Discussion paper

Access to redress for legal and other professional services
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Introduction

This discussion paper is intended to assist the Office for Legal Complaints (OLC) to consider the strategic direction of the Legal Ombudsman. We want the Ombudsman to remain modern and fit-for-purpose, and the timing seems right to debate where it needs to develop given a range of changes in our external environment as well as our own desire to ensure the Ombudsman remains a high quality customer facing service.

There are many issues that have prompted us to publish this discussion paper at this time. Of all the factors considered in this paper, it is the recent European Union legislation, which calls for all consumers to have access to some form of alternative dispute resolution for any goods or service purchased, that has focused us on beginning this conversation now. The timing of this legislation means that there is now an opportunity to take a more strategic view of how the Legal Ombudsman fits into the broader redress landscape. This paper considers the option of widening the Legal Ombudsman’s role in relation to alternative dispute resolution for all legal and other professional services, as part of a coherent overall framework for redress.

As part of this strategic discussion, we need to consider how our work abuts that of our fellow schemes. This is recognised across our sector; at the Ombudsman Association conference in May, there was general agreement about the need to simplify and rationalise our sector. The question that remains is how to do this in a way that does not replicate the problems of the past.

What underpins this paper is the idea that we should seek to help create a system that is accessible, transparent, effective and efficient both for consumers and for businesses. We are guided by two principles – the need for simplicity and for effectiveness in how redress is provided. Many consumers will not think about who provided a service or where the boundaries in definition lie. We know that legal services are increasingly becoming entwined with other professional services. This lack of clarity around regulatory boundaries can be problematic for consumers as well as for businesses which must grapple with more than one set of sometimes conflicting requirements if they operate in more than one sector.

With this in mind, we are seeking views from a wide range of stakeholders and look forward to what I hope will be a lively discussion. This paper seeks to promote debate to help us think what any changes could look like, both broad brush in terms of our overall role and also
specifically in relation to a voluntary scheme, before deciding whether to consult on the issue in order to make a case to the Lord Chancellor.

At the moment the Legal Ombudsman can help put things right for consumers only if service providers are regulated. For the reasons I touched on earlier, the Legal Ombudsman stands ready to consider widening its role in relation to alternative dispute resolution for all legal and other professional services, as part of a coherent overall framework for redress. I look forward to hearing your views about this important topic.

Elizabeth France CBE, Chair of the Office for Legal Complaints

This discussion paper and how to respond

This discussion paper will be of particular interest to:
- those who provide legal services (whether or not they are authorised legal practitioners);
- those who provide other professional services;
- consumer groups;
- policy makers, academics and others with an interest in alternative dispute resolution; and
- consumers and microenterprises that use legal and other professional services.

The deadline for responses is 30 September 2013.

Please send your comments electronically to consultations@legalombudsman.org.uk.

If that is not practicable for you, please send your comments in writing to: Janet Edwards, Legal Ombudsman, PO Box 6803, Wolverhampton, WV1 9WF.

We will assume that your comments can be published when received, unless you specifically tell us to treat them as confidential. If so, we may state that you asked for them not to be published.

We are also keen to discuss the issues and we will be holding workshop events for this purpose during September. A timetable is included at the end of this paper.
There is helpful additional background information in the following research reports:

- Northumbria University - [Redress for “Legal Services”](#)
- Queen Margaret University - [The future of ombudsman schemes: drivers for change and strategic responses](#)
- Centre for Consumers and Essential Services, University of Leicester - [Mapping potential consumer confusion in a changing legal market (October 2011)](#)

**Background**

The Office for Legal Complaints (OLC), established by Parliament under the Legal Services Act 2007, created an Ombudsman scheme – currently called the Legal Ombudsman. In autumn 2013 the OLC will consider its future strategy in the light of recent European Union (EU) legislation on alternative dispute resolution (ADR) and developments in the delivery of legal and professional services.

