



## **BAR COUNCIL RESPONSE TO THE FIXED RECOVERABLE COSTS REVIEW**

### **SECTION 1**

#### **INTRODUCTION**

1. This is the response of the General Council of the Bar of England and Wales (“the Bar Council”) to the Senior Judiciary announcement<sup>1</sup> on 11 November 2016 that Lord Justice Jackson had been commissioned to undertake a review of fixed recoverable costs, to be completed by 31 July 2017, and his invitation to provide responses by 30 January 2017<sup>2</sup> to various issues he has raised in connection with proposals for an extension of the fixed costs regime to the fast track and the lower reaches of the multi-track.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

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<sup>1</sup> <https://www.judiciary.gov.uk/announcements/senior-judiciary-announces-review-of-fixed-recoverable-costs/>

<sup>2</sup> The 30th January date was an extension to the original deadline  
<https://www.judiciary.gov.uk/publications/review-of-fixed-recoverable-costs/>

4. The structure of this Response Paper is:

SECTION 1 .....	1
INTRODUCTION .....	1
SUMMARY OF BAR COUNCIL POSITION.....	3
PURPOSE OF THIS RESPONSE PAPER.....	3
BAR COUNCIL STUDIES .....	4
SECTION II .....	5
ACCESS TO JUSTICE .....	5
CIVIL COSTS REFORMS.....	7
COSTS BUDGETING.....	8
PROPOSED REVIEW OF APRIL 2013 REFORMS .....	9
SECTION III.....	10
AIMS OF FIXED COSTS .....	10
ARE FIXED COSTS WORKING?.....	12
FIXED COSTS IMPACT ON THE BAR.....	13
THE YOUNG BAR .....	15
MODIFIED COURT PROCESSES .....	16
THE DANGER OF RELYING ON EXISTING REGIME AS A BENCHMARK.....	18
EFFECT ON DEFENDANTS .....	20
SECTION IV.....	20
HORIZONTAL EXTENSION OF FIXED COSTS .....	20
FAST TRACK BARRISTER’S FEES.....	23
Table - Typical PI (RTA/EL/OLA) case.....	25
Table – Fast/Multi-track split within results.....	25
Table – Value/Estimated value of cases within results .....	26
Table – Work Type of cases within results.....	26
Table – Type of costs assessment of cases within results.....	27
Table – Average costs assess/approved by case type .....	27
Table – Average Counsel’s fee from sample .....	28
COSTS BASED ON VALUE DAMAGES.....	28
SECTION V .....	32
VERTICAL EXTENSION OF FIXED COSTS .....	32
Table – Percentage of work up to £250,000 from March SBA Responses .....	33
LIMITATIONS ON TYPES OF CASES.....	34
THE JACKSON GRID FIGURES .....	35
Table – Exercise carried out by 4 Pump Court .....	40
Table – 4 Pump Court exercise – costs claimed per party .....	41
Table – Examples of professional negligence costs which have been allowed – 4 Pump Court .....	42
SECTION VI.....	44
SHARING OF FIXED COSTS.....	44
SAFEGUARDS.....	46
Indemnity Costs.....	47
Part 36 offers, mediation, ADR, ENE .....	47
Indexation and Review .....	47
CONCLUDING COMMENTS.....	48

## SUMMARY OF THE BAR COUNCIL POSITION

5. The Bar Council opposes extension of fixed costs above the Fast Track limit of £25,000.

6. The Bar Council accepts that the time has come to extend the fixed costs in the Fast Track beyond the current cohort of personal injury cases, however any extension of fixed costs across the Fast Track must be evidence based. Whilst the Bar Council has done its best to provide evidence in the short time available, more work is required on data collection.

7. It is crucial that the fixed costs arrived at are sufficiently remunerative to avoid an adverse impact on access to justice. The greater the shortfall in costs recovery, the greater is the disincentive to bring claims. Fixed costs at unreasonable levels of remuneration will mean that solicitors and barristers will simply not undertake the work. This threatens access to justice to our courts which must be the first priority.

## PURPOSE OF THIS RESPONSE PAPER

8. On 11 November 2016 the Courts and Tribunal Judiciary announced that Sir Rupert Jackson was to undertake a review of fixed recoverable costs (“the Announcement”). The Announcement makes it clear that a public consultation will take place following the Fixed Recoverable Costs Review (“FRCR”) after due consideration of Sir Rupert’s proposals. The Bar Council will participate fully in any such consultation exercise.

9. The purpose of this paper is to respond to the invitation by Sir Rupert Jackson as set out in the Announcement, namely:

*Lord Justice Jackson has invited written evidence or submissions to assist the review by Monday 16 January 2017 [now extended to the 30th January 2017], to be sent to: [fixed.costs@judiciary.gsi.gov.uk](mailto:fixed.costs@judiciary.gsi.gov.uk).*

*If evidence is being submitted of actual recoverable costs, this should identify the type of case (e.g. clinical negligence, property, judicial review etc.), and the source of evidence (e.g. detailed assessments under the post-April 2013 rules, approved budgets, agreed budgets etc.).*

*Material submitted should take account of the Civil Procedure Rules on proportionality, in particular the factors set out in rule 44.3 (5).*

*Views are also sought on the level of claim at which fixed recoverable costs should stop and costs budgeting should apply instead.*

*Other issues that the review will need to consider, and on which views are welcomed, are how to accommodate counsel’s fees, experts’ fees and other disbursements within a fixed recoverable costs regime. Another issue for consideration is the difference which frequently arises between claimant and defendant costs.*

10. Summarising the extent of the remit of the above invitation the salient areas for response are:

- submitting evidence of actual recoverable costs
- views on the level of claim to which fixed recoverable costs should apply
- how to accommodate counsel's fees
- how to accommodate expert's fees and other disbursements
- approach to fixing both claimant and defendant costs.

11. This Response addresses each of the above points. It also seeks to address a number of other issues which the Bar Council considers to be essential to any fair and reasoned approach to the establishment of a fixed costs regime of the kind proposed by Sir Rupert Jackson.

### **BAR COUNCIL STUDIES**

12. The contents of this Response reflect the work of the Bar Council Remuneration Committee and a specially convened sub-committee charged with the task of orchestrating a response to the Fixed Fees Proposals, namely the Fixed Fees Working Group ("the Working Group").

13. On 28 January 2016 Sir Rupert Jackson gave a speech entitled "Fixed Costs - the Time has Come". On 11 March 2016 the Civil Justice Council held a "big tent discussion" at which representatives of the Remuneration Committee, the Professional Negligence Bar Association ("PNBA") and the Personal Injuries Bar Association ("PIBA") attended. In advance of that meeting, the Working Group wrote to all of the Specialist Bar Associations ("SBAs") inviting responses to a Bar Council questionnaire directed at eliciting a broad spread of views relating to the proposal to introduce and extend fixed costs to the fast track and lower reaches of the multi-track. The responses ("the March SBA Responses") have been considered in full and this Bar Council Response draws together the various key points made. Copies of all of the responses have been retained by the Bar Council for future reference as required.

14. Additionally, at the beginning of November 2016, the Bar Council created an online survey platform for barristers to complete either on the summary assessment of fast track costs (so at the conclusion of a fast track claim) or on the approval of budgets in multi-track cases with value of up to £250,000. Access to the on-line survey is via the following hyperlink: <https://www.surveymonkey.co.uk/r/Q7ZXXMG>

15. The results of the survey are considered in Section IV.

## SECTION II

### ACCESS TO JUSTICE

16. Sir Rupert Jackson has stated that one of the aims of fixed costs is in enhancing access to justice. The Bar Council fully supports the notion that access to justice should be the first priority and that any extension of fixed costs must accommodate and be consistent with the principle of access to justice.

17. However, the Bar Council is deeply concerned that an extension of fixed costs, whether horizontally to other areas of litigation beyond just personal injury limit of up to £25,000, or vertically into the lower reaches of the multi-track, will be inconsistent with improved or effective access to justice.

18. Limiting the recoverable fixed costs a party is able to recover when successful, results in the successful party's costs exposure being higher. The fundamental premise that fixed costs will reduce what lawyers charge to their clients is far from proven or established evidentially or at all. There would be little commercial incentive for business as a whole to charge less; there rarely is in any economy. This has two undesirable results. First, it is simply unfair. If a party has been put to the expense of going to court in order to vindicate its legal rights then the party which has lost should compensate it for its reasonable costs of doing so. This is the principle that has governed English law in this area for centuries and is based on fundamental fairness. Second, it will adversely affect access to justice because legal proceedings will become more expensive because of a lower contribution towards success coming from the loser and a higher proportion being deducted from damages recovered.

19. Consumers willing to pursue claims under the existing regime at least know that, if successful, they will recover their reasonable and proportionate legal spend back from the losing party. In a fixed costs regime, the sums recoverable (at least as appears to be proposed by the table in the text of Lord Justice Jackson's speech of 28 January 2016) will amount to no more than a contribution towards the reasonable and proportionate costs, with the result that shortfalls in expenditure will arise.

20. If the fixed costs are set at unrealistic levels, then the recovery of costs will fall short of the reasonable and proportionate legal spend by potentially many thousands of pounds, making litigation not only more expensive for the consumer, but for those (often vulnerable) consumers who simply do not have the resources or means to make up a significant shortfall between the fixed costs recoverable and the reasonable costs required to pursue a claim. This will inevitably have a severe effect on access to justice.

21. The effect of such a fixed costs regime on the Bar also cannot be understated.

22. A fixed costs regime of the sort proposed (into the lower reaches of the multi-track) risks not only adversely affecting the livelihoods of individual practitioners, it is also likely to affect the quality and effectiveness of the Bar more generally. Whilst the world at large may have limited sympathy for the livelihoods of lawyers, it has an interest in their quality and effectiveness with the resultant effect on access to justice.

23. The result of a successful party not being able to recover its reasonable and proportionate costs would be that thousands of worthy claims would not be pursued and the volume of work for the Bar, in particular the junior Bar, would be severely reduced, all as an unintended consequence of measures intended to actually increase access to justice. The irony of the outcome needs no overstating. This is not just rhetoric. It is an entirely realistic consequence of the proposed changes.

24. It is the experience of PIBA that the current fixed costs regime in personal injury work has already led to a reduction in work undertaken by counsel as solicitors' firms keep the shrinking pool of work in-house. There is no reason why the same should not follow an extension of the fixed costs regime to other areas of work horizontally and vertically. Indeed, we would suggest that it is inevitable.

25. The rule makers must address this in the quest for access to justice. Consumers who lose the benefit of an independent specialist referral service will suffer. It is not in the interests of the courts either. Cheap representation leads to poor quality; poor quality at all levels including both in preparation, the imparting of advice and the presentation of cases at trials/hearings. The English courts are renowned around the world as representing an arena of the highest quality of service and representation. The Bar prides itself on being able to offer consumers a specialist and high level of service at reasonable cost. The introduction of an under remunerative fixed costs regime could remove at a stroke this established unrivalled service in the vast majority of consumer claims.

26. In this regard we see a parallel with what has happened with the reduction in criminal legal aid rates. As was found in the Government commissioned report from Sir Bill Jeffrey on *Independent Criminal Advocacy in England and Wales*, the effect of lower legal aid rates and fewer criminal cases as crime rates fall has led to more work being kept in house by solicitors' firms with the result that the market in criminal advocacy is not "*operating competitively or in such a way as to optimise quality*".<sup>3</sup>

27. Under the current fixed costs applicable to personal injury claims, counsel's involvement is usually last minute and then only in those cases presenting the greater risk. They are often cases which have been poorly prepared and the barrister's late involvement leaves them with little ability to influence the outcome of the case. The extension of fixed costs will lead to the same outcome in those newly captured fixed costs cases.

28. Although the Bar Council does not speak for solicitors, solicitors are the life and blood of a thriving Bar. An extension of the fixed costs regime both horizontally and vertically is likely to place solicitors under increasing commercial/financial pressure, with the result that many will exit the market in low value claims. Claims management companies will move in and provide substandard services to consumers, through the use of unqualified staff and poorly remunerated advocates prepared to undertake the work, most

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<sup>3</sup> Page 42, paragraph 5.24, "Independent criminal advocacy in England and Wales: A Review by Sir Bill Jeffrey", Ministry of Justice, May 2014.

<https://www.gov.uk/government/publications/independent-criminal-advocacy-in-england-and-wales>

likely from the position of in-house employment. Such an outcome can hardly be said to be positive for consumers.

## **CIVIL COSTS REFORMS**

29. It is important that where consideration is being given to the introduction of fixed costs to sectors and types of work not already subject to fixed costs, rule makers should consider the raft of substantive and procedural legislative changes which have only relatively recently been introduced.

30. The package of reforms introduced in April 2013 were specifically designed to address the incidence of high costs in civil claims with emphasis on ensuring that costs were kept proportionate to the value and complexity of the claim. This is one of the stated objectives of the proposals for fixed costs and therefore it is imperative that adequate consideration be given to the question of whether or not the April 2013 reforms: (a) have had sufficient time to bed in with a view to confidently appraising their effect, and (b) if they have, whether they are achieving the objective aims. There would be no need or basis for the introduction of yet further substantial reforms if the existing reforms designed to achieve the objective of the new proposals had either not been allowed to work, or indeed, were working in practice.

31. The Jackson reforms resulted in the abolition of recoverable success fees and other additional liabilities (ATE insurance) in the vast majority of cases. This will result in a substantial reduction to the overall recoverable costs across the litigation arena including in both fast track and the lower reaches of the multi-track.

32. The reforms introduced costs budgeting, designed to limit the amount of recoverable costs in multi-track cases and add a degree of certainty as to recoverable costs. Without a sufficiently robust appraisal of whether budgeting is working or not, the rule makers are in no position to assert whether there is a need for any replacement or alternative route to achieve the objective sought to be achieved by costs budgeting.

