



Informing Progress - Shaping the Future

FOIL UPDATE

March 2021



Guideline Hourly Rates

FOIL obtains data by FOI request that confirms the figures behind the 2020 recommendations are fatally flawed.

The work of the CJC review group

The review of the Guideline Hourly Rates commenced in 2020 was controversial from the outset. The CJC working group, chaired by Mr Justice Stewart, decided to gather data in two ways, by asking the judiciary for details of the hourly rates awarded for a three-month period at the end of 2019, and asking the legal profession for details of hourly rates awarded or agreed over an 18-month period between 1 April 2019 and 31 August 2020.

FOIL's Costs SFT took the view from the start that the approach was flawed, writing to Mr Justice Stewart in September last year raising a number of concerns. FOIL argued that the methodology being adopted was very unlikely to produce comprehensive data, and the data received would need to be treated with a good deal of caution as it was likely to be skewed by untypical cases.

In the case of data from the judiciary, with only 1% of cases proceeding to detailed assessment, the information would disproportionately focus on the kind of exceptional cases which tend to require judicial assessment. The data from the professional was likely to be out of date by the time it was analysed and be unreliable as costs negotiations invariably focus on global costs rather than detailed consideration of hourly rates.

Even if reliable data were available, FOIL argued that basing further GHR on those awarded in the past failed to recognise the significant changes in working practices and business models since 2010 when the rates were last set (the 2014 CJC working group having found that the 2010 rates were overgenerous and should be reduced, with LJ Dyson MR deciding in 2015 that the 2010 rates should 'remain in force for the foreseeable future'). In particular, past rates would not reflect the transformation of legal practice as a result of the pandemic.

The CJC report and recommendations

The CJC review group published its report and recommendations on the rates in January 2021. The report noted the criticisms made of the methodology adopted but declined to alter the approach or pause the review. It recognised that the data obtained through its chosen methodology was likely to suffer from shortcomings, including that figures awarded on detailed assessment may not reflect those paid on agreement; that many costs agreements do not rest on an agreed hourly rate, and that hourly rates awarded by judges may be “contaminated” by reliance on the 2010 rates uplifted for inflation.

Despite these concerns, the review group put forward recommendations for an average increase in the rates of 18%.

The review data

To enable it to undertake its own detailed analysis of the data submitted by the judiciary and the profession, following the publication of the report the FOIL Costs SFT made a Freedom of Information request to the CJC for the two spreadsheets containing the data. The information requested was provided by the Judicial Office and appears here [Consultation Responses and Lobbying - Forum of Insurance Lawyers \(FOIL\)](#). It bears out FOIL’s concerns at the unrepresentative nature and unreliability of the data on which the review has been based:

- The combined data from the judiciary and the profession reinforces the view that the dataset upon which the analysis has been based is very small. There are only 754 cases on the spreadsheets. In 72 of these no details are given of hourly rates agreed or awarded, rendering the data useless. The effective combined dataset is therefore only 682 cases.
- Looking at some specific areas, just 254 personal injury claims; 205 clinical negligence claims; 23 Court of Protection claims; and 16 abuse claims are included in the judicial figures. These numbers are tiny compared to the volume of litigation in these areas and are almost certain to be unrepresentative.
- Across all types of litigation recorded in the data, 19% of the cases have a value of over £1m, entirely unrepresentative of the value levels of litigation within the civil justice litigation process.
- With regard to personal injury claims (the largest claim type within the data) 22.5% of the cases have a value of more than £250k, with just over 10% of those having a value in excess of £1m, significantly over-emphasising higher value claims.
- With regard to clinical negligence claims (the second largest claim type within the data) 22% have a value of over £1m, resulting in an unrealistic overemphasis on higher value claims.
- Only 177 cases have been put forward by the judiciary and of these 110 are from the SCCO. Only 25% of the SCCO cases are from National Bands 1,2 and 3: the majority are London bandings, resulting in London cases being significantly over-represented.
- Details of the type of costs assessment undertaken are provided for 671 cases. Of these, 383 were dealt with by way of provisional assessment (57%); 72 were dealt with by summary assessment (11%); and only 213 were the subject of detailed assessment (32%). Therefore, two-thirds of the cases on which the recommendations were based were the subject of only rough and ready costs analysis.

- DWF provided a substantial amount of data. As indicated in para 4.14 of the report, the data from DWF was tabulated separately and not included in the spreadsheets. If it had been included it would have amounted to almost 40% of the total data submitted by the legal profession. It is noted in the report that the DWF rates are in general lower than the rest of the data, being more comparable to 2010 GHR, but this significant amount of data has not formed part of the analysis and was used only to justify in general terms the recommended rates in the report. Although the DWF data was presented in a slightly different format, with such small amounts of data being available overall, the exclusion of a significant quantity of data likely to have reduced the average rates awarded is a serious omission.

