

Consultation covering paper:
draft scheme rules

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The Office for Legal Complaints (OLC) has been established by the Legal Services Act 2007 to make sure users of legal services can go to an independent and impartial Ombudsman scheme to resolve disputes involving their lawyer.

The scheme rules are our first step in making the aims of the Act real so that users of legal services and their lawyers will have confidence in how complaints are resolved.

The scheme rules themselves provide the framework for how we will resolve disputes and, drawing on the learning from complaints, inform good practice. The rules will underpin our decisions and our process and we want to get them right with your help.

We published a discussion draft of the scheme rules over the summer to ask for early views about how the rules were developing. We were pleased that the overall feedback was that the rules provide the correct structure to support an Ombudsman scheme that resolves disputes impartially, quickly and fairly. We are still keen to hear views about how we could improve the rules further to make sure they reflect our desire to be accessible, clear about our role, proportionate and efficient. These are key principles identified by the British and Irish Ombudsman Association as central to good complaints handling.

The informal discussion about the scheme rules revealed some areas that needed further thought and some re-drafting. A key change is to the time limits in chapter four of the rules. A wide range of people from inside and outside the legal profession invited us to re-examine the proposed time limits. We have looked at good practice from other Ombudsman schemes to try to develop a different approach that is fair to everyone who will use the scheme.

Another area in which we have refined the suggested rules in response to the feedback we received is the definition of who can come to the ombudsman if they have a complaint. We were pleased there was a general agreement with our starting principle that we want our service to be available to as many people as need to use it. We have tried to define who can come to us as broadly as we can while retaining sufficient specificity to minimise confusion.

In this paper we have set out a few broad questions to indicate some key areas that we are still thinking about. We would like to work in an open, transparent and collaborative way with everyone who is interested to further develop the scheme rules.

We are pleased to be at the stage of publishing a draft of the scheme rules for formal consultation as required by the Act. This consultation will run for three months until December 2009. We will look forward to hearing your views on this revised draft of the scheme rules.

Background

The OLC is required by section 115 of the Act to set scheme rules that put in place the framework for how we will propose to resolve disputes. We must say who can complain to us, what sorts of complaints we will and will not look at, and set out procedures for how the scheme will operate in practice. These requirements are set out in the Act.

The draft scheme rules set out our proposed approach to our core role of resolving disputes involving lawyers and consumers of legal services.

The draft aims to bring together in one place a summary of the relevant provisions from the Act, relevant requirements from the LSB to approved regulators and the scheme rules made by the OLC.

The proposed scheme rules deal with complaints that are made after the OLC starts operating. Any transitional arrangements for complaints that are in process of being handled under the existing arrangements will be dealt with separately. Additionally, the provisions in the Act bringing claims management companies into the OLC jurisdiction are not due to come into effect at this stage.

We have aimed to provide enough (but not too much) detail on how we propose to handle complaints. This draft does not cover, for instance, the way in which the rules are approved, how ombudsmen are appointed or how the OLC Board works.

As the primary version of the scheme rules will be published electronically on the OLC's website, defined terms are underlined. This indicates that there will be an electronic link directly to the relevant definition.

Structure of the scheme rules

We would like your comments on the draft scheme rules. The Act is reasonably prescriptive about what we must include in the scheme rules and much of the draft rules summarises what the Act requires us to include in the rules; this is not open to change. The rules themselves provide the framework for how the Ombudsman scheme will resolve disputes. They set out the requirements and guidance about our overall proposed approach. The version of the draft rules that you will find on our website highlights those rules which the Act requires us to include and those which the OLC can make itself.

We have changed the format of the rules slightly following the feedback we received from the informal discussion draft of the rules. Again, please let us know how if you have ideas about how we could make the rules easier to read.

We have structured the rules in a way that we feel sets an appropriate framework for resolving disputes by an Ombudsman scheme. We would ask you to consider the rules in the context of how other Ombudsman schemes set out their rules. We are not a court and would ask you not to look at our rules as if they were court rules.

