



The Law Society

**The Law Society's response to the Office of Legal
Complaints' consultation on setting a fair case fee**

4 December 2009

supporting
solicitors



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This response has been prepared by the Law Society, the professional body for over 130,000 solicitors qualified in England and Wales, working at home and around the world. The Law Society represents the profession and lobbies regulators, government and others.

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

We understand that the aim of the OLC is to provide an ombudsman service which is based on dispute resolution, not blame. While we agree that it will be beneficial if the OLC manages to resolve most complaints without needing to determine right and wrong, it is nevertheless desirable to ensure that those who face complaints because they do not handle complaints properly should contribute towards the cost of the OLC doing this for them.

The OLC need not make a final decision on case fee structure and levels until it is closer to launching. It would be beneficial to all if more research and analysis was carried out and then for a more evidence-based proposal to be put forward in a second consultation. The consultation paper acknowledges that the impact assessment is largely qualitative, sets out early thinking and is based in a large part on assumptions.

The Law Society would be better able to evaluate whether the proposed fee system is fair once the rules, processes and costs are known. For example, in the Financial Ombudsman Service only one in six of all initial complaints and enquires go on to requiring more detailed consideration work by adjudicators. It is only at that stage that a case becomes "chargeable". Most cases get filtered out or conciliated before they are escalated. Knowing how any filtering stage might work is an important consideration when judging how case fees should be allocated.

Our response is based on the high-level principles that the:

1. The fairest system for the whole profession is for those who cause costs to meet those costs.
2. Complaints which are not upheld in cases where the lawyers operate appropriate in-house complaints handling processes, should incur a case fee.

The impact assessment is based on the assumption that the OLC will recover approximately 10% of costs via fees and 90% via the levy. The Law Society has for a long time favoured the principle that those causing the costs should pay an appropriate proportion of those costs. We hope that a higher proportion of the OLC's funding will in due course be met by those who fail to deliver an appropriate level of service. If the OLC's costs were met almost exclusively from the levy, inappropriate burdens would be imposed on those lawyers who meet their professional obligations, and invest resources in doing so.

The argument for flat fees is that they are easier for the OLC to administer and the profession to understand. However this needs to be balanced with the need to achieve fair outcomes. The disadvantage of a flat fee structure is that it does not take into account the way in which a complaint is dealt with. We agree that the OLC should operate a simple fee structure but believe that a single flat fee will not lead to fair outcomes. We believe that there should be two levels of case fee:

- the full cost should be charged for cases which go to adjudication and the complainant is awarded more than any offer the lawyer might have made, and
- a lower fee which should apply when matters are settled earlier, or if any conciliatory offer made by the lawyer is upheld on adjudication.

The consultation is not clear about what fee might be charged if the lawyer and client decide to settle the complaint prior to adjudication. This issue needs to be dealt with. We believe that if the full fee applies irrespective of whether or not the complaint is settled before adjudication this will act as a disincentive to conciliation.

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.

There is an important difference between complaints being lodged and complaints being upheld. The OLC may well be right that firms operating in contentious areas of law, such as immigration, criminal, family, or mental health, are likely to be subject to proportionately more complaints than those operating in other areas. However, it is wrong to assume that lawyers who operate in these areas of law are less likely to meet appropriate standards of service or have adequate complaints handling procedures. Provided that lawyers who have handled complaints properly are not subject to a fee, then we do not agree that lawyers dealing with such work will necessarily be adversely affected by the fee structure, though it is true that they may have to engage with the OLC more often.

If the OLC discovers that a particular sector has significantly more upheld complaints than others it should conduct research to discover why this is the case.

It is encouraging that the OLC is giving specific attention to this matter. The best way for the OLC to deal with this issue is for staff who manage complaints from contentious sectors to possess a good knowledge and understanding of the pressures which these practitioners are more likely to face. The OLC should also offer specifically targeted guidance to those who work in what they define as being a contentious sector and take into account adherence to this guidance when investigating a complaint.

The OLC needs to be sensitive to the particular problems faced by sole practitioners and small firms. For example, within these firms there is limited scope for a complaint to be considered independently. Tailored guidance, which promotes realistic expectations of how to operate a complaints handling system, would be beneficial for all.

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.

We do not support this proposal. The cost of the complaints handling process have to met either by those who have had a complaint upheld against them or by the legal profession as a whole through the levy. In essence two 'free' cases means that the remainder of the profession is subsidising poor complaints handling.

Case fees are only payable if a complaint is resolved in favour of the client and/or the ombudsman is not satisfied that the lawyer took all reasonable steps to try and resolve the complaint. In other words, those lawyers who have handled matters properly and have an appropriate complaints handling system will not have to pay any fee.

The OLC must ensure that it provides firms with authoritative and accessible advice which explains how the Ombudsman will define 'taking all reasonable steps to try and resolve the complaint.' If this guidance is clear, proportionate, understandable and based on realistic expectations of what is achievable then it would be fair to assume that law firms should behave appropriately.

An unintended consequence of the two 'free' cases per year is that lawyers who practise as individuals – and are thus unlikely to attract many complaints each year – will effectively be free from case fees, while larger firms will have to pay. It is not clear that a cross-subsidy of this sort is justifiable. We understand, for example, that it is very rare for a barrister to have more than one complaint against him or her in a year, although the set of Chambers in which he or she practises may well have several.

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

The Law Society believes that those legal entities that have complaints upheld against them should pay an appropriate sum towards the costs which they have incurred. The costs cannot properly exceed the costs of dealing with the average case, but subject to that should be sufficient to be a deterrent against law firms not bothering to have proper in-house procedures.

We cannot comment on the exact fee level at this stage as we do not possess the appropriate level of information around rules, processes and cost. It is difficult to say whether the case fee of £200 - £400 is high or low, without knowing the estimated average cost of each case. The cost should obviously be substantially lower than in LCS, since the projected running costs for OLC are well below the full costs of LCS. The Financial Ombudsman Service judges each one of their cases to cost £571.

The consultation paper does not say when solicitors will be charged a case fee. We would assume that this will take place once the case has been concluded. This is how both LCS and Financial Ombudsman Service operate.

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.

There are two areas where the OLC has not captured potential impacts. No consideration is given to the burden that each of the options will have on those who contribute to the levy. For example, Option 1b, which suggests each firm having two 'free' cases, does not explain how this will impact on the funds that the OLC will need to collect from the levy, which has an impact on the profession as a whole.

The impact assessments do not estimate how each proposal will influence good complaints resolution behaviour. For example, a higher fee may encourage more lawyers to settle early. If this is so then it would be interesting to know what impact this would have on the OLC's costs.

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.

The LCS has reported some problems in collecting fees. The OLC may want to consider operating a scaling system which is based on the promptness of payment. Similar systems are operated by the courts, the London congestion charge company, and many other fee collecting organisations. If a lawyer has not paid the amount demanded of them within a certain time period, for example 30 days, the case fee may be increased by 20%. This will encourage prompt payment and help to recuperate some of the extra costs that are involved in recovering fees from those unwilling to pay.