CJC Costs Consultation

Keoghs response to consultation - Oct 2022

About Keoghs LLP

Keoghs is the only top 100 law firm to focus exclusively on handling and defending both mainstream and specialist insurance claims. We offer an end-to-end claims service to insurers, public sector bodies and self-insured companies which includes pre-litigation, litigation and costs negotiation services. Keoghs acts for eight out of the top ten UK general insurers, and with almost 1,800 dedicated staff, is a recognised leader in its field. In the last 12 months, we handled approximately 100,000 claims across all classes of personal injury claim.

Executive summary

Keoghs recognises that access to justice and consumer protection for all play a vital part of the rule of law in a democratic society and that affordability is fundamental to such access. With this in mind we have considered and now respond to the consultation questions.

From a personal injury perspective, we consider the benefits of costs budgeting significantly outweigh the increase in cost and the amount of judicial resource needed. The visibility, certainty and consumer protection it provides facilitate early settlement thereby saving costs for the parties and the need for judicial intervention further along the procedural track.

The abolition of costs budgeting will place us back 10 years where it was accepted that access to justice was limited by disproportionate cost. One way disproportionate costs may be avoided is to increase range of claims that are subject of the FRC regime. This is intended for claims with a value up to but not over £100,000 but should be extended further. We recognise this is not within the remit of this working party and will require data collection and another consultation in the future.

The only viable option is to refine the existing cost budgeting regime to achieve targeted objectives. In our response, we set out a package of interlocking changes designed to

- Increase budget agreement;
- Reduce cost of costs budgeting;
- Minimise judicial intervention;
- Increase consistency of approved budgets;

We consider the this package of changes will provide access to justice as well as provide much needed protection for consumers of legal services.

There is a need for a new beginning for hourly rates. We consider GHRs are the problem and not a solution. They are the root cause of uncertainty and inconsistency in costs management and costs assessment. They generate frictional

litigation between the parties that eats up judicial time on listening to submissions and assessing the hourly rates one party may recover from another.

We propose replacing GHRs with Fixed Hourly Rates (FHRs) as an exception to the indemnity principle. Fixing the hourly rates a party may recover from another will provide certainty and consistency the parties and their representative need. It will improve visibility and access to justice. They will increase settlement of costs disputes and reduce the need for judicial intervention.

The mechanism for setting and changing them must be transparent and independent of those with a vested interest in there amount. We propose a Rates Inquiry Committee (RIC) is created to set the initial FHRs and to identify an appropriate indicator or package of indicators against which the rates move on an annual basis. The RIC should have similar powers to the committee created to review the personal injury discount rate under the Civil Liability Act 2018.

In principle, digitisation of dispute resolution has the potential of reducing friction, reducing life cycles and thereby reducing costs. However, from our own experience of IT infrastructure projects, digital transformation has the potential to increase costs and complexity of the end user where the transformation team do not consult, do not listen, or accommodate their needs.

End user representatives should be actively engaged in the creation of future court digital solutions to achieve savings for HMCTS through high quality and efficient digitisation whilst making them cost-effective to use.

PAPs should enable access to justice without lawyer involvement. They should be prescriptive as to the steps each party is to take whilst understanding of the fact significant expense is involved in taking some steps. Careful consideration of the point and trigger for costs shifting between the parties is needed.

They need to ensure there is equality of arms so that the process does not economically disadvantage a party preventing them from bringing or defending a claim. To that end, there needs to be a process of costs management and assessment within the pre-action space that contains costs to reasonable and proportionate levels.

If the PAPs do not achieve these aims, then satellite frictional litigation over behaviour as well as the substantive claim may well follow. Whilst we have made some broad proposals the “devil is in the detail” of yet undisclosed PAPs.

The extension of FRC will merely remove a tranche of cases from the regime of GHRs and costs management. It will not resolve the costs budgeting / GHR questions raised in the consultation or the proposals we set out in our response.

This consultation provides an opportunity for change for the better to be grasped firmly with both hands. We hope the working party considers the changes we propose as we believe they will reduce cost and judicial intervention whilst providing consumer protection and access to justice for all.

Costs Budgeting: Keoghs response

1.1 Is costs budgeting useful?

Annually, Keoghs handle over 3,000 multi-track personal injury, clinical negligence, professional negligence, property risk and coverage related claims. Consultations with the various sectors of our business confirmed, without reservation, Costs Budgeting is of considerable use and importance.

Visibility – saves costs and court resources

Prior to the introduction of costs budgeting, it is accepted fact that parties in civil litigation fought cases for many years, often to the death in court, without having any idea about the cost in terms of *“what will I recover in costs if I win”* and *“what will I be in for if I lose.”*

This unknown cost risk became a barrier to access to justice especially where case management and court directions narrowed the issues between them. The fear of the unknown costs risk had a paralysing effect on early and informed resolution

Costs budgeting provided much needed visibility of the amount of costs,

- Incurred together with broad detail of the extent of legal and factual investigations undertaken and evidence obtained;
- A party intends to incur together with broad detail of the cost of evidence a party intends to obtain and the costs of future phases in the proceedings;

The information contained within an approved budget is of obvious benefit to those making decisions about the future conduct of litigation, in particular for reserving.

It focusses the mind on future costs exposure and allows the parties to conduct a cost / benefit analysis of proceeding further along the procedural path. By way of example, comparing the cost of, say a further cycle of expert evidence, against the benefit that it may bring in narrowing the issues between the parties.

Visibility facilitates early resolution and reduces average claim lifecycle thereby saving costs and valuable court resource of a claim continuing further down the procedural track before resolution.

An analysis of Keoghs data shows a marked shortening of case life cycles except in cases involving an issue of principle such as fraud.

Incentive not to exceed an approved budget

Solicitors are in business to maximise the revenue and profit earned from each case in the course of advancing the interests of their clients. As a result, and as Lord Justice Jackson observed in his review of civil litigation costs, all too often the amount of costs incurred are unreasonable and disproportionate. With good reason, he cited the comment from Professor Zuckerman,

> *" All economic activity follows the most rewarding path. Lawyers are paid by the hour and have an incentive to do more work at each stage of the action. The client perceives that,*
>
> *(a) the cost of additional work will be recoverable if he wins and*
> *(b) the chances of winning are improved by undertaking yet more work.*
>
> *So the "ratcheting mechanism" forces costs ever upwards, unless incentives can be reversed."*[1]

Those who spend other people's money sometimes have a tendency to be over-generous, particularly when they are paying that money to themselves and expect the costs to be borne by their opponents.

As a result, lawyers draft budgets seeking approval of more cost than is needed to maximise the amount recovered from an opponent.

The costs management regime is critical to containing this "ratcheting" mechanism. It is the only way to change the incentive to focus lawyers to spend other people's money as if it was their own.

An approved budget provides much needed incentive to a lawyer to contain costs below the phase amounts approved by the court.[2]

[1] Preliminary Report, Vol II, Ch 48 para 3.23

[2] Preliminary Report, Vol II, Ch 48 para 3.23

It is the prospect costs non-payment for work done in excess of an approved budget that provides the incentive. Sadly, this incentive is weaker than it could be and is in need of review.[3]

Analysis of contested cost budgets

The table below shows analysis of Keoghs personal injury claimant budget data where we represented the defendant at a contested costs management hearing between 01/01/22 and 24/08/22.[4]

Contested budgets from 01/01/22	TP budget claimed £	TP budget approved £	TP Budget difference £	TP budget difference %
173	£51,024,718	£22,943,722	£28,080,996	55.03%

In all cases, the court made a costs management order because the litigation could not be conducted justly and at proportionate cost, in accordance with the overriding objective.[5]

The reduction of 55.03% is significant. However, it is important to understand that, more often than not, there were multiple reasons for the reduction, which are as follows:

- Reduced because the claim was budgeted on directions for a trial on liability only;
- Reduced/increased because different directions ordered than those sought;
- Reduced because the amount claimed was unreasonable and disproportionate in amount;

It is clear that different directions from those sought by the parties are a significant cause of contested budget hearings. Where directions were not in issue, budgeted costs are not agreed for the following reasons:

- Hourly rates – the contractual and estimated hourly rates applied in the budget were significantly higher than those likely to be allowed upon assessment;
- Hours – unreasonable and disproportionate hours claimed for the amount of future work;
- Disbursements – The frequency and amount of expert and counsel's fees are in issue;

For paying parties, the costs management hearing is the only opportunity to contain estimated costs to a reasonable and proportionate amount. The approved phase totals provide a limit to recovery on the costs that the lawyers want to incur and recover from unsuccessful parties, absent good reason for departure.[6] This provides a good measure of certainty for parties as to both the amount of their future costs risk and costs recovery.

