Responses of the Association of Costs Lawyers Response to the Civil Justice Council's Costs Working Group Costs Consultation

October 2022

OUR BACKGROUND

The Association of Costs Lawyers (ACL) is a membership organisation representing Lawyers, students and retired practitioners in the field of legal costs.

ACL was founded in 1977 as the Association of Law Costs Draftsmen (ALCD) with the aim of promoting the status and interests of its members. In 2007, Fellows of the ALCD were granted the right to conduct costs litigation and rights of audience under the Legal Services Act.

In 2011 the ALCD was renamed as the Association of Costs Lawyers (ACL) and became the statutory regulator of qualified costs practitioners. In line with the Legal Services Act, the ACL delegated regulatory obligations to the Costs Lawyers Standards Board (CLSB).

There are currently 440 members of the ACL who represent both paying and receiving parties in all forms of costs litigation. Many members also act for Litigants in Person and the ACL is committed to delivering better access to justice in all costs related matters. All of our members have experience in costs disputes and the vast majority deal with costs on a day-to-day basis.

Many of our members act for both paying and receiving parties in many areas of costs which are directly referred to or affected by the areas that have been highlighted for consideration of the Civil Justice Committee's (CJC) costs working group. The ACL considers that its members are the best placed legal professionals to provide comments, critiques and proposals for reform in respect of legal costs due to their experience of dealing with costs disputes on a day to day basis. This experience and immediacy of dealing with costs offers a unique insight into the areas where the relevant costs provisions are working or where there is scope for improvement on the procedures and rules currently in place. It is using this experience and knowledge that the below responses draw upon.

INTRODUCTION

In preparing this response the ACL has conducted a survey amongst its members to ensure that all viewpoints were considered. The survey received responses from members who act on behalf of receiving and paying parties and all respondents dealt with a wide range of costs issues. It should be noted that 96% of the respondents have dealt with Cost Budgeting and therefore have first-hand experience of dealing with this process.

Given the open-ended and holistic approach adopted by the consultation paper the ACL has prepared this response dealing with each of the parts and questions separately.

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?

The ACL considers that costs budgeting is a useful and effective case and costs management tool for judges and parties to have at their disposal. The benefits of costs budgeting can be felt throughout cases from the beginning to end and helps ensure that costs remain reasonable and proportionate.

The costs incurred pre-action and prior to the CCMC Hearing are included within the Cost Budget and the CPR currently provides judges with the ability to comment on the level of the

'incurred' costs which can be taken into account when setting the sums for each phase for the budgeted part of the litigation.

Furthermore, when costs budgets are addressed at Court alongside the proposed Directions it can provide the Court with additional information which can be used when considering the Directions to be ordered. For instance, when a judge is able to consider the level of costs to be incurred when instructing an additional expert they are able to assess whether the instruction is reasonable and proportionate to the rest of the claim. Without costs budgeting a judge would be 'in the dark' when it comes to making case management decisions and this ultimately will lead to a lack of control over the overall costs of a case which will not be realised until the final Bill of Costs is prepared as part of the detailed assessment.

In addition, the introduction of costs management has also improved the detailed assessment procedure. Following the subsequent clarification of how costs management orders should be dealt with at a detailed assessment in *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB) and *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 it is clear that costs management has had a positive impact on the detailed assessment. Over 73% of the respondents to our survey considered that costs management assists at the detailed assessment and anecdotally several members are reporting that it is reducing the overall number of detailed assessments required. It has achieved this by narrowing the arguments that can be brought at a detailed assessment and usually results in budgeted costs, where the costs are within the previously budgeted amount, being allowed as claimed save for any good reason to depart. Given that budgeted costs make up a significant percentage of a costs claim should a claim proceed all the way to trial then this can result in significant savings in both the court's time and in the overall costs of the detailed assessment.

Therefore, costs management and budgeting has achieved what it had been created to deliver, to provide judicial oversight on the cost for claims and provide a cap on what could be considered reasonable and proportionate.

