FLETCHERS GROUP RESPONSE TO THE CJC COSTS WORKING GROUP CONSULTATION JUNE 2022

Fletchers Group, Dukes House, 34 Hoghton Street, Southport, PR9 OPA.

Authors: Tony Armstrong, Directors of Costs & Gary Ratcliffe, Head of Costs – Technical & Compliance.

Contributors: Peter Haden, Chief Executive Officer & Adrian Denson Chief Legal Officer.

Executive Summary

Fletchers is one of the largest providers of personal injury legal services in the UK, with expertise in acting for vulnerable road users involved in motorcycle accidents and those who have suffered as a result of clinical negligence. Our response draws on that experience and the impact of the current cost's regimes in the provision of those services.

We are committed to working proactively with the CJC and support the need to carefully consider the effects of the costs issues and themes identified, particularly in relation to access to justice, the needs of and consequences for vulnerable clients and digitisation of the court system. A more robust, efficient interlocking system has significant potential to prevent the escalation of unreasonable and disproportionate costs of litigation, providing greater certainty to the profession and clients, whilst significantly reducing the cost of the administrative burden on the court service.

Our overarching summary responses can be stated as:

1. **Fixed Recoverable Costs in Principle**: We can accept the principle of FRC's if they are set and maintained at an appropriate level that reflects the genuine cost of providing legal services.

2. **Proportionality Principle**: Of all the Jackson Reforms this has been the most effective in controlling costs. It is such an embedded principle that its impact upon the legal market and the provision of legal services is now paramount to all others when contracting with clients and seeking to provide an efficient service.

3. **Costs Budgeting** – In contrast, the current system has not been successful or achieved the desired certainty of outcome. It is an expensive process to administer and rarely, if ever, results in resolution without traditional costs negotiation and/or detailed assessment. In the absence of significant reform, we support the abandonment of costs budgeting.

4. **Hourly Rates** – The publication of GHR's remain vital for the benefit of the court, legal representatives, and vulnerable and unsophisticated clients as the only source of published information against which it is possible to guide and extrapolate hourly rates. It is paramount that a defined mechanism is agreed for the collation of empirical data of appropriate market rates and that those rates are regularly reviewed against inflation in order that they do not stagnate

5. **Pre-Action Protocol Costs and Digitisation** – The current definitions of contentious and non-contentious business are not fit for purpose and require update to reflect the reality of modern litigation and dispute resolution; much of which will be conducted via a pre-action protocol or through an external portal. We consider that digitisation will have a significant positive impact upon the administration of justice and considerably lessen the financial burden upon valuable court resources. We consider it unlikely that digitisation alone will lessen the incurrence of costs in individual cases. Engaging with any digitised system may increase costs by moving some of the courts administrative burden to the parties and their representatives.

6. **Consequences of Extending Fixed Recoverable Costs** – To date, FRCs have not been set or maintained at an appropriate rate. The abject failure to review FRC's appropriately has had the unavoidable and entirely predictable consequence of the erosion of access to justice and client compensation. There have been many high-profile failures of legal businesses in the personal injury sector arising from the significant challenges facing it. It is imperative that any FRC regime is not allowed to stagnate for failure to legislate for an appropriate and timely process of review. The consequences of stagnant FRCs are felt most disproportionately by our most vulnerable clients and those from disadvantaged socio-economic backgrounds for reasons of economic viability and security in the provision of legal services. However, given the current state of the economy and particularly challenging market conditions it should now be inconceivable that Fixed Costs should be extended in personal injury matters to a larger category of cases to the benefit of insurers and detriment of individual clients.

7. **Impact on client deductions** - The interlocking costs regimes of fixed recoverable costs, costs budgeting, proportionality, capping of success fees and solicitor client challenges have had a limiting effect on otherwise reasonable recoverable between the parties' costs and an ever-increasing reliance on deductions from clients' damages to ensure viability. This works against access to justice for the most vulnerable.

If law firms can be confident of fair remuneration, then access to justice will be promoted. It is concerning that even within classes of litigation, law firms are having to make a stark choice as to whether legal services will be provided to clients based not on the merits of a claim but on economic grounds relating to the payment of a viable fee.

IS COSTS BUDGETING USEFUL?

- **In the field of personal injury litigation, we say that costs budgeting is very expensive and of limited value and use. Considerable effort is required for very little certainty as to the amount of recoverable costs that will actually be paid, as it is very rare for all of the phases of a budget to be completed particularly the trial phase.**
- **The absence of certainty of outcome, coupled and contrasted with the significant effort to comply, is a compelling reason to dispense with it.**
- **Dispensing with costs budgeting or fundamentally revising the process to enhance certainty of outcome would remove many contested hearings from the Court list and reduce a considerable and often duplicative burden on the courts and parties' resources.**
- **We consider the processes of provisional and detailed assessment, in the limited occasions that either are fully engaged, to be at least as effective and significantly less costly at controlling proportionate costs. Noting that "incurred costs" must always follow this path, in any event, in the absence of agreement.**
- **The usefulness of costs budgeting could be significantly improved if the concept of what a budget is, is fundamentally revised.**

Suggestion that proportionate costs can only be controlled through either costs budgeting or detailed assessment does a disservice to the way the legal market has adapted and changed, since 2013. Nor is it evident in the fact that in the vast majority of cases (99%) costs are resolved by negotiated agreement, without either a costs budget or assessment having occurred.

Proportionality is at the forefront of all litigators minds and is top of the agenda for legal service businesses who acknowledge that proportionate costs are efficient costs. It is an inescapable fact that disproportionate costs will ultimately be reduced by any and/or all of the processes of costs budgeting, costs negotiation and detailed assessment. Given the adversarial nature of litigation, it is difficult to set budgets that truly represent the rigours of litigation both generally and specifically.

It is truly clear, certainly in the personal injury market that the concept of proportionality is fully embedded and that many organisations are attempting to grapple with the reality that between the parties' recoverable costs (whether budgeted or not) are not sufficient for a viable legal service. Simultaneously, market forces are in play, with most personal injury firms offering to cap the combination of success fees and shortfalls payable by clients at a set percentage of total damages, with the balance being written off. Historically that percentage has been set at a market rate of circa 25% including VAT but it is becoming more apparent that those percentages are starting to rise as high as 40% plus.

These economic challenges mean that considerable effort is deployed both in organisational and operational design and considerable investment in the implementation of streamlined processes and IT to avoid wastage. In short, certainly in the personal injury arena, much is being done to try and reduce the amount of costs that are required to conduct a claim by fully engaging with the concept of proportionality to reduce irrecoverable disproportionate costs.

legal businesses are striving to reduce the amount of time spent on individual cases so as to ensure that their limited resources are deployed in a manner that can be fairly and appropriately remunerated for.

Whilst the "new" concept of proportionality and budgeting were introduced together, we say that the proportionality test has evolved to such an extent that costs budgeting is unnecessary and often requires disproportionate effort on any costs benefit analysis; particularly when the majority of cases (circa 75%) settle prior to approval of a budget.

It is our experience that despite doing all we can to work within budget, in the majority of cases that is simply not possible, and work remains necessary to provide a compliant and non-negligent service to our clients. Reasonable and necessary work does not become unreasonable or unnecessary, because a pre-emptive budgeted value has been placed against it on a prospective and speculative basis.

There is suggestion that Central London Courts are more generous in respect of costs budget allowances than provincial courts. Our experience is very different, we find that budgets set in London, in our clinical negligence cases and complex personal injury claims are lower than comparable cases in other courts. That only serves to highlight the perception that generally there is a very high level of inconsistency of approach to cost budgeting across the nation, by court and judge. A perception with which we agree.

In the absence of fully abandoning the system of costs budgeting, we have proposed several strategic changes for consideration that may bring greater force and certainty to the intention of costs budgeting and costs control.

