This is a response from DWF Law LLP to the Civil Justice Council, Costs Working Group Consultation. Our feedback comes from the perspective of the Insurance Division at DWF, which with over 900 staff members, handles all aspects of insurance and indemnity litigation throughout the lower and higher courts of the UK. We have provided further information "About DWF" and contact details at the end of this document.

This firm acts in a defendant capacity for a wide variety of clients and in most types of claims. This client base includes many insurers and reinsurers who have an awareness of costs issues which may be greater than for other business clients.

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

Yes.

The principles and objectives of costs budgeting are very useful insofar as they:

- control costs;
- provide parties with details of the likely costs of litigation through to trial and at each stage in the proceedings;
- provide greater costs transparency and support dispute resolution and commercial settlements;
- support access to justice. Defendants need to know their costs liability should a defence fail, funders require the information to consider prospects of success and the claimants need to know the likely shortfall from their damages even if the claim is successful;
- in many cases obviate the need for detailed assessments at case end.

Before costs budgeting was introduced for higher value claims, insurers/self-insureds were aware of their own (defendant) costs through initial costs estimates from their solicitors; interim billing and requests for payments to fund disbursements. Although claimants were also required to provide estimates of costs on the submission of Directions Questionnaires and Listing Questionnaires/Pre-trial Checklists, the reality, in the vast majority of cases, was that the true level of a claimant's costs only became apparent when a final bill of costs was served at the conclusion of the claim. Any discrepancy between earlier estimates and the costs claimed was rarely taken into account by the court on detailed assessment.

In addition, these broad estimates provided no indication of when costs would be incurred and which activities, in any given case, would attract the highest costs.

This uncertainty was removed in lower value claims by the introduction of fixed recoverable costs (FRC). Defendants could predict not only the costs they would pay if a claim settled at a

given stage in the claim but also their likely maximum exposure should the claim proceed to trial and the claimant succeed.

To a certain degree, the introduction of costs budgeting for higher value claims provided a similar degree of visibility, but sometimes only to the extent that, for reserving purposes, the defendant could predict its *possible* maximum exposure to a claimant's costs. In some cases, costs budgeting also introduced a measure of control over costs, with evidence that *some* judges were prepared to reduce budgets below a party's expectations.

The way in which the costs budgets are broken down has also allowed the parties to make more informed judgments about the cost/benefit of attempting settlement at a particular stage in the litigation.

Budgeting also supports access to justice. Funders, such as legal expense insurers require details of their exposure to costs should they lose and specifically in the personal injury market, claimants can be responsible for any shortfall in their solicitors' costs from their damages.

However, a number of problems remain:

First, there is the issue of hourly rates (see below).

Secondly, in most cases, budgets are currently set for the whole claim, and created before directions are given so they often factor in a number of contingencies, and are sometimes no more than improved estimates. Provision is made for the budgets to be revised but in relatively restricted circumstances and we have seen applications to vary under CPR 3.15A in only a handful of cases. From the outset, it has been perceived that claimants' budgets have been set too high and defendants' too low.

It should be borne in mind that defendants' budgets, particularly in insurance, claim the guideline hourly rates (see below) whereas claimants' budgets often seek rates considerably higher than guideline and often factor in considerably more contingencies than Defendants' budgets.

In our experience, judges on the whole are considering budgets on a broad-brush basis and are awarding only proportionate costs. Our data shows that:

- Claimants' estimated costs are reduced on average by more than 40%;
- Defendants' estimated costs are reduced on average by less than 20%;

Whilst we appreciate some commentators may argue that the above indicates in some instances an inflationary element is added to budgets to provide a buffer against reductions, our position is that this data demonstrates that one of the objectives of costs budgeting, namely prospective proportionate cost control is working in some areas of litigation.

Thirdly, costs budgeting has in some instances increased the length of hearings. But *if* costs budgeting is dealt with effectively, it can take-up a considerable amount of judicial and court time; but it should be remembered that there are the consequent savings at the end of the case with very few matters proceeding to detailed assessment. To put this into context DWF handles tens of thousands of costs cases per annum, but in the last 12 months has had less than 10 cases proceed to assessment. Further, if a judge does not allow the requisite time for budgeting process, in our experience the budgeting exercise can become ineffective.

Fourthly, although the parties are mandated to take costs budgeting seriously, there is a perception that not all members of the judiciary see its true value and/or have any real interest in ensuring that it is afforded the necessary level of consideration. Costs budgeting is not always popular! This may in turn reflect lack of experience and/or training or the pressures on judicial and court time/resource. That said, that is not a reason to abolish cost budgeting; rather amendments can be made to the process to improve it coupled with other areas of reform (see below) that will deliver efficiencies and reduce the pressures on the judiciary, court time and reduce costs.

