



Ministry of Justice Consultation: “Extending Fixed Recoverable Costs”

**A Response by
The Chartered Institute of Legal Executives (CILEX)**

[June 2019]



1. Summary of Recommendations

- 1.1. CILEx supports the principle that litigation should be an affordable means of resolving disputes.
- 1.2. When Fixed Recoverable Costs were first introduced, the Competition and Markets Authority (CMA) had not yet conducted its review of the legal services market, which has led to regulatory efforts to encourage price and service transparency. This consultation has not taken these efforts into account, nor considered supporting frontline regulators and professional associations like CILEx as they promote price transparency before considering a significant intervention in an independent market.
- 1.3. Nonetheless, any expansion of fixed recoverable costs must balance affordability for the public, and sustainability for providers. Access to justice for most legal disputes means access to a legal professional, and so any fee rates must ensure high quality delivery as well as a sustainable supply base.
- 1.4. Fee rates also need to be flexible enough to accommodate unexpected complexities in the case. Given the variety of circumstances that will naturally arise when so many different cases become subject to a fixed costs regime, judges should have discretionary powers to award modest cost increases, especially in cases which are more complex than they look at point of allocation, or where circumstances (including reasonable behaviour by either the claimant or defendant) add additional costs.
- 1.5. Given the sensitive balance that needs to be struck between affordability and sustainability, any change in the regime needs regular and proper review to ensure it is working to no-one's detriment. We would therefore welcome details of when the FRC regime will next be reviewed.

2. Introduction

- 2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 2.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is the public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, lawyers who specialise and who predominantly qualify through an on-the-job route, CILEx considers itself uniquely placed to contribute to policy and law reform.
- 2.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 2.4. CILEx engaged with members working in Civil Litigation and Personal Injury via its specialist reference groups, in developing this high-level response.

3. Substantive remarks

- 3.1. CILEx has long advocated for the principle that litigation should be an affordable means of resolving disputes. No person should be excluded from accessing justice on the basis of their wealth, nor is it reasonable to expect a person to navigate a complex legal system without support and assistance.
 - 3.1.1. Legal advice and representation comes at a cost. While CILEx lawyers qualify through a more affordable route, and so can have greater capacity to offer their services more affordably than other legal professionals, there is still a notable cost to running businesses that provide legal advice.
 - 3.1.2. With the Government abdicating its responsibilities to ensure meaningful access to justice, an integral part of maintaining the rule of law, many CILEx professionals already go above and beyond for clients who find it difficult to meet their legal costs. This includes conditional fee agreements, damages-based agreements, and of course acting pro bono. However, these initiatives cannot be relied upon to secure long-term sustainability of the legal services market, and member feedback has already highlighted that the imposition of fixed recoverable costs has affected the viability of working on such cases, particularly with regards to child claims and general personal injury.
- 3.2. We recognise that when Fixed Recoverable Costs (FRCs) were first introduced, the CMA had not yet conducted its review of the legal services market, which has led to regulatory efforts to encourage price and service transparency. It is surprising therefore that this consultation has not taken these efforts into account and considered supporting frontline regulators and professional associations like CILEx in their efforts to promote price transparency, before engaging in a significant intervention in an independent market.
 - 3.2.1. CILEx Regulation Ltd-regulated firms are required to publish information on price, service, complaints procedure and regulatory status on the Home page or via a link from the Home page of their website in a format that is clear, easy to find and understand. If a firm does not have a website, they are required to make the information available on request.
 - 3.2.2. Initially the Transparency Guidelines¹ have applied to conveyancing and probate services, but it is anticipated they will be extended to other services in future.
 - 3.2.3. Transparency rules are considered regulatory rules and so are subject to approval by the Legal Services Board, which maintains a degree of consistency between the different regulatory settings.
- 3.3. Nonetheless, any introduction of fixed recoverable costs must balance the affordability to the public, and the sustainability for providers. Access to justice for most legal disputes means access to a legal professional, and so any fee rates must ensure high quality delivery as well as a sustainable supply base.
 - 3.3.1. Our members tell us that this is not happening in practice, and that particularly smaller firms have had to turn clients away because they cannot handle enough claims to achieve a balance between the profitable and unprofitable cases. These claimants can be left without any local firm to take on their case at all.
 - 3.3.2. In this circumstance, the individual can choose to represent themselves, which carries risks for even the most simple civil claims, or pursue their claim with a

