



Informing Progress - Shaping the Future

FOIL Update 25th March 2024



MOJ extension of Fixed Recoverable Costs

FRC – further changes to the rules

Following the MOJ consultation in July last year on some of the details of the new extended FRC regime, the MOJ has published a response setting out changes and clarification to the rules. Most of the changes will take effect from 6 April, with two of the more significant reforms held over until October this year.

Extending FRC to costs issues

FOIL has long argued that it is anomalous that, whilst FRC have been extended to the majority of primary claims, gaps in the regime have still allowed standard costs to be recovered in some areas of costs assessment.

Part 8 (costs only) claims

The lack of FRC in Part 8 (costs only) claims was first highlighted in the 2013 case of **Tasleem v Beverley**, in which the award of Part 8 costs four times larger than the sum in issue prompted Lady Justice Sharp to note that this might be an area ripe for reform. Lord Justice Jackson recommended in his 2017 report that Part 8 (costs only) costs should be fixed, at £300 for a claimant and £150 for a defendant. FOIL has lobbied since then for FRC to be extended to these claims and the government has now confirmed that the costs will be fixed from October 2024.

The detail of the rules is still to be published but in its consultation paper the MOJ indicated that it favoured adopting either the figures proposed by Lord Justice Jackson, or the Interim Application Costs in PD 45 Table 1.

Costs on assessment

Recognising that even within a FRC regime, issues involving discretion and reasonableness will arise requiring assessment of costs, Lord Justice Jackson recommended the introduction of a shortened form of detailed assessment, with a provisional assessment fee cap of “say, £500”. FOIL has consistently lobbied for a streamlined assessment process with fixed costs and the government has now confirmed that a new ‘Fixed Costs Determination’ process will be introduced to fix the costs of assessment of costs in FRC cases. The government indicated in its consultation paper that, in line with Lord Justice Jackson’s proposals, it considered costs of £500, plus VAT and court fees, would be appropriate. The drafting of the rules is still being considered, with a view to introduction of the change in October.

Costs for inquests and restoration proceedings

The government recognised in the consultation, that under the extended FRC regime, the costs incurred in an inquest in a FAA claim, or in restoring a company to the Register (except in fast track NIHL claims) were not expressly recoverable. Although FOIL has argued that the costs for these slices of work are already included within the FRC figures, recoverable on a ‘swings and roundabouts’ basis, the MOJ has decided that further costs should be recoverable. Separate inquest costs will be recoverable, but only to the extent that they would be in any event, outside of FRC.

Restoration costs will now be extended beyond NIHL claims, to become recoverable in both the Fast Track and the Intermediate Track. Fixed costs of £1,280 plus disbursements will be allowed.

Trial costs for vacated hearings and in cases which settle late

On the back of lobbying by the Bar Council and PIBA, the current rules on recovery of trial costs will change.

In the Fast Track, 100% of the trial advocacy fee will now be recoverable where a claim is settled or vacated on the day of trial or the day before trial. 75% of the fee will be recoverable where a claim is settled or vacated not more than two days before the trial date.

In the Intermediate Track, 100% will be recoverable for settlement/vacation on the day of, or the day before trial, with 75% recoverable if the claim is settled/vacated not more than five days before the date of trial.

The Bar Council had sought 25% recovery where a claim is settled/vacated more than five days before the trial, but the government has decided not to take that forward.

Trial advocacy costs to be uprated for inflation

To remedy an apparent gap in Lord Justice Jackson's FRC figures the government will increase, by SPPI, trial advocacy costs in the Fast Track, Bands 1-3, to take into account the period between 2013 and 2016. This amounts to an uplift of around 20%.

All Fast Track, Intermediate Track and NIHL FRC figures will be increased by SPPI for the nine months between January and October 2023.

Admissions in clinical negligence claims

Under the current rules, a clinical negligence claim can only be allocated to the Intermediate Track where "both breach of duty and causation have been admitted." The government has now clarified that to come within the rule a full admission of liability (accepting that the claimant has suffered loss, including the injury set out in the pre-action protocol letter of claim, caused by the defendant's breach of duty) must be made in the pre-action protocol letter of response. (In line with the transitional arrangements for the extended FRC regime, the cause of action of the clinical negligence claim must accrue on or after 1 October 2023).

Other changes

A number of other small changes to the rules have been announced, including the following:

The ability to contract out of FRC - Part 45 1(3) is to be revised to clarify that parties may expressly agree that FRC shall not apply. As introduced in October, the costs rule indicated that only FRC could be awarded in a claim within the regime. This effectively removed the risk highlighted in the case of *Doyle v M&D Foundations and Building Services*, in which a reference to detailed assessment in an agreed court order was held by the Court of Appeal to remove the claim from the FRC regime.

The change reintroduces the potential for claims to be taken out of FRC inadvertently: the wording of settlements/agreed orders will need to be carefully handled.

Trespass to the person claims against a public authority

A provision is to be included in the rules requiring claims against a public authority for trespass to the person to be allocated to the Multi Track unless it would not be in the interests of justice to do so. The operation of the rule will be kept under review to ensure it is working as intended.

Expert reports

A revised version of CPR 28.14(3)(c) will provide clarity on what is included in the FRC '20-page limit for expert reports.

Except for the changes to Part 8 claims and the new Fixed Costs Determination process, all changes will come into force on 6 April. The full detail of the changes is available in the SI: [The Civil Procedure \(Amendment\) Rules 2024 \(legislation.gov.uk\)](https://www.legislation.gov.uk) And in the PD Making Document [\[62nd\]](#) [\[or 63rd \(justice.gov.uk\)\]](#).

The government will review the extended FRC regime in October 2026 (three years after implementation), including consideration of the figures in the Tables. Whilst the government is not minded to propose further changes at this stage, the regime will be kept under review. As the regime beds-down the MOJ will consider whether further proposals for change which are put forward can be dealt with as part of the proposed 2026 review or whether more urgent action is needed, leaving open the potential for further change within the next three years.

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