September 2012

Legal Ombudsman scheme rules revision

LEGAL OMBUDSMAN

1. Introduction

In March 2012, with the benefit of eighteen months operational experience of the Legal Ombudsman, the Office for Legal Complaints (OLC) reviewed the scheme rules. When the rules were first formulated, the OLC made a commitment to revisit them after this timeframe, and a review seemed timely in light of changes in the legal sector, the experience the Legal Ombudsman has gained to date, and potential changes to our jurisdiction. The OLC also wanted to ensure that the rules continued to promote and protect the interests of consumers in line with the regulatory objectives.

Changes to the definition of the people who can use our scheme must be made by the Lord Chancellor through an order under section 128 (4) (d) of the Legal Services Act 2007 (the Act)[1] in accordance with a recommendation under section 130, and changes to the award limit mentioned in section 138 (1) must be made by the Lord Chancellor through an order under section 139 of the Act.

Other changes are made by the OLC through rules under section 155 of the Act. These changes require the consent of:

1. the LSB; and
2. in relation to 'case fees', the Lord Chancellor.

2. Regulatory objectives and the Ombudsman Association's principles of good complaints handling

When considering whether the proposals should be adopted we have taken into account how they fit with the regulatory objectives described in Section 1 of the Legal Services Act 2007 and the Ombudsman

[1] http://www.legislation.gov.uk/ukpga/2007/29/contents

Association (OA) principles for good complaints handling[2]. Section 116 of the Act asks that the OLC have regard to good practice in other Ombudsman schemes and are mindful of the regulatory objectives.

The OLC took into account the principles of the OA. These say that good Ombudsman schemes should:

1. establish measures to feed back information and systematic advice;
2. give feedback to organisations on their performances at periodic intervals;
3. be aware of the wider public benefit that they can provide, including adding value for stakeholders such as by holding organisations to account for the ways in which they deal with people and respond to their complaints; and
4. ensure that learning is widely spread across the sector and generally raise standards.

The OLC developed some principles to guide this consultation which provided a framework for how the proposals should develop. These principles were included in the consultation and we invited stakeholders to comment on their suitability.

The principles were:

1. revisiting areas of the rules which have proved problematic in view of the experience of operating the scheme in practice;
2. making sure changes are consistent with the possibility of establishing a voluntary jurisdiction in the future or taking on claims management complaints;
3. harmonising with other Ombudsman schemes, particularly the Financial Ombudsman Service. This is in response to changes in the market/regulatory environment where the boundaries between legal and professional services are becoming increasingly blurred;
4. using evidence to inform changes.

These principles were broadly supported by stakeholders. The majority of responses either supported the principles or did not comment.

[2] http://www.ombudsmanassociation.org/docs/BIOAGoodComplaintHandling.pdf

When we initially developed our scheme rules, we looked to other Ombudsman schemes for examples of best practice. The Financial Ombudsman Service's scheme most closely echoed our jurisdiction and legislative footing.

Since we began operating in October 2010, it has become increasingly apparent that the traditional sectoral approach to professional services is eroding and therefore boundaries between our service and other Ombudsman schemes, particularly FOS, are blurring. We therefore took it as one of the principles governing our approach to look for opportunities to harmonise our approach with other similar schemes. Some of our proposed changes are prompted in part by this principle.

In their totality, we believe that our proposals to change the scheme rules will support the regulatory objectives. Widening our jurisdiction to include prospective customers and increasing time limits, for example, will improve access to justice and protect the interests of customers. There is a public interest argument for increasing the financial limit as our service is a cheaper alternative to the courts. Abolishing the free cases for firms will continue to encourage good complaints handling at the first tier. In addition the removing the free cases will lead to an increase in income generated by the case fees and a corresponding decrease in the amount borne by the regulators through the levy. We expect case fee income to increase from 2% to 11% which equates to a £1.4mn decrease in the levy.

3. Changes the OLC has decided not to recommend at this time

In addition to the proposals below, the OLC consulted on the suitability of the £1 million financial/asset limit for charities and trusts; and whether provision should be made to allow third party complaints.

The OLC have decided that at this time it would not be appropriate to change the financial limit for charities or trusts. The OLC appreciates that charities with higher incomes are unable to use our scheme and may also be unwilling to use donated income for court action. However, we have seen little evidence from charities themselves – or from stakeholders – that this is a concern from them and research commissioned by the Legal Services Consumer Panel[3] has shown that the vast majority of charities already fall under our jurisdiction. The current limit is consistent with that which applies to the Financial Ombudsman Service.