¹ <https://cilexregulation.org.uk/entity/price-and-service-transparency/>

larger national provider who handles cases in bulk. This too comes with issues, as members have pointed out to us, where high volumes of caseloads can cause more instances of cases being passed between different case handlers because of capacity, absence or higher staff turnover. This leads to stress and burnout for practitioners, and delays and confusion for clients.²

- 3.3.3. Any functioning market has a healthy mix of specialist and generalist, smaller and larger, local and national providers. Our members tell us that fixed recoverable costs have so far restricted smaller/specialist/local firms' abilities to offer their services and placed undue pressure on the workforce of larger/generalist/national providers, ultimately meaning a reduction in both access to, and quality of, justice. There have no doubt been instances that have surpassed LJ Jackson's proportionate test that "if litigation becomes uneconomic for lawyers, so that they cease to practise, there is a denial of access to justice."³
 - 3.3.4. We are therefore of the view that FRCs should be reserved for only the least complex cases, and restricted to cases below a realistic value level, to avoid exacerbating these understandable concerns.
 - 3.3.5. FRC bands also need to be routinely updated and reviewed to ensure that they do not inadvertently put extra strain on the market.
- 3.4. Fee rates also need to be flexible enough to accommodate unexpected complexities in the case. We are concerned at the prospect of expanding a rigid fixed costs regime to a wider range of cases where this could lead to an individual's case being dropped mid-process because it is more complex than how it first presented at allocation, and will therefore not be affordable under the proposed regime.
- 3.4.1. We acknowledge, as LJ Jackson refers to in chapter 5 of his report, that the court should retain the discretion to move cases between bands at point of allocation, and that the court retains discretion to change the track in which a case is heard. *'Any case of particular complexity does not belong in the fast track at all'*⁴ is a principle that should guide these reforms if introduced, especially if higher value 'intermediate' cases are to fall within the fast track.
 - 3.4.2. We have also received member feedback that defendants, particularly in EL/PL claims, may pressure claimant representatives to extend disclosure/investigations, which results in extra costs that would not be recovered under the proposed regime.
 - 3.4.3. These circumstances could plausibly be accommodated for by larger providers who have the portfolio of cases to off-set any extra costs, but not in all circumstances, and much less so for smaller providers.
 - 3.4.4. CILEx therefore believes that a modest amendment should be given serious consideration; for judges to have powers to award discretionary cost increases, especially in cases where behaviour by either the claimant or defendant is not unreasonable but does add disproportionate costs. This would accommodate

² One member said: "Due to the very tight profit margins that have been the inevitable result of FRC's I now have a much higher caseload. This inevitably means that you simply cannot give the same attention to each client although you try to and leads to delays in responding to them. I find this very difficult as I am aware of my duty of care to my clients & want to do my best by them but in ensuring that I give each client the attention they deserve & are entitled to expect, I then create a backlog in my work. It is a no win situation that is exploited by the defendants who constantly demand to know why there are delays in dealing with the claim and chasing for information & updates."

³ LJ Jackson; Review of Civil Litigation Costs, December 2009; paragraph 2.8.

⁴ LJ Jackson; Review of Civil Litigation Costs Supplemental Report, July 2017; Chapter 5 paragraph 5.3

for a range of circumstances that will naturally arise when a large variety of additional cases become subject to a fixed costs regime.

3.4.5. The risk that the costs regime will be unable to cater for more complex cases is also noted in respect of proposals for capping fee rates within multiple claims arising from the same cause of action. Member feedback highlighted that this proposal overlooks the complexities inherent within these types of claim, where additional issues such as treatment and recovery will need to be assessed on an individual basis and could warrant a greater caseload.⁵ Once again, the ability to apply for discretionary cost increases shall help to ensure that the proposed costs regime remains flexible enough to account for this wider variety of cases.

3.5. As stated above, we wish to reiterate that given the sensitive balance that needs to be struck between affordability and sustainability, any change in the regime needs regular and proper review to ensure it is working to no-one's detriment. We would therefore welcome details of when the FRC regime will next be reviewed.

For further details

Should you
require any
further
information,
please contact;

Simon Garrod
Director of Policy & Governance
simon.garrod@cilex.org.uk
01234 845725

⁵ Relevant member comments included: "A multiple action will mean a more complex case so that overlap of work (eg on liability) is offset by the other issues (injuries, treatment and recovery, possible instances of compromise on open labour market, will still create additional work. Again, the proposals do not take into account at all that claimant solicitors have to do when representing a claimant."; "This approach doesn't take into account the complexities of causation and quantum. Each Claimant should be treated as an individual."