CJC Costs Working Group – Consultation Paper, June 2022

NHS Resolution Response

Written: 21 October 2022

This is an amended response submitted on 21 October 2022. An initial response was submitted to the CJC on 14 October 2022, pending final input by 21 October 2022. This response replaces the initial response.

Contents

About NHS Resolution

- NHS Resolution (formerly known as the NHS Litigation Authority) is an Arm's-length Body of the Department of Health and Social Care ("DHSC"). It is a Special Health Authority established further to s. 28 of the National Health Service Act 2006 (which is derived from the National Health Service Act 1977).

- One of NHS Resolution's main functions is to administer clinical and non-clinical indemnity schemes for meeting losses and liabilities of NHS bodies in England. This consultation is relevant to several indemnity schemes administered by NHS Resolution, including cover for both primary and secondary care.

- NHS Resolution has significant expertise in handling pre-action and litigated claims. In 2021/22 we resolved 16,484 cases, with 77% of those settled pre-litigation, the highest number ever achieved and reflecting our ambitions to keep patients and healthcare staff out of litigation wherever possible.[1]

- In 2021-22 NHS Resolution paid £2.459 billion in compensation and associated legal costs across all its schemes. £163 million of that figure was NHS legal costs and a further **£488** million of that figure was claimant legal costs.[2]

- Our strategic objectives from 2022 to 2025 are delivering fair resolution, sharing data insights as a catalyst for improvement in the healthcare system, collaborating to improve maternity outcome and investing in our people to transform our business.[3]

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

- Costs budgeting provides transparency of costs to the parties and the Court by indicating likely costs if a claim settles at various stages. It therefore has some advantages from an administration and planning perspective.

- However, NHS Resolution has reservations about its usefulness as a means of managing or controlling increases in costs claimed and recovered. We believe it may be helpful to provide some statistics to assist the Council when considering our response. These statistics have been provided to us by one of our expert cost panel.

  We can set out the methodology used by our costs panel to derive these statistics as follows.

- The statistics are derived from one of our expert costs panel where costs instructions were given in the 12 financial years from 2010/11 to 2021/22. The dataset interrogated to derive the statistics includes over 40,000 cases, after removal of the following to promote reasonable consistency for costs analysis:
  - Co-Defendant matters (% contributions would affect average costs and damages);
  - Group action matters (separate costs protocols often operate);
  - Liability only matters (costs profile is incomplete);
  - Fixed fee costs matters (different basis for costs).

- Other methodology notes include:

[1] NHS Resolution - Annual report and accounts 2021/22, p.39
[2] NHS Resolution - Annual report and accounts 2021/22, p.23
[3] An early look at the NHS Resolution Strategy 2022-25 - NHS Resolution

- the 'settled costs' referred to in the analysis below are claimant costs finalised by settlement or assessment. They do not include the costs of any costs proceedings or associated interest;
- litigated matters include those where Part 7 proceedings were issued in the substantive action. This means Part 8 and Infant Approval only proceedings are included in the 'unlitigated' analysis;
- profit costs refers to the base legal fees (inc VAT), not including disbursements/ATE premiums, success fees when relevant, or the costs of cost budgeting;
- for each financial year NHS Resolution will have a mixed portfolio of value and volume of claims, which will change depending on the nature of claims we are dealing with at the time;
- about 1500 matters potentially eligible for the dataset could not be included because they would have required special manual data extraction not considered necessary given the available dataset is large and provides a strong basis for analysis. The unavailable claims included both cost budgeted and non-budgeted matters.

NHS Resolution Costs Dataset - Analysis[4]

Analysis of claimant solicitor profit costs for clinical claims, from the costs panel dataset mentioned above, is provided below.

- The average settled claimant profit costs for **litigated clinical matters** increased by approximately 80% between 2010/11 and 2021/22, and approximately 110% across **unlitigated matters** in the same period. There were sharp increases from 2014/15 to 2015/16 and 2020/21 to 2021/22. 2015/16 was the first year with a significant number of cost budgeted matters with costs resolved.

- Average **budgeted costs allowed for litigated** clinical matters increased by 110% in the period between 2015/16 and 2021/22.

- Average **settled claimant profit costs** for **litigated cost budgeted** clinical matters increased by approximately 140% between 2015/16 and 2021/22. Over the past three years the profit costs *claimed* in those budgeted matters during costing negotiations were on average 32% higher than the final settled costs.

- In the same period, between 2015/16 and 2021/22, **settled claimant profit costs** for **litigated unbudgeted** clinical matters increased by approximately 45%. Over the past three years the profit costs *claimed* in those unbudgeted matters were on average 35% higher than the amount for which the costs were settled.

- Average settled claimant profit costs in **unlitigated / unbudgeted** clinical matters were 73% higher in 2021/22 than in 2015/16.

- This data indicates:

  - profit costs paid for claimant legal representation in clinical negligence matters have increased significantly above general inflation over the last decade, including since 2013 costs reforms. This has occurred across all types of clinical claims, whether they are litigated or not, and budgeted or not;

  - despite costs budgeting, which aimed to control costs to those which are reasonable and necessary, profit costs for claimant legal costs have increased significantly more than for unbudgeted matters;

  - reductions from claimed costs are more commonly achieved for unbudgeted matters. NHS Resolution understand from its panel firms that costs for which a budget has been approved will often not be closely

[4] Cost panel data on NHS Resolution costs settlements. See– Methodology above

scrutinized, post settlement of the claim. We understand that this is due to the cost budgeting process, which is by its nature not as detailed as assessment, and because the threshold for challenging costs allowed within a budget by way of an assessment is very high.

