ABI Response to CJC Costs Working Group Consultation

About the ABI

The Association of British Insurers is the voice of the UK's world-leading insurance and long-term savings industry. A productive and inclusive sector, our industry supports towns and cities across Britain in building back a balanced and innovative economy, employing over **310,000** individuals in high-skilled, lifelong careers, two-thirds of which are outside of London.

Our members manage investments of nearly **£1.7 trillion**, collect and pay over **£16 billion in taxes** to the Government and support communities across the UK by enabling trade, risk-taking, investment and innovation.

We are also a global success story, the largest in Europe and the fourth largest in the world. The ABI represents over **200 member companies**, including most household names and specialist providers, giving peace of mind to customers across the UK.

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?

We are of the view that costs budgeting should not be abandoned as it remains an important tool, particularly in large loss cases. As the consultation recognises, costs budgeting helps transparency for claimants and is, in many cases, the only sensible means by which the court can intervene to control escalating costs.
However, we are also of the view that costs budgeting could better meets its objectives of controlling costs, improving certainty in relation to costs and reducing the number of cases going to detailed costs assessment. Anecdotally, our members report that costs consistently come in significantly over budget. We would therefore be supportive of a third way whereby instead of costs budgeting being abandoned, changes are made to the existing regime. For example:

- If the data demonstrates that budgets approved in London are unjustifiably more generous than those approved elsewhere, then the disparity should be reduced. This is one reason why there needs to be a more accessible evidence base to assist with costs budgeting;
- We agree that there is an issue with different judges not applying costs budgeting consistently. This can differ depending on the judge, the court and the area of the country. Streamlining/simplifying the cost budgeting process would therefore be welcome, and would also be helpful in the context of the DJ shortfall; and

- We also agree that there is a need for more training to improve the skills of judges, solicitors and barristers in relation to costs budgeting. This training should be centrally administered.

There are different potential responses to the question of whether budgeting should take place after the directions hearing. One view is that there is no need to budget up to a trial which often does not take place, and that the best approach would be to budget after the directions hearing and then up to the pre-trial review (this approach would also be cost saving). However, the alternative view is that budgeting and directions should not be separated as (i) the budgeting process means that the parties will properly consider the directions, (ii) budgeting often prompts settlement and (iii) delaying budgeting adds to the incurred costs that then fall outside the scope of the budget and need to be assessed. This approach would provide more certainty, which helps insurers with reserving. We see the merit in both approaches, and so our view is that the parties should be able to make representations as to which approach should be followed, depending on the circumstances of the particular case.

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

In our view, costs budgeting should be "default on" at least for proceedings worth less than £10 million, with the court having the option to "turn off" budgets if it believes that this is required. As to whether £10 million is the right level for "default off", we agree that the higher the value of the case, the greater the need for budgets to control costs spend. We would therefore welcome consideration of whether the level for "default off" should be increased, and indeed whether there should be any upper limit for budgeting. Given the current personal injury discount rate, cases are increasingly breaching the £10 million barrier and, even if it appears unlikely that a case will breach the barrier, claimant solicitors may plead the case above £10 million. The options of (i) increasing the level for "default off" or (ii) removing the upper limit for budgeting altogether should therefore be explored, as in any event the court will have the option to "turn off" budgets if it believes that this is required.
More broadly, extending FRC to £250,000 would address some of the issues with costs budgeting (and help given the lack of judicial resources) by reducing the volume of cases that need budgeting. However, given inflationary trends fewer cases are falling within the £100,000 – £250,000 range and so while extending FRC to £250,000 would be welcome, it would only go some way to addressing the issues with costs budgeting. Another issue not considered by the consultation is that most claims settle prior to litigation and so without the budgeting process. Understanding how and why these costs have been incurred is therefore difficult. There is then the challenge that in litigated cases, the budgeting process still does not deal with the question of the (often large) costs incurred prior to budgeting, which require later assessment if the costs cannot be agreed. This demonstrates that a greater onus should be placed on claimants to outline the costs incurred pre-proceedings, and also supports the case for extending FRC to £250,000.

