Civil Justice Council

Costs Working Group – Consultation Paper

October 2022

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Introduction

Irwin Mitchell LLP is a top 20 UK law firm with a full service offering, both to individuals and businesses. We employ c.3000 staff and have 17 offices throughout the United Kingdom.

We have a keen interest in and work hard to engage with Government around their law reform programmes wherever they impact our clients or practice. The different elements of this consultation affect all of our clients to varying degrees and so we are grateful for the opportunity to provide our input.

We have extensive experience around all of the elements the Council is considering and whilst we have set out the key points below, we have also kept the same to less than the 20 pages of text referenced in the consultation. If however, we can provide any clarification or further assistance on any of the points made, we would be more than happy to do so on whatever basis was felt most helpful.

If there are any queries in respect of this response, please direct them to:

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General Remarks

We appreciate the opportunity to input into what are important questions regarding the administration of civil justice for our clients, both before and after the commencement of Court proceedings.

When taken together, the elements covered in this consultation are fundamental to the workings of our system and we agree that it is good to revisit them at this time in order to consider how they might be improved.

The questions posed are no doubt purposefully open and so we trust in answering them we have provided an appropriate level of detail. As a result we have refrained from repeating key themes at the outset, but rather have concentrated on the questions themselves in turn below:

Part 1 Costs Budgeting

1.1 Is costs budgeting useful?

Costs budgeting, in our experience has had some difficulties since its introduction, in particular regarding the amount of Court time needed and available and some inconsistency in approach when the Court is setting budgets. That said, we believe that a long period of 'bedding in' was inevitable for this process and it is now showing signs of achieving some of its stated aims. We believe that Costs' budgeting is useful for the following main reasons:

- It allows for visibility to all parties of incurred and future costs at an early stage in litigation and so helps to inform clients about their overall cost liability;
- It allows visibility of costs for ATE Insurers, LEI providers and Litigation Funders, which is particularly important when considering the sufficiency of indemnity limits;
- It gives a good degree of certainty about recovery of legal costs if a case is successful or unsuccessful. Whilst the costs already incurred at the point the budget are considered they still need to be agreed or assessed, the estimated future costs are largely capped at the approved levels and these usually constitute the majority of a litigant's costs liability. This level of certainty will improve once case law develops further around reasons for varying budgets either as a result of significant developments or good reasons to depart from agreed or approved costs budgets;
- It provides clear costs information to the Court when making a final costs order and in making an order for an interim payment on account of costs;
- It assists parties when trying to resolve costs negotiations at conclusion of the litigation and we are seeing a decline in the number of contested Detailed Assessment Hearings.

In summary we believe that costs' budgeting is useful for litigants and if further efficiencies around their application can be achieved they will become an even more useful part of the administration of justice. Generally in the Multi-Track a bespoke budget for each individual case is a fairer way of

controlling costs than further fixed costs. That said, we certainly believe that some changes to the costs budgeting rules and process are needed to:

- Take appropriate cases out of the process to save Court time and to avoid any delays to case timetables;
- Streamline the approach to and length of budgeting hearings.

We have expanded on these points further in the subsequent sections, however at a headline level, we believe our proposals would reduce by 15-20% the number of budgets being dealt with by the Court at costs management hearings, whilst retaining the clarity and control they bring. This figure is over and above the 30-40% of budgets which may no longer be required as a result of the FRC extension.

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

Whilst we support retaining the preparation of costs budgets for many claims, we believe that there are a number of areas where a 'default off' approach would work well and that some cases should be excluded from budgeting altogether. The approach to budgeting can also be improved through a simplified procedure, which we outline within this paper.

By "default off" we mean that budgets are filed and served but that a Costs & Case Management Hearing (CCMC) to set the budget is not automatically listed unless the case managing Judge believes that one should be ordered. This would allow the Judge to consider the budgets alongside the proposed directions and only list a hearing to approve the budget if they believe it is necessary to do so. This approach would save the costs associated with a contested hearing to set the budget and free up significant Court time.

In "default off" cases where a CCMC isn't necessary, the costs information served and filed would form part of the detail available for consideration at any Detailed Assessment, when considering the reasonableness of the parties' costs. The budget would effectively stand as a costs estimate and there are Court rules in place in this regard but which could be extended if required[1]. It would be important that the 'estimate' should be informative only at the point it was prepared, to save parties needing to go to the additional expense of applying to amend it as circumstances develop through the life of the case.

