CJC costs working group- consultation paper

Strategic review of cost

A response by the Association of Personal Injury Lawyers

October 2022

Introduction

APIL welcomes the opportunity to respond to the Civil Justice Council's (CJC) strategic review of costs. APIL has been committed to injured people for more than 30 years. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics, who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. In putting together this response we have drawn on the experience of practitioners from a range of specialisms, including lower value claims and catastrophic injury claims. We have also heard from procedural specialists, costs specialists and those responsible for implementing change within their practices.

We support the retention of costs budgeting but have proposed a revised regime that aims to deliver the benefits of costs budgeting but with less delay, court time and cost. We believe that this is a fairer way of controlling behaviour and spend whilst still ensuring that the parties are put on an even playing field. We propose a 'default off' procedure whereby the parties' exchange budgets, but there is no requirement for there to be discussions about whether they are agreed or not, and there are no default costs management orders. We recommend in our paper that this process should apply to all cases over the fixed costs threshold. The budget would be based on and would be filed with the court, along with each side's proposed directions. A judge will then consider the budgets, in light of the directions proposed by all parties and make a decision whether or not a costs management hearing is required.

Guideline Hourly Rates (GHR) provide a benchmark/guidance as to what is a reasonable allowance between the parties when claiming costs and should be retained. Having said that, we believe that it is crucial there is an inflationary increase at the same time every year. We support the proposal in the CJC interim report on GHR, namely that the figures are uprated by the Services Producer Price Index (SPPI), specifically the SPPI legal services indexation, annually. We urge this CJC review group to recommend that the annual uprating of figures take place now (because if delayed it will have retrospective effect for 2022) with a full review every 10 years. That full review should consider not just what costs judges allow, but it should also look at the question of what rates were actually claimed, because GHR are intended to reflect the real market rates, the average price actually paid by litigants.

APIL can see considerable advantages to digitisation, however, digital reform is complex and historically has not been a great success in the PI sector. As the most recent reforms in the low value road traffic accident space and online courts show. Digital technology has the potential to make justice systems more accessible and efficient, it can help with procedure,

but it should be borne in mind that this type of litigation is not straightforward, every claimant's injury, treatment, recovery and related losses are different, especially once you get into complex injuries in the multi-track. It is crucial that reforms have a user focused approach, they are inclusive and when necessary, users are assisted. Reform should focus on the user's needs, learn from their experiences and be rigorously tested. There is also the need for greater consideration to the hidden cost of reform for solicitors implementing these systems. There are technical work streams and IT work streams that have to be looked at and these costs are not limited to initial outlay, they impact the business every time there is a change to the IT platform or process.

Part 1- Costs Budgeting

During this exercise APIL gave considerable thought to the question 'what do we want instead?'. We believe that there should be a change to the present system. We do not believe that the answer is fixed costs for the reasons we set out below, namely that they do not reflect the significant differences in individual cases for complex injuries. We have looked at the issues with budgeting, namely, the rigidity in the process, lack of court time, and the inconsistency in judicial approach and compared this against the benefits. We concluded the process needs revision. We have proposed a new regime, which in our view, will deliver the benefits of costs budgeting but with the benefit of reduced cost and time.

The consultation poses the question whether costs budgeting should be retained and whether it is useful. The debate at the CJC event in July demonstrated that there was still a lot of inconsistency in approach as to how budgeting was dealt with by the courts. Users felt that the current model provided some benefits to consumers around anticipated spend but was very time consuming for all parties involved in the process. Our members have seen considerable delays as a result. In the King's Bench Division of the High Court, it is not unusual to see delays of six months and in some cases even twelve months.

