1. Responses and reactions are invited to the questions raised in this paper, with a deadline of **12:00pm on Friday 30 September 2022**.
2. Responses should be submitted online at https://www.surveymonkey.co.uk/r/CJC-costs

CONSULTATION RESPONSES – GUIDANCE

3. When responding to this consultation, the Working Group would be grateful if Respondents could identify their areas of expertise/interest in the topic/levels of experience. Respondents are encouraged to respond to the overarching questions (or only some of the overarching questions) in any way they see fit, including by focusing only on one or two topics in respect of which they have particular expertise, or indeed only on specific questions or issues arising within individual topics.
4. The Working Group has not imposed limits on the volume of material which Respondents can provide when responding to the consultation. However, one condition, which must be adhered to, is that any response which amounts to more than 20 pages of text must be accompanied by an executive summary of no more than 2 pages in length.
5. Respondents should have in mind the point emphasised above that the Working Group's remit is strategic in nature. The report to be generated at the end of this process is intended to set the direction of travel for costs and address important general issues. This work will not descend into detailed rule making or a close revision of detailed provisions.
6. In this initial report, the Working Group only seeks to pose questions and put them in context. It invites answers, supported wherever possible by evidence and data. As part of the consultation phase the Working Group will also consider what data may be available to illuminate the answers to these questions and will take steps to seek it out. Any suggestions as to material that the Working Group should be taking into account would be welcome.
7. Throughout its work the Working Group will have regard to the three dimensions identified at the start - digitisation, the needs of vulnerable court users and the economic significance of the civil justice system as a whole. Respondents are invited also to bear these in mind in providing their responses.

THE QUESTIONS

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

It is certainly useful by focusing the mind on past and more importantly potential costs which will be subject to a microscopic examination during detailed assessment. It is also helpful to case planning.

However, the cost of incurring the exercise weighed against the benefit of having cases budgeted does not make the process useful overall. It remains the case that there are infinite permutations in litigation such that in reality it is impossible to sensibly predict the costs path in any case. There have been instances when I have been compelled to draft costs budgets in complexity personal injury cases which have taken no less than 30 hours. In some of those instances I have had to prepare a second liability only costs budget to cater for the possibility of the court ordering a split trial. This has added another 5 hours to the time spent in preparing a precedent H. At the end of the substantive case the budget has done little to deter my opponents from contesting the approved budgeted costs and at time I have been close to reaching a detailed assessment hearing which is precisely what costs budgeting was supposed to reduce.

I am also concerned that a disproportionate amount of time is being taken up at CCMC's on costs budgeting. I have just reviewed a case in which the Directions Questionnaire was filed a year ago and I have yet to receive a hearing date. Courts simply cannot cope with the burden of costs budgeting and it is not difficult to see why.

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

It should be brought to an end. At the very least a discretion should be given permitting either the parties or the court of its own volition to dispense with the filing and exchanging of budgets.

1.3 Should costs budgeting be abandoned?

Yes but parties must be required to file estimates of costs. A failure to do so should result in harsh penalties (unlike the pre budget days). That will allow the court to keep one eye on proportionality and if the estimate is exceeded even by 10% the courts should have the discretion to bind the inter partes costs to those estimates.

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

Non default

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?

Judges cannot obviously budget incurred costs but can comment on them. This discretion should be removed because Judges cannot possibly make informed comments about worker conducted hitherto without a proper bill of costs that breaks down each attendance.

It is anticipated that the answers to Questions 1.1-1.3 are likely to overlap. However, in answering these questions, Respondents may wish to consider:
Whether costs budgeting is more useful in some circumstances than in others and, if so, what those circumstances are and why. If costs budgeting is not considered useful, why? What (high level) changes should be made? If Respondents consider that costs budgeting is not always applied consistently (whether as between judges or courts) it would be helpful if Respondents could identify what they think are the reasons for the disparity and provide evidence to support their views. Evidence indicating whether costs budgeting has reduced the number of cases going to Detailed Assessment might be provided.
Respondents may also wish to identify their views (and explain their reasons) on whether costs budgeting (i) should be abandoned; (ii) is vital, at least in certain cases (and, if so, those cases should be identified); (iii) promotes access to justice for smaller parties litigating against better funded opponents; (iv) wastes significant time and costs in managing the budgets of parties whose costs will never be paid; and (v) causes the expenditure of costs which are disproportionate. Respondents may wish to consider whether there are any alternative rules that should be put in place of costs budgeting (for example to safeguard access to justice and to ensure the early consideration of costs by the parties together with the scope for intervention by the court to control costs).
If Respondents consider that costs budgeting should be abandoned, they may wish to consider and provide views on how the court will nevertheless ensure that cases are conducted justly and at proportionate cost in accordance with the overriding objective, what the potential impact might be on vulnerable parties and whether parties should still be required to exchange (and file) their own estimates of their costs to trial and if so when. Respondents may wish to provide their views on whether an alternative procedure or rule should be introduced to ensure the conduct of proceedings at proportionate cost.
In answering Question 1.4, Respondents may wish to consider whether the current arrangement, in which costs budgeting is default on for cases under £10 million (subject to exceptions), should be retained or whether it should only be applied to cases at the case management discretion of the court and upon the making of a court order to that effect ("default off"). Where the court makes such an order do Respondents have views on whether the rules should provide that a decision to order cost budgeting must carry out a costs/benefit analysis, taking into account the costs and complexity of the case? Are there any further criteria that ought to be applied aside from the overriding objective? If Respondents consider that the right general approach should be default off, they may wish also to consider whether there are any types of case (identified by subject matter or value) in which the default on rule should nevertheless be retained, and if so, why.
In answering Question 1.5, Respondents may wish to consider how incurred costs should be dealt with in the context of a costs management exercise and whether hourly rates should be considered in the context of such an exercise. They may also wish to express their views on who should carry out costs management, whether it should be dealt with by specialist costs judges and whether more training is required if the present system is to be retained. One

