The Forum of Complex Injury Solicitors
(FOCIS)

Response to CPRC Consultation on Part 21 & SCCO Practice Note on Protected Parties

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;

2. Share knowledge and information among members of the Forum;

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;

4. Use members' expertise to promote improvements to the legal process and to inform debate;

5. Develop fellowship among members.

See further www.focis.org.uk

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 24 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	JMW
Ashtons Legal	Irwin Mitchell
Balfour + Manson	Leigh Day
Bolt Burdon Kemp	Moore Barlow
CFG Law	Osbornes Law
Dean Wilson	Potter Rees Dolan
Digby Brown	Serious Law
Fieldfisher	Slater and Gordon
Fletchers	Stewarts
Freeths	Thompsons NI
Hodge Jones & Allen	

In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

Introduction

1. FOCIS welcomes the opportunity to respond to the CPRC's proposed amendments to Part 21. By these submissions[1] we seek to identify the present difficulties with the rules and practical process of solicitors acting for children and Protected Parties in personal injury claims seeking to recover from the Claimant's damages the reasonable difference between the costs payable on a solicitor-client basis and those payable between the parties ('the costs differential').

2. Such claims are, by the nature of the severity of the injuries, often complex and high value. It is usually in the best interests of the Protected Party to be represented by a highly experienced legal team, who adopt a rigorous approach to investigating and advancing the claim, even if at times that involves incurring more legal costs that might be recovered between the parties. Since the LASPO reforms of 2013 it has become increasingly difficult for firms' specialising in such claims to write-off the own client element of such representation and there is no legal basis for expecting them to do so.

3. We appreciate that the intended scope of these amendments is to improve the wording, rather than make substantive rule changes. However, FOCIS members are of the view that the workings of CPR 21, CPR 46 and the related SCCO Practice Note of December 2021 are unclear and have lacunas which are contrary to the overriding objective. If not addressed we are concerned they will have long term detrimental effect on the interests of Protected Parties, who are some of the most vulnerable users of the courts, with some of the most complex and high value injury claims.

4. Consequently, FOCIS proposes a series of changes, principally to the CPR, to make this process more transparent, predictable, cost effective and just. We invite the CPRC to form a sub-committee to consider these issues in more detail.

5. In summary, those proposed changes (an overview of some of which we provide in the attached flow diagram) are;

   5.1. To provide a clear process where the between the parties costs are agreed, but a costs differential is sought, whereby there is no need for the paying party to play an active

[1] Prepared by Roger Mallalieu KC (4 New Square Chambers) and Julian Chamberlayne

role unless the court identifies circumstances which require those costs to be assessed;

5.2. To clarify and simplify the process in those situations where the between the parties costs are not agreed, so that the process of assessing the between the parties costs and the costs differential takes place at the same time, in front of the same judge, thereby minimising cost and use of court time;

5.3. To address the presently operative presumption – at least in cases in the Senior Court Costs Office – that in circumstances where a costs differential is sought, the solicitor will usually pay its own costs of that process regardless of whether or not the Court concludes that the solicitor has behaved entirely properly and that the costs differential sought is reasonable;

5.4. To clarify the relationship between CPR 21.12 and CPR 46.4 and the respective roles of solicitor, Litigation Friend and Claimant in this process. To make clear that the costs a Litigation Friend has agreed to pay a solicitor to act on behalf of a protected party Claimant will usually be recoverable from the protected party's damages (and not be left as a liability for the Litigation Friend) unless the Litigation Friend has acted improperly or in breach of their duties.

6. We also propose clearer guidance within the rules as to the effect of:-

6.1. Prior approval by the Litigation Friend (or a Deputy) of the incurring of costs – for example, hourly rates, or a success fee – and to provide that such approval by the Litigation Friend would usually have the same effect as approval of such costs by a non-protected party client under CPR 46.9, unless the Court has reason to believe that the Litigation Friend has acted improperly or in breach of their duties;

6.2. Any post approval or consideration by the Litigation Friend or a Deputy of the costs differential and to provide within the rules that any such approval is a matter to be given weight both in the decision as to whether an assessment of the costs differential remains necessary and as to the reasonableness of the differential itself on any such assessment.

Appended

1. Table responding to CPRC proposed amendments to Part 21;
2. Flow chart of our proposals for the process for the assessment/approval of costs for Protected Parties;
3. Detailed submission in relation to Protected Party costs.

FOCIS – Appendices to Response

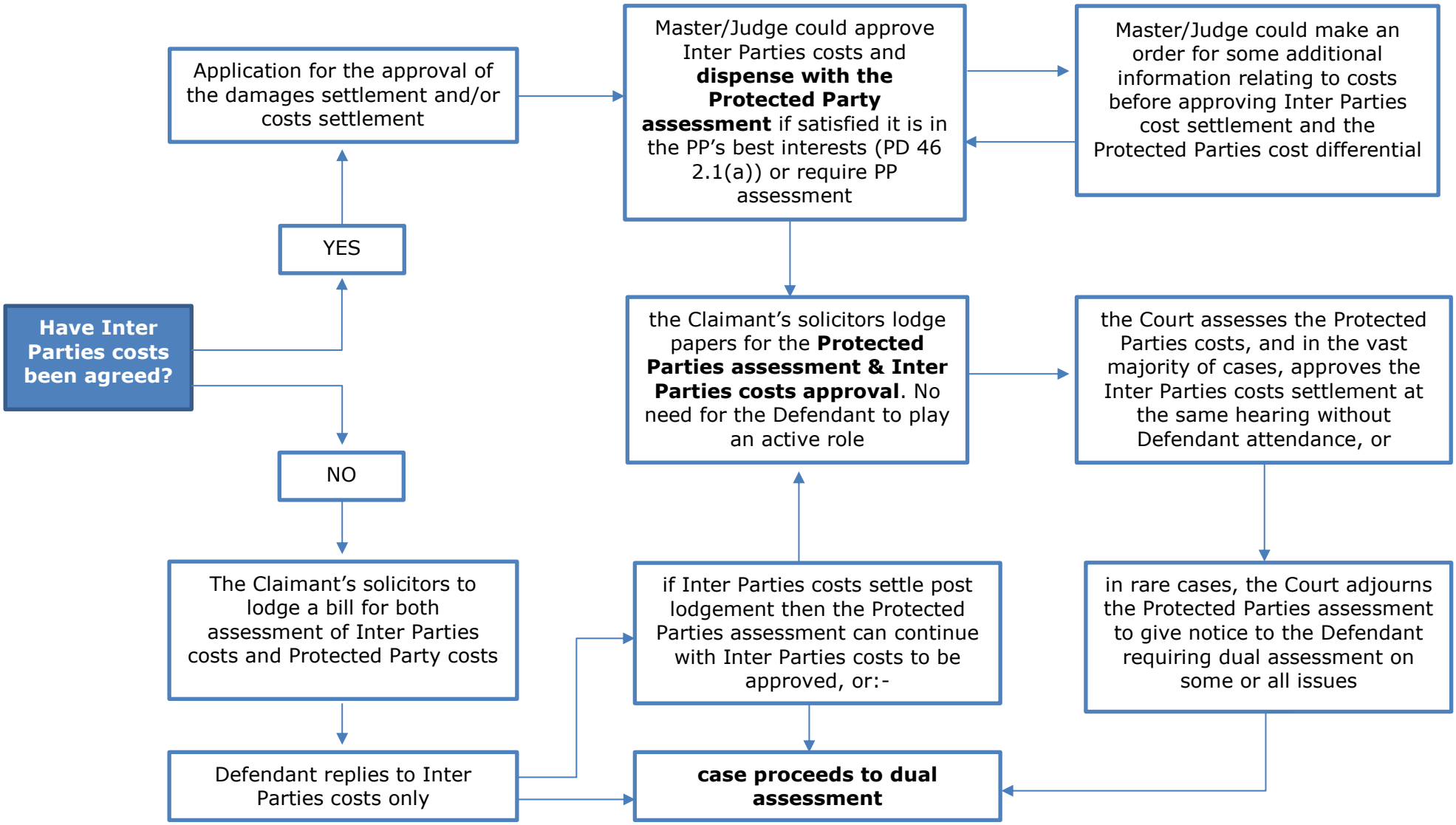
[1] CPRC Consultation – proposed amendments to CPR Part 21

