

**Title: CH011 Settlements and Disposal of IPS Complaints  
POLICY**

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## 1 Introduction

- 1.1 This document sets out the SLCC's policy on settlements and disposal to be applied where a complaint about inadequate professional service (IPS) or a handling complaint is upheld or partially upheld.
- 1.2 For the purposes of this document the term 'settlement' of IPS complaints refers to both settlement at investigation stage and the disposal directed at determination. Examples of actions or other recommendations are illustrative and not intended to be exhaustive.

## 2 Act and Rules

- 2.1 The relevant sections of the Act are 9, 10, 11, 16, 20, 24 and 25.
- 2.2 The relevant rules are 13, 14, 22, 23 and 26.

## 3 Aims and principles of effective settlements and disposal of IPS complaints

### Overall aims

- 3.1 The aim of any settlement is to put the complainer back in the position they would have been in but for the effect of the inadequate professional service (IPS) provided or, if that is not possible, to provide an appropriate level of compensation within the scope of the Act.
- 3.2 Each complaint and therefore each settlement must be considered on its own merits and in the light of the particular circumstances.
- 3.3 Broadly similar impact of Inadequate Professional Service should result in consistent and broadly comparable settlements.
- 3.4 Settlements should not result in complainers gaining advantage or making a profit.
- 3.5 The scope and amount of an individual settlement should be based on the consequences of IPS. The nature of the IPS should only be considered in the context of actions the SLCC recommends the practitioner take in relation to policies and procedures. There must be a clear causal link between the IPS and the consequence.
- 3.6 Where it is not possible to put a complainer back in the position they would have but for the effect of the IPS, financial compensation may be the only available settlement.

### Addressing the effect of IPS

- 3.7 The effect of IPS may differ depending on the circumstances of the complaint. This means in practice that the same IPS may result in differing levels of settlement. For example, delay in responding to correspondence in one conveyancing case may result in loss of a house sale for one complainer, but the same level and type of delay may simply result in inconvenience for another.
- 3.8 Not all IPS will result in loss, inconvenience or distress to the complainer but may still require a settlement that includes recommending the practitioner take action or receive training.
- 3.9 Where the evidence shows that the IPS has resulted in loss, inconvenience or distress, that is what the proposed settlement should address.

### Promote good complaint handling

- 3.10 In proposing a settlement the SLCC should also consider its wider duties to promote good complaint handling and improve service standards. The substance of settlements should take into account the need to promote the SLCC's wider duties. Settlements should both provide redress for the complainer and, where possible, seek to address the causes of the IPS by directing the practitioner to take action to rectify the situation.

- 3.11 The SLCC should also consider the competency of the practitioner and whether referral to the appropriate professional body is warranted.
- 3.12 Lessons learned from individual complaints should be monitored in the context of good complaint handling by the profession and guidance issued to the professional bodies and/or practitioners

#### **Evidence based settlements**

- 3.13 The SLCC should base settlements on appropriate evidence which quantifies the complainer's loss and/or supports other effects such as distress, illness or inconvenience.

#### **Substance of settlements**

- 3.14 Settlements recommended or awarded must be based on the remedies available under section 10 of the Act and the SLCC's rules.

#### **Proportionality**

- 3.15 Each complaint should be considered on its own merits in order that recommended settlements are proportionate to the effects of the IPS.
- 3.16 If the effect of the IPS does not result in loss, inconvenience or distress, the settlement should reflect this. For example, where a practitioner has carried out a transaction correctly but tardily, the effect of the tardiness will depend on the type and urgency of the transaction.

#### **Reasons and explanations**

- 3.17 The SLCC must provide reasons for both recommending settlements and the substance of the settlements – in other words explain why a settlement is being recommended and how the substance of such a settlement was arrived at.

