



# Third party complaints

Extending routes to redress

June 2012

# Consumer challenge



# About Consumer Challenge

Our Consumer Challenge series is designed to create a space for fresh thinking where the Legal Services Consumer Panel can stimulate debate, question the received wisdom and propose new solutions to old policy issues. These documents do not necessarily represent the Panel's final policy position, but instead allow us to test ideas and spark discussion.

This is the second publication in the series. The first Consumer Challenge paper focused on the Legal Education and Training Review.

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# 1 Executive summary

- 1.1. The Legal Ombudsman is currently consulting on widening the remit of its scheme to consider, in some circumstances, complaints from ‘third parties’ – individuals who are not the lawyer’s client. Although approved regulators currently do consider allegations of misconduct made by third parties which can lead to disciplinary proceedings being brought against a lawyer, third parties do not have a direct right of redress when they experience poor service.
- 1.2. The Panel considers that third parties who have suffered detriment should be able to obtain a remedy. The examples of consumer detriment highlighted in this paper suggest that the current absence of this right to redress frustrates the intention of a contractual relationship with businesses on which consumers rely in good faith, and creates the possibility of lawyers falling outside the Legal Ombudsman’s jurisdiction by entering into complex business arrangements. The lack of access to redress creates weak incentives for fair dealing and ethical behaviour and limits the opportunities to learn the lessons from complaints.
- 1.3. We do not argue that all third party complaints should be eligible for consideration under the Legal Ombudsman’s scheme. Lawyers must act in the best interests of their client and, in our adversarial system, it is right that they do so robustly. While a third party may feel uncomfortable, or believe that an outcome is unjust, it does not necessarily follow that a lawyer has done anything wrong. The consumer redress system must avoid impairing the proper pursuit and administration of justice.
- 1.4. However, the scheme rules under which the Legal Ombudsman currently operates are too crude as they prevent almost all third parties from bringing a complaint and so legitimate complaints are not being considered. This paper explores a range of scenarios where there appear to be good grounds for giving third parties a right of redress through the Legal Ombudsman, for example:

- Where legal work is intended to benefit consumers, but they are treated as third parties due to the nature of the contract or business structure, e.g. a remortgage when the legal work is arranged by the lender, and sub-contracting arrangements by unregulated businesses;
  - Hounding tactics by lawyers acting on behalf of corporate clients;
  - Bad treatment of victims and witnesses in the criminal justice system;
  - Non-contentious matters where both the client and third party lose out, e.g. a delay in a conveyancing transaction because the seller's lawyer loses some paperwork causing detriment to the buyer (a third party);
  - Personal information is compromised due to a data security breach;
  - Beneficiaries when they experience problems due to a defective will; and
  - Lawyers working on matters concerning groups of people where the work is arranged by another party on their behalf or in their name, e.g. leaseholders or unsecured creditors.
- 1.5. Giving third parties a right of redress would not give consumers new legal rights, but simply extend existing rights to redress beyond the courts. It would bring the Legal Ombudsman in line with practice in some other jurisdictions and with procedures adopted by ombudsmen in some other key service sectors, such as financial services, surveying, estate agency and utilities.
- 1.6. There are a series of implementation issues to consider, including deciding on the appropriate parameters of the Legal Ombudsman's jurisdiction. Since it will be impossible for the Legal Ombudsman to foresee all possible legitimate third party complaints, our preferred option is to make all third party complaints eligible, using the definition of a consumer in the Legal Services Act, except for specific types of cases that would be excluded.

## 2 Introduction

### Why look at this?

- 2.1. Giving consumers the right to complain about poor service and obtain redress is one of the key principles that underpin consumer policy. This is important for reasons of natural justice, but also for raising standards and promoting healthy competition based on fair dealing behaviour. This paper – the second in our “consumer challenge” series – aims to close redress gaps in legal services when poor service by a lawyer harms consumers who are not the client. These sorts of situations are known as ‘third party complaints’.
- 2.2. The standard ‘business-to-consumer’ relationship in legal services is between a lawyer and their client. Yet there are many situations where detriment to third parties could arise, from delay on a house purchase, to being disinherited from a will, to having personal data compromised. The financial and personal impact on third parties in these situations could be very serious. However, it would not be appropriate to allow third parties to complain in all circumstances, for example an embittered ex-husband complaining about a lawyer acting for his former wife on their divorce. The purpose of this paper is to identify which third party complaints should be considered by the Legal Ombudsman and which would be a step too far.
- 2.3. In England and Wales, lawyers’ codes of conduct generally do not give consumers the right to complain about poor service unless they are the client, although some remind lawyers that they have duties towards third parties. Similarly, the Legal Ombudsman may only accept complaints provided by a lawyer to their client, with limited exceptions explained in the next section.
- 2.4. The situation is different for complaints alleging misconduct or professional incompetence. The approved regulators may receive complaints from anyone about such matters. However, the Legal Services Act prevents the approved regulators from making provision for redress in their regulatory arrangements. Although these

allegations can lead to disciplinary investigations and/or findings being made, they do not provide a right of redress for the individual who made the complaint.