In the sections below, we first address different cohorts of Personal Injury claim and thereafter make some general comments about wider claim types.

<u>Personal injury cases subject to the new intermediate level fixed recoverable costs</u>

[1] Practice Direction 44 para 3.1 & 3.2
3.1 - In any case where the parties have filed budgets in accordance with Practice Direction 3D but the Court has not made a costs management order under rule 3.15, the provisions of this subsection shall apply.
3.2 - If there is a difference of 20% or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide a statement of the reasons for the difference with the bill of costs.

Given the intention to extend the Fast-Track upwards to £100k for many cases, costs budgets will not be needed in this cohort as fixed costs would apply.

Our data set shows that approximately 37% of our budgets relate to cases with damages below £100k and therefore (whilst not all of these will be designated as 'intermediate cases') it is clear that a significant amount of Court time currently spent dealing with budgets will be saved.

Personal injury cases with damages over £100k[2] but under £2m

We believe that 'default on' should remain the usual approach for this cohort of personal injury cases in the Multi-Track for the reasons set out above. We think that the majority of cases in this bracket will benefit from having a budget set by the Court.[3]

Where 'default on' or 'default off' is the norm, should a party wish to argue that a different route be ordered, an application supported by evidence could always be filed.

Personal injury cases where damages are over £2m

We propose that at the higher end of the Multi-Track in Personal Injury cases, the budgeting process should become 'default off' for cases valued at over £2m. The need to consider proportionality at all stages and levels is integral in the rules but at this level, disproportionality of costs is less likely to be such a major issue. We rarely see budgets claimed at over £1m in personal injury cases and they are usually significantly less, which is 50% or less than this suggested 'default off' level. The Judge would still be able to order a CCMC if concerned about the overall amount of the budget or something in particular within it. For example, the case managing Judge may not be concerned about the overall budget amount but there are one or two issues standing out which appear disproportionate and they want to consider putting some controls in place for those elements of costs only.

In the last 12 months, Irwin Mitchell filed 494 budgets in personal injury cases. From our data set, 49 of these had damages above £2m which amounts to approximately 10% of our cases. If these were 'default off', and given the greater complexity of such matters, further Court time would be saved as the largest budgets would not require a hearing.

Defendants costs budgets in medical negligence cases

Often in Personal Injury matters, there is a wide disparity between the party's budget levels. In our experience, this is particularly so in medical negligence cases where different market forces apply along with the difference in work levels undertaken by the parties. We believe consideration

[2] Or those which are under £100k but outside of intermediate FRC matters for reasons of case type (i.e. actions against the police) or complexity (i.e. trial lasting 4 days +)
[3] Please see our answer to question 1.5 below for details of the 'streamlined approach' which could be taken to those matters in the lower end of this bracket.

should be given to a 'default off' approach to Defendant costs budgets in medical negligence cases regardless of value. Just to be clear, a budget should still be filed as whilst Qualified One-Way Costs Shifting applies, when a Part 36 offer has been made, a budget can be particularly helpful when considering the indemnity levels of any insurance policy funding a claim.

Commercial and Non Personal Injury Cases

We believe that costs budgeting in commercial cases should generally be on a "default on" basis for the following primary reasons:

- Commercial cases can often involve significant early work on such issues as disclosure and so a process to consider and control expenditure at an early stage is usually appropriate;
- Qualified One Way Costs Shifting is not in place in these areas;
- Whilst all commercial entities will be concerned about the level of legal spend in a dispute, this can be particularly true where there is an imbalance of resources between the parties and therefore the degree of clarity and control a budget may well provide as to what is likely to be recoverable, is welcome.

There may be an argument for an upper level to a "default on" approach but we believe that should be much higher than the £2m referenced above in respect of Personal Injury cases, given the sums which may be in dispute between 2 large companies and proportionately the higher level of costs which may accompany such disputes.