CPR Part 21 revision	**FOCIS comments**
21.4(3)(c)	The litigation friend could themselves be ordered to pay costs including for instance, the costs of the protected party which they caused to be unreasonably incurred. Suggested addition in green: *"…that they or the claimant is ordered to pay".* The Litigation Friend's liability for costs when conducted a personal injury claim for a child or protected party should be subject to QOCS under CPR 44.13.
21.5(4)	See attached submission relating to the costs of acting for protected parties. We invite the CPRC to consider adding a requirement for the litigation friend to confirm they will diligently provide instructions to the solicitor in the protected party's best interests, compliant with the overriding objective of the CPR (which will consequently encompass the cost/benefit of the instructions they give to the solicitor).
21.6(6)	It is unclear from this new provision who would pay these charges when the OS is the Litigation Friend nor when they would be paid?
21.9(6)	This is potentially draconian especially if it simply follows from the child turning 18, although we observe it does require an application. It would be preferable for this rule to say *"stay"* or *"stay or strike out".*
21.10(2)(b)	Suggested addition: "...the costs of the claim including the costs of the litigation friend pursuant to Part 21.12, Part 46.4 and PD 46." Arguably Part 46.14(1)(b) should also be amended to cover the approval/assessment of protected party costs following pre-proceedings settlements, or at least cross refer to this provision.
21.10(3)(h)	In any case with a success fee this opinion ought to include an estimate of general damages and past losses, as that is necessary to assess whether the statutory cap on success fees has been engaged. See proposed Part 21.12(7)(h)
21.10(4)	Consider adding an obligation to satisfy the court that provisional damages have been considered.
21.11(9)(d)	This point is already covered by 21.11(9)(a), plus this part does not say by whom nor by when.
21.12(2)(c)	See attached submission relating to the costs of acting for protected parties. There is a lack of clarity in the rules in relation to where and when applications to dispense with assessment are appropriate, which has if anything been amplified by the SCCO Practice Note on Protected Party costs.
Deleted 21.12(4)	This should be reinstated. The deletion of this and the following will add to the uncertainty over the courts approach to assessment of protected party costs.

[1] CPRC Consultation – proposed amendments to CPR Part 21

Deleted 21.12(5)	This should be reinstated. Suggested amendment in green: *"…or protected party's legal representative or deputy…"*
21.12(5)	This should be clarified as this paragraph is meant to be read with 21.12(4) and is only meant to apply to low value cases of damages less than £5,000 but because of the drafting it has become disconnected. See the note in the White Book at 21.12(1).
21.12(7)(h)	This will often be an estimate, endorsed by counsel (see 21.10(3)), so this language of *"confirmation"*. Suggested amendment in green: *"confirmation or a legal opinion including an estimate of the amount...."*

[2] FLOWCHART: PROTECTED PARTY COSTS PROCESS



[3] FOCIS SUBMISSION IN RELATION TO PROTECTED PARTY COSTS[1]

Introduction

1. These submissions address concerns in relation to the question of the ability of Litigation Friends to recover costs and/or the solicitors that they have instructed to be paid for the work undertaken, at the end of a successful personal injury claim[2], out of a Protected Party's damages.

2. At the core of these submissions are the following propositions;

   2.1. That it is in the interests of Protected Parties that they are able to secure specialist and experienced representation to ensure that their cases are conducted as efficiently and as successfully as possible – to ensure that they are successful where they should be and that their entitlement to damages is maximised;

   2.2. That in the absence of a legal aid system which is available at all (in the majority of cases) or which is fully and adequately funded (in those limited cases where it is available), such representation will usually be on a private paying, Conditional Fee ('CFA') basis under which the solicitors take the risk of not being paid any costs if the claim is lost and also defer any entitlement to payment until the conclusion of claim, but in the reasonable expectation of being paid, with a success fee, on success;

   2.3. That such representation may and usually will involve the Litigation Friend of the Protected Party incurring costs which will rarely be fully recoverable from the opponent on a between the parties standard basis assessment, leading to a costs differential payable which, in a conventional case, would be payable by the client out of the recovered damages ('costs differential');

   2.4. That the likelihood of such a costs differential being deductible from a Protected Party's damages has materially increased following the introduction of the 'Jackson[3] Reforms' in 2013, not merely because success fees and ATE premiums are no longer recoverable from opponents, but because a combination of factors, including the non-recoverability of success fees, and the effect of cost- budgeting,

[1] Prepared by Roger Mallalieu KC and Julian Chamberlayne
[2] Personal injury here includes clinical negligence claims.
[3] Sir Rupert Jackson's Interim and Final Reports do not address in any detail the position of Protected Parties save, for example, where necessary to make appropriate allowances for cases involving them in his proposals for fixed costs. There is no reason why they should have done. However, it is an area which is overdue for comprehensive reconsideration.

mean that solicitors firms have much less capacity to forego costs incurred in a successful claim;

2.5. Furthermore, in the more complex and higher value cases, the statutory success fee cap under the CFA Order 2013 imposes a significant limitation on the success fee the solicitor is entitled to charge; 25% of general damages and past loss. In lower value claims that will often be similar to 25% of the whole value of the claim. However in complex injury cases, general damages and past loss will often be a small fraction of the overall damages (see, for example, a birth injury or serious spinal injury claim). The solicitor will therefore rarely be legally able to claim the full, contractually agreed, percentage success fee applied to the full reasonable base costs.

2.6. Consequently, post-LASPO claimant's solicitors have become less able to absorb any base costs differential as part of their operating costs. This phenomenon is more pronounced in complex and high value cases, including those involving children and Protected Parties, which due to their value are more likely to have a wide range of contested issues in relation to any of which a significant but reasonably incurred costs differential can arise. It is particularly in such cases therefore – the most valuable, complex and important cases – that the solicitor's ability to claim a reasonable base costs differential is most important if the solicitors concerned are to be able to continue to conduct such cases to a high standard;

2.7. That where the Litigation Friend has acted reasonably and properly in incurring such costs, in the best interests of the Protected Party, it would be unjust for the Litigation Friend to be left out of pocket;

2.8. That it is necessary and appropriate that the Court has a jurisdiction to ensure that the interests of the Protected Party are protected when it comes to any question of a costs differential;

2.9. That the procedure to consider the costs of the solicitors, the related decisions of the Litigation Friend and any sums to be deducted from the Protected Party should be as simple, transparent and cost-effective as possible if the interests of all of those parties – not least the Protected Party (and future potential such litigants) are not to be harmed;

2.10. That the present process and, in particular, its implementation since 2013 does not achieve this end.

Protected Parties and personal injury claims

3. A Protected Party is a party who lacks capacity to conduct the proceedings (CPR 21.1(2)(d)). Unsurprisingly, given the nature of complex personal injury and clinical negligence claims, they will often involve claims on behalf of people who had capacity before the accident but sadly no longer do so, or on behalf of children[4].

