Response of the Law Society to the Civil Justice Council's consultation on civil costs reform

October 2022

About the Law Society

The Law Society is the independent professional body for solicitors in England and Wales. We are run by our members, and our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

Response of the Law Society to the Civil Justice Council's consultation on costs reform

The Law Society welcomes the chance to respond to this consultation which we understand is looking strategically at the broad direction of travel for costs reform as the civil justice system embraces the many facets of technological advancement.

As a broad membership body representing all types of civil litigators, there will inevitably be pros and cons to any types of reforms for different types of case at a granular level and we won't revisit all of the arguments here. However, at a very high level we propose that prioritisation should be given to measures which will speed up the administration of justice while also providing clarity for solicitors and adequate consumer protection for their clients.

We propose:

- The Civil Justice Council makes recommendations to the government that a thorough review is carried out of specific parts of the statutory framework underpinning aspects of solicitor-own client costs arrangements and their assessment[1]. This would be with a view to providing more certainty and clarity for solicitors and their clients, especially as we move into a period of increased use of digital justice. Currently, parts of the statutory framework are no longer fit for purpose, and continue to cause bottlenecks in costs resolution, contributing to the increased use of satellite litigation which adds to the court backlogs.

- Retaining the broad concepts of costs budgeting and guideline hourly rates in the short term. Although there are understandable arguments for abolishing them, on balance we favour retaining them during a time where other reforms to civil costs are bedding in.

- Refraining from introducing further fundamental reforms until the extension of fixed recoverable costs (FRCs) in April 2023 has had time to become established and the impact evaluated.

- Simplifying procedural processes where there is the opportunity to do so, but not at the expense of consumer protection.

- Carrying out the groundwork now for comprehensive data collection to support future policy decisions regarding costs reform.

- Exercising extreme caution in addressing the issue of when the recoverability of costs should begin and seeking to understand the unintended consequences of any potential scenarios before implementing any changes.

[1] Particularly Part III of the Solicitors Act 1974

- Exploring ways of incentivising genuine resolution of a dispute pre-issue (or before costs liability kicks in) and possibly moving away from the current model of hourly rates in future, if appropriate.

Based on our points we would suggest that the four 'sections' of this consultation are perhaps back to front. The fundamental changes being brought in with the expansion of FRCs and the digitisation of processes, including pre-action protocols, will have the most significant change on the litigation environment and together will impact all aspects of civil justice including costs incurred. The use of costs budgeting and guideline hourly rates would simply remain as two of the mechanisms for calculating the costs that should be due to the legal professionals carrying out the work.

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?***

While costs budgeting is by no means universally popular, it allows for visibility of incurred and expected costs at an early stage, and this is an important principle that should remain where possible. Considering the extension of FRCs within the next few months, which will significantly impact on how many cases will continue to use costs budgeting, now is not the time to remove it completely.

However, the question remains of how to clear the perceived blockages that the process can produce and free up solicitor and judicial time to concentrate on the substance of the case. We would be supportive of simplified procedures, perhaps a 'costs budgeting lite mechanism' such as filing a one-page summary of estimated costs, perhaps to include contingencies or a likely range of costs for each item, in the first instance which would allow for immediate directions, and judicial discretion as to whether and when further detailed budgeting is required. In particular, we believe there is merit in exploring whether a detailed budgeting process is required from both sides in a costs-shifting environment.

We are of course aware that budgeting does not always equal the control of costs and the time and cost associated with preparing and developing the budget can increase costs overall, sometimes to the detriment of the winning party. This in turn is at odds with the idea of the winning party not having to pay out of pocket for their legal costs and the associated risk to accessing justice.

There is also likely to be merit in lowering the threshold to include more cases under the default-off rule, thus freeing up judicial and solicitor time. It may be that £250,000 is an appropriate cut off point but thorough risk and impact assessments for introducing a default-on or default-off mechanism for different values of claim should be carried out first. An overall costs cap on a case may be beneficial in some circumstances but we would be wary of adopting this approach as we feel a more nuanced and per-phase approach to sharing costs information is needed (however, some specialist cases may benefit from a costs cap and we refer to our points on intellectual property cases at the end of this response).