33. Significantly, the introduction of a new rule on proportionality under the Jackson reforms represented a radical shift from the pre-Jackson era of courts limiting recoverable costs to those that were reasonable and necessary. The court's ability now to reduce costs on the grounds of proportionality (CPR 44.3(2)(a)), even if the costs are themselves reasonable and necessary, will have a significant impact on the level of recoverable costs downwards. Before any radical further changes are introduced with a view to reducing costs, the reforms already introduced for that very purpose must first be allowed to take their full effect.

34. The package of reforms introduced are only just beginning to play a role in management of costs. The rule on proportionality was subject to transitional provisions with the consequences that it will only apply with full rigour in respect of a claim issued after 1 April 2013. Claims take time to pass through the system and the tail end of post-April 2013 multi-track cases are only now beginning to surface. Indeed, the Court of Appeal is still to rule on the application of CPR 44.3(2)(a) in low value claims.

35. There are very few, and no Court of Appeal, cases on the approach to proportionality and its inter play with access to justice. Until the courts have grappled with the concepts, it is wholly premature to introduce further legislative changes which cannot be justified on the assumption that the existing suite of reforms is not working. The 2013 package of reforms were said to be a holistic package. These proposed changes seek to significantly amend one element before the other elements have had the opportunity to bed down and (importantly) to have their effect objectively assessed.

36. We consider it premature to introduce any further major reforms without first allowing the existing April 2013 reforms to bed in and to allow a proper assessment of whether those reforms alone have impacted on the costs of litigation as intended. We return to this theme at paragraph 44 onwards.

## **COSTS BUDGETING**

37. Costs budgeting was a central new mechanism introduced with a view to reducing the level of costs in multi-track cases. Particularly so in the lower reaches of the multi-track where the risk is greater of costs being disproportionate to value. Whilst budgeting is ahead of the proportionality rule in terms of usage and application, consumers, litigation service suppliers and the courts are still getting to grips with the concepts of costs budgeting; all the more so in cases where the new rule on proportionality is also fully engaged. There are very few reported cases on the effect of budgeting on the costs of a concluded claim.

38. Costs budgeting is still in relative infancy. There has not been any substantial evidence-based appraisal or analysis of the impact of costs budgeting upon costs control. It seems inconceivable that costs budgeting has not had a positive effect on the control of costs. Used properly and effectively costs budgeting ought to be able to provide sufficiently robust costs controls over cases falling within the lower reaches of the multi-track.

39. A short (but nonetheless informative) review of the costs management regime was carried out in early 2015 with a view to suggesting how the budgeting rules might be developed. The results of the exercise were set out in Sir Rupert Jackson's lecture<sup>4</sup> of 13<sup>th</sup> May 2015, "Confronting Costs Management." It is relevant to note that the lecture extolls the virtues of the budgeting regime, particularly as a means of ensuring that recoverable costs are controlled and limited to proportionate costs (paragraphs 2.6 and 2.7 in particular).

40. Before the blunt tool of fixed costs is extended beyond its current limit, a comprehensive, balanced review of the existing regime, costs budgeting and costs control by reference to proportionality must be undertaken.

41. The costs budgeting process (when it is carried out in the way intended – regrettably in practice costs budgeting can be inconsistent and patchy) gives the Court a far greater range of powers to achieve justice by taking a more tailored approach to matching the directions required justly to resolve the issues between the parties with the proportionate

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<sup>4</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2015/05/speech-jackson-lj-confronting-costs-management-1.pdf>



costs of meeting those directions. The twin aims of the proposed extension of fixed costs: (1) consistency and certainty (2) reducing overall costs to proportionate levels, can each be addressed, in principle, by the costs budgeting process, as practitioners and the judiciary become more accustomed to it.

42. In a budgeted case the Court, if it is persuaded that particular directions are necessary, can adjust the budgeted costs to fairly match to those directions. Litigants still have the certainty, and proportionality issues must be considered by the Court under the current regime.

43. In a fixed costs regime, the Court's ability (unless there were to be frequently exercised escape clauses from fixed costs) to adjust the budgeted costs to meet the required directions would be lost. The Court would be faced with a stark choice of either: (i) giving directions regardless of the relationship between the cost of compliance and the recoverable fixed costs; or (ii) trying to give directions which might not enable justice to be done in a case but which put the parties on a level playing field/ensure equality of arms (particularly in the case where one party was of limited means).

#### **PROPOSED REVIEW OF APRIL 2013 REFORMS**

44. The extent of the impact of the April 2013 reforms over a sustained period must be considered carefully before any decisions can be taken about extending the fixed costs regime to other cases.

45. Any such review would have to include consideration of the following:

- the effects of the changes outlined above;
- the effects of the current fixed recoverable costs regime on consumers, legal representatives, and the courts;
- the likely future effect of the changes on:
  - consumers;
  - legal representatives;
  - institutional defendants;
  - small and medium sized enterprises;
  - competition within the legal market; and
  - the courts.

46. As the Bar Council understands matters, there is insufficient evidence as to the impact of the April 2013 reforms on the recoverability of costs across the civil litigation.

47. Certainly, there is insufficient evidence for anybody reasonably or fairly to attempt to devise an extended fixed costs regime.

48. As one senior practitioner has drawn to our attention: "Over extension of a fixed fee regime runs a serious risk of increasing the proportion of cases which are not comprehensively prepared, and which are not properly assessed. That will lead to fewer cases settling at the right level. Litigation will become more of a lottery, and more people

more will be tempted to buy tickets to enter the lottery. These points are easy for the judiciary and the Bar to overlook – because, in a sense, both deal only with the tip of the iceberg. The great bulk of civil cases that settle before our involvement do so against a background of confidence that the very small proportion of cases which find their way to judicial determination are likely to be correctly decided.”

49. Decisions should not be taken without a solid evidence base. That evidence base should extend far beyond the cases that judges see, to the far greater number of disputes that are resolved without the involvement of the courts, or even the Bar.

50. Accordingly, this provides a powerful reason for the rule makers to exercise considerable caution before extending fixed costs beyond the fast track. Indeed, even in respect of a lateral or horizontal extension of the scheme, the absence of hard data or statistics on the level of reasonable recoverable costs in other disciplines beyond personal injury strongly suggests that an extension even laterally would be unwise as matters currently stand.

51. The analysis of the impact of the 2013 reforms must also take into account the consequences arising from the significant reduction (almost to the point of elimination) in the availability of legal aid for civil proceedings, such reduction being highly regrettable and contrary to Sir Rupert Jackson’s Final Report recommendations<sup>5</sup>. This safety net having been removed (post the Jackson recommendations) it is essential that any further reforms enable the cohort of litigants of modest means to have access to the civil courts with skilled representation. The Bar Council is concerned that reforms which are predicated on the assumption that fixed costs will be no more than a contribution to a parties costs of litigation will essentially exclude this cohort of litigants from the civil courts.

### **SECTION III**

#### **AIMS OF FIXED COSTS**

52. The imposition of fixed costs appears to be justified by those supporting the principle on two main grounds: (1) consistency and certainty; and (2) reducing overall costs to proportionate levels.

53. Consistency and certainty in what a claimant may be able to recover by way of costs will not provide the claimant with consistency and certainty over what the solicitor conducting the claim may charge. The assumption that fixed costs provides costs certainty only applies in those circumstances where the legal representative is prepared to accept by way of solicitor and client costs the recoverable fixed costs. The Bar Council is sceptical as to whether that will happen. It very much depends on the level at which the fixed costs are set and the category of the case in which the regime applies.

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<sup>5</sup> Legal Aid and the Costs Review Reforms <https://www.judiciary.gov.uk/wp-content/uploads/ICO/Documents/Speeches/lj-jackson-speech-legalaidetclecture.pdf>

54. On any view, if the fixed costs are set at levels which do not provide for sufficient remuneration to prosecute a case reasonably from beginning to end, then necessarily the solicitor and client charge will be imposed. In those circumstances the reduction in fixed costs will result in the case being more expensive for the litigant than had the fixed costs been set at a more reasonable level. That result would entirely defeat one of the stated aims of widening the ambit of fixed costs, namely to reduce the legal costs incurred by litigants, rather than increase them.

55. What litigants are concerned about is what they will have to pay by way of costs. Fixing the amount that can be recovered from the opponent by way of costs is, as one respondent to the March SBA Responses observed, a “zero sum game”. The winning party will lose out and the losing party will gain. It is unlikely to make any difference to the overall cost of litigation.

56. Accordingly, any broadening of the fixed costs regime must ensure and result in fair and reasonable remuneration being provided for within the regime. If the fixed costs are seen purely as a contribution, however small, towards the legal spend, then it is inevitable that, either clients will not be able to pursue cases at all, or clients will carry a higher solicitor and client shortfall. The certainty demanded from fixed costs will have been lost and winning clients will end up paying more in costs than is currently the case with approved budgets.

57. The Bar Council accepts that in lower value claims costs can appear to be disproportionate in comparison to the damages. However, an important consideration often forgotten in the debate on proportionality is that any assessment of whether a legal spend is or is not proportionate must take into account the level of recoverable costs receivable in the event of win. Spending £30,000 to pursue a £25,000 may appear to be disproportionate, but on the assumption that the winning party recovers £15,000 in costs, this results in the litigant spending £15,000 to recover £25,000. If the fixed costs are reduced to even £10,000, then on the assumption that the legal spend remained the same, the shortfall in recovery for the successful litigant would be £20,000. The case therefore becomes more expensive through the perceived need to “reduce costs”.

58. When considering issues of proportionality, one has to recognise that there is a certain minimum standard requirement for any case in terms of investigation, analytical work, preparation and execution. There will always be a base level of costs which cannot be avoided and which is not directly linked to the value of the claim. It is critical that the rule makers have this in mind when setting any fixed costs regime. Any business providing legal services needs to make a profit. The same is true of barristers and solicitors. Overheads including staff costs, rent, indemnity insurance, borrowing costs, and hardware must be met by a viable fee income and some element of profit.

59. It is difficult to know precisely what was meant by Sir Rupert’s comment that some litigants desperately need the certainty of fixed costs. If this was a reference to the increasing number of litigants who are unable to afford legal representation at all, it seems to us that fixed costs cannot be expected to do the work of a legal aid fund. The fixed costs should not be set at unrealistically low levels in order to make litigation affordable for those without

any funds of their own. Recoverable costs must be set at a level which fairly remunerates lawyers, even for relatively low value claims, otherwise no one will be prepared to offer representation.

## **ARE FIXED COSTS WORKING?**

60. The experience of many of the SBAs, as expressed in the March SBA Responses, is that the current fixed costs regime has not been satisfactory. One overwhelming concern, expressed for example by PIBA, is that fixed costs have had an adverse impact on access to justice. This is not something that should be tolerated. Reports of cases being prepared poorly by inexperienced personnel are common. With the imposition of fixed costs (at low levels of remuneration) comes a regime dictated by costs savings and maximisation of profitability from fewer resources. This results in less work being undertaken on individual cases and work being undertaken by the most junior of fee earners (many of whom have no legal qualification). Little case analysis, little investigation and poor presentation results in a substandard service.

61. The commercial reality of a fixed costs regime, which provides for inadequate remuneration, is that fixed costs results in this undesirable outcome. From the consumer's perspective there is little positive in such an outcome. Whilst such a regime may provide some certainty as to the recoverable costs, it does so at a cost. Anecdotal evidence submitted by the SBAs is that cases are under settled and/or result in very much sub-optimal outcomes (less damages than could be recovered) to the disadvantage of the consumer<sup>6</sup>. Fixed costs have a strong bearing on settlement of claims. The commercial reality and pressure to maximise profitability is such that many claimants are advised by solicitors to settle at the earliest opportunity without the benefit of appropriate investigation or advice from counsel. The consumer is therefore directly and negatively affected by the impact of fixed costs.<sup>7</sup>

62. The SBA March Responses suggest that in the IP Enterprise Court (where fixed costs apply), the restriction on fees has tended to move work from the specialist barristers to the generalist barrister. This undermines the role that a specialist Bar offers. It reduces consumer choice through costs rules, which is not acceptable or compatible with access to justice.

63. Anecdotal evidence suggests that since the introduction of the fixed costs regime in personal injury cases, many barristers at common law sets have sought to realign their practices with other areas not caught by the fixed-costs regime, such as clinical negligence, or indeed left or considered leaving the Bar. This may have had an effect on access to justice, as well as on the practitioners themselves. It will clearly be particularly important to collect and review this sort of information if a fixed costs regime is adopted which applies only in certain areas of litigation.

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<sup>6</sup> PIBA referred us to the experience of the VWF (Vibration White Finger) miners' compensation scheme which resulted in over 500 successful professional negligence claims arising out of under settlements of valid claims: *Proctor v. Raleys Solicitors* [2015] EWCA Civ 400.

<sup>7</sup> See generally page 3 of PIBA March SBA Response.

64. The SBA March Response from PNBA suggests that in many barristers' experiences, fixed costs cases, such as those relating to RTAs, are now handled by very junior or inexperienced fee earners in solicitors' firms. Frequently, it is necessary to make a relief from sanctions application because the rules or directions have not been complied with and substantial costs of such applications have to be absorbed by solicitors or litigants.

65. The imposition of fixed costs also affects, hugely, the conduct of a claim. With a fixed limited inter partes costs risk, defendants (often funded by insurance or commercial entities) will face a fixed costs liability in the event they lose, however much work they cause their opponent to undertake. A capped liability for costs means that defendants will fight cases as they can afford to do so with a capped costs liability. Defendants are able to instruct counsel of their choice, paying fees well in excess of the fixed costs. PIBA's experience is that Defendants/insurers are now fighting more cases than previously as the costs of doing so are fixed.

