1.1 Is costs budgeting useful?

The overwhelming majority of liability claims insurers are asked to handle settle before legal proceedings are issued (with another notable volume of litigated claims concluding prior to budgeting), so from a paying insurer's perspective, budgeting has some benefits and is a topic to address, but the real issue for insurers is the costs incurred prior to the budgeting phase.

It is important that parties to litigation have the fullest possible understanding of the costs to which they may be exposed. Consideration to reasonable steps to achieve that are to be encouraged.

In theory, costs budgeting is useful and can serve as a useful tool to focus the parties' minds not only on the potential costs of the litigation, but also on strategy as it is necessary to consider all of the potential steps in the litigation when preparing the costs budget. It was intended to achieve a laudable aim, but it is beset by practical challenges.

A series of issues present regarding budgeting. The process adds in additional layers of cost and can be complex, with perceptions of limited judicial appetite to properly address costs budgets at CCMCs. Specialist costs counsel are often required, leading to unnecessary duplication of advocacy.

Budgeting should be limited to those cases where it is merited, i.e., those of a certain complexity or over a given value.

Ironically, a costs budget may be more advantageous where the current position is 'default off' i.e., in multi-party complex litigation where the cost of producing a costs budget is proportionate and very often the work will be outsourced to a specialist costs team, rather than in lower value cases where the position is 'default on' and the cost of producing a costs budget may become disproportionate. The parties may also be able to agree costs budgets before the CCMC. This will reduce the time spent by the Court on this matter so that the Court's time is spent dealing with cases where there is a real difference in opinion between the parties.

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

One recommendation is to consider restricting cost budgeting to cases valued >£250K, which dovetails with the Serious Injury Guide threshold and where the consultations on Pre-Action Protocols and Dispute Resolution were focusing.

A gap would then emerge between the claims above the £100K proposed FRC limit and the £250K starting point for costs budgeting. This could be filled by extending FRC to cases valued up to £250K in line with LJ Jackson's original vision, but in the meantime, it is appreciated there would be a volume of litigated claims valued between £100K and £250K which proceed without the budgeting process. However, our view is that such would be manageable, noting also that costs budgeting is a relatively new process in litigation.

Claimants should have to file a document akin to a precedent H form with a Letter of Claim setting out the prospective costs for the claim, which should have to be repeated at suitable intervals, perhaps quarterly.

With the particulars of claim, the claimant should have to file a schedule of costs incurred to date, or at least those costs that they seek to recover, perhaps even limited to costs incurred in key areas, akin to a mini precedent H form. The idea is to assist defendants in knowing the claim they must meet, which could inform approaches to the case and to enable the court to have the earliest sight of the overall costs position involved with the matter - costs are an important factor in any "loser pays" system and where QOCS has removed a lot of the risk for claimants in personal injury litigation.

Another change would be to have budgeting take place after the initial Directions Hearing, as that is the essential framework for the progression of the case and so to push the budgeting process back ought to reduce some of the guesswork or overprovisioning on a "just in case" basis concerning the various phases. Further, so few cases proceed to trial that budgeting only should be performed to the PTR stage. Further, so few cases proceed to trial that budgeting only should be performed to the PTR stage.

Finally, greater emphasis could be placed on parties reaching agreement in relation to costs budget prior to the CCMC with potential costs consequences if a party behaves unreasonably.

1.3 Should costs budgeting be abandoned?

It is considered that costs budgeting has a place in very high value claims, particularly where funding decisions need to be made (from a claimant's perspective). Also, compensators have reserving considerations and will benefit from additional information about the overall cost of the claim.

The ability of the court to control or limit the cost that the parties propose to incur / recover is welcome to promote proportionality. Zurich proposes a threshold value for claims of £250K before costs budgeting is mandatory.

The abandonment of budgeting would have some advantages, but importantly its replacement must not lead to additional complexity and costs for the parties. If abandoned, perhaps there should be a requirement for parties to disclose and file a quarterly statement of costs either incurred or in prospect. Whilst this may arguably lead to providing information about the strategy for the case the parties intend to take, nonetheless there should be some sort of lens into the costs being incurred in a case, which the other party will or may be expected to meet.

Costs budgeting is probably more workable in a costs regime that were to operate where costs are recoverable from the opposing party (where permitted) on a fixed hourly rate basis. The arguments would then be limited to the amount and type of work to be done.

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

The scope of the retention must determine the answer. Providing a suitable ceiling is in place, such as claims valued >£250K, the "default on" position is appropriate.

Alternatively, a hybrid scheme could operate in cases valued <£250K where the default position is off, such that £250K operates as a switching point for the default position.

