

Consultation response: April 2010

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# Scheme rules

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The logo for the Legal Ombudsman features the word "LEGAL" in a bold, sans-serif font, with a stylized, cursive flourish above the letters "L" and "E". Below "LEGAL" is the word "OMBUDSMAN" in a clean, sans-serif font.  
LEGAL  
OMBUDSMAN

# Scheme rules consultation response

## Introduction

The Legal Ombudsman is being established by the Office for Legal Complaints (Legal Ombudsman) under 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.

Finalising the scheme rules is a vital 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.

Over the last months of 2009 we consulted on the scheme rules. Of the three consultations we ran last year the scheme rules attracted the most responses (twenty) from a balanced mix of consumer and campaigning groups, individual firms and organisations representing the profession.

Thank you to everyone who shared their views with us. We were pleased that the overall feedback was that the rules provide a robust structure to support an Ombudsman scheme that resolves disputes impartially, quickly and fairly. The responses to our consultations are published on the Legal Ombudsman website at [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk).

Following the consultation our Board considered the responses we received and then agreed the scheme rules for the Legal Ombudsman. The Legal Services Board (LSB) then approved the proposed scheme rules as they are required to do under section 155 of the Act.

We then wrote to the Lord Chancellor to ask for his consent (also under section 155 of the Act) to the case fee structure which is included in chapter six of the scheme rules. We also wrote to the Lord Chancellor to ask him to make an order under sections 128 and 130 of the Act. This would allow us to include other people, such as small businesses and charities, in our jurisdiction.

We have published an all but final version of the scheme rules along with this consultation response. These are the scheme rules as agreed by our Board and the Legal Services Board. The rules will not be complete until both the Legal Services Board decide their approach to first tier complaints handling (which we refer to in chapter three of the rules) and until the Lord Chancellor has considered our requests under sections 128 and 130 of the Act. We will publish an updated version when these last aspects of the rules have been finalised.

## Background

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

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

The scheme rules will apply to complaints that are made after the Legal Ombudsman 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 Legal Ombudsman jurisdiction are not due to come into effect at this stage.

Our scheme rules consultation took place over two stages. Over the summer of 2009 (July/ August) we published a discussion draft of the scheme rules. We also held discussion groups as part of this informal consultation process. The scheme rules were then amended in light of the feedback we received (all documents are available on our website . [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)).

On 15 September 2009 we published draft scheme rules for formal consultation over three months. At the same time we ran a separate consultation (accompanied by an impact assessment developed with assistance from Ministry of Justice economists) on the case fees. We consulted separately on the case fees as there were additional requirements such as the impact assessment that needed to be included (as the case fee is a charge on private business).

We received responses to our consultations from a mix of consumer groups, legal professionals and the Approved Regulators. Many of the issues raised are relevant for setting up the organisation as a whole and determining our approach rather than for inclusion in the scheme rules.

For instance, some of the Approved Regulators told us in more detail about the importance of information sharing; we will pick this up in developing Memorandum of Understanding with each of these bodies. Consumer groups reminded us of the need for good, clear literature to explain what the Legal Ombudsman can and cannot do and what they can expect from the process. We will develop this as we build up to the opening of the Legal Ombudsman.

We will take on board all these comments as we continue to develop our approach: the scheme rules are not the home for many of them.

## Structure of the scheme rules

The Act is prescriptive about what we must include in the scheme rules. 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 Legal Ombudsman can make itself. In the version published with this paper the defined terms are underlined. This indicates that there will be an electronic link directly to the relevant definition when we publish them on our website.

We have structured the rules in a way that we feel sets an appropriate framework for resolving disputes by an ombudsman scheme and those of you who responded agreed that the way the rules are presented is logical. We would ask you to read 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.

Many of the responses we received from stakeholders . consumer groups but some legal organisations as well . demonstrated the need for us to explain our approach to them. We agree with the need to set out in clear language how the scheme will work and how people can access it.

