Ministry of Justice Consultation:

Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals

Response from the Motor Accident Solicitors Society

June 2019

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Paul Nicholls.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 100 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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1. Executive Summary and General Comments

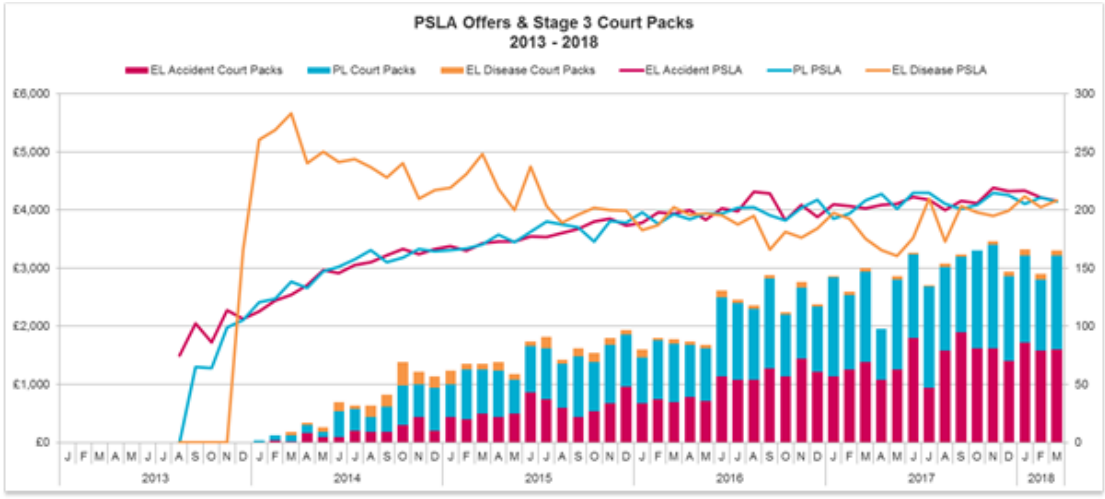
- We agree with the statement in the Ministerial Foreword that "the government understands that a 'one size fits all' approach does not work for all types of claims". MASS is fundamentally opposed to the proposal to introduce a fixed costs system to cases of a value between £25,000 and £100,000. Very often quantum of an action can have little bearing on liability issues. As suggested by the sums involved, these cases can be highly complex and the extension of fixed costs to such cases will impede access to justice, ultimately constraining the right of a seriously injured client to properly evidence their case. The defendant industry is well-funded, and the proposals will distort equality of arms. The reality is that whilst the Defendant can ultimately limit what they pay out by way of compensation, the Claimant does not have that option. By way of example, fatal accident matters, with no dependant, can involve highly complex issues requiring attendance at an inquest, where a Claimant has little or no funding option, but an insured defendant has an unlimited resource.

- Cases with a value between £25,000 and £100,000 are cases of significant value with permanent symptoms and often life changing injuries. Whilst we understand the desire to achieve proportionality, the test should be applied not to the value of the claim but to the issues at stake. Those claims towards the higher end of the scale can involve sums that represent years of lost income, particularly when a Claimant is earning average earnings or below and are of significant importance to that Claimant. The suggestion that an action with a value marginally in excess of £100,000 should be considered more complex, merely by reason of value, only serves to highlight the anomalies often experienced by tracks of banded value.

