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RESPONSE OF THE PERSONAL INJURIES BAR ASSOCIATION **TO THE DEPARTMENT OF HEALTH CONSULTATION ON FIXED** **RECOVERABLE COSTS**

PIBA is one of the largest Specialist Bar Associations, with 1480 members who undertake the full range of personal injury work, for claimants and defendants.

Preliminary observations

1. PIBA's response to the questions posed within the consultation is set out within the consultation questionnaire attached. PIBA offers the following observations on the issue of fixed recoverable costs to place its response in context.
2. PIBA is concerned that the Department of Health, the government department ultimately responsible for the National Health Service, is leading a consultation exercise which is expressly intended to reduce the NHS's liability for the legal costs reasonably incurred by individuals forced to seek compensation for injuries sustained as a result of clinical negligence whilst under the care of the NHS. There is an obvious conflict of interest and an inevitable perception that the consultation exercise will be driven by the DOH's desire to reduce its own liabilities, rather than a desire to see a fair balance struck between access to justice and equality of representation on the one hand and appropriate costs control on the other.
3. PIBA is also concerned that the DOH is seeking to pursue a consultation exercise with a view to implementing a stand-alone fixed recoverable costs regime ["FRC"] for clinical negligence claims, when Sir Rupert Jackson is simultaneously undertaking a far

wider consultation and review of fixed recoverable costs in civil litigation generally and which includes clinical negligence.

4. Sir Rupert Jackson held a specific seminar at which the issue of FRC in personal injury and clinical negligence litigation was the sole focus¹. In his previous report on FRC he made specific proposals for personal injury litigation. We can be confident that he will make specific proposals for personal injury and clinical negligence following his latest review. Any proposals for FRC would have to be incorporated within and dovetail with all of the provisions of the Civil Procedure Rules. That would be better achieved following Sir Rupert Jackson's wider review, as opposed to following a narrow consultation conducted by the government department responsible for health, as opposed to the government department responsible for civil justice [the MOJ], concentrating on a single area of litigation.

PIBA's primary position

5. PIBA accepts that FRC can and should be extended to cases valued at less than £25,000 **allocated to the Fast-Track**. PIBA has set out that position in its response to Sir Rupert Jackson's review, a copy of which is attached and which should be read alongside PIBA's response to this consultation exercise.
6. The experience of PIBA members is that FRC has operated successfully within the Fast-Track where, as a broad but accurate generalisation, claims are less complicated and are capable of being litigated efficiently, within a truncated timescale and determined at a one-day trial. That FRC has worked in Fast-Track personal injury litigation reflects the fact that many of the cases allocated to the Fast-Track raise similar issues, are factually straightforward and do not require detailed consideration of complex expert evidence. The same cannot be said of clinical negligence claims which are allocated to the Multi-Track and which, by definition, are complex cases requiring detailed consideration of factual, medical and complex expert evidence.
7. For the reasons set out in PIBA's response to Sir Rupert Jackson's consultation, FRC is not suitable for and should not be extended to Multi-Track claims.

¹ The seminar took place in Manchester on 7th February 2017. The event was very well attended. The NHSLA, other defence organisations and representatives of the insurance industry were present and a representative of the NHSLA made a presentation in favour of extending FRC.

The foundation for the DOH's proposals

8. The driver for the introduction of FRC in clinical negligence claims is the DOH's desire to reduce the sums paid by defendants in respect of the legal costs of successful claimants. In support of that argument the DOH relies upon historic data as to its past liabilities for those costs. That analysis fails to take into account the fact that the figures relied upon include (a) success fees, and (b) ATE insurance premiums. Success fees are no longer recoverable from the paying party, and recoverability of ATE premiums is now extremely limited leading to a significant reduction in the liability of paying parties for these premiums. It also fails to take into account the fact that the figures are derived from cases which were not subject to costs budgeting and were agreed/assessed before the introduction of the stand-alone proportionality test under CPR 44.32(2).
9. The DOH has offered no analysis of the costs savings which have been achieved by (a) costs budgeting, (b) the abolition of the recovery of success fees and ATE premiums, and/or (c) the introduction of the proportionality test. PIBA suggests, as it suggested to Sir Rupert Jackson, that it is premature to consider extending FRC to the Multi-Track without allowing a proper opportunity for the benefits of those changes to "*bed in*" and to be quantified. Those changes have inevitably resulted in a substantial reduction in claimant legal costs. It is only once those savings have been quantified and the actual liability - as opposed to historic liability - for costs is known that issues of proportionality and proposals to extend FRC can be properly considered.

Access to justice and equality of arms

10. It is beyond argument that claimants and defendants in clinical negligence litigation require specialist representation. The NHSLA and various defence organisations instruct a small number of firms of solicitors and counsel specialising in this work. The same applies to claimants. This does not reflect a desire by either party to incur unnecessary costs, rather it reflects the complexity of the issues and the real need for experience and expertise in the handling of these cases.
11. Imposition of a FRC regime with the sole intention of achieving a substantial reduction in claimant costs will lead to:

- 11.1. Experienced lawyers specialising in these cases no longer acting for claimants in cases which are subject to FRC; it will simply be uneconomic for them to do so.
- 11.2. Claimants with meritorious but complex claims will struggle to obtain specialist representation where the likely costs recoverable under FRC will not meet the true cost of investigating and pursuing the claim. Claimants with meritorious claims will be denied compensation as they will be unable to find effective representation.
- 11.3. Alternatively, claimants will be forced to surrender a significant proportion of their compensation to meet the shortfall between the fees allowed under FRC and the true cost of pursuing the claim, to which the claimant's solicitor is entitled.
- 11.4. A representation vacuum will be created which will be filled by non-specialists and/or unregulated claims management companies representing vulnerable injured people. In contrast, defendants will continue to have access to skilled, experienced and specialist representation. The inequality of arms and real disadvantage to injured people is obvious and significant.
- 11.5. Premature under-settlement of claims where maximum profitability and commercial considerations dictate how much work a solicitor can and will do on an individual case.
12. It is striking that the consultation document makes little if any reference to access to justice or equality of arms. Any proposal for the introduction of FRC is fundamentally flawed if it does not recognise and address the likely adverse impact of FRC on access to justice and equality of arms.

