



Ministry of Justice Extending Fixed Recoverable Costs in Civil Cases

Response from AXA UK

AXA UK

1. AXA UK (AXA) is part of the AXA Group, a worldwide leader in financial services. AXA Group operates in 61 countries with over 170,000 employees and 105 million customers. AXA has around 11 million customers in the UK and operates through specific operating companies – AXA Insurance and AXA PPP healthcare.

Executive summary

2. As a leading UK insurer, AXA welcomes the opportunity to submit to this consultation. AXA is in favour of the principle of extending fixed recoverable costs (FRC) and is largely supportive of the proposals outlined in the consultation paper for fast track cases, noise inducing hearing loss cases (NIHL) and intermediate cases. AXA also supports the response of the Association of British Insurers (ABI) to this consultation.
3. Although largely in support of the proposals, AXA does have concerns and seeks further clarity on several issues, especially regarding how the reforms will be applied in practice. These concerns include providing greater certainty on the application of bands to different claims, the scope of the intermediate track and the omission of Pre-action Disclosure Applications (PAD) from the FRC regime in noise induced hearing loss (NIHL) claims.
4. Moreover, AXA would like to emphasise the need for these rule changes to align with changes already being made through the Civil Liability Act and the Small Claims Track uplift. AXA believes that the reforms will work best as a package of interlocking reforms.

Chapter 3: The Fast Track:

Question 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.**

5. AXA agrees with the principal of extending the FRC regime and overall and is in agreement with the proposals outlined in the Government's consultation paper. However, clarity is



required on a number of issues, for example how the reformed rules will be applied in practice.

6. AXA is supportive of the proposals for allocating fixed recoverable costs to bands. AXA welcomes the intention to retain four bands in the fast track; this approach reflects the costs, benefits and consequences of an early liability admission in line with the current pre-action protocols. However, AXA believes that care needs to be taken to ensure the proposal does not lead to an environment where there are unnecessary disputes, and where there are financial incentives to raise disputes regarding which band applies. Furthermore, the table for the FRC regime will need to be updated to reflect a change in the Small Claim Track (SCT) by way of the Civil Liability Act to £5000 for RTA claims.
7. AXA supports the proposals for limiting the costs available in respect of multiple claims arising from the same cause of action. Limiting costs in this way will reflect the limited amount of additional work involved in pursuing claims involving multiple claimants from the same cause of action. This approach may also be a beneficial feature to reduce levels of motor occupancy fraud, which may be driven to some extent by the full legal costs recoverable by each individual claimant.
8. However, some caution must be exercised as there is potential for unintended negative behaviour arising from this proposal. Due to the lower costs available, law firms may refuse to act for multiple parties, and will instead recommend or refer claimants to other firms so that each individual claimant acts under separate legal representation and remains entitled to full legal costs. Therefore, AXA would be supportive of a mechanism whereby the application of limited and linked costs for multiple claims from the same cause of action will apply when the parties have sought separate legal representation.
9. AXA believes that the current low value road traffic accident (RTA) and employers' liability (EL) / public liability (PL) Pre-Action Protocol (PAP) and the Civil Procedure Rules must be fortified. This is necessary to ensure that the rules and behaviours support an environment of engagement between parties, with clear timescales to drive claims through to settlement efficiently and effectively for all concerned. Furthermore, the rules must support appropriate behaviours on both sides, with the potential for penalties if this is not the case.



Chapter 4: Noise Induced Hearing Loss:

Question 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.

10. In principle, AXA is in agreement with the intention to extend FRC to include NIHL. Expanding the scope of FRC to NIHL claims will introduce more proportionate costs and streamlining the process through mandatory rules should increase cooperation between the parties. This should in turn lead to a higher proportion of claims being resolved pre-litigation.

11. Although AXA does agree with the proposal to extend FRC to NIHL claims there are some valid concerns to be addressed and there remains considerable scope for satellite litigation, namely;
 - a. The link between claimant solicitor and audiologist will lead to expert selection to achieve a favourable opinion, which is likely to drive an increase in claims frequency. Therefore, AXA would be supportive of using MedCo as a means of obtaining expert evidence.
 - b. There is no reason why there should be exemptions to FRC applying in NIHL claims in the following circumstances;
 - i. Multiple Defendants – if exempt AXA believes that claimant solicitors will bring claims against multiple defendants to avoid FRC. This practice will create avoidable additional work, such as unnecessarily restoring companies to the Companies Register. As an alternative to exemption, and where it is established that bringing a claim against multiple defendants is reasonable, AXA would recommend an uplift of 10% being applied. This approach is suggested in line with the uplift proposed for claims involving multiple claimants.
 - ii. Military Cases – employer identification is easier in these circumstances and we are unaware of any evidence to indicate that these claims should be exempt from FRC.
 - iii. De Minimis – arguments in this case are a quantum issue and are determined by expert evidence, we therefore propose that an additional fixed fee be applied to ensure parties deal with the issues reasonably and proportionately.

12. With regard to Preliminary Limitation Trials, despite defendant costs not being recoverable, AXA believes they serve a useful purpose and that they should be supported and included in



the FRC regime. The costs should be reduced from what would be applied at a full trial because they involve less work.

13. AXA has significant concerns regarding the omission of Pre-Action Disclosure (PAD) Applications from the FRC regime. The Civil Procedure Rules (CPR) apply a fixed fee to PAD applications in EL claims, it would be inconsistent for FRC not to apply in NIHL claims. AXA believe that the omission could incentivise claimant solicitors to issue PAD applications in order to maximise revenue. Therefore, AXA would firmly support the application of the FRC to PADs in NIHL claims.

