-value civil litigation (cases up to £100,000 damages). As Sir Rupert Jackson says in his supplementary 2017 report on FRC, “the holy grail pursued by every civil justice reformer is a system in which the actual costs of each party are a modest fraction of the sum in issue, and the winner recovers those modest costs from the loser.” FRC would therefore ensure that costs are proportionate and predictable, so helping to increase access to justice as potential litigants would not be prevented from bringing their cases for fear of excessive costs.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

- **Option 0:** Base case (do nothing)
- **Option 1:** Introduce a package of reforms to extend FRC, including:
  - (a) Extending FRC across the fast track<sup>1</sup>
  - (b) Introducing an uplift to FRC for each additional claimant for claims with multiple claimants arising from a single course of action
  - (c) Streamlining the litigation process for fast track Noise Induced Hearing Loss claims, alongside the introduction of a bespoke FRC regime
  - (d) Expanding the fast track to include ‘intermediate’ cases with FRC
  - (e) Introducing cost budgeting<sup>2</sup> for “heavy” JR claims

The Government’s preferred option is Option 1a-e as this best meets the policy objectives.

**Will the policy be reviewed? Yes, this policy will be reviewed in light of consultation responses**

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A		<b>Non-traded:</b> N/A

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

<sup>1</sup> All defended cases are allocated to one of three court tracks; Small Claims Track (most claims under £10,000, except for personal injury), Fast Track (claims between £10,000 (except for personal injury) to £25,000 and the Multi Track (claims for over £25,000, or for lesser money sums where the case involves complex points of law and/or evidence).

<sup>2</sup> Cost budgeting is set out in Part 3 of the Civil Procedure Rules and is a process by which budgets are agreed ahead of the trial, following budget submissions by both parties.

Signed by the responsible Minister:

Date

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# Summary: Analysis & Evidence

# Policy Option 1

Description: Introduce a package of reforms to extend FRC

## FULL ECONOMIC ASSESSMENT

Price Base Year None	PV Base Year None	Time Period Years None	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: Unknown

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	Unknown	Unknown	Unknown

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs of this proposal as the total volume of cases where FRC will be applicable is unknown due to data limitations.

### Other key non-monetised costs by 'main affected groups'

The overall net non-monetised cost is likely to be a reduction in legal fees per case, which represents a reduction in income for lawyers. There could be cash flow costs to losing litigants in terms of reduced investment income, as cases may settle more quickly. There may be some implementation costs to HMCTS to expand the fast track to include 'intermediate' cases, and there may be some costs to update to judicial training modules.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	Unknown	Unknown	Unknown

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits of this proposal as the total volume of cases where FRC will be applicable is unknown due to data limitations.

### Other key non-monetised benefits by 'main affected groups'

The key benefit of these proposals is to control legal costs. This is an advantage for all parties when deciding whether to embark on litigation, and should result in fewer claimants being deterred from pursuing a claim. The overall net non-monetised impact is likely to be a reduction in legal costs per case. Except for cases subject to Qualified one-way costs shifting (QOCS)<sup>1</sup>, this represents a benefit for the losing party, as the costs are recovered from them. The proposals should mean less time and resources are spent arguing over costs, and claims could settle quicker. All the options might generate business process efficiencies, and if cases are settled more quickly, lawyers can take on more work, leading to solicitors maintaining their current profit margins.

### Key assumptions/sensitivities/risks

Discount rate

3.5

- No change in overall claim volumes relative to the base case, and no change in the number of court cases.
- Claimant lawyers would set their legal fees equal to the FRC being proposed.
- Claim settlement outcomes would remain the same.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:		
			No	

<sup>1</sup> Under QOCS, defendants will have to pay claimants costs if they fail to defend their case successfully, but claimants will not have to pay defendants costs should their case fail.

Please refer to Annex A for a glossary of key terms used in this document.

## Evidence Base

### A. Background

The MoJ consultation

1. This consultation focuses on the extension of FRC. FRC prescribe the amount of legal costs the winning party can recover from the losing party in civil litigation. FRC are relatively new in England and Wales but are firmly established in other jurisdictions. In Germany, a successful party does not have complete indemnity for their costs, but rather a statute dictates that legal costs are covered by a non-linear scale, using multipliers that vary per the value of the dispute. German legal fees are relatively low, compared to the rest of Europe, and they rank well for the ease of enforcing contracts.<sup>2</sup>
2. Extending FRC is an important component of controlling the costs of civil litigation more generally. As Sir Rupert Jackson<sup>3</sup> says in his July 2017 report<sup>4</sup>, ‘the holy grail pursued by every civil justice reformer is a system in which the actual costs of each party are a modest fraction of the sum in issue, and the winner recovers those modest costs from the loser’.<sup>5</sup> The best way to control costs is to do so in advance, which can be done through measures such as costs budgeting or FRC. However, FRC are the only way to provide certainty to both parties as to what their costs will be. As such, we believe they are key to ensuring access to justice as potential litigants will not be discouraged by uncertainty concerning the costs of litigation.
3. Sir Rupert’s July 2017 report is the culmination of at least 20 years work on controlling the costs of civil litigation. He was an assessor to Lord Woolf’s seminal report, ‘Access to Justice’, published in 1996.<sup>6</sup> That report recommended significant reforms to the civil justice system to improve access to justice, reduce the cost of litigation, and remove unnecessary complexity. One recommendation, on which work remains outstanding, was to expand FRC beyond fast track PI, RTA, ELA, and PL cases and implement a regime of FRC for fast track cases.<sup>7</sup>

#### The Jackson Report 2010

4. Substantial reforms were made to the civil justice system following Lord Woolf’s report, not least the introduction of the Civil Procedure Rules<sup>8</sup>. However, in the following years there were continuing concerns about the costs of civil litigation, primarily due to the Access to Justice Act 1999 reforms to ‘no win no fee’ Conditional Fee Agreements (CFAs). This led to the appointment, by the then Master of the Rolls, of Sir Rupert Jackson, ‘to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost’<sup>9</sup>.
5. Sir Rupert’s report was published in 2010, and led to statutory reforms in the LASPO Act 2012 and other changes to the handling of civil cases, which came into force together in April 2013. His recommendations included fixing the recoverable costs of fast track cases in principle, although further detailed work was needed on the detail.

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<sup>2</sup> <http://www.doingbusiness.org/en/rankings>

<sup>3</sup> Sir Rupert retired from the Court of Appeal on 8 March 2018.

