



Association
of Costs
Lawyers

Response of the Association of Costs Lawyers to the Hutton Committee Consultation on the New Format Bill of Costs

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1. INTRODUCTION

This is a response on behalf of the collective membership of the Association of Costs Lawyers ('ACL') to the draft new format bill of costs ('nBOC') and guidance document ('Guidance') circulated by Alexander Hutton QC for consultation, and his invitation to provide comments and suggestions by 18 September 2015.

The introduction deals with the general points raised on the topic of the new bill format. Part 2 discusses the issues arising as a result of certain incompatibilities that exist between the nBOC and the affected sections of the CPR. This is accompanied by a flowchart at appendix 1 which summarises the issues that arise at each stage of the assessment process. Also attached at appendix 2 is a flowchart in which we have sought to better explain the procedures that will be required to prepare a nBOC. Part 3 summarises the findings of an ACL survey, supported at appendix 3 by the full survey results containing further comments from members of the ACL. Part 4 suggests an alternative interim format which is attached as appendix 4.

All the views expressed in this document are taken from responses received from individual members of the ACL and from a survey carried out among ACL members, the results of which are set out more particularly below and which we hope will provide a particularly useful insight into the current thinking among members of our association.

In view of the time constraints that exist for the consultation and the planned implementation of a Practice Direction in October 2015 for a pilot scheme to become operative in the Senior Courts Costs Office, it has not been possible to circulate this document to the ACL membership in advance of its submission and so it is endorsed by the ACL Council on behalf of the membership in their representative capacity.

This response contains the views of experienced Costs Lawyers who have specialist knowledge and expertise in the field of legal costs and who deal, often on a daily basis, with the preparation of all forms of costs budgets and costs claims, thereby acquiring a valuable insight into the practicalities of the working processes and potential issues that will arise from any new bill format.

Whilst this consultation may be primarily intended as an opportunity to comment on the workings of the format of the nBOC itself, having regard to Lord Justice Jackson's desire for a system that will '*automatically generate schedules for ... bills for detailed assessment ...*' and '*... to harmonise the procedures and systems which will be used for ... detailed assessment*', this consultation must inevitably touch upon wider issues of practicality and procedure. The Hutton Committee (the 'Committee') has already recognised this by their development of the revolutionary UTBMS j-codes ('J-Codes') for time recording to phases, tasks and activities, upon which their proposed new bill of costs format heavily relies.

Consequently, the purpose of this response is, in the main, to assist the smooth implementation of the reforms inspired by Lord Justice Jackson by raising with the Committee our members' concerns, which it is believed are shared by many throughout the legal profession, as to the unforeseen ramifications and unfortunate consequences that they consider are certain to arise from a hasty introduction of this alternative means

of submitting claims for legal costs in a format for which both lawyers and the courts seem patently ill prepared.

Given that the ultimate goal of the nBOC is to allow costs claims to be submitted electronically, it is felt that, in the present absence of the relevant and necessary information technology amongst solicitors and the courts, time should be allowed for education and training, thus enabling the introduction of any new bill format to develop in line with customised rules, practices and procedures that will be needed to accommodate Lord Justice Jackson's ultimate long term aim of a largely paperless procedure.

In other words, there is grave concern that the nBOC is inadequately supported by the current infrastructure for which it is not designed, which raises important issues such as how such a bill will be processed through provisional and detailed assessment. The following is a brief non-exhaustive list of members concerns: -

- How should the nBOC be deconstructed for the purposes of formulating Points of Dispute and Replies?
- How should an assessment hearing itself be approached given the greater degree of generality and transparency that the nBOC requires?
- Is it desirable to formulate rules that will allow assessments to proceed on parts alone, affording the parties a greater opportunity to agree phases in the bill that are not in dispute and thus minimise costs?
- How can the nBOC and appropriately tailored procedures assist the ultimate aim of both increasing transparency and providing a less cumbersome and more cost efficient assessment procedure for the benefit of practitioners and the courts alike?

The nBOC is so fundamentally different from the existing bill of costs and so far removed from that with which our profession has been so familiar for so long, that it is a wholly unfamiliar alternative. It appears far more complex, when the aim of the nBOC is to eradicate complexity. Primarily this appears to be because its spreadsheet format seeks to cover every possible scenario, creating a plethora of different options over 54 columns that will not all apply in most cases, but are nevertheless required to be addressed and eliminated from any claim, thus making the drafting of the document more complex, particularly in its manual form.

