JUDICIARY OF
ENGLAND AND WALES

Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs

By the Right Honourable Lord Justice Jackson

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Executive summary

1. In England and Wales, the winning party in litigation is entitled to recover costs from the losing party. The traditional approach has been that the winner adds up its costs at the end and then claims back as much as it can from the loser. That is a recipe for runaway costs.

2. The only way to control costs effectively is to do so in advance: that is before the parties have run up excessive bills. There are two ways of doing that:

(i) a general scheme of fixed recoverable costs ("FRC");
(ii) imposing a budget for each individual case ("costs budgeting").

3. In my January 2010 report, I recommended FRC for 'fast track' cases (claims up to £25,000 which can be tried in one day) and costs budgeting for 'multi-track' cases (bigger claims). I also said that we would need to look again at fixing costs for cases in the lower regions of the multi-track, once the reforms which I was then recommending had bedded in.

4. Those reforms have now bedded in, although some fast track cases still do not have FRC. Therefore, it is now opportune to consider extending FRC. To that end, on 11th November 2016 the Lord Chief Justice and the Master of the Rolls commissioned me to carry out a further review, to develop proposals for extending FRC.

5. In carrying out this review, I was ably assisted by fourteen assessors from a variety of legal and other backgrounds. This review takes place against a range of other civil justice initiatives, described in more detail in chapter 1. It is important that the various initiatives (including my own) remain co-ordinated.

6. During this review, I have gathered evidence from many sources and received numerous written submissions, as summarised in chapter 3. I have held five public seminars and had meetings with a variety of stakeholder groups, despite the constraints of sitting as a judge in the Court of Appeal, which occupies most of my working time. A variety of opinions were aired at the meetings, many of which have been incorporated into this review. Chapter 4 provides further details of those meetings coupled with a summary of their content. I am grateful to the Master of the Rolls' office for organising the seminars, to those who hosted the various events and to all who took part.

7. In this report, I recommend a grid of FRC for all fast track cases, as set out in chapter 5. Above the fast track, I recommend a new 'intermediate' track for certain claims up to £100,000 which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side. The intermediate track will have streamlined procedures and a grid of FRC, as set out in chapter 7.

8. The costs grids in chapters 5 and 7 are based upon (a) evidence and submissions received during the review, (b) a detailed analysis of recent approved or agreed budgets, (c) a robust analysis of recent costs data by Professor Fenn, one of the assessors and (d) the experience and expertise of all the assessors.

9. Clinical negligence claims are often of low financial value, but of huge concern to the individuals on both sides. The complexity of such cases means that they are usually unsuited to either the fast track or my proposed intermediate track. In chapter 8, I

recommend that the Department of Health and the Civil Justice Council should set up a working party with both claimant and defendant representatives to develop a bespoke process for handling clinical negligence claims up to £25,000. That bespoke process should have a grid of FRC attached. This scheme will capture most clinical negligence claims. Previous experience (for example, with noise induced hearing loss claims) shows that it is possible for the 'industry' to come together and develop such schemes. There is sufficient good will on both sides to achieve that in the field of clinical negligence. I remain willing to arbitrate informally on any points of disagreement.

10. Business cases raise different problems. It is essential that small and medium-sized enterprises (generally known as SMEs) should have access to justice. The Federation of Small Businesses argues that there should be an FRC regime for commercial cases up to £250,000; the costs levels must be reasonable; they must balance incentives and "reduce the costs of going to law for small businesses"; there must be rigorous case management of cases subject to this regime; and there must be investment in modern IT systems to speed up court processes. I see force in those arguments, but not all business cases require FRC up to the suggested level. In chapter 9, I recommend that there be a voluntary pilot of a 'capped costs' regime for business and property cases up to £250,000, with streamlined procedures and capped recoverable costs up to £80,000. If the pilot is successful, the regime could be rolled out more widely for use in appropriate cases.

11. Chapter 10 recommends measures to limit recoverable costs in judicial review claims, by extending the protective costs rules which are currently reserved for environmental cases. Whilst those rules were originally introduced to achieve compliance with the Aarhus Convention, they are in principle suitable for judicial review cases in general, all of which are of constitutional importance. Citizens must be able to challenge the executive without facing crushing costs liabilities if they lose.

12. This report marks the completion of my second review to control the costs of civil litigation. In the first review, I put forward extensive proposals to revise civil procedure, to amend funding rules, to incentivise early settlement, to reform costs assessment procedures and to introduce costs budgeting. Those reforms have now been in place for four years. The focus of this review is much more narrow, namely to develop FRC for lower value cases. But at the heart of both reviews has been the same objective of promoting access to justice. Controlling litigation costs (while ensuring proper remuneration for lawyers) is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work.

13. In this review I have sought to balance the many competing interests in terms of access to justice and proportionality of costs. I have made my recommendations and set out what I believe to be reasonable costs and proposals. It will now fall to the Government to consider this report, and no doubt subject their own proposals for reform to public consultation. This will enable the profession and all other interested parties to feed their views into the policy-making process. I will observe developments with interest. If I can usefully make any further contribution I will do so (as I did during the consultation process following my previous report), but the baton now passes to others.

Rupert Jackson 21 July 2017