



The Law Society

**Law Society response to the OLC consultation on the
draft scheme rules**

8 December 2009

SUPPORTING
solicitors

The Law Society's response to the Office of Legal Complaints' consultation on their scheme rules

This response has been prepared by the Law Society, the representative body for over 130,000 solicitors qualified in England and Wales, working at home and around the world. The Law Society negotiates on behalf of the profession and lobbies regulators, government and others.

The Law Society welcomes the chance to comment on the rules for the Office of Legal Complaints' (OLCs) ombudsman scheme. We are pleased that following concerns, raised during the initial consultation on the rules, the OLC has altered its time limits for accepting complaints. The Law Society still has some concerns about some of the scheme rules and these are addressed within the answers to the individual consultation questions below.

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.

1. We believe it would be helpful for the Office of Legal Complaints (OLC) to provide guidance on best practice in complaints handling. The guidance should reflect the need for complaints to be handled fairly, consistently and promptly, and should take account of the size and make-up of the organisation being complained about.
2. The Law Society considers that solicitors should be encouraged to resolve complaints informally as early on as possible. The suggestion in the previous consultation, that where a lawyer resolves a complaint informally within five business days, obligations should be less onerous and the process less formal, is one that the Law Society supports. We believe guidance to this effect would greatly assist solicitors and lead to more complaints being resolved quickly. This would benefit both the client and the solicitor.
3. Guidance on how firms should analyse their complaints and identify where improvements can be made would also be beneficial. This will help solicitors identify remedial action that they can take to lower the number of complaints that they receive and potentially the number referred to the OLC.
4. As well as advice on best practice, the OLC should aim to provide more sector specific guidance based on its own analysis of the complaints it receives. Identifying issues which routinely produce complaints and guidance on how to either avoid or resolve them at firm level may decrease the number of complaints that the OLC receives. Providing anonymised trend data on the average number of complaints received by firms in different sectors and of different sizes, will allow firms to benchmark themselves against other firms and encourage firms with higher levels of complaints to try and identify and resolve the causes.
5. Provision of information to clients regarding the internal complaints system at an early stage is an important element of an effective complaints handling system. Provision of information regarding the OLC's role in the complaints process will be

important to provide when a client has made a complaint, however, we do not consider it necessary for this information to be provided to all clients at the start of a retainer.

6. While publishing information on websites is cost efficient, other forms of communication such as workshops and presentations should also be considered, particularly in the early stages of the OLC operational period. Using different forms of communication will reach a wider audience of solicitors and will ensure that a greater proportion are made aware of the OLC and the guidance it provides.
7. The Law Society is keen to assist solicitors to achieve the highest standard of internal complaints handling. In the future we would hope to work together with the OLC to devise suitable outreach programmes and other guidance to help solicitors manage complaints more effectively.
8. Putting in place an effective complaints handling system can be particularly difficult for sole practitioners as there is limited scope for a complaint to be considered independently. Therefore providing tailored guidance for sole practitioners, on the types of complaints handling system that they can use, would be helpful. One issue which may need to be considered is whether it is essential for a complaint to be considered independently at this stage. Obviously, it may well be helpful (and indeed good practice) for a practitioner to have a colleague consider a complaint but the profession's experience of complaints handling has matured. If, as is widely accepted, good complaints handling is an important commercial feature, then there is no reason why a sole practitioner cannot deal sensibly him or herself with a complaint without needing assistance from an outsider. Obviously if, as a result of poor practice, many complaints reach the OLC then that might trigger regulatory action, but we wonder how appropriate it is to require elaborate internal systems if a successful result from the complainant's point of view can be achieved informally.
9. The OLC's remit is complaints and therefore the OLC's focus should be on the complaints handling process. However it is worth noting that most complaints arise due to poor client care. Poor client care can arise through poor communication by the solicitor, failure of a solicitor to manage client's expectations and poor costs information.
10. It will be important for the OLC to liaise with representative bodies in order help improve client care. The Law Society has a number of active initiatives in this area and would be keen to help our members improve their client care where necessary. Passing on examples of good and bad customer service will help representative bodies provide better advice to their members on how to improve client care.

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.

11. It is important to remember that the purpose of this scheme is to provide redress to clients and, in particular, individuals who do not have the economic power or the knowledge to be able to deal on an equal footing with a lawyer. While there may be some attraction in allowing small businesses, charities, societies and clubs to complain, many will fall within these categories. Therefore care needs to be taken to

ensure that the OLC is not used for purposes for which it is not intended at the expense of the profession.

12. The Law Society considers that the number of employees is a key factor in determining whether a business is small and the limit of ten employees or fewer is sensible. This test should be coupled with the limit on turnover as suggested in the discussion paper.
13. Much more consideration will need to be given to how small businesses, charities, clubs or societies might use the service. For instance who from a business can contact the OLC and initiate a complaint and who will accept the determination. Also, the OLC will need to consider how it will assess whether an organisation is eligible to use the scheme and who will pay for that assessment.

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, who and why?

14. We agree that a complainant should be able to nominate someone to act on their behalf, for instance a carer, as this will make the service more accessible - particularly to those who are vulnerable. By the same token, we see no reason why a legal guardian could not take forward a case on behalf of a minor. However, third parties, such as carers should not be able to bring a complaint of their own motion if they are not authorised to do so. Solicitors may well need to provide advice to a client that their carer may dislike or disagree. There is a danger that such people would seek to use the complaints system for their own interests rather than the client's.
15. The question of what happens when a complainant has died is complex and sensitive and we would urge the OLC to make the system as simple as possible. There will inevitably be difficulties in dealing with such complaints because the complainant may well be an important source of evidence and it may not be possible to resolve a complaint without them. Assuming this can be overcome, however, we still consider that there needs to be a discussion as to how far the OLC should continue to investigate a complaint.
16. It is desirable we feel to distinguish between cases involving an obvious financial element, and those where poor service has caused annoyance but no measurable loss and where an apology would normally be sufficient. We suggest that the OLC should not investigate or continue to investigate complaints in these circumstances when the only outcome would have been likely to have been an apology. Obviously it can cause particular distress if relatives consider that the solicitor's actions have made life worse during a difficult illness or even to have contributed to the death. They may feel that they themselves are owed an apology. We doubt that this would be appropriate however. In a case in which a family member provides emotional or other support to a living complainant and who feels equally strongly any apology would nevertheless go to the inconvenienced client. If this is accepted a clearly stated policy would be necessary that, absent the need for financial redress, resources would not be expended in consideration of a possible posthumous apology.

