



The Bar Council

The Bar Council response to the Civil Procedure Rule Committee “Consultation on extending fixed recoverable costs (FRC): how vulnerability is addressed”

1. This is the response of the Bar Council of England and Wales to the Civil Procedure Rules Committee’s Consultation on extending fixed recoverable costs (FRC): how vulnerability is addressed.¹

2. 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.

3. 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.

Overview on vulnerability

4. The Bar Council agrees that new provisions in FRC are necessary to ensure that vulnerable parties and witnesses² are not disadvantaged in bringing cases under FRC and welcomes the opportunity to respond to this consultation.

5. The Bar Council notes the view expressed in the Consultation Paper that personal injury cases worth up to £ 25, 000 in the existing FRC, are ‘relatively

¹ <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about>

² In this paper we will use the term ‘vulnerable litigants’ to cover witnesses, parties, and interested parties.

straightforward' and *"it does not seem that problems have arisen in catering explicitly for more vulnerable claimants"*. The consultation notes that when issues of complexity arise, these claims are likely to have been transferred to the multi-track.

6. Because of the structure of the existing FRC, Counsel's involvement is very often limited to instructions for trial. We have been informed about cases in which Counsel has been instructed for trial, only to find that issues of vulnerability have not been properly addressed until that very late stage. These include but are not limited to:

- (i) issues of capacity not having been considered prior to trial and the case having to be adjourned because of the need for mental health assessment;
- (ii) the need for translators only being recognised at trial and the case having to be adjourned;
- (iii) documents, such as witness statements and pleadings, not being translated, so statements of truth cannot be verified at trial; and
- (iv) failure to make reasonable adjustments for a witness' vulnerability or disability which have greatly added to the length of trial.

In relation to (iv) the Bar Council's experience is that, while the courts are responsive to the needs of witnesses with physical difficulties, recognition and understanding of the challenges faced by clients with cognitive, behavioural, and educational difficulties is less developed. The Bar Council suspects that vulnerable litigants are a category of court user who have been severely disadvantaged under the current FRC.

7. The Bar Council notes the underlying policy position set out in the consultation. That policy is essentially that while the rules should be amended to recognise increased costs associated with vulnerable litigants, these amendments should not undermine the FRC:

"MoJ considers that (i) any vulnerability mechanism should only allow for an uplift in those exceptional cases in which it is clearly merited, and (ii) any new arrangements should not provide an opportunity to circumvent the principles of FRC in allowing inappropriate additional costs."

The Bar Council is concerned that this strikes an inappropriate balance between the needs of vulnerable litigants and the wider policy objectives of controlling costs through the expansion of FRC.

8. A factor which the Bar Council considers is missing from the policy quoted at § 7 above is that it appears to suggest that ‘ownership’ of the issue of vulnerability is exclusively within the domain of the vulnerable litigants’ representatives. The Bar Council submits that this is not the correct approach. 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.

9. The Bar Council suggests that the parties should be required to set out any issues in relation to vulnerability in the Directions Questionnaire, so that these factors can be taken into account at an early stage in the management of the claim and will be relevant issues to take into account when listing and estimating the length of trial.

Vulnerability and the FRC

10. The Bar Council’s view is that there are only three basic means by which increased costs caused by vulnerability can be taken into account under FRC:

- (i) Appropriately drafted rules allowing for ‘escape’ from the FRC by transfer to the multi-track;
- (ii) Discrete rules allowing for necessary disbursements in relation to vulnerable parties and witnesses; and
- (iii) A fixed increase in FRC cases involving vulnerable parties or witnesses.

11. The Bar Council’s view is that rules drafted in such a way, acting in combination, are likely to be the best means by which the specific issues in relation to vulnerability can be addressed.

Escape

12. The court has a wide discretion in relation to allocation and those matters relevant to allocation of track are currently set out at CPR 26.8. These should be amended to include “*issue in relation to vulnerability in relation to the parties, witnesses, or other interested parties*”. Following from the recommendations set out at § 8 above, these matters will have been set out in the parties’ Direction Questionnaires.

Disbursements

13. The existing rules set out a number of different provisions in relation to the recovery of disbursements. These vary from the highly specific to the very broad.