### **FIXED COSTS IMPACT ON THE BAR**

66. The Bar Council is extremely concerned about the potential adverse impact that fixed costs may have on the Bar, including primarily, but not exclusively, the junior Bar.

67. Given that the fixed costs regime for fast track cases currently only applies to personal injury claims, evidence of the effect of fixed costs on the wider market can only be assessed by reference to that particular market. Nevertheless, there is no reason to doubt that the impact of fixed costs on the Bar in personal injury work will replicate itself in other areas which become subject to fixed costs on the fast track.

68. It has been the experience of PIBA members that they have seen a reduction in work in fixed costs cases. This, it seems, is a natural consequence of costs reduction. The fixed costs model can encourage solicitors to retain as much work in house as possible. Junior members of the Bar who used to undertake pleadings and drafting work now tend only to get instructed at a late stage of a fixed costs case, primarily for trial, and then often only in cases where there is an allegation of fraud or dishonesty or some issues of complexity.

69. The lack of an independent adviser in the guise of a junior barrister early on in a case may also result in unnecessary cases going to trial and/or under settlements of cases. The junior Bar has provided an invaluable input to the pursuit of the vast majority of fast track claims. The reduction in recoverable legal spends by consumers will inevitably lead to the squeezing out of counsel at all stages other than perhaps trial.

70. The proposed fixed costs regime is likely to have a disproportionate effect on those barristers (and especially junior barristers) who act for defendants. The commercial pressure that can be brought to bear by (a) professional indemnity insurers on their panel solicitors, and (b) panel solicitors on professional negligence counsel, cannot be overestimated and may lead to practice in these areas becoming unsustainable.

71. The same is true of junior Chancery practitioners who act for banks and building societies and junior barristers working for insurers. Any large organization with the ability

to bring commercial pressure to bear on the legal industry will be able to control prices by reference to the “cap” imposed by any fixed costs regime.

72. Further potential results include:

- The restriction of opportunities for more senior juniors. If fees are calculated, or capped, by reference to the value of the claim alone then there will be an incentive for solicitors to use the most junior counsel available in order to ensure that there is a larger proportion of the capped sum available for them. This will reduce the advocacy opportunities for more senior junior barristers.
- Solicitors “using up” the recoverable amount prior to the instruction of counsel and junior barristers being left with “what’s left” of the fixed recoverable sum. Commercial pressures (both within and outside Chambers) will lead to junior barristers taking such cases for very limited remuneration.

73. More senior juniors will be priced out of cases which are under £250,000 in value as their hourly rates will exceed a level that can sensibly be brought within the fixed costs regime. The proposed fixed costs regime fails properly to appreciate that the value of the claim is not always determinative of its complexity.

74. A further issue is the negative effect on the quality of the Bar. Barristers are, by trade, specialist advocates. The proposed fixed costs regime may well (depending on the level the costs are set at) make litigation involving sums of less than £250,000 in value financially unfeasible for a client who will not recover the bulk of its costs. The result is that fewer cases will be fought (see the comments elsewhere about access to justice) and junior barristers’ opportunities to appear as advocates and to be involved throughout the life of a case, will be limited further. This undermines the future effectiveness of the profession which gives rise to further issues about access to justice. This concern goes hand in hand with the quality of applicants for pupillage. By making the Bar less financially attractive, good applicants will apply to City solicitors’ firms instead of seeking pupillage.

75. Chantal-Aimee Doerries QC, former Chairman of the Bar, recently commented that joining the Bar could cost a student up to £127,000<sup>8</sup>. Risking junior barristers’ fees at such a time would further limit access to the profession.

76. The Bar Council maintains that before any consideration can be given to extending the fixed costs regime horizontally or vertically, the rule makers must be appraised, by evidence, of the effectiveness of the existing fixed costs regime to date. As we understand matters, no such evidence has been made available.

## DIVERSITY

77. A significant concern response is the potential disproportionate effect on: lay clients from diverse backgrounds and on the diversity of the Bar. The FRCR review and any

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<sup>8</sup> <https://www.theguardian.com/law/2016/feb/23/qualifying-barrister-may-cost-new-students-127000>

subsequent Government consultation on the imposition of fixed costs should not proceed with changes without comprehensively assessing the potential impact on diversity.

78. In this submission we set out the likely disproportionate impact that there will be on the junior Bar by the extension of a fixed costs regime. This would have a particularly detrimental impact on the diversity of the Bar as a whole. For example, the statistics published on the Bar Standards Board website<sup>9</sup> show that in the Bar as a whole, male barristers outnumber female barristers by 2:1 (as at 2015 there are 10,239 male barristers and 5,660 female barristers). But for the young Bar, those under five years call, the proportions are more equal (2015: 755 male, 584 female); and for pupil barristers, there are more female than male barristers (in 2014/15 there were 215 male and 221 female pupils).<sup>10</sup>

79. Similarly, in terms of ethnicity, in the Bar as a whole, 13% of barristers are BAME (12,559 white barristers and 1,891 BAME); but pupil barristers are 24% BAME (2014/15 333 white pupils and 86 BAME).

80. The junior Bar and those entering the profession are more diverse in terms of ethnicity and have a more equal gender balance, than the Bar as a whole. Therefore any changes that will particularly impact the junior Bar, will disproportionately damage the diversity of the profession. The reasons why the junior Bar would be particularly impacted are set out further in this submission.

## THE YOUNG BAR

81. An extension of fixed costs to other areas within the Fast Track and beyond would likely mean:

- Low value court work will be considerably less remunerative;
- Junior barristers who rely upon such work will have their practices affected adversely.

82. Recruitment into chambers which rely upon fast track work and work extending into the multi-track (which is the vast majority of all Chambers nationally) will be affected in the same way as recruitment to the criminal Bar has been affected by the reduction in legal aid fee income. A reduction in volume of work and less remuneration will result in a contraction of the junior Bar. A viable Bar is integral to the fabric of our successful legal system.

83. Remuneration aside, there will be less lower value work because the prospect of irrecoverable costs will discourage litigants from litigating at all/with counsel:

- Junior barristers will lose the opportunity to develop as advocates;
- The profession as a whole will suffer accordingly.

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<sup>9</sup> <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

<sup>10</sup> <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/>

84. This will have an impact on access to justice:

- The reduced use of counsel will increase pressure on the courts. Less focused statements of case and witness evidence will reduce settlement opportunities, increase the issues the courts have to manage and eventually determine at trial;
- The courts will suffer if reliant upon advocates without the requisite skills.

85. In the likely event that practitioners will not be in a position to subsidize their earnings by other more remunerative work, they will suffer a substantial reduction in their earnings. This impact will be felt disproportionately by the junior Bar.

86. Furthermore, the fixing of costs by value alone will have a disproportionate impact on lower value claims. The work required on a case is not necessarily any less in claims of the same nature simply because the value is lower. Accordingly, the work directly subject to the proposed fixed costs extensions, which is the mainstay of the junior Bar, will be most heavily affected.

87. As said above, the proportion of the costs which will be irrecoverable is likely to be larger in lower value claims. The lower the value, the less economic sense it makes to litigate for either side. To say nothing of the arbitrary impact this has on access to justice, its impact on the junior Bar will likely be a sharp reduction of the very work which junior barristers require to increase their experience as advocates, to the detriment of the future of the Bar who form a significant pool from which the future judiciary are drawn.

88. Irrecoverable costs will mean more people will litigate in person. This places a great burden on the court system, the attempt to reduce costs in one area would result in greater costs in another area.

## **MODIFIED COURT PROCESSES**

89. Sir Rupert Jackson suggested in his January 2016 speech that the genesis of the perceived problem is that the influence of costs shifting and the system of “hourly rate” remuneration are inevitable drivers for making the civil justice system expensive for litigants.

90. Litigation is expensive anywhere in the world. It is using highly qualified people in a time-consuming process. Litigation can be more expensive than necessary as a result of court inefficiency or cumbersome court directions, even as a result of measures designed to assist the “court”, yet which result in no costs savings and which have to be paid for by the litigants. An example reported to us is the multiple listing of cases in front of the same Judge. This is costing litigants thousands of pounds with lawyers waiting around to get heard, with very often the court not having the time to hear the case. Any fixed regime must be coupled with greater court resources and efficiency.



91. Any extension of fixed costs vertically into the multi-track would have to coincide with a modification to the existing CPR processes. A new streamlined and more efficient court dispute resolution procedure should be devised alongside the imposition of fixed costs to ensure a fair balance between the demands of the courts as to what is reasonably required to pursue a case to trial, against a set of fixed recoverable costs.

92. The Bar Council would encourage a change of procedure of the kind witnessed in the Commercial Court with the introduction of the option of the Shorter Trial procedure/Flexible Trial procedure, the aim being to achieve shorter and earlier trials at a reasonable and proportionate cost. The procedures should also help to foster a change in litigation culture, which involves recognition that comprehensive disclosure and a full, oral trial on all issues is not always necessary for justice to be achieved. That recognition will in turn lead to significant savings in the time and costs of litigation. The Shorter Trial procedure offers dispute resolution on a commercial timescale. Cases are case managed by docketed Judges with the aim of reaching trial within approximately 10 months of the issue of proceedings, and judgment within six weeks thereafter. The procedure is intended for cases which can be fairly tried on the basis of limited disclosure and oral evidence. The maximum length of trial is four days, including reading time. Such procedures involve the adoption of more flexible case management procedures where the parties so agree, resulting in a more simplified and expedited procedure than the full trial procedure currently provided for under the CPR.

93. A fixed costs regime (if implemented) should also go hand in hand with the court being required, by way of rule change as part of the implementation of fixed costs: first, to tailor the directions so that the case or issue can be disposed of justly; second, to ensure work required to comply with those directions can reasonably be met by the fixed costs. If the Court were not able to balance these two objectives then a departure from any fixed costs scheme would be necessary. For example, it would be unjust to require a party to carry out a wide-ranging disclosure exercise where the costs allowed for disclosure are obviously insufficient to enable compliance. It could be said that the existing over-riding objective would require the court timetabling the case to ensure equality of arms and that the parties are on a level playing field but it would be preferable, if there is to be a fixed costs regime, to have an express obligation to consider the appropriateness of the directions and the appropriateness of the fixed costs to meet those directions. The concern would be that, freed from the requirements to balance costs and procedural directions inherent in the budgeting process, Courts (urged on by parties seeking to take tactical advantage) would give 'Rolls-Royce' directions without considering the costs of compliance with such directions.

94. The Court would also need to control the scope and number of any interim applications or procedural gamesmanship. For example, the Court should have a discretion to address repeated applications for specific disclosure, putting Part 18 questions or similar, by a party with deep pockets by ordering that the costs of compliance can be added to the fixed costs recoverable if the impecunious party is ultimately successful.

95. Similarly, it is necessary to deal with the situation in which a party with deep pockets seeks by other means to cause the opposing party to incur unwarranted costs, e.g. by writing numerous and lengthy letters, running multiple issues or similar.

## THE DANGER OF RELYING ON THE EXISTING REGIME AS A BENCHMARK

96. There is a danger in assuming that the perceived success of fixed costs in personal injury fast track cases is sufficient evidence for concluding that a fixed costs system could be extended vertically to the lower reaches of the multi-track.

97. A fast track personal injury case differs substantially from the plethora of cases pursued on the multi-track. A multi-track case will be case managed via case management conferences. No such case management takes place in a fast track case. Interim hearings and skirmishes are (or should be) exceptional in fast track cases, whereas unsurprisingly they are a common feature of multi-track litigation. The number of experts and involvement of counsel in a multi-track is very different from the average fast track personal injury claim. Complexity alone obviously distinguishes multi-track cases from those being tried in short one day hearings on the fast track.

98. In its March SBA Response, the PNBA made the forceful point that professional negligence and commercial cases have a multiplicity of issues and it is impossible to shoehorn them into a 'one size fits all' costs regime. There is no appetite for such a regime, in our experience.

99. The costs control exercised at the Costs Management stage, when a judge seized of the issues in the case can take a view on the level of costs appropriate to the issues, whilst imperfect, can be effective by prohibiting parties from incurring unnecessary and disproportionate costs. So too the court can exercise control over costs at the assessment stage.

100. A costs regime which limited a claimant in a professional negligence case worth less than £250,000, but with a large number of complicated issues on (for example) scope of duty, breach of duty, causation, loss, limitation and contributory negligence, to a very low level of costs expenditure, would effectively deny that claimant access to justice: either the claimant would stick to the costs allocation and would not prosecute the claim properly, in all probability losing the trial or being struck out for non-compliance with directions; or they would spend the amount that was actually necessary to prosecute the claim and would therefore lose a significant percentage of their damages to cover their irrecoverable costs. A one size fits all fixed costs regime simply could not work for many areas, including as the PNBA noted, in respect of professional negligence cases.

101. It is well understood that the fixed costs regime for personal injury cases was originally promulgated following a lengthy and successful collaboration between both sides of the industry (claimant and defendant). This is the case in respect of the fast track trial fee and the earlier regime in respect of fixed success fees and the fees payable on settlement without the need for proceedings. Such a process results in a more successful regime. Any proposed extension of the fixed costs regime should be the subject of consultation and co-operation by both sides of the industry to ensure fairness. The figures which apply to cases exiting from the RTA/PL/EL Protocol were imposed by Ministers and that, with respect, was not an acceptable way for Government to have proceeded.

102. The existing fixed costs scheme in RTA/PL/EL Portal exit cases have been predicated on the basis of a large number of cases with serial participants where the cases are predominantly funded by conditional fee agreements. In these cases it has been said that the so called “swings and roundabouts” can apply. However, the same assumption cannot be made to other areas of litigation where the “mass market” personal injury field does not exist. Take a contract claim or professional negligence claim: there is no mass market of the kind prevailing in the personal injury arena. There will be no “swings & roundabouts” for the major players as there are no “major players”.