We have chosen a few areas to seek specific comments on in relation to the draft scheme rules. We are not seeking to limit the discussion in any way and we welcome views on any aspects of the draft scheme rules. We would also be interested in comparative information about the existing arrangements.

Following feedback from the informal discussion draft, we have prepared a draft initial equality impact assessment on the scheme rules; this is attached to the end of this paper. We are interested in any views about the potential impact of the rules on particular groups either of legal service providers or consumers. We will be conducting a separate impact assessment on the proposed structure and level of the case fees set out in chapter six.

The issues and questions that follow are in the same order as the headings in the discussion draft of the scheme rules.

In-house complaints handling

The covering paper that accompanied the discussion draft of the scheme rules included a section that asked for views on whether there should be governing principles to promote consistency across the different parts of the profession in terms of in-house complaints handling. The OLC, with the LSB, was interested in preliminary views on this issue. As we noted then, the LSB has the power to set requirements for in-house complaints handling. If the LSB sets any principles about in-house complaints handling, the OLC will include them in the scheme rules as marked.

The Ombudsman scheme has an obvious interest in how the consumer journey begins at this first stage of dispute resolution. Whether or not formal standards are set by the oversight regulator, we are keen to work with all parts of the profession to promote good complaints handling at all stages of the process. When we are up and running, part of our role will be to feed lessons learned back to the profession – and their professional bodies – to improve standards of customer service. At this stage, we would be interested in views about how we can work with lawyers to improve the service they offer, particularly in respect of resolving complaints. We would also be interested to hear views about what else, if anything, the OLC should include in the scheme rules to make clear how in-house complaints handling interrelates to the Ombudsman service.

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.

Who can complain?

Under the Act, the OLC can take complaints from individuals. The Lord Chancellor can extend the OLC's jurisdiction to other types of complainant if we, the Legal Services Board or its consumer panel ask him to.

Part of our role is to provide an alternative means of dispute resolution which is easy to understand, quick, independent and free for consumers of legal services with a dispute they would like help resolving. For this reason, we believe that limiting the scope of who can complain only to individuals may mean that some small businesses, sole traders and charities that do not have deep pockets may be disadvantaged if they are not able to access the ombudsman service.

In our early discussion draft, we asked people what they thought about us asking the Lord Chancellor to include the following in our jurisdiction:

- a micro-enterprise – broadly speaking, this would include businesses that have fewer than 10 staff and a turnover or balance sheet value not exceeding €2 million (European Recommendation 2003/361/EC of 6 May 2003);
- a charity with annual income less than £1 million; and
- a trustee of a trust with a net asset value less than £1 million.

These are all groups of people eligible to use other Ombudsman schemes including the Property Ombudsman and Financial Ombudsman Service (FOS). The definitions above are those that will apply from 1 November 2009. Including these categories is an accepted way of ensuring access to justice for both people and small businesses that perhaps do not have the resources to seek justice through more traditional methods.

The key addition we would like to suggest is also including clubs, associations and societies along with micro-enterprises, charities and trusts. We were encouraged that most people who responded to our earlier discussion draft thought that extending our jurisdiction from only individuals to some small businesses adhered to good practice across ombudsman schemes generally. It seemed an illogical gap to allow some incorporated businesses to have access to our service but to exclude clubs and associations that may be community based and not for profit.

We are keen to hear any views about who should be able to access the ombudsman scheme and whether the above definitions and financial limits are correct. It is a key area that we want to get right from the start.

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 would also like to know if anyone else should be included so that they can bring a complaint to us. The Act states that the OLC can consider a complaint about services provided:

- to the complainant – the person who used the legal service;
- to another legal practitioner who procured them on behalf of the complainant; or
- to (or as) a personal representative/trustee where the complainant is a beneficiary of the estate/trust.

The Lord Chancellor can include other people so that we can consider their complaints. We would like to hear views on whether anyone else should be included.

