Housing Law Practitioners' Association
Legal Aid Practitioners' Group
Law Centres Network
Generation Rent
Shelter

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FIXED RECOVERABLE COSTS IN HOUSING CASES - AN EXISTENTIAL THREAT TO ACCESS TO JUSTICE

In this paper the organisations named above argue, and provide evidence by way of the attached 'Hawke Report', that in respect of housing cases the Fixed Recoverable Costs proposals represents an existential threat to the organisation delivering legal advice and representation to renters and borrowers in possession proceedings, housing conditions, unlawful eviction, homelessness and beyond. This cuts across key government priorities on levelling up, early advice and access to justice. It also undermines successive governments' previous justification for legal aid reforms because it makes CFA work for quality providers unfeasible.

FRCs are therefore an existential threat to access to justice in across housing law matters. We call for all housing cases to be exempted from FRCs, and for further detailed research to be carried out before costs reforms are considered in this area.

The delay to FRCs in possession cases announced in Housing Legal Aid: the way forward (31.05.2022) is welcome as far as it goes – but assuming it is accepted that FRCs represents a threat to sustainability, the logic is that the exemption should apply to all housing cases (including all CFA housing cases). It is fixed costs in housing disrepair counterclaims and standalone claims, also unlawful eviction claims and others which will hit firms and organisations the most, and consequently threaten in a very real and very practical sense the welcome early advice innovations represented by HLPAS. FRCs need to be re-evaluated for all housing cases if there is to be a housing advice and representation sector to deliver the government's commitments to access to justice.

Extending early advice improves access to justice for tenants but does not improve financial sustainability of providers. Housing providers will continue to rely on *inter partes* costs recovered in possession claims under any extended duty possession scheme.

We are not sure we understand the reference to possession proceedings being the only 'no choice' litigation for defendants. A family living in a home which is unfit for human habitation or facing unlawful eviction has 'no choice' but to litigate if they are to preserve their health or their home.

1. Under the Ministry of Justice's (MoJ's) proposed Fixed Recoverable Costs (FRCs) regime, (*Extending fixed recoverable costs in civil cases: the Government response* (September 2021) it is proposed that in civil cases allocated to the fast track, or vastly extended multi-track, the winning party will recover fixed costs in respect of the litigation. Regardless of how many hours were done to conclude the cases, the winning party will be limited to prescribed, fixed amounts. The prescribed amounts are considerably less than the *inter partes* costs litigators would expect to recover in most cases on the current standard basis paid at hourly rates, and, we fear, may even bring about circumstances where, almost unbelievably, the fixed costs would be lower than the hours charged at legal aid rates.

2. The housing legal aid sector relies for financial sustainability on the ability to recover reasonable assessed or agreed *inter partes* costs from opponents, given the low level legal aid rates are paid at. Where a legally aided litigant is successful in a case and the opponent is ordered to pay their costs, the solicitor is entitled to recover such costs from the opponent at *inter partes*/market rates rather than at legal aid rates from the LAA.

3. The next legal aid contracts are due for May 2023 for the housing possession court duty scheme and September 2023 for face to face housing legal aid contracts. Our membership i.e. housing legal aid providers, are likely to have to seriously consider whether such contracts are financially viable and worth applying for in light of fixed recoverable costs.

4. The Government is reviewing the sustainability of civil Legal Aid. We submit that this process is futile unless it is confirmed fixed recoverable costs will not apply to housing cases, given the reliance of the housing legal aid sector on the recovery of *inter partes* costs from opponents in successful cases. We are very surprised and concerned that it appears the MoJ has not realised the link between the impact of fixed costs and legal aid sustainability.

Renters

5. The impact of fixed recoverable costs will be that there will be far fewer providers doing housing work under legal aid and CFAs. This will result in renters ultimately bearing the brunt and not being able to secure legal advice and representation. Renters in housing law cases are often vulnerable with physical and/or mental health problems and reliant on a low income. We would request the Government consider the wider impact on society if renters are unable to secure advice and representation in cases where they face eviction or poor housing conditions.

