

Ministry of Justice, Fixed Recoverable Costs Consultation (opened 28 March 2019 closes 6 June 2019)

Response of Association of Child Abuse Lawyers (“ACAL”)

About our Association

The Association of Child Abuse Lawyers was formed in 1998 in response to a need for provide the victims of physical, sexual or emotional abuse of children and adults abused in childhood with good quality representation in claims for compensation against those who may be liable. We have currently 67 members who include solicitors, barristers, experts, and other professionals. Our members pursue the majority of child abuse cases initiated each year. We have a code of practice which obliges members to act in ways which will benefit the processing of legal cases in a proper manner namely:-

1. Promoting and procuring full and prompt compensation for the physical, sexual or mental abuse of children and adults abused in childhood.
2. Developing wider forms of redress for survivors of abuse within the legal system.
3. Advancing the role of the legal process in promoting higher standards of care and protection of children and adults abused in childhood.

We operate a part-time helpline for victims and members, a current cases database accessible to members only, which enables existing members to network with other lawyers, and obtain corroborative evidence in support of their cases, a list of legal precedents, and training aids for new lawyers.

We organise an annual conference to keep members up to date with the law as well as annual meetings when we discuss current issues and hear from invited speakers. We respond to government consultations on subjects which are relevant to the subject areas in which we practise, and take part in campaigns to change the law or practice where it is likely to be of benefit to our lawyers and clients. We are active in promoting the rights of victims of child abuse and are currently working with the Independent Inquiry into Child Sexual Abuse to highlight system failings by various state and non-state organisations.

The Association of Child Abuse Lawyers opposes the introduction of fixed recoverable costs in child abuse cases for the reasons set out below.

Specialism means efficiency

- 1) Lawyers working in this field have developed particular skills and expertise for the same reasons as those working in Clinical Negligence, Brain and multiple serious injury cases. This specialism has enabled the few firms who do this work on any scale to develop efficiency and appropriate skill levels. Our firms avoid wasting time, carrying out only work that is necessary. The proportionality

principle on assessment has reinforced the need for efficiency. Contrary to Lord Justice Jackson's comment about avoiding "Balkanisation", division into specialisms has actually enhanced efficiency and should be promoted.

Need for experienced lawyers

- 2) If these cases are to be pursued with reasonable care, appropriately trained and experienced lawyers have to be involved throughout the process. Fixed costs would inevitably lead to downgrading of the levels of expertise resulting in lower awards, issues being missed and clients suffering. These cases cannot be commoditised.

Document heavy.

- 3) Child abuse cases are particularly complex, multi-faceted and certainly not routine. Childhood sexual abuse works to destabilise and alter the course of individuals' lives. Their psychological reaction, behaviours, and life trajectory are moulded by it. This necessarily means lawyers on both sides of the case have to delve into every aspect of the claimant's life, searching for positive or negative causation factors. This makes claims involving adult victims of child abuse extremely time consuming. Many are also very vulnerable and have difficulty trusting professionals due to abuse from people in authority who should have been caring for them. These cases are document heavy. The entirety of the claimants medical, social services and education records need to be considered. Psychiatric or psychological reports need to be completed. There are more often than not medical reports to be completed for both the claimant and defendant. There is often a joint report which needs consideration. Where negligence of social workers is alleged in "failure to remove" cases social services and education records have to be considered along with social work experts reports being obtained.

Defendants set the tone (and cost) for the case.

- 4) An important point which needs to be considered is that the costs of each case is very dependent upon how a defendant responds to the initial letter of claim. The harder the defendant fights the case, the greater the costs. Fixed costs in these cases would give defendants a perverse incentive to "starve claimants out" by defending hard. This is exactly the opposite outcome to that espoused by Lord Woolf and Rupert Jackson when they encourage parties to find negotiated resolutions. Inequality of arms must be avoided. Our members have experienced situations in which Defendants conduct has been obstructive. This is not necessarily a criticism. It is the nature of the adversarial system. Whilst the interests of claimants is always to reach a settlement as quickly as possible, Defendant lawyers have to ensure that any settlement is reached on the basis of evidence and where they sense weakness it is their job to exploit the weakness. We have reports of Defendants failing to follow the spirit of the Woolf reforms by refusing to provide disclosure pre issue, refusing to provide

representative defendants (causing great expense and time to be spent tracing trustees of unincorporated associations) and delay by applications for preliminary issue hearings on limitation. There is no doubt that the way in litigation is fought by a Defendant is very much dependent upon the behaviour of the solicitor instructed, counsel advising, and the attitude of the client, which is often an insurance company. Sometimes, a combination of adverse, and litigious personalities can produce an approach of attrition to the legal proceedings which as many of our members have seen leads to cases lasting over a decade.

Risk of lawyers not taking these cases on.

