
**The Forum of Complex Injury Solicitors (FOCIS)**

**Response to**

**The Civil Justice Council Costs Working Group's Consultation Paper**

**October 2022**

**About Us**

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;

2. Share knowledge and information among members of the Forum;

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;

4. Use members' expertise to promote improvements to the legal process and to inform debate;

5. Develop fellowship among members.

See further www.focis.org.uk

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 24 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

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| Anthony Gold | Hugh James |
| Atherton Godfrey | JMW |
| Ashtons Legal | Irwin Mitchell |
| Balfour + Manson | Leigh Day |
| Bolt Burdon Kemp | Moore Barlow |
| CFG Law | Osbornes Law |
| Dean Wilson | Potter Rees Dolan |
| Digby Brown | Serious Law |
| Fieldfisher | Slater and Gordon |
| Fletchers | Stewarts |
| Freeths | Thompsons NI |
| Hodge Jones & Allen | |

In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

## Introduction

FOCIS welcomes the opportunity to respond to the CJC Cost Working Group's consultation paper. Our submissions below are all based on the assumption of the implementation of the proposed change of FRC to £100,000, which will helpfully remove a large tranche of cases from the cost management and cost assessment regimes. Our submissions are also focussed on complex and high value injury litigation including claims involving sexual abuse, clinical negligence, international issues (both jurisdictional and applicable laws), military and product liability and workplace accidents. Most of the clients of FOCIS members have sustained life-changing injuries and some of them are treated Protected Parties and/or vulnerable witnesses pursuant to the CPR. Every one of the complex injury claims we conduct for our clients involves differing combinations and severity of what are often multiple life changing injuries. They follow markedly differing treatment and rehabilitation patterns, often over many years right up to the trial. Likewise the related financial losses are very different, plus they are ongoing and changing during the life-cycle of the proceedings. This creates a requirement for rolling disclosure and multiple rounds of expert reports from large teams of medical, therapeutic and other experts[1].

## Part 1 – Costs Budgeting

### 1.1 Is costs budgeting useful?

We agree with APIL's submission that whilst budgeting has brought some real advantages the delays it has caused are an unacceptable detriment to our justice system.

Transparency concerning costs between parties has been improved by the requirement to file budgets and consequently has promoted earlier resolution of claims. The phase by phase detail required by Precedent H has caused parties to be more careful in their estimation of the likely costs. The inclusion of a Statement of Truth in Precedent H has ensured the parties' solicitors take the exercise seriously.

In our experience budget discussions between the parties rarely prove useful and tend to involve time being incurred by both parties without any benefit in the vast majority of cases. A significant issue is that the parties have invariably prepared their budgets based on differing directions and budget assumptions (e.g. as to the number of witness, length of trial etc). Disparities between hourly rates are another common impediment to agreement in budget discussions, as institutional Defendants to injury claims will have negotiated block rates for volume repeat work, in contrast to the position in injured claimants who are one-off litigants. The level of argument that would be required to resolve these issues is not appropriate at the BDR stage.

Cost Management by the courts has caused serious delays to the early stages of proceedings. This situation is particularly severe in the KBD where CCMCs are delayed by 6-12 months. Delays of this scale are an unacceptable obstruction to justice. The underlying problem is lack of court resources to be able to deliver cost management without adding significant delay to the process.

As mentioned above, opposing parties commonly propose markedly different directions, for instance one party proposing a liability only trial with the other proposing a full trial of all issues. This means each party then has to prepare a variant budget based on their opponent's proposal. This process is obviously inefficient, resulting in unnecessary "costs of costs", which frequently exceed the 2%/3% cap.

[1] In complex injury claims it is common for the court to give permission for 5-15 experts per party.

In order to make costs budgeting fit for purpose, we also contend that the phases must be reviewed to ensure they encompass the work that is actually being undertaken in complex injury litigation. A recurrent problem in such cases is that currently there are no defined PTA codes for work on rehabilitation issues. Rehabilitation is acknowledged as being a crucial part in the recovery of an injury person. Costs for treatment and rehabilitation are a major part of the claim. Rehabilitation is also important to enable seriously injured claimants to maximise their recovery, rebuild their lives and mitigate their losses. However to pro-actively pursue rehabilitation requires multi-faceted work by the legal team regularly liaising with the claimant, case managers, therapists, doctors and the opponent (for interim/rehabilitation funding). This work often continues over many years and throughout the life cycle of the litigation. The lack of PTA codes for rehabilitation regularly leads to significant inconsistency and insufficient provision for this type of work by the court when making CMOs. Consequently, seriously injured claimants may end up bearing the costs of the legal work related to rehabilitation out of their damages (rather than applying their damages to meet their injury related losses as intended).

