FOCIS

The Forum of Complex Injury Solicitors

FOCIS Response to The Civil Justice Council Consultation on

Reform of The Solicitors Act 1974, Part III

JULY 2026

ABOUT FOCIS

The Forum of Complex Injury Solicitors (FOCIS) are a group of pre-eminent solicitors who specialise in acting for seriously injured people in personal injury and clinical negligence claims. The objectives of FOCIS are to:-

- Promote the highest standards of representation for claimants with life-changing injuries;
- Increase understanding in the wider community of issues which arise for those who suffer serious injury;
- Use members' expertise to promote debate and improvements to the law and legal process; and
- Share knowledge and information among members of the Forum.

Further information is available here: https://focis.org.uk/

Membership of FOCIS is intended to be at the most senior level of the profession. The only formal requirement is that members are recognised by their peers as having achieved a pre-eminence in one or more specialist types of serious injury claim. We currently have 24 members, including members from England, Scotland, Wales and Northern Ireland. Nine of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hodge Jones & Allen
Ashtons Legal	Hugh James
Balfour + Manson	Irwin Mitchell
Bolt Burdon Kemp LLP	JMW Solicitors
Boyd Rice Solicitors	Leigh Day
Dean Wilson LLP	Moore Barlow
Digby Brown	Osbornes Law
Fieldfisher	Slater and Gordon
Fletchers	Stewarts
Gadsby Wicks	Switalskis Solicitors

FOCIS welcomes the opportunity to respond to the Civil Justice Council's consultation on reform of Part III of the Solicitors Act 1974. This response is informed by the practical experience of its members in conducting high-value and complex personal injury and clinical negligence litigation, including cases in which the court exercises a protective jurisdiction over children and Protected Parties.

EXECUTIVE SUMMARY

a) FOCIS welcomes the Civil Justice Council's proposed reform of the statutory framework governing solicitor and own-client costs.

b) The final statutory code should reduce the scope for unnecessary, technical or duplicative challenges, thereby promoting efficiency, proportionality and finality in the assessment and recovery of costs.

c) The level of scrutiny applied to solicitors' charges should be proportionate to the context, and should distinguish between consumer retainers, vulnerable clients and commercial arrangements entered into by informed and sophisticated parties.

d) The framework should accommodate modern litigation funding structures, including conditional fee agreements and damages-based agreements without imposing artificial constraints that distort commercial behaviour or undermine access to justice.

e) FOCIS is concerned that the consultation does not address the assessment of costs incurred on behalf of children and Protected Parties, including payments out of damages. Following discussions with Lord Justice Birss and former Senior Costs Judge Gordon-Saker, and following FOCIS' 2022 paper prepared with the assistance of Roger Mallalieu KC as part of the CPRC consultation on Part 21, FOCIS understood that these issues would be considered as part of Solicitors Act reform. Reform remains urgently required. In its absence, the current process continues to cause delay, uncertainty, inconsistency and inefficiency for Protected Parties, Litigation Friends, solicitors, counsel and the courts.

f) Although the indemnity principle is not expressly within the scope of this consultation, FOCIS considers that any reform of the statutory framework for solicitor and own-client costs should take account of the wider difficulties caused by its continued application. Sir Rupert Jackson identified the common law indemnity principle as outdated in 2009 and repeated in 2017 that it served no useful purpose and should be abolished. Modern litigation is frequently funded outside the traditional solicitor-client retainer model, including through CFAs, trade union-backed claims, insurer-funded litigation, bulk purchasing arrangements and other structures under which solicitors may agree not to charge unsuccessful clients. In that context, the indemnity principle gives rise to technical retainer challenges, satellite litigation, increased costs and unnecessary use of court resources. FOCIS therefore invites the CJC to revisit the continuing role of the indemnity principle and to recommend steps for its abolition, in accordance with Sir Rupert Jackson's earlier recommendations.

RESPONSES TO QUESTIONS

1. **<u>Do consultees agree that any revised code for the regulation of solicitor and own client costs should have the objectives identified in paragraph 4.2 above? above?</u>**

   <u>a. Should the revised code contain any other objectives that aren't identified</u>

   <u>b. If consultees disagree, why? What alternate objectives should be relied on?</u>

   FOCIS agrees that any revised code for the regulation of solicitor and own-client costs should reflect the objectives identified at paragraph 4.2. A revised framework should promote clarity, fairness, proportionality and consistency in the assessment of costs.