The EU legislation requires the United Kingdom (UK) to make ADR available, by 2015, for all complaints by consumers against traders (including those who provide professional services) under most contracts for services and goods. We would welcome your comments to inform our discussion on how far the OLC should seek to provide ADR for legal services that the Legal Ombudsman does not currently cover and for other professional services as well.

For those not already familiar with these topics, Annex 1 to this discussion paper summarises the EU legislation. Additionally, a discussion about the future direction for the Legal Ombudsman needs to be placed in the context of its existing remit, which we refer to here as its compulsory jurisdiction. Annex 2 to this paper summarises which legal services are currently covered by the Legal Ombudsman under its ‘compulsory jurisdiction’. The question of what activities should be ‘reserved legal activities’ is for the Lord Chancellor, advised by the Legal Services Board, and is outside the scope of this discussion paper.

The next section of this paper, Part 1, summarises some of the issues that currently arise about ADR, particularly for legal and professional services, and seeks views on them.

Part 2 then summarises what additional services the Legal Ombudsman might provide under the ‘voluntary scheme’ allowed for by the Legal Services Act...
Services Act 2007, and seeks views on this. Part 3 summarises what additional professional services (such as accountancy) a reconstituted Legal Ombudsman might perhaps cover as part of the UK’s implementation of the EU ADR Directive, and seeks views on this.

The Department for Business Innovation and Skills (BIS) leads on implementation in the UK of the European legislation in relation to alternative dispute resolution. We understand that it will be consulting publicly about the details of this in due course. The comments received in response to this discussion paper will help the OLC to shape the views that it expresses to BIS as well as informing its own strategy development.

Part 1: Issues about ADR, particularly in relation to legal and professional services

Developments in the provision of legal and other professional services mean that consumers can be confused about whether they are covered by a body providing ADR and, if they are, which one. And businesses operating across more than one sector may be faced with different, and sometimes, conflicting requirements.

The research by Northumbria University that we have published alongside this discussion paper examines this issue in detail. The findings echo previous research by Leicester University and that commissioned by the Office for Fair Trading, both of which looked at redress and access issues. Other research also shows that most individuals and small business consumers are not able to assess the quality of providers and do not understand the difference between regulated and unregulated providers.

1 Centre for Consumers and Essential Services, University of Leicester (October 2011) Mapping potential consumer confusion in a changing legal market.


3 Sources: Steve Brooker, Legal Services Consumer Panel Manager, The consumers role, Legal Services Board, Understanding the economic rationale for legal services regulation -A collection of essays, March 2011
Our view is that there are risks in the growing complexity of access to redress:

• consumers may stop complaining as it becomes too hard to negotiate the system. This means individual consumers lose out, as well as removing an important feedback mechanic to allow learning and improvements by businesses;
• the burden on business removes the incentive for markets to grow and innovate while the redress (and regulatory) framework remains complex; and
• proliferation of ADR providers, coupled with growing competition between them does not guarantee high quality dispute resolution that increases consumer confidence.

We briefly outline what we see as the main issues contributing to those risks here.

• The jurisdiction of bodies that provide ADR is often set on the basis of entities or activities that are regulated. For example, legal advice provided by an authorised legal practitioner is covered by the Legal Ombudsman but legal advice provided by other types of business is not covered by any organisation providing ADR. This can be very confusing for consumers and skews competition between providers of legal advice.

• The boundaries of some bodies providing redress are based on types of entities (as, for example, with the Legal Ombudsman) and other organisation’s boundaries are based on types of activities (as, for example, with the Financial Ombudsman Service). This can create both gaps and overlaps. For example, advice on financial services by an authorised legal practitioner may be covered by both the Legal Ombudsman and the Financial Ombudsman Service in certain circumstances.

• Where there are overlaps between the jurisdictions of different organisations providing redress, the outcome of a case may differ according to which body happens to end up dealing with it – because of differing time limits and compensation powers. The time limits to accept complaints, for instance, are now largely harmonised between the Legal Ombudsman and Financial Ombudsman Service, but their respective powers still differ considerably. And other Ombudsmen have very different time limits, for
instance in relation to property complaints where overlaps also occur.