The approach of different Judges to CMOs and the resultant outcome is also too variable. This reflects the fact that there is insufficient court time for them to give full consideration to the difficult issue of trying to predict the likely costs in each phase of complex litigation. This forces some Judges to make quick decisions, often more based on their own experiences and preconceptions than on careful analysis of the issues in the case, which can result in rough justice to the parties. The majority of injured claimants only have the misfortune to become caught up in complex and high value litigation once in their lives, but they are usually reliant on the outcome of the litigation for their future livelihood. Broad-brush cost management can do injustice; it is of no comfort to the litigant whose cost recovery from the paying party was so seriously restricted that another litigant before a different Judge may have got a much better outcome from cost management.

Whilst the Judges know they are not meant to determine hourly rates at a CCMC (CPR 3.15(8)) that creates a conundrum if they take the view the rates are too high and result in excessive figures in each phase. From our discussions with members of the Judiciary we know some of them find this conundrum problematic and dislike the fact that this judicial thinking is effectively hidden and so cannot be appealed, nor revisited on a variation application, nor reconsidered when it comes to any negotiation or assessment of costs at the conclusion of the case.

The amendments to the CPR in October 2020 relating to variations of CMOs were an improvement. However, the threshold for such variations is high and most litigants are put off from even making such applications.

CMOs are particularly problematic in cases involving Protected Parties as recent SCCO cases[2] suggest that Litigation Friends may be unable to give informed consent for work to be done in excess of the CMO even if such work is in the best interest of the client. Further guidance is required in this respect and in the meantime, we propose that the existing exclusion of children cases from the budgeting regime be extend to cases involving all Protected Parties.

The one positive aspect of cost management is that it has reduced cost disputes at the end of the cases. It is beneficial that judges make more generous payments on account of the costs allowed by the CMO. However, there are still frequent costs disputes relating to costs outside of the scope of the CMO (e.g. incurred costs, contingencies, applications, unbudgeted rehabilitation costs etc).

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[2] *EVX v Smith [2022] EWHC 1607 (SCCO)* (https://www.bailii.org/ew/cases/EWHC/Costs/2022/1607.html) and *ST v ZY [2022] EWHC B6 (Costs)* (https://www.bailii.org/ew/cases/EWHC/Costs/2022/B6.html)

To conclude, cost management has caused too many delays, extra costs and variable outcomes to justify the modest benefits that it brings and therefore we propose below a number of revisions.

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

We support the 'default off' option for cost management, but with parties' continuing to prepare and exchange Precedent H budgets. Parties would not be compelled to enter into budget discussions, but some parties may elect to do that voluntarily (like other forms of ADR) and could notify the court if that resulted in agreement in some or all phases. The budget would be based on, each parties' proposed directions. The Judge would then consider the budgets, in light of the directions proposed by all parties and make a decision whether or not a separate costs management hearing is required after the first Case Management Conference ('CMC').

This process should apply to all cases over the fixed costs threshold, including those that currently have a claim value in excess of £10 million. An exception would be for Protected Parties by way of extension to the existing exclusion of child injury cases. We believe a default off approach would significantly reduce the current unacceptable delays in listing CCMCs, reduce the court time they take up, but retain transparency required between parties in relation to costs.

**1.3 Should costs budgeting be abandoned?**

No, please see 1.2 above.

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

As explained at 1.2, we propose 'default off' for cost management, but retaining the preparation and filing of cost budgets.

**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?**

To implement 'default off' with discretion for Judges to list a cost management hearing after giving directions we support APIL's proposal for the amendments (in green) to the wording of Rule 3.15(2) of the CPR: *"The court may at any time make a 'costs management order'. Where costs budgets have been filed and exchanged the court may make a costs management order when it is not satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made."*

We note that the status of budgets that have been filed (but not subject to a CMO) at assessment is already provided for by the PD to Part 44 at 3.1-3.4. However, we suggest PD 3.4 be extended to clarify that Judges may also consider filed budgets when exercising their discretion to make payments on account of costs under CPR 44.2(8).

**Part 2 – Guideline Hourly Rates ('GHRs')**

**2.1 What is or should be the purpose of GHRs?**

GHRs are simply a start point to assist the court to enable what is a reasonable allowance between the parties when claiming costs, notably when applying a broad-brush during summary assessments.

In the majority of costs disputes faced by our members' clients, the paying party has proposed significant reductions in hourly rates with reference to GHR.