Keoghs LLP consider costs budgeting to be of significant benefit and value to the parties. However, improvements to increase consistency and certainty as to the amount of budgeted costs approved save costs and court time.[7]

Detailed assessment

Costs budgeting has had a marked effect of reducing the frequency of contested detailed assessment hearings. In 2012, prior to the implementation of costs budgeting, over 3% of Keoghs' contested costs claims proceeded to a detailed assessment hearing. Whereas in 2019, less than 1% of contested costs claims proceeded to detailed assessment hearing. Whilst there are other factors in play, this 2/3rds reduction in detailed assessment hearings is due for the most part to the costs budgeting.

[3] See "Reinforce the incentive to work within an approved budget" in our response to 1.2 below.
[4] The anonymised data set can be provided upon request
[5] CPR 3.15(2)
[6] CPR 3.18
[7] See response to 1.2 below

It has also reduced the severity in terms of length of detailed assessment hearings. A significant percentage (approximately 48.7% from Keoghs' data) of costs in a bill of costs are budgeted costs. Unless a party satisfies the court there is "good reason" to depart from an approved budget, these budgeted costs are not subject to a line-by-line assessment.

It is rare that a party can satisfy the court that there is "good reason" and so in the vast majority of cases, there is a significant time saving because there is no need to assess budgeted costs on a line-by-line basis.[8]

This represents a significant saving in costs and court resource. The Association of His Majesty's District Judges, Regional Costs Judges and Costs Judges in the Senior Courts Costs Office can attest more accurately to the average saving in court resource needed in a budgeted compared to an unbudgeted case.

Conclusion

As set out above, costs budgeting provides substantial benefit to the parties, their lawyers and to court administration.

This consultation is the first opportunity for an in depth review of costs budgeting. It is an opportunity to retain and improve existing benefits whilst improving efficiency through reduction of frictional costs and judicial resource of the costs budgeting process.

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

The undoubted benefits of the costs budgeting regime can be significantly be increased by reducing the frictional litigation caused by uncertainty. To that end we propose an interlocking package of changes to provide certainty by:

- Simplifying the process
- Increasing budget agreement;
- Increasing consistency of approved budgets;
- Reducing judicial resource required;
- Reducing costs; and
- Protecting the consumer;

Simplify the costs budgeting process

The current costs management process causes parties to incur unnecessary costs and does not optimise the use of court resource.

Where no agreement as to directions is reached, the parties submit budgets based on the directions they seek. Even if directions are agreed, there are occasions where the court will order different directions than those agreed.

The court then has to decide whether to budget on inaccurate budgets or adjourn the hearing so the parties can redraft budgets in accordance with the directions order.

The former increases the amount of court time at the hearing whilst the parties makes submissions as to the new amount of costs claimed and offered by phase based on the directions ordered. The latter increases costs in redrafting budgets, budget discussion reports, further negotiation, and attendance court at an adjourned hearing, as well as taking up further valuable court resource.

Both of these are unsatisfactory and can be avoided by a simple change in procedure. We propose the costs budgeting process is triggered by the court ordering directions. The process may look like:

[8] As Jacobs J observed in Yirenkyi v Ministry of Defence [2018] 5 Costs L.R. 1177:

- Within 7 days of the directions hearing, the parties should file and serve budgets drafted in accordance with the ordered directions;
- Within 21 days of the directions hearing, the parties to file and serve agreed budgets or budgets with budget discussion reports;
- Within 35 days of the directions hearing the court to consider and approve budgets online;
- A party who disagrees with the approved budget to apply for an oral hearing and pay the costs of the application unless the approved budget is revised by 20% or more;

This simplified process saves significant costs of attendance of costs lawyers at CCMCs. It avoids the costs of redrafting budgets, budget discussion reports and duplication of negotiation.

More importantly, it allows meaningful negotiation to take place thereby increasing the likelihood of budget agreement and saving judicial resource.

The case-managing judge has flexibility to deal with costs budgeting by way of online "box" work within proposed time scales. It also allows the costs managing judge to seek input of a costs judge on unusual cases.

We understand similar proposals have met with judicial concern over the lack of visibility as to likely cost of the claim and the cost of directions under consideration. After almost 10 years of costs management, we consider both practitioners and the judiciary are sufficiently aware of the cost of standard directions. Where non-standard direction are under consideration, the court may benefit from submissions from the parties.

In any event, the court may vary the directions if it subsequently considers they allow access to justice at disproportionate costs. For these reasons, we do not consider there is any merit in this point.

Sequential case and costs management already exists and works effectively in the County Court in Sheffield.[9] Further, sequential case and costs management routinely takes place in various High Courts in various District Registries in the King's Bench Division and is also working well.

Staged budgeting

At present, the parties are required to budget a case up to and including costs of the Trial. As the vast majority of cases are resolved before costs are incurred on the "Trial preparation" and "Trial" phases, the cost of drafting, negotiating, determining and approving a budget for these phases is a waste of costs and judicial resource.

These phases are two of the most contentious especially in higher value claims where the phase costs are dependent upon the court granting permission for oral evidence of witnesses and experts of each party.

Claimants budget on the basis the court will permit the parties to rely upon oral evidence of all witnesses and experts at trial. Whereas, defendants budget on the basis the court will permit oral evidence from the parties' core witnesses and experts, with the remaining evidence being on paper.

Further, claimants budget for all experts attending for 3/4 days each. Whereas, defendant offers allow a budget for core experts attending trial for 1 but no more than 2 days.

In the "Trial preparation" phase, Claimants budget on the basis all witnesses and experts attend conferences with leading and junior counsel. Whereas, defendant offers allow for a conference with only the core experts.

In higher value cases, this results in insurmountable differences between the parties over the "Trial preparation" and "Trial" phases resulting in contested costs budgeting hearings.

[9] District Judge Batchelor

Many courts accept there is uncertainty in budgeting a case too far into the future and budget up to the next CCMC or the PTR hearing.

Given cases up to £100,000 will be subject to fixed recoverable costs, we propose changing the default position from budgeting up to and including trial to budgeting up to the next CCMC or PTR hearing.

This will remove the prospect of unsurmountable differences thereby increasing the prospect of agreement between the parties.

It will create consistency of budgeting up to the next CCMC or PTR hearing. It will allow the parties and the court to make an evidence based decision on which witnesses and experts should give evidence orally and on paper.

More importantly, it will allow the parties to use the budget variation procedure to budget for the "trial preparation" and "trial" phases. The knowledge of which witnesses /experts are permitted to give oral evidence will improve budgeting accuracy and increased the prospect of agreement without the need for a hearing.

This variation will serve as a timely costs focussed reminder to the parties at a point in the proceedings where resolution may still be achievable at reduced cost.

Fixed Hourly Rates

There is significant inconsistency in approved phases on strikingly similar cases. The main cause is the wide variation in hourly rates applied to incurred and estimated costs. They are the biggest blocker to budget agreement and a significant factor behind the inconsistency in sums approved for the same phases.

We propose all budgets are drafted using fixed hourly rates.[10] The use of FHRs will bring consistency of incurred and estimated costs claimed and approved. It focusses the parties and the court's attention on the remaining variables, the estimated hours and disbursements when costs management is undertaken.

Practitioners have significant experience of the amount of time phase activities take. From our own experience in budget negotiation, the range of reasonable hours by phase is rarely too wide to prevent agreement. Practitioners know how many hours it takes to obtain and process each witness statement and expert report leading to agreement between the parties.

Similarly, whilst there will be a range of reasonable amounts for disbursements, these are unlikely to prevent agreement of all phases up to the next CCMC / PTR.

The use of fixed hourly rates to draft budgets allows the parties and the court to focus on these constituent parts and arrive at a phase total viewed through the lens of proportionality.

Its use in drafting budgets will take the friction out of the budgeting process leading to significant budgetary agreement, saving costs and valuable court time.

Fixed hourly rates provide consumers with certainty as to the rates recoverable between the parties.

Costs for a simplified costs budgeting procedure

The current rules set a cap on the amount of recoverable costs of initially completing Precedent H. It shall not exceed the higher of £1,000 or 1% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted costs (agreed or approved).[11]

[10] See detailed response to 2 below

[11] CPR 3.15A(5)(a)

The £1,000 lower limit works well for lower value multi-track claims where the costs recovered were less than £100,000. The lower limit represented almost 8 hours of grade D time to complete the precedent H.

