Costs Working Group

Consultation Paper – June 2022

1. In early 2022 the Master of the Rolls asked the Civil Justice Council ('CJC') to take a strategic and holistic look at costs, particularly given the ongoing transformation of civil justice into a digital justice system. The CJC approved the setting up of a Costs Working Group at its April meeting and agreed the scope of work would cover the four areas set out below. The membership of the Working Group is set out in Annex A.
2. The exercise will be divided into three phases. The first step is the publication of this initial paper, setting out the questions to be considered and explaining the context in which they arise. The second phase is the consultation phase. Responses and reactions are invited to the questions raised in this paper, with a deadline of 12:00pm on Friday 30 September 2022. Responses to the consultation should be submitted online by file upload at https://www.surveymonkey.co.uk/r/CJC-costs.[1] Also, in this phase, there will be a CJC Costs Conference on Wednesday 13 July 2022. The costs conference will provide an opportunity for a public debate about the issues raised. It is planned to take place in person. During September 2022 there will be a series of online webinars and other smaller events are planned too. Once the consultation closes, the final phase will begin. The Working Group will produce its final report with recommendations.

The four areas

3. The CJC agreed that the Working Group would focus on four areas:

    1) Costs Budgeting;
    2) Guideline Hourly Rates;
    3) Costs under pre-action protocols/portals and the digital justice system;
    4) Consequences of the extension of FRC.

4. The Working Group's remit is to take a strategic approach, recognising that access to justice for all plays a vital part of the rule of law in a democratic society and that affordability is fundamental to such access. The Working Group understands the importance of detail. However, it is not part of the group's remit to conduct an examination of the fine-grained aspects of any of the areas under consideration. The costs review is intended to be holistic in nature (albeit focusing firmly on the specific areas identified above), acknowledging that while

[1] A copy of the consultation questions is available for download at https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/costs/

each of these topics is important in itself, their interaction with one another and the wider context of civil justice as a whole, is crucial. That wider context has many dimensions but three in particular are worth highlighting at the outset.

5. The first is digitisation. This has the potential to transform civil justice and reduce its cost and complexity for many court users. Its impact is only beginning to be felt. The costs system in civil justice must be fit for purpose in a Digital Justice System. That will include costs incurred in proceedings before the court, and also costs incurred before court proceedings begin.
6. The second dimension is vulnerability. The needs of vulnerable court users must always be taken into account. That is particularly so when changes are being proposed. Furthermore, unintended consequences should be avoided.
7. The third dimension is the economic significance of the civil justice system. A functioning civil justice system is the bedrock of the economy. Everyone, including individuals, small and medium sized enterprises, and larger organisations, is entitled to a clear and enforceable legal framework in which to conduct their affairs. Organisations need such a framework to be able to plan and invest for the future, secure in the knowledge that breaches of their rights can be remedied, and that their obligations can be enforced, if necessary. Accessible courts promote respect for rights and proportionate dispute resolution, even without the need for parties to go to court. Lengthy delays and excessive cost needlessly magnify the stresses caused by involvement in court proceedings, with knock on effects for society and the economy. If disputes cannot be resolved within reasonable time and in a proportionate manner, then the rule of law itself is undermined.
8. The remainder of this document will address each of the four topics, summarising the background and the questions which this report poses. One aspect of the approach taken by the Working Group to the preparation of the questions is worth highlighting at this stage. For each of the four topics, the Working Group has identified some wide overarching questions. The purpose of this is to ensure that Respondents do not feel inhibited in expressing their views by the presence of too many granular questions. However, immediately following the groups of questions, the Working Group has included a number of paragraphs designed to identify the types of issues that Respondents may wish to consider when responding to the overarching questions. It is hoped that this will help to focus responses, but it is not the intention of the Working Group to be prescriptive. If Respondents identify additional issues which they consider to fall within the scope of the overarching questions and the remit of the Working Group, they are encouraged to raise them and to explain their rationale.