We would encourage an approach by the Courts whereby the parties have opportunity to input in a meaningful way into the decision as to whether or not costs should be budgeted. If a 'default on' approach was taken, parties should not be criticised for applying to dispense with budgets in all the circumstances, preferably but not necessarily by consent. Exactly the same challenges as those referenced separately apply with these case types; delay, length of budgeting hearings, inconsistent judicial approach for example. The points made in respect of greater efficiency through streamlining the approach to budgets in the right cases may save considerable Court time here as well, but still give parties additional information in respect of the those costs which may be recoverable.

Other general considerations

Where budgets are required, we would support clearer guidance within the rules about how exactly they should be dealt with by both the Judiciary and the parties to assist with the current inconsistencies experienced. For example:

- Whether budgeting should always be dealt with at the same time as directions and/or when and how it is appropriate to deal with the issues separately. Different Courts take their own individual approach, which is far from ideal. Whilst there is of course a clear overlap

between the steps necessary in a case and the costs involved with taking those steps, logical consistency should be possible;

- When the Court should order limited budgets such as 'only up to the exchange of expert evidence' or order budgets for liability issues or split trials only;
- How the Court should set costs budgets, referring to phase totals only and not addressing specific issues such as hourly rates.

We are sure that further judicial training would aid the desire for consistent best practice and if we can be of any assistance in this regard, we would be happy to help.

1.3 Should costs budgeting be abandoned?

We do not think costs budgeting should be abandoned as it has become an integral part of the Civil Procedure Rules in keeping control of costs at proportionate levels. However, as we have outlined above, we believe that some revisions to the process are required to improve the system.

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

Please refer back to our answer at 1.2 above as we do not want to duplicate our responses unnecessarily. The detail above is focused more on value, whereas in this section we refer to the approach which we believe should be taken to different matters according to their nature and complexity.

Personal injury cases

Just to ensure that our view is clearly understood, when we refer to a 'default off' approach, it does not mean that budgets are entirely dropped, but rather that the approach is streamlined in that a budget is still prepared, but a hearing to deal with it would very much be the exception.

To complete the picture, there are still some cases which should be entirely excluded from budgeting, these are summarised in the section below with reasons:

Personal injury cases which should be 'default on'

Cases which are not appropriate for intermediate level fixed recoverable costs, or which have a value of between £100k and £2m, we believe should be left as 'default on'[4] for the reasons outlined previously in this paper (see answer to 1.2 above).

[4] Unless otherwise excluded, i.e. complex children cases or where life expectancy is short.

Personal injury cases which should be 'default off'

- Where damages are likely to be above £2m, unless the Court orders otherwise. In this cohort, disproportionate costs are less likely to be incurred but the Court could order a CCMC hearing if concerned by the overall level of the budget or some aspect within it;
- Defendant's costs budgets in medical negligence cases (see specific section on this cohort in 1.2 above for greater detail).

Cases which should be excluded from the budgeting process

We think some cases should be completely excluded from the budgeting process where it is either not practical to prepare and set costs budgets at an early stage, or not fair to the parties to extend the duration of the case dealing with the costs budgeting process. We have in mind here:

- Cases where the prognosis is so unclear that any budget prepared would be speculative and multiple budgets and Court hearings to vary the budget would be likely. High value cases involving children fall into this category which should remain excluded but there are other cases with similar issues involving adults;
- Other cases involving Protected Parties. Whilst we acknowledge of course, the need for the Court to protect the interests of these Claimants, costs have to be assessed by the Court and certified as reasonable before any monies can be taken from recovered damages pursuant to CPR Rule 46.4. We believe adequate protection is in place already and budgeting only adds an additional and duplicative process;[5]
- Cases where the Claimant has a short life expectancy of less than 2 years where there is an obvious need to fast track the case to conclusion in the shortest possible time. Most mesothelioma cases fall into this category and are currently excluded. This cohort of case should remain excluded but there are other cases with similar life expectancy issues that should be excluded also;
- In Group Actions we believe timing is very important, as are the specific characteristics of the action. Costs in a particular group may be very difficult to predict at an early stage and multiple budgets and hearings may be needed (and therefore avoided). The extent/size of the group isn't always known early in the litigation. The case management applied to a

[5] We appreciate this is a much wider point than the question of budgeting in protected party cases, but in the interests of saving Court time, clear guidance would be extremely useful around Rule 46.4(2) and the assessment of Costs in these matters. Whilst some issues have been addressed in the recent Practice Note (Dec 2021), certain issues remain uncertain for Claimants and their representatives as well as taking up days of Court time. In summary:

- The practice note confirms that a Detailed Assessment of costs has to happen rather than an approval, but does not confirm how that DA should then be conducted;
- The client has usually raised no concerns over the costs and no points of dispute are taken;
- What Points of Dispute should be used or should it just be a sense check by the Costs Judge?;
- Should party/party agreements be approved and a solicitor/own client assessments only undertaken?
- Some Judges are effectively undertaking an assessment of the full Bill to determine if the between the parties agreement is reasonable to also ascertain what the client should pay.