<sup>4</sup> [www.judiciary.gov.uk/wp-content/uploads/2017/07/fixing-recoverable-costs-supplemental-report-online-2-1.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixing-recoverable-costs-supplemental-report-online-2-1.pdf)

<sup>5</sup> Jackson (2017), chapter 1, 1.2

<sup>6</sup> [www.barchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm](http://www.barchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm)

<sup>7</sup> [www.barchive.nationalarchives.gov.uk/20060214041355/http://www.dca.gov.uk/civil/final/sec2b.htm#c4](http://www.barchive.nationalarchives.gov.uk/20060214041355/http://www.dca.gov.uk/civil/final/sec2b.htm#c4)

<sup>8</sup> Under s. 1, Civil Procedure Act 1997

<sup>9</sup> Jackson (2010), chapter 1, 1.1

6. Following the report, the government concentrated its efforts on introducing (between 2010 and 2013) FRC for low-value (fast track) personal injury (PI) claims: road traffic accident (RTA), employers' liability accident (ELA) and public liability (PL) cases.
7. Sir Rupert's intention was that once these FRC reforms had become embedded in the legal system it would be possible to look at extending FRC more widely and to claims of higher value. With the current regime of FRC working well, we agree with him that the time is right to extend FRC in order to control the costs of civil litigation and improve access to justice.
8. It is worth emphasising the last of the above points, as some see FRC as compromising access to justice. We do not agree. Rather, we agree with what Sir Rupert said in 2010:

*'It has sometimes been suggested during the Costs Review that there is an antithesis between controlling costs and promoting access to justice. I accept that if litigation becomes uneconomic for lawyers, so that they cease to practise, there is a denial of access to justice. But, for the most part, achieving proportionate costs and promoting access to justice go hand in hand. If costs on both sides are proportionate, then (i) there is more access to justice and (ii) such funding as the parties possess is more likely to be sufficient.'*

9. In January 2016, Sir Rupert gave a lecture entitled 'Fixed costs – the time has come'<sup>10</sup> That lecture rekindled the debate about extending FRC much more widely.
10. Later that year, in a joint statement heralding an ambitious programme of reform to modernise Her Majesty's Courts and Tribunals Service<sup>11</sup>, the Lord Chief Justice, Lord Chancellor and Senior President of Tribunals stated:

*'More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.'*

11. On 11 November 2016 the Lord Chief Justice and the Master of the Rolls commissioned Sir Rupert to carry out a review of FRC. He was commissioned<sup>12</sup> to consider the areas in which FRC could be extended and to what value of claim. He published his report on 31 July 2017 and we are now consulting on the implementation of his recommendations. This Impact Assessment (IA) is intended to support this consultation.

## **B. Policy Rationale and Objectives**

### **Economic rationale**

12. The conventional economic approaches to Government intervention are based on efficiency or equity arguments. Governments may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or there are strong enough failures in existing Government interventions (e.g. waste generated by misdirected rules) where the proposed new interventions avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g. to reallocate goods and services to more needy groups in society).

<sup>10</sup> [www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf)

<sup>11</sup> *Transforming our justice system* <https://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf>

<sup>12</sup> [www.judiciary.gov.uk/announcements/senior-judiciary-announces-review-of-fixed-recoverable-costs/](http://www.judiciary.gov.uk/announcements/senior-judiciary-announces-review-of-fixed-recoverable-costs/)

13. The options assessed in this IA are primarily justified on efficiency grounds: the prospect of being able to fully recover the costs of litigation from the other side creates an additional incentive for a litigant to win a case. This is because, in addition to securing a favourable judgement, the winning party will also benefit from not paying their own costs. As each party to a dispute faces the same incentive, both sides may take on more legal advice (and therefore higher legal costs) than they otherwise would resulting in cases being more expensive than they would be if each side paid their own costs. This incentive may also explain why the aims of reducing the costs of litigation while ensuring that the losing party pays the costs of the winner have been proven so difficult to achieve in practice. Placing an advance limit on the level of recoverable costs would reduce this incentive, which could lead to a fall in the cost of litigation.

## **Policy Objectives**

14. One of the associated policy objectives is to increase certainty and reduce the costs of litigation. Currently, the lack of FRC leads to uncertainty and increases costs overall. By extending FRC, costs should be more certain and predictable, and more proportionate to the sums in dispute. FRC also encourage early settlement and help to streamline proceedings, leading to earlier resolution, thus saving court time and other costs.
15. The other policy objective is to promote access to justice. In order to promote access to justice, the government is committed to ensuring that legal costs are proportionate in civil litigation. To this end, FRC were originally brought in for low-value personal injury cases. Now that those reforms have bedded in and FRC are working well, it is time to consider their extension. This would make legal costs proportionate in a wider range of cases, thereby increasing access to justice.

## **C. Affected stakeholder groups, organisations and sectors**

16. The following groups are expected to be most affected by all or some of the options assessed in this Impact Assessment (IA). In the costs and benefits assessment for each option (section E), if a particular group is considered to be unaffected they have not been included. A brief description is included below outlining the role of each group in this area:
- i. Successful litigants – currently litigants are generally able to fully recover their legal costs from the losing party if they win the case. Other than claimants who have a ‘no win no fee arrangement’ this creates an additional incentive to win the case so that they can recover their legal costs, and may lead to them incurring high legal costs that are disproportionate to the sums in dispute.
  - ii. Lawyers – may currently undertake additional work, whether the case is successful or not, as while legal costs are subject to assessment, there is no fixed limit on what can be recovered if the case is won. The introduction of FRC should therefore encourage efficiency.
  - iii. Losing litigants – currently litigants have to pay uncertain and unpredictable legal costs if the case is lost. Other than in cases that are subject to Qualified one-way costs shifting<sup>13</sup> (QOCS), both parties are incentivised to spend more to win the case so that they can recover their legal costs, and may lead to them incurring high legal costs that are disproportionate to the sums in dispute.
  - iv. HM Courts and Tribunals Service (HMCTS) – FRC encourage early settlement and help to streamline proceedings, leading to earlier resolution, thus saving court time.
  - v. Costs lawyers – as more cases become subject to FRC, there would be a reduction in cases requiring the work of a costs lawyer.

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<sup>13</sup> Under QOCS, defendants will have to pay claimants costs if they fail to defend their case successfully, but claimants will not have to pay defendants costs should their case fail

vi. The judiciary – as more cases become subject to FRC, there would be a reduction in the need for the judiciary to spend time managing cases and assessing costs.