103. The court’s approach to fixed costs schemes has historically been that litigants or lawyers who do well or badly as a result of the rules in one particular case have to accept that this is part of the “swings and roundabouts<sup>11</sup>” inherent in such a scheme. However, that is a very different proposition in a low value case where the swings may be a few hundred pounds, from cases worth up to £250,000 where the work involved and the costs at stake are much greater, and where there will not be the same volume of claims.

104. The assumption that practitioners will retain reasonable remuneration on average due to holding many conditional fee agreements, which may (if cases are resolved successfully) produce higher fees to offset relatively modest payments under the fixed costs scheme does not hold good in the vast majority of work outside of personal injury work:

- The use of Conditional Fee Agreements is not widespread, nor is it likely to become so for practitioners with substantial practices in insurer-backed professional liability defence work. Even for barristers acting for claimants, the number of cases in the field being brought under CFAs has decreased significantly under the reforms brought in from April 2013, since they were made much less attractive for solicitors. It is very rare for insured institutional clients to instruct counsel on the basis of a Conditional Fee Agreement, the result being that practitioners in this field will not likely be able to hedge against their lost earnings with potentially more remunerative conditional fee agreement work;
- Since those reforms, the success fees recoverable under CFAs have been greatly reduced or in many cases eliminated entirely. Now that clients have to pay the success fees out of their damages and ATE premiums out of their own pockets success fees are being negotiated down by clients at the outset. Even where a case succeeds and the client is technically liable to pay the lawyers’ success fees, there is very often a moral and/or commercial pressure to waive the success fee – particularly in the cases being considered for this scheme where damages will be under £250,000.

105. Counsel should be entitled to choose the terms upon which they work and should not be forced to gamble with their livelihoods, especially at a junior level. Further, a number of barristers are uncomfortable with CFAs and DBAs because of the potential conflict of

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<sup>11</sup> By way of example, *Lamont v Burton* [2007] EWCA Civ 429 at 9.

interests introduced by them. A fixed costs regime which encourages CFAs and DBAs not only reinforces the conflict, but penalizes clients for litigating.

106. For the reasons advanced above, we struggle to see how the experience of the fixed costs regime can provide any comfort when that has been dealing with cases of very different value and complexity. Indeed, we suggest that the swings & roundabouts philosophy may have no application at all in the broader spectrum of cases to which fixed costs may be extended.

## **EFFECT ON DEFENDANTS**

107. The meritorious defendant will as unjustly affected by fixed recoverable costs as the meritorious claimant. The unmeritorious defendant with deep pockets may also be unjustly advantaged. Many defendants will be insured or represent commercial entities with the resources to afford to litigate at any cost. When the recoverable costs of the winning consumer are fixed to low levels, This means that defendants in this category can litigate with a view to spending their way out of the proceedings. Indeed, a consequence of the widening of the fixed costs regime to other areas is that for claims up to the fixed costs threshold there will be an immediate imbalance in bargaining power. That is not consistent with access to justice or with the CPR which requires the parties to be kept on an equal footing.

## **SECTION IV**

### **HORIZONTAL EXTENSION OF FIXED COSTS**

108. The Working Group's provisional view is that it ought to be possible to propose a system of fixed costs for all cases allocated to the fast-track (£25,000) or less but not beyond, providing that there is provision for allocation of appropriate cases to the multi-track and robust application of such provisions.

109. Fixed costs would then be restricted to the most/more straightforward cases capable of being litigated on the fast track.

110. The Bar Council would suggest that where there are cases with unusual features or any degree of real complexity, those cases would have to be allocated to the multi-track and therefore fall outside of the fixed costs regime. There will be cases where multiple experts are required, trial lengths of two or more days and so on. Again, such cases can be allocated out of the otherwise applicable fixed costs regime to the multi-track. The Bar Council would also go further and suggest that the rules relating to allocation to multi-track, notwithstanding value, should be widened to include cases where there is a real risk of inequality of arms or there are vulnerable clients (including but not limited to patients and children).

111. By way of example, the Chancery Bar Association reported that its members do have experience of appearing in fast track consumer credit claims where the costs of the advocate appearing at trial are fixed under r.45.38. Such claims are highly complex on account of the

nature of the statutory regime and defendants often run a large number of technical defences. This can mean that the trial costs which can be awarded to the creditor claimant simply do not reflect the costs which they incur in pursuing the claim. This illustrates the need to ensure that fixed costs are set at a realistic level and that there is flexibility to deal with complexity.

112. For those fast track cases which are not allocated to the multi-track, there are still likely to be cases where specialist areas require higher fixed costs than the average. This is not something that can be accommodated by “swings and roundabouts” (see above), as specialist cases are largely undertaken by specialist practitioners not also undertaking the more average cases.

113. In personal injury work, PIBA identified the following areas of practice which would justify enhancement within a fixed costs regime:

- Clinical negligence (assuming they were caught by fixed costs at all);
- Industrial disease;
- Stress at work;
- Complex employers’ liability claims; and
- Chronic pain cases.

114. Specialist cases require specialist practitioners and inevitably involve more work. It would be unprincipled to categorise all property cases as the same, or all contract claims as involving the same or parallel expenditure. The absence of an additional uplift or graduated fee to recognise and reflect the demands of the additional work involved in such cases would result in the most difficult cases being conducted by the least experienced legal representatives (counsel included) or not taken on at all. Neither of these outcomes is conducive to effective access to justice.

115. The alternative would be simply to exclude them from the costs regime. In the SBA March Responses, the point was made that clinical negligence cases are unsuited for fixed costs generally. These cases are heavily reliant on experts and each case is so highly variable from the next that achieving some broad commonality between them may be impossible.

116. In its March SBA Response, the PNBA identified a number of features of the Professional Negligence practice area which make it particularly unsuitable for a fixed costs regime:

- (i) Professional Negligence cases are extremely varied in terms of:
  - (a) the professions involved;
  - (b) the factual issues involved; and
  - (c) the legal issues involved.

Fixed costs by reference to value of the claim alone is too blunt a tool for such a wide variety of cases.

(ii) Significant time and cost is involved, both in preparation for and trial of, professional negligence claims irrespective of their value:

- In large part, professional negligence cases involve a substantial amount of factual investigation by necessity, which is not related to the value of the claim.
- It is usually not possible to resolve even low value claims by reference to a short factual or legal point.
- Irrespective of value, a claim will often involve several different causes of action, a number of alleged breaches of duty, consideration of hypothetical causation scenarios, and complex calculations of quantum.
- The factual background often spans a considerable period of time which is necessarily time consuming both in the preparation of the case and also means that trials can last multiple days even when the value of the claims are modest.
- Often expert evidence is required from professionals (e.g. accountants) whose rates are high, even for relatively low value claims.

(iii) Professional negligence cases involve issues of reputation which necessitate the defence to a claim, even if the costs of doing so appear disproportionate by reference to the value of the claim alone.

(iv) Notably, the above factors are reflected in CPR r.44.3(5)(b) (the complexity of the litigation) and (e) (wider factors such as reputation) as being relevant to determining whether costs are proportionate. A fixed costs regime by reference to the value of the claim alone ignores those factors entirely.

117. The Chancery Bar Association pointed out that even lower value claims will have some degree of legal and factual complexity. There are very few (if any) “standard” claims following a common pattern in Chancery work. This means that it is not a practice area which is suited to a fixed costs regime. If such a regime were to be introduced, safeguards or measures would need to be adopted to enable reasonable recompense for non-standard work.

118. There is considerable difficulty in relation to probate, family provision, proprietary estoppel and rectification cases in ascertaining their value. Is the value of the estate the guide? Often, the value of the claim itself is completely obscure at the outset and may bear no relation to the size of the estate. It does not, however, follow that it is particularly unsuited to such a regime, provided that there is sufficient flexibility to enable increased costs to be recovered where that is justified.

119. The Chancery Bar Association concluded that most (if not all) cases requiring Chancery counsel are of sufficient complexity to warrant additional costs. The difficulty is to determine when a case truly merits Chancery expertise and how much the uplift should be. It seems to us that it ought to be possible to devise a system which gives the Court some discretion to determine an appropriate uplift, perhaps subject to a predetermined maximum, on the grounds that the case involves specialist Chancery expertise. A system like that used

in New Zealand, where the appropriate level of complexity is determined at an early stage which then triggers different levels of fees, might cater for both flexibility and certainty.

120. There is a good argument that advisory work (pre-action and during the claim) should be expressly excluded from the fixed costs regime. Not only does it not fit happily into any of the restrictive categories proposed, but it is feasible that written advice on a complicated but low value claim could eat up a high percentage of the budget. This does not encourage the parties to seek proper, sensible, advice at an early stage, especially as the proposed fixed costs pre-action are extremely limited. Alternatively, there should be a ring-fenced category of fixed costs which addresses this work (e.g. in personal injury children cases).

121. A further concern arising from the proposed horizontal extension of the current fixed costs regime is that the particular features of litigation in the limited existing schemes (which in turn made them more amenable to fixed costs) are simply not present in most other areas of civil litigation.

122. The first current area is low value personal injury litigation. As stated above (paragraph 99), the particular features of the low value personal injury fixed costs schemes are those described in the “swings and roundabouts” cases, i.e. there is a sufficiently large pool of relatively predictable work which enables practitioners to get by overall being over-rewarded in some cases and under-rewarded in others, but which were regarded as fair when taken as a whole. In the more specialist areas of work, there simply is no such pool of consistent work and the Bar Council is concerned that it is not safe to ‘read-across’ from the personal injury schemes to other areas and that cases where the fixed costs might under-reward will simply not be pursued.

123. The second area of experience in fixed costs is in what is now the IP Enterprise Court. The Bar Council is concerned that litigants in the IP Enterprise Court are not representative of litigants across the whole spectrum of civil litigation. In particular<sup>12</sup> litigants in the IP court are usually well placed to fund a significant shortfall between their own incurred (solicitor-own client) costs and the fixed costs recoverable inter partes.

124. If, as was suggested in the January 2016 lecture<sup>13</sup>, so-called Balkanisation is to be avoided it would be dangerous to build a fixed costs scheme applying to all civil litigation on the foundations of the low value personal injury and IP Enterprise schemes when these schemes have very distinct features which are not replicated across the range of civil litigation.

## **FAST TRACK BARRISTER’S FEES**

125. The Working Group liaised with a selection of Chambers in the course of the early part of 2016 with a view to obtaining some average figures for a junior member of the Bar

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<sup>12</sup> This appeared to be the position of the IP representatives at the March CJC event.

<sup>13</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>

(up to 5 years call) undertaking fast track work in three different areas: personal injury, property and landlord/tenant cases, and professional liability work.

126. Collation and consideration of the results suggested that there was very little between the figures allowed for property/landlord tenant cases and professional liability cases. The results are shown below:

**Typical property/landlord tenant perspective and Professional Liability**

	Value of claim - no more than £3000	More than £3000 but not more than £10,000	More than £10,000 but not more than £15,000	More than £15,000
Pre-action advice (either written or in conference)	£500	£750	£1,000	£1,250
Pleadings (i.e. either a fee for PoCs and Reply or a Defence)	£350	£600	£750	£1,000
CMC	£350	£500	£750	£1,000
PTR	£350	£500	£750	£1,000
Trial (i.e. a fast track trial lasting one day)	£500	£750	£1,500	£2,500

127. Fast track work undertaken by juniors does however vary and often fees will be higher than these sums. One specialist professional liability set advised the Working Group that the pleadings fee is roughly half the amount they typically charge for a single pleading (and so, assuming a POC and Reply, the claimant’s fixed costs should be approximately 4 times the fee given). The same set commented that the CMC/PTR fees reflect the norm (if a little on the low side, particularly for the CMC) and the trial fees are a little low, although assuming a one day trial, they represent a small increase on the current fast track fixed fees.

128. For personal injury the figures were as follows:



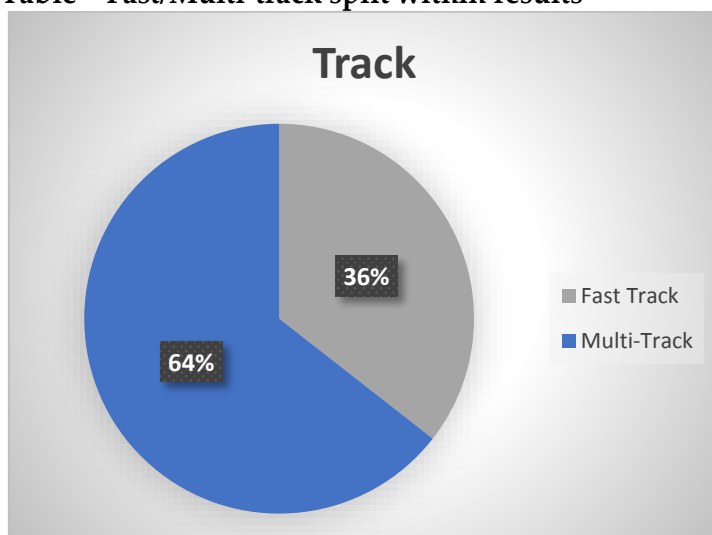
**Typical PI (RTA/EL/OLA) case**

	No more than £3000	More than £3000 but not more than £10,000	More than £10,000 but not more than £15,000	More than £15,000
Pre-action advice (either written or in conference)	£450	£600	£750	£900
Pleadings (i.e. either a fee for PoCs and Reply or a Defence)	£300	£450	£600	£500
CMC	£350	£500	£750	£1,000
PTR	£350	£500	£750	£1,000
Trial (i.e. a fast track trial lasting one day)	£500	£710	£1,070	£1,710

129. Any horizontal extension of the fast track fixed costs must therefore accommodate counsel's fees at this level as a minimum.