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?

Regarding 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, the risk of setting the budget first is that the work is 'value engineered' to fit within the budget and is not actually a true reflection of the work likely to be undertaken in connection to the litigation resulting in lots of applications to amend the budget. Consequently, the initial budget is not a true reflection of the actual cost of the litigation.

Parties to litigation should have to file declarations as to costs endorsed with a statement of truth swearing to knowledge of the level of costs claimed and to be incurred on their behalf and with a statement of knowledge that they remain liable for the unrecovered proportion thereof. This may assist in addressing the mischief of speculative claims or matters designed to pressurise defendants into paying weak claims.

In cases where litigants lack capacity, the undertaking would be necessarily by the Deputy or Litigation Friend.

The first CCMC could also be used as a process akin to detailed assessment, addressing past costs. Such a process could prevent later arguments on costs hitherto incurred.

Alternatively, parties could be obliged to file budgets ahead of Directions Hearings, with a view to a later, separate Hearing on budgets, should the parties be unable to reach agreement regarding the filed budgets. This approach could save Court time and expense for the parties.

A different regime could be considered for cases where liability is admitted by the defendant, such that claimant firms should have to set out proposed budgets promptly following the admission, whether the case be pre-proceedings or within litigation. Such a step could pave the way for interim payments on account of costs from defendants following agreement to the budget and subject to a commitment from the claimant for the timetabling of the case to settlement. Making costs interim payments in such circumstances could assist contain defendants' liabilities for interest on costs, which runs at an unreasonable rate and out of all proportion to interest on damages.

Section 2

2.1 What is or should be the purpose of GHRs?

GHRs should continue to be used as a guideline for assessing the reasonableness of a receiving party's costs, to ensure a level of certainty and consistency across the legal system. Parties to litigation appreciate certainty or as close to it as possible. The paying party should be placed in the best position to know what their exposure to the receiving party's costs is to the greatest degree of accuracy as possible.

Fixed Recoverable Costs (FRC) are the principal means by which that can be achieved, but it is recognised that there are and will always be cases out of scope for such.

In out-of-scope cases, the purpose of GHRs should be to firmly fix hourly rates for classes of legal work and levels of complexity within those classes, rather than serve as a point from which to move. Knowledge that hourly rates are effectively immutable would provide parties to litigation with far greater certainty and assist in decision-making and having less concern due to speculation as to what might be recoverable at the end of the process.

At present, far too much in the way of frictional expense is generated as a result of arguing about costs, in terms of the appropriate Grade of fee earner and the rate claimed for their work. Significant savings are often achieved as a result of challenge on both points, quite aside from reductions achieved in connection with claimed hours spent on the case.

An additional consideration is that GHRs should inform claimants in relation to the anticipated level of recoverable costs in connection with their case, to enable them to make decisions about the potential shortfall they may be expected to cover, bearing in mind contractual hourly rates chargeable by their lawyers and to enable claimants to seek lower contractual rates, stimulating competition among claimant firms.

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

See the answer to 2.1. If only used as a starting point, GHRs lose their purpose and permit undesirable argument as to costs, which in turn adds to expense. GHRs should not be used as a starting point but rather as an anchor. If the rates cannot be completely fixed, a positive case citing exceptional circumstances should have to be made to justify deviation.

Even rates fixed by grade of fee earner and complexity of the case would be a helpful starting point.

2.3 What would be the wider impact of abandoning GHRs?

Abandoning GHRs could arguably lead to a great deal more uncertainty and arguments as to costs based on geographic locations of law firms and the appropriate rate for Grade of fee earner, with a requirement for more data and evidence of what is fair to set as an hourly rate by locale. Whilst GHRs potentially help with the 'levelling up' of

the provision of legal services across the country, as mentioned above, case complexity in the post-pandemic, hybrid working era is probably a better yardstick than locality of law firm.

Further, a scenario of far more Detailed Assessments, more contentious costs budgeting hearings and increased administrative costs between client and lawyer are undesirable.

Zurich favours a simplified approach, with as little variability as possible. Zurich supports the idea of fixed hourly rates for different classes of legal work; particularly personal injury claims where there is substantial homogeneity across different classes of claim, increased use of IT and substantial homeworking by lawyers.

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

Yes, and by means of a suitable inflationary index, such as SPPI, RPI or CPI at appropriate intervals, which are clearly indices outside of the litigation environment and are therefore independent of it. Moreover, government indices are also used in personal injury litigation, via the Ogden tables.