17. The following groups are likely to have minimal impacts as a result of these proposed reforms, and as such have not been included in the cost-benefit analysis section:

- Legally aided claimants - As there are very few legally aided damages claims and the more complex claims are excluded from FRC, the volume of claims likely to be affected by this proposal is minimal. In addition, we think it is unlikely that the FRC rates will be lower than the legal aid rates<sup>14</sup>.
- Legal aid firms - For the same reasons set out in the legally aided claimants section above, the impact on legal aid firms is estimated to be minimal.

## D. Description of options considered

18. To meet the Government's policy objectives, the following options are considered in this IA:

- **Option 0:** Base case (do nothing);
- **Option 1.** Introduce a package of reforms to extend FRC. This option has five components (while Option 1b is dependent on Option 1a and/or Option 1c being implemented; Options 1a, 1c, 1d or 1e are not each dependent on the other options being implemented)
  - **Option 1a:** Extending FRC to all cases in the fast track<sup>15</sup> (with damages up to £25,000);
  - **Option 1b:** Introducing an uplift to FRC for each additional claimant for claims with multiple claimants arising from a single course of action;
  - **Option 1c:** Streamlining the litigation process for fast track Noise Induced Hearing Loss claims, alongside the introduction of a bespoke FRC regime;
  - **Option 1d:** To expand the fast track to include 'intermediate' cases with FRC (simpler cases currently in the multi-track with damages between £25,000 and £100,000);
  - **Option 1e:** Introducing costs budgeting for "heavy" JR claims

19. These options would be brought through the Civil Procedure Rule Committee (CPRC) via a Statutory Instruments made via the Lord Chancellor.

20. In what follows, each of the components within Option 1 is discussed separately. The preferred option is Options 1a-1e as this is considered most likely to achieve the desired aims of making legal costs proportionate in low-value civil litigation claims.

### Option 0: Base case (do nothing)

21. Under the "do nothing" base case, the current system would continue to apply. This would mean:

- Recoverable legal costs would remain unfixed for cases such as non-personal injury RTA claims and Employer's liability disease (ELD) claims in the Fast Track less than £25,000;

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<sup>14</sup> It is not possible to directly compare the legal aid rates to the FRC, because the legal aid rates are based on the number of items and the hours worked. We could look at case level data for legal aid cases, but unfortunately this does not contain enough detail to accurately determine which FRC will apply.

<sup>15</sup> All defended cases are allocated to one of three court tracks; Small Claims Track (most claims under £10,000), Fast Track (claims between £10,000 to £25,000 and the Multi Track (claims for over £25,000, or for lesser money sums where the case involves complex points of law and/or evidence).

- Recoverable legal costs would remain unfixed for claims in the multi-track between £25,000-£100,000;
- Recoverable legal costs would remain unfixed for noise-induced hearing loss (NIHL) claims in the fast track;
- There would be no cost budgeting for JR cases with costs above £100,000.

22. Under this option, other than in cases subject to QOCS, the incentives for both sides to increase their own legal costs so that they win the case and can recover their costs from the other side would remain. Uncontrolled costs would also continue to create an incentive for lawyers to undertake more work, as the cost of this can then be recovered if the case is successful. This could result, as currently is the case, in legal costs that are disproportionate to the value of the claim in dispute.

#### **Option 1a:**

23. Under Option 1a, FRC would be extended to all cases in the fast track, making legal costs proportionate in cases up to £25,000 damages. The fixed amounts would be those given by Sir Rupert in his report, which stipulates an amount for each stage of litigation. This would provide absolute certainty as to the costs of litigation, and remove the risk that one or both parties might run up excessive costs.

#### **Option 1b:**

24. The aim of FRC is to ensure that legal costs are proportionate. When multiple claims arise from the same cause of action, it would not be proportionate to maintain the same FRC for each claim. Under Option 1b, the FRC for each subsequent claim (after the principal claim) would be 10% of the original FRC. This would reflect the limited amount of work that needs to be carried out for each subsequent claim, when those claims arise from the same facts.

#### **Option 1c:**

25. Sir Rupert supports the Civil Justice Council's (CJC) proposals for NIHL claims.<sup>16</sup> This option includes a streamlined process, improvement to the process both pre- and post-litigation, and a set of FRC. This option would ensure the costs in NIHL claims are proportionate, and that claims are resolved in a timely manner.

#### **Option 1d:**

26. It has always been our intention to revisit FRC, once the previous proposals (FRC introduced for most Personal Injury claims) had had time to bed in. Whilst Sir Rupert suggested in January 2016 that FRC should be implemented for cases up to £250,000 damages, his proposal in his 2017 report is for an intermediate track up to £100,000 damages.

27. Having considered the issue carefully, not least the implementation aspects, we do not see the need for introducing a new track, with the costs and complexity that would involve. Indeed, there is simplicity and consistency in retaining the existing tracks, while expanding the fast track so that all its cases have FRC. Accordingly, our preference is to expand the fast track to include the 'intermediate' cases, that Sir Rupert identified. These intermediate cases would therefore be allocated to an expanded fast track and would be subject to FRC. For the sake of clarity, this document will refer to 'intermediate' cases rather than to the intermediate track.

<sup>16</sup> CJC report on NIHL claims, [www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf](http://www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf)



28. There are some cases that are not suitable for FRC at present, as laid out by Sir Rupert in chapter 7 of his report. We propose to accept the criteria for 'intermediate' cases given by Sir Rupert, which are intended to ensure that unsuitable cases are not brought into scope, but we are seeking views from consultees as to whether these will provide sufficient certainty for parties as to whether their case will be eligible for FRC. For those 'intermediate' cases that are subject to the FRC regime, the costs will be those proposed by Sir Rupert.

#### **Option 1e:**

29. JR cases have been considered inappropriate for FRC due to their special characteristics (explained by Sir Rupert in his 2009 preliminary report, in chapter 5, paragraphs 1.2 – 2.7<sup>17</sup>). Cost budgeting<sup>18</sup> would apply at the discretion of the court, in all 'heavy' JR cases with costs of a party above £100,000. This will not affect the costs protection regime in environmental cases under the Aarhus Convention (i.e. claimant liability capped at £5,000 or £10,000, defendant liability capped at £35,000, all subject to variation) that are in place for environmental JR cases.

## **E. Cost and Benefit Analysis**

30. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.

31. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in the UK with the aim of understanding what the overall impact on society might be from the options under consideration. These impacts are normally compared to those of the 'do nothing' option. As this means that the do nothing/base case option would be compared against itself, its costs and benefits are zero as would be its Net Present Value (NPV).

32. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, both positive or negative.