6. Under fixed recoverable costs tenants will end up being illegally evicted and homeless, or evicted despite having had a Defence, or having to live in terrible housing conditions.

Hawke Report

7. We commissioned a report from Hawke Legal, an independent costs consultancy, on the impact of fixed recoverable costs on housing providers. A copy is attached. 19 organisations took part in the data gathering including law centres and firms in private practice. Data from 131 housing cases (including both legal aid cases and CFAs) was analysed as was organisational financial data. This found inter alia;

A. The overall effect of the change from *inter partes* costs under the current scheme to FRCs would significantly reduce the income of legal aid providers.
B. In 43% of the legal aid housing cases analysed legal aid rates would be higher than the FRC costs.
C. In cases where Counsel was not used average fees would fall 47%. In cases where Counsel was used there would be a fall in fees of 87-89%.
D. 17 of the matters analysed would be undertaken at a loss for the provider once counsel is paid.
E. The average income of a Law Centre or other not-for-profit housing legal aid provider would fall by 20% as a result of these proposals.
F. The average income of a private practice housing legal aid provider would fall by 23% as a result of these proposals.
G. It appears likely that the reduction in viability caused by FRCs would lead to solicitor firms and not-for-profit organisations closing their housing departments. This in turn would reduce economies of scale, so that central overheads would not be able to be absorbed by other departments. This could lead to some legal aid providers ceasing to practice altogether.
H. The provision of legal aid housing under the FRC proposals would become unsustainable if the proposals are implemented unamended.

Background

8. To date the Government's response to our concerns has been on the basis that unless we, the housing sector, provide it with 'concrete' (para 24.3, page 79), 'statistical' (para 22.1, page 78), 'detailed evidence' (para 3.8, page 25) that housing cases are not suited to FRC, they will be subject to this regime because there is no good reason why they should not be.

9. This is what we do know:

a) The sector is highly sensitive to changes in its funding. The number of providers of specialist housing legal advice has fallen dramatically since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The number of housing and debt provider offices fell from 537 in April 2012 to 397 in September 2021 (Hansard Written Question UIN 51685, 20 September 2021; answered 23 September 2021).
b) The number of cases where legal aid was provided for initial advice fell by more than 75 per cent in the first year of LASPO's implementation and the number of grants for legal aid for representation fell by 30 per cent in the same period (Legal Aid, Sentencing and Punishment of Offenders Act 2012: post-legislative memorandum, MoJ, October 2017, Figure 6, page 46). The number of civil legal aid providers also nearly halved, from 4,253 providers in 2011/12 to 2,824 in 2017/18, including solicitor firms and not-for-profit organisations.

c) Across civil legal aid as a whole, the number of provider offices completing work fell by almost a quarter over the five years to March 2020 (Legal aid statistics quarterly, England and Wales January to March 2020, MoJ/LAA, 25 June 2020, page 19).
d) There has been no increase in legal aid rates since 2007. As has been explained previously in Legal Action magazine by the Legal Aid Practitioners Group:
   (1) In October 2007, the fixed fee for community care legal help cases was £290. The hourly rate for preparation and attendance in civil certificated cases was £70 in London and £66 outside (Community Legal Service (Funding) Order 2007 SI No 2441 Schedule Tables 1 and 10(a)). These fees were subject to a 10 per cent cut in 2011 and have not been adjusted since. Enhancements in county court claims have been capped also at 50%.
   (2) If the contracts contained mechanisms to uprate fees in line with the RPI, the rates would have increased by 2019 to £406, £98 and £92 respectively. These increases would have done nothing more than ensure that fees kept up with the rising cost of delivering services, which, according to the RPI, cumulatively increased by anywhere between 40 and 50 per cent in those 12 years. Without that mechanism, lawyers are being continuously asked to provide the same level of high-quality service for, in real terms, an ever-decreasing fee (July/August 2020 Legal Action 22).
e) There are few incentives left for legal aid providers to continue to provide a service. Legal aid rates are significantly lower than the market private rates charged by high-street firms and work on these rates alone would be unsustainable. The fixed fee for housing legal help cases is £157, having been cut by 10% in 2011.
f) Counsel are, contrary to the assumptions made, regularly instructed on Band 1- and 2-type cases that last for one day. Although such bands are unlikely to apply to housing cases.

