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Vice-chair:	Emily Formby QC, 39 Essex Chambers, DX London/Chancery Lane 298	Emily.formbyqc@39essex.com
Secretary:	Richard Wilkinson, Temple Garden Chambers, DX 382 London/Chancery Lane	rwilkinson@tgchambers.com
Treasurer:	Nigel Spencer-Ley, Farrar's Building, DX406 London/Chancery Lane	nsley@farrarsbuilding.co.uk

PIBA response to the Ministry of Justice's consultation on vulnerability and Fixed Recoverable Costs ["FRC"]

1. PIBA is one of the largest civil specialist bar associations with about 1,450 members. PIBA's members practise in personal injury law, including industrial disease and clinical negligence cases. They represent both claimants and defendants.

2. Many PIBA members have considerable experience of litigation in the civil courts involving vulnerable witnesses and parties, such as those who lack capacity, are close to the borderline of capacity or whose capacity fluctuates, by reason of brain or psychiatric injury or illness, neurodiverse conditions which are prevalent, wide-ranging and cause a host of varying needs, age or other disability. Other relevant categories of vulnerable party and witness represented and encountered by PIBA members in their work include the bereaved, victims of abuse and other crimes. Many PIBA members also sit in a variety of part-time judicial and tribunal roles at all levels, case managing, trying and determining cases across the full breadth of the civil and other jurisdictions.

3. Our observations on the consultation and response to the five questions posed are as follows:

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

4. No. PIBA agrees that vulnerability should be addressed within FRC, but does not agree that the Government's proposal is the right way to address it.
5. PIBA members deal with vulnerable parties and witnesses at all levels of litigation including cases restricted to FRC. The current tension between dealing with the needs of vulnerable parties and witnesses and the limited FRC often means that Counsel is first aware of vulnerability issues at trial. In reality this often leads to adjournments for a variety of reasons – whether there are capacity issues, or borderline capacity issues, which need to be determined or language difficulties meaning that translators have not been arranged or witness statements not properly prepared. Reform to FRC to take into account costs arising from vulnerability issues is welcomed, however it needs to tie in with the requirements imposed on parties and the Court in respect of specific vulnerability issues which are outlined below.

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

6. PIBA proposes:
   6.1. Amendment to CPR 26.8 and Directions Questionnaires requiring the Court to consider the vulnerability of a party or witness when considering allocation to track. Practice Direction 1A paragraph 6 now imposes a duty on the Court and the parties to identify the vulnerability of parties or witnesses at the earliest possible stage. The Directions Questionnaires should be amended so that the parties can provide that information to the Court to enable Practice Direction 1A to be complied with. A party's vulnerability may have such consequences that it is appropriate to allocate the matter to the multi-track instead.
   6.2. Recovery of additional costs due to vulnerability to be subject to the exercise of the court's discretion rather than a fixed threshold, or alternatively a lower percentage than 20%.

6.3. Recovery of specific additional disbursements caused by the vulnerability;

6.4. The potential increase in costs and disbursements due to the vulnerability of a party or witness being extended to the existing FRC schemes.

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

7. Yes.

Timing and Discretion

8. PIBA submits that recoverability of additional costs due to vulnerability to be subject to the exercise of the court's discretion at any stage rather than subject to meeting a fixed threshold at the end of proceedings. As Practice Direction 1A sets out, the parties have a duty to raise issues arising out of vulnerability with the Court at the earliest opportunity. Therefore it should be after the amended Directions Questionnaires and at a case management stage where vulnerability issues are identified so that appropriate directions can be given. The case managing judge can exercise their discretion at that stage whether to disapply FRC due to vulnerability. If so, this will give certainty to the parties at an earlier stage than at the conclusion of proceedings and streamlines matters by avoiding later applications for additional costs. However the discretion should also be able to be exercised at the end of proceedings.