We would support greater guidance within the rules about how costs budgeting should be dealt with by both the judiciary and the parties to assist with the current discrepancies and to ease cases through the process. Bureaucratic and unnecessary steps could be eliminated while still allowing for an open exchange of information at an early stage. In the early stages of a case there should be no need for specialist costs experts to have to prepare budgets as though it is an onerous undertaking; anything more than an initial simplified exchange of information should generally be unnecessary, and a granular level of detail should only be required in specified and limited circumstances.

At a practical level we are aware that case and/or costs management conferences can often be more productive when the two processes are separated out; this may be worth exploring, especially in terms of increasing the ease and speed with which these conferences can be arranged.

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?***

On balance, we support the continued use of GHRs. Whilst not perfect, they serve a useful purpose in providing a baseline on which to base and assess the value of a unit of work done.

The review and update to GHRs in 2021 should have addressed some of the issues that were being seen with huge discrepancies between different courts and judges. However, we noted at the time of the update that the new rates should be seen as an interim measure and that we would welcome a more comprehensive review of GHRs to be carried out in three years, to reflect whether the established level of GHRs are delivering value for money.

With regard to uprating, we feel that both GHRs and FRCs (including existing FRCs) should be subject to the same inflationary increases to ensure a level playing field. Every two to three years the SPPI index should be applied (or another inflationary index if the evidence supports that), with a more thorough review every five years to take into account changes in the legal landscape and working practices.

In our response to the Civil Justice Council's 2021 GHR consultation[2], we noted that the review at the time was not about: a) calculating how much the solicitor can reasonably charge their client, or b) working practices or business models adopted by law firms which determine the costs associated with staff, overheads, profit/loss to the firm.

We noted instead that a future, more comprehensive, review would be useful. In particular, we proposed that the following aspects should be addressed when carrying out a future review:

- The increase in different ways of working related both to the impact of Covid-19 and the evolution of technology facilitating increased 'remote' working.

[2] https://www.lawsociety.org.uk/campaigns/consultation-responses/civil-justice-council-consultation-on-guideline-hourly-rates

- The HMCTS Reform Programme and the digitisation of the court system, as well as the development of remote hearings and altered litigation processes.

- The banding by geographical location. This incorporates the two previous points with the distance between the physical location of a fee earner and the location of that fee earner's office potentially likely to widen over time.

- The introduction of fixed recoverable costs for civil cases valued up to £100,000. This would have a significant effect on the parameters of the data collected for any future GHR review.

- Whether rates should be looked at with reference to the type of work carried out.

- Whether rates should be looked at with reference to the size of the law firm and the associated overheads.

- How relevant and accurate the data is that is collected, bearing in mind inflation/deflation and any other relevant costs increases.

- Overall, whether GHR are delivering value for money. A comprehensive review of GHR based on several factors would assist solicitors in justifying their rates and enhance the integrity of the profession.

As already stated, GHRs are not perfect, and aligning costs incurred with time spent can result in the perverse outcome that the development of quicker and more efficient litigation mechanisms (coupled with the use of quick and competent staff) can lead to lower incurred costs.

This issue requires further consideration. If someone invests heavily in technology that means they have to spend less time on a case, the hourly rate approach disadvantages them, and may not deliver the necessary return on investment. We need a scheme that pays fairly in both cases. Until then, it may be that GHRs will naturally become less commonplace as we move towards an ever-expanding fixed costs regime, but for now they retain an important role, with judicial discretion key to the costs that are ultimately awarded.

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?***

We would urge the utmost caution when opening the debate on what is contentious business vs non-contentious business and which actions are pre-issue vs post-issue.

Looking at the issue of when a case crosses the threshold of being issued, it is perhaps inevitable that costs incurred pre-issue will become recoverable even if the case is resolved in full at this stage, and this is already evident in the intentions for the expanded FRC

regime. However, there needs to be a thorough analysis of any potential scenarios that might result from this approach. It may be that front-loading work and costs in the pre-issue space, assuming the costs are recoverable, will help to settle the case at an earlier stage, remove the incentive to issue and keep it out of court. However, conversely it may be that *any* work done in the pre-issue space (perhaps even something as simple as a litigant in person writing an email) would start the clock ticking on costs being incurred, possibly without the litigant's knowledge.