practical problem with costs budgeting that has been reported is the lack of consistency overall and, in particular, the differing approaches to the question of what comes first – identifying the work that needs to be done, or setting the budget with the work then being agreed within that budget? Respondents may wish to consider the solution to this problem.

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?
a 'starting point' for detailed assessment

2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?
No

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?

In answering Question 2.1, Respondents may wish to consider whether summary assessment could be carried out without GHRs or whether their use should be restricted to a starting point for summary assessments and not as a 'starting point' for detailed assessment. Three other potential issues are (i) the impact of the new value limit for FRC of £100,000 (if any); (ii) whether, if there is a place for GHRs, their use may be restricted to certain areas of civil litigation – and if so, which areas; and (iii) whether, if there is a place for GHRs, the question of geography and banding needs to be considered.
In answering Question 2.2 Respondents may wish to address whether GHRs have a role in consumer and small business protection in the purchasing of legal services, in the protection of litigants in person, and/or in enabling regulated providers of legal services to comply with their regulatory obligations such as to provide regular costs estimates and transparent pricing for their clients. For any of these roles (or any other role), if GHRs were to be abandoned, Respondents may wish to address whether consumers would have the means to gauge the reasonableness of solicitor and own client costs estimates and how regulatory obligations would be complied with.
In answering Question 2.3 Respondents may wish to consider any possible wider effects on, for example, Family proceedings or proceedings in the Court of Protection (or anywhere else) together with any potential effects (adverse or otherwise) that may be felt in the provision of litigation funding or costs insurance protection.
In addressing Question 2.4, Respondents may wish to address what proportionate ways of adjusting GHRs are available for the future. Might adjustment involve data as to rates allowed on detailed and summary assessments of costs? If so, what data should be captured, by whom, from whom and how should that be achieved reliably and proportionately? Should indices be used, perhaps with suitable adjustment, e.g. SPPI (services producer price inflation) legal or CPI (consumer prices index)? If not, why not?
In answering 2.5 Respondents may wish to give examples of alternative GHR models and/or methodology.

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?

A material breach of the protocols should result in severe costs sanctions such as an automatic right to indemnity costs for a winning opponent and a 30% reductions in costs if the winning opponent is the offender.

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?

No

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

In answering Question 3.1, Respondents may wish to consider what impact digital dispute resolution has on costs and what effect the current digital systems have. Is there an impact on the cost for unrepresented litigants? How should those costs be dealt with? Mindful of the cost of repetition, should the development of the digital system prioritise an API, or similar method of sharing information? What may be the cost advantages/disadvantages of such an API for professional users, the court system, the judiciary and litigants in person?
In answering question 3.2 Respondents may wish to consider how costs incurred before a case is issued should be governed. They also may wish to address whether more pre-action protocols (and other dispute resolution services) ought to include self-contained rules on party and party costs and if so, what these rules should be.
In answering Question 3.3, Respondents may wish to consider what reforms are required, whether they apply to all types of claim and whether they ought to apply only to costs owed to providers of legal services.
In answering Question 3.4, Respondents may wish to address whether there are areas in which the distinction between contentious and non-contentious business serves a useful purpose and what the implications would be of removing that distinction.

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?

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.

No. Fixed costs encourage low quality work except for the most straightforward of cases and should be limited to those cases.

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.

In raising these questions, the Working Group is NOT inviting comment on the extension of FRC (which has already been consulted upon), rather it is interested in receiving the views of Respondents on the consequences of the extension of the FRC.