Informing Progress - Shaping the Future

Response to the CJC Costs Working Group Consultation Paper – June 2022

October 2022

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

As will be seen from the above FOIL's interest in the consultation is in relation to insurance. The organisation also works in the area of law and the provision of legal services.

The consultation was drafted following consultation with the membership, in relation to the UK as a whole.

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Executive Summary

Part 1 - Costs Budgeting

- The is wide support within FOIL for the principles and aims of costs budgeting, with support in some areas of practice for the process as at present. However, there is a strong view within FOIL that the way the process is undertaken currently significantly reduces its value.
- FOIL proposes a reformed process to reduce the judicial time required to undertake costs budgeting and reduce the time and expense for litigants:

    - A reformed process
    - A refocusing of the judicial task
    - A reduction in recoverable costs for costs budgeting
    - Minor rule changes
    - Better judicial training

- FOIL believes strongly that costs budgeting should not be abandoned and that reform, coupled with the continued extension of FRC, is the right approach.
- Costs budgeting should be 'default on'.
- The current reach of the costs budgeting regime should be addressed to limit the process in low value claims and extend it to infant claims and claims worth more than £10m: all personal claims should be subject to costs budgeting.
- Post-mortem mesothelioma claims should be subject to costs budgeting.
- There are concerns at the current costs budgeting process for clinical negligence claims, the proposals for reform that have been put forward by the RCJ Masters, and the failure of the current process to control the costs of clinical negligence claims.

Part 2 – Guideline Hourly Rates

- Whilst, with the extension of FRC, GHR will be less important in claims up to £100,000, they will continue to play an important role in claims of higher value.
- GHRs should provide a guide to costs in average claims, to be amended up or down as appropriate. If rates are set on this basis there should be less judicial discretion to depart from them.
- A regional approach to GHR is outdated. The current Bands should be re-defined to become Complexity Bands, with the complexity of each case to be assessed as part of the budgeting process.
- GHR should be extended to counsel, with Form N260 amended to include an hourly rate for counsel.
- There are well recognised concerns over the data used to undertake the 2020 review of GHR, with an over-emphasis on higher value claims. This has resulted in rates being set which do not reflect average claims, an issue which would be assisted in part by FOIL's proposal to move to complexity bands in place of regional bands.
- Looking at future review of GHRs, FOIL sets out three options:
    - A full review – the most appropriate approach but the difficulties of data gathering on hourly rates are recognised
    - A partial review, reviewing the GHR already set by an analysis of the changes in the costs of running a legal services business, thereby delivering on the MR's aim of reflecting modern business practises in the GHR. FOIL would argue

strongly for this approach: whilst requiring some analysis and professional input, it would be less onerous than the previous two reviews and would address to some extent the recognised weaknesses of the 2020 review. FOIL believes this a pragmatic, compromise option.
    - Uprate by inflation – an approach which FOIL does not believe is appropriate, which would bake-in the current rates, could only result in an increase, and would fail to reflect modern business practises.
- If GHR are to be uprated by inflation either as part of the next review or in the future, FOIL would argue against use of RPI, CPI or the SPPI for legal services (the nature of which presents a distorted picture of the true inflation experienced in running a legal services business). The most appropriate index would be the generic SPPI. Review on the basis of inflation should be undertaken no more frequently than every 3-4 years.
- Fixed Hourly Rates (FHR) should be considered as an alternative to GHR, with detailed proposals on how they might be developed set out in FOIL's response.

Part 3 – costs under pre-action protocols/portal and the digital justice system

- With the CJC's work on PAPs placing much more emphasis on pre-issue work, it is important that potential litigants, incurring greater legal spend before issue, have costs awareness pre-issue to enable them to assess the claims risk. FOIL would propose exchange of costs information to stocktake stage within 21 days of the letter of response.
- There are concerns that defendants who repudiate a claim may be forced to incur heavy costs pre-issue (without an opportunity to recover them), to avoid the risk that if the claim is subsequently issued their defence may be struck-out for lack of compliance. To avoid injustice the rules should allow a defendant to decline to incur excessive pre-issue costs where a reasonable investigation has been undertaken and a claim is denied.
- Any proposals to extend costs-shifting pre-issue should be on the basis of a hard line between non-costs shifting and costs shifting stages. Although pre-issue costs shifting has worked successfully in formal processes such as the Claims Portal and the OIC, wider use raises issues of concern.
- FOIL does not believe there is any need for a new pre-issue summary costs assessment process and the introduction of a new process would have significant disadvantages.
- There should be more clarity between contentious and non-contentious work. It would be sensible for any work after a letter of claim, or formal notification of a claim, to be designated as contentious, to retain the consumer protection in place for contentious business, particularly around CFAs and DBAs.

Part 4 – Consequences of the Extension of Fixed Recoverable Costs

- There are concerns at the extension of FRC in multi-defendant claims: how will the rules allow one party to unilaterally settle the claim?
- Costs sanctions for breach of PAPs are likely to become more common in the light of the proposed new PAP regime. FOIL does not believe an award of indemnity costs as a penalty for breach provides an adequate driver of good behaviour: Part 36-style percentage awards are more effective.
- The decision in *Doyle v M&D Foundations and Building Services Ltd* [2022] should be reversed.
- Clarification is required on how non-money claims or mixed claims will fit into the extended FRC regime, particularly with regard to housing disrepair claims which should be within the FRC regime.
- The detail of the rules in the extended FRC regime is crucial to the regime's successful introduction. A paper setting out proposals to promote clarity and fairness is attached to this response as Appendix 1.
- The costs in Part 8 costs-only proceedings should be fixed.

Response to the CJC Costs Working Group Consultation Paper – June 2022

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 1f costs budgeting is to be 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?

1.1 Is costs budgeting useful?

FOIL is made up of member firms, handling a wide range of litigation, from product liability to motor claims. Consultation with the membership has naturally resulted in a range of views on the usefulness of budgeting, with some members and their clients seeing more value in the current process than others.

In general, there is wide support for the principles and aims of budgeting. FOIL members have appreciated from the outset the advantages of costs control before costs are incurred rather than at detailed assessment: to enable all parties to understand the financial implications of the litigation; to enable more accurate reserving for insurer clients; to encourage settlement; and to reduce costs and deliver proportionality. Although there are complaints and frustrations with the current process, there is no desire to return to the situation which existed before costs budgeting was introduced.

Nearly ten years on from the introduction of costs budgeting, in some areas of practice costs budgeting in its current form is delivering benefits. The FOIL Catastrophic Claims Sector Focus Team (SFT) reports that the certainty offered by budgeting is of value, the process offers much more control than estimating costs and ambushing on costs has reduced. The Disease SFT welcomes the assistance it provides in reserving. The Product Liability and Cyber Liability SFTs like the certainty and control that budgeting provides. The Professional Indemnity SFT, particularly those lawyers working in the TCC, see costs budgeting as a "*big plus".*

As one FOIL member reports:

"*Budgeting gives visibility of spend. The client can decide whether or not to incur the expense of, say, further expert evidence, or whether, instead, to use those funds as part of a settlement offer. As a result of budgeting the life cycles of large loss cases have reduced by 14 months, bringing with it reduced indemnity spend."*

Other FOIL SFTs support the principle of costs budgeting but report that the way it is undertaken currently significantly reduces its value. There is concern at:

1. a general reluctance within the judiciary to carry out the budgeting process as envisaged by Lord Justice Jackson.

2. A lack of time during CCMCs to evaluate and set budgets properly.
3. the huge costs that can be incurred in budgeting, sometimes involving the preparation of numerous budgets and several hearings with counsel.
4. the failure of the process to control costs.

Even within SFTs where budgeting is currently perceived as useful, these concerns are raised. In general, FOIL members welcome the advantages of costs budgeting, they believe that the aims of the process are valuable, but there is a desire for changes to the process which will deliver those advantages and benefits more effectively and at reduced cost.

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

The current complaints regarding costs budgeting, from both litigants and the judiciary, cannot be addressed by individual changes: an interlocking package of reform is needed, to make it more straightforward and less expensive for litigants and, importantly, to reduce the amount of judicial time and court resource required to undertake the process. Alongside the problems raised by FOIL members and their clients, FOIL recognises there is significant judicial resistance to costs budgeting. It is time consuming; it can be frustrating having to deal with numerous issues and voluminous budgeting documentation; and many judges do not feel prepared adequately by their training to undertake the task.

FOIL believes that rather than the problems leading to a conclusion that budgeting should be scrapped, changes should be introduced which will streamline the process, make it more focused, reduce the elements which incur considerable time and expense (often for limited benefit); encourage more agreement between the parties, and reduce judicial involvement. The changes proposed are aimed at addressing the concerns raised above by FOIL members in the answer to Q1.1.

The interlocking package of reforms should include the following:

- A reformed process to reduce the judicial time required for budgeting and reduce the time and expense for litigants.
- A refocusing of the process.
- A reduction in recoverable costs for costs budgeting
- Minor rule changes
- Better judicial training

- **A reformed process to reduce the judicial time required for budgeting (and reduce the time and expense for litigants)**

On the amount of judicial time absorbed by costs budgeting, Lord Justice Jackson recognised the challenge:

"I accept that CMCs which include costs management take more time that traditional CMCs……There will, however, be a saving of judicial time in two respects. First, some cases will settle earlier as a result of litigants gaining a greater understanding of their costs exposure. Secondly, effective costs management as an adjunct to case management will control some of the present excesses of litigation."

Lack of time to conduct the budgeting exercise is a major problem. It is simply not possible to analyse two parties' budgets and give the necessary attention to detail in a hearing time of 15 minutes. FOIL is not aware of any research to indicate whether or not costs budgeting has delivered earlier settlements or removed some of the excesses of litigation, as Lord Justice Jackson anticipated, but it remains the case that judicial time for budgeting is in very short supply.

Ironically, one of the complaints raised against costs budgeting at the time of the CPRC review in 2015 was of overly long hearings and micro-management. At inception it was clearly seen as a process which needed time to be undertaken. The picture has now completely reversed, with complaints arising from the scant attention given to the budgeting process.

In some types of litigation, lack of time prevents budgeting being carried out at all. In 2019 FOIL wrote to Master Gordon-Saker expressing concerns at the lack of budgeting in mesothelioma claims in the RCJ, particularly post-mortem claims where it was believed there was a strong argument that costs budgeting should apply. Master Fontaine kindly responded to the letter, forward to her by the Senior Costs Judge, stating,

"…. even if we were to apply costs budgeting only to post-mortem and/or asbestos and pleural thickening claims, that would have the effect of lengthening the times that would have to be allowed for a significant proportion of the hearings. Thus, the number of hearings that could be listed before any Master in a day would be reduced, and the knock-on effect would be that all hearings, for both living and deceased victims would be delayed. To enable us to apply costs budgeting routinely to post-mortem claims without a consequential delay in listing would require more judicial resources than we presently have."

It seems likely that similar concerns at the lack of judicial time is affecting listing times for all CCMCs, significantly undermining the effective delivery of the process.

FOIL believes that changes to the timing of the budgeting process would both reduce the judicial time commitment and reduce the time and costs for litigants.

<u>Costs budgeting after directions</u>

A major issue at present is that, with budgets finalised at the same time as directions, there is often a need to prepare several budgets and to budget for contingencies that do not arise in practice. As the CCMC is often the only opportunity for parties to influence the budgets, it has acquired inflated importance, in itself absorbing large sums in costs.

To overcome these problems and reduce the cost of budgeting, FOIL would propose the following:

- Budgets should be prepared and exchanged before the CCMC, but there should be no negotiations between the parties on budgets before the CCMC.
- The judge to give directions, with the budgets providing a steer on costs.
- Parties to have 21 days after the CMC to amend their budgets in accordance with the directions given and negotiate with the other parties.
- Budgets to be submitted to the court for a paper-based budgeting process, with a hearing to be arranged if requested.
- A party which requests an oral hearing to be required to achieve a shift in the original amount approved of 20% up or down, failing which the original budget approved to be confirmed, with costs of the hearing to be paid by the requesting party.

A process similar to this has been adopted and works effectively in Sheffield. Budgeting after directions is routine in the KBD and is also working well. It offers the advantages of allowing budgets to influence the directions as Lord Justice Jackson envisaged, whilst leaving the budgeting process to be completed after directions.
FOIL members report that budgeting after directions is adopted practice in the TCC, a division of the court service seen as being at the forefront of successful costs budgeting. Within the TCC there is a focus on agreement of the budget between the parties, with a

specific requirement to discuss the budgets before they are filed at court. Where the parties are unable to agree items in the budget the Technology and Construction Court Guide, para 16.3.8 sets out, that it would be "*of great help to the court if counsel can prepare a brief summary of the differences, if necessary, there is available on the market an Excel programme that can do this"*. In other courts, Precedent R, the Costs Discussion report, is rarely looked at.

Although the TCC has developed a reputation for a tough approach to control costs, the general principle set out in GSK Project Management Limited v QPR Holdings Ltd in 2015 indicates that this can be achieved with a relatively light judicial touch:

"Experience in the TCC has shown that most costs budgeting reviews can and should be carried out quickly and with the application of a fairly broad brush. Only exceptionally will it be appropriate or necessary to go through a Precedent H with a fine toothcomb, analysing the makeup of figures in detail."

The costs penalty for requesting an oral hearing that does not result in an approved budget adjusted by 20% or more would rule out most oral challenges, reducing the number of costs budgeting hearings very significantly. The provision is tried and tested, already used successfully in Provisional Assessment hearings.

The change would focus attention and allow more time for negotiation and agreement between the parties. Discussion after directions would be on a much firmer footing, with agreement more likely. The need for negotiation could be reinforced by a standard direction that the parties should engage in discussions on the budget, with an agreed list of issues in dispute to be prepared if complete agreement is not possible, as in the TCC, again reducing the scale of the judicial task.

Costs budgeting on paper would reduce costs and court resource. It also offers the advantage of allowing judges to more easily seek the input of costs judges in difficult cases. FOIL believes that this more streamlined and focused approach would allow the costs budgeting process to be handled more effectively within the time available.

If costs budgeting is to remain a process dealt with at a CCMC, allowing more time for the hearing is a critical change if budgeting is to work as envisaged. Even if costs budgeting to date has not delivered reforms to the civil justice process that would enable judges to spend more time on budgeting in individual cases, two anticipated reforms are likely to deliver change. The introduction of Lord Justice Jackson's extended FRC regime in 2013 will remove the majority of claims worth up to £100,000 from the budgeting process. At the same time, the CJC's current review of the PAPs, with a new focus on pre-action behaviour to encourage more claims to settle pre-issue, is aimed at reducing the number of claims before the courts. It can realistically be anticipated that these changes will increase the judicial time available for claims which involve budgeting.

