

Consultation response

Scheme Rules: Consultation Draft
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1. Introduction

1.1 Which? is an independent, not for profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. Which? is a member of the EU consumer umbrella body BEUC and of Consumers International. Which? is independent of both Government and industry, and is funded solely through the sale of Which? magazine and books.

1.2 We are also a provider of legal services through Which? Legal Service, offering consumer advice to subscribers. A basic subscription to Which? Legal Service costs from £31 per annum for Which? members to £85 per annum for Which? Legal Service Plus for advice by email and telephone. The service is regulated by the Solicitors Regulation Authority.
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1.3 We welcome the opportunity to comment on the OLC's draft scheme rules. Having been involved in the legal services reform agenda since before the Clementi Review was established in 2003, including as a member of the MoJ Ministerial Consumer Advisory Group, it is good news for consumers that the new statutory single legal complaints handling body is now so close to implementation. We hope it will be able to 'go live' in Autumn 2010.

1.4 In our response to the Scheme Rules discussion paper in September 2009 we said that, broadly speaking, we endorsed the approach you are taking. We are still of that opinion: in general the draft rules clearly seek to employ best practice so that the OLC can be an ombudsman service that will offer consumers a first class service.

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1.5 An exception is that we are disappointed that you have reduced the time limits for making a complaint to just one year from the 6 years suggested in the Discussion Paper. We do not think this is long enough even taking account of Section 4.5b (allowing a consumer to complain within one year of becoming aware of the problem) and Section 4.7 (allowing the OLC discretion to accept complaints).

1.6 This response repeats many of the points we made in our 2 September 2009 response to the Discussion Paper.

2. Which? comments on the draft scheme rules

Question 1: in house complaint handling

We agree that further guidance on the inter-relationship between in-house complaints handling and the OLC will be helpful both for legal firms and consumers, and furthermore that the LSB's requirements should be included in the OLC's scheme rules at Section 3.2. In fact it is essential that these two processes are joined up so that the consumer knows their rights.

As we noted in our response to the Discussion Paper, as part of raising levels of access and transparency among consumers, we would expect the OLC's existence prominently displayed on all correspondence etc by legal professionals. Furthermore, Section 5.1 says the OLC may require a complainant to complete a complaints form. We assume this does not preclude the OLC's staff from helping consumers complete the application form, as the Financial Ombudsman Service already does. We would like to see the OLC offer this service to consumers.

Question 2: Who can complain

Our view remains as set out in our response to the Discussion Paper. Though the OLC's focus is rightly on individual consumers, we agree that the OLC's jurisdiction should be extended to micro-enterprises and smaller charities and trusts. We therefore support your intention to seek the Lord Chancellor's agreement to extend the jurisdiction.

Question 3: gaps in who can come to the OLC

We also support the OLC in seeking the Lord Chancellor's agreement to widen the definition of who can complain to the OLC to include those set out in the Consultation Paper (estate beneficiaries, guardians, carers, etc).

But we remain concerned at how two groups of potential complainants will be dealt with by the OLC:

- > those with complaints which involve negligence
- > those complaining about someone else's legal professional.

In both cases, these complaints are likely to be of paramount importance to many consumers who contact the OLC and we suggest the OLC will need to set out clear guidance to consumers as to what the detailed scheme rules actually mean in practice, for instance in FAQs or myth busters in OLC literature, website, etc.

Negligence cases

We note the grounds for dismissal set out in section 5.7.

We of course recognise that negligence cases may have a disciplinary angle and this will be a matter for the relevant AR to consider what action, if any, to take against the individual legal practitioner. In such cases, the OLC will of course refer the case to the relevant AR.

But we do not think if a negligence case is referred by the OLC to the relevant AR that this should determine whether the OLC considers the complaint an excluded one for consideration by the OLC.

We therefore hope Section 5.7 will not be used by the OLC to dismiss legitimate complaints from consumers. In our view, the key determinant should be the level of potential redress, i.e. the OLC's decision to exclude a complaint relating to negligence should be primarily based on whether the negligence claim exceeds the prevailing OLC redress limit (currently £30,000).

An alternative approach could be that, once any disciplinary proceedings are completed, the relevant AR refer the case back to the OLC so that the OLC can determine if additional redress is due, i.e. a sum in addition to making good any proven loss up to the current redress limit of £30,000.

Overall, we continue to believe that, as a dispute resolution service designed to avoid complainants having to go to court and dealing with cases speedily and fairly, the OLC should have a role in resolving complaints about any matter including negligence where the complainant is claiming losses up to the prevailing redress limit. If the claimed loss is more than the prevailing redress limit, then clearly Section 5.8 will apply.

We therefore suggest the final scheme rules, and any consumer-friendly version of them, is as clear as possible about how the OLC will handle cases which involve negligence.

Complaints about someone's else's legal professional

We remain concerned at how the OLC will deal - in practical terms - with complaints from consumers about someone else's lawyer. While we understand

why this exclusion is made and recognise the complexities this issue raises, our experience of making a complaint to the Solicitors Regulation Authority in December 2008 about the conduct of a law firm which had been acting on behalf of corporate clients by serving legal papers on consumers alleging copyright infringement, revealed to us what a difficult situation this can put individual consumers in.

As we said in our Discussion Paper response, the current rules mean that consumers faced with this situation can not get redress for unfair treatment, and can only rely on the AR to take action if conduct rules have been broken. This is set out by the existing Legal Complaints Service in the following way:

We can't deal with your complaint if it is about the service provided by someone else's solicitor or about the impact on you of the actions of someone else's solicitor – for example, divorce proceedings. Action can only be taken if the solicitor has broken the rules of professional conduct – which all solicitors must follow. Breaking these rules, is called misconduct. If the solicitor has engaged in misconduct, the Solicitors Regulation Authority can take action in the public interest. But the SRA can't pay you compensation. (ref: LCS website).