17. The situation is obviously different where there may be some financial redress payable or a need to put mistakes right. We think that it is right that, in such cases, the OLC should look at the case. However, it should only do so at the request of the executor. The executor exists to take decisions in respect of the estate and is accountable to the beneficiaries. He or she is thus well placed to take a view on whether or not it is appropriate to pursue a complaint. This will avoid the OLC having to define who takes precedence in pursuing a complaint and involving itself in what may be emotional and complex family rows.
18. We note that cases alleging professional negligence may be considered by the OLC and that the OLC will decide on a case by case basis whether it will consider these cases. We believe that complaints which require a judgement about whether a law firm's actions or inactions amounted to professional negligence should only be dealt with by a court of law. This is because such complaints are likely to be complex and involve significant questions of law and fact which will be expensive and inappropriate for the OLC to resolve.

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.

19. The Law Society is pleased that the OLC has taken on board previous submissions on the time limit for bringing a complaint and has shortened the length of time accordingly. We believe that the current limits are acceptable.

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

20. Currently there is no right for a solicitor to appeal a decision. We consider this to be unfair as the complainant has the right to decide whether to accept or reject the determination. If they reject the determination they may take the matter to court. The solicitor has no comparable right to reject the determination or to take the matter to court unless the solicitor opts for the expensive and complex process of judicial review. In our view, a right to appeal is particularly important if the findings are to be published and so will affect the reputation of the firm. Any organisation, including the OLC, will make mistakes and occasionally reach decisions which are incorrect or unfair. It should have the opportunity to put these decisions right and to enable it to monitor and improve the effectiveness of its procedures. A solicitor must, therefore, have the right of appeal against such determinations.
21. When creating the OLC, Parliament put in place a system which makes awards, directed by that body, binding and enforceable on application to a court. Unlike other legislation for similar bodies, such as FOS, it allows the ombudsman as well as the client to apply to a court to make an order enforceable. These additional powers may mean that Article 6 of the European Convention on Human Rights will be applicable to the OLC. The potential applicability of Art. 6 means that it is difficult to justify the lack of appeal procedure.

22. It is good practice to resolve complaints informally as it cuts costs and provides a resolution for the complainant much more rapidly. There are some steps that the OLC can take to encourage resolution of complaints before they come to the OLC.
23. Some local Law Societies have conciliation services that are experienced at conciliating complaints at an early stage without the involvement of regulatory bodies such as the LCS. These schemes provide a valuable service and should be supported. The OLC may wish to encourage the use of these services to bring about more informal resolutions. Many larger firms have sophisticated systems for handling and resolving complaints. The OLC should ensure that clients have exhausted these routes before considering complaints.
24. When a complaint is referred to the OLC it is important that there is an attempt to resolve the complaint before it is referred for a decision. This will save time for both the lawyer and the complainant and lower running costs of the OLC.
25. The rules currently contain limited information about how the OLC plans to resolve complaints informally; we assume that the OLC's approach will be covered by a further consultation. We believe that the OLC should be open and transparent about its approach to resolving complaints. The LCS currently provides guidance on compensation levels which is useful for the solicitor to gauge the level of compensation that they should consider offering and also to manage the client's expectations. It is also important that solicitors understand why they are being asked to conciliate a case and which part of the work did not meet the high standards expected. The Financial Ombudsman Service (FOS) currently publishes examples of complaints it receives and the outcome. This type of information allows businesses to understand the means by which complaints are handled and the likely outcome of cases. A similar system of publishing anonymised examples may be helpful.
26. While in many cases, informal resolution of complaints is preferable, solicitors should not feel obligated to settle a complaint if they consider that it is vexatious or unwarranted. The OLC should put in place procedures to ensure no solicitor is placed under inappropriate pressure to conciliate a complaint.

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?

27. It is clearly important that the OLC, Approved Regulators (ARs) and Legal Services Board (LSB) should work closely together to ensure that legal service providers have a strong complaints handling process. It is important that lawyers are provided with clear guidance from both ARs and the OLC on best practice when handling complaints and that good practice is disseminated.
28. However it is not clear to us that it is necessary to impose rules to require ARs or others in the system to co-operate in this way. We would expect the relationship to be constructive and thus formal rules would be unnecessary. Putting in place formal rules would suggest a formal relationship where one need not exist. Any rules that were made should be ones which are exercised in the last resort where it is clear that an AR is failing to take account of good practice.

29. In our view, the assistance that the OLC may need from the ARs is likely to be guidance over the interpretation of individual rules and the extent to which certain actions might amount to misconduct. We believe that the OLC should be able to discuss such issues informally with the AR. In addition, there might be serious cases where there are issues of misconduct and poor service which need to be addressed concurrently. It should be ensured that such complaints can be referred to the AR swiftly and that, where appropriate, joint teams should exist to ensure that the costs of an investigation are kept low and there is minimal duplication.
30. It is likely that the scheme rules can only put in place the principles of such assistance. To ensure transparency the OLC should establish memorandums of understanding (MOU) between itself and the ARs, setting out clearly the details of the assistance to be provided, any payments due and the terms of any data sharing. The MoUs should be publicly available.
31. The OLC will also need to work closely with other ombudsman/complaints schemes to ensure complaints about Alternative Business Structures (ABS) are handled by the correct ombudsman when there is the potential for the complaint to be dealt with by more than one. They should also ensure that where a complaint has been dealt with by one ombudsman there is not scope for the complainant to go to another scheme with the same complaint. This will be particularly important where the outlook or determination for a party is bad and the temptation for them will be to try another ombudsman.

