Response of the Bar Council and the Personal Injuries Bar Association to "Fixed recoverable costs: consultation on issues relating to the new regime (July 2023)"

Introduction

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

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

3. This response incorporates the views of the Personal Injuries Bar Association ['PIBA'], particularly in relation to those matters which fall exclusively within the practice of personal injury. PIBA is one of the largest civil specialist Bar associations with about 1,450 members. PIBA's members practise in personal injury law, including industrial disease and clinical negligence cases. They represent both claimants and defendants.

4. Many PIBA members have considerable experience of litigation in the civil courts involving vulnerable witnesses and parties, such as those who lack capacity, are close to the borderline of capacity or whose capacity fluctuates, by reason of brain or psychiatric injury or illness, neurodiverse conditions which are prevalent, wide-

ranging and cause a host of varying needs, age or other disability. Other relevant categories of vulnerable party and witness represented and encountered by PIBA members in their work include the bereaved, victims of abuse and other crimes. Many PIBA members also sit in a variety of part-time judicial and tribunal roles at all levels, case managing, trying and determining cases across the full breadth of the civil and other jurisdictions.

The Scope of the Consultation and the Bar Council and PIBA's Response

[Note: for the sake of brevity, future references to "The Bar Council" in this document should be understood to include the views of PIBA].

5. The Civil Procedure (Amendment No 2) Rules 2023 were laid before Parliament on 22 May 2023 and will take effect on 1 October 2023 ['the SI'].[1]

6. The Ministry of Justice ['MoJ'] does not intend that any further amendments to the Civil Procedure Rules shall take effect in October 2023, but shall be implemented by Statutory Instrument in April 2024 (§5).[2]

7. The consultation is concerned with six amendments to the current rules:

(i) Fixing Costs on Assessment
(ii) Fixing Costs for Part 8 Costs only claims
(iii) Providing Recovery for (a) Inquest Costs and (b) Restoration Proceedings
(iv) Providing for Recovery of advocacy fees in cases which (a) are settled late or (b) are vacated
(v) Uprating the trial advocacy fees for inflation
(vi) Clinical Negligence Claims: CPR 26.9(10(b)

8. The Bar Council have consistently engaged with the MoJ on issues (iv) and (v) since 2019, in particular a letter and paper on uprating was sent on 3 October 2019; a further letter and paper on uprating and late settlement/vacation of hearings on 30 July 2021; and a third letter and paper on 12 July 2022. Between October 2022 and July 2023 there have been several meetings between the Bar Council and the MoJ. A Letter Before Action was sent on 7 June 2023 and the Pre-Action Protocol Response was received on 29 August 2023.

[1] https://www.legislation.gov.uk/uksi/2023/572/contents/made
[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1172811/draft-consultation-on-frc-issues-summer-2023.pdf

9. The Bar Council sets out its position to the Consultation's question on advocacy fees in the first part of this response and comments on the other matters raised in Part Two.

Part One: Advocacy Fees

10. At § 6 of the consultation the MoJ explains the process by which they have updated fees "finalised" in July 2016 and set out by Sir Rupert Jackson in his Supplemental Report, using the quarterly Services Producer Price Index ['SSPI'] as at January 2023. To take into account inflation from January 2023, a further uprating will take place for implementation in a new Practice Direction for April 2024. The policy of the MoJ is that FRC figures will be reviewed generally every three years.[3]

11. The Bar Council's present thinking about these issues is set out in the note prepared for the meeting with MoJ officials on 4 May 2023, "*Fixed Recoverable Costs and the Advocacy Fee: The Bar Council and PIBA's Request*" and the Letter Before Action dated 7 June 2023.

Uprating Advocacy Fees

Uprating Fees Bands 1-3 Table 12. CPR 55.44

12. The Bar Council's proposals in relation to the uprating of advocacy fees date back to 2019 and much of the analysis provided was concerned with the existing Fast Track. Following the reform to the CPR to be implemented on 1 October 2023 these cases will fall into complexity Bands 1-3 of the Fast Track (Table 12 CPR 45.44).

13. The gravamen of the Bar Council's position is that these fees have remained static since July 2013 (and, in some cases, prior). The MoJ's starting point is that fees subject to FRC, including advocacy fees, were considered in the preparation of Sir Rupert Jackson's Supplemental Report in July 2016, and these fees should not be "unpicked". However, at § 40 of the Consultation the MoJ recognises a fairness case for uprating advocacy fees from July 2013 on the basis that in his Supplemental Report Sir Rupert Jackson had uprated solicitor's costs in Bands 1-4 by 4%, applying the SPPI.

14. Our calculation is that updating fees as proposed in the consultation would translate to the Table 12 D Trial Advocacy for Bands 1-3 being amended as follows:

[3] See § 13: https://www.justice.gov.uk/__data/assets/pdf_file/0011/177644/frc-public-notice-updated.pdf

Table 1. Uprating Fees Bands 1-3 Table 12. CPR 55.44 by 4%

Bands 1-3	Current Rule	Uprated by 4 %
No more than £3,000	£580	**£603**
£3,000 to £10,000	£ 820	**£853**
£10,000 to £15,000	£1,200	**£1,248**
More than £15,000	£2,000	**£2,080**

If such figures were to be recommended to the Civil Procedure Rules Committee for implementation, it may be that some rounding up would be appropriate, so maybe £605, £855, £1,250 and £2,080.