The consultation

FOIL will be responding to the consultation on the report which closes at 4pm on 31 March. Members and insurers are urged to submit their own responses, to ensure that the views of defendant representatives are heard fully. Overall, FOIL will argue that the data obtained is so flawed and unreliable that it cannot support any recommendations for change and that therefore 2010 rates should remain in place until an effective review can be undertaken. In brief, FOIL's views on the questions raised in the consultation are as follows:

On the methodology

- Although the cost of carrying out the work has always been central to an assessment of costs, the review does not include any 'expense of time' analysis.
- The changes that have taken place in legal practice since 2010, including the Jackson reforms, LASPO, changes in business models and technological developments since 2010, are not reflected in the review.
- The PWC annual survey of law firms gives a snapshot of the profession which shows that chargeable hours worked and profitability have increased since 2010, whilst the percentage cost of business support, staff and property have all decreased. The focus on hourly rates awarded or agreed fails to reflect this.
- Basing GHR on past costs awards and agreements approaches the issue from the wrong angle: the focus should be on whether the rates present a reasonable return for the receiving party.

On the recommended changes to areas London 1 and London 2

- The data obtained for London 1 was infinitesimal – just 41 cases – and the majority were concluded by summary assessment, which will inevitably be light-touch.
- The data obtained for London 2 was much less, and therefore almost non-existent. The gap has been filled by data from London 1 firms and from the Forum of Complex Injury Lawyers.
- Any analysis of the above data is inherently flawed and the recommendations made are therefore unsound.

On the recommended GHR set out in para 4.18 of the report.

- The methodology that has been adopted is so flawed there is no evidence to support an increase in the rates.
- If, despite the significant shortcomings of the evidence, the Master of the Rolls is prepared to accept changes to the GHR, the recommendations are too high. The proposals must be viewed against the evidence that is available on the cost of time and the profitability of law firms since 2010, and the wider economic background. Although there is no evidence to support any change, in the event that recommendations for a rise in the rates are accepted, increases should be capped as a maximum of 10% for any band or grade.

On the specific question of whether the rate of £186 for London grade D is too high; if so, at what rate it should be set and why?

- The proposed rate for Grade D is too high and is significantly out of step with all other areas and grades. Our view, as set out in response to the answer above, is that the data does not support any increase, but if the rate is to go up it should be to no more than £150.

On the recommended changes to the geographical areas in Section 5 of the report and the recommendation to have two national bands.

- We agree with the suggestion to do away with National Band 3 as the rates are the same as National Band 2. We agree that existing National 1 counties and identified centres should remain in National 1, with the remainder in National Band 2.'

On the recommended changes to summary assessment form N260.

- We agree the recommended change as long as the requirement is for the signatory to provide the name and location of each and every fee earner for whom work is claimed in the N260 or in the electronic bill of costs.

On the recommended revisions to the test of the Guide in Appendix J

- The work of the Senior Costs Judge in bringing the Guide up to date is very impressive, with accessible and clear wording. However, in the redrafting some changes of meaning have inadvertently arisen which may be misleading:
 - The new wording could give rise to the misconception that the rates are minimum figures: the wording should allow for the possibility that lower rates may sometimes be appropriate.
 - The new para 29 codifies the practice of enhancing even junior fee-earners' hourly rates. The wording should recognise that in complex litigation a rate in excess of the hourly rate may be appropriate for Grade A, and sometimes for Grades B and C. The wording should make clear that there should be a clearly identified reason before a significantly higher rate is allowed.
 - The balancing corollary should be added into para 29: in minor and straightforward litigation an hourly rate below guideline figures may be appropriate for all grades.

Future reviews

It is of concern that the report states that the rigorous, evidence-based approach to setting the GHR envisaged by the Foskett Committee in 2013 is "*simply not possible*". Whilst recognising the weaknesses of the approach adopted this time the CJC review group makes no recommendations on how the process might be improved for the future. In addition to addressing the current review and recommendations through the consultation process, the Costs SFT has written to the Master of the Rolls, seeking a meeting with him to press for initiatives that would put future reviews on a firmer footing. FOIL would like to see the creation of a CJC working group to consider how data might be collected in future: the inadequacy of the data collection in the last two reviews cannot be allowed to continue.

The spreadsheets disclosed to FOIL by the Judicial Office are available on the FOIL website under 'Consultations and Lobbying'.

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