- Costs budgeting may have driven behaviours that have led to incremental but overall significant increases in the accepted baseline profit costs for each stage of litigation:

    - Costs budgets may be developed and allowed for all possible eventualities even if these are unlikely to transpire. This is more likely where the costs budgets are drawn up before the parties have an opportunity to closely consider the implications of Directions for management of a claim, and because they provide for the period right through to the end of the claim;

    - NHS Resolution panel firms have advised that there is some inconsistency in the different approaches to costs budgeting and assessment by different courts and judges. Senior costs judge Gordon-Saker recently acknowledged this issue, despite the training undertaken to date[5]. Variability in approaches may make it more difficult to reach agreement between the parties and reduce the overall benefits of the system.

- NHS Resolution also understands from its panel firms that in many cases directions are agreed prior to the Costs and Case Management Conference (CCMC), but costs budgets are frequently contested. This is most likely to occur when the parties' legal representatives do not discuss their proposed budget with each other prior to the CCMC. This reduces the opportunity to reach agreement on costs budgets without the need for judicial involvement. A parties' representative may wish to get a better understanding of the judge's approach to the steps required in the litigation, and any judicial comment on their proposed budget, before attempting to reach an agreed position..

- The standard CCMC is listed for 1.5 hours to deal with both Directions and budgets. Depending on the complexity of Directions, and the number and nature of cost budget issues, this may place pressures on judicial time available to provide effective scrutiny.

- Costs budgeting is likely to be useful in certain types of claims, for example, claims for damages of more than £100,000, but not in claims for up to £25,000 because budgeting adds a disproportionate layer of costs in lower value claims.

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

- Allocating sufficient time to assess costs budgets at the right time in the process, supported by initiatives to increase consistency in cost outcomes, would provide more effective control of costs.

- Requiring costs budgets only after Directions have been approved at the first CMC would result in cost budgets being agreed more often, and reduce the court and party resources required for cost budgeting.

- We understand from our panel law firms amendments to costs budgets are infrequently sought and there is a tendency to include all potential avenues of investigatory work that could be foreseen. This can lead to a risk of a potential inflation of the total cost budget agreed early in a case, which without detailed assessment and consideration post the event, could lead to inflationary pressures on total costs incurred and claimed.

[5] https://www.legalfutures.co.uk/latest-news/senior-costs-judge-break-the-link-between-case-and-costs-management

- A timetable could be set for costs budgeting to occur at a later point than the CMC, including providing the budget proposal to the other party, and budget and submissions to the court. Approval could be dealt with on the papers unless issues were raised by the parties requiring a hearing.

- Given that most claims do not go to trial, and that potential costs for trial preparation are often disputed, staging costs budgeting so it only addresses trial preparation at a later stage of the litigation could reduce costs and resource commitment.

- Ensuring access to detailed assessment of costs is preserved, and extended more often to costs for work included in an approved budget, would provide a robust method for assessing costs.

- It is unclear why cost budgeting does not generally apply to large matters over £10m. Transparency and appropriate costs controls are important in these matters and should be achieved without the need for assessment if the budgeting process is rigorous and consistent.

- If guideline hourly rates (GHR) were further reviewed and amended (see response to Part 2 below), it could be mandatory to use GHR in costs budgeting. If a party wished to argue for deviation from the GHR this could be brought to a costs budgeting/assessment hearing, unless agreed by the parties. This would reduce matters at issue during costs budgeting but maintain flexibility if required.

1.3 Should costs budgeting be abandoned?

- Costs budgeting by judges should only be abandoned if an effective alternative mechanism were put in place. The consequences of abandoning costs budgeting without an effective replacement are unknown, but it may result in more unconstrained costs growth and disputes between the parties.

- Managing costs is a specialist task requiring considerable detailed attention, which poses significant challenges for a busy judiciary.

- If costs budgeting were abandoned and all disagreements on costs were moved to the current process for detailed assessment, this may transfer pressure on the courts from one area to another.

- One option would be for a third party provider to be commissioned by the Court Service to perform the function of scrutinising costs budgets on Courts' behalf. Alternatively, the management of costs could be retained by judges, but undertaken separately and by a different judge from case management. Either approach would free up time for management and hearing of the substantive claims.

- Defendant costs budgets do not have the same utility as claimant budgets. NHS Resolution, much like other indemnifiers control the level of costs for its legal representation via its contractual arrangements. In the vast majority of claims the level of those costs is irrelevant to the claimant due to the operation of QOCS. Although the level of defendant costs will be relevant to costs recovery from a claimant where there has been late acceptance of a Part 36 offer or in cases where QOCS does not apply, this occurs in a very small number of cases and can be appropriately dealt with by assessment if required. The costs to parties and the court resources associated with defendant costs budgeting may outweigh potential benefits.

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

- If cost budgeting were retained, then this should be on a "default on" basis. The continued 'default on' use of costs budgeting in a large range of matters requires that the cost budgeting arrangements provide sufficient

time for detailed scrutiny of budgets where required. This is key to costs budgeting being an effective control over costs claimed and recovered. See answer to question 1.2.

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?

- Please see our responses to questions 1.2 and 1.4.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?

- A copy of our response to the CJC Consultation on Guideline Hourly Rates published in January 2021 is provided at **Appendix A**.

- We explained in the appended submission that the proposal for GHRs in 2021 did not achieve the intended purpose. The issues raised were not addressed by the GHRs introduced in 2021.

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

- See 2.1 above.

2.3 What would be the wider impact of abandoning GHRs?

- GHRs should not be removed without introducing other controls on the increase in costs because this would likely result in a significant further increase in costs claimed and allowed and disputes between the parties.

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

- Yes, GHRs should be adjusted over time to reflect commercial realities for law firms. See 2.1 above.