Furthermore, despite 18 different tabs, the nBOC still fails to present the information in a manner other than by phase, failing to disseminate the tasks and activities conducted within the phases and thus allow the easy reference to such deeper levels of generality.

Accordingly, it might be suggested that, without the guidance and support from an appropriate infrastructure of rules and practice directions, the nBOC fails to deliver upon Lord Justice Jackson's intentions set out *inter alia* under paragraph 206 of his Report that a new format bill of costs should be 'more informative'. The sheer weight and breadth of the nBOC, when seen at first blush and through no fault of its own, conveys a more complex, less transparent document than the one that the profession is currently familiar with and in respect of which this new format is intended to be an improvement.

The nBOC is unlike any other document required to be served or lodged at court and so, of itself, is going to be unfamiliar to many untrained in Excel, who operate throughout the court system on a day to day basis.

Any practical success the new format may expect to enjoy depends almost entirely on the application of the J-Codes. These codes have been in the public domain for less than a year and they have not been widely promoted. Even the most IT sophisticated lawyer will not have had time to fully develop their practice to accommodate the J-Codes to be fully compliant with j-code or similar time recording. Where adopted, lawyers will also require time to become accustomed to the J-Codes as anything but strict compliance with them will distort the data produced.

Moreover, few cases that conclude after 1 April 2016, when it is understood it is intended that the pilot scheme in the SCCO will become mandatory for all costs managed cases where final costs orders have been made after that date, will have been operating throughout on a compliant time recording system. The expectation is that practitioners will work backwards through their time recording to adapt their existing systems to comply with the format and the codes it relies upon. The time and expense is likely to be disproportionate in a high number of cases and may encourage litigants to settle costs at far lower levels than might otherwise be the case thus denying them access to the justice of a proper costs recovery.

Whilst the nBOC may provide the answer to the long term aims as envisaged by Lord Justice Jackson, its introduction without due notice and ahead of supporting software development, in isolation to education, training and appropriately designed rules, practices and procedures, may simply cause havoc in a system that is still struggling to define the costs budgeting process.

Practitioners are simply ill prepared to embrace, in the short term, the technology that they will require. Many solicitors do not have the computer software to encompass the J-Codes and the nBOC, and the expense of upgrading will be prohibitive in many cases or simply unjust for those who may have only recently invested significantly in upgrading their systems. The original ACL Working Party in their 2011 report 'Modernising Bills of Costs' envisaged that the procedures would be introduced over a number of years as practitioners naturally upgrade their systems to conform.

The ACL would respectfully suggest a wider consultation to encompass all factors and facets of what is intended to be a lasting format that will endure long into the future. Such a definitive development, particularly given its inevitability, surely deserves a sober and reasoned approach, not just from the point of view of practitioners, but also the courts which are themselves unprepared for the technological advances required of reform and are deserving of more time for consultation.

In any event, once the pilot is undertaken, the lessons learned will require a period of reflection and it must be doubtful whether the nBOC and proposed period of implementation will be capable of introduction without changes to the rules and practice directions following feedback from the judiciary and the wider legal profession.

2. THE NEW FORMAT BILL OF COSTS AND THE CPR

What follows is an analysis of CPR 47, highlighting areas of apparent incompatibility. This analysis should be considered in conjunction with the flowcharts at appendix 1 and appendix 2. Where a rule states *may* or *should*, or other discretion is implied we have not addressed any potential issues. Only where a rule states a part must take certain steps have we highlighted any issues.

CPR 47.6 – Commencement of detailed assessment proceedings

As stated above, specific issue is only raised where a party must do something. Despite there being option or preference in the majority rules and practice direction here, introduction of the new format Bill of Costs appears to require a complete rewrite of CPR 47.6 PD 5 as referenced below: -

The Bill of Costs does not state routine communications as a routine item.

CPR 47.6 PD 5.13(13):

'routine communications must be set out as a single item at the end of each head'

CPR 47.7 and CPR 47.8 - Period for commencing detailed assessment proceedings & Sanction for delay in commencing detailed assessment proceedings

No specific issue was found in these parts.

