

Client Alert:

Government response to the consultation on extending FRC in civil cases

The Government has responded to the 2019 consultation paper 'Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals'.

The 2019 consultation

In summary, the Government consulted on the following proposals:

1. Extending FRC to all other civil cases in the fast track, up to a value of £25,000 in damages;
2. A new process and FRC for NIHL claims;
3. Expanding the fast track to include simpler 'intermediate' cases valued between £25,000–£100,000 in damages; and
4. The introduction of costs budgeting in 'heavy' JRs

The 2021 Response

The Government's response was released on 6 September 2021, having been delayed principally due to the COVID-19 pandemic.

Having taken into account all of the consultation responses, the Government intends to implement the extension of FRC and will work with the Civil Procedure Rule Committee (CPRC) to ensure the smooth delivery of these reforms.

1. The Fast Track

Clinical negligence, business and property cases were excluded from the consultation and specific recommendations were made in respect of NIHL cases.

FRC will be extended to all other civil cases in the fast track up to a value of £25,000 in damages.

- **Banding:** All fast track cases will be allocated to one of the four bands of complexity, as set out in existing FRC regimes. Details of these complexity bands are outlined in Chapter 3 of the original consultation paper.
- **Counsel's fees:** These will only be ring fenced in Band 4 and for NIHL cases.
- **Costs liability:** An unsuccessful band challenge will incur a costs liability of £150 and will be kept under review.
- **Escape clause:** The current provision in CPR 45.29J, enabling a party to exit FRC in the fast track in exceptional circumstances, will continue to apply.
- **Package holiday sickness/credit hire:** Package holiday sickness claims will fall within Band 2. We can also confirm that credit hire claims will fall into Band 1.
- **Fortifying the rules:** Judicial discretion will not be reinforced by the rules as this would risk being too prescriptive. However, the views of the CPRC are to be sought.

- **Part 36 offers:** A penalty uplift of 35% of FRC will apply to the stage during which and those after the relevant period under a Part 36 offer expires.
- **Unreasonable behaviour:** A penalty of 50% of FRC will apply to unreasonable behaviour during litigation.
- **Uplift for additional claimants:** A 25% of FRC uplift will apply for each additional claimant in claims that arise from the same set of facts.
- **London weighting:** The existing provisions for London weighting in fast track FRC regimes will apply to the new FRC regimes.

3. Intermediate cases

The Government will expand the fast track to include 'intermediate' cases valued between £25,000–£100,000 in damages.

- **Court fees:** The existing multi-track court fees will be retained for new intermediate cases, but will be kept under review.
- **Exclusions:** Mesothelioma/asbestos, complex PI and professional negligence, actions against the police, child sexual abuse, and intellectual property will be excluded from intermediate cases.
- **Banding:** The four-band structure as proposed by Sir Rupert Jackson will be used so as to allow for greater flexibility ensuring particular cases are matched to appropriate bands.
- **Allocation criteria:** It will be the role of judges to exercise their discretion and ensure that intermediate cases are appropriately allocated, in accordance with the criteria set out in Chapter 5, 2.1 of our consultation paper.
- **Allocation Practice Direction:** The Government will consider with the CPRC the need for a new Practice Direction, similar to CPR 26.8, to (i) give guidance on allocation, and (ii) indicate the information the court needs in order to make an appropriate band allocation.
- **Exceptional circumstances:** No intermediate case should be allowed to exit from the proposed FRC regime, unless there are exceptional circumstances.
- **Costs liability:** An unsuccessful challenge to allocation should incur a costs liability of £300, but this will be kept under review. However, challenging or resisting band allocation without sufficient basis could amount to unreasonable behaviour, incurring further costs penalties.

4. Judicial Review

- **Costs budgeting in 'heavy' JRs:** Costs budgeting will be introduced to all 'heavy' JRs, as outlined in the consultation.

5. Next Steps

- **Inflation:** FRC will be updated from the figures consulted upon in line with the Services Producer Price Index (SPPI).
- **Operable Date:** FRC will apply to as many cases as reasonably possible, within the cohort of cases covered. This will mean those cases where the accident or cause of action arises after the implementation date, or in disease and equivalent cases where no letter of claim has been issued before the implementation date.
- **Vulnerability exceptions:** The Government accepts that there may be grounds for limited exceptions to specific vulnerabilities.
 - *The new fast track FRC regime could cover the specific vulnerabilities set out in the guidance to the legal aid Family Advocacy Scheme, and that a specified percentage uplift of FRC (25%, in keeping with the 25% bolt-on that is currently available under the Family Advocacy Scheme to those who "[have] difficulty giving instructions" as a result of a verified mental impairment) could be available in respect of parties who meet these criteria, upon judicial certification.*
 - *Additional disbursements may be needed for specific vulnerabilities (such as where a sign language interpreter may be required).*
 - *Government will consider whether arrangements for settlements for protected parties (adults lacking mental capacity and children, as under RTA cases) should be extended to the new FRC regimes.*

The Government will consider what arrangements are appropriate for each of the above with the CPRC.

Comment

The extension of FRC is very much welcomed as it will provide more certainty as to the amount of costs one party may recover from another. We are pleased to see that the penalties for failure to beat a Part 36 offer have been limited to a percentage uplift, rather than assessed costs.

The scope for a raft of 'banding' disputes on both fast track and intermediate cases is of particular concern and may result in test cases being taken on appeal if insufficient guidance is provided.

As with any new set of rules the 'devil will be in the detail', with a significant risk of satellite litigation as a result.

Given the variety of issues that need to be considered by Government in conjunction with the CPRC, it appears unlikely that we shall see the draft rules before April 2022 and implementation before October 2022.

The response to the consultation is available through the link below:

[CLICK HERE](#)



Get in touch

Howard Dean

Director of Costs and Partner

+44 (0)2476658136
h.dean@keoghs.co.uk



[Keoghs.co.uk](https://www.keoghs.co.uk)

The contents of this document are considered accurate at the time of publication. Nothing in this document constitutes specific legal advice. You should always consult a suitably qualified solicitor about individual legal matters. Keoghs LLP accepts no liability for errors or omissions in this document. All rights reserved. This document and the information contained within it are provided for personal use only. No part may be reproduced, stored in a retrieval system or transmitted in any form or by any means electronic, mechanical photocopying, microfilming, recording, scanning or otherwise for commercial purposes without the written permission of the copyright holder.

Keoghs LLP is a limited liability partnership registered in England and Wales (registered number OC 321124) which is authorised and regulated by the Solicitors Regulation Authority. A list of the names and our members is available for inspection at our registered office, 2 The Parklands, Bolton, BL6 4SE. We use the word "partner" to refer to a member of the LLP. Keoghs Scotland LLP, is a limited liability partnership registered in Scotland (registered number SO305857) which is authorised and regulated by the Law Society of Scotland and trading from its registered office 2 West Regent Street, Glasgow, G2 1RW. A full list of members is open for inspection at the registered office. Keoghs Scotland LLP utilises the trading name Keoghs under licence from Keoghs LLP. All services in Northern Ireland are delivered under Keoghs Northern Ireland LLP; a limited liability partnership registered in Northern Ireland (registered number NC001575) which is authorised and regulated by the Law Society of Northern Ireland and trading from its registered office address, Keoghs Northern Ireland LLP, 18-22 Hill Street, Belfast, BT1 2LA. Keoghs Northern Ireland LLP utilises the trading name Keoghs under licence from Keoghs LLP.