15. The Bar Council set out an alternative approach in Appendix 1 of the Letter of Claim. Some confusion has arisen as a result of references to SPPI. SPPI is a dataset showing quarterly service Producer Price Index movements for selected UK service sectors.[4] The Bar Council's position is that using SPPI does not preclude making an argument for uprating by reference to a specific sector and it was not clear to us that the MoJ had regard to a specified index in uprating fees. As we explained in the Letter Before Action: "*The Bar Council notes that the Ministry of Justice have not specified whether or not a specialist index would be used, but the Bar Council's position is that the Legal Services HSGL is the appropriate index*." It is now clear that the MoJ's approach is to uprate by SPPI All Services. The figures proposed by the Bar Council to the MoJ in its paper dated 4 May 2023 were based on the Legal Services specialist Index, and the figures set out there are the same as in the Letter Before Action.

16. The adoption of the SPPI Legal Services index represents a change in the Bar Council's position and a concession. In our June 2019 paper we specifically ruled out relying on SPPI:

> *Service Producer Price Index (SPPI)*
> *SPPI is an index of inflation based on a statutory quarterly survey which measures changes in the price of services provided to UK based customers for a range of industries, including legal services. It is a business to business survey and does not include the cost of services provided to consumers, though these will be included in the near future. The index is estimated to represent 59% of the total services sector at industry level. If prices are to be upgraded on an annual or three yearly basis, then the SPPI shows consistent annual upward growth, and it includes legal services as one of its indices. However, given the personal nature of the services offered by the Bar and the fact sensitive nature of the work done, it is not an entirely suitable vehicle for upgrading Counsel's fees.*

[4] https://www.ons.gov.uk/economy/inflationandpriceindices/datasets/servicesproducerpriceindexsppirecords

> As most advocacy services are provided by self-employed barristers, fixing fee increases to a business service index is not appropriate. Barristers cannot rationalise the services they provide by reducing costs or improving efficiencies: the fee charged represents the work they do in preparing the brief for trial. Barristers have no control over the costs that they will occur in their expenses/disbursements: travel to court, accommodation, or sustenance if trial is listed away from home. For these reasons the Bar Council and PIBA have consistently set out a case for increasing the advocacy fee by reference to RPI and CPI.[5]

17. The Bar Council has reflected further on this issue in light of the consultation and the Pre-Action Protocol response. Our view is that the MoJ should also give some further consideration to the appropriate approach to be taken to uprating fixed advocacy fees. In essence, for the reasons set out above, the Bar Council's position is that the advocacy fee and advocacy preparation and delivery is a discrete aspect of the procedure to trial which give rise to specific issues which fall to be considered. The Bar Council and the MOJ appear to agree that there are drawbacks with all the potential indices. In order to assist with this process, we make the following points:

(1) Although the provision of advocacy services is not exclusive to the Bar, most Fast Track trials are conducted by barristers in self-employed practice.

(2) Consistent with the approach taken on 4 May 2023 and the Letter Before Action, the Bar Council does not (now) pursue any claim to uprate fees to standard costs of living indices, RPI or CPIH.

(3) The Bar Council does not propose that figures uprated from 2013 should be 'inflation proofed'. In previous consultations the Bar had sought to include some element in updated fees that recognised the absence of any fixed periodical review being in place. However, the Bar Council notes a further uprating by three quarters (from January to October 2023) and there is a

[5] It may be helpful to have in mind what the 'advocacy' fee represents. In previous papers the Bar Council has highlighted the definition provided by Lord Woolf in *Access to Justice* as including a conference, final preparation for trial by the advocate and preparation of a skeleton argument. It does not include types of work in the preparation for trial that are not considered 'advocacy', for example the preparation of trial bundles. It does not include travel expenses, though by necessity travel is considered a factor in the assessment of the overall Chapter 4, §§37-44: http://webarchive.nationalarchives.gov.uk/20060214041355/http://www.dca.gov.uk/civil/final/sec2b.htm#c4

commitment to review within three years, and so pursuing such 'cushioning' is not appropriate at this time.

(4) The Bar Council is concerned that the government's reliance on SPPI All Services is inappropriate in the context of uprating advocacy fees since July 2013. We note that the task engaged is retrospective not prospective. It may be understandable that the overall 'All Services' rate of SPPI is used in relation to other fixed costs in Bands 2-3 as these were costs in which savings were expected to be made by law firms carrying out multiple cases following the implementation of FRC in 2013. We do not know. However, it is clear that these considerations do not apply to the advocacy fee as reducing costs and improving efficiencies cannot apply to the singular barrister spending time preparing a brief for trial.

(5) In giving retrospective effect to updating it is reasonable to have regard to the specific data in relation to the provision of Legal Services as in the context of the advocacy fee there is no applicable data to be taken into account that could effectively measure any efficiency savings applicable to other aspects of fixed costs. It seems to be fairest that the identification of a reasonable fee must have some reference to the costs of legal services subject to inflation.

18. Having set out the drawbacks of using overall SPPI in the context of advocacy fees, the Bar Council also recognises that there are difficulties with its preferred index, the Legal Services Index. An index that fixes fees to increased costs does not impose a 'control' on costs but simply reflects increases in the costs of legal services. However, as stated above there are limited efficiency savings that can be made in the context of an advocacy fee, and in the final analysis the Legal Services Index is a valuable benchmark for assessing the likely value of advocacy services to clients.

