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Compensation for Inadequate Professional Services

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"**Compensation** *n.* **1.** The act of making amends for something. **2.** something given as reparation for loss, injury, *etc.* **3.** the attempt to conceal one's shortcomings by the exaggerated exhibition of qualities regarded as desirable." *The Collins Concise Dictionary, 1982 edition.*

"The Committee process is slightly like palm tree justice in that it is done on the reading of papers and the gut feeling for the case" Law Society Committee Member

Introduction

In any decision-making situation there is a gap between the formality of a rule and the basis of the decision itself. Even where the rule is clear, differences of approach will operate. This report examines these issues for one sphere of the regulation of solicitors: compensation for Inadequate Professional Services (IPS). It explains how different philosophical underpinnings for compensation decisions drive different approaches and how the level to which compensation should be set.

Section 37A and Schedule 1A of the Solicitors Act 1974[2] ('the Act') gives the Law Society Council the power to take certain steps, "where it appears to them that the professional services provided by [a solicitor] in connection with any matter in which he or his firm have been instructed by a client have, in any respect, not been of the quality which it is reasonable to expect of him as a solicitor."[3] The "steps" are (in order of frequency of use):[4]

[1] This work was funded, in part by the Office for the Supervision of Solicitors. We gratefully acknowledge the help of anonymous OSS staff and Law Society Committee members through allowing themselves to be interviewed and in providing documentation and statistical information. We would like to extend our warm thanks to the Legal Service Ombusdman, Ann Abraham and Nick O'Brien, her Legal Adviser, as well as Marlene Winfield of the National Consumer Council, for taking the time to discuss the research with us. Pam Page-Bailey, of the OSS, has also proved crucial in securing information and documentation from the OSS. Responsibility for errors and omissions are our own.

[2] As amended by the Courts and Legal Services Act 1990.

[3] See, paragraph 1(1), Schedule 1A, Solicitors Act 1974.

[4] Section 37A refers to the remedies as steps rather than remedies, sanctions or powers. This view of frequency of use derives from the first OSS Annual Report.

1. Directing the solicitor to pay compensation to the client of up to £1,000[5];

2. Disallowing all or part of the solicitor's costs;

3. Directing the solicitor to rectify an error; and/or,

4. Directing the solicitor to take such other action in the interests of the client as may be specified at the solicitor's expense.

IPS is not, of itself, professional misconduct. Rather it is a regime for dealing with poor service complaints. There is also the possibility of IPS sanctions being supplemented by conduct sanctions where a complaint is a 'hybrid' of IPS and conduct elements, or where IPS is particularly serious or persistent.

The Law Society Council has delegated the power to find IPS and direct action (including compensation) to the OSS staff and various sub-committees of the society's Standards and Guidance Committee made up of lay and solicitor members. The OSS came into being on 1st September 1996. As part of its Business Plan for 1996/1997, it committed itself to a review of sanctions, within the broader framework of desiring an "open, efficient and effective system for handling core business which has the confidence of the Profession and establishes [the OSS] as the guardians of professional standards." That too is supplemented by a general aim of pro-actively policing for compliance with professional standards.

This report begins with a review of research and literature on complaints handling, relevant to the compensation limit. This offers some client perspectives on the use of compensation powers. It is followed by an analysis of the statutory origin of the compensation powers and the legal framework governing compensation for IPS. As a result it is clear that there are competing philosophical approaches to the resolution of client complaints. In particular, the use of the compensation power can be seen as punitive, regulatory or restitutionary in nature. This exposes an important debate about the role of a profession's regulator in service (rather than conduct) complaints.

Once these philosophical positions have been examined, a more detailed description of how the OSS actually deals with service complaints where compensation can be awarded is set out. The report describes the process of complaint handling by the OSS and provides the opportunity to see how philosophical approaches and contradictions are manifested in the work of the OSS. It is built on an analysis of OSS documentation, a review of a sample of compensation decisions, and interviews with OSS staff and members of the Law Society's client relations sub-committee who act as the appeal body from first instance decisions by the OSS.

[5] Where the bill was delivered after the Courts and Legal Services Act 1990 came into force.

I. Literature review and background to the debate

In publishing his 1994 report the then Ombudsman stated his view that there was a "strong case" for increasing the limit for compensation for IPS, "certainly to £2,000 and possibly to £5,000".[6] This appears to have been prompted in part by a National Consumer Council Report which was trenchant in its criticisms of the SCB.[7] This report called for an independent complaints council with powers to award compensation of up to £5,000. Similarly, the Bar Council's Standards Review Body recommendations (finally agreed in 1996) to have a compensation limit of £2,000 financial loss arising from inadequate service called into question the level of the compensation limit. Other factors continued to contribute to a questioning of the limit. In particular, the £1,000 limit remained static from 1991 whilst the small claims limit was increased, first to £3,000 and more recently to £5,000 in April 1999.

The level of the limit is not the only issue of interest to the OSS, the Law Society and to other interested parties. The basis of awarding compensation and even the term compensation itself causes some concern and suggests very different approaches to the use of the IPS award. There are three main philosophical approaches to the directing of IPS remedies.

1. **Remedies should be restitutionary.** Clients would be put in the position they would have been in but for any inadequate service. Quantification then becomes a technical exercise, based on quantifiable or 'special' losses and on more general awards for inconvenience and distress. Such quantification might include a costs reduction (an adequate job would have cost less) *and* compensation (the aggravation and loss caused by inadequacy should be compensated) as well as the possibility of further directions for remedial action. Perhaps crucially, the assessment of loss is client-centred: it focuses on what a service was worth to a client and what the inadequacy cost that client.

2. **Remedies should be punitive.** This philosophy suggests that solicitors should be punished for breaches of IPS, and should perhaps be punished more severely for repeated breaches of IPS. This approach seems to be more controversial (legally and theoretically) in that the Council's statutory powers generally appear to relate to individual matters of IPS rather than the adequacy of a solicitor or firm's service as a whole:

   > "The Council may take any of the steps... ..where it appears to them that the professional services provided by him in connection with any matter in which he

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[6] Legal Services Ombudsman (1995): *Fourth Annual Report of the Legal Services Ombudsman 1994* (London: HMSO), p. 9.

[7] National Consumer Council (1994): *The Solicitors' Complaints Bureau: a consumer view* (London: NCC).

or his firm have been instructed by a client have, in any respect, not been of the quality which it is reasonable to expect of him as a solicitor."[8]

The use of the word "compensation"[9] in the Solicitors' Act also suggests a presumption that the payment is for compensation rather than for some broader punitive purpose, and the fact that compensation is limited to the particular client, adds further weight to the claim that repeatedly weighty payments should not properly be awarded as compensation under Schedule 1A, Solicitors Act 1974. In any event repeated breaches may also be considered as a conduct issue under the more general rules relating to conduct and competence. As a result, there is a separate body of rules governing punishment and discipline.[10]

3. **Remedies should be regulatory.** A regulatory approach appears to permit both a resitutionary approach (re-establishing the relationship between professional and client, or at least righting the wrong to the client) and a punitive one (punishing regulatory breaches as a deterrent to further breaches within the firm by other solicitors complained of and more widely in the profession). An example of a regulatory approach to IPS is the OSS stated policy that failure to respond properly to complaints, e.g. by operating a Rule 15 procedure, will itself be evidence of IPS and may increase compensation awards.

This section reviews literature illustrating the potential for these three different philosophies to influence complaints procedures. Although this analysis is applicable to complaints handling generally, for brevity's sake the discussion here is confined to compensation and costs reductions. The complainant's viewpoint is considered first.

The Complainant's Viewpoint

Research into complainant's views invariably shows high levels of consumer concern about solicitor's complaints handling.[11] The causes of such concern are complex, relating to both process and outcome. The level of compensation payments and the rationale for such decisions is only one subset of issues for clients and is not a major focus of research into client concerns to date. There are, however, findings of specific relevance to the handling of compensation decisions in the main, recent research on client complaints.

In April 1995, the Law Society's Research and Policy Planning Unit conducted a large scale postal survey of lay clients of the SCB whose complaints had (in the SCB's view)

[8] See, paragraph 1(1), Schedule 1A, Solicitors Act 1974.

[9] Paragraph 2(c), Schedule 1A, Solicitors Act 1974.

[10] Moorhead *et al* (2000) *Willing Blindness? OSS Complaints Handling Procedures* (Law Society, London)

[11] See, Moorhead *et al* (2000), pp. 13 - 26, for a more detailed review.

been concluded.[12] More recently the OSS has conducted an unpublished telephone survey of cases closed in 1996. Even allowing for a level of non-cooperation, which in itself showed strong hostility to the SCB and the Law Society, the 1995 survey demonstrated high levels of dissatisfaction with the SCB.[13] On Lewis's analysis, the factors which affected complainant satisfaction most strongly were about procedures and communication: complainants wanted simpler, faster procedures; evidence that the SCB staff understood their complaint; evidence that the SCB were prepared to deal with them in a way which was not over-influenced by the solicitors' perspective; greater powers in the SCB to require action from solicitors; and, more interaction and feedback from SCB staff about the progress and outcome of their complaint.[14]

It is not surprising that lay clients would focus on the *process* of complaints handling. Indeed, Lewis's analysis is driven by the finding that when asked what was their most important expectation of the SCB, the answer clients most commonly gave was: that the SCB would, "Get in touch with [the] solicitor and sort things out." 40% of the respondents to this survey said this was the most important expectation that they had of the SCB and for 76% of the sample this was one, but not necessarily the most important, expectation.[15]

As Lewis's figures make plain, the clients also had expectations about the *outcome* of the complaints handling process. Clients had a fairly strong expectation that the solicitor would be punished: 17% of clients saw this as their priority expectation and 51% of the clients had this as one of their expectations. Whilst, the report emphasises the fact that 'relatively few' clients gave as their *priority* expectation the awarding of compensation (12%), the figures indicate that a much more sizeable 38% had compensation as one of their expectations. The comparable figures for costs reductions are 7% and 23%. In a more recent, but unpublished, 1996 survey ('the 1996 survey') complainant's expectation of compensation outscored an expectation that solicitors would be disciplined or reprimanded.[16]

There are difficulties in grading and evaluating the client's priorities in this way. Nevertheless, the client population surveyed in 1995 and 1996 surveys showed the payment of compensation as a significant expectation although punishment was a

[12] V. Lewis, *Complaints against Solicitors: the Complainants' View* (1995: London, Law Society, Research Study No. 19). For simplicity, the figures quoted in this report refer to Lewis's main sample, rather than the smaller, Practice Rule 15 sample, unless indicated otherwise.

[13] Lewis, *op.cit.* p. 52. In the unpublished 1996 survey, 62% of complainants considered that the OSS had not resolved their complaint at all. 76% of complainants said the outcome did not meet their expectations.

[14] See, Lewis, *op.cit.* xiv-xv.

[15] Lewis, *op.cit.*, p. 33.

[16] See, also, Moorhead *et al* (2000), *op.cit.*

stronger expectation. These expectations were not usually met. Clients in the 1995 sample said that compensation awards had been made in only 4% of cases. Conversely, costs reductions were made in 9% of cases.[17]

Lewis also looked at the impact of the outcome of the case on complainant satisfaction. Where clients had been paid compensation as a result of the complaint they were more likely to be satisfied than dissatisfied with the outcome of the complaint.[18] The only other outcome where the client was more satisfied than dissatisfied was where the client saw that the, "SCB contacted [the] solicitor and sorted things out". Where clients had their bills reduced or refunded, they were nevertheless more likely to be dissatisfied than satisfied with the outcome of their complaint. The 1996 Survey shows very low levels of satisfaction with the outcome of complaint.

Such figures do not include any evaluation of the 'justness' of the outcome of the complaint. Client satisfaction is not, of itself, an indication that a decision was right or wrong. Nor can it be said from these figures that the awarding of compensation *of itself* led to higher satisfaction.[19] Other factors, such as the likelihood that where compensation was paid there had been a finding against the firm of IPS, may contribute to the client's satisfaction. Nevertheless, on the available evidence, an approach which sought to dovetail better with client expectation would place more emphasis on compensation awards (and less on costs reduction).

It is also worth stressing that, in spite of the award of compensation, a significant proportion of clients remained dissatisfied (39%). Lewis's results suggest that this will relate to other concerns over the quality of the process. Conversely, it may be because of perceived inadequacies in the *level* of compensation awarded or the justifications given for any award. Similarly, confusion over the basis for compensation might contribute to complainant dissatisfaction. One respondent to Lewis's study commented: "[the SCBs] powers as to reduction of costs and ordering compensation should be more clearly defined."

There is one further finding from the 1995 survey that is relevant to the issue of compensation levels. Where the outcome was that the SCB said it could not take the client's case, complainant dissatisfaction was marked: 92% of complainants whose complaints were dealt with in that way were dissatisfied with the way the SCB had dealt with their complaint. Among this group of clients there may have been included cases

[17] Lewis, *op.cit.* p. 39.

[18] Lewis, *op.cit.* p. 42.

[19] The necessary analysis to make this assertion was not carried out in the 1995 report.

where the client had made a claim for IPS which included losses in excess of £1,000.[20] The £1,000 limit was a bar to the SCB satisfying these clients.