It would be a fair criticism that costs management took some time to get right. However, there has been continued development and improvement with clarification being provided with additional guidance to assist all parties. Over 70% of respondents agreed that the developments and the changes that have been made have resulted in clarification which has greatly assisted the operation and application of the costs management rules. That is not to say that there are no further improvements to be made and such suggestions are dealt with in respect of our response to 1.2.

Furthermore, as with other areas of litigation there is no substitute for experience and the area of costs is no different. The area of costs is conducted at its best when Cost Lawyers are involved and can provide their advice and apply their experience to the process. All our respondents considered that Costs Lawyers provide value to the costs management process. This can be through the preparation of documents that are accurate, assisting the court through well-reasoned advocacy and through the pragmatic application of the budget at the end of a claim.

Costs budgeting also provides a level of certainty to clients who are not acting under a CFA and are directly liable for their solicitors' costs. A cost budget can provide additional information to assist them in understanding how much it will cost in running the claim. Whilst

there is an obligation on firms to provide updates on the estimated costs of the claim this is not necessarily accurate and does not necessarily provide a cap for recovery, unlike a costs management order which can then help to crystalise a sum that the paying client may be liable for.

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

Over 57% of our respondents considered that there was still scope for additional amendments to be made to the costs budgeting regime to further improve its application. This is likely to come with an overall review and update of the CPR rules and Practice Direction to ensure that the smaller updates and amendments made over the past 9 years are incorporated within one simplified code. It is considered that costs budgeting will benefit from further refinement to provide additional certainty and clarity to the process. The ACL has set out a few of the suggestions received from our membership below:

Proposal to split case management and costs management

One of the main issues raised by our members who deal with costs budgeting is that the current timeline does not assist matters and can ultimately lead to some delay and duplication of work in limited circumstances. It is therefore suggested that the connection between case management and costs management should be de-coupled so that the court can set out the clear directions that the claim will take which would allow cost budgets to be prepared knowing exactly what Directions have been allowed by the Court (including the number of witnesses, type of disclosure, number and specialism of experts etc).

The main benefit of this approach is that it would avoid the all too common occurrence where parties have prepared budgets based off vastly different draft Directions which then require significant recalculating at the Costs and Case Management Hearing or require an adjournment so that updated cost budgets can be prepared.

Refinement of the Prec R process to greater improve the hearing process

The ACL considers that the current Precedent R should be reviewed and updated to reflect the approach adopted within Points of Dispute and Reply, namely, that both parties are able to include their comments and rebuttals within one document which is then served and filed with the Court ahead of any Costs Management Conference. This should assist judges in understanding the main points in issue and provide a clear structure that should be adopted when undertaking the Costs Management process. Written advocacy then supported by supplementary oral advocacy at a Costs Management Hearing would inevitably lead to hearings that are conducted in a far more efficient manner and would provide a further level of structure and predictability in how costs management is undertaken across the courts.

Incurred costs – up to or including the CCMC Hearing

One routine area where further clarification within the rules would assist is in respect of 'where the line' should be drawn in respect of costs that have been incurred (and not subject to costs management) and costs that are costs budgeted. This is a routine argument that is taken during the detailed assessment process and should be easily resolved in respect of the inclusion of further amendments to CPR 3E and CPR 47. Should guidance be provided that sets out clearly where costs are to be considered to be either incurred or budgeted then this would result in a number of arguments no longer being taken during the detailed assessment

process. Such guidance would likely coincide with the proposed changes above to stage at which costs management comes into the litigation process.

Potentially the essence of the current wording could be maintained as it currently is, save for minor tweaks, should there be a de-coupling of case and costs management.

Clarification regarding budgeting and spit trials/clarify part-budgeting by judges

The current Precedent H and rules are written on the presumption that the court will deal with the whole of the case up to the conclusion at trial. However, it has been noted that there are several instances where claims will proceed to a liability only trial as a means of conducting the litigation in compliance with the overriding principle. In other scenarios the CCMC Hearing comes at a relatively early stage of the litigation where it is particularly unclear how the case may proceed. In these circumstances it is unclear exactly how to prepare the Precedent H. This in part could be a direct result of dealing with costs before the Directions have been formally handed down and we would refer to our previous suggestion of the uncoupling of the case management and cost management to provide an additional level of clarity to the latter.