Many of these comments in relation to accessibility of the organisation will need to be met in coming months as we develop our literature, website and guidance. We have tried to keep the scheme rules as a formal document that ensures the impartiality of the scheme and that also sets out how we will handle unusual or exceptional cases. At times this makes the rules a little cumbersome. When we explain our overall approach to people who might use our service we will aim to make this as clear and straight forward as possible.

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

## First tier 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. 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 we will include them in the scheme rules in chapter three.

The LSB has recently finished a consultation with the Approved Regulators about developing a joint approach to promote good first tier complaints handling across the

legal services sector. We remain keen to work closely with the LSB and the legal sector to promote good complaints handling.

Most of the comments that we received in response to the consultation suggested that guidance on complaint handling would be useful provided that it is not too prescriptive. This reinforced our view that it would be useful for us to issue guidance based on the evidence we see from handling complaints.

The ombudsman scheme has an obvious interest in how the consumer journey begins at this first stage of dispute resolution. 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. We also heard that including some reference to any requirements set by the LSB in the scheme rules would help make sure regulation and redress joined up. Consistent with this we will include at chapter three of the rules a summary of any requirement set by the LSB in relation to first tier complaints handling. We have noted this in the attached updated version of the scheme rules.

## Who can complain?

Under the Act the Legal Ombudsman can take complaints from individuals. We have now asked the Lord Chancellor to extend the Legal Ombudsman's jurisdiction to other types of complainant.

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. 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.

We heard views to say that overall people agreed that we should ask the Lord Chancellor to include the following in our jurisdiction:

- a micro-enterprise as defined in European Recommendation 2003/361/EC of 6 May 2003 (broadly, an enterprise with fewer than 10 staff and a turnover or balance sheet value not exceeding " 2 million);
- a charity with an annual income less than £1 million;
- a club, association or society with an annual income less than £1 million;
- a trustee of a trust with a net asset value less than £1 million; or
- a personal representative or the residuary beneficiaries of an estate where a person with a complaint died before referring it to the Legal Ombudsman.

The definition of micro-enterprise is the version that applied from 1 November 2009.

There was some debate about whether the limit for each of these categories is at the right level. The categories that we have suggested above are groups of people

eligible to use other ombudsman schemes including the Property Ombudsman and Financial Ombudsman Service (FOS).

Including these categories is an accepted way of ensuring access to redress for both people and small businesses that perhaps do not have the resources to seek justice through more traditional methods.

We also suggested including some others in our jurisdiction. There was general support for our proposal to ask the Lord Chancellor to include personal representatives and beneficiaries of estates. This will mean 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 and have written to the Lord Chancellor to request these people are included in our jurisdiction.

During the consultation we asked again if people agreed with our view that paragraph 2.4 of the rules will allow others to act on behalf of the complainant should be sufficient in most cases where a person may need assistance to complain. We can see scenarios where a person needs help to make a complaint. There will also be times when a third party (for instance a carer or guardian) will seek to bring a complaint made on behalf of someone else who needs assistance. We did not hear any views to alter our approach to this. 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 authority from the person wanting assistance to bring a complaint.

In addition, under the Act, the Legal Ombudsman 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 if asked to. We have not sought to use this option under the Act. After two rounds of consultation no one has yet suggested to us a category of people they think should be excluded.

We have kept the amendment we made to the consultation draft that was intended to make it clearer when a lawyer can and cannot make a complaint to us. In short, 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 nevertheless be appropriate for a lawyer to make a complaint on someone's behalf which is why we have retained this option in the scheme rules.

### Third party complaints

We received a suggestion from a number of stakeholders, mostly consumer groups, that the ombudsman scheme should accept complaints from consumers about another lawyer (that they had not engaged personally).

The examples given in the consultation responses focused on the need for victims and witnesses to be able to access some form of redress. Others give examples of how this would also open up the ombudsman scheme to claims that a husband or wife could complain about the other side's lawyer in divorce proceedings. Another scenario raised is where someone is a customer of a body which itself takes legal advice in relation to the customer's business and the customer is not separately represented (for example, a mortgagee where the mortgagee takes legal advice).