Costs Budgeting

The introduction of costs management rules

9. Costs budgeting rules were introduced in the Civil Procedure Rules ('CPR') in 2013, following recommendations made by the Review of Civil Litigation Costs: Final Report ("Jackson Report") in 2010. Prior to the introduction of the rules, parties were required to file and exchange estimates of costs on Form H (now Precedent H) both at the time that the parties filed their directions questionnaires and when they filed their listing questionnaires. The Jackson Report

found that many litigants were ignoring the requirement to lodge estimates at all and that, when they did, Form H was seldom used.

10. The initial idea for costs management was influenced by developments in Australian litigation. The Jackson Report highlighted a study published in 2009 by the Access to Justice Taskforce of the Attorney-General's Department of the Australian Government entitled "A Strategic framework for Access to Justice in the Federal Civil Justice System". That study argued that a lack of information about costs restricts the ability of people to make decisions about dispute resolution and that greater transparency about costs would improve access to justice. The authors proposed that, in the Federal Court, lawyers should be required to provide their clients with a litigation budget and to provide copies of that budget both to the court and to opposing parties.
11. To test its proposed reforms based on the Australian model, the preliminary version of the Jackson Report set up a voluntary pilot exercise in the Birmingham Mercantile Court and the Technology and Construction Court. This was followed by a mandatory pilot in defamation cases in London and Manchester. The latter required the parties to lodge budgets, or revised budgets, as a case proceeded, setting out the assumptions on which they were based. The court approved or disapproved the budgets or revised budgets and sought to manage the costs of the litigation as well as the case itself in a manner proportionate to the value of the claim and the reputational issues at stake.
12. The pilots received generally positive feedback from the lawyers and judges involved, with similar views expressed at a number of conferences and seminars attended by Jackson LJ prior to the publication of his Report.
13. However, a working group consisting of representatives of third-party funders voiced concerns that the skills of judges, solicitors or barristers in relation to costs budgeting were deficient. Provided these problems could be fixed with adequate training, the working group favoured clear rules allowing the court to control the parties' costs budgets and the costs of the proceedings generally.
14. Further criticisms were voiced by Circuit Judges and the Bar Council, who considered costs management to be a time-consuming exercise which was already adequately provided for. They also questioned the skills of judges to deal with costs management. The Bar Council, in particular, raised a concern that defendants with weak cases could seek to press the Court to limit the costs that might be incurred by claimants to a level beneath that which claimants might reasonably need to incur to establish their cases.
15. Against that background, the Jackson Report recommended rules for costs management primarily for two reasons. First, the Report considered that case management and costs management go hand in hand; it does not make sense for the court to manage a case without regard to the costs which it is ordering the parties to incur. Second, the Report expressed the view that costs management, if done properly, can save substantially more costs than it generates. Accordingly, the Report recommended an outline structure for costs management whereby:

    i. The parties would prepare and exchange litigation budgets or (as the case proceeds) amended budgets.

ii. The court would state the extent to which those budgets are approved.
iii. So far as possible, the court would manage the case so that it proceeds within the approved budgets.
iv. At the end of the litigation, the recoverable costs of the winning party would be assessed in accordance with the approved budget.

16. Adequate training for solicitors, barristers and judges was also recommended.
17. An important feature of the Jackson Report was the recognition that the general culture around costs needed to change. As the report pointed out: "Costs are an important facet of every contested action. In a large number of cases they are the single most important issue, sometimes towering above all else. I have regretfully come to the conclusion that it is simply unacceptable for judges or practitioners to regard "costs" as an alien discipline, which need only be understood by costs judges, costs draftsmen and solicitors who specialise in that kind of thing."

Changes after implementation

18. The rules were first implemented in April 2013. In April 2016 amendments were made which added to the list of cases excluded from the rules unless the court otherwise orders. In April 2017 further amendments were made to ameliorate some aspects of the decision of the Court of Appeal in *SARPD Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120, expressly allowing comments to be made about incurred costs to be taken into account in subsequent assessment proceedings. In July 2020 amendments were made to incorporate the old Practice Direction 3E into the rules and a new rule was added (r.3.15A). Rule 3.15A restates the procedure to be followed on applications to vary a costs budget.