• What a consumer sees as one problem arising from a single transaction may actually involve the interrelationship between services covered by different schemes providing alternative dispute resolution. For example, differing parts of a typical house purchase will be covered by at least three different Ombudsmen – the Legal Ombudsman for the lawyer, the Financial Ombudsman service for the lender and either of two property ombudsmen, which cover between them some property professionals such as estate agents and surveyors.

• Traditional sectoral boundaries are breaking down. For example, authorised legal practitioners now include ‘alternative business structures’, which may be owned by a bank, an insurer, an accountancy firm or some other type of business. Additionally, some accountants are seeking to be authorised as probate practitioners in their own right, to allow them to offer this ‘reserved’ activity as part of their broader package of accountancy services.

• Technological and market change is happening at pace. This is creating real issues for legal providers and their customers. For instance, due to the structure of online services, in many cases consumers are purchasing unregulated services that have no access to redress. Additionally, virtual firms, with no physical presence and few tangible assets, can morph quickly once challenged into new incarnations. This is particularly concerning in the case of online or DIY law offers. It is increasing difficult to distinguish between services and products, particularly in the case of websites offering access to “smart” legal documents.

• Services provided to consumers under a single brand name (or through a single website) may in fact be provided by different entities within a group structure – the Northumbria research highlights examples of this. The different entities may be regulated by different regulators and covered by different bodies providing ADR. And some of the entities may be unregulated and not covered by any organisation providing ADR. If a problem arises, the consumer will have difficulty in identifying the relevant organisation providing ADR – or there may not be one.

• Geographical issues may also arise. For example, financial services throughout the UK are covered by the Financial Ombudsman Service. But lawyers in the UK are covered by three separate bodies – the Legal Ombudsman covers
only lawyers authorised in England and Wales. Additionally, many consumers do not realise that the Isle of Man and the Channel islands are not part of the UK.

Q1. Do you agree that these are the right risks and issues? Please give your reasons and include evidence that demonstrates the impact on consumers and businesses.

Q2. Are any risks and issues missing? Please provide evidence and reasons.

Part 2: Legal Ombudsman’s possible ‘voluntary scheme’

Earlier in this paper we outlined the European Union legislation about alternative dispute resolution (ADR). As part of this, the UK will be required to have in place alternative dispute resolution bodies for all consumer transactions by early 2015.

Under the Legal Services Act 2007, the OLC can ask the Lord Chancellor to give the Legal Ombudsman a ‘voluntary scheme’ (see section 164). This could be a mechanism for the Ombudsman to provide ADR for all legal services and assist to meet the EU requirements.

It is called a ‘voluntary scheme’ because businesses would have to volunteer to join it. It would not be compulsory for them.

Under the 2007 Act, there are external limits within which any ‘voluntary scheme’ must fit. In particular, it could only cover ‘legal services’ provided in England and Wales. For this purpose ‘legal services’ mean services that consist of, or include:

- reserved legal activities;
- legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; or
- representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

Given this remit for a voluntary scheme, adding it to sit alongside the core scheme of the Ombudsman is likely to sufficiently widen the scope of legal services so as to allow the Legal Ombudsman to be an effective
residual provider for ADR for all legal complaints. This fits with the overall intention of the Act; that the OLC would set up an Ombudsman scheme to provide a single point of entry for all consumer complaints as set out in the scope of Part 6 of the Act, when those complaints had not been dealt with effectively by the provider of those services.

Within those external limits, the scope of any ‘voluntary scheme’ can be set by the type of:

- ‘legal activities’;
- business complained about; and/or
- complainant.

Effective implementation of the EU Directive suggests that any ‘voluntary scheme’ might be open to all businesses in respect of all ‘legal activities’. This could include online services.