We agree with the observation of Costs Judge Rowley in Shulman -v- Kolomoisky [2020] EWHC B29 (Costs): "*there is rarely any other starting point offered by the parties to the court when considering the appropriate level of hourly rates*".

It is important to keep in mind that GHR operates to inform what successful litigants can recover from their opponents, but is not intended to define or limit what those litigants pay their own solicitors. That would be a restraint of trade of a type that does not to our knowledge apply to any other profession. If GHR is set below market rate it leaves our members' seriously injured clients having their compensation eroded by the consequent costs shortfall. That dilutes the full compensation principle.

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

No. They are a useful starting point, but they should not be given a broader role. We agree with the CJC 2021 working group's report conclusion that: "*Finally, if its recommendations are accepted, the working group is confident that judges who have to assess costs will have proper regard to the new GHR but will (a) appreciate that they have been and always will be no more than a guide, (b) have due regard to para 29 of the proposed revised Guide and (c) exercise skill, care and common sense in the assessment of costs."*

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

Abandoning GHR would be unlikely to have a negative effect at the conclusion of cases and for many of our members' clients it would likely be positive. The cost disputes in most complex injury cases are settled through negotiation with experienced cost lawyers instructed by the paying party. Even when cost assessment is required that is usually before a cost specialist Judge who will have considerable experience of the current market (claimed) rates in comparable cases. In addition many complex injury cases will warrant enhancements under para 29 of the Guide and applying the seven pillars of wisdom under Part 44. So it will rarely be appropriate to simply apply GHR to this important class of cases.

However, we acknowledge that abandoning GHR may lead to greater variation in summary assessment outcomes.

Until GHRs genuinely reflect current market rates and are annually indexed to inflation in the legal sector then this is a serious question, as GHRs currently result in unfairness to receiving parties whose legal rights have otherwise been protected by our civil justice system.

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

Annual indexation of GHR is crucial to avoid a repetition of the unfairness that prevailed for over 10 years prior to the introduction of GHR 2021.

We support the proposal in the CJC interim report on GHRs that the figures are annually uprated by the Services Producer Price Index Legal ('SPPI Legal'). SPPI Legal has statistical validity and is the closest match for inflation of solicitors' hourly rates.

As we previously pointed out in our response to the CJC consultation on GHR in 2021, the cost assessment bills in the data set then gathered by the CJC would on average have been drawn 12 months before the date of assessment. Working back from the mid-point of the data period would take us to January 2019. From Q1 2019 to Q2 2022 (the latest available) SPPI Legal has risen 15%. If the first revision is not implemented until Q1 2023 then four years will have

elapsed and the inflationary factor will be higher. The 2021 CJC working group report said it was unconvinced, given the present turbulent economic times, that there should be any increase on the rates for the subsequent time lag prior to implementation in October 2021. With respect we disagree. The period in question is too long and the subsequent inflation far too high to ignore.

We propose the annual uprating of figures take place immediately. If it is delayed then it should have retrospective effect for 2022. Once annual indexation is implemented then we suggest a full review would only be necessary every 10 years. We agree with the submissions of Stewarts that this 10 yearly full review should consider not just what costs judges allow, but it should also look at the question of what rates were actually claimed, because GHRs are intended to reflect the real market rates, the average price actually paid by litigants.

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

Expense of time?

We agree with the approach adopted by CJC's 2021 working party on GHR in departing from former attempts to set the GHR by reference to expense of time calculations. Such data was time consuming to prepare and impossible to gather (as demonstrated by the CJCs 2014 review). More fundamentally it was not directly reflective of the actual charges incurred by litigants. In any event, it is an approach that involves looking down the wrong end of the telescope. The GHR should be focussed on what reasonable litigants pay their solicitors, rather than the widely varying levels of expense and profit very different solicitors firm's experience.

A recent variation on the theme of expense of time arguments is whether changes to working practices of solicitors, in part driven by the COVID pandemic, should affect GHR. We contend that unless and until any such changes result in reductions to the average rates actually paid by litigants for their legal services then they are irrelevant to GHR. In addition they are factually flawed, as evidence indicates that law firms in recent years have continued to face significant increases in the three biggest components of their overheads: salaries; offices; and IT.

In January 2022 the Law Society Gazette reported that:-

"*Lawyers could be set for inflation-busting pay rises this year as firms desperately try to hold onto top talent. That was one of the key findings from recruitment consultancy Robert Walters, whose UK salary guide published today shows that professional services firms are planning to increase their budget for pay rises by 10-15% this year. That would be the largest increase seen since 2008 and more than twice the rate of inflation*".[3]

Since then legal salary inflation is if anything rising faster than that prediction.