Chapter 5: Intermediate Cases:

Question 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. Please give examples of who should be added along with your reasons**

14. AXA welcomes and fully supports the proposals outlined for intermediate cases. Nonetheless, some issues require further clarity.
15. AXA agrees with the interpretation from the Ministry of Justice that there is no need to introduce an additional 'intermediate track' to handle the cases to which the new FRC apply. Furthermore, AXA supports the implementation of a streamlined procedure for intermediate cases, as set out by Lord Jackson in his July 2017 [Review](#) of Civil Litigation Costs. There is still a degree of complexity within the proposed intermediate track, for example, claims that will fall into the new fast track regime, at the upper end, that currently sit within the existing multi-track, do come with support of existing multi-track rules allowing for medical evidence for both claimant and defendant parties. The streamlined procedure will still need to maintain the need to deal with an element of complexity and evidence gathering, particularly for cases of a relatively high value, whilst retaining the lower fixed costs scale.
16. AXA believes that the criteria outlined in section 2.1 of the consultation paper is sensible and logical with the exception of point vii regarding mesothelioma or other asbestos claims. AXA has reservations over whether mesothelioma or other asbestos claims are outside the scope



for the intermediate track; emphasis should be placed on ensuring as many cases as possible are subject to the FRC regime. Furthermore, AXA believes that further guidance will be required when assessing the appropriate band within the intermediate area. The difference between Band 2 and Band 3 on personal injury claims is a matter of complexity, which is currently undefined. It will be essential to develop the definition and criteria for this differentiating complexity. Otherwise, it is likely arguments and behaviours will result, aimed at raising disputes on the correct band in an attempt to achieve financial gain.

17. AXA believes that it is sensible to expect the parties to agree allocation. In AXA's view, it naturally follows that there should be a penalty that can be applied to either party for an unsuccessful challenge. This approach will need to be underpinned by clear rules and definitions as discussed elsewhere in this response. AXA would support further clarity over whether £300 is the correct figure to act sufficiently as a disincentive to raising spurious arguments.
18. AXA supports the introduction of bands and we believe the proposed figures would be a positive change that should support increased engagement and cooperation between parties, increasing the potential for early settlement. Arguments between parties with regard to the correct band for the case need to be avoided and emphasis must be placed on the provision of clear guidance and definitions. AXA supports the maintenance of four distinct bands with band four being reserved for cases with clear and exceptional differentiators which must be plainly defined.

Chapter 6: Judicial Review:

Question 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?

19. The judicial review (JR) process is not a core area of activity for AXA Insurance. However, AXA supports the proposals for costs budgeting and fixing costs for JRs as this reflects the position with other non-fixed civil litigation in the multi-track.

Chapter 8: Next Steps:

Question 5

We seek your views on the proposals in this report otherwise not covered in the previous questions throughout the document

20. AXA fully supports the introduction of FRCs in the multi-track. Moreover, we believe it is important that rule changes proposed in this consultation are aligned with changes currently being made through the Civil Liability Act and the Small Claims Track uplift. As was seen with



the introduction of the Legal Aid Sentencing and Punishment of Offenders Act in 2013, rule changes work best as a package of interlocking reform.

Chapter 9: Impact Assessment:

Question 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?

21. Based on motor claim related personal injury claims, where damages settled between £25,000-£100,000, AXA's data would suggest that approximately 32% of all spend relates to claimant legal costs. The average cost of claims in this area is around £46,000 with approximately £16,000 of that representing the costs. AXA are not able to demonstrate what proportion of claims have settled with or without litigation, and at what stage of the process they settled. However, if a reasonable assumption is made that most claims will settle without litigation, and that most litigated claims will settle without a trial or hearing, then it is possible to make some comparisons with AXA's past spend and spend under the proposed fixed costs.
22. Taking a point on the fixed costs scale up to stage 3. A litigated claim settling ahead of a Case Management Conference at £25,000 damages would attract legal costs of £11,000 plus a 14% uplift based on the total damages, taking total fixed costs to £14,500 plus advocacy fees. This would produce claimant legal costs approximately equal to our current spend. The same claim settling pre-issue generates much lower costs limited to £8,000 plus an 8% uplift creating total costs at £10,000.
23. It can be inferred from this data that there appears to be potential for fixed costs on the proposed scale to create costs entitlement equal to or higher than our current average spends. Therefore, AXA would encourage the proposed rates to be reviewed given the aim of these proposals is to reduce the issue of litigation cost. It is of course recognised that the scale does provide for a saving from our current average spend for cases that are settled without dispute and without litigation. With regard to these cases, AXA would refer to previous points made elsewhere in this response on the need for clarity of the appropriate band and the need to avoid claimant behaviours aimed at targeting litigation rather than settlement.



Chapter 10: Equalities Statement:

Question 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.

24. Based on the nine protected characteristics of race, gender, disability, gender identity, pregnancy and maternity, marriage and civil partnership, religion or belief, sexual orientation and age, we cannot foresee any additional impact to anyone who declares protected characteristic.

Question 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.

Question 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.

Question 10

Are there forms of mitigation in relation to impacts that we have not considered?

25. It is AXA's view that the range and extent of impacts have been considered. The intention of these reforms is to maintain access to justice, whilst also controlling the cost of civil litigation. AXA fully supports the proposals.

If you have any questions regarding this submission, please contact AXA UK's Public Affairs Executive, Jonathon Murphy, on jonathon.murphy@axa-uk.co.uk or 07866 032309.