
Response by Solicitors Sole Practitioners Group to Office of Legal Services Consultation in respect of Scheme Rules

Preamble

1. The Group is part of the Law Society. The Law Society has already provided a significant response to the Scheme Rules Consultation.
2. That response is largely accepted by the Group and the Law Society's comments will not be repeated in detail. The Group will comment on, or emphasise points which appear specifically relevant to sole practitioners or not dealt with by the Law Society in its response.
3. As a preamble the Group accepts and acknowledge the benefits of the proposed new regime whereby the internal resolution of the complaint by the solicitor is encouraged and indeed a requirement.
4. The criteria for acceptance of complaints and resolution of complaints on an informal basis set out in the consultation and draft rules appears to be broadly fair to both the complainant and the solicitor with the following qualifications.

Appeals

5. On the question of appeals the Group adopts the submissions of the Law Society that there should be an entitlement and procedure for appeals. The Act imposes on the Ombudsman a very wide discretion in the way that the Ombudsman can act, aimed at resolving complaints expeditiously, but in exercising such a wide

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discretion there is potential for the Ombudsman to fall into error, so that the result may be unfair.

6. In addition the amount of any compensation that can be awarded, up to £30,000, is a significant sum which should entitle the respondent or paying party to more than a purely first instance decision. Furthermore the finding against the respondent solicitor, even one not going as far as finding of misconduct, and particularly where the complaint might potentially be published to the public, is an extremely damaging situation which should entitle the solicitor to have the decision reviewed.
7. There are often complex issues as to why a client or complainant is dissatisfied and the solicitor may believe he has acted entirely fairly towards the complainant in circumstances which cannot be accepted by the complainant. That does not mean that the solicitor is liable to the complainant for bad service.
8. The solicitor is providing a service, the result of which usually depends on the actions and reactions of third parties which can cause dissatisfaction to a client. In addition the solicitor is often having to consider his professional duty, for instance in such circumstances as money laundering reports, which may cause considerable dissatisfaction to the client
9. If the solicitor has acted professionally and appropriately in such circumstances, but is penalised in connection with the complaint he should be entitled to be able to have the matter reconsidered on appeal.

Ombudsman reference of complaint to court resolution

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10. The Group is also concerned as to the proposed right of the Ombudsman to be able to refer the complaint to legal resolution. This could be an onerous decision for both parties who may not have wished to have to involve themselves in a court procedure. The parties should not be forced, possibly against their will to have to go to court.
11. In circumstances where the ombudsman feels it inappropriate to adjudicate on a matter either because it involved a misconduct matter or because it involved a legal issue such as negligence which should be resolved by the court, he should not be entitled to make a decision to erect the parties to resolve the matter by legal resolution.. In those circumstances the Ombudsman should decline to adjudicate and allow the parties to consider whether they are advised to take the matter to court with the implications which that involves as to costs. The option of legal proceedings must not be imposed upon both parties.

Cost indemnity by solicitor for hearing

12. Similarly if the solicitor wishes to have a matter resolved by a hearing before the Ombudsman it is inappropriate and unfair for the Ombudsman to impose a blanket liability for the solicitor to pay or indemnify the complainant's costs prior to any preliminary or final finding as to the solicitor's liability.

Internal dispute resolution

13. The Group supports the Law Society's concern about the method of internal dispute resolution by sole practitioners. There should be no hard and fast rule as to whether such dispute resolution should

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be by the solicitor concerned himself or by the appointment of an external solicitor.

14. Perhaps the right guidance to be given is that if the complainant and the solicitor are both happy with the solicitor reviewing the matter and reaching his own resolution then that is satisfactory; however if the complainant is unhappy with the solicitor acting as judge and jury on his own complaint than the solicitor should endeavour to obtain the services of an independent solicitor or alternatively the local Law Society disputes resolution service if available. The criteria should be whether the solicitor did everything possible to accommodate the reasonable requirements of the complainant to result in a fair internal resolution.

Waiver of charges for complaint

15. In the light of the proposed new regime which encourages informal early internal resolution of disputes, if the sole practitioner carries out an internal resolution which is subsequently found to be reasonable to the Ombudsman, resulting either

in an offer of a reasonable solution which is not accepted by the complainant or

a denial of liability where that is reasonable

then that sole practitioner should not be penalised

either by an adverse finding by the Ombudsman or

by liability to a contribution for costs.

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16. The object of the rules should be to encourage an early resolution by internal procedures and if such a reasonable resolution takes place then the rules should not be framed in such a way as to discourage such resolutions by unfairly penalising the solicitor who has carried out a reasonable resolution. In relation to charges in these circumstances the Act states as follows:

136 (1) Scheme rules must require respondents, in relation to complaints under the Ombudsman scheme, to pay to the OLC such charges as may be specified in the rules.

(2) The rules must provide for charges payable in relation to a complaint to be waived (or wholly refunded) where—

(a) the complaint is determined or otherwise resolved in favour of the respondent, and

(b) the Ombudsman is satisfied that the respondent took all reasonable steps to try to resolve the complaint under the respondent's complaints procedures.

17. The commentary interprets sub clauses (a) and (b) as both having to apply before the mandatory waiver of the charges applies. With respect, the Group feel that this is a misinterpretation and that Act should be interpreted on the basis that the mandatory waiver must apply in case of circumstances satisfying either sub clause rather than only in a case where circumstances satisfy both sub clauses.

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18. To apply the interpretation of the commentary where both sub clauses have to apply would make the clause unintelligible. Firstly there would have had to be reasonable steps to try to resolve the complaint. Any resolution offered would have had to be declined for the case to go forward to the Ombudsman, and at that point the Ombudsman would have had to resolve the complaint in favour of the respondent.
19. If a reasonable offer of resolution had been made by the respondent it is likely that the Ombudsman would have endorsed that resolution, which would have left the complaint as being upheld. There would therefore be almost no circumstances in which the two conditions could be met, which cannot have been the intention of Parliament.
20. The obvious intention of Parliament must be to waive the charge either in the case where the complaint is not upheld or in a case where the complainant has tried to resolve the matter fairly to the satisfaction of the Ombudsman, but that resolution has not been accepted. No doubt a legal opinion as to the interpretation of this clause will resolve this issue.

Costs against the complainant

21. Finally the Group takes issue with the fact that the consultation ignores the discretionary power for the rules to provide for costs against an unreasonable complainant. Parliament has enacted that that is an option open to the Ombudsman. It is submitted that is not open to the Office of Legal Complaints to ignore that option by arbitrarily omitting any such provision from the rules.

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22. Obviously such a provision would be exercised in very rare circumstances but there are many cases of clients who complained for wholly invalid and inappropriate reasons and may pursue their complaints beyond the initial screening process of the Ombudsman to the point at which they should be penalised in costs as a matter of natural justice.

Conclusion

23. Subject to the above points the Sole Practitioners Group broadly supports the proposed scheme rules.

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