- 2.5. There is flexibility within the Legal Services Act to extend the jurisdiction of the Legal Ombudsman’s Scheme to alter the scope of who amounts to a complainant, as the Lord Chancellor may prescribe by order other circumstances when complaints are permitted. The Act also gives the Consumer Panel statutory powers to recommend such changes to the Lord Chancellor.
- 2.6. When it first consulted on its scheme rules, the Legal Ombudsman decided not to ask the Lord Chancellor to expand its jurisdiction to include third party complaints, in part due to its strategy of starting simply. However, it indicated that it was open to looking at this issue in the future. Since then an independent report commissioned by the Legal Ombudsman on consumer confusion, prepared by the University of Leicester, has recommended that the organisation examine its strategy afresh. The Legal Ombudsman is now consulting on whether its scheme rules remain appropriate, including options on third party complaints.

## Existing legal situation

- 2.7. The Legal Services Act includes specific definitions for the parties in a complaint which may be considered under the Legal Ombudsman’s Scheme. It is important to understand these and we set out the key principles below. Not least, the difference in the definitions of ‘*consumer*’ and ‘*complainant*’ under the Act lie at the heart of this paper. However, to help make this document accessible for lay readers, wherever possible the majority of this document uses convenient shorthand terms, for example ‘lawyer’ or ‘provider’ instead of ‘authorised person’
- 2.8. The Panel wishes to make clear at the outset that we are not calling for new legal rights for consumers, but simply to expand

**“We are not calling for new legal rights for consumers, but simply to extend routes to redress.”**

the scope of routes to redress. The law already deals with the types of contractual and non-contractual situations described below in the examples of detriment suffered by third parties. However, as reflected in Government policy on alternative dispute resolution (ADR), wherever possible it is desirable to attempt to resolve disputes with lawyers outside of court. This offers both parties the prospect of cheaper, more informal and quicker redress than is possible through formal court procedures. This argument carries even more weight in the legal services market compared to other industry sectors given the court room is the working domain of the lawyer – understandably, legal services consumers have even less confidence to challenge a lawyer when things go wrong.

- 2.9. Section 128 of the Legal Services Act describes the parties in complaints who fall within the Legal Ombudsman’s jurisdiction. The provider (known as the ‘respondent’) has to have been at the relevant time an authorised person in relation to a reserved legal activity, although it is not necessary for the subject of the complaint to relate to a reserved legal activity. In other words, complaints are eligible if they are about poor service by an authorised person – this may be an individual or organisation – even if the legal activity at the heart of the complaint is not restricted to these persons (as with will-writing or employment advice etc). The complainant must either be an individual or a person (other than an individual) of a description prescribed by the Lord Chancellor. This provision currently allows certain microenterprises, charities and associations to complain, but it could also be used to extend the Legal Ombudsman’s jurisdiction to third parties.
- 2.10. The Act specifies that the services to which the complaint relates must be provided by the lawyer to the complainant. As we describe later, much hinges on when it is considered that a service is provided by a lawyer to *the complainant* as opposed to another party. Alternatively, the services to which the complaint relates must be provided by the lawyer to another authorised person who procured them on the complainant’s behalf. For example, this enables consumers to complain about poor service provided by a barrister instructed by a solicitor. Another eligible type of complaint is when services to which the complaint relates were provided by the lawyer acting in their capacity as a personal representative or trustee or to a person

acting as a personal representative or trustee, and the complainant is a beneficiary of the estate or trust in question. In simple terms, this covers the administration of an estate where the lawyer is either named as an executor in the will or is hired by the lay executors named in the will.

- 2.11. The Act also makes clear that the right of a person to make a complaint may not be limited or excluded by any contract term or by notice.

### In practice

- 2.12. The boundaries of the Legal Ombudsman's jurisdiction with respect to third party complaint situations are not altogether clear. In practice, we understand that the Legal Ombudsman uses a series of criteria to assess whether a complainant's circumstances fall within the eligibility requirements as intended by the Act. Criteria that make it more likely for a complaint to be accepted include: the existence of a contract; a financial transaction taking place; the consumer having a right to give instructions; the lawyer's work is intended to benefit the consumer; and where a duty of care can be said to exist. In the opposite direction, criteria that make it less likely for a complaint to be accepted include: the absence of the above factors; the presence of multiple intermediaries; and the possibility of competing interests between the parties. Of course, factors on both sides of the argument may be present in any situation and it is then for the Legal Ombudsman to reach a balanced judgement as to the eligibility of a complaint on a case-by-case basis.
- 2.13. These difficulties have been acknowledged by the Chief Legal Ombudsman himself. In his first annual report, he admitted that the blurred boundaries of regulation make it difficult to assess whether a complaint falls within his jurisdiction – to understand whether the legal service is being provided by a law firm or by a non-legal organisation. If it is the latter, he has to see if there was sufficient involvement on the part of a regulated lawyer to bring it within its scheme. However, the report also set out the difficulties in understanding the regulatory status of the entity providing the service which makes such decisions problematic.