## **4 Applying the principles**

### **Overview**

- 4.1 Section 9 of the Act places an obligation on the SLCC to recommend a settlement following investigation and direct a settlement as part of its determination. At determination stage, Rules 13 and 14 provide that the SLCC gives the parties opportunity to make representations on the settlement proposed by the determination committee before it (finally) determines the complaint and directs the settlement.
- 4.2 Section 9(3) places a specific requirement also to make settlement proposals to the employing firm.
- 4.3 Section 10(2) of the act outlines what settlements may include. Settlements should give consideration to:
- (i) reducing fees and outlays;
  - (ii) rectification at the practitioner's own expense of any error, omission or other deficiency arising in connection with the services provided;
  - (iii) the practitioner taking such other action in the interests of the complainer, at their own expense, as the SLCC may specify;
  - (iv) directing the practitioner to pay compensation to the complainer or party otherwise instructed by the complainer, not exceeding £20,000 to the complainer for loss, inconvenience or distress resulting from the inadequate professional services; and
  - (v) whether the IPS should be reported to the appropriate professional body.
- 4.4 The reasons for the level of proposed settlements at determination stage must be included in the determination report.
- 4.5 Under section 10(4), when considering what steps to take under 10(2) the SLCC must also take into account any:

- (i) prior direction on settlements;
- (ii) award of damages by the court to the complainer; or
- (iii) other compensation ordered (whether by determination, direction or otherwise) by a tribunal or other professional body to be paid to the complainer, in relation to the subject matter of the complaint – for example by the SSdT or by the Relevant Professional Organisation if a complaint about both conduct and service.

## **Fees and Outlays**

### **Fees**

- 4.6 Reducing fees should not be seen as another form of compensation. Any reduction recommended should relate directly to inadequate service. If a complaint is not upheld or concerns solely the level of fees without an allegation of IPS, the complainer should normally be advised to take the matter to taxation.
- 4.7 There is no formula for the amount by which fees should be reduced as this will be a judgement decision based on the merits and facts of the individual case. In reaching a view the decision-maker should give consideration to the following types of issues:
- 4.8 Was the complainer charged for a service that should not have been provided had the practitioner acted appropriately?
- 4.9 Was any of the service carried out to such a poor standard that it should not be paid for in part or in full?
- 4.10 Was the complainer charged for something that was not done or only partially completed?
- 4.11 Before refunding fees, the SLCC should hold documentary evidence of the fees charged and where appropriate, actually paid.

### **Legal aid**

- 4.12 If the complainer was legally aided and fees are to be abated or refunded the practitioner should be directed to refund fees directly to the Scottish Legal Aid Board (SLAB). The SLCC will also inform SLAB of its decision so that they may make any adjustments in respect of the complainer or take any other action it considers necessary.

### **Third-party complaints**

- 4.13 The SLCC will not normally direct a refund of fees where the complainer was a third-party complainer (ie complaining about a practitioner who was not instructed by them). However, the particular merits and circumstances of a complaint should be taken into consideration, eg whether they paid them on behalf of the third-party client, where fees were paid by the estate of a deceased person and so on.

### **Outlays**

- 4.14 A finding of IPS does not automatically mean a complainer should be refunded the costs in respect of outlays (or the fees reduced by this amount if not yet paid by the complainer). Refunding outlays should not be seen as a form of compensation but should be directly related to the IPS found.
- 4.15 The types of circumstances in which outlays would normally be refunded include:
- (i) if the IPS was such that the outlay was not needed in the first place;
  - (ii) if it can be demonstrated that the amount paid for the outlay was excessive, in which case a partial refund might be recommended; and/or
  - (iii) if the IPS resulted in the cost of the outlay (or associated costs) being higher than it needed to be. For example if delay in producing and lodging a document resulted in it having to be couriered and this cost was passed on to the complainer.
- 4.16 Before refunding, removing or reducing all or any costs in relation to outlays, the SLCC should satisfy itself that the costs were actually incurred.