We propose to ask the Lord Chancellor to include personal representatives and beneficiaries of estates so that if a person dies before referring a complaint to the Ombudsman scheme, another person may continue the complaint and see it resolved. This may be especially important where the subject of the complaint is related to the estate that remains. We did not receive any objections to this at the informal discussion stage.

We can also see scenarios where a person may need assistance to complain, or have a complaint made on their behalf, for instance by their guardian or carer. We heard views about the informal discussion draft of the scheme rules that paragraph 2.4 which allows others to act on behalf of the complainant should be sufficient in most cases where a person may need assistance to complain. We were also pleased that there seemed to be a consensus that there was no assumption that we would require formal legal authority for this as long as we had clear indication of authority from the person wanting assistance to bring a complaint.

We are keen to hear views on whether the current scheme rules capture these or any other potentially complex situations.

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?

In addition, under the Act, the OLC cannot take complaints from a public body (or someone acting for a public body), or from a legal practitioner who procured the services on behalf of someone else. The Lord Chancellor can exclude others. We do not propose to exclude anyone else. No one has yet suggested to us a category of people they think should be excluded.

We have tried to make the drafting in the scheme rules clearer about when a lawyer can and cannot make a complaint to us. The Act precludes a lawyer who is dissatisfied with the service provided by another lawyer to that lawyer's client from raising a complaint. The scheme rules, however, allow for lawyers to represent a person in making a complaint to the ombudsman scheme as long as the lawyer has authority from the complainant. We do not think this is a scenario that would need to happen often, as the ombudsman scheme will be free to use for consumers of legal services. Additionally, our aim is to be easy to use and easy to understand; there will be no need for legal knowledge or expertise in order to make a complaint to the ombudsman scheme. We do recognise that in certain circumstances it may be appropriate for a lawyer to make a complaint on someone's behalf which is why this remains possible in the scheme rules.

Excluded complaints

The Act states that in setting the scheme rules we may (but do not have to) exclude specified types of complaints. Even without this provision, the Act puts in place restrictions on the types of complaints the Ombudsman scheme can consider.

It is important to note here that the Ombudsman scheme has been established to resolve disputes about the service provided to a consumer by a lawyer. We have no role in investigating issues of misconduct or in disciplining lawyers – this is the role of regulators. We are committed to working with regulators to help them in their role.

We have included in the scheme rules at paragraph 5.7 an Ombudsman discretion to dismiss complaints without consideration of their merits. Beyond this, we have not yet identified any classes of complaint that we should exclude absolutely. For example, where a complaint is about professional negligence or judgement, we propose to consider (on a case-by-case basis) whether the issue is one that the Ombudsman scheme can deal with or whether the issue would be better dealt with in court.

Revised time-frames for bringing a complaint

In the previous discussion draft of the scheme rules, we set out the timeframes in which we would generally expect a firm to resolve a complaint (within eight weeks) and the timeframes in which we would generally expect a consumer of legal services to make a complaint (within six years from the act/ omission or within three years from when the complainant should reasonably have known there was cause for complaint). These time limits from act/omission were similar to the court limitation period for contractual claims.

It was in on the issue of timeframes that our discussion draft received the least support. There seemed to be a general agreement that the nature of legal complaints meant that there did need to be some flexibility to allow for those cases where poor service was not immediately obvious. For example, there was a consensus that we are likely to be asked to look at a lot of conveyancing complaints where problems often do not arise for many years after the event and that some consumers will not realise that there was poor service until they come to re-mortgage or sell their property. However, it was argued strongly that the timeframes suggested raise real practical issues. We have therefore decided to suggest shorter time frames, recognising that these may require a greater use of an Ombudsman discretion, particularly in relation to questions about when it was reasonable for a complainant to realise that there were grounds for complaint.

We were encouraged to go and look again at the time limits used by other ombudsman schemes, particularly those used by the Local Government Ombudsman and the Surveyors Ombudsman Service that is run by tOSI. Both of these schemes ask that a complainant raises a complaint with the ombudsman or the Council or surveyor within a year of realising that there was a problem. The Act requires us to look to ombudsman good practice and in response to this we have amended the time limits in paragraph 4.5 of the scheme rules to one year.