Robert Weir QC, Chair of PIBA

Darryl Allen QC, Vice Chair of PIBA

Judith Ayling, Stephen Cottrell, Sarah Lambert and Richard Wilkinson

(PIBA Exec members)

2nd May 2017

Consultation Questions

[PIBA's response to the individual question is set out in red text]

Question 1: Introducing Fixed Recoverable Costs

Yes No

Do you agree that Fixed Recoverable Costs for lower value clinical negligence claims should be introduced on a mandatory basis? YES

If not, what are your objections?

If you prefer a voluntary scheme instead, please explain how this would fulfil the same policy objectives as a mandatory scheme.

Question 2: Fixed Recoverable Costs Ranges

Do you agree that Fixed Recoverable Costs should apply in clinical negligence claims: Yes No

Option A: above £1,000 and below £25,000 (preferred) YES

PIBA agrees, subject to exceptions which are addressed later, that Fixed Recoverable Costs ["FRC"] should apply to clinical negligence claims where the value of the claim is less than £25,000 and the claim is allocated to the Fast-Track. PIBA does not agree that FRC should apply to any claim allocated to the Multi-Track.

By definition, claims allocated to the Multi-Track are more complex and require bespoke case management, unlike Fast-Track claims which are suited to (a) standard directions, and (b) relatively swift resolution.

Claims allocated to the Multi-Track are subject to Costs Management ["costs budgeting"]. Costs budgeting is effective. It provides bespoke "*fixed*" costs for an individual case and provides a budget which is proportionate to (a) the financial value of the

claim, (b) its complexity and (c) its importance to the claimant and to the healthcare provider/individual healthcare professional against which/whom allegations are made.

At the allocation stage the Court already has the power to allocate to the Fast-Track a claim where the financial value exceeds £25,000. PIBA suggests that allocation to the Fast-Track is the appropriate mechanism to engage FRC as this will be a reliable indicator of (i) the complexity of the claim, and (ii) its suitability for FRC. This is in contrast to focusing exclusively upon financial value which provides a very limited and ultimately unreliable indication of the complexity of the claim.

Option B: Another proposal

Please explain why

Question 3: Implementation

Yes No

Which option for implementation do you agree with:

Option 1: all cases in which the letter of claim is sent on or after the proposed implementation date.

NO

Option 2: all adverse incidents after the date of implementation.

YES

Another proposal

Please Explain Why

If the trigger for implementation/engagement of FRC is the timing of the letter of claim then this may/will encourage claimants to submit premature letters of claim in order to avoid FRC. In addition, adopting the letter of claim as the trigger event would result in different treatment of claims and different treatment of claimants by reference to the efficiency or inefficiency of their legal representatives. Adopting the date of the adverse incident as the trigger is both fair and definitive.

Question 4: Fixed Recoverable Costs Rates

Looking at the approach (not the level of fixed recoverable costs), Yes No

do you prefer:

Option 1: Staged Flat Fee Arrangement NO

Option 2: Staged Flat Fee Arrangement plus % of damages awarded: do you agree with the percentage of damages? NO

Option 3: Early Admission of Liability Arrangement: do you agree with the percentage of damages for early resolution? NO

Option 4: Cost Analysis Approach: do you agree with the percentage of damages and/or the percentage for early resolution? YES

PIBA agrees that in principle, *if* FRC are to be introduced then the most appropriate measure of costs is that envisaged by Option 4, namely a combination of (i) a fixed element set by reference to the stage reached, combined with (ii) a percentage of damages, intended to reflect the real “*market costs*” of dealing with this type of work. This approach is (a) advocated by Professor Fenn, and (b) mirrors the approach which has been adopted within the Civil Procedure Rules in other areas of personal injury litigation.

The question appears to have second and third limbs, namely (i) whether the percentage of damages proposed is agreed, and (ii) whether the proposed discount for early resolution [10% built into the fixed element of the suggested fees] is agreed.

As to (i), it is impossible to comment on the proposed percentage uplift on damages without consideration of the fixed fee component as it is the combination of the fixed fee and the percentage of damages which should provide a reasonable fee for the scheme to work effectively and fairly. The introduction to question (4) specifically asks for comments on the suggested approaches but not the level of FRC. In those circumstances PIBA is unable to comment on the percentage proposed, save to say that it must be set at a level which, when combined with the fixed element, would permit proper but proportionate investigation, preparation and presentation of claims so that injured claimants retain (a) effective access to justice, and (b) equality of arms.

As to (ii), §4.12 of the consultation document suggests that a 10% reduction has been built into the fixed fee component to

“encourage early resolution” of claims. On that basis, a defendant who does not admit liability and/or does not seek to resolve a claim at an early stage would still benefit from a 10% saving irrespective of its conduct. PIBA can see no justification for the incorporation of a 10% reduction in the fixed fee element in all cases to “encourage” early resolution of claims. All that such a reduction does is place the claimant’s legal representatives under commercial pressure to resolve claims at an early stage, potentially prematurely and at an under-valuation. The existing rules already encourage early resolution of claims by early admissions of liability under the relevant protocol, and/or by effective use of Part 36 and Part 44 offers.

If early resolution of claims is to be incentivised then a more appropriate model is a percentage reduction in recoverable costs [say 10%] which only applies where early resolution, for example at the pre-issue stage, has actually been achieved.

Option 5: Another Proposal

Please explain why

Question 5: Expert Witness Costs

Yes No

Do you believe that there should be a maximum cap of £1,200 applied to recoverable expert fees for both defendant and claimant lawyers

NO

Please explain why

Expert evidence is an essential component of every clinical negligence claim. Many personal injury claims valued at £25,000 or less can be litigated with input from a single expert limited to the issue of condition and prognosis. In contrast, in every clinical negligence claim expert evidence will be required on (a) breach of duty, (b) causation, (c) extent of injury, and (c) condition and prognosis. There will often be a psychological component to the Claimant’s injury; further expert evidence on that issue will be required. Any proposal that restricts a party’s ability to obtain appropriate and essential expert evidence must be approached with caution.