The National Consumer Council View

The National Consumer Council has also issued a number of reports into complaints handling by the solicitors' profession.[21] High levels of dissatisfaction have been reported[22] as well as a more deep-rooted philosophical concern:

> "Research has been critical of complaints procedures that put too much emphasis on the legal concept of fault, and consequently too little on the resolution of grievance... Legalistic models of dispute resolution... may be responsible for this approach.... ..The danger with the "fault-based" approach is that it leads to your responses to complaints focusing on issues that pose a risk to the organisation, rather than addressing the consumer's own specific concerns. It promotes a negative and defensive attitude to complaints (did we break any specific laws or duties?) rather than a positive and constructive approach (should we have done things better? Is there anything we can do to put things right?) A complaint system dominated by anxiety about legal fault can easily end up translating every complaint into something far more threatening than the consumer intended."[23]

In 1994, the NCC recommended compensation be awardable up to £5,000 by a system of Ombudsmen.[24] It's recommendations were backed by specific criticism of the implementation of the IPS regime and the £1,000 limit. In its view, the opportunity to salvage some unity from the fragmentation of poor service, conduct, over-charging and negligence remedies via the IPS route was being lost, in particular for negligence-IPS cases, because although, in the NCCs view, the Solicitors Act permitted an award of compensation for IPS and negligence: "Anecdotal evidence from the calls and letters we regularly receive at the National Consumer Council suggest that people who would prefer to use the Bureau are turned away early on because the value of their complaint exceeds

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[20] See, LSO (1997).

[21] See, in particular, National Consumer Council (1985), *In Dispute with the Solicitor* (NCC, London); (1994), *The Solicitors Complaints Bureau: a consumer view* (NCC, London); (1995), *Complaints against solicitors: the future? Our response to the Law Society* (NCC, London); and more generally, (1996), *Putting it right for Consumers: a review of complaints and redress procedures in public services* (NCC. London) and (1997), *An A-Z of Ombudsmen* (NCC, London).

[22] See, NCC (1994), *op.cit.*

[23] NCC (1996), *op.cit.*

[24] NCC (1994), *op.cit.* p. 4.and (1995) *op.cit.* p. 3.

£1,000."[25] This is a concern which has been partially supported more recently by the Ombudsman.[26]

The NCC's perspective indicated a desire for simplicity and clarity in dealing with IPS matters generally. It suggested that the existence of the £1,000 limit acted as a barrier to effective redress, operating to filter aggrieved clients away from the OSS back into the world of litigation. They also advocated a higher limit which would enable the OSS to operate a system of redress dealing with both IPS and negligence to a level equivalent to the small claims limit (as it will stand in April 1999) as an obvious, one-stop point of entry for aggrieved clients.

The NCC approach illustrates an interesting scepticism regarding fault-based and legalistic approaches to complaints. This relates to the technical machinery for adjudicating on complaints (the complexity and status of rules and procedures) as well as a broader philosophical concerns: that the system of complaints is about giving the client redress or 'sorting their problem out' rather than about adjudicating on fault, or professional standards.

The orthodox view on introduction of compensation powers into the Act

Until 1991, there was no power to award compensation for IPS. The original powers to remedy IPS were contained in section 44A of the Solicitors' Act 1974 and were repealed by the Courts and Legal Services Act 1990. As a result, IPS powers were shifted to a new s.37A, in a part of the Act which was not concerned with discipline and re-titled as powers of redress (under s. 44A they had been called powers to impose sanctions). At the same time the power of compensation was added to Schedule 1A of the Solicitors' Act. At the same time the power of the Solicitors' Disciplinary Tribunal (SDT) to impose sanctions for IPS was removed.

This was a clear shift from seeing IPS as a disciplinary mechanism to seeing it as a system of redress, distinct from the disciplinary machinery of the SDT. This shift was sought by the Law Society and adopted by the Government. In introducing the new clause, the then Solicitor-General stated:

> "..[T]he new powers will enable the society to take action, and direct payment of compensation to enable a client's clearly justified "small claim" to be satisfied.
>
> "..[The amendments] draw a clear distinction between the society's disciplinary functions, dealing with matters of professional conduct, and its powers to deal with complaints about the quality of service provided. ...disciplinary sanctions

[25] NCC (1994), *Op.cit.* p. 30.

[26] Legal Services Ombudsman (1998), *7th Annual Report of the Legal Services Ombudsman 1997* (London: HMSO), p.15.

> are not normally appropriate when a complaint relates to an isolated case of poor or negligent service, and where the more appropriate remedy will be to reduce the bill, compensate the client, or otherwise rectify the problem."[27]

This excerpt also makes plain a direct analogy between small claims and IPS as a system of redress. When questioned about the reasoning behind the £1,000 limit, the Solicitor-General stated the power was, "a small claims power to deal, in effect, in a comparatively summary way,"[28] and that the intention was to have the £1,000 limit, "move broadly in line with the small claims limit."[29] He also distinguished between compensating for shoddy work (or IPS) and negligence, which, "sometimes results in compensation for enormous figures" and is subject to the "full rights and safeguards" of the courts. Although it is perhaps most accurate to suggest the Solicitor-General was distinguishing IPS from higher value negligence claims. As the MP Austin Mitchell continued to push the Solicitor-General on the issue of the limit, the Solicitor-General stated:

> "The issue is whether to have a relatively informal procedure which can operate quickly and sympathetically, but which must deal with a limited amount of money, or whether to deal with much higher sums. If the procedure were to deal with much higher sums, it would only be fair to both sides to operate a more elaborate procedure. There has to be a cut-off point, and I suggest that this would be a sensible one both for the small claims court and for claims in relation to solicitors."[30]

The Solicitor-General accepted that the IPS powers were to cover claims under IPS and negligence for small amounts and that the limit was intended to be increased by reference to the small claims limit. Conversely, he distinguishes between IPS and negligence *for large claims* and so begins to recognise the difficulty of allowing the 'summary' procedure to govern large claims for loss.

Judicial and legal viewpoints on IPS and the use of powers under Schedule 1A

Cordery on solicitors states unequivocally that IPS powers are, "regulatory, for the maintenance of standards, and not compensatory".[31] This is surprising given the existence of a power of compensation in the legislation but there is some basis for the

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[27] *Hansard,* House of Commons, Standing Committee D, 12th June 1990, pp.410-411.

[28] *Hansard,* House of Commons, Standing Committee D, 12th June 1990, p. 411.

[29] The intention to charge clients a fee refundable if the client succeeds (unless they were on legal aid) was also stated: *op.cit.* p. 412.

[30] *Op.cit.* pp. 412-413.

[31] See, J.A. Holland (ed.), *Cordery on solicitors* (London : Butterworths, 1995), para. 403.

regulatory label. It is found in the case of *R v Solicitors' Complaints Bureau, ex parte Singh & Choudry (a firm)* [1995] 7 Admin LR 249, although it is worth looking more closely at that case, to understand what the Court may have meant.

Singh & Choudry sought to challenge a finding of IPS under s. 37A Solicitors Act 1974. As a result of a finding against the firm, they had their costs reduced to zero and they were directed to repay the Legal Aid Board the costs that they had claimed under the green form scheme. One basis of challenge was that the decision of the SCB and subsequent appeal tribunal was *Wednesbury* unreasonable. This was firmly rejected. The other basis dealt more directly with the nature of the Schedule 1A procedure. This challenge was on the basis that a *finding* of IPS required prejudice to the client. This is roundly rejected by Lord Taylor LCJ:

> "We take the view that in order to show that the quality has not been such as was reasonably to be expected of solicitors, the failure does not have to be shown to have prejudiced the client or to be capable of doing so. The object of the provision is not to enable an aggrieved client to bring any claim against the solicitors; it is not therefore a provision which requires proof of damage. The object of the provision is disciplinary. It is to assist in maintaining the standards to be achieved by solicitors *and to provide sanctions in terms of costs and payments if the proper standards are not reached. It is the quality of the service, in our judgment, which is of importance in applying the relevant provision, not the consequences of any shortcoming on the part of the solicitors."* (emphasis added).

The issue decided was whether the SCB power to *find* IPS in the absence of prejudice or damage and not whether a particular step under Schedule 1A was appropriate. Nor were compensation payments discussed by the Lord Chief Justice beyond his reference made above to, "sanctions in terms of costs and *payments"* (emphasis added).[32] Nevertheless, if Lord Taylor's words are given a broad interpretation, compensation would be related to the quality of service not the consequences of inadequacy for the client.

It is possible, and more appropriate, however to see a two tier approach in the language of the Solicitors Act 1974. A *finding* of IPS is clearly disciplinary in nature but *directions* under para 2, Schedule 1A, Solicitors Act 1974, should be more interpreted under the language of the directions themselves (i.e. that compensation is genuinely compensation rather than a fine). Similarly, paragraph 1(2) of Schedule 1A requires the Council (and hence the OSS) to be satisfied that in all the circumstances of the case it is appropriate to make the relevant direction for (say) compensation under paragraph 2. This poses an additional burden or restraint on the OSS. Hence, it could be argued that a finding of IPS is not enough in itself to give a particular direction to award compensation

[32] Similar, general acceptance that there are disciplinary elements within the scheme is set out in *R v The Law Society (The Solicitors' Complaints Bureau, ex parte Shuttari),* 21 February 1996, although the transcript is corrupted and does not deal with the issue with regard to the power of compensation.

under paragraph 2 and that some loss (however defined) needs to exist for compensation to be awarded.

This is not a distinction that is explicitly envisaged by the Lord Chief Justice in his judgment and paragraph 1(1) of Schedule 1A empowers *any* of the steps in paragraph 2 to be taken where a finding of IPS has been made (i.e. it could be read that *any* step, including compensation, can be taken regardless of prejudice). However, in *R v. the Council of the Law Society, ex parte Pictons Smeathans*[33] the two-stage approach is endorsed:

> "The first two paragraphs of the Schedule [1A] contemplate a two-stage process: The power to find that work has not been of the quality that it was reasonable to expect from a solicitor and then the power to take steps congruent on the finding which include a determination that the costs to which the solicitor would have been entitled to for the work should be limited to reflect the fact that his work was not of the required quality."

The issue of what would be a 'congruent' exercise of the power is not settled by this decision: does the nature of the breach dictate the sanction (e.g. the seriousness of the breach against a hierarchy of professional rules) or does the implication of the breach to the client (work carried out to the standard that it was carried out was only worth £x, hence the bill of costs should be reduced accordingly)? The answer is not made clear, congruence could be offence-centred (punitive), deterrent-based (regulatory) or compensatory (restitutionary).

To understand when compensation can lawfully be awarded, a number of general points should be emphasised about the statutory drafting of the IPS powers in Schedule 1A and in particular the old powers under Section 44A.

The original of IPS powers were clearly labelled as disciplinary sanctions in the amended Solicitors Act 1974. Such powers did not include compensation. The Law Society Council were uneasy about the 'penal' or 'disciplinary' label of the IPS powers. This led to the replacement powers under s. 37A Solicitors Act 1974 which instead of being called disciplinary powers were entitled "Redress for inadequate professional services".[34] In addition, section 37A was located in a different place in the Solicitors Act 1974 (i.e. not as part of the disciplinary proceedings sections (ss. 46-55)). Similarly, the use of the word can be compared to Section 47 Solicitors Act 1974, where the word 'penalty' is used for a power to fine.

Furthermore the repeal of Section 47A by Section 93(4) of the Courts and Legal Services Act 1990 removed the powers of the Solicitors' Disciplinary Tribunal (SDT) to impose

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[33] Unreported; QBD, 15th February 1996.

[34] The Council's 'unease' is discussed in para. 5 of Dutton's, *op.cit.*

"sanctions" for IPS. This emphasises the point that IPS was no longer to be seen as a penal or disciplinary matter: the SDT may simply inform the Council of its belief that action should be taken under the IPS scheme.[35]

As a result whilst judicial opinion on the power to *find* IPS has pronounced on the disciplinary or regulatory nature of the power, the Act specifically requires that remedies be appropriate in all the circumstances or, in the words of the *Pictons Smeathans* case, "congruent on the findings". Both the genesis of current powers, and the structure of the Act deliberately emphasised the non-disciplinary nature of the remedies. The ordinary principles of interpretation suggest that the judges could, and perhaps ought, to look simply at what the Act says: what does 'compensation' mean? Two dictionary definitions suggest quite clearly that the powers are restitutionary rather than punitive or regulatory.

> "**Compensate** *v.* **1.** *v.t.* counterbalance; recompense (person *for* thing); ... **2.** *v.i.* make amends (*for* thing, *to* person.)...". *The Concise Oxford Dictionary, 1982 edn.*
>
> "**Compensation** *n.* **1.** The act of making amends for something. **2.** something given as reparation for loss, injury, *etc.* **3.** the attempt to conceal one's shortcomings by the exaggerated exhibition of qualities regarded as desirable." *The Collins Concise Dictionary, 1982 edn.*

This suggests that compensation means just that: payment as reparation for loss, *not* punishment or a sanction designed to meet broader regulatory ends. This fits with the alterations in the structure of the Solicitors Act 1974 made by the 1990 amendments and the new 'title' for the relevant section but does not fit with the tenor of Lord Taylor's dicta in *Singh and Choudry.* In any event Lord Taylor's points are not made with specific reference to the power to avoid compensation.