14. CPR 45.12 provides that the court:

- (1) (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but (b) will not allow a claim for any other type of disbursement.*
- (2) The disbursements referred to in paragraph (1) are –*
 - (b) Where they are necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in Part 21 –*
 - (i) fees payable for instructing counsel; or*
 - (ii) court fees payable on an application to the court; or*
 - (c) any other disbursement that has arisen due to a particular feature of the dispute.*

15. Disbursements under r. 45.29I are limited to specific costs, not including the provision in respect of children and protected parties but including “(h) any other disbursement reasonably incurred due to a particular feature of the dispute.”

16. As pointed out in the consultation, in *Aldred v Cham* [2019] EWCA Civ 1780 the Court of Appeal drew a distinction between “a feature of the dispute” and a “feature” of the claimant. The costs required for advising on a child settlement were a feature of the child as a claimant, not a feature of the claim, so were not recoverable disbursements under r. 45.29I. This problem would have been avoided had r 45.19 included the same provision as CPR 45.12 (2)(b) specifically allowing for such a disbursement.

17. *Aldred v Cham* is a controversial decision and although the Supreme Court refused the Claimant’s appeal, their view was that this was a matter that should have been considered further by the Rules Committee. The Personal Injuries Bar Association (PIBA) intervened in *Aldred* in the Supreme Court. The position of PIBA and the Bar Council is that the rule should be amended to allow for the cost of advices for settlement in cases involving children to be recovered as a disbursement. In a joint paper sent to the Ministry of Justice and Civil Justice Council in July 2021 PIBA and the Bar Council they argued that the following amendment should be made to CPR 45.19

- 45.29I-(1) Subject to paragraphs (2A) to (2E), the court
- (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3) or (4); but*
 - (b) will not allow a claim for any other type of disbursement.*
- ...
- (4) Where they are necessarily incurred by reason of one or more of the claimants being a child as defined in Part 21, to include (i) fees payable for an advice on the merits of the settlement or compromise given by counsel or solicitor; and (ii) court fees payable on an application to the court.*

18. Given this background, the Bar Council is concerned that the current position of the Ministry of Justice does not consider amendments of the provisions in relation to disbursements at this stage. The Bar Council's view is that the current issue illustrated by *Aldred v Cham* is one which needs urgent consideration. In particular, the Bar Council is concerned that the failure to address this issue allows substantive injustice to occur as a result of a narrow interpretation of the current drafting of the rule. FRC cases cover the vast majority of civil claims and clarity is essential.

19. The Bar Council's view is that a similar amendment as at § 17 above should be made in relation to vulnerability, so for example by amending 45.29I further:

45.29I-(1) Subject to paragraphs (2A) to (2E), the court

(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3) *or (4) or (5)*; but

(b) will not allow a claim for any other type of disbursement.

...

(4) Where they are necessarily incurred by reason of one or more of the claimants being a child as defined in Part 21, to include (i) fees payable for an advice on the merits of the settlement or compromise given by counsel or solicitor; and (ii) court fees payable on an application to the court.

4) Where they are reasonably incurred by reason of the vulnerability of one or more of the parties or their witnesses.

Increase in FRC

20. The Bar Council notes the current proposal is as follows;

- (i) It is a judicial decision to determine whether or not the vulnerability gives rise to sufficient extra work to justify, exceptionally, an additional amount of costs;
- (ii) There needs to be a threshold, which is proposed to be 20% in line with existing provisions, of additional work caused by the vulnerability;
- (iii) The procedure by which people can establish a vulnerability uplift needs to be clear and simple; and
- (iv) The process needs to be retrospective (as with the assessment of costs generally), not prospective: the judge needs to be satisfied that sufficient extra work has been incurred, not that it may need to be.

21. The Bar Council agrees that a judge must find that 'exceptional circumstances' apply in the instant case. However, this should be a decision made as an exercise of discretion rather than being inhibited by a precondition (the 20% threshold). The judge should have a discretion to take all relevant factors into account in making such

an order and can be trusted to recognise that a tiny increase will not make the case exceptional. By contrast, a hard line between 19% and 20% is unnecessary and likely to be unworkable. To place vulnerable litigants in a position where they have to show that a precise amount of extra work is attributable to a vulnerability is unrealistic as it will involve a hypothetical comparison with a litigant who is not vulnerable. To expect such an exercise to be proved with any degree of precision is unfair and runs counter to the broad approach taken to costs generally.

22. The Bar Council submits that the rules should be amended to allow for greater flexibility not only in allowing all the circumstances of the case to be taken into account, but also in allowing these issues to be determined before the end of the case. The rules should expressly 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.