Whatever shape the reforms take there must be certainty as to costs liability and a clear understanding by parties, which may include litigants in person, when costs would be incurred, and the risk of adverse costs being generated. The increased use of ADR mechanisms and online portals must address this up front and centre. The digitisation of processes tends to shift the onus from legal professionals on to the litigant themselves to have the knowledge of the costs consequences of pursuing the claim or not. By way of example, if a litigant in person were to use a new HMCTS system to issue proceedings for a sum exceeding the small claims track limit, they may be unaware that by doing so, they have exposed themselves to a risk of incurring an order to pay the other party's costs.

Furthermore, when considering the line between contentious and non-contentious business (not to mention the use of contentious vs non-contentious business agreements which we refer to under Part 4) we must remember that solicitors are able to carry out litigation as a reserved activity under the Legal Services Act 2007. The highly regulated nature of the profession ensures a high level of consumer protection which should not be jeopardised. We acknowledge that as we move forward the distinctions between definitions, which are already beginning to blur, will require review, but there must be consideration of any unintended consequences negatively affecting consumers.

How should any unintended consequences of these reforms be dealt with? We would advocate for an incremental, risk-based approach with mechanisms available to reverse any changes that may not meet policy objectives or would hinder access to justice. The experience of the development of the Official Injury Claim (OIC) portal is an obvious example of a digital system that did not take the intended users on the journey during its development. The OIC (which comfortingly operates in the small claims space so claimant cost liability is less of an issue) is not a good example to draw on when developing digital processes for non-small claims track, or non-personal injury cases.

We understand that at the heart of these reforms would be the new Online Procedure Rules Committee (OPRC) which would set the rules to govern the pre-action space and any further digital justice developments. One of the first tasks of the OPRC should therefore be to establish the data required to be captured and ensure that digital processes are developed with the user and access to justice in mind. This should not be an onerous undertaking, as any new portal or digital process would inevitably capture much of this anyway. The evidence base for online rules may end up looking quite different to that of the traditional process, but data would be needed to influence any future reforms, such as to costs budgeting or GHRs. For instance, if the use of a digital pre-action protocol is not mandatory, how could we usefully compare the two processes to gain a better understanding of costs incurred, ease of use, and time to resolution of the dispute?

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.***

On the FRC regime, we make the following points:

- If FRCs are not set at a reasonable and proportionate rate to cover the costs incurred in work done, then the knock-on effects could dramatically change the face of civil justice in England and Wales. We refer to our previous positions on FRCs which remain valid[3] and where we noted that we do not support the extended regime based on the data available.

- The Law Society continues to be concerned about the impact of FRCs on certain case types, notably the housing sector which is one of the few areas to still benefit from civil legal aid, but which solicitors heavily subsidise through the recovery of between the parties costs. There is a real danger that extended FRCs will accelerate the decline of the number of legal aid practitioners and exacerbate the legal aid deserts crisis. These effects may not be immediately apparent, so careful monitoring is required over a period of several years to monitor the impact on practitioner availability, and to intervene quickly if necessary.

- Many legal aid cases, and a significant proportion of non-legal aid cases, do not involve damages, or damages are secondary to the principal dispute. Some cases where the monetary value is low will be hugely complex and may involve vulnerable parties.

- Clear guidance around banding allocation must be issued to reduce the risk of satellite litigation. This is particularly important in non-money claims that will not have a financial figure attached to them.

- Existing and extended FRCs must be subject to regular uplifts based on SPPI, or another inflation index. The stagnation that has occurred due to existing personal injury FRCs not being uprated since 2013 means that over time the costs do not cover the work required which makes these cases unviable and removes a client's ability to access a solicitor.

- Solicitor-own client costs will come under increased scrutiny. We refer here to our call for a review of some costs provisions in the statutory framework. In simplistic terms, if FRCs are not set at an adequate rate to allow for the fair, reasonable and proportionate allocation of costs then the following scenarios could occur:

    - Solicitors exit the market altogether

[3] https://www.lawsociety.org.uk/campaigns/consultation-responses/extending-fixed-recoverable-costs-in-civil-cases-law-society-response

- Solicitors continue to operate in the market but must cross-subsidise from cases where the work required is less than the FRC.
- Solicitors provide a service that still fulfils all their duties but only the bare minimum expected (examples may include not being able to spend extra time with a vulnerable client)
- Higher amounts of deductions are made from a client's damages to make up any shortfall for the solicitor between costs incurred and costs recovered. Unlike between the parties costs, the amount that a solicitor can charge their client does not always require proportionality, particularly where the client's behaviour has increased the costs.