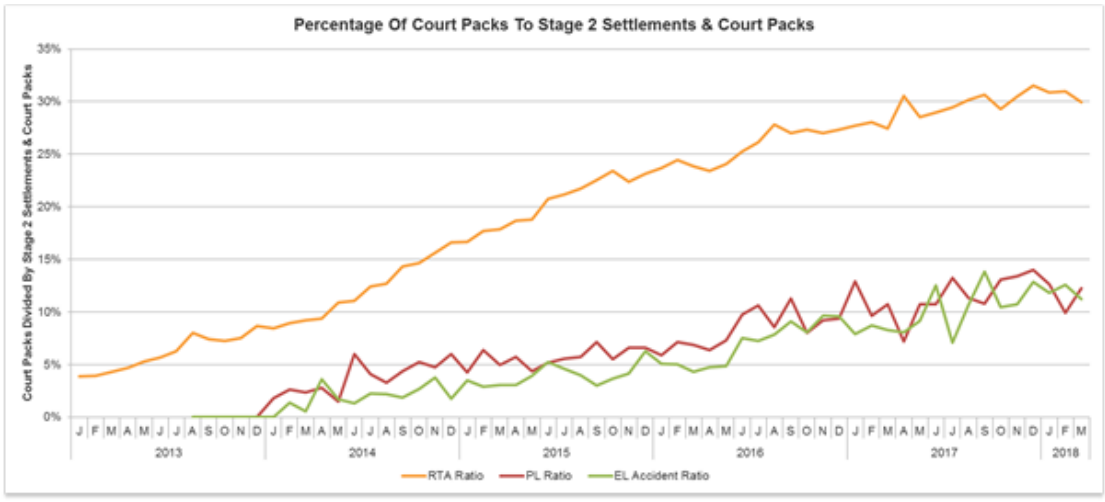
- One of the fundamental principles of English Law is that the Claimant is entitled to be put back in the position they were in before the accident occurred. That should mean that they are not dissuaded from pursuing their claim on the basis that they will have to meet some of the costs which exceed the fixed costs structure. These are not commercial Claimants with deep financial pockets. They have often suffered devastating injuries and are frequently amongst the most vulnerable members of our society. These proposals will further provide the insurance industry with the tools to exert a greater tactical advantage by putting additional pressure upon the Claimant to prove and provide evidence of all of their losses. This means extensive disclosure (receipts), more comprehensive witness statements and expert evidence where necessary.

- In paragraph 8.9, the consultation states that the government acknowledges that FRCs "can disadvantage a less well-resourced party against a deep pocketed opponent". It is important to emphasise that the Defendant insurance companies are particularly well-resourced and funded and have a significant inequality of arms in their favour on more complex matters, not necessarily complex by value – such as a fatal accident where there is no dependant, as indicated above. FRCs will actively facilitate behaviours which do not seek to settle litigation early but, on the contrary, extend the dispute so that the Claimant solicitor routinely exceeds the actual costs being awarded. There is increasing evidence of this with the current FRC system. More and more cases now proceed to a hearing because the costs implications of doing so are predictable and do not act as a deterrent. Put simply, there is no effective sanction to a Defendant whose litigation conduct is poor.

- The following chart shows the increasing number of Stage 3 hearings:



- The following chart from the Department for Work and Pensions confirms that the number of court packs continues to rise.



- In RTA claims there has been an increase in court hearings from 5% of cases in 2013 to nearly 30% currently. Consequently nearly 30% of cases now have to be referred to the court because the parties cannot agree a settlement and it is now cheaper for the Defendant to run cases to a hearing. There is clear evidence of poor conduct by some ‘rogue’ insurers.

- There are currently entirely appropriate safeguards in place to provide the successful Defendant with costs protection. Part 36 of the Civil Procedural Rules allows a Defendant to make an offer of settlement which, if beaten at court, allows the Defendant to recover their costs from the Claimant (often paid by their insurer). The reality is that the Defendant often fails to make early offers of settlement and when those offers are made, they are usually not at a level which provides the Defendant with adequate protection.

- MASS believes that these proposals will further impact access to justice. The proposed extension of fixed costs will make it more uneconomical for lawyers to support a Claimant. Many firms have ceased providing a service to the consumer as the risks are now perceived to be too high, and the rewards too low. MASS members are already seeing the Defendant insurance industry putting the Claimant to strict proof in cases below £25,000 in value with the consequential impact being that a Claimant will not be able to properly evidence their case within the fixed fee.

- There has been no increase in costs since 2013. Those representing insurers have no costs incentive to narrow the issues in the litigation unless there is a genuine attempt to settle the case early. As Lord Justice Jackson states in his 2010 report, if litigation becomes uneconomical for lawyers, so that they cease to practice, there is a denial of access to justice. This has already begun to happen, and those firms providing advice and assistance to the public have diminished.

- As background, the majority of firms who represent those who have sustained injury provide a broad range of services across all value bands. From 2020 the whiplash reform programme will take effect which will mean that many personal injury firms may have to cease supporting accident victims who have sustained minor injuries as cases below £5,000 in value will no longer attract costs. Coupled with an extension of fixed costs in cases up to £100,000 in value, it is highly likely to mean that this type of work will no longer be viable for many firms. Where appropriately qualified, regulated and insured lawyers fall away, the alternative assistance to a Claimant is poor, and, sadly, open to abuse of the consumer. It is widely anticipated that the proposals will have a detrimental effect such as to promote fraud from those poorly or unregulated alternative services.

