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Preamble

Stewarts is the UK's largest litigation-only solicitors' firm and specialises in high value and complex disputes. The firm acts for both corporate and individual clients and has leading and specialist departments in aviation and international injuries, clinical negligence, commercial litigation, competition litigation, divorce and family, employment, financial crime, insolvency, international arbitration, investor protection litigation, media disputes, personal injury, policyholder disputes, tax litigation and disputes, and trust and probate litigation.

Stewarts has strategic partnerships in place with other specialist solicitors' firms across the world, enabling its clients to take a global approach to litigation. The firm is top-ranked in both the Legal 500 and Chambers and Partners.

Stewarts appreciates the opportunity to respond to the CJC working group's consultation on Costs. Our submissions below are all based on the assumption of the implementation of the proposed change of FRC to £100,000, which will helpfully remove a large tranche of cases from the cost management and cost assessment regimes. Our submissions are also focussed on the types of complex and high value commercial and injury litigation in which we exclusively specialise.

Executive Summary

Costs budgeting and consequences of extending the fixed recoverable costs regime

Multi-track litigation with claim values above the incoming £100,000 threshold for FRC tends to involve complexity and variation that it would be difficult or impossible to fairly constrain within any further increase to that FRC threshold. Cost budgeting is a much better and fairer method of managing cost between litigants in such high value claims.

Whilst the requirement to file budgets has improved transparency between the parties concerning costs and consequently has promoted earlier resolution of claims, cost management by the courts has proved an unwieldly process in many claims. It has caused serious delays to the early stages of proceedings, with the problem particularly acute in the KBD where CCMCs often do not take place until 6 or even 12 months after Defence filing. That delay is an unacceptable impediment to justice. It is also reflective of the underlying lack of court and judicial resources to be able to deliver cost management in a timely and efficient manner. This seriously detracts from the good standing of our courts and their attraction as an international dispute resolution centre. Absent major investment in the courts and the appointment of many more Judges, the current system of "default on" cost management for cases with a value below £10m is unsustainable.

The approach of different Judges to CMOs and the resultant outcome is also too variable. This in part reflects the fact that there is insufficient court time for them to hear full arguments or give full consideration to the difficult issue of trying to predict the likely costs in each phase of complex litigation. This forces some Judges to make rapid intuitive decisions, sometimes more based on their own experiences and preconceptions than on careful analysis of the issues in the case. This can result in rough justice to the parties. It is of no comfort to the litigant whose cost recovery from the paying party was unfairly restricted that another litigant before a different Judge may have got a much better outcome from cost management.

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Consequently, we propose retaining 'default on' cost budgeting but shifting to 'default off' for cost management. So parties' would continue to prepare and exchange detailed (Precedent H) budgets (providing the necessary transparency). <u>Guideline hourly rates (GHR)</u> Much of the debate around GHR approaches the issue from the wrong end of the telescope. GHR controls what successful litigants can recover from their opponents, it does not define what the clients pay their own solicitors. If set below market rate it leaves those clients, who suffered a legal wrong, having their compensation reduced to meet the resultant costs shortfall. That erodes the full compensation principle. Nor is GHR intended to be a form of restraint on what solicitors charge, of a type that does not to our knowledge apply to any other profession. A sub-component of the fundamentally flawed expense of time argument is whether recent changes to working practices of solicitors should affect GHR. Unless and until any such changes result in reductions to the average rates paid by litigants for their legal services, those changes are irrelevant to GHR. They are also factually flawed, as such evidence as there is indicates that solicitors in recent years have continued to face significant increases in the three biggest components of their overheads; wages, offices and IT. We agreed with the CJC 2021 working group that the intention of the rates is to provide a simplified scheme and the guidelines are intended to be broad approximations of actual rates in the market. However, we still have concerns that the methodology that fixed the 2021 rate by reference to the average of rates assessed involved circularity, as those rates were influenced by arguments based on the outdated GHR 2010. It resulted in GHR 2021 rates that were 15% lower than average claimed rates for the historic cases analysed. They are also lower than CPI, let alone SPPI Legal, in most bands and grades. That strongly suggests that judicial moderation influenced by the legacy of GHR 2010 was and is out of step with market inflation. A switch to a methodology based on rates claimed data would not be unfair to paying parties as they would still be able to raise GHR arguments against anyone who instructed the 50% of solicitors who charge above the average market rate. It would also enable a much larger data set to be gathered, including filling the void of a statistically valid data set for genuine London 1 cases and for consideration to be given to creating an equivalent National band for heavyweight commercial disputes. Annual indexation of GHR is very important. It would avoid a repetition of the unfairness that has been faced by litigants who have proved they suffered a civil wrong over the last 10 years. When it comes to indexation the principal of close matching is paramount; SPPI Legal has statistical validity and is the closest match for inflation of solicitors' hourly rates. We estimated the data set gathered in the CJC review if 2021 would on average have had a mid-point in January 2019. From Q1 2019 to Q2 2022 (the latest available) SPPI Legal has risen 15%. If the first revision is not implemented until Q1 2023 then four years will have elapsed and the inflationary factor for which a revision is required will be higher. We urge this CJC review group to recommend that the annual uprating of figures take place now with a full review every 10 years. That full review should consider not just what costs Judges allow, but it should also look at the question of what rates were actually claimed, because GHRs are intended to reflect the real market rates, the average price actually paid by litigants. To inform the next review we suggest that HMCTS implement a system to	