Alternatively, GHRs could be subject to a reasonably lengthy fixed period before review. The present GHRs are generous and so in our view it would be appropriate to have these in place for a five-year period, which ought to be sufficient to allow for inflationary factors to offset the current high levels and provide sufficient time for the exploration of alternative approaches to non-fixed costs, mindful of changing business practices and other reforms in the Civil Justice arena.

2.5 Are there alternatives to the current GHR methodology?

The starting point for GHR should be derived from business operating costs and lawyers' salaries, with a reasonable profit margin in addition. This information is or ought to be obtainable.

Prior decisions of Detailed Assessments should not be used, on the basis that such represent a tiny minority of costs cases. Reliance on these outlier cases leads to an artificially high baseline and subsequent inflationary pattern. Our data indicates that over 96% of hourly-rated costs claims settle through negotiation.

Zurich approves of the concept of a blanket rate recoverable for personal injury work, irrespective of national geography and irrespective of the status of the lawyer(s) handling the work. Too many claimant firms use London office addresses to justify excessive costs levels, which is a particular concern, given that even pre-pandemic, a lot of legal work was performed in a homeworking model, which is a situation which has expanded following the pandemic and is set to continue as a permanent altered working pattern.

We do however recognise that hourly rates risk pricing lawyers out of the market, as we have seen with legal aid work, thereby reducing competition and consumer choice. The risk of pushing rates too low is the adverse impact it could have on the quality of service by increasing the incidence of negligence. We see lots of administrative errors where

Claimant law firms are handling high volume, low value claims such as missed time limits and a failure to take proper instructions.

Further, the idea that legal work can be done in a non-London-centric model by different law firms could offer clients real competition nationwide, but at the same time offering a more local service where clients may prefer that, which may be important in certain types of matter.

Cases of specific complexity or value could be subject to an exceptions regime permitting a percentage enhancement of the fixed the hourly rate, but very careful consideration would be needed, and exceptions defined clearly, lest the provision be applied for routinely and create undesirable satellite litigation.

A more radical idea is the concept that costs should not be recoverable between the parties, irrespective of the outcome of the case, which would give clients a greater interest in ensuring the containment of expense incurred on their behalf, mindful that recoverability is not possible. However, careful control over damages inflation would be necessary.

Another alternative is some form of capping so that the maximum in the way of costs recoverable in relation to a certain case type is limited to a ceiling, thus limiting the paying party's liability to a reasonable level.

What cannot be overlooked is our experience that generally, over 30% is reduced from claimant lawyers' schedules of costs in personal injury cases, with the majority of the reductions achieved from challenges to the rate claimed for the Grade of fee earner. However, it involves time and expense on the part of the defendant to achieve that result, which is a situation which could be alleviated in part at least by providing greater certainty as to recovery by fixing rates, although safeguards will need to be in place to mitigate the undesirable result of more hours claimed.

Section 3

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

The implications should be swifter and enhanced access to justice, resulting in a reduction in operating costs and consequently, reduced costs payable by the parties to disputes. However, this is predicated on an assumption that the IT to be used is robust, reliable and economic to implement and has sufficient investment behind it. We have seen unfortunate delays and issues with the Digital Claims Portal. Where appropriate, the market should be engaged beforehand in terms of technological solution development.

If a lot of requirements are rules-based (in an IT-sense) there should be less chance for gaming the system and for making arguments on technical issues such as the date of service. There should also be scope for costs savings as not least, less paper should be used.

Electronic disclosure is certainly beneficial from an environmental perspective in saving paper and storage space but there are heavy costs associated with maintaining an electronic platform for documents.

However, there will be some people who refuse to or are unable to engage with digitisation, which must be considered. There is a delicate balance to be drawn between unrepresented and represented parties. Access to justice must be preserved for those not able to or choosing not to engage a lawyer, but that choice should not be to the detriment of the opposing party. A simple rules-based system through IT should assist somewhat.

Our view is that litigation should be discouraged generally in the pursuit of disputes. A costs regime in place should not be one which provides advantages to parties settling claims after legal proceedings have been issued. Our experience is that legal costs rise substantially following litigation and particularly once cases reach the budgeting stage.

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

In Zurich's view, the CJC's work on costs reform should be tied intrinsically to the CJC's outstanding work on pre-action protocols. If pre-action protocols are optimised, a lot of the problematic issues seen in claims generally, whether they go on to litigation or otherwise, will be avoided.

If pre-action protocols are properly adhered to, the costs impact should involve reduction because of the early exchange of comprehensive information to enable disputes to be resolved and remaining issues narrowed, but the reality is that adherence is patchy and as such, costs containment is not realised to the extent originally envisaged by the protocols.

