Acumension
Intelligent legal spend management

# Response by Acumension 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 If 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?

Acumension supports the principles and aims of costs budgeting, namely

- To control costs before costs are incurred rather than solely at detailed assessment hearings
- Striving to reduce costs and to deliver proportionality
- Costs budgeting enabling more accurate reserving for insurer clients
- Outlines costs of litigation at appropriate stages of litigation to all parties thereby encouraging commercial settlement of claims before trial.

In our experience (having dealt with over 10,000 costs budgets and attended more than 3,000 hearings since introduction), the current process requires significant amendment to be truly effective, as some of the stated benefits are not being realised within the current process.

We are aware that the process is more effective for certain types of personal injury (RTA/EL/PL) claims than others (Clinical Negligence). However, we would strongly recommend that there are amendments to the current process with a view to realising the benefits, rather than a removal or reduction of the effectiveness of the current system.

Prior to the implementation of costs budgeting, paying parties routinely only found out the expected costs exposure after the claim had settled i.e. upon service of the bill of costs. The estimate system in place was ineffective and did not have any impact when considered on detailed assessment.

A mixture of Fixed Recoverable Costs (FRC) introduction in lower value claims and costs budgeting in high value claims provided some certainty as to the exposure for costs of the litigation process. This is more evident within the FRC claims due to the prescriptive nature of the costs allowable at each given stage of the claim.

Whilst costs budgeting has proven less effective than FRC implementation at providing visibility and certainty, it has at least assisted reserving in viewing potential maximum exposure for paying parties.

Issues with the current process centre around:

- The methodology used for hourly rates within budgets
- Application of CPR 3.15A is relatively rarely utilised
- Receiving parties appear to have adapted to the system by introducing more costs into the process acknowledging the court will reduce them, rather than attempting to operate a reasonable and proportionate budget from the outset

- Appropriate time is often not allocated to the costs budgeting process itself thereby leading to ineffective stringent policing of a budget at CCMC stage largely due to the time and resources pressure on the judiciary
- A perception that not all members of the judiciary are engaged with the costs budgeting process and see it as a necessity rather than a valuable exercise – thereby reducing its potential effectiveness
- Lack of uniform judicial training and therefore consistency of approach in the costs budgeting process

Whilst the areas for potential reform are numerous that is not to say costs budgeting is not useful, it just needs reform to meet its intended aims and objectives.

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

As there is a collective view that there is intrinsic value in the aims and objectives of costs budgeting it would be detrimental to all parties to abandon the current process in its entirety.

A number of changes need to be collectively delivered in order to ensure there is process improvement for all parties to the litigation. These interlocking reforms will seek to improve current processes and CPR provisions rather than starting again from scratch.

The current process is not being delivered uniformly nationwide and we note the impact this is having on the judicial time allotted to the costs budgeting aspect of the CCMCs.

The interlocking reforms we believe should:

- Reduce judicial time required and expense for litigants
- Be supported by judicial training to achieve consistency
- Reduce the costs incurred within the costs budgeting process

Due to the timing of current costs budgeting processes within the litigation process i.e. being finalised at the directions hearing there is often a need to prepare costs budgets based on multiple events occurring in the anticipation of contingencies that are not likely to arise, providing a barrier to budget agreement ahead of the hearing.

In order to facilitate a reduction to the costs of the costs budgeting process we propose:

- The preparation of costs budgets by both parties prior to the CMC without the need for parties to negotiate. The directions hearing proceeds with the judge referring to the budgets for guidance.
- Parties are given an allotted time period to amend costs budgets post directions hearing
- These are submitted with any objections for a paper based assessment, with an ability for either party to request a hearing.
- Akin to the provisional assessment process, there needs to be a successful % adjustment from the original paper assessment for any party to recover costs of an oral hearing

The changes above would allow more time for negotiation and facilitate an increase opportunity for agreement between the parties. Negotiations conducted after a directions hearing would reduce the areas of contention and therefore agreement is 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.

Costs budgeting on paper would facilitate reducing costs and court resource would be more effectively utilised.