This review

19. With the 10-year anniversary of the introduction of costs budgeting approaching, now is an opportune time to review the impact and effectiveness of the rules.
20. The implementation of costs budgeting has not been without its critics. Some call for its immediate abolition, arguing that (i) the resource cost is not worth the return; (ii) it causes severe delays; and (iii) in some areas it has actually driven up costs because budgets now err on the high side and once a high budget is set it will be spent.
21. On the other hand, supporters argue that costs budgeting is critical to access to justice and that it allows individual claimants to manage downside cost risk. Furthermore, supporters point out that costs budgeting focuses attention at an early stage on the costs of litigation and that whilst there may be specific issues with the costs budgeting process, the overarching exercise of costs management is, in many cases, the only sensible means by which parties can be encouraged to think about the costs of litigation from the outset and the court can intervene to control escalating costs.
22. Judges' views on the subject differ. Those in favour of reform suggest that they often feel they are not equipped to conduct the costs budgeting exercise properly (whether by reason of lack of training, experience or information). Further they consider there to be a disparity between budgets approved in London, which are thought to be more generous, and those approved

elsewhere. Judges in favour of the current rules point out that for courts outside London, costs budgeting is the key (and often only) tool to prevent disproportionate costs in cases at the lower end of the multi-track.

23. Given the substantial body of experience amassed over the best part of a decade and the broad range of opinions on the efficacy of costs budgeting, this consultation paper is designed to provide an opportunity for all interested parties to express their views on (i) whether costs budgeting should continue in its current form; (ii) whether it should be restricted in scope and if so how; (iii) whether it should be abolished altogether; and (iv) if costs budgeting is to be restricted or abolished, how an early focus on costs could nevertheless be maintained. Parties are also invited to identify and provide any specific data or other evidence which they believe would assist the Working Group in making its recommendations.
24. QUESTIONS are in Annex B, Part 1.
25. One of the questions posed on this topic and various of the issues that Respondents may wish to consider use the expressions "default on" and "default off". These are shorthand for rules which provide that a measure, such as costs budgeting, is to take place unless the courts directs otherwise (default on) or conversely does not take place unless and until the court makes a positive direction to do it (default off). The costs management rules at present are default on for proceedings worth less than £10 million, subject to various exceptions. They are default off for cases over £10 million.

Guideline Hourly Rates ('GHRs')

Background

26. GHRs have been a feature of the summary assessment of inter partes costs in civil litigation since the introduction of the CPR. The current Guide to the Summary Assessment of Costs 2021 Edition[2] summarises the purpose of GHRs at paragraph 28:

> *'The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment'.*

27. Lord Dyson MR in 2014 expressed the purpose of GHRs in this way:

> *'GHRs are guideline rates. The intention of the rates is to provide a simplified scheme and the guidelines are intended to be broad approximations of actual rates in the market.'*[3]

28. Initially issued by the (then) Supreme Courts Costs Office, responsibility for review and setting of the GHRs passed to the Master of the Rolls in 2007. Since then, there have been several reviews. In 2011 by the Advisory Committee on Civil Costs and then in 2014 and 2021 by

[2] Available at https://www.judiciary.uk/wp-content/uploads/2021/08/Guide-to-the-Summary-Assessment-of-Costs-2021-Final1.pdf

[3] Stewart J's interim report citing the 2014 views of Lord Dyson MR available at https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf

working groups led by Foskett J and Stewart J respectively. By that stage responsibility for reviews had passed to the Civil Justice Council when Jackson LJ's recommendation to set up a Costs Council was not implemented.

29. It is notable that the committee recommendations have not always been accepted by the Masters of the Rolls at the time, such as in 2011 and 2014. As a result, GHRs remained unchanged for many years.
30. The most recent review was conducted by a committee led by Stewart J with a final report in 2021.

