Civil Procedure Rule Committee in conjunction with the Ministry of Justice
Fixed Recoverable Costs Interim Implementation Stocktake

A response by the Association of Personal Injury Lawyers

December 2025

Introduction

We welcome the opportunity to respond to the Ministry of Justice's stocktake of the fixed recoverable costs reforms. It is still early days for the intermediate track. That, coupled with the short timeframe for responses when factoring in the Christmas period (43 working days), means that it is very difficult to provide a comprehensive set of data. Whilst our conclusions and recommendations are therefore not exhaustive, certain arguments and patterns of behaviour are beginning to emerge, which clearly demonstrate some of the issues facing injured people as a result of the extension of the fixed recoverable costs regime (FRC).

Q3 How well has the extension of fixed costs been working?

Members report that the regime works fairly well in terms of how quickly costs can be agreed, if and once the appropriate banding for a case is identified. In those circumstances where a case is settled in an agreed band and stage, costs tend to follow quite quickly, and disbursements tend to be recovered as requested. It is, however, still very early days for the new regime – cases have only been in the regime since October 2023, and it is hard to get a full picture of how this aspect is working. Problems are however arising where it is not clear which band a case falls into, or where, prior to allocation, a claim settles when that settlement figure may not reflect the full value of the claim (for the purposes of allocation under Part 26).

The preface to this call for evidence sets out that fixed recoverable costs are a crucial mechanism in ensuring that the costs of civil litigation are proportionate and predictable, with the introduction setting out that 'access to justice is enhanced if claimants can contemplate legal proceedings with an informed assessment of likely costs'. The lack of clarity in the intermediate track, particularly in relation to assignment, means that costs are not predictable, and there is uncertainty for both clients and legal representatives. Uncertainty around banding and track allocation means that it is difficult for claimant representatives to fully inform their clients from the outset of the costs they must pay, or the likely damages that they can expect to receive. The SRA is currently carrying out work related to high volume consumer claims, and as part of that they are looking at ways to improve transparency and clarity for consumers about their claim. While PI and clinical negligence were excluded from this work, we believe it is important for all clients to have clarity and transparency, and the current lack of clarity in the extended fixed costs regime does not sit well with this.

Lack of clarity between bands 2 and 3
While the aim of the banding was to not be too prescriptive, there are constant issues and uncertainty as to whether a claim falls within band 2 or band 3. It is not clear what makes a case 'unsuitable' for band 2 or what constitutes an 'issue in dispute', and it is usually necessary to have a dialogue with the defendant representative about where the case best fits. This can be very difficult if the defendant representative is not co-operative. We refer below to certain tactics that are deployed by defendants to take advantage of the lack of clarity in the current regime.

Lack of clarity where settlement value does not reflect the full value of the claim
If a case is identified at the outset as potentially being a multi-track case, and the case is being run as such, but the claim settles at a value that would put it in the intermediate track, defendants will typically not agree to assessed costs, yet the claimant's solicitor will have appropriately carried out all the necessary investigation and work for a multi-track case.

The case of *Doyle v M&D Foundations and Building Services*[1] provided some clarity to allow parties to contract out of fixed costs, but issues remain. Claimant solicitors set out what track and, if necessary, what band they believe the case falls within in the letter of claim, but rarely will defendants engage with this. It would be helpful if the rules required the parties to attempt to agree the track and, if necessary, the band at the outset of the case. It is not suggested that this is binding on the parties but could be referred to at assessment if costs cannot be agreed. This would help to further the overriding objective of the Civil Procedure Rules. Cases within the multi-track and the intermediate track will be run in different ways in line with the costs recoverable for those cases. Further, some firms will also charge clients on a different basis depending on whether the case falls within fixed costs or standard costs. Funding agreements may include a potential client liability for any shortfall in basic charges – in multi-track cases the shortfall may not be enforced, but in an intermediate track case it will. Having a requirement to agree from the outset what track and band a case is being run within will provide clarity for both the legal representatives and the claimant, and allow claimants to fully understand the costs that they will be required to pay from the outset without the risk of this changing throughout the case. In the event that parties agree to initial allocation within a band in the intermediate track but it becomes clear from consideration of evidence that the claim is in fact likely to instead be a multitrack case, notice to the other party should be provided at the earliest opportunity, allowing all involved to advise their respective clients and seek agreement on the updated costs position. Having clarity around track and banding will also prevent behaviours on both sides that may be driven by concerns about minimising or maximising cost recovery. The focus should be on running cases efficiently, and the uncertainty may be hindering this.