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?

As above, we agree that there is an issue with different judges not applying costs budgeting consistently and that there is a need for more training to improve the skills of judges in relation to costs budgeting. This training should be centrally administered.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

Broadly speaking, the purpose of GHRs should be to (i) provide some degree of certainty over the hourly rates recoverable at the outset of a case and (ii) reduce the need for judicial resource during or at the end of the case. However, in practice GHRs are not achieving these aims and do not reflect increasingly rapid changes to working practices, the use of technology and digitisation, particularly remote working and remote hearings. The ABI is therefore supportive of the proposal by Keoghs to move away from GHRs and introduce fixed hourly rates. This would bring considerable benefits to the parties and to the administration of justice in terms of:

- Certainty and transparency of rates. This would be beneficial for both claimants and defendants (for example, certainty helps insurers with reserving).
- Reducing court time, including at detailed assessment hearings.
- Fewer hearings, which is important given court backlogs and current court capacity.
- Incentivising early resolution without a hearing.
- Promoting competition between solicitors on rates.

While consideration would need to be given as to whether different areas of law would be appropriate for the introduction of fixed hourly rates, we believe that personal injury in particular would be an appropriate work type. This is because there is a significant volume of personal injury cases which result in claims for costs within a relatively small bandwidth of complexity.

We agree with the Keoghs proposal that a move from GHRs to fixed hourly rates would most likely need approval from the MoJ. Keoghs also propose that the MoJ establish a Rates Inquiry Committee (RIC) to set fixed hourly rates, with the CJC not having a role in setting rates. While careful consideration would need to be given to the mechanism and metrics for setting and reviewing rates, we note the limited resources of the Foskett and Stewart Committees. We would therefore stress that, whichever body or bodies has a role in setting rates, it would be imperative for them to be adequately resourced to do so and take a proportionate approach.

Keoghs also propose the following in relation to the mechanism and metrics for setting fixed hourly rates, which in substance we agree with:

- That the RIC should (i) be chaired by a High Court Judge with experience of costs assessment and (ii) consist of professions which the Judge considers will be able to assist the RIC in achieving the objective of setting fixed hourly rates. Members of the legal profession and representatives of those with a vested interest in the review (e.g. insurers) should be excluded from appointment.
- That the RIC should have full investigative powers (including access to legal practice accounts), the power to hear evidence upon application from stakeholders and the power to commission and obtain independent expert evidence.
- That there would need to be a mechanism to ensure fixed hourly rates are not only maintained at a reasonable and proportionate level, but also provide sufficient levels of profitability to ensure access to justice is maintained. The level of increase in fixed hourly rates should be aligned to the change in the expense of doing the work over time.

As above, we are supportive of the Keoghs proposal to move away from GHRs and introduce fixed hourly rates, and are also of the view that:

- It is important the process of setting rates has transparent governance which commands the confidence of both claimants and defendants, there is a clear methodology for setting rates and that a comprehensive evidence base is available from both claimant and defendant solicitors. Evidence should also be available on the cost of judicial sitting days.
- Law firm cost reductions (e.g. due to automation and case management systems) and other benefits/efficiencies (e.g. due to changes in working practices, the use of technology and digitisation) should visibly flow through to the assessment of rates.
- Careful consideration would need to be given to any potential exceptions to the rates.
- Assuming rates would still be regional rather than national, the risks of geographic arbitrage would need to be controlled.
- A review of rates every five years would be proportionate given the resources which will likely be necessary for setting rates.