Each example conveys the potential complexity of this area and the issues around how to ensure any approach that we might adopt would be fair. We are also aware that this is an area where we would need to be mindful of any potential conflict of interest given that a lawyer has a duty of care to his or her client.

This type of complaint does not seem to have been considered in drafting the Legal Services Act 2007: we could find no mention in Hansard or in other documents that were published in the course of developing these reforms that indicates that this type of complaint was intended to be covered by the Act. Balanced against this is that there is no other direct course of redress for consumers in this situation. Third parties are able to complain about the conduct of any lawyer, and an outcome of a conduct investigation can be an apology to a consumer. But there is no avenue for the third party to seek other redress in these circumstances.

After much thought, and to be consistent with our strategy of starting simply, we have not asked the Lord Chancellor to expand our jurisdiction to include third party complaints at this point in time, especially as this is not an area on which we have specifically consulted. We understand why consumer groups are concerned that this is an area in which consumer detriment may occur and this is an area which we would like to understand more about and the possible role for us as an ombudsman scheme. Adding to the complexity of our jurisdiction at this stage seems unwarranted. We would be open to looking again at this issue in the future.

### 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 for a range of reasons. 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.

## **Timeframes for raising complaints**

During the formal consultation we suggested a time frame of a year for raising a complaint about legal services. We acknowledged that this time frame 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. Our choice of time frame was influenced by those of the Local Government Ombudsman and the Surveyors Ombudsman Service 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 in our approach to the scheme rules.

On balance, we propose to keep to the time limit of a year. The groups establishing to campaign for reform of legal complaints handling objected to the change; most others welcomed it as a reasonable pitch between the longer timeframes to match legal proceedings and the current six month limits in place in existing complaints handling bodies. All agreed that the concept of awareness was a key feature to ensure fairness.

It is worth reiterating that the ombudsman scheme will not accept complaints previously considered by one of the existing complaints handling bodies.

## **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 and thank those of who shared your insights and experience to help us develop our approach.

As we outlined in the consultation paper, we have chosen not 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.

We also asked for your views about the proposed rules that set out when we may dismiss a complaint. In response to the consultation period we have altered our drafting of these paragraphs. For instance it is possible that any one of the range of

reasons not to accept a complaint under 5.7 may only come to light after a complaint has been accepted. It therefore seems logical to add to the rules to allow an ombudsman to discontinue involvement on the same grounds.

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.

## Case fees

Chapter six of scheme rules sets out our proposed approach to case fees. We have consulted separately on the structure of the case fee and we have set out our thinking in the case fee consultation response paper that you can find on our website ([www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)).

## Conclusion

The Act asks the Legal Ombudsman to have due regard to the regulatory objectives. These include the need to protect and promote the interests of consumers; which we believe Chapter two of the rules has at its heart. This has been a key area of focus during the consultation process to seek to ensure that we are accessible to consumers who wish to seek redress. The recommendation to the Lord Chancellor to expand our jurisdictions from individuals to small business, charities, and others who perhaps do not have deep pockets to access redress through the courts is consistent with this objective.

We believe that the rules in their entirety help fulfil the regulatory objectives. The fact of an independent ombudsman scheme should promote confidence in the legal profession. The rules are designed to ensure impartiality in decision making which will give both consumers and lawyers confidence in our process and therefore in the ability of the profession to sort out its problems. In relation to acting in the public interest, we believe access to independent redress speaks for itself.

As the Legal Ombudsman is a new service, starting simply is important. Until we open we will not know the exact shape of the scheme, the volume of complaints that we will receive or how we will change our practices to make sure the new scheme will be a success. We anticipate that the scheme rules will change again in time. For now we hope that you will agree that these will stand us in good stead as we open our doors for business.