Group Action should extend to bespoke costs management also. We would propose that all Group Actions should be approached on an 'excluded' basis at least initially, but that the issue should be considered at CMCs.

Commercial and non-personal injury cases

We would again refer back to the corresponding section of our response under 1.2 above. In particular, we would highlight the importance of parties requesting a differing approach to the default position given the specific circumstances of a particular dispute or the parties to it.

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?

Some personal injury cases which should have a streamlined process

For those matters which are of an intermediate value, but excluded from fixed recoverable costs and those claims at the lower level of the Multi Track, for example cases worth between the £100k - £200k, we believe that a more streamlined approach could further reduce costs and also free up additional Court time. Our proposal is as follows:

- A summary (front page only) budget could be filed which would be less time consuming and so less expensive to produce;
- The formal Precedent R process could be dispensed with in this cohort although parties could/should still try to agree the budgets or narrow issues;
- A Court hearing, on the rare occasion one was required, should be restricted to no more than 1 hour;
- Judges should have the power to 'default off' and not order a hearing if the budget looks proportionate or doesn't raise concerns.

Budget process timetable

One of the main difficulties experienced in the costs budgeting process are the very tight timescales which are often ordered.

Whilst it is generally better to be at the stage of advanced discussions around the case directions when finalising costs budgets, given the penalties for late filing of budgets, extremely tight deadlines for filing should not be ordered. This is a simple point, but a very important practical consideration.

The other tight deadline relates to the filing of the Precedent R, 7 days before the CCMC hearing which then leaves little time for the parties to try to agree costs budgets and enter into further negotiations. The Precedent R could be filed 10-14 days before the CCMC hearing, giving more time to enter into negotiations.

Phases in the Precedent H

Again, in the context of Personal Injury cases, we find that some work which has to be undertaken does not fit within the current phases outlined in the Precedent Form H. A couple of examples are:

- Work undertaken by the Solicitors in complex claims relating to the Claimant's rehabilitation from a serious injury. Work can include instructing and liaising with the appointed case manager throughout the case, attending multi-disciplinary meetings where the client's condition and rehabilitation is considered, dealing with Defendants queries and challenges to the Rehabilitation programme, advising the Claimant on managing interim funds and considering the impact on the value of the case. Some of the work undertaken can fit into the experts phase in the Precedent Form H, but some of the items (which can amount to substantial amounts of work) do not really fit any of the phasing at present;

- Approval of Damages hearings (and associated work) which if included in the trial phase, distorts the figures in this section. It could be a contingency, but the Courts often don't like these sections being used.

We think further guidance around work which doesn't fit properly into any particular phase would be extremely useful. Should it be claimed as a contingency for example or should more phases be developed?

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

We think that there is a benefit of having GHR's, which provide a 'starting point' for the Court when assessing recoverable hourly rates both in Summary and Detailed Assessments.

Without a benchmark for doing so, we feel that more inconsistency could occur and do not think there is a credible alternative which could be used by Judges for this purpose. It is difficult and arguably not desirable for firms to have to provide evidence of their own overheads as one of the measures when recoverable costs are assessed. So a 'broad' approximation of actual hourly rates in the market has always seemed to be the only way to prepare and publish GHR's.

The problems that we see with GHR's can be summarised as follows:

(i) If they are too 'broad' they do not reflect market rates especially for specialist areas of the legal profession;

(ii) Because it is so long since GHR's have been considered in terms of an evidence based review, they may not accordingly reflect overheads of law firms and market rates;

(iii) If they are not updated regularly they fall significantly behind market rates and growing overheads year on year;

(i) and (ii) can be addressed if Judges are prepared to depart significantly upwards from the GHR's if a justification can be provided to the Court to do so with reference to the CPR 44.3 (5) factors. (iii) above can be addressed by regular updates being undertaken as outlined later in our response at 2.5.