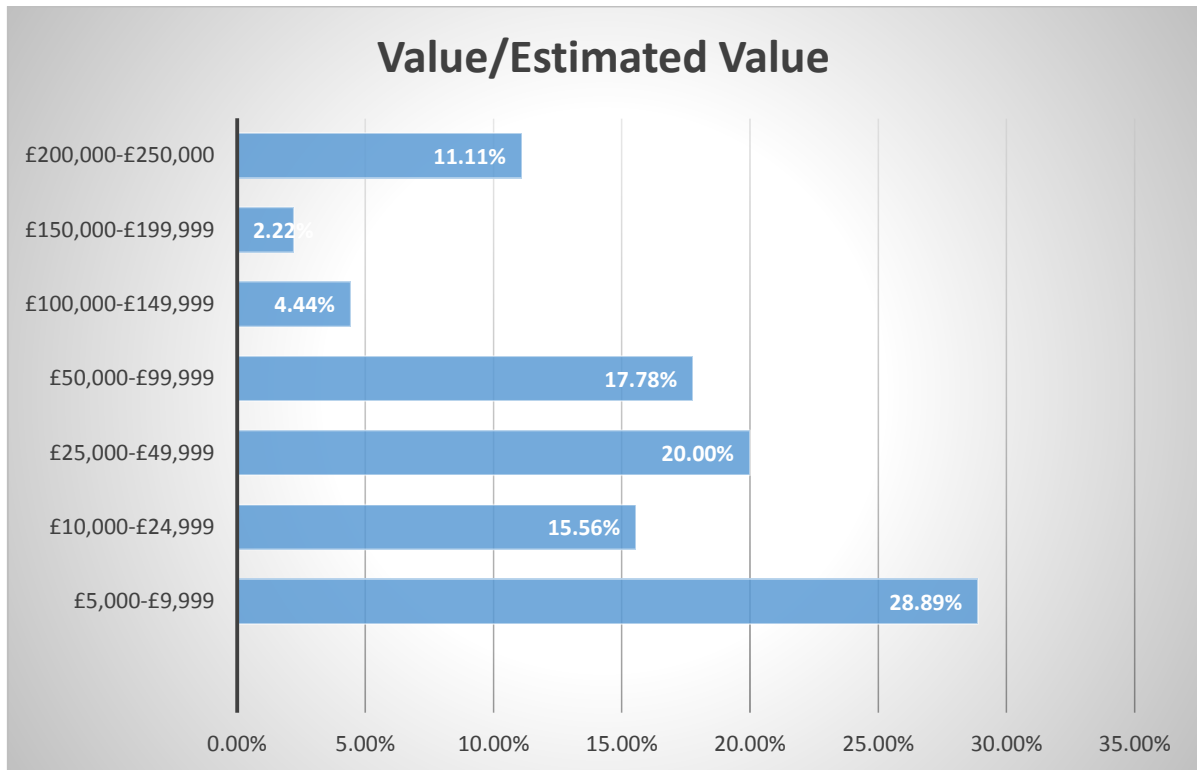
130. The Results of the Working Group's online survey are considered below. The results are split between the fast track and multi-track as follows:

**Table – Fast/Multi-track split within results**



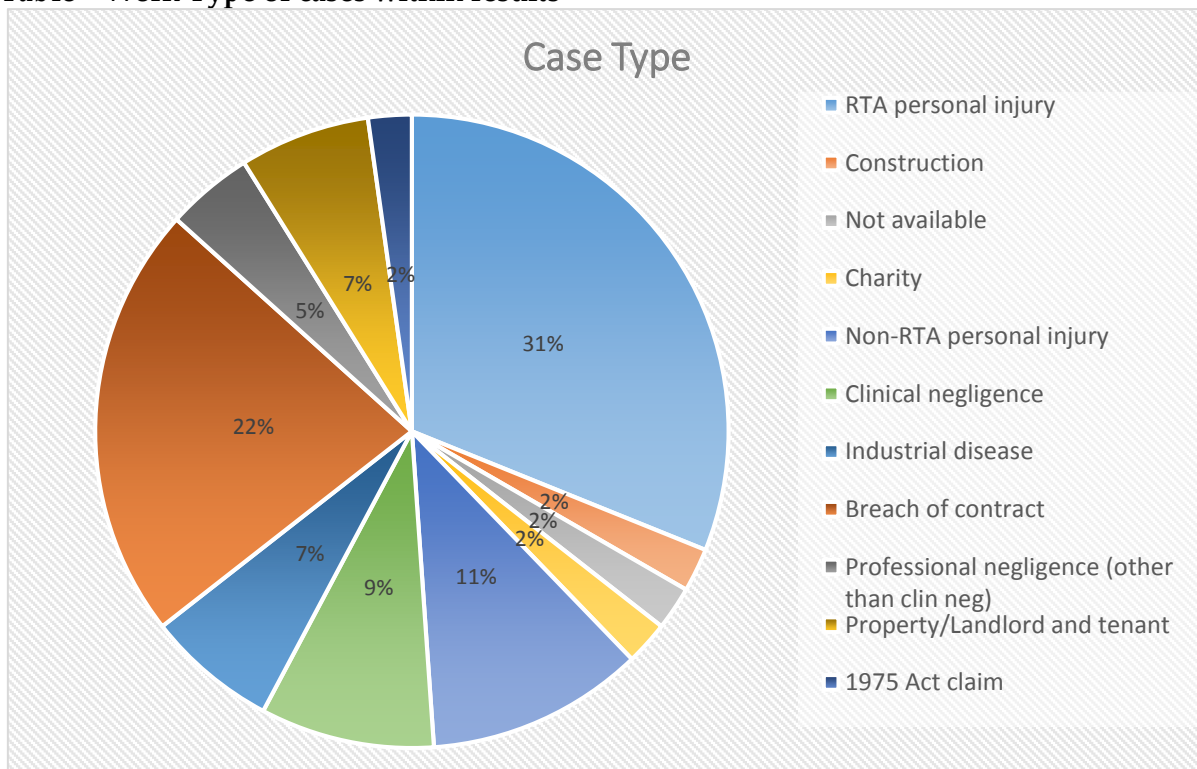
131. The value/estimated value of the cases for which responses were received are:

**Table – Value/Estimated value of cases within results**



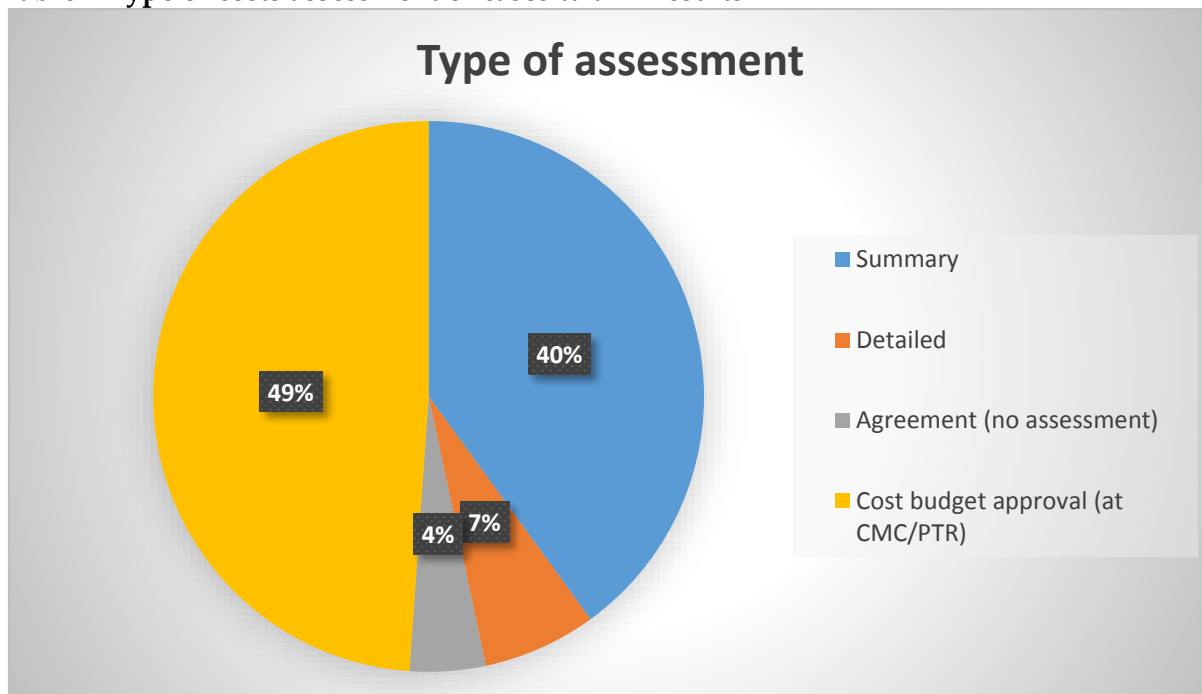
132. The work types within the survey are split according to the following proportions:

**Table – Work Type of cases within results**



133. As the chart below demonstrates, there was a fairly even spread between results gathered from summary assessments and those gathered from costs budgeting hearings:

**Table – Type of costs assessment of cases within results**



134. The average costs assessed or approved are summarised in the following table:

**Table – Average costs assess/approved by case type**

Case Type	Track	Average total costs assessed / approved
RTA PI	FT	£8,330.29
Non-RTA PI	FT	£14,931.25
RTA PI	MT	£69,563.25
Property/Landlord & Tenant	MT	£41,000
Clinical Negligence	MT	£103,966.20
Industrial Disease	MT	£111,449.30
Breach of Contract	MT	£53,989.44
Construction	MT	£10,184.95

135. The average assessed or approved counsel's fees are summarised below:

**Table – Average Counsel’s fee from sample**

Case Type	Track	Average counsel's fee
RTA PI	FT	£1,377.64
Non-RTA PI	FT	£882.50
RTA PI	MT	£15,437.50
Property/Landlord & Tenant	MT	£9,025
Clinical Negligence	MT	N/A
Industrial Disease	MT	N/A
Breach of Contract	MT	N/A

136. The full details of work done by the Bar Council can be shared with the Review and the Bar Council welcomes the opportunity to further explain the outputs from the work carried out. It must be stressed that the exercise carried out by the Bar Council is no substitute for a full review of the 2013 reforms (as set out in Section II above).

#### **COSTS BASED ON VALUE DAMAGES**

137. The current existing regime looks to the damages claimed as being the correct proxy for deciding whether the case falls within a certain track or fixed costs regime. Banding needs to be based on a proxy of some kind and the level of damages claimed or allowed seems to be the only sensible option. However, the issue of whether any banding should depend on the sums claimed or awarded requires careful consideration.

138. This is where, in our view, the biggest problem exists with the extension of fixed costs overall. In some of the cases barristers are involved with, it is particularly difficult to know until the end of the action what the value of the claim is likely to be. Examples are claims under the Inheritance (Provision for Family and Dependents) Act 1975 ('1975 Act'), proprietary estoppel claims (where relief is in the discretion of the court) and claims for an account where the amount of money missing might be unclear. In many other claims – e.g. for the removal of trustees in chancery proceedings – no monetary sum might ever be awarded. In some cases the relief sought might include both a claim for money and a claim for other relief which is difficult to quantify. It is hard to see how the banding system could apply to such cases.

139. The proposals appear to proceed on the basis of relatively simple claims for money, when in many areas of practice this is often not the sort of claim being made.

140. The Chancery Bar Association commented in its March SBA Response that either Chancery claims of the sort discussed above need to be excluded from the proposals (so that only claims where there is a solely a pleaded claim for money are included) or the banded system needs to be revisited.

141. Where money claims are concerned, it would seem to make sense to set the band at the start of the proceedings, otherwise: (a) parties will not know how much they can spend, and (b) the stated aim of improving access to justice will not be achieved. On the other hand, if the band is set purely by reference to the sum claimed, the parties will be encouraged to include as many claims as possible for as much as possible, even if the prospects of success are slight, in order to maximise costs recovery.

142. It is likely, therefore, that the court will need some oversight of the band into which the claim should fall. We are concerned that an early hearing to assess the applicable band could turn into a protracted debate in the nature of a summary judgment application: e.g. “this claim for £200,000 has no real prospect of success, so the case turns only on the other claim for £50,000 and the claim should really be in Band 1, not Band 4”. Such a dispute at an early stage would tend to increase costs rather than reduce them and could result in significant unfairness if the claim for £200,000 ultimately succeeds.

143. At this point we return to one of the stated aims of the fixed costs extension - certainty and consistency, i.e. that litigants know, at the outset of the case, what the recoverable (or adverse as the case may be) costs will be and be able to plan accordingly. If, in cases where the amount awarded at trial can, quite legitimately, vary significantly from the pleaded case, and the amount of fixed costs is predicated on the amount awarded, there can be no certainty and litigants (and their representatives) cannot plan or be properly advised.

144. As previously indicated, litigation is an area where the complexity and size of damages do not necessarily go hand in hand; a claim of relatively low value, and which may be relatively straightforward to bring, can involve considerable work to litigate. The reasons for this are that many disputed issues lie in areas of breach, causation and damages, which are both legally and factually complex. Parties in modest but complex claims, in particular, may be disproportionately disadvantaged if they are unable to retain solicitors and counsel of sufficient seniority to handle the complexity of a given case. As noted above, there is great inequality in the financial resources of litigants and thus their ability to absorb a shortfall on fees.

145. We suggest, therefore, that the Court must have some residual discretion at the end of the case to adjust the Band into which the case falls to avoid any injustice.

