

Review of fixed recoverable costs (FRC)

**A response by
The Chartered Institute of Legal Executives**

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Contents	Page
1. Introduction	2
2. General Points on possible options to extend the FRC Regime	3
- Extending the fixed recoverable costs regime to all fast-track cases (PI and non-PI)	3
- Extending the fixed recoverable costs regime to cover multi-track cases up to a value of £250,000	4
- Data & Timing	5
- Fixed Costs Grid for all fast-track cases	6
- Other General Comments	7



1. Introduction

- 1.1. 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. This includes more than 7,000 members of all grades who work in civil litigation.
- 1.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform.
- 1.3. 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.
- 1.4. This response includes contributions from some of CILEx's members working in the field of civil litigation including 3,700 members within the personal injury sector. CILEx liaised with civil practitioners through its Civil Specialist Reference Group, and conducted a survey of members in relation to various possibilities for extending the regime and potential related issues. These are expanded in more detail below.

2. General points on possible options to extend the FRC regime

Extending the fixed recoverable costs regime to all fast-track cases (PI and non-PI)

- 2.1. The majority of CILEx members are opposed to extending the fixed recoverable costs (FRC) regime to all fast-track cases, although there are those who can see some logic to revisiting this idea at the right point in time¹.
- 2.2. That logic may include extending clarity, certainty and predictability for clients, streamlining cases and the possibility of saving the resources of the courts as well as costs and it may be that the positive aspects of its application in PI cases could be applicable to other types of cases.
- 2.3. However, there are real concerns that such a change could adversely affect access to justice, particularly in relation to the complexity of cases. Many practitioners believe that the cost of a claim is not the most reliable indicator of its complexity and extending the FRC regime could make some cases unviable meaning vulnerable clients would be unable to secure the legal representation they need.
- 2.4. Extending the regime also assumes that all matters, regardless of area of law, broadly operate in the same manner. However, it is the experience of CILEx members that this is not the case and a one-size-fits-all approach would be inappropriate. This is particularly true when considering all non-PI cases which can include a huge number of very different disputes with different amounts of work involved. The alternative could be to introduce a very complex system of fixed costs for every type of dispute which again is likely to be inappropriate.
- 2.5. Therefore, again, there is a real risk that certain individuals and organisations of modest means in certain disputes would not be able to get good representation, as they could not afford to pay the extra costs (or bear the risk of not recovering them in full) of a matter. As such, smaller organisations and poorer individuals would be less likely to be able to secure professional legal advice and assistance (as they could not afford the costs, irrespective of fixed costs recovery) which creates an imbalanced system which could obviously be unfair.

¹ See 3.11 below

Extending the fixed recoverable costs regime to cover multi-track cases up to a value of £250,000

- 2.6 An overwhelming majority of CILEx members surveyed were against extending the FRC regime to cover multi-track cases up to a value of £250,000.
- 2.7 Reasons include some of those cited above: that a one-size-all approach is inappropriate because cases can vary by considerable degrees in respect of complexity, particularly, for example, where a claimant may have sustained a very serious injury; whilst a system of fixed costs might be applicable to low value PI claims, they are not where issues of complex liability and complex medical evidence are at play. In that scenario, neither a claimant nor defendant should be unnecessarily fettered by working within a budget; the present system of detailed assessment is arguably fairer as it provides a limit on costs, based on being reasonable and proportionate, but with reference to the specific issues and aspects of individual cases.
- 2.8 The variability of complexity of such claims could, in an FRC environment, mean that some claims were significantly under-awarded where their complexity is not sufficiently allowed for, and other straightforward cases overly so. Again, claim value is not a reliable indicator of case complexity.
- 2.9 As above, although a small minority of CILEx members surveyed could see some logic in an extension, it is not felt that the time to consider this option is right. The application of the FRC regime, its inter-relationship with Part 36 of the CPR, the viability of pursuing legal proceedings of a certain value, etc, all needs to be properly tested and determined first before it can be demonstrated that it could apply to such high value cases. Whilst some could envisage the possibility where full admissions of liability have been made, and the only issue to be determined is that of quantum, where liability remains in dispute it is thought far too early to judge the impact such changes could have on cases of such significant value.
- 2.10 As above, CILEx members are also concerned that such an extension could again have an adverse impact on access to justice: some claimants may find it difficult to find legal representation in an FRC environment which in turn could lead to an inequality of arms, where disputes are with corporations who would be more able to fund the legal representation to defeat a claim.

