



Informing Progress - Shaping the Future

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Civil Justice Council (CJC) Costs Review

IN BRIEF

Yesterday, the CJC published its long-awaited final report, following the consultation and review of a wide range of costs related topics, which began more than two years ago. Increasingly the review has been set against the background of the digitalisation of court processes. The recommendations made under each of the items under review are summarised below but only those of relevance to FOIL members.

Costs Budgeting

Costs budgeting should be retained but with recognition that 'one size does not fit all', i.e., a more tailored approach to costs management should be permitted to suit different types and/or venues where litigation is conducted. The report 'tentatively' identifies personal injury and clinical negligence work (covered by QOCS); claims processing in the Business and Property Court; and other specialist work as areas where the appropriate costs management regime may be different from the norm and from one another.

Where QOCS applies, it is recommended that in most cases full budgets should be dispensed with for defendants (particularly in clinical negligence cases involving NHSR) but with only the Precedent H front sheet to be provided to the claimant and the court.

It is proposed that for Part 7 multitrack cases valued at between £100,000 and £1M, there should be 'costs budgeting light' to avoid the risk of disproportionate costs being incurred in full budgeting. A

The CJC has published its final report covering proposals relating to Costs Budgeting; Guideline Hourly Rates; Pre-Action Digitalisation; and the consequences of the extension of Fixed Recoverable Costs.

lighter approach to costs budgeting should also be piloted in the Business and Property Courts both for claims above £1M and those under £1M.

One proposal which will probably be welcomed more than others is that in appropriate cases there would be no requirement to have a costs and case management hearing (CCMC) but instead to adopt a staged approach. Where necessary a case management hearing (CMC) would take place and budgets would then be set in the light of the directions given, potentially leading to more agreement on budgets. There would still be a need to exchange costs information before the CMC but there would also be the potential then to have cost management hearings dealt with by specialist costs judges.

The concern around this proposal is in which types of cases the staged approach should be available, given that in some areas CCMCs are not thought to cause problems or result in delays.

Guideline Hourly Rates (GHRs)

GHRs are viewed as having a useful purpose, as a starting point for summary and detailed costs' assessments, provided they reflect 'commercial reality/the market'. They should therefore be updated frequently. The report therefore recommends retention of the current GHRs subject to 'some minor tweaks' but with 'appropriate annual index linked increases' (using the Service Providers Price Index) but with a more detailed review in about five years. That review would look at a number of features felt by some to have been omitted from the last review, including working practices and the impact of IT, along with the most appropriate methodology to be adopted for the future. All of these issues should be considered by a working party.

In the meantime, it is felt that the test to be applied before a party is permitted to depart from GHRs should be clearly stated. As yet there is no agreement as to what that test should be.

Pre-Action and Digitalisation

Costs reform is seen as a means by which parties should be encouraged to engage in pre-action processes, whether digital or analogue. There is therefore a recommendation that with new pre-action protocols (PAPs), there should be provision for limited costs recovery pre-action, where settlement is achieved. With existing pre-action protocols, which provide for recovery of costs on settlement, a pilot is suggested to test the feasibility of introducing a rule so that certain types of disputes are deemed to be 'issued' (but no court fee would yet be paid) at the point the relevant PAP is commenced. CPR 46.14 would need to be amended to allow for the courts to deal with costs issues where parties settle the claim without proceedings but cannot agree the costs.

Consequences of the extension of Fixed Recoverable Costs (FRC)

The report makes it clear that the focus here was on considering the wider implications of the changes to FRC. There was a general consensus with the working group that FRC should be set at the right level and be subject to regular review and uprating in line with inflation. The report also opines that full account needs to be taken of the implications for the party who will have to pay their lawyer's costs, including clarity about what those costs will be and whether that party may have to pay more than is recovered either (i) in damages, or (ii) from the other side.

This is seen as highlighting the relationship is between recoverable costs and claimant compensation, and has a particular significance in areas of routine civil litigation like personal injury.

The likelihood of this occurring could increase from the extension of FRC (depending on the levels of FRC), as well as potential changes to GHR and costs budgeting.

FOIL President Nicola Critchley comments:

I had the pleasure of being a member of the WG and this is a considered report with a number of recommendations that FOIL colleagues will review and provide commentary on in due course. As a general observation it is pleasing to note that costs budgeting is here to stay and the acknowledgement of the CJC WG that "one size doesn't fit all".

The decoupling of CMCs and budgeting hearings is welcomed. The FOIL Costs SFT has some concerns regarding the proposals for a "costs budgeting light" pilot based on front sheets only, as well as for QOCS cases, preferring the full budgets for the transparency and detail it provides for all parties.

In terms of GHR FOIL supports the 5-year substantive reviews but would have preferred inflationary reviews every 3 years rather than annually, in line with LJ Jackson recommendations. It is noted GHR should extend to counsel's fees, with the risk recognised in the report of an increase and should be approached with care.

The recommendation regarding costs reform pre-action needs careful thought and consideration and could result in radical reform. It works well within the Portals and current digitised systems but FOIL would have serious concerns if this was widely extended.

There will be continued wide scale reform in costs and costs reform remains a key area of focus, given the amounts involved and the impact on indemnity spend.

The full report may be found at: [Civil Justice Council Costs Review – Final Report - Courts and Tribunals Judiciary](#)

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