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

Given the broad view that there is value in costs budgeting, it would be a retrograde step to abandon it. Rather, there should be some material changes to how it operates along with an interlocking package of reform.

This paper suggests that costs budgeting should not be undertaken until a directions hearing has taken place when the steps approved by the court are known giving a clearer picture of the actual work to be undertaken by the parties. The following points are made in support of this proposition:

1.2.1 By the time of a directions hearing (but with that hearing in mind), the parties' cases will have crystallised and thought given to what evidence will be required. The directions given may impact on one or more parties' proposals in regard to evidence and consequential costs.

1.2.2 Once directions have been given, the costs may be budgeted on the basis of the steps approved by the court. We suggest that given this later stage at which the budgets would be prepared, they would be more accurate than is currently the case. This, in turn, should result in more budgets being negotiated and agreed between the parties thus avoiding involvement from the courts.

It should be a requirement of the rules that each party's budgets should be shown to and agreed by the client (as used to be the case with costs estimates) and not be a matter solely for the party's representatives.

Separately CPR 3.15A, which is rarely used in our experience due to its limited application, should be varied so that any party in the action can apply to vary a party's budget (up or down) in the event of significant developments.

Costs budgets would be exchanged within 14 days of the directions hearing; agreed budgets would be filed with the court within a further 14 days; in default of which each party's (not agreed) budget along with the budget discussion report would be filed with the court within that same 14-day period.

We understand that a similar process operates effectively in Sheffield County Court and a similar approach is adopted in the TCC, both of which are working effectively.

A designated costs judge would then carry out a paper assessment of the disputed budget(s) and issue a determination of each party's costs. These judges should be experienced (or fully trained) in costs budgeting and be fully engaged with the process. Their lists should allow adequate time for these 'paper' assessments to be carried out properly.

A party aggrieved by the paper assessment would be permitted to request a hearing but, as with the provisional assessment of costs rules (CPR 47.15) would bear a costs penalty if failing to achieve an increase/decrease in the budget complained of, of less than 20%.

There would need to be provision for the parties to ask the court, as an alternative to the paper budgeting process, to carry out an oral budgeting hearing, similar to the current CCMC, rather than proceed via the paper assessment route, where for example there were multiple parties or the amount of costs claimed.

In addition to changing the timing of the budget process which should drive significant benefits in terms of reduction in court time and judicial involvement, the following interlocking package of reforms should be adopted:

1.2.3 Extend the FRC regime – (Jackson LJ envisaged FRC up to £250,000).

1.2.4 Whilst incurred costs should not be formally assessed in the budget process (which in effect would be a detailed assessment) greater weight should be given to the costs already incurred. Our data shows that on average 30% of the Claimants' overall budgets are incurred costs.

1.2.5 Greater emphasis on proportionality in line with the overriding objective supported by further judicial training so a more consistent approach is adopted.

1.2.6 The application of hourly rates – budgets are drafted on the basis of the claimed hourly rates, which in a large numbers of cases are significantly higher than the Guideline Hourly Rates (GHR). Budgets should be drafted on the basis of the GHR (see below).

1.3 Should costs budgeting be abandoned?

No: for the reasons set out in 1.2 above.

Unless FRC are in place, costs budgeting is far preferable to a return to almost meaningless estimates which had no perceivable impact on the controlling of legal costs. An improved process, dealing with a reduced number of cases, should prove more acceptable to those still required to engage in costs budgeting.

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

It should be on a 'default on' basis. We believe that this is crucial to ensure consistency of approach. However, if costs budgeting took place after the directions hearing, it would be open at that hearing for the parties to request that it should not be ordered. It is anticipated that such permission would be granted in a very limited number of cases and where good reason was provided by the parties (e.g., it was believed a settlement was imminent).

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?

As indicated above, this paper proposes that costs budgeting should take place after a Directions Hearing. When FRC are introduced for most forms of litigation, initially valued at up to £100,000 (but hopefully at some point up to £250,000) this will see the transfer of a very high volume of claims to FRC regimes and would correspondingly free up considerable judicial time. We believe that CPR 3.12 should be amended. We see no reason why claims valued at £10 million or more are excluded from the budgeting process and budgeting for higher value/complex claims particularly in personal injury would bring the benefits highlighted above.

We understand that specifically in relation to clinical negligence claims costs budgeting is not working as effectively as in other areas of personal injury but equally we do not believe that the orders proposed by the RCJ Masters (listed below) will be particularly effective, namely;

- no defendant budgets;
- no cost management order is made at the first CMC;
- an obligation on the parties to reach agreement on the claimant budget and where there are unreasonable objections this will be a conduct point to take into account at detailed assessment.