In the light of Qualified One Way Costs Shifting [“QOCs”], any discussion about FRC is essentially a discussion about fixing the costs recovered by a successful

claimant. As a result, any cap on recoverable expert fees will limit the ability of the claimant to instruct a suitable expert; the defendant will not expect to recover its costs and therefore a maximum cap on “*recoverable*” fees will have little if any impact upon its ability to instruct any expert of its choice or upon the amount of work which it can instruct that expert to undertake. In any event, the defence of the action will be funded by the NHSLA, a relevant defence organisation or a private insurer, each of which will have sufficient funds to instruct an expert of its choice regardless of any fees cap. In contrast, the claimant and his advisers will be forced to instruct experts who are willing to work within any fixed cap or the claimant will have to surrender a proportion of his damages in order to meet the shortfall between the cap on expert fees and the actual costs incurred. Each option disadvantages the claimant; there is an obvious inequality of arms consequence.

Given that the admitted driver for the proposal to introduce fixed costs in clinical negligence litigation is to reduce costs, it is almost inevitable the cap on expert fees will be set at such a low level that very few, if any, respected experts will limit their fees to the level of the cap. That represents a further inequality of arms consequence, the defendant having unrestricted access to experts of its choice.

In terms of access to expert or quasi-expert evidence/advice, claimants are already at a significant disadvantage to defendants in clinical negligence litigation where defendants have ready access to (i) evidence/opinion from the treating clinicians/senior management within the relevant department, and (ii) advice/opinion from medically qualified staff within the NHSLA or relevant defence organisation. A claimant is entirely dependent upon obtaining independent expert advice in order to understand (a) whether he has a case at all, (b) what that case is potentially worth, and (c) whether it is worth pursuing.

All of the above addresses the principle of a fixed cap on expert fees. As to the proposed level, the question suggests a maximum cap of £1,200 for all expert fees. That would have to cover (a) a preliminary report, (b) a conference, (c) a final report following exchange of witness statements, (d) production of a joint statement, and (e) attendance at trial to give oral evidence. The combined experience of PIBA members is that it would be impossible to instruct someone who is a genuine expert, able to give a properly informed and considered opinion in a clinical negligence action, to undertake that work for those fees.

Finally, one has to consider the wider but unintended consequences of a cap on expert fees, particularly a cap set at a level which is intended to significantly reduce costs:

- There is a very real risk that genuine experts, i.e. senior clinicians with a wealth of experience and expertise, will leave the “*market place*” unwilling to work for such low fees.
- Claimants will be unable to pursue their claims without expert evidence and so there will be a continued demand for expert evidence.
- Individuals who could not be truly classed as genuine experts will fill that gap in the market.
- As a result, claimants will receive inferior advice from those individuals which will affect their prospects of success: good cases will slip through the net as the “*expert*” fails to identify relevant criticisms; alternatively, weak cases will be encouraged where the “*expert*” purports to identify criticisms or arguments supporting causation.
- Claimants with good cases are unable to pursue them as a result of poor expert evidence. Alternatively, claimants with weak cases are encouraged to pursue them as a result of poor expert evidence. The consequence of the latter is that their loss of trust in the healthcare provider is fueled and reinforced, and their hopes of a positive outcome are raised unfairly and inappropriately.
- Individual doctors, nurses and other healthcare professionals will be the subject of allegations and criticisms which are not supported by robust good quality expert evidence. That has both a personal and organizational impact.
- The commercial reality is that a cap on fees will encourage experts to spend significantly less time on their reports which is undesirable where fellow professionals may be the subject of public criticism based upon those reports.

Question 6: Single Joint Expert

Expert fees could be reduced and the parties assisted in establishing an agreed position on liability by the instruction of single joint experts on breach of duty, causation, condition and prognosis or all three. Should there be a presumption of a single joint expert and, if so, how would this operate?

There should be no presumption in favour of a single joint expert. The Civil Procedure Rules already require the Courts to limit expert evidence to that which is reasonably required [see CPR 35.1]. The Courts are already required to consider and do actively consider the possibility of a single joint expert being instructed to deal with a particular issue/issues [CRP 35.7]. No presumption is required for the Courts to properly exercise those powers.

Further, a presumption in favour of a single joint expert to comment on those issues in cases of this type would be simply unworkable in practice. A claimant will have to obtain expert evidence on breach of duty and causation in order to assess whether he has a viable claim *at all*. That is done well before the letter of claim stage. How could a defendant be invited to participate in the joint instruction of an expert, attracting a costs liability, at a stage where it is not known whether there is a viable claim at all? Further, if a single joint expert is instructed then, absent a change to the Civil Procedure Rules or the authorities, neither party could have a discussion with that expert in the absence of the other party without that other party's permission. Both parties would be disadvantaged as a result.

At present a claimant will instruct an expert [or experts] on breach of duty and causation before sending the letter of claim. It is impossible for the claimant to present a proper reasoned analysis of his case in a letter of claim without the benefit of independent expert evidence. Unless the defendant is willing to accept that expert as a single joint expert then the cost of additional expert evidence will be incurred: either the cost of instructing a new expert as a single joint expert, alternatively the defendant instructing an expert of its choice. The former is problematic and is unlikely to be more cost effective than the latter.

It must be recognized that at present solicitors specialising in this type of work accept instructions from claimants where there *appears* to be a potentially viable claim for compensation which ultimately proves not to be the case once independent expert evidence is obtained. Many cases are filtered out by claimant solicitors as having insufficient prospects of success. Those cases are filtered out without the defendant incurring any or any significant costs responding to them. A shift towards a presumption in favour of jointly instructing an expert at an early stage will result in defendants being involved and incurring costs in many more cases than they are at present. PIBA is unable to identify a sensible justification for such a shift.

Question 7: Early Exchange of Evidence

Do you agree with the concept of an early exchange of evidence?

PIBA agrees with the principle of early exchange of evidence which is to be encouraged in all cases. However, an obligation or requirement for the claimant to unilaterally disclose his evidence at an early stage [i.e. pre-action] disadvantages the claimant. Our reading of the consultation document and the Draft Protocol is that they envisage the claimant disclosing his evidence at the

letter of claim stage before the defendant has even provided a response.

The Draft Protocol [Annex D] envisages that the defendant will not be obliged to provide a reasoned response unless the claimant includes his expert evidence with his letter of claim [see §8.15(f)]. The claimant is therefore effectively obliged to disclose his expert evidence with the letter of claim; in default he will not be entitled to a reasoned response and will be vulnerable to criticism and denial/reduction in his costs for failure to comply with the protocol. Conversely, it is envisaged that the defendant will only have to disclose such expert evidence *as it has obtained* when providing the reasoned response; the potential sanction for failure to do so is that the court *may* refuse to grant permission to the defendant to rely upon expert evidence where it has failed to disclose its expert evidence when sending the reasoned response [see §8.27(1)].