4. Such a person must have a Litigation Friend to conduct proceedings on their behalf (CPR 21.2(1)) [5]. Whilst a Litigation Friend is not procedurally required until after a claim has been issued and served (CPR 21.3), in cases where the lack of capacity to conduct litigation is apparent prior to the proceedings being issued it will be usual for the solicitor to be instructed by, to take instructions from and to enter into a retainer with the person it is anticipated will be appointed as Litigation Friend.

5. The role of such a person is to carry on the claim on behalf of the Protected Party and in their best interests. They must make all the decisions that the Protected Party would have made, had he been able[6]. In the modern vernacular, they must be able to 'fairly and competently conduct proceedings on behalf of the protected party' (and have no interest adverse to that protected party) (CPR 21.4(3)).

6. To act as such in proceedings, they must be prepared to undertake to pay any costs, subject to any right of repayment from the assets of the protected party (CPR 21.4(c)).

7. Where such a person is acting on the Protected Party's behalf, and provided they do so properly, they have long been held to be entitled to be indemnified against the costs of doing so out of the Protected Party's estate – see *Steeden v Walden* [1910] 2 Ch 393 at 397 citing with approval Lord Brougham in *Nalder v Hawkins* (1833) 2 Mylne & Keen 243 at 250[7]. The form of order made in Steeden at 400 was that the party so acting was entitled to be reimbursed;

   "the costs, charges and expenses properly incurred by [him] on the defendant's behalf in and in relation to such action."

8. The proposition embodied in these cases - that the Courts should do nothing to discourage appropriate persons coming forward to act as Litigation Friends for those lacking capacity - is one which carries at least as much force today. The strains on such a person, who will often be a close and loving relative of the injured Protected

[4] The term 'Protected Party' is used throughout this note, but save where a distinction is drawn the points made are generally of equal applicability to claims brought on behalf of children.
[5] As must a child unless a court orders otherwise (CPR 21.2(2).
[6] *Re E (mental health patient)* 1984 1 All ER 309 at 312 (Megarry VC).
[7] As cited with approval by Bennett J in *B v B* [2010] EWHC 543 (Fam) at [16].

Party are obvious and the difficulties caused when no such person is willing to bear those strains will be well known to any who have had to deal with such a case.

9. That indemnity is, of course, limited to costs 'properly incurred' – which in turn, in the modern vernacular, would be limited to 'reasonable costs'. The question of a Litigation Friend being entitled to be indemnified for their legal costs is now codified in the CPR.

The CPR and associated guidance

Approvals of compromises

10. CPR 21.10 provides that no settlement or compromise so far as it relates to a claim by, on behalf of or against a child or Protected Party shall be valid without the approval of the court.

11. The reasons for such a rule are obvious – there is a need to protect people who lack capacity from making settlements which are disadvantageous to themselves[8], and that protection includes protecting them from any lack of skill or experience on the part of their legal advisers which might lead to settlement of a money claim for far less than it is worth[9].

12. The SCCO Practice Note of December 2021[10] indicates that the CPR 21.10 procedure states at paragraph 10 that the CPR 21.10 procedure may not merely be used to approve a settlement of the damages claim, but also a settlement compromising the between the parties costs[11] claim[12] if there is a costs differential claimed as payable to the solicitors.

The Litigation Friend's costs and expenses

13. CPR 21.12(1) provides that a Litigation Friend who incurs costs and expenses on behalf of a child or Protected Party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court,

[8] *Dunhill v Burgin* [2014] 1 WLR 933 at [2]
[9] *Dunhill* at [33]
[10] Approval Of Costs Settlements, Assessments Under Cpr 46.4(2) And Deductions From Damages, Children And Protected Parties, Practice Note By The Senior Costs Judge

[12] Whether that is strictly correct or not, see further at para 33 below, it appears to be a sensible course to have the facility to approve such a settlement in appropriate circumstances.

but only to the extent that it has been reasonably incurred and is reasonable in amount.

14. This is a reflection of the general indemnity position identified above. That a costs indemnity is limited to 'reasonable' costs is unsurprising.

15. The rule then notes that;

> *"(3) No application may be made under this rule for costs or expenses that*
> *(a) Are of a type that may be recoverable on an assessment of costs payable by our out of money belonging to a child or protected party;*
> *(b) Are disallowed in whole or in part on such an assessment*
>
> *(Costs and expenses which are also "costs" as defined in rule 44.1) are subject to rule 46.4(2) and (3))*
>
> *(4) In deciding whether the costs or expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.4(3) and 46.9."*

16. The rule, therefore, effectively incorporates both CPR 46.4(2) and (3) and CPR 44.4(3) and 46.9.

17. CPR 46.4(2) provides the general rule in relation to costs where money is payable to a child or protected party that the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party.

18. The net effect, therefore, is that where the Litigation Friend incurs costs, the Litigation Friend has a right to reimbursement of those costs provided they were reasonably incurred and reasonable in amount. The determination of the same is essentially subsumed in the CPR 46.4(2) process.

19. As to the standard of reasonableness – CPR 21.12(4) (as presently drafted) refers to CPR 44.4(3) (the general factors to be taken into account when deciding the amount of costs, whether on the standard or indemnity basis) and CPR 46.9 (basis of detailed assessment of solicitor and client costs, which is on the indemnity basis). It does not refer to CPR 44.3(5) (factors relevant to determining whether costs are proportionate), which would only apply on the standard basis. This is no doubt because the Litigation Friend's reimbursement is essentially an indemnity to someone taking the steps the Protected Party would take if not lacking capacity and is therefore approached on an indemnity basis.[13]

[13] The current CPRC Consultation on proposed amendments to CPR Part 21 and proposed revocation of PD 21 suggests deletion of CPR 21.12(4) and (5). It is understood that this is not intended to reflect any change of legal principle, but simply on the basis that the cross reference to CPR 44.3 and CPR 46.9 is unnecessary. FOCIS has provided a separate response to that consultation.

20. There has been some question as to whether such an assessment is a 'Solicitors Act 1974' assessment[14]. It is respectfully suggested that this both misses the point and also highlights some of the difficulties in this area.

21. As between the solicitor and the Litigation Friend, each would be entitled to seek an assessment pursuant to s.70 Solicitors Act 1974 of any bill rendered by the solicitor to the Litigation Friend, since it is the Litigation Friend that is the client. That assessment would be a Solicitors Act 1974 assessment, on the indemnity basis, having regard to the CPR 46.9 and CPR 44.4(3) factors.

22. Neither the CPR 21.12 nor the CPR 46.4 process are a Solicitors Act 1974 assessment. However, assuming the Litigation Friend has been acting properly in incurring costs, there is no obvious reason why the outcome should be any different. The CPR 46.4(2) assessment will have regard to the same factors and be on the same, indemnity basis, determining what are the reasonable sums which the Protected Party should pay out of damages to the Litigation Friend (and ultimately usually to the solicitor). As CPR 21.12(5) notes, when considering reasonableness the Court will have regard to the facts and circumstances as they reasonably appeared 'to the litigation friend or to the child's or protected party's legal representative when the cost or expense was incurred'.

23. Unless the Litigation Friend has been acting in some way improperly, therefore, the costs they are entitled to recover and which will be payable from damages should be the same as those which the Litigation Friend would be liable to pay the solicitor at the end of a Solicitors Act 1974 assessment.

24. This will, of course, mean that there usually would be a difference between the between the parties costs recovery and the costs reasonably payable by the Litigation Friend and, in turn (assuming no improper conduct by the Litigation Friend), out of the Claimant's damages – the costs differential. This is not unexpected – indeed it is, of course, the whole reason why CPR 21.12 and CPR 46.4 exist. What is required is a reasonable, fair, just and proportionate mechanism for ensuring that the costs differential is a reasonable sum.