- 4.17 Section 10(3) makes specific provision in respect of to whom the proposed settlement in respect of fees and outlays should be directed. This is covered in section 10.
- 4.18 The outlays that might be refunded could include the following. This is not an exhaustive list but provides examples of the types of outlay.
- (i) Search fees
  - (ii) Stamp duty
  - (iii) Land Registry fees
  - (iv) Notary Public fees
  - (v) Court fees
  - (vi) Courier costs
  - (vii) Sheriff Officer costs
  - (viii) Counsel fees/Agent fees – potentially these can run to 1,000's
  - (ix) Any agent fees such as translation fees, medical reports, expert reports, transcripts fees, surveyors' fees
  - (x) Council fees eg planning department etc
  - (xi) Mileage

## Rectification

- 4.19 Rectification is action the practitioner is asked to take to put something right they did wrong or that they omitted to do in the first place.
- 4.20 The action recommended/directed will depend on the case and any action already taken/omitted by the practitioner. For this reason specific guidance on what to do in each case cannot be given but the following general principles apply.
- 4.21 Where the practitioner has failed to take action or the IPS is such that an action in relation to the service needs to be re-taken, the practitioner should be directed/ recommended to do this at their own expense.
- 4.22 The SLCC must ensure that the action is both necessary and give reasons why it is so.
- 4.23 The SLCC should also direct/recommend as appropriate who should (or should not) take the action. For example
- (i) if the settlement also includes a recommendation about the competency of the practitioner, the decision-maker may direct that a different practitioner be instructed to carry out the work; or
  - (ii) if the practitioner is no longer practising the SLCC may recommend that an alternative practitioner is instructed by the complainer; or
  - (iii) if the relationship between the practitioner and complainer has deteriorated to the point that the decision-maker feels it inappropriate for the practitioner to carry out the work, they might recommend a different practitioner be instructed.
- 4.24 The recommended settlement in respect of rectification should include the timescales within which the action is required and what evidence is needed from the practitioner to demonstrate it has been taken and is effective.
- 4.25 Section 10(3) makes specific provision in respect of to whom the proposed settlement in respect of rectification should be directed. This is covered in section 5.

## Other Action

- 4.26 Other action is action the SLCC considers necessary in the interests of the complainer. Other action the SLCC might recommend/direct includes:

- (i) apologising for the consequences of the IPS;
  - (ii) reviewing and revising policies and procedures; or
  - (iii) revising the way in which the practitioner deals with complaints.
- 4.27 The action recommended/directed will depend on the case and any action already taken/omitted by the practitioner. For this reason specific guidance on what to do in each case cannot be given but the following general principles apply.
- 4.28 Where the practitioner has failed to take action, has acted inappropriately or the IPS is such that an action needs to be re-taken, the practitioner should be directed/recommended to do this at their own expense.
- 4.29 The SLCC must ensure that the action is both necessary and give reasons why it is so.
- 4.30 The SLCC should also direct/recommend as appropriate who should (or should not) take the action taking into account the type of action recommended and the particular details of the case.
- 4.31 The settlement in respect of other action should include the timescales within which the action is required and what evidence is needed to demonstrate it has been taken and is effective.

## Compensation

- 4.32 Compensation should cover loss, inconvenience or distress. This covers both quantifiable loss and non-quantifiable loss (ie compensation). In explaining the amount of compensation, the SLCC should distinguish between the amount for quantified loss and the compensation element based on the tariff.
- 4.33 The total amount of compensation must not exceed £20,000.

### Quantifiable loss

- 4.34 This includes compensation for quantifiable expenses that a complainer incurred. The general principles are that:
- 4.35 the SLCC must be satisfied that the expenses were the direct consequence of IPS and would not have been incurred but for the IPS;
- (i) where the complainer claims to have already paid the expenses the SLCC will normally require documentary evidence (such as a receipt) to confirm they were paid and the amount;
  - (ii) where the expenses have not been paid the SLCC must be satisfied as to the amount claimed, ideally with supporting documentary evidence (eg a bill or invoice);
  - (iii) the rationale for the amount of quantifiable loss should be included in the reasons for the recommended settlement; and
- 4.36 the amount of compensation in relation to quantifiable loss should normally be based on actual expense not estimates.
- 4.37 The evidence required to support the loss claimed will vary depending on the circumstances of the case but could include: receipts, invoices, credit/debit card slips, pay slips, tickets and/or letters from traders/professionals.
- 4.38 The SLCC does not seek to place an unnecessary burden on complainers but recognises there is a responsibility on complainers to support the claims they are making; both the amount of the expense and the need to have incurred it in the first place. Where an expert opinion is required to support the level of quantifiable loss (eg a medical report) the complainer should bear the cost. If the complaint is later upheld, this cost will form part of the settlement.

