Housing Law Practitioners' Association

HLPA RESPONSE TO "Consultation on extending fixed recoverable costs (FRC): how vulnerability is addressed"

Sir Rupert Jackson in 'Supplemental Report Fixed Recoverable Costs'

''Many people assert that the 2013 cutbacks in legal aid were based on my recommendations. Indeed, a very senior Queen's Counsel, who has held public office, suggested that at the Cardiff seminar. As can be seen from the above summary, that is not correct. ***In fact, I recommended in forthright terms that there should be no cutbacks in legal aid.''***

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

No. We think the government's thinking in this context on the issues of vulnerability is unlikely to be genuinely helpful to vulnerable people. The main issue which is skirted by this consultation document is that a very large proportion of defendants in the housing law cases have some kind of vulnerability and indeed are almost always vulnerable in proceedings due to the power imbalance between landlords and tenants, where the landlord's interest is generally financial and the tenant/borrower's interests concern their home and their well-being. Vulnerability is contextual and often complex.

Threat to tenant/borrower facing housing law sector and therefore to vulnerable tenants and borrowers

As we have set out extensively here we consider that the FRC proposals are going to remove a great deal of the current housing law advice available to tenants and borrowers which will have a disproportionate impact on vulnerable people generally. Recovery of *inter partes* costs from opponents gives housing legal aid a modicum of sustainability given the low levels at which legal aid rates are paid and which were cut by 10% in 2011. To be clear, these are cases where the tenant is legally aided and succeeds in the case (such as a successfully defending a housing 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 and CFA work, and the tenant/borrower facing housing legal aid/CFA sector will collapse. Renters will suffer including losing their homes and living in terrible conditions. For further detail we refer to the submissions linked above in this consultation response.

The proposals at paragraphs 15 exacerbate rather than alleviate the problems we have set out. The threshold cap is perforce arbitrary and there is no explanation for the amount suggested. It appears to plucked out of the air and the whole concept of a cap seems to speak

to convenience rather any sense of justice between the parties or proper consideration of how vulnerability impacts litigation and the party who vulnerable.

The proposal as to the determination of whether any allowance is made for vulnerability is disastrous. How is any organisation supposed to plan legal services for potentially vulnerable clients when they have no idea how they will be remunerated when they win the case, save that it will be at a low level whatever the outcome? This, and the complexity of proving vulnerability, simply creates a perverse incentive on organisations to avoid cases where issues of vulnerability may be borderline[1]. In fact this particular issue is simply an extreme example of the whole problem with FRCs across the board. Organisations delivering vital legally aided and CFA legal services to tenants will be put to the wall by these proposals because they will not be able to survive the drop in income. We do not recognise the "swings and roundabouts" of this and previous FRC documents (to use a more useful metaphor, we see only snakes and no ladders) but even if there were compensations, this retrospectivity proposal would make planning services for vulnerable tenants impossible.

Real life example

A client sought advice within the last month from HLPA's co-chair who was duty adviser at court. This client has depression with some psychotic symptoms. The client was so distressed that he was effectively debilitated by a two hour long panic attack that saw him sobbing, unable to speak and literally clawing at the wall of the duty room at court. Security attended and it was considered whether an ambulance should be called. We managed to get sufficient instructions to get an adjournment for a defence and counterclaim for disrepair and we hope we will save his home. The judge on the day had no idea about any of this because the case was listed for 5 minutes in a busy possession list. If, as is most likely, we settle this case with set off against arrears, works being done and a conditional order to clear any remaining arrears while he and his family remain in his home, then no judge will have had cause to have any idea of his vulnerability. Nevertheless we can confirm that working with this client is a difficult and time consuming as his vulnerability suggests.

The judiciary is not in the best position to decide on the vulnerability of a represented party – see example on the left

Putting the burden of the decision on to the judiciary as to whether vulnerability in a case gives rise to an allowance seems to be moving against the aims of the FRC in the first place. While we can see the superficial attraction of clear rules and guidance to manage the burden, that flies in the face of the nature of vulnerability it itself which is rarely clear or simple, and is often opaque and complex.