Consideration has to be given to the costs implication of obliging the claimant to disclosing his report with the letter of claim. Such a report will have to be finalised and perfected so that it is suitable for disclosure. It will then have to be revisited and refined once the defendant's case on (a) the facts, and (b) the allegations is known. There will be an inevitable increase in costs which is contrary to the main stated driver for the DOH's proposed reforms.

The reality is that in the majority of claims valued at £25,000, the reasoned response is based upon the views of the clinicians involved and/or the opinions of senior staff within the relevant department; they are not based upon independent expert evidence. It would therefore be open to a defendant to legitimately respond to the letter of claim without disclosing its expert evidence as none had been obtained at that stage. If the case progresses to litigation and the Court is required to consider granting permission to the defendant to rely upon expert evidence, it will be open to the defendant to argue [with a very real prospect of success] that it did not obtain expert evidence at the outset as it considered it disproportionate to do so *at that stage*, that there was no breach of the protocol as it had no expert evidence to disclose, but that it now requires expert evidence as it would be unfair for it to be denied the opportunity to obtain expert evidence having taken a reasonable and proportionate response at the pre-issue stage. The reality is that the Protocol as drafted would compel claimants to unilaterally disclose their expert evidence at a stage when the expert did not know what the defendant's position was in relation to the facts.

Early exchange of evidence, in particular expert evidence, is to be encouraged. However, it should be (a) mutual exchange, and (b) undertaken once the parties competing positions on the facts have been made clear so that the experts are

able to take that into account when setting out their opinions.

PIBA suggests that consideration should be given to mutual exchange of expert evidence following service of the reasoned response but before proceedings are issued. Consideration should also be given to obliging a defendant to obtain independent expert evidence at the pre-issue stage which is then exchanged with the claimant before proceedings are issued.

If no, do you have any other ideas to encourage parties to come to an early conclusion about breach of duty and causation?

See above. Consideration should be given to requiring a defendant to obtain independent expert evidence before providing a reasoned response. At present, many reasoned responses do not reflect the views of an independent expert but represent the views of those directly involved in the claimant's care [often those who are the subject of the allegations] who are not best placed to comment or respond on issues of breach of duty or causation. Early input from an independent expert instructed by the defendant would encourage early resolution of claims (a) by promoting early admissions where the expert identifies a causative breach of duty, alternatively (b) by providing a robust well reasoned analysis of the case demonstrating that there was no breach of duty or causation, which would lead claimants to reconsider their prospects of success with a significant number of unmeritorious cases abandoned at that stage without issuing proceedings. An alternative is to consider a meaningful sanction [for example increase in damages or costs as per the Part 36 provisions] in the event that the defendant's case on liability substantially changes and/or there is a late admission of liability where independent expert evidence is not obtained until after proceedings have been issued.

Please Explain Why

Question 8: Draft Protocol and Rules

Do you agree with the proposals in relation to	Yes	No
Trial Costs (paragraph 5.6)		<u>NO</u>

On the one hand the consultation document proposes extending FRC into the Multi-Track, by definition capturing cases of greater complexity and trials of longer duration, yet on the other hand proposes adopting Fast-Track trial fees which are intended for straightforward cases which can be concluded in a day without

expert evidence. The inconsistency and absurdity of such a proposal is obvious.

Assuming that FRC are limited to Fast-Track trials, as they should be, then the trial advocacy fee should be ring fenced and payable to the advocate, as is the case at present. The question which then arises is whether trial costs should be the same as that provided for other Fast-Track trials under CPR 45.38. PIBA's position is that trial costs should be set at a higher level in clinical negligence claims to reflect (a) the complexity of the case, (b) the fact that in the overwhelming majority of cases cross-examination of experts and professional witnesses will be required, and (c) as a reflection of the complexity of the case, more senior practitioners [solicitor advocates and counsel] will be instructed.

Setting the trial fee at a level which does not fairly or reasonably reflect the amount of preparation required for these cases will result in claimants having to instruct inexperienced junior advocates whereas defendants will be in a position to instruct senior advocates of their choice without the pressure of fixed fee constraints.

Anticipating the argument that solicitors and counsel representing defendants already charge less than those representing claimants, that arrangement reflects the commercial incentive of agreeing to charge at a reduced rate for the individual case/piece of work in return for the reward of receiving large numbers of cases/instructions with the volume of guaranteed work more than compensating for the reduction in charges in an individual case.

The reality is that the ability of a defendant to instruct experienced advocates specialising in this type of work will be unaffected by fixing trial costs at a low level; in contrast claimants will be adversely affected.

Multiple Claimants YES

Exit points YES

Technical Exemptions (paragraph 6.9) YES

Where the number of experts reasonably required by both sides on issues of breach and causation exceeds a total of two per NO

party. (paragraph 6.11)

PIBA's primary position is that where the number of experts reasonably required by both sides is more than one then the claim should not be subject to FRC.

If PIBA's primary position is rejected then it agrees that where the number of experts reasonably required by both sides is more than two then the claim should not be subject to FRC.

Child Fatalities (paragraph 6.12)

YES

Interim Applications

The consultation document does not include a proposal as to how to address interim applications.

PIBA accepts that if and insofar as FRC applies to clinical negligence claims allocated to the Fast-Track then a provision similar to CPR 45.29H should apply, i.e. a provision which dictates the level of costs recoverable following an interim application.

PIBA does not accept that the costs of interim applications for Multi-Track claims should be fixed. Those costs are appropriately dealt with by the Court on a case by case basis. The Court is able to exercise control over those costs by (a) costs budgeting in Multi-Track cases where the need for interim applications is actively considered and addressed within the budgeting exercise, and, perhaps more significantly, (b) robust summary assessment of costs at the conclusion of the hearing.

London Weighting

YES

Please Explain Why

Question 9: Behavioural Change

Yes No

Are there any further incentives or mechanisms that could be included in the Civil Procedure Rules or Pre-Action Protocol to encourage less adversarial behaviours on the part of all parties involved in lower value clinical negligence claims, for example use of an Alternative Dispute Resolution process (ADR)? This would include both defendant and the claimant lawyers, defence

organisations including NHS LA, the professionals and/or the organisation involved.

See response to question (7).