33. It has not been possible, to monetise the overall impact of these proposals as the total volume of cases affected is unknown due to data limitations. Therefore, the cost and benefit analysis below gives the known volumes of cases that would be affected, highlights where volume data is missing and, where possible, highlights the potential impact on legal costs for certain case types. The non-monetised costs and benefits are outlined below.

### **Assumptions**

34. The following assumptions have been made for assessing the expected impacts of all the options:

- The overall willingness of claimants to bring a claim would remain unchanged.
- There would be no aggregate impact on claimant lawyers' willingness to take on cases. Whilst some claimant lawyers might exit the market it has been assumed that others would enter, or

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<sup>17</sup> <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf>

<sup>18</sup> Cost budgeting is set out in Part 3 of the Civil Procedure Rules and is a process by which budgets are agreed ahead of the trial, following budget submissions by both parties.

existing providers would expand to meet demand. This is because the proposed FRC are assumed to reflect the amount of work which an efficient and effective provider would undertake.

- There would be no change in overall case volumes relative to the base case. This stems from the above assumptions about claimants and claimant lawyers being as willing in future to pursue cases as they are now. In addition, there is no reason to consider that the reforms might somehow impact on the underlying volume of personal injury accidents in relation to which claims are made, e.g. as a result of fraud or other claimant behavioural change.
- Claimant lawyers would set their legal fees equal to the FRC being proposed for each case type. The data from Taylor Rose TTKW supports our assumption that agreed profit costs would equal FRC (this data is discussed in more detail under the next heading).
- Claim settlement outcomes would remain the same.
- The proportion of cases that are subject to the escape clause<sup>19</sup> would only be very small and would have no significant impact in the overall costs and benefits of the proposals.
- All cases would be allocated to the appropriate FRC regime and band. Movement between bands<sup>20</sup> would be minimal and would not impact the overall costs and benefits.
- There would be no change in the number of litigants in person.
- There would be no change in the number of claims where court proceedings are issued, where cases are allocated to a court track, and where court hearings take place.
- Civil Procedure Rule Part 8 claims<sup>21</sup> would not be subject to FRC under these proposals<sup>22</sup>.
- For option 1b, all group claims would be subject to the staged FRC and would not be treated as individual claims.
- For option 1c, the majority of NIHL claims would be allocated to the fast track and only in exceptional circumstances, and when appropriate, would a NIHL claim be allocated to the multi-track (where FRC would be avoided).
- For option 1e, the overall claimant willingness to bring a JR remains unchanged.
- These assumptions are discussed further in the 'risk and sensitivity' section

## **Data**

### **Volumes**

35. All civil claims, including specified money, unspecified money and non-money claims would be subject to the proposed FRC. In cases which settle out of court or before being allocated to a track, the applicable FRC would be agreed as part of the settlement of the case. Data was needed in all of these settlement stages; where it is not available, we tried to estimate the

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<sup>19</sup> The escape clause allows for claims to be made above the FRC regime, however in these cases the successful litigant must recover at least 20% more than the prescribed fixed costs. If they fail to persuade the court to award more than the FRC regime, then they must pay for the unsuccessful litigant's Part 8 costs.

<sup>20</sup> The court would have the discretion to move cases between bands depending on the nature of the individual case.

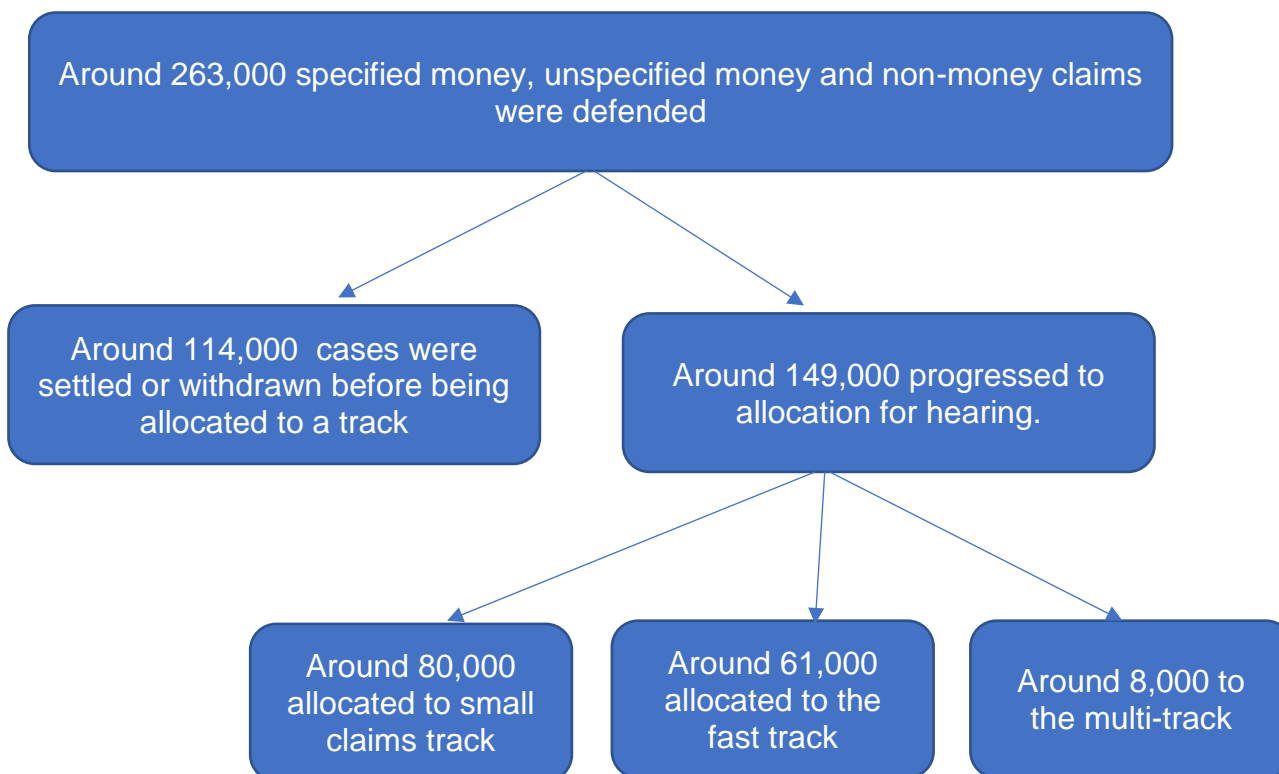
<sup>21</sup> [www.justice.gov.uk/courts/procedure-rules/civil/rules/part08](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part08)

<sup>22</sup> It has been proposed that Part 8 claims should not be subject to FRC until the proposed reforms have had time to bed in. The question of extending FRC to Part 8 claims would be deferred for future consideration.

number of affected cases, however this was not possible in all cases. This is explained in more detail below.