2.14. Clearly, such uncertainty as to the intended effect of the Act is unsatisfactory.

Consumers and their representatives do not fully know what their rights are, while lawyers do not know what the full extent of their liabilities are. One of the benefits of creating a third party jurisdiction within the Scheme Rules would be to formalise existing practices and provide much-needed certainty for all parties.

2.15. However, there is a need to go beyond this and discuss what would simply be the right thing to do. The next section of this paper discusses a variety of situations, some of which are clearly beyond the scope of the existing scheme rules, but where third parties suffer detriment through no fault of their own. The Consumer Panel would welcome an open debate about the sorts of third party situations that should rightly fall within the Legal Ombudsman's jurisdiction.

# 3 Third party detriment

## Quirks of contract

3.1. It seems particularly unjust to exclude situations where a lawyer carries out work intended to benefit a consumer, but the consumer is not treated as the client since this work was arranged through a non-legal or unregulated legal business. Since the consumer's contract is not with the lawyer, s/he has no direct redress.

3.2. One type of situation is in a tripartite contract where some or all of the services are performed by the lawyer for both parties. An example is a home sale or remortgage where a lawyer acts for both the lender and the homebuyer. In law, where a lawyer is performing one task for two parties, they are liable to both parties independently for doing the work right. However, the Legal Ombudsman cannot deal with the complaint because the legal work is arranged by the lender and the consumer is deemed to only have employed the lender and not the acting lawyer. Although there may be cases where the lender and homebuyer have competing interests, in other situations poor service by a lawyer may make little difference to the

lender but have serious consequences for the homebuyer and potentially others, e.g. lost paperwork leading to a transaction becoming delayed.

3.3. It is possible to imagine similar scenarios, for example a lawyer appointed by an insurer working on an employment dismissal case under a legal expenses

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insurance policy. Is the lawyer acting for the insurer, or the employee? Another example is when the at-fault driver's lawyer does the legal work on the victim's vehicle repair claim – so-called 'third party capture' cases. To whom should the accident victim complain in such circumstances? Certainly, third party funding should not dilute the lawyer's responsibility to provide good service.

- 3.4. Another type of situation is when an unregulated legal or non-legal business subcontracts part or all of the legal work to a regulated law firm. The Legal Ombudsman's annual report gives an example of an unregulated estate administration company which subcontracted obtaining the grant of probate to a firm of solicitors, but the consumer was unable to complain to the Legal Ombudsman because they had employed the company and not the solicitor to do the work. At the time of arranging the work, the individual was told these were third party costs although understandably did not know what was meant by this, and certainly did not appreciate that this would exclude him from seeking any redress.
- 3.5. The arguments to support giving third parties access to the Legal Ombudsman in such circumstances are straightforward. If legal work is carried out with the consumer in mind, that person should be able to seek redress where the work is poorly delivered to the extent that it leads to loss or detriment being suffered on their part. To do otherwise would be to frustrate the intention of the contractual relationship upon which consumers rely in good faith. Without this right of redress, in order to protect themselves from loss, consumers would need to negotiate a separate contract with the lawyer, which would be complicated, costly and burdensome. Furthermore, it creates weak incentives for lawyers to perform the work to a high standard.
- 3.6. This situation also creates the possibility of lawyers seeking to steer clear of the Legal Ombudsman's jurisdiction by entering into complex business arrangements. The Legal Ombudsman has said its jurisdiction is not so helpful in enabling it to deal with cases where the service has involved both regulated and unregulated entities as some of these structures, whether accidentally or by design, have the

effect of taking the complaint outside its jurisdiction. This relates to wider issues being considered by the Legal Services Board around the boundaries of regulation.

- 3.7. Consumers might have recourse to an ADR scheme in relation to the other entity, but there are significant gaps in coverage of ADR making this a bit of a lottery. There are EU proposals to give consumers the right to complain to an ADR scheme about any trader, although the draft Directive leaves it to Member States to determine whether the participation of traders should be made mandatory. The issue of third party complaints in legal services would largely be resolved should the Directive be passed and the UK Government decide on mandatory trader participation, but this seems unlikely given its lukewarm response to the initiative.

## Opposing clients

- 3.8. Perhaps the most controversial type of third party complaint is one made by a complainant against his/her opposite number's legal representative. Examples might include when a person suffers distress, for example should a lawyer's insensitivity upset the other spouse in a divorce or someone is aggressively hounded by a lawyer acting on behalf of a corporate client.
- 3.9. This is difficult because the overriding duty of lawyers is to act in the best interests of their clients. This may, quite properly, involve taking action or acting on the instructions of their client that is contrary to the interests of the other parties. In our adversarial system, when a person's liberty or financial interests are at stake, it is right that a lawyer defends their client's interests robustly. Another party may be put in an uncomfortable position, or feel that the outcome was unjust, but this does not mean that a lawyer has done something wrong. Similarly, a client may instruct their lawyer to adopt tactical manoeuvres, such as to

**“It is important that the consumer redress system does not create conflicts of interest or impair the proper pursuit of justice.”**

deliberately delay in sending documents, as this would serve their interests in a negotiation at the expense of the other side. It is important that the consumer redress system does not impair the proper pursuit or administration of justice.