9. Alternatively, if the MoJ decides to retain a fixed threshold, PIBA submits that it should be a lower threshold than the current 20% for exceptional circumstances. In practice, PIBA is aware of only a handful of cases that have successfully used the exceptional circumstances escape route. This indicates that the current 20% threshold is too high. In addition, as vulnerability is an equality issue PIBA submits that the threshold should be lowered to 10%.

Exceptional circumstances separate from vulnerability?

10. It appears to be anticipated that the opportunity to claim additional costs because of a party or a witness' vulnerability should apply separately and in addition to any provisions in the extended FRC regime which will allow for a claim for additional costs in the circumstances of "exceptional circumstances".

11. If so, it is not clear what would happen in a case involving exceptional circumstances (not due to vulnerability) **and** a separate issue of vulnerability if both are kept with a 20% threshold. Does the party claiming costs overcome the 20% minimum threshold on both issues combined or does that party have to prove 20% additional costs in respect of each issue? PIBA would suggest that it should be 20% on both issues combined if a 20% threshold for both is retained.

Consequences of not achieving additional costs

12. The current disincentives for claiming additional costs due to exceptional circumstances are that if the application fails, the applying party either does not recover its costs of the application or may have to pay the responding party's costs.

13. In light of the nature of vulnerability issues, PIBA submits that any consequence for failing in an application to seek additional costs due to vulnerability (whether the court finds that there is no vulnerability or that the vulnerability found does not cause sufficient extra costs) be limited to the applicant not recovering its costs of the application.

Other considerations

14. Further, and as detailed below, PIBA considers that the MoJ should be considering:

    14.1. Introducing vulnerability provisions to the existing FRC regimes; and

14.2. Allowing parties to claim additional disbursements in respect of vulnerability in addition to costs.

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

15. Yes.

16. There appears to be no good reason to exclude vulnerable parties or those with vulnerable witnesses from being able to claim additional costs just because they fall within the existing FRC regimes. PIBA considers that these costs provisions should apply to the existing FRC regimes because:

16.1. The vulnerability provisions now in force were not considered when the existing FRC regimes were introduced;

16.2. Lower value PI claims still involve vulnerable parties and witnesses;

16.3. The swings and roundabouts argument does not displace the need for additional costs due to vulnerability

16.4. The new provisions make vulnerability an issue, and there are sufficient checks and balances to make sure that FRC are not undermined.

16.5. No need for reduction to existing FRC levels as additional costs due to vulnerability will only be awarded if the minimum 20% is reached.

Vulnerability provisions post-date introduction of existing FRC regimes

17. The 2020 report by HHJ Cotter QC (as he then was) for the Civil Justice Council ["the Cotter Report"] noted at paragraphs [224] and [225] that:

"Whilst, as some consultees and responses to the consultation report comment, all involved in the civil court process ought already to have been astute to the needs of

vulnerable parties/witnesses, as this report recognises more could and should be done. One consequence of this may indeed be, as some responses suggest, that increased work is required of legal representatives and litigants may be put to increased expense/loss where issues of vulnerability arise and require specific measures to be taken.

As the consequences of measures taken in respect of vulnerability being over and above that anticipated when the 2013 reforms were drafted and introduced (including the various fixed costs regimes) and when Sir Rupert Jackson considered an extension to fixed recoverable costs, the Council believes that it is necessary for consideration be given to the costs implications for those involved in litigation."

18. As the Cotter Report said, more could and should have been done in respect of the needs of vulnerable parties and witnesses. Recognition of those needs and the means to address them are now formalised and enshrined in the CPR putting a duty on lawyers to consider these procedural aspects in addition to their professional duties. Further, the latest version of the Equal Treatment Bench Book emphasises (at page 47) that it is the judge's responsibility to ensure that all parties and witnesses can give their best evidence and have a general duty to ensure a fair hearing which will include making reasonable adjustments. Consequently it is right to recognise that there are likely to be additional costs due to vulnerability issues within the existing FRC regimes which pre-dated this procedural change.