36. Data on the number of claims in the County Court is available from the County Court Case Management System (CaseMan)<sup>23</sup>. The flowchart below is based on this data.

37. The diagram below provides details of the volumes of defended cases in the County Court between July 2017 and June 2018:



38. This data has been used in the analysis below to illustrate the potential volume of claims impacted by each option. For claims which drop out between being issued in court and being defended, we have made some assumptions about the number of these cases which would be subject to the proposed FRC. In addition, there are also claims which settle without going to court, which are excluded from this data. All these cases would be subject to FRC, but we have been unable to quantify the volume.

### **Legal costs**

39. The analysis below uses data from Taylor Rose TTKW<sup>24</sup> showing the legal costs for all their costs cases which settled between 1st July 2006 – 1st January 2017. This is the same data that has been used by Sir Rupert Jackson and analysed by Professor Fenn in the 2017 report.

<sup>23</sup> Aggregate data is published in the Civil Justice Quarterly Statistics: <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>. However, we requested a more granular breakdown from CaseMan for our analysis. This data is based on case progression, rather than workload, and duplicate cases have been excluded.

<sup>24</sup> Solicitors and cost lawyers providing (among other things) costs and advocacy services predominantly to insurers and compensators.

40. The Taylor Rose TTKW dataset contains 565<sup>25</sup> fast track claims which are non-personal injury RTA claims valued between £10,000-£25,000, and 2,117 fast track Employer Liability Disease claims valued between £1,000-£25,000<sup>26</sup>. We are interested in these claims because they are a good proxy for the case types in the fast track which do not currently have FRC. The analysis below on the impact of option 1a on legal costs for fast track Employer Liability Disease claims has been restricted to the post LASPO cases, to match the data Professor Fenn used in his analysis.
41. The Taylor Rose TTKW dataset also contains 1,461 multi track claims which settled after the LASPO Act 2012 was introduced, with damages less than £100,000 and where the claimants had provided no more than three expert reports<sup>27</sup>. This data has been used below to estimate the impact of option 1d on legal costs.
42. Taylor Rose TTKW estimate that they had a 10% market share over the period covered by the data, and have no reason to expect the data to be biased when compared to legal costs across the whole market. Although the firm is based in Peterborough their case load is national.

## **Impact on Volumes**

### **Option 1a**

43. There were around 61,000 cases defended in the County Court fast track over the period July 2017-June 2018. Of these, we estimate around 48,000 are currently subject to FRC<sup>28</sup>. Therefore, around an extra 13,000 cases in the County Court could be subject to FRC under option 1a.
44. It is assumed that all cases that settle or withdraw before being allocated to a track will agree, as part of the settlement of the case, whether FRC are applicable and if so which FRC apply. Some of these cases will enter the Small Claims Track where FRC do not apply<sup>29</sup> and some will already have FRC<sup>30</sup>. If the remaining cases under £25k were allocated to the fast track, an additional 4,000<sup>31</sup> cases could be subject to FRC under option 1a. This is likely to be an underestimate because there are a large number of claims where the claim amount is unknown<sup>32</sup>.
45. It has not been possible to identify the total volume of cases that could be affected by this option because FRC also apply to cases which settle outside of court and there is a lack of data available on the volume of non-PI claims up to £25,000 that settle outside of court<sup>33</sup>. **17,000 is therefore a lower bound estimate of the number of cases affected by option 1a.**

### **Option 1b**

46. It has not been possible to identify the total volume of cases that would be affected by option 1b because there is a lack of data available on the volume of group claims.
47. This option was developed when the process for dealing with group package holiday claims was being considered. According to the Association of British Travel Agents (ABTA), in November

<sup>25</sup> This differs to the 521 figure in Jackson's report, because of a data recording issue which meant some cases with zero general damages were excluded.

<sup>26</sup> Part 8 claims have also been excluded.

<sup>27</sup> Claims without a settlement phase recorded and Part 8 claims were also excluded.

<sup>28</sup> Assuming all fast track PI cases <£25k are currently subject to FRC, and based on county court data, where there is a valid value for a money claim amount and a track allocation.

<sup>29</sup> Assuming all PI claims <£1k and all other claims <£10k are allocated to the SCT.

<sup>30</sup> Assuming all PI claims £1k-£25k already have FRC.

<sup>31</sup> Based on county court data where there is a valid value for a claim amount.

<sup>32</sup> There were around 13,000 cases in the County Court between July 2017-June 2018 that settled or withdrew before being allocated to a track, where the claim amount is unknown.

<sup>33</sup> PI claims up to £25,000 that settle outside court are already subject to FRC and so would not be affected by this proposal.

2017 the average number of claimants per Gastric Illness (GI) claim was 2.6. Given that the average claim has more than one claimant, the majority of GI claims would be affected by this proposal to introduce a sliding scale of FRC for all group claims.

### Option 1c

48. There is a limited amount of data available on NIHL claims, as they are often not reported to the Compensation Recovery Unit<sup>34</sup>. Insurers' market data may also be incomplete and may double count any claimants who present claims to multiple defendants.
49. According to the Civil Justice Council's (CJC) NIHL report published in September 2017<sup>35</sup>, although there has been a significant rise in the number of NIHL claims over the last decade, there has been a reduction in the number of claims in recent years.
50. The report states that the insurance industry reported around 24,000 claims in 2010 and by the beginning of 2015 this rose to around 87,000 claims per annum recorded by the Institute and Faculty of Actuaries, although this dropped to around 57,000 claims per annum by the end of 2015.

### Option 1d

51. There were around 6,000<sup>36</sup> specified money, unspecified money and non-money claims in the Multi Track with a value of less than £100,000 defended in the County Court over the period July 2017 to June 2018. All of these cases may be 'intermediate' cases subject to FRC under this option, if they can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side.
52. It has been assumed that all cases settled or withdrawn before being allocated to a track will agree which FRC are applicable, as part of the settlement of the case. Some of these cases will enter the Small Claims Track where FRC do not apply<sup>37</sup> and some will already have FRC<sup>38</sup>. If the remaining cases between £25k-£100k were allocated to the fast track, an additional 5,000<sup>39</sup> cases could be subject to FRC under option 1d. This is likely to be an underestimate because there are a large number of claims where the claim amount is unknown<sup>40</sup>.
53. It has been assumed that claims currently defended in the High Court with a value of under £100,000 would be too complex to be 'intermediate' cases. Therefore, we are assuming that they would not be affected by this option.
54. It has not been possible to identify the total volume of cases that could be affected by this option because FRC would also apply to cases which settle outside of court and there is a lack of data available on the volume of claims that settle outside of court, that can be broken down by claim amount. **We think the vast majority of cases settle out of court and so the minimum volume affected by option 1d would be 11,000.**

### Option 1e

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<sup>34</sup> The Compensation Recovery Unit recovers social security benefits in certain compensation cases and NHS costs in certain injury cases.