It is worth noting that the Ombudsman scheme will not accept complaints previously considered by one of the existing entities.

We are aware that there is still scope in this new formulation for complaint to come to us a long time after the initial transaction with a lawyer. We have heard from people who agree with concerns that evidence and memories disappear or become patchy over time. Opting for a shorter time limit does in part answer these concerns. In addition, we have said in the scheme rules that we should be able to dismiss a complaint if there is no evidence (see paragraph 5.7). With this, we think there is enough of a safeguard against a lack of evidence.

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

Our approach to resolving complaints

The role of the Ombudsman scheme is to resolve disputes and to inform good practice based on the learning from those complaints.

We would like to encourage informal resolution of complaints where possible. The Act asks us to resolve complaints quickly, and informal resolution is one method of achieving this aim. We are looking to good practice among Ombudsman schemes to inform our approach. We are interested in your views about how we can promote informal resolution of disputes in the context of complaints about lawyers.

In addition, we do not propose to exercise the power, under section 133(3)e) of the Act, to make a rule authorising the administration of oaths – we believe that it would be inconsistent with the informal nature of ombudsman proceedings to do this.

The draft scheme rules also sets out when we may dismiss a complaint. We would be interested in your views about this section and in particular whether any aspects of it are too onerous or if there are any gaps.

The draft scheme rules also provide an important framework for how the ombudsman scheme and approved regulators will work together. We knew this was an important area for the ombudsman scheme. Hearing from regulators, the profession, other ombudsmen and consumer groups during the informal discussion stage only confirmed what a key area this is to make sure that both the systems for making sure consumers have access to redress and the regulatory structures work well and in a coordinated way. We have not had any negative feedback on the draft scheme rules but a lot of encouragement to put in place strong day to day working arrangements with each of the regulators with responsibility in this sector.

The Act allows us, in Schedule 15, to make arrangements with approved regulators if we would like their assistance in investigating or resolving a complaint. We have not specifically included how we might do this in the scheme rules and would like your views about whether we should include some more detail about this in the scheme rules.

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

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?

Case fees payable by legal practitioners

The Act is prescriptive about many elements of the case fee. We must charge a fee and the Act is also specific about when it does and does not apply. Many people took issue with the wording of paragraph 6.2, which states that a case fee is payable unless a complaint is resolved in favour of a lawyer and if the ombudsman is satisfied that the lawyer took all reasonable steps to try and resolve the complaint. We do not have the capacity to change this, as the wording in the rules is drawn from the Act and echoes what Parliament intended.

Chapter six of scheme rules sets out our proposed approach to case fees. The rules set out the structure of the case fees, which we propose should be a flat fee. The structure of the case fee also includes the principle of a small number of 'free' cases each financial year.

We have not included amounts or numbers attached to case fees in this draft of the scheme rules. We will consult on the figures accompanied by an impact assessment separately. Our thinking at this stage, following feedback from the informal discussions about the previous draft of the scheme rules is that the OLC would initially recover a small proportion of its costs in this way. The Act allows us to re-visit the level of the case fee and so if appropriate, we could amend the amount in the future.

General

We would like your comments on the discussion draft of the scheme rules which is included with this paper. We have tried to capture everything we need to in the scheme rules but are aware that there may be gaps. As we mentioned before, we are interested in your comments about the scheme rules generally, as well as on those areas we have highlighted here.

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.

How to respond

If you would like to send through your views on our the draft scheme rules, our contact details are below. If possible, please send your responses electronically (in Microsoft word format) but hard copy responses by post or fax are also welcome.

Our formal consultation on the scheme rules will close on 8 December 2009.

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As we indicated above, 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 who are interested in the scheme rules at workshop events which we propose to hold during the consultation cycle or separately.