APIL is not opposed to the control of costs in the personal injury claims process, but the rules around costs should act as a leveller between the parties, helping to put them on an equal footing. We also agree that there needs to be some transparency in spending, and that it is essential that any system has something in place to deal with costs management fairly and effectively. We do not, however, believe that further extension of the fixed costs regime is the right answer. Fixed costs allow the better resourced party to deploy whatever costs they want, against the less resourced individual. In the multifaceted world of complex injury claims budgeted costs are a fairer way of controlling behaviour and spend whilst encouraging transparency and putting the parties on an equal footing. APIL has consistently pointed out that personal injury litigation (including clinical negligence) is not formulaic. All cases involve individual victims who have been harmed as a result of someone else's negligence. These are often cases involving multiple and interrelated issues around liability, causation or contributory negligence. In some cases, there will be significant evidential issues, multiple experts, limitation arguments and complexities around future loses. In the worst-case scenario, the death of a child. Personal injury and clinical negligence cases can often be changing and unpredictable. Particularly in cases involving significant injuries, the treatment can be on going for years and new or different losses often arise later in the claim. This can create multiple rounds of experts' reports and rolling disclosure, which incur additional costs. These individual differences do not work within a fixed process, which is a

necessary prerequisite of a fixed costs system. Fixing costs and a related fixed cost process would be very difficult and extremely unattractive to victims of negligence who have sustained complex injuries.

Instead APIL proposes a system whereby costs are budgeted, rather than fixed, for the reasons given above. The benefit of costs budgeting is that the parties have the visibility of the costs in the claim. It also allows the court to manage the process, when necessary, in order to further the overriding objective of dealing with cases justly and at a proportionate cost. In personal injury cases this type of costs budgeting also recognises that costs are not a "one size fits all" model and this is a fairer approach.

APIL's proposal

We propose a 'default off' procedure whereby the parties' exchange budgets, but there is no requirement for there to be discussions about whether or not they are agreed and there are no default costs management orders. This process should apply to all cases over the fixed costs threshold. The budget would be based on and would be filed with the court along each side's proposed directions. A judge will then consider the budgets, in light of the directions proposed by all parties and make a decision whether or not a costs management hearing is required. If it is not required, the budget will then be taken into account at the end of the case when the party comes to claim costs. If the directions made by the court differ to those assumed by the party filing the budget, then the court should have the option at that stage to require the parties to file revised budgets matching those directions. The current Civil Procedure Rule at 3.15 could read,

> (1) In addition to exercising its other powers, the court may manage the costs to be incurred (the budgeted costs) by any party in any proceedings.
>
> (2) The court may at any time make a 'costs management order'. Where costs budgets have been filed and exchanged the court **may make** a costs management order **where it is not satisfied** that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made.

The advantage of 'default off' is that it preserves fairness to both parties and the key benefits of costs management are retained, but significantly simplified. The process ensures that the parties are aware of the scale of costs attached to the litigation, the judge can consider the budgets and directions being proposed but it removes the considerable delay, court time and cost of lengthy costs management hearings. It is envisaged that a similar lighter touch approach would be replicated for varying budgets. If the judge believes there may be proportionality issues with the budgets (or varied budgets) a costs management hearing can be listed either alongside or preferably after the case management hearing so that the directions and related budget assumptions are known. This would significantly reduce the delays associated with costs budgeting and the conflict around whether cost or case management comes first.

The process would also largely preserve the benefits and ease of determining appropriate payments on account of costs following settlement or judgment. Our members' experience is

that such payments drive settlement of costs at conclusion of a case reducing the additional costs, time and demand on court resources of contested costs assessments. There is also the added benefit where if the case does go to detail assessment, costs budgets have been exchanged and where necessary amended all with the endorsement of a statement of truth.

When a costs management hearing is required, we would like to see more consideration by the judiciary of what is required for the consumer to pursue their claim. In some claims there is too much emphasis on proportionality rather than what work is required to bring a claim.

We would also like to see more judicial training. We believe that consistency in approach is important and that training would greatly assist with this. Practitioners have become experienced at budgeting and their feedback should form part of the training provided by the Judicial College.