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

GHR's in our view, help law firms to inform their clients with more certainty about the likely recovery of their legal costs. This is both necessary and important when providing costs estimates of likely solicitor and own client charges and transparency of pricing arrangements.

We believe that not having GHR's as a 'starting point' for recoverable costs, would be detrimental for consumers.

2.3 What would be the wider impact of abandoning GHRs?

We have outlined the purpose and benefits of having GHR's in our response at section 2.1. Those benefits include helping law firms to provide costs estimates of solicitor and own client charges and help to provide greater transparency for consumers.

If GHR's were withdrawn, we would see this as a backwards step.

We also see benefits of GHR's for Legal Expenses Insurers, After the Event Insurers and Litigation Funders. They need to quantify their liabilities and GHR's provide them with a benchmark and some way towards measuring these. Without GHR's they would have the same difficulty as law firms when trying to quantify and advise around recoverable costs.

GHRs are also used a reference points in the Employment Tribunal and Family Courts on occasion, despite them functioning within completely different costs regimes. Similarly, in these areas, GHRs are a valuable tool to those funding different legal scenarios through particularly insurance.

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

A significant problem with GHR's in the modern legal landscape was that they were not updated for 10 years and fell well behind both the overhead increases which law firms experienced over

this period and market rates. In our view GHR's should be adjusted annually to address inflationary pressures and avoid the relevance of the rates falling behind the market.

We think that the best way to adjust GHR's is to use the SPPI index (Service Producer Price Inflation Index) for legal services. This we have long since thought best tracks inflation and value measures in the service sector which includes law firms. We are not supportive of a full review of GHR's in the short term because we think that is too early to do so following recent changes.

We believe a full review after 5 years would be sensible around methodology and levels of GHR's to see if anything has fundamentally changed. By then, any changes to working practices in the legal profession post pandemic should also have had time to bed in as well as any changes to overheads of law firms.

2.5 Are there alternatives to the current GHR methodology?

The original methodology for GHR's was established with reference to law firms' overheads and was (as far as possible) evidence driven. We fully understand the difficulty with obtaining evidence around law firms overheads to help with establishing GHR's and why a different methodology had to be found.

We have considered other methodology, such as looking at market rates or finding ways to find more data for an evidence based review, but we do not think that these are practical alternatives.

Similarly, there are real concerns around utilising 'recovered' hourly rates as the data set for GHR's because:

- The recovered rates have evolved from out of date GHR's and;
- The recovered rates given the above may have too many inconsistencies to provide fair 'broad' approximations.

Our concerns regarding the current GHR's would be alleviated to a degree if our suggestions in this response were applied, in particular:

- Annual increases to the GHR's;
- The legal element of the SPPI index is used as the measure to increase GHR's;
- Costs Judges utilise the rate as the 'guideline' they are intended to be and exceed the GHR's in appropriate cases if this departure is justified, especially in specialist areas of law.

Part 3 Questions: 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?

We of course agree that parties to a dispute should engage proactively both pre and post the commencement of litigation to seek to resolve their differences or at least narrow issues where possible.

Facilitating such engagement is what we do, in that the vast majority of the matters we take on across multiple fields are resolved without the need to involve the Courts or Tribunals and of those where proceedings are commenced only a small fraction actually require the appropriate Court or Tribunal to make an ultimate decision. In complex personal injury and medical negligence for example, less than 10% of the enquiries we receive end up in litigation and often that step is taken to protect our clients from statutory limitation. Only a very small fraction proceed through the entire Court process and result in a trial. Many high value complex personal injury and medical negligence lawyers can go years without needing to take a case to trial.

No doubt this particular question is purposefully wide, however if different forms and degrees of dispute resolution were contemplated in different circumstances, then the costs implications would be particular to each scenario. The Council will be aware that the Ministry of Justice has recently been consulting on mandated mediation within Small Claims Track litigation, however the costs implications of this are wholly different to say the mediation which takes place within a family setting or the impact of a pre-action portal such as the Official Injury Claims (OIC) procedure.