In regards to third party complaints, the OLC has decided not to make a recommendation to LSB or the Lord Chancellor at this time. However, the OLC have agreed in principle to the creation of a list of specific circumstances where we would accept complaints about third parties. No change will be proposed or implemented until the next iteration of the scheme rules but we will work with stakeholders – particularly the LSB, the Legal Services Consumer Panel and approved regulators – over the coming months to create a specimen list for the next consultation. This list will comprise of third party complaints where there is no conflict of interest between the complainant and the person who engaged the authorised person. This would exclude, for example, complaints by litigants against the opposing party's lawyer.

4. Implementation of changes to the scheme rules

The intention of the OLC is to implement the proposed changes to the scheme rules by 1 January 2013 (subject to Lord Chancellor's approval). The exception to this will be the proposed changes to the case fee structure which potentially would be implemented from 1 April 2013, in line with the Legal Ombudsman's financial reporting year.

The OLC have proposed to the Lord Chancellor changes to those eligible to use the scheme and a change to the award limit. If the Lord Chancellor agrees, orders will be laid in parliament. If these amendments are approved a further announcement will be made before the end of the year.

The OLC have adopted the other changes and presented them to the LSB for their approval. Approval will also be required from the Lord Chancellor in relation to the case fee changes.

4. Chapter 1: Introduction and definitions

Amendments to chapter 1 reflect the introduction of alternative business structures, and changes in the identities and names of authorised regulators. This involved changes to paragraphs 1.1, 1.7 and 1.8.

In our consultation, we asked two questions related to this chapter:

i. *"Do you have any views on these proposed changes to the scheme rules?*
ii. *"Are there any additional changes to Chapter 1 that in your view are necessary?"*

Consultation responses:

In response to the first question, there were no objections to the proposed changes and several respondents noted that these are consistent with Alternative Business Structures (ABS) entering our jurisdiction.

In response to the second question, the Chartered Institute for Legal Executives (CILEX) requested that "chartered" should be inserted before any mention of themselves or their practitioners to reflect their recent acquisition of chartered status.

The OLC has decided to make the proposed changes to the drafting of chapter 1 of the scheme rules.

We agree that the changes requested by CILEX are appropriate and have therefore inserted the word “chartered” where CILEX and their practitioners are mentioned.

5. Chapter 2: Who can complain about what?

These specifications are largely prescribed by section 128 of the Legal Services Act, with power for the Lord Chancellor to make changes by statutory instrument.

Prospective customers

In our consultation, we asked:

“Do you agree with our proposal to bring our service in line with other Ombudsman schemes and accept complaints from prospective customers?”

Background:

When the OLC created the first scheme rules, we recommended to the Lord Chancellor that in some cases it would be appropriate for people other than those who have directly engaged a lawyer to be able to complain to the Legal Ombudsman. The Lord Chancellor agreed and made orders under section 128 of the Act to allow beneficiaries of wills and personal representatives to use our scheme.

Since we launched in October 2010, it has become apparent that there are further people, other than the individual who engages the lawyer, who arguably should have access to redress for losses caused by poor legal service.

Currently under the scheme rules a complainant has to have actually received a service from a legal provider before the Legal Ombudsman

can accept a complaint for investigation. However, there are two important situations where consumer loss as a result of a service provision failure can be recognised by the relevant regulator as misconduct but the complainant cannot seek redress for that loss.

The first of these is when a consumer is unreasonably refused a legal service; for example, we recently received a complaint from a member of the public who felt that she had been discriminated against by a law firm who refused to take on her case because she had undergone gender reassignment. We could not investigate the case because the complainant had not actually received any service from the lawyer.

The second situation is when a consumer feels that they have been unreasonably and persistently offered an unwanted service by a legal provider; for example, where an authorised person continues to make unsolicited phone calls to a consumer despite being asked to stop the calls.

Another reason for consulting on this change is to future proof our scheme in anticipation of changes in the legal sector. ABS and other market changes mean that the legal sector is becoming increasingly commoditised and competitive marketing techniques are becoming more common place. These practices are already evident in the claims management sector and we consider it prudent to prepare ourselves for complaints from people reporting aggressive marketing practices; particularly, as the Ministry of Justice have recently announced that our jurisdiction will be expanding to include claims management companies.

In the future we are likely to accept complaints about ABS firms which cross jurisdictional boundaries with the Financial Ombudsman Service (FOS). FOS can currently accept complaints from prospective consumers and it would make sense to harmonise our rules with FOS to ensure that a comprehensive system of redress is in place.