Predictions that a shift to remote working would greatly reduce law firms' office space and spend have also proved to be incorrect for most firms. As reported by Knight Frank:-

*The legal sector drove UK regional office take-up in Q1 2022, accounting for 13% of total take-up across ten key UK cities. The level of take-up is in excess of the five-year Q1 average figure of 9 %[4].*

[3] https://www.lawgazette.co.uk/news/pent-up-demand-will-see-lawyers-wages-rise-across-the-board/5111097.article

[4] https://www.knightfrank.com/research/article/2022-06-13-uk-legal-sector-office-demand-increases-

*"Law firm take-up in London continued its record-breaking streak with over 400,000 sq ft of space acquired by law firms during Q2, 2022. This equates to 13% of London take-up and nearly a quarter of City take-up."* [5]

*"In 2021, UK law firm leasing take-up across the main UK office markets stood at 1.5mn sq ft, a 67% rise on 2020."*[6]

Likewise, those arguing this point often suggest there have been (or will be) savings through technological changes in the way lawyers work. However, to achieve these changes increases the overheads of most solicitors. Most firms now have to purchase and maintain hardware and software to enable their staff to work both from the office and from home. We accept that investment in technology is modernising the way some law firms work and might over time enable some of them to undertake some types of legal work for less hours. However, it does not reduce the hourly rate for that more efficiently delivered legal work; if anything it does the contrary.

Rates allowed or rates claimed?

We reiterate the concern that we expressed when responding to the CJC's consultation on GHR on 2021, that the approach based on historic rates allowed or agreed involved circularity and the underlying data was dragged down by the failure to update GHR 2010 for over 10 years.

The allowed rates methodology led to proposed GHR that were 15% lower than average claimed rates. They are also lower in most bands and grades than would have resulted from the alternative of uprating GHR 2010 by CPI, let alone SPPI Legal. That strongly suggests that judicial moderation influenced by the legacy of GHR 2010[7] was and is out of step with market inflation.

We agreed with the statement in the introduction to that CJC 2021 working group's report that "*The intention of the rates is to provide a simplified scheme and the guidelines are intended to be broad approximations of actual rates in the market*." The principle that GHR are intended to be broad approximations of actual rates in the markets had also been acknowledged over the years by Lord Justice Dyson and Lord Justice Jackson[8]. However, we contend that this principle and related intention was not followed.

We commend both the 2021 CJC working party for successfully gathering a credible body of data on rates claimed and assessed, and Professors Fenn and Rickman for their review and reporting on the assessed claim data. We agree that data set was the best evidence available to inform GHR 2021. However, we maintain our view that there ought to have been an analysis of the rates claimed from the same data set. That would have provided better insight into what the market rate is.

We contend that the rates claimed approach would not be unfair to paying parties, who would still be able to raise GHR arguments against anyone who instructed the 50% of solicitors who charge above the average market rate actually paid by receiving parties.

To illustrate this issue, we reiterate the simplified example provided by our Chair, Julian Chamberlayne in his email to the CJC of 12 February 2021. That example assumed 10 cases for assessment, with Grade A charge rates for cases 1 to 10 rising in £10 increments from

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5 https://www.knightfrank.com/research/article/2022-08-23-law-firms-lead-the-charge-for-new-office-space-in-london#:~:text=Law%20firm%20take%2Dup%20in,quarter%20of%20City%20take%2Dup

6 https://content.knightfrank.com/research/2420/documents/en/uk-law-firm-real-estate-report-2022-8897.pdf

7 Which affected virtually all rates previously allowed or agreed.

8 https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf and https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

£300-£390, all assessed by a Judge who never allowed more than £340. The mean for the claimed rate would be £345, but the mean for the allowed rate would be £330. The former would be the average market rate, but the latter would not. So, the average of assessed rates will inevitably drag down the outcome and will not then give you a fair figure to reflect prevailing market rates.

We refer to the comparison table we produced with the cost lawyers Harmans which we submitted for the 2021 review. That comparison showed that the allowed rates for all 3 bands[9] and virtually all grades represented less than CPI inflation on GHR 2010 which was in itself probably below real market rates back in 2010. In contrast the claimed rates were a better match for the inflation measures than allowed rates, as at most grades they were between CPI and SPPI Legal.

Our further analysis of the data gathered by the CJC revealed that:-

1. there were 681 cases after excluding any where there was a miss match of data claimed and allowed;

2. rates claimed were allowed/agreed in full in just 123 (18%) of these cases, but reduced in 82% of cases;

3. 38 of those 123 cases were claimed at GHR, so 87% of non-GHR cases were reduced on assessment.