However, for present purposes FOCIS simply notes that it considers that some reference to the applicable factors, in particular those in CPR 46.9, applying in the circumstances of assessment of costs recovery between the parties would remain useful. As noted above, the rules have caused difficulty in application and anything which increases the uncertainty as to the standards to be applied to consideration of such costs is likely to increase and not reduce the scope for dispute.

[14] See Master Brown in *EVX v Smith* [2022] EWHC 1607 (SCCO) at [44].

25. Addressing these points highlights the uncertainties caused, even amongst specialist tribunals, by the present wording of the rules and the fact that the process is spread across more than one part of the CPR. It hardly needs saying that for Litigation Friends to understand these rules and the risks they may be exposing themselves to is a far from easy task.

26. It is respectfully suggested that any reconsideration of the rules or practice direction should seek to harmonise the rules and in particular should make clear the nature of the indemnity and the basis of the assessment.

The impact on the between the parties costs process

27. CPR 46.4(2)(b) provides that on any CPR 46.4(2) assessment of the costs differential, the Court must also assess the between the parties costs unless either a default costs certificate ('DCC') has been issued or the costs are fixed.

28. Given that DCCs can only be issued in very limited circumstances (CPR 47.9) and fixed costs only apply in lower value claims, in practice this means that there must be a between the parties assessment in any case where a solicitor-client costs differential is sought from the Protected Party's damages, even if the between the parties costs are agreed which, in many cases, they are.

29. Where the between the parties costs are agreed, the SCCO, in the December 2021 Practice Note has indicated that the CPR 21.10 process may be used to approve any between the parties settlement, without a full assessment. However, firstly it is not at all clear that is what CPR 46.4(2) permits and secondly it does not, in any event, mitigate the problem substantially in that any such approval appears to be anticipated to occur only once the CPR 46.4(2) assessment has taken place.

30. The between the parties agreement cannot therefore be finalised until that has occurred – and the possibility both of that agreement not being approved and of a between the parties assessment being needed remain. This not merely delays finality between the parties, but increases the risk of additional costs being incurred by those parties – and of the inability to finalise a settlement being a potential bar to settlement, not merely of the costs but of the claim as a whole, occurring at all.

31. In addition to the cases where the parties are able, at least in principle, to settle the between the parties costs (subject to approval), there are of course also the cases

where the between the parties costs remain in issue and therefore there may be both the question of a between the parties assessment and then an assessment under CPR 21.12 and/or CPR 46.4 of any costs differential.

32. FOCIS key concerns here are;

    32.1. That the present rules in relation to how any between the parties settlement or assessment and any Protected Party (CPR 21.12/CPR 46.4) cost assessment should interact are unclear and inconsistently applied and again lead to unnecessary cost and uncertainty;

    32.2. That the combination of these factors does not serve Protected Parties or their solicitors well and risks inhibiting access to justice for Protected Parties.

Underlying difficulties

33. As set out above, in any circumstances where a costs differential is sought other than in relation to a success fee only (and even then potentially in that scenario) the present CPR 46.4 process mandates an assessment of the Litigation Friend's liability to the solicitor, effectively on a solicitor-client basis, and at face value CPR 46.4 appears to require a between the parties assessment of the costs even where those costs have been agreed.

34. Putting aside for a moment the specific issues in relation to Protected Parties, neither of those processes are without their difficulties. The problems with between the parties assessments were highlighted in Sir Rupert Jackson's Final Report[15];

    "*The procedures for detailed assessment are unduly cumbersome, with the result that (a) they are unduly expensive to operate and (b) they frequently discourage litigants from securing a proper assessment."* (Report, paragraph 3.1)

35. Whilst some of his recommendations (such as electronic bills) might be said to have produced some improvements in this area, others (such as the expansion of fixed costs) are of little relevance in complex personal injury claims and it is perhaps fair to say that there is much debate as to whether costs management has produced the anticipated benefits, not least given that incurred costs remain to be assessed and many personal injury claims settle before conclusion (and therefore are open to an argument that budgeted future costs should be reconsidered on detailed assessment).

[15] Review of Civil Litigation Costs, Final Report, December 2009

36. Few would suggest that the problems of delay, expense and discouragement to participation in detailed assessment have been eradicated.

37. The process of solicitor-client assessments is even less efficient and effective. There have been widespread calls for reform in this area, with the relevant sections of the Solicitors Act 1974 being described as not fit for purpose. The Association of Costs Lawyers have supported calls by the Senior Costs Judge for reform in this area. Those calls have recently been echoed in strong terms by the Master of the Rolls in **Belsner v Cam Legal Services Ltd [2022] EWCA 1387**;

> *"…the whole court process of assessment of solicitors' bills in contentious and noncontentious business requires careful review and significant reform."* [15]

38. This is not merely a question of the Solicitors Act 1974 procedure, but the principles applicable, with much ongoing legal argument about the correct approach to such assessments[16].

39. There may be no easy answer to the problems with both between the parties detailed assessments and solicitor-client assessments. The difficulty with Protected Parties is that on any occasion where a costs differential is sought the present rules are confusing but appear to require a potentially lengthy and costly combination of both processes.

40. This not merely uses up substantial court time and cost, but delays the final resolution of what may already have been a lengthy claim for the Protected Party and their Litigation Friend in circumstances where there is apparently (on the present interpretation of the rules) no scope for the Protected Party via their Litigation Friend or Finance & Affairs Deputy to shorten that process by agreement.

41. It is respectfully suggested that a reconsideration or redrafting of those rules – or fresh guidance in relation to their operation – should allow for the court to have greater flexibility to abbreviate or moderate the process whilst ensuring the Protected Party remains adequately protected.

The present ability to simplify the process

42. In most cases the outcome of the CPR 46.4 process will determine also any CPR 21.12 application. This is because CPR 21.12(1A)(a) limits the CPR 21.12 recoverable costs to those assessed pursuant to CPR 46.4(2).

[16] See the substantial disputes in Belsner itself, which has answered some important questions in that regard, but was never intended to and does not resolve the wider difficulties.

43. CPR 21.12(1A)(b) allows for a simplified application process where the only claim is for a success fee (or DBA payment), the damages do not exceed £25,000 and the success fee or DBA payment has been summarily assessed. Again, this invokes part of the CPR 46.4 procedure (CPR 46.4(5)). This simplified procedure is not considered further here since this note is focussed on more complex claims with much higher damages[17], save to note that it again highlights the unnecessary 'spread' of the relevant procedure across more than one rule.

44. In certain other circumstances CPR 46.4 and the related PD permit an abbreviated procedure. These circumstances are set out in CPR 46 PD 2.1 and, in summary, are;

    44.1. Where the solicitor agrees to limit costs to sums payable between the parties (PD 2.1(b) and (c));
    44.2. Where any costs differential will in fact be met by an insurer or other third party and not ultimately from the Protected Party's damages (PD 2.1(d)) – this may, for example, occur if an After the Event insurance provider or Legal Expenses Insurer is meeting the a costs differential;
    44.3. In the court's discretion where the only sum claimed is a success fee or balance of a DBA payment (CPR 45.4(5) and PD 2.1(e)), in which case the Court may agree instead to summarily assess the sums[18];
    44.4. Where there is no need to do so to protect the interests of the child or protected party (PD 2.1(a)).

45. The final circumstance – 'no need to do so' – appears to represent a potentially important safety valve and one with a potential to save substantial cost and court time. In practice, for some time, both practitioners and certain courts used this as a basis to seek to save both.