A paper based system would allow for the removal of Precedent R, thereby saving costs and coupled with the proposed FRC and PAPs changes there should be more availability for the courts to deal with

less budgeted claims. This would allow the remaining costs budgeted claims to have greater focus and time spent on them.

Should costs budgeting remain to be dealt with at the CCMC in its current format, in our opinion more time will be need to be allocated to the costs budgeting process than is currently being allowed.

Defendants' budgets

Acumension are of the opinion they should remain part of the process. They are relatively inexpensive to produce and provide a useful comparator to the claimant's budget. Paying parties also find them of assistance in reserving.

Defendants' budgets do enable informed decisions to be made on legal spend. A budget can reveal disproportionate costs.

The lack of consistency in the way costs budgeting is approached at present is one of the largest challenges within the current process. Judges will often adopt their own budgeting process which leads to inconsistency of approach and reduces certainty ahead of a hearing. This results in an ineffective negotiation process.

The perception is that due to a lack of judicial time and potentially shortcomings in the national judicial training programme, a practice by some judges of merely identifying an appropriate sum for each phase, to then be spent as the party chooses, has resulted in a lack of proper scrutiny of costs budgets.

Hourly rates and pre-issue costs are not addressed effectively at the CCMC which provides for a contentious issue to remain outstanding until the conclusion of the claim.

Effective budgeting requires a more consistent approach. The constituent parts of the budget require consideration, looking at how much time is likely to be taken up by the work involved, in conjunction with consideration of the appropriate rates. The amount of costs already incurred is an often overlooked consideration. A provisional budget can then be identified before assessing whether the amount is proportionate or not.

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

Under the current system disproportionate budgets are approved regularly.

### 1.3 Should costs budgeting be abandoned?

Costs budgeting should not be abandoned. We are strongly of the opinion that it must not be abandoned and that reform, coupled with the continuing extension of FRC, is the right approach.

Within his Supplemental Report, Lord Justice Jackson commented that the "only way to control costs effectively is to do so in advance" either by costs budgeting or by FRC and we concur with his views on this.

Any abandonment of costs budgeting at this stage will effectively return costs litigation to a point at which it was over 10 years ago i.e. relying solely on ineffective costs estimates with no control on litigation spend until it is too late i.e. after the event.

We would welcome 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 establish. Subject to the successful implementation of FRC for claims up to £100k, a process is needed to control costs in advance, in claims where FRC does not apply. Costs budgeting is not perfect but we believe that the correct approach at this stage is to reform the process and improve its effectiveness rather than abandon it.

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

We believe it should be on a 'default on' basis.

Any agreed envisaged exceptions can then be managed by exception rather than as an everyday occurrence. A consistent and reliable approach ahead of any CCMC ensures that the parties can limit the amount of judicial time required, by entering into meaningful negotiations ahead of any hearing.

**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?**

With the proposed FRC implementation up to £100,000 this will provide benefits in freeing up a large amount of judicial resource. Costs budgeting is most needed in high value claims and therefore we would propose an amendment to CPR 3.12 to allow costs budgeting for any value of personal injury claim.

We understand the Masters within the RCJ 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".

We are concerned that the proposed process will not increase the prospect of reaching agreement on the claimant's budget and the additional pressure on paying parties should be at least uniform across all the parties to the litigation.

In our opinion, costs budgeting is not currently working effectively for clinical negligence claims. Should the process involve a lesser stringent judicial approach to costs in the litigation coupled with a detailed assessment process where the costs budget limits oversight, this would significantly increase costs in an already high cost area of litigation.

As the known effect of this proposal is not capable of being established from a monetary perspective and the impact it would have on public spending and the NHS is significant we would strongly recommend this course of action is avoided.

**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?**

The GHR should provide a reliable guide for judges to make costs decisions on with the certainty of what they represent. The GHRs should consist of the costs associated with conducting an "average claim". This can then be adjusted up or down to reflect the complexity of the claim in question. The rates currently in force are not representative of average claims but are based on higher than average claims thereby creating inconsistency in how they are adopted nationwide.

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. This is not representative of the value levels of litigation within the civil justice litigation process.