Objections

10. We object to the FRC proposals, and ask for housing law work to be exempted from the regime for the reasons that follow.

11. It is vitally important that we make it clear that access to justice in the housing field is at threat from these proposals. And justice for renters, borrowers and leaseholders could not be more important than at the current time.

12. Possession proceedings are opening up and huge rent deficits built up during the pandemic sit behind that. The media and the Housing Ombudsman are highlighting the poor condition of rented housing stock. The mood music around the cladding scandal and remediation may be moving in a more positive direction but there is still much to do in the legal arena to ensure that just outcomes are reached.

13. At the same time the renters' reform agenda proceeds alongside proposed reform to possession proceedings, there are consultations on a new early advice service in possession proceedings, intentional homeless decision reform for those fleeing domestic violence, as

well as proposals to make it easier for those people to remove perpetrators from tenancy agreements. We don't presume to say that lawyers are the only stakeholders in these issues but lawyers are needed and will continue to be needed to ensure justice and that the rule of law is maintained.

14. Housing Possession Court Duty Scheme providers are at risk. Organisations and firms that litigate cases for tenants with health threatening disrepair are also at risk. And yet as the Law Society has been reporting since 2018 England and Wales desperately needs *more* quality housing law providers to protect housing rights.

15. FRCs are apt to drive providers out of the sector. We are concerned that the 2021 report on FRCs and those before it fail to grasp the extent to which the legal aid sector, and housing law in particular works like an ecosystem, with each individual activity that an organisation undertakes being reliant on the sum of its activities. So loss-making activities at low remuneration rates are supported by the possibility of litigation which can bring in *inter partes* costs.

16. We are certain that FRCs will drive out of business the majority of organisations, including both private practice and not-for-profit currently doing legally aided housing law work and housing law work under CFAs. On 24 September 2021, Islington Law Centre wrote to Lord Wolfson giving some examples of the impact that FRC will have. It analysed figures in its cases involving recovery of *inter partes* costs from opponents in successfully defended legal aid possession claims, and found that under FRC Band 3 recovery of profit costs would only be between 31 and 38 per cent of the costs recovered under the current costs regime. It even argues that perverse incentives will occur whereby the legal aid provider may decide not to pursue *inter partes* costs because payment, even at paltry legal aid rates, will outstrip FRC.

17. It is important to reiterate that organisations that currently deliver court duty advice, and legal help for early advice to tenants rely on *inter partes* fees from successfully suing landlords in order to subsidise the duty and legal help work.

18. Housing possession (including Counterclaims for disrepair) is one of the main areas of work left within scope of housing legal aid and most housing possession cases are allocated to the fast track.

19. Recovery of *inter partes* costs (at market rates in successfully defended possession cases for example) from opponents gives housing legal aid a modicum of sustainability given there has been no increase in rates for a significant period and there was a 10% cut in rates in 2011. To be clear, these are cases where the tenant is legally aided and successfully defends the possession claim and so costs are paid by the landlord at market rates rather than the LAA at legal aid rates. Limiting *inter partes* recovery would mean housing would no longer be sustainable financially as an area of legal aid.