Minimising confusion for consumers and businesses, as well as operational efficiency, suggests that any ‘voluntary scheme’ might cover the same types of complainants as the ‘compulsory jurisdiction’:

- individuals;
- personal representatives or beneficiaries of the estates of deceased individuals;
- microenterprises;
- charities with an annual income (net of tax) of less than £1 million; and
- trustees of trusts with an asset value of less than £1 million.

For the same reasons, the time limits, processes and powers for any ‘voluntary scheme’ might be the same as in the ‘compulsory jurisdiction’.

If we decide to pursue the creation of a ‘voluntary scheme’ we would consult in detail on:

- our proposal to the Lord Chancellor;
- the rules and operating terms that would apply; and
- the cost and funding arrangements.

Any recommendation to the Lord Chancellor would include an economic impact assessment, setting out the costs and benefits of implementing any proposed ‘voluntary scheme’ – including the benefits of removing any detriment for consumers, balanced against any additional burden on businesses. It will also need to be supported by other evidence to demonstrate that the shape of the scheme would be effective overall in meeting the regulatory objectives in the Act and, in this context, the EU
legislation. Our aim in considering whether or not to establish such a scheme will be guided by our principles of simplicity and effectiveness – we would want implementation of such a scheme to reduce confusion and assist access to redress.

Q3. We would welcome your comments (supported by evidence where possible) on whether this approach to a voluntary scheme would assist businesses and consumers by promoting simplicity and effectiveness for them in relation to redress.

Q4. Is this proposal for the scope of a voluntary scheme the right one to be thinking about? Please state your reasons why or why not.

Q5. Are there any issues or risks that we should be aware of about this approach? Is there anything else that we have not considered that you think is missing? Please provide evidence and reasons.

Part 3: What else might be covered under the ADR Directive

The EU ADR Directive requires the UK to make ADR available for all complaints by consumers against traders (including those who provide professional services) under most contracts for services and goods. So it is not a question of whether ADR should be provided but how it should be provided.

The Directive encourages member states to look to existing ADR bodies to increase their remits. So it is for consideration whether the OLC should propose to BIS that a restructured Legal Ombudsman should be extended to cover other professional services, on either a voluntary or compulsory basis. This could provide:

- clarity for consumers;
- consistency across professional sectors;
- the benefits of using an established organisation rather than creating a new one; and
- economies of scale.
Potential candidates for coverage might include:

- chartered accountants;
- other accountants;
- some property professionals;
- other tax advisers;
- architects; and/or
- planning advisers.

This list is not exhaustive. What all the professionals outlined above have in common is that there is no access to independent redress for services provided by these professionals. Additionally, many engage in the provision of some aspects of legal services. Finally, these might be covered UK-wide, rather than limited to England and Wales, where there is no existing ADR provider.

There is a question as to why an Ombudsman might be a preferable form of ADR in this area. The European Consumer Conditions Scoreboard shows that 67% of UK consumers find it easy to resolve disputes with sellers/providers through ADRs compared to 51% of UK consumers finding it easy to resolve disputes with sellers/providers through the courts. With the ongoing reforms to the court service and a continued focus on mediation in civil justice, this trend is likely to continue. Where there is a significant disparity between the knowledge/resources of the parties, ombudsmen tend to provide an effective form of ADR, having been set up as an alternative to the courts. The inquisitorial and investigative role of an Ombudsman means it is an effective form of ADR in this context. Ombudsmen also have powers to access information (such as documents and files) which other forms of ADR do not and have high levels of compliance with decisions, for instance, compared with the county court. Because of this, it is our view that in some areas, such as legal services and other professional services, the Ombudsman model is preferable to other models which may not have access to the same tools to ensure a level playing field between parties in resolving problems.

