Response of the City of Westminster and Holborn Law Society To Office of Legal Complaints Consultation Paper

Draft Scheme Rules

The City of Westminster and Holborn Law Society ('CWHLS')

The City of Westminster and Holborn Law Society ("CWHLS") enjoys perhaps the most diverse membership amongst local Law Societies, encompassing as it does, a membership ranging from larger firms, including those which have been called in recent years "the silver circle" down to small high street practices and individual in-house solicitors, including those working for public bodies and government. Our membership includes those who practice at all levels of the profession, including those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal, and those who have practised extensively in the field of solicitors' negligence and professional indemnity insurance.

Membership is voluntary and CWHLS is run by a committee comprising 33 solicitors representing a very wide range of specialisms. Its work is carried out by 11 specialist sub-committees, one of which, the Professional Matters Sub-Committee, concentrates on matters such as regulation of solicitors, matters affecting their practice, etc.

Response

Q1 "Should we include some additional guidance in the scheme rules about how in-house complaints handling inter-relates to the Ombudsman Scheme? If you agree, what form should this take? More generally, what can we do to promote good customer service in the legal profession? Please give examples and reasons.

CWHLS believes that it is important for the OLC to provide some guidance on its view of in-house complaints handling. The current draft rules provide only that the authorised person must comply with its regulators' rules. The regulator will no longer be responsible for complaints handling CWHLS considers that the purpose of replacing individual complaints organisations for each branch of the profession with the OLC is to improve, inter alia, on consistency of approach. It is our submission that this objective can only be achieved if the OLC sets out some of its own views on best practice. Furthermore, the OLC has some powers to take the conduct of the respondent into account, in determining costs for example. It is therefore important that the OLC guidance should clearly state what factors it will consider as relevant in this respect.

It is also important to consider that the OLC jurisdiction is limited by reference to the internal complaints procedures. It should not be the case that a complainant should be unduly

prejudiced by having to go through an unnecessarily complex internal procedure before being permitted to use the OLC service, nor should a respondent be prejudiced by being required to accept complaints which would otherwise be out of time, thus re-opening the possibility of a complaint to the OLC. Amongst our members are those with experience of complaints being re-opened many years after the conduct complained of by complainants with dishonest or improper motives. It should not be forgotten that the OLC jurisdiction is to compensate clients who have not received a proper level of service, not to replace the jurisdiction of the court or to second guess the professional judgment of lawyers.

There is much to be said for consistency and transparency. In our experience, the vast majority of lawyers who fall into error, do so inadvertently through naïveté or pressure of work. The timely provision of guidance is the key to ensuring good service. In customer service, as in regulatory affairs, it is important that lawyers know where they stand. Clear and consistent guidance, enabling lawyers to learn from the mistakes of others will be of enormous benefit. We suggest that the OLC consider publishing anonymised case studies, demonstrating their own approach to resolving complaints.

Q2.Should the OLC ask the Lord Chancellor to consider exercising this power to include the others we have suggested? Should we include anyone else? Please give your reasons why or why not.

We agree that small businesses should be included amongst those able to make a complaint to the OLC. We consider that many small businesses are in the same position as individuals and may have difficulty in pursuing alternative methods of complaint. There are cost considerations, for both lawyers and complainants and it is in no-one's interest to force complainants to litigate where the OLC service may be more appropriate. Larger corporate clients (and, indeed, wealthy and/or sophisticated individuals) are unlikely to have recourse to the OLC in any event, due to a greater appreciation of what may be expected from lawyers leading to more targeted demands of their lawyers and more purchasing power so that they can apply pressure on the lawyers to deliver high quality service.

CWHLS therefore believes that it is appropriate to ask the Lord Chancellor to exercise his powers but urges the OLC to consider whether it is appropriate to reserve to itself a discretion to refuse to hear complaints where the Court is the more appropriate forum, particularly where the complaints relate to commercial matters.

Q3. Are there any gaps in who can come to the Ombudsman Scheme? Should we ask the Lord Chancellor to consider including anyone else and, if so, whom and why?

