



## **SETTING A FAIR CASE FEE**

**A RESPONSE BY ILEX PROFESSIONAL  
STANDARDS LIMITED**

**CONSULTATION BY THE OFFICE OF LEGAL  
COMPLAINTS ON DEVELOPING A STRUCTURE  
FOR CHARGING A FEE WHICH SUPPORTS THE  
ROLE OF AN OMBUDSMAN SCHEME AS AN  
INDEPENDENT AND IMPARTIAL SERVICE  
ASSISTING CONSUMERS OF LEGAL SERVICES  
AND THEIR LAWYERS RESOLVE COMPLAINTS**

**DATE: 4 DECEMBER 2009**

## **Introduction**

1. This response represents the views of ILEX Professional Standards (IPS), the regulatory arm of the Institute of Legal Executives (ILEX).

## **ILEX Professional Standards**

2. IPS is a regulatory company established by ILEX to take responsibility for the regulation of Legal Executives. ILEX is the professional body representing 22,000 qualified and trainee Legal Executives and is an Approved Regulator under the terms of the Legal Services Act 2007 (the Act).
3. ILEX and IPS are committed to regulating Legal Executive businesses and businesses in which Legal Executives are partners and directors by 2012. IPS will be responsible for establishing regulatory arrangements that not only comply with the requirements of the Act and with any regulations made by the Legal Services Board (LSB) under the Act but that also provide public protection.

## **Executive Summary**

4. IPS supports the general approach which the Office of Legal Complaints (OLC) proposes to adopt. We recognise that the OLC has produced a hybrid of case fee structures currently used by other ombudsman services.
5. Narrow prescriptions are made within the Act in order to preserve the public interest. The ombudsman scheme however is not the subject of rigid rules. The flexibility allowed in the ombudsman scheme is beneficial as the OLC does not know the number of complaints it will receive, the types/entities the complaints will come from and also how the case fees will influence practice, behaviour and internal complaints procedures.
6. It is apparent that due to the OLC's limited knowledge, the proposed case fee structure is not set in stone, the Act allowing the OLC to revisit the level of the case fee and to review its approach within the first three years of operation allowing it to adjust the case fee structure accordingly.
7. The main objectives of the case fee are firstly to pay for the service, enabling the scheme to be case fee dependent as opposed to levy fee dependent and secondly, to influence behaviour. The case fee options proposed include the OLC doing nothing, i.e. not charging for complaints handling, the OLC charging a flat fee, the OLC imposing a sliding fee structure and finally the OLC offering a number of free cases per firm per year. The flat fee was proposed to range between £200 and £400. It was highlighted that a case fee in that range is relatively low in comparison to what other ombudsman schemes charge.

8. The remainder of this response sets out answers to the specific questions within the consultation paper, where IPS is able to offer a view.

**Q1. Do you think our approach to the case fee is fair? Please give your reasons.**

9. The legal profession will pay for the full cost of the OLC by a combination of a levy and case fees charged to lawyers for dealing with individual complaints. The ability to charge for the cost of dealing with complaints is an important regulatory tool.

10. The approach to the case fee is fair to the extent that it embraces the polluter pays mechanism. The polluter pays mechanism is based on a policy that ensures that those responsible for the cost of complaints handling are required to pay for it, rather than the cost being spread among the whole of the legal profession. IPS agrees with the applicability of the polluter pays mechanism.

11. We feel, however, that in using the polluter pays mechanism, regard should still be had to principles of Good Regulation, principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted.

12. Of great importance is the Good Regulation principle requiring that regulatory activities are targeted. Targeted means that regulation should be focused on the problem, and minimise side effects. With that in mind the consumer interest should be a driver for the fee, given that the ombudsman service is ultimately run for consumers. It is not in the consumer interest for the focus of the case fee to be on guilt/innocence, win/lose and right/wrong. Good regulation dictates the focus should be on the problem. As a result from a regulatory and consumer perspective, the problems that should be tackled are internal practices and behaviours. The case fee approach does not substantially focus on changing practice and behaviour. This is an area we will revisit when discussing the proposal of offering two free cases to each firm per year.

13. The case fee arrangements should seek to strike a reasonable balance amongst the following factors:

- a. fair shares amongst firms of different sizes, types and behaviours;
- b. no undue incentive for firms to reject justified complaints, nor accept unjustified complaints;
- c. sustainable over time through variations in case numbers;
- d. practicable for the OLC to assess and collect;
- e. limited transitional difficulties if the system is changed; and
- f. easy for firms to understand.

14. The factor that has already proved most challenging is: any case fee arrangement should be fair to firms of different sizes and types. As stated the approach to the case fee is fair to the extent that it embraces the 'polluter pays' mechanism, however, the preferred structure, to deal with this challenging factor, is not. This leads us on to the next question within the paper.

