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Alison Robinson,
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Dear Ms Robinson

Office for Legal Complaints: Draft Scheme Rules

The National Consumer Federation welcomes this opportunity to respond to the Office for Legal Complaints' Draft Scheme Rules.

The Federation is the only national grassroots consumer organisation and our members work voluntarily to promote the interests of consumers of goods and services as well as to campaign to improve consumer rights for everybody.

We have a long-standing interest in the reform of legal services to improve the consumer experience and have followed the progress of the Legal Services Act from inception - encouraged by its guiding principle to put consumers first.

Our Charter recognises that, to play an effective role in any market, consumers need **choice, information, representation, access, fairness, quality, safety and redress**. The Office for Legal Complaints will play a central role in ensuring that the LSA's objective of putting consumers first is realised by promoting in particular: **quality of service; fairness in responding to consumer complaints; and redress**. However, this outcome is dependent on adhering to certain key principles governing the Ombudsman scheme. It is our view that consumers with first-hand experience of current complaints-handling should be engaged in all stages of the process of formulating the rules. Information gathering and sharing by the Office should include consumer organisations like NCF, as key stakeholders whose participation in the formulation and on-going review of the rules should be seen as central to the success of the scheme.

Some members of the public with experience of current legal-complaints handlers cite delay, bias, lack of transparency, service restrictions and complexity as detrimental to a fair outcome. We acknowledge that even before its arrival on the statute book, the

Legal Services Act had already had some influence for the better and that both the Bar Council and the Law Society have taken action to improve the regulation of their members and their complaints-handling procedures. Nevertheless, without a robust and independent complaints-handling authority, which maintains focus throughout on the reasonable needs of consumers, the Act could well fail to deliver the promised necessary reforms to the provision of legal services.

Before responding to the seven questions posed in the covering paper for the Draft Scheme Rules, we would like to make a few preliminary comments and enquiries.

§ We would like to know how the Office intends to establish a system for ongoing dialogue with stakeholders, like NCF, which represent consumers of legal services.

§ We would like to know how the Office intends to access past records of real cases in order to obtain the necessary bank of knowledge (with linked knowledge-management and quality-control systems) to inform the structure of the scheme from the outset and which also has regard to legislation on data protection and FOI.

During the passage of the Act, Ministers made a commitment that the Office would be based in the West Midlands. It will come as no surprise that we have concerns that the selection of Birmingham, while welcome for several reasons, locates the service in a centre less than an hour's journey from Leamington Spa.

§ We await publication of draft arrangements for recruitment and training of staff and look forward to having an opportunity to comment on them.

§ We await publication of draft rules on transitional arrangements for dealing with complaints that are being processed by current complaint-handlers at the time the OLC becomes operational. Again, we hope we shall have an opportunity to respond.

The main challenge for consumers who wish to receive redress for detriment suffered as a result of inadequate or negligent legal services is the distinction between the two headings: was the service *inadequate* or was it *negligent*? The poorly-served client is less concerned with the label than the remedy but the label is all important. If the service is filed as inadequate, the complainant can rely on the Legal Complaints Ombudsman to investigate further at no cost to the complainant, and if a finding of inadequate service is made, the consumer should be offered appropriate recompense. If, however, the OLC decides that the service may have been more than inadequate and that the work carried out by the lawyer was negligent, it would appear that hapless consumers are left to their own devices to seek recompense from a lawyer (or lawyers) through the courts, with all the expense, stress and confusion such action can entail made even more challenging when the opponent is a lawyer.

§ We note draft scheme rules 5.8 & 5.13 with interest, but it is not clear whether these rules fully address the problem posed by a negligence label. We would welcome an opportunity to collaborate with the Office on the issue of defining negligence and hope the Ombudsman will bear in mind the potential difficulties outlined above.

We note that although the covering paper does not list a specific question about

grounds for dismissal of a complaint (Section 133(3) of the Act), the consultation draft identifies at 5.7 thirteen grounds for dismissal for all or part of a complaint *‘without considering its merits’*. It is not clear to us at this stage how or why such action should be taken other than under section 126(1) of the Act. We comment further on this below.