On balance then the power to award compensation, if it is to be exercised in accordance with the intention of the Act, should only be used to compensate the client for losses, it should not be used as an element in a punitive decision or a payment for regulatory purposes. This compensatory approach would not be necessarily confined to financial losses: distress and inconvenience could fall within the power of compensation (this would be consistent with the *Singh and Choudry* case where it was held that prejudice was not necessary to find IPS) . However, one proposal mooted by the Law Society that there should be higher levels of compensation for repeat offender approach to increasing sanctions may be unlawful within the context of awarding compensation.

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[35] Para. 8, Schedule 1A, Solicitors Act 1974.

Similar arguments could be applied to other powers under paragraph 2 of Schedule 1A, although with less weight. Schedule 1A appears to create a two stage process. For the first (the finding of IPS) courts have said clearly that the power is regulatory. The decision as to which steps to take under paragraph 2 is one which must be appropriate in all the circumstances. Appropriateness must be tailored to the powers used. Hence under paragraph 2(d) the power to direct "other action" is explicitly limited to action in the interests of *the client*. This narrows the purposes to which the power can be put in a way that paragraph 2(b) does not. 2(b) permits the ordering of rectification of (inter alia) deficiencies arising *in connection with the matter in question*. So, broader concerns about (say) management structures or training within a practice might be addressed under 2(b) but not under 2(d).

The position of costs reduction is perhaps least clear. It is a power vested in the Council to determine entitlement to costs for sub-standard work. Obviously, the concept of Wednesbury reasonableness would act as some check on the use of the power. There is a persuasive argument that this power should be confined to reducing costs to a level which reflects the worth of the case to the client (or a third party funder, such as the Legal Aid Board). This might reduce the costs to the client to zero (and enable compensation to be paid on top for actual losses).

It is clear that cost reductions can be made over and above any finding on taxation.[36] This could be read as allowing the Council's view of what a case is 'worth' to trump that of the Court (which may have proceeded to tax a bill in the absence of any finding on IPS). Conversely, it could be taken as evidence that, the Society is not bound by purely financial considerations when making its determination (i.e. that it can operate as a form of punishment).

Equally a regulatory approach might allow the Council to say that for certain types of breach the level of service was so below that which could be reasonably expected of the practitioner that they should not be able to charge for it and costs should be reduced to zero, even if the work had some value to the client. The decision in *Singh and Choudry* supports that argument although in that case it could quite clearly be argued that no worthwhile work was done for the client and so no costs should be paid. As already demonstrated, that decision focuses primarily on the ability to *find* IPS and not the precise basis on which the power to take steps can be taken. It is clear, however, that there is no basis in the Act to suggest that the power to reduce costs could be used as a way of awarding extra compensation beyond the £1,000 limit.

Cost reduction decisions could conceivably be justified on the basis of:

[36] Paragraph 4, Schedule 1A, Solicitors Act 1974. *R v The Law Society (The Solicitors' Complaints Bureau, ex parte Shuttari)*. 21 February 1996, unreported. The transcript is corrupted but the basic point made here is clear enough.

1. What the case is worth to the client as a result of the breach (an 'economic evaluation').

2. That IPS breaches are of a type for which practitioners should not be able to charge for services (a regulatory approach).

3. That the level of inadequacy is such that a partial reduction in costs is justified on the basis that inadequate work dictates an inadequate fee. In this sense, the costs reduction is not measured by the impact on the client of the IPS breach or the overall value of the case to the client. It reflects an assessment of the breach itself (i.e. how serious is it on the 'scale' of IPS breaches) (a punitive approach).

Tied to the second and third steps, it is conceivable that the courts would accept an card approach which increased the level of cost reductions for repeat offenders. The basis would be that practitioners should not be able to charge, or charge fully, where their work has been shown to be repeatedly inadequate. The lawfulness of using the second and third options in this way is questionable, although the courts have been willing to accept in general terms the disciplinary nature of the IPS scheme. The OSS might, for clarity and safety, decide to stick to an 'economic evaluation' of what costs should be.

How is the conceptual basis of compensation important to the quality of OSS work?

The above review of research; the competing judicial opinion and the Statutory origin of the IPS power illustrates conceptual frameworks for compensation. Consumers want speed, clarity and redress. They also want punishment and regulatory resilience (expressed as not wanting what has happened to them to happen to others). The judiciary have seen the power to find IPS as regulatory and disciplinary in nature. They have not directly commented on compensation, the only new power introduced by the Courts and Legal Services Act amendment of the Solicitors Act 1974, which took effect in 1991. Conversely, the structure of the Act and the genesis of the 1991 changes should make the position reasonably clear: the power is compensatory not disciplinary.

The competing conceptual viewpoints have vexed the Law Society and the OSS in the search for a philosophy which drives the awarding of compensation for IPS. There are a number of aspects to the problem. The conceptual basis of IPS remedies affects:

a) the relationship between the OSS and firms of solicitors in setting and policing standards (self-regulation);

b) the relationship between the OSS and the complainant (professional reputation); and,

c) the nature and purpose of the OSS's dispute resolution and complaints mechanisms (technical aptitude).

Paragraphs a) and b) are often perceived to be in conflict. At its heart, conflict over how to deal with consumer complaints is indicative of broader tensions between

professionalism, consumerism, external regulation and the forces of competition. In particular, business-oriented and client-focused approaches to service (complaints procedures; emphasis on costs advice and the need for clear communication, particularly of merits and timescales of cases) have begun to force their way into the professional lexicon as an attempt to shore up professional reputation at a time of vocal consumer concern. This has met with resistance from practitioners on the ground (through the failure to implement Rule 15 procedures) which in itself calls into question the viability of self-regulation.[37]

As will be seen below, in terms of the technical aptitude of the OSS systems, the OSS approach is informed in part by an adjudicatory approach (determining cases on evidence on a rule-based approach). This is used to exclude certain types of consumer complaint (especially negligence claims, see below), and, at least on occasion, exclude client losses (on the basis that IPS is 'not negligence' and so, the sorts of losses that negligence claims would support are not compensable under the IPS regime). A pragmatic 'summary' procedure, whilst in theory operating to the benefit of the lay client, is also used as a justification for excluding loss on the basis that the procedures for handling IPS complaints are not sufficiently rigourous to test any evidence of loss and so that loss should not be compensable under the IPS powers. As a result, an adjudicatory paper-based approach of this sort, may tend to disadvantage complainants.

For compensation payments, exclusion of loss is premised on an acceptance of the limitations of a paper and telephone based process which operates to favour the law firms complained against. The exclusion of such loss is not supported by the legislative framework and seems to have grown out of the same acceptance of the limitation of the paper proceedings and the practice of caseworkers, which also focuses on the nature of an IPS breach rather than the consequences of any breach for the client. As a result the client's interests are subverted by the inadequacies of the procedure and an approach which is neither necessary in operational terms nor demanded by the legislative framework. The law permits, and may require, that the OSS take a restitutionary approach to compensation and the OSS case procedures could be improved, to clarify the basis of compensation and the collection of evidence for that. Once a finding of IPS has been made, the rules of compensation should focus most clearly on what the client has suffered, rather than on some analysis of how serious the breach of the rule is.

[37] Christensen,*et al* (1999) *'Learned Profession? – the stuff of sherry talk': the response to Practice Rule 15?* 6 International Journal of the Legal Profession 27.

II. How compensation decisions are taken at the OSS

This section describes the process of complaint handling that leads to compensation payments. The description is based on written material provided by the OSS, interviews conducted with the OSS staff and a review of OSS decisions.

Outline procedure

Complaints from clients (and sometimes lay beneficiaries) have to pass a number of hurdles before being admitted to the OSS section dealing primarily with IPS, the Client Relations Office. Complaints which have not been dealt with in-house by firms will be referred back under Rule 15. Complaints may also be designated into departments other than the Client Relations Office. In particular:

- Where there are significant conduct elements, they may be referred to the Professional Regulations Unit for investigation of the misconduct element of the complaint.[38]

- In cases that involve negligence the OSS may decline jurisdiction. This may happen immediately on receipt of the complaint as part of the designation process or where a caseworker, following investigation of a complaint feels there is a prima facie case of negligence, the matter will be referred to a Negligence Panel Solicitor for free advice to the client on negligence.

Similarly the OSS may decline to investigate complaints where:

- a client alleges overcharging, although there are IPS breaches which relate to overcharging which can be dealt with by the Office (e.g. exceeding a written quotation or failing to give written costs advice);[39]

- the issue is the operation of a lien (again there are exceptions to the exclusion where there is "an obvious breach of principle)"[40]; or,

- where the OSS would be giving legal advice or commenting on legal advice given by anybody else.

It is clear from OSS guidance to caseworkers, that the likely loss involved will influence whether the OSS will accept jurisdiction. If loss of over £1,000 is being claimed by the

[38] They may also be investigated simultaneously as 'hybrid' complaints

[39] Such cases may be dealt with by the Remuneration Certificate procedure or by the courts through taxation.

[40] See, OSS (1998): *OSS Casework Induction Training* (internal, unpublished, April 1998). This refers to principle 12.12, Law Society (1996) *Guide to the Professional Conduct of Solicitors*, p. 217, 7th edition.

client as part of their complaint there is a strong likelihood that the matter will be excluded as being a case for the courts.[41]

This initial designation of cases is conducted by senior caseworkers, senior advisers and Assistant Directors. A complaint which is designated as one requiring an IPS investigation is passed to a caseworker in the Client Relations Office. The normal procedure operating at the time of the research was:

1. **Streamlined Procedure (negotiation/conciliation).** The caseworker seeks to negotiate agreement between the client and the solicitors firm. If this is unsuccessful the case proceeds to investigation and report.

   Procedure 6a. Where the caseworker believes the firm has made a reasonable offer for reducing their costs and/or compensation (the two issues are not separated out at this stage) and the client has not accepted the offer, then the case can be closed without going to the next stage i.e. *without a first instance decision being taken or any compensation being paid.* The client is advised by the caseworker in writing at some length as to the reasons why the OSS think the offer is reasonable and the case is closed. A Senior Adviser reviews the file and the letter before it goes out. This appears to deny the client the right of appeal to the Client Relations Sub-Committee. It is justified by the OSS as a means of support to professionals wishing to address complaints themselves by making sensible offers. In effect, it reflects an approach where a client declining a litigation-type 'reasonable' offer loses any remedy, although the client can still ask the Legal Services Ombudsman to look at the matter. The OSS would equally support a sensible offer by ordering compensation at the level suggested by the lawyer concerned – instead it awards nothing..

2. **Investigation and Report.** The Caseworker investigates the complaint (in so far as further investigation beyond the period of negotiation is necessary) and prepares a report. The caseworker does not necessarily look at the lawyer's file. The report recommends a finding as to whether there has been IPS and further recommends whether there should be a costs reduction and/or a compensation payment. No recommendation is made as to the precise amount of such compensation or costs reduction.

   The report is sent to the client and the solicitors' firm for comment.

[41] The guidance states: "As our compensation powers are limited to a reduction in the bill plus compensation of up to £1,000, attention should also be paid to the likely loss involved. Where this is not clear, the customer should be encouraged to obtain clarification before deciding whether to ask the OSS to continue investigating." Pp. 10-11, *OSS Casework Induction Training* (internal, unpublished, April 1998).

3. **First Instance Decision.** That report is submitted with any comments from complainant and complained against that are received to a Senior Adviser (there are two of these) or the Assistant Director (there is one for Client Relations Office) for decisions under delegated powers as to:

   a) whether there is enough information to make a decision

   b) whether the caseworker's reasoning on the finding is satisfactory (and if not to reverse it)

   c) deciding on what is the most appropriate remedy or financial award (including costs reductions or compensation).

   This process will result in a finding as to whether or not there was inadequacy and whether or not any remedy is ordered. The client and firm are then written to informing them of the decision.

4. **Appeal.** These findings can be appealed on paper to the Client Relations Sub-Committee, which is made up of two lay members, on of whom chairs the committee, and one solicitor member (who is often a member of the Law Society's Council). Such appeals operate as a reconsideration, and both parties have an opportunity to comment further prior to the appeal committee sitting. Appeals can and do reverse findings of IPS and reduce compensation/costs reductions even where it is the client (and not the firm) that has appealed. This is on the principle that there should not be a 'no risks' appeal procedure for clients. This is likely to underline any perception of bias against the complainant. The client can take the matter further by asking the Legal Services Ombudsman to investigate the complaint and/or its handling. Equally they can increase compensation ordered at first instance.

Documentation and Guidance

The OSS was asked to provide all up to date guidance on the subject of IPS and the awarding of compensation. The following section is an analysis of the material received.