Consultation responses:

Agree: Legal Services Consumer Panel, Which?, Solicitors Regulation Authority

Supporters of this amendment emphasised the importance of covering prospective clients in light of future developments, particularly the expansion of our jurisdiction to cover claims management, which has since been announced by the Ministry of Justice. Some suggested that it is in the public interest for the Legal Ombudsman to be available to people who are impacted by actions of a lawyer, even if they have not engaged the lawyer.

Respondents argued that the current measures – for example, reporting issues to regulators – fail to encourage people to report poor service as there is no redress available for prospective customers. They also felt that recourse for members of the public to the Legal Ombudsman could provide a deterrent against undesirable sales techniques.

"Allowing such complaints should serve as an important deterrent against cold-calling and other undesirable sales techniques" (Legal Services Consumer Panel).

During one of the consultation events held, some of the representatives from professional indemnity insurance companies expressed surprise that prospective customers are not already covered by the Legal Ombudsman. Regulators were keen to work in partnership with the Legal Ombudsman to share information and implement any changes.

Disagree: Council for Licensed Conveyancers, Law Society, Bar Standards Board

Some stakeholders were concerned that accepting complaints from prospective customers could create extra duties for lawyers. They were apprehensive that complaints from potential customers, who had been declined services for legitimate reasons, would be investigated. They also felt that sufficient arrangements already exist, allowing recourse to regulators, the Equality Act 2010, courts and tribunals. There was some concern from respondents that there is not enough evidence to support allowing complaints from prospective customers into our scheme and that it would be difficult to define “prospective customers”.

The OLC is confident that most of these concerns can dealt with through the scheme rules. We propose the rules are changed to allow prospective customers and that paragraph 5.7 is amended to allow the Legal Ombudsman to dismiss complaints where a service has been refused by a lawyer or firm for legitimate business reasons (for example, lack of capacity to handle the work or where there are concerns about money laundering).

The OLC recommend to the Lord Chancellor that Section 128 (d) be amended under Section 128 of the Act to allow prospective customers to use our scheme as this is the most relevant section of the Act.

Successor firms

In our consultation, we asked:

"*Are there any additional changes to Chapter 2 that in your view are necessary?"*

Background:

Section 132 of the Legal Services Act 2007 sets out protections for consumers when firms merge, divide or close and then reopen under new arrangements.

Section 132 (2) requires the Legal Ombudsman to make rules, "determining the circumstances in which, for the purposes of the Ombudsman scheme, an act or omission of a person ("A") is, where A ceases to exist and another person ("B") succeeds to the whole or substantially the whole of the business of A, to be treated as an act or omission of B."

Paragraph 2.10 of the scheme rules lays out the approach regarding successor practices. However, in practice there can be confusion by practices and regulators over what constitutes a successor firm.

To give the Ombudsman flexibility in determining which firms can be considered as successor firms, we proposed to add the following line to the end of the rule:

> *"Unless an Ombudsman decides that this is not fair and reasonable in the circumstances of the case."*

Consultation responses:

Many respondents did not comment on this proposal.

Agree: Society of Scrivener Notaries, Solicitors Regulation Authority

The SRA suggested that this change is desirable in light of changes to the legal sector, particularly ABS, as firms are more likely to rebrand and change their arrangements as legal practices are taken on by new enterprises.

Disagree: ILEX and IPS

Those who disagreed with the addition to paragraph 2.10 argued that it is not up to the Ombudsman to decide whether a firm is a successor or not and, in some cases, challenged the definition, stating that it does not take account the complexities of the law in relation to successor firms.

The Legal Ombudsman takes the view that it is Section 132 (2) of the Legal Services Act 2007 that provides the definition of successor firms. The amendment to the rules does not affect this definition, it allows us to dismiss cases if it fair and reasonable to do so. The OLC does not feel that sufficient evidence was provided to change this view.

The OLC has decided to adopt the addition to Chapter 2 paragraph 10 of the rules.

6. Chapter 4: When complaints can be referred to the Legal Ombudsman

In our consultation, we asked:
"*Do you agree with the proposed change so that complaints can be accepted up to six years from the event or three years from the knowledge of the event? Please provide evidence to support your view. If you think the current arrangements are problematic, please provide solutions you would find appropriate."*

Background:

There were both strategic and operational reasons for reviewing the rules regarding time limits. Strategically, with the onset of ABS, we were keen that time limits harmonised with other Ombudsman schemes, particularly the Financial Ombudsman Service (who can receive complaints about alleged poor service which happened up to six years ago or where the date of awareness was up to three years ago)[4] as it is very likely that we will see more hybrid cases covered by both schemes.