In response to the wider points raised by the consultation:

- In our view, summary assessment without GHRs should be avoided as there is a risk that it would be arbitrary. In our view, there should be as little deviation as possible from GHRs in either summary or detailed assessment. This would enable the parties to have greater certainty, limit the matters at issue and focus on the time aspect rather than the rate.
- The new value limit for fixed recoverable costs (FRC) of £100,000 will, to a certain extent, address some of the issues with the GHRs regime, namely the lack of certainty and the increasing need for judicial resource. Partly for these reasons, we would support the principle of a further extension of FRC to £250,000 (as recommended by Lord Justice Jackson). However, in our view extensions to FRC are not a substitute for a move from GHRs to fixed hourly rates, which would meaningfully reduce the need for judicial resource and provide certainty and transparency of rates. This is important given court backlogs and current court capacity, and would be beneficial for both claimants and defendants (for example, certainty helps insurers with reserving).
- We agree that, regardless of any move from GHRs to fixed hourly rates, the question of geography and banding needs to be considered and future reviews should be based on actual settled cost data. In our view, GHRs do not reflect increasingly rapid changes to working practices, the use of technology and digitisation (particularly remote working and remote hearings), which is increasing the risks of geographic arbitrage. These risks would still need to be controlled in the event of a move from GHRs to fixed hourly rates (assuming rates would still be regional rather than national).

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

We agree that GHRs should have a role in consumer and small business protection in the purchasing of legal services, in the protection of litigants in person, and in enabling regulated providers of legal services to comply with their regulatory obligations such as to provide regular costs estimates and transparent pricing for their clients. However as above, in our view the GHRs regime is not providing sufficient certainty over the hourly rates recoverable at the outset of a case. A move from GHRs to fixed hourly rates would provide meaningful certainty and transparency of rates and therefore (i) improve consumers' ability to gauge the reasonableness of solicitor and own client costs estimates

and (ii) better enable regulated providers of legal services to comply with their regulatory obligations.

2.3 What would be the wider impact of abandoning GHRs?

We are supportive of a move from GHRs to fixed hourly rates for the reasons set out above. While as above consideration would need to be given as to whether different areas of law would be appropriate for the introduction of fixed hourly rates, we believe that personal injury in particular would be an appropriate work type. This is because there is a significant volume of personal injury cases which result in claims for costs within a relatively small bandwidth of complexity. Although fixed hourly rates are unlikely to be appropriate for Court of Protection matters, we do not envisage fixed hourly rates having any adverse effects in respect of personal injury litigation and in our view, there would not be an impact on the provision of litigation funding. The greater certainty of fixed fees may in fact assist in securing litigation funding.

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

Our preference would be for a move from GHRs to fixed hourly rates for the reasons set out above, but we agree that, in any event, the level of increase in rates should be aligned to the change in the expense of doing the work over time. It is important that rates are not only maintained at a reasonable and proportionate level, but also provide sufficient levels of profitability to ensure access to justice is maintained. In principle, we support the mechanism and metrics proposed by Keoghs for setting fixed hourly rates (please see our answer to question 2.1 above) and also consider that, if there is not a move from GHRs to fixed hourly rates, this could still provide a basis for adjusting GHRs over time. It is also important that, in any event, law firm cost reductions (e.g. due to automation and case management systems) and other benefits/efficiencies (e.g. due to changes in working practices, the use of technology and digitisation) visibly flow through to the assessment of rates. As above, in our view (i) future reviews should be based on actual settled cost data and (ii) a review of rates every five years would be proportionate given the resources which will likely be necessary for setting rates.
One caveat to this is that using data from costs assessments does not account for the large proportion of claims which settle without a costs assessment. Indices such as SPPI are therefore a better indicator in respect of these claims. In particular, use of non-legal services specific SPPI would overcome the circular argument that if rates are set by legal services SPPI, they then affect the legal services SPPI, which in turn affects the rates and so on. Use of non-specific SPPI was also supported by Lord Justice Jackson in his supplemental report on updating FRC.