It is this last point that we believe needs much further consideration as we are likely to see a significant shift in the business models of law firms, and how they charge clients, as they adjust to the changes. In legal aid cases, the last option would not be viable, and there is a real danger that solicitors will cease to practice in these cases. There is also a risk that in cases where the FRC are not adequate, there will be a greater call on the legal aid fund than at present.

We also await the judgment from the Court of Appeal on *Belsner v CAM Legal Services* which will have a significant impact on the future of solicitor-own client costs agreements. The conclusion of that case may even set the basis for some of these costs reforms before the Civil Justice Council is able to report on the findings of this consultation.

Solicitor-own client costs provisions

The legislation underpinning many of the issues being addressed in this consultation is currently unfit for purpose. For example, Part III of the Solicitors Act 1974 (the Act) sets out provisions for contentious and non-contentious business agreements and is the mechanism through which solicitor-own client charges can be challenged. It is therefore a crucial piece of legislation as the future of costs reform is likely to lie more in the consideration of solicitor-own client costs, than in the recoverability of between the parties costs. Fixed recoverable costs and cost budgeting may only ever go part way in ensuring that solicitors are paid fairly and proportionately for their work. Shortfalls will be sought from the client, and this must be done in a way that is both transparent and open to challenge if needed. Therefore, we cannot separate out the issues of the extension of fixed recoverable costs with the impact on solicitor-own client funding agreements

As we have seen from the high-profile cases of *Herbert v HH Law* and *Belsner v Cam Legal Services*, the basis of an increasing number of costs disputes is due to the muddled, or non-existent definitions that exist, along with confusion with overlapping requirements under the Civil Procedure Rules. The Law Society used to publish a model Conditional Fee Agreement template, to be used and adapted by solicitors, but this has been withdrawn due to the complexities in interpreting the associated legislation and the seemingly constant challenges to costs agreements in the courts.

Overall, we are of the opinion that any potential costs reforms would be undermined by the inadequacy of Part III of the Act as it stands and we call for a review to provide a strong and stable bedrock on which to ensure both robust consumer protection and clarity for solicitors when setting and assessing funding agreements, as well as future proofing the legislation to take into account digital justice processes and any potential shift in the definition of when a dispute and the associated costs recovery begins.

Intellectual property sector

In response to Q4.3, we refer to Appendix A.

Conclusion

The civil justice sector is facing constant change and reform. If costs reform is to occur, then solicitors working on a broad range of civil justice issues must be allowed the time to adapt to any such changes. Policy decisions must be based on adequate evidence, and where this is lacking, then consideration of robust future data collection must be given priority. Where reforms are proposed but the consequences are unclear, then a thorough impact analysis coupled with a form of pilot scheme would provide the most suitable means of assessing whether the reform would be a positive for all parties.

The Law Society looks forward to considering any firm proposals resulting from the Civil Justice Council's final report on costs reform and would welcome the chance to be included in any further discussions.

Appendix A

Response to question 4.3 – Intellectual Property Sector

Here we have given specific consideration to the last question in the consultation and our response has been developed from the perspective of Law Society members who have experience of engaging in intellectual property (IP) litigation and their clients.

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.***

1. In preparing this response, we have had the benefit of being provided in advance with a copy of the Intellectual Property Lawyers Associations' (IPLA) response to that same question (the IPLA Response Paper).

2. The IPLA Response Paper recommends the introduction of a total costs cap of £500,000 for patent cases taking place under the Shorter Trial Scheme (STS) under PD67AB, with the intention of accommodating and supporting the enforcement of patent rights in the case of "mid-tier" disputes (i.e. cases which are less complex and valuable than the types of cases conducted in the Patent Court, but more complex and valuable that the types of cases brought in IPEC).

3. We strongly support this proposal. It would give those considering litigation a greater degree of budgetary certainty so far as costs payable to the other side are concerned, should that litigation ultimately prove unsuccessful. This is something that we believe will be welcomed by commercial entities of all sizes. However, this would be particularly useful in the case of those entities that are not of a size that can risk the potentially unlimited costs exposure associated with full Patent Court litigation. We believe that this is likely to enable entities to bring cases before the English courts that presently they cannot (much in the same way as the costs recovery caps in IPEC have meant that smaller scale enterprises have been able to bring cases to enforce their rights, when previously they would not have been able to do so).