   Any revised code should remain focused on the regulation of solicitor and own-client costs. It should not create, or be capable of being used to create, an additional route by which paying parties seek to challenge or undermine costs liabilities arising in litigation. That is particularly important given the existing rules governing inter partes costs and the need to ensure that any assessment process remains proportionate, efficient and confined to issues properly within its scope.

2. **<u>We propose that solicitors' charges should be subject to an overarching principle that they be 'fair and reasonable', judged on an objective basis, which should apply both to the amounts actually charged and to contractual terms, but not to the manner in which the agreement was reached. Do consultees agree with this recommendation?</u>**

   FOCIS welcomes the proposed move away from the concept of "informed consent", which:

   - gives rise to evidential difficulties in establishing what the client understood at the relevant time, often leading to uncertainty and inconsistent outcomes; and

   - encourages defensive lawyering, which can materially increase costs and divert attention from the substantive issues required to advance the claim.

   An overarching "fair and reasonable" test would provide a single objective standard, subject to further guidance as addressed in response to Question 3. It should reduce reliance on technical arguments and limit retrospective, hindsight-based challenges. Appropriate safeguards should nevertheless be retained within the regulatory framework to ensure that clients, particularly vulnerable clients, are able to understand their potential exposure to costs. The "fair and reasonable" test should also apply expressly to Litigation Friends who authorise steps in litigation on behalf of children and Protected Parties, whose costs are currently subject to assessment under CPR 46.4 and CPR 21.12.

3. **<u>We propose that the approach taken in reg. 3 of the 2009 Order – subject to some updating – would be a sensible approach to producing guidance on the meaning of 'fair and reasonable'. Do consultees agree? Consultees should consider whether: a. there is anything presently contained in reg. 3 of the 2009 Order which should be excluded when producing guidance on the meaning of 'fair and reasonable.' B. there is anything not presently contained in reg. 3 of the 2009 Order that should be included.</u>**

   The question of what is "fair and reasonable" is inherently fact-sensitive and may lead to uncertainty unless clear guiding principles are provided. Although regulation 3 of the

2009 Order identifies a number of relevant factors, FOCIS considers that the existing formulation is too broad. Without further guidance on the meaning and relative weight of each factor, parties are likely to become embroiled in disputes about interpretation and application. That would undermine the objective of promoting clarity and consistency and would risk generating further satellite litigation.

The conduct of the parties, whether the client, the opposing party or others involved in the litigation, can have a direct and material impact on the level of costs incurred. Additional work, expense and delay may arise from such conduct. FOCIS therefore suggests that "the conduct of the parties" should be added as a headline factor in assessing whether charges are fair and reasonable.

Factor (g) in regulation 3, concerning land and estates, appears to relate to a specific category of work. FOCIS suggests that any matters peculiar to specialist or non-general fields should be identified in separate subsections of the code, rather than forming part of a general list of factors.

The current factors do not adequately address the additional time, work and welfare-related responsibilities required of solicitors acting for children, Protected Parties or other vulnerable individuals. It is well recognised in practice that additional costs are incurred when acting for such clients. FOCIS therefore proposes an additional factor: "whether the client is vulnerable, or whether the solicitor is acting through a Litigation Friend on behalf of a child or Protected Party".

FOCIS further suggests that the application of the relevant criteria should be guided by an overriding objective which recognises that:

- high-value and complex claims will, as a matter of principle, require higher levels of expertise, more substantial time input, higher invoices and, frequently, a greater number of experts;
- a client's choice of solicitor will generally involve acceptance of that solicitor's terms of business, including the hourly rates charged; and
- If, having agreed terms with their solicitor, a client wishes to challenge the terms or estimates for being unfair or unreasonable, it should be clear that the burden of proof for doing so rests with the paying party (the client).

4. **<u>Do consultees agree that the distinction between contentious and non-contentious business should be removed? Do consultees perceive any disadvantage in doing so?</u>**

FOCIS agrees that the distinction between contentious and non-contentious business should be removed. Removal of the distinction would create a more coherent and modern framework, reflecting contemporary legal practice rather than maintaining rigid and outdated categories.