If the budgeting paper becomes paper based, Precedent R should remain in use. Under the current process, in practice, no attention is given to Precedent R and if budgeting is to remain part of the CCMC, it could be discarded, saving the costs of preparation.

Costs budgeting to PTR

There has been an active debate within FOIL on the pros and cons of limiting initial costs budgeting to PTR/listing hearing only, reflecting that many claims settle before trial. There is a view that limiting the budgeting process to PTR would save the costs of full budgeting. The alternative view is that whilst budgeting to trial may appear to be unnecessary in the many claims that settle, the additional cost of preparing a full budget is fairly limited and there is significant advantage in the full budget being available at the outset. A picture of

costs to trial assists with reserving for insurers, focuses minds on risk and costs, and encourages settlement.

If costs budgeting were to be limited to PTR/listing hearing, it is recognised that trial preparation occurs before that hearing and costs budgeting should reflect that, with that preparation included in the initial budget.

If costs budgeting were to be limited to PTR as 'default on', it would be helpful to allow some flexibility within the rules, enabling parties to agree to budget to trial as 'default off'.

Defendants' budgets

Some FOIL members take the view that defendant budgets serve no purpose in QOCS cases. This is the view of the Clinical Negligence SFT and the Product Liability SFT, with regard to personal injury product liability claims. However, the majority view is that they should remain part of the process. They are relatively inexpensive to produce and even in QOCS cases costs are sometimes recovered by a defendant. They provide a useful comparator to the claimant's budget. Insurers find them of assistance in reserving.

Defendants' budgets do enable informed decisions to be made on legal spend. A budget can reveal disproportionate costs focused, for example, on a small head of damage in a substantial claim. In those circumstances, a decision might be made to divert those costs to achieve settlement. In general FOIL believes that the value of defendant budgets is worth the cost of preparation and hearing.

In claims to which QOCS does not apply, claimants find defendant budgets helpful to guide their own decision-making and advise their clients on risk. They are often a standard requirement for litigation funders.

- **A refocusing of the process**

The lack of consistency in the way costs budgeting is approached at present is a major hurdle in advising clients on costs and undertaking risk assessments. Judges will often adopt their own budgeting process. Perhaps due in part to a lack of judicial time and potentially shortcomings in the judicial training programme, a practice by some judges of merely identifying an appropriate sum for each phase, to then be spent as the party choses, has resulted in a lack of proper scrutiny of costs budgets. A view is often taken at CCMCs that it is inappropriate to give any attention to pre-issue costs, or to consider appropriate hourly rates.

Effective budgeting requires a more consistent approach, for the constituent elements of the budget to be considered, looking at how much time is likely to be taken up by the work involved, coupled with consideration of the appropriate rates. The amount of costs already incurred should be kept in mind. Taking all those elements into account, a provisional budget can be identified. The judge should then step back and consider whether the overall budget figure is proportionate and, if not, adjust it accordingly.

Proportionality

A consideration of proportionality is critical if a just budget is to be approved, reflecting the requirements of the overriding objective.

It should be remembered that Lord Justice Jackson's Review of Civil Litigation Costs was set up "*because of a perception that the costs of civil litigation were too high"*. The concept of proportionality was at the centre of the reforms. As set out in para 7.23 of the Final Report:

7.23 "The new dimension. The judge carrying out costs management will not only scrutinise the reasonableness of each party's budget but will also stand back and consider whether the total sums on each side are "proportionate" in accordance with the new definition. If the total figures are not proportionate, then the judge will only approve budget figures for each party which are proportionate. Thereafter, both parties, if they choose to press on, will be litigating at their own expense."

In practice, at present, disproportionate budgets are approved regularly.

Hourly Rates

Under the present regime, paying parties are denied access to justice by the rules and case law. Budgets are drafted on the basis of the claimed hourly rates. Budgets are approved on the basis of those rates by operation of CPR 3.15(8) which provides*, "….it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget."* When the claimed hourly rates for incurred costs are reduced upon assessment there is no corresponding reduction in the amount of budgeted costs. Where the court notionally reduced the hourly rates when arriving at the amount of an approved budget, there is no certainty that the reduction is the same as that of the assessing judge.

FOIL proposes that all costs budgets are drafted on the basis of set rates, such as the GHR complexity bands proposed in the response to 2.1 below (or on the basis of Fixed Hourly Rates as FOIL has set out in response to Q2.5 below). GHRs are intended to be the starting point for the judiciary when assessing costs and so it is an anomaly that they are not followed when assessing the amount of costs approved. The parties and the judiciary are well aware of what is involved in each phase, the amount of disbursements, and how long the activities are likely to take and so budgeting adherence to GHRs would instantly bring consistency of approved costs budgets. In essence, the court will assess and approve hours, disbursements and phase totals when budgeting

To ensure that each party has access to justice, there must be an opportunity for each party to be heard on the issue of hourly rates at detailed assessment. Receiving parties may then claim the contractual hourly rates in relation to the amount of approved hours and therefore make a claim exceeding budgeted costs. If approved by the court, the increase caused by higher hourly rates should be accepted as a 'good reason' to depart from the budget under CPR 3.18. Similarly, paying parties should be allowed to seek a reduction in the claimed budgeted costs on the basis that the hourly rates should be lower, which, if accepted by the court, should also a 'good reason' to depart from the budget under CPR 3.18.

These changes will reduce significantly the frictional litigation over budgets at CCMCs leading to increased budget agreement, reduced cost and court time, and deliver access to justice to all parties.

Incurred costs

FOIL members frequently raise incurred costs as one of the problems with costs budgeting. In some types of litigation, including clinical negligence and disease, the incurred costs are usually so high that the costs budgeting process is of reduced benefit.

FOIL does not propose that incurred costs should be formally addressed within the budget, but as part of the holistic process more attention should be given to the sums already incurred when the budget is viewed overall.

The TCC has shown itself to be unintimidated by incurred costs in setting a proportionate costs budget. In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and others*

[2015] Mr Justice Coulson reduced the proposed budget to a sum less than the reported incurred costs, to remove excessive legal costs and better deliver proportionality.

Good reason to depart

The high bar required to depart from a budget provides certainty and reduces the need for detailed assessment but it can only be justified if an appropriate budget is set at the outset. FOIL members complain that an inadequate budgeting process, with very little analysis, sets up a very high budget which the claimant can then spend with impunity. There is very little opportunity for downwards revision, bearing in mind the paying party also needs to establish a good reason to depart from the budget. As a result, the paying party is denied any detailed examination of the costs they will be required to pay.

Longer term benefits of a refocused approach

If proposals were brought forward to either introduce Fixed Hourly Rates (as FOIL has proposed as an alternative to GHR in its response to Q2.5), or to allow less flexibility in allowing rates outside of GHR, that would further streamline the refocused approach outlined, with less time spent on the issue of rates.

In due course an approach which required judges to consider both the time to be spent and the rate, would assist in further development of FRC to claims of higher value.

- **A reduction in recoverable costs for costs budgeting**

Under CPR 3.15(5), recoverable costs for preparing Precedent H are limited to the higher of £1,000 or 1% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted costs (agreed or approved). All other recoverable costs of the budgeting and costs management process are capped at no more than 2% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted (agreed or approved) costs.

The rules work well in lower value claims, but the recovery of a percentage of the budget provides a further incentive to inflate costs, and results in excessive budgeting costs in higher value claims. The costs should be fixed to more closely reflect the amount of work required. If FOIL's proposals for a more streamlined costs budgeting process are implemented, the costs of costs budgeting will thereby be reduced, necessitating a review of the appropriate recoverable costs for the work involved to introduce a revised costs cap.

- **Minor changes to the rules**

To ensure that clients are fully informed on costs the reintroduction of the former CPR r.44.2, requiring legal representatives to inform their clients of the budget prepared by opposing parties, should be reinstated. Awareness of costs focuses minds, encourages the use of ADR, and provides impetus to settlement negotiations.

CPR r.3.15A sets out the requirements to amend the budget in the light of significant developments:

> (1) A party ("the revising party") must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.

The rule should be amended to make it clear that either party may apply to vary any party's budget in the event of significant developments.

- **Better judicial training**

In recommending the introduction of costs management in his Final Report, Lord Justice Jackson recognised that making the process work effectively would not be easy. However, having conducted the extensive analysis and consultation which formed the basis of his Final Report, he was convinced of its merits. Two years on from implementation, in delivering the Harbour Lecture in May 2015 he remained of the same view:

"When Properly Done Costs Management Works Well
The first and most important conclusion to be drawn from the experience of the last two years is the same as that which was drawn from the pilots. Costs management works. When an experienced judge or master costs manages litigation with competent practitioners on both sides, the costs of the litigation are controlled from any early stage. ***Although some practitioners and judges regard the process as tiresome, it brings substantial benefits to court users."*** (FOIL's emphasis)

The level of skills in 2009, at the time of the Final Report, was seen as a major issue:

"All the evidence suggests that a modest number of solicitors, a far smaller number of barristers, and an even smaller number of judges currently possess the requisite skills to carry out costs management. In my view (which was shared by many respondents during Phase 2) the solution is not to abandon the enterprise as hopeless, but to insist that proper training is delivered."

FOIL agrees with the comment in the CJC paper at paragraph 17, that "*An important feature of the Jackson Report was the recognition that the general culture around costs needed to change."* As the Final Report pointed out, *"Costs are an important facet of every contested action. In a large number of cases they are the single most important issue, sometimes towering above all else. I have regretfully come to the conclusion that it is simply unacceptable for judges or practitioners to regard 'costs' as an alien discipline, which need only be understood by costs judges, costs draftsmen and solicitors who specialise in that kind of thing".*

Whilst client demands and market pressures have forced practitioners to understand and adopt costs budgeting, there are considerable concerns at the judicial approach to budgeting. As the CJC paper recognises, a section of the judiciary believes it is "*not equipped to conduct the costs budgeting exercise properly (whether by reason of lack of training, experience or information)".* This accords with the experience of FOIL members, who regularly encounter judges who are reluctant to undertake budgeting, do not examine budgets effectively, and do not bring to the process the kind of rigour that Lord Justice Jackson was speaking of when referring to costs budgeting "*done properly".*

There are exceptions, of course. Some judges are extremely skilled and have become very experienced at costs budgeting. The TCC has been a front-runner in using costs budgeting to control costs, perhaps because the concept of project management is so closely aligned to the subject matter of the claims it handles.

In his Final Report, Lord Justice Jackson placed considerable emphasis on the importance of judicial training. He indicated that the form of the training "*must be a matter for those who deliver it"* but that "*solicitors who have developed expertise in costs budgeting would be well-placed to assist in the development of training programmes for judges, barristers and solicitors. Costs judges would also be well placed to assist in the development of these training programmes*".

The fact that 10 years on, some judges are seeking reform of the process because they are "*not equipped to conduct the costs budgeting exercise properly (whether by reason of*

lack of training, experience or information)", provides strong evidence that current judicial training is not preparing judges adequately. Judges are at the heart of the process: if they are not able to undertake costs budgeting the process cannot deliver on its aims. As a fundamental, preliminary step towards effective budgeting, judicial training should be significantly improved.

FOIL would be willing be involved in the development and delivery of judicial training.

Alongside training on the principles and practical delivery of effective costs budgeting, judicial training should also encompass IT training. Practitioners are not infrequently asked for budgets on paper as the judge is not prepared or able to deal with the budget on Excel. The use of IT by a trained user significantly improves the budgeting process, making it much more efficient. Judges also need to be provided with appropriate IT equipment.

Discussions within FOIL have considered whether costs budgeting should be handled by costs judges. It is felt, however, that it remains a task that should be undertaken by the judge responsible for case management. To provide assistance to judges who are not costs specialists, FOIL would support the suggestion put forward by Lord Justice Jackson in the Harbour Lecture in 2015:

"From time to time the costs judges sit as assessors at costs management hearings in large group actions. I understand from the Senior Costs Judge that, although he and his colleagues are under considerable pressure of work, they could assist in other cases as appropriate. If any judge would like the assistance of a costs judge with a difficult costs management hearing, he/she should contact the SCCO well in advance to see whether arrangements could be made for this."

1.3 Should costs budgeting be abandoned?

In short, no, costs budgeting should not be abandoned. FOIL believes strongly that it must not be abandoned and that reform, coupled with the continuing extension of FRC, is the right approach.

As Lord Justice Jackson recognised in his Supplemental Report, the "*only way to control costs effectively is to do so in advance"* either by costs budgeting or by FRC: FOIL agrees. To abolish costs budgeting at this stage would return litigation to a pre-Jackson state, with costs at large until detailed assessment, denying litigants any certainty, reintroducing 'costs by ambush', and preventing the handling of litigation to be steered by an awareness of costs and costs risk. A strong argument for retaining costs budgeting is the difficulty of devising a process which improves upon it. The estimating of costs is not satisfactory, involving much of the work of budgeting but without certainty and control of costs.

FOIL welcomes the extension of FRC to claims worth up to £100k, which will remove a significant percentage of claims from the costs budgeting process. The extension of FRC is a very important change and will take time to bed-down and be reviewed. Subject to the successful implementation of FRC for claims up to £100k, FOIL anticipates that in due course the limit for FRC will be increased, potentially to the £250k originally envisaged by Lord Justice Jackson. In the meantime, a process is needed to control costs in advance in claims where FRC does not apply. Costs budgeting is not perfect but FOIL believes that the correct approach at this stage is not to abandon but to reform, and particularly to improve the execution of the process.

FOIL anticipates there will be responses to this consultation which call for costs budgeting to be abandoned or severely limited. It is unpopular with many members of the judiciary, it has reduced value for claimants in QOCS cases, and some experienced defendants and their representatives are disappointed and frustrated by the process. Against that

background it may seem logical to abandon the process or to reduce it to a process that uses broad general principles rather than considering cases individually. In response, FOIL would sound a cautionary note. The process does need reform, and a concerted drive is required to improve the delivery of the process and a culture change as envisaged, but the gains to be achieved if it is done properly have not diminished since Lord Justice Jackson asked a similar question in his Final Report – "*is the game worth the candle?".* FOIL agrees with his conclusion, that it is. Costs must be controlled in advance, costs budgeting is the best means of achieving that, and reform should be the focus.

