**This is the response of the Legal Aid Practitioners Group.**

**Details of the Legal Aid Practitioners Group (LAPG)**

LAPG is a membership body for firms and organisations which carry out legal aid work in England and Wales. Our members are private practice firms, not for profit organisations, barristers and costs lawyers. Our members carry out all areas of civil and criminal legal aid work and cover the whole range of business models from smaller, niche and/or sole principal firms to many of the largest providers of legal aid services.

In preparing this response we have consulted with LAPG members and the LAPG Advisory Committee which is made up of legal aid practitioners, costs lawyers and practice managers. We have incorporated all views expressed, as far as has been possible. We have also encouraged LAPG members to respond directly to the Civil Justice Council (CJC).

**Introduction**

There are some issues in this consultation which are of limited relevance to legal aid practitioners. The issue of most concern is Fixed Recoverable Costs (FRC). We are aware that this consultation is not about the existing position but there is a need to consider that any change in costs may have a number of consequences, not all of them intended. Therefore in keeping with the strategic nature of this consultation we will endeavour to identify how the proposals will affect legal aid providers.

We note that the Working Group's remit is to take a strategic approach, recognising that access to justice for all plays a vital part of the rule of law in a democratic society and that affordability is fundamental to such access. Three areas are being looked at:

1. Digitisation
2. Vulnerability. "The needs of vulnerable court users must always be taken into account. That is particularly so when changes are being proposed. Furthermore, unintended consequences should be avoided."
3. The economic significance of civil justice.

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## THE QUESTIONS

### Part 1 – Costs Budgeting

**1.1 Is costs budgeting useful?**
**1.2 What if any changes should be made to the existing costs budgeting regime?**
**1.3 Should costs budgeting be abandoned?**
**1.4 If costs budgeting is retained, should it be on a "default on" or "default off" basis?**
**1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?**

LAPG understands that the driving force behind costs budgeting is trying to ensure that costs do not become disproportionate to any compensation involved. In the context of two opposing parties, both at risk of having to pay the other side's costs, being able to weigh up the costs versus potential benefits of proceeding

with their claim/defence would be helpful. Costs are a genuine negotiation tool in practice and may lead to early settlement of cases, thus to some extent reducing the need to use court resources.

In many areas of social welfare work the remedy is not damages but some other unquantifiable benefit. How does a judge decide if the costs of securing that benefit (e.g. housing or access to social care) to the client - to whom that benefit matters so much - are disproportionate?

Proportionality is considered by whether costs incurred bear a reasonable relationship to the 6 factors under CPR 44.3(5):

a) sums in issue
b) value of any non-monetary relief in issue
c) complexity of litigation
d) additional work generated by paying party's conduct
e) any wider factors involved e.g. reputation or public importance
f) any additional costs due to vulnerability of a party or witness (defined under Practice Direction 1A)

Also wider factors which used to be known as the 7 Pillars of Wisdom, having been around since the early 1970s, which are loosely the above but expand thereon and include skill, effort, specialised knowledge and responsibility involved, and time and circumstances in which all or part of work was done.

So the issue is the application of these or other factors by judges when setting budgets on non-monetary relief claims.

Of relevance to Legal Aid Practitioners therefore are the following issues:

a. Many legal aid cases are non-monetary in their nature e.g. challenging a local authority or central government decision, action or failure to act. The challenge could lead to life-changing results for the claimant. In the circumstances the proportionality issue is not about or not limited to monetary issues. In these cases the substantive outcome or remedy being sought is not capable of being quantified in monetary terms, but is of overwhelming importance to the claimant.
b. Many claimants are restricted by the legal aid limitations on scope and level of finances. If the other side has deeper pockets – which is almost always the case – then allowing those with deeper pockets to deter the other party is deeply worrying. We accept that this happens without costs budgeting. No judge can cap the amount that a party with considerable resources can spend on a case and that seems to be the heart of the problem which costs budgeting does not resolve.
c. Costs budgeting in e.g. Court of Protection (COP) or other cases could benefit the stronger party. They could seek to pressure judges to impose lower budgets than are reasonable to enable a client to establish their case. It would have the potential to remove the incentive for an opposing part to consider the weaknesses and shortcomings of their case at an early stage.
d. In cases where it is very infrequent for costs orders to be made (once again using COP cases as an example) it would be disproportionate in terms of the time spent preparing the budgets for all cases.
e. It could lead to defensive budgeting. Practitioners may budget for a very high figure to make sure that their costs were covered if that budget was to be imposed – for example, if a costs order was made in their favour.