1.1 WHAT IF ANY CHANGES SHOULD BE MADE TO THE EXISTING COSTS BUDGETING REGIME?

- **We propose that a single budgeted figure should be set for a case; recognising the influence that both incurred and future costs have on each other.**
- **We firmly believe that the determination of a single overarching figure of a sum of money which would be prima facie reasonable to incur to resolve litigation would undoubtedly assist the resolution of costs disputes and further limit the intervention of the court in respect of provisional or detailed assessment.**
- **We propose that Case Management and Costs Management hearings should be decoupled, and that Costs Budgeting be split between an "ADR Settlement Budget" set at the CMC or CCMC and a "Trial Budget" set at the PTR only if required. We believe that this focused approach will improve budgeting and greatly improve certainty of outcome whilst reducing substantially protracted costs negotiations and assessments.**
- **We propose that all costs budgets should be filed 21 days before the CCMC hearing (and following the CMC hearing).**
- **We propose that Defendants, in cases where QOCS applies, should not file a costs budget.**
- **All parties should be free to conduct litigation within budget, subject to compliance with the indemnity principle, in a manner that is flexible, adaptable and recognises the rigours of litigation.**

Generally, costs budgeting lacks the certainty that was intended. Incurred costs fall outside of budget meaning that they follow a traditional route to resolution, whilst future budgeted costs, at least in principle ought to be allowed if in budget. In practice both incurred and future costs fall to the rigours of intense negotiation, as it is seldom the case that a paying party accepts that the work done within phase is reflective of reasonable costs, usually by analysis of the budget assumptions or suggestion that the work required ought to fall substantially below the budgeted amount. A move to recognising the budgeted amount as being indicative of a sum of money that would offer fair value for resolution of a case howsoever achieved would greatly improve certainty and speed up the administration of justice. It would also significantly reduce the strain on the courts resources in assessing bills and determining issues that otherwise fall within budget. We explore below how the combination of the budgeted amount and the claim for inter partes costs could be used to provide greater certainty for costs resolution.

HOURLY RATES

We agree that it is not appropriate to finally determine or approve this component, or any other component, of a budget in isolation. To do so would conflate the principles of budgeting and assessment. Finally determining any components that are currently resolved on detailed assessment without the benefit of the same clarity and certainty that present on detailed assessment, ought to be avoided at all costs.

Even providing an indication of what may be a reasonable hourly rate would likely tether parties to the law of unintended consequences. It is entirely foreseeable that work done within budget but at an hourly rate greater than one on which an indication had been expressed would lead to an increase in detailed assessments. It is also foreseeable that parties would attempt to deconstruct approved budgets by reference to any mention of hourly rate whether assessed or indicated in an effort to try and determine how much time was permitted. This would open pandora's box and would likely lead to increased assessments and satellite litigation.

DEFENDANTS FILING COSTS BUDGETS IN QOCS CASES

We propose that it is inappropriate for a "Defendant" to file a costs budget in any QOCS case when the likelihood of recovering fees is at best remote. Valuable court time is wasted dealing with a defendant budget that could be much better spent on directions and costs management, if necessary, of the Claimants costs.

We also opine that for personal injury cases the comparison of the costs budgets of both parties is not a helpful comparator, primarily because the difference in retainer arrangements between Claimants and Defendants in this sector does not aid a true comparison.

Additionally, we perceive that opponents' budgets are sometimes drawn and presented not on the basis of what may be reasonably required to conclude the litigation but drawn tactically at an amount where the variance between budgets is exaggerated. Where the rules are designed to limit the recovery of Defendant costs as a matter of policy, the time and motivation to deal with such budgets is at best questionable and there are inadequate safeguards in place to remedy such a tactical approach.

We suggest that Defendants in QOCS cases should either not prepare a budget or prepare a budget which is exchanged as indicative of a reasonable sum to be spent and a copy placed on the court file in a sealed envelope only to be considered as a form of estimate should QOCS protection fall away at some future point. Alternatively, defendants in QOCS cases could file budgets limited to time required to conduct matters which may aid analysis without the distraction of a value.

A final alternative would be for Defendants to serve costs estimates upon the Claimant at key junctures for the purposes of Claimant's ensuring their insurance indemnity provisions remain sufficient.

DECOUPLING OF CASE AND COSTS MANAGEMENT

It is our experience that when costs management and directions are decoupled it leads to swifter resolution of both. It may seem counter intuitive to set directions without considering the budget and vice versa but on balance we feel that it promotes certainty and leads to less speculative budgets or hastily adapted cost budgets during the course of a case management hearing.

Whether or not specialist costs judges ought to be required to deal with budget setting, if a question at all, ought to be left to the discretion of the judge ordering directions. Whilst there may be additional

costs involved in a separate hearing, it may more adequately permit the setting of budgeted amounts that truly control the costs of litigation whilst removing the perception of inconsistency.

Such de-coupling could lead to opportunities to further improve costs budgeting and lead to swifter resolution and certainty on settlement of the substantive claim. Often the simultaneous focus on directions and budgeting, whilst conceptually welcome, is often practically corrosive of agreement on either. As positions change and common ground is found considerable work is often undertaken in re-working costs budgets. We agree that when directions are agreed, the need to deal with the budget prevents the CMC from being dispensed with.

It has also been suggested that there is benefit in allowing a District or Circuit Judge to deal with directions and a cost minded judge to deal with budgeting.

We agree that the splitting of process and responsibility creates opportunity and explore, below, how that concept could lead to reduced costs of both the budgeting and detailed assessment process. By refining the stages at which budgets are approved and the concept of what approval means we anticipate that substantial improvements to certainty of resolution could be achieved.

TIME FOR FILING THE COSTS BUDGET

In combination with the above proposal, we propose that the filing of costs budgets should be simplified. Currently, for cases pleaded below £50,000.00 there is a requirement to file costs budgets with the Directions Questionnaire, as opposed to 21 days before the CCMC hearing as with other matters.

This is an unnecessary and unmeritorious complication with such cost's budgets considered even more speculative given the time yet to elapse before the CCMC hearing or requiring update and further work prior to the CCMC.

We propose that all costs budgets should only require filing 21 days before the CCMC hearing and following the directions being approved by the Court.

STAGES AT WHICH COSTS BUDGETS ARE APPROVED

It is estimated that less than 1% of all cases go to trial. Unfortunately, the trial phases of a budget are often the most expensive and speculative element in terms of length and more particularly the prediction of counsel and experts' fees, often years in advance.

Practically, by including this element in a budget it has the consequence that when one stands back and considers the budget as a whole for proportionality, it is the earlier phases that seem to be invariably adjusted to compensate, whilst trial phases are subliminally ring fenced. Secondly, the fact that trials are not common means that the anticipated certainty of recovery on conclusion does not exist.

We propose that a costs budget should be prepared in two phases.

1. At the Directions Stage (as currently) but to exclude the trial preparation and trial phases.
2. At the Pre Trial-Review Stage, where a focused approach to trial expense can be achieved on those rare occasions that it is required. It would also enable a more accurate prediction of counsel and experts' fees.

This would result in parties having an "ADR Settlement Budget", giving a proportionate allowance for a matter to settle without a trial and then a discrete "Trial Budget". As is discussed in further detail below, this should be viewed as a global proportionate sum for parties to spend to achieve a settlement without a Trial.

If this approach is coupled with the use of costs judges the benefit of budgeting will likely be enhanced and offers opportunity for greater certainty of outcome.

We would anticipate that the benefit of taking a sequential approach to costs budgeting would be a more focused and accurate budget, without greatly increasing judicial time. Budgeting at the PTR stage should be very efficient and in truth simple, it may also bring into sharp focus a more accurate view of imminent trial costs that could lead to resolution. It is also probable that budgeting when directions are set and/or when the trial phase is imminent and therefore more accurately predictable has the potential to result in the agreement of budgets, saving judicial time.

DISTINCTION BETWEEN INCURRED AND FUTURE COSTS

It is trite to say that a judge cannot approve the incurred element of a costs budget. However, when setting the budget for future costs, the incurred costs are considered on a global basis and are perceived to greatly influence the outcome.