Cost control in these types of claim is needed more than ever and a budgeting process that lacks consistency, cost control and judicial input is not supporting the aims or objectives of budgeting and is not ensuring that the costs are proportionate. The issues that arise specifically in clinical negligence matters require further examination and we would suggest that a working group is established, as was done by the CJC clinical

negligence working group (looking at fixed costs up to £25,000), in order to consider the discrete issues that arise in this specific area of litigation in more detail.

Part 2 – Guideline Hourly rates

2.1 What is or should be the purpose of GHRs?

GHRs should primarily provide all parties to a dispute, together with the judiciary, with a reasonably clear indication of an average hourly rate a solicitor may charge for work undertaken, where a successful party will recover costs from an unsuccessful party. They should provide consistency and transparency for the parties as to their exposure to the other party's costs at either a summary or detailed assessment.

GHRs should be clearly divorced from solicitor/own client charges contractually payable by a client to their solicitor. That said, GHRs should help inform claimants of their likely exposure from damages of the shortfall between the contractual rate charged by their solicitor and the likely recoverable rate between the parties.

GHRs should reflect the complexity of the work undertaken (currently achieved by reference to the grade of fee earner) and the cost of running a firm of solicitors. In the majority of claims, the reference to geographical location is now outdated in light of the post-pandemic change in working practices of law firms. In line with the FRC extension this paper advocates that GHRs should be set, not by reference to geographical location but, by reference to the complexity bandings 1-4 in the FRC extension.

Once set, GHRs should represent the fixed hourly rates (FHR) allowed for each grade of fee earner in question with any uplift or reduction to be applied only where it is clear and obviously appropriate to do so. i.e., the case was *substantially* more straightforward/complex and thus exceptional.

The above proposals would provide certainty and consistency of approach and obviate the practice at present where it is often the case that claimants seek to argue for a GHR at or closer to their solicitor/client rates and correspondingly, defendants argue that GHRs are already too generous and that the GHR are sometimes ignored by the judiciary.

The concept of GHR/FHR should extend to counsel's recoverable hourly rates.

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

Firstly, in personal injury very few cases proceed to assessment as demonstrated by the limited evidence gathered as part of the GHR review in 20/21 (754 in total). Of the limited number of cases we have taken to costs assessments, GHRs have been one of the major points of argument for decades. The introduction of the summary assessment of costs has seen those arguments move into that process.

While the grade of fee earner is used as a measure of complexity, that in itself opens up arguments as to whether a fee earner of a particular grade needed to do some or any of the work.

Separately the grade of fee earner should not be looked at in isolation but should be considered alongside the time spent and the instruction of counsel.

Where a firm of solicitors is sited and/or where work is carried out is also increasingly of concern, particularly in the light of Covid and post-pandemic working practices.

What is required is a move from GHRs, which by their very nature are open to variation either way, to the greater certainty of a fixed hourly rate (FHR) based on complexity bands as detailed above and with scope to move upwards or downwards dependent on the complexity of an individual case.

For a vast number of cases this aim could be achieved by the extension of FRC. A matrix of tables for work types/value and the stage at which the case is concluded would immediately provide certainty for both parties and relieve the judiciary of a high volume of cases requiring any form of costs involvement. An extension of FRC has already been mooted for cases valued at up to £250,000, as originally recommended by LJ Jackson. This paper supports that proposal.

For the remaining higher value and more complex cases, there should be a move to FHR. This would require bands to be established to define the hourly rates to be attached to the specific levels of expertise required to deal with cases of varying value and complexity, and as mentioned above this could be similar to what has been achieved in the FRC extension banding.

Whether used in FRC matrices or FHR for non-matrix cases, the underlying hourly rates or costs allowances must be based on the best quality data. Any assessment must take into account a number of factors of relatively recent origin:

2.2.1 The reduction in office space used by firms of solicitors;

2.2.2 The increased efficiency achieved by using technology;

2.2.3 The impact of working from home (WFH) on 2.2.1 by the use of 2.2.2 above.

2.2.4 Even where working space is required, the move to lower cost ‘out-of-town’ locations.

There has been resistance to any attempt to carry out a detailed analysis of the costs of running legal practices (the expense of time) around the country. Instead, factors considered have included the outcomes of a relatively limited number of cases subject to assessment, over a limited period and historical data mined from various sources.

As FRCs are revised and extended, time and care should be taken to collate and analyse the best data available as to the costs of running legal practices, with a view to producing FRCs and FHR which are based on expertise, complexity and value only.