2.5 Are there alternatives to the current GHR methodology?

We are supportive of a move from GHRs to fixed hourly rates for the reasons set out above. We believe that personal injury would be a particularly appropriate work type for fixed hourly rates, as there is a significant volume of personal injury cases which result in claims for costs within a relatively small bandwidth of complexity.
However, regardless of whether fixed hourly rates are introduced, future reviews should be based on actual settled cost data, with the level of increase in rates being aligned to the change in the expense of doing the work over time. The current GHR methodology does not reflect increasingly rapid changes to working practices, the use of technology and digitisation, particularly remote working and remote hearings.
We also support the principle of a further extension of FRC to £250,000 (as recommended by Lord Justice Jackson), which would make more cases and value bands subject to FRC and thereby address some of the issues with the GHRs regime. However, in our view extensions to FRC are not a substitute for a move from GHRs to

fixed hourly rates, which would meaningfully reduce the need for judicial resource and provide certainty and transparency of 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?

The ABI agrees that the importance of full engagement in the pre-action area will be just as great, if not greater, in the future with a digital justice system. We are supportive of the digital justice system ultimately using a consistent data architecture to integrate the pre-action arena explicitly and directly with the court process. If such an integrated system guides a litigant from initial advice to a portal governed by the relevant protocol and then ultimately, if necessary, to the relevant court process, it will be important for appropriate signposting/warnings in relation to costs to be built into the system. The digitisation of dispute resolution can in this way help all users, and particularly unrepresented litigants, to understand costs implications. Claimants should not be discouraged from pursuing claims without legal representation and should be supported in doing so for most personal injury matters and minor disputes. Care therefore needs to be taken in signposting costs matters to unrepresented litigants.

However, while the digitisation of dispute resolution should help unrepresented litigants to understand costs implications, it should be recognised in the development of the digital system that professionals are highly likely to be the majority of users. The digital system should therefore be appropriately tailored to the needs of professional users, while not neglecting unrepresented litigants.

In addition, appropriate data gathered at each stage being transferred throughout by an API (or similar technology) would minimise the cost of repetition, and we would therefore support the development of the digital system prioritising an API (or similar method of sharing information).

Finally, it is important to recognise the risk that the desire to increase the pace of court digitisation will not be matched by sufficient funding or time for testing, and take steps to mitigate this. In the future, the ABI will therefore be seeking more dialogue and engagement with HMCTS and the MoJ in advance of the rollout of new initiatives.

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

Pre-action protocols should always have a clear status which is reflected in the CPRs. It will also be important that the rules created by the Online Procedure Rules Committee (OPRC) do nothing to discourage clarification of disputes, the narrowing of issues and early resolution if possible.

In addition, we were clear in our response to the CJC interim report on pre-action protocols that we do not support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the pre-action protocol stage. We agree with the Forum of Insurance Lawyers (FOIL) that at present, many claims are brought forward and settled without the need for legal representation or legal proceedings and that the creation of a new summary costs procedure has the potential to create costs litigation and increase the burden on the court system, without discernible benefit. In addition, it is unclear that there would be a sufficient volume of cases meeting the relevant criteria to justify the development of a new summary costs procedure.

The consultation also states ‘costs consequences and other sanctions may be imposed by the court after proceedings are issued if a party fails to engage fully in pre-action processes’ and that ‘dishonesty in these processes will be treated in the same way as dishonesty after proceedings have commenced’. However, in our members’ experience, whether a party to litigation is penalised for failure to comply with pre-action protocols largely depends on which judge in which court handles the litigation. There should

be improved judicial monitoring of adherence to protocols in addition to greater consistency in enforcing compliance. This would help to ensure that all parties to a dispute, including where court proceedings are ultimately appropriate, take an open and fair approach to providing relevant information at an early stage in the process. The development of the digital system has the potential to improve compliance with pre-action protocols as (i) online pre-action portals can ensure that users are able to comply with pre-action protocols simply by following the on-screen instructions and (ii) even where this fails, digitisation can facilitate improved judicial monitoring. The applicable sanctions for failing to adhere to pre-action protocols should also be clearly defined – and then clearly communicated via the digital system – in order to reduce the risk of satellite disputes and litigation.
In relation to how costs incurred before a case is issued should be governed, our position is that unrepresented litigants' reasonable costs/disbursements should be recoverable, but that legal costs should not be recoverable where no professional has been instructed. However, care should be taken not to encourage litigants to instruct legal professionals where this is not necessary.