20. The housing legal aid sector has operated for many years on the basis that important work paid at lower rates (such as legal help homelessness) can be done and subsidised due to the recovery of *inter partes* costs in possession and disrepair cases. A solicitor dealing with a housing legal aid case does not have the option of charging the client a success fee or

recovering from the client the costs not recovered from the opponent. In many cases legal aid rates will now exceed fixed costs and so result in a disincentive to seek costs orders against opponents. This will mean providers are unable to fulfil the contractual duty to protect the legal aid fund and recover costs from opponents. There will be a conflict of interest between solicitor and client in legally aided damages cases (such as Counterclaims) – the client will want (need) their solicitor to recover costs from the opponent due to the statutory charge whereas providers will be inclined to seek costs instead from the LAA as they are likely to be higher. The MoJ is clearly on one hand concerned about legal aid sustainability but has failed to grasp the impact of fixed rates on legal aid providers or explain how the significant loss of income to legal aid providers will be ameliorated.

21. Fixed fees are likely to be the final nail in the coffin for the already fragile housing legal aid sector. The importance of *inter partes* fees to the legal aid sector has been recognised by the Supreme Court;

Governing Body of JFS and others [2009] UKSC 1 at para 25:

> *"It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful.* ***If that were to become the practice, their business would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work****."*

22. The following types of housing case will be affected by fixed recoverable costs;

(i) Possession proceedings.
(ii) Counterclaims within possession claims including disrepair Counterclaims.
(iii) Anti-social behaviour injunction claims.
(iv) Claims for illegal eviction/harassment.
(v) Disrepair/nuisance/housing conditions claims.
(vi) Discrimination claims under the Equality Act 2010 involving housing issues, for example as Counterclaims in possession proceedings.

23. Legal aid is available for all the above types of housing case although disrepair claims are now usually dealt with under CFAs due to disrepair legal aid not covering damages claims unless as Counterclaims. Disrepair claims were taken out of legal aid scope in 2013 with the justification that they could be run under CFAs. It will not be possible for disrepair claims to be run under CFAs under fixed costs proposals, save for possibly very cheaply and poorly by claims farmers, with poor outcomes for tenants.

24. The housing legal aid sector has had to adapt to significant changes in recent years. Disrepair was virtually taken out of scope of legal aid by LASPO. Now only cases where there

is a serious risk of harm to health and safety are within scope and this is only in relation to the injunction element, legal aid will not fund the damages claim. Disrepair cases are therefore basically unworkable under legal aid and are now dealt with under CFAs. Some firms and in particular law centres do not however offer CFAs due to the risk involved of no payment. Many firms and law centres have had to adapt to the loss of *inter partes* income from freestanding disrepair claims. There was also the 10% cut in legal aid fees in 2011. Firms also had to adapt to changes for legal aid in relation to judicial review claims, where there is now no payment unless permission to claim for judicial review is obtained from the court.

25. Legal aid providers have had to adapt and one such way has been pursuing opponents more vigorously for costs in successfully defended cases such as possession claims and anti-social behaviour injunctions. Legal aid providers will not be able to adapt further and will not survive if there is a significant reduction in *inter partes* income, in particular when there has been no discussion in relation to a significant increase in legal aid rates.

26. There are multiple issues the Government has failed to consider in terms of the interplay between legal aid and a possible fixed recoverable costs regime;

(a) How will the Government ameliorate the financial impact on legal aid providers of the significant reduction in *inter partes* income? Will legal aid rates (£63 per hour for certificated cases) be increased to *inter partes* rates (£200-300 per hour)?
(b) If costs at legal aid rates will exceed fixed recoverable costs will providers be able to choose not to enforce a costs order and seek payment from the LAA instead? Can the provider advocate for the Court to make no order for costs even though they have succeeded on a case?
(c) Will the contractual duty to recover costs from opponents and protect the legal aid fund be removed? Especially given legal aid rates may exceed FRC. It would be perverse to expect providers to pursue opponents for fixed costs where these are lower than legal aid rates (see Standard Civil Contract Specification 2018 para 6.57).
(d) If Counsel is used in a legally aided case where an *inter partes* costs order is obtained, will the solicitor be paid nil if Counsel's fee takes up the fixed costs allowable?
(e) If legal aid rates exceed fixed recoverable costs will the statutory charge still apply to damages recovered? If so what steps will the Government take as this will create a conflict of interest between solicitor and client.
(f) Where a litigant is legally aided their costs cannot be summarily assessed by the Court (PD 44) and so this conflicts with a fixed costs regime. What consideration has been given to this by Government?