Defining Inadequacy

The starting point for any compensation award is a finding of inadequacy. The statutory framework provides a very loose definition of inadequacy. It is made clear by the OSS that it, "prefers to deal with each case upon its facts and merits."[42] In written guidance, caseworkers are given shorthand types of inadequacy:

[42] paragraph 1.3, *Notes for the Guidance of CRU Caseworkers in Inadequate Professional Service Matters* (OSS document, undated).

Insufficient - not doing all the work that is supposed to be done

Substandard – work "not of a very good quality (e.g. poor documentation)"

Unsatisfactory – failures to communicate properly with the client or to keep the client properly informed

Ineffective – the work done was of no use to the client

No administrative decisions hang on these shorthands, and there is clearly some overlap between the categories. They seem to have been offered simply as aids to recognising IPS along with similar but more specific examples of when IPS would usually be found.[43]

The OSS guidance makes plain that the simple factual accuracy of a complaint is not enough to found an IPS finding: hence a client can be dissatisfied and the reasons for their dissatisfaction be proven but this does not necessarily amount to inadequacy. The specific, prima facie, examples of inadequacy[44] are not automatically grounds for a finding of inadequacy: they are factors which, "must be viewed in the context of their seriousness when weighed up against the urgency of the case and the general circumstances surrounding." Conversely, the generally high or adequate quality of the work done will, "not preclude a finding of IPS if the one factor is sufficiently serious to warrant such a finding" although it is stated that the otherwise high quality of the work is relevant to the issue of redress.

IPS remedies

There is also written guidance on the steps that may be taken where IPS has been found. In relation to costs reduction, seriousness [of the IPS breach]; the length of time of the retainer; the importance of the matter to the client and the urgency of the matter are indicated as relevant factors. It is unclear how far, for example, importance of the matter to the client is an indication of subjective (what the actual client thought was important) or objective importance (what a reasonable client would think was important); or a mixture. Furthermore, an apparently overriding 'rule of thumb' is offered in the guidance: "the severity of the costs reduction should mirror the severity of the IPS." Similarly, a 'client-value' based assessment is ruled out: "it is <u>not</u> the OSS's function to assess the reasonableness or quantum of the solicitor's costs but rather, in the context of these costs, to assess the inadequacy of service." This guidance suggests a punitive or

[43] Delay, failure to take instructions, failure to follow instructions, failure to keep the client informed, general incompetence or inefficiency, failure to give proper costs information, failure to comply with the overall principles of professional conduct (where such non-compliance would not amount to a 'conduct' complaint) or failure to take proper care of, or return, client documentation in appropriate circumstances. *Ibid.* para. 2.

[44] See note 43.

regulatory rather than economic approach. This guidance is supplemented by a remedies matrix which indicates clearly that different levels of severity lead to different percentage reductions in costs.

Guidance on compensation payments is as follows:

> "Here the concern is with the consequences or prejudice to the client arising out of the IPS and the OSS would look for signs of:
>
> specific expenses which have been incurred
>
> inconvenience
>
> annoyance
>
> non-co-operation or where the solicitor has exacerbated the inadequacy, e.g. by failing to deal with the complaint in a proper fashion.
>
> In awarding compensation the OSS is not awarding "damages" (so that it is not necessary to undertake a precise assessment of financial loss) but any award must be capable of justification on the evidence available and supported by reasons in the decision itself."

This guidance is clear taking a restitutionary approach to the client's complaint, whilst not being tied to a legalistic definition of damages, given the nature of the complaints process. It remains unclear whether inconvenience and annoyance are indications of the client's subjective perspective or a more objective test. The latter might be preferable (a client who is more annoyed than a reasonable client only gets the damages entitlement of a reasonable client entitled) and might justify the OSS's tariff-like approach (see below). However, there would also need to be capacity to take into account 'objective' client characteristics which make their increase compensable 'loss' e.g. age, infirmity, or ill-health.

The aggravating factor of non-cooperation with the complaints process is less clearly restitutionary in nature and smacks of being a penalty against recalcitrant solicitors. It may have added to the client's levels of inconvenience or anger but ordinarily it shortens the OSS inquiry and leads to findings against the solicitor. Conversely it appears to add to the client's sense of injustice.

Mitigating factors

The OSS guidance to caseworkers suggests that, "the effects of IPS may be mitigated if:

> The solicitors (*sic*) has apologised; or
>
> taken steps to rectify bad workmanship; or

made a reasonable financial offer by way of amends."

It is not clear whether such factors can counter what would otherwise be a finding of IPS. The use of Procedure 6A suggests it can.

What factors actually drive decisions

To get a clearer picture of what factors actually drive decisions, this research reviewed 30 OSS decisions, interviews with two Senior Advisers (who decide on IPS remedies), a caseworker (hereafter these three are referred to collectively as "OSS staff") and six members of the client relations committee ('committee members').

Which remedy?

Where IPS has been found, the first issue is which remedy should be chosen. There were conflicting approaches in the OSS in deciding whether costs reduction should be chosen ahead of compensation. There was some recognition amongst OSS staff that they had been asked to consider compensation first. One of the OSS staff acknowledged that, they had, at the behest of lay committee members, been asked to consider compensation first. This staff member said that they always considered compensation now and almost always awarded something for IPS in respect of compensation. This had not been recognised by all the staff we spoke to. One was clear that the approach taken was to look at a case and see if costs reduction were adequate and, *only if it were not* would a compensation award be considered necessary. A third staff member said that cost reductions were looked at 'in the round'. Initially, first consideration had been given to cost reduction and then compensation but the approach was not one which was met with the sympathy of the committees and so caseworkers and senior advisers had moved towards considering costs and compensation together.

All interviewed committee members except one generally agreed that compensation powers were related to costs reductions. Partly this was because in some cases, notably legal aid or third party complaints, the complainant would not benefit. Implicit in that approach is a recognition that costs reduction is being used to provide economic benefit to the client. Several committee members saw compensation and costs reduction as a total package. One committee member went further, pointing out that problems due to the restricted level of compensation could be addressed by costs reduction.

At the same time, there was some consciousness that costs reduction and compensation could and ought to be used for different reasons. One member said reducing fees was seen as a strong signal to solicitors: a reflection of the level of professional service they have provided and it sends a good message to the consumers. Costs reduction was also recognised as being a method for promoting standards in a regulatory (and possibly punitive) sense by another committee member: where the work was truly, horrifically inadequate but there is little loss, they said the focus should be on reducing the bill. For this member, the award of compensation was limited to the client's damage and loss.

The member who said that costs reduction and compensation should be dealt with entirely separately saw the matter as first requiring compensation to the client to recognise the stress that has been experienced plus an element for inconvenience. Then the bill should be taken and a look at the utility of the work carried out and how this relates to the client's anxiety. A significant cost reduction may be appropriate as a result.

What is compensation and costs reduction for?

Differences about the distinctiveness and choice of remedy were further reflected in differences of opinion as to what compensation and cost reductions should be for. The comments of committee members already make plain that there is some view that costs reduction is regulatory and some view that it should reflect the value of the work as diminished by the inadequacy.

For one member of the OSS staff, the cost power was essentially a power to reduce costs for a "naff job". There would be no costs reduction, and therefore compensation was much more likely to be awarded, where legal aid or other third party funding was the source of funding. This staff member did not use cost reduction to penalise the solicitor or to repay public funds. Delay, mistakes on documents and so on, would reduce the value of the job. Thus, in broad terms, the economic value for the job done was being looked at although equally what was not involved was a process of taxing costs or performing a remuneration certificate type role. Cost reductions were usually thought of in terms of a percentage reduction of the bill.

Conversely, for this staff member, compensation was basically there to address the clients' inconvenience: "compensation is not about punishment it is about redress." However, the same person was also wary of allowing clients to claim for losses arising from IPS. Cases where Rule 15 had not been followed, i.e. where firms had not been taking reasonable steps to deal with the matter within their client care procedure, would be more likely to receive an award of compensation as they would be seen as increasing the anxiety and hassle of bringing a complaint.

The second staff member agreed that compensation was for the degree of distress and hassle suffered by the client. Although other things would affect a decision: failure by the solicitors to try and sort out the complaint themselves would increase the likelihood of compensation. There was also an awareness that compensation could be used to deal with limitations on the OSS's ability to award costs for disbursements which had been incurred by the client via the inadequate solicitor.

The third OSS staff member also agreed that compensation was awarded for inconvenience and distress. They said, specific, concrete losses would be compensated for (such as storage and hotel costs in conveyancing cases where sale and purchase were staggered as a result of solicitor inadequacy). Other types of loss, which were less concrete, would not be compensated for.

Committee members were also asked to indicate the criteria that they used in making compensation awards. The following factors were mentioned:

Committee Member A

"The extent to which the complaint is genuine – in some cases it can be six of one and half a dozen of the other.

"I look at whether it is a "difficult" client.

"The seriousness of the offence is relevant – there are some matters which can be put at different tariffs depending on how the offender has performed.

"The extent to which the client is put out. I look at this objectively – how much should the complainant have been put out.

"Failure to reply to correspondence particularly for a long period of time, is relevant, and also failing to reply to correspondence from the OSS moves it significantly up the tariff in my view."

Committee Member B

"It would be for distress and inconvenience. There are obviously degrees of seriousness here and we need to have an understanding of the extent and look at the extremes in the case.

"A tariff system should not be used. We should take account of the individual circumstances. The number of times that the complainant has had to contact the solicitor or the OSS and the vulnerability (e.g. age) of the complainant should be taken into account.

"So should the reasonableness of both parties."

Committee Member C

"Inevitably I look at it from the solicitor's point of view. Do I think when looking at a case "here but by the Grace of God go I". I look at what has happened through my eyes with an understanding of the pressures that exist, but without covering up for colleagues. I am fairly tough on my own profession."

Committee Member D

"We look at anxiety as a result of delay and the degree of incompetence.

We look at what we would expect as human beings as adequate compensation. We look at delay and associated stress and incompetence together."

Committee Member E

"[It] is actually done on the basis of gut reaction... ..Whether the client has had a rough deal or a rougher than usual deal might lead the Committee to increase the level of compensation slightly.

"It takes quite a lot to upset those awards [made at first instance by the OSS]. It is noticeable that the lawyers on the Committee are kinder to the clients than the lay members and equally tougher on the lawyers."

Committee Member F

"We are not really awarding compensation but a measure of the seriousness of the inadequacy of the solicitor combined with the effect it had on the client.

"On a personal level I look at two fundamental things: Is it a widow/orphan case ... If I feel the solicitor has particularly let down his fellow professional colleagues."

"I am rather opposed to members who would like a matrix that they can consult when making an award as every case is different.

Committee Member G

This committee member did not answer this question directly but said at another stage of the interview:

"The aim is to compensate the client for the time taken to make the claim/complaint. I am not sure it is right to compensate for hurt feelings. Compensation is not on the basis of this and it is not appropriate for the client to go out for all they can. The compensation is for being let down."

Attitudes to 'Loss'

Attitude to compensating clients for their loss met with a varied levels of resistance from OSS staff. Staff Member 1 indicated that caseworkers were not asked to quantify loss. It was not felt to be their job to do that. Further resistance was expressed on the basis that clients, occasionally, simply said, "I want £1000. My case merits the maximum." And that the word 'compensation' could stir up emotive concerns in clients and a feeling they should be compensated for all "losses". This member of staff did not see this as the role of the OSS.

When asked about specific examples of loss, this staff member indicated no award would be made in compensation for new solicitors costs (where the complainant had instructed solicitors to handle a complaint) on the basis that there is no way of taxing those costs or knowing whether or not they were reasonable. Similarly, where clients said that they had suffered days off work as a result of the complaint, the staff member would not feel able

to quantify that as a compensable loss. It would not be possible to know whether or not the days off work had been caused by the solicitor's IPS. It could also be argued that the client had been unreasonable to take time off work to respond to a complaint.

The second staff member felt that client losses would be taken into account to some extent in assessing compensation but was conscious that the OSS was not a court. In terms of raising such matters for report, it generally depended on whether the client raised losses with the caseworker. If they did, they might be included in the caseworker's report. It was clear there was no standard approach to the gathering of information about losses, nor indeed was there a presumption that *any* information would be collected about losses. The staff member felt that certain vulnerable clients would be likely to get more compensation. In particular, psychologically unstable clients might get higher awards because the solicitor would need to take more care with them and elderly clients might attract more sympathetic treatment.

The third staff member appeared more willing to consider client claim for losses, but remained a little wary being worried about drifting into awarding damages on the basis that a court might. As mentioned above, specific costs such as storage and hotel costs would be included within a compensation award. Compensation for days off work was less certain and clear. Caseworkers would not be expected to take reporting of loss that far. Time of work, for instance, would be dealt with under the general heading of inconvenience. Compensation was related to both the level of inadequacy and the level of impact on the client [i.e. it was not just related to what the client had lost, nor was compensation solely a type of sanction]. Where there are specific losses and those losses were, to the staff member's satisfaction, related to the solicitor's inadequacy, then they would be taken into account in the award of compensation.

Committee members were also asked what sort of losses should be (or should not) be paid for by a compensation award.

Committee Member A tended to approach this on the basis that compensation was also a deterrent to the solicitor. Compensation had a special damage basis (tangible losses) and a punitive element: the deterrent.