In addition to the above the ACL considers that further provisions should be included within the CPR to further provide guidance on how Bills of Costs should be prepared when dealing within matters that were budgeted in parts to ensure that the full benefits of the costs management process can be realised at the conclusion of the case or at a subsequent detailed assessment.

Clarification regarding Prec T and whether formal applications are required?

The introduction of the process of varying costs budgets was a welcome additional to the CPR. Providing a new Precedent T to enable practitioners a clear way of setting out the changes that are being sought to a costs budget as the case progresses and provides a mechanism for costs management to be an active part of case throughout its duration. However, there are a couple of aspects that may be revised following a period of time of the provisions bedding in.

The first is in respect of the test for varying the cost budget. The current rules current state that the test for when budgets should be amended is when there are 'significant developments' in the case (CPR 3.15A (1)). However, there is a different test when it comes to the detailed assessment where the costs management order can be departed from where there is 'good reason to depart'. The two tests appear to have different levels and it has been interpreted that the bar is lower to establish a good reason to depart than to establish 'significant developments' in the case. Therefore, in some circumstances, it may be currently better for a solicitor to decide to not update a cost budget during the case and claim good reason to depart at the conclusion. It is considered that this is not in the spirit of costs management and instead the tests should be placed on a parity to ensure and encourage parties to manage and vary their costs budgets throughout the course of the claim.

The second aspect that should be considered is to clarify within the rules whether a formal application is required to be made when applying to vary the costs budget. At present, it appears the rules set out at CPR 3.15A are silent as to whether a formal application is necessary and simply state that the Precedent T should be submitted to the Court.

1.3 Should costs budgeting be abandoned?

No. To abandon costs management at this stage would be akin to 'throwing the baby out with the bath water'. If costs budgeting was to be abandoned then the ACL considers that there are only two options that would prevail, either: a return to dealing with unmanaged costs solely at the end of the claim, or, further expansion of the fixed costs regime. The ACL considers that neither of these options are suitable and will have a negative impact on access to justice.

If costs budgeting was abandoned and it was reverted back to the previous method of assessing costs at the end of the claim through a detailed assessment then it is anticipated that there would be a significant increase in the amount of costs sought at the end of the claim. This is because the costs incurred throughout the course of claim will not have been scrutinised by the Court or by the other party until right at the end of the claim. This will inevitably lead to more arguments in respect of the sums sought and increased costs of detailed assessment.

Alternatively, if fixed recoverable costs are extended further in lieu of costs budgeting then it is considered that there will be an inevitable impact on access to justice. Fixed Costs provide a rigid and inflexible structure that simply cannot deal with complex and unusual cases as they arise. Due to the rigid application, it would mean that such complex cases cannot be run profitably by solicitors and, therefore, they either will refuse to take on such cases or will seek to recover any shortfall from the claimant's damages. In either event there would a significant negative impact on the access to justice.

What the ACL does advocate is that costs budgeting does provide a 'middle ground' or compromise between these two alternative options. It provides a mechanism that enables the Court to consider and essentially set a reasonable and proportionate budgeted amount, which in effect (save for good reason to depart) acts as a quasi-fixed cost for the litigation and its specific phases. It allows both parties to provide their submissions on the particular details and complexities that are unique to that specific case, whether it is the need to instruct specific experts or conduct more thorough disclosure investigations and allows the Court to take these into account when setting out what it considers to be a reasonable and proportionate level of costs for the litigation to cost.

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

The ACL refers to its response to 1.1 and highlights just how useful cost budgeting is in providing certainty and clarity on the position of costs whilst simultaneously helping to reduce and control the costs to a reasonable and proportionate amount. Considering the above the ACL considers that a 'default on' position should be used for all cases where cost budgeting applies.