Points of Dispute and Reply – CPR 47.9 and 47.13

The current Precedent G is for preparation of Points of Dispute in connection with the current format bill of costs at Precedent A. There is, however, a question of whether the nBOC should incorporate the ability to prepare Points of Dispute and Replies with offers and counter offers. In any event, if Precedent G remains, it may require reconsideration, particularly where there is no breakdown per party/document etc.

If the precedent for Points of Dispute is to be included within the new format Bill of Costs, consideration will need to be given to:

CPR 47.9 PD 8.2:

'Points of dispute must be short and to the point. They must follow Precedent G in the Schedule of Costs Precedents annexed to this Practice Direction, so far as practicable...'

CPR 47.10 to CPR 47.12 - Procedure where costs are agreed & Default costs certificate & Setting aside a default costs certificate

No specific issue was found in these parts.

CPR 47.14 - Detailed assessment hearing

If the precedent for Points of Dispute is to be included within the nBOC, consideration will need to be given to:

CPR 47.14 PD 13.2(d) to (f):

'The request for a detailed assessment hearing must be in Form N258. The request must be accompanied by—

(d) a copy of the points of dispute, annotated as necessary in order to show which items have been agreed and their value and to show which items remain in dispute and their value;

(e) as many copies of the points of dispute so annotated as there are persons who have served points of dispute;

(f) a copy of any replies served'

CPR 47.15 - Provisional Assessment

The same issues arise here as in the case of a detailed assessment where the detailed assessment rules are adopted.

Consideration should be given to whether provisional assessments should be excluded in the initial stage. In the alternative, the SCCO may wish to limit the pilot to provisional assessment only in order to obtain a sample assessment on what are perceived to be simpler claims.

If the precedent for Points of Dispute is to be included within the nBOC, consideration will need to be given to:

CPR 47.15 PD 14.3 (e):

'In cases falling within rule 47.15, when the receiving party files a request for a detailed assessment hearing, that party must file—

(e) completed Precedent G (points of dispute and any reply).'

CPR 47.15 PD 14.4(2):

'Once the provisional assessment has been carried out the court will return Precedent G (the points of dispute and any reply) with the court's decisions noted upon it. Within 14 days of receipt of Precedent G the parties must agree the total sum due to the receiving party on the basis of the court's decisions. If the parties are unable to agree the arithmetic, they must refer the dispute back to the court for a decision on the basis of written submissions.'

The following should also be considered. Is an additional copy of the Bill of Costs required where the assessment can, and arguably should, be undertaken electronically?

CPR 47.15 PD 14.3 (c):

'In cases falling within rule 47.15, when the receiving party files a request for a detailed assessment hearing, that party must file—

(c) an additional copy of the bill, including a statement of the costs claimed in respect of the detailed assessment drawn on the assumption that there will not be an oral hearing following the provisional assessment'

CPR 47.16 - Power to issue an interim certificate

No specific issue was found in these parts.

CPR 47.17 - Final costs certificate

There appears to be no 'assessed' column that would allow the nBOC to be recalculated as an assessment progress.

CPR 47.18 - Detailed assessment procedure where costs are payable out of the Community Legal Services Fund

The nBOC is incompatible with a claim for costs payable out of the Community Legal Services Fund and, therefore, no comments are made on the rules here.

The nBOC will require very significant revision to enable practitioners to use it with these claims.

CPR 47.19 - Detailed assessment procedure where costs are payable out of a fund other than the community legal service fund

Again, the nBOC is incompatible with a claim for costs payable out of a fund other than Community Legal Services Fund and, therefore, no comments are made on the rules here. Such claims considered by the working party are Court of Protection claims. One of the reasons is that the J-Codes on which the Bill of Costs is based are based on litigation phases. Court of Protection, general management costs claims are not litigation.

The nBOC will again require very significant revision to enable practitioners to use it with these claims.

3. ACL Survey summary of results

Attached are the results of a survey conducted by the ACL among its members which has produced some statistical information regarding the existing working practices of costs lawyers and their clients in order to assess how the nBOC may impact upon the profession. Because of the tight time frame for a response to the consultation, this survey was conducted over a short period and it is expected that some members have not had the opportunity to respond. Nevertheless the survey has resulted in feedback from 142 individual members. The Committee is respectfully referred to the findings attached hereto at appendix 3 and the various specific comments that have been raised by those who have kindly taken the time to respond to this survey.