19. The Bar Council considers that there is room here for compromise: the Bar Council's case is that SPPI All Services is too low in the context of advocacy services and the MoJ's position is that the Legal Services Index does not properly control costs. Against this background we suggest that an equitable solution would be to uprate advocacy fees by reference to the Legal Services Index but reduce this figure by 10% to reflect the need to control costs consistent with government policy. If such a compromise were achieved, the revised figures would be as follows:

Table 2. Advocacy Fee. Bands 1-3 Bar Council's Proposal in the Letter Before Action reduced by 10%

Band	Letter Before Action	Reduction by 10%	Rounded Up
No more than £3,000	**£ 715**	**£643.50**	**£645**

£3,000 to £10,000	**£1,015**	**£913. 50**	**£915**
£10,000 to £15,000	**£1,525**	**£1,393**	**£1,395**
More than £15,000	**£2,430**	**£2,187**	**£2,190**

20. Taking the above into account the relative position of the Bar Council and the MoJ (not taking account of the further three quarters of inflation which is referred to in paragraph 6 of the consultation) appear to be as follows:

Table 3. Summary : MoJ and Revised Bar Council Positions

Bands 1-3	MoJ (Table 1)	Bar Council
No more than £3,000	**£603**	**£645**
£3,000 to £10,000	**£853**	**£915**
£10,000 to £15,000	**£1,248**	**£1,395**
More than £15,000	**£2,080**	**£2,190**

21. The Bar Council does not suggest that the above offer should set a precedent, that future uprating should be fixed by reference to the Legal Services Index less 10%. Our view is that resolution on these terms brings an equitable end to the issues initially raised in 2019 which have been complicated and challenging. Having set the figures in 2023, the issue of further concern is how to implement fixed periodical reviews. We recognise that this issue does not fall within the current consultation but would very much welcome the opportunity to discuss this further with the MoJ at a suitable time.

Uprating Fees Band 4 Table 12. CPR 55.44

22. The Bar Council set out its concern that the Band 4 figure was too low in July 2022 in our paper, "*Fixed Recoverable Costs: the Bar's Case for Reform*", see § 62. There are two aspects to our concern about the Band 4 fee: the first is the 'knock on' effect of increases in advocacy fees in Bands 1-3 on Band 4. If the former is to be updated, do the Band 4 figures need to be considered further? Secondly, if figures in Bands 1-3 are too low, did it also not logically follow that Band 4 figures were also set at too low a level?

23. In light of the proposals set out above, this issue can be looked again in the context of the revised figures we have proposed:

Table 4 Bar Council's proposed Advocacy Fees for draft Table 12 r. 45.44 (Bands 1-3) compared to Band 4

D. Trial Advocacy Fees

Band	1	2	3	4
No more than £3,000	**£645**	**£645**	**£645**	**£1,600**
£3,000 to £10,000	**£915**	**£915**	**£915**	**£1,600**
£10,000 to £15,000	**£1,395**	**£1,395**	**£1,395**	**£2,100**
More than £15,000	**£2,190**	**£2,190**	**£2,190**	**£2,900**

24. The Bar Council notes that the MoJ does not consider a case for increasing these fees but accepts that these figures should be considered in a post-implementation review (§ 43). Presumably, however, the same inflation increases, including for the three quarters from January to October 2023, should be applied from the date that they were set, as the MoJ accepts for Bands 1 to 3. In any event, we consider that a post-implementation review is vital, in particular given the rather narrow basis upon which these advocacy fees have been set, i.e., by reference to a large volume of Employers' Liability Disease claims from one solicitor's firm, see Supplemental Report Chapter §5.7. The Bar Council would appreciate it if the MoJ could set out a clear time frame for such a review in its response to this consultation. Additionally, in relation to these fees, we also repeat the need for fixed periodical review (see § 29).

Advocacy Costs on the Intermediate Track

25. Following the same reasoning for Band 4 costs, the Bar Council was concerned that the failure to update existing fast track fees had a knock on effect on the MoJ's proposals in respect of advocacy fees and Bar-related work on the Intermediate Track. These concerns were set out in "*Fixed Recoverable Costs: the Bar's Case for Reform*" at §§ 63-65. This case was restated with updated figures on 4 May 2023, and in the Letter Before Action (Appendix 1).

26. In respect of these fees, the Bar Council repeats the points made at § 24. The same inflation increases, including for the three quarters from January to October 2023, should be applied from the date that they were set, as the MoJ accepts for Bands 1 to 3. Otherwise the Bar Council simply reserves its position as to any further uprating of these fees at this time. We would again emphasise the urgent need for full consideration be given to the issue of fixed periodical review and that these fees should be subject to review within a clear timetable.

Noise Induced Hearing Loss

27. The Bar Council repeats the points made above and does not pursue an increase in these fees at this time, subject to the same points about review and fixed periodic review.

Further Points about Uprating Advocacy Fees

CPR 45.29 Tables 10 and 11

28. The Bar Council remains extremely concerned that there has been no increase to fees under CPR 45.29 Tables 10 and 11 since we raised this issue in 2019. While recognising that these figures do not fall within the scope of the extension of FRC, these fees should be subject to an urgent review as soon as practicable.