We have had feedback on certain areas of law.

**Medical Negligence Claims**

- A claimant will usually have a CFA (conditional fee agreement) in place, which limits the amount of their own costs which can be recovered from their damages if their claim succeeds. Qualified One

Way Costs shifting (QOCS) also means that a claimant will generally not be at risk of having to pay their opponent's costs if their claim does not succeed.

- A key argument for cost budgeting in civil litigation claims seems to be proportionality – are costs proportionate to the damages payable if the claimant's case succeeds? However in many medical negligence cases there is no direct link between the likely amount of damages and the complexity of the case. A claim could be valued low in monetary terms but still be very complex legally. This can significantly hinder access to justice (and is also likely to be exacerbated by the existence of fixed recoverable costs).

**Court of Protection Cases**

- We have already flagged up how proportionality is measured where the outcome is not an award of damages.
- In health and welfare COP matters – it would not be proportionate to incur the costs of cost budgeting on every case just in case an adverse cost order is made, as they are so infrequent.
- The structure and format of litigated COP cases is very different to the structure and format of other civil litigation matters, where there is a clear process that most (if not all) cases work through: pre-action protocol; issue of proceedings & service; defence; cost/case management conference to set directions; expert evidence; disclosure; roundtable meeting/negotiations; PTR; trial. The cost budget may allow for some slight flexibility (using contingency phases, for instance, and by stating the assumptions on which the costs are based), but it is unlikely that a claim would not follow the above process.
- In COP matters the nature of the dispute means the same clear pathway does not exist. Albeit that there are fairly standard steps that are generally taken in the lead up to a hearing, it is virtually impossible to know from the outset of proceedings how many hearings will be needed, the extent of evidence that will be required, or when the case will conclude. COP proceedings have to evolve, often very quickly, in response to what is happening on the ground. In COP matters there could be any number of possible outcomes, in contrast to a claim in civil litigation.
- Timescales – cost budgeting would hinder the timely progression of cases, when time is very much of the essence. For example, in serious medical treatment cases, decisions need to be made extremely quickly; often hearings are listed in a matter of days or sometimes hours. There would be no time for cost budgeting.
- Imposing cost budgets may prejudice particularly vulnerable clients who require more time to be spent on them, as well as litigants in person who often require the legal process to be explained to them.

**Judicial Review Cases**

- Very rarely damages are sought and where awarded they tend to be lower than in other areas of civil litigation (e.g. for human rights breaches). In view of the many hurdles already faced by JR practitioners, another layer of uncertainty about costs is not helpful.
- Timescales – JR proceedings are, for the most part, urgent and limitation periods are considerably shorter than in other areas of civil litigation: 3 months as standard, 1 month in some cases, albeit the onus is on applications being made as quickly as possible – this contrasts with 3 years in most medical negligence/PI cases, 6 years in other areas of civil litigation and no deadline for issuing where a claimant lacks mental capacity to bring a claim. There are already significant backlogs in the listing of both permission and substantive hearings. Adding an additional requirement for cost budgeting would increase the work required for both parties within already tight timescales and increase the court's workload,

thus potentially increasing time to conclusion of each case in the context of legal issues that often need to be decided very quickly.