<u>Issues of vulnerability may affect all claims</u>

19. Lower value PI claims still involve parties and witnesses who may be vulnerable because of the factors listed in paragraph 4 of Practice Direction 1A, for example:

    19.1. Age, immaturity or lack of understanding;

    19.2. Communication or language difficulties (including literacy)

    19.3. Physical disability or impairment, or health condition;

19.4. Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties)

19.5. Social, domestic or cultural circumstances.

20. There is no good reason to exclude these parties and witnesses from recovering the additional costs caused by such vulnerability just because the claim is not as valuable as those that will fall within the extended FRC regimes.

Swings and roundabouts

21. Paragraph 19(a) of this Consultation states that vulnerability provisions should not apply to existing FRC cases because *"those cases already implicitly allow for vulnerability in that the recoverable costs allowed cover vulnerable cases, and vulnerability is therefore generally captured within the 'swings and roundabouts' of FRC."*

22. The point is made above that the existing FRC regimes were introduced prior to the change in the CPR in respect of vulnerability. But even if vulnerability provisions are introduced into the existing FRC, it remains the case that many vulnerable cases will be restricted to FRC and captured within the 'swings and roundabouts' of FRC because not all of them will generate costs greater than the proposed threshold or that causes a Judge to exercise their discretion in favour of the vulnerable party. The vulnerability provisions are just and proportionate as they will be only applicable in those cases with a bigger swing in costs due to more serious issues of vulnerability.

Vulnerability has always been an issue

23. Paragraph 19(b) of this Consultation states that vulnerability provisions should not apply to existing FRC cases because: *"this could encourage vulnerability to be claimed more frequently in existing FRC regimes where it*

previously was not an issue, which would increase costs and undermine the principle of FRC."

24. Vulnerability has always been an issue - just one that was not fully recognised and dealt with prior to April 2021 when Practice Direction 1A came into force. As the Cotter Report said *"… more could and should be done."* There has now been a change to the CPR and consequently, there should be a change to the existing FRC regimes.

25. It is likely that a consequence of introducing vulnerability provisions in existing FRC regimes will cause vulnerability to be claimed more frequently because there is currently no provision at all in those regimes for vulnerability. However, as set out above, vulnerable cases will still largely fall within FRC if they do not cause an increase in costs meriting the Court exercising its discretion to allow additional costs. Those that want to claim vulnerability will have to justify the additional costs and run a costs risk if they fail to do so. Therefore the principle of FRC is not undermined, just as allowing the 'exceptional circumstances' principle does not undermine FRC.

<u>No reduction needed to FRC</u>

19. Paragraph 20 of the Consultation states: *"Given that existing FRC already cater for vulnerability to some extent, it may be that, if vulnerability uplifts are allowed in existing FRC cases other than exceptionally, the FRC may need to be reduced somewhat to account for this."*

20. As set out above, the majority of cases with some vulnerability will continue to fall within FRC. Those that do not will be subject to the requirements as proposed and which are already set out in the CPR for claiming additional costs due to 'exceptional circumstances'. Therefore, there is no need to reduce FRC.

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

26. Yes.

27. At pages 17, 64 and 80 of its response to the consultation to extend FRC dated September 2021, the MoJ recognised that "…*additional disbursements may be needed for specific vulnerabilities (such as where a sign language interpreter may be required)* and *specific additional work required (by law) in a particular case i.e. protected parties in preparing papers seeking the required judicial agreement to a settlement."*

28. Further, at pages 80 and 81, the MoJ also recognised that, despite ***Aldred v Cham***, more work was required to consider whether to limit the number of vulnerability-related disbursements. Indeed, when refusing permission to appeal in May 2020, the Supreme Court in ***Aldred v Cham*** expressed the view that it was appropriate for the CPRC to consider the issue.