Clinical negligence claims analysis:

If one considers the CJC's 205 clinical negligence claims (the second largest 'Case Type' within the GHR data) 59 cases (28.8%) have a value of over £500,000 or more, whilst 46 cases (22.4%) have a value of £1 million or more. That is also unrepresentative of case value levels within clinical negligence claims.

Table 1 - Clinical negligence claims data:

Table 1 (below) compares the CJC's clinical negligence claims data sample with NHS Resolution clinical negligence claims settled / assessed in the time period of 1st April 2019 and 27th November 2020 inclusive:

| **Claim Value** | **CJC No. of Cases** | **CJC % of Cases** | **NHSR No. of Cases** | **NHSR % of Cases** |
|---|---|---|---|---|
| **£0 to £49,999** | 73 | 35.6% | 5,503 | 69.0% |
| **£50,000 to £99,999** | 31 | 15.1% | 921 | 11.6% |
| **£100,000 to £499,999** | 42 | 20.5% | 997 | 12.5% |
| **£500,000 to £999,999** | 13 | 6.3% | 185 | 2.3% |
| **£1 million to £4,999,999** | 22 | 10.7% | 205 | 2.6% |
| **£5 million plus** | 24 | 11.7% | 162 | 2.0% |
| **Total** | **205** | **100%** | **7,973** | **100%** |

[Rounded to one decimal place]

[Data note: NHS Resolutions' 7,973 claim data sample (above) includes all NHS Resolution costs disputes resolved by NHS Resolution's two main legal costs management suppliers during the specified time period i.e. claims settled / assessed in the time period of 1st April 2019 and 27th November 2020 inclusive. The table excludes a minority of costs disputes resolved by NHS Resolution's 12 panel law firms during the specified time period i.e. a) 4 panel law firms dealt with costs disputes of 'any' value arising from substantive litigated cases they were instructed to act on and therefore such cases would have a similar claims profile to the other cases in the table, and b) all 12 panel law firms dealt with costs disputes up to a value of £50,000 arising from substantive litigated cases they were instructed to act on, which if added to the table would only serve to increase the % of cases falling into the lower claim value band/s.]

The NHS Resolution data sample is circa 39 times greater than the CJC's data sample.

As a data sample size increases, uncertainty decreases, the confidence in the data increases, margin of error decreases, and there is greater precision in data based results.

Whilst the CJC's small data sample indicates 22.4% of clinical negligence cases have a claim value of £1 million or more, the NHS Resolution's much greater data sample demonstrates that only 4.6% of clinical negligence cases have a claim value of £1 million or more. The difference in the data based results is stark.

Guideline Hourly Rates should reflect the complexity of the work undertaken and the cost of running a firm of solicitors. We are of the opinion that the reference to geographical location is now outdated in light of the change in working practices of law firms.

We consider that the complexity bandings (1-4) in the FRC extension should be adopted and then allow any departure from the same to exception manage more straightforward/complex claims.

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

In our opinion, the current GHRs do not provide a starting point for assessment because the type of case/level of complexity of case they are intended to represent is not known.

GHRs should 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. This certainty assists in reducing the impact on the courts as a fundamental argument to the costs process can be addressed before reaching court.

The GHRs must provide certainty as to the type of case they represent by reference to complexity regardless of where the work was conducted.

In an increasingly digitized world, where hybrid working is extensively and increasingly utilized, the reference to location is clearly outdated and therefore should be revised.

**2.3 What would be the wider impact of abandoning GHRs**

This would be counter-productive in our opinion. A form of GHR is fundamental to the costs process. Without the same, costs assessments would be a lottery and generate conflict and uncertainty for the parties, increasing disputes and therefore negatively impacting on the court service with more claims destined for detailed assessment.

The issue is the constituent parts of the GHRs not the concept of them.

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

The methodology for establishing the current GHRs was flawed as recognised by paragraph 3.8 of the GHR review in 2020:

*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.

The composition of this data set amounts to 254 personal injury claims; 205 clinical negligence claims; 23 Court of Protection claims; and 16 abuse claims.