The approach of judges is inconsistent, some will focus on the work that remains to be done setting a budget accordingly, others will consider the costs previously incurred as a limiting factor when determining future costs. The difference in approaches is subtle but can lead to stark outcomes and a lack of certainty. Currently, with incurred costs subject to reduction on a detailed assessment, a limited allowance for future costs on this basis opens parties to the risks of double jeopardy.

We propose that this distinction ought to be reconsidered in order to move to a position where certainty is finally achieved such that complex negotiations and detailed assessments can be avoided.

We propose that when setting a budget, the court ought to set a budget indicative of an amount that is reasonable to spend on the whole litigation. In simple terms it ought to be the combination of incurred and future costs that sets the total budget on a global basis.

Whether there is value in continuing to isolate incurred and future costs will be brought into question dependant on the certainty that can be achieved in respect of the status of an approved budget as explored below.

The use of costs judges may enable this and may also permit of some form of expression of reasonableness of the incurred costs and their influence on the overall approved budget. Be that as a prima facie reasonable amount that permits of the recovery of reasonable future costs, or a prima facie unreasonable amount which has had some form of limiting effect on the future costs. By applying that approach, it would be possible to truly focus on the total value of the set budget as being indicative of reasonable costs that ought to be paid, subject to compliance with the indemnity principle and absent good reason to depart from the budget.

This would drive swifter and more certain resolution of inter partes costs disputes, significantly reducing the demands on the resources of the courts and parties.

BRINGING CERTAINTY TO BUDGETS

The principle that once a budget is set, costs falling within budget should be permitted unless there are good reasons to depart is laudable but severely lacking in practice. Arguments, persist that the work budgeted for was not fundamentally complete, that assumptions were not met or that the budget somehow has a limiting effect on conducting the case in an alternative manner to that which was strictly presented for approval. All of which fails to acknowledge that it the requested budget was revised by the court, it ought to be unsurprising that the manner in which a case was conducted had subsequently been adapted to fit.

Our perception is that negotiations on budgeted cases are more complex and detailed assessments, when they occur, take longer; mainly due to a micro analysis and contrasting of the budget to the bill. The fact that incurred costs remain to be assessed, if not agreed, does little to speed up the negotiation process or provide certainty of outcome.

To improve the purpose of costs budgeting, costs falling within budget should be subject to a rebuttable presumption that they are prima facie reasonable (subject to strict compliance with the indemnity principle. Challenges to costs falling within budget ought to be discouraged by modification of rules relating to the liability for costs of detailed assessment.

Sharp practice, where parties seek to unreasonably maximise a budgeted amount by clear inflation of elements of a bill, can be controlled through existing rules for misconduct.

Whilst the current consultation discourages the consideration of detailed rules, we do feel that by providing examples of modifications that could promote the certainty and usefulness of costs budgeting, a more strategic discussion can be guided.

PART 36:

Part 36 could be modified so that a party who beats their own Part 36 offer at trial, will be awarded the minimum of the total set budget and a 10% uplift. Whilst that would require a legislative modification of the indemnity principle, it would focus the parties on the consequences of failing to accept an offer that ought to have been accepted, whilst simultaneously providing certainty at a sum previously found to be reasonable and proportionate to conclude matters. For those who wish to suggest that there is good reason to depart from the budget and achieve more than the minimum of budgeted costs then they should be permitted to do so subject to the following.

CPR (47.20)

Where the receiving party presents a Bill of Costs to a paying party and the amount sought does not exceed or is limited to amounts approved in a costs budget then that Bill will be considered bona fides and reasonable unless proven otherwise. Any party challenging such a bill must secure a reduction of more than 20% in order to be awarded the costs of assessment. Failure to reduce the bill by 20%, absent findings of misconduct, will result in paying the costs of the assessment process in any event on the indemnity basis.

Where a receiving party presents a bill of costs that exceeds a costs budget, then if those costs in excess are reduced by more than 20% or the bill is limited to the budgeted amount, they will pay the costs of assessment process in any event. In addition, where a successful party has beaten their own Part 36 offer and is automatically entitled to their budgeted costs and a 10% penalty on them, that penalty will be reduced to 9% as a further penalty for overspending as against the approved budget.

1.1.1 SHOULD IT BE RESTRICTED IN ITS SCOPE?

- **We propose that costs budgeting should be restricted, in the field of personal injury, when damages are expected to exceed £2 to £3M.**
- **We would propose that for claims arising from brain injuries, particularly those sustained at birth, and other complex catastrophic injuries, where a lifetime care package is required that budgeting should be set to default off.**

- **Cases where costs are likely not to exceed the provisional assessment limit of £75,000 ought not be subject of costs budgeting.**
- **It ought not be necessary to present court fees within a budget. Such an approach would align with the approach to proportionality.**

It is noted that under Practice Direction 3E, costs budgeting will ordinarily be dispensed with if a Claimant has a severely limited or impaired life expectation of 5 years or less. We agree that this is appropriate.

We further note that in personal injury and clinical negligence litigation the provision of a costs budget may be dispensed with where the claim is £10 million or more. We would suggest that in this category of work that threshold could reasonably be halved or more. If the purpose of costs budgeting is to avoid unreasonable and disproportionate costs, it is difficult to comprehend of anything but the most exceptional of personal injury cases, in a claim anticipated to be valued at £2 to £3 million or more where the costs viewed either through the prism of costs management or costs assessment would usually be disproportionate or not adequately controlled by market forces and/or detailed assessment.

Navigating and corralling a multi-disciplinary approach to highly complex litigation, is rarely disproportionate when considered as a whole. Injuries arising from birth and other catastrophic life changing injuries must put the speed of resolution ahead of budgeting costs and the imposition of potential limitations and obstacles in circumstances where the costs are rarely deemed disproportionate.

Cases where costs are likely not to exceed the provisional assessment limit of £75,000 ought not be subject to costs budgeting. We submit that provisional assessment is a far less expensive and fairer method of determining reasonable and proportionate costs for such cases. It is the antithesis of saving costs and reducing the administrative burden on the court to permit a case at this level to potentially incur all of the following:

- A budget fee of £1000 or 1%
- Costs Management Fees of up to 2%
- Provisional Assessment Fees of up to £1500
- Court fees and judicial resource.

We recognise that there is a practically difficulty in identifying these cases at an early stage but the notion of de-coupling case management from costs management may assist a court in certifying a matter as fit for provisional assessment or costs management, at the case management hearing.

SHOULD COSTS BUDGETING BE ABANDONED?

- **In the absence of significant reform, we support the abandonment of costs budgeting.**
- **The current framework for costs budgeting does not fundamentally meet the objectives of certainty of outcome or speed of resolution. Nor is it deemed to be a fair and consistent process.**
- **The process is deemed to be highly demanding of resource and judicial time, without providing a benefit that is substantially greater than a negotiated outcome which is still required in 99% of cases in any event, or assessment which is required in the other 1%.**
- **However, if the budgeting process could be evolved to a meaningful standard, perceived to be fair and reflective of the features of a case, whilst influencing a more certain approach to costs recovery, when claims for costs are made within budgeted amounts, we would support that.**

Our experience is that the main criticism of budgeting is twofold.

1. That the budgeting process is expensive, often far exceeding the amounts recoverable under the rules and does not provide the certainty required or avoid often protracted costs negotiation. At best there is no discernible difference between how budgeted and non-budgeted cases are resolved from a cost's perspective.
2. The pre-emptive nature of budgeting lacks the consistency and fairness of a detailed assessment.

In our experience detailed assessment remains the most effective way of ensuring that reasonable costs are paid, allowing the most accurate reflection of what has occurred. In most cases the parties agree costs without further intervention from a court.

In our experience the majority of cases that require the production of a budget settle prior to the approval of that budget. We estimate that budgets are prepared in less than 10% of our total cases and budgets are approved in less than 1% of those. Despite this the process of costs budgeting takes up approximately 30% of the capacity of our internal costs team, which is devoted to the production of traditional bills and budgets. This calls into question the need to produce budgets in all currently prescribed cases, within the personal injury sphere.