The Context of this review

31. The current Master of the Rolls accepted the recommendations of the Stewart Committee[4] including that any updates to the proposed GHRs (if adopted) should be guided by the outcome of the reviews of FRCs and IPEC capped costs. He committed to a review of GHRs in two years.
32. The Working Group is also aware that other areas of the civil jurisdiction, such as the Ogden tables in personal injury litigation, use government indices for review purposes.
33. The task of this Working Group is not a review of the GHRs themselves. Rather it is to consider two broad questions. First, what is the purpose and effect of GHRs in the current interlocking landscape; and second, if there is a place for GHRs in the future, what is the right approach to reviewing GHRs over time.
34. The first topic will take into account all aspects of the current landscape of civil justice, including changes such as the use of technology, including any impact of remote hearings and remote working, and the extension of fixed recoverable costs to cases valued at up to £100,000 and IPEC capped costs.
35. The second topic will seek to identify a feasible mechanism for reviewing GHRs. This will involve considering what the right approach should be and how often the GHRs should be subject to review. Part of the context for this will be the disparity between the herculean nature of the task and the limited resources faced by the Foskett and Stewart Committees. Stewart J summarised the work as an: 'attempt to guide the GHR ship through the narrow strait between the Scylla of comprehensive but unachievable evidence and the Charybdis of arbitrariness'.
36. QUESTIONS are in Annex B, Part 2.

Costs under pre-action costs/portals and the digital justice system

37. Pre-action protocols ('PAPs') embody the principle that litigation should be a last resort. Even if the processes they set out do not result in a full settlement, they should at least lead to a clarification of the dispute and a narrowing of issues. Both outcomes mean that the court only has to resolve those disputes the parties cannot otherwise resolve. Costs consequences and other sanctions may be imposed by the court after proceedings are issued if a party fails to engage fully in pre-action processes. Dishonesty in these processes will be treated in the same way as dishonesty after proceedings have commenced. Overall, it is now clear that pre-action

[4] Available at https://www.judiciary.uk/publications/master-of-the-rolls-accepts-recommended-changes-to-guideline-hourly-rates/

protocols are an integral and highly important part of litigation architecture. The relationship between pre- and post-issue processes means that we need to think holistically about how all the costs associated with the resolution of the dispute are dealt with.

38. Access to justice is not only concerned with access to the courts but includes access to pre-action processes. The point was recognised by the Supreme Court in *Bott v Ryanair* [2022] UKSC 8 in deciding that a solicitor had an equitable lien for their costs over the compensation payments due to claimants in respect of delayed flights, even if there was no dispute between the parties about the entitlement to compensation. The recognition of a lien in these circumstances helped promote access to justice and serves to emphasise the need to examine costs in the pre-action space.
39. The importance of full engagement in the pre-action area will be just as great, if not greater in the future with a digital justice system. Encouraging early resolution or, where that is not possible the narrowing of issues, will be a central part of that. The digital justice system will ultimately use a consistent data architecture to integrate the pre-action arena explicitly and directly with the court process. Such an integrated system may, for example, use the opportunity presented by digital technology to seamlessly guide a litigant from initial advice, into a portal governed by a relevant protocol, and then ultimately, if necessary, into the relevant court or tribunal process. Appropriate data gathered at each stage being transferred throughout by API, or similar technology. Such a system will of course need to maintain sufficient flexibility to allow claims and defences to evolve as information is exchanged, even if currently repetitive requirements are removed.
40. In future this integrated process will be governed by rules created by an Online Procedure Rule Committee ('OPRC') to be established by powers set out in the Judicial Review and Courts Act 2022. This legislation expressly caters for the need for governance of the pre-action processes as well as those in online courts. Therefore, it is right for the CJC to examine the governance of pre-action costs at this stage.
41. The CJC has recently published an interim report on pre-action protocols. It suggests (at paras.3.13 to 3.16) a new summary costs procedure which would allow the court to determine the amount and incidence of costs on paper when a dispute settles at the pre-action stage.
42. The position of unrepresented parties pre-action also falls to be considered. It may raise different issues from the position of unrepresented litigants before the court.