It is also the case that judges dealing with a case may not be given any clear idea of the extent of the vulnerability of a party, particularly if the case settles. Part of the hard work of representing vulnerable clients is mitigating the vulnerability in the conduct of the case, particularly at hearings. A judge at an interim hearing mostly does not need to know the details and it would be perverse if parties were to be incentivised to make detailed representations to judges in interim hearings as vulnerability *simply to engage an uplift to the FRC if the matter does not go to trial.* And yet that is what is being proposed. Even at trial the judge may not need to know the details of vulnerabilities which made it difficult to obtain instructions if it not relevant to the matters at hand – and a judge would rightly criticise representations which

[1] In reality quality organizations doing this work will do the best job for their clients regardless but the point is that this is likely to put them at serious financial risk of going under.

were not relevant to the issues in the trial. In disrepair cases it is usual to settle with the case having had no judicial involvement save for the making of directions. Evidencing vulnerability would be a fresh piece of work to do at the end of the case, possibly necessitating written representations, witness statements and/or medical evidence which you may not hold and which the client would have little interest in cooperating with. In addition the costs of making such representations would likely outweigh the 20% uplift. Even more importantly it does harm to a client's dignity and to client/solicitor relations for the representative to have to elucidate vulnerabilities that are not relevant to the issues at hand. Such a practice will undoubtedly create conflicts of interest. Some vulnerabilities are such that the client has little or no insight into them but they are onerous to deal with nevertheless. Is a representative to seek permission to make representations about issues that a client may be unaware of or in denial about because they are issues that should give ride to an uplift?

Even without those kinds of complications, it must be the case that no-one wants an oral hearing or even extraneous written representations on vulnerability as it relates to the work done for client. But otherwise who is justice going to be done on such an issue? And if a case settles pre-issue will we have to issue a part 8 claim to have vulnerability assessed to get an uplift?

FRCs, discrimination and data

The harm to vulnerable people from FRCs has been acknowledged by way of this consultation but the proposal is not supported by evidence and will not ameliorate the harm. This is a breach of the PSED. There has not been 'due regard' of the need to eliminate discrimination but a tick box exercise has been carried out. In particular:

- S149 (1) (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This has not been done.

- S 1(1) EA 2010 says "An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage." This has also not been carried out. This duty is applicable to a Minister of the Crown.

The MoJ's thinking on vulnerability is, with all due respect to the work that has been done, still incomplete. In 2019 Dr Natalie Byrom's report) 'Digital Justice: HMCTS data strategy and delivering access to justice' (Byrom, N (2019) was produced. The report, while directed primarily at court reform and digital agenda contained important recommendations for HMCTS (and by extension MoJ) for understanding vulnerability in the civil justice system and ensuring access to justice. There is no evidence of those recommendations being followed in this document or previous FRC documents and we are doubtful that the full range of data gathering that was recommended has been carried out. Indeed, the Cotter Report referred to in the document stated:

> *Surprisingly, there is no data as to the number of vulnerable parties or witnesses (or those who perceive themselves as such) who appear before the civil courts across the range of jurisdictions and types of case, or in relation to any steps taken to assist any vulnerable party or witness.*

It is clear that these FRC proposals are being introduced at a time when the MoJ has no proper idea of the impact on vulnerable litigants, and where in housing law we see a disproportionately large number of vulnerable litigant tenants, we consider that there is no adequate evidence base to provide any confidence whatsoever that access to justice will be maintained.

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

Our alternative proposal is to exempt all housing law cases which include a remedy other than money from Fixed Recoverable Costs on the basis that many housing law litigants on the tenant side are vulnerable to varying degrees and to ensure access to justice. We commend this proposal not least for the reason that it is genuinely "clear and simple".

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

Our only comment is that we do not see how this can be drafted to ensure that access to justice is maintained for all tenants and particularly for vulnerable tenants. The proposals themselves do damage to this group and no drafting techniques can mitigate that.

iv. *Should any new provision in respect of vulnerability apply to existing FRC, which generally cover lower value PI (please consider in the context of paragraph 20 above)? v. Do any changes need to be made to the arrangements for disbursements for vulnerability in FRC cases?*

Nothing to add.

We continue to urge government to exempt housing law cases from the FRC regime. A failure to do so will cut across and threaten many of the government's current policy priorities around a fair deal for tenants, early advice and the sustainability of the housing law sector.

Housing Law Practitioners' Association

20 June 2022