The primary reason behind maintaining the 'default on' position for cost budgeting is that it provides certainty for all parties involved. It is noted that there was significant litigation when costs management was first introduced in respect of when costs budgets should be filed and resulted in a number of high-profile decisions relating to the implementation of the penalty for default and the test for relief from sanctions. However, now that these areas have been clarified the position regarding the filing of cost budgets is clear and within the responsibility of all litigators involved.

To move to a 'default off' position would inevitably result in a lack of clarity and further unnecessary satellite litigation to address a wide range of possible scenarios which could arise. The ACL considers that a 'default off' position should only be considered appropriate in respect of Defendants to claims where liability is fully admitted or where the Claimant is under the protection of the Qualified One-Way Costs Shifting regime. In these circumstances, it is extremely unlikely that the Defendant will be seeking their costs from the Claimant and, therefore, it is a potentially unnecessary expense to be incurred. The ACL considers that if such a suggestion is to be implemented then it should be incorporated within the current list of exceptions to costs budgeting with clear definitions as to how these exceptions will be triggered.

The ACL notes that the current exceptions to cost budgeting are reasonable and should not be changed or amended. Furthermore, the ACL considers that it is appropriate for the Court to retain a discretion in respect of applying costs management to cases to ensure that, even in extremely high value cases, that costs can be properly managed and kept in check.

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?

We refer to the responses provided above. The amendments are set out there with the relevant reasoning. These should be considered and new or amended wording to the CPR should be contemplated. It would be highly recommended that any amendments should also be consulted upon before they are introduced.

Part 2 - Guideline Hourly Rate

2.1 What is or should be the purpose of GHRs?

For many years now GHRs have been in place and in use as a tool for the judiciary when deciding the reasonableness of hourly rates on assessments. Looking back to the original purpose of GHRs, when judges were assessing costs for firms based outside their locality, the GHRs did not require a judge to have knowledge of whether rates claimed for work done in a particular geographical area by a particular grade of fee earner. It should remain as it always has been, a starting point for summary assessment and exactly as the description states, a guideline. This is the view shared by the majority of the ACL's membership.

Again, having regard to the historical purpose of GHRs, their main function was to serve as a tool on summary assessment so in effect hearings of less than a day. That is still the case and is stated so in the latest 2021 version. The GHRs were therefore always a starting point for more straightforward matters not complex hearings lasting several days or weeks. In more complex matters an appropriate uplift would be applied. There have been many decisions on the application of uplift and how hourly rates should be enhanced in certain circumstances. Long established costs law in this area should not be forgotten.

Fifty years ago the Law Society's 'Expense of Time' guidance document assisted solicitors in calculating the cost of doing the work so that they could work efficiently and profitably. Without keeping an eye on the time spent some firms would offer fixed fees that did not even cover the overhead cost of doing the work. While that document was never intended to be a starting point for summary assessment it did encourage solicitors to think about overhead costs on an hourly rate basis, and ultimately what became known as the 'A factor', to which an element of profit was added, the 'B factor', to allow solicitors to be paid at least their overheads and a

reasonable element for profit. A higher A factor was allowed for a more 'expensive' solicitor with specialist experience and enhanced B factor where a higher level of client was required, or the case raised novel and complex issues. It was a very transparent means of calculating hourly rates and came to prominence in Re Eastwood, Lloyds Bank v Eastwood [1974] 3 All ER 603.

On assessments courts would assess the B factor according to what is often referred to as the 'Seven Pillars of Wisdom' (now incorporated into CPR 44.5(3)). In respect of the A factor, courts assessing the reasonableness of hourly rates in other geographical areas faced difficulties without local knowledge. Local Law Societies and courts encouraged practitioners to submit details of their 'A factor' rates and local guidelines were drawn up. In time those guidelines were consolidated into the very first guideline hourly rates as we know them, back in around 1999. The rates were also expressly inclusive of an assumed B factor uplift of 50%, for the most straightforward run of the mill cases, there being the starting point for assessments in straightforward cases, and indeed for summary assessments which were regularly carried out at the end of fast-track trials. It provided greater certainty, to ensure solicitors could only recover a reasonable hourly rate for the work done, having regard to their grade and locality.