29. Practice Direction 1A identifies several measures that can be taken to ensure that vulnerable parties and witnesses are on an equal footing and can participate fully in proceedings and give their best evidence. Some of these measures will result in disbursements being incurred that otherwise would not have been. Examples are:

    29.1. Communication or language difficulties may require an interpreter, carer or support worker, device or other aid to help that person communicate.

    29.2. If evidence is to be given remotely, or pre-recorded, then there needs to be suitable technology and a private location which a party or a witness may not have. If not, then there is the cost of hiring rooms with the appropriate technology available.

29.3. If a person's ability to understand proceedings and their role in them or instruct their representatives is reduced due to vulnerability factors such as, for example, a mental health condition or learning difficulties that fall short of depriving that person of capacity, a conference with Counsel or written advice from Counsel may be needed to ensure that the person is able to understand advice given.

30. In addition, CPR r.32 and Practice Direction 32 were amended in 2020 to formalise the procedure for obtaining evidence from a witness who speaks a language other than English. Paragraphs 18.1 and 19.1(8) of PD 32 states that the witness statement must be drafted in the witness' own language. Paragraph 23.2 of PD 32 then sets out that where the witness statement is in a foreign language, the party wishing to rely on it must have it translated by a translator who certifies that the translation is accurate.

31. In addition, if a legal representative is to sign a statement of truth on a statement of case attesting to that party's belief in the truth of its contents, if the party does not understand English, that legal representative will need to make sure that the statement of case is translated into that party's language.

32. PIBA submits that vulnerabilities will cause a need for certain disbursements as illustrated above and these additional disbursements should be provided for within the FRC regime. If they are not so provided then the risk is that vulnerable parties and witnesses will have to bear the costs themselves or it will reduce the amount of FRC their lawyers receive meaning that lawyers will be less inclined to take on such clients.

33. Further, PIBA invites the MoJ and the CRPC to take up the recommendation of the Supreme Court and tackle the issue in ***Aldred v Cham*** of recoverability of disbursements relating to settlements in respect of children and protected parties in respect of the existing FRC regimes as well as the proposed extended FRC schemes. In brief, three main reasons to do so are:

33.1. **Vulnerability considerations:** If Master Cham had required an interpreter then that disbursement too would have been disallowed by the Court of Appeal's application of the FRC scheme as his inability to speak English would have been a feature of the claimant, not the dispute. However, since then, the Cotter Report and Practice Direction 1A provides the basis and the need for the issue of disbursements in FRC schemes to be reconsidered.

33.2. **Inconsistency between regimes:** There is now a lacuna in that the cost of advice from Counsel is recoverable in cases which remain in the portal, whereas, the cost is unrecoverable in the cases which exit the portal. This is particularly illogical when cases which exit the portal usually do so for liability reasons. If a settlement is then reached, there is a good chance that it will involve some discount for chance that the claimant may not succeed at all. Therefore Counsel's advice is even more crucial and likely to be more detailed as it will need to deal with liability as well as quantum. This inconsistency in the existing FRC regimes needs to be resolved, as well as provision made in the proposed extended FRC regime.

33.3. **Benefit of Counsel:** PIBA submits that Counsel can provide valuable assistance to the Court when giving an opinion on settlement. Indeed some courts' standard directions for the listing of an approval hearing require that the author of the advice sets out with in it their qualifications and experience to demonstrate that they are suitably qualified to give advice. The Bar, particularly the Junior Bar, have the qualifications and experience in order to do that.

34. PIBA notes that the MoJ is not proposing to amend the rules at this time in relation to disbursements. PIBA commends to you its detailed and updated paper jointly prepared with the Bar Council on the Bar's Case for Reform of

proposals to extend FRC, fee levels and other problems which includes a section setting out PIBA's practical proposal for addressing issues around disbursements and ***Aldred v Cham.***

Charles Bagot QC, Chair of the Personal Injuries Bar Association
Jasmine Murphy
On behalf of the Executive Committee
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