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record the type of data collected by the CJC in 2021 for all cases in which a bill, endorsed with a statement of truth/accuracy, is filed with the court. We suggest that the criteria for summary assessments be amended to exclude claims for costs in excess of £100,000, most of which would be London 1 cases. They should instead be assessed by a specialist cost Judge either sitting alone to or as an assessor alongside the assigned Judge. We further suggest that the guidance at paragraph 29 in the Guide to the Summary Assessment of Costs be amended (see further below) to clarify that, in exceptionally complex and/or high value cases, an enhancement could be up to 100% and could encompass Grade D. <u>Costs under pre-action protocols/portals and the digital justice system</u> Our only concern relating to the pre-action protocols is that there is very rarely any sanction imposed for non-compliance once the case is issued. Our experience is that cases settling pre-action almost always do so on either a global basis (notably for commercial disputes) or with costs agreed without any cost assessment by the courts (for our complex injury claims). We would be wary that any attempt to introduce rules of this type might cause more problems than they resolve, notably detract from the freedom to pursue ADR on an unfettered basis There are considerable advantages to digitisation, but implementation is complex and historically has not been a great success in the lower value and complexity end of personal injury claims. It is crucial that any digital reforms have an inclusive and user-focused approach. There is also the need to consider the very significant hidden cost of reform for solicitors implementing these systems. In principle the distinction between contentious and non-contentious business serves no proper purpose and is confusing to the public. However, it is our understanding is that any change would require primary legislation which the Government do not have on their legislative agenda. When there is genuine governmental intent to address these issues there should be a separate consultation considering the issues for a root and branch replacement of the Solicitors Act 1974 to bring it in to the modern age including making it understandable by members of the public.	
Part 1 – Costs Budgeting	
Is costs budgeting useful?	Aspects of cost budgeting have been useful, but overall our experience of cost management has been that it has caused more significant problems than it has solved. The requirement to file budgets has improved transparency between the parties concerning costs and consequently has promoted earlier resolution of claims. The Precedent H format, with phase by phase detail, has required parties to be more diligent, using a bottom-up approach methodology, than the previous cost estimates that were often prepared on an intuitive top-down basis that was less reliable.

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	The requirement for Precedent H to carry a Statement of Truth has ensured the parties' solicitors take the exercise seriously. Budget discussions between the parties rarely prove productive, in part because the parties are often proposing budgets based on differing directions and assumptions. There are frequently other barriers to agreement including significant mismatches between hourly rates if one of the parties has negotiated block rates for high volume repeat work, whereas the other is a one-off litigant. Many of the cost issues between the parties would require full argument in a detailed assessment process to resolve, but that is not possible nor appropriate at the BDR stage. So significant additional time is incurred without any benefit in all but a small handful of cases. Cost Management by the courts has proved an unwieldly process in many claims. It has caused serious delays to the early stages of proceedings, with the problem particularly acute in the KBD where CCMCs often do not take place until 6 or even 12 months after Defence filing. That delay is an unacceptable impediment to justice. It is also reflective of the underlying lack of court and judicial resources to be able to deliver cost management in a timely and efficient manner. This seriously detracts from the good standing of our courts and their attraction as an international dispute resolution centre. Absent major investment in the courts and the appointment of many more Judges, the current system of "default on" cost management for cases with a value below £10m is unsustainable. It would also discourage international parties from choosing English jurisdiction clauses in their contracts. Under the CPR the parties currently prepare and file a cost budget based on their own proposed directions and related assumptions. Commonly the opposing parties will conduct the same exercise, but with markedly different proposed directions/ assumptions (e.g. one party proposing a preliminary issues trial). This often results in each party then having to prepare a variant budget to cover their opponent's proposal. Then at the CCMC the Judge will commonly give directions that differ from both, which either requires rough and ready recalculations during the hearing or an adjournment for further revisions to the budgets. This process is patently inefficient and incurs far too much "costs of costs", which is ultimately detrimental to both the paying and receiving[1] party. The approach of different Judges to CMOs and the resultant outcome is also too variable. This in part reflects the fact that there is insufficient court time for them to hear full argument or give full consideration to the difficult issue of trying to predict the likely costs in each phase of complex litigation. This forces some Judges to make rapid intuitive decisions, sometimes more based on their own experiences and preconceptions than on careful analysis of the issues in the case. This

[1] As they frequently incur costs in excess of the 2%/3% cap with the excess often irrecoverable.