Q4 How well has the new intermediate track been operating? Has it had an impact on case progression?

[1] *[2022] EWCA Civ 927*

Please see our answer to question 3 which raises the issues around lack of clarity and the impact that this has on claimants and firms.

Members report that the reforms have had little impact on case progression overall, though there has been an increase in defendant representatives making substantial offers before a medical report has been obtained, particularly in cases which are on the borderline between intermediate and multi-track (with defendants making offers likely intended for the purpose of arguing that only fixed costs should apply).

Pre-medical offers put the injured claimant in a difficult position, as they may be attracted to the offer and want to take it to avoid lengthy court delays, but without a medical report it is very difficult to get a full picture of the extent of the claimant's injuries and the likely impact of those injuries in the future. It is usual for these offers to arrive after the immediate needs assessment (INA) has been sent for the purposes of arranging rehabilitation. The INA is not intended to be the basis on which to value a case. The purpose of an INA is to ensure that the claimant obtains the right rehabilitation to enable them to be put back as closely as possible, to the position they were in prior to the negligence. Consideration should be given to whether the rules could include a prohibition on making offers after the filing of the directions' questionnaire and before allocation, where there is an ongoing disagreement on track allocation and/or banding.

Nothing within the track has led to the stalling of cases, and as above, where the correct band can be identified early on, cases can be settled smoothly. There does not, overall, appear to have been a reduction in case durations for cases in the intermediate track. By their very nature these cases, particularly those at the higher end of the track, require a necessary waiting period before an expert is in a position to provide a final prognosis; the extent of the injuries are clear; and to ensure that the claim is settled at the right amount. The intermediate track cannot, and should not, change that. As above, there has been an increase in pre-medical offers, which may have led to some cases settling earlier, but as set out above, usually these offers put undue pressure on claimants to settle early for an amount that may not be fully representative of the injuries that they have suffered. Overall, the fixed costs regime does little to incentivise claimants to settle early (pre-issue), as the tariffs in Stage 1, in particular, in Band 1 are disproportionality low with the cost of doing the work significantly higher than the tariff. See Q7 for an example of this.

The disproportionality low costs in the intermediate track, specifically Band 1, means that the claimant may have to cover the shortfall and lose a significant amount of their damages on top of the success fee and insurance premium that they already have to pay out of them. Alternatively, the firm will have to write the work carried out off, or in some cases firms may make the decision to not take on the work at all.

Q5) Do practitioners and court users (including LiPs) have access to sufficient information on FRC and their application.

As set out above, there is a lack of clarity around banding, and if a case changes track during the claim process, this also leads to uncertainty. Personal injury claims involve, by nature, claims for an unspecified sum, which means that it may be unclear at the outset within which track, and if necessary which band, a claim should fall. We have set out above in answer to question 4 the impact this uncertainty has for claimants in being fully informed of their costs' liability at the outset of a case; and defendant behaviours which play on this uncertainty. The issue of uncertainty is magnified in cases involving a vulnerable client, where the costs incurred will almost inevitably be higher than in cases involving a non-vulnerable client, but it will be near impossible to identify if the additional costs will be awarded from the outset of the case.

Q6) What effect has the extension of the FRC had on cases that use the OCMC and DCP

Members report that the combination of the extension of FRC and the introduction of the Damages Claims Portal has led to some District Judges not fully understanding the new process. Members report cases being allocated to the intermediate track, but then not being assigned to a band. Directions orders have also been received that bear no relation to the case at hand or the agreed suggested directions of the parties, for example orders have been received with listings for costs budgeting on intermediate track allocations. We recommend that there should be additional training for the judiciary. Unclear or irrelevant directions lead to increased work and therefore costs for legal representatives (who, under the fixed costs regime, are unable to recover those costs meaning that the injured person pays the shortfall), and further uncertainty around whether sanctions will be incurred if the – irrelevant - directions are not followed.