146. Where cases do not involve the recovery of damages, but involve instead non-monetary relief, then clearly they would fall outside the fixed costs regime determined by damages recovered. Such claims may benefit from not being the subject of fixed costs at all, or their own separate fixed costs regime if sufficient evidence of costs expended in such cases is available to promulgate fair and reasonable figures.

147. As to the methodology to be adopted for allocating claims involving non-monetary relief to an appropriate Band, this is a difficult point to address in the abstract. However a possible approach to allocation could be as follows:

- For claims for relief which is solely non-monetary in nature, the Band could be determined by the judge, if not agreed by the parties, in light of set considerations which may include:
  - (a) the complexity of the issues;
  - (b) the value in money terms of the relief sought,
  - (c) wider factors such as
    - (i) reputation; and
    - (ii) public importance of the claim.
- Such a determination would need to take place at an early procedural stage so as to prevent injustice to the parties, who would otherwise be incurring costs without knowing whether they will be recoverable in principle. However, one can readily see that a 'band determination hearing' would itself become a highly contested and expensive interlocutory matter, like a budgeting hearing but potentially with more wide ranging evidence and argument.

148. For claims which include both a monetary and non-monetary element of relief, the starting position could be that the claim is allocated to the relevant Band for the monetary element of the claim, unless it can be shown that the non-monetary element justifies moving the claim to a higher band by reference to the considerations discussed in the previous paragraph.

149. Evidently, this cannot be a process of scientific specificity and can only aim to achieve a "rough and ready" proxy for the value of the non-monetary element of a claim. Introducing a judicial discretion, which seems unavoidable in cases of non-monetary relief, will inevitably generate a degree of satellite litigation. The Rules Committee would need to be satisfied that the effect of such satellite litigation is not to neutralise the benefit of fixing costs in these cases. The difficulties inherent in such cases may well be a factor in preferring to retain the existing costs budgeting/costs management system rather than extend the scope of fixed costs.

150. We note at the outset that the "Rules" set out on p.14 of Sir Rupert's lecture state that: "1. If the claimant wins, the band is determined by the sum or the value of the property recovered. If the defendant wins, the band is determined by the sum or the value of the property claimed."

151. This rule refers to a "win" by the claimant or defendant, but it is not clear how it relates to a settlement. Nevertheless, on the face of it the proposal does specify how the value would be calculated. The Band is proposed to be fixed at the end of the case, and is determined either by: (a) above if the defendant wins, but (c) above if the claimant wins. We address this proposal below:

152. The Band is based on the pleaded sum - This option has the benefit of certainty, as it enables practitioners to advise, and clients to understand, their costs exposure at the outset and to plan their expenditure. However, it is likely to lead to inflating the pleaded value, for instance in cases where claimants are wealthy (e.g. banks in professional negligence claims) and for whom an increase in the fees they pay their lawyers is an acceptable cost for the

benefit of forcing defendants to incur more. It might also arise where the claimants' lawyers advise that they cannot conduct the case effectively for the fees in a lower band.

153. The risk of inflating the pleaded value could, however, be dealt with by providing the court with a power, where after the outcome of the case it concludes that the claimant had deliberately inflated the value, to direct that the claimant's costs be fixed at a lower, more appropriate band. Although this could in itself lead to satellite litigation, the benefit probably outweighs the disadvantage. We would also suggest that this power be confined to the outcome of the case, so as to avoid tactical attempts by defendants in the course of the litigation to attempt to persuade the court to direct that a lower band is appropriate.

154. The Band is fixed at the start of the case - on or shortly after issue, or at allocation, based on agreement or assessment by the Court. From a claimant's perspective, difficulties with the proposals are that: it is not always straightforward to assess the value of a claim accurately; there is often a dispute about the appropriate measure of loss; there is a risk of inequality of arms here and reduced access to justice; if a claimant has an arguable claim to an additional head of loss, he may be discouraged from bringing it because of the costs risk: that might itself be thought positive, but it would affect the wealthy claimant who can afford costs less than the claimant of more modest means.

155. From a defendant's perspective, a difficulty with the proposal is that if a claimant succeeds, but recovers less than the pleaded claim, with the result that a lower Band applies than the pleaded claim would suggest, defendants may well by that point already have paid their lawyers' fees based on a higher Band, but would not have any means of recovering the excess. A defendant is thus effectively penalised for the claimant's exaggeration of its claim.

156. We believe an option involving assessment by the Court at/shortly after issue or at allocation could cause real problems. It would encourage satellite disputes at an early stage, thereby potentially increasing costs and further entrenching the parties' positions generally. In addition, unless the matter was clear-cut, the court would not have sufficient material to make a decision, so would either: (i) rely on the pleaded value, or (ii) depart from the pleaded value for more or less arbitrary reasons.

157. We do however see sense in the parties being able to agree the appropriate band, and even to be able to agree that fixed costs do not apply at all. There is no injustice in permitting parties to agree the appropriate costs regime for their dispute. Given that Sir Rupert Jackson's primary concern appears to be access to justice, we consider that whatever regime is ultimately adopted (if any) the parties should expressly be permitted to opt-out (by agreement) of the fixed costs regime should they so wish or agree that a case should fall within a different Band within the regime. This is important and does not currently appear to be provided for in the proposals.

158. The Band is based on the sum recovered - In theory, the benefit of this approach is that it would keep claimants "honest" in their assessment of the value of the claim and the resources they expend during the course of the litigation in pursuing it. However, this would defer the determination of the appropriate Band to the end of the case and so cause unacceptable uncertainty to both parties. It would also cause difficulties determining the

appropriate Band in a case where a claim failed on liability, and the recovery was therefore nil.

159. This proposal would have the benefit of discouraging inflated claims. Claimants would be incentivised to plead their claim as close to the level of their likely recovery as possible in order to avoid an unwelcome change of expected Band (and irrecoverable cost) at the outcome of the case. Claimants who plead at a reasonable level would therefore have a significant degree of certainty. However, the uncertainty which would inevitably be faced by claimants (even those with the best of intentions at the outset) counts against the stated advantages of the fixed costs scheme.

160. The defendants “pleaded basis” rule also provides a measure of certainty in that should they defeat the claim altogether, they would have certainty over their recoverable costs.

161. As mentioned previously the proposal should also be modified to enable the parties to agree either that fixed costs do not apply or that a specific Band applies.

162. Whichever approach is selected (and the difficulty in selecting an approach serves to illustrate the dangers of extension of fixed costs) it does inevitably create an additional layer of tactical complexity to litigation which does not currently exist which in itself is undesirable. This seems to be an unavoidable consequence of any fixed costs regime which contemplates different recoverable costs depending on whether the claimant or the defendant succeeds. Again, this might support the suggestion that the costs budgeting approach should not be discarded.

## SECTION V

### VERTICAL EXTENSION OF FIXED COSTS

163. The Bar Council opposes an extension of fixed costs to £250,000.

164. For the reasons expressed below, the Bar Council strongly resist any attempt to extend the fixed costs regime beyond the fast track until sufficient time has been allowed for:  
(a) the existing April 2013 reforms to bed in; and  
(b) any horizontal extension being monitored to the point is recognised as a success (we have set out our reasons why we doubt that it would succeed).

165. This approach should hardly come as a surprise. It was indeed the view expressed by Sir Rupert Jackson in his final report in respect of the April 2013 changes: [emphasis added]

*.....The top priority at the moment must be (a) to achieve a comprehensive scheme of fixed or predictable costs in the fast track and (b) to introduce a scheme of capped scale costs for lower value multi-track IP cases. These proposals are set out in chapters 15 and 24 respectively.  
2.10 Once the necessary reforms have been implemented in the fast track and in multi-track cases in the Patents County Court (the “PCC”), there must be a period of evaluation. Following that period of evaluation, I recommend that further*



*consideration should be given to the possibility of introducing a scheme of fixed costs or scale costs into the lower reaches of the multi-track. When that consideration takes place, the views of court users should be elicited by surveys of the kind that the FSB kindly undertook during Phase 2. Such surveys should be undertaken on a more extensive basis amongst a variety of categories of court users.*

2.11 *If, following that future consultation process, any scheme of fixed costs or scale costs is to be adopted, there will be a variety of models for consideration. One model would be a system of scale costs subject to an overall cap, such as that which is planned for the PCC. Another model would be the CMS scheme. A third model would be a scheme of fixed costs of the kind operated in Germany. The German costs regime is described in PR chapter 55. Since the German civil justice system is structured differently from our own, the German costs rules could be a general guide but not, of course, a template. These are all questions for the future but not, I suggest, the remote future.*

Page 172

166. Until both conditions referred to above have been met, there is a serious risk that any vertical extension of fixed costs will result in failure and intolerable restrictions on access to justice, quite apart from the potentially devastating effect it might have on the junior Bar.

167. To put matters into context, the results of the March SBA Responses demonstrate that claims value up to £250,000 represent a significant proportion of the work of the Bar generally, but more particularly the junior Bar.

168. The Table below summarises the data from the March SBA Responses:

**Table – Percentage of work up to £250,000 from March SBA Responses**

<b>SBA</b>	<b>Percentage of work up to £250,000</b>
PIBA	Conservative estimate is in order of 80% plus
PNBA	50%
CBA	“A significant number of our members would be caught by the fixed fees”
TECBAR	80% of junior counsel work (up to 5yrs call) Outside London - “a high percentage of work for barristers outside of London at all levels”
4 New Square <sup>14</sup>	0-5 yrs call: 75% 5-13 yrs call: 60% 13yrs+ juniors: 30% Silks: 10%
Pump Court	5 yrs call: 50%

169. The figures demonstrate that any broadening of the fixed costs regime to claims up to a value of £250,000 would have a significant impact on, for some barristers practically all

<sup>14</sup> A leading professional liability set

of their work, for others a very high percentage of their work. This alone supports the proposition that a cautious approach should be taken to the extension of fixed costs. In the interests of all concerned, if any extension is to be agreed, it should be incremental in stages following experience of earlier extensions.

170. An extension of the fast track to claims up to a value of £250,000 would be unprincipled without a thorough evidence and experience based background from which to confidently impose fixed costs.

171. An extension of fixed costs is likely to lead to meritorious claims not being pursued if the level of remuneration is too low to allow solicitors and counsel to take on difficult or complex cases where the fixed costs do not accommodate the actual and very real costs of investigation, analysing and preparing a claim, and would evidently not be based on any meaningful evidence or evaluation.

172. There is also real difficulty in setting a fixed fee for such a broad damages value to accommodate the significantly varying types of cases that would be caught by fixed costs up to a value of £250,000. The problem with fixed costs is that, by their nature, they treat all cases alike. A fee which is proportionate in the context of a simple case brought to collect a debt of £250,000 may not be proportionate in a complex probate dispute about an estate worth £250,000 (on the assumption that the limits on value would apply to such cases). Chancery matters often involve legal and factual issues with significant complexity. This is true no matter what the value of the claim might be. An issue about proprietary estoppel and constructive trusts, for example, is complicated whether the property concerned is worth £100,000 or £10 million.

173. The New Zealand model, in which differing levels of complexity are taken into account as well as value, better caters for the substantial variations in subject matter and specialism which can occur.

## LIMITATIONS ON TYPES OF CASES

174. A horizontal extension of fixed costs to other areas of the law beyond personal injury, but up to a value of £25,000, must accommodate the complexities and difficulties inherent in all of the areas of civil litigation to which it would apply.

175. The PNBA in its March SBA Response stated:

“We do not accept that the costs in our area can safely and fairly be fixed for cases up to £250,000:

(i) The figure of £250,000 is too high as this connotes a significant case for most members of public and many solicitors and barristers; it will cover a large number of claims where the value and complexity will vary enormously, meaning that making only fixed costs available (even if on graduated basis) will be arbitrary and unjust.

(ii) There are many cases which might have a monetary value of less than £250,000, but where the complexity or importance of the case means that it cannot possibly be conducted satisfactorily or at all at anything like the level of fixed costs being proposed.

Several examples from members of chambers (out of the many which could be available) include the following:

- the North East Property Buyers litigation: when it reached the Supreme Court, it was one repossession of a house worth less than £150,000 - but the issues decided determined thousands of cases. There had been 9 test cases originally, each equally low value. Mortgage cases in general are prime examples of low value cases that can raise highly complex issues that cannot be dealt with at low cost - especially where the borrower is in person;
- a case which is ongoing but reported both in QB and CA on strike out. This is a complex advance fee fraud but the claim is modest in value (c. £150,000). An estimated £60,000 was spent initially investigating where the money had gone and who were the proper defendants. After repeated extensions of time for sending a Letter of Response to the Pre Action Protocol Letter, the Defendants tendered a cheque for the principal sum lost (£100,000) plus interest but no costs - asserting Tender before Claim. They denied liability. The cheque was refused and proceedings commenced alleging (amongst other things) negligence of the defendant accountants and fraudulent misrepresentation. The Defence asserted Tender and denied liability. The Defendants applied to strike out, going up to the Court of Appeal, with the Defendants being represented by a senior QC [...]. The matter is now proceeding to a 4-5 day trial. Even ignoring the 3 hearings to strike out the claim the case could not have been deal with on a budget of £70,000."

176. The Bar Council is opposed to the introduction of fixed costs up to anything above £25,000 until the horizontal extension has first been allowed to bed in and experience has been gained as to whether its introduction has been successful or not.

### **THE JACKSON GRID FIGURES**

177. Although we understand that the grid of figures appearing in Sir Rupert Jackson's January 2016 paper (paragraph 5.4), are merely illustrative, the Bar Council has received some helpful feedback from the March SBA Responses as to the applicability/utility of the figures proposed.

178. The figures in the Grid are plainly only concerned with cases in the lower reaches of the multi-track. We have seen no similar illustrative figures for the fast track.