46. This could occur, for example, by inviting the Court making the costs order to consider summary schedules of solicitor-client costs as against an agreed figure for between the parties costs and asking the court summarily to conclude that a costs differential in a set sum or percentage was reasonable and therefore no detailed CPR 46.4 process was necessary.

[17] Hundreds of thousands, millions or even low tens of millions for the most serious injuries involving children and/or severe mental incapacity.
[18] In practice, in sizeable cases, this is problematic, at least in the case of success fees, since the percentage success fee is applied to the solicitor client base costs. These may not be known or capable of easy determination or may not be accepted by the Court as necessarily being reasonable even on an indemnity basis without further enquiry.

47. Plainly, if the Court considered that such a summary process was inappropriate in all the circumstances, it should have a residuary power to 'order otherwise' and provide for a more detailed process. That process might involve, depending on the circumstances, a more detailed enquiry either before that court or before a costs judge into either a specific aspect of the costs (for example, a specific item of cost, or the percentage of the success fee or similar) or if appropriate, order the type of detailed assessment that is the default presumption under CPR 46.4.

48. What is lacking in the present system – OR at least unclear on present interpretation - is the flexibility to fit the process to suit the case and thereby to avoid or mitigate the substantial cost and use of the parties and the court's time by mandating a full detailed assessment of both the solicitor-client costs and the between the parties costs in every case where a costs differential is sought.

49. Paragraph 12 of the SCCO Practice Note state that '*Applications for orders that the court "approves" or "certifies" the payment of costs by a child or protected party to their legal representatives are unlikely to be appropriate*.' This has caused confusion amongst practitioners as to whether and in what circumstances it would now be appropriate to make an application based on paragraph 2.1(a) of Practice Direction 46. Was this aspect of the Practice Note merely intended to require such applications to be supported by evidence and to address the requirement, or was it intended to discourage or restrict such applications? It is also unclear whether this Practice Note is only intended to apply within the SCCO or whether it also applies within the Royal Courts of Justice and the District Registries.

The cost of the process

50. Neither CPR 46 nor CPR 21 provides for any presumption or prescription in relation to the costs of the process of assessing a Protected Party's costs.

51. The SCCO Practice Note, however, does impose an effective presumption;

"

16. *The assessing judge is likely to take as a starting point that the hearing has been arranged for the benefit of the legal representatives and that it is not incumbent upon the child or protected party to bear the attendant costs.*

17. *For that reason, unless the child or protected party's litigation friend or Court of Protection deputy takes issue with the costs sought by the legal representatives and participates in the detailed assessment of those costs, the court is likely to make no order as to the costs of the detailed assessment process beyond any figure agreed with the paying party."*

52. There is no common law principle or authority supporting such a presumption and it is respectfully suggested that such a presumption is unfair and unjust. This point is considered further below.

Problems with the present process and suggested solutions

53. The problems with the present process may be divided into the following areas;

    53.1. The apparent irrelevance of any agreement by the Litigation Friend to the costs being incurred (or the costs that have been incurred) ('the LF approval point');
    53.2. The lack of any ability for the court to deal with any costs differential summarily, where appropriate ('the summary process point');
    53.3. The apparent requirement to proceed with a between the parties assessment even if costs are agreed between the parties in any situation where a costs differential is sought, and the lack of clear guidance as to how the between the parties position interacts in practice with the assessment of the costs differential is resolved ('the between the parties point')
    53.4. The time, cost and complication involved in the ex-post facto approval process ('the assessment point');
    53.5. The 'presumption' against costs recovery for engaging in the process ('the negative costs presumption point').

54. These are considered in turn below.

The LF approval point

Prior approval

55. The difficulties with the present process include the cost and time of the present ex post facto process and the uncertainty of outcome. Solicitors acting for a Protected Party should be able to achieve some degree of confirmation that costs they are incurring on their behalf in advancing all aspects of the claim in their best interests are likely to be paid.

56. Ordinarily this could be achieved by obtaining a client's prior and informed consent to specific costs or to a specific approach. However, such agreement from a Litigation Friend appears to have little, if any, protective benefit.

57. This identifies one of the key difficulties in such cases. Solicitors need someone to take instructions from. That person is usually the Litigation Friend. It is simply not possible to take instructions from – and therefore not possible to obtain informed consent to the incurring of costs from – the Protected Party.

58. Similarly, the solicitor cannot enter into a contract of retainer with the Protected Party. That contract of retainer will usually be with the Litigation Friend, subject to their rights of indemnity as set our earlier.

59. Whilst the Litigation Friend is only able to be appointed if they are considered to be acting in the best interests of the Protected Party, the present CPR 46.4 / CPR 21.12 process and its interpretation appears to give no, or no significant weight to, any agreement by the Litigation Friend to the costs the solicitor is to incur.

60. This is as a result of a number of factors;

    60.1. The Litigation Friend is not the Protected Party. Accordingly, even if the Litigation Friend is said to have given informed approval to specific costs, this does not appear to give rise to the same presumptions that would apply if a client (of full ages and capacity) had approved those costs;

    60.2. Ordinarily, on a solicitor client basis, informed consent gives rise to presumptions that costs were reasonably incurred and reasonably in amount (see CPR 46.9 – as expressly referred to in CPR 21.12). The interaction between these presumptions as they apply to the Litigation Friend and how any costs differential should be assessed in relation to the Protected Party's damages is unclear;

    60.3. The limited thread of current judgments considering this issue appear to adopt an approach that any such informed approval by a Litigation Friend is of limited, if any weight, for a variety of reasons, including;

        60.3.1. If the presumptions apply, it appears that (at least in Protected Party cases) some courts are taking the view that all that is required to rebut any such presumption is the court taking a simple view that the relevant cost is too high and is therefore unreasonable;

        60.3.2. There appears to be a recurring theme, at least in some courts, that in some way Litigation Friends lack any sufficient understanding of how the costs process works to be able to provide informed consent at all[19]. However, there is nothing to indicate that Litigation Friends here are in

[19] See, for example, the decisions of Master Brown in *EVX v Smith* [2022] EWHC 1607 and his provisional decision in *BCX v DTA* [2021] EWHC B27.

any better or worse position than litigants generally in terms of their understanding[20].

61. The legal correctness of the approach in 60.3.1 and 60.3.2 above is a matter that may be addressed by way of appellate authority in due course. For present purposes, the point – and potential need for such further appellate consideration - simply serves to highlight the unsatisfactory situation.

62. If the present interpretation is correct, in practice it appears to matter little how carefully or diligently a solicitor discusses costs and the costs benefit analysis of a case with a Litigation Friend (usually the only person they are able to take instructions from and enter into a retainer with), or how careful they are to obtain informed consent. It will have no real effect in mitigating the need for the full CPR 46.4(2) process.

63. This may then be combined, as noted above, with the fact that there does not appear presently to be any process for the Litigation Friend or the solicitor to seek prior court approval of such costs.

64. The net effect, therefore, is that short of accepting, in every case, that the costs incurred on the Litigation Friend's instructions must be limited to the recovered between the parties costs (bar success fee and ATE) the only choice is effectively a full solicitor client type assessment (with an unclear position as to the proper application of the presumptions in CPR 46.9) possibly with some element of a between the parties assessment (or at least an approval) and with no certainty of outcome.

65. Solicitors acting in complex, high value, personal injury litigation frequently have to undertake work which incurs costs which go beyond the costs likely to be recovered between the parties. The solicitor will almost always do so in whole or in part reasonably. They will usually do so with the agreement and approval in whole or in part of the Litigation Friend. They will usually do so because they are seeking to act in the best interests of the Protected Party.

66. The same phenomenon of course applies to all other litigants, the only difference being that there do not appear to be any other practice areas where the court rules or practice assume n that the solicitor rather should bear that cost risk themselves.