Q6. Is this proposal for the possible scope of the remit of the Legal Ombudsman broadening to include professional services the right one to be thinking about? Please state your reasons why or why not.
Summary

We have tried to outline the range of different issues that we think need to be considered in grappling with the challenges posed by the EU ADR Directive, and an evidence base that strongly suggests that a more coherent system of redress across the UK is vital. There are many unknowns about how any such arrangements would work in practice and how this could be achieved and over what timetable. Nevertheless, the timing seems right to begin a discussion on these issues, and we are keen to hear from you.

We believe that it would benefit consumers (by ease of access) and businesses (by having certainty) to have redress provided in a more joined up way – fewer schemes with clearer remits that follow along from consumer understanding of the different types of service provision. Part of this could see redress in relation to all legal and professional services - where the service or product being sold is in effect a transfer of knowledge from an expert provider – coming within the remit of the Legal Ombudsman.

Alongside this debate about the role for the Legal Ombudsman, we also wish to encourage and work towards building a cooperative approach to sort out any ‘grey’ areas in terms of jurisdictional overlap between redress providers and ensure the system as a whole works to the benefit of consumers while promoting enterprise and confidence in business. There may be opportunities to assist in this way, for instance, through the creation of a common portal to assist consumers, with Ombudsman schemes sorting out between them where best a complaint might be resolved.

Q7. We would welcome your comments (supported by evidence where possible) on whether this is the right model to be thinking about at this time.

Q8. We would also welcome views on any area of this paper, or if there are additional areas that you think are relevant and would also help to inform this debate.
Timetable

If you would like to send through your views on how we might approach publishing our decisions, our contact details are below.

The deadline for receiving responses is 30 September 2013.

Email: consultations@legalombudsman.org.uk

Post: Janet Edwards
Legal Ombudsman
PO Box 6803
Wolverhampton
WV1 9WF

Please note that we plan to publish all responses we receive in relation to this discussion paper.

We are also keen to discuss the issues we have raised in this paper in other ways. We would welcome opportunities to meet people and organisations, and we will be holding workshop events for this purpose during the coming months.

Timeline

We are working to the following timetable:

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<th>Timeline</th>
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<tr>
<td>30 July 2013</td>
<td>Publication of discussion paper.</td>
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<tr>
<td>September 2013</td>
<td>Meetings with stakeholders about the thrust of our proposals (leaving the detailed responses to come later in the consultation cycle) and discussion workshop(s) to refine our approach. Discussion paper responses published as received.</td>
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<tr>
<td>30 September 2013</td>
<td>Deadline for responses to the discussion paper.</td>
</tr>
<tr>
<td>End October 2013</td>
<td>Publish and announce report</td>
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Summary of questions

Q1. Do you agree that these are the right risks and issues? Please give your reasons and include evidence that demonstrates the impact on consumers and businesses.

Q2. Are any risks and issues missing? Please provide evidence and reasons.

Q3. We would welcome your comments (supported by evidence where possible) on whether this approach to a voluntary scheme would assist businesses and consumers by promoting simplicity and effectiveness for them in relation to redress.

Q4. Is this proposal for the scope of a voluntary scheme the right one to be thinking about? Please state your reasons why or why not.

Q5. Are there any issues or risks that we should be aware of about this approach? Is there anything else that we have not considered that you think is missing? Please provide evidence and reasons.

Q6. We would welcome your comments (supported by evidence where possible) on whether there is a need to consider ADR in relation to professional services?

Q7. Is this proposal for the possible scope of the remit of the Legal Ombudsman broadening to include professional services the right one to be thinking about? Please state your reasons why or why not.

Q8. We would also welcome views on any area of this paper, or if there are additional areas that you think are relevant and would also help to inform this debate.
Annex 1: EU legislation

The EU Directive on ADR and the EU Regulation on ODR (online dispute resolution) both came into force on 8 July 2013. They are intended to create a more consistent and accessible network of ADR across the EU, for both domestic and cross-border disputes. The Consumer Affairs Minister, Jo Swinson MP, has said that the UK Government’s general position is to “increase consumer confidence and enhance the internal market as intended by the proposed legislation.” 4

**ADR Directive**

The ADR Directive 5 requires member states (including the UK) to ensure that ADR is available for all disputes brought by consumers against traders about disputes arising from most types of contracts for services or goods.