Please explain why

Question 10: Evidence

Please provide any further data or evidence that you think would assist consideration of the proposal, particularly for other than NHS provision. In particular, we are interested to gather data from private, not- for profit and mutual organisations delivering healthcare. Please identify your organisation in your response. We would be interested in hearing views on: the scale of expected savings if Fixed Recoverable Costs outlined is introduced; the expected growth in the number of claims received and settled over the next 10 years to help in modelling the impact of the proposals; any details on the number and size of legal firms involved in clinical negligence (primarily as claimant lawyers), any information on the likely administrative savings and set up costs due to introduction of Fixed Recoverable Costs. Please indicate whether your organisation would be willing to work with DH in providing more details on the impact for future IA analysis. This would be provided in confidence and anonymised in any future analysis.

Please provide evidence.

Question 11: Equalities, Health Inequalities and Families

The Government has prepared an initial assessment of the impact of Fixed Recoverable Costs on equalities, health inequalities and families. This assessment will be updated as a result of the consultation. Please give your view on the impact of these proposals on: Age; Gender; Disability; Race; Religion or belief; Sexual orientation; Pregnancy and maternity; Carers; Health Inequalities and Families

Please provide evidence.

Appendix:

**PIBA submissions dated
20.1.17 on Fixed Recoverable
Costs in advance of Lord
Justice Jackson's review**



PERSONAL INJURIES BAR ASSOCIATION

Honorary President: The Honourable Mr Justice Langstaff
Honorary Vice Presidents: The Rt Hon Dame Janet Smith, DBE
The Rt Hon Sir Philip Otton
The Rt Hon Sir Roy Beldam
Sir Robert Nelson

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PIBA'S SUBMISSIONS ON THE PROPOSAL TO EXTEND FIXED RECOVERABLE COSTS IN ADVANCE OF LORD JUSTICE JACKSON'S REVIEW

PIBA is one of the largest Specialist Bar Associations, with 1480 members who undertake the full range of personal injury work, for claimants and defendants.

SUMMARY OF PIBA'S POSITION

1. PIBA's position is that:
 - (a) The scheme of Fixed Recoverable Costs ('FRC'), which already embraces most all Fast Track personal injury cases, should be extended horizontally so that all Fast Track personal injury cases are subject to a FRC regime.
 - (b) FRC should not apply to any personal injury case allocated to the Multi-Track. There should be no vertical extension of the scheme of FRC in personal injury litigation.

2. Personal injury¹ litigation was treated as a special case in respect of costs by Lord Justice Jackson in his 2009 Review of Civil Litigation Costs.² PIBA would invite Lord Justice Jackson to continue to treat personal injury as a special case in what is a continuation of, or extension to, the review he has already conducted.
3. The particular features of personal injury litigation which together distinguish it from other litigation are that:
 - (a) All claimants are individuals.
 - (b) Almost without exception, all defendants are either governmental bodies or insurers.
 - (c) The claimants have been injured. They are, by definition, vulnerable and start from a position of weakness. In claims valued between £25,000 and £250,000, they may well also be disabled within the terms of the Equality Act 2010. Claims of this scale matter to them.
 - (d) All claimants, with a claim of merit, can expect to obtain legal representation. This will mostly be by way of a conditional fee agreement ('CFA'), much less often pursuant to before the event ('BTE') insurance. There are no litigants in person to speak of in personal injury litigation.³
 - (e) In accordance with Lord Justice Jackson's 2009 recommendations, claimants in personal injury actions have been singled out for special treatment because of the unique nature of their claims (for bodily injury) and the limited financial circumstances of most PI claimants. In order to obviate the need for such claimants to purchase expensive ATE premiums, the QOCS system was devised. In order to ensure that the damages recovered by claimants was not eroded excessively by lawyers' fees, a cap was placed on the recoverability of success fees and the level of damages for pain, suffering and loss of amenity increased by 10%; these measures are unique to personal injury claims.
 - (f) It is not possible to predict the value of the claimant's claim at the outset. The severity of an injury and its (actual and financial) effect on a claimant cannot be measured save with the benefit of expert evidence and after a period of time, which will vary from claimant to claimant, usually measured in terms of years, not months.

¹ By "personal injury" PIBA means any claim for damages which includes a claim for damages for personal injuries, including arising out of clinical negligence, or a claim arising out of death.

² And by Lord Justice Briggs in his 2016 Civil Courts Structure Review.

³ Outside of the Small Claims Track.

- (g) The amount of time and cost put into a given claimant's claim is not a function of the quantum of damages recovered. Each case is different, turning as it will on the specific features of the injury and the idiosyncrasies of the claimant's life and the effect the injury has on him.
 - (h) There is now a longstanding and effective culture of seeking to resolve personal injury litigation consensually and without recourse to litigation.
4. Accordingly, under the current regime for Multi-Track cases, the twin arms of the right to a court are achieved for both sides to the litigation:
- (a) Access to justice: this is achieved under the current regime for all claimants. The CFA regime, coupled with QOCS, enables all claimants to litigate claims with merit. Defendants also enjoy access to justice under the special regime of QOCS which struck a new balance welcomed by the insurance industry between recovery of costs when successful and the quantum of costs payable when unsuccessful.
 - (b) Equality of arms: there is a level playing field between claimants and defendants. Claimant lawyers will incur differing amounts of costs on different cases, each tailored to the individual claim. Those costs will only be recoverable if they are reasonable and proportionate to that claim. If the claim is issued and allocated, costs budgeting provides a bespoke fixed costs regime where costs are payable on the standard basis, subject to one or other party contending on assessment that the budget should not be followed.

Defendant lawyers are entitled to incur as high a level of fees as they wish. There is no bar in place. They will self-regulate in the knowledge that, pursuant to QOCS, they are unlikely to recover their costs.
5. There is no need to introduce FRC into Multi-Track personal injury litigation. The current regime works effectively. Indeed, PIBA would go further and submit that reform will be positively damaging to claimants, to defendants, to the courts and to the quality of justice provided. PIBA wish to highlight the following under a FRC scheme:
- (a) Setting FRC: If FRC are introduced into Multi-Track cases, it will presumably be by reference to the amount recovered. But, in cases over the proposed range of £25,000 to £250,000, there is nothing approaching a linear relationship between damages recovered and costs incurred. There is no standard amount of work incurred in a case for which damages obtained are £100,000. Nor can it be predicted at the outset how much work will need to be incurred in a case which, very

likely 2-4 years later, settles for that figure. A FRC scheme will not provide the defendant insurer with any certainty as to the amount of recoverable costs in a case until it actually settles for a given amount. Indeed, a claimant who beats his own Part 36 offer will still be able to recover costs outside of the FRC; as such costs will not be budgeted, the defendant will not even know how much these costs will be until assessment at the end of the case.