- The consultation document states (paragraph 1.2) that “Civil legal costs…have for a long time been too high and too uncertain, making litigation riskier and less accessible than it should be and thereby undermining access to justice.” We completely reject this statement. Since LASPO, costs have sharply diminished. It is not only an untruth to imply that costs have risen – it is simply inept, and bizarre to make such a statement. Costs are at a much lower level than prior to LASPO.

- It is important to emphasise that the costs only become disproportionate because of the conduct of the parties. If a Defendant seeks to achieve proportionate costs, there should be an incentive to do so by seeking to narrow the issues between the parties at the earliest opportunity, or the making of a Part 36 offer, or properly engaging with ADR. If the Claimant continues to evidence aspects of the claim which have been agreed, the Defendant is at liberty to challenge the reasonableness of those costs at a detailed assessment hearing. All too often, despite a properly evidenced case, the Defendant will file a generic defence putting the Claimant to strict proof in respect of all of the losses claimed, leaving the Claimant with no alternative but to incur further costs in order to respond to the defence. That is why costs can be disproportionate. The best approach would be to focus the parties on narrowing the issues in dispute to achieve a proportionate costs outcome. The current regime has so few sanctions, it actively promotes poor conduct from defendants, causing the limited costs there are to be expended.

- For many years Claimant’s solicitors have faced reducing legal costs whilst at the same time there has been limited focus on expert fees other than in soft tissue low value cases. We would welcome the introduction of a fixed costs system for experts who continue to inflate invoices contributing to the perception that costs are disproportionate. An example of this would be fees charged by, for example Pain

Management Consultants and Neuro Psychologists. Often the fees charged for a single examination can dwarf the fixed costs of a Fast Track Case to trial.

- We would also welcome reform of the court fee charging structure. A Claimant with a case valued at £100,000 attracts a court fee of £5,000. A case with a value of £200,000 attracts a court fee of £10,000. Whilst fee remissions are available, the reality is that the fees at the top of the range are excessive and only serve to make overall costs disproportionate. The massive increase in fees only serve to punish the most severely injured. A working spouse with a severely injured partner in receipt of much needed benefits should not be expected to find or fund court fees of £10,000. The fees charged are, respectfully, inappropriate, and can be a bar to access to justice.

- Serious consideration needs to be given to the obligations placed upon professionals in this area in terms of properly evidencing the various aspects of the claim. A failure to do so will result in negligence actions for a failure to properly prepare a case. For example, a Claimant with multiple injuries may require three or four reports from experts in different disciplines. There is no other proportionate way in which to address causation and constrain costs unless the Defendant is prepared to accept the legitimacy of the injury without a formal medical report. The proposed fee structures in both the Fast Track and for intermediary cases puts the Claimant in a position whereby their ability to obtain the expert evidence they require is heavily constrained in some cases.

- The costs budgeting process works effectively for the purpose of achieving proportionality. The judge tasked with managing costs through the cost budgeting process can consider the specific issues of the case in order to determine whether the proposed spend is proportionate regarding the issues which are being taken in the litigation. An arbitrary fixed costs matrix makes no provision for the specifics of the case which can vary widely and not necessarily be linked to value. Our preference would be for the allocation process to be far more comprehensive with a view to focusing on what costs need to be incurred.

- Rehabilitation cases of £100,000 in value will have case management. If a Claimant, through the provision of extensive rehabilitation, achieves a good outcome to the extent that their damages are below £100,000, costs will be limited. With case management in place, costs will inevitably be higher because of the interventions of a case manager and the reporting processes to the instructing lawyer. MASS questions whether rehabilitation fees, including case management, will be included in the assessment of damages? If it is, then this could result in a defendant insurer not agreeing to fund rehabilitation, particularly in the most challenging cases, which will have a significant impact on the accident victim.

- The consultation suggests that one of the reasons for extending fixed costs is to avoid the costs associated with cost assessments. The proposals may indeed prevent some cases going to assessment for costs, but it is important to recognise that Defendant's insurers routinely challenge disbursements. It is not clear how these proposals would safeguard a Claimant to ensure equality of arms.

2. Questions

Chapter 3: The Fast Track:
1. Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out? We seek your views, including any alternatives, on:
(i) the proposals for allocation of cases to Bands (including package holiday sickness);
(ii) the proposals for multiple claims arising from the same cause of action;
(iii) whether, and how, the rules should be fortified to ensure that (a) unnecessary challenges are avoided, and (b) cases stay within the FRC regime where appropriate; and
(iv) Part 36 offers and unreasonable litigation conduct (including, but not limited to, the proposals for an uplift on FRC (35% for the purposes of Part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement.

1. Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out?

(i) the proposals for allocation of cases to Bands (including package holiday sickness)

FRC have been in place since 2013 for most Fast Track PI RTA and EL/PL cases. The uprating for inflation (page 17, paragraph 7.1) is welcome. However, 4% is not appropriate given the pound experienced an average inflation rate of 2.16% per year in the period 2013 to 2019 (Office of National Statistics composite price index). Given that any amendments are likely to take effect in 2020, the uprating for inflation should be set at a minimum of 15%. It is interesting to note that whilst FRCs have remained static, court fees have risen time and again. It is ironic that with the increase in court fees, and no movement in costs, the statement is made with alarming regularity that costs are too high.

The sums outlined in Complexity Band 1 are wholly insufficient for RTA non-PI claims which generally include a claim for Hire charges. Such claims require specialist Counsel and Solicitors, commonly require extensive documentary evidence and a significant amount of Court time for witness evidence on issues in dispute (ranging from a simple need for a vehicle through to the finer points of consumer protection legislation, contractual rights and allegations of fraud), in addition to lengthy and technical submissions on points of fact or law.

We disagree with the proposed 'pre-issue' sum of £500. Such a figure will provide no incentive for claimant practitioners to settle RTA non-PI claims before the issue of proceedings and litigation will likely increase as a result.

The sum of £1,850 is proposed for claims that settle post-issue-pre-allocation. Whilst £1,850 is significantly less than a claimant practitioner can expect to be paid on a Standard Basis assessment, the 'additional' £1,350 for issuing proceedings will likely be a significant incentive for claimants to issue and the basis of many inter parties' disputes over the appropriate level of costs thereafter. This would be particularly unwelcome to the Judiciary who are already overstretched, and unable to cope with current listings, not helped by the fact that over half of the court estate has been sold.

One of our members suggests that the proposed 'pre-issue' figure of £500 represents only 23% of the £2,174 average sum (based on a sample of 158 RTA non-PI claims) that was agreed between the parties' during the financial year 2018/19 following costs negotiations. The sum of £2,174 was considered a reasonable and proportionate legal spend to achieve settlement without need for proceedings. The proposed £500 is simply too low and is unjustifiable.

All parties should be incentivised to achieve early settlement. A pre-issue sum of £2,000 would enable claimant practitioners to bring claims properly and provide an incentive to settle claims without proceedings. £2,000 would still represent an overall reduction, being 92% of the current average settlement, yet it would provide adequate compensation to claimant lawyers to bring claims properly. Further increments of an additional £500 per stage would provide an acceptable amount of compensation for the additional work done up to and including Trial.

	Average Agreed Profit Costs (sample)	MOJ Proposal	Proposal % of Current Average	Alternative Proposal/%
Pre Issue	£2,174	£500	23%	£2,000/92%
Post Issue Pre Allocation	£2,649	£1,850	70%	£2,500/94%
Post Allocation Pre Listing	£3,109	£2,200	71%	£3,000/96%
Post Listing Pre Trial	£3,588	£3,250	91%	£3,500/98%

The average legal spend shown in the post-issue pre allocation and post allocation pre-listing stages were considered reasonable and proportionate. A 20% reduction reflected in the proposals is therefore unreasonably high. The alternative proposed figures better reflect the work done, whilst still achieving the consultation's aims of being proportionate and fixed.

The assessment of costs cap should remain at £1,500 plus VAT for Provisional Assessments. Fixing costs does not stop there from being disputes over the amount of fixed costs that are payable. Disbursements - fixed or otherwise - are often vehemently argued between the parties. The existing Rules and costs cap under CPR work well and provide enough renumeration for submissions to be brought properly. There is no reason to depart from the current procedure.

(ii) the proposals for multiple claims arising from the same cause of action

We fundamentally object to the proposals in this section. The Government states that where a cause of action is the same, there is less work to be done and this would lead to over remuneration. Whilst we understand the Government considering this area, the conclusions reached are flawed.

The issue of multiple claims arising out of the same cause of action has not been an issue of any serious contention between claimant and defendant practitioners. It is accepted within the RTA PI Industry that each successful claimant is awarded one full set of fixed costs and the trial advocacy fee where appropriate. There are several County Court decisions on the issue, none of which were ever Appealed to a higher Court.