Consultation timeline

We want to work be open, accessible and clear in how we develop and discuss our approach. As for the informal stage of our discussion about the scheme rules, the timetable at the end of the consultation period is very tight. We had to balance wanting to make sure we took a full three months for the formal consultation stage with making sure we met our key milestones. Please do not mistake the tight turnaround as a sign of us not wanting to listen or take on board views. We thought it was more appropriate to put the demands of meeting tight deadlines on us rather than shortening the consultation period.

Many of you will have seen the previous discussion draft of the scheme rules. We now enter the formal consultation phase, as we are required to do under s.205 of the Act. This also means our reporting on the progress and outcomes of the consultation will be more formal.

We will publish all responses received during the formal consultation period. When you send us your submission, unless you tell us you do not want your views published, we will assume you are happy for us to do so. Generally, we would like to share stakeholder views as we believe in being transparent and open. We will discuss any concerns you have with you about publishing your response and are happy to be flexible in individual cases. If you would prefer not to have your response published we may note that you did not consent for publication in our summary of consultation.

We intend to work to the following timetable:

Timeline	Engagement
15 September to December 2009	Launch formal consultation with revised Scheme Rules. Meetings with stakeholders about the thrust of our proposals (leaving the detailed responses to come later in the consultation cycle) and consultation workshop(s) to refine the scheme rules. Consultation responses published as received.
8 December 2009	End of formal consultation period – deadline for detailed written submissions from stakeholders.
Mid December	Publication of consultation response summary and OLC response.
Late December 2009	Final Scheme Rules considered by OLC and LSB.
January 2010	OLC to request Ministry of Justice to seek Lord Chancellor approval for any inclusions/ exclusions under s128 and s130 and for inclusion in the OLC Commencement Order to be finalised, to Ministers and laid before Parliament as a statutory instrument.

Initial draft equality impact assessment of the draft scheme rules

At this stage we have concentrated on considering the scheme rules against the key questions that an equality impact assessment suggests we ask as a starting point. And then looked at how these might impact on lawyers and the various groups who suggested by the impact assessment framework. We have taken the legal requirements of the Act as a given.

As we said previously, we are publishing this with our consultation and would like to hear views and receive evidence that will help us assess the impact of the scheme rules. If you have any comments on the initial equality impact assessment below, please let us know.

Questions that need to be asked:

What are you looking to achieve in this activity?

To provide a complaint handling service that is fair, easily accessible, easy to use and which focuses on resolving complaints informally and quickly.

- Who in the main will benefit?

People who have a complaint about their lawyer and legal services providers.

- Does the activity have the potential to cause adverse impact or discriminate against different groups in the community?

Yes, if the needs of particular groups or individuals are not properly taken into account. The scheme rules are drafted at a level which, on the whole, should not impact adversely on different groups or lawyers – subject to some comments below. However, when the scheme rules are translated into operational reality we will need to ensure both that there are no adverse impacts and that the service makes a positive contribution to equality.

- Does the activity make a positive contribution to equalities?

It has the potential to do so if the scheme meets the objectives in 1 above

A theme running throughout is that the proper use of discretion is key, whether this is to provide a fair and balanced service to lawyers or to adjust services to meet the needs of particular individuals or groups.

The particular groups listed in the framework stem from the existing legislation in the United Kingdom that covers discrimination. The groups and target areas include:

- age
- sexuality
- faith or belief
- race
- ethnicity
- disability
- gender

Other considerations that may be relevant for us are:

- means
- language and literacy levels
- geography

Lawyers – solicitors firms and others would not normally come within special interest groups in terms of considering equalities. However, as they are one of our main customers, we will also consider potential impacts on them.

There are some Scheme Rules that may have a particular relevance to an equality impact assessment: some have the potential for positive impact, some negative.

2.1 'A complainant must be an individual'

- This now includes clubs and societies. If clubs or societies were not included then that could potentially groups such as those based on faith or belief or disability.