**Q2. Do you think there is likely to be a potential impact on small firms or sole practitioners, or specific areas of the law which might attract more complaints or potential impact on diversity within the profession? Please give your reasons and provide any evidence that you think will help us measure any impact.**

15. There is likely to be an impact on small firms, sole practitioners and lawyers who work in specific areas of law. Legal Executives providing immigration advice and services and those doing contentious work, for example family litigation, are likely to be disproportionately impacted by the proposed case fee arrangements. The OLC needs to recognise that the ability of small firms and sole practitioners to provide services will not match that of a large practice.

16. Charging a case fee provides an incentive for all firms, big or small, to resolve complaints in-house before they are escalated to a chargeable ombudsman service. At the same time imposing a case fee can deter small firms from taking on contentious cases for fear of being charged a large number of complaint case fees. To balance both possibilities, the case fee needs to be substantial enough to encourage in-house complaints handling but not too high that firms are deterred from accepting certain cases. If a balance between the two is not struck the case fee arrangements can have an adverse effect on access to justice.

17. From a regulatory standpoint, however, sound practices would not have any worries about the risk of complaints because not only would complaints be unfounded, all complaints received by the firm would be processed appropriately by means of the firm's internal complaints handling procedures. The ability of small firms may not match that of large firms although small firms should still be able to meet competent standards.

18. IPS agrees that the approach to case fees needs to be fair and reasonable bearing in mind that smaller firms and firms operating in contentious areas of the law may be disproportionately impacted. That impact may be somewhat mitigated by allowing for two free complaints per firm per year; however, if that approach is taken to protect such firms the rest of the profession will effectively be subsidising through the levy, firms that provide poor service and poor complaints handling. The firms will have less incentive to change poor practices.

19. The size of a firm and the nature of the area of law worked in are factors to be considered but shouldn't provide an excuse for poor service and poor complaints handling. If certain firms are not able to keep up standards both in the area of service and complaints handling the regulator should be providing support and guidance to enable those struggling firms to improve. Firms should not be given excuses for getting things wrong and escape being held financially accountable.
20. The challenge for regulators is to be alert to issues that are likely to generate large volumes of complaints and at the same time provide support to firms to enable them to adapt their business practices and complaints handling procedures accordingly.

**Q3. Do you agree with the option of structuring the case fee as a flat fee with two free cases per firm per year? Please give your reasons why or why not.**

Flat Fee

21. Structuring the case fee as a flat fee and the provision of two free cases per firm per year may lead to potential problems.
22. A flat fee doesn't recognise the level of time taken by OLC in dealing with cases. A sliding scale may be better at reflecting the time spent and the stage the case reached in the resolution process. A sliding scale may also encourage speedy resolution of cases so as to avoid mounting costs.
23. Due to the fact that a flat fee structure does not consider the impact of the timing of resolution, nor reward those who strive for an early, informal complaint resolution in the OLC process and who contribute to saving some of the OLC operative costs, an alternative may be that the ombudsman service will cost nothing for firms whose complaints are not converted into real cases that require formal decisions by the Ombudsman, firms only being charged for cases that reach the adjudication stage of the process. In real terms a case that is resolved by the OLC before it reaches the adjudication stage, would cost a lot less than a case that is adjudicated on, something which a flat fee cannot accommodate.
24. IPS agrees with the flat fee structure solely due to it being simple to administer and non-contentious however the factors highlighted above in paragraph 23 should be considered when setting the flat fee amount.

## Free Cases

25. It is understood that a flat fee is simple to administer and that free cases may alleviate a disproportionate impact on small firms, sole practitioners, or practitioners working in specific areas of the law. The potential danger with the proposed case fee structure is the system being faced with firms "dumping" cases on the Ombudsman because either the case fees are cheaper than the cost to some firms of handling complaints properly themselves or because firms are able to submit their first two cases to the OLC without paying a case fee.
26. Two "free cases" may be welcomed by small firms; however, this issue is part of a broader debate of "who should pay for the investigation of complaints?" The problem with "free cases" is that it allows poor practice to continue as there is minimal cost or impact upon the lawyer at fault, in comparison to them changing their practices. The question that needs to be asked is, "do free cases hinder the OLC's aim of changing/addressing poor practice?"
27. "Free cases" do not address redress or improvement mechanisms. Two "free cases" effectively gives a firm three chances to get their services and complaints handling up to scratch. In the paper it is stated that "Allowing for a small number of free cases per firm per year has the advantage of acknowledging that firms with good in-house complaints handling procedures might end up with an occasional complaint reaching the OLC. It sends the signal of OLC "goodwill" in that such lawyers or firms are not penalised for occasional complaints." Not charging a firm for a case that is not upheld and was handled appropriately by way of their internal complaints procedure is "goodwill." Not charging a firm for a case that is upheld and was handled either inappropriately or appropriately by way of their internal complaints procedure is nonsensical.
28. Case fees are intended to be used not only as a behavioural instrument to motivate lawyers and law firms to keep to a high quality of service but to also assist and encourage good in-house complaints handling. IPS would argue, however, that the most important factor of the two is motivating lawyers and law firms to keep to a high quality of service. Not charging a firm for cases that are upheld provides less incentive for firms to improve their standard of service let alone their complaints handling procedures. Firms that repeatedly provide poor service are more than likely to have in place poor, if any, complaints handling procedures. Firms should not need two chances per year to improve their service and their complaints handling procedures. One chance per firm (not per year) to raise the level of good complaints handling is sufficient.
29. The existence of a considerably large number of "free cases" will penalise firms that do not have many cases with the OLC. The "free cases" are, in effect, paid for by the levy on all firms. A model that