Often in RTA cases though liability issue is straightforward and can be applied to all cases, but then all the passengers have different injuries and losses and the majority of the costs on the case are to do with quantum and not liability. To only allow 10% costs for each passenger would result in solicitors rejecting these claims as they would not be profitable.

The proposal ignores the fact that liability is often only a small part and each Claimant has their own injuries and losses.

There are several reasons why it is appropriate for each additional claimant to be awarded a full set (100%) of the FRC, including but not limited to:

- Claims which settle within the RTA or EL/PL Pre Action Protocols are subject to fixed costs of between £500 and £2,250 for each claimant. It would be perverse if the level of recoverable fixed costs for additional claimants was to reduce once a claim no longer continued under one of the Protocols.

- The fixed costs payable under section IIIA of Part 45 are prescribed by reference to the stage of proceedings at which the claim concludes. It must be considered that each claimant's claim could conclude at a different stage of proceedings. It is not appropriate to award a fixed uplift for additional claimants without giving proper regard to the additional work that is required for each individual claimant. It is neither reasonable, nor proportionate to calculate the amount recoverable costs of additional Claimants by reference to the amount recovered by the 'lead claimant'.

- What if the 'lead claimant's' claim fails? There is no guarantee that all claims will be successful. The lead claimant could be struck out for a procedural issue or have their claim found to be dishonest/fraudulent, yet the remaining claimants have valid claims. How would costs be apportioned in such circumstances?

- Solicitor/Client costs are normally chargeable on an hourly-rates basis. The Fixed Costs that are recovered inter-parties are generally only a contribution to towards a client's full legal spend. Consideration must be given to the fact that damages payments are often subject to a deduction by the Solicitor – It would be unjust for a claimant to receive a reduced contribution towards their costs, simply because there are multiple injured parties who may often be unrelated.

- The FRC sum has been agreed as a reasonable and proportionate costs award for a single claimant bringing a claim. It is repeated that FRC are only a contribution towards a full legal spend. The assertion that claimant lawyers will receive a windfall is misguided and contrary to the 'swings and roundabouts' intentions of the FRC regime.

- Any 'incentive' to bring additional/unmeritorious claims is heavily outweighed by the costs and other possible consequences of bringing such a claim. Strike out, Costs Orders without QOCS protection and even imprisonment are potential outcomes in such circumstances.

- An additional 10% per claimant will provide little-to-no incentive to lawyers to take on multiple claimants, particularly in the lower-value claims. This will undoubtedly lead to multiple firms of solicitors taking on individual cases from one single cause of action. This can only lead to a significant increase in unnecessary litigation. On this basis, a band 2 case settling for £6,000 at trial would attract costs of £396. If the Government is proposing 10% of the base costs fees plus 20% of damages, the calculation would be £1,476 which is still significantly lower than would be required to prepare a case of this nature properly for trial.

- There does not appear to have been any specific consideration given to those cases which settle at Trial. What are the proposals in relation to Trial Advocacy fees? Are

Counsel expected to present each additional case for an additional 10% per claimant?

- An arbitrary 10% of the fee for the principal Claimant does not consider the specific complexities of cases. For instance, by their very nature infant cases can be more complex. Court approval is required. Ordinarily the judge when tasked with approving any settlement will want to be satisfied that the injured minor has recovered in line with the prognosis. These proposals will deter Claimant lawyers from representing injured children, primarily because of the additional procedural hurdles in place, particularly if the costs recovered at 10% of those of the principal claim.

- On this basis, a band 2 case settling for £6,000 at trial would attract costs of £396. If the Government is proposing 10% of the base costs fees plus 20% of damages, the calculation would be £1,476 which is still significantly lower than would be required to prepare a case of this nature properly for trial.

The only reasonable amount to award additional claimants is a full set (100%) of FRC. If there are potential issues with, for example, package holiday claims then a different approach should be considered for that particular basket of claims.

(iii) whether, and how, the rules should be fortified to ensure that (a) unnecessary challenges are avoided, and (b) cases stay within the FRC regime where appropriate

This pre-supposes that there will be 'unnecessary challenges'. If unnecessary challenges are made, costs sanctions would likely provide an appropriate punitive measure.

iv) Part 36 offers and unreasonable litigation conduct (including, but not limited to, the proposals for an uplift on FRC (35% for the purposes of Part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement.

We agree that it is difficult to prescribe how a higher costs award for beating a Part 36 should be assessed within an FRC regime.