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.

32. The Law Society agrees that the jurisdiction of the OLC should be wider than just considering complaints about reserved work. However, we believe that there may need to be some limit on the type of work that can be complained about. For instance, where, as is likely, under the regime for ABS, firms may well be providing significant services which are not currently undertaken by lawyers. This could mean that the OLC will potentially be asked to consider complaints completely unrelated to legal matters.
33. One of the main driving forces around the creation of ABS was to allow firms to set up multi disciplinary practices (MDPs) to carry out a variety of work including legal work. Examples could include other professional services, such as accountancy or auditing or some non professional services such as the provision of funerals. It may well be that the rules on ABS will require significant ring-fencing of the legal and non-legal work undertaken by firms. However, it is not clear that this will be the case and, in our view, it is not appropriate for the OLC to deal with complaints unrelated to legal services. Nor is it appropriate for the profession to pay for the handling of complaints which are unrelated to legal services.
34. In its consultation, ABS: Approaches to Licensing, the Legal Service Board has proposed that the OLC will take complaints about non-lawyers within ABS and refer

them to the appropriate body where necessary. However, there may be cases where there is no appropriate body to deal with the complaint. As yet there is no proposal as to who will handle these complaints. As stated above the Law Society firmly believes that it is not appropriate for the profession to pay for the handling of complaints that are unrelated to the legal services provided by an ABS and we thus consider it inappropriate for the OLC to handle such complaints.

35. The OLC's jurisdiction over costs should be clearly defined in the rules. Complaints which are solely about the size of a bill, as opposed to the quality of service, should be dealt with by the current system of court assessment. The OLC should confine itself to considering cost where it is linked to poor service. For instance, in cases where no work was done or the work undertaken achieved nothing, the OLC would need to consider the costs and whether the bill should be reduced. The OLC should not, under normal circumstances, consider the hourly rate of a solicitor or the number of hours charged to carry out a particular job. Providing judgements on the rates charged by a solicitor would amount to unjustified interference in the market
36. The current scheme rules state that the ombudsman may publish details of the investigation, consideration and determination of a complaint. The possibility of publishing details of complaints was raised by the LCS who held a consultation in early 2008. We have provided our response to the consultation in Annex A. While this response may not be fully applicable to the OLC it provides an overview of the Law Society's views on the subject. We assume that the OLC will consult separately on this issue and we will respond to that consultation fully.
37. There is little information in the rules about how compensation for complainants will be assessed. Compensation should be proportionate to the distress and inconvenience caused but should also take into account the cost of the work that was carried out . The compensation should not be disproportionate to cost of the work carried out.
38. The Law Society accepts that it will be difficult for the OLC to provide precise timescales for handling complaints at the current time. However, the OLC should endeavour to be as transparent as possible about timescales for handling complaints once they are operational. This will ensure that both clients and solicitors are informed as to how long it will take for a complaint to be decided by an ombudsman. This will be particularly important for solicitors where a bill is outstanding pending the resolution of a complaint.
39. As noted in our previous submissions further clarity on the following is required -
 - 5.8 - We would like the OLC to clarify who will pay where the ombudsman refers a case to court within the rules.
 - 5.12 – We think that where a respondent objects to a transfer of a case to another ombudsman they should have the right to appeal the decision of the ombudsman.
 - 5.24 – It should be stated whether the admissibility of evidence relates to the criminal or civil standard of admissibility of evidence.
 - 5.32 – The rules should provide an exception for failing to meet time limits where there are exceptional circumstances. This is particularly

important where the respondent is a sole practitioner, as in the event of them being incapacitated there may be no one to provide the information required within the time limits.

- 5.33 – If Article 6 of the European Convention on Human Rights is to be enforced by the ombudsman, then both respondents and complainants would have the right to an oral hearing. As this is not the proposal being put forward in the rules then the reference to Article 6 should be removed.
- 5.37 – The Law Society considers that the ombudsman should also consider what the solicitor has already done to resolve a complaint when making his determination.
- 5.57 – the Legal Service Act (s141 (5)) requires that the OLC specifies when the Ombudsman would enforce a determination through a court. The current rule does not specify this and should be revised.
- 5.61 - To ensure client confidentiality is maintained we think 'or other client' should be included after complainant, as the OLC may acquire documentation which includes information about other clients as well as the complainant. This information should not be shared.

Annex A



The Law Society

Exploring the publication of
solicitors' complaint records

The Law Society's response

24 April 2008

SUPPORTING
solicitors

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Annex - consultations informing this response

1. Introduction

This response has been prepared by the Law Society, the representative body for over 130,000 solicitors qualified in England and Wales, working at home and around the world. The Law Society negotiates on behalf of the profession and lobbies regulators, government and others.

The Law Society agrees that solicitors should be pursuing excellence in client service and provide appropriate redress when things go wrong. How a solicitor responds to client complaints is a very tangible expression of their ability to provide quality customer service and their professionalism.

We do not aim to 'protect' those solicitors who consistently provide poor service from appropriate accountability processes. However, we are committed to providing practical support to help solicitors give outstanding client service and handle complaints well. We are drawing on best practice from internationally recognised complaints handling agencies to shape our policy and membership services, to ensure that our solutions are effective and evidence based. We would welcome the opportunity to work with the LCS in developing these.

We appreciate that with the increasingly diverse range of legal service providers in England and Wales, it can be very difficult for clients to decide on the right person to entrust with their important and personal legal affairs. The Law Society is working with a wide range of consumer agencies to provide clients with more information to help them find the right solicitor for them in their circumstances.

Each client will have different information needs and a different degree of choice depending on their geographical location and funding options. It is for that reason we are developing our Find a Solicitor directory to take into account more of these relevant factors which clients want to know about when selecting their solicitor.

