

Alison Robinson
Office for Legal Complaints
sent by email

2 December 2009

Response to OLC consultation: Draft scheme rules

Dear Alison,

The Legal Services Consumer Panel is pleased to respond to the Office for Legal Complaints' (OLC) consultation exercise on draft scheme rules. The OLC consulted informally about scheme rules during the summer, to which I responded in a personal capacity, as by then the Panel had not been formally constituted.

We agree with the vast majority of the proposals, which have benefited from earlier informal consultation. Below, we briefly highlight areas that we particularly support, or where we have concerns, following the order they appear in the consultation document.

Structure of the scheme rules

We strongly support the emphasis throughout the draft scheme rules on the use of informal resolution. An ombudsman service contributes to improving access to justice for consumers by providing a quicker, cheaper and less formal alternative to the courts. It would therefore be entirely wrong to replicate a courtroom environment just because this is what lawyers are familiar with.

In-house complaint handling

Quick, fair and effective in-house complaints procedures will ensure that consumers receive due redress as soon as possible. It will also help lawyers to improve their service by learning from client dissatisfaction. However, the evidence suggests this is a current area of weakness in parts of the profession. In the case of solicitors, the high caseload of the Legal Complaints Service (one complaint for every six solicitors in England and Wales) suggests that too many firms fail to deal properly with complaints. In the case of barristers, the Behrens Review found low use

among barristers of local resolution to deal with complaints. The Review concluded this resulted in some complaints being considered by the regulatory authority when they could have been resolved in Chambers.

The consultation has to some extent been overtaken by events, as the LSB has decided to introduce a rule using its powers under section 112 of the Act making it clear to consumers that they have a right to complain and to whom. The LSB has also indicated it wishes to work with approved regulators and others to reach agreement on effective complaints handling outcomes without having to use its statutory powers to impose requirements. As a body that has the opportunity to observe first-tier complaint handling at close hand, the OLC is well placed to assist the LSB and its partners to identify such outcomes.

Who can complain?

We agree with proposals on the jurisdiction of the scheme, including making clubs, associations and societies eligible complainants, in addition to micro-enterprises, small charities and trusts as originally proposed. This is consistent with the spirit of the Legal Services Act, which recognised the many different types of consumer of legal services. The Consumer Panel has interpreted its own remit in this context, by choosing to prioritise those consumers who are less able to give voice to their own interests. The above categories of consumer, alongside individual retail consumers, are most likely to meet this principle, but there may be others. We hope the OLC will use its discretion on a case-by-case basis to consider other types of complainant, who may be similarly disadvantaged because they do not have deep enough pockets to access other avenues of redress.

However, we would urge the OLC to rethink its definition of a small charity. The current definition appears to mirror that for a small business, but the circumstances of charities are very different. A definition of a small charity needs to consider both annual income and net asset value as they could have a small annual income and high net asset value, or vice versa. Further, the nature of work of charities means that their income and asset value may fluctuate quite significantly over a relatively short time period, so a charity could find itself moving in and out of scope of the OLC's eligibility criteria. The Consumer Panel contains members with significant experience of working in the third sector and we would be happy to explore these issues with you in more detail.

Similarly, the OLC should consider an extension of its remit to trustees of a trust with a higher net asset than £1 million. We can foresee examples of when inexperienced individuals can suddenly have large assets to hold on trust, for example as an executor of a will with property to dispose. They would not be covered by suitable complaints systems, yet would be accountable to the final beneficiary for the good management of the fund.

We are pleased the OLC will ask the Lord Chancellor to include personal representatives and beneficiaries of estates as eligible complainants. However, the OLC should be able to consider complaints from all persons who are indirectly affected by the actions of a lawyer, as well as direct

purchasers of legal services. An example is where poor legal work on a remortgaging transaction leads to consumer detriment, but the purchaser of the legal advice is the consumer's bank rather than the borrower. Another example is a witness who suffers undue stress due to the lateness or abusive behaviour of a barrister. Focusing narrowly on the client with whom the lawyer has a contract misses the point; if someone suffers harm due to the actions of lawyer, they should be entitled to secure redress.

Finally, we are pleased that the draft scheme rules will allow others, such as a guardian or carer, to act on behalf of a complainant. This measure will be of particular benefit to vulnerable consumers.

Excluded complaints

We are pleased that the OLC has not identified any classes of complaint that it should exclude absolutely. A weakness in the current arrangements is that the Legal Complaints Service does not accept negligence cases. As the consultation document points out, the key issue is not about the type of complaint, but instead whether the case is of such complexity that it would be better dealt with in court. In nearly all circumstances the speed, cost and informality of the ombudsman service will make this a superior option for consumers compared to going to court, so it is important to reflect this in the scope of cases eligible for consideration.