- Costs budgeting would increase further the frontloading of JR work. With the Pre-action Protocol for JR and the permission stage which only exists for JR, public law work is already very frontloaded. Initial work pre issue may be carried out under the legal help scheme. A certificate will be applied for if proceedings are to be issued. The practitioner will only receive guaranteed funding once permission has been granted. They are working at risk for the whole period between the issue of the certificate and the grant of permission – if it is granted.
- In some JRs legal aid is not granted and practitioners may have to issue because of time constraints. Since 2019 it has been possible to work at risk and if certificate is granted they MAY be able to get the certificate backdated.
- In addition, in JR practitioners don't necessarily receive full costs, or costs at all, for pre-permission stage work which is settled between them and the public body.
- Costs budgeting would need to be seen in the context of other the other steps that frontload JR work, rather than in isolation. In isolation, there is nothing in principle wrong with costs budgeting but in practice and in context there could be.

## Part 2 – Guideline Hourly Rates

**2.1 What is or should be the purpose of GHRs?**
**2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?**
**2.3 What would be the wider impact of abandoning GHRs?**
**2.4 Should GHRs be adjusted over time and if so how?**
**2.5 Are there alternatives to the current GHR methodology?**

2.1 What is or should be the purpose of Guideline Hourly Rates

Our response aims to focus on issues of relevance to legal aid practitioners. Many costs issues are interlinked and we are concerned about consequences for legal aid practitioners.

Costs at present can be charged/assessed in a number of ways.

1. Firms carrying out large commercial transactions may charge a rate for the job, GHRs may be at the basis but the value of the transaction will lead to a mark-up or indeed a charge may be a percentage of the value of the transaction, thus departing from GHRs.
2. Conveyancers may charge a rate based on the value of the property. So while the purchase of an expensive house would not necessarily take longer than the purchase of a cheaper house, the conveyancing is likely to cost more.
3. In legal aid cases, the government sets the hourly rate either as an hourly rate or with fixed fees. There is much concern that both legal aid hourly rates and fixed fees are too low, have not been uprated for more than two decades and have not been reviewed to reflect changes in case mixes (i.e. due to LASPO Act scope changes, leading to more losses on the swings than gains on the roundabouts).

GHRs are relevant in legal aid cases when inter partes rates are ordered (see full answer on this point to the FRC questions).

We agree that the purpose should be as per the consultation – a starting point for the assessment of costs but not a figure to be slavishly adhered to.

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

We believe that they are useful as a starting point.

2.3 What would be the wider impact of abandoning GHRs?

1. It is possible that Judges would reduce costs to rates much lower than they award at the present time. One member gave us an example of a Court of Protection case last year where the guideline rate did not apply and the court capped the hourly rate at a low hourly rate with no explanation of why the work done was only worth that amount.
2. It could lead to great inconsistency and probably unhelpful regional variations, such as more generous awards in London than elsewhere.
3. The GHRs at present may not adequately reflect the high cost of operating in some areas and they need to be considered regularly.
4. It is possible that very high hourly rates are submitted in inter-partes costs cases – the “go in high” concept.

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

If they are maintained, the GHR should rise with inflation and be adjusted annually or every two years if inflation is low.

We are aware that there have been a number of cost of time exercises. They were useful because they provided data upon which to base the calculations. The Scottish one in particular used to have a good participation rate. The LMS benchmarking survey produced by The Law Society is the closest we have to something like that now.

If GHRs were accurately set, then changes in technology should be taken into account e.g. is it cheaper to send an email than send and post a letter? This would be difficult because while the fee earner can probably send off more emails than letters in any time period, the underlying software and infrastructure costs could make this equally or more expensive for the practice.

There needs to be less of a postcode lottery – business rents can fluctuate over the years and a robust measure is needed to reflect overheads, particularly in cities where costs are high. The Legal Aid Agency contract demands that in most areas of law, practices are to be situated in a certain area of the country and there are contractual requirements regarding staffing and the presence in particular of supervisors. Therefore for legal aid matters, basing costs on remote working would not be appropriate. It is also possible that fewer people work remotely in future.