4. It also needs to be acknowledged that although IP rights are territorial in scope, IP rights owners will often have equivalent rights in multiple jurisdictions in circumstances where the law that applies to questions of validity and infringement are similar, if not identical, and the determination of those issues in one court may impact on the decision in others (and/or facilitate settlement elsewhere). In such cases the English courts are likely to be in competition with the courts of other jurisdictions (and in the case of patents, the newly established Unified Patent Court) as a venue of first choice for rights holders. The IPLA's proposal, if implemented, would make the English courts a more attractive venue in such cases, particularly in comparison to other court systems that have adopted similar cost capping measures.[4]

5. We also make the following observations:

    (i) Although the IPLA proposal focuses on patent cases, we believe that there is a very strong case for that proposal to apply to all intellectual property cases governed by Civil Procedure Rule (CPR) 63 where proceedings have been commenced under or transferred into the STS. The advantages of greater

[4] See for example the recoverable costs cap scale adopted by the Unified Patent Court

budgetary certainty apply equally to all such cases. Arguments or possible differences of view as to whether £500,000 is the right level of cap, and in particular whether it would be too high, for non-patent cases, are not in our view a good reason for not at least adopting that cap for those cases. First, the existence of a cap (rather than the exact level at which the cap is set) provides a very large part of the advantage of the IPLA proposal. Second, recovery of costs will otherwise still be subject to the same indemnity and reasonable recovery rules that apply to all cases under the STS. It would be better to have a cap that is too high than no cap at all.

(ii) Alternatively, we would strongly support the adoption of such a costs cap to at least all STS cases taking place in the Patents Court (i.e. those falling within Part 1 of CPR 63, which would include, for example, registered design cases).

(iii) Intellectual property cases normally involve separate trials as to liability and quantum. A claimant rights holder who has lost on liability, will not face a quantum phase. Therefore, a costs cap even if just restricted to a liability trial would be beneficial (and we would suggest that any proposed Practice Direction make it clear that the £500,000 cap does not apply to any quantum phase if quantum is heard separately). However, in IPEC there is also a cap on costs recovery at the quantum stage (initially £25,000 but now £30,000). We recognise that in IPEC there is a maximum financial recovery of £500,000. This in turn raises issues as to proportionality of costs in IPEC for the quantum phase, which do not necessarily arise under the STS where there is no limit on liability. Nevertheless, it is preferable that the additional budgetary certainty provided to all parties by a liability stage costs cap is not undermined by a possible unlimited costs exposure at the quantum stage. In the circumstances, consideration should also be given as to whether an additional cap (say £250,000) should apply to the quantum phase of any relevant litigation begun under the STS.

(iv) Although the existence of a cap is as important, if not more important, than the exact value chosen for that cap, the number chosen still inherently involves an imperfect balancing of competing policy interests; i.e. the granting of greater certainty to a losing party as to the potential impact of an adverse costs order, to the potential detriment of a winning party's ability to recover costs reasonably incurred. Therefore, if a cap remains fixed for many years and is not adjusted to reflect inflation, this will involve an automatic and yet unthinking policy shift in favour of one party. We think this is problematic and needs to be addressed. An example, of such an unwelcome policy shift occurred in IPEC where the overall caps remained unchanged from 2010 to 2022. As a result of this the maximum costs recovery in IPEC had by 2022 become too low a percentage of the costs likely to have been incurred by the winning party. We would, therefore, suggest that regardless of the exact number chosen for any cost cap, the cap should automatically increase in line with inflation (with the relevant cap in any case being fixed by reference to the date that proceedings were commenced).

(v) We support the IPLA's proposal that there be a potential increase in recoverable costs (as per paragraph 1.12 of the IPLA's draft practice direction), in cases where a Claimant's Part 36 has been made. The figure of £625,000 the IPLA has proposed in our view strikes the right balance between additional budgetary certainty provided by a cap and encouraging settlement. In percentage terms the

proposed uplift is consistent with present IPEC practice and case law[5] and it is also preferable that (in contrast with what occurred with IPEC) express provision is made in this respect from the outset.

[5] *Martin & Anor v Kogan & Ors* [2017] EWHC 3266 (IPEC)