With the possible exception of London, there should be no geographical variations, as the revised FRCs and FHRs will reflect the value of the legal services performed, without concern for where the work has been carried out. There would still need to be a grading of fee earner within categories of claim, to reflect the need for appropriate delegation (unless some form of blended rate could be devised).

Where FRCs do not apply the FHRs would provide a starting point for costs budgeting by removing any arguments about the hourly rates to be utilised. It would also reduce the time at the end of the case arguing about the GHR, one of the anomalies in the current budgeting process that the court does not fix or approve the hourly rates.

2.3 What would be the wider impact of abandoning GHRs

This would be a retrograde step. Some forms of GHRs/FHRs are vital. They are needed to provide guidance and consistency across the judiciary. It would create uncertainty and conflict for all parties if no guidance existed as to what hourly rates were likely to be approved in different court regions and result in a court lottery and court shopping. It would increase costs disputes and assessments and take up considerable judicial time and resource.

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

Yes. If a more robust methodology can be developed for setting FRC/FHR as identified in 2.2. above, the same underlying measures could be revisited periodically to up or down rate FRC/FHR. A five-yearly thorough review should be viable, once the underlying measures have been identified.

It has been suggested that there should be inflationary increases on an annual basis. We do not support this approach as we believe that this will lead to gaming and delays in progressing matters. An inflationary or deflationary review could take place every three years with a thorough review every five years. In terms of any inflationary methodology we consider this should be based on the services producer price index.

2.5 Are there alternatives to the current GHR methodology?

As indicated above, there are concerns about the current GHR methodology and that it does not utilise sufficiently robust or representative data to formulate the appropriate rates to be applied or take into account the changing practices of law firms. A process that is as close as possible to an ‘expense of time’ exercise would be preferable.

Further, as detailed above GHR should be replaced with FHRs to provide greater consistency of approach and transparency. As part of the interlocking package of reforms mentioned above

it would also reduce the court time involved within the budget process and result in a higher number of budgets being agreed as well as removing any friction in summary/detailed assessment of costs connected to hourly rates.

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?

There can be little doubt that well designed and robust digital processes to include digitisation of dispute resolution should serve to increase efficiency and settlements, reduce court time and costs.

Any online process which allows information to be inputted (or updated) once and then accessed by all interested parties must inevitably lead to considerable savings in time and therefore cost.

The above is however predicated on the assumption that the systems are robust and sophisticated and there is sufficient funding to achieve objectives. An example of shortcomings with the digitisation programme is the Damages Claims Portal, in broad terms, lack of functionality, no application programming interface (API) and the additional cost of this mandatory process to professional users. Online processes must fully reflect, and have embedded within them, the applicable PAPs, Civil Procedure Rules, and timeframes with proper consultation and engagement in design and build, tapping into professional users' resource and expertise, from users and robust user testing prior to implementation with technology to streamline the process, e.g. APIs.

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

A distinction must be drawn between pre-action protocols (PAP) where no provisions are made for costs and those which involve portals and rules as to costs consequences.

This paper addresses only those situations where no costs provisions apply.

PAPs are potentially valuable means by which proceedings may be avoided. This will be even more the case if there are reinvigorated PAPs, following the CJC's work on the PAPs, under which the full and proper exchange of information is enforced; some form of Alternative Dispute Resolution (ADR) is expected to take place; and there is a stocktake resulting in the conduct of the parties to date coming under scrutiny.

The problem this creates is that all parties to a dispute will be obliged to front-load costs to an extent (even if there are savings where trials are avoided). There needs to be a mechanism, in non FRC cases, whereby the parties are provided with some indication of the other parties' estimated costs to a given stage or stages. For claimants this estimate must become a reference point should the claim settle (with or without proceedings) and a claim for costs is

made. Less emphasis should be placed on defendants' cost estimates, given that defendants are often playing a reactive role in the early phases of a dispute.

A costs review may be appropriate as part of the ADR phase. This should be in the form of a 'best estimate' to which reference back could be made at the costs budgeting stage, should the claim not settle. For example, a party declining to agree another's costs budget could state as one ground that it bore no relationship to that party's estimate at the pre-action ADR stage.

This would undoubtedly assist both parties during the ADR process. What is proposed would not involve any material duplication of work, as the cost estimate prepared for the ADR stage would merely need updating and formalising (i.e. be placed in the appropriate columns) for the post-directions cost budget.