1.1.2 IF RESTRICTED OR ABOLISHED, HOW COULD AN EARLY FOCUS ON COSTS BE MAINTAINED?

- **Absent approval of costs budgets, it may be appropriate to retain a short form budget on an indicative basis that is filed to assist the court in shaping a view on how best to control costs through directions.**
- **We reiterate that the impact of proportionality and market forces are the most effective controllers of costs. These are such embedded principles that their impact upon the legal market and the provision of legal services is now paramount to all others when contracting with clients and seeking to provide an efficient service; that focus must be maintained at all times.**
- **Solicitors have a fiduciary duty to act in the best interests of their clients and that includes resolving litigation as quickly and as economically as possible.**
- **Solicitors who fail to acknowledge that duty will find themselves in opposition to their clients and will have an unsustainable business model.**

A court could in the absence of abolishment, retain the discretion to order a costs management hearing be undertaken by a specialist costs judge should the short form budget or courts experience suggest unreasonable and disproportionate costs are highly likely, absent costs management and cannot otherwise be controlled by assessment.

More broadly we note that the legal market for personal injury litigation, ordinarily conducted on conditional fee terms, has fundamentally changed from a time when severe scepticism surrounded the economic market and the absence of client interest or any real form of control.

Market forces and the prevalence of contractual client deduction caps in this market are having a significant effect on how legal services are provided. A drive for efficiency of legal services and processes is evident, with most PI law firms considering how best to utilise their limited resources and capacity to avoid writing off costs and labour resources.

In the sphere of personal injury litigation, the advancement of Fixed Recoverable Costs, the challenging concepts and uncertainty of proportionality and costs budgeting have resulted in a challenging economic climate, with many high-profile casualties within the profession.

The knowledge that there is a difference between the work required for the performance of contract for a client and amount contributed by the opponent, has led to the common introduction of contractual deduction caps designed to limit a client's exposure to that difference. In short, some nearly ten years on, Sir Rupert Jacksons desire for control through market forces is a reality.

The increase in solicitor act assessments being a simultaneous indicator of client's awareness of their rights and ability to challenge but also a significant indicator that inter partes costs recovery is perceived as unfair as increasingly shortfall amounts are challenged. Clients do not understand why and are often not prepared to accept that opponents should not pay their reasonable costs in full.

This increase in prevalence of solicitor act assessments, was anticipated by many in the cost's profession as an entirely foreseeable outcome following the Jackson Reforms. The plethora of recent judgments in this field, means that lawyers either through compulsion or election have recognised that market forces now mandate the need for efficient and viable practices. It is no longer just the enlightened few who are actively trying to reduce the amount of work required on any individual case. The penny has dropped. Doing more and building WIP to the exclusion of all else does not maximise reasonable fees. Working diligently, efficiently, and effectively without wasting otherwise chargeable hours which instead can be spent on other deserving cases is the way to economic viability, whilst maintaining access to justice.

Resultantly, to combat this most law firms are actively looking to reduce costs incurred to ensure that resource can be utilised in a more productive and efficient manner. The amount of shortfall costs being written off at a law firms expense are unacceptable and cannot be sustained.

Control of costs is not limited to a judicial process; it is driven by market forces and the knowledge that failure to address ever increasing deductions from client's damages will reach a threshold where business models will fail. It is not wise to rely on the court to set a reasonable budget as the only way of controlling costs. That control must be exercised by providers of legal services failing which there will likely be a further increase in solicitor act assessments.

1.1.3 IF COSTS BUDGETING IS RETAINED, SHOULD IT BE ON A "DEFAULT ON" OR "DEFAULT OFF" BASIS?

- **We propose that costs budgeting should be set to "default off"**
- **The court should retain a discretion, at a CMC, to certify a matter as appropriate for cost budgeting where features of a case create a strong impression that costs may not otherwise be appropriately managed by the usual mechanism of assessment.**

Our proposal would save valuable court time, avoiding the current one size fits all approach to costs budgeting and the usual duplication of inevitably required costs negotiations and/or assessment in any event. This would also permit a view to be taken as to whether a) provisional assessment may be a less expensive and equally effective method of controlling costs whilst saving significant court time, or b) whether a detailed assessment would be at least as effective if the costs indicated do not signal gross unreasonableness or disproportionality. In determining either the court will recognise that one of these paths will be required for incurred costs (currently).

1.2 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?

- **There is considerable cross over between this question and those above, we reiterate each proposed change as outlined above.**

- **We wish to emphasise the need to change the concept of budgeting to the setting of a single figure, within which a bill will be considered bona fides, unless proven otherwise.**

We have throughout this response proposed a series of changes which when taken together will provide a truly integrated approach, encouraging:

- the setting of budgets only when necessary and with greater consistency,
- at more appropriate stages, with the hope of achieving greater certainty of outcome,
- whilst, discouraging unreasonable challenges wherever possible in a way that is transparent, with clear and appropriate consequences.

Our primary focus if budgeting is retained is to make the rules workable, with greater certainty of outcome.

Recognising the influence that future and anticipated costs ought to have on each other should be indefatigable. Whilst this would result in a considerable cultural shift, it would enable the setting of a budget that would be more meaningful and useful.

Those opposed may have a valid argument that it would stray close to the concept of costs capping. Budgeted costs are effectively capped now, absent good reason. It ought not necessarily limit the assessment of incurred costs but would provide an arena in which costs within the overall cap would be prima facie reasonable. That level of certainty would be further increased, if the parties were able to agree the overall budget as indicative of reasonable costs, without necessarily distinguishing incurred from future costs.

We do not believe that incurred costs ought to be provisionally assessed as part of setting a budget. That would likely lead to equally unjust outcomes and as much criticism as the current regime, as the ability to view the reasonableness of the costs having regard to all of the factors of the claim would not present.

2 GUIDELINE HOURLY RATES

2.1 WHAT IS OR SHOULD BE THE PURPOSE OF GHR'S? (WHAT IS THE PURPOSE OF AND EFFECT OF GHR'S IN THE CURRENT INTERLOCKING LANDSCAPE? THIS SHOULD TAKE INTO ACCOUNT ALL ASPECTS OF THE CURRENT LANDSCAPE OF CIVIL JUSTICE, INCLUDING ANY IMPACT OF REMOTE HEARINGS AND REMOTE WORKING, AND THE EXTENSION OF FIXED RECOVERABLE COSTS TO CASES VALUED UP TO £100K AND IPEC CAPPED COSTS)

- **GHR's play an important role in establishing informed consent, as the only published reference point by which any view of the market can be established. Whether or not alternative arrangements are agreed.**
- **They are a vital point of reference in many jurisdictions and provide a useful benchmark from which it is possible to extrapolate rates in more complex cases, particularly on an assessment of costs.**
- **The introduction and extension of Fixed or Capped Recoverable fees is not expected to substantially change the basis on which solicitors' contract with clients; such is the uncertainty of litigation.**
- **The absence of any form of GHR's would likely cause significant uncertainty and ultimately harm to clients and the profession, leading to a considerable rise in both inter partes and solicitor own client assessments increasing the burden on the court system.**

- **A publicly identifiable GHR, assists protection of consumers and has influence, as a form of benchmark, in ensuring that contractual pricing arrangements are relatable and not abused.**

The absence of any guidance would likely lead to chaotic pricing and considerable uncertainty of outcome on detailed assessment. Without some view of the market, how would anybody engaging in legal services be able to take a view as to the reasonableness of rates or determine if they are "unusual" unless they are sophisticated in this area of law.

Whilst not perfect, a publicly identifiable GHR, assists protection of consumers and has influence in ensuring that contractual pricing arrangements are relatable and not abused. It is trite to suggest that GHR's ought to reflect, rather than set, reasonable market rates.

Due to the adversarial nature of litigation and the uncertainty of client needs and requirements a move away from an hourly rate method of charging for litigation is unlikely. Support for this can be found in the current portals and fixed costs regimes where there has not been a wholesale move to fixed fee pricing. There is limited use of non-contentious business agreements, in the pre litigation (non-contentious) phase but the legitimacy of that model appears to be under threat, or at the very least cloaked in confusion, by judicial comments emanating from the Court of Appeal, in the ongoing matter of Belsner v Cam Legal Services.