2.5 Are there alternatives to the current GHR methodology?

- DHSC has recently consulted on what the impact would be of introducing fixed recoverable costs in pre-action lower value clinical negligence cases. If introduced, it would be necessary for there to be clarity around use of GHRs.

- The same issue applies for other claims where fixed recoverable costs apply or may apply in future (noting the recent consultation on extending fixed recoverable costs for many claims with a damages value up to £100,000, not including clinical negligence).

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?

- Achieving cost benefits associated with digitisation / portals relies on the process being more efficient than existing processes for all parties.

- Realizing those advantages will require significant ongoing consultation.

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

- NHS Resolution has no comments beyond noting DHSC has recently consulted on introducing fixed recoverable costs and associated processes in pre-action lower value clinical negligence cases.

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?

- See our response to question 3.2 above.

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

Part 4 – Consequences of the extension of Fixed Recoverable Costs

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

- DHSC has recently consulted on the impact of introducing fixed recoverable costs in pre-action lower value clinical negligence cases (clinical negligence FRC).

- If clinical negligence FRC is introduced, it will be important for protocols and rules to provide clarity on application of those clinical negligence FRC fees and processes, rather than cost budgeting.

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

- See our response to question 4.1 above.

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.

- See our response to question 4.1 above.

Appendix A

Guideline Hours Rates – Civil Justice Council Consultation – NHSR Response March 2021

Appendix A - Guideline Hourly Rates Response - Introduction

1. NHS Resolution (formally known as the NHS Litigation Authority) is an Arm's-length Body (ALB) of the Department of Health and Social Care (DHSC). It is a Special Health Authority established further to s. 28 of the National Health Service Act 2006 (which is derived from the National Health Service Act 1977).

2. One of NHS Resolution's main functions is to administer clinical and non-clinical indemnity schemes for meeting losses and liabilities of NHS bodies in England. The main scheme of relevance to this inquiry is the Clinical Negligence Scheme for Trusts ("CNST"), which covers clinical negligence claims in relation to incidents taking place on or after 1 April 1995.

3. CNST works on the basis of risk pooling and is 'pay as you go'. This means that each member makes annual financial contributions to meet the payments which are expected to be made in the relevant year. Contributions are influenced by a range of factors: the type of organisation, its workforce, the specialties it provides, and its own claims history, as well as trends in the costs of claims across the broader NHS.

4. From 2019, GPs and their staff have also been covered by a new indemnity scheme for general practice which operates on a centrally funded (non-membership) basis. This brings information in claims for primary and secondary care under one roof for the first time.

5. In 2019-20 NHS Resolution paid £2,324.2 billion in compensation and associated costs. £143.5 million of that figure was NHS legal costs and a further £497.5 million of that figure constituted claimant legal costs.[6] Our objective is to resolve claims quickly and fairly, share learning and improvement and preserve financial resources for patient care.[7]

6. As such, the subject of this consultation is a material consideration for the objectives of NHS Resolution. In 2019-20 71% of claims were resolved without formal court proceedings. Around one third of claims end up in litigation, sometimes to determine the amount due or because court approval of a settlement is needed but most of these are resolved and fewer than 1% of claims overall go to a full trial.

7. We continue to play our part in reducing the cost of claims through actions to improve both patient safety and the way incidents and complaints are handled but, as the National Audit Office (NAO) report published in 2017 concluded, any strategy to tackle the drivers of cost will need to include legal reform.

8. In November 2017 the Public Accounts Committee called for a cross-government strategy to tackle rising the cost of clinical negligence, and we currently await further progress on the Department of Health and Social Care's (DHSC's) proposals for fixed recoverable legal costs. We hope that through

[6] NHS Resolution: Annual report and accounts 2019/20

[7] NHS Resolution: Annual report and accounts 2019/20

legal reform a way can be found to significantly reduce the cost to the public purse at no detriment to justice.

Methodology used by the working group[8]

Background

9. In May 2014 the CJC costs committee (chaired by Mr Justice Foskett) reported to the then Master of the Rolls, Lord Dyson, on recommendations on GHRs for 2014. The terms of reference of the Foskett committee were:

   - To conduct a comprehensive, evidence-based review of the nature of the Guideline Hourly Rates and to make recommendations accordingly to the Master of the Rolls by January 2014;
   - On an annual basis to review the GHR and make recommendations to the Master of the Rolls regarding how they need to be updated;
   - To monitor the operation of the costs rules, in consultation with the Ministry of Justice, and where appropriate, to make recommendations.

10. On 28 July 2014 Lord Dyson MR issued a detailed statement on this exercise. In this statement he noted that the approach of the CJC costs committee was to focus on *"what it costs lawyers to run their practices"*.[9]

11. This had been an expense of time approach, which requires estimating the cost to law firms of an hour of fee-earner time, taking into account the full salary cost paid to fee-earners for those hours and the expenses of the firm that need to be recovered from hours billed for the firm to break even (including a wide range of costs and overheads). Once this figure has been arrived at, a percentage mark-up is added to represent a reasonable profit element.

12. However, having examined the range of data which the committee had used in reaching its judgement, the committee's own reservations about this data, and his own; Lord Dyson MR concluded that he could not accept their recommendations because the evidence on which they were based [was*] "not a sufficiently strong foundation on which to adopt the rates proposed."*[10]

13. The current consultation and recommendations are of course based on a different methodology and evidence base. However, it is our view, that as was the case in 2014, neither the methodology nor the evidence base is an accurate enough estimation of "what it costs lawyers to run their practices" to justify the adjustments to Guideline Hours Rates that have been proposed.

14. In fact, as will be argued further below, much of the available evidence points to the conclusion either that Guideline Hours Rates should be reduced, or should remain unchanged.