3.2 'The Legal Services Act 2007 allows the Legal Services Board to make requirements to guide in-house complaints handling. If the LSB were to set requirements for in-house complaints handling, the OLC would include a summary of those principles here'

- If there is no consistent requirements for in-house complaints handling, then it is more likely that complaints standards will be variable and probably impact unfairly on, for example, the less articulate or those with lower levels of literacy. Such guidance – particularly if at the level of principles – also has the potential for positive impact on legal services which may find it helpful to have advice on how the Legal Services Board or Ombudsman would expect them to deal with complaints. Very prescriptive rules should probably be avoided because what might be suitable for a large firm of solicitors is unlikely also to be suitable for small firms or single practitioners and might put them to undue costs.

4.2 'But a complainant can use the Ombudsman service if an Ombudsman considers that there are exceptional reasons to consider the complaint sooner. Or sooner without it having been made first to the authorised person'

- This is potentially positive in the respect of urgent cases, such as those in relation to immigration, and might impact positively on particular ethnic groups
- Important to note here that such cases should be taken on selectively so that legal services get proper opportunities to resolve matters themselves

4.5 Time limits from acts/omissions

- The drafting has already been changed here in response to lawyers' views that that time limits were impractical and may not lead to fair investigations or decisions.

4.6 'If an Ombudsman considers that there are exceptional circumstances, he/she may extend any of these time limits to the extent that he/she considers fair.'

- This is potentially positive in respect of age, disability and ethnicity.
- It might also have a negative impact on legal services if discretion were used too widely

5.1 'The Ombudsman service may require a complainant to complete its complaint form'

- This is potentially discriminatory in terms of age, disability, language & literacy levels. As long as the contact centre accepts complaints in other formats or orally, this can be avoided.

5.4 'If the authorised person's written response under chapter three claims that all or part of the complaint... an Ombudsman will give all parties an opportunity to make representations before deciding'

- An over-reliance on written documentation may impact on age, disability, language and literacy groups.
- The rules as drafted are generous to legal services here as they give the lawyers essentially a second chance to give their views on why a complaint should be dismissed

5.6 'The Ombudsman will then give the complainant and the authorised person his/her decision and the reasons for it'

- This and other sections illustrate the importance of plain English in how we communicate how the ombudsman scheme will operate and in our communications with people who use our service.

5.14 'The Ombudsman service may make such arrangements as it considers appropriate (which may include paying fees) for Approved Regulators or others to provide assistance to an Ombudsman in the investigation or consideration of a complainant'

- Positive – this improves access by eg enabling complainants to make use of translators.

5.17 'The Ombudsman Service will try to resolve complaints at the earliest possible stage, by whatever means it considers appropriate – including informal resolution (such as mediation)'

- Geography could be an issue here. Whatever methods are chosen they should be equally available to all, wherever they live.

5.25 'An Ombudsman may require a party to attend to give evidence and produce documents at a time and place specified by the Ombudsman'

- Potentially negative – Need to account for groups such as age, disability and means of getting there. Also potentially costly/time consuming for lawyers

5.31 'An Ombudsman may fix (and may extend) a time limit for any stage of the investigation, consideration and determination of a complaint'

- Discretion is key here – if a rigid time limit is put into place then this may impact on getting responses from particular groups.
- Need to guard against unfairness to lawyers who should not experience extensive delay in hearing an outcome to a complaint – again proper discretion key.

5.35 'A hearing, may be held by any means the Ombudsman considers appropriate in the circumstances, including (for example) by phone'

- Hearings have the potential for negative impact especially in a legal context. They are likely to naturally favour the firm as opposed to the complainant who is unlikely to be used to such processes. Hearings may also make it difficult for those with very limited means or literacy

5.39 'As a complainant does not usually need assistance to pursue a complaint with the Ombudsman's service, awards of costs are likely to be rare'

- This may impact adversely on, for example ethnic groups as immigration cases may need representation to present a complaint.

6 Case Fees:

- A separate impact assessment is being conducted on case fees. This will be published separately alongside OLC thinking about the amount and operation of the case fee.

For further information please contact:
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www.officeforlegalcomplaints.org.uk