Against this background, there have been updated GHRs published since, but they have always only been a guide for summary assessments to which suitable enhancement can still be applied. Solicitors are still allowed to make a profit; the process has perhaps become a little less transparent but the principles remain the same. There are other forces too which should be taken into account such as the fact that some firms act on a CFA-lite basis, meaning they will not be paid at all for fees not recovered. Others acting on a CFA in a personal injury case for example with a success fee deductible may be limited by the statutory cap against damages and in any CFA case would have to wait until the conclusion of the case before they were paid. Defendant firms are in a way more fortunate in that they are usually paid regardless of the outcome, can bill monthly on bulk work and are often able to charge lower rates to their clients as a result.

If the GHRs were designed to be used in summary assessments in straightforward cases, there should be consideration given to the fact that fixed costs are soon to be introduced for all cases where damages exceed £100,000. In particular, personal injury and housing cases which are not subject to fixed costs may involve a far greater degree of complexity and significant importance to the individuals involved. Adjustments should therefore be made to account for the cases not subject to fixed costs.

There are some within the legal profession who might argue that working from home is a relevant factor. The ACL does not consider this to be the case. Due to the very nature of hybrid working it would not be appropriate to make adjustments for homeworking. An office may operate with staff in five days one week two days another, such is the nature of hybrid and agile working. It should make no difference whether the work was completed physically in the solicitor's office space or remotely.

Most members of the ACL believe that home working will in fact have little impact on overheads. It is true that most firms have adopted some form of hybrid working model but overheads such as rentals, employee salaries and IT are likely to remain constant regardless of whether a solicitor's employee completes some work at home or even on the train home. Increasingly solicitors' firms are using central postal addresses as far more communications

are electronic. This may be because employees are working from home and are not always in the office to receive physical post. There are likely to have been some savings here in terms of postage and DX costs but we do not have evidence to quantify such likely savings and what proportion of the overall overheads they would represent.

It is also probably too early to say that home working is here to stay. There are some indications that firms are increasingly encouraging employees to work in the office more often, to encourage greater engagement, teamwork and ultimately productivity. We could well see a greater shift towards office-based working in the near future. All things considered any downward shift in GHRs to reflect home working is unlikely to be justified without proper long-term assessment and evidence.

Arguably more important than location is the nature of the work. Reverting back to the background to GHRs as set out above, the cost of employing a solicitor in a practice could be a relevant consideration. There are highly skilled specialist solicitors throughout the country who for certain types of work are remunerated with salaries comparable to those which in year gone by were only to be found in London. This is a factor that could be considered on a case by case basis. To formulate differing rates for different types of work could create greater scope for claimants to be more creative and defendants more argumentative over definitions.

Market forces should be allowed to develop. Fixing GHRs could be damaging and seen as an attempt to fix the market. The GHRs would no longer be guidelines and more court resources and disproportionate costs would potentially be wasted. While solicitors could charge clients different rates to 'fixed' hourly rates, this could lead to more Solicitors Act 1974 assessments and ultimately further cost to claimants and that cannot be in the interests of access to justice.

The ACL's position is that GHRs should continue to apply in their current format and reviewed on a regular basis.

In addition, the ACL's view remains that costs lawyers should be recognised within the GHR. This was originally a recommendation that was included within the CJC Costs Committee's Report to the Master of the Rolls on Recommendations on Guideline Hourly Rates for 2014. The committee previously recommended that 'Costs Lawyers who are suitably qualified and subject to regulation be eligible for payment at GHR Grades C or B, depending on the complexity of the work.' The ACL remains of the view that this recommendation should be included explicitly within the GHRs 'fee earner' category. Costs Lawyers are regulated professionals and are qualified to conduct reserved legal activities pursuant to the Legal Services Act 2007. The ACL refers to the comments made by Stephen Mayson in his report on 'Reforming Legal Services: Regulation Beyond the Echo Chambers' that advised that costs activities should be restricted to costs lawyers to ensure that 'harmful dabbling' is avoided and to ensure that there is greater consumer protection when dealing with the issues of costs. The ACL considers that one method of assisting this would be to ensure that Costs Lawyers are enshrined within the GHRs to reflect their specialism and underscore their value to the process. Furthermore, the ACL considers that such an inclusion should not be limited by the recommendations made in 2014 but should be extended to reflect that there are complex costs issues (with key costs cases regularly being heard by the Court of Appeal) that warrant Grade A rates.