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	can result in rough justice to the parties. In high value claims with a cost budget of say £1m, before one Judge the CMO may allow say £900,000, whereas on exactly the same facts another Judge might allow £700,000. Many of our clients only have the misfortune to become caught up in complex and high value litigation once in their lives. They may be reliant on the outcome of the litigation for their future livelihood. The £200,000 differential highlighted by the above example illustrates how broad-brush cost management can do injustice and can seriously undermine the full compensation principle. It is of no comfort to the litigant whose cost recovery from the paying party was so seriously restricted that another litigant before a different Judge may have got a much better outcome from cost management. Only insurers and institutional defendants can play the numbers game based on large portfolios of litigation. All other litigants have to live with the orders made in their single case. One of the hidden causes of the differential in the above examples is the views of the Judge on the claimed hourly rates. Whilst the Judges know they are not to determine hourly rates at a CCMC (CPR 3.15(8)), they cannot ignore them altogether if they take the view they result in figures in each phase and in total which exceed a reasonable allowance. But under the current regime this judicial thinking is hidden and so cannot be appealed, nor revisited on a variation application, nor reconsidered when it comes to any negotiation or assessment of costs at the conclusion of the case. So, reverting to the above example, £100,000 of the reduction may in the cost managing Judge's mind have related to hourly rates they considered too high, but without having heard any submissions on the point. Later when the case resolves, it might end up in the SCCO where the cost specialist Judge, having heard submissions on the issue, may conclude that for the incurred costs pre-CMO an enhancement to GHR was warranted and allow the claimed rates in full. However, there is little if anything the receiving party nor the cost Judge can do at that juncture about the majority of costs under the CMO, as there is no record of the hidden hourly rates reduction by the cost managing Judge. So, this litigant has lost out by £100,000 as a result of an ineffective and unfair process. The amendments to the CPR in October 2020 relating to variations of CMOs were an improvement. However, the bar for securing such variations remains high ("*if significant developments in the litigation warrant such revisions*") and most litigants are put off from even making such applications, as shown by the relatively small number of reported decisions. We agree with FOCIS that CMOs are particularly problematic in cases involving Protected Parties as recent case law[2] suggests it may be difficult or impossible for the solicitor to rely on instructions from the

[2] *EVX v Smith [2022] EWHC 1607 (SCCO)* (https://www.bailii.org/ew/cases/EWHC/Costs/2022/1607.html) and *ST v ZY [2022] EWHC B6 (Costs)* (https://www.bailii.org/ew/cases/EWHC/Costs/2022/B6.html)

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	Litigation Friend to undertake work in excess of the CMO that are considered to be in the best interests of the Protected Party. This is primarily a problem for litigants lacking mental capacity as child cases are already excluded from the cost management regime. We also support FOCIS's proposal on the introduction of defined PTA codes for work on rehabilitation issues in injury litigation. Conversely, we accept that CMOs do reduce the incidence and scale of cost disputes at the end of the cases. It is helpful that the courts make much larger (typically 90%) payments on account of the costs allowed by the CMO. However, in many cases there is still an ongoing costs dispute, primarily relating to incurred costs, contingencies and any other costs beyond the CMO. In summary the process of preparing and filing cost budgets has been a positive development in civil proceedings, but cost management has caused too many delays, additional costs and variable outcomes to justify the modest benefits that it brings.
What if any changes should be made to the existing costs budgeting regime?	We propose retaining 'default on' cost budgeting but shifting to 'default off' for cost management ie: • Parties would continue to prepare and exchange detailed (Precedent H) budgets (providing the necessary transparency); • There would be no requirement for budget discussions between the parties, but no prohibition on parties doing that voluntarily like most forms of ADR; • The budget would be based on and would be filed with the court alongside each parties' proposed directions; and • The Judge/Master would then consider the budgets, in light of the directions proposed by all parties and make a decision whether or not a separate costs management hearing is required. This would also enable the judge to consider whether the directions are themselves proportionate. This process should apply to all cases over the fixed costs threshold, including those that currently have a claim value in excess of £10 million. The only exclusion would be for Protected Parties. It will greatly reduce the current delays in listing CCMCs and the amount of court time they take up whilst retaining the transparency required between parties in relation to costs being incurred. We suggest that it would in practice be relatively rare in London 1 cases for Judges to flip the switch and order a cost management hearing, but that is an important safeguard. In those rare cases we agree with the recent suggestion[3] of Senior Costs Judge Gordon-Saker

[3] https://www.legalfutures.co.uk/latest-news/senior-costs-judge-break-the-link-between-case-and-costs-management