Separately, we believe there needs to be caution to any extension of costs shifting in a pre-action matter. Costs shifting is already provided for in the pre-litigation portal processes. In other pre-action matters, if as part of the settlement there is an agreement to pay costs, the claimant can proceed via the Part 8 process for assessment. There should not be an extension of costs shifting per se as part of the amendments to the PAPs. The defendant needs to be protected against opportunistic and vexatious claims and the considerable expense they may need to go to in order to defend or fall foul of sanctions for lack of pre-issue engagement.

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?

This paper is not in favour of another form of costs process. Claimants who settle their claims within the PAP phase will usually recover their costs from the defendant as part of the agreement or can issue costs only proceedings. Defendants will invariably accept that costs are not recoverable where a claim is discontinued in the PAP phase.

Widening the scope for pre-litigation costs in the absence of agreement will lead to a raft of unintended consequences including the exploitation of claimants, gaming, poor behaviours and significant costs litigation.

The introduction of FHR would assist the agreement of claimants' pre-issue costs, as that should reduce arguments about hourly rates. A further improvement would be the requirement for claimants, at the time of settlement, to serve certified statements of their pre-litigation costs as to both what work had been carried out and by which fee earner(s).

Extending the scope of FRC to disbursements including experts and counsels fees (beyond the portals) would narrow some of the issues between the parties.

Separately, while it is tempting to suggest that reform of solicitor/own client charging is overdue, it must be borne in mind that this is a contractual issue. While claimants must be protected from

exploitation, they must also be free to engage their lawyers on whatever terms they may wish to agree.

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

It is the view of this paper that such a distinction serves no useful practical purpose.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

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

If FRCs are extended, particularly to include cases with a value of up to £250,000, many of the issues relating to costs budgeting will fall away. They must, however, be based on a realistic assessment of the costs of running the various types of claims.

Any exceptions allowed to the application of FRCs must be clearly defined, as otherwise there is a risk of satellite litigation in which parties seek to argue for exemption. Given the broader range of claims to which FRCs would apply, such applications could occupy the valuable court time that FRCs are intended to free-up.

In the meantime, a principal concern will be how pre-action 'behaviour' under the proposed revised PAPs will be adequately 'policed' by the courts. Parties, but particularly claimants, should not be permitted to pay lip-service to PAPs but should face meaningful costs consequences for non-compliance. This would reflect, for example, a failure to make the full disclosure of documentation in the pre-litigation phase. Conversely defendants should not be put to considerable expense in defending opportunistic or vexatious claims by having to engage pre-issue in a case that will ultimately be defeated. There still requires an element of discretion and the defendant should not be penalised in proceedings for controlling their pre-action costs in cases that they will ultimately successfully defend.

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

It is the view of this paper that FRCs should gradually be extended to cover all cases up to a specific value (with a target of up to £250,000) irrespective of the nature of the dispute. This view anticipates the gradual digitalisation of such claims.

Specifically we consider the non-fixing of Part 8 costs to be an anomaly. A number of the Part 8 proceedings we see arise from low value fixed fee cases. We envisage that with the FRC extension, in the short term, there will be a number of Part 8 costs only proceedings for the

court to interpret the rules. It would therefore seem appropriate as part of the FRC extension to fix Part 8 costs.

Generally, as each type of case becomes subject to FRCs, a number of steps must be taken that will be fundamental to the success of FRCs:

4.2.1 The complexity of each type of claim must be fully considered and catered for in the matrix by which costs are allowed, whether or not the process is digital.

4.2.2 The true cost of running each type of claim must be fully analysed before FRCs are set. This is to avoid the risk that parties will feel obliged to 'game' the process to achieve what they believe is a fairer reward. Correspondingly, abuse of the process must be subject to meaningful penalties.

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.

This is outside our area of expertise.

About DWF

DWF is a leading global provider of integrated legal and business services, with over 4,000 people within the DWF Group working globally across over 30 key locations. Our clients range from FTSE 100, Fortune 500, multinational household names through to private individuals, in both the public and private sectors, including in the following core sectors:

- Consumer
- Insurance
- Energy & Natural Resources
- Real Estate
- Financial Services
- Technology, Media & Communications
- Government & Public Sector
- Transport

Dedicated Insurance Practice

DWF has one of the largest dedicated insurance practices in the UK with over 900 members of staff, providing us with a market-leading capacity to help insurers, loss adjusters, corporate clients, local authorities, and police forces.

Founded in 1977, we represent insurers and indemnity providers handling the full range of personal injury and clinical negligence claims - from small claims to catastrophic injury claims – along with commercial insurance and professional indemnity claims.

We also have one of the largest in-house legal costs teams in England and Wales, comprising over 50 fee earners across 6 national locations, and an advocacy team, comprising over 20 barristers and advocates, which operates much like an in-house set of chambers.

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