It is important to look to the future. Lord Justice Jackson anticipated that costs budgeting would take time and a commitment to training and skills development. If costs budgeting is embedded in judicial and professional training now it will become a natural part of the litigation process for judges and professionals of the future. Judges will shortly be appointed from Generation Y, born between 1981 and 1996. Used to living their lives online, the IT skills which make budgeting easy and effective will come naturally to the next generation of judges. It is to be expected that tomorrow's judges will not experience the same problems and have the same reluctance to undertake budgeting as those who have had to acquire the skills during the course of their professional lives. As Lord Justice Jackson recognised, the general culture around costs needs to change: given time there is reason to be optimistic that this can be delivered and the correct approach now is to persevere.

1.4 1f costs budgeting is to be retained, should it be on a "default on" or "default off" basis?

FOIL believes firmly that, in general, costs budgeting should be 'default on'. There is a danger that if it is "default off" the inconsistency of its adoption will make the litigation process a costs lottery.

The concept of costs/benefit in relation to costs budgeting is raised in the consultation paper. It is difficult to see how that could work in practice to identify in advance those claims that would benefit most from costs budgeting.

There may be exceptional cases where the parties agree that costs budgeting would be inappropriate and in these circumstances that decision should be permitted.

Often one size does not fit all. As indicated above, it might be appropriate for budgeting to PTR to be 'default on', with budgeting to trial to be available as an option for the parties, 'default off'.

It is difficult to undertake effective budgeting in multi-claimant claims. Much of the work is applicable to all claimants, with 100% of the work to be undertaken regardless of the stage at which each claim settles. It is difficult to apportion those general costs across the claims, and inappropriate to duplicate them in each claimant's budget. FOIL takes the view that budgets in multi-claimant cases incur high costs and are confusing: it would be preferable to carve out such claims and remove them from "default on" budgeting.

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

<u>The current limits on budgeting</u>

At present under PD3, Para 4(b), costs budgeting is limited in lower value claims:

"In cases where a party's total costs (incurred and estimated) do not exceed £25,000 or the value of the claim as stated on the claim form is less than £50,000, the parties must only use the first page of Precedent H."

When FRC are extended, the vast majority of claims worth up to £100k will no longer require costs budgeting. For the small percentage that remain within the process, FOIL would propose that the damages limit in the PD should remain at £50,000, with the costs limit increased to £50k.

In view of the reduction in the Discount Rate, the restriction of costs budgeting to claims worth less than £10m in personal injury is now outdated. FOIL believes there is no reason for a cap in personal injury claims and that all such claims, whatever the value, should be budgeted.

FOIL members also see no reason why budgeting should not be used in infant claims. The proposal above that staged budgeting should be introduced to allow budgeting to PTR would assist in managing the uncertainty in claims involving minors.

As mentioned above, FOIL has previously raised the issue of budgeting in mesothelioma claims with the senior judiciary. Whilst recognising that mesothelioma claims have some special features including, in claims with a living claimant, the need for claims to be dealt with quickly, FOIL believes there is a strong argument that costs budgeting should be adopted in post-mortem cases. Mesothelioma claims will usually involve claims for damages exceeding £100k and are, in any event, outside the extension of FRC. As set out above, in correspondence Master Fontaine has indicated that a lack of judicial time is the reason why costs budgeting is not adopted, rather than a decision that mesothelioma claims are inherently unsuitable for budgeting. In these circumstances it is disappointing that inadequate court resources are impacting negatively on the handling of claims and it is be hoped that as part of the review consideration will be given to changing that position to introduce costs budgeting, at least for post-mortem claims. The proposed streamlined process outlined by FOIL in the answer to Q1.2 above would assist.

FOIL understands that with regard to clinical negligence claims, the RCJ Masters have drafted an order proposing to change the costs budgeting process as follows:

- No defendant budgets
- No costs management order is made at the first CMC
- A process to be introduced whereby agreement can be reached on the claimant budget "*and if there are unreasonable objections this would be a conduct point to be taken into account on detailed assessment".*

FOIL understands that the proposed order has been prompted by a view that claimants' budgets have become predictable and formulaic, budgets are rarely agreed, and incurred costs meant that detailed assessment is often still required, rendering budgeting a waste of judicial time.

Defendant representatives are concerned that the proposed process will not increase the prospect of reaching agreement on the claimant's budget. It is of great concern that it has been made clear that it is only defendants who will face the prospect of a conduct issue at DA if the budget is not agreed, placing pressure on defendants to agree.

At present, it is accepted that costs budgeting is not working effectively for clinical negligence claims. However, there is great concern that the alternative proposed, removing judicial input into costs at an early stage and placing responsibility on defendants to agree the claimant's budget will inevitably increase costs.

As Lord Justice Jackson recognised in his Final Report:

"…lawyers are human. Those who are spending other people's money sometimes have a tendency to be over-generous, particularly when they are paying that money to themselves and expect the costs to be borne by their opponents. There therefore needs to be some effective control over the costs that are expended on litigation."

The proposals for clinical negligence claims have the potential to be the worst of all worlds: a budgeting process that lacks rigour and judicial input, coupled with a detailed assessment process that is limited by the budget. Such an outcome would have serious adverse consequences in an area of litigation already subject to high costs awards. The control of litigation costs is important whatever the nature of the litigation but expenditure on clinical negligence claims has particular significance in the light of current restraints on public spending and the challenges to the NHS.

The National Audit Office report on 'Managing the costs of clinical negligence in trusts' published in September 2017 succinctly summarised the problem of the excessive costs of clinical negligence claims:

"*Over the last ten years, spending on the Clinical Negligence Scheme for Trusts has quadrupled from £0.4 billion in 2006-07 to £1.6 billion in 2016-17, while the number of successful clinical negligence claims where damages were awarded has more than doubled, from 2,800 to 7,300. The cost of clinical negligence claims is rising at a faster rate, year-on-year, than NHS funding, adding to the financial pressures already faced by many trusts, which can have an impact on patients' access to services and quality of care. In addition, trusts spending a higher proportion of their income on clinical negligence are significantly more likely to be in deficit. In 2015-16, for example, all 14 trusts which spent 4% or more of their income on clinical negligence were in deficit.*

The increasing number of claims accounted for 45% of the increase in costs, while rising payments for damages and claimant legal costs accounted for 33% and 21% respectively. The fastest percentage rise was in claimant legal costs, which has risen from £77 million to £487 million over the same time period. This is mainly due to an increase in both the number of low- and medium-value claims of less than £250,000 and their average cost. In 2016-17, the claimant's legal costs exceeded the damages awarded in 61% of claims settled.

According to the NAO, the Department of Health and NHS Resolution's proposed actions to contain the rising cost of clinical negligence claims are unlikely to stop this growth. The Department of Heath and NHS Resolution have taken action to contain the rising cost of clinical negligence claims. For example, NHS Resolution has reduced the average costs per claim of its claims operations. It also challenges excessive charges of claimants' legal firms, saving £144 million in 2015-16 by challenging claimants' legal costs. A number of further schemes are proposed to contain the costs, however, even if successfully implemented, these will only save some £90 million a year by 2020-21. By contrast, the spending on the Clinical Negligence Scheme for Trusts is expected to double to £3.2 billion by 2020-21."

In fact, as set out in NHS R's annual report and accounts for 2020/21, page 74, *"…. it is important to recognise that the cost of clinical negligence across the NHS in-year continues to be significant. The estimated cost of incidents arising from the clinical activity in 2020/21 covered by CNST* [Clinical Negligence Scheme for Trusts] *was £7.9 billion…."*

It should be noted, in addition, that FRC in clinical negligence claims, when introduced, will only apply to claims worth up to £25,000, making costs budgeting more important in medium-value clinical negligence claims than in other types of litigation where extended FRC will apply from 2023.

The comments from the NAO highlight how difficult it is for even experienced litigants to control costs, even with costs budgeting. It is clear that costs budgeting is not working effectively in relation to these claims at present.

The introduction of the proposed changes outlined in the answer to Q1.2 above would facilitate agreement of budgets and alleviate much of the time-consuming frictional litigation RCJ Masters are seeking to avoid in both clinical negligence and fatal mesothelioma cases.

One of the issues discussed during the course of the consultation process has been limiting costs budgeting to claims worth less than £250,000. FOIL would strongly argue that costs budgeting should continue, and is even more necessary, in higher value claims.

Whilst proportionality of costs is important, it should not be seen as an issue only relevant to lower-value cases where costs can easily exceed the value of the claim. It is important to also ensure that costs are reasonable in large claims, where the sums involved are so much higher. If costs are not controlled in high value claims the result is that successful parties find their damages reduced by the unrecovered sums: a very serious concern in catastrophic personal injury claims, but also in commercial cases where small and medium-sized businesses can find their success in business-critical litigation seriously undermined by the obligation to pay unrecovered costs.

(Considering this point further, successful costs control between parties relies upon the setting of a satisfactory budget, but solicitor and client costs are not similar controlled when legal representatives can merely recover costs not recovered from an opponent from their own client. To encourage adherence to the budget the principle outlined in *ST v ZY [2022] EWHC B5 (Costs)* could be adopted as a general rule – that costs incurred in excess of a budget will be considered to be unreasonably incurred unless there is a good reason or, on an indemnity basis assessment, the client gave express written consent to costs being incurred in excess of the budget.)

To make the budgeting process more straightforward, FOIL has considered the adoption of various general rules, for example, linking recoverable costs to the value of the claim or allowing budgeting to be exceeded by a certain percentage to allow more flexibility. There are concerns however that, if adopted, these approaches have the potential to encourage claims inflation and costs building, and gaming of the costs regime. These approaches break the existing link between what a litigant has spent and what can be recovered, with the potential for injustice for either the paying or the receiving party depending upon the circumstances.

Whilst methodologies which put in place a single figure for the proposed legal spend have the attraction of simplicity, all visibility on the costs of particular stages and the ability the shape the litigation accordingly is thereby lost.

FOIL believes the proposals it has set out in response to Q1.2, for a reformed process for cost budgeting to reduce the judicial commitment required whilst retaining consideration of the costs to be incurred in an individual case, represent a balance between a simplified process and ensuring a fair approach to costs assessment for all parties.

Part 2 – Guideline Hourly rates

2.1 What is or should be the purpose of GHRs?

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

2.1 What is or should be the purpose of GHRs?

It is recognised that with the extension of FRC, GHRs will become much less important in the majority of claims worth up to £100k. They will continue to play an important role in claims outside the FRC regime and those of higher value.

Simply put, GHRs should provide a guide for judges required to make costs awards. To that end, they should reflect average claims, to be amended up or down as appropriate in claims which are less or more complex than average. A problem a present is that the data on which they are based is not representative of litigation in general, and does not reflect average claims, being heavily focused on claims of higher value.

GHRs could be set and used to more effectively deliver on their primary purpose of acting as a starting point in costs assessment.

With regard to the data used to set GHR at the last review, across all types of litigation recorded in the data, 19% of the cases have a value of over £1m, entirely unrepresentative of the value levels of litigation within the civil justice litigation process.

With regard to personal injury claims (the largest claim type within the data) 22.5% of the cases have a value of more than £250k, with just over 10% of those having a value in excess of £1m, over-emphasising higher value claims. Data from FOIL member firms indicates that the value of claims on which costs were settled or assessed between 1 April 2019 and 27 November 2020 was as follows.

Personal Injury	**CJC data**	**FOIL data**
£25k - £49,999	47.6%	39.0%
£50k - £99,999	12.6%	25.9%
£100k - £499,999	25.6%	28.6%
£500k- £999,999	3.5%	3.2%
£1m - £4,999,000	9.1%	2.7%
£5m plus	1.6%	0.6%

The proportion of claims over £1m in the CJC data is over three times greater than in the FOIL data.

With regard to clinical negligence claims (the second largest claim type within the data), 22% have a value of over £1m, again resulting in an unrealistic overemphasis on higher value claims. Data from FOIL member firms indicates that the value of claims on which costs were settled or assessed between 1 April 2019 and 27 November 2020 was as follows.

Clinical Negligence	**CJC data**	**FOIL data**
£0-£49,000	35.6%	69.0%
£50k - £99,999	15.1%	11.6%
100k - £499,999	20.5%	12.5%

£500k - £999,999	6.3%	2.3%
£1m plus	10.7%	2.6%
£5m plus	11.7%	2.0%

The proportion of claims worth over £50k in the CJC data is twice the level seen in the FOIL data – (31% in the FOIL data compared to 64.3% in the CJC data).

The proportion of claims worth over £1m in the CJC data is almost five times that in the FOIL data (4.6% in the FOIL data compared to 22.4% in the CJC data).

Only 177 cases in total have been put forward by the judiciary and of these 110 are from the SCCO. Only 25% of the SCCO cases are from National Bands 1,2 and 3: the majority are London bandings, resulting in London cases being significantly over-represented.

If GHR are set to reflect average work, there should be less judicial discretion to depart from them. There should be a strong understanding that in straightforward claims rates at less than GHR will be appropriate. At present, too many costs awards are made using rates above GHR: it is too easy to argue for an increase on the basis of expertise or complexity especially in niche areas such as disease. The criteria for an increase on GHR should be higher.

At present, GHR are based significantly on the regional area where the work has been undertaken. This approach is outdated: changes in work practices have rendered location much less significant. Instead, FOIL would propose a move to redefine the current regional bands as complexity bands, recognising that by dint of operation of the legal services market, complexity will automatically reflect location. FOIL would propose the application of the rates as follows:

- Band 1 - City Work/High Value Commercial work – the rates set currently for Inner London
- Band 2 – the rates set currently for Outer London
- Band 3 – the rates set currently for National Band 1
- Band 4 – the rates set currently for National Band 2 – standard work

The rates are fixed for each Band. The complexity of the claim would be assessed as part of the costs budgeting process and the appropriate Band confirmed, without reference to location. The move would simply the process and improve consistency. The rates would reflect to a greater extent the 'average' work in each Band. The issue of an appropriate hourly rate would no longer be entirely at large during the course of the litigation but would be more predictable at an earlier stage, providing benefit to litigants in understanding their costs exposure.