The 1% cap does not work well in moderate to high value cases where the costs agreed or allowed upon assessment exceed £500,000. The upper limit of 1% on costs of £500,000 is £5,000. This represents just under 40 hours of grade D time. This is more than sufficient to draft an initial precedent H irrespective of the amount of the budget.

We consider the cap on recoverable costs (of initially completing Precedent H) should be limited by the amount of work needed not the amount of costs agreed or recovered. We propose a limit of 40 hours work at the prevailing hourly rate of a grade D fee earner. This equates to £5,040 based on the current grade D guideline rate of £126 per hour.

The rules also set a cap on all other recoverable costs of the budgeting and costs management process. It shall not exceed 2% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted (agreed or approved) costs.[12]

The proposed simplified costs management procedure obviates the need for attendance and advocacy at a costs management hearing. As a result, the 2% cap is too high. The other recoverable costs a party may incur in relation to their own and any other party's budget include:

- Drafting own budget / consideration of opponent budget;
- Drafting / considering budget discussion reports;
- Negotiation;
- Filing agreed budgets / budgets and budget discussion reports;

We propose a limit of 20 hours work at the prevailing hourly rate of a grade D fee earner. This equates to £2,520 based on the current grade D guideline hourly rate a rate of £126 per hour.

The work involved is very similar in nature and amount to the work involved in provisional assessment where the costs are limited to a maximum of £1,500 plus VAT.[13]

Reinforce the incentive to work within an approved budget

For some lawyers, refuse to work within an approved budget. They ignore it because they can deduct unrecovered disproportionate costs from their own client's damages. The ability to deduct costs in excess of a budget needs to be deterred so as to reinforce the lawyer's incentive to work within the approved budget.

The risk of costs deduction from damages in claims made by or on behalf of a person under the age of 18 (a child) is well understood and the rules provide the child with some protection. They require the court to order a detailed assessment of the costs payable by, or out of money belonging to a child or protected party.[14]

Costs incurred that are unusual in nature or amount are presumed to be unreasonably incurred unless the presumption is rebutted.

CPR 46.9(3) provides:

> *Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –*
>
> *(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;*

[12] CPR 3.15(5)(b)
[13] CPR 47.15(5)
[14] CPR 46.4(2)(a)

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

(c) to have been unreasonably incurred if –

(i) they are of an unusual nature or amount; and

(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

In a solicitor and own client assessment involving costs to be deducted from the damages of a 7 year old child [15], the court was faced with assessing costs in excess of an approved budget. In considering whether the costs were unreasonably incurred, Senior Costs Judge Gordon-Saker said,

"49. Were the excess costs unusual in amount? In my judgment they were. In approving the budget at £53,401.72 …the court arrived at the figures, which it considered would be reasonable and proportionate to take the case to trial. In respect of issue/statement of case, that reasonable and proportionate figure was exceeded by over 100 per cent. In respect of witness statements, the reasonable and proportionate figure was exceeded by over 400 per cent. In respect of ADR / settlement, the reasonable and proportionate figure was exceeded by over 150 per cent. These figures are so far over what they should be, and what the court has already decided that they should be, that they must be unusual in amount.

53. To avoid the presumption applied by CPR 46.9(3)(c), the solicitor must tell the client that as a result the costs might not be recovered from the other party. That must mean as a result of their unusual nature or amount. Telling the client that some costs might not be recovered from the other side is not sufficient. ST should have been told that the budget was being exceeded by a wide margin and that, as a result, those costs might not (and, indeed, almost certainly would not) be recovered from the other side.

54. Accordingly, in my judgment, the costs in excess of the budget and in excess of the caps imposed by CPR 3.15(5) are to be presumed to have been unreasonably incurred.

55. I should add that I think it very surprising that a solicitor would not tell their client that the budget had been exceeded and that the costs in excess of the budget would not be recoverable. At that point the client is moving from pursuing a claim in which reasonable and proportionate costs will be recoverable to a claim where no further costs will be recoverable in respect of some or all of the phases.

56. Instead IM appear to have been happy simply to ignore the budget and incur costs which they would or should have known would not be recovered from the Defendant."

In claims involving a child, the rules provide lawyers with a significant incentive to remain within the approved budget and protect the child from a deduction of costs from damages. Whereas, the rules provide no such incentive or protection for other claimants especially those who are vulnerable.

In order to reinforce the incentive to remain within an approved budget, we propose the rules introduce a presumption that,

"All costs incurred in excess of:

- *A phase in an approved budget, or*
- *the cap for non-phase costs*[16]

are unreasonably incurred unless,

i. on a standard basis assessment, the court is satisfied that there is good reason to depart from an approved budget; or

[15] ST v ZY [2022] EWHC B5 (Costs) (21 February 2022).

[16] CPR 3.15(5)(a)(b)

ii. on an indemnity basis assessment, a party gave express written consent to incurring the amount of costs in excess of an approved budget."

The benefits of this provision are that it,

- Maintains the current position of recovery of excess costs where "good reason" is made out;
- Protects consumers from lawyers incurring costs in excess of their approved budget without their prior express written approval of the excess amount.
- Reinforces the incentive for parties and their lawyers to work efficiently within an approved budget.

Introducing the presumption that all costs incurred in excess of a budget or cap are "unreasonably incurred" provides consumers with much needed protection from their own lawyers.

Absent this protection and absent costs budgeting, lawyers are free to deduct unrecovered disproportionate costs from consumer damages. For these reasons, the default position for personal injury claims must be mandatory costs budgeting.

No exception from costs budgeting for claims made by or on behalf of a child

Upon implementation of the costs budgeting in 2013, no exception to costs budgeting applied to claims made by or on behalf of a person under the age of 18 (a child).

On 6 April 2016, the rules[17] changed to disapply costs budgeting from these claims. In an instant, the most vulnerable in our society were excluded from the protection provided by the costs budgeting regime. Protection from the ratcheting effect of their own lawyer incurring unrecoverable disproportionate costs to deduct from damages.

The Costs Judges in the Senior Courts Costs Office see these claims on a regular basis on solicitor and own client assessments and are in a better position to speak to the volume of these claims.

We request the urgent removal of this exception in order to protect the most vulnerable in our society.

No exception to costs management for personal injury claims

Costs budgeting applies to all multi track claims except where the amount of money claimed is £10 million or more.[18]

Up to 26 February 2017, high value personal injury claims were subject to costs management. The personal injury discount rate changed from 2.5% to - 0.75% on 27 February 2017.

This change increased the monetary value of a significant volume of cases above the £10m limit taking them out of the costs management regime. The discount rate changed again on 15 July 2019, this time to - 0.25%, bringing some of those claims back into the regime.

As can be seen from the table below, the discount rate changes simply altered the multiplier used to calculate future losses and thereby the value of the claim. What they did not do is change the amount of work or the complexity of the claim.

Example: A 40-year-old claimant whose serious injury has reduced their life expectancy to a further 30 years has estimated future care costs of £200,000 pa and other future losses of a further £100,000 pa. The lump sum future loss awards under differing discount rates would be:

Discount Rate	Multiplier	Annual Loss	Future Loss award
2.5% (2001 – 2016)	21.19	£300,000	£6,357,000

[17] The exception at CPR 3.12(c) was introduced

[18] CPR 3.12(1)(a)

-0.75% (2017 – 2019)	33.66	£300,000	£10,098,000
-0.25% (2019 to date)	31.16	£300,000	£9,348,000

The need to conduct litigation at proportionate cost in accordance with the overriding objective is particularly sensitive in personal injury claims because lawyers regularly deduct unrecovered disproportionate costs out of their client's damages.[19]

In our view, it is as important to costs manage high as well as low value personal injury claims because the amount of unrecovered disproportionate costs is far higher than in lower value claims and can have life changing as well as financial consequences for a claimant.

For these reasons, we propose that the £10m exception is limited to non-personal injury claims. For this reason and the reasons previously expressed, the default position for personal injury claims must be mandatory costs budgeting.

Judicial training

Practitioners are required to set out their budget in a mechanistic way using the constituent parts of Precedent H namely, hourly rates x hours by grade of fee earner plus disbursements by phase. This low level of detail is far above the granular detail required by a Precedent S bill of costs for detailed assessment.

Keoghs attend many costs management hearings annually. We see different approaches to costs budgeting depending upon the individual judge and the amount of time available.

The management of costs is of significant importance to the parties as they are the ones who are going to pay them. We urge the Ministry of Justice to provide sufficient judicial time to deal with costs issues as it does to dealing with issues over damages.

Some judiciary take a mechanistic approach to costs budgeting, consider the amount of hours by grade of fee earner.

In discussions with advocates they provide a view as to what would be a reasonable amount of hours per witness statement or expert report.