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

Given the reasons already provided, the GHRs should remain a starting point for assessments However, the ACL's view is that fixed recoverable costs should not be extended beyond their current form.

2.3 What would be the wider impact of abandoning GHRs?

This is not supported by the ACL. The general consensus within the costs profession is that a form of chaos would ensue. There would be less certainty and a lengthy evidence based assessment could be necessary on almost every case. Judges might find difficulty in deciding what a reasonable and proportionate hourly rate should be and the whole assessment process becoming far more complicated. The risk there is that satellite litigation surrounding hourly rates could increase exponentially. That in itself could increase litigation costs between the parties. On summary assessments there would inevitably not be sufficient time for arguments on hourly rates and more cases could be unnecessarily referred for detailed assessment. The GHRs should continue to serve their purpose, to act as a guideline on summary assessments.

Guidance on hourly rates is helpful as has been the case for many years. We suspect the judiciary would agree. We need to retain flexibility on hourly rates to allow for discretion but on a case by case basis as already happens and has happened for many years, even pre Woolf. It allows parties to agree and predict the likely recovery of costs, thus reducing the need for judicial ruling on hourly rates.

It should also be remembered that while the court will not make a ruling on hourly rates when approving a costs budget, inevitably hourly rates will be taken into account. The judges conducting costs management hearings are not necessarily experienced in conducting detailed assessment hearings, some conducting assessments might not be familiar with what civil litigation practitioners charge in the marketplace. Without GHRs there is a danger either way that the judge will have to rely on memory e.g. in relation to what had been allowed for another firm in the same locality and it is not impossible that such decision making could be based on inaccurate or outdated recollection. Even if the GHRs were not published officially it is possible that unofficial GHRs would continue to exist but without any degree of verification or control. It has been suggested that in such a scenario wholly reliant on discretion, receiving parties might be attempted to 'forum shop', taking their assessments to a different court where they might find a more generous judge. The GHRs provide a central source for all to use and to maintain consistency regardless of the court in which a matter is being heard.

As the feedback from the last GHR review suggests, receiving parties rarely ever produce evidence in support of the overheads element to justify enhanced hourly rates, not even the most rudimentary expense of time calculation. In this regard the pendulum may have swayed too far the other way in that receiving parties rely too heavily on the GHRs when deciding the rates to charge their clients and/or the opponent.

From a consumer perspective there is the undesirable possibility that firms would enter into retainers with unknowledgeable clients with artificially high rates, simply so they could charge higher rates to the opponent, knowing that they would never charge the same to their clients. It is reasonable to assume that GHRs could benefit clients, to assist them with making more informed choices when choosing which firm to represent them.

Even in cases where only fixed costs are recoverable it is quite conceivable that many firms will continue to charge clients the shortfall in unrecovered costs and base success fee charges on the actual hourly rate charge rather than the fixed recoverable costs. In that situation GHRs

could play a significant role as the number of costs assessments could increase, but on a solicitor / own client basis.

Proportionality should not be overlooked. Regardless of the amounts specified within any GHRs, the court still has discretion to rule on disproportionate costs. If hourly rates claimed are deemed proportionate for the type of work, the resultant costs would be closer to a proportionate figure, irrespective of grade or location.

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

The majority of ACL members feel there should be a review of the GHRs at least every two years, if not every year.

The reviews should be index-linked to ensure that increases are predictable and transparent. The ACL supports the proposition by Sir Rupert Jackson in his 2017 report to apply to SPPI, being the index closest linked to legal services.

2.5 Are there alternatives to the current GHR methodology?

There may well be alternatives but the existing methodology (i.e. average overheads with profit element applied) has proved reliable thus far and for many years. The last GHR review applied hourly rates as allowed on assessments. This is the established principle on its head, and arguably flawed. They were calculated mainly with reference to what was already being allowed and, therefore, infected by the previous GHR which were ten years out of date.