Basing recoverable costs on complexity is a feature of Lord Justice Jackson's extended FRC regime to be introduced in April 2023. In proposing four bands for cases on the Intermediate Track (now the extended Fast Track) Lord Justice Jackson set out that (page 102 Supplemental Report),

"Band 1 will be for the least complex cases in the intermediate track. A simple claim over the fast track limit, where there is one issue and the trial will take a day or less, would be suitable for that band; for example, many debt claims or quantum only personal injury claims would be suitable for Band 1. Band 4 will be for the most complex cases in the intermediate track: for example, a business dispute or an employers' liability disease claim where there are serious issues of fact/law and the trial is likely to last three days. Bands 2

and 3 will be the normal bands for intermediate cases, with the more straightforward cases being in Band 2 and the more complex cases going into Band 3".

Similar thinking could steer decisions on the appropriate Band of GHR.

GHR for Counsel
The concept of recoverable hourly rates should be extended to apply to counsel, with Form N260 amended to allow a rate to be included.

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

In FOIL's view the current GHRs do not provide a starting point for assessment because practitioners and the judiciary do not know the type of case/level of complexity of case they are intended to represent. It is the type/complexity of factors in a case that determine the skill, effort, specialised knowledge and responsibility needed for a solicitor to progress it efficiently at proportionate cost. Practitioners want GHRs to provide certainty and be a benchmark for comparison to the case they are dealing with.

The purpose of GHRs should be to provide certainty at the outset of a case as to the hourly rates that one party may recover from another upon conclusion. It follows that cases falling into different complexity bands should attract different GHRs. The GHRs should be set at a rate which incentivises parties to settle and promotes agreement of both budgets and costs claims thereby avoiding the need to take up valuable court time. The GHRs must provide certainty as to the type of case they represent by reference to complexity irrespective of where the work was done. Legal practice digitalisation and home working have now made the location of where the work is done irrelevant.

2.3 What would be the wider impact of abandoning GHRs?

Abandoning GHRs would return the civil justice regime to the era when each judge had their own GHR, with parties not knowing what the rates were, making costs awards a lottery. Without a standard starting point parties would be faced with arguing on costs in a vacuum. Without GHRs, frictional litigation would increase, taking up significant court resource. Some standard guidance is essential, against which parties can compare their own case: the main issue is how GHR are set and what they represent.

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

The weaknesses in the methodology adopted for conducting the GHR review in 2020 are well-known: the working group itself acknowledges them in para 3.8 of the report:

> *1.8. The working group realised at the outset that the overall reliability of the evidence produced may suffer from shortcomings. These include:*
>
> *(a) The relatively small number of cases that result in a detailed assessment may not be representative of the hourly rates effectively paid between parties by agreement. Further, the majority of cases where costs are agreed do not specify or record any hourly rate agreement. Costs are agreed in a global sum.]*

(b) Hourly rates awarded by Judges may be 'contaminated' to some extent by reliance on the 2010 GHRs with some uplift for inflation. [A footnote records that one correspondent referred to his concern that; "using a dataset of historic hourly rates will only serve to "bake" into any new GHR the overheads and inefficient business practices of the pre-COVID business models that are changing as a result of digitalisation and remote working."

(c) Insufficient data on which to form sound recommendations.

Alongside the problem of an over-representation of high value claims mentioned above, the combined data from the judiciary and the profession upon which the analysis was been based was very small. There were only 754 cases in the dataset. In 73 of these no details are given of hourly rates agreed or awarded, rendering the data useless. The effective combined dataset was therefore only 681 cases.

Looking at some specific areas, just 254 personal injury claims; 205 clinical negligence claims; 23 Court of Protection claims; and 16 abuse claims are included in the judicial figures. These numbers are tiny compared to the volume of litigation in these areas and almost certain to be unrepresentative.

Details of the type of costs assessment undertaken were provided for 671 cases. Of these, 383 were dealt with by way of provisional assessment (57%); 72 were dealt with by summary assessment (11%); and only 213 were the subject of detailed assessment (32%). Therefore, two-thirds of the cases on which the recommendations were based were the subject of only rough and ready costs analysis.

All of these factors have resulted in GHR that are unrepresentative. They do not reflect 'average litigation' and, as recognised by the MR when putting in motion an early review of the rates, they do not reflect current working practices, particularly post-pandemic.

FOIL has consistently called for the adoption of an 'expense of time' approach in reviewing the rates, as adopted by Mr Justice Foskett in 2013. However, the practical difficulties of obtaining the necessary data and reviewing the rates on that basis is accepted. Although the MR has identified the need to reflect current working practices, it will be 2-3 years before the impact of the changes are fully reflected in the costs of running a business.

Future review of GHR is clearly an area where any proposals need to recognise the current position: we are where we are. There are three possible approaches: undertaking a further full data-based review to place the current rates on a sounder footing; use the current rates as a starting point, to be adjusted in accordance with changes in the expense of running a legal practice; or merely update the current rates by an inflation index.

1. <u>A further review</u>

FOIL would argue that this approach is most appropriate. The inevitable shortcomings of the review process, recognised by the CJC working group, render the current figures insufficient rigorous to provide a firm basis for future review.

2. <u>Updating the current figures to reflect the costs of running a legal practice</u>

Whilst the difficulty of obtaining data on hourly rates is accepted, there is the potential to use data already available on the costs of running a legal practice to review and adjust the current rates. The review would be substantially more straightforward than the task undertaken by the two previous GHR reviews. It would require some professional input but, bearing in mind the very significant impact of GHR on the costs of civil litigation, and the impact of legal costs upon the UK economy and government budgets, FOIL believes the limited work required would be justified. It has the benefit of delivering on the MR's aim of reflecting changed business practises within the GHR.

Appropriate expenses to be considered would include:

- Salaries – The salaries of a variety of different grades of law firm employees are available over time from the Average Hours and Earnings Survey compiled by the National Audit Office. This authority is relied heavily upon by both practitioners and the judiciary in personal injury claims. Traditionally, employees' salaries make up approximately one-third of the revenue of a legal practice on an annual basis. It is a significant indicator of expense inflation because legal practices manage salary costs to the business through the changes they make.

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

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

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

These are some easily identifiable examples, which can be monitored over time. FOIL would argue strongly that this approach, recognising the work done to date in setting the GHR whilst going some way to addressing the accepted shortcomings, is a pragmatic, compromise solution.

3. Review by reference to inflation

Whilst simple and straightforward, this methodology can only result in an increase in GHR, baking in the current rates, and failing to deliver on the MR's aim of reflecting changed business practises in the GHR.

FOIL does not believe this basic methodology would be the best approach but, if it were adopted, FOIL would argue against use of the RPI, with its accepted flaws, no longer calculated as a national statistic and recognised by the ONS as no longer compliant with international standards.

In his report on extending the FRC regime Lord Justice Jackson recommends use of the generic Services Producer Price Index (SPPI). FOIL would support the use of that index for the uprating of GHR. Whilst it might be thought that SPPI for legal services would provide a more accurate guide, the weakness of this index is that it reflects the costs charged by legal providers, not the cost of provision of their service. Uprating is therefore circular: the more

the costs of legal services rise the more the SPPI increases, and therefore the more FRC and GHR rise, and so on. Due to the impact of recoverable costs, the index reflects a position on costs that cannot be considered a free market. The weaknesses of the legal services SPPI were recognised by Professor Rickman in the Guideline Hourly Rates CJC working group report published in January 2021:

From Appendix H
"*SPPI Legal Services: This reflects changes in the prices that law firms are able to charge other businesses, Government, non-profit institutions and (recently) consumers. While this may seem to be a natural candidate for uprating GHRs, there is a potential difficulty because it effectively compensates law firms for cost increases that may largely be in their control."*

Whilst there is no ideal inflation index, FOIL believes the generic SPPI provides the best solution. It is more aligned with the inflation experienced by business than the RPI or the CPI which are consumer focused. Many of the driving factors of inflation in the general services market will be the same as in the legal services market but the general market is not subject to the same artificial influences as legal services and will more accurately reflect genuine market forces.

Frequency of review

Whichever method is used to re-examine GHR at this stage, it is likely that they will be updated by inflation in the future: once set now there will be no need for a further evidence-based review for some time. FOIL would argue strongly that inflationary increases should not be on an annual basis but should be undertaken every three to four years. Annual increases would cause uncertainty and encourage delay and gaming. As Lord Justice recognises and recommended in his supplemental report on FRC costs, page 81, "*Annual increases will generate too much complexity and confusion in ongoing cases. I therefore recommend reviews every three years."*

2.5 Are there alternatives to the current GHR methodology?

There is a view within FOIL that GHRs should be replaced by Fixed Hourly rates (FHR), fixed for different complexity bands, to reflect the skill, effort, specialised knowledge and responsibility of a lawyer handling litigation, set taking into account the expense of running a legal practice, the hourly rates paid for solicitor and own client work, and hourly rates allowed on detailed assessment. FHR would provide considerable advantages:

- Certainty and transparency – clients and practitioners have certainty and transparency as to the hourly rates recoverable between the parties.
- Competition between solicitors - FHRs could be treated as an exception to the indemnity principle, a change which would create competition between solicitors upon the contractual hourly rates a client is liable to pay.
- Save court time on Costs budgeting - FHRs would increase the likelihood of agreement of costs budgets and reduce the amount of court time needed to deal with costs budgeting.
- Save court time on summary/detailed assessment – the amount of the recoverable hourly rates is the primary issue between the parties upon assessment. FHRs would remove it and significantly increase the likelihood of settlement save time at assessment hearings.
- Save court time on detailed assessment hearings – FHRs would remove objections to retainers and breaches of the indemnity principle.

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

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

To set FHR, proposals have been developed by Howard Dean, a partner at Keoghs, and a member of the FOIL Costs SFT, for the introduction of a Rates Inquiry Committee (RIC) chaired by a High Court Judge with experience of costs assessment. It should consist of professionals who the judge considers will be able to assist the RIC in achieving the objective of setting FHRs under the terms of reference.

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

(Members of the legal profession and representatives of those with a vested interest in the review should be excluded from appointment.)

The RIC should have terms of reference:
• To conduct an evidence-based review of the rates an informed member of the public would agree to pay their solicitor out of their own money on a private basis.
• To obtain evidence concerning:

- expense to an efficient legal practice of producing 1 hour's work
- the hourly rates actually paid for solicitor and own client work • the range of hourly rates allowed upon detailed assessment
- variations by grade of fee earner
- To make recommendations as to the FHRs.

The RIC should have the following powers:

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

<u>Funding of the RIC</u>
It is noticeable that previous reviews of a similar nature have suffered from a lack of funding and reliance upon voluntary production of evidence. Success will depend upon RICS being properly funded.

This may be achieved through a variety of means as follows:
- A direct levy of all legal practices engaging in civil litigation.
- A levy collected through court fees.

- A fee payable by stakeholders who apply to submit evidence and make submissions as to the RIC on the level of FHR
- Some or all of the above.

Future reviews/increases of FHRs.

There needs to be a mechanism to ensure that the FHRs are varied to ensure that they are not only maintained at a reasonable and proportionate level but also provide sufficient level of profitability to ensure access to justice is maintained.

The uprating of FHRs by SPPI is superficially attractive as the extension of fixed recoverable costs to cases up to £100,000 is highly likely to distort the percentage inflation of pricing in the legal sector that the SPPI is designed to reflect. For this reason, uprating by SPPI is unsatisfactory. A better method would be to align the review to the change in the expense of doing the work over time. The need for a new beginning is evident from the acknowledgment by the Master of the Rolls of the concerns raised as to objectivity, vested interests and the migration to digital home working in relation to the setting of the GHR. The proposal above will allow the RIC to obtain the evidence they need and avoid the issues that have affected working groups when reviewing the GHR.

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?

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

In principle, digital processes have the potential to significantly reduce costs. The Claims Portal, with FRC, has reduced the costs of handling low value personal injury claims.

There are concerns within FOIL that the wider use of digital processes is reducing the costs incurred by HMCTS, whilst shifting the cost burden to users. For example, the IT difficulties and the operational complexities within the DCP have increased the resource needed to handle claims issued within in. These claims are often handled on agreed fixed rates and are becoming uneconomic in view of the increased handling caused by the DCP.

It is essential that digital processes have a reliable API to enable them to be used within firms' case management systems. The DCP, without an API, hampers supervision and the application of the risk management features within case management systems and increases the costs by removing the cost effectiveness delivered by case management systems.

FOIL has argued consistently for better processes within the DCP, to make it easier and more cost effective to use. To give a few examples of the issues raised, the list of users which firms use to allocate cases did not appear in alphabetical order. With large firms reporting 16 pages of users, allocation can be very time consuming. With regard to witness availability, at present dates have to be input one at a time. Although a 'date picker' is being developed by HMCTS, there is no date for implementation. With regard to claims notification, an enhancement is being developed which will allow a defendant legal representative to nominate their own email address for service notification. This will significantly improve efficiency and reduce risk in large firms, but there is as yet no go-live date.

FOIL members welcome digitalisation of the court process, being well-used to adopting IT solutions to improve their productivity and reduce risk. Court digitalisation which reduces efficiency and increases costs and claims risk, is a backward step. It is essential that digitalisation is funded effectively by the government. The government's policy position is that 100% of the costs of the civil court system should be recovered from court users. The savings to be achieved by HMCTS through greater use of digital process should be used to ensure those processes are high quality, efficient and cost-effective to use.

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

The CJC working group's proposals for reform of the PAP process will place much greater emphasis on pre-issue work.

Pre-issue costs are raised frequently by FOIL members as a problem in costs budgeting. In some kinds of litigation, including clinical negligence and disease, the incurred costs can be so high that budgeting is of reduced value. With the introduction of a regime where much more work is undertaken pre-issue, that problem will be exacerbated. It is important that with potential litigants incurring greater spend on legal costs before issue they have the same costs awareness pre-issue, which is perceived as a key benefit of costs budgeting after issue. It should not be possible for parties to press-on pre-issue in ignorance. This is of particular importance for defendants. Claimants are able to control their own expenditure but defendants who settle a claim are likely to face a demand for costs and potentially Part 8 proceedings. Costs information is important in assessing claims risk.

To provide some steer on pre-issue costs, FOIL would propose that within 21 days of the letter of response, both parties should be required to exchange an estimate of costs to stocktake stage. To encourage the process to be taken seriously, should the claim be issued, a party whose pre-issue incurred costs are within the estimate should not be required to include those costs within the budget. This would deliver a significant costs saving, with no requirement to review pre-issue costs and allocate them to budgeting phases.