- (b) Reducing access to justice: If FRC are introduced, inevitably they will not reflect the costs that would currently be incurred and recovered in some cases. The effect is that claimant solicitors, when it becomes apparent that the case is one which will require high levels of work, may refuse to take the case on a CFA. Or they may be encouraged to accelerate cases through the FRC stages whilst incurring the minimum spend. FRC put the costs in the hands of solicitors, meaning that counsel will be used sparingly.
- (c) An unlevel playing field: Whilst claimant solicitors will, in certain cases, be required to limit the work they can put into a given case (if they are to recover those costs from the defendant), the defendant remains at liberty to incur as much (or little) as it wishes. The quality of investigation, preparation, advice and advocacy is skewed in favour of the defendant.
- (d) Consequences:
 - i. It will be open to claimant solicitors to charge claimants more for their services than can be recovered inter partes. So claimants, who have through no fault of their own, complex claims will have partially to fund them out of their damages beyond the level set by LASPO. That is patently unfair on those claimants.
 - ii. Where claimants are unwilling to pay beyond the inter partes recovery levels, defendants will secure a key advantage and seek to apply it to encourage claimant solicitors to drop the litigation. This risk has materialised in Fast Track cases which are subject to a FRC regime.
 - iii. Where claimant solicitors are unwilling to take a case on, the representation vacuum will be filled by claims management companies or the claimants will be forced to become litigants in person ('LiPs').
 - iv. The work available to the junior Bar will inevitably reduce, thereby impacting upon progress made towards building a socially diverse profession. Barristers add value to litigation, in terms of weeding out weak cases,

promoting settlement by accurate assessment, presenting cases effectively and so forth.

6. PIBA would invite Lord Justice Jackson (and the Government) to assess the impact of the major reforms implemented in personal injury litigation, in particular through LASPO, before proceeding with any further reform in this already highly regulated area of litigation. The impact of any proposed reform, affecting as it will disabled people, should be carefully evaluated. Any vertical extension should exclude claims brought by children for the same reasons that claims brought by children are currently excluded from the requirements as to costs budgeting.

THE CURRENT COSTS REGIME FOR MULTI-TRACK CASES: HOW AND WHY IT WORKS

7. Claimants need representation: Claimants with personal injury claims worth over £25,000 are fairly bound to be under physical, financial or psychological distress. They have sustained a personal injury which will have affected their daily lives. Real issues are likely to arise in terms of losing income, needing to pay for medical treatment, having to pay the mortgage. At the same time, they are not well placed to take the appropriate steps to protect themselves given that:
 - (a) They have been injured.
 - (b) Personal injury litigation always requires expert evidence. In a case ultimately found to be worth £25,000 to £250,000, there may well be a considerable number of experts involved.
 - (c) Personal injury litigation benefits from the skilled expertise of lawyers. Lord Justice Briggs recognised this even when considering whether low value personal injury litigation should fall within his proposed Online Court.
8. Claimants obtain representation: There is a diminished pool of solicitors in light of the various reforms in personal injury litigation. Nevertheless, a claimant who has a claim of merit can be assured that he will obtain legal representation. This will almost always be via a CFA, sometimes BTE insurance. The claimant's solicitor is prepared to take the

case on because the solicitor knows that reasonable and proportionate costs (whatever that amount subsequently proves to be) are recoverable in the event the litigation is successful. That is a workable business model.

9. Front-loading of costs: In a serious personal injury, a good deal of work will have to be done in the early stages. The cost of this work has traditionally been difficult to control. However, since 2013, the court's ability to disallow costs on the basis that they were disproportionate, despite being reasonably and necessarily incurred, has provided real protection to insurers and a disincentive to claimant lawyers to engage in 'costs building'.
10. Furthermore, the amount of costs incurred prior to costs budgeting is a matter the court will take into account when setting a budget, sometimes with dramatic consequences: see, for instance, *Redfern v Corby Borough Council* [2014] EWHC 4526 (QB).
11. Settling claim without litigation: For many years, the courts have actively encouraged parties to cooperate and to attempt to resolve disputes without the need to attend court. In personal injury litigation, this has worked. There are Pre-Action protocols and there is a rehabilitation code for personal injury claims which are designed to and succeed in leading to many cases being resolved without resort at all to litigation. There is no added incentive for a claimant solicitor to litigate as the costs rules are the same whether the claim is issued or not.
12. In a Multi-Track claim, the expectation is that the claim will take over 2 years to settle even assuming collaboration between the parties. This is a product of the claimant being seriously injured. Generally speaking, a firm prognosis cannot be given for at least 2 years. Very often, it will take longer, especially if the claimant is due to have further surgery. Claims simply cannot be valued accurately at the outset.
13. Issuing claim and proceeding to first CCMC: A claimant will generally issue early only if liability is in issue or the defendant is being obstructive, for instance in relation to providing an interim payment. Otherwise, the better approach is to wait until the prognosis is reasonably clear. When a claim is issued, at this stage, the court obtains key power over the case by way of the Costs and Case Management Conference ("CCMC"). At this point, the case is likely to be sufficiently developed that the court can make an assessment as to: (i) whether the claim should be allocated to the Multi-Track; (b) if so, the likely future costs for this particular claim.