"Solicitor own client costs" and *"party and party costs"*

43. Part of the landscape involves the distinction between "party and party" costs and "solicitor and own client" costs. The latter are the costs due from a client to their solicitor while "party and party costs" are costs to be paid by one party to another.
44. The assessment of solicitor and own client costs is governed by section 70 of the Solicitors Act 1974 ("the Solicitors Act") and by CPR 46.9. These provisions are due to be considered by the Court of Appeal in an appeal against the decision in *CAM Legal Services Limited v Belsner* [2020] EWHC 2755 (QB). In that case, an RTA personal injury claim had settled before issue. The injured party entered into a conditional fee agreement (CFA) with a 100% success fee with her solicitor. The costs payable to the solicitor by the claimant were potentially greater than the

damages recovered, so that the injured party could be left not only with no damages but with a debt to her solicitors. The matter was adjourned by the Court of Appeal and is due to return to the court later this year.

45. The *Belsner* case highlights the relevance of the classification of costs as "contentious" and "non-contentious". The distinction may be important in claims that settle prior to issue. Different requirements are imposed if an agreement with a solicitor relates to "contentious business" rather than "non-contentious business." In *Belsner* one of the issues is whether the Solicitors Act definition of "contentious business" (business done "*in or for the purposes of proceedings begun before a court*") applies to pre-action work only once proceedings are commenced. So, if a dispute settles before a claim is issued, work done in respect of it may arguably be "non-contentious". This approach may seem to be at odds with the practical reality that pre-action protocols are already integrated into the civil justice system.
46. The amount of party and party costs incurred in a claim that settles pre-issue might be disputed, in which case such costs can be assessed by the court. If the principle of whether one party must pay any costs at all to the other is disputed, proceedings may need to be issued to determine that dispute. CPR 46.14 deals with these costs-only proceedings. Sometimes costs are catered for in a pre-action protocol. CPR 45.9 to 49.15 apply to costs-only proceedings and allow represented parties in certain RTA claims to claim fixed costs. Some pre-action protocols (for example the low value RTA pre-action protocol) make express provision for the payment of fixed costs by a defendant at various stages without the need for any court-based assessment.
47. QUESTIONS are in Annex B, Part 3.

Consequences of the extension of Fixed Recoverable Costs ('FRC')

48. In 2021 the Government accepted the recommendations to extend fixed recoverable costs made in Jackson LJ's 2017 FRC report for certain cases up to £100,000 in value. The implementation of these changes is underway. A sub-committee of the Civil Procedure Rules Committee is working on it. It is not the purpose of this Working Group to examine that work. Nor is it part of the Working Group's remit to cut across the work being done relating to costs in clinical negligence cases. Rather the Working Group is tasked with considering the wider implications of the changes to FRC for the rest of the civil justice system. This will clearly involve topics (1) to (3) but the potential issues arising may have wider implications too. For example, there may be other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration. A possible example could be certain kinds of high value specialist litigation. An idea mooted recently has been to set up an extended form of costs capping arrangement, similar to the one operated in the Intellectual Property Enterprise Court but set at a higher level, for patent cases in the Shorter Trials Scheme. With that in mind, responses from the intellectual property sector (and any other specialist sector where similar changes would be of value) are invited. Another example could be the control of incurred costs as discussed in Chapter 6 of the Jackson 2017 report.
49. QUESTIONS are in Annex B, Part 4.

Consultation responses – guidance

50. When responding to this consultation, the Working Group would be grateful if Respondents could identify their areas of expertise/interest in the topic/levels of experience. Respondents are encouraged to respond to the overarching questions (or only some of the overarching questions) in any way they see fit, including by focusing only on one or two topics in respect of which they have particular expertise, or indeed only on specific questions or issues arising within individual topics.
51. The Working Group has not imposed limits on the volume of material which Respondents can provide when responding to the consultation. However, one condition, which must be adhered to, is that any response which amounts to more than 20 pages of text must be accompanied by an executive summary of no more than 2 pages in length.
52. Respondents should have in mind the point emphasised above that the Working Group's remit is strategic in nature. The report to be generated at the end of this process is intended to set the direction of travel for costs and address important general issues. This work will not descend into detailed rule making or a close revision of detailed provisions.