At present, pre-issue, a claimant may pursue a claim without risk of incurring a costs liability. In the event that the claim is settled pre-issue, Part 8 proceedings may be commenced to recover costs. A defendant who successfully sees off a claim pre-issue has no remedy for the costs incurred in doing so. A defendant may be reluctant to incur very heavy expenditure pre-issue in a claim which has been repudiated and may reach a stage when it is considered more reasonable to wait until a claim is issued, to enable costs to be recovered if the claim is ultimately defeated. At present, whilst the PAPs place obligations on parties to engage pre-issue, there is some discretion and a defendant is unlikely to be heavily penalised in later proceedings if they decline to incur heavy pre-issue costs to defend a claim.

Under the proposed new PAP regime, a lack of engagement pre-issue may result in the defence being struck out. The possibility that a defendant will be denied the opportunity to

defend a claim will pressure defendants to incur costs pre-issue. It is of concern that in some types of commercial litigation, especially involving expert evidence and extensive documentation, those costs could be very high. It is unjust in these circumstances to require a defendant to incur costs which cannot be recovered, with the potential for gaming, with claimants pursuing weak claims with the aim of achieving at least a nuisance settlement.

Consideration should be given to the protection of defendants in these circumstances, in the same way as the security for costs provisions in the CPR protect defendants facing a risk that their costs may be irrecoverable if the claim is unsuccessful. To allow costs to be recovered by a defendant without a claim being issued would be a major departure from the current civil justice process and instead consideration should be given to allow a defendant which has conducted a reasonable investigation and repudiated the claim, where it is clear that the claim will require heavy expenditure on experts or disclosure, to decline to undertake further investigations and continue to good faith steps to narrow the issues and to stocktake, to prepare the claim for litigation if the claimant chooses to pursue it further.

With much more focus on pre-issue stages of dispute resolution, questions around pre-issue costs have become more important. At present, the issuing of proceedings provides a hard line marking the moment when costs shifting applies. A claimant who settles a dispute, with an agreement that costs are in principle recoverable, can use Part 8 proceedings to have those costs assessed. If the payment of costs is not agreed the claimant has the option of issuing to move the dispute into a cost-shifting arena.

The development of pre-litigation portal processes such as the Claims Portal and the OIC, have shown that formal costs shifting within a pre-issue dispute resolution process can work successfully. However, in general, the concept of costs shifting pre-issue raises several issues:

- Allowing costs shifting without a hard-line creates uncertainty. It is important that parties to a dispute have certainty on the point when costs shifting commences. Any uncertainty on when costs shifting applies, or the potential for parties to a dispute to drift into a position where they are responsible for the other party's costs could carry serious consequence, particularly for LIPs.
- Costs shifting before issue may perversely reduce dispute resolution and encourage litigation, by removing or restricting the flexible, safe space available pre-issue for parties to resolve their disputes before legal costs are incurred.
- The availability of costs pre-issue could encourage the instruction of lawyers at an early stage, reducing the use of informal dispute resolution between parties.
- Pre-issue costs shifting could allow weaponisation of the Pre-Action Protocols, with costs threats used to intimidate an opponent.
- If limited to successful claimants, creates an unfair regime in which defendants who settle are required to pay costs, but defendants who successful see-off a claim are unable to recover their costs.

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

FOIL has considered carefully the proposals put forward by the CJC working group on the PAPs, with regard to a new costs process for assessing costs incurred pre-issue.

The creation of a new summary costs process will put in place an entirely new costs jurisdiction and FOIL is concerned it will lead to a new satellite claims industry. At present,

many claims are brought forward and settled without the need for legal representation or legal proceedings. Commonly they are for special damages only in specified sums. These claims are handled by the litigants themselves and therefore no legal costs are incurred. This allows smaller claims to be resolved cost effectively and quickly: it is to the benefit of both claimants and defendants that this status quo is preserved.

Sometimes lawyers act in these straightforward uncontested claims and seek costs; a rise in this unnecessary behaviour was sparked by the fixed costs regime in 2003, but the jurisprudence shows that the same issue has been recurring for a long time. Generally, by paying the claim but not agreeing to pay costs this minority issue was controlled. However, opening up jurisdiction for lawyers to argue that they should recover costs between the parties for the straightforward pre-litigation work will lead to exploitation.

It is recognised, quite rightly, within the CJC PAP review interim report that "*the risk of costs affecting litigant behaviour in undesirable ways is very real in the English system*". There is a risk that a new process to formalise the recovery of costs pre-issue will encourage lawyers to seek to get involved in more claims pre-issue, on the basis that they are arguably costs bearing. It has the potential to create costs litigation and increase the burden on the court system, without discernible benefit.

FOIL does not believe there are real deterrents in the current system which discourage parties from settling. In practice, defendants will generally recognise that if there was a reasonable expectation that the settled claim, if issued, would have been costs bearing, it will be agreed that costs in principle are payable. Usually, costs can be agreed but CPR 46.14, with Part 8, works well to deal with disputes over quantum.

In the experience of FOIL's Costs Sector Focus Team, made up of costs specialists across member firms, very few claims are settled pre-issue which would meet the criteria for use of the new process, with the need to refer all costs issues to a judge. FOIL does not believe that the volume of such cases would justify the development of a new process. Instead, the new process would create a new category of straightforward settled cases where claimants will sue for costs, where previously no cause of action existed or was thought to be needed by any of the senior courts cases that have examined this corner of law.

On the issue of costs paid pre-issue, the process of assessing and agreeing costs is often protracted by a lack of transparent, reliable information from the receiving party. The process could be improved and made more cost-efficient by including in Part 45 a provision echoing the statement in Form N260:

"Where there is a contract of compromise giving rise to an entitlement of costs, the costs should be set out in a letter and certified as being accurate and compliant with the indemnity principle."

With regard to solicitor and own client costs, the current process is complex and expensive, and can extend over a very long period. The system is ripe for significant reform, including review of the Solicitors Act 1974.

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

The distinction between contentious and non-contentious costs is confusing and uncertain, as evidenced in the current litigation in *CAM Legal v Belsner*. It would be helpful for more clarity on the distinction between the work-types to be provided. It would be sensible for any work after a letter of claim or formal notification of a claim to be designated as contentious.

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

Part 4 – Consequences of the extension of Fixed Recoverable Costs

4.1 To the extent that you have not already commented on the point, what impact do you think 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 costs capping scheme may be worthy of consideration?

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.

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

Following the extension of FRC, costs budgeting will become less important within the civil justice regime. The move to FRC for claims worth up to £100k and the new PAP regime being proposed by the CJC will significantly change the civil justice landscape. There is a view that considering costs budgeting at this stage is premature when such significant reforms will be implemented shortly.

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

Costs sanctions after issue will become more important under the new PAP regime. At present costs sanctions are rarely imposed for a failure to meet the requirements of a PAP. Where they are imposed, in general, the penalty is an award of indemnity costs. FOIL does not believe that awarding indemnity costs provides an adequate driver of good behaviour: in practice the difference between standard and indemnity costs is small. Part 36 costs penalties are much more effective and a similar approach should be adopted for sanctions for poor pre-issue behaviour: a percentage award.

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

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

The detail of the rules is crucial to the successful extension of FRC. FOIL has considered in detail how the new regime should work and a paper setting out proposals to promote clarity and fairness is attached to this response as Appendix 1.

Add in reference to reputational risk being considered as one of the factors in considering whether a claim is suitable for FRC.

4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or costs capping scheme may be worthy of consideration?

FOIL has long-argued that the recoverable costs in Part 8 costs-only proceedings should be fixed.

Costs-only proceedings may be brought in any claim in which the underlying dispute is compromised without proceedings. However, they are most common in low value claims, because low value claims themselves are most common and higher value claims are often litigated on substantive issues.

The costs of many low value claims are fixed under CPR 45. The CPR caps also the costs of some stages of the costs proceedings themselves: if the costs claim proceeds as far as detailed assessment and the costs were no more than £75,000, provisional assessment under CPR 47.15 applies, the costs of which the Rules cap at £1,500.

Costs-only proceedings are an intermediate stage between the substantive claim and detailed assessment. If claims settle at that intermediate stage, the costs of the proceedings are recoverable but are neither fixed or capped, in contrast to the costs of the preceding and following stages. This has been described by the CPRC as a 'very small gap' and a 'very minor issue'. However, it does have very significant costs consequences with the costs of this small intermediate stage often significantly exceeding the costs of the substantive proceedings and the sums in issue.

In order to bring costs-only proceedings a claimant must take the following steps:
- Prepare a claim form (most firms use a template)
- Prepare a draft order (again, a template is used)
- Send sufficient copies to court
- Pay an issue fee of £59
- Consider any sealed documents returned by the court
- Consider the defendant's acknowledgement of service; and
- Consider the order made by the court determining the proceedings.

A defendant must:

- Consider the claim form and prepare a notice of acting, acknowledgement of service, and, where required, a witness statement if the claim is opposed
- Consider the order made by the court determining the proceedings.

Thereafter the parties will begin the detailed assessment process.

The work does not vary significantly depending on:
- The value of the underlying claim
- The circumstances of the underlying claim
- The number of parties.

The costs of the procedure are eminently suitable for fixing for both parties. Fixing would operate on the usual 'swings and roundabouts' basis, where remuneration is fair when taken as a whole.

Claimants are presently incentivised to commence costs-only proceedings:
1. to generate additional recoverable costs of commencing the proceedings; and

2. because those recoverable costs are not fixed or capped; and
3. to recover additional costs generated by the costs negotiation process which would otherwise be unrecoverable.

In addition, claimants are incentivised to issue costs-only proceedings at the earliest opportunity:

1. to prevent the defendant having time to make a final offer for costs, which might put the claimant at risk on costs of the proceedings; and
2. to minimise the work that may be done in the costs negotiation process which might not be recovered.

Fixing the costs of bringing costs-only proceedings at a reasonable level would reduce these incentives.

Those claimants who abuse the process will send their claim for costs with a covering letter saying that if costs are not agreed or a reasonable offer is not made within, say, 14 days, costs-only proceedings will be commenced. That threat is typically followed through, irrespective of offers or the defendant's attempt to negotiate. It is difficult to envisage another type of claim where it might be thought reasonable to commence proceedings after so short a time.

Prematurely commenced costs-only proceedings are typically opposed. Many courts list a hearing to determine whether to make an order for assessment or dismiss the claim.

Courts are required to process a great many low value claims. As the costs-only procedure is a type of Part 8 claim, these claims are not issued in the DCP or the MCOL. They are issued in the hearing centres of the County Court. The issue of proceedings is processed by administrative staff. The proceedings also go before a judge, usually in box work, to consider what order to make on the papers. More judicial time is required where the proceedings are opposed and the court wishes to hear from the parties before making a decision.

Although some of this work is in the larger court centres, pressure is also on many smaller regional courts if a prolific costs draftsman happens to practice in the local area. Fixing costs to discourage commencement of proceedings would relieve some administrative pressure on the courts and save some judicial time.

The Court of Appeal has recognised the problem: *Tasleem v Beverley* [2013] EWCA Civ 1805 was a case concerned with the interaction of costs-only proceedings and default costs certificates. Sharp LJ, with whom Hallett LJ and the Chancellor of the High Court agreed, said at [22-23]:

I take Mr Marven's point that the costs of bringing such Part 8 proceedings may be, or should be, relatively minimal. Whilst a claimant who commences costs-only proceedings should not be worse off than one who uses the detailed assessment and default procedure where there are underlying proceedings, he should not be better off if he does so either. Care should therefore be taken to ensure that matters properly encompassed within the detailed assessment and default regime are not claimed as part of the Part 8 costs-only process. But that is a matter which should be sorted out by the summary assessment process in the event that the parties cannot agree those extra costs.

The problems which this may give rise to (that is, that there is no fixed costs regime for Part 8 costs-only proceedings) is a matter which may merit examination by the Civil Procedure Rules Committee in due course.

In that case costs of around £1,500 for commencing the costs-only proceedings were recovered although the sum in dispute was only £371.

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.

FOIL makes no comment on this question.

APPENDIX 1

The extension of Fixed Recoverable Costs

In its response to the consultation "Extended Fixed Recoverable Costs in Civil Cases" (the consultation paper) the government has now confirmed that it intends to implement the extension of FRC proposed by Sir Rupert Jackson. The government has indicated that it will now work with the CPRC "*to ensure the smooth delivery of these reforms*". The MOJ will "*engage with the CPRC on the detail of the implementation*."

The experience of the existing FRC regime, including satellite litigation that has arisen on the minutiae of the rules, has shown clearly that delivery of the policy objectives behind fixed recoverable costs is very dependent upon the detail of the rules: any ambiguity or imprecision will have the potential to warp the regime and deliver unintended consequences.

The cases of *Broadhurst v Tan* [2016] EWCA Civ 94, *Bird v Acorn* [2016] EWCA 1096, and *Qader v Esure* [2016] EWCA Civ 1109 all concerned features of the existing FRC regime which FOIL does not believe were always intended, and which have impacted upon the effectiveness of the provisions in controlling costs and ensuring they are proportionate. Uncertainty in the rules, with the need to seek clarity from the courts, is extremely disruptive. The powers of the court in addressing existing rules are much more limited than the power of the CPRC in drafting the rules. The Master of the Rolls in *Broadhurst v Tan* recognised that the Court of Appeal's decision would "*lead to a generous settlement for the claimant"* but "*not so unfair to the defendant*" that it required a different interpretation of the rules. Whilst that was the best outcome the Court of Appeal could deliver, it may be that had the issue been considered during the development of the rules that a different approach would have been taken, to achieve a fairer and more proportionate outcome for all parties.

This note is prepared with a view to providing detailed input into the debate. It highlights the areas where FOIL believes there is a need for a careful approach, where there are shortcomings in the regime or where caselaw has altered the existing FRC regime creating unintended outcomes. The details included have been gathered from FOIL members within a short time frame. The points are not exhaustive but will hopefully indicate where areas of concern are likely to arise and highlight the critical need for precise wording.

The following areas are considered:

1. The valuation of claims
2. Reallocation of claims
3. Flexibility between bands
4. Use of counsel and specialist lawyers
5. Allocation of NIHL claims
6. RTA Personal Injury claims
7. The proposals for multiple claims arising from the same cause of action
8. Part 36 and QOCS
9. The triggering of stages
10. The leapfrogging of stages
11. The definition of the Intermediate Track Stages
12. Vulnerable parties and witnesses
13. Disbursements following *Aldred v Cham*
14. Standard disbursements
15. The existing FRC regime: CPR Part 45, Section IIIA

1. The valuation of claims

The issuing of claims in the correct claims regime is already an issue of concern. FOIL and APIL are in discussion with a view to agreeing informal best practice, to avoid the situation which often arises currently, of claims being issued inappropriately either within or outside the OIC and the Low Value claims portal, because claims have been valued inadequately or incorrectly at the outset.