We do not believe that there are gaps in the list of persons who can complain. If limited companies and charities are to be included in those who may complain, it should be made

clear whether and to what extent members of companies can complain where the company has been the recipient of bad advice. On a similar note, the position of trustees in bankruptcy, liquidators and receivers should be clarified. We assume that these persons will step into the shoes of the complainant and be covered, however we believe that the rules should be completely clear on this subject.

Q4 What do you think about the proposed time limit to bring a complaint? If you think it should be different, please say what time limits you would include and why.

We understand that the OLC is likely to operate a predominantly paper based system of complaints with oral hearings being the exception rather than the rule. We therefore believe that the default period of one year is appropriate, provided that it is adequately publicised and there can be no doubt about when the period is deemed to run from. We are concerned that there is no longstop date in 4.5(b). It is common practice for lawyers to destroy certain files after 6 years, others will be kept for 12 years and still others will be kept permanently. In practice, this may mean that lawyers are unable to defend a complaint brought after 6 years where the file has been destroyed. While there is no longstop date, practical concerns must remain, in particular, the ability of the respondent to respond appropriately to any complaint. We would advocate the incorporation of a longstop date. The Limitation Act 1980 currently provides for 15 years, save in cases of dishonesty. 15 years would therefore be consistent with the general law.

Q5 Do you have any comments on the approach to resolving disputes set out in the scheme rules?

We are generally satisfied with the approach set out however we have some concerns about the terms upon which the OLC may refer matters to the Court. We consider that the approach set out in 5.9 is extremely unattractive as it interferes with the discretion of the Courts in respect of costs. We do not see that the Courtõs discretion should be limited in this way, particularly in circumstances where the OLC will not have such a detailed understanding of any case as the Court ultimately hearing it.

We also have concerns about the nature of complaints which may be brought to the OLC. We consider that the types of complaints should be limited. In particular, certain allegations of professional negligence should always be brought before the court, particularly those allegations which relate to professional negligence in litigation. The court is best placed to assess what should have happened and it is not for the OLC to replace its judgment for that of the Court.

The OLC should make it clear that its jurisdiction is not a replacement for the courts and is designed to deal with inadequate professional service. It would be wrong for the OLC to stray

into matters of misconduct or matters which should properly be determined by a Court. The OLC should be reluctant to interfere in matters of professional advice and should not substitute their own judgment for lawyersôprofessional judgment.

We must also raise our objection to draft scheme rule 4.6. This is not consistent with the general law and is highly prejudicial. The test should be objective. The subjective test which it appears is proposed, is impossible to prove and is heavily weighted in favour of the complainant. We would advocate the provision being amended in accordance with the general law, or in the alternative, a rebuttable presumption that the complainant has knowledge which he or she could reasonably have obtained without expenditure.

Q6. The scheme rules also set out a framework for our ongoing relationship with approved regulators. Is this framework sufficient? If you think we should include something additional, what form should this take?

We have no comment on this question, save to suggest that, whatever framework is ultimately adopted, it should be absolutely clear to lawyers and complainants alike, that the regulator has responsibility for matters relating to professional conduct and the OLC has responsibility for service related complaints.

Q7. Are there any other points or issues you wish to raise in relation to the draft scheme rules? Do you think there is anything missing? Is there anything you disagree with? Please give your reasons.

We would echo the concerns outlined in the discussion paper about the wording of 6.2. Whilst we accept that this is the wording set out by Parliament, the OLC is given a partial discretion under 6.2(b) and we would urge the OLC to consider that a lawyer should not, as a general rule, be obliged to pay costs where a complaint has been wholly without merit.

We would also highlight that the OLC rules relating to liability for successor practices are a departure from current practice and should be reconsidered in light of the SRAôs current consultation on successor practices. It is our view that the potential liability of successor practices is a deterrent to firms to take on businesses which are failing or unable to continue because, for example, partners are suffering from ill health, or for economic reasons. This can lead to viable businesses having to be closed or intervened (with resultant disruption for clients) and we would not advocate any provision which would unnecessarily make it more difficult for firms to ñrescueòfailing firms by increasing potential liability and thereby insurance cover.