27. Other jurisdictions with no costs recovery such as the US have huge damages awards in comparison to the UK, enabling DBAs. UK courts have deliberately limited damages partly due to the fact that legal costs can be recovered. Limiting costs to a fraction of what they were previously will limit justice and undermine the global reputation of courts in England and Wales.

28. The FRC regime would prevent lawyers working under legal aid and CFAs from being properly remunerated in cases that they win (against bad landlords) by which they subsidise poorly paid legal aid work and duty scheme work. The concern rightly held by the MoJ that early advice in housing and related matters should be more widely available is at grave risk from the FRC regime because providers will not be there to deliver that early advice.

29. The Means Test Review and possible expansion of the availability of legal aid will also be futile if there are no housing providers to undertake the work.

30. While FRCs are thought to be costs neutral to Government, in fact the costs to Government arising from the loss of an already chronically depleted housing law advice sector will be found in the costs of homelessness, health outcomes and social care outcomes.

31. Housing cases are further not suited for an FRC regime due to their complexity. Often the home is at stake (as in possession matters) or the client's home is in disrepair and an injunction is required. The client may have been illegally evicted without a court order and need an injunction for re-entry. Housing clients are further often vulnerable with mental and/or physical health problems resulting in longer attendances. Housing cases are document heavy often with considerable disclosure including repair and housing files. Cases often involve expert evidence from surveyors and medical experts.

32. FRC is based mainly around damages awarded. This fails to consider for example the potential loss of a secure/assured tenancy to a council/housing association tenant, and therefore the importance to the tenant of defending the possession claim and all the related complexities. The 'value' of such a social housing tenancy is too considerable for a fixed fee regime.

33. Landlords have said they are concerned about the claims handler model of disrepair litigation and that FRC is a panacea to those concerns. That is short-sighted to say the least. Far from discouraging them, FRCs will encourage and cause a proliferation of claims handler type organisations who do this work cheaply and with dubious results. We have seen an increase in unsolicited approaches by referrers since the FRC announcement last year.

34. But FRCs discourages (in fact will eradicate) quality housing lawyers who do a proper job for their clients either under legal aid or by CFAs. Access to justice will be curtailed as tenants facing disrepair will have no choice but to engage low quality claims handler organisations. See Giles Peaker – Inside Housing 14.03.2022 https://www.insidehousing.co.uk/home/home/lobbying-for-fixed-recoverable-costs-on-housing-condition-cases-takes-chutzpah-74663.

35. We also contend that FRCs dispose of a right and proper sanction against landlords found not to have complied with the law. The standard *inter partes* costs order, as well as remunerating the tenant's solicitor for work done, is a quite proper sanction against a defaulting landlord on the "polluter pays" principle. It should be recalled that all such orders are subject to detailed assessment if not agreed.

36. The scheme, despite its extraordinarily long gestation, further fails to take into account the fact that housing claims often have other, non-money related remedies such as orders for repairs, injunctions against unlawful eviction, declarations. These remedies are vitally important to tenants, often securing their health and safety along with other housing-based rights. But the scheme makes no provision for the facts that pursuing a non-money remedy adds to (i) the workload generally, (ii) the issues that need to be resolved before settlement can be contemplated and, relatedly (iii) the length of time that the litigation is in train.