It is very difficult to offer meaningful commentary on the costs of digitisation of dispute resolution generally, however we would always offer a detailed view on any specific proposal. We assume that Government will consult on such individual reforms as has been the case with the extended Small Claims Mediation Service (SCMS) recently.

One area of significant concern around the costs associated with digitalised dispute resolution are the technology integration costs involved for law firms. It strikes us that a portal (or 'funnel') which caters for multiple dispute types may have to be so wide in its approach as to likely be meaningless, however at the other extreme building digital solutions for the many and varied disputes types would be incredibly expensive, for government and practitioners[6].

Assuming that it is accepted that pre-action portals such as the low value claims portal or the OIC portal are forms of dispute resolution, perhaps a recent example would be useful to highlight some of the costs difficulties involved in integrating and maintaining such systems:

The low value claims portal (operated by Portal Co.) has been around now for about a decade, however it has been largely, but not fully overtaken by the Official Injury Claims portal. As a result, law firms now have to maintain their integration with two separate systems. A number of firms will have spent millions of pounds in the last 2 years integrating with the new OIC portal, only for a sizeable 2 factor authentication upgrade to be planned to the 'old' claims portal in February 2023. In some cases, integrating this changed technology is simply not viable and such considerations will cause firms to exit the market, which in turn means that many more wronged individuals cannot access justice.

There is also a cost to society in that if civil justice is pushed on-line, particularly in a low cost or no-cost environment, those who are unable to access or make use of technology are at a

[6] We understand the Official Injury Claims portal costs tens of millions to build, however we don't believe the full cost has been published to date.

significant disadvantage. When we hear that the average reading age in the UK is around 9 to 11 years of age with high illiteracy rates and over 14 million living in poverty, these are concerns government cannot afford to ignore.

There are of course differing considerations for differing costs regimes. In a commercial litigation for example, where currently costs are unlikely to be recovered pre-litigation, mandating certain pre-issue processes or procedures could reduce the costs likely to be payable by the party in the wrong. In an environment where Court inefficiency and delay is being used to avoid paying debts, a party knows it is going to have to ultimately meet, great care is needed to safeguard those needing to use the system to address such behaviours.

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

We began to touch on this at the end of the last section, in terms of the clarity around where the Court process begins from a costs recovery perspective. If the commencement of proceedings is the trigger for costs recovery, then driving matters outside of the current formal Court process requires careful consideration to ensure that the full implications are understood. We trust that the Government will consult in a meaningful way around such significant reforms.

Pre-action protocols (PAPs) are of course very important and in many claim types they work well. We would refer the Council to our full submission to their Pre-Action Protocol Review which closed in December 2020, and the more specific consultation in January of this year. PAP's can help control costs, but they can also be a hindrance. They should bring logical structure to how claims of whatever nature are to be approached, however it is possible that they force parties to 'go through the motions' with steps which do not add value to the particular case type/dispute in question. As is so often the challenge, getting the balance right and recognising exceptions are important components.

We are concerned that there may be a movement towards a small number of 'more general' PAPs. Perhaps to help support the building of one general digital pre-action portal/funnel, however if this is the case, there is a real risk that it is so wide as to be meaningless as a control. On the other hand a different portal for each case type presents a different challenge given the expense involved with developing the current portals in the lower value arena.

We would certainly advocate that less is not more on this occasion and given that parties are only usually concerned with any one PAP at once, there is little benefit to be gained from working to simply reduce the number of protocols.

As a general rule, we would welcome a greater expectation of compliance with pre-action protocols. Our experience is that we regularly see Defendant solicitors ticking the box on a directions questionnaire to indicate that they have fully complied with the relevant PAP, when in our view this is entirely untrue. This is compounded and to a degree even validated by the Courts when they show little appetite to tackle such behaviour.

Turning to recent portal developments, we would reference both the recent OIC portal and the Damages Claims Portal (DCP) builds. Neither of these reforms have gone smoothly.

The OIC portal has cost tens of millions of pounds and whilst it was understandably built with the Litigant in Person in mind, the vast majority of users are still represented. Unfortunately, the integrations between the portal and these professional users were, to a degree, an afterthought (not because they were not understood, but just because you cannot build to integrate a system until it is largely finished).