We have closely reviewed the proposals presented by the Legal Complaints Service (LCS) with respect to publishing complaints and have consulted widely on the issues. We are of the view that the proposals:

- will not achieve their stated aims and may positively mislead clients,
- will undermine the positive work being done by the Law Society, and
- may jeopardise the LCS's ability to achieve the targets it has been set within its actual remit, namely the resolution of complaints in a timely manner.

We are also particularly concerned that the LCS is seeking to rush through these proposals when it will be replaced by the OLC within three years.

It is for these reasons the Law Society cannot support the current proposals by the LCS to publish inadequate professional complaints records and why we are advocating an alternative, positive and proactive way to enhance the experience of clients when interacting with solicitors in England and Wales.

2. General Comments

2.1. What is the role of the LCS?

The LCS has been delegated the Law Society's statutory powers to investigate and resolve complaints of inadequate professional service.

As the name suggests, these complaints involve allegations of poor service by the profession ranging from delay to negligence. It does not deal with allegations of professional misconduct, except to refer them to the SRA. The LCS is set to be replaced by the Office for Legal Complaints (OLC) by 2011.

The LCS is not a court and its decisions are not binding precedents. Nor is it a regulator. Instead it fills an important role within the legal market as an independent complaints resolution body, bridging the gap between client and solicitor when there is a breakdown in that relationship. It seeks to resolve disputes on a case by case basis, to find an outcome which is fair in all of the circumstances.

To the extent that LCS seeks to provide information to both clients and solicitors outside of an individual dispute, the LCS should ensure that the information is helpful and cannot be taken out of context to the detriment of the user of the information.

2.2. The current proposals

2.2.1. The LCS's preferred option

The LCS believes it will provide improved information for the public if it publishes some information about the outcome of individual complaints against firms.

Essentially the LCS's preferred option of publication is that any adjudicated and upheld service complaints against a firm of solicitors should be published.

This publication would take place from a date to be set in the future, with complaints to be removed from the record after a period of three years.

Publication would be by way of a summary of the decision, rather than league table or full decision. Publication would occur whether or not there is an appeal against the decision.

2.2.2. The stated aims

LCS states in its consultation document that the aims of the proposals are to:

- inform clients by educating and empowering them to make the right decisions at every stage of the legal process; and
- improve standards amongst solicitors by supporting them to provide a better service, to help prevent complaints about service arising.

We support these aims, but do not believe that the proposals will achieve them.

2.3. Information for clients will not be meaningful

After considering the practical application of the proposals, we do not believe that the information provided to clients will be meaningful, nor will it assist them to make a choice between the majority of practices.

The case load for LCS last year was 14,514, while there are currently 8,926 law practices in England and Wales, thus averaging 1.6 complaints per firm.

Of the cases received last year, 18% were not upheld by the LCS and 35% were conciliated. Other cases went to adjudication, were not within jurisdiction, or were dropped by the client.

For the year 2006-07, there were 1098 upheld adjudicated complaints. This number has decreased to 597 for 2007-08. One would expect to see this number continue to decrease if the LCS is successful in supporting solicitors to provide better service and resolve complaints effectively.

As such this means that the number of adjudications and so published complaints, if evenly spread across the profession, would relate to less than 7% of the legal practices in England and Wales. There will be no information provided by these proposals for the client about the quality of client care provided by the remaining 93% of the profession.

The LCS have failed to explain in their proposals what conclusions the clients can accurately draw from the limited information they are proposing to provide about a tiny proportion of solicitors' practices. Perhaps this is because, as the next section of our response outlines, such meaningful conclusions are few.

2.4. The real effects of publication

We believe that the proposals will:

- Highlight a very small number of firms with a high number of adjudications, but do nothing to understand why this is the case or improve performance.
- Disproportionately penalise another slightly larger group of firms who for one reason or another have an adjudicated complaint.
- Cause distortions to the legal market and damage the reputation of solicitors in general as they are the only sector which will be covered by the proposals.

As the LCS will cease to exist within the next three years these proposals are not an effective use of the LCS's resources for either the client or the profession.

2.4.1. Few firms with more than one adjudicated complaint

During parliamentary debates relating to the Legal Services Act 2007, it was asserted that the majority of complaints made about solicitors to supervisory bodies relate to only 7% of firms.

However, to generate meaningful information and improve standards it is important to look beyond the mere numbers and understand why complaints are being generated.

The LCS has not provided any analysis of:

- the types of the firms obtaining a number of adjudicated complaints,
- the area of work they are undertaking,
- the main issues being complained about,
- why these complaints consistently require the intervention of external bodies such as the LCS to resolve them, or
- whether these firms are still in practice.

It is important to understand whether the high complaints levels for some firms are due to:

- a genuine misunderstanding of client service standards or appropriate compensation levels;
- the area of practice attracting litigious clients with unrealistic views of the compensation they should be provided; or
- deliberate and systemic failure to comply with Rule 2 of the code of conduct by the firm.

If the high complaint levels are due to either of the first two points, then there needs to be greater education for firms in the standards expected and for clients over what it is reasonable to expect. Both can be achieved without public 'naming and shaming'.

If, however, the high complaint levels are due to a deliberate and systemic failure to comply with Rule 2 of the code of conduct, such behaviour goes beyond mere inadequate professional service and the Law Society agrees that clients have a right to expect to be protected from them. It is for this very reason that the SRA as the regulator has the ability to take action against firms for persistent poor client service.

There is already a process for the LCS to refer matters to the SRA where they have concerns about inadequate service which may amount to misconduct. The SRA may issue a public reprimand or refer the firm to the SDT for persistent poor service. Such a regulatory finding would have real meaning for the public. It is not clear how far the LCS are using this referral process or how effective it is. Using this process would be more proportionate and accountable, than for the LCS to take on a quasi-regulatory role and simply impose the penalty of publication on these firms.

The LCS needs to be more transparent about its approach to firms with high levels of complaints. The LCS needs to:

- outline why it believes these high levels of complaint are occurring,
- what steps it has taken with respect to these firms within existing protocols,
- why it thinks existing protocols are insufficient, and
- why it thinks that publication is a proportionate response.