Fixed Periodic Review

29. As indicated above the Bar Council is very concerned that this issue remains outstanding when a significant expansion of the FRC is contemplated. This issue needs to be addressed as a priority and should not wait for a review of FRC. The concessions made by the Bar Council as set above are made in good faith on the understanding that fees implemented in October 2023 will become subject to fixed periodic review. It remains the Bar Council's position that annual uprating of advocacy fees is both highly desirable and practically achievable. The Bar Council welcomes the opportunity to discuss this further with the MoJ. It would be very helpful to have a draft plan in place prior to implementation on 1 October 2023.

Advocacy Fees for Late Settlement and Vacated Hearings

The Bar Council's Proposal

30. The Bar Council proposes that fees for late settlement or the late vacation of a hearing date should be included in FRC with amendments to Table 12 rr. 45.44 and Table 14 r 45.50. This case was set out by PIBA in a paper submitted to the MoJ in June 2019, in the July 2021 paper "Fixed Advocacy Fees and Disbursements on the Fast Track" §§ 60-94, and July 2022 in "*Fixed Recoverable Costs: the Bar's Case for Reform*" at §§ 66-86. The Bar Council summarised the position in the note provided to the MoJ on 4 May 2023, "*Fixed Recoverable Costs and the Advocacy Fee: The Bar Council and PIBA's Request*" §§11-13, and again in the Letter Before Action. In summary, the Bar Council's position is that:

> ***We propose a rule change so that in cases settled or removed from the list on the day of trial, the full trial advocacy fee should be recoverable; and in cases settled or removed from the list within 2 working days of the date fixed for trial 75% of the full trial advocacy fee should be recoverable.***
> **(**§ 12, "*Fixed Recoverable Costs and the Advocacy Fee: The Bar Council and PIBA's Request*")

The position is correctly set out at § 26 of the consultation.

The Basic Principle

31. The Bar Council accepts that although they may have the same result in practice, different considerations apply to cases that are vacated late due to lack of judicial resources, and those which settle late, in particular after delivery of the brief for trial. However, the underlying premise of the Bar Council's submissions relies on the same basic proposition: that barristers should be remunerated for work done in preparing for trial (and often unrefundable travel and/or accommodation costs will also have been incurred). The current provisions of the CPR do not allow for such costs to be recovered, and in these cases, Counsel is not renumerated for work done or expenses incurred. That Counsel should be entitled to be paid for work done is a basic principle that should be agreed on all sides. The MoJ considers that there may be merit in this suggestion, but there is, in fact, no rational contrary argument.

The Scale of the Problem

32. Since 2019 PIBA members in particular have reported a huge problem with Courts adjourning Fast Track trials at short notice due to lack of judicial resource. This has a major impact on litigants, witnesses and junior members of the Bar doing fixed cost work. Examples of the scale of the problem have been given to the MOJ in our previous papers:

(i) the clerking team at one London Chambers (Temple Garden Chambers) collated data for the first 4 months of 2019. During this period 200 cases were taken out of the diary due to the lack of a judge to hear the case. Of these, 107 cases were taken out of the list the working day before the hearing and a further 29 were taken out two working days before the hearing. These figures do not take any account of the significant number of further cases which were adjourned on the day of the hearing because no judge was available.

(ii) Another Chambers' data for the period 01.09.20 to 23.12.20 showed that 359 Fast Track cases were ineffective. 238 were vacated, 66.3%. 185 were vacated and notified to Counsel within the working day of the hearing, 77.7%.

(iii) Still another Chambers' data in the period 01.09.20 to 04.11.20 showed 168 Fast Track trial cases were ineffective: notice was given within 2 days in 50 cases, but 103 the day before and 6 on the day of the hearing; so almost 65% within a working day of the trial date.

33. PIBA continues to collect data in relation to vacated hearings, including:

(iv) a chambers in north-west England who report that in the six months between February and August 2023, 202 cases were either settled or vacated within 2 days of trial; and

(v) a London Chambers collated the following data for November 2022 and March to June 2023 (4 months), which included 206 Fast Track trials being vacated within 3 days of the date listed for trial. 372 cases in total were vacated, including small claims hearings (121) and Multi Track Trials (45). In total 296 of the 372 cases were vacated in the day before trial was listed.

34. PIBA and the Bar Council will continue to collect data, but the above examples and the consistent reports we have had from our members leave us in no doubt that this is an enormous problem that must be addressed and that it impacts upon the sustainability of high quality representation in the county courts essential for consumer and public confidence in the justice system and efficiency and timeliness of the case-load.

35. The ability for wronged, but not wealthy, parties to have decent quality representation by allowing the means to recover payment of a reasonable fee and in circumstances where there are no impacts upon public (tax-payer) spending should be championed by the MoJ. It is one part of the civil procedure pipeline that can be smoothed and further assist with bearing down on the caseload and backlog.