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?

While we agree that there is a need to reform the process of assessing solicitor own client costs when a claim settles before issue, in our view the appropriate process is to await the outcome of the Court of Appeal in *Belsner* and then consider what (if any) legislative reform would be desirable and achievable. We also consider that, at this stage, other initiatives such as the reform of costs budgeting and GHRs should take priority.
Regarding party and party costs, as the consultation notes the amount of party and party costs incurred in a claim that settles pre-issue might be disputed, in which case such costs can be assessed by the court. We agree that where appropriate, more pre-action protocols (and other dispute resolution services) ought to include self-contained rules on party and party costs, which would provide certainty. For example, the low value RTA pre-action protocol makes express provision for the payment of fixed costs by a defendant at various stages – without the need for any court-based assessment – and we would support other protocols making similar provision where appropriate. We would also support consideration of using the Serious Injury Guide as a 'best practice' addendum to the rules.

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

In our view, it is not clear that the distinction between contentious and non-contentious business necessarily serves a useful purpose. The idea of a pre-issue settlement being non-contentious work may be difficult to reconcile. This is because regardless of whether a claim was issued, there was clearly a dispute between parties that was most likely regulated by a pre-action protocol, designed amongst other things to reduce the prospect of litigation. However, we would not support removing the distinction between contentious and non-contentious work without careful consideration of what the implications of this would be. Non-contentious work, for example, can be done on any costs agreement and it is important to retain this flexibility.

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?

As above, the new value limit for FRC of £100,000 will, to a certain extent, address some of the issues with the GHRs regime, namely the lack of certainty and the increasing need for judicial resource. Partly for these reasons, we would in principle support a further extension of FRC to £250,000 as recommended by Lord Justice Jackson (although in our view, extensions to FRC are not a substitute for a move from GHRs to fixed hourly rates). We support the principle of an extension of FRC to £250,000 as this could be of considerable benefit in bringing greater certainty and clarity in terms of legal costs. In our view, the case for any possible exemptions should be carefully considered given the considerable benefits this new value limit for FRC could bring.

Similarly, as above extending FRC to £250,000 would address some of the issues with costs budgeting (and help given the lack of judicial resources) by reducing the volume of cases that need budgeting. However, given inflationary trends fewer cases are falling within the £100,000 – £250,000 range and so while extending FRC to £250,000 would be welcome in principle, it would only go some way to addressing the issues with costs budgeting.

While an extension of FRC from £100,000 to £250,000 would be significant, it should be noted that (i) the real terms of value of £250,000 is different now than when Lord Justice Jackson recommended FRC of £250,000 in 2010 and (ii) inflationary trends in principle strengthen the case for an extension of FRC to £250,000. In addition, although we support the principle of an extension of FRC to £250,000, it is important to note that we would first need to consider:

- The impact of the new value limit for FRC of £100,000, including the impact on litigation behaviours;
- The impact of any changes to costs budgeting and/or GHRs; and
- The rules underpinning an extension of FRC from £100,000 to £250,000, which should preclude the outsourcing of work to counsel at high cost when this is not necessary and be clearly drafted. We agree with FOIL that given satellite litigation which has arisen on the minutiae of the rules in the past, delivery of the policy objectives behind FRC is clearly dependent on the detail of the rules. Any ambiguity or imprecision has the potential to work against the objectives of the regime and lead to unintended consequences, so clear drafting of the rules will be critical.

Once the above is known, the case for an extension of FRC to £250,000 will be clearer.

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.

The recommendations of Lord Justice Jackson's 2017 report[1] should also be revisited as appropriate.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

We do not have any comments in response to this question.

[1] https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf, page 133