37. Essentially we respectfully contend that Sir Rupert Jackson and the Government have failed to adequately (or at all) take into account the specific performance element of a disrepair case;

- Repair works at a property can be complicated and difficult for parties to resolve. This means the case can drag on and is something not within the control of the claimant.
- Therefore how can we reasonably offer a CFA in disrepair cases under a fixed fee? The risk would be too high as we would not be able to reasonably assess how long or how much work would be needed to complete the case.
- Liability is ongoing and issues of disrepair can easily arise after the case has started. E.g. a simple case of mould in a property could, after further inspection, be discovered to be chronic rising damp. What could easily follow is a protracted argument involving experts as to the extent of the works needed to resolve the problem and consequently the extent of the Landlord's liability.
- Damages are historically low as they are based on rent values. They do not reflect the value to the client in getting the disrepair resolved. Therefore it is wrong to base the FRC on ratio around the value of damages.

38. See the example of client E below from HLPA co-chair Simon Mullings. This case is not part of the data set.

Case of Client E

There is nothing unusual or excessive about the details of the case study below. Any housing disrepair practitioner would recognise the details as being common in such cases.

On 29.01.2020 I first saw client E. She complained of disrepair in her council flat. The disrepair was affecting her and her children's health. Client E signed a Legal Help form so that we could commence the housing disrepair/conditions pre-action protocol.

On 05.02.2020 I wrote to the council setting out the disrepair under the relevant pre-action protocol. On 14.07.2020 an expert's report was sent to the council. The council failed to agree a joint expert.

No works were done and on 03.09.2020 legal aid was granted to seek an order for the repairs to be carried out.

A draft copy of the particulars of claim were sent to the council on 08.10.2020.

Repairs were still not done. As time had passed, a need for further repairs had become apparent and the council disputed the existence of any repairs (contradicting their own expert's report), it was advised that a further expert's report should be obtained which we did. That was served on 05.01.2021. Still no repairs were carried out.

Proceedings were issued on 16.03.2021. We hope it will be appreciated that every step we have taken prior to, at the point of and after proceedings being issued was communicated to the council landlord.

We also signed a CFA agreement with client E so that we could pursue the money claim for damages.

The council argued that the matter should be allocated to the small claims track knowing that if it was then legal aid funding would not be available to client E. However at a hearing on 27.09.2021 the claim was allocated to the fast track.

Even after proceedings were issued and the case allocated to the fast track, no adequate works of repair were done. The council sent workmen and some minor works were done but they were not works that brought the property to fitness for human habitation and were often done to an appallingly low standard.

Trial was fixed for 10.03.2022.

There have been two expert reports on our side and one on the council's. Each report found there was still disrepair and unfitness, meaning the council failed to carry out adequate repairs over a period of 24 months and more.

The council moved our client to new accommodation in January 2022 at a time when repairs were still not completed – however that dealt with the claim.

Just to reiterate that the claim could not settle until the removal of the risk of harm to the occupiers.

We settled on a modest amount of damages - £1,500 but the costs of the case are estimated to be £23,000.00 including profit costs, disbursements, Counsel's fees and VAT.

Just to put the work we did in perspective, our estimate (pre-assessment) amounts to 4 hours per month done by a grade C fee earner. Any less work on a case would be borderline negligent. We are making the point that we are not intending to charge for excessive amounts of work. Those costs will either be agreed or subject to detailed assessment by the Senior Courts Costs Office. The most likely outcome is that we will settle on around 75% to 80% of the costs as drawn.

The work over 24 months was necessary because the council did not carry out works of repair that experts had said needed to be carried out to make the premise fit for human habitation.

At best under a FRC regime, assuming band 3, and assuming we undertook the hours that Counsel spent on the case, we would be being paid for this case £5,192 which would amount to an hourly rate of £47.20 per hour. My firm would not be able to do this work at those rates.

39. FRCs will also include proceedings that have a quasi-criminal law element such as possession proceedings based on alleged anti-social behaviour and anti-social behaviour injunction claims. Again it is quite clear that such cases are highly unsuitable for a fixed fee regime which caps the work to be done on them and the effect of FRCs is that there will even less providers with the expertise to take on this work and so alongside the civil justice system, an element of the criminal justice system will have an access to justice problem.