2.5 Are there alternatives to the current GHR methodology?

We would endorse GHRs with judicial discretion as now. Some commercial firms consider that the rates are too low whereas legal aid practices report that the rates can be four or five times what they would be paid by the Legal Aid Agency.

It is a sad reflection of the current position that civil and criminal legal aid practices rely on having a few cases receiving high costs (in civil cases - inter partes rates and in criminal cases Crown Court costs) because without these cases the practices would not be viable due to the legal aid rates that have been set far below market rates.

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

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

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

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

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

The Consultation states that "Pre-action protocols ('PAPs') embody the principle that litigation should be a last resort."

In considering access to justice, which is of paramount importance, we would take a step back to consider that statement. The issue for many legal aid practitioners is that they represent the weaker party when it comes to litigation. An individual may be challenging local government on care needs or challenging a local authority on a housing decision or an asylum claim against the government. Claims are often about major issues which will cause expense to the government or to local government if they succeed e.g. care needs, housing or asylum support. At a time when government finances are stretched it is clear that decisions may be made having regard to finances rather than a particular authority's legal obligations. Many legal aid practitioners are only too aware that their clients' cases are exceptionally strong and they will take that case on. The problem is one of gatekeeping. The potential defendant authority relies on the fact that most people turned down will not access legal advice, and that even if claimants are occasionally successful if they can find a solicitor to take on their case and following legal challenge, this approach still represents a net saving when compared to the cost of abiding by their legal duties

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

The use of online court hearings has led to far less travel. In some legal aid cases this cost was not remunerated by the Legal Aid Agency so this has been financially helpful.

We are told that hearings are starting on time and so the unnecessary costs of turning up at court for a 10.30 hearing only to be have to wait until 3pm to get called are removed.

Many legal aid practitioners have incurred the costs of enabling their vulnerable clients to access remote hearings e.g. paying for phone credit, buying devices for loaning to clients, renting office space to enable clients to participate in hearings.

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

The use of the pre-action protocol in JR cases has, ideally, the effect of focusing the mind of the defendant early. The fact that inter-partes costs are not available in JR cases that settle pre-issue causes difficulty.

In JR cases, if the case is not issued, costs are paid by the Legal Aid Agency. If the case is issued but permission is not granted the other party will not have to pay costs – there is discretion on the part of the LAA. So there is a problem where cases are issued and permission is not granted.

Feedback from one member: "The shrinking band of us who still do JR work on Legal Aid may not get paid AT ALL if we don't get permission. That is another difference between us and commercial firms. We can only do JR work because quite often we win. If we are not paid properly for doing it when we win we won't be able to do it at all. None of the important cases that have been taken in the areas of homelessness (from Ali and

Aweys through to Elkundi et al) and public law (disability discrimination in housing allocations policies – Habibo Nur) would be taken. Public bodies will be able to act unlawfully with impunity."

Solicitors have to do more work at the start of a case where there are PAPs. We are aware that housing lawyers have raised this issue with the MoJ.

One example we have been sent is where a lawyer acts for the tenant in a disrepair claim. Works are started to remedy disrepair. There may be an offer of compensation. It may be thought that the Landlord should pay reasonable costs. The landlord may say that they were going to do the works in any event. The compensation offered is low. The landlord's solicitor can argue that it is in effect a small claim with no costs payable. How can the dispute about costs be settled? It would not be desirable to issue a Part 8 application (cost £308) i.e. to issue a claim just to obtain costs. There should be an easier way to get costs assessed in a summary way. It would be ideal to have a procedure where the judge can decide if costs should be awarded and at what level. This is a particular problem in disrepair cases.

The Practice Direction states that if there is no PAP then practitioners should use the standard protocol but this procedure needs improvement.

3.3 Is there a need to reform the process for assessing costs when a claim settles before issue including both solicitor own client costs and party and party costs

Yes – where a lot of work has been carried out and the Respondent makes an offer but does not agree to pay costs at all or a low amount there should be a simple procedure for applying to court and having a decision made by a judge on the papers. In the Administrative Court there is already a procedure where each side limits their arguments to 2 sides of A4 and this could be replicated.