2.4.2. Even good firms have something to fear

The LCS has stated that good firms will have nothing to fear from publication. However, complaints are a fact of life and no matter how good your service, you

cannot guarantee that you will never receive a complaint. Unfortunately there will also be some complainants who will never be happy with your attempts to resolve a complaint.

Practices may find that one or two cases are not conciliated but proceed to adjudication for a number of reasons, such as:

- The client may have refused to accept a reasonable offer of compensation from the solicitor,
- They may be seeking a ruling on a borderline question having received conflicting advice from LCS staff,
- They may genuinely consider that either the complaint is not justified or the level of compensation sought is unwarranted, which may be supported either by the adjudication or on subsequent appeal.

Under the current proposals, even if the adjudicator finds that the original offer of compensation was reasonable and should be accepted, or that there was a legitimate point to be resolved, the fact that the complaint has been upheld will mean that the case will still be published.

Thus it is likely that a responsible and competent firm which makes either a borderline mistake or is unlucky enough to have a client who refuses to accept a conciliation, may find the details of the complaint published while a firm which receives many more justified complaints, but is willing to pay whatever the client asks in conciliation, will be given anonymity.

Our real concern with these proposals is the significant impact which publication will have on those firms who end up with a single complaint which goes to adjudication.

Given the small number of firms who will be listed on the complaints register, a firm may find that they are the only firm within a 50 mile radius or practicing in a certain area of law with a complaint on the register. Any firm who makes the register, even with just one complaint, will be perceived as providing poor quality client service. We are of the view that this is disproportionate.

Publication in relation to these firms will do little to provide meaningful information to clients or to enhance client service. It will simply remove the avenue of adjudication from firms so that they can no longer ensure that they are getting a fair hearing and a realistic outcome.

The Legal Services' Ombudsman predominantly looks into complaints from clients who are unhappy with the decision by the LCS. Judicial review is not available where all other avenues of redress (such as adjudication) have not been taken up.

As such firms may decide that they have no option but to pay whatever compensation the client demands irrespective of the merits of the case, as the reputational risk of challenging the client's expectations without a proper avenue of appeal may simply be too high. While this may increase client satisfaction, it is likely to lead to a sense of injustice and alienation from the LCS, which must hold the confidence of solicitors as much as it should hold the confidence of clients to be truly effective.

2.4.3. Not all sectors are covered

Solicitors are not the only providers of legal services in the UK, but they are the only practitioners who fall within the LCS's jurisdiction and will be subject to these proposals. Extensive publicity around the publication of complaints against

solicitors may cause some clients to turn to other providers of legal services in the mistaken belief that a lack of reported complaints means that there is a better level of client service. However, other providers of legal service do not have the same level of regulation or the same complaint resolution processes as solicitors. As such clients will find that they have even less protection when using such other providers. We do not consider that this will assist clients to make a truly informed choice.

2.4.4. Avoiding publication rather than improving practice

When seeking to bring about a cultural or organisational change you need people to focus on the big picture. As outlined above, the proposals for publication will not reward firms for doing well at complaints handling, it exposes all firms to the risk of intransigent clients and punishes those who cannot provide compensation which will satisfy the client.

As such it has the potential to focus the activities of the firm onto avoiding publication on a complaint by complaint basis. Resources, both in terms of time and money may be focussed on dealing with currently unhappy clients rather than on firm-wide improvements in client care and complaints handling procedures. While publication is meant to be against a firm, this places much greater pressure on individual solicitors who have exposed the firm to the risk of publication, rather than creating an open environment where lessons can be learnt from past mistakes.

The current proposals will not clearly demonstrate to the public those firms who have proactively undertaken reviews of their practice management to resolve client service and complaints issues. If a firm is only receiving one adjudicated complaint in a year then it is very difficult to identify real improvements in client care. As such publication is likely to have a negative impact on a firm's motivation to improve practices once they are on the list.

2.4.5. Limiting access to justice

A number of members have advised us that they undertake work in certain areas of practice which are known to generate high levels of complaints (examples provided include immigration, mental health, child protection), where clients may well have impossible expectations for outcomes and who require skilled handling. These areas of practice are generally not profitable; but solicitors believe that they should undertake work in these areas of practice in the interests of promoting access to justice. These are areas of work where it is easy for relatively minor errors of handling, compounded by a client's intransigence over reasonable settlements, may lead to adjudications. The knowledge that there is a risk of publications of these findings may prove the last straw for firms who do a conscientious job in these areas. This cannot be in the wider public interest in that it could limit the already small choice which those clients tend to have when selecting a solicitor.

We are concerned that these proposals may also lead to people simply not pursuing their legal rights or pursuing them inadequately without appropriate legal assistance; either because:

- o solicitors are ceasing to act in certain areas due to fear of complaints as outlined above, or

- clients choose not to instruct a solicitor due to a loss of faith in the legal profession due to the publication of complaints.

Such an outcome would not be to the advantage of clients or the public generally.

2.5. Human rights

Article 8 of the European Charter of Human Rights provides the right of respect for a person's private life. This right has been interpreted by the European Court to extend to the right to respect for one's professional life and the right to not have one's professional reputation defamed. The Law Society is concerned to see that this right of our members is appropriately respected.

We accept that the right contained in Article 8 does not confer a right to falsely retain an undeserved reputation. However, we are not convinced that the proposals as currently drafted will truly serve the public interest in a way which provides useful information to clients without creating arbitrary anomalies for solicitors. We are concerned that the proposals may lead to innocent solicitors about whom incorrect adjudications are made having this right unjustifiably breached.

This is a significant issue which the LCS has simply not addressed.

2.6. An alternative way forward

2.6.1. Time to do something

The LCS states that if they decide not to publish detailed complaints records:

- the opportunity to improve or expand the information available to clients would be missed; and
- the current situation for both clients and solicitors would therefore be preserved.