Drafting a Rule

36. PIBA and the Bar Council have carefully considered how the rules could be amended to achieve the result set out at § 30 above. The conclusion we reached was that payment on disbursement basis at the discretion of the judge was unworkable in practice, would not achieve the stated aim, and could possibly lead to unnecessary satellite litigation. Given the nature and scale of the problem we have identified, the best solution was to amend Tables 12 r 45.44 and rule 45.50 to include two new categories of brief fee:

Where the claim is listed for trial and is removed from the list or is settled up to 24 hours before the date listed for trial [6]	*The full advocacy fee as set out above*
Where the claim is listed for trial and is removed from the list or is settled up to 48 hours before the date listed for trial [7]	*75% of the advocacy fee as set out above*

The unfairness and anomaly of the current rules

37. The current law recognises that when settlement occurs "at the door of the court" Counsel is entitled to recover the advocacy fee for trial: *Mendes v Hochtief (UK) Construction Ltd* [2016] EWHC 976 (QB).[8] A rule which limits recovery of trial fees to cases which settle "at court" is somewhat arbitrary. If costs can be recovered at the door of the court at 0930 on Friday, then why not if compromised over the phone at 1645 on Thursday? Limiting the rule of recoverability of advocacy fees to cases which settle at court on the day of trial is anomalous and unfair.

38. A further example of how the current rule has a perverse effect is illustrated by *Coleman v Townsend* (SCCO, 13 July 2020, Master Haworth). Directions provided for exchange of skeleton arguments two days prior to trial. The claim settled the day before trial. The Claimant submitted that Counsel's fee for the skeleton argument and an abated fee for trial were recoverable as disbursements pursuant to CPR 45.29I(2)(h). Although Counsel prepared a skeleton argument in accordance with the court's directions, Master Haworth held that neither an abated brief fee nor a fee for the skeleton argument were recoverable. The claim had not reached the trial stage, so the trial advocacy fee "*and implicitly the costs of preparing for the trial which self-evidently would include a skeleton argument*" were not recoverable.

39. The amendments we propose go a long way to reset the balance so that Counsel can be paid in cases that settle prior to the date listed for hearing. In a simple rule that fixes the full fee if the case is settled at trial is consistent with *Mendez* and corrects the anomaly by which Counsel has to be physically present in court. A rule that awards an abated fee of 75% also provides a reasonable basis for counsel to recover fees. A rule which triggers payment by reference to the day, the day of trial or 48 hours before, provides certainty, and avoids the prospects of any arguments about when a 'trial'

[6] This would involve adding new categories to Table 12: categories (5) for the day of trial and (6) up to 48 hrs before the date fixed for trial.

[7] Similarly, this would involve an addition category of fees, proposed S16 and S17. Both proposals are included in Appendix 2 of the Letter Before Action and

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

took place and whether or not it was dependent on Counsel addressing the judge. Another complicated formulation is likely to result in satellite arguments, undermine certainty, and will act as a bar to settlement in such cases.

The MoJ's Response

40. The MoJ appear accept the merit of the Bar Council's proposal and reasons (which were specifically targeted as Fast Track cases). Rules which facilitate and promote settlement are welcome and fall within the general purpose of the FRC in seeking to achieve such settlement without the necessity of trial. Court time is saved and may be redeployed. The Bar Council does not consider that there is any merit in the suggestion that provision of such a rule might be of benefit only in higher value cases in the intended Intermediate Track. All of the Bar Council's arguments apply equally to existing Fast Track cases as for the intended Intermediate Track cases. The only difference is, as is recognised by the MoJ, that more preparation time will be required for multiple-day cases on the Intermediate Track, than on Fast Track cases. This is not a reason for refusing to address the iniquity so far as the Fast Track is concerned. The Bar Council's data set out at § 32 and § 33 shows the scale of the problem that applies now to the current Fast Track. Any reformulation of the rule which did not apply to the Fast Track would simply fail to address the problem we have identified. Moreover, this point does not address the issue of principle that we have raised that the rules should allow counsel to be paid for work done, a principle that applies to all claims listed for trial within FRC.

41. The Bar Council is surprised by the MoJ's suggestion that the provision of such a rule may have a perverse effect and might result in delayed settlement. This is not our experience and it is not the basis upon which we proposed this change. The point the Bar Council has made consistently is that Counsel is usually instructed for trial at a late stage and it is only at that point they can advise the client about the issues in the case and the merits of settlement. At the moment, the potentially perverse effect is with the current rule which does not allow for payment by counsel when they have perfectly properly advised a client to settle a claim shortly before trial, and appears to disincentivise getting to grips with the case and advising on the merits until the day of trial. If this were an argument that the MoJ considers has merit the answer to it would be to provide for recovery of part of the brief at an earlier point in time, not dispensing with the ability to recover at all.

42. The only other reason cited for limiting this reform to the Intermediate Track is Sir Rupert Jackson's comment cited at § 33 of the consultation document. It must, however, be borne In mind that Sir Rupert was not considering the fixed advocacy fee component (as accepted at § 41 of the consultation document) and that, in any event, the MoJ has already accepted that changes to aspects of FRC so far as the advocate is concerned is merited and "fair" notwithstanding they were not changes that Sir Rupert

proposed. We consider that this point has no real weight, but that the merits of the proposal (which Sir Rupert evidently gave no consideration to) should be considered instead.

Vacated Hearings: Limited to the Intermediate Track

43. The Bar Council is surprised and does not understand the MoJ's suggestion that the impact of vacated hearings may be significant only in higher value cases (§ 31). The Bar Council struggles to understand what evidence the MoJ can have to support such a proposition. By contrast the evidence we have accumulated so far and summarised at § 32 above illustrates the scale of the problem on the existing Fast Track. The Bar Council does not understand the basis upon which the MoJ suggests that a rule should be put in place for the Intermediate Track alone (which currently does not exist and for which there is no evidence) instead of the Fast Track for which there is a very significant amount of evidence as set out above.

