

September 2022

## **MPS submission to the Civil Justice Council consultation on costs**

### **Executive summary**

MPS welcomes the opportunity to respond to the Civil Justice Consultation on costs. We are also thankful to have participated in the discussion on the 13<sup>th</sup> July 2022.

As a medical defence organisation, MPS has a particular view on this topic which applies mostly to clinical negligence claims. The rising cost of clinical negligence has a very significant impact on healthcare professionals not covered by a state-backed scheme, including doctors working in private healthcare and dentists. Responsible and well-managed defence organisations such as MPS have an obligation to reflect the rising costs of clinical negligence in membership subscription fees that healthcare professionals pay so we can be in a position to defend members' interests long into the future.

If the cost for healthcare professionals to protect themselves from claims rises too high, this not only impacts the healthcare professionals concerned it could also have a detrimental impact on the cost of healthcare provision and potentially even the viability of providing some healthcare services.

Given the impact that legal costs have on the price that healthcare professionals pay to protect themselves against claims, we are keen to ensure effective means are pursued to control costs. This is the reason why we advocate for cost budgeting.

We also fully support the principle of fixed recoverable costs (FRC) for claims of clinical negligence. We are pleased that the Government will introduce FRCs for claims up to a value of £25,000 but we would like this to be extended to claims up to a value of £250,000. This will significantly facilitate the resolution of claims, reducing the burden on the court and unnecessary delays.

### **Questions**

#### **Part 1 – Costs Budgeting**

##### **1.1. Is costs budgeting useful?**

Yes, MPS believes that cost budgeting is useful to control costs. There is a risk that if costs budgeting is removed, we would lose the forward planning on costs and the claimant costs could end up being considerably higher as the claim settles.

From our experience, costs budgeting is useful as you can attach a cost to certain phases of a claim. This can encourage parties to settle claims earlier, having regard to the costs of the trial related phases. The transparency of costs via the budgeting process can assist in the making of case management decisions. For example, in clinical negligence claims, there is often a need to engage a number of different experts. Sometimes there is disagreement between the parties on

whether the involvement of certain expert disciplines is reasonable. When the Judge is considering these arguments, understanding the potential cost of engaging certain experts can be a significant consideration. There are times when having considered the Costs Budget, the judge concludes that engaging a certain expert may be a disproportionate expense.

We understand that the main alternative to budgeting is to revert to the previous use of cost estimates. However, we believe some caution must be applied as the previous use of estimates demonstrated, there were arguments over reliance and a retrospective approach taken to costs which previously led to satellite litigation and estimates routinely being exceeded by 20%.

It appears that some of the calls around review of budgeting is due to delays in the court in listing CCMC's and the fact that Budgets do take a large proportion of time during the CCMC's . In our view, the introduction of fixed recoverable costs (FRCs) will alleviate a lot of this issues as it will reduce the volume of claims subject to costs budgeting and thereby the burden on the court. Further, if the process is tweaked to improve efficiency, then this issue should naturally resolve.

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

MPS believes that a change that could be made is to remove the obligation on paying parties to prepare Costs Budgets. Removing this will reduce some of the time associated with the process and it is widely considered that a comparison of receiving and paying party Budgets is of limited use. Further, if the court was able to do the budgeting exercise on paper or by remote hearing as a default, it will help with cost control as often there is a significant cost attached to travel and attendance of costs advocates,

## **1.3 Should costs budgeting be abandoned?**

No, MPS believes that costs budgeting should be retained for the reasons expressed when responding to question 1. In our view, cost budgeting is an effective way to control cost.

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

MPS believes that cost budgeting should continue in a “default on” basis. In our view, if it becomes a “default off” there is a risk that the majority of cases would be excluded due to disagreement between the parties over whether Budgeting should be utilised. It is important to bear in mind that the purpose of Costs Budgeting was to control excessive costs and with an acknowledgement that receiving parties had difficulty historically in doing this in the absence of sufficient controls and direction.

## **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?**

MPS believes that cost budgeting should continue. The only changes we would like to see is fixed recoverable costs being applicable to claims up to a value of £250,000 which will as a result see cost budgeting not applicable to those claims.

## **Part 2 – Guideline Hourly Rates**

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

MPS believes that GHR should continue to serve as guidelines. We therefore believe they should be treated as such, and be departed downwards when necessary depending on the value and complexity of the claim. These GHR were prepared based on evidence from multiple types so in our view, they shouldn't be treated as the starting point but as already mentioned, be used to depart downwards.

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

As above, MPS believes that GHR should be treated as guidelines and not as a starting point in costs assessments but rather be departed downwards as necessary.

We would also question the relevance of these rates being linked to locality. Even more so now, with the rise in remote working, we believe that locality should be of decreasing relevance and type of claim and complexity should be the overriding factor.

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

MPS has long advocated for fixed recoverable costs (FRCs) to be applicable for claims up to £250,000. We believe that these should be implemented instead of GHRs for claims up to this value.

In our view, abandoning GHRs in favour of FRCs will only translate in a decrease in the cost of litigation and therefore cost budgeting.

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

MPS has no comments on this question.

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

MPS has no comments on this question save for comments made in relation to question 2.2

## **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?**

MPS has no comment on this question

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

MPS has always been supportive of pre-action protocols and Alternative Dispute Resolution as a principle.

Cost budgeting only applies after a certain date, so if there is a way to apply cost budgeting to the pre-action stage that would certainly be beneficial.

### **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?**

Over time, we would expect the extension to fixed costs across claims of lower value and complexity to address the majority of concerns about pre issue costs.

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

MPS has no comment on this question.

## **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?**

MPS believes that Fixed Recoverable Costs (FRCs) increase transparency and proportionality for all parties. It also benefits both parties financially, as it would hopefully lead to more claims settling without legal proceedings and therefore avoid the need for the costs management process. So, effectively it would reduce the strain on the cost for budgeting.

We would like to see FRCs extended to claims up to a value of £250,000, as this will considerably reduce the cost of litigation.

### **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.**

MPS has no comment on this question.

### **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.**

MPS does not believe this is applicable or appropriate for clinical negligence claims.

## **About MPS**

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

## **Contact**

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

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