FRC's in isolation are uneconomic, and hourly retainer arrangements remain the preferred approach in contentious litigation, because it is easily understood, quantifiable, professionally compliant, and applicable to most professional services.

Unfortunately, moving to value-based pricing arrangements, as an alternative to hourly rates, is a complex topic when one considers the limits placed on funding arrangements within contentious business and issues as to compliance. Damages Based Agreements have not been adopted because they are not considered viable. Conditional Fee Agreements work but have obvious limitations.

In all circumstances the nature of a between the parties' assessment requires an hourly rate approach that does not marry well with value pricing solutions whether permitted or not.

Published GHR's must be retained.

REMOTE HEARINGS & HOME WORKING

- **There is no evidence that remote hearings or home working have a limiting effect on overheads.**
- **It our opinion that remote hearings have no effect on the overhead costs of providing legal services; they instead offer a legitimate opportunity to avoid increased costs in individual cases; without affecting the quality and value of the legal preparation work and advocacy.**
- **We anticipate that any reduction in office premise overhead costs is highly likely to be countered by salary inflation due to a highly competitive national recruitment market.**
- **Current inflationary drivers, at a generational high, mean that it is far too early to understand the impact of home working and its long-term consequences for overheads.**

The impact of Covid19 has been immeasurable but borne of necessity, the concept of home working and remote hearings has been proven. What remains to be determined is whether either have a direct impact on the overhead cost of providing legal services.

It our opinion that remote hearings have no limiting effect on the overhead costs of providing legal services. Remote hearings, when appropriate, ought to be recognised as a sensible way of reducing the overall cost of conducting litigation and making it more proportionate by eradicating unnecessary

costs related to travel, waiting, accommodation and subsistence on a case-by-case basis. This has substantial benefit in providing access to justice at reasonable cost, particularly to consumers with limited resources. Remote hearings do not, however, change or lower the overheads of the business or devalue the time spent in preparation for and attending the hearing.

Similarly, the direct effect on overheads from working from home is yet to be fully understood. Whilst it may create opportunity to reduce some overheads, others are likely to rise. We consider that it is the overheads of the employing organisation and not the location of the employee that ought to be the primary way of determining the rate to be charged.

Working from home creates a national opportunity for recruitment only likely to be attractive as a long-term proposition for experienced and competent practitioners. Those same practitioners will expect and require competitive salaries that may no longer be constrained by economic forces driven by geography. There is a strong possibility that this will further drive salary inflation within the profession particularly in a highly competitive recruitment market. We are already experiencing the need to compete with the salary demands of a broader talent pool. There is some indication that London firms are hiring from National Band 1 & 2 areas by offering London salaries, without causing salary inflation for themselves.

We anticipate that any reduction in office premise overhead costs is highly likely to be countered by salary inflation due to a highly competitive recruitment market and the need to invest and re-invest in adequate technology to support the long-term logistics of home working. Considering the concerns caused by current inflation being at a generational high, it is far too early to understand the impact of home working and its long-term consequences for overheads. It has recently been reported in the press that the costs associated with working from home are, as of August 2022, considerably higher than at the beginning of the pandemic. Employees will wish to be compensated for this, particularly where organisations have substantially dispensed with some or all office space as part of a long-term strategy and the ability to return to the office is limited or not possible.

We acknowledge that many national firms have indicated a strategy to permit home working but the extent and scope of that is not binary. The extent to which individuals work from home is likely to be guided by the nature of the role and the needs of the business. We anticipate that the majority of smaller legal practices will be less likely to realise a reduction in overheads as a result of home working.

We expect that for all organisations increased investment in IT systems is a likely outcome of supporting home working, particularly when linked to the digital transformation of the civil justice system. The need for such investment is likely heightened where intuitive platforms will be required to support communication and engagement with a justice system for vulnerable clients who will not themselves have access to the IT resources necessary but will require a seamless service.

The banding of hourly rates as a matter of geography may become less important. Rates have historically been set on the presumption of a notional solicitor with reasonable overheads providing a service. A more appropriate measure may be the appropriate rate for the type of service being offered, taking into account a national view of overheads rather than a regional view or a regional view on which local law societies consult. This could be achieved by making the completion of an annual Expense of Time Calculation a mandatory professional requirement to be provided and centralised through the law society; such calculation to be subject to audit.

2.1.1 DO OR SHOULD GHRS HAVE A BROADER ROLE THAN THEIR CURRENT ROLE AS A STARTING POINT IN COSTS ASSESSMENTS?

- **GHRs when correctly set, represent a fair charge embodying a reasonable amount for the average direct cost of providing legal services and an appropriate level of profit in routine matters.**
- **On the above premise the GHR's already have a broader role than a starting point on detailed assessments; they are used in many jurisdictions as a benchmark and their**

current use in benchmarking unusual rates and determining informed consent has never been more prevalent.

- **If GHR's are considered a starting point on assessment, that ought only to be because they are reflective of a market rate. That market rate must then have a significantly broader use in the setting of contractual terms and there use and value ought not significantly differ dependant on whether the client instruction or transaction is assessed.**
- **As a reflection of a guided market rate, they remain a valuable source of reference and influence generally.**
- **We propose that GHRs should therefore be a clear starting point for routine contentious or non-contentious business of any type. This would provide a clear framework for unsophisticated consumers against which contractual offerings could be measured, taking into account how more complicated matters could be extrapolated and compared.**
- **GHR's lose value economically, and therefore as a comparator tool, when they do not appropriately reflect true market rates. A process of review is imperative to retain the value that they bring to the provision of legal services generally.**

We believe that the influence of GHR's is significant as the only benchmarked comparator by which unsophisticated consumers of legal services can make a value judgement as to the pricing of all legal services. The absence of GHRs would be detrimental both to consumers and professionals. It is noted that GHRs often have influence in areas such as the court of protection or when determining pricing matters and/or disputes for matrimonial or transactional type work

Often the more common question is whether the GHRs ought to be an applicable starting point only at summary assessment, rather than detailed assessment. It is difficult to envisage why there ought to be a difference, if the rate is an appropriate reflection of the market.

The publication of GHRs was not intended to replace experience and knowledge of local judges when assessing rates. More properly they were introduced, as a codification of the historic practice of published local rates often known only to those who dealt with detailed assessment or taxation as it was then known. They were intended to provide knowledge of the existing rates whilst courts and more importantly individual judges gained experience of the local rate. Unfortunately, GHRs became a self-fulfilling prophecy as those without the pre-requisite knowledge, relied on them unequivocally. However, they were unable to distinguish the GHR's from a representative market rate in more complex cases as they lacked the costs knowledge and awareness of precedent. The nature of summary assessment meant that addressing these distinguishing features meant that too much time was required, such that the GHR became the de-facto rates.

Overtime, the local knowledge and experience of those who previously held it was lost or significantly eroded and those who were supposed to gain it had only the GHR's and an absence of detailed assessment experience to inform their decisions.

That erosion of experience has caused tension in that hourly rates for a discrete interlocutory element of a complex and significant claim may be said to be guided by GHR but on detailed assessment a more objective view is ascertained. It is difficult to understand why elements of a complex and weighty claim may be said to be adjudicated differently, dependant on whether they are summarily or detailed assessed. They should not, but that is often reliant on the experience of judges who have never assessed complex bills but are having to make important decisions on interlocutory matters, arguably out of context.