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	that a Cost Judge be involved in that cost management hearing. In some actions with values exceeding £10m cost budgeting has scope to help level the playing fields and make it more predictable what level of ATE cover the Claimants really require. Absent such a procedure, there could be a real adverse impact on access to justice in such cases, notably in group actions with a David v Goliath inequality of resources.
Should costs budgeting be abandoned?	No, please see above.
If costs budgeting is retained, should it be on a "default on" or "default off" basis?	We propose retaining 'default on' for the preparation and filing of cost budgets but shifting to 'default off' for cost management as above.
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?	To implement 'default off' with discretion for Judges to list a costs management hearing after giving directions we propose the amendments (in green) to the wording of Rule 3.15(2) of the CPR: "… "*unless it is concerned that the litigation cannot be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made*". The PD to Part 44 at 3.1-3.4 already appropriately provides for the status of budgets that have been filed (only) if the case proceeds to assessment. However, we suggest PD 3.4 be extended to clarify that Judges may also consider filed budgets when exercising their discretion to make payments on account of costs under CPR 44.2(8).
Part 2 – Guideline Hourly Rates	
What is or should be the purpose of GHRs?	Guideline Hourly Rates (GHR) provide a start point as to what is a reasonable allowance between the parties when claiming costs. In virtually every costs dispute our clients have faced, the paying party has sought reductions in hourly rates with reference to GHR. Even when the matter proceeds to assessment and even if the costs Judge departs from the GHR, there are few if any judgments that suggest the costs Judge wholly excised them from the decision-making. This point is illustrated by the comments of Master Rowley in Shulman -v- Kolomoisky [2020] EWHC B29 (Costs) that "*there is rarely any other starting point offered by the parties to the court when considering the appropriate level of hourly rates*". Much of the debate around GHR approaches the issue from the wrong end of the telescope. GHR controls what successful litigants can recover from their opponents. GHR does not define what the clients pay their own solicitors. If set below market rate it leaves those clients, who suffered a legal wrong, having their compensation reduced

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	to meet the resultant costs shortfall. That erodes the full compensation principle. Nor is GHR intended to be a form of restraint on what solicitors charge, of a type that does not to our knowledge apply to any other profession. If GHR were perceived as limiting what solicitors could charge their own clients that would restrict competition for legal services in the UK.
Do or should GHRs have a broader role than their current role as a starting point in costs assessments?	No they are a useful start point, but no more. We agree with the CJC 2021 working group's report conclusion that: "*Finally, if its recommendations are accepted, the working group is confident that judges who have to assess costs will have proper regard to the new GHR but will (a) appreciate that they have been and always will be no more than a guide, (b) have due regard to para 29 of the proposed revised Guide and (c) exercise skill, care and common sense in the assessment of costs.*" However we are concerned that in some recent cases[4] engaging London 1 rate issues the GHR has been considered not just as the start point, but also as the end point. Whilst that may have been done to the submissions made to the courts in those cases it is important that Judges feel free to apply common sense and their own judicial knowledge in accordance with point (c) above. For instance in the summary assessment of London 1 rate costs in Samsung, Lord Justice Males said : *3. In some cases, therefore, the rates claimed are more than double the guideline rates.* *4. The guide recognises that in substantial and complex litigation an hourly rate in excess of the guideline figures may sometimes be appropriate, giving as examples "the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element". However, it is important to have in mind that the guideline rates for London 1 already assume that the litigation in question qualifies as "very heavy commercial work".* That suggests a surprisingly limited approach to applying enhancements to GHR and is premised on the London 1 rates actually reflecting the rates for "very heavy commercial work"; see our submissions below that the data on which London 1 was set was very thin and does not match that definition.

[4] *Samsung & others v LG Display & another [2022] EWCA Civ 466* (https://www.bailii.org/ew/cases/EWCA/Civ/2022/466.html) and *Athena & others v Secretariat of State for the Holy See [2022] EWCA Civ 1061* (https://www.bailii.org/ew/cases/EWCA/Civ/2022/1061.html)