These indications are "gold dust" to practitioners as they provide predictability on what is likely to be allowed at future costs management hearings. They enable the parties to work out the amounts likely to be approved and enable budgetary agreement.

Whereas, some judiciary appear to pluck a figure from the ether and provide no indication as to how it has been arrived at or why. This approach is very unhelpful and does not assist the parties in reaching agreement on future budgets.

We want a single approach where the court informs the parties of its thinking in terms of assessment of hours allowed for the phase and disbursements to arrive at a figure. Then the court stands back and takes a view on whether that figure is proportionate for the case and determines the approved phase amount.

The Court of Appeal provided guidance on the approach to proportionality to costs assessment because there was an absence of consistency in the way in which costs bills were assessed.[20] The Master of the Rolls said,

> 88. *First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary*

[19] See ST v ZY [2022] EWHC B5 (Costs) (21 February 2022) where Irwin Mitchell sought approval from the Court to budget overspend of £53,719.16 from an infant claimant's damages.

[20] West -v- Stockport NHS Foundation Trust [2019] EWCA Civ 1220

condition of proportionality: see Rogers at paragraph 104. This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.

89. *At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total figure will have involved an assessment of every item of cost, including court fees, the ATE premium and the like.*

90. *The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert's reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.*

91. *At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like. Specifically, therefore, if the ATE premium is assessed as reasonable, it will not fall to be reduced by any further assessment of proportionality.*

92. *The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.*

93. *Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double-counting.*

We consider this guidance on the approach to proportionality is equally applicable to costs management. It applies as follows:

- First, the judge should go through the budget phase by phase, assessing the reasonableness and proportionality of the total estimated costs claimed in rows 5 and 13 of each phase.
- Second, the proportionality of the figure produced in row 14 of each phase must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total phase figure is found to be proportionate, then no further assessment is required
- Third, if this overall phase figure is disproportionate, then a further assessment is required. The judge should undertake a proportionality assessment by looking at each row of the phase excluding those, which are properly regarded as unavoidable, such as court fees. In respect of each row, the judge should consider whether the costs are disproportionate. If yes, then the judge will make such reduction as is appropriate.

In this way, the parties are aware of how the figures are arrived at and reductions for proportionality will be clear and transparent for both sides.

The inconsistency in judicial approach to costs management highlights a pressing need for judicial training so every judge adheres to the same method instead of going off on a frolic of his or her own.

Consistency of approach provides predictability and leads to increased budgetary agreement, less cost and less judicial involvement.

Consumers can only control costs if they are aware of the approved budget.

Costs management was one of the central features and recommendations of Lord Woolf's Final Report in July 1996.[21] He acknowledged the comments of the Chief Taxing Master, who said,

[21] "Access to Justice - Final Report Lord Woolf" = July 1996

"that the most effective and simple method of keeping costs under control is to keep the client informed at all times as to what is proposed in his name."

CPR 44.2 of the 2013 Civil Procedure Rules set out the duty of the solicitor to notify the client in writing of the costs order no later than 7 days after the solicitor receives notice of the order.[22] Sadly, this requirement was removed and there is no requirement to notify the consumer of the budget claimed and approved in their name, or of another party's approved budget.

Currently, the parties are required to re-file and re-serve the budget in the form approved.[23] We propose the rules are amended to provide,

> *"Where –*
>
> *(a) the court makes an order approving the budgeted costs or recording the parties agreement; and*
>
> *(b) the client is not present when the order is made,*
>
> *the party's solicitor must provide to their client a copy of the budget in the form approved or agreed no later than 7 days after the solicitor receives notice of the order"*

A client can only abide by the budget if they are aware of it. This is key to the creation of the client's incentive to control costs incurred in their name.

They need to know the consequences of exceeding the budget and the risk of having to pay the excess from their own money before it is incurred.

Vulnerability information to be provided before costs management commences

By the time of a CCMC, each party should have sufficient information to provide the court with detail of the vulnerabilities of the parties and their witnesses. The rules should require the parties to provide details of vulnerability in the case summary.[24]

Vulnerability impacts upon costs in terms of the hours and disbursements and so provision of this information allows the parties and the court to understand the reasons supporting the amount of incurred and estimated time / disbursements claimed.

The court needs this information to carry out effective costs management.

1.3 Should costs budgeting be abandoned?

There is a view that costs management takes up too much court resource and is not worth the candle but there is no objective evidence to support this view.

We address the 3 options below:

- Abandonment;
- Refinement;
- No change;

[22] 2013 CPR 44.2

[23] CPR 3.15(7)(a)

[24] PD 5.7(1)(a) to CPR 29

Abandonment is not an option

The CPR are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.[25] There are two essential overriding objectives directing the court to manage the cost of cases: saving expense and deal with cases in ways that are proportionate.[26]

The court is under a duty to give effect to the overriding objective[27] and has a duty to further the overriding objective by actively managing cases.[28] In order to actively manage cases, the court must consider whether the likely benefits of taking a particular step justify the cost of taking it.[29]

It follows that litigating parties must furnish the court with details of the steps that they wish to take together with the cost of each step before the court can manage the case. Case management deals with what costs are spent upon. Whereas costs management is needed to deal with the proportionality of the costs of the individual case.

The benefits of costs management are significant and should be maintained and enhanced not abandoned. A return to the 2012 cost estimate regime will increase costs of the costs assessment and the amount of judicial resource needed.

Refinement to reduce cost and limit use of court resource

Light touch costs management is achievable through refinement of the costs management regime.

We set out an interlocking package of changes in our response to question 1.2 above. The proposed package of changes

- Simplify the process
- Increase budget agreement;
- Increase consistency of approved budgets;
- Reduce amount of judicial resource required;
- Reduce costs; and
- Protect the consumer;

In summary, the interlocking package of change are as follows:

Simplifying the budgetary process, with judicial intervention further back in the process, provides the parties with the opportunity of agreement of budgets drafted in accordance with the order for directions before the court even embarks on costs management.

Fixed hourly rates focusses negotiation on the differences in hours and disbursements reasonably required significantly improving the likelihood of budgetary agreement. They provide consumers with certainty as to the rates recoverable between the parties.

Staged budgeting up to the next CCMC / PTR avoids the “Trial preparation and Trial” phase blocker to budgetary agreement and significantly improves the likelihood of budgetary agreement.

Simplifying the budgetary process reduces the amount of work the parties need to do. Reducing the costs caps to reflect the amount of work allows proportionate costs recovery between the parties.

[25] CPR 1.1(1)
[26] CPR 1.1(2)(b) and (c)
[27] CPR 1.2(a) and (b)
[28] CPR 1.4(1)
[29] CPR 1.4(2)(h)

Reinforcing the incentive to work within an approved budget will results in more claims being conducted at proportionate cost. Introducing a presumption that all costs incurred in excess of a budget / costs cap are "unreasonably incurred" provides consumers with much needed protection from their own lawyers.

The exception from costs budgeting of claims brought on behalf of children removes the protection from the most vulnerable in society. The exception needs to be removed.

The arbitrary £10m exception limit should be restricted to non-personal injury claims. The default position for personal injury claims must be mandatory costs budgeting in order to protect consumers from disproportionate costs being deducted from damages.

Adherence to one approach brings consistency, predictability and increased budgetary agreement thereby reducing the need for judicial intervention.

Consumers can only control costs if they are aware of the budget, the consequences of exceeding the budget and the risk of having to pay them from their own money.

Vulnerability information must be provided before case management so the parties and the court may cater the directions to assist the vulnerable and cost manage the case proportionately.

No Change

For the reasons set out in our response to question 1.2 above, we consider change must be made to the costs management regime.

Response to alternative proposals

We understand that some consider costs budgeting is too rigid and inflexible. They propose the introduction of a rule that allows recovery of costs where they do not exceed the approved budged costs by more than 20%.

This proposal will seriously undermine the benefits of certainty provided by costs management. The rigidity of the budget provides strength but it is flexible. An approved or agreed budget sets a line in the sand for automatic recoverability if successful.

Allowing recovery of 120% of the budget just moves the line in the sand. It does not alter the rigidity at all. It will have the effect of rewarding inefficiency and those lawyers who spend consumer's money unwisely.

It creates uncertainty as to reserving and as to the costs risk consumers face. Most of all, it allows cases to be dealt with at disproportionate cost.

The frequency of contested budget hearings is likely to increase as the proposal has the potential to increase costs by 20%. This will have a direct impact upon consumers hiving to pay costs themselves or through insurance premiums. As a result, the demand on judicial resource involved will increase.