179. There is unanimous consensus that the figures proposed are wholly unrealistic at providing a level of fixed recoverable costs for the various levels of claims captured by the table.

180. For ease of reference, we have set out the Table as it appeared in Sir Rupert Jackson's speech below:

	<b>BAND 1 £25,000 – £50,000</b>	<b>BAND 2 £50,001- £100,000</b>	<b>BAND 3 £100,001 - £175,000</b>	<b>BAND 4 £175,001 - £250,000</b>
Pre action	3250	5250	8750	12000
Issue/statements of case (add 25% if counterclaim)	1400	2250	3750	5750
CMC	950	1500	1500	1750
Disclosure	1875	3000	3500	5000
Witness statements (add 10% per witness approved by the court over 3)	1875	3000	5000	7500
Expert reports (add 10% per expert approved by the court over 2)	1400	2250	3750	5500
PTR	950	1500	1500	1750
Trial Preparation (add 5% per day for the 6 <sup>th</sup> and subsequent days if trial fixed for more than 5 days)	1900	3000	5000	7500
Trial (add 5% per day for the 6 <sup>th</sup> and subsequent days if trial lasts for more than 5 days)	3750	6000	11000	18000
Negotiations/ADR	1400	2250	3750	5500
<b>TOTAL</b>	<b>18750</b>	<b>30000</b>	<b>47500</b>	<b>70250</b>

181. By reference to the initial draft of figures proposed, we would comment specifically:

182. If the figures were just for counsel's fees, they would appear broadly (and subject to the comments below) to be workable. We suspect however that these are intended to cover both solicitor's costs and counsel's fees, thus, £1,000 for drafting a Statement of Case will quickly become only £500 or less for counsel's fees once solicitor's costs of preparing instructions and papers, reviewing the draft etc. have been taken out.

183. We appreciate that grading the fees according to the value of the claim reflects the practice in existing schemes, but the reality is that this leads to arbitrary differences, because the amount of work involved may be the same whatever the value.

184. At the rates proposed it may be possible to find counsel to take on the work, but even at the higher rates for claims in excess of £15,000, the choice may well be restricted to barristers of one or two years call, given that hourly rates for barristers of 5 years call in most chambers are approximately £150 (which is still comparable to that of even many trainee solicitors).

185. The pre-action costs appear to us to be far too low, with the requirements of the Pre Action Protocols and the investigation work that is required in the vast majority of cases. This is particularly so in clinical negligence and other professional indemnity disciplines.

186. Issue/statements of case (add 25% of counterclaim). For counsel this could include drafting Particulars of Claim (and potentially aspects of Claim Form), Defence (and Counterclaim), Reply (and Defence to Counterclaim), Rejoinder, Part 18 Requests. Again, the range is considerable, but can range between 5 hours – 50 hours for Particulars of Claim and Defence, and between 2-15 hours on Reply, Rejoinder and Part 18 Requests. The Grid figures are plainly far too low.

187. The proposed 25% uplift for counterclaims is a concern. It is somewhat arbitrary. If the counterclaim is directly related to the claim this might be a reasonable amount. If, however, the counterclaim is relatively distinct then there may be considerable work (and potentially more work than the claim).

188. CMC: for counsel this would be attendance at, and discussions before, the CMC. The concern is that instructing junior counsel for, say, a one day CMC could cost in the region of £2000-£3000 which, even using very junior counsel, would exhaust the fixed allowance without solicitor's time. Even if the CMC were only half a day there are real concerns that the CMC allowances are insufficient. Further, it is not clear if only one CMC is covered or multiple CMCs (which would not be particularly unusual in cases up to £250,000).

189. The figures for disclosure could be very low in a case with a significant quantity of material to deal with. This can be the case, for example, in a proprietary estoppel dispute where the disclosure given may go back over decades (if the representations and detriment are alleged to have taken place over such a period of time). Witness evidence in such a case could also be significant.

190. The figures for issue and statements of case could be low even in Band 4 where there are complex legal and factual issues necessitating lengthy pleadings.

191. The grid does not allow for contingent costs as on precedent H – e.g. interim applications. Some allowance should be made for this.

192. The experts reports work figures are far too low. Experts work will involve conferring between experts prior to exchange of reports, conferring with experts upon receipt of counterpart reports, drafting agendas and considering and advising on joint reports.

193. Trial preparation: this does not include brief fees which fall within the trial category. Therefore counsel's involvement might include attending a conference with the client or advising on specific issues which arise. However, if a conference does arise (and there is limited other allowance for conferences with counsel in the fixed figures), the cost of the conference will not leave much, if any, sums left over for true trial preparation. If conferences with counsel become less common this would be regrettable, since these may often be a driver towards settlement or a narrowing of issues at trial.

194. The trial costs are inadequate. Trial costs should be based on a per day rate, to include the fees of any counsel instructed separately identified or ring fenced wherever possible. £6,000 for five day trial, for example, is greatly below the fair and reasonable figure for both solicitors and counsel combined. Indeed, for counsel alone it is probably bordering on 50% of what would be recoverable on a standard basis assessment. Taking the two extremes: if you have a one day trial for £25,000- £50,000 and instruct very junior counsel, then they would charge around £1500- £3000. At the upper end, for a five day trial using more experienced counsel, then they would charge around £15,000 - £35,000. The figures in the table mean that: (i) solicitors will not be able to attend trial; and (ii) the cases may have to be prepared and conducted by more junior counsel.

195. The grid therefore fails to provide for a fixed cost for preparation and conduct of a trial lasting up to five days (with an uplift of 5% per day thereafter) in all four Bands. For example, it is reasonably unlikely that a trial in a claim for less than £50,000 (Band 1) would last five days, but if it were to last that long, costs of £1,900 for preparation and £3,750 for the trial would obviously be inadequate: the length of trial would suggest that there was considerable factual and/or legal complexity. If £7,500 and £18,000 are allowed for preparation and conduct (respectively) of a 5 day trial for a claim in Band 4, it is difficult to understand how a similar length of trial could cost significantly less than this, just because the amount at stake is less.

196. Consideration should be given to the preparation of a separate grid for trials (preparation and conduct of the trial itself) which puts more emphasis on the length of the trial and less emphasis on the amount at stake (although some, less significant differentiation between the Bands might still be justified).

197. The consequence of these fixed costs might be that, instead of junior juniors and middle- juniors losing work, senior juniors or junior QCs are no longer instructed.

198. For court hearings, the fees do not adequately cover the cost of travel; the majority of hearings in such cases will be in the County Court and so many will be outside London. Many clients and solicitors do want specialist London counsel for work in the professional liability field, given the reputational issues and the specialist nature of the work, and it will not be economic for London counsel to attend a hearing in say Manchester where the train fee alone is often in excess of £200.

199. The PNBA observed in its March SBA Response that in the experience of its membership, costs budgeting has been very mixed, largely because of the lack of consistency between the courts and judges. The figures for fixed costs being proposed fall considerably

below the level of the budgets which PNBA members know are being put forward and agreed/approved for claims within the value of the Grid. The PNBA said that its members could not anticipate a costs budget for a professional negligence case worth £250,000 ever being at the level of fixed costs now proposed. Given this, we question to what extent the figures reflect real experience of budgeting.

200. As PIBA pointed out in its March SBA Response, the most striking feature of the table is the trial costs. This is an area where the great majority of solicitors rely upon counsel. It would appear that there is a lump sum allowance for any trial with a length of hearing of up to five days. It follows that the same sum is payable for a one day trial or a five day trial. This appears to us to be illogical, unprincipled and wrong.

201. The figures for negotiations and ADR seem to us to be very low across the bands, when one considers for example the cost of a mediation. A mediation will often be the best route to solving probate and inheritance disputes, for example, without the expense of a trial, but the parties will need to pay for the costs of a mediator who is a specialist in the field (which may climb if the mediation runs on late), potentially for a venue and for the costs of those representing them. Preparation is required from those representing clients at mediations, including position statements. We are concerned that even the figures for Band 4 are not realistic bearing this in mind, and the need to engage in settlement discussions at other points during the case. The figures that have been chosen would jeopardise the settlement of disputes pre-trial.

202. Evidence supplied by barristers to the Bar Council in the form of budget hearing outcomes further demonstrates that the Grid figures are far too low.

203. The table below was helpfully compiled from data from 4 Pump Court: a well-known specialist professional liability set. The summary table records (1) the fixed fees identified by Jackson LJ at page 13 of the January 2016 paper – for **both solicitors and counsel**; alongside (2) the average figures approved at each stage -- **for counsel only** – based on data derived from 63 cases, so for example the fees approved for counsel alone exceed the total costs contained in Jackson LJ's table. This demonstrates that the fees proposed (if that is what they are) by Jackson LJ are unworkable and far too low.

**Table – Exercise carried out by 4 Pump Court**

	BAND 1 £25,000 - 50,000		BAND 2 £50,001-		BAND 3 £100,001 -		BAND 4 £175,001 -	
	LJ Jackson*	4 Pump Court**	LJ Jackson*	4 Pump Court**	LJ Jackson*	4 Pump Court**	LJ Jackson*	4 Pump Court**
Pre action	3,250	6,248	5,250	1,035	8,750	1,597	12,000	0
Issue/statements of case	1,400	2,357	2,250	2,148	3,750	3,411	5,750	5,655
CMC	950	1,421	1,500	1,773	1,500	2,205	1,750	2,442
Disclosure	1,875	891	3,000	947	3,500	1,600	5,000	2,369
Witness statements	1,875	1,751	3,000	1,162	5,000	2,410	7,500	4,792
Expert reports	1,400	1,717	2,250	2,014	3,750	2,035	5,500	4,786
PTR	950	1,486	1,500	1,718	1,500	2,098	1,750	2,288
Trial Preparation	1,900	5,522	3,000	6,063	5,000	8,407	7,500	8,988
Trial	3,750	5,938	6,000	10,186	11,000	10,300	18,000	21,802
Negotiations/ADR	1,400	1,014	2,250	1,533	3,750	2,799	5,500	2,092
<b>TOTAL</b>	<b>18,750</b>	<b>28,345</b>	<b>30,000</b>	<b>28,579</b>	<b>47,500</b>	<b>36,862</b>	<b>70,250</b>	<b>55,214</b>
Total number of cases	n/a	15	n/a	17	n/a	18	n/a	13
Total number of cases in London	n/a	5	n/a	6	n/a	10	n/a	6
Total number of construction cases	n/a	2	n/a	4	n/a	10	n/a	6

\* The figures given are those suggested by Jackson LJ in the grid at para 5.4 (page 13) of his 28 Jan 2016 paper

\*\* The figures represent the average of the fees approved across the total number of cases identified in Row 16 for the band in question. It has not been possible in the limited time available to provide figures for individual cases demonstrating the range of fees from one case to another.

204. The table below shows the case costs per party claimed and/or approved in sample cost budgets contributed by individual barristers at 4 Pump Court:



**Table – 4 Pump Court exercise – costs claimed per party**

	Value of case (pleaded)	Type of case (prof neg/construction/etc)	Claimant		Defendant	
			Budget claimed (total)	Budget approved (total)	Budget claimed (total)	Budget approved (total)
1	£ 14,000	Prof neg (surveyor's neg)	£65,071	(No formal record although it was approved in roughly the same amount)	£45,714	(No formal record although it was approved in roughly the same amount)
2	£14,000 (agreed multi-track)	Tree roots claim, Medway County Court	£81,926	£71,951	£61,606	£53,317
3	£44,000	Tree roots claim, Gloucester County Court	c.£60,000 <sup>15</sup>	£47,398	c.£45,000*	£36,573
4	£62,000	Tree roots claim, Central London CC, TCC list	£97,736	£88,507 (mostly agreed)	£79,898	£76,7949 (agreed)
5	£111,511.88	Commercial (insurance coverage dispute)	£104,444	CMC awaited	No budget submitted	CMC awaited
6	£125,000	Construction	£207,201	£171,749	£161,470	£151,470
7	£176,000	Contractor/sub-contractor flooding dispute, QBD	£273,900	[CCMC only approved costs up to mediation. Case settled at mediation]	D1: £99,556 D2: £156,538	[CCMC only approved costs up to mediation. Case settled at mediation]
8	£200,000	Prof Neg (Chancery Division of HC)	£540,000	Assessed at £380,000 but not approved	£240,000	£240,000

\* No budget available but Counsel's hearing note says: "The total for the Claimant's budget is around £60,000 and that for the Defendant is around £45,000."

205. The table below provides evidence of what the courts have been allowing in professional negligence cases (by way of example):

**Table – Examples of professional negligence costs which have been allowed – 4 Pump Court**

Band	Claimant as claimed	Claimant as approved/agreed	Defendant as claimed	Defendant as approved/agreed
1			£120,690.50	
1			£120,341.00	
2	£52,762.00	£41,800 (approved)	£19,700.00	£19,700 (agreed)
2	£95,292.70	£104,788.30 (approved)	£129,260.50	£119,469.50 (approved)
2	£81,385.00	Left over for another hearing	£137,777.32	Left over for another hearing
2	In person	In person	£157,336.78	£111,715.28 (approved)
2			£80,077.50	
2	£124,431.25		£141,143.12	
2	£243,258.83			
3	£208,336.00	£208,336.00 (agreed with very minor variations)	£245,716.08	£245,716.08 (agreed with very minor variations)

206. The above evidence confirms that the figures contained in Sir Rupert Jackson’s Grid are unworkable commercially.

207. If the Grid figures, or something even approaching them, became the standard rate at which services were provided, the likely outcome is that counsel will not be instructed in cases under £250,000, or will be instructed very late, or will have to take on work of a complexity which would otherwise merit a more senior barrister. Insofar as access to counsel, and counsel of suitable experience/specialism/seniority, is seen as in the interests of justice, this would obviously be detrimental. However, we consider that the more likely outcome is that in fact, the rates that are charged would not change, but the lack of recoverability will mean fewer claims are litigated. This would have the same detrimental effect in that there would be a temptation to keep as much of the fees related to a diminishing pool of work in house as possible, meaning counsel being instructed late, or counsel of insufficient experience or specialism being instructed.