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	It is well known by all firms regularly conducting genuine London 1 cases, and we suspect by most of the Judges hearing them, that the London 1 rates are a long way below the market rate for solicitors specialising in heavy weight commercial disputes. That is likely because of the lack of cost assessment data on the cases that meet the new criteria for London 1. We agree with the observations of Macfarlanes as set out in the 2021 CJC working group's report that:- *"the hourly rates claimed in Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2504 (TCC) , and allowed…. in Shulman, are at the bottom end of the spectrum of hourly rates charged by leading City law firms. The hourly rates claimed in Shulman (ranging from approximately £250 to over £1000) are closer to current market practice and are more reflective of the overheads that City law firms have to pay."* Consequently we submit that further efforts should be made to gather reliable data on London 1 cases, but in the meantime the definition of London 1 should be recast to remove the word "very". We also suggest that the criteria for summary assessments be amended to exclude claims for costs in excess of £100,000, most of which would be London 1 cases. They should instead be assessed by a specialist cost Judge either sitting alone to or as an assessor alongside the assigned Judge. We further suggest that the guidance at paragraph 29 in the Guide to the Summary Assessment of Costs be amended as follows to clarify that in exceptionally complex and/or high value cases an enhancement could be up to 100% and could encompass Grade D. Firms like Stewarts that specialise in complex and high value claims invest in recruiting the brightest and best staff. They also invest in training, supervision and systems to enable their Grade D fee earners to undertake valuable and productive work on those cases. The actual charge rates for Grade D fee earners amongst those firms are well in excess of GHR and it ought to be within the discretion of the Judges assessing the costs in cases of high complexity and value to apply enhancements across all grades. Unless that anomaly is rectified it could even create a perverse incentive for that work to instead be delegated to a Grade C fee earner, at higher cost to the paying party. The amendment we propose to address these two issues is:- "29. *In substantial and complex litigation an hourly rate not exceeding 100% in excess of the guideline figures may be appropriate for grade A, B, C and D fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate."*
What would be the wider impact	For the complex and high value litigation that Stewarts conducts we doubt that abandoning of GHR would have a negative effect and for

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of abandoning GHRs?	some of our clients it would likely be positive. The cost disputes in most of our cases are settled through negotiation with experienced opponents. Even when cost assessment is required that is usually before a cost specialist Judge who will have considerable experience of the current market (claimed) rates in comparable cases. For the majority of our clients who succeed in their claims, then subject to the application of enhancement factors, GHRs can increase the differential between their incurred costs and those they can recover from their opponent. So GHR dilutes the full compensation principle for many of our clients. However, a small minority of our clients who end up paying parties to high value commercial disputes may benefit from GHRs reducing the exposure to adverse costs. Consequently, we contend that unless GHR genuinely reflect current market rates and are annually indexed to inflation in the legal sector then they risk resulting in unfairness to receiving parties whose legal rights have otherwise been protected by our civil justice system. With the forthcoming increase of the limit for FRC to £100,000 the number of cases requiring cost assessment will greatly diminish as will the relevance of GHR to those that remain, many of which will warrant enhancements under para 29 of the Guide and applying the seven pillars of wisdom under Part 44.
Should GHRs be adjusted over time and if so how?	Annual indexation of GHR is very important. It would avoid a repetition of the unfairness that has been faced by litigants who have proved they suffered a civil wrong over the last 10 years. When it comes to indexation the principal of close matching is paramount. Providing the data source is statistically valid then the one that is the closest match will usually be the best candidate. According to analysis from KPMG, legal services contributed £60bn to the economy in 2018. Therefore, there can be little doubt that Services Producer Price Index Legal ('SPPI Legal') has statistical validity and is the closest match for inflation of solicitors' hourly rates. Our experience of working with lawyers in many other jurisdictions is that the UK legal sector is well ahead of the curve when it comes to modern ways of working. There is no evidence that the UK legal services sector is inherently inefficient but, if and when technology or process efficiencies lead to a reduction or flattening in average charge rates that will be reflected in SPPI Legal, and hence would track through to GHR if linked. Until that happens, successful litigants would be the losers if any other index were adopted, as they would be paying market rates but GHR would be falling behind based on an unrealised expectation of future theoretical changes. The cost assessment bills in the data set gathered in the CJC review of 2021 would on average have been drawn 12 months before the date of assessment. Working back from the mid-point of the data period would take us to January 2019. From Q1 2019 to Q2 2022 (the latest available) SPPI Legal has risen 15%. If the first revision is not

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	implemented until Q1 2023 then four years will have elapsed and the inflationary factor will be higher. The 2021 CJC working group report said it was unconvinced, given the present turbulent economic times, that there should be any increase on the rates for the subsequent time lag prior to implementation in October 2021. We respectfully disagree, as the period was, even then, too long and the subsequent inflation too high to ignore. As above there is now a four year period of inflation to address. It is crucial that there is an inflationary increase at the same time every year. We support the proposal in the CJC interim report on GHRs that the figures are uprated by the SPPI Legal annually. We urge this CJC review group to recommend that the annual uprating of figures take place now (and if delayed have retrospective effect for 2022) with a full review every 10 years. That full review should consider not just what costs Judges allow, but it should also look at the question of what rates were actually claimed, because GHRs are intended to reflect the real market rates, the average price actually paid by litigants.
Are there alternatives to the current GHR methodology?	<u>Expense of time and changes to working practices</u> The CJC's 2021 consultation on GHR quite rightly departed from former attempts to set the GHR by reference to expense of time calculations. Such data was time consuming for firms to prepare, impossible to gather (as demonstrated by the CJCs 2014 review) and not directly representative of the actual charges incurred by litigants. In any event, it is an approach that envisages looking down the wrong end of the telescope. The GHR should be about what reasonable litigants pay their solicitors, rather than the highly variable levels of profit very different solicitors firm's make for undertaking a widely differing range of legal services. A sub-component of the fundamentally flawed expense of time arguments is whether recent changes to working practices of solicitors should affect GHR. Unless and until any such changes result in reductions to the average rates paid by litigants for their legal services those changes are irrelevant to GHR. They are also factually flawed, as such evidence as there is indicates that solicitors in recent years have continued to face significant increases in the three biggest components of their overheads: salaries; offices; and IT. In January 2022 the Law Society Gazette reported that:- "*Lawyers could be set for inflation-busting pay rises this year as firms desperately try to hold onto top talent. That was one of the key findings from recruitment consultancy Robert Walters, whose UK salary guide published today shows that professional services firms are planning to increase their budget for pay rises by 10-15% this year.*