The existing costs management regime is both rigid and flexible. Rigid as to the amount of the budget but flexible by way of revision of approved budgets where significant developments in the litigation arise.[30] It is flexible even where a significant development has not been determined. A party may recover more than an approved budget provided the court is satisfied there is "good reason" to depart from it.[31]

The parties have 5 opportunities for full recovery of reasonable and proportionate costs:

- Draft a full, reasonable, and proportionate budget;

[30] CPR 3.15A

[31] CPR 3.18

- Obtain a reasonable and proportionate budget by agreement or approval;
- Manage the work appropriately and efficiently so as to avoid exceeding the budget;
- Apply to revise the budget where there is a significant development;
- Apply to recover costs in excess of the approved budget by satisfying the court there is good reason to depart.

For these reasons, we consider the current regime to be both rigid and flexible.

One methodology mooted is to pigeonhole cases by value in brackets that attract a single figure budget for the whole case. At first blush, it has the attraction of simplicity but it fails to provide visibility or incentive to control costs in each phase of the litigation. It provides the lawyers with a target to achieve before settlement irrespective of how far it proceeds along the procedural path to trial. For these reasons, it is not a viable alternative.

We understand some are of the view that defendant budgets serve no purpose in QOCS cases. The benefits of costs budgeting apply equally to defendants as they do for claimants irrespective of whether costs are recoverable from a claimant.

Defendants benefit from costs management because they often have "skin in the game" because they are self-insured or have a significant deductible.

Defendant costs budgeting is of considerable benefit to claimants where the QOCS exceptions apply. Their removal would deprive many consumers of the benefits of costs management that defendants enjoy in relation to claimant's costs.

For these reasons, we consider defendant costs budgeting should continue.

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

We refer to our response to question 1.2 above, we consider costs budgeting must be retained but refined as per our proposal.

For the reasons set out in our response to question 1.2 above, we propose that the £10m exception is limited to non-personal injury claims and the default position for all personal injury claims must be mandatory costs budgeting.

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

We refer to our response to question 1.2 above, we consider cases that continue within the costs budgeting regime costs budgeting as refined by our proposals.

Keoghs Response to Part 2

2.1 What is or should be the purpose of GHRs?

The GHR should be the fixed hourly rates that one party may recover from another. Its purpose is to provide certainty as to the hourly rate recoverable for the work a party has done on a case based upon complexity.

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

Keoghs consider that the current GHRs do not provide a starting point for assessment. Practitioners and the Judiciary do not know the level of complexity of case the GHRs represent. Until this is rectified, they are no purpose or assistance.

It is the type / complexity of factors in a case that determine the skill, effort, specialised knowledge and responsibility needed for a solicitor to progress it efficiently at proportionate cost.

The role should be to provide certainty at the outset of a case as to the hourly rates that one party may recover from another upon conclusion.

It follows that cases falling into different complexity bands should attract different hourly rates. The rates for each complexity band should be set at a rate that incentivizes parties to settle. It will facilitate agreement of both budgets and costs claims thereby avoiding the need to take up valuable court time.

The rates must provide certainty as to the type of case they represent by reference to complexity irrespective of where the work was done. Legal practice digitalization and home working have now made irrelevant the location of where the work is done. It follows that the time is right for a new beginning for hourly rates, one that takes account of these modern practices and ways of working whilst ensuring that locational based community legal providers are appropriately rewarded.

Currently, the hourly rates one party may recover from another are limited by indemnity principle. However, there is no valid reason as to why the hourly rates one party recovers from another should not be an exception to it. Complexity banding of hourly rates would bring considerable benefits to the parties and to the administration of justice in terms of:

- Certainty and transparency – Clients and practitioners have certainty and transparency as to the hourly rates recoverable between the parties.
- Competition between solicitors – certainty as to recoverable hourly rates will create competition between solicitors over the contractual hourly rates a client is liable to pay for solicitor and own client costs.
- Save Court time on Costs budgeting – certainty as to recoverable hourly rates would increase the likelihood of agreement of costs budgets and reduce the amount of court time needed to deal with costs budgeting.
- Save Court time on summary/detailed assessment – The amount of the recoverable hourly rates are the primary issue between the parties upon assessment. Certainty as to the hourly rates removes this issue and significantly increase the likelihood of settlement thereby saving time at assessment hearings.
- Save Court time on detailed assessment hearings – Certainty as to the recoverable hourly rates would remove objections to retainers and breaches of the indemnity principle.
- Incentivise settlement – Certainty as to hourly rates actively incentivizes clients to seek early resolution especially where they are less than the contractual hourly rates agreed between the solicitor and the client.
- These are tangible benefits for the administration of justice, for practitioners and for their clients.

The hourly rates allowed upon assessment vary by the complexity of the work and the skill, effort, specialised knowledge and responsibility shown by the fee earner undertaking the work, and location of where the work was done.

The hourly rates allowed for dealing with heavyweight commercial work is significantly higher than for dealing with simple debt actions. This is recognised in the creation of a new London 1 band of GHR introduced specifically for heavyweight commercial work.

The CPR recognises different fixed recoverable costs for different types of work and so there is precedent for different tables of fixed costs by work type. Further, the government have accepted recommendations to extend fixed recoverable costs using different bands of complexity for different work types.

Given this precedent, there is no reason why complexity bands of fixed hourly rates cannot be introduced for the vast majority of cases with specific work types allocated to specific bands.

These complexity bands should represent the skill, effort, specialised knowledge and responsibility of fee earners involved in cases in the band regardless of geographical location and underpinned by the principle of proportionality.

The use of IT and the seismic increase in continued homeworking means location of where the work is done is of increasingly less importance. The introduction of hourly rates by complexity band would mean that the same hourly rates apply to all work irrespective of whether done in an office or at home and irrespective of location.

There is a clear need for a new beginning for hourly rates one party can recover from another. The purpose of GHR should be to provide certainty as to the rate that one party may recover from another at the outset of a case rather than at the end. Hourly rates that incentivises clients to settle, promotes agreement of both budgets, and costs claims thereby freeing up valuable court time.

2.3 What would be the wider impact of abandoning GHRs?

We understand “abandonment” to mean the current GHRs are;

- of no evidential weight,
- not endorsed by the Master of the Rolls for use in assessment of costs; and
- are not to be taken into account in assessment of hourly rates awarded upon assessment.

On this understanding, we consider the wider impact would include:

- uncertainty as to the rates allowed upon assessment;
- inconsistency in rates allowed upon assessment for identical cases;
- increased frequency of costs litigation;
- Increase in costs of costs litigation;
- increased demand for judicial resource;
- Judicial and practitioner lobbying for set hourly rates based upon complexity.

In conclusion, practitioners and the Judiciary need a framework for agreement / award of hourly rates.

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

The framework for agreement / award of hourly rates needs be flexible to reflect changes in the way legal services are delivered.

It is clear from the comments of the Master of the Rolls to both previous GHR reviews that they suffered from serious fundamental flaws in methodology and failures to take account of modern business practices.

We recognise that for practical reasons, any future review may not be possible to address all flaws or business practices. However, any future review should be evidence based and include the following objectives:

- To identify fixed hourly rates by complexity band of case;

- To ensure that those hourly rates are controlled by the changes in a basket of expenses of a legal practice;

The first objective is achievable by obtaining data on the hourly rates claimed and allowed upon assessment by complexity. Once sufficient data is obtained to provide a robust statistical conclusion, the work types can be categorised into complexity bands and average hourly rates by grade.

The complexity of factors by work type determine the skill, effort, specialised knowledge and responsibility needed to progress it.

The individual complexity and the activities of the case can be reflected in the number of hours allowed by grade of fee earner.

The second objective is to identify a basket of the main expenses of law firms and track their change over time. Examples of those expenses are as follows:

- Salaries – The salaries of a variety of different grades of law firm employees are available over time from the Average Hours and Earnings Survey compiled by the National Audit Office. Both practitioners and the Judiciary in personal injury claims rely heavily upon this authority.

  Traditionally, employees' salaries make up approximately 1/3 of the revenue of a legal practice on an annual basis. It is a significant indicator of expense inflation because legal practices manage salary costs to the business through the changes they make.

- Property costs – Office is rented out on the basis of £/sq foot. The average change in £/sq foot over time will be a good indicator of expense to a legal practice. Traditionally, the cost of office premises made up approximately 10% of the revenue of a legal practice.

- Professional indemnity premiums – the change in the average legal practice premium is a good indicator of expense of a legal practice. Traditionally, it made up approximately 5% of the revenue of a legal practice.

- Overheads – Utility expenditure – the change in the cost of utilities is a minor indicator of expense. Traditionally, it made up 1% of the revenue of a legal practice.