14. Costs budgeting: The innovation of costs budgeting enables the court, at the earliest stage it is involved, to control costs expenditure prospectively. This provides the defendant with a degree of certainty as to the costs that can be incurred going forward. Such an assessment can only be made once the case is sufficiently developed that the court can make a prediction of appropriate costs spend in the given case. In the event the claimant issued proceedings very soon after the accident (for instance to seek to establish liability and so obtain an interim payment), then the court will limit its costs budgeting to the issue of liability.
15. The costs budgeting process has now bedded in. District Judges and Masters are very much more efficient at making costs budgets than at the outset – and lawyers more skilled at agreeing them. The result is that CCMCs are now routinely being conducted in 45 minute or 1 hour hearings. Junior counsel almost always attend without additional costs lawyers. The costs associated with budgeting, additional to the cost of attending a CMC at which the court will allocate and provide directions for the ongoing conduct of the litigation, are now modest.
16. PIBA fully supports the introduction of costs budgeting as a key component of the Jackson reforms. It is so successful because it manages to combine clarity for the parties (not just the defendant) as to potential costs liability in a case with an assessment of the reasonable and proportionate costs that should be incurred in that individual case. This can be achieved because the court is making an assessment in relation to the facts of a specific claimant's case and at a time when the claimant's condition resulting from his injury is sufficiently developed to enable it to do so and when the defendant's approach to the claim is also apparent.
17. Detailed assessment: The role of detailed assessment is markedly reduced in the light of costs budgeting. In the ordinary way, costs should be capable of agreement at the end of litigation.
18. The defendant can seek to reduce costs on the basis they were not reasonably incurred or that, even if reasonably incurred, they are not proportionate. This is a powerful tool in the defendant's armoury. There is still a role for detailed assessment, not least where the claim is not litigated.

19. Overall costs levels have reduced significantly: The abolition of recovery of the CFA uplift and ATE premium by LASPO has resulted in a huge reduction in costs paid by the defendant insurer. Any debate in relation to the quantum of costs should proceed only by reference to data obtained for post-LASPO cases.
20. To PIBA's knowledge, no attempt has been made to quantify these savings. In PIBA's submission, this should happen before any further steps are taken to impose further reform in this highly regulated area of litigation. So, too, should evidence be obtained to assess the ongoing frequency and costs of detailed assessments and the additional costs now (not initially) incurred by costs budgeting.

FRC SCHEME IN FAST TRACK CASES: WHAT HAS HAPPENED, WHAT CAN BE LEARNED AND HOW IT SHOULD BE EXTENDED

21. Current FRC schemes: The vast majority of personal injury litigation is road traffic and almost all road traffic litigation is for damages below £25,000. The RTA Protocol captures all this litigation.⁴ The RTA Protocol has fixed costs; and where a case comes out of the RTA Protocol⁵ then section IIIA of CPR 45 provides a full fixed costs regime.
22. In these cases, there will be variations in the amount that would otherwise actually be spent in litigating the claims but the variations are modest. If the case has an issue, such as an allegation of fraud, which means the trial will last more than 1 day, then the case will likely be allocated to the Multi Track. In those circumstances, the FRC regime no longer applies: see *Qader v Esure Services Ltd* [2016] EWCA Civ 1109.
23. In this way, the risk of obvious injustice – by fixing the claimant with a set amount of costs in a case in which substantial costs need to be incurred – is largely avoided. Variations in the remaining basket of cases are tolerable – claimants' solicitors handling large volumes of cases may be overpaid for work in one case, underpaid in another but should expect to come out roughly even on a 'swings and roundabouts' basis.

⁴ Also, the EL and PL Protocols capture employers' liability and public liability cases respectively.

⁵ For instance, because liability is in issue.

24. In *Qader* the Court of Appeal recognised, as the Government had done, that this approach did not apply where a case had been deemed sufficiently complex to move out of the Fast Track and into the Multi Track, even where its value was considerably below £25,000.
25. If the court cannot permit a case to come out of the FRC regime in this way, then the temptation is for the claimant solicitor, faced with an allegation of fraud which will inevitably lead to substantial work being involved in pursuing the claim, to recommend settlement at under-value. It is a temptation also faced by the claimant, who may otherwise be expected to pay for his solicitors' costs insofar as not recovered from the defendant insurer. This is a very real problem in those cases where fraud is alleged which are not allocated by District Judges to the Multi Track.
26. PIBA's experience is also that counsel's involvement in Fast Track cases has dropped substantially. It is increasingly rare for claimant's counsel to be involved other than at trial – and surely no coincidence that the FRC scheme provides for an advocate's fee. Defendant counsel are used sparingly but more than claimant's counsel, for instance in Small Claims Track cases where fraud is alleged.
27. PIBA draws a clear link between a rule under which the claimant's solicitor is paid a fixed sum of money, regardless of whether the solicitor involves counsel, and the diminishing use of counsel in FRC cases. One consequence of handing financial control to solicitors has been that it is all but unheard of for claimants' counsel to be offered, as part of their CFA, a share of the success fee. 0% success fees for counsel are now the norm. Another is that a problem emerged of solicitors seeking to pay counsel a lower brief fee than that fixed for the trial advocate in the Fast Track rules.
28. In the RTA, EL and PL cases operating under the current FRC regimes, the relative simplicity of these cases allows the courts to manage them by way of standard directions leading to a trial of no more than 1 day within a period of 26 weeks from issue. The position is quite different from Multi Track cases which require bespoke case management and, in just the same way, bespoke fixed costs.
29. PIBA could mount a proper argument that they should not be extended to other areas of Fast Track personal injury litigation given they often involve difficult areas meriting specialist advice, such as Noise Induced Hearing Loss ('NIHL') cases, clinical negligence

cases and travel cases. However, PIBA recognises the drive for change and, therefore, supports the extension of FRC into all personal injury litigation which reaches the Fast Track; the level of recoverable fees would not necessarily be the same across different areas of personal injury. The case, by virtue of its allocation to the Fast Track, cannot have the level of complexity or difficulty which would mandate bespoke fixed costs; a FRC regime is tolerable even in those cases.

NO JUSTIFICATION FOR EXTENDING FRC INTO MULTI TRACK PERSONAL INJURY CASES

30. No issue over access to justice under current regime: The current regime works. Claimants enjoy access to a solicitor in every case with merit. The claimants pay a proportion of their damages, if successful, to their solicitor by way of a success fee; they have 'skin in the game' and so an interest in the fees. At the same time, in practical terms, claimants are invariably prepared to allow the solicitors to run the litigation in the knowledge that the recoverable success fee element has been capped.
31. Claimants also enjoy access to the junior Bar. So long as the costs of counsel are reasonable and proportionate, they should be recoverable. They will be fixed, along with all other costs, at the CCMC.
32. No issue over equality of arms under current regime: As matters stand, the claimant can expect to enjoy a proper amount of legal service, controlled by the twin tests of reasonableness and proportionality. The defendant insurer or governmental body can incur as much or little as it chooses in the knowledge that, in the vast majority of cases, its costs will be irrecoverable. In fact, the defendant bodies, by virtue of their status as repeat defendants, are invariably able to and do impose highly competitive rates on the lawyers undertaking their work. The Government is a good example of this: counsel on the Treasury panel are paid at a severely low level, well below the market rate.
33. No known issue of excessive costs being incurred in assessing costs because fixed costs regime has not been imposed: PIBA is unaware of any data which suggests that, in light of costs budgeting, an excessive amount of costs is being incurred in assessing costs.