44. The Bar Council's submissions had addressed the Fast Track. For single-day trial cases an appropriate period within which, in the case of late settlement or vacation prior to the trial date, is 48 hours (plainly in some cases preparation will have commenced long before that, but the period selected represents an extension of the 'rough and the smooth' approach for the sake of simplicity). In relation to multiple-day Intermediate Track cases in order to more fairly reflect the week or so of work, including lodging of skeletons/submissions that are invariably required and directed by the Court, typically one or two clear days before the trial date (48 or 72 hours prior), it will be necessary to set the date on which recovery of part of the brief fee may be made in the case of late settlement or vacation at an earlier point, say five clear days before the trial date of, say, 50% of the fixed advocacy fee and two days before the trial date of, say, 75% of the fixed advocacy fee.

The draft rule in relation to vacated hearings

45. The Bar Council considers that in cases where trials are vacated late in the day, the same rules should apply as for those cases which settle late: 100% should be recoverable if vacated on the day of the trial, but an abated fee of 75% if vacated within 48 hours. The reasons are similar to those stated above. Such a rule provides certainty. In cases involving the late vacation of a trial counsel will have prepared for trial and essentially there is no prospect of such work being remunerated under the current rules.

Is the Fast Track Working?

46. The Bar Council remains fully committed to making the Fast Track a success, but the suggestion at § 33 of the Consultation that the Fast Track is working well is

somewhat complacent. In the papers we provided in 2021 and 2022 we set out serious concerns that both the Bar Council and PIBA have about the Fast Track, and in particular how the late vacation of trials and absence of any provision for Counsel to recover payment for work done was a significant problem which was undermining confidence in the system. The facts set out at § 32 and § 33 above, are not consistent with a system 'working well'. Our members feel very strongly that the system is not working well and that the incidental costs of these issues is a cost borne disproportionately by junior members of the Bar in particular.

47. The Bar Council also notes that there are specific examples of the current Fast Track failing litigants. A particularly important example is the Court of Appeal's decision in *Aldred v Cham*. The learning point that the Bar Council takes from this case is that allowing specific recovery of costs in certain parts of FRC but not others can give rise to unfairness. If FRC should be amended to allow for the recovery of advocacy fees in cases which settle late or are vacated at a late stage, the unfairness to be addressed arises regardless of the value of the case. The rules allowing recoverability of these fess should be the same in both the Fast and Intermediate Tracks.

Impact Assessment Issues

48. The Bar Council has emphasised its concern about the impact the failure to uprate advocacy fees and systemic issues in relation to the late vacation of trials has on the junior Bar in particular. Fast Track trials are very often conducted by junior barristers at the outset of their practice and pupils. It is highly likely that the issues we have set out have the greatest impact on those that can least afford it.

49. An alarming trend in recent years is that the data indicates a widening gap between male and female earnings at the Personal Injury Bar. The Bar Council published "Barrister earnings by sex and practice area – 2022 update" in October 2022.[9] Overall fee income in personal injury indicates that women earned 53% less than men in 2021. (Figure 4 p.5). The data is based on the renewal process for the Bar Mutual Indemnity Fund (BMIF) which involves barristers declaring their annual income for insurance purposes.

50. The disparity between male and female earnings is an obvious concern for the Bar and clearly there are multiple causes. However, we are concerned that the issues we have raised contribute to the gender gap in Personal Injury earnings.

[9] file:///Users/mmcleish/Downloads/Barrister%20earnings%20by%20sex%20and%20practice%20area%20-%202022%20update%20(2).pdf

51. Our statistics do not go so far as to provide the granular detail that would prove such a link beyond doubt, but it seems reasonable to consider that there is such an association based on the fact that the issues we have identified will impact disproportionately on those earning the least at the Personal Injury Bar and the data available suggests that these are more likely to be women. In this context, we suspect that a significant factor which may contribute to the gender disparity in personal injury earnings is the difficulties faced by women who may depend on Fast Track work on returning from maternity leave.

52. The Bar Council is also concerned that these problems may have a wider impact on race as well as gender, as the junior Bar who undertake most of this type of work is more diverse than the more senior Bar.

53. The Bar Council is concerned that the failure to deal with those matters that we have raised about advocacy fees, the late vacation of hearings, and the expansion of FRC in Personal Injury in particular may intensify the gender pay gap identified. The Bar Council will keep this issue under close review and, if possible, we will provide further information to the MoJ if more specific data can be obtained.

54. The Bar Council raises this issue at this time as it is a factor to which the MoJ should have due regard consistent with the three limbs of its Public Sector Equality Duty, s. 149 Equality Act 2010, to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity, and foster good relations between those of different groups.

Part Two: Other matters for consultation

55. The Bar Council recognises that other stakeholders will be better able to deal with other matters set out in the consultation and will defer to those with greater experience of the matters in issue. We set out some comments below on matters with which we are familiar.

Fixing costs on assessment

56. The Bar Council agrees that it is sensible to introduce a simplified assessment process for FRC cases which give rise to costs disputes. The Bar Council agrees with the MoJ that such disputes are likely to be narrow in scope and detailed assessment would be inappropriate. The Bar Council would defer to others with greater knowledge of costs disputes about the level of the fixed fee and the outline procedure set out at § 11 of the Consultation.