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

We have no comment on this.

## Part 4 – Consequences of the extension of Fixed Recoverable Costs

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

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

**4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.** In raising these questions, the Working Group is NOT inviting comment on the extension of FRC (which has already been consulted upon), rather it is interested in receiving the views of Respondents on the consequences of the extension of the FRC.

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

Of considerable concern is the lack of reference to the impact of any costs changes on legal aid practices. We will in this section try to draw these together.

In 1989 costs were still being paid out of the legal aid fund at inter partes rates: s.107 of the Legal Aid (General) Regulations 1989.

Civil non-family rates were first prescribed (i.e. non-market rates) on **25 February 1994** under The Legal Aid Civil in Proceedings (Remuneration) Regulations 1994 (Si 1994 No 228).

On the same date, Regulations 107A and 107B were added to the Legal Aid (General) Regulations 1989 via amending regulations SI 1994 No 229 The Civil Legal Aid (General)(Amendment) Regulations 1994. Reg 107A specified the basis of assessment (standard basis) for which prescribed legal aid certificate rates would be assessed and Reg 107B disapplied the indemnity principle from legal aid rates and any costs limitations thereon in order to enable legal aid solicitors to recover market rates on inter partes recoveries. Provision was also made for recovery in legal aid only costs in addition to inter partes recovery – indicated by provisions added by Reg 106A.

As an aside, because the 1989 regulations only applied to certificates, Reg 107B didn't apply to Green Form and ABWOR so you could only claim market rates on pre-certificate work until the scheme switched to the Access to Justice Act 1999 and Reg 15 of the CLS (Costs) Regulations 2000 applied, which carried the same policy as Reg 107B, but applied to all Community Legal Service funding including controlled work.

LAPG has been looking into the basis of this agreement but has only been able to find a reference to the negotiations with The Law Society and The Bar Council in this article: https://www.lawgazette.co.uk/news/a-year-of-opportunity-issues-and-opportunities-for-1994-/19438.article

The Gazette article is interesting for these two main reasons:

1. The Law Society survey on rates being allowed in the County Courts showed that the legal aid rates introduced in 1994 averaged 20% lower than the going rate.
2. When the concession allowing recovery of market rates was made, The Law Society was of the view (and there is no reason to doubt that they were absolutely correct) that the minority of cases would actually be paid out of the fund i.e. a minority of cases stuck at the lower legal aid rates. However, less than 7 years later, in 2000, the landscape had completely changed with the removal of many eligible cases including but not limited to Personal Injury and Clinical Negligence and Boxall v Waltham Forest 2000 enabling public bodies to avoid paying costs in JRs if they conceded before

permission stage i.e. most JRs. Then it changed even more dramatically due to the introduction of the LASPO Act in 2013, leaving legal aid lawyers to deal with the most desperate cases, many of which do not have good prospects of recovering costs e.g. possession claims for public and social tenants.

It would appear that the availability of inter partes rates in successful cases influenced the decision to pay below commercial rates for legal aid work. In considering any changes to the costs regime we would highlight that this is a very serious issue for legal aid practitioners. Civil legal aid providers are declining in numbers and the number of cases being brought under the civil legal aid scheme has declined by hundreds of thousands since the peak of 2009/10.

One of our members fed back to us: "How will the Government ameliorate the financial impact on legal aid providers of the significant reduction in inter partes income? Legal aid rates are paid at around £63 per hour for certificated cases (London) and inter partes rates are £200-300 per hour. Legal aid rates were set in 1994, increased by £1 in 1996 and then cut by 10% in 2011. The indemnity principle was disapplied in 1994 to allow providers to supplement low legal aid rates with inter partes costs. Inter partes costs will continue to be crucial to legal aid given any future increase in fees will not be up to inter partes levels."