Conclusion

53. In this initial report, the Working Group only seeks to pose questions and put them in context. It invites answers, supported wherever possible by evidence and data. As part of the consultation phase the Working Group will also consider what data may be available to illuminate the answers to these questions and will take steps to seek it out. Any suggestions as to material that the Working Group should be taking into account would be welcome.
54. Throughout its work the Working Group will have regard to the three dimensions identified at the start - digitisation, the needs of vulnerable court users and the economic significance of the civil justice system as a whole. Respondents are invited also to bear these in mind in providing their responses.

TABLE OF ACRONYMS

Acronym	Meaning
API	application programming interface
CFA	conditional fee arrangement
CJC	Civil Justice Council
CPR	Civil Procedure Rules
DBA	Damages Based Agreement
FRC	Fixed Recoverable Costs
GHR	Guideline Hourly Rates
IPEC	Intellectual Property Enterprise Court
OPRC	Online Procedure Rule Committee
RTA	road traffic accident

ANNEX A – MEMBERSHIP

Steering Group
Lord Justice Colin Birss (Deputy Head of Civil Justice)
Mrs Justice Joanna Smith (High Court Judge)
His Honour Judge Nigel Bird (Designated Civil Judge)
Master Amanda Stevens (Queen's Bench Master)
District Judge Judy Gibson (CJC)

Wider working group
Senior Costs Judge Andrew Gordon-Saker (Senior Costs Judge)
District Judge Simon Middleton (Regional Costs Judge)
Master Francesca Kaye (Chancery Master)
Nicholas Bacon QC (Costs Barrister)
Nicola Critchley (Defendant solicitor & CJC)
Brett Dixon (Claimant solicitor)
Laurence Shaw (CILEX)
Jack Ridgway (Association of Costs Lawyers)
Elisabeth Davies (Consumer Interest & CJC)
Paul Seddon (Legal Aid Practitioners Group)
Andrew Higgins (Academic & CJC)
Robert Wright (Ministry of Justice)

CJC Secretariat
Sam Allan
Leigh Shelmerdine
Amy Shaw

ANNEX B – THE QUESTIONS

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

1.2 What if any changes should be made to the existing costs budgeting regime?

1.3 Should costs budgeting be abandoned?

1.4 If costs budgeting is retained, should it be on a "default on" or "default off" basis?

1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

It is anticipated that the answers to Questions 1.1-1.3 are likely to overlap. However, in answering these questions, Respondents may wish to consider:

Whether costs budgeting is more useful in some circumstances than in others and, if so, what those circumstances are and why. If costs budgeting is not considered useful, why? What (high level) changes should be made? If Respondents consider that costs budgeting is not always applied consistently (whether as between judges or courts) it would be helpful if Respondents could identify what they think are the reasons for the disparity and provide evidence to support their views. Evidence indicating whether costs budgeting has reduced the number of cases going to Detailed Assessment might be provided.

Respondents may also wish to identify their views (and explain their reasons) on whether costs budgeting (i) should be abandoned; (ii) is vital, at least in certain cases (and, if so, those cases should be identified); (iii) promotes access to justice for smaller parties litigating against better funded opponents; (iv) wastes significant time and costs in managing the budgets of parties whose costs will never be paid; and (v) causes the expenditure of costs which are disproportionate. Respondents may wish to consider whether there are any alternative rules that should be put in place of costs budgeting (for example to safeguard access to justice and to ensure the early consideration of costs by the parties together with the scope for intervention by the court to control costs).

If Respondents consider that costs budgeting should be abandoned, they may wish to consider and provide views on how the court will nevertheless ensure that cases are conducted justly and at proportionate cost in accordance with the overriding objective, what the potential impact might be on vulnerable parties and whether parties should still be required to exchange (and file) their own estimates of their costs to trial and if so when. Respondents may wish to provide their views on whether an alternative procedure or rule should be introduced to ensure the conduct of proceedings at proportionate cost.

In answering Question 1.4, Respondents may wish to consider whether the current arrangement, in which costs budgeting is default on for cases under £10 million (subject to exceptions), should be retained or whether it should only be applied to cases at the case management discretion of the court and upon the making of a court order to that effect ("default off"). Where the court makes such an order do Respondents have views on whether the rules should provide that a decision to order cost budgeting must carry out a costs/benefit analysis, taking into account the costs and complexity of the case? Are there any further criteria that ought to be applied aside from the overriding objective? If Respondents consider that the right general approach should be default off, they may wish also to consider whether there are any types of case (identified by subject matter or value) in which the default on rule should nevertheless be retained, and if so, why.