Hourly rates must be viewed having regard to time spent and proportionality generally. Some would suggest that guideline rates can be a blunt tool that reward inefficiency and fail to recognise expertise.

One of the issues with GHRs is that they do not accurately not reflect the legal market. There is a perception of widespread ignorance that clients supposedly do not pay anything and have no interest. In cases where clients are more likely to bear the full costs themselves e.g. in family proceedings or probate, market rates develop as clients are more likely to shop around. There is no evidence to suggest that firms doing that type of work limit their fees to those set out in the GHRs and neither should they. To impose fixed GHRs on solicitors would be to fix markets.

There is a big world outside clinical negligence and personal injury. The new GHRs will potentially cause significant issues for access to justice particularly to SMEs and those who can afford a lawyer at the market rate but who get punished by woefully inadequate recovery rates.

One costs lawyer reported routinely seeing extremely complex clinical negligence and personal injury claims where the hourly rates charged by specialists face significant reductions on recovery whereas run of the mill contract disputes do not see comparatively similar reductions.

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 is the potential for the use of technology to provide a more streamlined process that will ultimately reduce the costs incurred by both sides. However, it is currently too early to advise by how much or how this will impact on the rate of claims that are resolved without recourse to issuing proceedings.

Stakeholder engagement is key with any development in this area. For example, the recent roll-out by HMCTS of the Damages Claims Portal where no API is being developed by the MOJ to link claimant and defendant case management systems to the portal has lead to additional work in the process and not delivered a time saving.

There is a concern that should the costs provisions associated with the digitalisation of dispute resolution result in many claims becoming uneconomic for solicitors or other legal professionals to be involved then it could result in the adverse of the intended outcome of reducing the amount of claims that result in litigation before the Courts. This is because, from anecdotal evidence, in disputes that arise between two lay persons it is likely that, without formal legal advice regarding the associated risks and costs consequences of proceeding to litigation, they will 'want their day in Court'.

It is this inherent concept of receiving justice through the legal system that most lay people will seek when commencing claims and if there is not sufficient access to professional legal advice it could result in an increase in unmeritorious claims being brought and potentially a significant number of litigants in persons being liable for costs which they were unaware of.

There are also concerns regarding access to justice if digitalisation of processes is used as a reason to reduce costs in the form of a significant 'inequality of arms'. Most larger firms, including Insurers, can manage such claims through the economies of scale of turning over very high quantities of claims.

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

The current pre-action protocols and portals already utilises a significant number of formulaic procedures and submissions such as the Claims Notification Forms. It is therefore imperative that any further digitalisation of these processes should ensure that they are user friendly.

Furthermore, for additional digitalisation to work it is strongly recommended that there are strict and clear costs consequences for all parties that default in respect of the relevant rules and deadlines set out.

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?

43% of the respondents considered that there was no need to amend or reform the process for party and party costs whilst 26% didn't know. Most of our members consider that the current Part 8 process is adequate and is relatively costs and time effective. Our membership considers that the introduction of provisional assessment to have been a particular help in dealing with lower value costs disputes and would be potentially beneficial if it applied to all pre-issue costs claims.

However, our membership considers that there needs to full and in-depth review of the Solicitors Act and the mechanism for dealing with solicitor own client costs. The current provisions are archaic and do not reflect the current legal environment, especially post-LASPO. A detailed review and consultation is the only method that we consider to be appropriate to ensure that the correct balance is struck between client protection and certainty for solicitors.

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

From a funding perspective, a key distinction between contentious and non-contentious business is the conditional fee agreement and damages-based agreement (DBA) compared with the contingency fee agreement.

The former has had regulation which manages the operation of the agreement with 2013 being the last round of significant changes to these types of funding arrangements as against the latter which has had no significant change since its introduction under the Solicitors Act 1974.