Members also report behaviours from defendant representatives who do not engage properly with the directions questionnaire, and either do not make an attempt to value the case or suggest which band it should be assigned to, or suggest the intermediate track in a case that is likely to be a multi-track case, but with no reasons given. Cases are stalling on the DCP because of this behaviour, and defendants are using this delay and uncertainty to then make pre-medical offers to encourage the claimant to settle. It is very difficult for claimant representatives to fully advise their clients on how to proceed in these circumstances because there is no certainty on costs until a case is allocated to a track and if necessary, a band.

Q7 Do the complexity bands enable the award of proportionate costs? Is this the case in both the fast and intermediate tracks?

Band 1

The costs awarded in band 1 are hugely disproportionate to the work that needs to be carried out in a personal injury case. Lord Justice Jackson in his final report on the extension of fixed recoverable costs, only intended for the simplest cases to be caught by band 1, and specifically for personal injury cases, this was where quantum only is in dispute. The

Government also, in its response to Jackson's report, stated that quantum only personal injury cases would go into band 1. The wording of the rules sets out that band 1 will apply when there is 'only one issue in dispute'. However, quantum investigations for cases with a value up to £100,000 usually requires significant investigation and there can be a number of disputes over, for example, specific heads of loss and/or causation. Quantum is not a single "issue".

It also must be borne in mind that the figures used to calculate band 1 costs were derived from the expected agreed costs as estimated for varying levels of damages for the claims categories as non-personal injury RTA. No account was taken of quantum-only PI cases when calculating the fixed costs for band 1. A £50,000 case that settles at stage 1, band 1, attracts recoverable costs of £3,152. This is brought into sharp focus when comparing this case with a *fast track* case that settles at the same stage but in Band 2 (the equivalent band in the fast track for this type of case). A fast track case settling at the same stage in band 2 for *£20,000* results in fixed costs of £3374 i.e. fixed costs that are £222 more than in the intermediate track for a case that settles for £30,000 less.

A further example was provided by another member. An employer's liability case with a value of £25,000 (liability accepted) which has exited the EL/PL portal is automatically assigned to Band 3. A case that settles for £25,000 in the fast track, post issue but before the defence has been filed attracts fixed costs of £8,200 plus VAT plus disbursements. In the intermediate track a liability admitted employers' liability case which settles post issue but pre-defence for £50,000 attracts fixed costs of only £3,100.

Because the costs in band 1 are so disproportionate, those claimants whose cases fall within band 1 will usually be required to make up the shortfall in terms of recoverable costs and the costs that are actually incurred. Alternatively, the firm will have to write off the work carried out, or in some cases firms may make the decision to not take on the work at all. A large PI firm has reported that for cases settled in IT Band 1, the fixed costs only covered 35% of the actual cost of doing the work.

Cases funnelled into band 1 are also a breeding ground for early pre-medical offers, putting pressure on the claimant to accept damages that may not be representative of their injuries, in order to avoid the risk of losing more of their damages through legal fees.

A further issue is that Stage 1 costs in the intermediate track apply not only up to the date of issue, but up to the date of service of the defence. For context, the fast-track rules state that stage 1 costs apply up to the date of issue. Costs will be incurred running the case and then issuing the case, for the defendant to then admit liability/agree quantum just before the date that the defence should be served, or request an extension to the defence which cannot be reasonably refused in most cases. In the DCP an extension of less than 28 days cannot be agreed, so any extension provides the defendants at least a further month to admit liability. Most defendants are seeking this extension, in addition to the 28 days already afforded due

to filing the Acknowledgement of Service. Defendants use this time to make pre-medical offers to settle the claim and take advantage of the lower fixed fee.

We suggest either a significant increase in the costs at band 1, or for PI cases to be removed from band 1 completely. Stage 2 costs should also apply post issue, and not from the date of the service of the defence.