- 3.10. One concern is that a third party complaints process could be abused by people with nothing to lose in complaining about the other side's winning legal team. The Legal Ombudsman raised this in responding to the original consultation on their scheme rules, giving the example of a husband or wife complaining about the other side's lawyer in divorce proceedings. However, whilst concerns about speculative cases are legitimate, the Legal Ombudsman has the power to quickly dismiss any complaints which it considers to be vexatious or frivolous. This should not distract from ensuring there is an avenue for redress for third parties who have legitimate grievances. This is important not just for reasons of access to justice, but also to create the right incentives for ethical conduct and fair market behaviour.
- 3.11. A real example of behaviour causing distress to clients was when letters were sent by law firms to alleged file sharers as instructed by intellectual property rights holders. The letters accused the recipients of downloading and distributing copyright-protected material over the web, and also asked them to pay around £500 in compensation in order to avoid legal proceedings. Following a complaint filed by Which?, the SRA successfully brought disciplinary action before the Solicitors Disciplinary Tribunal (SDT) against two solicitors, who between 2006 and 2009, had sent over 6,000 letters to individuals claimed to have been involved in unlawful file sharing. The SDT found that the letters of claim had a devastating impact on many of the individuals who received them causing enormous distress, upset and frustration and sometimes exacerbating health problems. The SDT found the way that the solicitors had presented their clients' cases to potential defendants was unacceptable and that their correspondence had been aggressive, overbearing, misleading and disproportionate.
- 3.12. This is not the only example of aggressive hounding tactics. Citizens Advice has exposed the tactics used by civil recovery agents. Their evidence suggests that 100,000 people in each of the last three years have received letters from law firms

employed by these agents demanding a substantial sum of money as ‘compensation’ for their alleged shoplifting or employee theft, and threatening civil court action (and associated extra costs) if the sum demanded is not paid promptly. The SRA’s responded by issuing guidance on solicitors’ duties when instructed to seek recovery from shoplifters.

- 3.13. There is much discussion about the need to reinforce professional ethics, and, as part of this, controlling the excesses of ‘client zeal’. At all times lawyers must act in accordance with their code of conduct and the professional principles. We suspect that extending the Legal Ombudsman’s jurisdiction to cover third party complaints would provide a useful counterweight to the overzealous pursuit of client interests, which goes beyond acceptable boundaries. Lay people may not appreciate what is expected of solicitors instructed by corporate clients and may feel bullied and intimidated, especially where getting such a letter is a rare thing and they feel the allegations are unfounded.

## Victims and witnesses

- 3.14. The court room is an environment where people can feel hard done by, despite the ‘opposition’ lawyer acting properly in the pursuit of justice. However, the Panel is of the view that consideration should be given to opening up redress to victims and witnesses, who are among the most vulnerable users of the criminal justice system.
- 3.15. Louise Casey, the former Victims Commissioner, has written powerfully about the need to provide accountability to victims across the criminal justice system. She wrote that it is necessary to support victims because the rule of law depends on a victim not seeking revenge or retribution themselves, but stepping aside for the State to prosecute the individual as an offence against the Crown. There is an obligation to repay that with an effective response on their behalf. And because, secondly, by supporting someone to come forward, report a crime and give evidence in court, the victim is also critical in helping to stop that offender targeting others. To quote from her first report: “*We rely on victims to have the courage to come forward and report crime, to do their duty and stand up in a court room and*

*be a witness in a trial, to help the criminal justice system bring harmful and dangerous people to account. No one should take them for granted; the system should at the very least operate fairly and with understanding towards them – and offer the right type and level of support.”*

- 3.16. Providing evidence in court can be a daunting experience, particularly given the need to confront the alleged offender, who may be accused of having committed a violent crime. It is important that lawyers do not go beyond what is required of them, by intimidating victims or witnesses, or otherwise treat them badly, as this may have a material impact on the outcome of the trial and leave emotional scars on the individuals concerned. The lack of access to redress also represents, in our view, a missed learning opportunity as victims and witnesses have a unique insight into the way the criminal justice system, including the behaviour of lawyers, has worked in their case. There are already checks and balances in this area, including the role of the judiciary, the proposed introduction of the Quality Assurance Scheme for Advocates (QASA) and voluntary charters. However, while welcome, none of these interventions provide an opportunity for victims and witnesses to complain about poor treatment and, where appropriate, receive a remedy.
- 3.17. The creation of a statutory code of practice has provided victims of crime with entitlements to service standards that are required to be met by different parts of the criminal justice system. This includes a right to complain to any one of the various agencies about the service they have received. Outside of the Crown Prosecution Service (CPS), lawyers fall outside of the code since they are not a criminal justice agency. The Victims Commissioner has identified serious shortcomings in relation to complaints, but there is at least an opportunity to complain about these agencies, whereas victims have no such right to complain about lawyers. The QASA competency standards include treatment of witnesses, but there is no lay input to the assessment of advocates and no access to redress for victims or witnesses if advocates fall short of meeting these standards.
- 3.18. The Panel has previously considered this issue when the Chartered Institute of Legal Executives (CILEx) applied to become an approved regulator to award rights

