FOIL noted in its initial response to the CJC costs consultation that "The distinction between contentious and non-contentious costs is confusing and uncertain, as evidenced in the current litigation between *CAM Legal v Belsner"*. The Court of Appeal judgment in the case has only served to emphasise those difficulties in the context of litigation and pre-action work.

It is clear that civil justice reform has outstripped the statutory provisions in the Solicitors Act 1974 which govern the remuneration of solicitors and provide consumer protection. The development of alternative dispute resolution processes including the Claims Portal and the OIC were unforeseen when the statutory provisions were last considered, when proceedings in the County Court were the normal process for resolving lower value personal injury claims. Having found that the provisions in Section 74(3) of the Solicitors Act and CPR Part 46.9(2) do not apply to claims within the portals, where there are no court proceedings, the MR noted that "…the distinction between contentious and non-contentious business is out dated and illogical", and "there is no logical reason why Section 74(3) and Part 46.9(2) should now apply in cases where proceedings are issued in the County Court and not in cases pursued through the pre-actions protocols". FOIL would agree, and also endorse the MR's comment that there is an "urgent need for legislative attention". The solicitors' costs regimes provide greater consumer protection for contentious business than for non-contentious and it is unsatisfactory if the definition of such work is arbitrary and based on an out-dated view. The position is likely to become worse as a result of the CJC's current work on Pre-Action Protocols, with many more civil disputes being resolved without the need for proceedings and therefore falling outside the protections offered by the contentious costs regime.

Any examination of the distinction between contentious and non-contentious costs will need careful consideration. If the Solicitors Act 1974 is amended, attention will need to be given to the transitional arrangements to avoid an unfair impact on costs arrangements already in place. To avoid the kind of problems which have arisen in *Belsner* it is important that the distinction provides certainty, with a clear step required to tip non-contentious costs into the contentious arena, bearing in mind the retrospective effect of the change if proceedings are commenced. FOIL suggested in its initial response that any work after a letter of claim or formal notification of claim might be designated as contentious.

It is also important that the concepts of contentious costs rules and the rules on costs shifting are not muddled together. Although at present, with proceedings required to create a contentious costs environment, there is very considerable overlap between contentious and recoverable costs, if the definition of contentious costs were to be moved to earlier in the dispute resolution process it must be clear that that would not affect the general rules on recoverability of costs.

It is of concern that, in *Belsner,* a commonplace costs arrangement has been found to be non-compliant with the SRA Code of Conduct for Solicitors. As the MR notes, it is "wholly

unsatisfactory for solicitors generally, and these solicitors in particular, routinely to suggest that their clients agree to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth." Sir Geoffrey indicated that an Order under Section 56 of the 1974 Act might be a way to deal with the problem (and went on to provide further guidance in the judgment in *Karatysz v SGI Legal LLP*, delivered immediately after *Belsner*). Bearing in mind that legislative reform of the 1974 Act itself may be unachievable at present, it may be that the same provision, or other secondary legislation, could be used to ensure that clients engaged in legal work which for all intents and purposes is contentious but for the outdated 1974 statutory provisions, are given greater consumer protection (particularly around CFA and DBAs) than is currently available to clients engaged with non-contentious work.