[20] If anything our experience is that on average Litigation Friends take their duties and responsibility more seriously than clients with full capacity do in relation to their own affairs and in particular the recent decision in *MNO v HKC & Anor [2022] EWHC 2919 (SCCO)* at [54]).

67. To have to do so with no certainty that the costs of such work will be paid – and with a presumption applied that if they wish to seek those costs from their client they will usually face a lengthy and costly process and have to pay the costs of that process – is a real deterrent to solicitors acting for such clients. Over time this is likely to result in some solicitors firm's concluding that this type of case is insufficiently profitable or can only be conducted profitably by reducing the level of work (or level of experience at which it is undertaken). By their nature many claims involving Protected Parties relate to injuries of the utmost severity. It is no exaggeration to suggest that such a shift could result in a reduction in the damages for some of those Protected Parties by six or even seven figure sums. In net terms that would be far in excess of the cost differentials that typically result from experienced complex injury specialist solicitors applying a rigorous approach of fully exploring all viable avenues to achieve full compensation[21] for their Protected Party clients.

68. Of course such solicitors have one further option. The Litigation Friend's approval is effective (assuming informed) against the Litigation Friend. The solicitor could seek such costs as against the Litigation Friend personally (and not out of the client's damages) and leave it for the Litigation Friend under CPR 21.12 to seek the costs differential from the Protected Party. Since the solicitor would not be directly seeking any deduction from the Protected Party's damages – it would be the Litigation Friend who would have to do that – CPR 46.4 would not bite as against the solicitor.

69. The Litigation Friend could seek a s.70 Solicitors Act 1974 assessment as against the solicitor – and the whole matter may end up being heard together in an even more convoluted and costly process – but as noted, at least from the solicitor's perspective, this would mitigate the problems caused by seemingly being unable to rely effectively on any form of approval of costs by the Litigation Friend.

70. This, of course, highlights the true nature of the relationships involved. It also throws a spotlight on one of the reasons why the presumption that the solicitor should usually pay the costs of this type of assessment is unjust.

71. However, no solicitor acting in this field has any desire to place a Litigation Friend who has been acting in the best interests of the Protected Party, often a close relative, through difficult times in such an invidious position. In addition any real prospect of such an outcome would be a serious deterrent to anyone volunteering to take on the onerous role of Litigation Friend in the first place.

[21] Not to mention pro-actively assisting those clients with very important rehabilitation issues as per the Rehabilitation Code and Serious Injury Guide.

72. What is required instead is a process whereby the rules and processes give proper regard to the Litigation Friend's role and their ability to provide informed consent to costs[22]. It is respectfully suggested that a redrafting or reinterpretation of the rules which makes clear that there is an effective and robust presumption that informed approval by a Litigation Friend to costs means that such costs are reasonable and may be recovered from the Protected Party's damages will be of substantial assistance in resolving some of the present problems.

73. If such redrafting is allied to the above proposals as to the Court's ability to simplify the process in appropriate cases a more effective and efficient system may be arrived whilst still ensuring Protected Parties are adequately protected and the Court has the ability to require more detailed enquiry in appropriate cases.

74. Whilst some form of approval to ongoing between the parties costs can be achieved by the costs management process in CPR Part 3, that process is exclusively focussed on between the parties costs. It is a contentious process and contains no facility for the Litigation Friend or their solicitor to identify aspects of costs which the Court can consider and provide any form of prior approval of.

75. This is so even if, at the costs management stage, the Court indicates that a particular item of cost is unreasonable 'between the parties'. Such a cost – for example a particular level of attendance on the Litigation Friend or the Protected Party – may be one which is uncontentious on a solicitor-client basis and may be one that the Litigation Friend has expressly agreed to. However, the court does not have the facility to enquire into the same in that costs management process (and it would often be inappropriate to do so anyway in the CPR Part 3 process, since it is an open, between the parties, process).

76. Both the Litigation Friend and the solicitor are left, therefore, to see the outcome of any attempt to recover such costs at the end of the claim – with the consequences already identified.

77. FOCIS has two proposals in this regard. Firstly, as set out in its response to the recent CJC Working Group Consultation on Costs Management, FOCIS considers, for the reasons set out therein and not repeated here, that costs management should not

[22] Of course, if their consent is not informed or the Court has concerns in that regard that may be a reason, on the circumstances of a given case, for the Court to enquire further. Similarly, in those rare cases where the Litigation Friend might be said to have been acting unreasonably or improperly in agreeing to something. Such cases are, it is suggested, extremely rare – a point which appears to be recognised in the SCCO Practice Note which effectively assumes that the issues in CPR 46.4 assessments will usually be in relation to the solicitors and not in relation to any question of the propriety of the Litigation Friend's actions.

apply to Protected Party cases or, at the very least, there should be a 'default off' position in respect of such cases.

78. Whilst there are sound reasons for that proposal, it would not assist ongoing cases that are already subject to Cost Management Orders.

79. FOCIS second proposal, however, would. This is as set out in FOCIS' response to the CPRC consultation on CPR Part 21. This is twofold.

80. The first is that CPR 21.12(4) and (5) should be amended to so as to provide that one of the factors material to a Litigation Friend's suitability to act as such should be their ability to consider and approve the incurring of costs on behalf of the Claimant.

81. The same should be provided for under CPR 21.12(4) and should form part of the certificate of suitability under CPR 21.12(5).

82. The second is that any such approval should then be specific in CPR 21.12(5) (assuming CPR 21.12(5) is retained) and, perhaps more importantly, should be identified in CPR 46.4 as a factor material to the determination of whether those costs are payable out of the Claimant's damages.

83. In short, provided the Litigation Friend is a suitable person who has signed a certificate of suitability confirming their responsibility in relation to cost issues, then any approval they have given to the incurring of costs should have the same effect in terms of the ability to recover those costs from the Claimant's damages as would such approval if given by a litigant with full capacity in respect of their own claim.

84. This does not mean that such costs would not be scrutinised. CPR 46.9 sets out the effect of prior approvals of costs on a solicitor-client basis. They give rise to presumptions and, where appropriate, those presumptions may be rebutted (for example as a result of a lack of informed consent due to a lack of proper information being provided before the decision is made).

85. FOCIS does not seek to suggest that the approval by a Litigation Friend to incurring of costs should be treated any differently. It would not remove the application of the indemnity basis test when determining whether the costs should be recoverable from a Claimant's damages. Nor would it mean that a Litigation Friend's approval would always mean those costs were recoverable – or recoverable in full[23].

[23] In addition, pursuant to any modified version of CPR 21 and 46, any deduction of costs from damages would remain subject to court oversight, which would continue to provide additional protection to Protected Parties.

86. What it would do, however, is provide that a Litigation Friend's prior approval – for example of hourly rates, a success fee or a specific item of costs (say instruction of leading counsel) would have the same effect as and could be relied on to the same extent as a client's approval in a non-protected party case.

87. This would be sensible, practical and entirely fair. A solicitor is required to set out its terms of business when agreeing to act in a case. In a case where the only person able to provide instructions is the proposed Litigation Friend, it should be entitled to rely on any agreement provided by that Litigation Friend to those terms of business. There is no one else the solicitor can ask.

88. This is subject to one qualification. A Litigation Friend is someone who is expected to fairly and competently act on behalf of the child or Protected Party and not to have any adverse interest (CPR 21.4(3)(a) and (b)). They are expected to act in the Protected Party's interests and to do so properly.