Revised time frames for bringing a complaint

We are satisfied with the eight week maximum period firms have to resolve a complaint before a consumer can refer it to the ombudsman service. In addition, it would be sensible to allow consumers to refer the complaint before the eight weeks once a firm acknowledges there is no prospect of resolution by issuing a 'deadlock' letter. This would mirror arrangements in other ombudsman schemes such as energy and telecommunications. There seems little advantage for anyone to have to wait until the full eight weeks has expired before a complaint can proceed. We think the proposed scheme rules as drafted would technically allow such a process, but this should be made explicit.

Following feedback to its informal consultation, the OLC now proposes that a consumer must have raised a complaint with the ombudsman service within a year of them reasonably knowing there was a cause for complaint. We are largely content with this revised proposal, subject to two caveats explored below, as the critical issue is when the consumer realises there is a problem, not when the problem occurs. Nevertheless, the OLC must maintain discretion to waive this rule if it would have been unreasonable for a consumer to have raised a complaint within this period.

The first caveat concerns how the ombudsman will decide when a consumer should 'reasonably have known there was a cause for complaint without taking advice from a third party'. Where the answer to this test is unclear, it is essential that consumers are given the benefit of the doubt. The law is a complex field and it can be difficult for consumers to determine who is to blame when something goes wrong. For example, in a

conveyancing case it may be unclear whether responsibility lies with the surveyor or the lawyer.

Our second concern is that the consumer must refer a complaint to the *ombudsman service* within one year of knowing there was a cause for complaint. Instead, the rule should require the consumer to refer a complaint to either an authorised person or the ombudsman service within this time period. Whilst consumers may refer a complaint to the ombudsman service after eight weeks, they may choose not to exercise this right if they consider a resolution at first-tier level remains possible. Requiring consumers to refer a complaint to the ombudsman service alone would discourage local resolution or provide consumers with a narrow window to access the ombudsman scheme once they had decided there was no longer a good prospect of local resolution.

Arrangements with approved regulators

Schedule 15 of the Act allows the OLC to make arrangements with approved regulators if it would like their assistance in the investigation or consideration of a complaint. As the OLC will know, this was one of the most hotly contested issues during the passage of the legislation. The Act achieved a compromise that met consumer concerns that their complaints about lawyers should be handled independently of lawyers, whilst enabling the ombudsman to access the expertise held by approved regulators on a case-by-case basis.

We would expect the OLC to seek such assistance rarely, since it should develop the necessary expertise to resolve most types of complaint. Given the sensitivity over this issue, it is vital that any such arrangements that the OLC enter into operate with maximum transparency. The details of these arrangements should be included in the OLC's annual report and published on its website. Individual complainants should be informed if the OLC has sought the assistance of approved regulators about their case.

'Dismissal' of complaints

It is important that the ombudsman service is accessible, which includes avoiding the use of language that complainants find off-putting. For example, 'dismissal' comes across as an unnecessarily high-handed word which suggests the complaint has no merit, when in fact there are a range of reasons why it is decided not to consider a complaint. A softer term might simply be: 'grounds for deciding not to consider a complaint'.

Case fees payable by legal practitioners

The Panel has responded separately to this consultation and will not expand on the points here. In summary, we recommended that the OLC derive a larger proportion of its income from case fees, in order to have a greater impact in shaping lawyers' behaviour. We also proposed a flat fee for all cases except those where the lawyer insists upon a final ombudsman decision, which should attract a higher fee.

Other

The draft scheme rules cover the 'nuts and bolts' of running an efficient ombudsman service. However, an ombudsman adds value by using the intelligence from complaints and other mechanisms to help raise standards across the industry it operates within. The OLC is right to focus initially on getting the right complaint handling processes in place, but we hope it will soon explore this second part of an ombudsman's role. The earlier that the OLC begins its thinking in this area, the easier it will be to ensure that the processes it is building support this wider role.

Thank you for the opportunity to comment on this document. Should you require further information, please contact Steve Brooker (Consumer Panel Manager) at steve.brooker@legalservicesconsumerpanel.org.uk or 020 7271 0077.

Yours sincerely

A handwritten signature in black ink that reads "Dianne Hayter". The signature is written in a cursive, flowing style.

Dr Dianne Hayter
Chair, Legal Services Consumer Panel