There needs to be a clear incentive for a Defendant to make a reasonable Part 36 offer and in our view that incentive only becomes significant where there is meaningful costs exposure for failing to accept a reasonable Claimant Part 36 offer. The current Part 36 regime is working well, and a balance has been achieved to some extent in providing the Defendant with an opportunity to provide costs exposure by making early Part 36 offers. Sanctions work well at present, and any attempt to lower punitive measures would only serve to stimulate poor conduct from a defendant.

In our view, changing Part 36 to provide for a percentage increase will not provide a sufficient incentive for either the Claimant to make a reasonable Part 36 offer or indeed for the Defendant to accept one. If the government is intent on proceeding with a percentage uplift, it should be applied to the whole of the costs, not just the stage in which the Part 36 offer was made. If the government proceeds as intended, we would expect Part 36 to become less effective in cases under £100,000 in value.

We welcome the government's comments in relation to allowing indemnity costs when there is evidence of unreasonable conduct. We would encourage the government to go further in defining unreasonable conduct. In our view, a fixed costs structure should only include

cases which are straightforward in nature and capable of being dealt with by the court expeditiously which many of the material issues agreed. In other cases, particularly where there are fairly modest heads of loss, properly evidenced and which should be capable of agreement, we would like to see costs sanctions where a Defendant puts the Claimant to proof unnecessarily. We would favour a process whereby at the allocation hearing, the judiciary are tasks with examining the issues in the case in order to then determine whether the outstanding issues between the parties are such that the case can be dealt with in the extended fast track. For cases where blanket denial defences are lodged, we would contend that those cases should be moved onto the multi-track. This would ensure that Claimant's only incur costs relating to the issues at stage. Essentially the Defendant has an opportunity to save costs by narrowing the issues. The consequence of this is that those representing a Claimant will not be put to the cost of doing work within a highly constrained fee. The conduct of the parties should play a more important part in determining the level of costs applicable.

Fixed costs and assessed costs are conceptually different. Fixed costs are awarded, whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the work that has been carried out on any given case. Assessed costs reflect the actual work that has been done. Assessed costs provide compensation that is tailored to the facts of the individual case.

Fixed costs are generally only a contribution towards the full costs incurred on a solicitor/client (hourly rates) basis. It would be manifestly unfair to expect a claimant to be liable for any of the additional costs incurred because a defendant has not accepted a reasonable Part 36 offer. The only way to ensure complete fairness is by way of order or agreement to a reasonable level of the additional costs incurred on an hourly rates basis. It is reiterated that it is common practice for costs in excess of fixed costs to be deducted from claimants' damages – for example deductions under Conditional Fee Agreements in PI cases.

Replacing the current Indemnity Costs enhancements with a fixed uplift will not incentivise early settlement. Quite the contrary; it will enable defendant lawyers to run claims all the way to trial with full knowledge of their maximum Costs liability from the outset. Any judicial time potentially saved by fixing an uplift to FRC will likely be eclipsed by more claims, settling later in proceedings, more often. It is extremely rare for a single indemnity basis assessment to go in front of the Court.

It is not clear from the consultation whether the proposed uplift is inclusive of the costs award for the percentage of damages. In most cases the result is the same, however this is not always the case.

An uplift of 35% is insufficient to properly compensate successful claimants who have made early offers to settle during proceedings. The only way to properly compensate is by way of Assessed costs, payable on the Indemnity basis. Such costs are reasonably incurred and reasonable in amount, however they reflect the actual work that has been done on the case. It is worth noting that an uplift of 100% would still be less than the solicitor client costs, however the margin is considerably less. Therefore, in an alternative to assessed costs, there is evidence that the proper uplift should be set at 100%.

Clarification needs to be given in relation to the other additional benefits that a successful claimant enjoys under CPR 36.17, including interest and the additional 10% on damages. It should not be forgotten that the process litigation can be bewildering and frightening to Claimants; a claimant who is forced to attend Trial to prove their case, only because a defendant has refused to accept their reasonable Part 36 offer should continue to be entitled to these additional sums.

Further consideration must also be given to the issue of late acceptance of Part 36 offers. If a change to the rules is required, then now would be the correct time to redress the imbalance that claimants face on a daily basis where defendants can (and do) accept Part 36 offers late, right up to and including the day before trial without any additional costs/additional sum consequences. If an uplift of 100% is appropriate for those cases that settle at Trail; an uplift of 60% would be appropriate for cases of late acceptance.