<sup>35</sup> [www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf](http://www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf)

<sup>36</sup> This excludes duplicates, where there are multiple records per case e.g. because of multiple defendants. This is because cases with multiple defendants would not be suitable as 'intermediate' cases.

<sup>37</sup> Assuming all PI claims <£1k and all other claims <£10k are allocated to the SCT.

<sup>38</sup> Assuming all PI claims £1k-£25k already have FRC.

<sup>39</sup> Based on county court data where there is a valid value for a claim amount.

<sup>40</sup> There were around 13,000 cases in the County Court between July 2017-June 2018 that settled or withdrew before being allocated to a track, where the claim amount is unknown.

55. This option applies to ‘heavy’ JRs with costs of a party above £100,000. The proposed cost management regime would be discretionary and applied at the judge’s discretion to appropriate cases. The volume of cases affected will be very small. In 2017/18, there were only 16 JRs with total costs (excluding VAT) exceeding £100k<sup>41</sup>.

**Impact on Legal Costs**

**Option 1a**

**Method**

56. To estimate the impact on legal costs for option IA, the current agreed profit costs using the Taylor Rose TTKW set out in the data section have been compared to the proposed FRC recommended by Sir Rupert Jackson (detailed below). This analysis was done on a case-by-case level, where for each case the proposed FRC using Sir Rupert’s formula was derived, and compared against current legal fees. This was used to calculate an estimate of the average difference in legal fees per case as a result of this option.

57. The proposed FRC for fast track claims recommended by Sir Rupert Jackson (in table 5.2 of the report, on page 85) are set out in table 1 below:

**Table 1: Proposed FRC for Fast Track Claims**

Stage (pre-issue split by damage amount):	Complexity Band			
	1	2	3	4
Pre-issue £1,001 - £5,000		The greater of £572 or £104 + 20% of damages	£988 + 17.5% of damages	£2,250 + 15% of damages + £440 per extra defendant
Pre-issue £5,001 - £10,000		£1,144 + 15% of damages over £5,000	£1,929 + 12.5% of damages over £5,000	
Pre-issue £10,001 - £25,000	£500	£2,007 + 10% of damages over £10,000	£2,600 + 10% of damages over £10,000	
Post-issue, pre-allocation	£1,850	£1,206 + 20% of damages	£2,735 + 20% of damages	£2,575 + 40% of damages + £660 per extra defendant

<sup>41</sup> This figure is based on the overall costs charged to the client, which is not necessarily what would be claimed (as some costs are not claimable).

Post-allocation, pre-listing	£2,200	£1,955 + 20% of damages	£3,484 + 25% of damages	£5,525 + 40% of damages + £660 per extra defendant
Post-listing, pre-trial	£3,250	£2,761 + 20% of damages	£4,451 + 30% of damages	£6,800 + 40% of damages + £660 per extra defendant
Trial advocacy fee	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £1,380 b. £1,380 c. £1,800 d. £2,500

- Complexity bands 2 and 3 are the existing FRC in the Fast Track for RTA Personal Injury claims, and Employer Liability and Public Liability accident claims respectively, with an uplift of 4% to take in to account inflation from July 2013 to July 2016<sup>42</sup>.
- Complexity band 1 does not currently have FRC. Non-personal injury (PI) road traffic accident (RTA) claims (popularly known as ‘bent metal’ claims) are a good proxy for this band.
- Complexity band 4 does not currently have FRC. Employer’s liability disease (ELD) claims are a good proxy for this band and the figures are based on an analysis of Taylor Rose TTKW data, recording the claimants’ costs agreed in a large volume of fast track ELD claims.

58. The data provided by Taylor Rose TTKW includes the current agreed profit costs paid for Fast Track non-PI RTA claims<sup>43</sup> between £10,000-£25,000 (which correspond with complexity band 1 in table 5.2 of Jackson’s report) and Fast Track ELD claims between £1,000-£25,000 (which correspond with complexity band 4 in table 5.2 of Jackson’s report). The agreed profit costs are the legal fees received by solicitors for their work, whether calculated on an hourly rate and time spent basis or with a fixed costs formula (where the figure will usually include all legal representatives’ fees). It does not include disbursements, interest on costs or fees which cannot be recovered from the losing party e.g. success fees and ATE premiums.

59. We have assumed claimant lawyers would set their legal fees equal to the FRC being proposed for each case type. Therefore, the current agreed profit costs have been compared to the proposed FRC to calculate an estimate of the average difference in legal fees per case as a result of this option. The results are shown in table 2 below:

**Table 2 - Difference between Fast Track proposed FRC and current legal fees**

Stage	Average (mean) difference in legal fees per case (and current average legal fees in brackets)			
	Fast Track Non-PI RTA (£10,000 - £25,000)		Fast Track ELD (£1,000 - £25,000)	
Pre-issue	-£1,640	n = 108	-£870	n = 121

<sup>42</sup> Some of the existing FRC were set earlier than 2013, however in 2013 a policy decision was made to readopt the earlier figures. Therefore, Sir Rupert has proposed all of the figures are uplifted by 4%, as derived from the Services Producer Price Index.

<sup>43</sup> Based on claims with zero general damages and positive special damages.

	(£2,140)		(£4,420)	
Post-issue, pre-allocation	-£1,180 (£3,030)	n = 226	-£970 (£6,750)	n = 119
Post allocation, pre-listing	-£950 (£3,150)	n = 116	-£1,800 (£10,900)	n = 49
Post listing	-£880 (£4,130)	n = 115	-£820 (£10,840)	n = 48

Figures have been rounded to the nearest £10.

60. A negative number in table 2 means the proposed FRC are, on average, lower than current legal fees. The table above therefore shows that the proposed FRC are on average lower than the current legal fees at all settlement stages for non-PI RTA and ELD claims in the Fast Track. Legal fees for bands 1 and 4 are therefore likely to be reduced under this option.

61. As the FRC for bands 2 and 3 are simply inflation-adjusted versions of the current FRC, the legal fees for these bands will remain the same in real terms.