The value of a claim will become much more important under the new extended FRC regime than it is at present, not only in identifying Intermediate Cases but also when considering the appropriate band, particularly if, as considered below, claims will only be moved between bands in exceptional circumstances. At the moment schedules of loss with Heads of Damage 'TBA' are commonplace, which will make it impossible to decide where the claim should sit. A lax approach is taken currently to the requirement in CPR PD 16 para 4.2:

"The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims."

Thorough valuation of cases at the outset is essential. Valuation must be based on more than a global sum: there must be reference to the different heads of damage. In a personal injury claim, the Judicial College Guidelines should be referenced.

This issue highlights the current work of the CJC to review the Pre-Action Protocols, and the MOJ Call for Evidence on Dispute Resolution. FOIL believes that successful adoption of ADR pre-issue rests upon the development of a regime that requires mandatory disclosure of sufficient details of the claim and loss to enable the defendant to make fully informed decisions on liability and quantum. Such an approach would significantly improve the operation of the proposed FRC, by reducing the potential for claims to be valued incorrectly and therefore issued incorrectly. Without that discipline on evaluation and valuation at the outset, the new regime has the potential to either bake-in injustice through incorrect allocation or lead to significant satellite litigation as allocation decisions are challenged.

Circumstances already occur in which claims are pleaded at a high level which later falls significantly. The issue can arise on detailed assessment when a claimant is seeking to recover a court fee paid on a much higher value than that eventually recovered at the end of the case. In these circumstances the arguments focus on what was the reasonable expectation of the party at the outset. This argument will have much more significance under the new regime: at present it impacts only in relation to proportionality and in recovery of the court fees (although judges are usually loath to order the defendant to pay less than the full sum paid by the claimant). Where fixed costs are calculated relative to the amount of damages, the final value of the claim is already a significant factor. Making the approach to disbursements consistent with the approach to fixed costs gives rise to the risk of shortfall in recovery, which promotes the proper rigour on valuation that the new regime will need.

To avoid gaming of the system, in cases excluded from FRC in view of a valuation over £100,000, where there was no reasonable expectation that the claim was worth a figure over £100k, FOIL would suggest that under the rules the costs recovered should be limited to the FRC that would have been recovered if the claim had been properly allocated. In these circumstances the recoverable court fee should be limited to that which would have been payable if the claim had been correctly valued at the outset. Such a rule would accord with the current CPR r.45.24 for existing FRC cases.

If there was a reasonable expectation that the higher value was correct at the time, FRC should not automatically apply but should be taken into account upon assessment, as a measure of proportionality.

2. Reallocation of claims in and out of the FRC regime

At paragraph 2.6 the consultation paper indicates that:

"It may be necessary, where the nature of a case changes fundamentally, for the court to re-allocate a case. Sir Rupert recommends that the court should only be permitted to do so with intermediate cases after the first CMC 'in exceptional circumstances, as is the case in the fast track.'"

Referring back to Sir Rupert's report, his concerns around reallocation related to reallocation *out* of the Intermediate Track, as this removes certainty as to costs which he sees as one of the principal benefits of FRC. He makes no comment on reallocation into the Intermediate Track.

Under present rules (CPR, r.26.10) once a claim has been allocated to a track, the court may make a subsequent order reallocating to a different track. FOIL would suggest that the same rule should apply between the newly extended Fast Track and the Multi Track, to enable claims which become suitable for treatment as Intermediate Cases to be reallocated.

Whilst it may be appropriate to limit that power to 'exceptional circumstances' when considering a transfer out of the Intermediate Cases category, there would appear to be no reason why the court should not have more flexible powers to transfer claims *into* the Intermediate Cases category during the course of the litigation. To do otherwise will encourage exaggeration of claims, as once outside the regime claims will remain outside regardless of how the litigation develops and will be subject to a higher costs regime than appropriate, and thus to disproportionate costs. Flexibility will also be important where cases genuinely fall in value. Pleaded claims and schedules may not be challengeable in the early stages of proceedings but may become so when, for example, witness statements are produced.

As with a reallocation from the Small Claims Track at present, the new costs regime should apply from the date of reallocation.

3. Flexibility between Bands

The government proposes in para 14.1 of the response to the consultation paper, that "*once an intermediate case has been allocated to a band, the band should only be revisited in exceptional circumstances: for example, if substantial unfairness would be caused if the case remained in its allocated band".*

Within that general principle there may be circumstances where it is appropriate for there to be provision within the rules for a change of band, in areas where a routine situation makes a reconsideration of band appropriate. For example, the MOJ consultation on FRC noted that where there is a trial on a preliminary issue, two trial fees will be recoverable, not necessarily on the same band. A reconsideration of Band might also be appropriate following an admission of liability; following settlement of some parts of the claim by Part 36 or otherwise, where the remainder would be more suitable for a different band; or similarly following admission of some heads of claim. The costs of the new Band should apply from the date of reallocation.

4. Use of counsel and specialist lawyers

On Fast Track Band 4 and for NIHL claims, Sir Rupert recommends specific additional amounts to be recovered by counsel or specialist lawyers:

- Post issue advice or conference - £1,000
- Settling defence or defence and counterclaim - £500

Whilst counsel's advice and drafting can sometimes be very beneficial in narrowing the issues and achieving earlier settlement, there is the potential for this 'specialist' advice to be claimed on every

case in Band 4, where in many circumstances it will not be justified, or is, in reality, no more that appropriate case handling would require.

The availability of the additional costs creates attractions for a business model under which junior or unqualified staff handle claims, with input from a 'specialist'. In his Supplemental Report (Chapter 5, paragraph 5.9), Lord Justice Jackson indicates that the phrase 'counsel or specialist lawyer' will include counsel, but:

"*on occasions the proper person to do the ring-fenced work and receive the ring-fenced fee may be a solicitor, for example the intended trial advocate. On some occasions the proper person to do the ring-fenced work and received the ring-fenced fee may be a fellow of the Chartered Institute of Legal Executives with appropriate expertise"*.

If this very broad definition of a specialist were to be adopted it is likely to include almost any experienced solicitor or FCILEx, whether or not the intended trial advocate. Work undertaken by the 'specialist' would increase the fixed sum allowed for a claim which settles shortly after issue by 40%. For some categories of claim it is likely to prove attractive for claimant firms to begin to employ specialist counsel for this purpose.

In considering how the issue of specialist input should be dealt with, an approach is required to ensure that appropriate expert input can be funded, without allowing gaming of the system to recover such additional sums excessively. The current rules on FRC allowing counsels' fees to be recovered only when reasonably required do not work well, with a heavy presumption in favour of allowing counsels' fees in almost all cases, which would seriously undermine the FRC regime if adopted more widely. FOIL would suggest that guidance should be provided within the rules on the issues to be considered if an application is made for costs for input from a specialist or counsel, to include, perhaps, whether liability has been admitted, the complexity of the claim within the band, and the complexity of the issues raised in the defence.

The consultation paper indicates that the MOJ is only considering ring-fencing counsels' fees in Band 4 and for NIHL as "*counsel is rarely consulted in cases outside of Band 4*". In the experience of FOIL members, in fact, counsels' fees are regularly claimed as disbursements in cases that will fall outside Band 4 and the position on counsels' fees in these cases should be made clear. FOIL presumes that in these cases there will be no additional sums available for counsel and it will be a matter for the legal representative how the FRC are divided between legal representatives. It follows from ring-fencing that counsel's fees are usually included in fixed costs. The new rules will no doubt list what can be recovered as disbursements but a list of what cannot be recovered, such as counsel's fees, would be equally helpful.

The concept of 'ring-fencing' of counsels' fees has raised some uncertainty in discussions amongst FOIL members, in ascertaining whether the term refers to the express allocation of a particular portion of the permitted FRC to counsel, or the ability to recover an additional sum above the usual FRC, to be paid to counsel. It would be helpful if a term could be employed which more clearly sets out the intention.

5. Allocation of NIHL claims

Looking at the categories of NIHL claims which will be excluded from the new FRC regime, the fourth exclusion mentioned in the consultation paper states that in cases with a single defendant, "*the defendant may elect for the claim to go through the Portal*". FOIL's response on that point is noted in the MOJ response at para 9.7: FOIL is the "*defendant respondent*" referred to.

A claimant bringing a claim against one defendant at present must put it through the Portal. Defendants can only *remove* claims from the Portal, by denying liability or failing to meet certain procedural requirements. The consultation paper indicated that where liability was denied and the case succeeded, the FRC would be those of the Fast Track in general.

This creates some difficulties. It is not clear where these claims would sit as the criteria for the Fast Track Bands set out in para 3.2 of the consultation expressly exclude NIHL claims from Band 4, where other ELD claims sit. If a comparison is undertaken between Fast Track FRC and NIHL FRC, it will be seen that regardless of the Fast Track Band to which they are allocated, NIHL claims will attract higher costs in the Fast Track than under the NIHL regime – creating a quirk in the system. This is likely to encourage gaming, limit the impact of the new NIHL regime, and increase costs without justification. NIHL cases which drop out of the Portal should fall into the new FRC for NIHL claims.

6. RTA Personal Injury claims

Arising from discussion with FOIL members, there is some confusion over the allocation of RTA Personal Injury claims under the new regime. FOIL's understanding is that Band 2 will be for those RTA PI claims which start within the Pre-Action Protocol/portal process but drop out. Band 3 will be for those RTA PI claims worth up to £25,000 which are outside the Low Value Pre-Action Protocol as set out in paragraph 4.1: claims

- in respect of a breach of duty by a non-road user
- made to the MIB under the Untraced Drivers' Agreement
- where the claimant is a protected party
- where the claimant or defendant is the personal representative of a deceased person
- where the claimant is bankrupt, or
- where the defendant's vehicle is registered outside the UK.

However, some FOIL members are concerned that it may be argued that Band 2 applies to cases concluded within the Portal, under the Low Value RTA PAP. Clarification confirming that that is not correct would be very helpful.

7. The proposals for multiple claims arising from the same cause of action

In para 5.1 of its response, the government indicates that 25% FRC for each additional claimant is the appropriate figure to both reflect duplication of work and discourage referrals.
The detailed wording of the rules on the point will be important to avoid gaming. FOIL would suggest:

"*A further claim brought by a different claimant in addition to a claim by a principal claimant, arising out of the same circumstances with the same or substantially the same facts, or a common cause of action, whether or not a conflict of interest may arise."*

FOIL would like to see this provision preventing defendant workloads being increased by separate firms acting in claims where there would be no conflicts of interest for one firm acting for all. Following RTAs where drivers and passengers have claims, there may be spurious arguments of potential for conflict of interest at the outset simply because liability has not yet been admitted. The proposed definition anticipates that.

The provision should also discourage the bundling of small claims with a lead fast track claim with the intention of making the small claims costs bearing where the small claims could just as effectively be stayed pending the decision on liability in the lead fast track claim. Where the financial rewards are curtailed, staying in the interests of the overriding objective is more likely to be achieved.

This provision should also simply end excessive costs where the current fixed costs apply per claimant.

8. Part 36 and QOCS

Whilst the Part 36 rules are being considered if would be helpful for the interplay between Part 36 and QOCS to be considered. The rules do not work as well as they should as QOCS has been bolted onto the existing Part 36 regime. Revision to ensure the rules fit together effectively would be beneficial.

FOIL has written separately to CPRC on the compelling logic that Part 36 settlements should be counted in the fund for QOCS enforcement.

Sir Rupert Jackson's intention from his original *Final Report* that both damages and pre-offer costs should form a fund for defendant's costs where the claimant does beat the defendant's offer at trial has also not been given effect, in view of the Supreme Court decision in *Ho v Adelekun*. Pre-offer costs do not count towards the fund, because set off can be achieved only up to the amount of damages and interest. In the absence of rationale for that departure, FOIL considers the QOCS provision should be reconsidered.

9. The triggering of the stages

As the regime proceeds on a linear basis, with additional costs being allowed for each subsequent stage, two issues arise:

- The need for clarity on when each stage starts; and
- What happens when a stage has been partially completed when the case is concluded?

Lord Justice Jackson considered the second issue in his speech 'Fixed Costs – The Time has Come' delivered as the IPA Annual Lecture on 28 January 2016. On page 14, in setting out the proposed rules, Sir Rupert proposed that "*50% of the fixed cost is payable if proceedings have been issued and the work stage has been substantially started"* The issue was not considered further in his Supplemental Report and it is not covered in the MOJ's response. FOIL is concerned that introducing a loose concept such as "*substantially started*" into the rules will be a source of friction and gaming and will create satellite litigation. There will be a powerful incentive for claimant representatives to reach the next stage and therefore prompt further payment, with arguments arising over what is meant by "*substantially started".* Rather than basing payment on the amount of work done within a partly completed stage, FOIL believes the focus should be on the action which has caused the claim to settle. Where an offer is made by the paying party which gives rise to settlement of the case, the receiving party is not in control of the timetable and settlement on the offer should prompt payment of 50% of the partially completed stage, regardless of how much work has been done. Where the receiving party makes an offer which leads to settlement, that party is in control of the timetable and if the claim settles on the basis of that offer, no costs will be payable for the partially completed stage.

The proposal is not without flaws. It may be argued, for example, that the claimant representative was unable to make the offer before starting work on the partially completed stage. However, it has the advantage of certainty - a key aim for Lord Justice Jackson. It will on occasion operate harshly, to the detriment of either party, but there will be an element of 'swings and roundtables' which has found favour with the judiciary in the past when seeking to find a simple, fair solution to problems in the existing FRC regime. The 'swings and roundabouts' approach is used by Lord Justice Jackson to fairly allow Stage 1 costs as FRC in personal injury claims, rather than capped costs as in non-personal injury claims.
The proposal would provide some encouragement for early offers: once in a stage the claimant representative would be incentivised to settle the claim at the earliest opportunity,

to receive 50% of the costs of that stage regardless of the amount of work undertaken. A defendant representative will have an incentive to make an offer at the earliest opportunity, to avoid slipping into the next stage.

The proposed rule would not remove the potential for gaming, with the potential for costs to be racked up unnecessarily. It would be appropriate for the provision to be augmented by a provision allowing the courts to vary the default rule in cases where the receiving party has behaved unreasonably. There is already precedent for this in CPR 45.24 which sets out the costs consequences when a claimant unreasonably fails to use the RTA or EL/PL claims portal or unreasonably drops out a claim. Lord Justice Jackson proposes a remedy in the case of unreasonable litigation behaviour in para 5.14 of his Supplemental Report: that could include significant gaming on the stages.