2.2 WHAT WOULD BE THE WIDER IMPACT OF ABANDONING GHRS?

- **Instinctively, the abandonment of GHRs would have a significant impact on the civil legal justice system and consequential impact on other areas of legal practice.**
- **The absence of GHR would affect vulnerable unsophisticated consumers of legal services who would have no way of benchmarking and determining the reasonableness of rates, including higher rates, without some form of reference point.**
- **Professionally, considerable uncertainty as to market and/or unusual rates would be evident and the ability to advise clients as to expected charges and between the parties' recoveries would be greatly harmed.**
- **Similarly, we predict that the absence of GHRs, unless that knowledge was replaced in some other way, would over a period of time significantly impact costs budgeting and assessments of costs.**
- **Removal of any form of published rate would greatly increase the burden on the court services by way of increased inter partes and solicitor own client assessments.**
- **The responsibility of the CJC for publishing a national view of hourly rates, could only be abandoned if there is a return to local courts in consultation with local law societies publishing their own rates.**

Even prior to GHRs local courts published their own rates, this was a welcome practice that provided an element of clarity and a starting point that was readily understood and contrasted against complexity and known precedent. With retrospective reflection it was arguably a more comprehensive, sophisticated and fairer method of providing guidance.

If it is considered appropriate to abandon the setting of GHR at a national level, then the setting of a GHR at a local level will need to be reintroduced. Failing which the old practice of the court rate being in the District Judges top drawer will inevitably return to the detriment of all

2.3 SHOULD GHRS BE ADJUSTED OVER TIME AND IF SO, HOW? (IDENTIFY A FEASIBLE MECHANISM FOR REVIEWING GHR'S. THIS WILL INVOLVE CONSIDERING WHAT THE RIGHT APPROACH SHOULD BE AND HOW OFTEN THE GHR'S SHOULD BE SUBJECT TO REVIEW.

- **It is imperative that GHR's are appropriately adjusted over time. Market conditions constantly evolve, as is currently evident given the stark national inflationary conditions.**
- **To establish a market rate consideration needs to be given to both the rates routinely contracted, claimed and allowed, as in a well-functioning market it is the contracted rates and the value they offer, not those solely assessed, that should carry greater influence and reflect the market.**
- **In view of current inflationary challenges, we strongly urge urgent consideration be given to adopting an interim annual inflationary review against the October 2021 GHR's.**

We consider the viable options for adjustment to be:

1. Introduce a modernised and mandated Expense of Time Survey to be completed by all legal organisations as an obligatory condition of practising on a 3-to-5-year cycle to be centralised via the Law Society or an independent body. Thus, enabling a broadly accurate view of all legal markets upon which national guidance could be established. Any outcome should then be monitored against an appropriate inflationary measure, until the next expense of time review is mandated.

2. Re-empower local courts to set and publish their own rates. A review of rates at a local level on an annual/bi-annual basis, guided by Regional Costs Judges, with representation from local law societies would provide more informed guidance.
3. The introduction of a mechanism to capture contracted, claimed, offered and allowed rates on provisional and detailed assessment. This could be achieved by requiring the receiving party when setting a matter down for assessment to file a document in readiness for completion by the assessing judge, or enter such information within a portal, together with short supportive details as to the nature of the case for later collation and review.
4. Accept the October 2021 guidelines as correctly set and appropriate for routine litigation and automatically review them annually each calendar or fiscal year by way of an appropriately agreed inflationary index.

Prior to the introduction of GHRs in their current format, local courts issued their own rates and often complimentary guidance. Often these rates had the expense of time survey as a point of genesis with some form of representation by local law societies. Over time the courts local knowledge coupled with inflation resulted in, usually, the annual publication of rates. Where rates were not published (which was rare) direct comparison could be drawn between other geographical locations and the nature of the law firm and work being assessed.

The Association of Costs Lawyers was able to collate that information and publish a comprehensive bible of national rates for routine litigation.

Unfortunately, the current GHR's have become a self-fulfilling prophecy. Too much reliance has been placed on the published rates as being the applicable starting point all cases. That perception is borne out by a general failure to depart from guidelines for routine matters, even when rates have not been updated for inflation between 2010 and 2021. It is also borne out by the failure to consider an alternative starting point when enhancing rates in complex cases.

The current format GHR's were never intended to replace the local knowledge of the court, they were designed to guide those who initially were required to summarily assess costs who had not had that responsibility before. Overtime it was expected that that local knowledge of market rates would be established by a broader group of judges. That has not occurred, or if it has, it has been entirely masked by an over reliance on previously published GHR's. In the absence of nationally published GHR's, backed by empirical data gleaned from an expense of time type calculation, we would advocate for a return of local rate setting on the basis that sufficient experience exists, ought to exist, or can be gained to give a more precise view of local factors affecting hourly rates.

The danger in failing to update the GHRs in the current economic circumstances will likely lead to a significant widening between GHRs and the basis upon which legal firms are prepared to contract. That in turn, will likely lead to an increase in solicitor client disputes in circumstances where the absence of regularly updated guidance would be damaging to both parties and greatly increase the burden on the courts.

The economic value of appropriate rate setting is not simply defined by how much clients or opponents might pay, or how much a court might be guided to allow but in the value of certainty and reducing the burden of dealing with the administration of justice on rate challenges which primarily arise because of the failure to review and update. Failure to review is an expensive false economy for all.

2.4 ARE THERE ALTERNATIVES TO THE CURRENT GHR METHODOLOGY?

- **The current methodology of combining the base costs and profit costs elements into a single hourly rate is welcome when it comes to presenting a single rate to clients. We agree that this approach is more readily understood by them.**

- **However, the clarity of the approach to rate setting and its component parts is far less transparent and much more uncertain than was the approach prior to the introduction of a composite rate when it comes to advising and assessing those rates.**
- **We propose a return to categorically stating within the guidance, the percentage attributed to each of the component elements of the composite rate on an A & B basis.**
- **We believe that this one clarification will eradicate complex hourly rate arguments that ought not to exist and free up valuable capacity for all. Advising clients would become much more straightforward and enhanced rates could be distinguished and extrapolated based on certain factors and precedent.**

Complex arguments as to the appropriate amount of direct costs and profit within the published GHR are commonplace and are not as easily resolved as would have been prior to the introduction of GHRs. Some parties and courts believe and/or accept that the composite rate has a notional two-thirds direct cost and one-third profit element, others do not. In reality, it must be split in some way as no professional person applies an hourly rate without considering the costs of doing the work and factoring in an appropriate amount of profit.

Resultantly the "old" A & B method of calculation is still, often, used as a cross check and often referred to in written judgements. We propose a return to that approach, as a more transparent and certain method of calculation would support swifter resolution of disputes. In complex cases where rates have been extrapolated based on precedent, lengthy submissions and court time in resolution would be significantly reduced.

3 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? (RESPONDENTS MAY WISH TO CONSIDER WHAT IMPACT DIGITAL DISPUTE RESOLUTION HAS ON COSTS AND WHAT EFFECT THE CURRENT DIGITAL SYSTEMS HAVE)

- **It cannot be assumed that the further digitalisation of dispute resolution will automatically reduce the necessary costs, arising from evidence gathering and legal preparation and consideration which will be incurred by legal representatives.**
- **However, we agree enhanced efficiencies in the processing and cycle time of cases by digitising dispute resolution and exchange of data will undoubtedly improve access to justice by enabling swifter resolution.**
- **We anticipate that the most significant beneficiary of costs (overhead) savings, will be the court service who ought to significantly reduce the administrative burden of marshalling cases and information.**
- **Harmonising internal case management systems with centrally digitised court systems will require substantial initial investment from both lawyers and technology partners and a continued burden of maintenance.**

We have considerable experience dealing with the current pre-action protocols for low value personal injury claims and the associated portals. Our experience of implementing digital change has been that without adequate integration of internal and external digitised systems there is at least initially a propensity for duplication and inefficiency. Whilst this can be overcome, it can be particularly challenging and expensive to achieve and to ensure alignment as changes inevitable occur.

Digitisation, unless aligned with a streamlined resolution process, will not alone reduce costs. However, a more direct exchange of information has the capacity to reduce the burden on the court and improve the speed of resolution. Anything that directly and favourably impacts the resolution of cases and therefore the speed at which clients are compensated is welcome. It will have the consequential effect of reducing the amount of time that organisations will have to self-fund cases, as is common in personal injury litigation, generally improving the economic outlook presenting opportunities for greater viability and in the longer-term access to justice and the possibility of reducing or maintaining, rather than increasing, client deductions.