40. The same is true of cases which involve housing and discrimination law, and housing and debt matters. Moreover, in the case of discrimination cases there must be an overriding concern that the various reports including that from September 2021 did not take into account the changing conditions under which discrimination law and debt matter legal advice and representation is accessed by the public. Where previously these cases were behind the Legal Aid Agency 'gateway' and it was not possible to get advice face to face without going through the gateway first, that was changed in May 2020. It would be retrogressive to say the least if the Government opened up access to discrimination and debt cases with one hand and then closed a significant number of them down again with the other.

41. Landlords of poor quality housing will know that under a FRC regime, the longer they delay doing any repair works, the more unsustainable it is for reputable quality lawyers to bring claims against them. The landlord community will have a mechanism to prevent themselves from having to face high quality litigation claims. They will use the same tactics against claims handler organisations and that will lead to settlements being recommended to clients which will leave them with significantly less damages than they would be entitled to in the usual run of litigation and other remedies not being pursued to a satisfactory conclusion.

42. In circumstances where the fixed costs would be lower than the hours charged at legal aid rates there may arise significant conflict of interest depending on what the MoJ proposes. Cases occur, particularly where there are non-financial remedies, where there are settlements available to tenants in which it is in the best interests of the tenant themselves to not seek the costs from the opponent but to let the public fund meet the costs. In damages claims however funded under legal aid, such as disrepair Counterclaims in possession proceedings, it is in the client's best interest to recover costs from the landlord and so to ensure the statutory charge does not apply and the client can keep the net damages. If legal aid rates will exceed FRC, there will be a conflict of interest between solicitor and client. Solicitors would in that situation rather pursue no order for costs in order to claim from the Legal Aid Agency, whereas the client will want the solicitor to recover costs from the opponent to prevent the statutory charge from arising and attaching to the damages. There will therefore be a conflict of interest between solicitor and client in relation to recovery of costs.

43. We see circumstances where FRCs could have the unintended consequences of causing a great draw on the public fund and the scheme would not be cost neutral to Government.

44. Even in cases where base legal aid costs are less than fixed recoverable costs, they may still be more once an up to 50% enhancement is applied on assessment of costs by the Court or LAA.

45. Further in cases where fixed recoverable costs are more than legal aid costs, but not by a significant extent, it is unlikely to be worth the time and costs associated with pursuing an opponent in terms of assessment of costs and recovery. Providers are far more likely to in that situation simply seek to submit a claim to the LAA.

46. Given all the above we consider fixed recoverable costs are likely to result in a higher legal aid expenditure and which has also not been considered by the Government.

47. The Government is in possession of the relevant data and which has not been considered by the Government as part of the fixed recoverable costs process. Providers have to submit a report to the LAA once costs have been recovered from an opponent (these were previously known as Claim2s but are now submitted under CCMS). The Government therefore has the figures going back multiple years in relation to sums recovered from opponents rather than the LAA and therefore knows the importance of these sums to providers.

Data

48. What is abundantly clear from the September 2021 report is that decisions made in relation to FRCs are based on a paucity of information about the way in which housing law cases in their variety of forms are conducted. There is little or nothing that deals with the issue of damages plus specific performance disrepair cases, nothing on counterclaims where again work consists of defending a claim plus one or more remedies being sought, including injunctions, declarations and others.

49. It is well known that data across the civil justice system in E&W is inadequate for planning (see eg. Dr Natalie Byrom's October 2019 report, Digital Justice: HMCTS data strategy and delivering access to justice: Report and recommendations.)

50. It is submitted that FRCs should not have been nor should they now be contemplated without a proper data gathering exercise building on the data we have gathered and using the department's infinitely greater resources to ensure that any review of the costs regime is properly led by data and evidence rather than the current proposal to proceed in the absence of data and evidence.