Data and Timing

- 2.11 For CILEx, any consideration of extending the FRC regime must be supported by adequate data. No changes should be contemplated or introduced until a point is reached where there is that adequate data available so that it can be used to reduce any risk that changes could have an adverse impact.
- 2.12 It has been suggested that there is now sufficient data, particularly in relation to costs budgeting that is available and would enable supporting changes to the FRC regime. However, the majority of CILEx members surveyed are of the view that much more data should be obtained before any changes to extend the FRC regime are made. In particular, there should be further research conducted to take into account each type of civil claim on its own merit.
- 2.13 It is also felt that the costs budgeting experience to date has not provided sufficient data on which to make any changes. Whilst it has worked well, CILEx believes that the system has not been in place for long enough to bank a sufficient volume of data in relation to cases settled to be of real use. Although costs budgeting has been in place for almost 4 years, it has taken some time for any consistency to be developed amongst the judiciary in terms of its assessment; it is only now that consistency is emerging, and therefore the costs budgeting system still needs time to bed in and properly establish itself before it generates any meaningful data to support any FRC change.
- 2.14 Even then, there are those who argue that costs budgeting would provide only an imprecise guide compared to cases that have been to detailed assessment, for example. Overall, CILEx believes that more detailed research is required, conducted on a forensic basis over a longer period with much more data before any changes to the FRC regime should be contemplated.

Fixed Costs Grid for all fast-track cases

- 2.15 CILEx members considered the fixed costs grid for all fast-track cases set out in Lord Justice Jackson's lecture to the IPA in January 2016. CILEx members surveyed overwhelmingly took the view that such a standardised approach was not applicable to all types of case.
- 2.16 Again, this is because it is felt that such a system would not sufficiently allow for the varying complexities of cases and that value is no proper indicator of complexity. Whilst it is a factor in assessing complexity, it should not be the main one. Many low value claims can contain elements of complexity to varying degrees and for a variety of reasons: there could be an issue of public policy involved, it could require expert evidence or preliminary hearings, have litigants in person involved, have multiple defendants, require medical reports, involve disputes on causation between experts (particularly in PI cases)², etc.
- 2.17 To that extent therefore, it is felt that the figures in the grid are too arbitrary; some might be appropriate and others not and there is no evidence to suggest that such swings would balance out for firms doing a volume of such work. This in turn would threaten the viability of cases and potentially undermine access to justice.
- 2.17 It is also thought that the figures are not sensitive enough, allowing for no differential between multi-party actions and cases where liability or quantum are issues. Arguably, the more a complex case falls within the upper reaches of the fast-track, the less applicable an FRC regime becomes.
- 2.18 The extension of the FRC regime and the rates within it therefore not only require greater assessment of relevant data but also extensive consultation on any proposed rates, as was the case previously when fixed costs were introduced (such as those relating to RTA cases). The minority of CILEx members surveyed who thought some sort of incremental extension to the FRC regime might be an acceptable alternative, also felt that this could only happen following proper assessment and evaluation of potential impact.

² A Chartered Legal Executive from Cardiff specialising in employment law, for example, indicated that a low value Noise Induced Hearing Loss case can take as long as a £250k asbestos case. A Chartered Legal Executive from Hull specialising in Personal Injury highlighted that COSHH cases can be extremely complex due to the involvement of multiple defendants, complex chemicals and data sheets.

Other General Comments

- 2.19 CILEx members surveyed expressed a range of related issues to the proposals suggested by Lord Justice Jackson. These include that such changes could lead to an inequality of arms between parties undermining access to justice. If a case is low value but complex, claimants may struggle to find representation; or successful parties may in future have to pay any shortfall between actual costs and costs recovered out of any compensation received, wrongly denying them that compensation for the detriment suffered. This could be particularly distressing for vulnerable clients.
- 2.20 Others suggested that extending FRCs risked the whole reason for costs shifting - allowing a litigant to push a matter on to trial without any sanction as to costs to the other party if there was unreasonable behaviour or conduct, or even encouraging more cases to go to trial even where the prospects are not very high at all.
- 2.21 Many felt that the extension of FRCs might be too blunt an instrument to therefore fairly manage costs and that it is not subtle enough to relate on the true impact of a claim (let alone allow for complexity)³.
- 2.22 That said, although CILEx members were generally sceptical about the extension of the FRC regime, it is recognised that there are serious issues to remedy in this area and, to that extent, the review is a welcome start of the debate in relation to those issues. Possible solutions, though, need more and deeper consideration and CILEx members would welcome the opportunity to engage with that.

For further details

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³ An employment/civil litigation CILEx practitioner expressed it this way: For example, a married man, with two children and owning a home, being out of work through no fault of their own for 1 year but fortunately with no longer term consequences, may lose income of £20,000.00 net and be entitled to a claim for his injury and some out of pocket expenses. So a low-to medium value claim one might say. However, that 1 years wage may be absolutely crucial to meeting this fictitious Claimant's mortgage costs and supporting his family and as a result the impact that loss of income has had upon him and his family and their personal circumstances can be significant and far reaching, to the extent of them being subject to housing repossession proceedings and accruing all sorts of other debts just to make ends meet. The importance to that family of recovering that award of damages therefore, at what would be regarded as a fairly low level, is absolutely paramount to their future. The same analogy could be applied to a small business, and the employees of that small business whose income depend upon its continuation.