With respect, neither of these can be correct. The first argument suggests that this is the only opportunity to expand the information available which patently cannot be true. The second ignores the fact that there are other activities which can be undertaken which will actually achieve the aims of enhancing client service standards and providing useful information to clients to help them select the right solicitor for them.

The Law Society is so convinced of the effectiveness of these other methods that we are already committing resources to these activities.

2.6.2. Developing capacity

While the LCS says that one of the aims of publication is to support solicitors to improve client service, there is nothing in the proposals which actually provides support, which educates or provides information on what is good practice, develops capacity for client care or rewards good practice.

To increase standards of client care across the profession you have to take a positive and holistic approach. This involves demonstrating how good client care

and complaints handling can benefit a firm and actually providing practical support and tools for firms to develop their capacity in complaint handling and client care.

Effective capacity development does not mean that you will have every firm providing excellent client care overnight. It does mean that you have a range of tools and opportunities for firms to help them move along the continuum from adequate service and compliance with Rule 2, through good practice, and ultimately to achieve excellence in client care and complaints handling.

The Law Society is working to expand its existing services to solicitors with a focussed client care campaign. Activities being undertaken over the course of this year include:

- Publication of practice notes outlining good practice in the following areas:
 - Complaints management
 - Client interviews
 - Client care letters
 - Providing costs advice and billing
 - Responding to an investigation by the LCS or the SRA

- Running training seminars around England and Wales on:
 - Client care and complaints handling
 - Costs
 - Additional complaints handling skills such as communication, dealing with difficult people and stress management
 - Responding to an investigation by the LCS or the SRA

Last year the Law Society ran 18 training seminars which included information on client care. We have already run 12 such seminars this year and are aiming to aim to conduct another 33 seminars by the end of December.

Our training on client care and other practice management topics will continue to provide legal professionals from a variety of backgrounds with opportunities to develop their knowledge in these key areas. These courses form part of the Law Society's commitment to support our members in an increasingly challenging market environment.

- Encouraging firms who want to pursue best practice in client care to seek Lexcel accreditation.
- Including excellence in client care and practice standards as an award category in the Law Society's annual Excellence Awards.
- Promoting best practice in law firm management and client care through the Law Society's Law Management Section which provides a range of support to its 2000 member firms through:
 - Managing for Success its quarterly journal

- Bi-monthly e-bulletins
- Full day seminars on all aspects of practice management

The LCS has stated that it is of the view that other methods of raising standards such as accreditation and audit are expensive options both for the provider and the firm, and the take-up of accreditation is often low and does not deliver the change required.¹

We dispute this and would not be spending solicitors' money pursuing these options if we did not think that there would be a real dividend for both solicitors and clients.

Research into the effectiveness of Lexcel accreditation has demonstrated that these firms tend to receive 40% less complaints than non-accredited firms and they have higher client satisfaction levels. Insurance companies are recognising the benefits from the intensive capacity development through Lexcel and accredited firms are obtaining lower insurance premiums.

In reviewing a wide range of UK and international complaints handling bodies, the vast majority provide some level of capacity development to the service providers they oversee. Such capacity development includes the provision of guides, toolkits, training seminars and helplines. In terms of publication many complaints handling bodies favour publishing details of complaint trends and anonymous case studies as ways to highlight good practice and areas in need of improvement, rather than singling out individual service providers for public criticism.

For more details on the lessons to be learnt from other complaints handling bodies see our separate comparative analysis, provided with this response.

2.6.3. Giving information to clients

As the LCS has recognised in its consultation document, clients really want information on which solicitor to choose to represent them. In the past they have in the most part done this by personal recommendation or on the basis of returning to a firm they had used previously.² This approach already incorporates information on how the firm treats its clients and handles complaints.

As stated previously, the current proposals will not help clients distinguish between over 90% of solicitors and may positively mislead them about competent practitioners. Knowing which solicitors in your area are recognised as positively providing good quality client care and legal advice (rather than merely an absence of published complaints) is more useful than being given information that you may want to avoid one of the many solicitors you are considering.

Currently the Law Society offers clients the ability to search for a solicitor via its Find a Solicitor directory. The directory assists clients to make a choice between solicitors by highlighting firms with either Lexcel accreditation or SRA panel accreditation. One of the benefits of Lexcel accreditation for clients is that firms

¹ <http://www.lawgazette.co.uk/opinions/letters/view=letter.law?GAZETTEOPINIONID=374703>

² Client Views – Research Study 40 – Clients' experiences of using solicitors for personal matters – Law Society of England and Wales – 64% of clients surveyed chose their solicitor on the basis of personal recommendation or previous use.

are independently assessed on over 50 requirements on an annual basis, including areas such as client care and complaints handling. Being awarded Lexcel proves a firm's commitment in achieving best practice through the investment of significant time, effort and money required to gain and maintain accreditation.

At present there are 704 legal practices throughout England and Wales with Lexcel accreditation, with a further 40 going through the accreditation process. This number is set to increase over the year. Accredited practices range from sole practitioners to large law firms and in-house to private practices. The Lexcel requirements can require a firm to adopt processes, policies, plans and procedures not currently used within the practice. This, combined with assessments required on an annual basis, means that the adoption of Lexcel must be led by the firm's management, often resulting in positive culture changes into instilling best practice.

Law firms with employees, who have achieved SRA panel accreditation, are assessed as being specialists in their field, and the quality of their client care is monitored as a condition of their ongoing membership of the panel. There are over 4,000 legal practices in England and Wales with employees who are members of SRA panel accredited firms.

Unlike the number of adjudicated complaints which should decrease if the LCS is effective in its role, the number of firms seeking such accreditation as they pursue excellence and seek to distinguish themselves in the UK's competitive legal market is very likely to increase. Accordingly, quality marks for excellence in client care and legal expertise will increasingly assist clients to make informed choices about which solicitor they want to represent them.

The Law Society has detailed information on its website and in printed brochures for clients and client bodies to help explain the significance of Lexcel accreditation³ and SRA panel membership⁴ and factors a client should look for when choosing a solicitor⁵.