However, care will be required to avoid unintended consequences. Removing the distinction could inadvertently affect existing agreements. Any reform on this point should therefore operate prospectively and should not invalidate or disturb existing arrangements.

5. **<u>As part of our wider provisional recommendation for a graduated dispute escalation procedure, we propose a route for smaller bills, as set out above. In summary, clients must exhaust internal complaints processes and LeO's complaints procedure before petitioning the Court, initially with an application</u>**

for permission to proceed which would need to show good reason why further recourse was justified. Do consultees agree with this proposal? proceedings. The WG are particularly seeking views on the proposal that clients must show good reason before being given permission to proceed by way of Court proceedings

FOCIS broadly supports the provisional recommendation, subject to having resourcing and capacity concerns regarding the Legal Ombudsman, as further addressed in response to Question 7. However, the concept of "good reason" should be clearly defined in the code, either by objective criteria or illustrative guidance. Without such guidance, there is a risk of satellite disputes about whether the threshold has been met, increasing costs and delay and undermining the stated objective of streamlining dispute resolution. There is also a risk that the LeO process may be followed, only for the Ombudsman ultimately to decline to determine the matter and refer it to the court because of complexity. In that scenario, the parties would have incurred substantial delay without effective resolution.

Assessments involving children and Protected Parties should remain within the court's jurisdiction, regardless of value, given the court's supervisory role and the safeguards required where costs may affect damages awarded to a child or Protected Party. A fast-tracked court procedure for disputes below £50,000 could improve efficiency without compromising those protections.

The proposed procedure should operate as the default process, but there should be an escape mechanism for matters involving complex legal issues that are not suitable for determination by the LeO. In such cases, access to the court should not be restricted.

6. **Do consultees agree with our recommendation for a graduated dispute escalation procedure, including ADR, for those cases falling outside LeO's jurisdiction, as a precondition to accessing the courts in disputes about solicitors' costs?**

ADR may promote early resolution, but FOCIS does not consider that it should be mandatory in all cases. In some matters, entrenched positions, limited scope for compromise, legal complexity or emotional factors may mean that ADR is unlikely to be productive. Mandatory ADR in such circumstances may add cost and delay without achieving its intended purpose.

FOCIS suggests that ADR should be strongly encouraged, with potential sanctions for any party who unreasonably refuses to engage. There should also be scope for the parties to agree to opt out where they can identify clear and sensible reasons why ADR is unlikely to assist.

7. **Do consultees agree with our recommendation that the jurisdiction of LeO in relation to costs be clarified and expanded, in the manner suggested?**

FOCIS agrees in principle with clarifying that the Legal Ombudsman's powers extend to complaints relating to costs. FOCIS notes that the consultation expressly recognises that the proposed process will not function unless it is adequately funded. However, there is a serious concern that the LeO will have insufficient resources to operate the proposed model effectively. Existing complaint-handling targets are not consistently being met, and the number and complexity of complaints may increase further, including through the use of AI-generated complaints. There is a real risk that the LeO would be unable to absorb an additional costs dispute workstream. To assist with case management, it may be appropriate for the new process to provide for an automatic stay of complaints to the LeO concerning costs disputes above £50,000, pending resolution through the court process or ADR.

FOCIS is also concerned about proposed changes to the LeO scheme rules intended to reduce avoidable complaints. Under those proposals, all complaints accepted into the LeO's jurisdiction would attract a case fee, increasing according to the stage reached.

When considered alongside the CJC's proposals for extending LeO jurisdiction over solicitor-client costs disputes, the proposed case fee regime could have the unintended effect of increasing the cost of enforcing unpaid legal fees. Even where a complaint is ultimately rejected, firms may incur case fees and administrative costs, potentially making recovery of lower-value bills uneconomic and encouraging the use of Ombudsman complaints as a tactical response to legitimate fee collection efforts. Whilst this may operate to protect the individual unmeritorious complainant it will over the time have a negative effect on future consumer clients as law firms will be forced to increase their charges to make up for the burden of these additional complaint costs.