These are some easily identifiable examples, which should be available on an annual basis and may be used to inform the changes in an hourly rate framework.

2.5 Are there alternatives to the current GHR methodology?

The court rules setting out the basis of assessment of hourly rates are complex and provide the court with discretion as to the rates a party may recover from another. As a result, the courts regularly resolve costs disputes where hourly rates are the primary issue between the parties.

In order to provide some consistency, the judiciary consult periodically on guideline hourly rates, which are intended to be a starting point when assessing the hourly rates recoverable between the parties. These consultations have been beset with difficulties over methodology, lack of response and lack of data. As a result, the recommendations received criticism some of which is acknowledged by both the former[32] and now the current Master of the Rolls.[33]

The purpose of this paper is to ask and explore whether there is better way? One which will provide certainty to the parties over the hourly rates that are recoverable at the outset of a case and one which will not require judicial resource to determine them during or at the end of the case?

[32] Lord Justice Dyson MR in his GHR consultation conclusion of 28 July 2014 and April 2015

[33] Lord Justice Vos MR in his GHR conclusion on 17 August 2021

Vested interests

For many decades, the determination of guideline hourly rates in civil actions was based substantially on data of the cost of running a legal practice. This was freely provided by law firms through expense of time surveys to local Law Societies.

The results of the Law Society surveys were presented to the District Judges of local Courts who deliberated on the data submitted together with the hourly rates they saw claimed on assessment and determined the local guideline hourly rates ("GHR") a party may recover from another upon assessment.

This exercise continued up until 2001 when the number of firms submitting a response to the survey fell. Future surveys and calls for evidence failed to obtain sufficient data culminating in the review of 2013 when the Master of the Rolls found that the data obtained was not robust enough to ratify the proposed recommendations.
The "elephant in the room" is the question of why law firms suddenly decided not to provide data and respond to surveys.

For solicitors, the only incentive in submitting data was the prospect of an increase in GHR. It was recognised that data showing an increase in profitability and a decrease in expense would support a reduction in GHR.

It is worth noting at this point, that in the 2013 review the working party chaired by Lord Justice Foskett obtained a significant amount of data from the Law Society. It was this data that resulted in recommendations being made to reduce 18 out 25 GHRs.[34]

It follows that firms and their representative body, The Law Society, had a vested interest in changing the remit of the review and the methodology used so that expense of time data was no longer needed or considered by the working group.

The changes impacting the costs of doing the work and profitability are well known to all. From 2000 we saw the introduction of the recoverability of success fees. In his Review of Civil Litigation Costs - Final report, LJ Jackson said in relation to the recoverability of success fee,

"In April 2000 …success fees became payable by the opposing party, rather than by the lawyers' own client. This was a massive reform, which has had widespread unintended consequences."

LJ Jackson identified "cherry picking" as one of the unintended consequences in the recoverability regime which would lead to super profits for firms. At chapter 10 of his final report he said,

"4.17 If claimant solicitors and counsel are successful in only picking "winners", they will substantially enlarge their earnings. As Professor Zander pointed out at the London seminar, if the claimant solicitor wins a case with a 100% success fee, he or she receives an additional 300% profit."

In other words, if a firm only conducts winning cases on CFAs, having rejected or dropped less meritorious cases at an early stage, the success fees generated are all profit. Whilst the recoverability of success fees has been abolished between the parties it continues to be recoverable from a client's damages subject to a cap.

The other change that significantly reduced cost from 2000 is the increased IT migration to computer case management systems, automated dictation systems and paperless working.

The efficiencies provided by workflows, precedents and automated processes significantly reduced costs and increased profitability. It enabled fee earners to handle higher caseloads whilst obviating the need for administrative staff. It reduced the amount of property needed to house a paper footprint to a digital footprint.

[34] GHR report response of Lord Justice Dyson (MR) dated 28 July 2014.

It is for these reasons that the reviewing body that makes recommendations as to the level of hourly rates should be entirely independent of those with vested interests. It is for these reasons that agreed / claimed hourly rates should be considered by a new independent body.

Who should determine the level of Hourly rates?

We propose the creation of a Rates Inquiry Committee (RIC): chaired by a High Court Judge with experience of the operation of the civil cost rules and costs assessment. The RIC should consist of members of professions who the Judge considers will be able to assist the RIC in achieving the objective of the review under the terms of reference.

Members of the legal profession and representatives of those with a "vested interest" should be excluded from appointment. The RIC should comprise the following:

- High Court Judge (Chairman)
- A Chartered accountant
- An Economist
- A representative from the Financial Conduct Authority
- A representative from the Solicitor's Regulation Authority
- A representative of the Ministry of Justice
- A representative from the Office for National Statistics
- A consumer representative with experience of legal costs

The RIC should have terms of reference:

To conduct an evidence-based review of the market rates an informed member of the public would pay their solicitor out of their own money.

To obtain evidence concerning the following:

- hourly rates actually paid on solicitor own client bills by grade of fee earner
- hourly rates agreed / allowed upon detailed assessment by grade of fee earner

The RIC should have powers:

- Full investigative powers including access to legal practice accounts (a similar structure as has been created for discount rate reviews under the Civil Liability Act 2018)
- to hear evidence upon application from stakeholders
- to commission and obtain independent expert evidence
- To make recommendations as to the level hourly rates

Funding of RIC

It is noticeable that previous reviews of a similar nature have suffered from a lack of funding and reliance upon voluntary production of evidence. The success of the body will depend upon it being fully funded. Funding can be achieved through a variety of means as follows:

- A direct levy of all legal practices engaging in civil litigation;
- A direct levy on the SRA/ Law Society
- A levy collected through Court fees;
- A fee payable by stakeholders who apply to submit evidence and make submissions as to the RIC on the level of hourly rates.
- Law Society members will call for a review of hourly rates and so the Law Society should fund it.

Alternatively, by some or all of the above.

How often should a review take place and how should it be uplifted for inflation?
Following a comprehensive review the level of hourly rates should be uplifted by reference to a basket of expense indicators (determined by RIC) for the legal sector on an annual basis.

Examples of those expenses are as follows:

- Salaries – The salaries of a variety of different grades of law firm employees are available over time from the Average Hours and Earnings Survey compiled by the National Audit Office. Both practitioners and the Judiciary in personal injury claims rely heavily upon this authority.

  Traditionally, employees' salaries make up approximately 1/3 of the revenue of a legal practice on an annual basis. It is a significant indicator of expense inflation because legal practices manage salary costs to the business through the changes they make.

- Property costs – Office is rented out on the basis of £/sq foot. The average change in £/sq foot over time will be a good indicator of expense to a legal practice. Traditionally, the cost of office premises made up approximately 10% of the revenue of a legal practice.

- Professional indemnity premiums – the change in the average legal practice premium is a good indicator of expense of a legal practice. Traditionally, it made up approximately 5% of the revenue of a legal practice.

- Overheads – Utility expenditure – the change in the cost of utilities is a minor indicator of expense. Traditionally, it made up 1% of the revenue of a legal practice.

These are some easily identifiable examples, which should be available on an annual basis and may be used to inform the changes. The RIC should be able to identify similar / better indicators to of expense.

These indicators will show how much the expense of a legal practice has increased / decreased and should be reflected in the hourly rates allowed between the parties.

Further reviews should take place periodically every 5 years or where criteria are met to trigger a review to ensure that fixed hourly rates reflect modern working practices of providing legal services.

We consider that the existing prices indices such as the RPI and CPI are too broad to be of assistance. In addition, the SPPI is unlikely to be helpful as it is likely to be distorted by the Fixed Recoverable Costs extension to intermediate cases.

It is important that if indicators of expense are used then any recommended % increase only applies to expense element of the hourly rate and not to the profit element.

Fixed Hourly Rates
Currently, the hourly rates one party may recover from another are limited by indemnity principle.[35] However, there is no valid reason as to why the hourly rates one party recovers from another should not be an exception to it.

- Fixed Hourly Rates ("FHRs") would bring considerable benefits to the parties and to the administration of justice in terms of:
- Certainty and transparency – Clients and practitioners have certainty and transparency as to the hourly rates recoverable between the parties.

[35] A party may not recover more than the amount they are liable to pay their own solicitor.

- Competition between solicitors - FHRs would create competition between solicitors upon the contractual hourly rates a client is liable to pay.

- Save Court time on Costs budgeting - FHRs would increase the likelihood of agreement of costs budgets and reduce the amount of court time needed to deal with costs budgeting.