In any event, we would urge rule drafters not to adopt the phrase 'substantially started' in the new rules in any way that invites an enquiry into what constitutes 'substantially' and whether it happened in a particular case. Instead, there should be simple criteria to determine whether 50% (or other suitable percentage) of the costs of the incomplete stage should be paid, whether on our offer-based proposal or some other mechanism.

The need for clarity on when each stage starts

Looking at the first bullet point set out above, if payment is by stages, it must be clear when each stage starts, to avoid frictional litigation.

The proposed FRC table sets out the fixed fee stages in relation to the procedural chronology of the case.[1] Those proposed stages do not currently provide any certainty or clarity as to when they commence and when they end.

Having given the issue further consideration over past weeks, we propose the following periods and triggers for each stage:

Stage (S)	Period and commencement dates
S1 Pre-issue or pre-defence investigations	Pre-issue up to the date of service of the defence.
S2 Counsel/specialist lawyer drafting statements of case/advising	Optional FRC for an advice on the merits and/ next steps and / or drafting statements of case.
S3 Up to and including CMC	From date of service of the defence up to and including the date of the CMC.
S4 Up to end of disclosure / Inspection	From date of the CMC to the date for exchange of lists of documents.
S5 Up to service of witness statements and expert reports	From the date for exchange of lists of documents to the date for service of witness statements or expert's reports, being the last date for service as stated in the directions.
S6 Up to PTR /14 days before trial	From the last date of service of witness statements or expert's reports to the earlier of the date of the PTR or 14 days before trial.
S7 Counsel/ specialist lawyer advising in writing or in conference	Optional FRC for advice on the merits and /or evidence
S8 Up to trial	From the earlier of the date of the PTR or 14 days before trial up to the date of trial.
S9 Attendance of solicitor at trial per day	The date of the first day of trial provided the trial commences.
S10 Advocacy fee: day 1	The date of the first day of trial provided the trial commences.

[1] Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs Ch 7 at paragraph 5.1

10. The leapfrogging of stages

This issue, in relation to disposal hearings, is noted in the MOJ response at para 21.9:
"An insurer respondent commented that careful consideration should be given to how disposal hearings are dealt with under FRC, to ensure that they are appropriately catered for and the recoverable costs reflect their more straightforward nature. It was noted by this respondent that, currently, they are considered to be a trial and FRC are payable at the pre-trial level even though very little work will have been necessary by the claimant's solicitor, as often these cases settle shortly after proceedings are issued."

This issue arises from the decision in *Bird v Acorn* [2016] EWCA Civ 1096. As Lord Justice Briggs indicated in the Court of Appeal judgment, the case turned upon the "*special definition*" of "*trial*" for the purposes of EL/PL Low Value Protocol cases in CPR 45.29E(4)(c). The question was whether a disposal hearing listed for the quantification of damages payable after judgment under CPR 26 PD 12.2(1)(a) is, or is not, a trial within the meaning of rule 45.29(4)(c).

The case concerned an injury to Mr Bird's hand. The case was commenced in the Portal under the EL/PL Low Value Claims Protocol. The defendant did not acknowledge the claim and the claim was withdrawn from the Portal but liability was admitted shortly thereafter when the insurer became involved and medical evidence was submitted. When quantum was not agreed, proceedings were commenced, judgment was entered and to determine quantum the was listed for a 10-minute disposal hearing. A dispute arose over whether conclusion of the claim by a disposal hearing entitled the claimant to the substantially increased Part B, column 3 costs, applicable when a claim is disposed of "*on or after the date of listing but prior to the date of trial".*

The Court of Appeal was called upon to interpret the rules in front of it, which allowed for only two options: that either column 1 or column 3 in Part B were to be applied in those circumstances. Had the issue been considered during the drafting of the provisions, it may have been that an additional column would have been added to reflect the situation of a short disposal hearing after admission of liability, circumstances in which the claimant representative will not have undertaken the work required to reach the post-listing stage of a case where liability is contested.

The decision in the case means that in a case where liability is admitted at an early stage, and damages are assessed at a short interim hearing, the claimant will recover £725 plus 5% of damages (plus VAT) more than a representative handling a claim in which liability has been denied, and which settles just before listing. For example,

- Scenario A: The defendant in an RTA claim files a defence denying liability. The court orders direction questionnaires to be filed. The defendant makes an offer in settlement which the claimant accepts prior to allocation. The fixed recoverable costs are £1,160 base costs plus 20% of the damages.

- Scenario B: The defendant, on the same facts as above, admits liability and makes an offer that does not expire and is not accepted until after the court has listed a disposal hearing. Under *Bird v Acorn* the fixed recoverable costs are £2,655 base costs plus 20% of the damages.

The difference in the outcome is very significant: the claimant representative in Scenario B, having undertaken no more work than in Scenario A, receives 129% more in base costs.
It is difficult to envisage that the Rule Committee intended such an outcome.

The decision in *Bird v Acorn* has warped the intended operation of the FRC regime in low value claims and has the potential to do the same to the new extended regime if left unaddressed.
Whilst a 'swings and roundabouts' approach is used to achieve fairness in FRC cases, in broad terms the regime aims to align work undertaken and costs recovered. The costs payable on cases which start in the Portal and later drop out are based on the stage the case has reached when it

is concluded: pre-issue; post issue/pre allocation; post allocation/pre-listing; and post listing/pre-trial. The costs payable are increased at each stage. The same system will apply under the new regime.

In *Bird v Acorn*, the claim had not been allocated to a track but was listed for a disposal hearing.

Under Practice Direction 26 para 12.4 a Disposal Hearing is defined as a hearing:

(a) which will not normally last longer than 30 minutes, and
(b) at which the court will not normally hear oral evidence.

At a Disposal Hearing the court may:

(a) decide the amount payable under or in consequence of the relevant order and give judgment for that amount; or
(b) give directions as to the future conduct of the proceedings.

The Court of Appeal held that a disposal hearing fell within the definition of a trial, being a "*final contested hearing*". There was no requirement that the costs stages should be passed sequentially (a decision which appears at odds with Lord Justice Jackson's recommendations). The claimant was therefore entitled to recover post listing/pre-trial costs, not the costs which would have been payable pre-allocation.

Although it may be a 'final contested hearing' a disposal hearing is completely different in nature to a trial, which on the Fast Track will last up to a day and will invariably involve the hearing of oral evidence. Disposal hearings were not historically equated with trials (see for example, the Court of Appeal decision in *Forcelux v Binnie* [2009] EWCA Civ 854).

At the drafting stage, the Rule Committee has advantages that the Court of Appeal can never have. It is possible to be clear on what work is reflected in the figures for each stage. For instance, the Rule Committee had available the work of Professors Fenn and Rickman on setting figures for the fixed costs, which drew on the costs of actual claims and identified the costs of cases going to trial by payment of the now abolished allocation fee. As that fee was never paid in disposal cases, then the costs for the trial stage did not take into account the actual costs of disposal cases. If a similar approach is taken now of fixing costs with regard to actual costs, disposal cases should be identified as a specific category.

The decision results in anomalies and unfairness in a very wide range of cases. Some courts, such as Liverpool and Birkenhead County Courts, routinely list cases for disposal hearings as a first step in litigation, raising the prospect of *Bird v Acorn* costs in many cases which have not been allocated.

FOIL believes that the decision in *Bird v Acorn,* based on judicial interpretation of the rules as drafted, has given rise to an outcome that is wrong in principle. The wording of the rules upon which the decision is based was inadvertently defective. The CPR should be amended to make it clear that a disposal hearing is not a trial, thereby ensuring that the FRC costs awarded following a disposal hearing are proportionate to the work required to reach that stage, both under the current FRC regime and the new extended regime.
Such an approach would create consistency with the fixed fast track trial costs. PD 45 4.3 expressly states that trial costs will not apply where the claim is concluded at a disposal hearing (underlined below):

> ***PD 45***
> ***Section VI Fast Track Trial Costs***
> ***Scope***
> ***4.1*** *Section VI of Part 45 applies to the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track.*

4.2 *It applies only where, at the date of the trial, the claim is allocated to the fast track. It does not apply in any other case, irrespective of the final value of the claim.*
4.3 *In particular it does not apply to a disposal hearing at which the amount to be paid under a judgment or order is decided by the court (see paragraph 12.4 of Practice Direction 26)).*

11. The definition of the Intermediate Track Stages

The stages for Intermediate Cases make reference to a PTR (S6). However, some courts do not list for PTR and including that stage within the staging definitions may add costs, or in many cases will be introducing a fiction into the process. It would be more appropriate for Stage 6 to be defined as '14 days before trial or alternatively up to the PTR'.

12. Vulnerable parties and witnesses

In February 2020 the CJC published a report on 'Vulnerable Parties and Witnesses in Civil Proceedings' which suggested changes to the wording of rules and Practice Directions to ensure that vulnerable parties and witnesses can participate fully in proceedings and give their best evidence.

As a result, the CPRC agreed various rule changes, in particular to amend the Overriding Objective to include that aim in the factors to be taken into account when dealing with a case justly and proportionately.

A new Practice Direction 1A on participation of vulnerable parties and witnesses was introduced in April 2021. CPR r.44.4 was amended to allow the court to include within a costs order "*any additional work undertaken or expense incurred due to the vulnerability of a party or any witness."*

The CPRC has discussed the possibility that the new provisions on vulnerability may have a general effect on costs including on FRC.

FOIL has written to the CPRC on the issue. FOIL is supportive of measures that will assist vulnerable parties and witnesses in engaging fully in civil litigation but it has a number of concerns. Vulnerability is defined very widely in the new Practice Direction, to include amongst other factors, immaturity, social or domestic circumstances, or physical disability or impairment, or heath condition.

There is the potential for a very large number of claimants to fall within the provisions: it has already been argued by claimant representatives that "*in almost every personal injury case, there will be a vulnerable claimant taking on a well-resourced insurer*".

There is the potential for the FRC regime to be significantly undermined if judicial discretion were introduced to allow additional costs to be recovered to reflect the involvement of a vulnerable individual in the proceedings using that very wide definition. FOIL notes in the consultation response, para 24.3, that "*Although respondents to our consultation argued that additional costs provisions may be needed due to the vulnerability of a party, little concrete evidence was presented to support the idea."*

In its response to the consultation, in para 24.4, the MOJ accepts that there may be grounds to make "*limited exceptions in FRC for specific vulnerabilities, rather than more expansive allowances that would be contrary to the objectives of FRC".* Under para 24.5 the government identified the legal aid provisions relating to the Family Advocacy Scheme (FAS) as providing "*one example of a possible framework that could be applied to FRC".* The government proposes

that the new FRC regime should cover the specific vulnerabilities set out in the FAS guidance, which are much narrower than the definitions included in the Practice Direction. The government indicates that one possible option is for a fixed percentage uplift in FRC of 25% to be available for claimants meeting the FAS definition of vulnerability, with a precondition of judicial certification. The government is to discuss the arrangements with the CPRC.

FOIL believes that the approach outlined by the MOJ is the most appropriate. It is important that a narrower definition of vulnerability is used in the FRC regimes, to limit additional costs to circumstances where the vulnerability has resulted in more work being required: the use of the FAS definition will achieve that. It is also important that the uplift, where appropriate, is fixed and predictable, as proposed, rather than open to judicial discretion which introduces uncertainty into the regime which Lord Justice Jackson was so keen to avoid.

With regard to the existing FRC regime, many of the steps that the CJC envisaged being taken to assist vulnerable parties and witnesses will not involve a legal representative incurring increased costs. Where additional work is required, it is already well-established that existing FRC are fixed at a level which reflects the involvement of vulnerable individuals with different characteristics and needs.

Indeed, the costs data upon which FRC were based reflected those different needs and the cost of work arising from the involvement of vulnerable individuals was therefore built into the figures.

FOIL understands from the minutes of the CPRC meeting in November 2020 that the issue of possible rule amendments to allow discretionary increases in fixed, scale and capped costs to reflect vulnerability has been referred to the MOJ and it is possible that there will be further consultation. FOIL would argue strongly against the introduction of such discretion.

There is the potential for gaming in this area if the rules are not tightly drawn. Within the existing regime, FOIL is seeing exceptions to scope being stretched beyond what was intended in the pursuit of hourly rate as opposed to fixed recoverable costs.

The Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims sets out the exceptions to its scope. It provides,
"4.3 This Protocol does not apply to a claim—
(8) for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;"

In *Scott v Ministry of Justice* [2019] EWHC B13 (Costs):
C, employed as a prison officer, was injured by an inmate whilst attempting to restrain him. C issued a claim stating the value of the claim was "no more than £5,000."
The value on the Claim Form was subsequently amended to "over £30,000." A defence denying liability was served alongside a Part 36 offer of £15,000. C accepted the Part 36 offer.
The parties were unable to agree whether the EL/PL Protocol applied and fixed recoverable costs applied.

D submitted C had initially misled the Court about the claim's true value, and the subsequent acceptance of the Part 36 of £15,000 implied the amended value of £30,000 was inflated.
C submitted that the exception at paragraph 4.3(8) of the EL/PL Protocol applied, arguing that the inmate was a "vulnerable adult" who caused harm to the C.

The key submission made by C was that the inmate (said to be a vulnerable adult) had caused the claimant harm, and that "harm" means, or is capable of meaning "personal injuries".
Deputy Master Friston found applying the exception in these circumstances would *"cause serious internal inconsistencies in the EL/PL Protocol,"* and dismissed C's submission. He said,

"18. There is, however, a more fundamental problem with Mr Fletcher's argument. If the word 'harm' could be read as meaning personal injuries per se, this would cause serious internal

inconsistencies in the EL/PL Protocol. In particular, if Mr Fletcher's analysis were correct, it would also apply to children (including those who bring public liability claims as a result of having sustained an injury). This would mean that any child with any personal injury (whether as a result of abuse or neglect or otherwise) would be excluded from the EL/PL Protocol. This, however, is demonstrably false, as that protocol repeatedly makes reference to children. By way of example, paragraph 6.4 states that where the claimant is a child, this must be noted in the relevant section of the CNF, and paragraph 6.5 says that 'where the claimant is a child the statement of truth may be signed by the parent or guardian'. There are similar references at paragraphs 6.16, 7.24. 7.44 and 7.53. In my view, it would make no sense at all for the EL/PL Protocol to include multiple provisions relating specifically to child claimants, only for that same protocol to disapply itself. This requires a different reading of the meaning of the word 'harm' to that urged upon me by Mr Fletcher."