Committee Member B thought that compensation should focus on actual loss. This needed to recognise the time complainants had spent in dealing with the complaint; particularly given the way solicitors charge for their work. It was felt to be rude to ignore the fact that other people's time was valuable. Travel expenses and small expenditure should also be included. The member felt that a related issue was whether the system was available to everyone. For those on a low income the costs of complaining and pursuing a complaint might deter them, even though these costs are small they may be significant to some people.

Committee Member C felt any genuine and real losses should be compensated. In particular, anything that the Courts would regard as a head of damage in negligence or a

breach of contract case including loss of opportunity (e.g. the opportunity to buy or sell a house) should be compensated.

Similarly, Committee Member D felt all losses, if precisely calculable, should be worked out and met by compensation. Generally, the approach of the committee to IPS compensation was to address subjective concerns (i.e. hurt feelings etc.), but both the objective (i.e. readily quantifiable losses) and the subjective should be addressed.

Committee Member E felt that generally compensation was for emotional pain and suffering. But in extreme cases, where there was no negligence, then something towards financial loss might be sensibly awarded. Similarly, in blatant cases of negligence a maximum compensation award would be made which might reflect a gesture towards the sometimes considerable financial loss suffered by the client (the member cited a case where a complainant lost her home, as a result of the solicitor advising her, and her husband, negligently and in a clear conflict situation). The member was prepared to consider out of pocket expenses, but not special damages. Conversely, the member felt the Committee should have scope to consider the loss of opportunity and injury to feelings. The member did not want to spend time assessing in depth claims but felt a discretion to do this should be available but not automatic.

Committee Member F felt that losses should not be taken into account at all as the Committee was not actually in a position to award 'compensation'. Essentially IPS compensation was for where the client is upset and the more general effect that a solicitor's IPS has had on a client.

Committee Member G felt the aim was to compensate the client for the time taken to make the claim/complaint rather than for hurt feelings. Conversely, "compensation is for being let down".

The Negligence IPS divide

The existence of a negligence issue has the potential to remove complaints from the OSS. There is a concern, identified for example by the NCC, that this acts as an inappropriate filter removing cases from the OSS which could be adequately addressed, to the client's satisfaction by the OSS. The views of committee and staff members on the distinction between IPS and negligence and its impact on the progress of a complaint were sought.

Staff Member One said that what distinguished negligence from compensation was the things people tried to recover rather than the cause of the action in itself. It was felt that the OSS did not have jurisdiction to investigate losses of the type associated with negligence and that it was possible to get a feel, almost from the complaint letter itself, whether it was a negligence or IPS matter. It was said that the OSS had tightened its procedures and training for dealing with negligence. This member also felt that the OSS were occasionally being used as a source of second opinion for clients who have already received advice on professional negligence.

Staff Member Two put a slightly different gloss on the approach to negligence. It was only cases which appeared to show prima facie negligence that were referred out to negligence panelists. In particular, caseworkers would filter out cases where allegations were made which did not seem to have serious prospects of success. The OSS did not want to refer lots of useless cases to the negligence panelists. Similarly, the amount of any claim being made was crucial. If a case fell below the £1000 limit, but contained allegations of negligence, they would look to try and bring those cases within the IPS framework by identifying IPS issues. Even cases over £1000 could be and were brought under the OSS remit, if IPS issues could be separated from negligence issues. It was said that something which influenced a decision as to whether or not to take an IPS/Negligence claim was whether the client was practically capable of taking court action for negligence.

Staff Member Three candidly stated that this was an issue that had plagued the OSS and SCB since 1987 and particularly since 1991 when compensation powers were granted. IPS was more a matter of customer focus on the day to day practical aspects of running a case whereas negligence was more to do with legal/specific judgmental aspects. This staff member acknowledged that it was possible to say that all negligence was also IPS and so the OSS could take those cases on. It was also felt that when a letter comes in for designation, there was not always enough information to point to either negligence or IPS. Quantum (i.e. the £1,000 limit) was one factor which would assist in saying one case was negligence or IPS but it was only one factor amongst many. It depended on what was being alleged by the client. Similarly, even where cases were referred out to negligence panel solicitors, it was still open for a client to bring a case back to the OSS even where a negligence panel solicitor had decided that the case *did* constitute negligence, if that is what the client wanted.

Committee members were asked if IPS awards should ever be made where there is the possibility of a negligence claim.

Committee Member A said yes, but felt that in nearly every case negligence and IPS were separate issues. IPS is a matter of conduct, whereas if a solicitor had indulged in negligence it was not for the OSS to second guess what might happen in another tribunal. If there was some misconduct in the field of IPS, the OSS should deal with this rather than turn away the entire complaint.

Committee Member B also felt that cases containing allegations of negligence ought to be addressed. It was felt to be very weak and cowardly not to deal with a case because of the possibility of negligence. The OSS was felt to have a responsibility to confront it.

Committee Member C felt that in debarring negligence type cases there was a risk of deserting the clients who had suffered the most serious forms of IPS. "If we walked away from every case where there was a possibility of negligence then those who had suffered the worst sort of IPS but who did not have grounds to bring a negligence claim would be stuck."

Committee Member D also agreed. Each case should be taken on its merits although it was stated that it would not be sensible to take the possibility of a negligence claim into account in assessing IPS and awarding compensation, because then the client would suffer further delays. H echoed the comments of Members B and C: "It is not for us to decide that we don't confront a case as we find it."

Committee Member E was reluctant to admit negligence claims into the IPS mechanisms. The member pointed to the "very narrow limit between compensation and negligence". In negligence cases, it was felt, "the Law should follow the normal course of events. Proving a case can be difficult – although it is easier than it used to be and nowadays suing for negligence is no different than suing for debt collection. Negligence is usually pretty obvious.... e.g. missed deadlines etc.... though quantum may be arguable, liability is not necessarily." The OSS was felt to be the wrong forum for dealing with negligence.

Committee Member F (a lay member) felt constrained by perceived legal limitations on the OSS and the committee. "We aren't at law allowed to interfere with negligence. Complainants sometimes refer to negligence when they mean IPS. These must be sifted out. We shouldn't deal with real negligence. In a wider context – we could possibly deal with very minor negligence if it is too expensive for the complainant to get a claim going. It is a question of whether we should be allowed to do this, as at the moment we cannot." This is not an accurate view of the legal position, but it is understandable how it has come about given the OSS policy on complaints and it is interesting to note how the view has solidified in this committee member's mind into a legal bar on awarding compensation for cases involving negligence.

Committee Member G recognised the predicament of a client faced with making a negligence claim: "With no legal aid and the client possibly feeling emotionally battered they are often not going to be able to get a claim going. In view of that, and the difficulties that both those raise, then I wouldn't rule [allowing negligence claims under IPS] out. Obviously if it is an open and shut case of negligence, e.g. the deadline for issuing a writ is missed – then it must be passed on [to SIF]. Smaller/less clear negligence claims must be dealt with."

Attitudes to the £1,000 limit and its impact on awards of compensation

At the time this research was conducted, the limit on compensation for IPS was £1,000. The small claims limit in the County Court was £3,000. Part of the function of the research was to advise on an increase in the compensation limit. As a result staff and committee members were asked for their views on the £1,000 limt and increasing the limit. Staff Member One felt that straying beyond £1000 was to venture into the world of negligence rather than inadequacy and that the Courts were the correct forum for decisions on negligence. £1000 was a sensible level to express the inadequacy of service and, in particular, any distress that a client might associate with that.

The Staff member was asked to describe a case that had been awarded compensation at the £1000 limit. This had been a case of inordinate delay in a medical negligence case of

over 5 years. Whilst the Complainant could have changed solicitors, the staff member felt very angry about the way the solicitor had dealt with the case. It was a legally aided case, and therefore, no costs reduction would have helped the client. The client had suffered distress as a result of the delay. There had been no apparent loss of opportunity as the medical negligence case was an action that could not, and did not, proceed. The client had been advised there was no negligence claim against the solicitor when the OSS had referred the case to the Negligence Panel solicitor prior to the IPS being dealt with, "... in that there was no loss."

Staff Member Two sometimes felt that cases should be awarded compensation of over £1000 where "the service was just appalling". An example was where there had been lots of delay. A specific case was where the client's bankruptcy might have been caused by the IPS delay, although it could never be established on the file. There was also a suspicion that the solicitor was misleading the client. This staff member felt that the solicitors should be penalised for their handling in that case beyond the compensation level of £1000.

Staff Member Two also thought that a lot of the lower level awards of £100, £200 and £250 were a reflection of the comparatively low limit of £1000. The level of lower awards would increase if the £1000 limit was increased. This member felt that the low level of such awards, generated a lot of appeals although it was also stated that clients were sometimes simply being unreasonable and wanting the full £1000 for comparatively minor complaints.

The third staff member felt the power to award maximum compensation was being used more now than it had been previously. On several occasions more than £1,000 would have been awarded if there had been power to do so.

This member was asked to describe cases which reached the £1000 limit. It was felt this was much more likely to happen where the client would not get any benefit from a cost reduction. Where inadequacy was gross and the client was seriously disadvantaged then there would be a case where the £1000 limit would be reached. Again the mixture of discipline and restitution is apparent in this reasoning.

The specific example given was, as with colleagues, one of gross delay. "Awarding £1000 compensation was the only thing [the OSS] could do". The complainant was claiming specific loss of sorts which were regarded as a "legal matter" and the OSS could not deal with them.

This member was worried about increasing the £1000 limit very much beyond (say) £1500. The higher the award, the more specific the reasons for that award would have to be. The OSS would get involved in issues of mitigation and so on and that would cause problems. Conversely, this member was asked what the highest level of cost reduction was and was aware of a case of £22,000. Significant costs reductions seemed to cause OSS staff members no difficulty, these were almost always referred to by reference to a percentage of the total costs, and could rise to well beyond £1,000.

Committee Members were asked how appropriate the current limit for IPS compensation awards was. If they did not think the level was appropriate, they were asked to indicate what level they thought it should be at and why. They were also asked, in what circumstances they would feel it appropriate to make a maximum award

Committee Member A thought the level should be, "at least £3,000. £5,000 is a bit stiff. I would be happy for there to be a further increase in one or two year's time." On making maximum awards he would adopt a regulatory approach which sought to reduce inadequate services by punishing repeat-offenders:

> "The obvious one is for repeat i.e. serial defaulters. I am disinclined to give a firm the full whack for a one off first complaint. But for a second, third or fourth hit I would go for the maximum or near to it.
>
> "It is very difficult to tie it down and to say what should be at the top and what at the bottom. The logic is to reduce complaints, and most complaints are about only 10% of firms – these are serial offenders – they should be hit where it hurts. I am reluctant to go for a very high award for the first time successful complaint. After all we are talking about shoddy work not professional misconduct or dishonesty."

Committee Member B felt the £1,000 award was not appropriate.

> "My view is that the Committee and the OSS requires much more flexibility in awarding compensation. A limit of £1,000 does not reflect what consumers understand compensation to be and can appear as an insult.

The 'knock-down' effect of the £1,000 limit on more run of the mill complaints is also noted:

> "If £1,000 is for the most serious cases, a scale is required and an award made low down or even at the mid point of the scale for long running complaints can appear like an insult to the complainant.
>
> On the basis that we need to be able to make a reasonable spread of awards. I think a significant increase is needed, to at least £3,000 but preferably £5,000. This should then be reviewed on a regular basis.

The maximum award should be related to the following factors.

> "I think it would be for distress and inconvenience. There are obviously degrees of seriousness here and we need to have an understanding of the extent and look at the extremes in the case. A tariff system should not be used. We should take account of the individual circumstances. The number of times that the complainant has had to contact the solicitor or the OSS and the vulnerability (e.g. age) of the complainant should be taken into account. So should the reasonableness of both parties."

The member stressed the extent to which the £1,000 tied the hands of decision-makers dealing with IPS compensation.

> "My preference is for the Committee to have discretion. With a £1,000 limit they do not have this and so the maximum award is used too often because to award less is offensive. The limit needs to be higher so that discretion can be exercised."

Committee Member C also felt that £1,000 was "on the low side". The 'knock-down' effect was again apparent:

> "The issues we have to deal with are sometimes very significant and it already seems to me that the maximum has to be reserved for the more serious cases which means that the awards that can be made have to be under £1,000. The limit could easily go up considerably. I would want a ceiling on our powers and would be happy for it to go up to £5,000. We could then make realistic awards.

Again, it was not felt that the limit should be static: "It could be linked to the small claims limit." It was also recognised that upping the limit might have knock on effects for the workings of the Committee: "If the Committee does have greater powers it has implications for the way things are done."

On maximum awards:

> "It is hard to say... There are a few separate strands here – what loss has been occasioned/the degree of inconvenience/loss of opportunity. These are the effects of the IPS. There is also the degree of culpability. *How* inadequate was the service provided."

Where there were "high ratings in both areas" the maximum could be awarded, i.e. where there is loss and extreme inadequacy.

For Committee Member D, the current limit for IPS compensation was, "Quite inadequate," and should be replaced by a limit of at least £3,000.