- 5) The work done in this type of litigation is often front loaded. Claimants' solicitors have to research the claimant's background and present to the defendant all facts surrounding the case, historic records and medical reports. The proposed system would cause solicitors to either be much less thorough in their work or to decline to take on instructions in any other than most serious cases (incidentally even in this most serious bracket, damages reach a maximum of approximately £60,000 and £70,000. As a group ACAL view fixed costs as being disastrous for this area of law in which average settlements or awards are around the £20-40,000 mark. Most cases settle pre-issue and to expect claimant lawyers to investigate, obtain records, statements, medical reports, advice and all attendant assistance which goes with supporting this vulnerable group of litigants all for £8,000 plus 8% of damages would put ACAL Lawyers out of business and leave litigants with no recourse to redress).

Justice through civil courts provides much needed recognition

- 6) We have to recognise that adult victims of child abuse come forward only when they feel able to do so. They need to feel supported and that they will be taken seriously. Without the support of the legal system and proper access to justice, another reason for them to feel empowered to disclose and seek help is removed from them. Victims would remain out of sight, failing to come forward, would continue to live dysfunctional lives, using mal-adaptive coping strategies such as becoming alcohol or drug dependent, living lives blighted by anxiety and depression, all of which is very costly to society.
- 7) Appendix 1 below is a letter written to Lord Edward Faulks QC by clients when the idea of fixed costs emerged in early 2016. It provides a personal perspective.
- 8) The proposal to introduce fixed costs for this cohort of claimants would only add to the burden on society which child abuse already causes (for a calculation of this cost, please see the report here) <https://www.nspcc.org.uk/services-and-resources/research-and-resources/2014/estimating-costs-of-child-sexual-abuse-in-uk/>

- 9) The proposal in 2013 to remove child abuse from legal aid eligibility was opposed on the same grounds as set out here (i.e. that it would harm access to justice for this important group of individuals who deserve to have their cases properly investigated). The Legal Aid Agency recognised the importance of this group having access to justice and we trust that the Ministry of Justice will likewise exempt all child abuse cases from this proposed fixed costs regime.

Clients already disadvantaged by success fee from damages.

- 10) ACAL also makes the point that claimants who are not legally aided have had, in practice, to suffer the 25% reduction in the value of their claims as solicitors have had to routinely charge the 25% capped success fee since 2013. Fixed fees would amount to a further assault on their access to justice.
- 11) There is also the risk that firms will cherry pick cases, taking on only the ones, such as those with multiple claimants, which could potentially be economically viable under an otherwise uneconomic fixed costs regime. This happened in criminal cases leaving many litigants unrepresented. This outcome would send a message that our civil justice system was not willing to respect the rights of victims of child sexual abuse.

Civil litigation has real value to victims of child abuse.

- 12) We urge decision makers to appreciate that litigation in child abuse cases is not just about the figures. Taking responsible defendants through civil proceedings has real meaning to claimants and has to be done carefully. Claimants value the recognition that comes with access to justice and decisions from courts, having their cases examined by claimant, defendant lawyers and judges. Reaching outcomes based on the evidence is highly valued and for many forms an integral part of the process of recovery.

Judiciary recognise complexity of child abuse cases.

- 13) Our experience of dealing with detailed assessments is that District Judges and Masters consistently recognise child abuse cases as being complex, and worthy of enhancements being applied to the guideline rate.

Proportionality and precedent H regime is already working.

- 14) Additionally, despite the complexity, the Precedent H system and proportionality principle seem to be working in these cases. We have to recognise that the values of these cases are on average between £20,000 and £40,000 with a maximum of approximately £60,000 to £70,000 in very rare cases. A few cases reach 6 figures but the vast majority of cases settle at under £250k. Our members have worked on many cases in which costs have exceeded damages but in which the proportionality principle has worked to reduce the final costs settlement. The principle of proportionality and costs

budgeting appears to have had the desired effect of reducing costs in these cases.

Many new instructions declined due to proportionality.

- 15) It is also worth pointing out that the issue of proportionality in costs assessment has caused our members to decline to take instructions in hundreds of cases in the last few years and so whilst these decisions have been painful for those abused in childhood overall the 2013 changes are having a direct effect.

Collaborative approach between claimant and Defendant lawyers.

- 16) An interesting development has been the intervention of Master Victoria McCloud at the RCJ who has invited lawyers working in this field to come together in a series of meetings to put together pre action protocols for child abuse cases and standards by which lawyers on both sides will be expected to behave. Whilst this initiative is currently with the Rules Committee this collaborative approach will work to improve efficiency even further.