NIHL costs

There is also a disparity between the costs recovered in noise-induced hearing loss cases, in the fast-track and intermediate track. For a liability admitted case worth £27,500 where papers have not been prepared to start proceedings, the costs awarded are £2994. If a case is valued at £25,000, so in the fast track, and the case is settled before issue of proceedings, the recoverable costs are £6434.

Wide range of cases

The intermediate track operates in a £75,000 range, and while value is not the only indicator of complexity, there is usually a huge difference between a case settled for £30,000 and one that settles for £90,000, in terms of the complexities. The value of the case within the intermediate track should form part of the factors considered when it is determined where a case should be allocated. The uplift as a percentage of the value of the claim is not sufficient to factor in additional complexities when a claim is worth more. The nature of these injuries requires further time to pass to be able to accurately assess their impact on those who are injured. Commencement of treatment and repeated attendances with medicolegal experts are often required, with co-ordinated reporting in different medical areas and conferences with counsel for clarification. We would recommend that where a case is valued at more than £50,000, it should not, under any circumstances and regardless of any agreement on liability be allocated to band 2 or below.

Cases involving additional issues

Please see below in response to Q28 for our views on vulnerability within the extended fixed costs process, but for this question, we simply highlight that if a case has any additional requirements, for example the client is vulnerable, or defendants raise fundamental dishonesty, the fixed costs regime does not cater for these additional aspects and ultimately it is the claimant who loses out, having to make up the shortfall for any additional work that is required to be carried out, out of their damages. It is unclear whether an allegation of fundamental dishonesty is enough to push a claim into the multi-track.

Fast track cases

Overall, the fast-track works well. We reiterate the point we raised previously that the trial advocacy fee is the same between bands 1-3, with an increase only taking place at band 4. There is no distinction between the costs for a quantum only trial, and a trial dealing with both liability and quantum. Where liability is in issue, it will be more costly to conduct the case, and the claimant may either struggle to obtain representation, or face losing some of

their damages to make up the short fall between the costs recovered and the costs incurred by counsel.

Q8) To what extent do the complexity bands simplify the costs determination process?
For the reasons above, the complexity bands do not simplify the costs determination process.

Q9) Are there any issues with the interpretation of CPR 36 as a result of the CPR Part 45 changes?
An uplift of 35 per cent - and then only on any difference in fixed costs as applicable at the end of the relevant period - where the claimant has made a Part 36 offer that the defendant does not accept, but then the claimant goes on to match or better that offer at court, is an insufficient replacement for the 10 per cent uplift and indemnity costs. Fixed costs are still paid, and there is little incentive to defendants in accept reasonable offers.

We do not accept the MoJ's previous argument that indemnity costs "undermine the principle of fixed recoverable costs by requiring detailed costs assessment (and the keeping of records to inform an assessment should it arise)". Firms will keep a running tally of costs anyway, as it is a professional obligation for them to do so, and there is also a possibility that any case will move between the tracks and continue outside of the fixed costs regime, so firms will keep a record of costs for this purpose, also. Both claimant and defendant firms are free to agree with their clients to pay more than the fixed costs recovered up to the level of indemnity costs.

It is vital that Part 36 retains teeth. An arbitrary 35 per cent uplift on the fixed fees is simply not a sufficient deterrent to prevent defendants from continuing to accept Part 36 offers late. Claimant behaviours in relation to Part 36 is already tempered by the arrangement that the Part 36 regime trumps qualified one way costs shifting, and as such, if a claimant refuses a defendants Part 36 offer, but fails to beat it at trial, they lose QOCS protection. There must be a proper mechanism in place to prevent defendants from acting against the intentions of the Part 36 regime. We previously recommended in our response to the Government in 2019 that if a percentage uplift is introduced, it should be as well as costs on an indemnity basis, and should apply to the claimant's damages, as well as fixed fee amounts.

The 35 per cent uplift is arbitrary and is not set at a level sufficient enough to act as a credible threat to change defendant attitudes towards late acceptance. It does not take into account that the claimant will also likely have some of their damages deducted to pay for the costs of the case.