89. Thankfully, it is rare that a Litigation Friend does not do so. However, the rules should of course admit of the possibility that this might happen. Accordingly, FOCIS considers that whilst the Litigation Friend's approval of costs should be given full weight under CPR 46.9, it also considers that any such rule amendment should also provide that this would not be the case '*…if and to the extent that the Court considers that the Litigation Friend has acted improperly and / or has not complied with their duties under CPR 21.12(3)(a) or (b). In such a case the Court may order that the Litigation Friend alone shall be liable for any costs incurred as a result of a failure to comply with those duties*'.

90. Not only would this protect the Protected Party by ensuring that in a rare case where the Litigation Friend expressly agreed costs on an informed basis, but did so for some improper purpose, the Protected Party's damages would be safeguarded. It would also protect the solicitor by making it clear that in such circumstances the approval might still operate, but as against the Litigation Friend and not the Claimant.

91. In the even rarer case where the Litigation Friend and solicitor acted improperly in concert, then not only would the proposed amendment protect the Protected Party, but the Court would have ample resources (for example under CPR 44.11 – misconduct) to ensure the solicitor's conduct was also addressed.

Ex post facto approval

92. There appears to be no scope within the current process for any ex-post facto approval by the Litigation Friend or other suitable person (such as a Financial and Affairs Deputy) to the costs differential.

93. Again comparing the position to the solicitor-client basis, if a client was provided with a statutory bill, informed of the costs and any deduction from damages and raised no objection, there would be no assessment.

94. It is fully appreciated that in the Protected Party context the court must maintain a supervisory jurisdiction and that is an important point of difference. However, if undue court and parties' time and cost is not to be wasted, it is submitted that any ex post facto consideration of and approval of the costs by a Litigation Friend or a Deputy is a matter that should at least be recognised as being of considerable weight and as a factor to take into account both in (i) deciding if a detailed assessment of the costs differential remains necessary and (ii) in deciding the reasonableness of the costs of any such assessment.

95. Again, as with prior approval, the Court would have a discretion to give little or no weight to the same in the event of any improper behaviour on the Litigation Friend's part. It may wish to have regard to the quality of the information provided to the Litigation Friend when considering the weight to be given to the approval[24]. However, none of these points serve to undermine the core point that taking into account a considered and informed ex post facto approval by a Litigation Friend of a costs differential is a sensible and just consideration and one which might serve to substantially reduce the time and complexity of the assessment of protected party costs differentials.

The summary process point

96. This has largely been addressed above. In ensuring Protected Parties are protected, an appropriate level of balance is required. It should not be necessary in every case for there to be a detailed examination of all costs incurred in order to decide whether a costs differential is reasonable. In some cases it may be – and the time and cost

[24] The CPRC's current consultation on amendments to CPR21.12(7) proposes a detailed witness statement from the litigation friend to support a claim for payment from a fund of costs or expenses, including appending some of the relevant cost documents.

may be justified – but in many, if not most, cases it will not be such an assessment will cause delay[25], uncertainty, additional costs, occupy court time, but yet will not serve any meaningful benefit to the Protected Party.

97. Provided the Court retains the power to order more detailed enquiry where required, it is respectfully suggested that the perceived lack of flexibility in the present process is a major flaw which can be relatively easily remedied by amendment to the CPR and SCCO Practice Note.

The between the parties point

98. FOCIS contends that the rules should be clear on the status of any between the parties settlement. They should include an inherent presumption that settlement will stand, subject to final court approval, and that a detailed assessment of the between the parties costs will not usually be required in such a case unless the Court 'calls it in'.

99. In those cases where the between the parties costs have not settled, there should be an efficient process whereby the between the parties costs and the costs differential costs claimed out of the Claimant's damages are assessed at the same hearing to ensure fairness of decision making and minimisation of costs. FOCIS's proposal of a clearer but comprehensive process would involve;

    99.1. Amending the rules so that it was clear that in cases where the between the parties costs remained disputed, any CPR 21.12 or CPR 46.4 assessment of the costs differential would take place as part of the same process as and immediately following on from the between the parties assessment. This would be akin to the position with legal aid assessments. This would ensure that the same judge, at the same time, would consider both the between the parties costs and the extent to which any costs not recoverable between the parties could be recovered from the Claimant's damages. It would minimise costs duplication and the use of court time. It would also reduce the risk of items of costs falling between two stools or disjointed decision making. FOCIS' interpretation of the present rules is that there is nothing to prevent this happening, but equally nothing to make clear that this should be the usual or expected course;

    99.2. Making provision in the rules to streamline the position with cases where the between the parties costs have settled, subject to court approval, but there is a

[25] With the inherent risk that such delay and uncertainty may delay decisions as to the investment of damages, the purchase of accommodation or equipment etc.

claim for a costs differential. In such cases FOCIS agrees that the Court should retain a discretion to not approve the between the parties assessment, but this is likely to be rarely exercised for the reasons already given. The rules should provide that in such circumstances there is no need or expectation that the paying party will participate in or be involved in the conduct, post settlement, of the costs claim, but should further provide that the Court may direct otherwise at any stage. Further, the rules should provide for an expectation that the between the parties settlement will be approved unless the Court directs otherwise – effectively reversing what is the prima facie inherent presumption in CPR 46.4(2)(b) that there will always have to be a between the parties assessment, subject only to the discretion in CPR 46 PD 2.1(a) to decide that the same is unnecessary.

100. Such amendments would ensure that the Protected Party remains protected from the relatively unlikely possibility of unreasonable or improper undersettlement[26], the opponent in the claim is able to settle the costs claim without becoming unduly involved in the CPR 46.4 process, but the court retains a full range of discretion over each element of the costs in question to be (a) recoverable between the parties (b) paid out of Protected Parties (c) not be payable at all[27].

The Protected Party assessment point

101. This is addressed above. Put shortly, substantial time and money is being incurred in a convoluted and opaque process which is not merely unnecessary in the vast majority of cases in order to protect the Protected Party, but which appears to be confused and which risks creating unnecessary division between Litigation Friends, their solicitors and Defendants who may all previously have worked together effectively to settle a difficult personal injury claim.

102. In many cases it will be an inefficient process, incurring more time cost than it saves. However, it is of course important that judges have the power, in the rare cases in which it has reason to suspect that the proposed cost differential is unreasonable and/or the conduct of the Litigation Friend and/or solicitor requires scrutiny, to commit court time and resources to carry out a detailed assessment.

[26] As noted, the Protected Party does not need to be protected from over settlement by the opponent and this process does not exist to protect the opponent. The only real concern is undersettlement and the process above maintains protection for the Protected Party.
[27] There is a 4th option outlined in paragraph 68.

The negative costs presumption point

103. The imposition of a negative costs presumption – that solicitors will usually pay the costs of the CPR 46.4 process – is invidious and unjust. It is also unprincipled and without support in authority or the rules.

104. Firstly, it operates as an effective penalty to solicitors who are simply following the rules. There is nothing improper in a solicitor claiming from a Litigation Friend and, in turn, the Litigation Friend seeking to recover from a Protected Party's damages a costs differential between the reasonable solicitor client costs and the agreed or assessed between the parties costs. If there was anything improper in so doing, the Civil Procedure Rules would have provided for it back in 1999 or in one of the many amendments that have followed in the decades that have followed. For the rules to impose an effective penalty on solicitors for doing so will act as a disincentive for solicitors to take on the significant responsibility and challenge of representing Protected Parties in complex injury claims.

105. Secondly, when such a costs differential is to be claimed, the Litigation Friend and the Solicitors have no choice but to follow the presently complicated, opaque and inefficient CPR 21.12 and CPR 46.4 process. It is mandatory and – as set out above – the Courts (on present interpretation) there is a lack of clarity as to the ability of the courts – in particular the costs courts - to disapply or modify it in appropriate cases.