23. Although the court must be satisfied that the ‘exceptional circumstances’ test is met, the Bar Council does not consider that the threshold for making an application should be high nor that adverse consequences should follow from making such an application. The Bar Council also notes the recent research done by the Legal Research Board and the needs for costs to be ‘transparent’ in cases involving vulnerable litigants.³ The potential costs consequences involved in such litigation should be managed from an early stage, the ‘retrospective’ effect of the rule change has the potential to cause confusion and uncertainty during litigation.

24. The Bar Council notes that the current rules follow existing examples in the CPR such as CPR 45.29J. This allows a party to apply for an amount greater than FRC, but will award fixed costs or the assessed amount of costs if the sum assessed is less than 20% above that of the FRC (r. 45.29K). When costs are assessed at less than 20% above the amount of FRC the court can make an order that the party making the claim not be awarded costs, or an order that they pay the defending party’s costs, CPR 45.29I.

25. The Bar Council questions the reliability of this precedent for costs involving vulnerable witnesses. Solicitors’ representatives and the judiciary will be best placed to comment on how often applications under this rule and similar provisions have been made. The Bar Council’s understanding is that this is a rule that is effectively never used as the costs provisions are such a significant disincentive to make such an application, as it involves balancing a reasonable estimation of the costs likely to be

³ <https://legalservicesboard.org.uk/news/lsb-research-highlights-the-need-for-the-legal-sector-to-provide-better-support-to-vulnerable-consumers>

recovered, the costs of making the application, the defending party's costs, and the prospects of achieving more than 20% costs recovery. Taking all those factors into account it is understandable that this is not a provision that has been widely used. Its primary purpose is to act as a disincentive to parties to challenge FRC even when the costs incurred have been considerably greater than those recoverable under FRC.

26. The Bar Council questions the use of this rule but recognises that a rule must be in place which allows a degree of flexibility to make an application but does not undermine the FRC or flood the courts with costs applications. The answer to this is probably to provide a limited costs sanction if the application fails.

Summary

27. The Bar Council submits that new rules should have regard to the following:

- (i) in determining when FRC should be disapplied the court should be satisfied that exceptional circumstances apply;**
- (ii) in determining whether or not expectational circumstances apply the court should have regard to all the circumstances of the case, including vulnerability;**
- (iii) the parties should set out any issues in relation to vulnerability in their directions questionnaires;**
- (iv) the court's case management powers should be amended to consider the needs of vulnerable litigants at any stage of the claim;**
- (v) at allocation the needs of vulnerable litigants should be a specific factor taken into account.**
- (vi) the Bar Council does not support the current proposed rule change for the reasons set out above, however, if such a rule were to be introduced it should be amended as follows:**
 - (a) at the end of the case a party may apply for FRC to be disapplied: in considering such an application the court should have regard to all the circumstances of the case, including vulnerability and the following should apply when the court finds that there are exceptional circumstances:**
 - (b) if the costs incurred are greater than 20% of the amount of FRC then FRC shall be disapplied;**

(c) if the costs assessed are more than FRC but less than 20% more than FRC the court shall have a discretion either to apply the sum assessed or FRC;

(d) in either (a) or (b) the defending party shall pay the applicant's costs subject to assessment;

(e) if the court finds that the case is not one to which exceptional circumstances apply or where the Claimant cannot show that additional costs have been incurred over FRC, the party making the application shall pay the defendant a fixed amount of £ x: such an amount to be determined by the Rules Committee.

Response to specific questions

28. The Bar Council addressed the specific questions in the consultation as follows.

i. Do you agree that the Government's proposal (as outlined in paragraph 15) is the right way to address vulnerability within FRC?

29. No. For the reasons set out above.

ii. If not, do you have an alternative proposal?

30. Yes. The Bar Council has set out a number of proposals above.

iii. Do you have any drafting comments on the draft new rules?

31. Yes. The Bar Council has set out a number of points about the current drafting of rules above.

iv. Should any new provision in respect of vulnerability apply to existing FRC, which generally cover lower value PI (please consider in the context of paragraph 20 above)?

32. Yes. For the reasons set out at §§ 5-6 above.

v. Do any changes need to be made to the arrangements for disbursements for vulnerability in FRC cases?

33. Yes. The Bar Council has set out its comments at §§ 13 to 19 above.

Bar Council
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