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	That would be the largest increase seen since 2008 and more than twice the rate of inflation".[5] Since then market indicators suggest that salary inflation in the legal sector is if anything rising faster than that prediction, particularly for the firms undertaking London 1 work. Predictions from some quarters that a shift to remote working would greatly reduce law firms' office space and spend have also proved to be incorrect for most firms. As reported by Knight Frank:- *The legal sector drove UK regional office take-up in Q1 2022, accounting for 13% of total take-up across ten key UK cities. The level of take-up is in excess of the five-year Q1 average figure of 9 %[6].* *"Law firm take-up in London continued its record-breaking streak with over 400,000 sq ft of space acquired by law firms during Q2, 2022. This equates to 13% of London take-up and nearly a quarter of City take-up." [7]* *"In 2021, UK law firm leasing take-up across the main UK office markets stood at 1.5mn sq ft, a 67% rise on 2020."[8]* Likewise, those arguing this type of point often loosely refer to savings through technological changes in the way lawyers work. However, to achieve these changes increases the expenses of most law firms. Deloitte reports that the average technology budget, as a percentage of revenue, was 4.25% in 2020 and they predict it will grow to 5.11% in 2022[9]. Whilst that investment in technology might enable some law firms to modernise the way they work and might over time result in efficiencies that then enable them to deliver some types of legal work for less hours, what it does not do is reduce the hourly rate; if anything it does the contrary. In the meantime most firms have had to purchase and maintain hardware and software to enable their staff to work both from the office and from home. <u>Rates allowed v claimed</u> We remain concerned that the approach adopted by CJC when setting GHR 2021 involved circularity because it was based on historic rates allowed or agreed. Whilst GHR 2021 were a very welcome uprating

[5] https://www.lawgazette.co.uk/news/pent-up-demand-will-see-lawyers-wages-rise-across-the-board/5111097.article

[6] https://www.knightfrank.com/research/article/2022-06-13-uk-legal-sector-office-demand-increases-

[7] https://www.knightfrank.com/research/article/2022-08-23-law-firms-lead-the-charge-for-new-office-space-in-london#:~:text=Law%20firm%20take%2Dup%20in,quarter%20of%20City%20take%2Dup

[8] https://content.knightfrank.com/research/2420/documents/en/uk-law-firm-real-estate-report-2022-8897.pdf

[9] https://www2.deloitte.com/xe/en/insights/focus/cio-insider-business-insights/impact-covid-19-technology-investments-budgets-spending.html

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	they were based on data that was dragged down by the legacy of the aged and flawed GHR 2010. The CJC 2021 methodology, based on allowed rates, led to proposed GHR that were 15% lower than average claimed rates. They are also lower in most bands and grades than would have resulted from the alternative of uprating GHR 2010 by CPI, let alone SPPI Legal. That strongly suggests that judicial moderation influenced by the legacy of GHR 2010[10] was and is out of step with market inflation. Stewarts agreed with the introduction to that 2021 working group's report that "*The intention of the rates is to provide a simplified scheme and the guidelines are intended to be broad approximations of actual rates in the market*." However, we are concerned that intention was not actually realised. The 2021 CJC working party and Professors Fenn and Rickman are to be commended for successfully gathering a credible body of data on rates claimed and assessed, and then reviewing and reporting on the assessed claim data. We agree that data set was the best evidence available to inform setting a new GHR in 2021. However, Stewarts continues to contend that there ought to have been an analysis of the rates claimed from the same data set. That would have given valuable insight into what the market rate is. As acknowledged over the years by Lord Justice Dyson[11] and Lord Justice Jackson[12], the guidelines are intended to be broad approximations of actual rates in the market. This approach would not be unfair to paying parties as they would still be able to raise GHR arguments against anyone who instructed the 50% of solicitors who charge above the average market rate. To illustrate this issue, we reiterate the simplified example provided by our Mr Chamberlayne in his email to the CJC of 12 February 2021. That example assumed 10 cases for assessment, with Grade A charge rates for cases 1 to 10 rising in £10 increments from £300-£390, all assessed by a Judge who never allowed more than £340. The mean for the claimed rate would be £345, but the mean for the allowed rate would be £330. The former would be the average market rate, but the latter would not. So, the average of assessed rates will inevitably drag down the outcome and will not then give you a fair figure to reflect prevailing market rates. If required, there are statistical techniques to weed out any extreme outliers, both high and low, that might otherwise warp the results. While the CJC suggested evidence on market rates is elusive, for this review they did gather both claimed and assessed data. This point is directly relevant to the circularity arguments, as assessed rates are

[10] Which affected virtually all rates previously allowed or agreed.