Further considerations

There is currently a disparity between how vulnerable claimant's cases are managed. A child brain injury and an adult brain injury case are dealt with differently. Child brain injury cases are currently not subject to costs budgeting, however, in adult brain injury cases, costs budgeting remains, although there is a recognition and discretion in the rules to disapply costs budgeting. Our members report that this is not applied regularly by judges and can lead to restrictions on the work required in the case. We believe that there needs to be more consistency in approach for vulnerable claimants generally. It is important that those that require additional protection are not turned away by solicitors who advise that their cases are not financially viable to run. Equally, lower value multi track cases (abused dementia sufferers for example or delay in diagnosis cases), may be told their cases are disproportionate to pursue.

There is also some confusion following the Senior Courts Costs Office (SCCO) practice note and recent cases in the SCCO which suggest that litigation friends may be unable to give informed consent for work to be done in excess of the budget, even if such work is in the best interest of the client. We would suggest that this is something that the CJC or CPRC should give consideration to, as further guidance is urgently required. In the meantime, we propose that the courts do not make Costs Management Orders in any protected party cases.

Finally, as part of these additional considerations, whilst work is being done to modernise budgeting and to make it fit for purpose, we would ask that the phases are looked at to ensure that they fit with the work that is actually being undertaken in personal injury cases. It is important that the phases fit with the work required. One area that has caused difficulty for our members from the outset of the budgeting regime is rehabilitation. Rehabilitation is acknowledged as being a crucial part of the injured person's recovery[1]. Certainly, in more complex injury claims, claims for treatment and rehabilitation can be a major part of the claim. There is currently no defined PTA code to record that work and for serious injury clients this leads to significant inconsistency around what is and what isn't allowed by the

[1] The Rehabilitation Code is an agreed framework between claimant and defendant representatives to promote early rehabilitation and intervention.
https://www.iua.co.uk/IUA_Member/Publications/Rehabilitation_Code.aspx

court when making Costs Management Orders. In the cases where no, or little, allowance is made for rehabilitation costs the seriously injured claimants end up either:

a) bearing those costs out of their damages (which leaves them short of funds to apply those damages to meet their needs as intended) or,
b) reducing the focus on rehabilitation that can impede their recovery to the detriment of them and of the paying party (as the damages award would then likely be higher).

Part 2- Guideline Hourly Rates

We support the retention of GHR. There is still an important role for a published benchmark and guideline for hourly rates in civil litigation. Whilst they do not reflect the market rate actually paid by litigants, they do provide an indication of the start point for what is a reasonable allowance for costs between the parties. GHR are not scale figures nor are they a cap. An important feature that is made clear at paragraph 29 of the accompanying judicial guide, is that:-

> 29. In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note (a) that these are only examples and (b) they are not restricted to high level commercial work, but may apply, for example, to large and complex personal injury work.[2]

Setting the rates in the future

It is crucial that there is an inflationary increase at the same time every year, to prevent the 11-year freeze experienced between 2010 and 2021. We support the proposal in the CJC interim report on GHR that the figures are uprated by the Services Producer Price Index (legal services) (SPPI) annually. SPPI reflects changes in the prices that law firms are able to charge other businesses, government, non-profit institutions and recently consumers. We urge the CJC to recommend that the annual uprating of figures now takes place. We do not believe that should be controversial. The data on which the last increase was based is already out of date[3], there has been no increase for 2022 and there is a danger that the rates will become quickly out of date again if action is not taken. We would also suggest that the indexation should kick-in early at certain times when the inflation has increased over a certain percentage. It is essential that indexation is not overlooked.

[2] Guide to the Summary Assessment of Costs 2021 Edition. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022598/2021_-_Guide_to_the_Summary_Assessment_of_Costs.pdf

[3] The cost assessment bills in the data set gathered by the CJC for the 2021 review would on average have been drawn 12 months before the date of assessment. Working back from the mid-point of the data period would take us to January 2019. Hence there is already an additional 3 years of inflation to account for.

Once that happens then we take the view that a full review, to consider the ongoing role of the GHR and ensure they have not fallen out of kilter with market rates, need only take place once per decade.