ACAL's Preliminary View

- 17) In the view of our Association the consultation rightly makes an exception from the FCR Intermediate Cases of "Child Sexual Abuse cases" at Chapter 5, paragraph 2.2. The Association wishes to point out the bracket of cases which should be included in this "Child Sexual Abuse" category includes negligence cases against statutory organisations such as local authorities and police forces and should include child neglect and child physical abuse cases. This refined definition would acknowledge that the complexity of these cases is such that they are all routinely allocated to the multi-track on the basis that the issues involved are complex both in relation to fact and law, limitation is more often than not argued and that vicarious liability and quantum are also usually in dispute.
- 18) In fact all child abuse cases allocated since the commencement of the Woolf Reforms have been allocated to the multi-track due to these factors, the importance to the claimants and the growing importance to the public that these cases are dealt with sensitively and with due rigour.
- 19) If the suggested refinement of this category of cases as set out at Chapter 5 of paragraph 2.2 is not expanded to include these types of cases, ACAL opposes their inclusion as Intermediate Cases. These cases fall into the category considered by Lord Justice Jackson's November 2016 consultation. Our response explained in detail with evidence the necessity to exclude these cases from a fixed costs regime.
- 20) Lord Justice Jackson excluded not only child abuse cases, but also Police Assault cases principally because they involve much more than negligence, namely intentional harm of the most serious nature. Often, the abuser is an employee of government or other public body, and as such access to justice

takes on an exceptionally meritorious and serious form. It is not uncommon for the abusers to be convicted of multiple offences against children. Public Interest is paramount, and aggravated/exemplary damages are always pleaded. Abuse is therefore regarded as sitting in an exceptional category worthy of special treatment.

- 21) It is worth pointing out to the Minister that the costs budgeting regime is causing significant pain to claimant lawyers but that the expansion of a fixed costs regime to child abuse cases in this field is certain to reduce access to justice with firms deciding not to take on these difficult cases. Here is an analysis of three recent litigated cases. The proposed FRC regime would inevitably lead to all ACAL child abuse departments refusing to accept cases.

	Case 1 KW	Case 2 AM	Case 3 SW
Cost of solicitors work done	127,995	57,980	67,410
Approved budget solicitor's costs	48,851	38,986	60,333
Proposed FRC projection	28,250	19,000	32,700
FRC allowance as a % of budgeted costs	57.83%	48.73%	54.19

Case 1 KW (foster case sex abuse) was settled post PTR for £40,000

Case 2 AM (Priest sex abuse) was settled pre exchange of witness statements for £30,000.

Case 3 SW (Priest sex abuse) went to trial with a value of £25,000.

- 22) It is also worth pointing out in respect of pre-action protocols that claimant and defendant lawyers in this field are working with the Civil Justice Rules Committee on detailed proposals to promote early information sharing and settlement.

- 23) There is a widespread perception among claimant lawyers in this field that effective lobbying by insurance companies between 2010 and 2012 achieved the desired effect of an introduction of the 2013 LASPO reforms in routine personal injury cases and has led to the extension of the fixed costs regime. There is a further perception that the introduction of the proposed extra fixed costs into the personal injury field is motivated by a political desire to deny justice to the common man. Our clients were usually brought up in under privileged households, abused in care, in the family home or in institutions. For its part the Association of Child Abuse Lawyers which represents this especially vulnerable under-class of child abuse survivors, resist the extension of the fixed costs regime which would have the effect of removing solicitors from this type of socially progressive work.

- 24) If it is proposed to designate child abuse cases generally into the Intermediate Cases category we would seek to make further representations. We assume, at this point however, that (as pointed out above) the exception at Chapter 5,

paragraph 2.2 of the Consultation for Child Sexual Abuse cases would cover all categories of child abuse cases.

David Greenwood

(Executive officer of ACAL) on behalf of ACAL

27th May 2019

For further information please contact ACAL at info@childabuselawyers.com
www.childabuselawyers.com

APPENDIX 1

Letter from client to Lord Faulks QC

Dear Lord Faulks

Re: Proposed Extension of Fixed Costs/Child Abuse Cases to be exempt

I write to object to the proposal to extend fixed costs to compensation cases involving child sexual abuse.

I am a survivor of child abuse and the fact that I can currently pursue a compensation case to Court against those responsible for my abuser is very important to me.

I understand that the effect of fixed costs being applied to child abuse cases would be that lawyers acting on behalf of survivors would not be able to pursue cases properly or would decide not to pursue them at all.

I have suffered immense harm and the likely compensation in my case goes nowhere near any kind of proper recompense but to find myself in a position which I could not pursue a case would be even worse.

I would like you to understand that it is very difficult to come forward and talk about these issues, to have to explain to my solicitor and then to a psychological expert and possibly to the Court what happened to me. All this takes time and a great deal of psychological harm is likely to be caused to me just by going through this process. I need to know that my lawyers are being paid for the work that they do so that they can do a good job for me and stand up for me against the lawyers on the other side. I urge you to make an exception to the proposal on fixed fees for child abuse cases. If you do not do so, many survivors will decide that it is not worth coming forward.

Yours sincerely