[11] https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf

[12] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

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	influenced by the historic 2010 GHR which had unquestionably fallen far behind market rates. The fact Grade D rates (aside from London 1) have only had very modest rises based on assessed rates, well below the level of any of the potential measures of inflation, illustrates the suspicion that assessed rates are some way out of line with the real market rates that litigants pay. We contend that to look only at the rates allowed, without considering the rates claimed, curtates the distribution without first looking at the full spread. That is an approach, which, as we understand it, most statisticians would consider to create an inherent bias and breach a fundamental principle of distribution theory. Only once you have considered the full spread can an informed decision be made on whether it is appropriate to curtate on one basis or another. We refer to the comparison table produced by FOCIS and Harmans and submitted for the 2021 review. That comparison showed that the allowed rates for all 3 bands[13] and virtually all grades represented less than CPI inflation on GHR 2010 which was in itself probably below real market rates back in 2010. Conversely the claimed rates were a better match for inflation than allowed rates, as at most grades they were between CPI and SPPI Legal. Further analysis of the data gathered by the CJC revealed that:- 1. there were 681 cases after excluding any where there was a miss match of data claimed and allowed; 2. rates claimed were allowed/agreed in full in just 123 (18%) of these cases, but reduced in 82% of cases; 3. 38 of those 123 cases were claimed at GHR, so 87% of non-GHR cases were reduced on assessment. This further analysis demonstrates that most Judges reduced the hourly rates claimed, even if they are already below the average market rate paid by the average litigant. A further potential problem of the 2021 methodology for data analysis is that it is unclear that it allows for the impact of reductions in rates allowed due to London solicitors working on cases in regional courts. Were those cases included within the London data analysis? If so that would drag down the mean for rates allowed or agreed for London rates. The same problem would not arise in a comparison of rates claimed for the same cases. The relative lack of data for London 1 cases highlights a further problem with the current rates assessed methodology, which is the

[13] It is unfortunate that there were no equivalents to tables 5c and 6 to enable comparison of the claimed and assessed rates for London 1 and London 2. However, we understand that such claimed rates data as there was for London 1 and London 2 indicated a comparable differential between claimed and assessed rate to those applicable to London 3, National 1 and 2.

<table>
<tr><th>Question/issues raised by the CJC</th><th>Stewarts response</th></tr>
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fact that very few high value commercial disputes result in cost assessment. Costs for those claims are virtually always settled, usually as part of a global settlement that is inclusive of damages, costs and interest. The same problem will arise on any future review based on this methodology, but would not arise in relation to a switch to a methodology based on rates claimed.

Our analysis of the London 1 component of CJC 2021 data set is as follows:-

<table>
<tr><th></th><th>GHR DATA PROFESSIONS FOI</th><th>GHR DATA JUDICIAL FOI</th></tr>
<tr><td>1. Number of London 1 cases;</td><td>119 of 557 - 23%</td><td>38 of 173 - 21%</td></tr>
<tr><td>2. How many have a claim value stated?</td><td>62 of 119 - 52%</td><td>23 of 38 - 61%</td></tr>
<tr><td>3. How many of those are not really London 1 at all (e.g. claim value is less than £10m)?</td><td>54 of 62 - 87%</td><td>17 of 23 - 74%</td></tr>
<tr><td>4. Average of claim value stated (figures with and without significant outliers)</td><td>£5.9m* / £2.7m</td><td>£6.2m** / £1.3m</td></tr>
</table>

* 2 x claims over £100m

** 1 x claim over 250m

The above analysis strongly suggests that there was an insufficient number of cases that genuinely met the London 1 definition on which to base that rate. Whilst the CJC in 2021 defined the qualifying characteristic for London 1 to be very heavy weight commercial dispute, we continue to agree with the submission that the CLLS made in 2021 that the "very" component should be dropped, as it adds to the subjectivity and scope for argument. It also does not match the relatively low levels of average damages from the data set on which the 2021 London 1 rate is based.