For Committee Member E, the £1,000 was adequate. Maximum awards would be made where there has been, "extreme bad service that falls short of actual legal negligence. There must be some financial loss to the client as well. Upset to be dealt with by a reduction in fees and compensation should be used if there has been financial loss."

For Committee Member F the limit was described as:

> "Totally and hopelessly inadequate if we continue to talk about compensation.
>
> "The logical answer, therefore, is if [the award of compensation] is simply a measure of the seriousness of the inadequacy and the effect on the client it doesn't matter what the award is – it could be 50% bad or 90% bad. If we are talking

about compensation plus an element of fine then tens of thousands of pounds would seem appropriate.

"My own view is that solicitors shouldn't be allowed to practice if they are basically inefficient, which is what IPS is. The only way to stop them is either to fine them such a large sum that they effectively go out of business or, for IPS, that there is input onto their practising certificate to say that they can only practice in the environs of an efficient firm.

On when maximum awards would be made:

"If a situation is hopeless. – i.e. the solicitor has made a complete mess and the client is upset then this is a likely case for a maximum award. My approach is to look at the obverse – what good did the solicitor do, and if there is very little, give the maximum."

For Committee Member H, the limit might needed increasing, but modestly:

"I think that if people have actually been negligent then the client's redress is in negligence. We would be compensating clients for letters written, inconvenience and loss of time. I think the limit should be about the £1,000/£2,000 mark. £2,000 is possibly preferable."

This member would be inclined to make a maximum award:

"If the solicitor has been rude and aggressive in the treatment of the client. I am thinking here of private clients, commercial clients are different... The award is appropriate where solicitors have not tried to resolve complaints and have written rude and pompous letters to the client."

The interviews with OSS staff and committee members, both lay and solicitor, show some times quite marked differences in opinion, emphasis and approach to compensation issues. Statements as to a theoretical approach to compensation awards, the maximum level and other issues to do with compensation must be treated with some caution. Nor should too much criticism be made of differences between OSS staff and between Law Society committee members. The differences do, however, reveal significant differences in the perceived purpose of compensation powers (whether they are a redress mechanism for clients or a disciplinary mechanism for the profession). There appears to be much greater resistance to accepting negligence complaints within the Office staff group than within the committee members that we interviewed. Across both staff members and committee members, there was a reasonably broad level of support for increasing the compensation limit. The justifications for this, however, are not based on a consensus view. Several interviewees commented that the effect on the £1,000 limit on compensation was to knock down less serious awards to very minimal compensation levels. Others commented that consumer expectation demanded high levels of compensation. Some wanted the limit increasing to provide greater flexibility of

response by the OSS and the Law Society committees. Others felt that the limit should be increased to strengthen the disciplinary or deterrent effect of compensation awards.

The comments of OSS staff and committee members provide a rich account of the different perceptions and motivations behind decision-makers in looking at compensation decisions. However, from the perspective of clients, the critical issue is how OSS decisions are *in fact* taken. The report turns to this issue next.

Review of OSS Decisions

30 sets of OSS decision papers, chosen at random by the OSS from decisions taken during the late-Summer of 1998, were reviewed by the researchers. The decision papers consist of the caseworker's report and any subsequent correspondence from the client and the solicitor on that report as well as the form describing the basis and nature of the Senior Adviser or Assistance Director's first instance decision. These papers provided quite a lot of detail about the recorded reasoning and factual background for decisions.

In two of the cases there was no finding of IPS. In sixteen cases the OSS directed an award of compensation and in fifteen cases a costs reduction was awarded. In three of these fifteen cases an award of both costs reduction and compensation was made. The factor which led to compensation payments being made in the remaining fourteen compensation cases was almost always that a costs reduction would not benefit the client. In five cases this was because the client did not fund the case (usually they were on legal aid) and in a further four cases a costs award was inappropriate for other reasons (because costs had already been litigated, taxed or subject to a remuneration certificate).

If these cases are typical of the OSS approach, then the dominant approach seems to be to look first to costs awards and only if costs awards cannot be made in a way that benefits the client will compensation usually be awarded. Some of the recorded reasoning illustrates quite clearly that this is the approach the caseworker is taking. For example in the following cases, these reasons were given:

> " The solicitors' costs in respect of the bill.. ...were reduced upon application for a remuneration certificate to £xxx.xx plus VAT. **I therefore determine** that this is an appropriate case for an award of compensation."
>
> "I have carefully considered whether an award of compensation is appropriate in this case.... ..I consider that the above costs reduction is sufficient recompense for inadequacy of service."

There are a small number of apparent exceptions to the primacy of costs reduction. Most notably the cases where compensation and costs were both awarded. The reasons why compensation was awarded in these cases is also instructive. In one case there was an allegation of loss which, if compensated in full, would exceed the total costs reduction available. The total economic benefit to the client was taken much closer to the level of

that claim as a result of a supplementary compensation award. The decision-maker's reasoning also provides an interesting, partial acceptance of a client's loss claim:

> "[The complainant] has incurred costs of £xxx.xx in respect of [the other side's costs]. On the evidence before me, I cannot conclude that the entirety of these costs would have been avoided if the above inadequacies had not occurred but I do consider that the amount of costs would have been mitigated."
>
> The award of compensation was about one fifth of the total 'loss' claim.

In the second case, the client specifically requested that compensation be taken into account and there was a failure to respond to client complaints. In the third case there was also a failure to respond to client complaints.

Interestingly, given the uncertainty of staff about the role of losses in calculating compensation (or costs reductions) there was evidence of awards being made for: storage and van hire, lost interest on money which was retained by the firm or the Legal Aid Board as a result of inadequacy by the firm in question and the costs of instructing solicitors in connection with the subject matter of the complaint. It appeared however that such losses had to be raised on the initiative of the client. The caseworker report form does not require a report on client losses.

There were however several instances where claims for losses by the client were not addressed in the decisions or where stress and inconvenience, even where the client specifically raised the issue, was not met with any discussion of compensation. Furthermore, in seven of the fourteen cases where compensation was not awarded, there was no evidence in the decision that the decision-maker had considered whether or not to award compensation.

Similarly, there were occasions where, rather than address the linkage between any loss and the finding of IPS the decision-makers utilised 'jursidictional exclusions' to do with 'negligence' and 'loss'. Examples are:

> In rejecting a part of the complainant's claim, it was "[T]his Office has no jurisdiction to consider allegations of negligence and I am not in a position to assess whether [the complainant] has been caused any financial loss as a result of the manner in which her affairs were handled."[45]

In another case:

[45] This claim was for solicitors costs and interest on money held by the firm in question, something which has been compensated in other decisions reviewed by the researchers.

"[I]t is not my function to determine whether the client has incurred a specific financial loss. I do not therefore consider it appropriate to take this into account in assessing what steps to take in dealing with inadequacy of service"

Although this case involved a quite difficult loss to prove as being caused by the IPS, the nature of the evidential and reasoning exercise is similar to the partial compensation of costs award referred to above. The decision-maker was the same in both cases.

This review of 30 cases shows quite strongly that the OSS decision-makers, although acknowledging and recognising that they had been asked to consider compensation first, do not appear to be doing that. The primary and often the only response of the OSS on these cases was to reduce costs. Although a significant number of compensation awards were made, many of these were made in circumstances where a cost reduction could not be effected or would not benefit the client. The official policy of the OSS committees and the stated reasoning of OSS staff members appears to have been contradicted by actual practice.

Interestingly, the OSS staff showed greater openness to the awarding of costs and financial losses than might have been expected from the interviews. More worrying was the unpredictable basis on which losses would be dealt with and the use of "jurisdictional exclusions" in a way that is not necessary and appears not to be consistent across all cases.

Statistical Information

Statistical information provides a further backdrop to the OSS's handling of complaints. 22,305 complaints were received by the OSS in its first year.[46] The Annual Report does not clearly distinguish which of these allege IPS. As a result, it is very difficult to build up an accurate picture of what cases may be compensable. It appears however, that in 1,237 cases compensation or costs reductions were agreed during conciliation and in 151 cases compensation was ordered by the office.

It is also not possible to ascertain in how many cases the OSS declines jurisdiction because a case involves "negligence". The OSS statistics include categories for the outcome of complaints such as the client accepting the OSS cannot remedy (about 879 cases), complaint withdrawn and implied acceptance of the OSS response (over 3,421).[47] Over 4,289 cases are categorised as other and 973 cases were closed pending litigation.

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[46] including regulator matters, which could be estimated as being about 3,000 of that figure based on previous year's figures. See, Office for Supervision of Solicitors (1998): *Annual Report 1996/97 The First Year*, p. 7.

[47] Lewis's research showed the danger in relying on this sort of statistic. Many clients whom the OSS thought had their complaints resolved, actually thought there matter was still pending within the complaints structure.

The latter may be the category most likely to contain 'negligence' cases but any of these categories, and particularly the first, would also be candidates. It is possible that a considerable number of cases are being excluded by the OSS because negligence complaints are made and/or the loss 'claimed' by the client exceeds £1,000. The OSS also do not currently hold the number of cases which are dealt with under "Procedure 6A" described above. Future sets of published statistics should, if possible, include this information.

Over 2,000 cases are referred for First Instance Decision (many of which will include purely conduct-based complaints and, as such, will not be compensable). The Annual Report states that of these, in 537 matters a First Instance Decision relating to poor service was made. These broke down as follows:

151 resulted in compensation (28%)

145 resulted in reduced or limited costs (27%)

97 resulted in costs reduction and compensation (18%)

33 resulted in disciplinary proceedings (6%)

62 in other action (12%)

In 49 cases there was no finding of IPS (10%)

The Annual Report does not provide a breakdown of the distribution of compensation awards from first instance decisions but states that the average compensation award was £325. Total compensation awarded against the profession was £80,743.[48] The OSS has kindly provided the researchers with further breakdowns of compensation payments. From September 1996 – August 1997, 13 maximum compensation payments were made out of 242 first instance decisions. The average cost reduction during this period was £791.42. This is considerably higher than the average compensation award during the period of the annual report and suggests that the total impact of cost reductions is more significant than the compensation payments. The highest cost reduction during that period was £13,657.50.

The OSS has also provided the Researchers with more detailed information for cases completing in 1998 since the Annual Report was published. In those cases where delegated (i.e. First Instance Decisions) were made, £1,000 compensation was awarded on 24 occasions out of 716 (3%). In 11 of these 24 cases compensation payments were ordered but no costs reductions were made. On 10 occasions costs reductions were made in addition to £1,000 compensation awards and in 3 cases the OSS case report is unclear (i.e. there may or may not have been a costs reduction). Thus in a significant proportion

[48] Ibid, page 9. This figure does not include conciliated agreements on compensation and costs reduction.

of cases, the client was receiving an economic benefit in excess of £1,000 as a result of the Office's decision to reduce costs. There is a possibility that the current OSS approach to compensation, as an unintended consequence, favours private payers. They are in effect not subject to the £1,000 limit. The approach of committee and staff members as identified during interview appears to support this analysis.

On their face, the OSS statistics provide little support for increasing the level of compensation. Average awards are modest and the percentage of maximum awards is low. Although there are indications that the number of maximum awards is growing. Conversely, it was the practice of the OSS in about half of the cases where maximum awards of compensation were made to award costs reduction as well. Economic redress to the client will then exceed £1,000. It is also clear from staff and committee members that the £1,000 limit has a trickle-down effect generally reducing levels of compensation as First Instance Decisions and Appeals reflect the perceived need to reserve the maximum award for serious cases of IPS and high loss.

Other compensation providers

The Legal Services Ombudsman has unlimited power to recommend compensation against solicitors firms. Failure to meet those recommendations is rare and is met by publicity sanctions. The Ombudsman has indicated to the researchers that in cases where more than £1,000 compensation would be awarded, actual loss to the client would ordinarily be needed.

The Legal Services Ombudsman also publishes figures on the number of compensation awards made by the Ombudsman against lawyers (which would include awards against barristers and licensed conveyancers). The following table summarises these awards.

Table 1 : Compensation Recommendations Made by the Legal Services Ombudsman 1995 - 1997

Level of compensation awarded against lawyers	1995	1996
Under £500	54	91
Between £500 and £1,000	8	16
Between £1,000 and £2,000	9	2
Between £2,000 and £4,000	1	2
Between £4,000 and £6,000	1	2
Over £6,000		1[49]
Totals	72	114

Source: Legal Service Ombudsman's Annual Reports (1995, 1996)

The 1997 report presents the statistics in a slightly different format. There is no indication of how many awards topped £1,000. The Ombudsman on one occasion awarded £5,000 for the shock of receiving a large (£30,000) bill "at the last minute" where costs advice had been "singularly lacking" and £6,801 for loss in another case.[50] Awards for loss were made in 20 cases (The average (mean) award was £730) and for distress and inconvenience in 117 cases, mean award £357). Although occasionally straying beyond the £1,000 mark, given that the Ombudsman is not subject to formal

[49] The Ombudsman proposed compensation of £32,871 and as a result a settlement of £25,000 was agreed.

[50] Legal Service Ombudsman (1998), op.cit., p. 14 and 28.

limitation in terms of the amount awardable, the Ombudsman's recommendations are clearly relatively modest, especially for distress and inconvenience.