#### Option 1b

62. This option proposes that in group claims the FRC for each additional claimant should be set at 10% of that for the principal claimant. Therefore, assuming claimant lawyers set their legal fees equal to the FRC being proposed, the legal fees for each additional claimant could be up to 90% lower than they currently are.

#### Option 1c

63. It has not been possible to get data on the legal fees currently paid for NIHL cases<sup>44</sup>, so we are unable to assess the impact of this proposal on legal fees.

#### Option 1d

64. The method used to estimate impact on legal fees is the same as that used for option 1a.

65. The proposed FRC for 'intermediate' cases recommended by Sir Rupert Jackson (in table 7.1 of the report, on page 106), are set out in table 4 below:

**Table 4: Proposed FRC for 'Intermediate' Cases**

<b>Stage (S)</b>	<b>Band 1</b>	<b>Band 2</b>	<b>Band 3</b>	<b>Band 4</b>
S1 Pre-issue or pre-defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Council/ special lawyer drafting	£1,750	£1,750	£2,000	£2,000

<sup>44</sup> it is not possible to separately identify NIHL cases in the Taylor Rose TTKW data.



statements of case and/or advising (if instructed)				
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damages	£17,400 + 18% of damages
S6 Up to PTR, alternatively 14 days before trial	£5,100 + 15% of damages	£12,750 + 16% of damages	£13,950 + 16% of damages	£21,050 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500
S8 Up to trial	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages
S9 Attendance of solicitor at trial per day	£500	£750	£1,000	£1,250
S10 Advocacy fee: day 1	£2,750	£3,000	£3,500	£5,000
S11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/ specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750

Total: (a) £30,000 (b) £50,000 (c) £100,000 damages	(a) £19,150 (b) £22,150 (c) £29,650	(a) £33,250 (b) £37,250 (c) £47,250	(a) £39,450 (b) £43,450 (c) £53,450	(a) £53,050 (b) £57,450 (c) £68,450
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- Non-personal injury (PI) road traffic accident (RTA) claims (popularly known as ‘bent metal’ claims) are a good proxy for complexity band 1
- PI RTA, employer liability and public liability claims are a good proxy for complexity band 2
- Employer’s liability disease (ELD) claims are a good proxy for complexity band 3.
- Complexity band 4 is for the most complex ‘intermediate’ cases, for example, a business dispute, or an employer’s liability disease claim where there are serious issues of fact/law and the trial is likely to last 3 days.

66. The figures in table 4 have been derived by Sir Rupert based on (a) the data supplied by Taylor Rose TTKW, (b) discussion with his assessors, (c) consideration of his budget exercise, the submission and data received and (d) his view of how CPR rule 44.3(5) should be applied to ‘intermediate’ cases. Sir Rupert’s report provides a full explanation of how he has derived the proposed FRC for each settlement stage (paragraph 5.5 in chapters 5 and 7).

67. The FRC for stages 1, 3, 5 and 6 of bands 2 and 3 were derived solely using the Taylor Rose TTKW data<sup>45</sup>. The proposed FRC for the other bands and stages were influenced by Lord Justice Jackson’s and co-assessors’ interpretation of other available evidence. This suggests the Taylor Rose TTKW data for these other bands and stages was not considered representative in light of all the information LJ Jackson and his co-assessors’ had available to them.

68. Given the concerns about how representative the data is for some case types, we have only used the Taylor Rose data for those bands and settlement phases where the proposed FRC were derived solely from the data. In order, to estimate the impact of this option, we have compared the agreed profit costs (i.e. legal fees) currently paid to the proposed FRC.

**Table 5 - Difference between Intermediate Track proposed FRC and current legal fees**

	Average (mean) difference in legal fees per case (and current average legal fees in brackets)			
Stage	Band 2 - Multi-track PI RTA, EL & PL (<£100,000)		Band 3 - Multi-track ELD (<£100,000)	
S1 Pre-issue or pre-defence investigations	£50 (£6,660)	n=338	<i>Sample size too small</i>	
S3 Up to and including CMC	£170 (£10,750)	n = 453	-£1,310 (£11,220)	n = 68

<sup>45</sup> Regression analysis was used in order to derive a formula for FRC based on damages

S5 Up to service of witness statements and expert reports	-£250 (£15,900)	n = 224	£1,670 (£11,940)	n = 64
S6 Up to PTR, alternatively 14 days before trial	£110 (£18,020)	n = 182	£1,260 (£15,610)	n = 58

*Figures have been rounded to the nearest £10. Results have not been included where the sample size is less than 10 claims*

69. Table 5 shows that the average differences between the proposed FRC for bands 2 and 3 and the current legal fees are small proportionally in relation to the current legal fees. A positive number in table 5 means the proposed FRC are, on average, higher than current legal fees, and a negative number means the proposed FRC are, on average, lower than current legal fees. The proposed FRC are, on average, higher than the current legal fees for some settlement stages and lower for other settlement stages.

70. Where the proposed FRC are less than the amount claimant lawyers currently charge, legal fees are likely to be reduced under these proposals. Where the proposed FRC are higher than the current legal fees, there is a risk that claimant lawyers will increase their legal fees. As we do not know the number of cases which will settle at each stage, we cannot determine whether the net impact is an increase or a reduction in legal fees for bands 2 and 3 under this option.

71. For the reasons given above, we have not been able to assess the impact of this option on legal fees for cases which settle at stages 2, 4, 7 or 9-15 or for cases in bands 1 and 4.

### **Option 1e**

72. Cost budgeting is set out in Part 3 of the Civil Procedure Rules and is a process by which budgets are agreed ahead of the trial, following budget submissions by both parties. For cases where the costs of a party are likely to exceed £100,000 or the hearing length is likely to exceed two days, the courts have a discretion to make a costs management order at the stage of granting permission.

73. It is not possible to estimate by how much legal costs would change as a result of cost budgeting. The option of extending cost budgeting aims to provide certainty and proportionate legal costs in 'heavy' JRs. It is therefore assumed that the net impact is likely to be a reduction in legal costs for cases subject to cost budgeting, as agreeing budgets at the outset of a JR should prevent legal costs on both sides from escalating.

### **Summary of Costs and Benefits**

#### **Option 1: Introduce a package of reforms to extend FRC**

##### **Summary of Costs:**

##### **Lawyers**

74. As explained above, net legal fees are likely to be reduced as a result of options 1a, 1b, and 1e. Due to a lack of data it is not possible to determine the total costs of options 1c and 1d, but we think it is likely there will be an overall net reduction in legal fees when combining all of these options.