Operationally, since we opened in October 2010 a lot of time and resources have been spent resolving issues around time limits. In addition, the existing rule can be very restrictive as it only allows us to accept cases which exceed these relatively tight time limits under exceptional circumstances. Often, people have legitimate but not exceptional reasons for not complaining within a year.

We also took the review as an opportunity to look at how the rules work when someone dies with an outstanding complaint.

In the consultation, we offered five alternatives:

a. To clarify the drafting of 4.4 (which deals with the time since the complaint was made to the lawyer) without making any change of substance.
b. To amend 4.6 (which deals with the time limit from the date of awareness) so that if a consumer dies before referring the complaint to us, the time limit does not start again on their death.
c. To extend the time limits in 4.5 to six years from the date of the alleged poor service and three years from the date of awareness.

[4] DISP 2.8.2 of the FSA Handbook

[If these basic time limits were extended, it would not be necessary to proceed with alternatives D and E.]

d. If the time limits in 4.5 remain at one year, add a further one-year time limit running from the end of the lawyer's retainer [this would not apply if alternative C were adopted]
e. If the time limits in 4.5 remain at one year, extend the Ombudsman's discretion [this would not apply if alternative C were adopted].

Consultation responses:

Due to the range of alternatives offered, responses to the extension of the basic time limits were varied.

Agree: SRA, CLC, Consumer Panel and Which?

Support for this change came from both regulators and consumer groups who acknowledged that the current arrangements were unsuitable. Respondents thought that an extension would support consumers who may require more time because of their lack of knowledge of law, and would allow consumers to complain after a retainer has finished. They also thought it would take the pressure off the courts and that it would be helpful to harmonise our timescales with FOS in light of Alternative Business Structures.

Middle ground: BSB, Law Society, Society of Scrivener Notaries and some law firms.

These respondents agreed to an extension of the time limits; however, they preferred a two year time limit or one year from the end of a retainer. One of the main arguments for this approach was that we should be encouraging consumers to bring complaints as soon as possible.

"*It is an axiom of good complaints management that complaints should be raised as soon as possible after the event"* (Law Society).

These respondents did not think that there is enough evidence to support a change in line with other Ombudsman and courts.

Disagree: ILEX, Institute of Professional Will Writers and Association of Women Solicitors, some law firms.

Respondents raised concerns about how the change will work operationally, mentioning for example that timescales for misconduct referrals with some regulators are less than three years. They thought that this change could be unfair on practitioners who may have to change their policies for retaining files and thought that the change could impact on professional indemnity insurance premiums. Others had concerns about the resolution process, arguing that the change could make it harder to resolve complaints informally (although this argument was not fully explained) and that the change could compromise the simplicity of the Legal Ombudsman. A couple of respondents were concerned that the change would diminish ‘buy-in’ to the scheme on the part of the profession. Respondents commented that any additional costs for lawyers would eventually fall on the public through increased bills. There was also a suggestion that Pro Bono work may become unattractive.

We do not anticipate that this rule change would be difficult operationally. Where the date of awareness of the alleged poor service is less than a year we already accept complaints for investigation. This means that we routinely deal with older cases. Six years is the standard document retention requirement in many circumstances. 'If we receive a complaint where there is insufficient evidence on which to base an investigation and it is not reasonable to expect the firm to have held onto the records - for example, when the case is more than six years old - paragraph 5.7(k) of the scheme rules allows an ombudsman to dismiss the case where 'it is not practicable to investigate the issue fairly because of the time which has elapsed since the act/omission.

The OLC has decided to increase the time limits for making complaints to 6 years since the act or omission or 3 years since the date of knowledge.

In response to concerns expressed by stakeholders we will implement the six and three year time limits gradually. This means that from January 2013, unless there are exceptional circumstances, we will accept complaints where:

- the alleged poor service happened after 6 October;
- the date of awareness was after 6 October 2010.

The OLC also highlighted that a key reason for the change is the harmonisation with the courts and other Ombudsman schemes.

Finally the Board accepted that complainants should bring complaints as soon as possible.

7. Chapter 5: How the Legal Ombudsman will deal with complaints

In our consultation, we asked:

"What do you think our financial limit should be for compensation? Please provide evidence to support your view."

Background:

We decided to consult on raising this limit because – although, the majority of cases where we order compensation the financial value of the redress is less than £1,000 – we have had a number of cases where the upper limit of £30,000 has been insufficient. We feel that it would be in the interests of consumers to be able to access higher levels of redress through our scheme without having to go through the courts.