Methodology for the 2021 consultation

15. In obtaining evidence the first port of call was to enlist the assistance of the (then) 8 Senior Courts Costs Office (SCCO) Judges, the SCCO Costs officers and the 26 Regional Costs Judges (RCJs) across England and Wales.

[8] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf
[9] https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf
[10] https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf

16. The evidence from the SCCO/RCJs is for rates allowed on provisional and detailed assessment between 1 September 2020 and 27 November 2020. It was not considered practicable to try to obtain from these Judges evidence on any summary assessments they may do in the relevant period. In total this involved 754 cases.[11]

17. In addition, the working group considered other sources of evidence. These were from members of the legal profession. A letter and forms for completion were sent to a number of organisations. Also, some individual firms were contacted directly.

18. There have been at least three articles on the working group's work in the Law Society Gazette (17 April 2020, 11 May 2020 and 19 October 2020), and notices in the ACL News (10 September 2020) and the Costs Lawyers Standards Board September 2020 Newsletter.

19. The profession was asked to provide two pieces of information, one historical covering the period 1 April 2019 to 31 August 2020, the other prospective, covering the period 1 September 2020 to 27 November 2020.

20. In addition to the same information requested from the SCCO/RCJs, (i) summary assessment evidence was sought and (ii) the information was to include rates which were either awarded by the court at an assessment hearing or were agreed between the parties after the commencement of the assessment process.

21. As part of this process, the committee recognised a number of limitations. Of those limitations, this response wishes to highlight the following:[12]

> *"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."*

Comments on the methodology employed

- Before the days of summary assessment, taxing masters used to arrive at hourly rates by means of a two stage process. This entailed, first, ascertaining the cost to the receiving party's solicitors of the time which was reasonably spent by appropriate fee earners on the case (the "A" factor)[13]

- The A factor represented an estimation of the cost of carrying out the work such as the costs of employing staff, leasing office space, business rates, and associated overheads per hour of fee earner time (i.e expense rate).

- Secondly assessing a reasonable addition for care and conduct relating to the difficulty of the matter (the "B" factor). The B factor represented the solicitor's remuneration (i.e the profit element, hence the term "profit costs").The hourly rate allowed upon taxation was the sum of the A and B factors where B was a % of the A factor.

- The A factor became synonymous with the "expense of time" derived from the Law Society "Expense of Time" calculation whereby the expenses of a practice were calculated and apportioned between the fee earners in the practice in accordance with their actual salaries.

[11] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf Appendix H.

[12] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf p.14

[13] Review of Civil Litigation Costs: Preliminary Report 2009

- Historically, the courts had been willing to allow solicitors to submit their Expense of Time calculations on a case by case basis. However, this practice fell away when Kerr J said: [14]

> *"[The A factor] would be based on the [cost judge's] general knowledge and experience of the average solicitor or executive employed by the average firm in the area concerned"*

- This led to Local Law Societies carrying out "Expense Rate Surveys" of local law firms. Average expense rates were produced and published and the use of this data became part of the process of assessing guideline hourly rates.

- In L v L,[15] Lord Justice Neill said that those assessing costs should take account of all relevant information including:

a) knowledge of expense rates claimed by other solicitors in the area;
b) knowledge of expense rates allowed to other solicitors in the area;
c) information obtained from discussions with local law societies or local solicitors;
d) the results of any surveys which provide reliable statistical evidence.

- It is clear that this information formed the basis for the assessment of local expense rates allowed between the parties.

- These "expense rates" were the local rates for the A factor that District Registrars and Taxing Masters used upon taxation.

- The report cites, *"(iv) the impossibility of obtaining hard evidence of expense of Time / solicitors charging rates;"* as a good reason why the working group, *"resolved to seek evidence on what was in fact allowed by Costs Judges who have experience and expertise in reflecting what is reasonable and proportionate."*[16]

- However it is simply not true that such evidence is impossible to find. The evidence exists and there are a number of methods that could and should have been used to obtain indicative (if not detailed) evidence of *"what it costs lawyers to run their practices"*.

- Much of the data could have been sourced from the Solicitors Regulation Authority (SRA) as part of their annual application process for the bulk renewal of solicitors' practising certificates. Each year solicitor firms are required to submit data on the expenses of the practice, their operating models and accounts. This information is used by the SRA to monitor the financial health of practices and identify those practices which may be at risk of becoming insolvent requiring a need for intervention.

- The process requires applicant firms to fill in several screens, going far beyond a simple list of the solicitors renewing. For instance, they include client money, professional indemnity insurance, introductions and referrals, fee sharing, influence, negligence claims, LSB complaints, turnover and areas of work.

- The process specifically asks:

a) How many legally qualified fee earners are in the firm?

[14] Leopold Lazarus Ltd v Secretary of State for Trade and Industry (1976) Cost LR, core vol 62

[15] L v L [1977] 1Costs LR 9 at para 13 per Neill LJ

[16] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf pp.10-11

b) How many non-qualified fee earners are in the firm?
c) What level of competency has each fee earner reached?

- It would be a simple expansion of that section to ask the SRA to include a data survey for the CJC to the expense of time to include questions such as,

a) What is the mean salary of fee earners in each grade?
b) How many fee earning and non-fee earning staff do you have?
c) Where is the work done?
d) What is the annual cost of overheads?
e) What is the average locational overhead per fee earner?
f) What was the gross profit of the firm?
g) What was the EBITDA of the firm?

- While it is true that the SRA would not collect data for, or share it with, the CJC without participant consent, it would be reasonable to expect that many firms would participate providing far more comprehensive data.