Fixed Costs for Part 8 Costs only Claims

57. Bar Council defers to those with experience of such costs disputes to guide the MoJ in this matter.

Providing Recovery for Inquest costs

58. The Bar Council agrees with the MoJ that this is an issue which needs to be addressed. Inquests are an integral part of the process for investigating unnatural deaths and will inform and facilitate decisions taken about civil proceedings. The rules should allow for such costs to be recovered in a civil claim to which FRC applies, bringing the Fast and Intermediate Tracks into line with the Multi Track in which such costs are recoverable. The Bar Council agrees with the MoJ that an amended rule should allow for inquest costs to be separately recoverable subject to assessment.

59. It would be wrong to be overly prescriptive in defining the cases when inquests costs ought to be recoverable. Those claims that may be made following an inquest are not limited to claims for dependency under the Fatal Accidents Act 1976. There will be claims on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934; and accidents involving fatalities which found claims for family and non-family members for psychiatric injury as primary and secondary victims. Claims involving the deaths of children and young adults can be complex, but the damages recoverable can be limited to the levels set out in the Fast and Intermediate tracks.

60. Many cases involving inquests will be complex, and they should fall outside both the Intermediate and Fast Tracks. The CPR have recognised that claims brought by dependants under the Fatal Accidents Act are complex, and these should be excluded from the Fast Track. The Bar Council would support a rule to that effect. The Bar Council is less sure about to what extent such cases should also be excluded from the Intermediate Track. There will be some cases when the facts of an inquest greatly assist the determination of civil liability, and admissions may be made, and judgment entered. These cases may be suitable for the Intermediate Track as a result. It is important that the CPR allow for inquest costs to be recovered in these circumstances.

61. The Bar Council appreciates that drafting such a rule is not straightforward but is particularly concerned that it is important the recoverability of inquests costs is dealt with promptly so such costs can be recovered when the new rules take effect on 1 October 2023.

Restoration Proceedings

62. The Bar Council agrees that an amendment to the rules should allow for the costs incurred in restoring a company to the Register to apply to the new Intermediate Track. The Bar Council notes the final provision of £1,280 plus VAT under CPR

45.61(2) and the provision for disbursements under CPR 45.61(2). The Bar Council sees no reason in principle why this provision should not also apply to the Intermediate Track, and that the current rules should be amended so that this amendment will come into effect before 1 October 2023. The Bar Council would defer to others on matters of detail and in relation to the appropriate amount of costs. The Bar Council consider that particular consideration must be given when there are more than one company that have to be restored to the register, and that appropriate provision should be made within the rules to allow for this.

Clinical Negligence Claims: CPR 26.9(10(b)

63. The Bar Council opposes the proposed inclusion of clinical negligence cases in the FRC and notes several problems with this proposal.

64. The Bar Council notes that there was no consultation on including clinical negligence cases in FRC. The absence of such consultation is telling as the proposal made by the MOJ is practically unworkable.

65. The proposal to allow clinical negligence claims to proceed under FRC when "both breach of duty and causation have been admitted" is flawed. A solicitor having conduct of a case has to investigate the facts prior to sending a letter of claim. Such costs may be considerable, involving detailed investigation, and the instructions of experts. Such costs are reasonably incurred without reference to the level of damages which may be awarded and are not suitable for FRC.

66. The rule contains no time limit as to when breach of duty and causation are admitted. It is not feasible for a Claimant solicitor to assess the likely value of the claim without having conducted their own investigations, in the absence of disclosure or expert medical evidence in 'anticipation' that breach of duty and causation may be admitted.

67. The Bar Council notes that at § 50 of the Consultation the rule will be "tightened to make explicit that the early admission of liability must be made in the pre-action protocol letter of response". While this creates some certainty, it does not remove the essential fact set out at § 65 above that the Claimant solicitor will still have to investigate the claim with little or no evidence to allow him to advise on either the value of the claim or the prospects of success.

68. The Bar Council is concerned that there is an overlap and confusion with the Department of Health and Social Care (DHSC) scheme. The Consultation paper does not set out how these potentially overlapping fixed costs regimes will interact.

69. There are many organisations and stakeholders with significant evidence as to the costs of running clinical negligence claims. Such evidence was not considered by Sir Rupert Jackson when making his proposals about the level of fixed costs in his supplemental report. The Bar Council is extremely concerned that costs set out in the FRC do not properly represent the costs of running a clinical negligence claim even if breach of duty and causation are admitted.

General Comments

70. The Bar Council notes the MoJ's invitation to comment on matters generally as well as on the specific questions set out in the consultation. The Bar Council has two general comments to make about matter which do not formally fall within this consultation.

Vulnerability: a new dimension to FRC

71. The crucial aspect of civil litigation which has changed since Sir Rupert Jackson's Supplemental Report in 2017 is a heightened awareness of issues of vulnerability. The Bar Council recognises that the MoJ is alive to this point and consulted on changes to FRC in June 2022.