The current Pre-Action Protocols and associated portals for low value personal injury claims are intrinsically linked to a fixed costs regime that has now not been updated to reflect increasing costs and inflation since implementation in 2013. Overtime the value of fixed costs has eroded significantly in real terms, which has necessarily coincided with an increase in real term payments required from client to ensure viability.

it is an unsafe assumption that digitisation achieves costs saving in terms of the reasonable costs required per case. The digitisation of dispute resolution, extended pre-action protocols and portals linked to a fixed recoverable costs regime very often increases the amount and level of cases where there will be a disparity between the work required and the contribution in costs paid by opponents.

The implementation of the current fixed costs regime has simply passed the expenditure to clients to pay from their damages. It is reasonable to assume that any extension of the digitisation of dispute resolution, enhanced protocols and the extension of fixed recoverable costs will lead to a similar outcome in other practice areas to the detriment of consumers generally.

As a result of the current protocol process and the associated fixed recoverable costs, there has been a considerable number of legal service providers exiting the sector. The consolidation of the industry, considered through a consumer lens, leads to a lack of choice, a loss of specialism and increases the commoditisation of such work. The danger being that over time reduced service levels and quality will be risked for the benefit of economic viability. The lack of a genuine marketplace and competitiveness in the industry will impact upon consumers, with an increasing proportion of compensation required to be paid to legal representatives on account of the extended application of fixed recoverable costs.

Equally, the digitisation of dispute resolution does not simplify the law or replace the expertise and benefit of professional assistance. The current digital systems have not resulted in reducing the actual costs required to be incurred by legal representatives or rendered the associated fixed costs fair recompense. Neither have they been adopted by consumers without professional support.

IS THERE AN IMPACT ON THE COST FOR UNREPRESENTED LITIGANTS? HOW SHOULD THOSE COSTS BE DEALT WITH?

As Solicitors, it is difficult to assess the potential costs implications on unrepresented litigants.

Following the Whiplash Reforms (The Civil Liability Act 2018, The Whiplash Regulations 2021 and the Civil Procedure (Amendment No.2) Rule 2021), there was a reported drop in Whiplash cases being reported to the OPI than previously.

It is our assessment that potential causes are:

- Online Portal System being too complicated for lay and vulnerable claimants.
- The reclassification of whiplash injuries and corresponding value of compensation awards made potential claims less attractive.
- A lay and vulnerable client's inability or lack of confidence to determine the reasonableness of settlement proposals without professional support.

Notwithstanding the above, the statistics show that most cases are still being submitted to the portal by legal representatives. Therefore, even for the most simple and low value of personal injury claims, the digital systems are not being used directly by litigants in person.

It is foreseeable that unrepresented litigants will be required to have access to the technological demands of a digitised dispute resolution system, which not all persons will have. It might be that legal organisations offer an unbundled service to assist with parts of the process, which could prove to be an expensive but necessary outlay for unsophisticated and vulnerable clients.

How will a fixed costs regime apply in circumstances where clients require support on some but not all elements of a claim?

The potential expense of compliance and/or support will impact those from disadvantaged socioeconomic backgrounds far greater than others.

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?

- **We agree that a centralised API (or similar) could be utilised as a central point of access for all parties for dealing with key communications and exchanges of documentation and evidence as between the parties.**
- **It should also be a centralised repository for filing documents with the court, greatly assisting the considerable burden of marshalling vast arrays of documents on the court service.**
- **This would also provide a clear, indisputable, chronology of events likely to be of value in supporting swifter administration of justice.**
- **Unless fully integrated with case management systems an API could lead to duplication and an increase in costs.**
- **Potential detriment to most vulnerable and disadvantaged communities and minority groups who are often not IT literate or lack access to appropriate technology.**

However, given the significant investment undertaken in most modern law firms to utilise a fully paperless case management system and given that most communications as between parties are now conducted via email, it is difficult to assess to what extent such an API would have on costs savings per case. It may even lead to duplication. The potential pitfalls and limitations centre on data protection, privilege and the duplication of work for legal representatives between the use of their own internal case management system and any API.

We consider the below factors to be key costs issues associated with a digital system and API:

- Electronic bundling, for hearings and Trials from paperless case management systems is a significant time-consuming exercise with high associated cost – could a centralised API avoid the requirement or lessen the burden? This would create opportunities for significant costs savings both for professional users and the courts
- Security costs associated with hacking risk and data breaches are likely to be significant
- Storage costs – data storage requirements are likely to be considerable
- Required investment and continued investment for legal representatives to ensure processes and case management systems are compatible/harmonise with any developed API

3.2 WHAT IS THE IMPACT ON COSTS OF PRE-ACTION PROTOCOLS AND PORTALS?

- **It should be acknowledged that often the desire to encourage early settlement, requires an approach that often front loads costs.**
- **Fair setting and maintenance of pre action costs will encourage engagement.**
- **Fair setting will also better enable funding options and contractual retainer terms that reduce the growth in client deductions.**
- **Greater sanctions need to be imposed on those who fail to comply with pre-action protocols and portals. Failure to comply often increases the costs burden on the opponent.**
- **Pre-action protocols should provide an automatic pathway for the recovery of legal costs in all personal injury matters and/or other matters that would require the intervention of the court in the absence of agreement, with a simplified procedure for costs resolution.**

In the personal injury sector, the right to recover pre-action costs is only provided in limited circumstances by reference to fixed cost regimes as enshrined in CPR 45. More generally, there is no automatic right to the recovery of costs where cases settle pre-litigation.

However, it has become common place, to the extent of being accepted custom and practice, in personal injury litigation, for pre-action settlements to encompass an agreement to pay legal costs failing which there is no agreement and proceedings become necessary.

We propose that in personal injury litigation, this approach ought to be codified to simplify and set the expectation that costs will be paid for a pre-litigation settlement between the parties and to simplify the requirements of the Part 8 procedure or provide an alternative, simpler, originating process enabling assessment of costs.

We recognise that in some practice areas, particularly commercial litigation, such an approach may not be appropriate. The safe space, created by the absence of an automatic right to costs, may be an invaluable tool in encouraging commercial parties to negotiate terms. Often, other significant commercial considerations such as preservation of relationships and reputation may militate against automatic costs consequences.

3.2.1 IS THERE A NEED TO REFORM THE PROCESSES OF ASSESSING COSTS WHEN A CLAIM SETTLES BEFORE ISSUE, INCLUDING BOTH SOLICITOR AND OWN CLIENT COSTS, AND PARTY AND PARTY COSTS?

- **As above, we consider that any reform here should focus on the provision of a direct route to costs assessment, without the requirement for the duplicative costs of separate originating proceedings such as Part 8 proceedings.**
- **The ability to issue matters directly for assessment without the additional costs of Part 8 would benefit the clients and significantly reduce the burden on the court service.**
- **It is extremely rare (less than 1%) where a paying party will dispute the right to assessment.**
- **Alternatively, a much-simplified part 8 procedure that does not rely on evidence of agreement and avoids the potential for dispute could be achieved if pre-action resolution**

in personal injury litigation included an expectation to pay costs in the absence of agreement.

In personal injury litigation, represented parties ought to have the certainty that a pre-action settlement will result in some form of costs payment as contribution and that all damages will not be eroded. A clear signpost in the pre-action protocols that costs will be provisionally assessed in the absence of agreement with the court procedure being redrafted to avoid the additional required expense of separate part 8 proceedings would reduce the costs of resolution and the duplicative burden on the clients and court service.

However, on a Solicitor Client basis, particularly in the personal injury sphere and with associated fixed costs highly relevant, it is necessary to appreciate that a solicitor charging their client for work done prior to the issue of proceedings is distinct and separate from the dispute between the parties.

Any rights to assessment are governed by the Solicitors Act 1974 and the legislative framework applicable to the type of retainer entered between the solicitor and client. It is exceedingly difficult, without a substantial redraft of the Solicitors Act to determine how a solicitor client protocol might be achieved.

