

Alison Robinson
Office for Legal Complaints
sent by email

13 November 2009

Response to OLC consultation: Setting a fair case fee

Dear Alison,

The Legal Services Consumer Panel is pleased to respond to the Office for Legal Complaints' (OLC) consultation exercise on setting a fair case fee. We attended the consultation workshop held on 6 November, which we felt produced an intelligent discussion of the issues. In light of this experience, we hope that the OLC will repeat similar events in future consultation exercises.

The design of a case fee system is not just a matter for lawyers. Consumers pay in the end for the cost of regulation, either through higher prices or taxation. More fundamentally, however, the way in which the legal profession pays for the cost of administering complaints to the ombudsman service can shape the behaviour of lawyers in their dealings with consumers. A well designed case fee mechanism could deter poor practice that gives rise to client dissatisfaction in the first place and could encourage early resolution of complaints.

The OLC's preference for a 90% general levy is understandable to achieve business stability given the uncertainties present in a new regulatory framework. However, for reasons we explain below, we consider a different balance between general levy and case fee would have a greater impact in shaping lawyers' behaviour. If the OLC agrees with this analysis, but decides to stick with its original approach, or close to it, to provide a measure of certainty in the set-up period, it should state clearly that it intends to move towards a different system in future. A review of policy should take place after two years at the latest, by which time case volumes should be sufficiently predictable to enable a change in approach.

General levy versus case fee

Some level of general levy is appropriate because the entire profession benefits from the enhanced consumer confidence that normally results from the existence of an ombudsman service. If consumers know they can achieve redress when something goes wrong, they are more likely to engage the services of lawyers.

The Act mandates the setting of a case fee for good reason and it is important that the OLC designs a case fee mechanism that reflects the wishes of Parliament. The smaller the proportion of case fee, the less financial incentive there is for those lawyers subject to a complaint to change their behaviour in ways that would benefit consumers. In particular, the prospect of paying a case fee encourages lawyers to get things right first time, and when mistakes inevitably occur, to deal promptly and properly with complaints in-house.

There is a suggestion that lawyers working in contentious areas of law, such as family or immigration, will attract higher complaint numbers. The Panel is alert to the possible unintended consequences for consumers that might result should such areas be disproportionately affected by case fees, particularly on diversity or access to justice. However, we consider these risks are exaggerated since, as long as the firm is not at fault on the substantive issues and has effective first-tier complaint handling arrangements, such cases will not attract an OLC fee.

Lawyers working in contentious areas of law should not be insulated entirely from the costs of regulation. Indeed, as their clients may themselves be in vulnerable circumstances, it is especially important for the lawyers to have a strong incentive to deal sensitively with their clients and to maintain effective complaint handling arrangements. Further, the number of cases involving contentious areas of law will be small relative to the OLC's total income. The OLC has discretionary powers to reduce or waive case fees in the rare occasions when it considers that an alternative approach is merited. Finally, it would be wrong to set the OLC's whole fee policy around the interests of a minority and we are sympathetic to views expressed by parts of the legal profession that 'good' lawyers should not subsidise 'bad' lawyers.

Granting a number of free cases per year is not an approach that we find desirable in principle as it may breed complacency among lawyers about first-tier complaint handling. However, we accept there is some merit, at least in the early years of the OLC's existence, to adopt this measure as a safeguard against the risks of unintended consequences such as those above. Two free cases should be the maximum permitted, and we would hope to see this reduced or eliminated following a review. Certainly, for individual practitioners (such as barristers), the idea that two cases a year is somehow "acceptable" is not one we would condone.

We have chosen not to recommend what the initial balance between general levy and case fee should be. However, in time it should be evenly split at minimum, and ideally balanced heavily in favour of case fee

income. We note that the Financial Ombudsman Service has a roughly 50:50 split, whilst Otelo has an 80% (case fee) versus 20% (variable general levy) split. We accept that it may be misleading to rely too heavily on practice elsewhere as the profile of the market participants in legal services differs from that in the financial services or telecommunications markets, which are dominated by a small number of very large firms. Nonetheless, in considering market profile for legal services, the OLC should have regard to the trend towards consolidation in the sector and the likely possible creation of large scale firms as a result of alternative business structures.

Flat fee versus sliding scale

The case fee structure needs to encourage firms to settle informally, but without acting as a deterrent where firms have legitimate reasons to seek a second, independent opinion and to resist the complaint. Further, the case fee structure also needs to be simple and cost-efficient to operate; it would be impractical to design a multi-tiered system that adjusted case fees depending on the wide range of possible complaint outcomes, on the time spent on the case or on the size of the firm.

It should be possible to design a case fee structure that is both simple and encourages the right sorts of behaviours. Our favoured solution is to have a flat fee for all cases except those where the lawyer insists upon a final ombudsman decision. This would mean that those few cases that are most expensive for the OLC to administer would attach fees that reflected these costs. It would also discourage lawyers from pursuing a case beyond the Case Handler's recommendations unless they were sure of their ground. As part of its statutory powers, the OLC would retain discretion to reduce or waive this fee where justified by the circumstances.

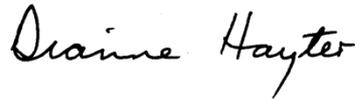
Vexatious complainants

One aspect of the proposed case fee system is notable by its absence from the consultation document. Section 133 (3) (i) of the Act makes it possible for the OLC to award costs against complainants, 'if in the ombudsman's opinion that person acted so unreasonably in relation to the complaint that it is appropriate in all the circumstances of the case to make such an award'. We hope that, since the OLC has not consulted on this issue, this is a signal of intent that it does not intend to invoke this clause.

Whilst there is always the risk of 'vexatious complainants', this should happen rarely. The most sensible way for the OLC to deal with this is to use its statutory powers to dismiss such cases at the outset. At this stage, the complaint will not have attracted a high administrative cost. There is a real danger that making costs awards against vexatious complainants would dissuade legitimate complainants from bringing a case for fear of being labelled as vexatious. This is perhaps more likely to happen in contentious areas of law such as criminal or family where emotions run high.

Thank you for the opportunity to comment on this document. Should you require further information, please contact Steve Brooker (Consumer Panel Manager) at steve.brooker@legalservicesconsumerpanel.org.uk or 020 7271 0077.

Yours sincerely

A handwritten signature in black ink that reads "Dianne Hayter". The signature is written in a cursive style with a large initial 'D' and a long, sweeping tail on the 'y'.

Dr Dianne Hayter
Chair, Legal Services Consumer Panel