of audience and rights to conduct litigation to its Associate Prosecutor members. Since these members are employees of the CPS, the CPS is considered as the client under the terms of the Legal Services Act. In effect, the CPS handles complaints internally and, if necessary, refers disciplinary action to CILEx. However, this creates a lacuna whereby victims and witnesses cannot complain to an independent body about poor service by a Crown Prosecutor.

3.19. We are mindful of the need to not inadvertently impair lawyers from performing their difficult role in what can be testing circumstances. The media coverage of the cross-examination of Milly Dowler's parents demonstrates that these are not easy issues and deciding whether a line of questioning is appropriate is a fine judgement. Judges act as a vital safeguard against inappropriate questioning, but individuals can be left feeling victims twice over and it seems unjust that they have no recourse to complain. We note that the Director of Public Prosecutions has said he will look at how victims are treated in court, which suggests it is important to consider carefully whether it would be appropriate to provide access to redress in such cases.

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3.20. These are tricky issues, especially when it comes to treatment of victims and witnesses by lawyers representing defendants. There is also the safeguard that poor behaviour, such as aggressive questioning, is likely to constitute misconduct and thus be considered by an approved regulator. However, it seems unfair that defendants can complain about their advocates, but victims cannot complain about lawyers on prosecuting side. There is also no innate competing interest between prosecuting lawyers and victims and witnesses. Furthermore, this scenario is a useful place to remind ourselves that compensation is only one type of remedy that

the Legal Ombudsman can award. Ordering a lawyer to apologise to a victim or witness for their behaviour could well be an appropriate course of action here.

## Non-contentious matters

- 3.21. Poor service does not only arise in cases involving opposing parties in an adversarial setting, but may also occur in non-contentious matters where both the client and the third party suffer detriment. Examples can occur in conveyancing, such as the seller's lawyer losing some paperwork or giving bad advice on a query about title. In such situations, both seller and buyer may suffer equal detriment as a result of an identical mistake, but currently only the seller has a right of redress. This is iniquitous and creates weak incentives for high standards of work in relation to third parties.
- 3.22. The Scottish Legal Complaints Commission (SLCC) can act in such circumstances, but the Legal Ombudsman operating in England and Wales cannot. The key feature to note in the SLCC's arrangements is that they can only accept third party complaints when the client has also suffered detriment (although it is not necessary for clients to complain). This is designed to prevent spurious complaints, although this would seem overly restrictive for the Legal Ombudsman given it already has powers to dismiss frivolous and vexatious complaints without investigation.
- 3.23. Keeping the affairs of clients confidential is one of the professional principles in the Legal Services Act. The approved regulators are rightly putting increased pressure on law firms to minimise risk and ensure compliance with rules on data security. During the course of their work, lawyers are provided with personal information relating to third parties in transactions. This can be contact information but also sensitive details about their personal circumstances, which could have a big impact if these are disclosed or fall into the wrong hands. Of course, as recognised by data protection rules, it is vital that lawyers properly protect this information, by ensuring that information is held securely and is not passed to others without the consent of the individuals concerned (unless certain exemptions apply). The Information Commissioner's Office can investigate potential rule breaches and penalise

wrongdoers, but it cannot award redress to people whose personal information has been compromised. The Legal Ombudsman can award redress in relation to a lawyer's client, but not if the victim is a third party. We note that two per cent of its caseload in its first six months was complaints about papers not being kept safe.

3.24. There have been data security problems within the legal services market and the growth of the digital economy means this is a growing area of consumer detriment. Moreover, other features of the legal services market, such as referrals of work and outsourcing, make breach of data security an ongoing risk. In relation to referrals, a key issue is whether someone has consented to their details being passed on as leads to law firms – this is pertinent as complaints about claims management companies could potentially be brought within the Legal Ombudsman's jurisdiction. In 2011, the Justice Select Committee called for the Information Commissioner to be given powers to carry out data audits to address such problems. In one case, the Information Commissioner fined a claims management company employee for obtaining patient details from his girlfriend who worked in an NHS walk-in centre and then passing these on as leads to a law firm.

3.25. Data breaches can be inadvertent, although this may be of little comfort to those affected. The Information Commissioner fined A4e £60,000 for losing clients' personal data after the personal details of 24,000 clients were lost when an unencrypted laptop was stolen. In a similar case, the stolen laptop of a Scottish advocate contained personal data relating to a number of individuals involved in eight court cases. This included some details relating to the physical and mental health of individuals involved in two of the cases.