- Save Court time on summary/detailed assessment – The amount of the recoverable hourly rates are the primary issue between the parties upon assessment. FHRs would remove it and significantly increase the likelihood of settlement save time at assessment hearings.

- Save Court time on detailed assessment hearings – FHRs would remove objections to retainers and breaches of the indemnity principle.

- Incentivise settlement – FRCs would actively incentivize clients to seek early resolution especially where FHRs are less than the contractual hourly rates agreed between the solicitor and the client.

These are tangible benefits for the administration of justice, for practitioners and for consumers.

What type of case should FHRs apply to?

Currently, the hourly rates allowed upon assessment varies by the complexity of the work and the skill, effort, specialised knowledge and responsibility shown by the fee earner undertaking the work, and location of where the work was done.

The hourly rates allowed for dealing with heavyweight commercial work is significantly higher than for dealing with simple debt actions. This is recognised in the new London 1 band of the new guideline hourly rates introduced specifically for heavyweight commercial work.

The CPR already recognises fixed hourly rates in the fixed hourly rate a litigant in person is allowed to recover under CPR 46.5(4)(b).

The CPR recognises different fixed recoverable costs for different types of work and so there is precedent for different tables of fixed costs by work type. Further, the government have accepted recommendations to extend fixed recoverable costs using different bands of complexity for different work types.

Going forwards there is no reason different Fixed Hourly Rates should not be introduced in bands of complexity with work types allocated to specific bands.

The FHR bands should represent the skill, effort, specialised knowledge and responsibility of fee earners involved in cases in the band regardless of geographical location and underpinned by the principle of proportionality.

The use of IT and the seismic increase in continued homeworking means location of where the work is done is of increasingly less importance. The introduction of FHRs would mean that the same hourly rates would apply to all work irrespective of whether done in an office or at home and irrespective of location.

The need for a new beginning

There is a clear need for a new beginning for hourly rates one party can recover from another. One that provides certainty as to the rate that one party may recover from another at the outset of a case rather than at the end.

A fixed hourly rate incentivises clients to settle, promotes agreement and saves court resource.

The creation of an independent review body; free of vested interests; comprised of appropriate experts; with power to obtain relevant evidence; fully funded to conduct a wide ranging review; and make recommendations to the Ministry of Justice as to the level at which hourly rates should be fixed.

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

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

In principle, digitisation of dispute resolution has the potential of reducing friction, reducing life cycles and thereby reducing costs.

The claims portal for low value personal injury claims coupled with the pre-action protocols containing prescriptive steps coupled with fixed recoverable costs by stage demonstrates what is possible for other areas of civil justice.

The portal was created by stakeholders with the end user in mind in terms of ease of use and costs reduction. However, we are concerned that the digital platforms and processes built by HMCTS do not have this focus. The DCP appears to reduce costs for HMCTS but increase costs for users.

The IT issues and operational complexities of the DCP has increased rather than reduced end user resource needed to handle claims. End users will have no alternative except to pass on this increased cost to the consumer.

It is essential that digital processes have a reliable application programming interface (API) allowing different computer programs to communicate with each other. This API enables a firm's case management system to communicate with the DCP.

The DCP prevents / obstructs the operation of case management systems that provide costs efficiencies, risk management and supervision features. The absence of an API has increased operational costs of handling claims that we have no alternative except to pass on to the consumer.

We have argued for an API and better processes within the DCP to reap the benefits of case management systems for the benefit of end users. Sadly, HMCTS appear too focussed on completion of the DCP to take into account the views of end users.

There are simple improvements that will immediately reduce costs can be made. By way of a few examples:

- We deal with over 100,000 claims per annum and have over 1,800 employees. A significant number of our fee earners deal with DCP claims and the volume is growing day by day. On the DCP, the list of users does not appear in alphabetical order. This significantly increases the time taken to allocate claims appropriately.
- We have to key stroke input each and every date of witness availability. We have requested a 'date picker' and understand it is being developed but there is no date for implementation.
- In respect of claims notification, we do not have an option for e-mail service notification. We have been informed one is being developed but again there is no date for implementation.

These simple changes will significantly improve efficiency and reduce risk in large firms. We can provide a list of further improvements upon request.

Keoghs have significant experience in IT innovation having created our own case management system. As a result, we welcome digitalisation of the court process, being well-used to finding IT solutions to improve productivity and reduce risk.

However, digitalisation without consultation that adversely impacts end users is a backwards step. It reduces efficiency and increases costs and claims risk. We are aware of the government's policy position to recover 100% of the costs of the civil justice from court users. As a result, end users are paying for digitisation.

For these reasons, end user representatives should be actively engaged in the creation of future court digital solutions to achieve savings for HMCTS through high quality and efficient digitisation whilst making them cost-effective to use.

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

The CJC working group's proposals for reform of the PAP process will require much of the work currently done post issue to be undertaken prior to the issue of proceedings.

De-lawyer the process

At present, many claims do not involve any legal representation or legal proceedings. The litigants themselves handle these claims and no legal costs are incurred.

Commonly they are for special damages only in specified sums. The speedy and efficient resolution of these claims would be adversely affected by prescriptive protocols that give rise to an entitlement to costs between the parties.

The introduction of an entitlement to costs would upset the status quo and the benefit to both claimants and defendants would be disturbed. It would encourage rather than discourage lawyer involvement to a range of claims that simply do not need it.

A rise in this unnecessary behaviour was sparked by the fixed costs regime in 2003. It opened the door to consumers being bombarded with unsolicited telephone calls by claims farmers.

We urge the working party to proceed with caution and consider the unintended consequences of change and how they may adversely affect dispute resolution that works perfectly well in the absence of lawyers.

Costs management

In personal injury cases, approximately 25% of the costs in a budget are incurred prior to the costs management hearing. In certain types of litigation, including clinical negligence and disease, the incurred costs can be as high as 33%.

The proposed pre-action protocols and portals will have the effect of substantially increasing this % of unmanaged costs. This increases the risk to consumers of deduction of unrecovered disproportionate costs from damages.

We recognise it is important for PAPs to allow sufficient costs for the parties to investigate and evidence the issues between them; understand the strengths and weaknesses of each other's case; to enter into meaningful negotiations.

However, lawyers should be deterred from incurring pre-issue disproportionate costs without approval of the consumer clients or without notice of objection from other parties.

Costs management process

PAPs should contain a process for the exchange of costs information in a precedent H and objections in a precedent R style to be taken into account upon costs assessment. As described in response to question 1.1 above, visibility of this costs information plays an important role in early settlement, shorter lifecycles, lower costs and accurate reserving.

This is of particular importance for defendants who are likely to face a demand for costs and potentially Part 8 proceedings. Costs information is important in assessing claims risk.

To provide some steer on pre-issue costs, we propose the following process:

- Exchange of precedent H (up to and including the stocktake stage) within 21 days of the letter of response;

Where the claim settles pre-issue:

- Within 42 days of settlement
    - Where the costs claimed are up to £75,000 the receiving party to provide a certified N260 statement of costs and disbursement vouchers;
    - Where the cost claimed are £75,000 or more the receiving party to provide a certified precedent S bill of costs;
- There is a 21 day negotiation period;

If a negotiated settlement is not reached during this period:

- A paying party to has a further 21 days to serve points of dispute;

Where a negotiated settlement is not reached within 21 days, the receiving party is then eligible to issue Part 8 / N258 application for detailed assessment hearing.

Where a claim does not settle pre-issue, the parties should revise their precedent H up to the first PTR hearing for management by the court.

Inequality of arms

Currently, a defendant who successfully repudiates a claim pre-issue has no method of obtaining an entitlement to costs. Whilst the PAPs place obligations on parties to engage pre-issue, there is some discretion and a defendant is unlikely to be heavily penalised in later proceedings if they decline to incur heavy pre-issue costs to defend a claim.

Under the proposed new PAP regime, a lack of engagement pre-issue may result in the striking out of the defence. The possibility of denial of an opportunity to defend a claim will pressure defendants to incur costs pre-issue.

It is of significant concern that in some types of litigation, especially those involving expert evidence and / or extensive documentation, these costs could be very high. It would be unjust in these circumstances to require a defendant to incur unrecoverable costs, especially given the potential for gaming, with claimants pursuing weak claims with the aim of achieving at least a nuisance settlement.

Unless the PAPS make provision to rectify this “inequality of arms”, all defendants will be at significant commercial disadvantage compared to claimants.

We propose each PAP contains provision to provide a defendant with an entitlement to costs in certain circumstances. Those circumstances could be where a claimant progresses a claim beyond the defendant’s initial letter of response to the cause of action but does not commence proceedings upon expiry of the stocktake period.