- A broad range of statistics on the expense inflation of a legal practice are available which have not even been considered, such as the average earnings of legal staff; [17] the rateable value of offices; [18] and the applicable business rates between 2010 and 2020.[19]

- Moreover, the judiciary are quite accustomed to consulting the Annual Survey of Hours and Earnings (ASHE) compiled by the Office for National Statistics. This is often used as the basis of future loss calculations in personal injury claims in all courts.

- A comparison of the average earnings of employees in a legal practice for 2011 and 2020 shows a difference in earnings in the table below.

Legal salaries comparison from 2011

Position	ASHE code	2011 Median	2011 Mean	2020 Median	2020 Mean	Median 9 yr % increase	Mean 9 yr % increase
Fee Earner	3520	£24,536	£31,646	£26,712	£32,404	8.9%	2.4%
Legal PA	4215	£18,306	£18,971	£17,556	£20,541	-4.1%	8.3%
Legal Secretary	4212	£16,633	£17,630	£19,102	£20,772	14.8%	17.8%
Owner - legal services	2419	£56,048	£70,908	£71,366	£86,015	27.3%	21.3%
Solicitor*	2413	£38,508	£46,661	£41,160	£49,008	6.9%	5.0%
Average		£30,806	£37,163	£35,179	£41,748	14.2%	12.3%
Average (excl Owner)		£24,496	£28,727	£26,133	£30,681	6.7%	6.8%

- The mean salary of a “Fee Earner” increased by £758 in the 9 years to 2020 or 2.4%. In 2010 the average hourly rate for all fee earners in band National 2 was £172 per hour. The average proposed hourly rate for all fee earners in the same band is £195.75 which is an increase of £23.75 per hour. This is an increase of 13.81%.

[17] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/occupation4digitsoc2010ashetable14
[18] https://www.gov.uk/government/statistics/non-domestic-rating-stock-of-properties-2020
[19] https://www.gov.uk/government/collections/national-non-domestic-rates-collected-by-councils

- The mean salary increase of £758 would take approximately 32 hours work or 1 week to cover. The proposed hourly rate increase would mean a substantial additional net profit for each additional hour worked by a fee earner during any subsequent year. In real terms, if the average fee earner did 1,400 hours per year then this would result in an additional net profit of £32,490 per fee earner.[20]

- Similarly, the mean salary of a "Solicitor" increased by £2,347 in the 9 years to 2020 or 5.02%. This mean salary increase would take approximately 99 hours or 3 weeks to be covered. The proposed rate increase would produce an additional profit of £30,898.75 per fee earner.[21]

- Whilst the annual chargeable hours paid may vary according to the individual fee earner and from firm to firm, unless the proposed rate increases match the increase in expenses, then the surplus is likely to be translated directly into net profit.

- Indeed one can see that this is already happening. This is why the mean salary of those described as "Owners" in the ONS statistics has increased by 27.33% between 2011 and 2020.

- Nor is there any realistic prospect of these higher fees being translated in higher salaries for all those who do not own the practices in which they work. There is simply no upward pressure on salaries from real terms supply and demand in the labour market.

- To take one example, since 2011 solicitors salaries have increased by a mean average of 0.55% per year. This is significantly lower than the CPI rates of inflation for the wider economy.[22] Despite this, according to statistics compiled by the Solicitors Regulation Authority, between August 2011 and January 2021 the number of practicing solicitors has increased by 25.06%.[23]

- Similar points can be made about the rateable value of office space. The table shows the business floor space rateable comparison between 2009 -10 and 2019-20. At a high level it shows an average increase of £7/m² in GHR bands National 1 and 2 and an increase of £145/m² in GHR bands for London 1 and 2.

- If the average office space required by each fee earner is 5m² then the cost per fee earner has increased by £35 in GHR bands National 1 and 2, and £725 in GHR bands for London 1 and 2. The proposed hourly rate increase would cover the increases in less than 1.5 hours and less than 4.5 hours respectively.

Business Floor space (office sector) rateable value comparison since 2010

Administrative area	2009-10 value/m²	2019-20 value/m²	Value increase (£/m²)	Percentage increase (%)
North East England	77	75	-2	-3%
North West England	85	93	8	9%
Yorkshire / Humberside	84	86	2	2%
East Midlands	72	78	6	8%
West Midlands	95	97	2	2%
East England	104	116	12	12%
S East England	112	128	16	14%
S West England	88	100	12	14%

[20] £23.75 x (1,400 - 32)

[21] £23.75 x (1,400 – 99)

[22] ONS CPIH INDEX 00: ALL ITEMS 2015=100 In March 2011 using 2015 as a base line this figure stood at 92.6. In March 2020 this figure stood at 108.6. This is a change of 16 percentage points or 1.77 percentage points per year.

[23] https://www.sra.org.uk/solicitor-population/

London	200	345	145	73%
Wales only	75	81	6	8%
Average	99.2	119.9	20.7	21%
Average (excl London)	88	95	7	8%

- The table shows a reduction in rateable value for North East England and given the enforced digitalisation and homeworking brought about by Covid-19, the need for office space across the country will diminish significantly.

- Indeed the Government has already acknowledged that Covid-19 has seen significant changes in the market for commercial property. For example, on 9 December 2020 Secretary of State for Housing Rt Hon Robert Jenrick MP was quoted as saying:[24]

> *"We are witnessing a profound adjustment in commercial property. It is critical that landlords and tenants across the country use the coming months to reach agreements on rent wherever possible and enable viable businesses to continue to operate."*

- It is already being widely reported that many commercial rents are in the process of renegotiation[25] and this new commercial reality is reflected in the corporate reporting of some of the country's largest commercial property holders.