The ACL recommends that this be an area that is reviewed further and whether the distinction is retained or not, consideration as to whether these types of arrangements should be reformed. Furthermore, the ACL considers that the Solicitors Act itself may require review and an update to ensure that it is fit for purpose given the significantly changed legal landscape we find ourselves in. Such a review should be subject to consultation with the main aim of the review to be to simplify the Act whilst simultaneously avoiding the onerous and unworkable regulations which are currently associated with DBAs.

Finally, the ACL also considers it appropriate to await the outcome of the recent Court of Appeal case of Belsner v CAM Legal Services when considering the future of contentious/non-contentious business.

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?

The consequences of fixed costs are likely to be significant and while we are asked not to comment on the principle of extension of fixed costs, the negative consequences which are likely to follow the extension of fixed costs underly the very reasons the ACL is opposed to the implementation of extended FRCs.

Fixed costs will undoubtedly impact access to justice. Indeed the widened application of fixed costs is likely to impact access to justice significantly. It will be the lay client who suffers most with greater deductions from damages (for shortfall costs in addition to success fees) and other satellite litigation on interpretation of the Rules and paying parties still likely to raise challenges as we have seen with the fast-track fixed costs in personal injury matters. Costs capping or costs budgeting are by far preferable to fixed costs in the multi-track.

Likewise, some take the view that solicitors may become more reluctant to take on higher value cases if the likely damages will not take them outside of the fixed costs regime, thereby preventing, rather than assisting, access to justice. Much will depend on the level fixed costs that solicitors can recover. Otherwise, a culture of cutting corners in the interests of costs efficiency and process driven communication may reduce client care and even mean

claimants recover less in damages as it will not be cost effective to do the best job for the client.

Fixed costs encourage paying parties to behave oppressively during litigation and drag out cases to the point of financial exhaustion for claimants. Increasingly claimants are having to pay their solicitors for unrecovered costs out of their damages. Costs budgeting is by far a preferable route to fixed costs and allows greater scope for discussion with clients about costs and ways of minimising charges for unrecovered costs.

The 'escape' provisions envisaged by Sir Rupert Jackson are too restrictive. There should be greater discretion for cases to come out of the FRC regime. Additional work generated by vulnerability, complexity and parties' behaviour should be taken into account else would be claimants could find themselves either without representation or with a greater deduction from damages than a claimant in a more straightforward claim of the same value.

On the one hand there will be fewer budgets and CCMCs, the costs of which can be disproportionate in lower value claims. There is a concern that paying parties will attempt to use the level of FRC as a tool to limit costs in matters that are valued over £100,000 but settle at less than £100,000. Arguments already exist along these lines in personal injury cases which settle for less than £25,000.

By definition fixed costs will negatively impact the costs lawyer profession. There is likely to be a reduction in the work done by costs lawyers and in the absence of low value costs claims from the assessment process creates a potential barrier to entry for trainee costs lawyers entering the profession.

Clarification on the costs rules will be required for different types of work such as clinical negligence, judicial review and low value data breach claims.

There should be a cap on defendants' costs that may be recovered and this should not be in excess of FRCs a claimant may be entitled to recover.

<u>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.</u>

Fixed costs should not be extended. Over 70% of costs lawyers surveyed believe there should be alternatives to fixed costs in certain types of cases.

There should be as already suggested, a means of 'escape' more readily accessible, particularly where:

- vulnerability is involved, including children and protected parties;
- a party is legally aided.
- costs are/are likely to be unusually high, either due to complexity/unusual amounts of documents to be considered, numerous experts and /or other particular issues, and the 'swings and roundabouts' principle is not appropriate.
- defendant's conduct is an issue or there is evidence of oppressive behaviour.
- Multi-party cases (i.e. more than one Claimant or Defendant or both);

- Novel points of law or wider public interest issues are to be decided;
- There is to be a split trial e.g. on liability or limitation.
- Counterclaims
- Part 36 offers and late acceptance

There should also be provision for parties to agree that fixed costs should not apply and that costs budgeting or capping is more appropriate.

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.

No, costs capping has not proved to be successful and if anything has led to satellite litigation and encouraged additional costs building. We therefore cannot recommend there be any extension of existing costs capping arrangements.

END OF DOCUMENT