- 4.39 If the SLCC requires expert advice, such legal advice about the complaint to support its decision-making, this will be paid for by the SLCC. All payments must be authorised by the CEO.
- 4.40 A complainer may suffer quantifiable loss that is not a direct expense but the financial impact of delay or lost opportunity. Such instances might include:
- (i) something a complainer owns might lose value. For example if there was delay in the conveyancing for a house sale which then fell through, the house in the current market may have lost value;
  - (ii) losing out on interest on capital; or
  - (iii) losing out on rental payments.
- 4.41 If loss is ongoing, the settlement should be calculated on the basis of the complainer's position 21 days from the date of the recommended settlement or 28 days from the date of determination.

### **Non- quantifiable loss**

- 4.42 Section 10(d) provides that in addition to loss the SLCC may compensate for inconvenience and distress. The SLCC will normally base compensation on the tariff system as set out below. This tariff is a guideline but the SLCC recognises that there may be exceptional circumstances where it is not appropriate.
- 4.43 Inconvenience is the time and effort spent by the complainer in relation to poor service and in having to pursue a complaint about that poor service.
- 4.44 Distress includes the worry, concern, anxiety, anger, disappointment or embarrassment a complainer may experience as a result of poor service. Distress can also include loss of confidence in a practitioner and reluctance to engage further with the profession. Distress can vary from mild irritation to anxiety that requires medical treatment.
- 4.45 In considering which level of the tariff to apply, the SLCC should consider such issues as:
- 4.46 How much of the 'inconvenience' would have been experienced anyway and how much could have been avoidable – for example it may have been inconvenient for the complainer to attend court, but if they would have been required to attend anyway, the SLCC should not compensate for this.
- 4.47 To what extent was the distress the consequence of the practitioner's actions or poor service? Often the reasons for consulting a legal practitioner in the first place are stressful in themselves – for example divorce, death of a loved one, crime or moving house.
- 4.48 How did the practitioner handle the complaint – for example, did they simply dismiss it or did they make reasonable and appropriate efforts to put things right?
- 4.49 The SLCC should also consider what information it needs in applying the different levels of the tariff. This will vary from complaint to complaint and should be based on the merits and consequences of the individual situation. A balance has to be struck between asking a complainer for information which would support the consequences claimed and demanding information which might add to the distress already caused. However, the SLCC also has to be mindful of the need to give clear and supportable reasons for the level of compensation recommended.

### **The tariff**

| <b>Factors/Consequence of the poor service to consider/might include</b> |  | <b>Range of compensation</b> |
|--|--|------------------------------|
| <b>Limited</b>   | <ul style="list-style-type: none"> <li>• limited effect and duration</li> <li>• caused minimal inconvenience on a single occasion</li> <li>• resulted in irritation and/or minor annoyance</li> <li>• the practitioner put the matter right</li> </ul> | <b>Up to £150</b>            |

|                    |  |                                 |
|--------------------|--|---------------------------------|
| <b>Modest</b>      | <ul style="list-style-type: none"> <li>• limited effect and duration</li> <li>• caused minor inconvenience on a number of occasions</li> <li>• caused some worry and concern</li> <li>• effect was short-term</li> <li>• practitioner took reasonable steps to put matters right</li> </ul>  | <b>Over £150 – up to £750</b>   |
| <b>Significant</b> | <ul style="list-style-type: none"> <li>• more serious effect over a period of time but not a lasting effect</li> <li>• caused significant inconvenience on several occasions</li> <li>• caused worry, concern, some anxiety and upset</li> <li>• practitioner failed to take reasonable steps to put matters right</li> </ul>  | <b>Over £750 – up to £1,500</b> |
| <b>Serious</b>     | <ul style="list-style-type: none"> <li>• serious effect probably over a long period of time, possibly affecting the complainer’s well-being over a long period of time</li> <li>• significant inconvenience over along period of time or on many occasions</li> <li>• quality of life of complainer (and/or family) considerably and noticeably disrupted</li> <li>• complainer or family member suffered particular difficulties</li> <li>• caused significant distress and upset</li> <li>• practitioner failed to take reasonable steps to put matters right</li> </ul> | <b>Over £1,500 up to £5,000</b> |

