

Response of the Legal Complaints Service (LCS) to the OLC consultation on setting a fair case fee

The LCS welcomes the opportunity to respond to the OLC's consultation on its suggested approach to the setting of case fees. Having attended the consultation workshop held on 6 November, we appreciated the opportunity for open and frank discussion that this provided. Our response builds on our comments and contribution and is intended to provide the OLC with constructive input and support towards achieving a fair outcome.

Background

By way of background to our response, the LCS has established and developed its own scheme of cost directions which it has operated for a number of years.

In setting cost directions, the LCS's strategy has been deliberately to focus its cost recovery endeavours on proven complaints against solicitors. Where a complaint is resolved without the need for an adjudicator's decision we will not seek to recover the costs of our investigation, since no blame has been apportioned. Conversely, where a complaint is upheld by an adjudicated decision, we will use our powers to issue cost directions against the firm involved, for an amount based on the average full case management costs of adjudicated complaints.

This has the effect of ensuring that those providers of legal services who have been found to have delivered inadequate professional service contribute in full measure towards the costs of LCS, thereby mitigating the financial burden of their poor service provision on the profession as a whole.

Cost recovery and complaint resolution

Prior to the enactment of the LCS's powers enabling us to recover our costs, we had found that a small but significant number of solicitors would accept that there had been poor service but would be unwilling to resolve the complaint. There was a view held that by going to adjudication they might have to pay less compensation than might result from a conciliated outcome. As there were no on-cost implications to this, solicitors rightly felt that they had very little to lose.

We have found that these same powers have helped to encourage the early resolution of complaints. By operating our cost recovery powers in the way we do, we have seen the numbers of adjudicated matters drop markedly and currently, adjudicated outcomes represent less than ten percent of file closures while one third are conciliated. By corollary and depending upon how the OLC policy on case fees is structured, the numbers of matters requiring an ombudsman's decision may increase if the incentive to conciliate (or mediate) is reduced.

Impact on lawyers and consumers

One way or another, the costs of the OLC will be funded by the legal professions and ultimately, the consumers of legal services. It is therefore important to ensure that the incidence of these costs is both fair and proportionate and that there are no unforeseen or perverse implications.

a. Allowing a number of free complaints

The proposed case fee structure of ~~two~~ strikes and a flat fee addresses the tension between the need to minimise the adverse impact of case fees on small firms and sole practitioners and the need for proportionality in the recovery of the costs of complaint management. The proposition of allowing a small number of free cases a year as an approach to resolving this is intended as a pragmatic solution.

The issue about the potentially disproportionate impact of case fees on certain areas of law or on diversity within the profession is an important one and is linked to the distribution of complaints.

- LCS data show no evidence of sole practitioners generating more than a proportionate number of complaints. They represent nine percent of solicitors and generate eight percent of complaints.
- The data do however show that most complaints by far are generated by small to medium sized firms. Fifteen percent of solicitors work in these firms and generate twenty seven percent of complaints.
- Large firms, by contrast, generate relatively few complaints. Despite employing more than forty percent of solicitors, they account for only fourteen percent of complaints.

This suggests that allowing a small number of free cases would be beneficial to sole practitioners. However, since sole practitioners account for a relatively small percentage of the total, the overall benefit may not be great.

By contrast, the small to medium sized category of firms generates more complaints pro rata, than any other category. LCS data also show a concentration of BME solicitors in this category. As they would be less likely to have fewer complaints than larger firms, the potential for minimising any regressive impact on diversity through the provision of a small number of free cases is likely to be limited. The same will be true in terms of any access to justice benefits, at least in terms of geographical coverage and local presence of solicitors.

There is evidence that complaints are concentrated disproportionately around particular areas of law, reflecting both the relative number of transactions overall and the nature of those transactions, where certain types of cases are more complex or there is more at stake for the consumer. Examples are conveyancing, where the numbers of cases is largely proportionate to the market and immigration, where it is disproportionately high. The latter also shows a disproportionate representation of BME solicitors. In this situation again, the potential benefits of a small number of free cases may be less than evident.