Methodology

A full review of GHR should take place every 10 years. It should consider not just what a judge has allowed, but also what rates were actually claimed. An individual that conducts himself in a reasonable manner throughout litigation should be able to recover reasonable costs for pursuing their claim and should not have to pay a significant amount of costs out of their damages. To have procedural rules that prescribe otherwise undermines the principle of full compensation and can even reduce access to justice. So, what the review should consider is not just what costs judges allow, because they make assumptions about what is a reasonable rate between the parties, but it should also look at the question of what rates were actually claimed and what was allowed. GHR were intended to reflect the real market rate, the price actually paid by litigants, but do not currently do so.

There are some who advocate reverting to a cost of time review, surveying practitioners on the expenses of the legal practice, namely the number of fee earners in that practice, the chargeable hours and profit margins from firms at a local level. We firmly believed that such an approach is incorrect and would fail. The purpose of the GHR is to provide an average figure for what the market is charging at the time. It provides information on what litigants pay for their legal services and how much is recovered, reverting to costs of time would not provide this, instead it would look at the expenses and attempt to set some arbitrary profit margin for law firms. Further, obtaining the data is not practically achievable, which was accepted by the CJC reviews in both 2014 and 2021. GHR are intended to reflect a real market rate so salaries and cost of office space, investment in IT do not answer the question of how much is the average litigant is paying for the representation they need.

At the CJC event there were calls to review the rates due to changes in business practice post Covid. Businesses are still very much in a state of flux. Firms still have premises to run etc and the suggestion that remote working has reduced fees that should be passed on to consumers is misguided. Very few firms have switched to fully remote working and most are encouraging their staff to work from the office for at least part of the week. We are also in a considerable period of economic uncertainty, which may make office working work attractive again. Any change is not likely to be immediate but more of a gradual change overtime. There is, to our knowledge, no reliable evidence to the effect that the majority of law firms have reduced their office space. Anecdotal experience suggests otherwise. Expenses to firms may have actually gone up in the short term as there has been a greater reliance on IT, and staff have required adaptations to successfully work from home. There are also the considerations for wages and price inflation that will inevitably put pressure on most firms to increase their rates. There is a greater use of technology but face to face hearings and meetings with clients will continue, meaning firms are likely to want to stay in similar locations in order to be able to meet with clients.

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

Digital justice

APIL can see considerable advantages to digitisation, increased efficiency, and better outcomes for clients to name just two. However, it must not be assumed that digitisation makes obtaining compensation easy. It can help with the processing but the issues that arise in individual cases, such as causation, calculation of loss and liability disputes, to name a few, are not always straightforward. Every claimant's injury, treatment, recovery and related losses are different, especially once you get into complex injuries in the multi-track.

Historically, legal IT projects have been plagued with problems and two of the most recent projects in the personal injury sector provide evidence of just that. The introduction of the Official Injury Claims Portal (OICP) and Damages Claims Portal (DCP) warrant analysis and review in their own right. We could and should, learn from these projects before further digital reforms are recommended.

The implementation of the OICP provides useful lessons, which if learned will improve the rollout of the future digital platforms. There is significant discontent amongst claimant representatives, who believe that the operation of the new system has disadvantaged individual consumers. The maturing data in relation to the OICP is now starting to evidence a reduced proportion of claims settling, claim delays, and fewer claims reaching court. The process was introduced prematurely, as a result of political pressure in relation to associated elements of the whiplash reforms. The result was that the system was not fit for purpose at go live. Professional users, who represent more than 90% of consumers, have encountered problems at every stage of the process. See case study of issues in appendix one.

The OICP implementation process has meant that consumers have had their claims delayed. Delay denies justice. It leads to consumers accepting under-settlement of their claims, to avoid waiting for the claim to run through the process to secure the correct award. Despite the system being designed for litigants-in-person, just 9% of claims submitted to the portal were made by unrepresented claimants [4]. The key question that has not been addressed as part of these reforms is what happens to those that cannot access a lawyer or the system. 137 claimants have accessed the paper claims process for the OICP and this is only about 0.05% of claims submitted. The evidence that so far exists does not strongly support the extension of digitising claims beyond the least serious claims and in fact raises real concerns about whether digitising even these types of claims meets consumer demand.