2.6.4. Will publication ever be an option?

We are not closing the door on publication completely. We accepted that it was appropriate for the SRA as the regulator to publish relevant information which was in the public interest.

Once the OLC is in place, then some of the problems intrinsic to the LCS proposals, such as the singling out of solicitors against the rest of the legal sector, will no longer be relevant.

We would expect that the OLC publishes clear policies on its approach to complaints and demonstrated transparency and consistency in its own handling of complaints, before the question of publication was re-enlivened.

³ <http://www.lawsociety.org.uk/choosingandusing/findasolicitor/view=lexceldetails.law>

⁴ <http://www.lawsociety.org.uk/choosingandusing/specialise.law>

⁵ <http://www.lawsociety.org.uk/choosingandusing/commonlegalproblems.law>

We note with interest the recommendations made by Lord Hunt of Wirral in his review of the Financial Ombudsman Service with respect to publication, which promote a more holistic approach to transparency and accountability. We would hope that any future discussions regarding publication would be carried out in a similar vein and take into account the effectiveness of the capacity development currently being undertaken.

3. Response to specific consultation questions

3.1. If we decide to publish, what factors, if any should be considered when deciding on how to do so? Why is it relevant?

Part 2 of our response outlines many of our concerns in relation to publication which we do not believe the LCS has adequately countered to justify publication. However, should the LCS choose to proceed with publication, we are of the view that these further points need to be considered.

Contextual information

The suggested contextual information has been reviewed by our research team. They are of the view that the contextual information suggested is inadequate to provide a meaningful or fair comparison between firms.

We are also concerned about the LCS's suggestion that contextual data would be held on websites not maintained by them, in terms of data protection requirements and their ability to ensure the quality of that information.

In order to understand properly whether or not the adjudication record is a significant indicator of current service levels being provided by the firm the following information needs to be included:

- the overall number of matters which a firm handles
- the client and casework mix of the firm
- the size of the firm
- the area of law in which the complaint arose
- the general complaint trend data for the area of law in which the complaint arose
- clear information on the severity of the conduct found in this instance to be inadequate professional service compared to the range of matters dealt with by LCS
- the attempts made by the firm to resolve the complaint prior to adjudication
- whether the adjudication is subject to appeal, and in the event that the appeal is successful, the record being removed

Once this information is provided alongside the very small number of complaints which go to adjudication, it will quickly become apparent that the majority of the records published are irrelevant when assessing the current service standards of a firm.

Disproportionate impact on sole practitioners

The LCS prefers the option of publishing complaints against firms rather than against individual solicitors as they consider that it is not constructive to ask who is individually 'to blame' for poor service. However, this fails to take into account the situation for sole practitioners, of which there are over 4,000 in England and Wales.

Complaints records will in most cases effectively be against the solicitor because they are the firm. It is also more difficult for sole practitioners to effectively resolve complaints themselves as they are sitting in judgement of their own conduct, and clients are less likely to accept that their complaint has been dealt with objectively or independently.

A better approach would be to develop initiatives to support sole practitioners in providing more robust complaints handling processes. The Law Society would welcome the opportunity to work with the LCS to provide such support.

Time

The LCS has recognised that time is a relevant factor in the usefulness of any complaints records. It is important for clients to be able to assess the standard of care they are likely to receive at the time they instruct the firm, rather than basing their decision on out-dated historical information.

For this reason we suggest that other contextual information should be included in the complaint relating to time, such as:

- Dates when the service complained of were provided
- When the complaint was made both to the firm and to the LCS, this is particularly significant given that the LCS has now advised clients it will take into account complaints even after 15 years
- Length of time taken by the firm to provide a response to the complaint
- Length of time taken for consideration by the LCS

The LCS has proposed that findings should remain on the record for three years after the adjudication, but it has not provided any evidence with respect to the time frame taken to implement changes in practice and procedure and make a difference to client care which would justify their decision that three years is an appropriate period.

The LCS's performance data demonstrates that around 63% of adjudicated complaints take over six months to reach closure. The LCS will accept complaints up to six months after the final response to the complaint from the solicitor. Therefore it is quite likely that the incident of client service in question will have occurred around 12 months prior to the time the decision is published. In the light of the significant penalty which will be imposed through publication, particularly for those firms with only one or two complaints on the record, we think that three years is disproportionate.

One way of mitigating this would be to allow the firm to make an entry on the record which highlights any changes to practice and procedure which have been made since the complaint to address the relevant service issue.

3.2. Comments on the draft publication policy section about exemptions

We agree that the LCS should retain the discretion not to publish and should be transparent about how it will exercise that discretion. This is particularly relevant as the OLC will have a statutory discretion with respect to publication.

However, we have a number of concerns with the current proposed policy on non-publication:

- The suggestion that the LCS may publish a note of the complaint without a summary of the facts is particularly unfair to the firm, as all contextual information will be removed. This leaves clients wondering whether it was an extremely serious complaint with a full compensation award or a minor infringement with a £50 award. It removes information which could help drive good practice through learning by shared experiences and will give no credit to any attempts by the firm to address the complaint. The lack of this contextual information would be misleading to clients and fail to assist them to make an informed choice about whether or not to instruct the firm.
- The reasons for exemption are dependent upon the client's interests rather than the public interest as a whole, or the question of the interests of justice with respect to the particular case. The narrowness of this approach is relevant when considering the possibility of legal action resulting from publication.
- The policy fails to take into account the possible unintended consequences of publication, such as restricting access to justice with respect to geographical areas, particular communities or particular client groups. It may be that the LCS decides that those consequences are not sufficient to prevent publication in full, but there may still be instances where these consequences manifest significantly in individual cases. The LCS should be able to retain its discretion not to publish in those cases.
- The policy provides that publication will take place prior to any rights of appeal being exhausted. The Law Society is of the view that natural justice requires that a note should be placed on the record to explain that it is subject to appeal. The LCS should also have a policy regarding the steps they will take to correct the record and compensate a firm for the damage to their reputation if the adjudication is overturned.