## Where there's a will

3.26. The Legal Ombudsman may already accept complaints from beneficiaries of a will where the lawyer acts as a personal representative or trustee in relation to the deceased's estate. The volume and nature of complaints received by the Legal Ombudsman about probate and estate administration activities in its first year shows the value of this inclusion within the scheme's jurisdiction. The Panel's

analysis of a sample of complaints identified a series of issues around delay, poor communication and costs. The detriment that can result is often severe, involving large sums of money, but also some very human consequences – stress, ill health and fractured personal relationships – which are difficult to repair.

- 3.27. However, while the Legal Ombudsman can provide redress to beneficiaries who have suffered detriment due to poor service by a lawyer administering an estate, it cannot currently act should those same beneficiaries suffer detriment, notably a loss of inheritance, due to a defective will. Strangely, the Legal Ombudsman could act if the testator (the client) complained about a poorly drafted will, but not if the errors are spotted only after the testator's death by their intended beneficiaries (the third parties). Although damage to the testator is likely to be limited to the cost of preparing a new will, the intended beneficiaries could lose out on substantial sums of money and the intentions of the testator may be frustrated. In a worst-case scenario, should a defective will be declared invalid the intestacy rules then determine who gets what.
- 3.28. The Panel's investigation into will-writing identified that the vast majority of clients whose wills had been prepared by solicitors were happy with the quality of their will, but in a mystery shopping exercise one in five wills prepared by solicitors was failed by an independent panel of expert assessors. This highlights the difficulty consumers have in judging the technical competence of their lawyer's work. In addition, the highly personal nature of making a will heightens the risk of non-discovery of problems, since clients may understandably prefer not to share the document with others, such as relatives to seek feedback.
- 3.29. There are legal remedies open to intended beneficiaries, but they are out of the reach of many people due to the high costs of going to court. Moreover, all probate claims are due to be removed from the scope of legal aid. Although any legal costs may come out of the estate, the 'loser pays' principle still applies – should the case be lost the litigant will normally pay the costs of both sides. This is likely to be a strong disincentive for intended beneficiaries to seek to bring claims. In his major

review of the costs regime, Lord Justice Jackson highlighted that, as in *Jarndyce vs Jarndyce*, the legal fees can rise to the extent that these exhaust the estate.

3.30. The Legal Ombudsman understandably steers clear from complex disputes about negligence, and we recognise that it would not be appropriate for it to intervene in disputes between family members. However, the Panel's will-writing investigation showed that problems with wills are often due to sloppy mistakes – such as the document not being properly signed or witnessed, names being misspelt, or omission of standard clauses – yet which may still not be spotted until it is too late to fix them. Given that the Legal Ombudsman can already act in such cases if problems are identified by the testator in their lifetime, we consider it should also be possible for beneficiaries to bring complaints. Indeed, the costs of going to court mean this might offer the only realistic prospect of getting justice.

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3.31. Extending the Legal Ombudsman's jurisdiction in this area would not create new legal rights for consumers. In *Ross v Caunters* (1980), the court decided that solicitors were held to be liable to a group of beneficiaries under a will for having failed to warn the testator that the will should not be witnessed by the husband of one of the intended beneficiaries. When the disappointed beneficiaries under the ineffective will sued the solicitors, they admitted negligence but argued that the only duty they owed was to the testator. However, Megarry VC held that a duty of care was owed to the beneficiaries as well, since there had been sufficient proximity between the solicitors and the beneficiaries, who in effect had relied on the solicitors' legal expertise to create a valid will. The House of Lords re-affirmed this decision in *White v Jones* (1995), where it held that by accepting instructions to draw up a will a solicitor thereby entered a 'special relationship with those intended to benefit under it' and this, in consequence, imposed a duty on the solicitor to 'act with due expedition and care' on behalf of the beneficiaries.

## Groups of consumers

- 3.32. Lawyers sometimes act in situations where multiple numbers of people are affected by their work, but the contractual relationship is between the lawyer and a single party thus preventing other parties from complaining to the Legal Ombudsman.
- 3.33. A hypothetical scenario is when flat-owners are invited to extend their lease because the low expiry period is reducing the potential sale value of the property. They decide to arrange the legal work collectively through their residents' association (which then becomes the lawyer's client) rather than each separately engaging their own lawyer. It makes sense, in terms of convenience and cost, for all the parties – the leaseholders, landlord and managing agents, the law firm – to arrange the legal work collectively rather than individually through different firms. However, by doing so the leaseholders may be unwittingly sacrificing their right to complain directly to the Legal Ombudsman. They may achieve redress if they can persuade the residents' association to complain on their behalf, but the association's members may not be willing to do this.
- 3.34. At least in the situation above the parties are known to each other and so there is some prospect of an informal resolution to the complaint, but there are other times where this is not the case. A potential scenario is the legal work on a corporate insolvency where the insolvent company's customers have paid cash in advance for goods not delivered. The customers then have the status of unsecured creditors and must wait in line to receive their share of the company's remaining assets, which happens once creditors further up the chain have been paid. Especially during recessions, it is all too common for consumers to find themselves out of pocket due to a sudden business failure. As the unsecured creditors are near the bottom of the queue, the sum recovered is often a tiny fraction of that paid. These things make it important to minimise the legal fees in the administration and to ensure the legal work progresses quickly so that the customers can be speedily reimbursed. However, should the lawyers, for example, give poor information about costs, or cause undue delay, there is no route for unsecured creditors to complain

since they are considered to be third parties. In this scenario, the administrator or equivalent has the status of client.