The Council for Licensed Conveyancers can award up to £1,000 for loss resulting from poor service, but have been criticised for making infrequent use of the powers.[51]

The Bar Council's Adjudication panel has power to award compensation of up to £2,000 or to reduce, refund or waive fees. Compensation is restricted to actual financial loss.[52] By the time of the last Ombudsman's report, no compensation awards had been made in the first 9 months of the operation of the panel.[53]

There is wide diversity in the powers of Ombudsmen and professional bodies to award compensation and reduce costs. The following table sets out the position for Ombudsmen operating in professional and commercial service fields.[54]

[51] Legal Service Ombudsman (1997), *Sixth Annual Report of the Legal Services Ombudsman 1996* (London: The Stationary Office), p. 1 and p. 12; and Legal Service Ombudsman (1996), *Sixth Annual Report of the Legal Services Ombudsman 1995* (London: The Stationary Office), p. 3 and pp. 15-16.

[52] Legal Service Ombudsman's Report (1996), op.cit., page 10.

[53] Legal Service Ombudsman's Report (1997), op.cit., page 20.

[54] This table is derived from a review of *A-Z of Ombudsmen: A guide to Ombudsmen schemes in Britain in Ireland* (1997: National Consumer Council, London).

Table 2: Powers of Ombudsmen to Award Compensation

	Max	Typical/ average	Highest
Banking Ombudsman	£100,000	£2,815	£56,740
Building Societies' Ombudsman	£100,000	-	£52,350
Ombudsman for Corporate Estate Agents	£100,000	£40-£1,000	£13,000
Funeral Ombudsman[55]	£50,000	£900	£2,665
Health Service Ombudsman	No limit		
Independent Housing Ombudsman	No limit	£250-£500	£4,000
Insurance Ombudsman Bureau	£100,000[56]	£5,400	£271,400
Office of the Investment Ombudsman	£100,000[57]	-	£66,670
Personal Investment Authority Ombudsman Bureau	£50,000[58]	£4,120	£90,712[59]
Legal Services Ombudsman	No limit	£500-£5,000	£5,119
Pensions Ombudsman	No limit	£500-£5,000[60]	£124,000
Adjudicator for Inland Revenue, Customs and Excise and Contributions Agency	No limit	£60-£500	£28,490

[55] Of this up to £5,000 can be awarded for distress and inconvenience.

[56] £20,000 for permanent health insurance. Recommendations unlimited.

[57] £750 maximum for stress and inconvenience.

[58] Up to £1,500 can now be awarded for stress and inconvenience, although increases are proposed in both limits (to £100,000 and £1,500 respectively), information supplied by The Legal Service Ombudsman's office.

[59] Although the formal limit is £50,000, there is a voluntary jurisdiction which service providers can submit to, where the limit is £100,000.

[60] For distress and inconvenience.

The average or typical awards show some variation in the practice of Ombudsmen. Similarly, within the global maxima, there is often a cap on awards for distress and inconvenience that can range from £750 to £5,000.

A number of professional bodies were contacted to provide an indication of the arrangements other professional bodies have in place in relation to compensation for clients that complain about the quality of service they have received. They were asked to indicate, in addition to any ordinary legal remedies that clients may have (e.g. a negligence claim through the courts), whether the particular professional body made any provision for the payment of compensation (or the reduction of professional costs or the fining of members) where a client has complained of professional services which are of poor quality (whether or not those services are actually negligent). They were also asked to indicate the maximum amount of compensation awardable for such complaints and the basis on which any such compensation payment is ordinarily calculated.

Of those that responded, the Association of Chartered Accountants stated that they did not have a system for compensating inadequate services. Nor did they have any involvement in fee disputes. For breaches of professional conduct rules an Investigations Committee could impose fines of up to £1,000 and Disciplinary and Appeal Committees could impose fines of £50,000. They said, indemnity cover was required of its members and there was a compensation scheme for private investors losing money or investments as a result of poor investment advice where the accountancy firm has since gone out of business or been closed down (with a maximum £48,000 per claim).

The Chartered Institute of Management Accountants stated it had no system for compensating clients with complaints about quality of service. There were fines for dishonourable or unprofessional conduct of up to £5,000 and indemnity cover was required.

The Institute of Chartered Accountants has a relatively new power, through its Disciplinary Committee, to reduce fees in whole or in part up to a ceiling of £5,000.

The General Dental Council did not have any system of fining or compensation. They register and discipline dentists through the register itself.

The Insurance Brokers Registration Council stated that they had no such system. Clients would be expected to pursue their complaints through the courts for negligence. There is, however, the capacity to discipline brokers for unprofessional conduct. There is also a grant scheme covering claims for a broker's dishonesty. It is a fund of last resort.

It seems that the Law Society are unusual amongst the professional bodies in offering clients compensation for professional services. The lack of consensus amongst Ombudsmen on compensation suggests that a fruitful area of further research and policy formulation for Government would be to review the role of Ombudsmen generally within the civil justice framework.

The courts have considered awards of compensation by Ombudsmen, see, Westminster *City Council v Haywood and another* [1996] 2 All ER 467. This followed a complaint to the Pensions Ombudsman pursuant to the provisions of the Pension Schemes Act 1993. The ombudsman found that the local authority was guilty of maladministration on the grounds that it had failed to warn Mr Haywood when he took voluntary redundancy about doubts as to the validity of its severance and compensation scheme and had therefore given him misleading or at least incomplete advice. He directed the local authority to increase Mr Haywood's monthly payments and to pay him £1,000 compensation for distress and inconvenience. One of the bases of appeal, was that the Ombudsman had no power to award compensation for distress and inconvenience.

It was held at first instance that there was no pecuniary loss established as being a consequence of that maladministration. In the absence of such loss, there was no lawful basis on which the Ombudsman could direct the local authority to pay H a pension larger than that to which he (or any other pensioner in his position) was lawfully entitled. The Pensions Ombudsman could however order payment of reasonable compensation for distress and inconvenience, notwithstanding the fact that the power to make such awards had not been expressly created by Parliament. Indeed, if monetary compensation could not be awarded for non-monetary injustice, it was held that many complainants might be left without an effective remedy and the statutory function of the ombudsman would be frustrated. As such, an award of £1,000 was regarded by Mr Robert Walker J as high, but not so excessive as to be wrong in law.

The Court of Appeal[61] reversed this decision on the basis that the Pensions Ombudsman had no jurisdiction to entertain the original complaint. The Court also went on to look at the remedies points. It held that it was clear that the maladministration recognised by the Ombudsman had caused him neither pecuniary loss, nor anxiety or distress. The complainant had not complained of disappointment, and had, in fact, received payments totalling £1,580 in excess of those to which he was lawfully entitled which he was not being asked to repay. The Court of Appeal found as a result that he had been fully compensated for any disappointment that he might have suffered. Accordingly, the Court of Appeal's view was that even if the Pensions Ombudsman had jurisdiction to entertain H's complaint and to award compensation for non-pecuniary loss, his award of £1000 for distress and inconvenience could not have stood.

> "If, as the Pensions Ombudsman implicitly found, [the maladminsitration] consisted in the wrongful reduction in Mr Haywood's pension, then it might well be appropriate to compensate him, not only for his pecuniary loss, but also for the anxiety which he suffered until he knew that his pension was to be restored to its proper level. But once this analysis is rejected and the maladministration is identified as the failure to warn Mr Haywood that there was some doubt as to the amount of his pension, or as the promise to pay him more than he could lawfully

[61] See, [1997] 2 All ER 84.

be paid, then the basis on which the Pensions Ombudsman made the award of £1,000 can no longer be supported. Properly identified, the maladministration caused neither pecuniary loss nor anxiety or distress, but the reverse. The most that can be said is that it inevitably led to disappointed expectations.

"There would, in my judgment, have been two objections to upholding the award of £1,000 for disappointment. The first, which could probably have been overcome without too much difficulty, is that this (and the maladministration which gave rise to it) was not something of which Mr Haywood complained. The second, and more important, is that one consequence of what happened is that Mr Haywood received payments totalling £1,580 in excess of those to which he was lawfully entitled, and he is not being asked to repay them. Whether or not Mr Haywood could have been compelled to repay them is neither here nor there; but in my judgment, given the value which the Pensions Ombudsman placed on distress and inconvenience (which no one has argued was too low), the overpayments which Mr Haywood received have fully compensated him for any disappointment which he may have suffered by reason of the council's handling of his entitlement to retirement benefits

The Office of the Legal Services Ombudsmen has advised the researchers that:

"The restrictive approach of the courts to payments of compensation for distress and inconvenience colours and constrains the awards made by most, if not all, other ombudsmen in this country. PIA Ombudsman has recently increased the limit for his awards for distress and inconvenience from £750 to £1,500. The new Land Registry Case Examiner has an agreed limit of £5,000 for such awards. The Inland Revenue Adjudicator makes consolatory awards for distress, anxiety and inconvenience which are usually between £50 and £250, and do not exceed £2,000 even in the most extreme cases. The new CSA Case Examiner talks about her consolatory awards for gross inconvenience normally being about £100. The Banking Ombudsman regards the range as being between £50 and £5,000. The highest award for distress and inconvenience made by the Pensions Ombudsman is £3,000. The Building Society Ombudsman regards the normal range as being between £50 and £500. The Estate Agents' Ombudsman awards would not normally exceed £750. The Local Government Ombudsman would regard the normal range as between £200 and £1,000, but has made much higher awards than that: a complainant and her family received £10,000 for distress caused by persistent racial harassment over a period of 11 years; another complainant got £4,000 for the consequences of nuisance and harassment, including physical assault, over a period of 6 years. In 1997, the LSO's highest award for distress and inconvenience was £5,000, the lowest was £50 and the average was £350. The case reports in previous LSO Annual Reports suggest that awards of £500 and £1,000 have been noteworthy, though not infrequent. Awards that high against either of the professional bodies would, however, be exceptional since most of these fall between £150 and £300."

The importance of the Westminster City Council case is that it is possible a court asked to look at the issue of compensation within the context of Schedule 1A of the Solicitor's Act, 1974 would take a similar approach relying on actual loss, anxiety, distress or disappointed expectation so long as such loss, distress, anxiety or disappointment was directly related to the inadequate service. Equally, it indicates a certain judicial skepticism of large awards for distress and inconvenience.

Summary and Conclusions

The imposition, removal or moving of a limit for IPS compensation is, to an extent, arbitrary. There is no single obvious test for picking one figure over the other. However, a number of perspectives, provide important indicators.

Client perspectives support an increase in client compensation. They also support placing the client more centrally in the OSS approach to remedies. Compensation is a significant component in the expectation of clients complaining to the OSS: more so than costs reductions. Lewis's research suggests that compensation is also one of the few outcomes that appears to have a positive impact on complainant satisfaction. Where clients had their bills reduced or refunded, they were still more likely to be dissatisfied than satisfied with the outcome of their complaint. Perceived inadequacies in the *level* of compensation awarded or the justifications given for any award may contribute to a considerable residue of dissatisfaction amongst compensated clients. Similarly, confusion over the basis for compensation might increase dissatisfaction. It is also extremely likely that the barring of client claims for IPS or negligence that include losses in excess of £1,000, contributes significantly to public resentment of the complaints process.

The National Consumer Council has criticised a fault-based, legalistic approach to client complaints. It is difficult to conceive of a system which did not rely, to some extent, on rules and conceptions of fault. But the NCC's core concern (that such an approach promotes a negative and defensive approach to complaints) is valid, at least in so far as it relates to the handling of IPS *remedies*. Once an IPS complaint, or 'fault', has been substantiated, there is strong merit in the OSS taking a positive and constructive approach which, within the constraints of the legislation, seeks to put things right for the client. Fault having been established, the issue of remedies could be positive and client-centred whilst remaining fair to firms.

The analysis of IPS decision-making set out above highlights the considerable influence of fault-based, and disciplinary reasoning on the decision to award compensation. Fault and conceptions of punishment may be a hangover from the pre-1991 scheme. It is also clear that legalistic concepts of fault, damage, and 'negligence versus IPS' contaminate the reasoning of decision makers in ways which are unnecessary, and add extra levels of inconsistency to the process. This, allied to the investigation and adjudication paper-

based nature of the IPS conspires to exclude and minimise the extent of claims for compensation from clients. An OSS approach which sought to compensate the client *in full* for losses which reasonably appear to have flowed from the IPS might go some way to reversing public scepticism of the Office, it would provide a clear overarching approach to compensation and would send clear messages to practitioners that IPS had consequences for clients which need proper, rather than symbolic, redress. This would require a change in approach to compensation and an increased limit.

At the moment, the attitude of decision-makers to IPS awards shows a cocktail of approaches: restitutionary; disciplinary and regulatory. This sends a mixed message to complainants and those complained against[62] as well as to decisions-makers. It damages the credibility and consistency of the process. The dominant philosophy appears to be that IPS compensation reflects the decision-makers' views as to what constitutes 'really bad' IPS. The client's perspective is not always ignored, but it is distanced from the centre of the process. The OSS approach may also encourage a censorious attitude to firms. Ultimately, current practice is concerned with the extent to which professional standards have been breached rather than the impact on the client. Although it should be recognised that the two areas are not mutually exclusive, least of all in the minds of clients, this approach often appears to border on fining. Where the decision-makers step across this border it is probably unlawful.