72. The FRC attempts to wrestle with the difficulties on vulnerability by amending the CPR as set out at r. 45.10 (1):

> ***Claims for an amount of costs exceeding fixed recoverable costs – vulnerability***
> ***45.10.***—*(1) The court may consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in Section VI, Section VII or Section VIII of this Part where—*
> *(a)a party or witness for the party is vulnerable;*
> *(b)that vulnerability has required additional work to be undertaken; and*
> *(c)by reason of that additional work alone, the claim is for an amount that is at least 20% greater than the amount of fixed recoverable costs.*
> *(Rule 1.6 and Practice Direction 1A make provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses).*
> *(2) If the criteria in paragraph (1) are met, the court may—*
> *(a)summarily assess the costs; or*
> *(b)make an order for the costs to be subject to detailed assessment.*

The Bar Council is concerned that this is not an appropriate mechanism for dealing with issues in relation to vulnerability. These concerns were set out in our response to the consultation.

73. In the Consultation Paper the MoJ acknowledged that the model for CPR 45.10(1) was the 'escape' provision for personal injury cases worth up to £25,000 in the existing FRC, so, for example, CPR 45.29J. The MoJ suggested that such provisions in the rules are 'relatively straightforward' and "*it does not seem that problems have arisen in catering explicitly for more vulnerable claimants*". As we noted in our consultation response, solicitors' representatives and the judiciary will be best placed to comment on how often applications under this rule and similar provisions have been made successfully, but our understanding is that this is a rule that is effectively never used as the costs provisions are such a significant disincentive to making such applications. The Bar Council would welcome some reassurance from the MoJ that it has an evidence base establishing that the current rule does work well and that such applications are heard and granted at a level which the MoJ considers to be consistent with the rule "working well".

74. The Bar Council has expressed concern about the drafting of CPR 45.10. The current rule leaves it for the judge to determine whether or not the vulnerability gives rise to sufficient extra work to justify, exceptionally, an additional amount of costs. However, a further 'hurdle' remains in that the applicant has to show that the additional work has caused additional costs of at least 20% more than the amount of FRC. Any application will be made retrospectively, so in all cases the additional costs will already have been incurred with no certainty that they will be recovered.

75. The Bar Council's concern was that the retrospective nature of this provision and the limited discretion available due to the application of a threshold is very likely to make this provision unworkable in practice. Our preferred method of dealing with issues of vulnerability was to allow for greater flexibility in the management of the case at an early stage and to give the court a case management power to disapply FRC at any stage in the claim on account of vulnerability. The court should also have the same wide discretion when considering an application not to apply fixed costs at the end of the case.

76. Many vulnerable witnesses or claimants will also have protected characteristics. The Bar Council's view is that all parties and the court have a duty to consider the needs of vulnerable litigants at all stages of proceedings. The court has a positive obligation to consider the issue of vulnerability, possible issues in relation to vulnerability which may impact on the management of a case, and any reasonable adjustments that may be required either during the course of the proceedings or at trial.

77. In our answer to the consultation on vulnerability the Bar Council expressed a concern that that vulnerable litigants are a category of court user who have been severely disadvantaged under the current FRC.

78. The vulnerability mechanism resonates with members of the Bar as it mirrors the experience our members have had of working for no remuneration. Just as in those cases that settle when the advocate has no entitlement to their brief fee, those solicitors dealing with the additional costs of vulnerable parties or witnesses, are unlikely to be remunerated properly. The rule appears to accept that up to 19% of additional costs will not be recovered, but the risks inherent in the mechanism contained in the rules will mean that applications will not be made. There is a difference between a system of fixed costs which imposes costs restraints on lawyers, and one which implicitly or explicitly expects lawyers to work for no remuneration. The latter is not acceptable and an affront to access to justice.

79. A further and important point needs to be made about vulnerability. In so far as there is a developing jurisprudence about FRC, there is a danger of complacency in applying the 'swings and roundabouts' analogy. There are cases which are uneconomic to run and others which can be done with such ease that a balance can be achieved; however, vulnerability is different, and the analogy is not so easy to sustain. Vulnerable parties and witnesses demand more time and additional resources, and this fact must be recognised in FRC cases. The concern is that if sufficient protection is not included in the rules, vulnerable parties and witnesses will fall within a class of litigants whose cases will not be taken up because they are uneconomic.

80. The Bar Council would welcome the opportunity to consider these issues further with the MoJ and it is an issue which requires anxious scrutiny and review when the new rules take effect.

Delay and Consultation

81. Having now had many discussions with other stakeholders and officials at the MoJ, the Bar Council is conscious that the expansion of FRC has been an enormous task, demanding significant resources on the part of the MoJ for a prolonged period of time.

82. The delay in reaching this point has created some difficulties. The Bar Council is concerned that discussions have been weighed down by a lack of flexibility on the part of the MoJ to deal with the actual issues raised. Concerns about what is and what is not inside or outside of scope has resulted in a situation when the concerns of the Bar Council set out as long ago as 2019 were not addressed until a very late stage, the first engagement by the MoJ being in October 2022.

83. The Bar Council is also concerned that the MoJ's reliance upon Sir Rupert Jackson's report was inconsistent and at times unhelpful. In particular, the process of updating recommendations made in 2017 for implementation in 2023, created several

problems, not least that figures set out in that report were out-of-date. The resulting process of updating those figures was at times somewhat contrived.

84. The Bar Council hopes that valuable lessons can be learned about how reform of the CPR should be approached in the future and is happy to discuss this further with the MoJ. We would emphasise that the Bar Council and its members are fully committed to the success of the Fast Track and the Intermediate Track and are always willing to engage with the MoJ on matters which fall within our expertise.

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