This has resulted in multiple API amendments, issues with the new Small Claims Notification Forms (SCNFs) being rejected, PDF format failures, issues with integration with the medical reports processes, offers not being received, not being able to exit into the Court process etc. There are always going to be teething issues, but ideally the time and space required to get something right first and fully tested ought to be allowed.

In respect of the DCP, whilst we had early sight as a firm, we were not keen to start using the system whilst it was not fit for purpose. We have experienced issues with logging in, administration on the site, clarity around Defendant engagement, inability to re-assign cases (leavers are still a real problem), options to supervise work in the DCP, inability to use a centralised e-mail address, limited PBA options (we have more than the 2 allowed), an effective re-writing of the Limitation Act around the notice period required etc.

All of these challenges impact the costs and risks involved in engaging with pre-action portals, which is particularly pertinent given that OIC claims are essentially in a non-cost bearing environment and DCP (currently) impacts claims which are to be subject to extended fixed costs. We would urge the Government to work hard to ensure that any future developments of this nature are more carefully managed within a timescale which give the best possible opportunity to get them right before they are forced to go live.

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?

Whilst the process today achieves the intended end, it certainly could and should be more efficient. When a claim settles pre-issue, whilst we will attempt to agree costs this is not always possible and the process for commencing detailed assessment is involved (something the paying party of course knows). As the Council will know, it is necessary to issue costs only proceedings, solely to obtain the necessary order which can then be used to pursue a detailed assessment of costs. We submit that it ought to be possible to pursue the assessment of costs without having to 'waste' c.6 months in issuing part 8 proceedings first. We know that this situation has arisen over time and has been considered in various Courts at different times, however if the Council are able to recommend a more straight forward approach based on the agreement/contract which must be in place for costs to be pursued, it would save time for all concerned (including the Court) and improve the current situation.

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

It seems to be almost universally accepted across the legal industry that, particularly Section III of the Solicitors Act 1974 is overdue a fundamental review. It is of course nearly 50 years since it was enacted, long before regular interim billing, fixed costs, cost caps, pre-action protocols and portals or digitised justice were even contemplated. Progress in all of these areas has overtaken it and so has the distinction between what in practice is considered 'contentious business' or 'non-contentious business'.

This issue is of course a live question before the Court of Appeal even as this consultation period draws to a close in the case of *Belsner v Cam Legal* where it has been highlighted that it makes little logical sense to categorise an Employment Tribunal dispute as non-contentious and the pre-litigation element of a Personal Injury claim contentious retrospectively once proceedings are commenced. We, like so many others await the outcome of that hearing to see what the Court of Appeal make of the distinction. What we would say is that great care is needed not to render 'illegal' large swathes of agreements made in good faith in light of the legislation which has been in place for decades.

Part 4 Questions: 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?

There is an important point to make generally in answer to this question that quite simply, we do not yet have sight of the new fixed recoverable costs (FRC) rules which Government have indicated will come into force in the spring of next year. We have the outline consultation response, which in many respects was light on particulars, with the detailed rules being worked on separately within the Civil Procedure Rule Committee. Until that detail is published, we cannot say with certainty what the impact of those changes will be on the issues covered in the earlier 3 sections of this consultation.

In respect of cost budgeting, we assume that there will be no requirement to carry out a budgeting exercise on those cases which fall under the new regime. That will certainly take some of the pressure off the Courts in respect of backlogs around budgeting[7], however it should be noted that it does not necessarily take so much work away from the lawyers. It will not always be clear earlier on in the life of a case whether it will fall within or without fixed costs and in any event it will still be necessary to keep a detailed time record to evidence to their clients the work that has been completed on a case.

In respect of guideline hourly rates, FRCs do not do away with the need to set out what the agreed hourly rates are between a client and their solicitor. For the reasons referenced above in respect of costs budgeting, it is still very important that the solicitor can set out to their client the work which has been done in the usual format in the majority of fee agreements under which solicitors work.

Turning to the issues of digitalisation, pre-action protocols and portals it is very important indeed that FRCs are only set once there is set process which is clearly understood. It is very worrying

[7] See our answer to question 1.2 above re: c.37% of our budgets in personal injury matters being on claims worth between £25k and £100k.

that the current proposals around fixed costs were arrived at as far back as 2017 and were based on even older data. At that point in time there was no damages claims portal, no suggestion of mandated dispute resolution or changing pre-action protocols. We know that the fixed costs indicated are to be uprated according to SPPI inflation since 2017, however that does nothing to take into account any additional work required to comply with a changing approach to pre-litigation and civil justice generally.