This applies whether the dispute is domestic (where the consumer and trader are both in the same EU member state) or cross-border (where the consumer and trader are in different EU member states. This comprehensive provision of ADR must be implemented by 9 July 2015. The ADR Directive encourages member states to look to existing ADRs to increase their remits and accept new types of complaints.

The bodies providing the ADR must comply with standards – specified in the Directive – of accessibility, independence, impartiality, expertise, transparency, effectiveness, fairness, liberty and legality. The Legal Ombudsman already meets the standards laid down by the Directive. It is open to member states to make ADR mandatory, to make its decisions binding or to impose higher standards than those required by the Directive.

**ODR Regulation**

The ODR Regulation 6 requires the European Commission to create an EU-wide online platform to channel disputes about online transactions

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4 Commons debate, 15 April 2013


Online transactions are defined as those where services or goods are offered and ordered by website or other electronic means. The online platform must be created by 9 January 2016.

The ODR regulation requires the online platform to operate in all official EU languages and to be user-friendly, secure, accessible and free to consumers. ADR bodies must ensure they are able to receive and handle complaints electronically through the online platform, and provide feedback through the online platform. The Legal Ombudsman will be able to do so.

Implementation in the UK

Implementation provides an opportunity to develop a more coherent and consistent landscape for ADR – providing comprehensive coverage, and minimising gaps and overlaps. Avoiding a proliferation of different ADR bodies would prevent confusion for consumers and traders, as well as facilitating economies of scale.

There are different types of ADR. The ombudsman model is likely to be the most appropriate where there is a significant imbalance of knowledge and resources between consumers and traders – as is the case with legal services or other professional services.

It would be undesirable for businesses to have a choice between competing ADRs within any particular sector. This would give the appearance, and a real risk, of the business choosing an ADR on the basis of the one most likely to be favourable to it – damaging impartiality.

The Department for Business Innovation and Skills (BIS) leads on implementation in the UK. It will be consulting publicly about the details of this in due course. The comments received in response to this discussion paper will help the OLC to shape the views that it expresses to BIS.

Annex 2: Legal Ombudsman’s existing ‘compulsory jurisdiction’
It is called the ‘compulsory jurisdiction’ because, if a consumer refers a relevant complaint to the Legal Ombudsman, the ombudsman’s jurisdiction is compulsory for authorised legal practitioners.

Authorised legal practitioners are those authorised to provide one or more ‘reserved legal activities’ in England and Wales, comprising:

- alternative business structures;
- barristers;
- costs lawyers;
- chartered legal executives;
- licensed conveyancers;
- notaries;
- patent attorneys;
- probate practitioners;
- registered European lawyers;
- solicitors; and
- trade mark attorneys.

The ombudsman’s jurisdiction covers all the services provided by authorised legal practitioners, not just the ‘reserved legal activities’ which different types of lawyers are authorised to carry out. This means, for example, that legal advice (which is not a ‘reserved legal activity’) is covered where it is provided by an authorised legal practitioner but is not covered if it is provided by any other type of business.

The scope of the ‘compulsory jurisdiction’ is set under the Legal Services Act. There are two main ways in which it could be extended:

- The Lord Chancellor can extend the ‘compulsory jurisdiction’ to cover ‘claims management companies’. The Ministry of Justice has announced that this will be done in the near future, though an exact date has not yet been set.
- The Lord Chancellor can extend the range of ‘reserved legal activities’, which would potentially create additional types of authorised legal practitioners. We are not aware of any impending extensions. The Lord Chancellor recently decided that will-writing should not become a ‘reserved legal activity’.

We have summarised the ‘compulsory jurisdiction’ as background to this paper. The question of what activities should be ‘reserved legal activities’ is for the Lord Chancellor, advised by the Legal Services Board, and is outside the scope of this discussion paper.