includes free cases will have a similar effect as the model where no case fees are charged at all. Both result in extra costs to every member of the legal profession in terms of a levy. Applying the key assumptions on page 12 of the paper, an increase of the proportion collected via the levy of £120-30 per authorised person (lawyer) will be expensive for lawyers who have done no wrong.

30. IPS does not agree with the provision of free cases against the polluter pays principle and creates an apparent subsidisation of poor complaint-handling firms by good complaint-handling firms.
31. On an administrative basis, will there be a log of the areas a particular firm is failing in each time a complaint is dealt with by the Ombudsman? Furthermore, is a firm allowed to have two free cases that both relate to the same thing. i.e. can the firm fail in the same area of service twice and not have to pay a case fee. Has the OLC considered the administrative costs and complexity of counting free cases per firm or office?
32. From a regulatory standpoint will the OLC notify the Approved Regulator of the types of complaints found against their members including those that the lawyer/firm is not required to pay for; so the Approved Regulator can address it with the lawyer/firm? For example, notification could trigger an inspection of the firm.
33. It is difficult to predict how providing a number of free cases per year will work in practice. This uncertainty means that it is difficult at this stage to assess the effect of any case fee model that includes free cases both on the financial stability of the OLC and on firms in different groups. If each firm has a potential allocation of free cases it is unclear whether the number of free cases will fall in line with the overall number of cases or remain fairly constant, in line with the number of firms (and so form an increasing proportion of cases, requiring an increase in levy).
34. It is the OLC's intention to review its approach within the first three years of operation. It may be worth the OLC considering a review of its case fee policy sooner than three years, possibly each year in line with an OLC Business Plan or Budget review

**Q4. Do you think that £200 - £400 for the case fee is at the correct level? Please give your reasons why or why not.**

35. It is difficult to assess whether £200 - £400 for the case fee is at the correct level. The £200 - £400 band presents a large variation. It would be helpful to know exactly what the flat fee would be within that range.
36. It is difficult for Approved Regulators to consider case fees in total isolation of levies, however, if the OLC aim to increase the proportion

of its funding raised from case fees; that can more realistically be achieved if case fees are not set too low.

37. Furthermore, it is hard to quantify whether £200 - £400 is sufficient when it is unknown what £200 - £400 actually covers. The case fee amount should be assessed in real terms. In the paper the case fee amount doesn't appear to have been assessed according to the grade of staff handling cases, the time taken to investigate cases, time taken to deal with complex cases and the stage a case reaches in the resolution process. These are just a few of the important factors that need to be considered. Without such analysis data it is hard to quantify what amount would be sufficient.
38. The deciding factor ultimately is, whether the cost of investigation and resolution is adequately recouped by the case fee. If a real terms assessment is not undertaken it may later be revealed that the Ombudsman incurs costs in dealing with complaints, which are not adequately recouped from fees for cases.
39. If the case fee is set on the basis that some cases will cost less and some more than the set fee, the fee itself needs to be set higher than the lowest actual cost. On that basis, it is hard to foresee any case costing less than £200 to deal with.
40. The case fee is not intended as a punishment but it should be a deterrent. If the fee is too low (combined with free cases) resulting in firms dumping cases with the Ombudsman, and the real cost not recouped resulting in the Ombudsman incurring costs in dealing with complaints the net effect will be poor complaint-handling firms being subsidised by good complaint-handling firms. In essence inadequate case fees go against the polluter pays principles.

**Q5. Do you have any comments on the attached initial consultation impact assessment? Do you think there is likely to be any other potential impact of implementing the case fee that we have not captured in the attached impact assessment? Please give your reasons and provide any evidence that you think will help us measure any impact.**

41. In the paper the OLC states that allowing free cases per firm per year introduces complexity of administration. Adding to that complexity, has it been considered what happens if many complaints stemming from a firm/lawyer's one instance of disservice goes through the system at the same time and how the free cases will be allocated.

**Q6. Are there any other points or issues you wish to raise in relation to the case fee level or structure? Do you think there is anything missing? Is there anything you disagree with? Please give your reasons.**

42. The OLC has not provided proposals of how it will resolve the foreseeable problem of case fee collection. If compliance is less than 100%, what is the OLC's cost enforcement strategy and how much will collection and enforcement cost?

**IPS 4 December 2009**