- For example, the Chief Executive of British Land – while putting an understandably optimistic gloss on the situation – in their annual report and accounts for 2020 commented:[26]

> *"In Offices, occupiers are working on plans to get back to the workplace and most feel that it is too early to make fundamental long term changes around their requirements. However, we are mindful that the trend towards greater flexibility may accelerate following this prolonged period of working from home."*

- Furthermore we can reasonably expect that the need for office space will reduce even if all fee earners returned to office working. This is because the office space needed to meet the "digital footprint" of the firm will be much less than the "paper footprint" of each firm.

- For example, a fee earner in a typical solicitor's practice may only need 3m² as opposed to the 5m² because they no longer need filing cabinets to store their files. A 40% reduction in the office space will significantly reduce the annual cost of office space.

- Take a 100 fee-earner firm in London. Currently, they would need 500m² of office space which costs £345/m² or £172,500 per year. If we follow through the logic of the example given above, that same firm would now require only 300m². This would reduce the annual cost of office space to £103,500 producing a saving of £69,000 per year.

- Salary and office costs are the two biggest expenses of a typical solicitor's firm. The above indices show average percentage increases of 12.3% and 8%. This is a far more modest rate of increase than the 18% proposed for the new Guideline Hourly Rates and as such suggests that they are unjustified.

[24] Business evictions ban extended until March

[25] The Power Balance Is Shifting in London's Commercial Real Estate

[26] https://www.britishland.com/sites/british-land-corp/files/investors/results-reports-presentations/2020/annual-report-and-accounts-2020.pdf

Data used for the consultation

- The CJC obtained data on the hourly rates claimed and allowed upon detailed assessment, and claimed and agreed between the parties. However, historically, the hourly rates claimed were those that a client would actually pay to his solicitor irrespective of the outcome.

- Lord Justice Jackson said: [27]

  > *"the aim of the GHR should be to reflect market rates for the level of work being undertaken" and that "[these] would be the rates which an intelligent purchaser with time to shop around for the best deal would negotiate."*

- However, this assumes that all clients have a financial interest in reducing the hourly rate to an affordable level and that firms are competing on affordable hourly rates to tender for the work whilst operating at a profit.

- This is simply not the reality of what happens in in the real world. The vast majority of civil litigation is funded under "No win: No fee" conditional fee agreements. This means a client's liability to pay high hourly rates in respect of costs recovered from an opponent and either no liability, or a liability to pay a much lower hourly rate, in respect of unrecovered costs.

- These funding arrangements mean a client is never going to have to pay those high hourly rates out of their own pocket. As a result, because the client has no financial interest in reducing them, and so there is no meaningful competition on price within this area of the legal market. In fact the only downward pressure on hourly rates is how much a costs judge will allow on assessment.

- Information from NHS Resolution's contracted panel firms indicates that of the cases that they handle, only 1% those cases proceed to a detailed assessment hearing. In the vast majority of those 1% of cases, the level of hourly rates claimed is a significant issue between the parties upon detailed assessment.

- Whereas, in the other 99% of cases, the average level of hourly rates claimed is lower and less of an obstacle to achieving a negotiated settlement. It is a matter of fact that the 1% of cases that the court sees are not representative of the 99% of cases that are settled between the parties.

- The consultation's assumption that these 1% of cases are in fact a fair representation of the other 99% of cases – in the face of available evidence to the contrary – is statistically and factually erroneous.

- The courts' knowledge of hourly rates claimed and allowed is limited to and influenced by the hourly rates claimed in the 1% of cases they see. The lack of awareness about the local rates claimed on the 99% of cases which are settled between the parties means that the courts' perspective of the hourly rates in the marketplace should not be relied upon.

- Information from NHS Resolution's panel firms indicates that in very few clinical negligence cases, are hourly rates claimed at 2010 GHR levels and agreed between the parties. Rather, in the vast majority of cases, the hourly rates claimed are higher than 2010 GHR and lower than the proposed 2020 GHR.

- In these cases, the parties negotiate on a global all-inclusive basis having made representations as to the hourly rates likely to be allowed on assessment. These representations are taken into account by the parties as one of a number of factors during negotiations. As highlighted above, the fact that many agreements are made on the basis of a global sum has already been acknowledged in the document

[27] Review of Civil Litigation Costs: Final Report

accompanying this consultation.[28] As no agreement is reached as to the amount of hourly rates, that information simply does not exist.

- However, an analysis of accounts published by Companies House for a number of legal firms can be used to show that these arrangements have had little effect on profitability. If anything their percentage of net profit has improved over the last decade. For example, for Irwin Mitchell net profit has increased from 22.12% in 2011[29] to 23.68% in 2020.[30] Similarly, between 2011 and 2019[31] Fletchers Solicitors saw their net profit increase from 15.64%[32] to 19.71%.[33]

Are the proposed guideline hourly rates a reasonable starting point?

- As already explained, before the introduction of the Civil Procedure Rules (CPR), the courts taxed costs allowing hourly rates using the A plus B approach. The A factor represented the broad costs of a fee earner doing the work and the B factor the discretionary profit element allowed by the District Registrar or Taxing Master.

- The B factor was expressed as a percentage of the A factor and was a matter of judgment and discretion based on what were colloquially termed "the seven pillars of wisdom". Nowadays, the B factor is based on factors which are listed in CPR 44.4(3).

  a) conduct;
  b) value;
  c) importance;
  d) complexity, difficulty or novelty;
  e) skill, effort, specialised knowledge and responsibility involved;
  f) time spent; place where and the circumstances in which work was done;
  g) last approved or agreed budget.