Robust sanctions are required for non-compliance with pre-action protocols and portals without reasonable excuse. The reality is that the noble and laudable aspirations of PAPs have not always been reflected in re-proceedings practice. The courts (and defendant lawyers) just do not see the poor behaviours perpetrated in most claims that are handled and dealt with pre-litigation. It is essential to the ambition of reducing litigation volumes per se and an effective system that pre-action behaviour must come under great scrutiny and sound in sanctions for non-compliance. Thus cuts both ways and unreasonable defendants and insurers also need to be sanctioned where in breach. This is the only way to ensure parity and improve the prospects of pre-litigation compromises/settlements. Building a digitised justice system to compel compliance with pre-action protocols would be welcome.

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?

Yes, although Zurich replies to this question from a predominantly inter parties' perspective.

The objectives of reform can be achieved in several ways.

Broadening the FRC regime as far as possible and increasing it beyond both current and proposed limits would also assist, whilst ensuring that the "escape" or exceptions to FRC are as limited as possible. It is noted that extensions to the current scheme are in progress.

Fixing GHR would also assist as it would reduce the matters in dispute.

Ensuring that the receiving party is aware throughout the life of the case of the costs being incurred and to be incurred on their behalf is crucial, with the implications in the event of a shortfall in recovery from the paying party. Litigated cases have revealed all too often that organisations in the background are really pursuing the claim and for their own benefit; the obvious example is certain credit hire organisations.

An online costs assessment of bills up to a certain amount could be delivered through automation like the process an insurer uses when reviewing panel invoices such as Legal-X.

Answers to previous questions, such as 1.2 and 1.5 provide additional detail.

The idea is that once costs outside of FRC are presented at more reasonable levels, there will be fewer cases to have to assess.

Fixing recoverable disbursement levels recoverable by class or value of claim may also have merit.

Fixing recoverable advocacy costs (counsel's fees) may also assist.

A helpful idea might be a "Fast Track" or summary assessment process for cases up to a certain value, whereby the parties must file case summaries, to include a costs schedule and counter schedule, which follow a pre-set format. This in turn could enable an evaluator, judge or costs judge sitting remotely to assess the recoverable costs on paper without a need for advocacy.

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

As an insurer, Zurich's qualification to respond to this question is limited. However, based on our understanding, the distinction appears to be of limited relevance in today's environment. The idea of a pre-issue settlement being non-contentious work is difficult to reconcile. We comment that whether a claim was issued or not, there was clearly a dispute between parties that was probably regulated by a pre-action protocol, designed amongst other things to reduce the prospect of litigation.

Section 4

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?

The changes to FRC should:

- Reduce the number of cases in scope for costs budgeting, thus reducing the volume of issues to be addressed because of the budgeting process and its challenges
- Remove or dramatically reduce the need for arguments on costs in what previously were hourly rated matters
- Result in simplification of costs issues in a greater number of cases
- Aid in providing greater certainty to the parties in terms of the costs to be incurred and recoverable in their case
- Accelerate the process of costs payment to the receiving party
- Enable litigation funders to make earlier, more informed decisions.

However, more needs to be done to limit disbursement costs to reasonable and proportionate levels, whilst ensuring quality and the integrity of the content.

If the extension to FRC is as successful as hoped, further extension in line with LJ Jackson's original vision should be pursued, to bring a greater volume of claims into scope and for such cases, bring greater certainty to the parties to litigation and lead to a more rules-based, accessible system.

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.

Zurich replied to the MOJ's consultation on FRC in 2019 and refers to the responses given therein.

Additionally, costs capping generally has considerable merit, in terms of assisting parties in understanding their liabilities to a greater extent. Costs caps probably have a place in curtain defined classes of litigation, which need to be explored more fully.

Zurich supports the idea of capping recoverable disbursement costs (whether by hourly rate chargeable or by an absolute ceiling or some combination thereof), noting that in some expert disciplines, the costs of securing evidence is exorbitant and would be beyond the appetite of a claimant, were it not for the confidence of being able to recover the cost from the defendant.

Further, Zurich is of the view that robust rules need to be drafted to prevent solicitors maximising profit margins by effectively outsourcing large elements of the case to counsel, for whose work disbursements are claimed in addition to FRC levels. In effect, the Aldred v Cham principle needs to be maintained.

Finally, we comment that whilst legal costs reform is progressing, the volume of satellite litigation in FRC matters generally underlines how important it is to get it right as far as possible, by the development of an effective system that cannot be "gamed" or "worked" by parties.

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.

Zurich is insufficiently qualified to comment in this area.