In addition, the C's submission that the inmate was a vulnerable adult was also dismissed, as it was *"impossible to characterise the lawful and proper restraint of a prisoner as being an act that makes that person into a 'vulnerable adult."*

In *Cameron v Leicester County Council* (HHJ Headley – 24/06/21)
C, a teaching assistant, was hit by a pupil. C's solicitors sent a letter of claim under the personal injury protocol claiming damages for negligence and breach of statutory duty against her employer.

D submitted that the claim should have been notified on the portal against D as the compensator. C's solicitors disagreed asserting that,

"We note your comments in relation to the claim being submitted through the MOJ Portal and can confirm that we do not agree the same. Under 4.3(8) of the Protocol it clearly states that claims are excluded for damages in relation to harm abuse or neglect of or by children or vulnerable adults."

D admitted liability 3 weeks later and placed C on notice that they disagreed that the incident was outside the portal and said they would only consider fixed costs.

Following the issue of proceedings, D made a Part 36 offer of £5,000 which was accepted by C. Upon provisional assessment of costs, in D's points of dispute, D maintained the submission that the exception did not apply and the claim fell within the scope of the protocol. The District Judge at first instance found that the exception 4.3(8) does not apply. However, at an oral hearing the District Judge ruled that she was not bound by the decision in *Scott v Ministry of Justice* and held that the exception applied, in effect reversing her previous decision.

The case proceeded upon appeal where HHJ Headley found,

"53. As to paragraph 4.3(8) itself, in my judgment

a. …. paragraph 4.3(8) does not refer to a child or vulnerable adult as a party but simply claims for damages "in relation to" harm abuse or neglect of or by children or vulnerable adults. In my judgment this clear distinction makes it clear that the exception does not apply only where a child or vulnerable person is a party, but is of wider application where the claim relates to such abuse. It is not necessary for the child or protected party to be a party to the claim in order for the exception to arise. Any other meaning would be to re-write the EL/PL Protocol."

In other words, the mere involvement of a child or vulnerable adult triggers the exception, and 'harm' includes personal injury. The Court of Appeal refused permission to appeal, leaving these points at large.

FOIL is concerned that wherever a vulnerable individual is involved in a claim an exception will be cited as to why it has not been commenced under the protocol. This will lead to significant test litigation with cases being stayed behind them pending the outcome.
The litigation presents a real risk of opening the flood gates for the majority of claims to escape the Fixed Recoverable Costs Regimes and all of the benefits of litigation avoidance and proactive resolution that they bring.

13. Disbursements following Aldred v Cham

The Court of Appeal's decision in *Aldred v Cham* [2020] 1 WLR 1276 held that a disbursement for counsel's advice in child claims was not recoverable under CPR 45 Section IIIA. *Obiter dicta*, translation and interpreting fees were not recoverable either.

We understand that the CPRC is considering proposals to add those items to the recoverable disbursements under CPR 45 Section IIIA, and further to add a provision that any other disbursement which is required by the rules to be incurred should be allowed.

FOIL would argue that the rules as they stand are working well and do not require amendment. Satellite litigation and the burden on the County Court has been substantially curtailed as a result of the decision in *Aldred.* As is the case whenever it is argued that the fixed costs are not adequate in a given set of circumstances, the better solution is to consider whether an increase in the specified fixed fees is warranted, rather than add complexity with further 'bolt-ons' or recoverable disbursements.

If it is considered that a change is required, then the following important points should inform the decision-making:
1. *Fixed costs should not be further un-fixed.* If more recoverable disbursements are added to the rules, they should be for fixed sums. Otherwise, there will inevitably be satellite litigation about the amounts to allow, increasing the burden on the County Court. Disproportionate costs will be generated on a case-by-case basis as attempts are made to control the upward 'creep' of un-fixed disbursements. Already some disbursements are not fixed in amount, causing a need for assessment, e.g., counsel's fees for additional advice where the claim exceeds £10,000.

It would be easy to fix the fee for counsel's advice as the figures from CPR 45 Section III for the same task can be adopted.

2. *Translation and interpreting fees present a substantial challenge*. FOIL has seen cases where the claims for those fees exceed the fixed costs. Assessments will be inevitable if questions of whether translation or interpreting was necessary at all, whether fresh translations of generic documents should be allowed per case, and the general quantum of fees are left at large. We urge the Committee to prescribe the fees to be allowed and the circumstances in which they will be allowed.

In considering how translation and interpreting costs should be handled it should be remembered that, in practice, a family member will often act as a translator, for which no fee should be payable. Fees should only be paid to those providing a professional service, with appropriate qualifications, and on the basis of a detailed invoice. It would not be appropriate for stock documents to be translated afresh in every claim.

3. *A wider disbursements allowance is not appropriate.* The reported proposal that any disbursement required to be incurred by the rules should be allowed is at odds with uncontroversial points in *Aldred*. First, if there are such disbursements, they could be identified and provided for expressly. Second, even the counsel's fee at issue in *Aldred* did not need to be a disbursement. PD21 provided that the advice could be provided by solicitor or counsel. Only a fee incurred by counsel would be a disbursement: the provision did not inevitably require a disbursement. It is better in fixed costs cases to consider what work is required and consider

whether appropriate provision for its cost is made, irrespective of who does the work, and whether it is classed as a disbursement or profit cost.

4. *The provisional assessment costs cap will not apply*. This develops the first point but is important enough to stand alone. We understand that HHJ Lethem prepared the initial report on these proposals. As he identified correctly in his judgment in *Ivanov v Lubbe* [2020] WLUK 256 there is no automatic right to assessment in fixed costs cases and instead applications are appropriate where there are fixed costs disputes. Thus, the dispute will not come before the court by way of the provisional assessment procedure in CPR 47.15, and the costs of the dispute will not be capped at £1,500. We are concerned that engaging in these disputes will be a popular revenue generation opportunity in fixed costs cases. Again, the solution is fixing the sums to be allowed.

FOIL is concerned that un-fixing categories of cost in these claims which in turn will add to the burden on the County Court at a time of considerable pressure on HMCTS is a policy change and we have written also to the Ministry of Justice to express those concerns.
We hope that if these proposals are taken forward it will be done so in light of these points and only specific and fixed sums will be permitted by the rules.

14. Standard disbursements

With a view to the FRC regime being as precise as possible, we have been asked to identify standard disbursements which will arise regularly in particular types of litigation:

Employers' Liability, Public Liability and Motor claims
Standard disbursements (causation and quantum)
Medical records (currently no fee, but a statutory cap remains for copying even though access should be free following GDPR and DPA 2018, and agency fees are recoverable in the RTA regime)
MRI Scan
GP Report (most cases above £25k will go straight to orthopaedic, but some may still have an initial GP report)
Orthopaedic Report
Psychiatric Report
Acoustics Engineer's report (EL, NIHL only)
Police reports (motor – NB MIB can obtain at no charge)

Standard disbursements (current Multi Track, all causation and quantum save for liability report)
Liability report in relevant field (EL, e.g., where injury caused by faulty machinery)
Engineer's reports (Motor)
Pain Management
Plastic Surgeon report
Part 35 Questions to all experts
Joint Statements of all experts

Occasional disbursements (all causation and quantum, less likely to be included in FRC regime)
Skin Camouflage report (MT)
Accountant/Forensic Accountant/Pension expert (MT)
Care Report (MT)
Occupational Therapy Report
Rheumatology report
Prosthetics report
Accommodation report

Credit Hire claims

Engineers' reports
(Basis Hire Rates (BHR) evidence is routine but is lay evidence with no fee payable.)

Disease claims
Medical reports
In NIHL claims, an ENT report is standard, with predictable work required, to consider the audiologists report, take a medical history form the claimants, and determine if there is NIHL.

Product Liability claims
An expert report on liability will often be required but the nature and extent of the evidence required will depend on the product and nature of failure. Such reports are not standard and the costs involved can vary significantly.
Product liability claims typically involve personal injury and/or damage to other property. Reports relating to medical causation or quantum in personal injury claims may be standard, depending on the nature and extent of injury. Reports relating to quantum in property damage claims are difficult to standardise due to the unique nature of properties, materials, and the cost of repair/rectification etc.

15. The existing FRC regime: CPR Part 45, Section IIIA

Highlighting again the need for precise wording, the table below sets out issues arising from CPR 45 which are still causing uncertainty and litigation. FOIL members report that of the issues listed, it is the lacuna for claims unreasonably exiting the portal that is the most problematic.

Issue	Rules involved	Problems in practice	Proposed solution
No definition of 'agreed damages'		Disputes are running to court on whether the fixed costs should be calculated against the gross or net damages after contributory negligence	The definition of 'agreed damages' in PD45 2.3 should be extended to Section IIIA. Other provisions in the practice direction, e.g. PD45 2.6, have been extended to Section IIIA already. In PD45 2.3, after 'Fixed recoverable costs' insert 'in Section II and IIIA of Part 45'.
Counsel's fees claimed as disbursements		Claims are made for fees of counsel as non-fixed disbursements in addition to the fixed recoverable costs. The background materials make clear the intention is that the fixed costs apply to the work of all legal representatives (e.g. see Jackson's *Final Report*, p.159, para 5.12). Claimants cite CPR 45.29I(2)(h), the provision for 'any other disbursement arising due to	In the headings to Tables 6B, 6C and 6D, after 'Fixed costs' add the words 'for legal representatives'. (That is consistent with the use of that phrase in CPR 45.29C(2)(b) and 45.29E(2)(b).)

		a particular feature of the dispute'. However, properly understood, they should be seeking greater costs instead under the 'exceptional circumstances' test in CPR 45.29J.	
Cost of advice from specialist solicitor or counsel being listed as a disbursement (adding to confusion on previous item)	CPR 45.29I(2)(c) CPR 45.23B	In practice claimants cite CPR 45.29I(2)(c) to argue that counsel's fees are disbursements under Section IIIA. This appears to be a drafting error. CPR 45.23B makes provision for an addition to the fixed costs in claims in the RTA or EL/PL Protocol. There are qualifying conditions. CPR 45.29I(2)(c) is plainly intended to preserve recoverability of the additional sum if the claim leave the relevant Protocol after the advice is obtained. But between 45.23B and 45.29I, the fee changes from a fixed cost to a disbursement.	Move the provision in CPR 45.29I(2)(c) to new rules 45.29C(5) and 45.29E(5), which both read: 'The court may allow the fixed cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol where the advice was obtained under that Protocol'.
No additional fees in approval cases		The rules do not make provision for additional fixed costs in approval cases, e.g. for the cost of advice on the settlement and for attendance at the approval hearing. This leads to claims for additional disbursements, which are disputed in principle for the preceding reasons and even if allowed require assessment. This is leading to wasteful repetitious disputes in many cases.	Something akin to the proposal in Sir Rupert Jackson's *Final Report*, p.160, para 5.16 for additional fixed costs in approval cases should be implemented. The sums stated for solicitors are probably too high. A new CRPR 45.29H2 might allow fixed costs for advice of £150 and attendance at £250, plus VAT.
Disposal hearings equated with trials	CPR 45.29C(4)(c) CPR 45.29E(4)(c)	In *Bird v Acorn Group*, the Court of Appeal construed the definition of 'trial' ('the final contested hearing') as including a disposal hearing. That means (a) where a claim proceeds to	Delete the unnecessary definitions in CPR 45.29C and 45.29E, so that the common law meaning of trial applies instead: see *Forcelux v Binnie* [2009] EWCA Civ 854.

		the short disposal hearing, the claimant gets the same costs he would if he attended the day-long trial; (b) if the claim settles in advance of the disposal hearing but after listing, he gets costs under the last stage in Part B of the relevant Table; (c) claims can skip stages in Part B. This appears to distort the balance of the fixed costs; the costs of actual claims in which they were based included all disposal hearings in the 'pre-allocation' figures because a disposal hearing is not generally equated with a trial. A disposal hearing comes in the early stages of the claim and does not involve the time or cost of a fast track trial.	Create a new CPR 45.29H3 to make provision for modest additional fixed costs for (a) preparing for and (b) attending a disposal hearing. Stage 3 hearing are a good comparison and therefore mirroring the Type A and Type B fixed costs in Tables 6 or 6A would be apt.
Lacuna for unreasonable exits from relevant Protocol	CPR 45.24	CPR 45.24 gives the court the power to limit a claimant to Protocol fixed costs where he unreasonably fails to follow the relevant Protocol. It applies only where there are Part 7 proceedings and a judgment. In *Williams v Secretary of State* [2018] EWCA Civ 852, the Court of Appeal avoided that limitation by limiting costs using the Part 44 conduct provisions. In the circumstances of that case, no fixed costs automatically applied so Part 44 governed the assessment. However, in claims that unreasonably leave the relevant Protocol but then fall within Section IIIA, CPR 44 does not apply: see *Lamont v Burton* [2007] EWCA Civ 429. If	References to Part 7 and judgment in CPR 45.24 should be removed. It would then be available in Part 8 costs-only proceedings.

		there are no Part 7 proceedings, there is no remedy for the unreasonable conduct.	
Part 36 acceptance said to oust powers to limit costs or allow greater costs	CPR 36.20(2) CPR 45.24 CPR 45.29A(3) CPR 45.29J	Some judges have held that CPR 36.20(2) creates an inviolable entitlement to fixed costs in accordance with the relevant Table on Part 36 acceptance. But CPR 36.20(2) plainly does not reproduce enough of Section IIIA to operate in isolation and is instead to put beyond doubt the applicable stage of fixed costs upon Part 36 acceptance. But nevertheless, these decisions mean that defendants cannot argue to limit costs under CPR 45.29A(3) and CPR 45.24, and claimants cannot argue for greater costs under CPR 45.29J. CPR 36.20(2) could be clearer.	At the start of CPR 36.20(2), insert 'Subject to rules 45.24 and 45.29J…'
Other extensions of PD45 paragraph 2		Further clarity would be achieved by extending more of the provisions of the practice direction to Section IIIA. That would avoid disputes where one party seeks to construe Section IIIA differently.	Extend PD45 2.4, 2.7, 2.8, 2.9 (with necessary addition of references to CPR 45.29I) and 2.10 (adding before 'proceedings', 'if no other proceedings have been started')