- Over time the courts arrived at a consensus as to the factors that would attract a B factor of 50%. In Johnson v Reed Corrugated Case Ltd , Evans J explained:[34]

> *"I approach the assessment on the following basis. I am advised that the range for normal, i.e. non-exceptional, cases starts at 50%, which the registrar regarded, rightly in my view, as an appropriate figure for "run-of-the-mill" cases.*
>
> *"The figure increases above 50% so as to reflect a number of possible factors – including the complexity of the case, any particular need for special attention to be paid to it and any additional responsibilities which the solicitor may have undertaken towards the client, and others, depending on the circumstances – but only a small percentage of accident cases results in an allowance over 70%. To justify a figure of 100% or even one closely approaching 100% there must be some factor or combination of factors which mean that the case approaches the exceptional. "*

[28] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf p.14
[29] https://find-and-update.company-information.service.gov.uk/company/OC343897/filing-history/MzA1MTQ5MzgzNmFkaXF6a2N4/document?format=pdf&download=0
[30] https://find-and-update.company-information.service.gov.uk/company/OC343897/filing-history/MzI5MDQzNjUyN2FkaXF6a2N4/document?format=pdf&download=0
[31] Latest figures that are available
[32] https://find-and-update.company-information.service.gov.uk/company/05743784/filing-history/MzA0Mzk0MjQwM2FkaXF6a2N4/document?format=pdf&download=0
[33] https://find-and-update.company-information.service.gov.uk/company/05743784/filing-history/MzI0ODg5ODUzMWFkaXF6a2N4/document?format=pdf&download=0
[34] 1997 Costs LR (Core Vol) 190

- When the CPR was introduced, the judiciary at all levels became required to summarily assess costs. This led to an immediate request for details of the local hourly rates. The Senior Courts Costs Office compiled a list of expense rates (A factor) allowed by courts for local solicitors.

- This list reflected the different expense rates of practices with offices in city centres as well as those outside those same city centres. This approximately reflected the different cost of an hour's work in the place where the work was done.

- Following the "Controlling Costs" consultation by the Lord Chancellor's Department,[35] solicitors became required to provide the court with an all-inclusive hourly charging rate containing the A and B factors.

- As a result, the Supreme Courts Costs office[36] uprated the 1999 expense rates to include a 50% B factor representing "run of the mill cases". This led to the SCCO publishing a comprehensive guide in 2002 which contained guideline hourly. This was updated in 2005 and published as the "Guide to the Summary Assessment of Costs 2005".[37] The stated intention of the guide is to assist judges:[38]

  > *"to assess costs summarily at the end of a trial on the fast track or at the conclusion of any other hearing which has lasted not more than one day."*

- In paragraph 42 of the same guide it further specifies that:[39]

  > *"intended to provide a starting point for those faced with summary assessment who do not have that local knowledge."*

- This is as distinct from substantial and complex litigation as is stated at paragraph 43:[40]

  > *"In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A fee earners where other factors, including the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate to reflect higher average costs. It is no more than a guide and a starting point for Judges carrying out summary assessment who do not have local knowledge."*

- It can therefore be concluded that the level of the case that the guideline rates represent is a run of the mill case:

  a) of no more than £25,000;
  b) of no more importance than any other routine case;
  c) involving issues of no complexity;
  d) that does not require the exercise of skill, expertise, specialised knowledge and responsibility above that of a routine case.

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[35] Controlling Costs; A Lord Chancellor's Department consultation in May 1999

[36] Now known as the Senior Courts Costs Office or SCCO

[37] Summary assessment of court costs: a guide for judges

[38] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/422614/senior-court-costs-summary-assessment-guide.pdf Forward 21 December 2004.

[39] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/422614/senior-court-costs-summary-assessment-guide.pdf

[40] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/422614/senior-court-costs-summary-assessment-guide.pdf

- This run of the mill case is the "starting point" against which the case before the court is measured when assessing whether to depart from the guideline hourly rates.

- It is within this context that the data which has been collected needs to be assessed. One could reasonably have expected the best like-for-like data to be collected; this is the hourly rate data from (i) summary assessments carried out by the judiciary, and (ii) applications that would have been summarily assessed but for costs being agreed between the parties.

- However, the report accompanying this consultation confirms that this was not the case. It states:[41]

> *"It was not considered practicable to try to obtain from these Judges evidence on any summary assessments they may do in the relevant period."*

- The decision not to obtain the data from summary assessments means that the most representative data set of the appropriate level of case, the "starting point" data set, has effectively been ignored.

- Data was requested on cases that proceeded to a detailed assessment hearing. The profile of these cases is not representative of the profile of cases that proceed to summary assessment. By their very nature, cases at detailed assessment will:

  a) range from in excess of £25,000 to potentially many millions of pounds
  b) contain cases involving life changing sums and be of life changing importance;
  c) contain cases of significant, if not of the utmost complexity;
  d) require the exercise of significant skill, expertise, specialised knowledge and responsibility well above that of a routine case.

- The forms at Appendix D and F of the committee's data gathering process ask for:

  a) The *"Type of claim e.g. PI, clinical negligence, other professional negligence, commercial dispute, property dispute, building dispute etc.";*
  b) The "Value of the claim and/or detail of any non-monetary remedy sought"; and
  c) Details of *"Any 'out of the norm' features that affected hourly rates allowed*?"

- However, this information does not help to determine what should be the Guideline Hourly Rate for the "starting point" level of case. It would involve the working party making an arbitrary judgment call on each and every case as to how the information in the responses affected the judge's assessment of the hourly rates claimed and allowed.

- The information requested does not specifically address the factors that should be taken into consideration. For example, the case being reported may be a clinical negligence case but there is a considerable difference in complexity, the exercise of skill, expertise, specialised knowledge and responsibility in a fully contested case where breach of duty, causation and quantum were in issue compared to a quantum only case.