There are several considerations that are crucial to digital reforms,

- There must be proper engagement with the profession.
- Extensive user testing.
- User feedback from a range of stakeholders affected.
- Full integration with law firm's systems.
- Reform must not be piecemeal.

[4] Official Injury Claims, claims data 1 April 2022 – 30 June 2022.

It is also important to recognise that there is already significant work being done in many interlocking areas at the moment, fixed recoverable costs, a review of the pre-action protocols, alternative dispute resolution and the court reform program. It is essential that reforms are approached in a co-ordinated way. All of those areas are interconnected and there is a significant risk of unintended consequences if this is not the case. It is unacceptable for poor technological advancement to be pushed on the sector. Claimants in the OIC can only pay on issue fee by way of cheque. Similarly, if you use the DCP, you have no access to a pre-emptive Help With Fees application. These create barriers to justice.

The DCP reforms have been plagued with problems and we have two IT solutions in the personal injury sector that cannot interconnect. If a claimant wishes to issue court proceedings after progressing through the OICP, one system concludes and a new process in the DCP has to be commenced. All of this is time-consuming and illogical.

Digital technology has the potential to make justice more accessible and efficient. However, ensuring access to justice for all is a huge challenge, one acknowledged by Lord Justice Briggs in his review of the civil court structure. Justice includes access to information, advice and remedy, whether that be through the court or another means. It is essential that digital exclusion is tackled head on. Whilst the trend is towards digital capability, we are not yet in a position where such systems are easily accessible to all. It is crucial that reforms have a user focused approach, they are inclusive and when necessary, users are properly assisted. Reform should focus on the user's needs, learn from their experiences, and provide significant investment to do that. There also needs to be engagement with all affected parties.

There also needs to be greater consideration to the hidden cost of reform for solicitors implementing these systems. There are technical workstreams and IT workstreams that have to be looked at and these costs are not limited to initial outlay. They impact on a business every time there is a change to the IT platform. Solicitors attempting to integrate with the OICP, and their technology suppliers, have had to wrestle with 16 months of additional development and rectification work, beyond the initial build costs. The additional cost is substantial and as a result has seen a contraction in the number of law firms able to offer the service to consumers. These additional costs are not only borne by claimant representatives, but apply equally to insurers and the MIB. Launching too soon dramatically increases the costs for all stakeholders.

The pre-action protocols

There are significant advantages to retaining flexibility in the pre-action space that should not be ignored. Currently it isn't over regulated, the parties have a degree of flexibility about how the issues are resolved. The ability to have discussions and resolve cases through informal dispute resolution is key. Some litigants may even be put off from making their claims at all if the process was perceived by them as complicated or onerous, with an adverse impact on justice. Regulation might sound attractive but it could easily have unintended consequences of pushing some cases to litigation that might otherwise have resolved pre-proceedings. Experience suggests that attempts at regulation or prescribing fixed processes can often cause a front-loading of costs. Members suggest they have very few cases that settle pre-

action going to Detail Assessment, suggesting considerable collaboration on both sides. It also suggests there is no real problem to fix here.

There will be calls from some quarters to increase control in the pre-action space. Our recommendation is that the existing protocols for personal injury claims remain fit for purpose but sanctions for non-compliance within those protocols need to be applied more frequently once cases are issued. So, if a defendant, for example, has not responded as they should have done on pre-action disclosure there should be a real sanction for non-compliance once the case is issued. Another example is that if a defendant failed to provide a detailed reply to the letter of claim, forcing the claimant to commence court proceedings, then the court ought to have a discretion, for instance, to make an interim costs award for the defendant to reimburse the claimant for the court fee. The additional benefit to this is that the parties (and their legal teams) will in future cases take compliance with the protocols more seriously.

Sanctions for non-compliance

We would also suggest that the Directions Questionnaire is enhanced, so that it is not just a tick box, which in our members experiences is often answered in the affirmative by defendants who have not on any objective basis truly complied with the protocol. Confirmation of the date on which the party complied with each aspect of their obligations under the protocol would tie in neatly with the idea of digitisation. Non-compliance could then be linked to an order, for example, for costs.