## Competence

- 4.50 Section 10(2)(e) provides that the SLCC may report what it considers to be insufficient competence to the relevant professional body. Any such recommendation must be supported by a clear rationale that demonstrates why the practitioner’s competence falls below that expected of a competent practitioner in the same situation.
- 4.51 See section **Error! Reference source not found.** for more information on internal approval for such recommendations.

## Set-Off

- 4.52 The SLCC does NOT have a general policy of allowing the set-off of settlement payments against unpaid fees owed to the practitioner. Any such agreement to do so is considered to be a private matter between the parties.
- 4.53 The SLCC may, however, on a discretionary basis, allow set-off in certain circumstances where it can be evidenced that the fees have actually been or will be reduced. Set-off should not form part of the proposed settlement or determination, but can be considered as a method for achieving settlement if requested by one of the parties. Such circumstances may include for example, when a practitioner can provide evidence that fees have been taxed and that the amount being compensated has being deducted and reflected in the amount pursued.
- 4.54 The practitioner must provide evidence which demonstrates this to the satisfaction of the SLCC. Suitable evidence would include a copy of a taxed account in respect of the services the practitioner has rendered and a revised fee note or if being pursued through the courts appropriate court documents. A statement or letter, unsupported by suitable documentation is not sufficient.
- 4.55 The decision to allow set-off must be approved by the HI or Chair of the Determination Committee that considered the complaint.

## 5 To whom to propose the settlement

- 5.1 Section 10(3) sets out the parties to whom a settlement must be proposed.
- 5.2 Where the practitioner was an employee of an employing practitioner at the time the inadequate service was provided:

- (i) a recommendation/direction under 10(2)(a), (b) or (c), ie in relation to reduction or refund of fees or outlays or rectification, must be to the employing practitioner not the employee practitioner
  - (ii) a recommendation/direction under 10(2)(d), ie in relation to compensation, may be either
    - to the employing practitioner or the employee practitioner to pay all of the compensation directed; or
    - to the employee practitioner to pay a specified amount of the compensation and to the employing practitioner to pay the remainder of the total amount
- 5.3 a copy of any report to the professional body under 10(2)(e), that is in relation to competence, must be sent to the employing practitioner.
- 5.4 Both the investigation and determination reports must make it clear which part of the settlements apply to which party and send a copy of the proposed settlement to each.
- 5.5 Settlement payments should normally be paid directly by the practitioner to the complainer or the person/party the complainer instructs. Exceptionally, the SLCC will receive the payment from the practitioner and forward it on to the complainer. Exceptional circumstances might include for example, the complainer for valid reasons does not want to divulge their address. Where alternative payment arrangements are suggested at investigation stage, they must be agreed by the CIM. At determination stage they must be agreed by the Chair of the Determination Committee or CEO as expedient.

## **6 Monitoring and enforcement**

- 6.1 The SLCC will monitor compliance with all settlements, whether agreed at investigation stage or directed at determination.
- 6.2 If a settlement is not implemented at investigation stage the complaint will be referred to Members for determination. Oversight should be advised of the non-compliance for monitoring purposes.
- 6.3 If a settlement is not implemented following determination, the SLCC will normally enforce it under the powers set out in section 20 of the 2007 Act.
- 6.4 If a determination is appealed, enforcement action must be suspended until the outcome of the appeal is known.
- 6.5 Responsibility for monitoring compliance lies with the officer (eg investigator / clerk) responsible for making or communicating the terms of the settlement / determination.
- 6.6 Where the settlement is not paid, the matter should be referred to Oversight who will follow the process detailed in the Non-Compliance Policy and Process.