The watering down of the Part 36 provisions is at odds with the shift in focus towards alternative methods of resolution, and the amendment to the overriding objective to include a requirement to promote or use alternative dispute resolution. Part 36 can be seen as a mechanism of ADR, and we believe that changes to the provisions as a result of the

extended FRC reforms has meant that Part 36 is now an inadequate incentive to make offers, and an inadequate disincentive for defendants not to accept reasonable offers in a timely manner.

Q11) Is it sufficiently clear that additional costs relating to vulnerability or exceptional circumstances would be included in costs consequences under Part 36. If not, please share your reasons and/or suggestions for how this could be clarified.
Members do not have sufficient experience of this to provide a view at this time.

Q16) Are the FRC exemptions under the CPR 26.9(10) sufficiently clear to practitioners and claimants?
The FRC exemptions under CPR 26.9(10) are sufficiently clear, though as mentioned above, practitioners are beginning to see arguments around admission of liability in clinical negligence cases.

Q17) Are any amendments required to CPR 26.9(10)? If so, what are these?
Fatal accident claims should be included within the exemptions. There are additional complexities and sensitivities in fatal cases which do not sit well with fixed recoverable costs.

Q18) Do you consider that any of these exemptions should be reviewed? If so, please provide your reasons.
No, we believe all of the categories of case that are exempt at present should remain so.

Q19) Do you have any observations on how FRC are operating in relation to any of the following types of claims?

a) **Claims for or including non-monetary relief?**
b) **Where more than one claimant is represented by the same lawyer**
c) **Counter claims**
d) **Where there is a preliminary issue trial**
e) **NIHL**

In relation to noise induced hearing loss claims, members state there is a lack of clarity as to the types of NIHL that are excluded from the FRC regime. Annex E4 of the Pre-Action Protocol for Disease and Illness Claims provides a list of NIHL claims that are excluded from fixed costs, but it is unclear whether those claims are excluded entirely from the FRC regime and therefore subject to standard costs, or whether it means that they are only excluded from CPR Part 45 section VIII Claims for Noise Induced Hearing and instead will fall for consideration under the Intermediate Track Complexity Band 3 (unless allocated to the Multi-Track). Clarity here would be welcomed.

Q20) If you have experience with clinical negligence claims, what proportion do you see allocated to the intermediate track?

a) **What level of costs are usually awarded in those intermediate track claims?**
b) **Which complexity bands are generally allocated to them?**

Clinical negligence claims are usually allocated to the multi-track, as per CPR 26.9(10) and are therefore not subject to FRC. However, under certain circumstances – if the defendant admits breach and causation to some injury within their letter of response - clinical negligence claims may be allocated to the intermediate track and be subject to FRC. If this happens then it is arguably a single issue (quantum),in dispute and therefore the case is allocated to band 1. If that case settles up to the date of defence (if issued) the recoverable costs would be £1652 plus 3% damages. One member reported that they are currently dealing with a case whereby the defendant is arguing that they did admit breach and causation – the claimant's solicitor disputes this - but if the defendant is successful in arguing this, it would have been allocated to Band 1. The recoverable profit costs would be £3,062, for a case that settled for £47,000. On average, the costs of investigating breach and causation even before a LOC is sent, is £7500. The recoverable costs are therefore not proportionate to the damages and the claimant will again lose a substantial amount of their damages as they do in most PI claims. There are very few cases where the D admits breach and causation but this is likely to happen more and more, as if the case is successfully argued to be in the intermediate track, the costs are pitifully low. The proposed lower value clinical negligence costs tariffs are actually higher.

Claimant representatives are also reporting that defendant representatives are arguing for an extension to the protocol period, and then admitting breach and causation within the extended period, but still arguing that the case should fall within the intermediate track.

These cases have not yet concluded so it is not possible to say yet with any certainty whether the intermediate track provisions are working for clinical negligence cases. We are aware of the arguments being raised above, and it is an area that will need to be closely monitored to establish if any further amendments are required.