75. However, the impact will vary for different solicitors depending on their cases and current costs. This is therefore likely to represent a cost to lawyers from reduced income per case. It may result

in lawyers reducing the resource they spend on each case, as any increase in expenditure would reduce their profit margins. However the benefit section below indicates that cases could potentially be settled quicker so lawyers could do more cases, and efficiencies might be applied, therefore the net impact on lawyers is not assumed to be a loss.

### **Unsuccessful litigants**

76. As solicitors are likely to try and reduce the resources they spend on a case, it could mean cases are settled more quickly. This could generate cash flow costs for litigants that lose their case, which may take the form of reduced investment income. The aggregate value of earlier payment has not been monetised. This would depend upon the size of funds which are paid earlier, how much quicker they are paid, and the value of any reduced investment income.

### **HMCTS**

77. There may be implementation costs to HMCTS as a result of option 1d to apply the proposed FRC to the lower end of the existing multi track, but these are not expected to be substantial.

78. Option 1d and 1e are likely to require an update to judicial training modules, but the costs of this should be minimal.

### ***Summary of Benefits:***

#### **Unsuccessful litigants**

79. A key impact of the reforms is to fix and reduce the costs recovered by the winning party. This will represent a benefit for the losing party. In cases that are subject to QOCS it will always be the defendant who benefits from reduced legal fees because they cannot recover their legal costs if they win the case.

80. A key benefit of all options is to control legal costs. This is an advantage for all parties when deciding whether to embark on litigation, as they know what costs they would have to pay if they lose.

#### **Lawyers**

81. In all cases affected by options 1a to 1d, solicitors would no longer have to maintain documentation required for costs assessment or spend time arguing about costs. Given this, less resource might be devoted to settling costs, generating further savings. The extent of any savings is unclear.

82. All the options might generate business process efficiencies in the form of reduced management costs or overheads, in order for solicitors to maintain their profit margins, and cases may be settled more quickly which means they can take on more cases.

#### **Successful litigants**

83. A key benefit of all options is to control legal costs. This is an advantage for all parties when deciding whether to embark on litigation, as they know what costs they would have to pay if they lose.

84. All of the options should mean less time is spent arguing over costs, resulting in cases being settled quicker. This would provide successful litigants with cash flow benefits and with increased utility from having earlier access to compensation funds and the services and products these might be used for. Where funds are invested there might be further financial benefits. The aggregate value of earlier payment has not been monetised. This would depend upon the size of

funds which are paid earlier, how much more quickly they are paid, and what they would be used for.

85. Option 1e may result in claimants being less likely to be deterred from pursuing JR claims, if cost budgeting is available to reduce the risk of costs escalating.

## HMCTS

86. FRC encourage early settlement and help to streamline proceedings, which may lead to earlier resolution, thus saving court time.

## Wider economic benefits

87. Overall the reforms should be associated with improved economic efficiency. In particular, fewer resources would be used to achieve equivalent outcomes, freeing up these resources for alternative uses which may generate social and economic benefits.

## F. Risks and sensitivities

88. The following risks apply to the assessment of expected costs and benefits of all options:

- It has been assumed that claimants and claimant lawyers would be as willing as in the base case to pursue cases in future. There is a risk, however, that some claimant lawyers might be less willing to take on cases which are relatively more expensive to process. This might relate to the complexity of the case, including the nature of the claimant, the nature of their injuries, and the ease of establishing liability. It is unclear to what extent claimant lawyers might be able to identify at the outset which individual claims might be cheaper to process. It is also unclear whether there is a significant degree of potential variation in relation to the specific levels of liability and damages which apply to individual cases. However, whilst some claimant lawyers might not be willing to take on some cases, others may enter or existing providers may expand to meet demand. This is because the proposed FRC are considered to reflect the amount of work which an efficient and effective provider would undertake.
- If the number of cases in court decreases, then there would be a loss in court fee income. However, we may find more defendants challenge claims in court, because their costs to do so would be lower and/ or they are less likely to be deterred due to the cost certainty that FRCs provide
- It has been assumed that claimant settlements remain the same. There is a potential risk that claimant settlements might be lower in future. This risk might materialise if claimant lawyers reduce the time and resource they spend on cases in response to FRC, and if as a result settlement negotiations lead to worse outcomes for claimants. Whether this risk materialises would depend upon the behaviour of defendants in such settlement negotiations.
- Where the proposed FRC are higher than the current legal fees, there is a risk that lawyers could increase their legal fees.
- As solicitors are likely to recover less money in FRC, there is a risk they may take more of a success fee from the damages (although this would be capped at 25% of certain damages in personal injury cases). However, this is hard to assess until we can see the reaction of the legal market to these reforms.
- There is a potential risk that the number of litigants-in-person might increase. However, as explained above, we expect there would be enough claimant lawyers to meet demand.
- There is a risk that a substantial number of cases would be subject to the escape clause, and therefore the potential benefits of the proposals would be reduced.

- There is a risk that a substantial number of cases would be moved to a different band, at the court's discretion, and therefore the potential benefits of the proposals could be reduced.
- There is a risk that claimant representatives may seek to allocate a significant number of NIHL to the multi-track, in order to avoid the proposed FRC.
- There is a risk that there could be an increase in the number of professional negligence claims if claimant lawyers reduce the amount of work they are able to complete on each case, as a result of FRC, and claimants are unhappy with the outcome of the case.

## **H. Specific Impact Tests**

### **Equalities Statement**

89. Please see the separate equalities statement in annex (x) for more information.

### **Monitoring and evaluation**

90. As this is a consultation IA, the data that will need to be collected in the future are the responses and feedback to the points raised in this document. This shall be completed via the process described in the consultation document. The evaluation process shall follow appropriate guidelines.

### **Competition Assessment**

91. The proposals should have no influence on competition in the legal sector as these reforms would impact all legal firms that undertake this work.

### **Justice Impact Test**

92. The justice impacts are set out in the main body of this impact assessment.

### **Family Impact test**

93. There would be no impact on strong and stable family relationships as a result of this proposal.

### **Small and Micro Business Assessment**

94. The proposals could make small legal firms less able to compete with larger firms that have greater economies of scale and can provide services on mass as cheaply as possible.

### **Environmental impact**

95. No impacts on the environment have been identified with the options assessed in this IA.

## **Annex A: Impact Assessment Glossary**

The following definitions/abbreviations are used in this document:

FRC	Fixed Recoverable Costs
CJC	Civil Justice Council
CMC	Case Management Conference
ELA	Employers' Liability Accident
ELD	Employers' Liability Disease
JR	Judicial review
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
NIHL	Noise induced hearing loss
PI	Personal Injury
RTA	Road Traffic Accident