All of these factors have resulted in GHRs that are unrepresentative. They do not reflect 'average litigation' claims and they do not reflect current working practices, particularly post-pandemic.

We would suggest a 5 year review once the above has been addressed and the methodology for implementation has been rectified.

We are not in favour of inflationary increases on an annual basis as it encourages a "delay for gain" approach to litigation which is counter-productive to early resolution of costs claims. An inflationary increase/decrease could be factored into the relevant review period.

**2.5 Are there alternatives to the current GHR methodology?**

As commented on earlier in this response, we have concerns regarding both the methodology and data set utilised to formulate the appropriate GHRs and their operation. This should be more aligned to an "expense of time" exercise.

A fixed hourly rate system as mentioned earlier within this response, would provide greater certainty and consistency and assist in reducing both time and number of court attendances, thereby saving judicial resource.

**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?**

An appropriately designed and delivered digitally enabled process (including the digitisation of dispute resolution) would increase efficiency and settlements, thereby reducing court time and costs.

Online processes will allow information to be inputted, verified and updated singularly. This prevents duplication of time, effort and costs for all parties to the litigation and standardises processes for the judiciary.

The comments above are based on the assumption that the systems are adopted/designed technically to allow for nationwide scale and usage together with appropriate funding to achieve the same. This should be underpinned by training, where appropriate, and usage guides to minimise error rates.

Any roll out of the proposed solution should be rigorously tested before implementation with multiple feedback points from legal practitioners from both sides of the litigation process. This should also involve judicial input to ensure an end to end process is catered for and delivered.

Any proposed solution should be futureproofed to allow for suitable integration from relevant parties, this can be achieved in multiple ways e.g. APIs.

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

Pre-action protocols do not contain costs provisions themselves and should be treated differently to portals from a costs perspective.

Pre-issue work is something that is of concern to all paying parties as the frontloading of costs in claims before they can be budgeted or known about will become even more prevalent than it is already.

It should not be advantageous for a Claimant to incur as much costs as possible due to relevant PAP reforms without the same controls that exist post issue (providing costs budgeting remains).

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 whilst a defendant who successfully repudiates a claim pre-issue has no remedy for the costs incurred in doing so.

With the backing of the relevant PAP and if limited to successful Claimants only, there is in effect and unfair regime where Defendants are required to pay costs when they are unsuccessful but not recover them when they are. This creates a scenario where there is little risk in pursuing unmeritorious claims before litigation occurs.

**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?**

Not in our opinion. There is an inherent danger that introduction of a new system increases the potential for satellite litigation, as evidenced on introduction each fixed costs regime since 2003. The current system allows for defendants to recognise (and routinely do) that pre-issue costs are payable and Part 8 together with CPR 46.14 provides a way of dealing with any quantum dispute.

**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.

**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?**

Providing FRCs are extended as previously outlined, the vast majority of issues highlighted within the costs budgeting section of this response would disappear.

It should be noted that the success of an FRC implementation would be achieved by limiting the areas for exemption (thereby restricting the litigious points within the scheme). This would need to be in conjunction with setting the right "incentives" for parties to settle earlier within the process.

Relevant sanctions on both parties should be introduced for breaching any PAP or for Claimant's bringing opportunistic claims without merit. The status quo for PAP breaches is inadequate for "policing" the behaviour and therefore needs to be extended.

**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?**

We recommend the fixing of costs only proceedings costs. The claiming and generation of costs only proceeding costs has become completely disproportionate.

Claimants are presently incentivised to commence costs-only proceedings:

- to generate additional recoverable costs of commencing the proceedings; and
- because those recoverable costs are not fixed or capped; and

- to recover additional costs generated by the costs negotiation process which would otherwise be unrecoverable.

This puts additional strains on the court process which is being used dealing with unnecessary voluminous Part 8 requests. Fixing costs would provide an incentive for the receiving party to focus on the negotiation process and successful resolution of the costs claim itself, rather than ways to profit from an uncapped mechanism of costs recovery.

**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.**

Acumension have nothing to submit on this particular aspect of the proposal.