The key findings of this survey appear to be as follows: -

1. A narrow majority of those who responded currently use non-electronic methods to prepare bills of costs (52.82%), which include dictation (26.76%) and pen and paper (13.38%).
2. A large percentage of those who responded either strongly agree or agree that a revised bill format is required in light of the LASPO reforms (61.97%, increasing to 73.94% when those who neither agree nor disagree are added).
3. A narrow majority either strongly agreed or agreed that an electronic format is desirable (53.53%, rising to 78.18% when those who neither agreed nor disagreed are added).
4. Significantly, a clear majority have responded that they have not attempted to construct a nBOC because they lack the requisite competence in the use of Excel (80.16%).

5. Also significant perhaps is that a clear majority would consider moving to a simplified spreadsheet style bill if one were available (70%) – see appendix 4.

6. Nevertheless, a vast majority felt that the nBOC is not workable in its existing format (80.99%).

7. Responses suggest that a majority of members' clients record their time electronically, but around half of those who do record their time electronically cannot be relied upon to accurately transfer their recorded time into a bill of costs.

8. It would seem that a very small percentage of their clients are actually using the j-codes at present and fewer than half have indicated that it is their present intention to do so.

9. Unsurprisingly in the circumstances of these findings, there also appears to be very little intention among these clients to engage in the voluntary pilot scheme.

These responses suggest that further time is required to reflect upon the practicalities of the nBOC given the high level of respondents to this survey who felt that the new format is not workable in its present format. Other indications nevertheless suggest that, despite this view, there may be a wider acceptance that an electronic format is desirable and that some form of simplified spreadsheet might be more enthusiastically embraced (see section 4 below and appendix 4).

These results also suggest that time is also required to address the present lack of necessary practical skills amongst costs practitioners, which will be a pre-requisite in order to use and better understand the scope and potential of any new electronically generated bill of costs or spreadsheet. It also seems vital that more time be allowed to better promote the use of j-codes, either electronically or manually, for the recording of time, given that these codes are the cornerstones of the nBOC and, whilst not mandatory, are essential to the new bills success.

4. ALTERNATIVE/INTERIM FORMAT BILL OF COSTS

Attached to this document, at Appendix 4, is an alternative bill format, suggested as an alternative for use during a possible transitional stage to enable the profession to integrate slowly but surely the requirements envisaged by Jackson during an interim period.

Whilst this alternative bill does not have the sophistication of the nBOC, it may serve in the interim to introduce practitioners both to the use of excel and the incorporation of J-Codes into their working practice. Indeed, this will also assist the judiciary, as it may be used for costs management by the courts.

This alternative bill, which is in Excel format, not only enables time entries to be recorded chronologically in date order, but also, and most importantly, enables work to be assigned to the j-Codes which are easily and immediately identified as such.

Looking at the first page, we can see that each entry is recorded firstly in date order, which is numbered, and then followed by the fee earner undertaking the work and then a description of the work/entry. There then follows the hourly rate being claimed for that

entry together with the time and subsequent claim. Disbursements are also shown, where appropriate. There then follows the Phase code and other J-Codes.

The J-Code system, which many are unfamiliar with, is listed in columns at the end of the page, and starts with the Phase Code, with which, since 2013, many are now familiar.

Another positive aspect of this alternative bill is that the work undertaken is recorded in date order at the front of the bill; - each is numbered which enables the Points of Dispute and Replies to be easily identified with the numbered items at the rear of the alternative bill format. This aspect of the alternative bill is unique and readily makes this alternative format 'Jackson compliant' in terms of transparency. Furthermore, the Excel format means that the information can be manipulated to whatever degree of generality may be required.

The results of the ACL survey would suggest that such a format may be greeted more favourably and with more enthusiasm and as such, would no doubt represent a more realistic short term goal for compliance.

Claire Green (Policy Officer, Association of Costs Lawyers)

Appendix 1 – The New format Bill of Costs and the CPR

Appendix 2 – Using the New format Bill of Costs

Appendix 3 – Full results of ACL Survey on the New format Bill of Costs

Appendix 4 – Alternative/Interim format Bill of Costs