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.

At a general level, the extension of FRCs will certainly drive different behaviours, partly as a result of the ways costs are to be banded for various stages of settlement and elements of work. Some of these will adversely impact the demand on Court time and Court scheduling. For example, as currently published Stage 6 of the fixed costs matrix is defined as 'Up to Pre-Trial Review, alternatively 14 days before trial'. If the PTR is passed, regardless of how long that is before trial, there is then no costs incentive whatsoever for the Defendants to engage further around settlement until either the day before trial or the day of trial (depending on the detailed rules). By changing the incentives, you also change the behaviours.

There will be a similar shift around levels of litigation as the rules are currently drafted. The lowest level of costs will be available for those matters which settle pre-issue ('or pre-defence investigations' which again is something we trust will be clarified by the detailed rules). Defendants may therefore be more engaged early and may well change their approach to early Part 36 offers. Equally, Claimants are likely to be less tolerant of Defendant behaviour pre-issue and commence proceedings more readily than is perhaps the situation today.

One area of the extended FRC regime which will also impact costs are arguments about complexity bandings. Again, unless greater clarity is provided in the rules (something which the Ministry of Justice indicated would not happen), it strikes us as almost impossible to say with certainty what should and would fall into Band 2 and Band 3 matters[8]. As a result, parties are unlikely to agree this which will increase the amount of work done (and therefore cost incurred) in determining this point.

Additional costs and no doubt Court time will be spent seeking clarity around whether or not a case should be in or out of FRCs, how exceptionality should be applied, where one stage starts and finishes etc. To this last point and by way of example, Stage 5 is described as 'Up to service of witness statements and expert reports'. What happens if witness reports have been disclosed pre-issue, or some statements are disclosed earlier than others? There is still no clarity around many of these sorts of issues and so as a result, costs will be incurred seeking the necessary clarity over time if the rules do not provide these answers for Claimants and Defendants alike.

[8] The current definition is not helpful at all – *'Band 2: along with Band 3 will be the 'normal' band for intermediate cases, with the more complex claims going into Band 3.*
Band 3: along with Band 2 will be the 'normal' band for intermediate cases, with the less complex claims going into Band 2.

We may be in danger of overstressing the point, but we do not know exactly how uplifted costs will be applied within the new intermediate cases. We have broad indications of the impacts of Part 36 offers, unreasonable conduct or additional Claimants, but as yet we have no clarity and so it will impact the cost of running these cases over no doubt many years as all of these elements are worked through. By comparison in the context of this wider consultation, arguably we are just reaching a point, after almost a decade, where budgeting is better understood and various questions have been settled by case law. We could go on to raise queries around the use of specialist lawyers, disbursements, sanctions etc but may well address these concerns directly to the CPRC if that would be helpful.

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.

As referenced in respect of costs budgeting above, generally we prefer a more bespoke approach to controlling costs than that which may be achieved by a cap. We do not therefore believe that costs capping arrangements should be introduced in any new areas. In personal injury matters for example, a cap would not assist solicitors in explaining to clients the costs which will and will not be recovered for different areas of work (phases), which certainly helps inform clients. That said, costs caps can work well in the right cases in the sorts of matter indicated, i.e. IP disputes before the Intellectual Property and Enterprise Court. This is particularly true where a claim may concern clear questions of law with straightforward facts requiring little substantiation; or one party is significantly better resourced and seeks to use that advantage to exploit their opponent.

Similarly, the Shorter Trials Scheme and indeed the Flexible Trials Scheme can provide greater certainty to parties around the potential costs involved with continuing to pursue a claim. These schemes are generally only possible as a result of careful and close case management on the part of the Court, in the right cases. It is necessary for example that the 'designated judge' is able to be available to manage the matter on multiple occasions. If it is possible to identify appropriate cases early (and resolve any disputes between the parties as to that question of appropriateness), a shorter trial approach clearly can work.

We believe that such pilots/protocols are positive tools, as long as they fit the circumstances of matters and are not used inappropriately in a way which may ultimately put justice at risk.