One area of concern is that in some cases a Claimant rejects an offer that has been made with all the evidence available and it is a reasonable offer. In these cases, an uplift would be reasonable. There are cases where defendants make early tactical offers that the Claimant cannot possibly make a decision on as the medical evidence is far from complete due to the extent of the injuries, but Claimants may feel forced into acceptance due to the costs risk and the additional uplift – especially on high value cases.

The difficulty with the uplift on both Part 36 and unreasonable litigation is that they really need to be discretionary on the facts of the case and variation allowed, but that goes against the fixed costs regime and allows for satellite litigation which they are trying to avoid. This could lead to unfair costs decisions in some cases.

Unreasonable litigation conduct and incentivising early settlement
The only way to properly compensate for unreasonable litigation conduct is by way of Assessed costs, payable on the Indemnity basis.

The concept and perceived benefits of reducing the amount of judicial time and resources that are spent on the assessment of costs are clearly understandable. The reality however is that Indemnity Costs assessments are rare, and any judicial time potentially saved by an uplift to FRC will likely be overshadowed by more claims, settling later in proceedings, more often.

The only way to truly disincentivise unreasonable litigation conduct is the threat of a potentially substantial costs award. If judicial input is required to set the % uplift on the facts of the particular case, then this time could/should be used to conduct a summary assessment of costs on the Indemnity Basis.

In the alternative to assessed costs an unlimited uplift should be applied for cases of unreasonable litigation conduct. Unlimited should be exactly that (i.e. potentially more than 100%) and the Court should exercise their discretion appropriately. Such an arrangement would have no bearing on the Indemnity Principle because the Indemnity Principle does not apply to fixed costs.

With regards to incentivising early settlement, it is clear that the existing rules provide little-to-no incentive for defendants to settle fixed costs cases early on. The obvious way to modify this behaviour to increase the potential sanctions and/or rewards connected to Part 36 offers by awarding Assessed Indemnity Costs or an uplift of 60% of FRC in cases of late acceptance.

Chapter 4: Noise Induced Hearing Loss:
2. Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:
(i) the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response.

(ii) the contents of the proposed standard directions, and the listing of separate preliminary trials.

NIHL does not fall within the remit of MASS.

Chapter 5: Intermediate Cases:
3. Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:
(i) the proposed extension of the fast track to cover intermediate cases;
(ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;
(iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;
(iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done; and
(v) whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.

(i) the proposed extension of the fast track to cover intermediate cases;

We fundamentally object to the proposals to extend fixed costs beyond £25,000 at this time. It would be patently sensible to postpone extension until after the implementation of the whiplash reform programme to so that the government can assess the impact of the proposed wider forms on access to justice. Extension of fixed costs at this juncture risks devastating consequences for the industry. The personal injury market has already seen significant change and many firms have ceased trading or exited the market. Whilst we understand the government's desire to introduce a predictable costs structure for cases of up to £100,000 in value, in our view this measure will not facilitate access to justice. On the contrary they will put in place further constraints which mean for many firms that it is uneconomical to continue to operate in this sector particularly if there is no focus on incentivising a Defendant to narrow the issues in the litigation.

Our preference would be for there to be more of a focus on seeking to narrow the issues at the point of allocation specifically with reference to the particulars of claim and the defence with a view to setting out the budgets that the parties must work to in relation to the specific issues which cannot be agreed. Whilst costs budgeting to some extent seeks to ensure proportionality, and is generally working well, in our view there needs to be a greater focus at a CCMC to the specific issues at stake in the case when giving permission for further evidence to be obtained. Unfortunately, due to time constraints, it is often the case that CCMC is not used effectively to narrow the issues between the parties. A schedule of issues is sometimes requested in preparation for the CCMC but rarely used effectively.

Sir Rupert's July 2017 report clearly confirms that cost management is working in the multi-track and recent improvements reduce the need for FRC's. We share that view. A more robust allocation and cost budgeting process will in our view safeguard the risk of costs becoming disproportionate to the issues at stake.

Whilst a fixed costs system will provide predictability, in our view it further dumbs down the legal process to the extent where litigation is poorly conducted which is a constant criticism of the judiciary driven by costs constraints impacting on the proper preparation of the case.

CPR 45.29J is rarely applied in our experience and does not provide sufficient comfort in our view to safeguard access to justice.