In answering Question 1.5, Respondents may wish to consider how incurred costs should be dealt with in the context of a costs management exercise and whether hourly rates should be considered in the context of such an exercise. They may also wish to express their views on who should carry out costs management, whether it should be dealt with by specialist costs judges and whether more training is required if the present system is to be retained. One practical problem with costs budgeting that has been reported is the lack of consistency overall and, in particular, the differing approaches to the question of what comes first – identifying the work that needs to be done, or setting the budget with the work then being agreed within that budget? Respondents may wish to consider the solution to this problem.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?

2.3 What would be the wider impact of abandoning GHRs?

2.4 Should GHRs be adjusted over time and if so how?

2.5 Are there alternatives to the current GHR methodology?

In answering Question 2.1, Respondents may wish to consider whether summary assessment could be carried out without GHRs or whether their use should be restricted to a starting point for summary assessments and not as a 'starting point' for detailed assessment. Three other potential issues are (i) the impact of the new value limit for FRC of £100,000 (if any); (ii) whether, if there is a place for GHRs, their use may be restricted to certain areas of civil litigation – and if so, which areas; and (iii) whether, if there is a place for GHRs, the question of geography and banding needs to be considered.

In answering Question 2.2 Respondents may wish to address whether GHRs have a role in consumer and small business protection in the purchasing of legal services, in the protection of litigants in person, and/or in enabling regulated providers of legal services to comply with their regulatory obligations such as to provide regular costs estimates and transparent pricing for their clients. For any of these roles (or any other role), if GHRs were to be abandoned, Respondents may wish to address whether consumers would have the means to gauge the reasonableness of solicitor and own client costs estimates and how regulatory obligations would be complied with.

In answering Question 2.3 Respondents may wish to consider any possible wider effects on, for example, Family proceedings or proceedings in the Court of Protection (or anywhere else) together with any potential effects (adverse or otherwise) that may be felt in the provision of litigation funding or costs insurance protection.

In addressing Question 2.4, Respondents may wish to address what proportionate ways of adjusting GHRs are available for the future. Might adjustment involve data as to rates allowed on detailed and summary assessments of costs? If so, what data should be captured, by whom, from whom and how should that be achieved reliably and proportionately? Should indices be used, perhaps with suitable adjustment, e.g. SPPI (services producer price inflation) legal or CPI (consumer prices index)? If not, why not?

In answering 2.5 Respondents may wish to give examples of alternative GHR models and/or methodology.

Part 3 – Costs under pre-action protocols/portals and the digital justice system

3.1 What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

3.2 What is the impact on costs of pre-action protocols and portals?

3.3 Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?

3.4 What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?

In answering Question 3.1, Respondents may wish to consider what impact digital dispute resolution has on costs and what effect the current digital systems have. Is there an impact on the cost for unrepresented litigants? How should those costs be dealt with? Mindful of the cost of repetition, should the development of the digital system prioritise an API, or similar method of sharing information? What may be the cost advantages/disadvantages of such an API for professional users, the court system, the judiciary and litigants in person?

In answering question 3.2 Respondents may wish to consider how costs incurred before a case is issued should be governed. They also may wish to address whether more pre-action protocols (and other dispute resolution services) ought to include self-contained rules on party and party costs and if so, what these rules should be.

In answering Question 3.3, Respondents may wish to consider what reforms are required, whether they apply to all types of claim and whether they ought to apply only to costs owed to providers of legal services.

In answering Question 3.4, Respondents may wish to address whether there are areas in which the distinction between contentious and non-contentious business serves a useful purpose and what the implications would be of removing that distinction.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

4.1 To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

In raising these questions, the Working Group is NOT inviting comment on the extension of FRC (which has already been consulted upon), rather it is interested in receiving the views of Respondents on the consequences of the extension of the FRC.