3.3. If not in favour of publication – please explain why?

See Part 2 of this response.

3.4. What are your views about the possible unintended consequences of publication? How real are the risks that LCS has considered? What level of impact might they have? Share details of any consultation you have undertaken.

In relation to the current proposals of publishing only adjudicated complaints see Part 2 of this response.

If the LCS were to consider expanding the proposals to publish conciliated or all complaints in order to share more information with clients, the Law Society is of

the view that this is likely to make firms less willing to conciliate a complaint once it has been referred to the LCS.

Firms will still need to make a business decision as to whether it is worth expending the time and resources on pursuing a complaint through to adjudication where they do not agree with the level of compensation sought by the client or recommended by the LCS case worker. However, if the matter is to be published anyway, they may wish to explore all avenues of appeal open to them, with attendant costs for the LCS and delays for the client. This would seriously damage the complaints handling process.

The details of the consultations we have undertaken in forming these views are included in the annex to this response. The majority of solicitors we consulted were of the view that publication of all or conciliated complaints would lessen the incentives to resolve complaints quickly.

Accordingly, while we are opposed to any publication at this stage, if LCS were nevertheless to go ahead with publication we believe it should be confined to adjudicated cases.

3.5. Do you agree or disagree with the view that the benefits of publication outweigh the disadvantages? Explain

As outlined in Part 2 of our response we believed that the benefits do not outweigh the disadvantages in the proposals because they fail to achieve the stated aims of the project.

The information provided to potential clients will not assist them to choose between 93% of firms and for the remaining 7% it will be lacking in sufficient contextual information to be meaningful.

The proposals provide no support to firms to assist them to improve their complaints handling. Instead it allows the LCS to:

- abdicate its role in ensuring that firms with significant complaints records are dealt with by the relevant regulatory body,
- severely penalises firms who simply have one or two adjudicated complaints,
- remove the option for firms to seek a fair hearing of a dispute through adjudication.

We are concerned that the LCS has proceeded to consultation and expected consultees to be able to fully comment on costs and benefits without providing an equality and diversity assessment or any information on how the implementation of the project would be resourced.

Both the profession and clients, who will ultimately bear the costs of these initiatives, are entitled to know:

- How does the LCS intend to fund this project?
- How much does the LCS believe the proposals they favour will cost?
- What contingency funds has the LCS put in place for possible successful legal challenges?
- What impact will resourcing this project have on the LCS's actual statutory work and meeting the targets set by the Legal Services Complaints Commissioner?

3.6. If you support publication, but do not support the scheme preferred by the LCS – outline the scheme you would prefer.

Policies and procedures of the LCS should be published so that LCS demonstrates that it is transparent and accountable.

We support the publication of anonymous key case studies and more detailed trend information. This will promote good practice, allow problem areas to be identified and responded to with greater training, as well as helping firms and clients see the standards against which the LCS operates.

Annex – consultations informing this response

Consultations undertaken

Two polls of the profession were undertaken through our e-newsletter, Professional Update, on the issues raised throughout the consultation processes. We received 325 responses to the first poll and 116 responses to the second poll.

Within our membership, we consulted further with:

- A number of City firms
- A number of Lexcel accredited firms
- Local Law Societies
- Junior Lawyers Division
- Solicitors Sole Practitioner's Group
- Solicitors with Disability Group
- Association of Women's Solicitors

We also spoke with representatives from:

- Access to Justice Alliance
- National Consumer Council
- Citizens Advice Bureau

Comments from the profession

Since the LCS first launched the idea of publishing complaint records in 2007, we have had many firms raise concerns with us about the proposals. The comments outlined below highlight the general feeling expressed to us from within the profession:

“If the LCS are really concerned to drive up standards, a better way to do this would be to regularly publish top causes of complaint to law firms so their risk managers / partners can address any learning points internally, and go to visit

firms with a higher record of complaints to go through with them the causes and help them improve.”

Partner

“There appears to be a policy of ordering compensation to be paid to most (almost all) complaints regardless of the real circumstances, whether the solicitor is genuinely at fault and whether the complainant is themselves at fault or has actually suffered any loss.”

Partner

“I was in favour of an independent complaints service because I assumed that a well managed firm had nothing to fear from an independent body. Nothing could be further from the truth. We prepared a will for a client. He complained of inadequate costs information, delay and failure to carry out instructions. The LCS found all of his complaints to be completely without justification. However, it was recommended that we make a compensation payment to him because of an alleged failure to deal appropriately with his wholly unmeritorious complaint.”

Chief Executive

“A client did not challenge the bill we sent by seeking a remuneration certificate within the statutory time limit which was set out on the invoice itself. The LCS contacted me and told me that I was taking a very harsh line and that I ought to allow the client to apply for a remuneration certificate outside of the time limit laid down by Parliament. I expressed disquiet at this, but once again, painted into a corner of having a formal adjudication or paying a relatively modest sum to obtain closure, the sensible course was obvious.”

Client Care Partner

“A very large firm might have a miniscule proportion of complaints but the number might seem very large to a journalist, politician or prospective client lacking information on the other statistics. Very often the problem has been solved before the information would be published because the offending fee earner has been dismissed, re-trained or some other corrective action taken.”

Partner

“One of the difficulties here is that some firms act for very large volumes of clients. My firm acts for 1,500 clients a year. 99% are very happy but 1% is still a rather large number of complaints. Most of the clients are “Legal Help” small matters but that does not prevent a client from complaining.”

Senior Partner

“Invariably complaints arise from those who still approach solicitors on a “principle” basis and do not fully appreciate the costs involved in litigation. In the circumstances most complaints do seem to arise from bills which are rendered for potentially less than £500.”

Partner

“A mere comparison of numbers of complaints received by different firms would not necessarily reflect the work profile undertaken by those firms and may well

misrepresent which actually has the "better" record since pure numbers may not be the true guide for this.

Therefore there has to be a huge question mark as to the intention behind publication of a firm's complaints numbers and whether this provides any sort of useful information at all."

Partner