

<i>Meeting</i>	OLC Board	For Information
<i>Date of meeting</i>	26 April 2023	Paper no: 126.14

<i>Title</i>	Horizon Scanning – April 2023
<i>Sponsor</i>	Steve Pearson – Deputy Ombudsman
<i>Status</i>	OFFICIAL
<i>To be communicated to:</i>	Members and those in attendance

Executive summary
The board are asked to note the contents of the Horizon Scan.
Recommendation/action required
Board is asked to NOTE the update and analysis provided.

Impact categories

High – this issue has the potential to alter our day-to-day operations within the next year and may require a direct response.




Medium – this issue could necessitate policy development on an issue; it may affect the environment in which we operate and/or is likely to affect us directly within the next three years.

Low – this issue may have an effect on our stakeholders but is unlikely to require any action from us and/or the issue is unlikely to develop for five years or more.

Horizon Scan – April 2023

Overview

Likelihood score refers to how probable it is that we will be impacted. Demand is effect on complaint volumes.

Issue	Impact	This will affect...	Likelihood (1-5)	Demand
Qualified One Way Costs Shifting (QOCS)	Medium	Costs complaints, complaint volumes.	2	
Fixed recoverable costs	Medium	Firm closures, complaint volumes	2	
Reserved Legal Activities	Low	Jurisdiction over complaints	5	

Thematic issues and news

Qualified One Way Costs Shifting

From the 6 April 2023, the rules governing liability for legal costs in death and personal injury cases in UK courts have been changed to increase the amount of costs that defendants can recover from unsuccessful claimants.

Up until this date, the 'Qualified One-Way Cost Shifting' regime (QOCS) meant that, subject to certain exceptions, if a claimant lost any aspect of the case, any cost awards that were made in favour of the defendant could only be enforced up to the level of any damages and interest awarded to the claimant. Therefore, if the claimant was entirely unsuccessful, the defendant could not recover any costs. In reviewing this regime, the Supreme Court has now stated that the rules could be considered "counterintuitive and unfair" in certain circumstances and a new QOCs regime has been implemented.

The new rules provide that defendants can offset all their costs against the claimant's damages, interest, and costs. Narrative within the legal sector is suggesting that the rule change will see greater risks for claimants themselves and their lawyers. Whilst the new QOCS regime came into force on 6 April, it is not being applied retrospectively, therefore any case where proceedings were issued before this date will not be subject to the new rules.

This raises two factors for the Legal Ombudsman when considering the impact on complaints. Firstly, it was speculated that the hard deadline of 6 April would mean an increased number of proceedings being issued in haste and therefore increasing the possibility that service standards may fall. Secondly, as this means that defendants can now recover costs, it could mean that some new issues and complaints arising, such as different success fees for pre and post action.

Whilst it is too early to tell what the impact of the changes may be on complaints of this nature, LeO will continue to monitor for any longer-term trends or issues arising.

Fixed Recoverable Costs

As previously reported through horizon scanning, the Government is intending to impose fixed recoverable costs (FRC) across the fast-track and in most money cases worth up to £100,000. Initially this was due to come into force in October 2022 but after a number of delays, it is due to come into force in October 2023.

The reforms largely mirror the recommendations of Sir Rupert Jackson from 2017 and include new rules on penalising delays in the resolution of cases, with an uplift where a Part 36 offer has been beaten or one party has engaged in 'unreasonable behaviour'.

Minutes from the latest Civil Procedure Rules Committee has shown that the intention is that fixed costs will apply to claims where proceedings are issued on or after 1 October 2023, except for personal injury. The new rules will apply to personal injury claims where the cause of action accrues on or after 1 October, and will only apply to disease claims where the letter of claim has not been sent to the defendant before 1 October.

Whilst the timelines have been published, the rules themselves and the figures attached to the fixed cost regime have yet to be confirmed. Once the fixed costs regime comes into force there may be an impact on the number of cost complaints in litigation cases that LeO sees. Some firms,

particularly smaller firms could be impacted as the level of recoverable costs may limit the viability of taking on cases.

Reserved legal activities

The Legal Services Board (LSB) has confirmed that it does not intend to review the list of reserved legal activities. The LSB confirmed that without a fundamental reappraisal of the Legal Services Act there was limited justification for continuing with a review of the reserved activities.

Instead, the LSB will look to clarify the rules around conveyancing and probate work to ensure they are directed to the main areas of risk. Whilst changes would not have been immediate, altering the scope of reserved activities could have impacted on the number of cases the Legal Ombudsman would be able to look at under its jurisdiction.