We would challenge the assertion that cases of £100,000 are low value. Such cases often involve significant complexities with often multiple expert reports required to determine quantum. Quantum awards at this level can include those with life changing injuries. The upper limit of the extended track will include elderly Claimant's whose claims are significant in terms of complexity but not significantly valuable. For example, a 65-year-old male who is retired and sustains a traumatic brain injury with ongoing cognitive impairment on the background of generalised atrophy of the brain with minimal physical impairment is unlikely to recover over £100,000 in damages because his future earnings are not limited because of his retirement. Causation could be particularly complex. A case of this nature would often require multiple experts reports from a neurologist, neuropsychologist, neuroradiologist, GP/orthopaedic. The costs as proposed would mean that the Claimant was not in a position to properly evidence his case within the prescribed fee. If extension of FRC's is favoured, we would support an extension to £50,000 in value which will in the main rule out those with life changing injuries.

We have grave concerns regarding the approach to determining complexity on the value. This is better illustrated by reference to contributory negligence. A severely injured Claimant who steps into the path of an oncoming vehicle from behind a parked car is likely to face a significant reduction for contributory negligence. The case would still require multiple reports from numerous experts albeit with limited quantum. A case with a gross value of £200,000 and a 50% contributory negligence reduction would attract fixed costs. That case would be categorised as a catastrophic injury case with a need for accident reconstruction expert evidence in addition to multiple medical reports. The reality is that if such cases with a high risk of contributory negligence were to be allocated to the fast track, it would perturb Claimant solicitors from taking those more difficult liability cases. To illustrate the extreme but likely scenario, a motorcyclist seriously injured when overtaking a line of traffic who is struck by a vehicle turning right, is likely to find himself 80% responsible for the accident. The claim could have a gross value of £500,000. After applying a contributory negligence reduction, the claim would have a net value of £100,000. Again, a case of this nature would still require the same expert evidence.

The extension of fixed costs to cases of £100,000 in value would have a significant impact on rehabilitation and how it is provided under the current system. If the costs of rehabilitation are not factored into the litigation (as is currently the case under the Rehabilitation Code 2016) there is a potential incentive for those representing Claimant's to not actively encourage their clients to engage in rehabilitation because to do would potentially mean their claim falls within a FRC system. There are costs associated with rehabilitation. Case Managers appointed either unilaterally or under the Rehabilitation Code on a joint basis will produce monthly reports including therapy reports to update the parties on the progress the Claimant is making. No provision is allowed for the work associated with this in the proposed FRC.

(iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation

The suggestions refer to agreeing allocation at an early stage in the letter of claim. This would often not be possible as sometimes complex injuries resolve quickly and sometime what appear to be straight forward can become complex. This allocation should be agreed at the point of issuing proceedings. This may be what they meant – but it refers to the letter of claim which suggests a very early stage.

Page 31, 4.2 refers to “straightforward quantum only cases’. In cases over £25,000 the issue of quantum is often not straightforward and if the defendants get their own medical experts there can be a vast difference in opinion and they are not straightforward. Therefore, perhaps Band 1 should be where the defendants are not getting their own medical reports?

The proposed costs in Band 2 and 3 do not appear too unreasonable considering recent multi-track cases I have settled, but where there is a dispute on medical evidence Band 1 costs would be too low.

There also needs to be a clear distinction between band 2 and 3 or just join them as otherwise there will be arguments between parties all the time with the Claimant wanting higher costs of band 3 and defendants arguing for 2. If the penalty for losing an application is £300 it may seem worth it if there is a chance to move the band one way or another.

There definitely needs to be more definitions and clarification than in the current proposals.”

Chapter 6: Judicial Review:
4. Do you agree with the proposal for costs budgeting in JRs with a criterion of ‘whether the costs of a party are likely to exceed £100,000’? If not, what alternative do you propose?

MASS have no observations in relation to Judicial Review matters.

Chapter 8: The Next Steps:
5. We seek your views on the proposals in this report otherwise not covered in the previous questions throughout the document

Please see our opening comments in Section 1.

Chapter 9: Impact Assessment
6. Do you have any evidence/data to support or disagree with any of the proposals which you would like the government to consider as part of this consultation?

No evidence or data is offered.

Chapter 10: Equalities Statement
7. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.
8. Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.
9. Do you agree that we have correctly identified the extent of the impacts under each of these proposals? Please give reasons and supply evidence as appropriate
10. Are there forms of mitigation in relation to impacts that we have not considered?

7. We have no specific observations to make, other than individuals with protected characteristics will inevitably find detrimental changes more onerous.

8. The range of impacts have been correctly set out.

9. It appears that there has been a correct identification of considered impacts.

10. There are no observations to make.