We therefore re-state what we suggested in our response to the Discussion Paper: at a minimum, the OLC must ensure that a) it can identify if more than one consumer is making the same complaint about the actions of someone else's lawyer and b) it has close working relations with the ARs (especially the SRA) to ensure that this information is communicated from OLC to ARs for the latter to take action as appropriate.

The OLC must also ensure that it explains clearly to consumers what their rights are in the situation where they have a complaint about someone else's lawyer, i.e. that they will have to complain to the relevant AR. It may also be appropriate for the OLC to actively assist consumers who want to complain about someone else's lawyer, for example by formally referring cases to ARs.

We note that the Property Ombudsman (covering estate agents) can award redress to an actual or potential buyer of a property even though it is the seller of the property who has the contractual arrangement with the estate agent. We therefore suggest that in future the OLC and LSB will need to consider if the right to redress should be extended in certain situations where consumers have a legitimate complaint about someone else's lawyer, and whether it is possible for the OLC's remit to be extended to consider exceptional cases where consumers have a complaint about the actions of someone else's lawyer.

One option would be to enable cases where the AR had found against the legal professional on conduct grounds to be referred back to the OLC for consideration of any redress for the complainant.

Question 4: Time limits

We are very disappointed that you have amended your proposals from that set out in the Discussion Paper, i.e reducing the time limit from 6 years to 1 year.

We would still prefer a longer period than now proposed for the reasons you set out originally, eg complaints about conveyancing which might not come to the attention of a consumer until years later, as well as drawing on the 'best practice' time limits set by other ombudsman services. We do not see that up to 6 years is too onerous as file notes etc should be stored for at least this length of time.

We do not therefore think 1 year is long enough because some consumers may not wish to face the stress and anxiety of making a complaint within one year. We therefore strongly suggest the period set out in Section 4.5a should be much longer than 1 year.

However we accept that the OLC has discretion to accept complaints outside of the proposed time limit and we hope you will use this discretion to the fullest extent possible as set out in Section 4.7 if the time limit is reduced from 6 years.

We acknowledge that a key time limit is that the consumer must raise the complaint within one year of *becoming aware of it (our emphasis)* as described in Section 4.5b. In cases where the original problem was from many years earlier, this provision will still allow consumers to raise their complaint with the OLC.

We agree that the OLC should not accept complaints previously handled by the existing complaints handling bodies. We want to see the OLC start with as 'clean a sheet' as possible. However after a set period (eg one year) there may be a case for the OLC to complete any outstanding cases which would otherwise be eligible to be heard by the Legal Services Ombudsman. This is a matter for the Ministry of Justice and we have communicated our views on this point to them.

Question 5-6 Resolving disputes

Section 5.59 (misconduct). We consider that the OLC should require (rather than *may* require) the AR to tell the OLC what action it will take and the outcome. Furthermore, in addition to informing the complainant that their complaint has been referred to an AR, we suggest that the OLC should inform the consumer of what action is being taken by the AR and its outcome if the AR is not itself communicating this information to the consumer.

We of course welcome that the OLC will be totally independent of the ARs. However as part of helping resolving disputes, it is inevitable that ARs may have a role. As this was subject to much debate during the LSA07's passage, our concern is that any cooperation that is given to the OLC by ARs does not extend to influencing the outcome of a complaint. The final decision should rest with the OLC as the Legal Services Act 2007 schedule 15, section 18 (3) only states that "*the arrangements (the OLC) may make include arrangements for*

assistance to be provided to an ombudsman in relation to the investigation and consideration of a complaint”.

We also seek clarification on whether the OLC will require a legal professional to put on hold any legal action against a consumer (eg for payment of their fees) pending the conclusion of the consumer’s complaint to the OLC.

Question 7: other points on the draft scheme rules

From an individual consumer’s point of view, the scheme rules will be difficult to understand. We know that you realise how important it is therefore for a ‘consumer-friendly’ version to be prepared of the key points. As noted earlier, this can be achieved via FAQs and myth busters in OLC literature, website, etc.

We seek clarification that Section 5.55 (Publication) does not preclude publication of the authorised person’s name or at least their firm. As you know, the Financial Ombudsman Service is now publishing complaints data and it was also proposed by the existing Legal Complaints Service. We hope the OLC will take the lead in this matter because in principle it is right that consumers should know more information about the complaints records of legal firms/authorised persons.

We also have some other general points about the OLC which we made in our response to the Discussion Paper. These are:

- > We believe that the OLC could also have a quality/service intelligence role by, for example, passing recurring issues (not specific individual complaints) to the relevant ARs, as well as to the LSB and its statutory Consumer Panel, so that ARs can promote change among their members to help ensure similar problems do not continue to occur.
- > In the same vein, publishing aggregated complaints data and more detailed information on type of complaints than that currently published by the Legal Complaints Service, will also help in raising standards of service by lawyers so that, in the long-term, the OLC receives fewer consumer complaints rather than more.
- > Finally, though these points are not subject to this consultation on the draft scheme rules, we seek clarification on how complaints about the OLC will be handled, for instance if a consumer is unhappy with the way the OLC has handled their complaint about a lawyer, and on how the OLC will be monitored by the LSB in practice in terms of its performance and effectiveness (in effect the role currently undertaken by the Legal Complaints Commissioner with the Legal Complaints Service/Solicitors Regulation Authority).