3.35. The Insolvency Service is consulting on whether to establish a complaints-handling body for insolvency practitioners. There is a desire to extend the jurisdiction of an existing scheme rather than to create a new bespoke organisation. Solicitors may be regulated as insolvency practitioners and already fall under the Legal Ombudsman's jurisdiction, but consumers using other types of professional currently lack access to an independent ADR scheme. The Legal Ombudsman has stated it is willing to consider being the home for such a function due to the overlap between the work of lawyers and insolvency practitioners.

## 4 Comparisons with other jurisdictions

- 4.1. The Legal Ombudsman would not be alone in accepting third party complaints if its jurisdiction was extended. Complaints bodies in some other jurisdictions already deal with these, although it is difficult to make direct comparisons due to differences in the types of complaints accepted by schemes, i.e. service and misconduct.

### In legal services

- 4.2. The Scottish Legal Services Commission may receive a complaint 'by or on behalf of any of the persons (including any person who appears to the Commission to have been directly affected by the suggested inadequate professional services) suggesting that professional services provided by a practitioner in connection with any matter in which the practitioner has been instructed by a client were inadequate'. Since opening on 1 October 2008, up to 31 March 2011, it had received 305 eligible third party complaints, of which 76 related to service issues.
- 4.3. In Ireland, the general rule is that complaints can only be made by or on behalf of a client about their own solicitor. However, there are exceptions, for example the Law Society can deal with a complaint if the consumer's own solicitor endorses their complaint or if the complaint is made by beneficiaries of an estate.
- 4.4. In Australia, the Legal Services Commissioner in New South Wales deals with complaints by 'opposing clients'. In 2009-10, it received 452 such complaints out of a total caseload of 2,661 (14%). However, there is a reform project which may lead to the creation of a national ombudsman scheme to deal with consumer and conduct complaints. A complaint is to be defined as any dispute or issue between a person and their lawyer relating to the provision of legal services to the person. Therefore, it appears that third party complaints may not be permitted in future.

## Outside of legal services

### 4.5. Outside of legal services, other ombudsman schemes accept third party complaints:

- Financial Ombudsman Service – a complaint may be brought on behalf of a deceased person who would have been an eligible complainant; by a person who is a beneficiary of, or has a beneficial interest in, a personal pension scheme or stakeholder pension scheme; a person for whose benefit a contract of insurance was taken out or was intended to be taken out with or through the respondent; a beneficiary under a trust or estate of which the provider is trustee or personal representative; and by employees covered by a group permanent health policy taken out by an employer, which provides in the insurance contract that the policy was taken out for the benefit of the employee;
- Pensions Ombudsman – may accept complaints from a spouse or dependant of a deceased member or former member of a pension scheme and a person appointed to act on behalf of the estate of someone who was a member or beneficiary of a pension scheme who has died;
- Ombudsman Services: Communications – can accept complaints about problems resulting from consumers switching between companies;
- Ombudsman Services: Energy – can deal with problems resulting from consumers switching gas or electricity supplier and problems resulting from an energy company's sales activity;
- Ombudsman Services: Property – estate agents act on behalf of sellers, but buyers may also complain about poor service; and
- Property Ombudsman – may deal with unresolved disputes between sales and letting agents and consumers who are actual or potential buyers or sellers or landlords or tenants of residential property in the UK.

# 5 Issues

- 5.1. Should it be decided that the Legal Ombudsman's jurisdiction can be extended to include third party complaints, there are a series of issues around implementation that it would need to consider. An in-depth examination of these is beyond the remit of this paper, but we list some here to stimulate discussion.

## Parameters

- 5.2. Decisions will have to be taken on which types of third party complaint should be permitted and which should remain ineligible.
- 5.3. The Legal Ombudsman's consultation suggests four options:
- Leave the provisions in the rules as they are now;
  - Write the rules to specify circumstances where third party complaints can be looked at by the Legal Ombudsman;
  - Write the rules to specify that where there is a duty of care to the person complaints can be looked at by the Legal Ombudsman; and
  - Write the rules to specify that all third parties can be looked at by the Legal Ombudsman.
- 5.4. It is certainly not our view that consumers should be able to make third party complaints about poor service to the Legal Ombudsman in every situation. However, we do think that the present system is a crude one, as it prevents most third party complaints, so that innocent parties with legitimate grievances are shut out from seeking redress (unless they go to court). A better approach would be to reverse the presumption, so that the Legal Ombudsman may accept third party complaints about poor service but exclude those in certain prescribed categories.