This analysis strongly suggests that most Judges reduced the hourly rates claimed, even if they are below the average market rate paid by the average litigant.

To inform the next review of GHR we suggest that HMCTS implement a system to record the type of data collected by the CJC in that review for all cases in which a budget or bill, endorsed with a statement of truth/accuracy, is filed with the court.

To summarise, in order to preserve the full compensation principle we make the proposition that a seriously injured claimant who makes a reasonable choice of solicitor for the type and scale of the claim in question ought to be able to recover at up to market rate for that work[10]. If they prove in the litigation that their injuries were wrongfully inflicted then, under the loser pays principle, why should they be left with a shortfall in costs attributable to the GHR being artificially set at a lower rate?

**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?**

We agree with the submissions of APIL that there are considerable advantages to digitisation, but implementation is complex and historically has not been a great success in the lower value and complexity end of personal injury claims. Digital technology has the potential to make justice systems more accessible and efficient, but it has proved very difficult to align the procedure with the technology even in relatively simple claims. It is difficult to envisage a successful implementation of sufficiently flexible processes to encompass the very wide variety

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[9] It is unfortunate that there were no equivalents to tables 5c and 6 to enable comparison of the claimed and assessed rates for London 1 and London 2. However, we understand that such claimed rates data as there was for London 1 and London 2 indicated a comparable differential between claimed and assessed rate to those applicable to London 3, National 1 and 2.

[10] With enhancement factors applied if applicable as under para 29 of the Guide to Summary Assessments.

and sheer scale of the evidence, which is constantly changing during the life-cycle of the proceedings[11].

It is crucial that any digital reforms have an inclusive and user-focused approach. Legal IT projects have been historically plagued with problems as evidenced by two of the most recent projects in the personal injury sector: the introduction of the OIC and Damages Claims Portal (DCP). A review into these projects should be carried out before further digital reforms are recommended.

There is also the need to consider the very significant hidden cost of reform for solicitors implementing these systems. There are IT and lawyer training implications and costs that arise not just at the outset but also impact the firms every time there is a change to the digital platform.

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

The scope of the portals does not fall within the remit of FOCIS, so we defer to APIL on that issue.

Our primary concern relating to the pre-action protocols is that there is very rarely any sanction imposed for non-compliance once the case is issued. Common examples experienced by our members included defendants failing to provide a detailed reply to the letter of claim, and/or not providing adequate pre-action disclosure. These scenarios may effectively force the claimant to issue proceedings early in a case that might otherwise have been resolved pre-issue or resulted in a reduction in the number of parties or issues pleaded. A stricter approach by the courts would likely encourage parties (and their legal teams) to take compliance with the protocols more seriously in future cases.

Another suggestions is that the Directions Questionnaire be modified. In our members' experience some opponents approach them as a tick box exercise, with answers given that do not truly accord with what the protocol in question required. For example, a requirement for confirmation of the date on which the party complied with each aspect of their obligations under the protocol would be an improvement.

### 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?

From our members' perspective, this is not a significant issue. Complex injury cases settling pre-action almost always do so on either a global basis or with costs agreed without any cost assessment by the courts. An attempt to introduce rules of this type might cause more problems than it resolves, notably detracting from the freedom currently associated with pre-action ADR.

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

The distinction between contentious and non-contentious business serves no principled purpose and is confusing to members of the public. The same applies to the out-dated concept of the indemnity principle. When there is genuine governmental intent to address these issues there should be a separate consultation considering the issues for a root and branch

[11] As further described in our preamble to this response.

replacement of the Solicitors Act 1974 to modernise it including making it understandable by the public.

**Part 4 – Consequences of the extension of Fixed Recoverable Costs ('FRC')**

**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?**

Injury litigation with claim values above the incoming £100,000 threshold for FRC tends to involve complexity and variation that it would be difficult or impossible to fairly constrain within any further increase to that FRC threshold. FRC does not work fairly where the process is not fixed or the work required within the process changes over time, as is common in complex injury cases. Cost budgeting is a much better and fairer method of managing cost between litigants in high value injury claims.

**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.**

Any extension would likely require even greater consideration of the types of complexity that can arise as claim values within the scheme increase. That would likely require an ever growing list of exceptions and escape routes that would likely detract from the perceived benefits of fixed recoverable costs. Hence, as above, cost budgeting is a much better and fairer method of managing cost between litigants in claims in excess of £100,000.

**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.**

We do not consider any extended cost capping regime is warranted in personal injury and/or clinical negligence practice areas.