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Q21) Are you aware of any applications made to decrease and/or increase the FRC payable on the basis of unreasonable behaviour? If so, how well has this worked?

'Unreasonable behaviour' is vaguely defined, and has the potential to lead to satellite litigation. Members also report that there appears to be judicial reluctance to find any unreasonable behaviour. Any guidance on the judicial interpretation of unreasonable behaviour would be welcomed.

Q22) are any amendments required to CPR 45.13? Please provide your reasons.

Q23) Are you aware of any reason why any of the FRC figures should be reviewed before 2026?

The FRC figures should be reviewed in light of judgment in *Mazur* and its implications for fixed costs.

Q24) Do you have any observations on the recovery of disbursements?
It is perhaps too early to form a view, but members have not yet reported any problems with disbursements specific to the intermediate track.

Generally, though, if there are issues with disbursements, it is the claimant who will have to pay the shortfall out of their damages. If it would be beneficial to get an early opinion from counsel, which would not be uncommon in higher value intermediate track cases, there is no provision for this within the fixed costs and would need to be paid for by the client. In order for the job to be carried out correctly, the client is needing to cover the shortfall, and this is not fair, and is not access to justice.

We also flag that the wording of table 14 of Part 45, stage 2, there appears to be a missing comma, and the wording reads 'Specialist legal representative providing post-issue advice in writing or in conference or drafting a statement of case'. It cannot be the intention that the case would need to be issued and then counsel or the solicitor draft particulars.

Q25) How is the 20 page limit for experts reports in intermediate track claims working in practice?
This rule demonstrates the importance of allocation of a case at an early stage, and the need for the parties to follow the overriding objective and to work together to agree where the case should be dealt with at the outset. The 20-page limit is not an issue per se, but in more complicated cases, where there is a reasonable belief at the outset that a case is worth over the intermediate track limit, and then it is subsequently valued within the intermediate track, problems arise.

We also suggest that if a case falls within the intermediate track but an expert requires more than 20 pages to provide an effective medical report, this should be a factor to consider in relation to where the case should be allocated.

Q26) Are you aware of any requests to extend the 20 page limit? If so, please share any data or information that you have.
We have no comments on this at present.

Q27) Do you find it easy to submit a precedent U? Is it clear what information should be included? If you answered no to either question, please provide you reasons
We have no comments on this at present.

Q28) Can you provide any evidence or estimates of how often a party or witness' vulnerability necessitates additional work?
It is still early days in relation to the vulnerability provisions, but in principle, the provisions create further uncertainty as they require parties to incur costs related to vulnerability and subsequently prove that the costs were related to vulnerability.

There should be a requirement for the parties to seek to agree at the outset to agree whether a party is vulnerable. The way the vulnerability provisions work at the moment, a vulnerable person does not know how much of the costs of their case are going to be recoverable at the point where they are needing to decide whether to pursue their case. That the provisions kick in when the costs incurred are at least 20 per cent more than the fixed costs allowed is also arbitrary. It is nonsensical that if the additional work incurs 15 per cent more in costs than the fixed costs allowed, there can be no application for recovery of those costs.

Q29) If so, please provide details of the nature of this vulnerability and additional work, and how much additional time is required to undertake it.
Vulnerable clients include those whose first language is not English – there is lots of additional work here to put legal wording into a context that the client can understand, an interpreter or translator may also be required.
Those who are deaf or blind will also require additional accessibility requirements.

It is vital that the additional costs associated with vulnerability can be recovered – without a guarantee that costs associated with vulnerability can be recouped, some members have reported that they have been unable to take on lower value cases where a person has a vulnerability. Therefore, those who are vulnerable will find it more difficult to obtain access to justice.

Q30) Are any amendments required to CPR 45.10? Please provide your reasons.
It would be helpful if the rules made provision for the recoverability of costs associated with e.g. an interpreter for medical appointments, rehabilitation. Not every case is issued or comes before the court, so a special measures provision for pre-issue recoverability guidance would be very helpful.

Q31) Do you have any further information?
We have no further comments at this stage.

Any queries in relation to this response should be directed, in the first instance, to:

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