



BIRMINGHAM LAW SOCIETY
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**Response to the Civil Justice Council
Consultation on Guideline Hourly Rates**

March 2021

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DISPUTE RESOLUTION COMMITTEE
RESPONSE TO CONSULTATION ON GUIDELINE HOURLY RATES**

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Introduction

The Birmingham Law Society is the largest provincial local law society with a membership of some 5,000 representing solicitors, barristers and paralegals working in the West Midlands area.

This response has been prepared by the Society's Dispute Resolution Committee in relation to the questions posed by the working group report for consultation dated January 2021.

Contributions to this response have been received from members of small, medium and large firms from across the West Midlands region.

To summarise our response to the consultation, we have serious concerns regarding the methodology adopted by the working group which has reached its conclusions on limited data and which fails to recognise that the purpose of Guideline Hourly Rates ("GHR") is to provide an overview of rates and to be broad approximations of rates in the marketplace.

Moreover, we do wonder whether GHR continues to serve the purpose of being an "*overview of rates / approximations in the marketplace*", or whether they are now otiose. Traditionally, GHR have been relied upon by defendants' insurers, their legal advisers and costs draftsmen to reduce the amount recoverable by successful claimants, particularly in personal injury cases. GHR has therefore acted as a costs constraint as opposed to any real indication of commercial rates. The time may have come to step away from this one-sided objective and to leave rates to the free market.

(i) The methodology used by the working group

We agree with the concerns raised by the working group at paragraph 3.8 which states that: -

(a) The relatively small number of cases that result in a detailed assessment may not be representative of the hourly rates effectively paid between parties by agreement. Further, the majority of cases where costs are agreed do not specify or record any hourly rate agreement. Costs are agreed in a global sum.

(b) Hourly rates awarded by Judges may be 'contaminated' to some extent by reliance on the 2010 GHRs with some uplift for inflation.

(c) Insufficient data on which to form sound recommendations

We agree that the Expense of Time ("EOT") approach, with a percentage mark-up added to represent a reasonable profit element would be too difficult to implement. Moreover, we also agree that GHR should not be set on the EOT approach. It is not the remit of Costs Judges to decide upon what level of profit should be permissible.

In terms of the methodology which underpins the recommended GHR, this is based upon limited data provided by Costs Judges. Heavy emphasis was placed on data from a single law firm, DWF - which is not representative.

Paragraph 2.9 identifies that “... led the working group to seek information of rates claimed, rates suggested by the paying party and rates agreed by legal professionals”. Yet it appears that limited data was relied upon by the working group. We assume that this was primarily due to a lack of engagement from legal professionals.

The data relied upon (and therefore the ultimate conclusion reached regarding GHR includes limited data from the Business & Property Courts (spanning a period of 3-4 weeks only, appendix G) and Cost Judges for the period September to November 2020 (appendix C).

The type of information requested from professionals, along with the date range of April 2019 to August 2020 seems reasonable (appendix F).

If the underlying principle of GHR is to provide an overview of rates and be broad approximations of rates in the marketplace, then the only data to be relied upon / used should be the rates agreed between the professional and client.

It is unknown how many professionals have responded to the consultation and provided data. We would be interested to understand the location of the firm submitting the data, along with the size of the firm and type of work that is being undertaken.

It is impossible for us to be able to determine whether there was sufficient data from professionals to make sure that the data collected was as representative as possible. We note that there was limited data for London 2. We do not know to what extent this was an issue across the board, particularly with data for the national bands.

The case / type of work being undertaken, along with the value of complexity cannot be completely disregarded. Applying GHR across the board, therefore, is an inappropriate way of placing restrictions on the market for what it should charge.

Proportionality Issue

To our mind, we wonder whether there remains a need for GHR especially in circumstances where increasing hourly rates will not necessarily have an impact on what is recovered by the paying party due to the application of proportionality. Unless the current application of proportionality is shifted, increasing GHR is arbitrary and ultimately does not assist the client. If anything, the client will end up paying a larger shortfall to the professional in respect of costs that are not recovered from the paying party.

The combination of proportionality and increasing the GHR is unlikely to increase the amount of costs recovered from the paying party and instead increases the amount the shortfall / amount the client is liable to pay their solicitors.

Whilst continued emphasis might be that GHR are guideline rates, they are relied upon and adopted across the profession. Indeed, the view is that the GHR are mandatory or set rates in many instances.

Let the market set the GHR

GHRs should be a guide to rates which are both reasonable and proportionate. The best indicator of that will be the rates agreed between a professional and their client.

Paragraph 1.17 of the report reinforces 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*”.

If the GHR are meant to give a fair representation of market rates, then GHR should be based upon a professional’s charge out rates to their clients, rather than on the view adopted by paying parties (or Cost Judges) as to what should be reasonable.

If the client is willing to engage a professional to carry out work, on rates agreed between them, then this should be a strong indicator as to market rates.

Perhaps the better approach to GHR would have been to examine the charge out rates only, rather than on what was agreed inter-partes or awarded by Cost Judges. Basing GHR on this methodology or approach would also mitigate the extent to which those rates have been tainted by the 2010 rates.

What was in fact allowed by Costs Judges (or agreed between the parties) is also somewhat irrelevant once the test of proportionality is then applied.

Summary

We are unsure what role the GHR continues to have and ultimately whether the GHR are required.

Initially when the working group was commissioned to investigate GHR, we welcomed it especially given the rates have not increased since 2010. However, after considering the working group consultation, we wonder whether GHR should be disregarded entirely.

We remain concerned over the methodology adopted. On the basis that the GHR are meant to reflect what the market is charging; the correct methodology should be to rely upon data from the marketplace when recommending GHR. The methodology should have focused upon examining *only* the rates agreed by solicitor / client. This achieves the objective of the GHR.

It is uncertain how much engagement the working group had from professionals and in turn whether this could be considered properly representative from professionals in different geographical locations, size of practice and type of work being carried out (to include complexity and value).

We agree that if GHR are adopted then they should be updated annually in line with an appropriate SPPI index.

(ii) The recommended changes to areas London 1 and London 2

We have no specific comments with regard to the proposed changes for areas London 1 and London 2. We do, however, repeat the concerns we have above in our response to (i) above as to the methodology adopted by the working group which underpins the new recommendations and whether the underlying data being relied upon is representative. We also note that limited data was available to the working group for London 2.

(iii) The recommended GHRs set out in paragraph 4.18 of this report.

Our general observation is that the GHR recommended are much lower than professionals' typical charge out rates to clients, especially when considering the National 1 and National 2 rates.

We also repeat our concerns as to the evidence relied upon by the working group to set the recommended GHR's.

(iv) Specifically, whether the rate of £186 for London 1 Grade D is too high; if so, at what rate it should be set and why?

The answer to this question rests on what average market rate is charged out by firms for London 1 Grade D.

However, we do not have any data to be able to respond to this question.

(v) The recommended changes to the geographical areas in section 5 of this report and the recommendation to have two national band

In terms of changes to geographical areas, we have no comment, save for repeating our concerns as to the evidence relied upon by the working group to set the recommended GHR.

We agree to retain the existing national bands.

In terms of having two national bands, this seems sensible. Although we repeat our concerns above about whether there is sufficient data from professionals.

(vi) Should the working group recommend that the Civil Procedure Rule Committee be requested to consider amending the summary assessment form N260 and the information provided on the detailed assessment bill - the amendment would be to require the signatory to specify the location of the fee earners carrying out the work

Assuming the GHR remain fixed according to geographical location - then yes, we agree with this recommendation.

(vii) The recommended revisions to the text of the Guide in Appendix J.

No comment.

March 2021