The costs budgeting process clearly required time for practitioners and judges to adjust; this has now happened.

34. No known issue of excessive costs being incurred in Multi Track personal injury litigation: The court now has powerful tools by which to control costs: costs budgeting and the twin tests of reasonableness and proportionality. No costs bill in a Multi Track case up to £250,000 can (nor should) escape these controls. In those circumstances, PIBA contends that there would have to be clear evidence that, in the face of this, costs were nevertheless excessive before reform by way of FRC should even be considered. Even then, the next step would be to understand how the costs are remaining excessive – with proper costs budgeting and the application of the proportionality test, this simply should not happen. Any identified problem should be met with the least invasive response – wholesale FRC is not that.
35. If there really is a concern that Multi Track personal injury cases are being given a ‘Rolls Royce’ service, then the promoter of reform should be clear in saying that a less effective service is all an injured claimant merits – and in circumstances where the defendant remains entitled to provide itself with a ‘Rolls Royce’ service. In any event, the solution – if this is deemed to be a problem – is surely for the courts to manage the costs incurred in such litigation through costs budgeting and assessment.
36. What is the stated justification for extending FRC into Multi Track personal injury cases? PIBA asks this question because it is not at all obvious to PIBA what it can be. Lord Justice Jackson is respectfully invited to consider whether there is any evidential basis for interfering in the newly established regime by way of a FRC scheme at all. To PIBA, there is none.

THE DAMAGING EFFECTS OF A FRC REGIME ON MULTI TRACK PERSONAL INJURY CASES

37. ‘Swings and roundabout’s analogy not appropriate: In Multi Track cases, the progress of a claim is as unpredictable as the human being who lies at the heart of it. A claim could resolve for £60,000 because: an elderly client has multiple, serious orthopaedic injuries

but little financial loss; an employee suffers stress at work, continues to be employed but is at risk of losing his job at some point in the future; a middle aged person with a lengthy history of mental health problems develops chronic pain and is subject to covert surveillance footage; a young claimant has a traumatic brain injury with symptoms which largely settle after 2-4 years; delay in diagnosing cancer leads to early death and a claim under the Law Reform Act as well as the Fatal Accidents Act; cases with a higher value which settle for a lower sum to reflect contributory negligence, risks of liability and/or causation; and so on.

38. Even when seeking to categorise the case – for instance as a chronic pain case or a stress at work case – the variations between cases are legion. In some cases there will be a need for extensive study of pre-accident and post accident documentation; in others, there will be none.
39. What can be said with a high degree of certainty is that different cases ultimately recovering the same amount of money are most unlikely to need the same amount of costs to litigate. Nor can the cases be said to revolve around a common level of costs such that there is a ‘swings and roundabouts’ element for the claimant’s solicitors. Multi Track cases are not the norm: Fast Track cases are. Where the cases are allocated to the Multi Track, the cases cannot be characterised as formulaic or straightforward – this is precisely because they relate to injuries suffered by a person, which injuries are not static at the point of accident. Furthermore, some cases, such as chronic pain cases, will probably become uneconomic for claimant solicitors to run at all under a FRC scheme.
40. FRC regime will lead to less work being invested in some cases than currently occurs: PIBA cannot foresee a FRC scheme being implemented which pays claimant solicitors an amount equalling the highest amount they can recover in any particular claim. It follows, therefore, that the amount will be lower than they can expect currently to recover for at least some of the cases they run. Where they are fixed with a certain amount of costs, which is insufficient to enable them to investigate and run these cases, there is a problem. Either the case is simply not going to be as well prepared or the claimant is going to have to invest more of his damages into pursuing his claim.
41. If it is the former, then the legitimate aim behind the imposition of FRC must be a strong one. Yet PIBA cannot identify one at all. If it is the latter, then first the balance

identified by Lord Justice Jackson when setting the recoverable success fee is being altered in a way detrimental to the claimant. And secondly, the risk of a claimant accepting an under-settlement of his claim is substantially enhanced.

42. The involvement of the Bar will reduce: This is inevitable if a fixed pot of costs is paid to claimant's solicitors whether or not counsel is involved. The loss is not just to the Bar. PIBA believes that junior barristers provide an invaluable service to claimants and defendants alike and to the court in seeking to resolve accurately personal injury claims, if possible without using up court time and resources.
43. Access to justice will be impeded: As set out above, a claimant's opportunity to obtain legal representation is diminished if the claimant solicitor is conscious that more work needs to be done on a case than can be recovered on an inter partes basis. The temptation for claimant solicitors will be to concentrate on those cases deemed to be straightforward.
44. If that happens, a further market will open up for unregulated claims management firms. This will be an unintended but very damaging consequence of the proposed reform. Inevitably the number of LiPs will also increase with all the concomitant expense to the court system that brings with it.
45. Cases will be managed with an eye to maximising costs recovery: Where a claimant solicitor is paid according to the steps taken in litigation, the temptation clearly is to rush through those costs bearing steps. The draw is pursuit of litigation not settlement or resolution. The incentive to undertake all the necessary steps in the preparation of the case is reduced; after all, the same fee will be payable regardless.
46. And there will be an inequality of arms: Claimants under a FRC scheme can expect to enjoy limited services from a solicitor (and almost none from a barrister) in a case deemed appropriate to take on at all. The amount of work that the solicitor will be prepared to do (or the claimant will have to fund privately) will be set in advance by the FRC rules even though, at the outset, neither the amount of work needed nor the fee likely to be recovered can be predicted. These limitations apply only to the claimant; the defendant will continue to enjoy the ability to obtain full legal representation and can apply this advantage by increasing costs that the claimant has to incur so as to pressurise the claimant into under settlement.

CONCLUSION

47. PIBA is very troubled by the proposal for wholesale reform of costs in Multi Track cases and asks that consideration is given, for the reasons set out above, to excluding personal injury litigation from this proposal.

20 January 2017

Robert Weir QC, Chair of PIBA

Darryl Allen QC, Vice Chair of PIBA

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