51. Figures obtained from the Legal Aid Agency for legal aid housing cases closed during the below financial years show the total of what providers have reported for costs recovered from opponents per year;

Year	Costs housing
2008-09	10,402,100.89

2009-10	10,195,787.42
2010-11	10,270,254.13
2011-12	10,831,401.93
2012-13	9,201,209.36
2013-14	10,862,345.71
2014-15	12,468,619.05
2015-16	11,607,056.03
2016-17	11,193,801.17
2017-18	10,504,662.17
2018-19	11,823,354.33
2019-20	10,901,887.08
2020-21	8,271,571.82

52. These are clearly substantial sums (around £10-12.5 million per year). There will be a significant reduction in these sums following the introduction of fixed recoverable costs. Housing legal aid providers rely on *inter partes* costs recovered from opponents for financial sustainability and to subsidise lower paid work. No consideration has been given by the Government to how the provider base will survive following a substantial reduction in *inter partes* income. There has been no analysis by the Government on the impact on the housing legal aid sector of FRC.

53. These issues have been raised in meetings and in correspondence with the MoJ and LAA by HLPA and the Law Centres Network and others, however there has been no substantive response to the impact on the housing legal aid sector. The Government has to engage with this issue and reply substantively.

Disrepair and Levelling Up

54. Poor housing conditions is especially at present a significant problem faced by renters.

55. The Grenfell tragedy exposed the dangerous living conditions and fire safety issues faced by renters. The BBC and ITV have further reported recently and extensively on the terrible living conditions faced by renters including severe mould and damp.

56. As a part of Levelling Up the Government is keen to spread opportunity more equally across the UK. We do not see how this can be achieved if renters will not be able to access

legal advice and representation as a result of the reduction in housing providers due to fixed recoverable costs. If renters are living in terrible housing conditions or homeless/evicted due to an inability to access legal advice, it will be difficult for the Government to achieve their agenda especially given the link between having a secure/safe home and being in employment.

Access to justice

57. The Government is clearly aware there are access to justice consequences of fixed recoverable costs. We understand mesothelioma/asbestos, complex PI, professional negligence, actions against the police and child sexual abuse cases will be excluded from fixed costs. We would submit the same considerations clearly apply to housing cases and which involve stopping loss of the home and homelessness and ensuring safe housing conditions and so housing cases should also be excluded.

Summary

58. We consider that the proposals are deleterious to access to justice and would have unintended consequences:-

1) As the Hawke Report shows, it will drive quality providers who are dedicated to their clients' interests out of the legal aid and CFA housing law sector as the work will no longer be sustainable. Further housing legal aid deserts will occur.

2) 'Claims handler' type organisations may fill the gap but with worse consequences for clients and their damages.

3) Landlords will have little incentive to carry out works of repair or refrain from other breaches of tenancy as tenants will have even less ability to find quality providers by whom to seek legal redress.

4) There will be an increase in homelessness due to tenants being evicted due to not being able to defend possession claims due to the lack of housing legal aid providers.

5) The Government's early advice projects and the housing possession court duty scheme are at grave risk from these proposals.

6) Other adjacent areas of law such as discrimination will be adversely affected.

7) The importance of recovery of *inter partes* costs to financial sustainability of legal aid providers has not been considered by the Government at all. Many firms are likely to exit the housing legal aid sector.

8) All of the above means that housing law should be excluded from the FRC regime unless and until a proper data study shows that access to justice for tenants and homeless people will not be adversely affected.

59. We request an urgent meeting with the relevant Government ministers on this issue.

60. Given the Government has acknowledged that concerns have been raised about the impact on legal aid and has committed to 'continue to bear this in mind' (para 26.3 – Extending Fixed Recoverable Costs in Civil Cases: The Government Response) it is incumbent on the Government to engage with this issue and respond substantively to these submissions before any extension of fixed recoverable costs.

01 June 2022

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Chris Minnoch (CEO) for LAPG

Nimrod Ben-Cnaan (Head of Policy and Profile) for Law Centres Network

Alicia Kennedy (Baroness Kennedy of Cradley) (Director) for Generation Rent