- The report does not address the methodology used to take the information into account and does not deal with the weight attributed to each response affecting the hourly rates claimed and allowed so as to arrive at the proposed Guideline Hourly Rate.

- From the evidence published as part of the consultation, we cannot know what the "starting point" is in terms of the level of case that the proposed GHR represent.

[41] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf p.12

- However, thanks to an FOI lodged by one of NHS Resolution's panel firms with the Civil Justice Council we can now say with certainty that rather than being the 'run of the mill case', the sample of clinical negligence cases (205 from the total sample of 754) is unduly weighted towards cases:

  a) With a value of £100,000 or greater;
  b) of significant importance as it involves a life changing sum of money;
  c) involving issues of some considerable complexity;
  d) Requiring the exercise of more than routine skill, expertise, specialised knowledge and responsibility.

- The evidence about those negligence cases that have been employed in the sample – when compared with NHS Resolution's own claims experience is as follows:

Combined table comparing the CJC's data sample with Acumension and Keoghs data on 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%

- The CJC's data sample is therefore not representative of the overall spectrum of clinical negligence cases. As such, it is our view that whereas the CJC sample suggests an increase in Guideline Hourly Rates may be justified, wider and far more comprehensive evidence suggests that this is not the case.

Impact of changes in technology

- In April 2015 Master of the Rolls Rt Hon Lord Dyson wrote:[42]

> *"In July 2014 I published my conclusion that I had no evidential base to make any change to the existing Guideline Hourly Rates (GHRs), and they would therefore be remaining at their current rates, as originally set in 2010.*

Part of Lord Dyson's justification for saying so was:

> *"This exercise is not happening in a vacuum, and I am conscious of a number of trends in the legal services market and other factors that are rendering GHRs less and less relevant. They include, but are not restricted to:*

[42] Guideline Hourly Rates

- *advances in technology and business practices and models;*
- *the ever-increasing sub-specialization of the law which is seeing the market increasingly dictate rates in some fields (particularly commercial law);"*

- It is important to state at this point that this opinion is more than just anecdotal and that the evidence for what Lord Dyson described can be seen clearly within the Annual Survey of Hours and Earnings (ASHE) data already quoted above. Although these ONS statistics are not perfect, they are the most comprehensive data available.[43]

  If we use this data to look at the number of legal staff employed within practices in different roles and compare the figures from 2011 with those from 2020 we get the following results:

Position	ASHE code	2011 Total Number of Jobs	2020 Total Number of Jobs - provisional	2011 Ratio to Number of Solicitors	2020 Ratio to Number of Solicitors
Fee Earner	3520	45000	61000	0.69:1	0.76:1
Legal PA	4215	216000	179000	3.32:1	2.24:1
Legal Secretary	4212	24000	22000	0.37:1	0.276:1
Owner - legal services*	2419	34000	46000	0.52:1	0.58:1
Solicitor*	2413	65000	80000		

- What this shows is that between 2011 and 2020, as the impacts of technology and specialization have taken hold the ratio of fee earners to solicitors has increased, the ratio of legal PAs and legal secretaries to solicitors has decreased and the ratio of owners to solicitors has increased.

- This suggests that the use of technology has significantly reduced the costs of running a successful practice and the results in terms of profitability have already been shown in some of the examples given above.[44] Furthermore, the specialisation of firms and sub- specialism in various legal sectors has resulted in economies of scale and concentration of expertise that lead to increased profitability.

- However, despite the availability of this evidence from the ONS and elsewhere the current proposals for Guideline Hours Rates have failed to take these facts into account.

Impact of Covid-19

- The emergence of Covid-19 has had a profound effect on the legal profession as it has on many other sectors of the economy. The legal profession, in common with many other area of work, has accelerated moves towards home and remote working and the effects of this on the price of commercial property and a firm's costs have already been noted above.[45]

- The consequences of this starting to appear, as a number of law firms are reducing their bricks and mortar footprint because it is no longer necessary in a drive for digitization, are reduced overheads for firms. Examples of this in the legal press are not hard to find,[46] and perhaps as a reflection of the prevailing attitude of its members, this even includes the Solicitors Regulation Authority.[47] In many cases, work is no longer done in offices in cities where it can be done from home.

[43] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/occupation4digitsoc2010ashetable14

[44] Paragraph 69

[45] Paragraphs 51 to 53.

[46] See for example Slater and Gordon to close London office as remote working becomes norm & Dentons closes two UK offices and moves to permanent home-working

[47] SRA shuts up shop in London as home working becomes the norm

- This eliminates the need for travel expenses to attend meetings, conferences and court hearings, and will further increase profitability. Similarly, the elimination of travel time has increased and will continue to increase the number of chargeable hours produced by each fee earner, logically increasing profitability still further.

- The methodology used to produce the revised Guide Line Hourly rates that are the subject of this consultation has made no provision either for changes as a result of Covid-19 or of digitization and as such, in our view, should be reconsidered.

- Using a dataset of historic hourly rates will only serve to hard wire into any new Guideline Hourly Rate, practices which may have been commonplace in 2010 but are increasingly out of place in 2021.

Conclusions

- In conclusion, this review has failed to apply the established basis of Guideline Hours Rates; and has sought and relied upon a very limited dataset containing a completely different case profile to the profile of case the Guideline Hourly Rate typically represents.

- For all of the reasons which have been outlined above, it is our view that the current methodology should be extensively revisited on the basis of more accurate information and a closer appreciation of the developing realities of commercial practice.

- It is our view that the proper outcome of such a process would be that Guideline Hourly Rates would remain unchanged, or be reduced, in the light of commercial realties.