One of our members has explained it in this way

"Presumably the rationale for FRC is something like – parties will know how much they will have to pay if they lose, and what contribution to their costs the other side will pay if they win. So a non-legal aid solicitor can say to the client "We will charge you £220 per hour for our work. We think that if we go to trial and win our total costs will be £5,000, but the other side will only have to pay £3,000, so of the £5,000 you are liable to pay us you will have to pay £2,000" And the client can then make a commercial decision as to whether to take or defend the case.

Unless they change the whole way that legal aid is funded, allowing us to charge the LAA the going rate, legal aid lawyers simply cannot do that. We do not have a client to whom we can say, we will charge you X, you may recover Y and will have to pay the difference of Z.

"The market" will not adjust to be able to accommodate FRCs in possession cases as there is no "market" for legal aid work – we get paid what the government decide we get paid. People's homes are at stake."

Turning to a disrepair claim she says

"We had a case listed for trial today. It settled at 5 pm last night, the city council having fought tooth and nail up until yesterday (when I think they received some stern advice from the counsel they had briefed for trial). The client is a vulnerable single man who would not meet the especially vulnerable 'get out' for FRC. Our costs are £10k at legal aid rates and £40k at inter-partes rates. Costs have been increased by the manner in which the case has been defended. Would we take the chance of persuading the court that there was unreasonable conduct justifying departure from FRC regime? No we would not.

We simply will not take on this kind of case once FRC come in. People like this poor man (who had no working toilet when we were first instructed, and a bathroom floor in danger of imminent collapse, and where we had to issue an injunction application to get the very urgent repairs done) will be left at the mercy of incompetent (or worse) landlords and/or claims farmers who will not achieve anything beyond maybe getting a bit of money for him and for themselves."

One of our members has been told by their local judge that since the introduction of fast track costs in PI cases there has been a race to the bottom. Good firms leave the market. Some firms are doing PI work very

badly: trials are very badly prepared; one sentence paragraph template witness statements are filed; the client never having met a lawyer until the day of the trial and then they meet counsel who asks for more time in order to get proper instructions, with the result that the claimant doesn't do as well as they should. The judge fears that all other fast track work will go the same way if FRC are introduced. We appreciate that this is only anecdotal evidence but there must be the ability for the MoJ to gather evidence from judges on this point.

There simply is no "market" for civil legal aid work in any area. People are leaving the sector not joining it. FRC will accelerate that decline."

PI and the majority of clinical negligence cases were taken out of legal aid in 2000. CFAs are also occasionally used in housing disrepair cases where either ATE can be obtained or the adverse costs risk is deemed not too high. There are difficult issues regarding unpaid lost cases. There is undoubtedly truth in stating that legal aid providers in most cases do get paid even where the case is lost but legal aid rates were never designed to fully remunerate providers including counsel. After over 28 years of a pay freeze and various reductions including a 10% reduction and low fixed fees, legal aid practices are even more dependent on the inter partes recovery that they obtain – even more so than their counterparts on CFAs and other forms of litigation funding.

LAPG is not in a position to investigate either the ATE or BTE insurance market but would urge the CJC or MoJ to look into availability before making any recommendations. Entire sections of legal expertise are almost exclusively funded by legal aid. We are concerned that if these areas are made subject to FRCs on the assumption that a decent accessible insurance market will quickly develop, and it does not, then it is unlikely that those areas will resurface by the time it is acknowledged that this is not a sustainable solution.

LASPO changed the position on CFAs requiring their use if available, leaving only those that cannot be financed in this way within the remit of the legal aid scheme. Many of those eligible are not in a financial position to invest in financial products or insurance policies that include BTE.

LAPG is concerned that legal aid practitioners' ability to carry out civil legal aid work will be adversely affected if changes are brought in that do not take into account how difficult it is for them to provide advice and representation under the current under-funded legal aid scheme. Many, many vulnerable clients cannot access advice or representation at present. We await the Ministry of Justice's review of civil legal aid sustainability and urge caution in making changes without reference to the legal aid scheme.

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? If so please give details.

See above.

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.

See above.