In the consultation document, we proposed a recommendation to increase our limit to £50,000 and we invited feedback from stakeholders.

Consultation responses:

Agree: Consumer Panel, Which?, BSB, CLC.

Respondents felt that an increase to £50,000 would be a step in the right direction and help to make LeO a viable alternative to the courts. Consumers groups thought that the limit should be in line with the Financial Ombudsman at £150,000.

"As the Legal Ombudsman is an alternative to court we therefore naturally favour a higher limit. On the other hand, we recognise that the Legal Ombudsman is not a court of law so higher value claims should be excluded. We consider the dividing line is better set at £150,000" (Which?)

Middle Ground: Law Society, SRA and some insurers.

These respondents supported the idea that awards could go over the current limit but did not go as far as supporting the proposed change. Suggestions were given such as keeping the current limit but having discretion to go further. One insurer said they already contest any order of compensation above the value of £20,000.

Disagree: Cost Lawyer Standards Board, and Association of Women Solicitors, some insurers.

Insurers said that some firms are already struggling with insurance premiums and a higher limit may increase financial pressures, some noted that it is consumers who ultimately pay the cost. Another respondent felt that high value cases should be resolved in court:

"Increasing the financial limits will invite more and more complicated complaints which would be better resolved in Court" (Association of Women Solicitors).

There was some concern that the higher the level of compensation on offer, the more our service would be open to abuse. Some critics thought that there was insufficient evidence to support an extension in the financial limit and others commented that £50,000 is equally as arbitrary as £30,000.

It is difficult to estimate the number of cases where remedies will exceed £30,000 but this is not surprising given that we advertise that the maximum level of compensation we can order is £30,000.

The Chairman of the Institute of Professional Willwriters submitted a personal response to this consultation. He commented that – if he was

covered by the Legal Ombudsman – he would prefer it if there was no financial limit at all. He stated that he would much rather go through the Legal Ombudsman than go through the expense of going to court.

We accept that there are cases which, for various reasons, would be better dealt with in court. We already encounter these cases and have mechanisms in place to identify and deal with them appropriately. However, there are also cases that have come to us which have not been too complex for our service to deal with and where consumers would have benefited from a higher level of compensation. Consumer organisations believe that the maximum level of financial redress available through our service should be higher; some other stakeholders, including law firms, thought it should remain the same. Our proposal of £50,000 seems to be a good compromise.

The OLC has decided to recommend to the Lord Chancellor that he makes an order under section 139 of the Act to amend section 138 (1) increasing the financial limit from £30,000 to £50,000.

8. Chapter 6: Case fees payable by authorised persons

In our consultation, we asked:

"Please express your preferences in relation to options one and two. Please explain your reasons."

Options:

1. Retain the current system
2. Remove or reduce the number of free cases allowed per annum.

Background:

We charge a case fee of £400 for each case we investigate. Currently, we allow a firm two free cases per year. In addition, where the

ombudsman is satisfied that the customer service was adequate and that any remedy offered was reasonable we waive case fees.

When we developed our existing scheme rules, we decided that the free cases would help to protect smaller firms who provide high risk legal activities. However, we have found that we waive many more fees than we anticipated (we initially expected to waive fees in 10% of cases; however for the financial year 2011/2012 we waived around 35% of case fees) and few firms or lawyers exceed the free case allowance.

In practice, we have found that the fee waiver rule covers smaller firms doing high risk activities as, if firms deal with complaints adequately at the first tier, the fee will be waived anyway.

Consultation responses:

The majority of responses favoured the option two, removing or reducing the free cases. The BSB thought that the number of free cases should be reduced and the Consumer Panel, ILEX, CLC, Law Society and the Cost Lawyers Standards Board thought that they should be removed altogether. Others were satisfied with the argument that there would not be an adverse impact on those operating in more contentious areas of law.

A few respondents preferred option one. This included the SRA and some individual firms. The SRA felt that the current system should remain as there was no evidence of a negative impact on consumers, and some felt the current system worked well. Two respondents did not go so far as supporting option two but stated that they were not averse to it.

It is clear that there is majority support for the removal of the free cases. Moreover, the rationale for the initial decision to introduce the free case policy is now not as convincing as it was. The profession has had a chance to gain confidence that case fees will be waived where entities have handled the complaint reasonably. The Legal Ombudsman therefore believes that the additional administrative complexity introduced by free cases is no longer required.

The OLC has decided to recommend to the Lord Chancellor that the free cases provision is removed.