Contentious and non-contentious business

We agreed there is a need for change, the Solicitors Act 1974 is outdated and does not reflect modern practice. There is however, the potential for many unintended consequences in reforming this area. It is not something that should be decided in civil justice alone and there would need to be a full consultation with the wider profession on this before any change is implemented.

Part 4- The consequences and extension of FRC

Fixed recoverable costs can work for lower value cases where they are predicated on a fixed process. However, APIL members are now finding that fixed costs do not reflect work required, even on a swings and roundabouts basis, where the process is not fixed and where work required even within what was an established process changes, and increases, over time. That problem is compounded by fixed costs having not been reviewed or uprated.

The low value RTA, EL and PL rates have remained frozen for nearly a decade and that is unfair to consumers. The rates are not adequate for the work required to be undertaken and given the considerable delay in reviewing them, consumers are seeing further deductions from their damages to make up the short fall between the work that is required to be done and the costs recovered from the at fault party. We have proposed above an annual uprating of GHR indexed to the SPPI legal services inflation rate. It cannot be right that GHR are uprated yearly but all FRC are not. We strongly recommend that the same is implemented

for all FRC, not just those that are due to be implemented in 2023. All rates need to be reviewed and uprated, there also needs to the a mechanise for uprating the figures early at certain times when the inflation has increased over a certain percentage.

One market expert has recently expressed his concern about the proposed fixed costs due to be implemented in April 2023. The article seen in the Law Society Gazette[5], suggested that the clients' contributions will have to be much higher to cover the solicitor/ client shortfall in respect of unrecovered profit costs and success fee, if firms are to remain profitable. Such a position is alarming for injured people, their damages are carefully calculated to cover the past and future loss, this would significantly undermine the principle of full compensation and create a barrier to justice. A review is long overdue.

[5] Law Society Gazette, Firms must deduct 50% from damages to survive fixed costs extension. Dated 20 September 2022 https://www.lawgazette.co.uk/news/firms-must-deduct-50-from-damages-to-survive-fixed-costs-extension/5113705.article

Appendix 1
Digital Claims Platforms - Case Study - OICP

Some professional users, who represent more than 90% of consumers, have encountered problems at every stage of the process. For example:

Initially Small Claim Notification Forms would be rejected because:

- The National Insurance number included a space.
- The document included hyphens, apostrophes or special characters.
- The accident date/time included a number “5”.

They also had issues submitting details of the claim:

- Uploading the medical report would fail because of the naming convention applied to the pdf.
- The process for uploading loss documents would fail, seemingly at random.
- Communications would be sent but not received.

As cases progressed towards settlement:

- Offers would be sent by the insurer but not received by the claimant.
- Where received, the offer would often be in a different amount than intended.
- Where negotiations were unsuccessful, there would often be no option to move to the case forward into the court process.

Once draft proceedings were created:

- The insurer address would be inaccurate.
- The issue fee would be calculated incorrectly.
- The wrong damages numbers will be pulled into the court pack.
- We are ordered to file documents that the system has not produced.

The above is not a full list of issues. It is in illustration of some of the problems that have arisen. The nature of the process is that there been a high number of technical and operational problems, some of which are minor and some significant. The majority of claimant law firms have been unable to successfully integrate with the new Portal, impairing justice for the more than 90% of consumers who still need assistance with the process.

The OICP provides an excellent example of the importance of proper planning, testing and communication. Many of the technical points outlined above were not communicated to the users prior to implementation. The OICP shows the importance of effective user engagement. It is essential to engage users pre-launch and on an ongoing basis, to fully test all the technical elements.

There should be a formal structure for stakeholder feedback. It is not sufficient simply to advise users what the process or changes will look like. Those elements should be informed by user feedback, to best understand and provide feedback on the downstream and customer impact.

There should be transparent data provision, that demonstrates the success or otherwise of the system. System integration is also key. Many (if not most) claimant representatives have had difficulty integrating with the OICP, and it does not link to the court service.

All of these requirements need to be ensured through an effective governance framework.

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