Consultation responses and publications

LSB 2023/24 Business Plan

On 31 March the LSB published their [Business Plan for 2023/24](#). The plan includes a number of existing priorities alongside new priority areas for the coming year. Existing priorities include implementing their revised regulatory performance framework and new policy statements on consumer empowerment and ongoing competence. Other existing priorities being continued include work on equality, diversity and inclusion, including the identification of how regulation can help address counter-inclusive practices.

New workstreams for 2023/24 include:

- Access to Justice: We will consider the role of regulation in improving access to the publicly funded justice system and scope future work in this area.
- Market analysis: Through increased horizon scanning, we will develop a better understanding of the risks and issues facing the sector and how they may impact on delivery of the strategy.
- Consumer vulnerability: Building on our consumer research published in 2022, we will develop our understanding of best practice across the sector and agree principles on how to support consumers in vulnerable circumstances.

A number of responses to the LSB's consultation raised concerns about the organisations over-reach and called for closer collaboration to deliver priorities.

The LSB summarised responses to their consultation as: *key themes across the responses included a clear appetite for collaboration on aligned priorities; the need for the LSB to focus on issues impacting the legal sector and society more generally, specifically the cost-of-living crisis and issues with access to justice; and interest in the planned work on EDI, technology and innovation, regulatory performance and professional ethics and rule of law programme. There was also a clear call for the LSB to appropriately prioritise activities, to ensure that key areas of concern received their due effort, and that regulators and others could plan their own resources and contributions to delivering better outcomes for consumers. There were differing views on priorities for research and which workstreams should be prioritised.*

Bar Standards Board Business Plan and action plan

On 4 April, the Bar Standards Board published its latest [Business Plan and budget](#) for 2023/24.

The Business Plan includes reforms aiming to improve operational performances to deliver core regulatory services, and to deliver a more timely and responsive service. The BSB also states that it aims to be engaged and proactive as a regulator, anticipating risks and opportunities, making better use of the intelligence we gather and seeking to ensure that the chambers to which most barristers belong, are themselves effective in overseeing standards, equality and access. These topics also link back to the latest OLC and BSB Board to Board meeting.

Alongside the Business Plan, the Bar Standards Board also published a letter to the Legal Services Board and an associated action plan setting out its response to the Legal Services Board's most recent Regulatory Performance Assessment (as reported in January 2023's Horizon Scanning paper). The action plan captures reforms set out in the wider Business Plan and sets milestones for their achievement.

Online Procedure Rules Committee

As part of the latest Ombudsman Association Policy Network meeting, the MoJ's Dispute Resolutions team attended to provide an update on plans to introduce mandatory mediation for small claims, and the introduction of a new Online Procedure Rules Committee which will produce rules which govern the online court space.

Mandatory mediation

- Overarching aim is to increase meditation so that judicial resources are freed up for more complex cases.
- Consulted from July-October on the proposal to automatically refer people involved in civil disputes valued up to £10,000 for free mediation.
- Mediation for all small claims disputes will use in-house mediators from HMCTS. MoJ currently reviewing the readiness of the mediation industry to support the increased requirements. Considerations also include referring to external mediators in the future, for higher value claims.
- Already had strong feedback that the words 'compulsory' and 'mandatory' are off putting. Suggestion has been put forward to move towards using 'integrated mediation' instead.
- Also exploring options for increasing access to justice and digital support for users- including the use of online signposting tools.

Online Procedure Rule Committee

- The Online Procedure Rule Committee is a new rules committee that will have the ability to make rules for online services in the civil court, family courts and tribunals.
- Its remit also extends into the pre-action dispute resolution space, meaning that it will make rules for online courts and have the ability to set data and behavioural standards for online

dispute resolution providers.

- The aim behind this is to provide a framework for allowing cases which are not successfully resolved at the pre-action stage to transfer 'seamlessly' into the online court system, and therefore saving litigants the need to make a fresh claim.
- Six members, including Sir Geoffrey Vos (Master of the Rolls) who will chair the Committee.

There are a few questions which the MoJ team were keen to put forward to capture views from Ombudsman services during this development stage. Ongoing discussions are taking place with L2 Ombudsman to capture any feedback LeO may want to give to the questions raised.

At a recent Westminster Policy Forum the Deputy Director of the MoJ Dispute Resolutions team confirmed that the planned changes in mediation could increase the workload of HMCTS's inhouse mediation team by as much as sevenfold.

Announcements and appointments

Alan Kershaw

On 6 February 2023, the Ministry of Justice and Legal Services Board confirmed the appointment of Alan Kershaw as the new Chair of the LSB. He has been appointed for a four-year term effective from 1 April 2023. Dr Helen Phillips steps down from the role after eight years.