This would act as a much-needed deterrent to nuisance / unmeritorious claims.

Whilst it would give rise to an entitlement to costs, in personal injury claims, the QOCS provisions would prevent enforcement unless one of the exceptions applied. However, in non-personal injury claims, a successful defendant would be able to enforce the entitlement to costs.

No penalty when electing against significant expenditure

Alternatively, in cases where a defendant considers it has a strong defence and progression would involves significant expenditure, on say disclosure / experts, the PAP should provide an opportunity for a defendant to elect to decline to incur the expenditure and to proceed in good faith to the stocktake stage.

The claimant then has a decision to either commence proceedings or walk away.

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

We have significant concerns over the creation of a new summary costs process. It would introduce an entirely new costs jurisdiction and create a new satellite claims industry.

At present, many claims do not involve any legal representation or legal proceedings. Commonly they are for special damages only in specified sums. The litigants themselves handle these claims without incurring legal costs. This allows straightforward claims to be resolved cost effectively and quickly.

The introduction of a summary costs process would upset the status quo and the benefit to both claimants and defendants would be disturbed. It would encourage rather than discourage lawyer involvement to a large range of claims that simply do not need it.

A rise in unnecessary lawyer involvement was sparked by the introduction of the fixed costs regime in 2003. It opened the door to consumer bombardment of unsolicited telephone calls by claims farmers.

We urge the working party to proceed with caution and consider the unintended consequences before embarking down this route. Implementing change to improve early dispute resolution has benefit but may very well adversely affect existing early dispute resolution that is working perfectly well without lawyer involvement.

Opening up a jurisdiction for lawyers to argue over costs between the parties for the straightforward pre-litigation work will lead to exploitation. It was quite rightly recognised that,

"the risk of costs affecting litigant behaviour in undesirable ways is very real in the English system".[36]

There is a risk that a new process to formalise the recovery of costs pre-issue will encourage lawyers to seek to get involved in more claims pre-issue, on the basis that they are costs bearing. It has the potential to create costs litigation and increase the burden on the court system, without any discernible benefit.

The current system does not contain any real deterrents to settlement. In practice, defendants recognise those claims where an entitlement to costs would arise if issued. They respect the premise and agree to pay costs in principle when reaching a pre-issue settlement.

Cost claims are agreed in the vast majority of cases and for the remaining few, costs only proceedings[37] works well to deal with disputes over quantum. In our view, there is no need to fix a process that is simply not broken.

We do not consider there is a need for a new process especially one that creates a cause of action where one did not previously exist or is supported by any of the senior court authorities who have examined this area of costs law.

Compulsory use of N260 statement of costs

Irrespective of whether a costs entitlement arises pre or post issue, the process of assessing and agreeing costs is often protracted. The costs claim provided by receiving party often lacks sufficient detail and transparency to understand the work being claimed or who has done it.

Cost claims are all too often marked "without prejudice" and lack certification that it does not breach the indemnity principle.

[36] within the CJC PAP review interim report

[37] CPR 46.14

Paying parties want to assess, agree and pay costs quickly. They want to avoid frictional costs of the costs litigation. However, they are prevented from doing so by receiving parties treating the initial costs claim an "opening gambit" to negotiation in order to generate costs of the assessment process.

By way of example, Regional Costs Judge Deurden considered five inflated costs schedules marked "without prejudice". They significantly exceeded the costs claimed in the corresponding certified bill of costs by a significant margin.[38] When it came to considering an informal claim for costs, he recognised the parties were not on an even footing. He said,

> *"There will be common elements in the files of each party. Those will be limited to correspondence between them; any exchanged documents which the paying party would be able to assess as to its weight and the length of time it will take.*
>
> *What the paying party will never have at this stage, and I stress that this is all without any proceedings having been commenced, is the solicitors' correspondence file with his client; the attendance notes; he will have no means of knowing what work was done; what work was reasonably done and whether it is proportionate in nature and amount.*
>
> *The only way in which he gets to know that is from the schedule tendered for agreement. The importance of the accuracy of that schedule will be clear to anybody dealing with matters of this nature. It is not an opening gambit; this is not a game of cards or chess. This is an attempt, although not yet in court but within the ambit of civil proceedings, to avoid litigation."*

We need a simple process whereby receiving parties are required to provide costs claims containing a prescribed minimum amount of information.

We propose each PAP require a receiving party to serve a fully completed N260 statement of costs containing the signed certificate,

> *"The costs stated above do not exceed the costs which the [PARTY] is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated."*

A fully completed N260 contains the minimum amount of information a paying party needs to assess and make an appropriate offer of settlement. This will improve the paying party's understanding of the cost claims they have to meet leading to quicker resolution.

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

The distinction between contentious and non-contentious business serves no real purpose where a client enters into a written retainer with their solicitor.[39]

We do not believe any personal injury claims are conducted without a written retainer being entered between client and solicitor.

In circumstances where a retainer explains that not all costs may be recovered and the client will have to pay any shortfall, guidance is needed on,

- when are costs unusual in nature and amount?

[38] Ramsay v InStore Plc (Bury County Court 29 April 2008) – Nicholas Bacon KC acted for the claimants in these cases.

[39] CPR 46.9(2)

- Is the client liable where a lawyer fails to expressly inform the client they are not recoverable?

The rules on contentious business, particularly around CFAs and DBs provide important consumer protection and should be retained.

Part 4 – Consequences of the extension of Fixed Recoverable Costs: Keoghs response

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?

Following the extension of FRC, costs budgeting will become less important within the civil justice regime. The move to FRC for claims worth up to £100k and the new PAP regime being proposed by the CJC will significantly change the civil justice landscape.

There are concerns at the impact of extended FRC on multi-defendant claims. How will the rules allow one party to unilaterally settle the claim against them?

Currently, defendants are penalised in costs for failure to comply with PAPs by the claimant progressing the case to the next FRC stage. It is up to the defendant to make a reasonable settlement offer to provide costs protection from subsequent FRC stages.

We do not see there is a need to change the incentives on defendants to settle cases at the earliest opportunity.

Conversely, claimants are free to push a claim along a PAP process free of adverse costs risk until they commence proceedings. In CFA and DBA funded cases, claimants are no risk of having to meet their own costs until the "win" clause is satisfied crystallising their liability to pay costs.

We do not consider there is any need to change the point at which a claimant becomes liable to pay the defendant's costs unless a PAP requires the defendant do more than investigate and make a decision on whether to meet a claim. Where it would require a defendant to bring into being evidence they will rely upon before the court (Such as witness statements and expert reports) we consider the claimant should be at risk of adverse costs.

Costs sanctions after issue will become more important under the new PAP regime. At present costs sanctions are rarely imposed for a failure to meet the requirements of a PAP. Where they are imposed, in general, the penalty is an award of indemnity costs.

We do not believe that awarding indemnity costs provides an adequate driver of good behaviour. Part 36 costs penalties are much more effective and a similar approach should be adopted for sanctions for poor pre-issue behaviour: a percentage award.

The FRC rules should ensure that the decision in *Doyle v M&D Foundations & Building Services Ltd [2022] EWCA Civ927 908 July 2022)* is reversed. For claims within a FRC regime, however the right to costs arises, costs in accordance with FRC should be the sum awarded.

Clarification is required on how FRC will apply in claims where there is no money claim or where there is a mixed claim. The issue affects housing disrepair claims where specific performance is often sought. These claims are suitable for FRC and should be included within the regime.

We met with the Ministry of Justice in order to raise potential issues in drafting the rules on FRC. We provided details of the issues together with solutions. We attach a copy of our note by way of assistance.

The cost implications of the extension of FRC will be in the detail of the yet undisclosed rules. We would welcome an opportunity to see and discuss the impact FRC will have once disclosed.

We are already receiving e-mail invitations from costs barristers to attend seminars on "Escaping Fixed Costs". As a result, rule drafters and the working party should ensure that the intention of the rules is made clear in explanatory notes.

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 costs capping scheme may be worthy of consideration?

Fixed recoverable costs regimes do not remove frictional cost arising from issues over a disbursement being reasonably incurred or reasonable and proportionate in amount.

A summary assessment process is not be needed if disbursements are fixed. We want to see the following:

- Fixed recoverable hourly rates for experts;
- Fixed costs for experts for standard reports;
- Fixed disbursements by case type.

Fixing as many elements of a costs claim as possible provides certainty and removes potential causes of frictional litigation thereby saving costs and valuable court resource.

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 consider that where the parties are required to follow a process then there is an opportunity to assess the amount of work reasonably required. Where the amount of work is capable of assessment the costs are capable of being fixed or capped.

For more information, please contact:

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