106. The net effect, therefore, is that solicitors who have undertaken work in a case acting reasonably for their client on the instructions of the Litigation Friend and who wish to be paid for that work must follow this process so that the Court can scrutinise those costs.

107. If they do so and if the Court then accepts those costs are to be paid from damages, the present negative presumption imposed by the SCCO means that the solicitors must then pay the penalty of their own costs of that process.

108. This is not limited to cases where the solicitors have used the process and the Court has decided that their costs claim is unreasonable or improper. Quite the opposite – the terms of the presumption imposed in the SCCO Practice Note make clear that this presumption applies even in those cases where the outcome is that it has been properly established that the solicitor is entitled to be paid some or all of the required

costs from the Protected Party's damages and those costs are reasonable and in accordance with the Litigation Friend's agreement to them.

109. This is unprincipled and unjust. Those costs are part of the costs of finalising the claim. They should be payable in the usual way and should – to the extent that they are reasonable – be payable out of the Protected Party's damages.

110. Of course, there must be a discretion here – a discretion to be exercised properly. If, for example, the claim for a deduction was unfounded or improperly or unreasonably brought by the solicitor or Litigation Friend as it may be, then there may be reason to order otherwise. However, again such cases are likely to be rare.

111. Equally obviously no one – not least the Litigation Friend or the solicitors that have fought so hard to recover damages for the Protected Party – wish to see the Protected Party's damages used to pay further costs unnecessarily. However, the process which leads to these costs is not simply the Litigation Friend or the solicitor's choice. Almost always the work in question will have been undertaken for good reason, in the Protected Party's best interests, but, for the very wide variety of reasons that costs are challenged on inter partes assessments, may not be recovered.

112. It is not just effective to say to solicitors 'do not seek payment of the costs to which you are reasonably entitled, because the mandatory process you must follow will incur more costs and eat into the Protected Party's damages'. If that is to be the position, then it is likely to drive the better firms of solicitors away from such work. Further, if the position is to be that either no a costs differential are to be allowed, because it is thought to be contrary to public policy that solicitors should be paid from Protected Party damages, or that solicitors must pay a financial penalty if they wish to be so paid, then this is a matter that should be provided for by primary rule making and legislation, following consultation. Such a significant policy position should not be an inadvertent consequence of this well intentioned Practice Note.

113. The fact that such costs are incurred by following the mandatory process is not a reason to use those to penalise solicitors who follow that process. It is rather a fundamental reason to ensure that any such process is as effective and efficient as possible and only incurs such further costs as are necessary to ensure the Protected Party is properly protected. It is a reason to engage with the proposed reforms identified above.

114. A final point in this regard is that the negative presumption risks further damaging the relationship between solicitors and the Litigation Friends. It might be said that

the way for solicitors to avoid the negative presumption is to seek their costs from the Litigation Friends on the basis of the retainer.

115. As noted above, this would be by way of s.70 Solicitors Act 1974 assessment, where the solicitor would be able to rely on s.70(9) to recover their costs of the process unless their bill was reduced by at least 20%.

116. The Litigation Friend would then be left to rely on CPR 21.12 and CPR 46.4 to recover the difference between what they had to pay the solicitor and what the opponent had paid out of the Protected Party's damages. The solicitor could sit back and play no part – indeed, by this point, the solicitor may no longer be instructed. The Litigation Friend would then incur the costs of the CPR 21.12 process. Query whether they would be subject to a similar negative presumption because they were acting then, 'in their interests'?

117. As with the general process above, no one wishes for the process to become further fractured in this way. What is needed is some sensible and progressive reform and a careful balancing of the interests of all involved, including the Protected Party. Imposition of unjust and penal costs provisions on solicitors who have acted for Protected Parties exacerbates, rather than improves, an already difficult position.

118. FOCIS submits that there are three possible alternative approaches, each of which have merit and should be consulted on;

118.1. That the costs of the necessary process assessing any costs differential under CPR 46.4 should be a recoverable cost of the litigation – that is to say usually payable by the Defendant – on the basis that they are an inherent cost associated with a successful personal injury claim. This would be to the same effect as the position in relation to the necessary process for Court approval of the substantive damages claim. It is appreciated that Defendants will feel strongly about having to pay an additional layer of costs in circumstances where they have taken reasonable steps to settle the costs claim, but as with the approval in the substantive claim, provided all parties behave reasonably it is properly to be regarded as an inherent cost of litigation involving a Protected Party. A Defendant's understandable concern in this regard are best served by ensuring that the process – and associated costs – are as transparent and efficient as possible. Plainly, the court should retain a discretion to order otherwise (just as with any other costs order), for example if the Court finds that the costs claimed were unreasonably or improperly claimed;

118.2. That the costs of the necessary process under CPR 46.4 should form part of the damages that the Claimant can claim in the substantive claim, in the same way as Court of Protection or Deputyship costs;

118.3. That the costs of the necessary process under CPR 46.4 should form part of the costs differential itself – that is to say are payable out of the Claimant's damages. Once again, plainly the Court would retain a discretion to order otherwise if the circumstances so required.

Conclusion

119. By these submissions, FOCIS seeks to identify the present difficulties with the rules and practical process of solicitors acting for children and Protected Parties in personal injury claims seeking to recover from the Claimant's damages the reasonable difference between the costs payable on a solicitor-client basis and those payable between the parties ('the costs differential').

120. Such claims are, by the nature of the severity of the injuries, often complex and high value. It is usually in the best interests of the Protected Party to be represented by a highly experienced legal team, who adopt a rigorous approach to investigating and advancing the claim, even if at times that involves incurring more legal costs that might be recovered between the parties. Since the LASPO reforms of 2013 it has become increasingly difficult for firms' specialising in such claims to write-off the own client element of such representation and there is no legal basis for expecting them to do so.

121. Consequently, FOCIS proposes a series of changes, principally to the CPR, to make this process more transparent, predictable, cost effective and just.

122. In summary, those proposed changes are;

122.1. To provide a clear process for the costs differential where the between the parties costs are agreed, but a costs differential is sought, whereby there is no need for the paying party to play an active role unless the court identifies circumstances which require those costs to be assessed;

122.2. To clarify and simply the process in those situations where the between the parties costs are not agreed, so that the process of assessing the between the parties costs and the costs differential takes place at the same time, in front of the same judge, thereby minimising cost and use of court time;

122.3. To provide clearer guidance within the rules as to the effect of prior approval by the Litigation Friend (or a Deputy) of the incurring of costs – for example, hourly rates, or a success fee – and to provide that such approval by the Litigation Friend would usually have the same effect as approval of such costs by a non-Protected party client under CPR 46.9, unless the Court has reason to believe that the Litigation Friend has acted improperly or in breach of their duties;

122.4. To address the effect of any post approval or consideration by the Litigation Friend or a Deputy of the costs differential and to provide within the rules that any such approval is a matter to be given weight both in the decision as to whether an assessment of the costs differential remains necessary and as to the reasonableness of the differential itself on any such assessment;

122.5. To address the presently operative presumption – at least in cases in the Senior Court Costs Office – that in circumstances where a costs differential is sought, the solicitor will usually pay its own costs of that process regardless of whether or not the Court concludes that the solicitor has behaved entirely properly and that the costs differential sought is reasonable;

122.6. To clarify the relationship between CPR 21.12 and CPR 46.4 and the respective roles of solicitor, Litigation Friend and Claimant in this process. To make clear that the costs a Litigation Friend has agreed to pay a solicitor to act on behalf of a protected party Claimant will usually be recoverable from the protected party's damages (and not be left as a liability for the Litigation Friend) unless the Litigation Friend has acted improperly or in breach of their duties.