Consequently, in view of the likely limited benefit of free cases, the added distortion and complexity and the negative revenue implications, we would not favour this approach. In addition, there is the adverse impact on the size of the required levy to consider.

b. Flat fee or two tier case fees

A flat fee has the obvious attraction of simplicity and non-discrimination but by definition, it seeks neither to focus on those firms against which a complaint has been formally upheld nor to encourage the informal resolution of complaints, which can have significant benefits for both parties.

An alternative and preferable approach would be to have a two tier case fee structure deliberately designed to reflect the higher costs of resolving contested and upheld complaints. By focusing the burden more on those firms that give rise to the greatest costs and where a complaint is formally upheld, this would facilitate a culture of no-blame dispute resolution as well as better serving the consumer interest by focusing case fees where poor service has been formally identified.

It would also enable base case fees to be set at a lower level than under a flat fee structure, for the same level of contribution to the overall costs of the OLC, with potential benefits for small firms and sole practitioners.

c. Proportion of costs to be recovered

Turning to the issue of the correct level for case fees, £200 to £400 is likely to understate to a significant degree the average costs of complaint handling by the OLC. There is therefore a strategic question to be addressed, as to whether cost recovery is an objective that should apply in its own right or whether case fees should be targeted simply to disincentivise poor service.

The OLC proposal is to recover only ten percent of its total costs, which leaves the profession as a whole, the vast majority of whom provide good professional service, to pick up the remaining ninety percent. There is at least some question about the fairness of that and we are aware that other ombudsman services seek to recover different proportions of their total costs through case fees.

It is arguable that the OLC should seek to recover a higher proportion of its overall costs from case fees, since an unnecessarily high levy might be deleterious to its intent to build a positive relationship with the legal professions. If the profession is not supportive of the OLC, this may harm its ability to deal with complaints quickly and informally.

Although the LCS has chosen not to charge case fees other than on complaints upheld by adjudicators, the level of cost directions has been set deliberately to reflect the actual cost of managing a case through the complete complaint handling process, from receipt through to adjudication.

Practical issues

Collection of cost directions has been a significant issue for the LCS. Under the provisions of the Solicitors Act Schedule 1A, whilst we have the power to direct costs in full or in part, to reflect the cost of dealing with a complaint or a reasonable contribution towards that cost, no specific provision is made for debt recovery within the legislation. The SRA is able to raise cost directions and to recover debts in relation to conduct matters but, although it might be argued that failure to comply with

the provisions of the Act should be construed as a conduct matter, this approach has not been pursued.

In the majority of cases, failure to pay is linked to other concerns and there are a number of factors that have been identified to be linked with non-payment. These include intervention into the firms concerned by the SRA, insolvency, the bankruptcy, death or imprisonment of a solicitor and the firm ceasing to trade, for whatever other reason.

The OLC will be in a different position in terms of its powers under the provisions of the Legal Services Act 2007 but will face some of the same practical considerations, in particular the need to work effectively with the approved regulators, who will act as a channel for the recovery of case fees.

An important consideration is that, if a case fee is applied to all complaints (subject to a small number of free cases if that is decided) rather than only those that are formally upheld, this has the effect of multiplying the number of individual debts to be collected and the relevant amounts of work involved, both for the OLC and for the approved regulator. This comes at significant cost and, while this should not be an overriding consideration, it does need to inform the assessment of the overall costs and benefits of what is proposed.

We agree with the OLC's assumption in the Business Plan that the number of complaints received is likely to increase with the launch of the new ombudsman scheme. However, the assumption in the case fees document is that the expected number of eligible complaints received per year will be approximately 14,000, which is somewhat less than the level of current LCS receipts. The increase may be temporary but based on LCS data, there is an underlying slight upward trend of about 2 percent a year.