We reiterate a suggestion that we made in response to the 2021 GHR review. To inform the next review of GHR we suggest that HMCTS implement a system to record the type of data collected by the CJC in that review for all cases in which a budget or bill, endorsed with a statement of truth/accuracy, is filed with the court. In particular it is crucial to gather reliable data on the market rates paid by litigants for the type of high value and complex litigation intended to be covered by the new London 1 band and consideration be given to creating an equivalent National band. We also suggest that this incorporates
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	collecting data on the claimed and assessed rates for counsel. They are a significant component of litigation costs and to have a scale of GHR for counsel would likely assist Judges and litigants. Naturally, the application of GHR for counsel would be subject to judicial discretion including the enhancement factors. Our over-arching point is that to preserve the full compensation principle we contend that a party to a multi-track claim who makes a reasonable choice of solicitor for the type and scale of the claim in question ought to be able to recover at up to market rate for that work. If they prevail in their litigation, then under the loser pays principle, why should they be left with a shortfall in costs attributable to the GHR being artificially set at a lower rate?
Part 3 – Costs under pre-action protocols/portals and the digital justice system	
What are the implications for costs associated with civil justice of the digitisation of dispute resolution?	We agree with the submissions of APIL that there are considerable advantages to digitisation, but implementation is complex and historically has not been a great success in the lower value and complexity end of personal injury claims. Digital technology has the potential to make justice systems more accessible and efficient, but it has proved very difficult to align the procedure with the technology even in relatively simple claims. It is difficult to envisage a successful implementation of sufficiently flexible processes to encompass the very wide variety and sheer scale of the evidence in more complex cases. Every one of the complex injury claims we conduct for our clients involves differing combinations and severity of what are often multiple life changing injuries. They follow markedly differing treatment and rehabilitation patterns, often over many years right up to the trial. Likewise the related financial losses are very different, plus they are ongoing and changing during the life-cycle of the proceedings. It is crucial that any digital reforms have an inclusive and user-focused approach. There is also the need to consider the very significant hidden cost of reform for solicitors implementing these systems. There are IT and lawyer training implications that arise not just at the outset but also impact the firms every time there is a change to the digital platform.
What is the impact on costs of pre-action protocols and portals?	We do not undertake any work in the portals so cannot comment. Our only concern relating to the pre-action protocols is that there is very rarely any sanction imposed for non-compliance once the case is issued. Common examples included defendants failing to provide a detailed reply to the letter of claim, and/or not providing adequate pre-action disclosure. Either scenario may effectively force the claimant to issue proceedings to obtain those documents in a case that might otherwise have been resolved pre-issue or at least have enabled the number of parties or issues pleaded to be limited. A tougher approach

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	by the courts would force parties (and their legal teams) to take compliance with the protocols more seriously in future cases. We would also suggest that the Directions Questionnaire is enhanced, so that it is not just a tick box exercise, with answers given that do not truly accord with what the protocol in question required. Confirmation of the date on which the party complied with each aspect of their obligations under the protocol would be an improvement.
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?	No, from our perspective this is not an issue. Our experience is that cases settling pre-action almost always do so on either a global basis (notably for commercial disputes) or with costs agreed without any cost assessment by the courts (for our complex injury claims). We would be wary that any attempt to introduce rules of this type might cause more problems than they resolve, notably detract from the freedom to pursue ADR on an unfettered basis.
What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?	In principle the distinction between contentious and non-contentious business serves no proper purpose and is confusing to the public. However, it is our understanding is that any change would require primary legislation which the Government do not have on their legislative agenda. When there is genuine governmental intent to address these issues there should be a separate consultation considering the issues for a root and branch replacement of the Solicitors Act 1974 to bring it in to the modern age including making it understandable by members of the public.
Part 4 – Consequences of the extension of Fixed Recoverable Costs	
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?	Multi-track litigation with claim values above the incoming £100,000 threshold for FRC tends to involve complexity and variation that it would be difficult or impossible to fairly constrain within any further increase to that FRC threshold. Cost budgeting is a much better and fairer method of managing cost between litigants in such high value claims. By setting the threshold at £100,000 and having "default off" costs management, case management Judges and specialist costs Judges will be able to devote more time to complex cases and the issues of reasonable and proportionate costs and client shortfalls.
Are there any other costs issues arising from the extension of fixed recoverable costs, including any	Any extension would likely require even greater consideration of the types of complexity that can arise as claim values within the scheme increase. That would likely require an ever growing list of exceptions and escape routes that would likely detract from the perceived benefits of fixed recoverable costs. Hence, as above, cost budgeting is a much

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other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.	better and fairer method of managing cost between litigants in claims in excess of £100,000.
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.	We do not consider any extended cost capping regime is warranted in any of our current practice areas (as listed in the preamble). We agree with the submission of CLLS that the existing rules on costs already meet the stated objectives of the Shorter Trial Scheme; to achieve shorter and earlier trials for business related litigation, at a reasonable and proportionate cost. Consequently, we would not support the introduction of a fixed costs or cost capping scheme to trials in the Shorter Trials Scheme in general.