208. In relation to those lay clients who are able to be represented by solicitors, and/or by counsel (with direct access training, if necessary), there may be pressure on counsel to considerably reduce their fees in a given case by reference to the amount already spent by instructing solicitors, or simply because the amount of work counsel is required to undertake in a given case is not commensurate with the amount available within the fixed fee allowances. Counsel in such cases will either find the amount of work they are required

to carry out for such cases economically unsustainable for their practices, or find themselves under economic pressure to dedicate less time to certain cases than those cases may warrant.

209. At anything like the proposed Grid figures, the alternative is that the shortfall in recovery of costs would be significant across the litigation piece with the consequences set out earlier in this submission.

210. The proposed fixed costs scheme would reduce the frequency with which counsel is engaged at any stage prior to trial, meaning that the majority of work relating to statements of case, evidence, and case management would be dealt with exclusively within solicitors' firms. Even then, however, the enforced parsimony is likely to mean that firms are likely to be required to reduce the time spent in preparing cases. As an example, taking the example of a case falling within Band 2, in the event that a firm based in the City were instructed, at the prevailing Guideline Rates, the provision of £2,250 in respect of Issue/Statements of Case, presuming that counsel was not instructed, would cover less than 8 hours' work for a Grade B practitioner for the review of the papers, review of other statements of case (if any), and drafting of the statement of case.

211. Given that this limited time is unlikely to be considered an adequate period by relevant practitioners in which to investigate, research, and draft a statement of case in full, practitioners will be led to rely upon template pleadings, and to focus on general matters rather than specific points requiring involved investigation and explanation. Incentivizing such an approach, while initially perhaps less expensive for lay clients, is likely to produce more complications in the long run, with cases unable to be settled efficiently where allegations are not specifically made and specifically dealt with in statements of case (such that parties are denied the opportunity to carry out a detailed and sober assessment of the merits and risks of their positions early in the litigation).

212. As another example, the proposed fixed costs scheme would, in a case falling within Band 2, mean that the fee for settling any witness statement for a fourth or further approved witness would be £300 – essentially one hour of Grade B practitioner time. This would likely incentivize the use of templates and minimal detailed exploration of witness evidence as part of settling statements, with the result that statements are likely to be less detailed and less useful, such that parties are incentivized to proceed to trial to clarify matters in dispute, rather than to take proper stock of their cases prior to trial and come to a settlement without needing to expend the time and cost of full proceedings.

213. This will ultimately place a greater burden on the courts.

214. Given that the fixed costs regime will apply to claims of the values which constitute a high proportion of claims involving the junior Bar, the impact set out above will have a substantial effect on the junior Bar. In the absence of reasonable revenue streams as a result of an increased share of formerly counsel's work being taken in-house by firms, there are real concerns about the financial viability of practice in specialist fields for some junior barristers.

215. Sir Rupert's lecture states that these figures have been arrived at after consultation with costs judges and practitioners. They however fall far short of what in our experience the courts are routinely permitting on a budgeting basis. We consider that a survey should be undertaken of the costs budgets for cases in each of the bands. This would provide empirical evidence of the likely shortfall between the fixed costs proposed and the costs which are currently being incurred (with the court's approval) and proper time for consultation on the basis of that evidence should then be permitted. It is unsafe to seek to introduce a system of fixed costs (even once the 2013 reforms have bedded in and been analysed) without proper evidence which can be tested and scrutinised objectively.

216. It is also extremely difficult to provide a measure for the shortfall given the range of possible levels of complexity in a given case (which is the major flaw with a fixed costs scheme for such work). However, based on the views of the clerks and numerous barristers who are used to dealing with costs budgets for claims of up to £250,000, it appears relatively clear that as an absolute minimum the total figures are off by at least 50-75% in total for every band for cases of "normal" complexity in this field.

217. An additional problem is that the January 2016 lecture proposes a number of rules, such as a 15% uplift if a case needs to be done in London, 50% payable for a work stage which has been substantially started but not completed and a percentage uplift in case of exceptional complexity or where substantial extra work has been caused by the other side's conduct. We appreciate that these rules are presumably intended to meet the objection that fixed costs are inflexible when confronted with the possible variety of cases. However we are concerned that all of these rules are ripe for disputes as they are subjective and fact sensitive: when does work "need" to be done outside London, when has work been "substantially" started, what extra cost has been caused by the opponent's conduct? Even in the existing fixed costs regimes which cover much smaller value claims there are numerous such disputes, where there are much smaller sums at stake and where there is far less variety between claims, but these rules all invite such challenges. That means increased costs, tying up of court time and uncertainty for the parties and lawyers, all undermining the principal benefits of fixed costs.

218. The above illustrates why there is an irresolvable conflict between the roll out of fixed costs schemes - which may be tolerable for simpler, cheaper cases - and the variety, complexity and cost of claims in very many fields of practice below this quite substantial value of £250,000.

## **SECTION VI**

### **SHARING OF FIXED COSTS**

219. The Bar Council is concerned about the risk that a fixed costs regime brings to the remuneration of the Bar. With a fixed cost for all categories or stages of work, the purse strings will remain, for the vast majority of cases, with the solicitor.

220. Solicitors have the dominant position commercially. They obtain the work, they are responsible for costs recovery and receive payment of fees. Experience of the fixed costs

regime in the personal injury field has been witness to solicitors dictating to barristers that they cannot be instructed if they insist on a success fee, and solicitors seek to agree trial fees at figures substantially less than the fixed trial recoverable cost. At times, this is tantamount to a referral fee, which is ethically prohibited for barristers. The Bar Council's Ethics Committee and Remuneration Committees have had to issue an assistance document for barristers in this respect.<sup>16</sup> This would get worse if the fixed fee regime was extended. The driver for maximum profitability and any fee paid for counsel coming out of the single fixed cost, will inevitably lead to a reduction in work for the Bar and a reduction in fee income.

221. A similar result has been seen in criminal legal aid, where in the Advocates' Graduated Fee Scheme there has been a huge rise in in-house advocates undertaking guilty pleas and less complex cases, leaving the less economic or more complex cases to the self-employed Bar. Where, to quote again from Sir Bill Jeffrey's report, "The group of providers who are manifestly better trained (if not always more experienced) as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price (in a system where fee rates are fixed) nor on quality."<sup>17</sup>

222. The proposed fixed costs will have to be "shared" between the work of solicitors and the work of any barrister instructed. What might be set as a reasonable fee for a trial counsel fee, could be unwound by the solicitor simply forcing a reduced fee on the willing barrister wishing to secure the trial work.

223. The junior Bar has no bargaining position and is very often forced to take on work at fees less than the prescribed trial advocate's fee under the current fixed costs regime. This is not acceptable but it is happening. The Bar Council is concerned that with an extension of the fixed costs regime to other areas of work, the same pattern will emerge.

224. PIBA has expressed the view<sup>18</sup> that unless counsel's fees are ring fenced and separately fixed, the dominant bargaining position of solicitors and the driver for maximum profitability discussed above are likely to pose a significant threat to the self-employed personal injury Bar, not just the junior Bar. Indeed, PIBA commented that the impact on the junior Bar "would be huge". The cost of education and training combined with the prospect of a modest income with heavy commercial uncertainty is likely to deter all but those from high income family backgrounds. As a profession striving to encourage social mobility and diversity at all levels of the profession, this would be hugely damaging.

225. Doubtless consideration will be given by the rule makers to a regime or structure which best protects the interests of the young Bar. The Bar will engage in assisting in the development of proposals for a ring fencing of fixed fees for counsel if that is considered an appropriate course to adopt. It is fair to acknowledge that the ring fencing of counsel's fee is

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<sup>16</sup> <http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/remuneration/discounted-fixed-fees/>

<sup>17</sup> Page 42, paragraph 5.24, "Independent criminal advocacy in England and Wales: A Review by Sir Bill Jeffrey", Ministry of Justice, May 2014.

<sup>18</sup> March SBA Response

a topic which the Bar has had to grapple with in the past with the fixing of fast track trial fees and the RTA/EL/PL portal exit cases. No aftercare solution has been identified.

226. The Working Group was asked to consider this aspect of the reforms. Its recommendation, which the Bar Council fully supports, is that as a minimum, at the conclusion of all claims which go to trial, the solicitor should be required to certify that the fixed trial fee (whatever the figure may be) will be paid in full to the trial advocate. Any solicitor not willing to so certify should be required to explain why to the court so that the record can be noted. This will at least provide a mechanism for the issue of fee sharing/referral fees to be brought to the court's attention. If the court considered the arrangement between counsel and the solicitor to be improper, it could so rule. If the court were satisfied, either by agreement, or otherwise, that the arrangement was fair and reasonable an order for the payment of fixed costs could be made. Any outstanding dispute over the fees could then be referred to the Joint Tribunal by the court.

## **SAFEGUARDS**

227. Any fixed costs regime must have a safety valve, to allow those cases which are not suitable to be limited to the fixed costs regime, but which would otherwise fall within the scheme (so assuming they are not allocated outside of the applicable Track), to receive fees unrestricted by the fixed costs and subject to the standard costs or indemnity costs rules.

228. Consideration should be given to permitting a party to recover costs in excess of the fixed costs where the court is satisfied in all of the circumstances that it is necessary to do so in the interests of justice. This would permit the court to ensure that the conduct of the parties can be taken into account in determining whether a party should be limited to fixed costs. If the conduct of an opponent drives up costs unnecessarily beyond those compensated by the fixed costs, then it must be within the court's discretion to allow a greater level of costs recovery than of fixed costs to the innocent party.

229. We question whether tests of "exceptionality" would serve their purpose here. We consider the better view is that the court should be entitled to award costs in excess of the fixed costs where it is necessary to do so to avoid an unjust outcome. This discretion should be exercised after taking into account all of the circumstances of the case. It should result in the court being able to rule that costs on the standard basis for all or part of the proceedings should be allowed to be recovered in substitution of the fixed recoverable costs. The amount of those additional costs could be assessed at trial just as the court summarily assesses costs in the present environment.

230. We would also suggest, in keeping with the aim of consistency and certainty, that parties should be able to apply at an early stage of the case for a direction to take the case out of the fixed costs regime where all the circumstances require it or to avoid an unjust outcome. The need for such an approach is so that either (i) parties can properly plan and budget in advance; or (ii) the Court can address perceived injustice at an early stage (for example by making appropriate case management orders or addressing conduct which unreasonably drives up costs).

231. One of the problems identified earlier in this paper is that with the introduction of fixed costs comes tactical gamesmanship. Experience suggests that the NHSLA and other defence organisations already push up costs unnecessarily by failing to make early offers or admissions for purely tactical reasons. It is this sort of conduct which needs to be considered by the court at the conclusion of a claim. It cannot be fair, reasonable or just for a losing party to string a claimant along causing the claimant to incur costs well in excess of the fixed costs, only then at the end to make an offer or admission which if made earlier would have avoided the irrecoverable costs wastage incurred in response to the loser's tactical gamesmanship.

### **Indemnity Costs**

232. In any case where a court awards a party indemnity costs, then it should follow that that party should not be subject to fixed costs. This would be consistent with the court's approach to fixed costs under CPR 45.92A.

### **Part 36 offers, mediation, ADR, ENE**

233. The only real way for parties to resolve modest value but complex cases whilst limiting the costs to an amount which bears a reasonable relationship to the damages (leaving aside the other proportionality factors) is by the parties seeking to settle the dispute at an appropriate but early stage by use of offers, ADR, early neutral evaluation or similar. The costs at trial will inevitably appear disproportionate and the imposition of the sort of fixed costs regime contemplated simply shifts the shortfall from the losing to the winning party.

234. If a party secures an indemnity basis costs order, whether via Part 36 or otherwise, the costs should not be subject to fixed costs.

### **Indexation and Review**

235. Any fixed costs regime must have a review mechanism or indexation. There should be a set timetable for this. The reviewing body should be under an obligation to consult and consider any evidence submitted in response to consultation. The Bar Council is mindful that Sir Rupert Jackson's recommendation for the formation of a Costs Council was not implemented in 2013. Given the breadth and complexity of the proposed fixed costs scheme a Costs Council or other body is necessary.

236. An annual or (more feasibly) a biannual review of the figures used should be implemented if a fixed costs regime is introduced. Indexation is a blunt tool and it would not be suitable means of adjusting the fixed costs figures in the early years of the scheme. It may be that in the future, when a regime has bedded in, that index linked adjustments would be a sensible and proportionate way of updating the figures.

237. The reviewing body would need to review cases in different practice areas and consider within each practice area:

- Average costs awarded per stage of the grid;
- The frequency with which the exception permitting a percentage uplift in exceptional cases is exercised and the extent of the uplift;
- Views of the judiciary, practitioners and clients as to the impact of the regime on the conduct of litigation and any detriment the regime is having on the quality of justice and the economics of legal practice.

238. We would also recommend that it should fall within the remit of the Costs Council or other reviewing body to assess or make recommendations to the effect that the scope and extent of fixed costs (if implemented) should be reduced. This is particularly so if the current proposals were to be implemented on a very limited (and unsatisfactory) evidence base.

## CONCLUDING COMMENTS

239. For all the reasons set out above, the Bar Council has serious concerns about the proposed extension of fixed costs and would welcome the opportunity to continue engage in the consultation.

**Bar Council**  
**30 January 2017**

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