- 5.5. Such an approach would be more consistent with the definition of consumer<sup>1</sup>, as opposed to complainant, used in the Legal Services Act. As well as users or potential users of legal services, it embraces those ‘who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons’ and those ‘who have rights or interests which may be adversely affected by the use of such services by persons acting on their behalf or in a fiduciary capacity in relation to them.’
- 5.6. It is unlikely to be possible for the Legal Ombudsman to predict all possible examples of legitimate complaints, so in our view a permissive and principles-based approach is likely to work better, but one which is framed in a way that affords certainty for lawyers and consumers. Our analysis suggests there is justification for a broad third party jurisdiction with only limited types of situations, such as in some opposing client scenarios, being refused.

## Confidentiality

- 5.7. The Legal Ombudsman may need to obtain information about the lawyer’s client in order to adjudicate on a third party complaint. It would need to ensure its procedures maintained client confidentiality. In particular, it would have to ensure that its communications with the third party complainant do not reveal information that could infringe this principle. In practice, this may mean that the complainant is not able to be told all the information on which the Legal Ombudsman has made its decision. This is not ideal, but it is better than having no opportunity to get redress.

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<sup>1</sup> Section 207 of the Legal Services Act 2007

## First-tier complaints

- 5.8. Consumers must currently exhaust the lawyer's internal complaints process before being able to complain to the Legal Ombudsman. However, as demonstrated in Annex 1, codes of conduct do not usually oblige lawyers to consider complaints from anyone except clients. It would not be necessary to amend codes straightaway as the Legal Ombudsman could rely on the existing provision in its scheme rules that allows it to make an exception to the first-tier complaints requirement. However, in the longer-term it would make sense to harmonise first and second-tier complaints arrangements.

## Making decisions binding

- 5.9. It is possible to foresee that lawyers may be less likely to honour remedies awarded by the Legal Ombudsman when they do not have a relationship with the third party complainant. However, the principle that ombudsman decisions are binding would remain and so allow complainant's to enforce decisions. The prospect of the lawyer being found in contempt of court for refusing to cooperate with the Legal Ombudsman, or being exposed under the Legal Ombudsman's publication policy, would act as a deterrent. Failure to honour remedies would also be a breach of code of conduct duties to co-operate with Legal Ombudsman investigations and could therefore result in disciplinary proceedings being brought.

## 6 Conclusions

- 6.1. The Legal Services Consumer Panel's interest is to protect the interests of consumers who have suffered harm due to poor service by a lawyer. There are many situations where it is not just the lawyer's own client who is affected, but third parties as well. This can involve significant financial and personal consequences for those involved.
- 6.2. It would not be appropriate to allow third parties to complain in every situation, for example in some opposing client relationships. However, the current rules are designed the wrong way around as they exclude all cases. This serves only to deny people who have legitimate grievances the opportunity to seek redress.
- 6.3. The absence of a right to redress for third parties denies lawyers the chance to learn from complaints and does little to create good incentives for fair market behaviour. It also frustrates government policy to promote ADR since it forces consumers to pursue their case through the courts – although many will lack the financial means to do so, which in turn affects access to justice.
- 6.4. This paper is designed to draw attention to the significant detriment that is (and will continue to be) suffered by third parties and seeks to make a convincing case for access to redress through the Legal Ombudsman. It does not seek to propose a blanket case for all third party complaints, but is designed to provoke discussion on where the boundaries of third party complaints should be drawn. The paper also recognises the need to consider and debate a number of issues that will arise from extending the Legal Ombudsman's jurisdiction to include third party complaints.
- 6.5. We would be interested to hear from anyone with views on these issues.

# Annex 1 – Existing code of conduct duties

## Bar Standards Board

(Guidance section)

### Non-client complaints

“The Legal Ombudsman will only deal with complaints from consumers of lawyers' services. This means that only complaints from the barrister's clients fall within the Ombudsman's jurisdiction. This does not mean that non-client complaints should not be investigated by Chambers. Some non-client complaints, such as discourtesy, may be capable of resolution by Chambers. However, the BSB recognises that Chambers' ability to resolve many kinds of non-client complaints is limited and that they are more suited to consideration under the disciplinary processes of the Bar Standards Board. Accordingly, if Chambers feel that the issues raised by non-clients cannot be satisfactorily resolved through the Chambers complaints process they should refer the complainant to the Bar Standards Board.”

## Costs Lawyer Standards Board

None

## Council for Licensed Conveyancers

None

## Faculty Office

None

### **ILEX Professional Standards**

A guidance document makes clear that anyone can make a misconduct complaint, but there is no mention of service complaints by third parties.

### **Intellectual Property Regulator**

None

### **Solicitors Regulation Authority**

Chapter 11 of the Handbook covers duties relating to third parties, but there is no mention of service complaints by third parties.

**The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.**

### **Consumer Panel Members**

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Jeff Bell

Graham Corbett

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