We consider that an appropriate change to the CPR directing that Solicitor Client costs disputes arising from a pre-action settlement ought first to be dealt with by a form of Solicitor Act provisional assessment may be helpful. However, we note with caution that this could invite spurious challenges to solicitor charges without adequate safeguards in place. To counter this, we feel that it is or ought to be permissible to allocate very low-level solicitor client claims to the small claims track under the courts general case management powers. That would discourage the taking of very low-level challenges without undertaking a genuine cost benefit analysis for the benefit of the client, without exposing them and solicitors to significant costs risks, by those promoting such cases and offering indemnity. In any other sphere of litigation such low level claims would not be permitted beyond the small claims track.

3.2.2 WHAT PURPOSE(S) DOES THE CURRENT DISTINCTION BETWEEN CONTENTIOUS BUSINESS AND NON-CONTENTIOUS BUSINESS SERVE? SHOULD IT BE RETAINED?

- **Currently the relevance of the distinction between "contentious" and "non-contentious" business remains important due to the different legislative regimes that may become engaged.**
- **It is fundamental that certain types of retainers are not permissible for contentious business.**
- **Changing the definitions to remove or change the distinction without any transitional provisions would potentially invalidate currently legally enforceable funding agreements.**
- **However, we would endorse a re-definition of what constitutes contentious and non-contentious business based on the nature of the instruction and whether it arises from a dispute and not a technical distinction that changes with the issuance of proceedings.**

We acknowledge that the current definition of contentious business significantly pre-dates the invent of the Pre-Action Protocols and Portals. We suggest that where legislatively possible, the definitions of contentious and non-contentious should be updated based on the proposition that the Pre-Action Protocol/Portal phase will be a seamless transition into the litigation/court system (any distinction by reference to the issue of court proceedings ought to be avoided). We propose for consideration.

- **Contentious Business** – The provision of legal services arising from a dispute between persons or entities, which would require adjudication by an appropriate court or tribunal in the

absence of earlier resolution, whether or not originating proceedings and adjudication are required.

- **Non-Contentious Business** – The provision of all other legal services, not otherwise defined as contentious business.

The fact that current pre-action protocol and portal work is widely considered non-contentious but is then reclassified as contentious upon the issue of a claim form, is a technical distinction that only gives rise to confusion. As has recently been explored before the Court of Appeal in Belsner v Cam Legal Services. Whilst it does permit an opportunity to engage in alternative methods of funding that may not be available once litigation has commenced. It has no other impact that we can evidence or that a consumer would readily understand and comprehend.

However, the implications for removal of this distinction could be considerable. Many solicitors across the country may have entered non-contentious business agreements with their clients for pre-action work, which may be rendered unenforceable should definitions shift or be removed without transitional arrangements.

Non-contentious contingency fee arrangements can provide the certainty and fairness that both the legal representative and consumer are searching for in a way that cannot currently be achieved within contentious business as currently defined. We urge, reconsideration of funding methods for contentious business. It is our assessment that in the context of modern personal injury litigation, the concerns and safeguards against champerty are no longer as relevant as they once were.

4 PART 4 – CONSEQUENCES OF THE EXTENSION OF FIXED RECOVERABLE COSTs (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).

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 extension of fixed recoverable costs to a broader range of cases, including cases of value up to £100,000.00 will reduce the scope of cases to which costs budgeting and a consideration of the guideline hourly rates will be relevant on a between the parties' bases.

In terms of costs budgeting, subject to our above proposals, we do not consider this to be problematic as the details and requirements of each individual claim will still be the subject of consideration and assessment. It is arguable that as lower value matters are removed from costs budgeting, the need to control proportionality through costs budgeting is eroded as claim values increase.

However, we do consider that the extension of fixed recoverable costs could impact upon the validity of the Guideline Hourly Rates as they appear to be set currently. By removing the tranches of cases that were arguably the sort of cases upon which the Guideline Hourly Rates were based, it will further impact the courts' ability to monitor, understand and reflect market rates without alternative methods of achieving this.

The Guideline Hourly Rates have historically suffered from a lack of empirical data as to the true costs of running personal injury claims. As lower value and less complex cases are removed from the spectrum of cases which the courts have the opportunity to scrutinise, the position will be exacerbated and accordingly the ability to reflect market rates will be further restricted.

Unless Fixed Recoverable Costs also have a mechanism in place to review them and keep pace with inflation, then their value will continue to be constantly eroded to the significant detriment of consumers. We will see limited choice, as firms exit the market and/or consolidate. We will continue to see an increase in deductions from clients' damages as the disparity between the costs required to undertake the work and the contribution that paying parties are required to contribute widens.

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.

- **Extending fixed costs, will exacerbate solicitor client challenges, moving the burden for resolving costs disputes from one area to another.**
- **The Solicitors Act 1974 must be for purpose as part of any extension of fixed costs.**
- **The importance of the role of third parties (counsel and experts) in the administration of justice and their ability and/or willingness to support cases subject to fixed costs, must be established.**

The ever-increasing number of solicitor client assessments and the significant costs associated with the extremely technical legal challenges and appeals has seriously damaged the appeal and effectiveness of fixed costs as a principle. It was an accepted policy intention that clients would be required to contribute to costs and that such a requirement would have effect on establishing market control.

However, many of the current challenges are not based in equity, they seek to expose otherwise fair and appropriate bargains to overly technical hazards and are more reminiscent of the "CFA Costs Wars". Even a cursory consideration of the extension of FRC's to other practice areas ought to acknowledge the complexity of the solicitors' act and the need for fair remuneration. It should address how consumer protection can be secured without also being abused on technical grounds such that access to justice is not eroded by lawyers avoiding various work types because of the complexity and prevalence of own client costs disputes balanced against low recoverable between the parties' costs.

It is also likely that extension of FRC's will encourage more vulnerable consumers in need of money, often seduced by the promise of costs reduction without any risk, to a very real exposure of a considerable costs risk. The burden on the profession and court service in dealing with these disputes is in large parts a very direct result of Fixed Recoverable Costs.

We not advocating for clients' rights to be eroded in any way. We are suggesting that the impact of extended FRCs will further increase activity in this area. Very careful consideration ought to be given to remedying the issues in relation to the complexity of the Solicitors Act 1974, as part of the interlocking landscape and any intention to further the use of FRC's.

We understand that experts, counsel and agencies are all very concerned with the proposals for FRC's. For a well-functioning civil justice system all stakeholders need to be adequately remunerated.

The expertise and independence of counsel in reviewing matters afresh and advocating before the courts is invaluable to clients, legal practitioners and the courts. Failing to explicitly provide for the use of counsel as an additional fee, with an appropriate review mechanism will greatly harm the administration of justice over time.

Similarly, failing to review medical experts' fees is unsustainable with many experts and agencies choosing to exit the market. Expert evidence is often the foundation on which resolution is achieved. If experts continue to exit the market and counsel cannot be adequately secured the amount of time taken to resolve cases will lengthen considerably, as cases will inevitably be delayed.

Overall, we have no doubt that the extension of the fixed recoverable costs scheme will most heavily and disproportionately impact those consumers with meagre economic resource and those with protected characteristics such as disability or other health issues. A key component of damages in many cases is the claimant's income, and the presence or absence of a loss of earnings claim is often the key driver for a claim for future losses. This means that two claimants may have the same injuries but, if recoverable costs are similar, one will suffer far more damages erosion.

Whilst fixed costs are known to be a blunt instrument, they discriminate, particularly against the elderly and women, who as a result of the wage gap, are likely to have a lower loss of earning claim. This effect is even more pronounced for the disabled and minority groups who experience an even bigger wage gap. The extension of the fixed costs regime will result in the most vulnerable receiving a lower proportion of their damages

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.

We do not feel qualified to comment on issues that do not fall within our specific area of expertise.

However, we instinctively feel that the consequences of costs capping, particularly for small businesses with a legitimate claim, will likely be an erosion of damages as has been the case in the personal injury sector. Capped or fixed costs do not generally equate to reasonable costs. Given the current state of the economy it seems inconceivable that Fixed Costs should be extended in the areas top which they apply or other areas.