8. **Do consultees consider the proposed cap of £50,000 to be appropriate? If consultees disagree, would they suggest a higher or a lower figure? Why?**

FOCIS agrees that the proposed cap of £50,000 is appropriate, but it should be kept under review. Without review, there is a risk that increasing litigation costs will cause a significant number of straightforward consumer costs disputes to fall outside the cap shortly after implementation.

9. **Do consultees agree that the concept of the 'statute' or 'statutory' bill should be abolished, and that the content and format of bills should be set by conduct rules and rules of court?**

FOCIS considers that abolishing the concept of the "statute" or "statutory" bill is sensible. Disproportionate time and cost are currently spent on disputes about whether an invoice falls within section 69 of the Solicitors Act 1974 and related case law on compliant bills.

Clear guidance on the format and content of bills should be prescribed in the applicable conduct rules, to remove ambiguity about the status of an invoice. For example, if a bill must contain sufficient narrative to enable a client to take advice on whether to seek assessment, the rules should specify the level of narrative required.

To promote consistency and certainty in practice, FOCIS suggests that standardised template examples should be appended to the conduct rules, illustrating compliant formats and appropriate levels of detail.

10. **Do consultees agree that requirements as the signature and delivery of bills should likewise be addressed by conduct rules, reflecting up-to-date practice?**

FOCIS agrees with this proposal. Clear guidance within the conduct rules would reduce the scope for dispute and limit technical challenges concerning signature and delivery.

11. **Do consultees agree that there should be a single time limit for initiating proceedings of one year from receipt, regardless of whether the bill is paid, subject to a power to extend the time limit where it is fair a reasonable to do so? Consultees in particular are asked to consider whether the proposal of a single time limit regardless of payment of the bill raises any concerns.**

The courts currently spend disproportionate time adjudicating complex arguments arising from different time limits affecting a client's right to detailed assessment. A single time limit would promote clarity and assist both practitioners and clients in understanding their respective positions.

To guard against unfairness, clients should receive clear information explaining the finality and significance of the deadline.

FOCIS considers that clear guidance will also be required as to what constitutes a "fair and reasonable" extension request. Without such guidance, clients may seek to rely on the extension power to circumvent the 12-month rule, leading to satellite litigation, uncertainty and inconsistent outcomes.

12. **Do consultees agree that the matters described above at paragraphs 4.29-4.34 above do not require legislative provision, and where necessary can be addressed via conduct rules and/or rules of court?**

FOCIS agrees that these matters do not require detailed legislative provision and can, where necessary, be addressed through conduct rules and/or rules of court.

13. **Aside from the provisions in the existing legislation outlined above in paragraphs 4.29-4.34, are there any other provisions in the current Part III that consultees feel should be reviewed or removed?**

No, save that paragraph 4.30 refers to a new regime for CFAs and DBAs. FOCIS has long supported the need for reform of the DBA Regulations. By contrast, the law relating to CFAs is now well settled and operates effectively.

14. **Our recommendation is that the proposed changes can be introduced via limited primary legislation containing an appropriate enabling power. Other matters can be addressed by changes to the LeO Scheme Rules, changes to conduct rules, and changes to rules of Court. Do consultees agree?**

FOCIS agrees. Introducing limited primary legislation supported by an appropriate enabling power would be proportionate, efficient and less time-consuming than detailed legislative reform of every procedural matter.

The current framework lacks the flexibility required to respond to developments in practice. An enabling power would allow matters to be kept under review through ongoing mechanisms, avoiding the need for repeated amendments to primary legislation.

15. **In principle, would consultees support the concept of 'fair and reasonable' charging being extended to other legal services professionals? Please explain your answer, giving examples if possible.**

FOCIS supports, in principle, extending a "fair and reasonable" charging standard to other regulated legal services providers.

There is already a clear practical parallel in relation to counsel's fees. Solicitors are routinely required to consider and justify the reasonableness of counsel's fees, both in the context of recovery from opponents and in the solicitor-client relationship. Extending a "fair and reasonable" test more broadly would therefore reflect an established and well-understood approach.

A consistent standard across regulated legal services providers would promote transparency and fairness, ensuring that clients receive equivalent protections whether they instruct solicitors, barristers, costs lawyers or other regulated professionals.