The treatment of compensation for 'loss' requires firmer clarification within the OSS and committees. The justification that IPS compensation is 'not damages' is weak, is inconsistently applied within the office and, indeed, may be wrong in law. It is also unclear as a result what is 'not damages' and therefore legitimate compensation. On one level, although decision-makers did not always take this approach, the 'not damages approach' seeks to confine IPS to distress and inconvenience. This will artificially contain and diminish the nature of the client's concern and problem. Very concrete parts of the client's problem are seen as being irrelevant to the IPS mechanism, even though it may be very relevant to the client.

There is no formal impediment to the OSS awarding compensation for loss which is shown to have been incurred by IPS. This will leave the OSS needing to exercise its judgment on when IPS did or did not cause a particular loss. The cases reviewed by the research showed some indication that the OSS was willing to do this on occasion, sometimes for quite speculative losses. On others the clients were simply told that it was not the Office's function to assess specific financial loss.

Declining an award for loss is unnecessary and does not deal with the substance of the complaint. It must be better for the caseworker to base the compensation on whether the IPS appeared to cause the loss that the client alleges. Even if the end-result was negative,

[62] An example is the tendency of complained against firms to seek lower awards of compensation on the basis of the cost already incurred by the firm in dealing with the OSS investigation. This 'plea in mitigation' approach is appropriate to a fine but not to a payment of compensation.

such an approach would be more likely to satisfy the client. The claim would have been considered in full rather than pared down or rejected on a technicality. Nor will the results of such a causation- rather than fault-based approach always favour the client. The incantation of 'jursidictional exclusions' for specific financial loss is not performed consistently and should be diminished or removed from decision-makers approaches wherever possible.

Nor need the OSS's paper-based procedures act as a bar to recovery of such loss. If paper-based procedures form the basis of an assessment of whether there has been inadequacy it is difficult to justify not assessing loss on that basis. Indeed, to do so appears to be an example of the OSS utilising the simplicity of its procedures argument to counter the interests of the complainant. The main justification of such 'simple' procedures, other than cost to firms and the OSS, is to benefit the complainant. Yet the same justification is used for ignoring certain losses. This borders on the perverse. It is also worth noting that the 'paper-procedures', or the need for clearer reasons, or arguments about the fairness of the procedure to firms does not appear to provoke such concern when costs reductions are being considered by the OSS or by Committee members.

The problems of loss and fault are also an example of how the 'boundary dispute' between IPS and negligence contaminates other aspects of OSS thinking, especially on compensation. There is a sense in which, a desire to exclude cases which contain negligence, has broadened into an attitude whereby ideas associated with negligence (notably 'damages') have added an extra layer of exclusion into the complaints handling process.

A further problem is whether the OSS should be able to take negligence cases within the IPS mechanism. There is a clear overlap between IPS and negligence. The Solicitor's Act clearly shows that negligence in itself must be capable of amounting to "professional services provided by [a solicitor] in connection with any matter in which he or his firm have been instructed by a client [which] have, in any respect, not been of the quality which it is reasonable to expect of him as a solicitor."[63] That definition of whether IPS exists must include cases where negligence exists and other cases which, although not negligent are, inadequate. As Schedule 1A of the Solicitors Act makes clear, a remedy in negligence does not bar an IPS complaint. If the OSS were to award compensation for losses clearly on the face of the awards issues of double jeopardy would diminish. The interface between IPS and SIF would need to be addressed. Implications for caseworkers and the investigative process would also need to be worked through. The difficulties are real, but not insuperable.

The position under the Solicitors' Act is that a case where there is negligence must amount to IPS. The OSS are not obliged, however, under the Act to take any of the

[63] Section 37Aand Schedule 1A

'steps' (or remedies) under Schedule 1A, such as compensation. There is a legitimate concern that the OSS ought not decide whether 'negligence' has occurred. They have no formal power to find negligence and there are implications for SIF if they were to attempt to do so. This is particularly the case were a solicitor to seek to claim IPS compensation against the SIF fund (although we understand that such claims could be excluded by amending the SIF rules) or where a larger (uncompensated) claim for negligence were made by the client which was then referred to SIF.

It is, however, open to the OSS to investigate the facts of any case where there has been IPS, consider allegations which might constitute negligence against the standard of IPS (i.e. whether the work is of a poor quality rather than negligence) and make a finding of IPS on that basis. The complainant satisfies an easier test and so the finding of IPS would not amount to a finding of negligence and ought not prejudice any subsequent negligence claim.

This report recommends that the OSS take a clear and client-focused approach to awarding compensation for IPS. This is consistent with the structure of the Act and will send a clearer message to the client that compensation is there to address the impact *on them* of IPS. This involves the client being compensated for distress, inconvenience, and any other loss that on a balance of probabilities has been caused by the IPS. It involves compensation being treated as the first remedy and the merits of compensation being considered in reasonable isolation from other remedies. The collection of evidence of loss need not be onerous or time-consuming. Caseworkers should be required to collect and present in a systematic fashion evidence and representations from both parties on losses, inconvenience and distress. This could usually be carried out by an appropriately worded letter. This will focus the minds of both parties as to the purpose of compensation and will demonstrate to the client that the OSS takes seriously the *impact* of IPS on them.

There are other aspects of concern which the decision-makers and clients might quite rightly want an outlet for: discipline and, in particular, regulatory resilience are matters which can and ought to be the concern of the IPS mechanism. The occasionally cavalier attitude of practitioners to client complaints and OSS investigations is shocking. Levels of IPS, either as gross one offs or as a pattern of concern about an individual or a firm, may also need addressing through the remedial framework provided by Schedule 1A. However, as stated above, there are good reasons of legal propriety, organisational clarity and cultural identity in treating compensation as solely restitutionary. For that reason, it is not recommended that increased compensation for repeat offending be considered by the Law Society.

Costs awards should not be treated as an extra avenue or (as appears still to be the case) the first avenue of compensation for the client. The use of costs reductions to increase compensation awards is evidently practised by the OSS. This de facto means there is no statutory limit on economic compensation for private paying clients but a limit for third party funded clients, most notably legal aid clients. Such an approach suggests that costs reductions are being used unlawfully. Costs reductions should reflect the diminution in

value for the work paid caused by the IPS ('what was the case worth'). In certain circumstances, (i.e. where quotes have been given and exceeded without proper terms of business and costs advice) the solicitor might be confined to the level of the quote (essentially, the basis here is the level of informed consent to the costs incurred by the client). The 'what the case is worth' basis might conceivably reflect a disciplinary approach in that gross inadequacy quite literally diminishes the value of work, even if the client has gained 'value for money' from the costs incurred. The presumption should however be to use compensation to address client loss and grievance. Only where the specifics of the case demand it, should costs reductions be used in addition or in the alternative (one occasion would be where the solicitors work did not in any way advance the interests of the client – it could be therefore said to be of no value and the client should get those costs back). There are judicial review concerns if costs reduction is used as a disciplinary measure, although the decision in *Singh and Choudry* suggests that it is possible.

An important aspect for clients and the profession generally is that the firms "are not able to do this again". This might need to be addressed more firmly through directing the relevant solicitors to take steps under Schedule 1A such as training. Endorsing the practicing certificate is also a possibility but the significance of this might put a strain on the credibility of paper-based adjudication.

Amount of compensation

The parliamentary debates on the introduction of the compensation powers suggested that the IPS limit would keep pace with the small claims limit. This small claims limit was extended to £5,000 in April 1999. Clients have often had to deal with a hostile solicitor's firm and a dramatic loss of faith in the professional dealing with them. To refer them back to a legal forum for disputes is something which the profession should avoid, not just on self-regulatory principles but on business principles. For these people their relationship with the firm, not uncommonly with the OSS, and on occasion with the profession itself has broken down.[64] Such complainants will perceive themselves as 'victims' asked to step into the territory of the 'perpetrator'. From a business perspective, the profession's reputation has suffered and such clients are very likely to communicate their dissatisfaction more broadly within their circle of friends and colleagues. One of the points of a complaints service is to tackle such dissatisfaction where possible rather than push it into the hostile ether of litigation.

[64] "The profession appears rife with incompetence and self-interest. In future, I shall do my utmost to avoid ever consulting/employing the services of the profession again." Respondent quoted in Lewis, *op.cit.*, p. 48. "There have been past complaints about the Solicitors' Complaints Bureau being seen to side with a solicitor, even when it is clear the solicitor was in the wrong, which was why I understood a new office was formed. My own impression now is that almost nothing has changed and genuine grievances are not being dealt with efficiently, and the support of solicitors, where a real and genuine complaint exist (*sic*) is being drawn out, stalled, in order to find a way through to side with the solicitor." Comment of client from random selection of OSS decisions reviewed by this research.

This report recommends that the limit for IPS compensation be extended in line with the Small Claims limit and that the limit be reviewed regularly to keep pace with the limit. At the same time, it should be noted that the inconvenience and distress that clients suffer may only exceed £1,000 in extreme cases. Such an approach would be consistent with the Ombudsman's approach and the apparent restrictions placed on such awards by the Court of Appeal. Other losses may take awards higher, but again the Ombudsman's approach does not suggest that such awards will be particularly frequent or onerous to the profession as a whole.[65]

There is an argument that the limit should be increased substantially beyond £5,000. If the OSS is willing to award costs reductions of £22,000[66] then why shouldn't it be able to award compensation of the same amount? This is a difficult issue to address. The economic interests at stake become large and the necessity of testing evidence of causation, IPS and loss would become stronger. Beyond the small claims limit the client may have the benefit, in appropriate cases, of conditional fee arrangements. Litigation may not be quite as forbidding although some of these clients may have lost all faith in the legal profession. If a higher limit for IPS compensation were sought, or a limit removed, the OSS might also need to design a special procedure for such cases.[67]

Our analysis of decision-makers suggests a reasonably strong consensus, amongst committee members and OSS staff that the limit for compensation should be increased. Committee members on the whole want higher increases than OSS staff. An increase will provide decision-makers with greater flexibility and reduce the tendency to 'knock-down' awards in the more minor cases.

A significant increase in compensation powers might encourage firms to take Rule 15 and conciliation more seriously on the basis that there are obvious and transparent economic risks to them in not doing everything they can to discourage a client from proceeding with a complaint to the OSS. This might have the twin benefit of encouraging a cultural shift in firms' approaches to client complaints towards a more pragmatic, client-centred approach and reduce the workload of the OSS *and firms* in the handling of complaints. The cases reviewed for this research evidenced that many of the complaints are over quite small bills where costs reductions do not provide much of an incentive to firms to 'sit up and take notice'. The potential for sizeable IPS awards might make some difference to these cases. Conversely, many firms were already clearly aware of the time spent in defending complaints, and of the economic costs of that. Indeed this

[65] See, Legal Services Ombudsman (1998)

[66] This is the highest award mentioned to the researchers by the OSS.

[67] Article 6 of the European Convention of Human Rights and the Human Rights Act 1998 are more likely to be drawn upon by clients and firms in this situation. The ECHR may in any event impact on the current procedures if the IPS mechanism was held to be determinative of a client or firm's civil rights and obligations.

was perceived by many of them to be a plea in mitigation when costs reduction and compensation where up for decision by the OSS. This indicates one of the dangers of confusing the use of compensation with a disciplining function. It also indicates that economic incentives alone do not appear likely to persuade all firms to take complaints seriously. Similarly, high levels of concern within the profession about the competence and independence of the OSS may make raising the compensation limit a difficult step for the Law Society or the OSS to take.

There is little convincing evidence that the IPS mechanism has been instrumental in changing the attitude of firms to 'service'. Nor has it successfully addressed the concerns of client or met with the approval of the profession. A decisive shift towards a restitutionary basis of compensation setting will make a statement about client concerns without necessarily changing dramatically amounts awarded in IPS cases. It may contribute to IPS's regulatory impact. It should certainly clarify and improve the responsiveness of the OSS to client needs. It would also clarify the messages sent to the profession, although these messages will almost inevitably not be well received by all. It may, nevertheless, be more appropriate to persuade practitioners that IPS has real consequences for their clients and those real consequences will include real losses.

Some gap between what the rules about IPS say, how decision-makers say they interpret that rule, and how the rule is actually interpreted is inevitable. The current level of contradiction in the OSS approach goes beyond this and probably alienates clients and practitioners alike. The contradictions certainly confuse decision-making and build inconsistency into the system. To avoid any suspicion that compensation awards simply drop from the palm tree of OSS justice, a clear loss-based framework for awarding compensation should be adopted. Arguments will remain over what 'loss' is 'caused' by IPS. But the arguments that will be raised will be decided on clear principles. Arguments are inevitable: confusion and lack of coherence are not.

Any new approach to compensation will need to be carefully introduced and rigorously monitored. The review of OSS decisions has already shown that the policy guidance given by Law Society Committees for OSS staff to consider compensation first seems not to be followed by decision-makers. All should work together in the future to achieve a positive change in culture and approach.