§ It is our view that all complaints referred to the Office should be investigated and reasoned arguments given if, in any instance, the Ombudsman concludes that all or part of a complaint should be dismissed. Again, we would welcome an opportunity to examine and discuss this further with the Office.

QUESTION 1: Additional guidance about how in-house complaints handling inter-relates with the Ombudsman scheme.

We agree that the scheme rules should include guidance on in-house complaints-handling to ensure some uniformity in in-house systems, that they relate to the Ombudsman scheme and also that the complainant is not confused by different approaches should the in-house procedures fail to deliver an agreed resolution. We assume the guidance will be provided through the LSB and Approved Regulators and will adopt the approach of the OLC rules, adapted if need be to ensure relevance to the different service providers. On the other hand, it may prove efficient and desirable for the OLC to work directly with ARs.

A prime role of the OLC is to feed back to ARs and their regulated lawyers, knowledge and information gained from investigations of complaints which should identify conduct to be avoided and commend good practice where it is found. For this reason, we consider it advisable to ensure that procedures for providing guidance allow for flexibility so that amendments and additions can be made as they are identified, particularly in the early stages of the scheme.

We hope that the Board and the Office will consult with consumers and consumer organisations on drafting guidance for in-house complaints-handling.

QUESTIONS 2 & 3: Should parties not already identified in the rules be entitled to complain?

We agree that the scope of the scheme should not be limited to individuals and that the service should be open to others who may be disadvantaged if they are unable to access it. Whereas it is true that micro-enterprises, charities and trusts may be eligible to use other Ombudsman schemes, we endorse the proposal to include such groups in the OLC scheme. We can see the logic of adding all not-for-profit and community-based organisations such as clubs and associations.

We generally support an approach which avoids discriminatory exclusions from the service when the overriding concern is to ensure that the protection offered by the OLC is available to all in need. Therefore, guardians and carers should have unrestricted access to the service if need be as long as - where possible - there is clear evidence of agreement from the person requiring assistance. It is important to permit personal representatives and beneficiaries of estates to be able to continue a complaint on behalf of a deceased complainant who has died before the matter is resolved; and it should also be clear that these parties will be able to instigate a claim on their own

initiative on behalf of the estate.

It appears to us that the Act excludes complaints from members of the public who are *not* clients of the lawyer complained about (128 (4)(a)) even though they may have suffered detriment as a consequence of acts or omissions by that lawyer. No current complaints-handling service permits this (although complaints can be referred to the regulatory authority if misconduct is suspected) but a situation can arise whereby the conduct of a lawyer acting for one party is detrimental to others but not detrimental to his/her client who has no interest in raising a complaint. There is no contract between the lawyer and the would-be complainant and therefore any claim for recompense would be difficult to pursue through the courts. Furthermore, bad practice can continue unchallenged and un-investigated. Delays, for example in conveyancing property, or unnecessary and even vexatious litigation practices in civil disputes, such as divorce, that either avoid court or are not appropriately addressed in court, can cause serious detriment. If no sanction or inadequate sanctions (for example a mere reprimand) are imposed on bad and detrimental practices, the party suffering detriment has no redress and the potential benefit of the Ombudsman service to advise on good and bad practice fails to address such conduct and to advise the LSB and/or the ARs accordingly.

§ If it is agreed that such complaints are excluded by the Act, then we ask that this problem be addressed by the OLC and representations be made to remedy the problem. In any event, it is our view that members of the public who are not, or have not been clients of the lawyer complained about but believe they have suffered detriment as a result of acts or omissions by that lawyer, should be entitled to have their complaint investigated by the OLC.

QUESTION 4: Time limits

We are unsure that the arguments for reducing the time limit to one year are entirely persuasive. Firms generally retain files for six years and internal memos (which under present arrangements, we note in passing, are not usually made available to or agreed by clients) should provide adequate evidence and refresh memories - at least for providers. Would-be complainants may be aware that they have cause for complaint but decline to act immediately for a variety of acceptable reasons: for example, a consumer may realise there is a problem but not how serious it is or its full consequences; a consumer may need to overcome an understandable reluctance to face the challenge involved in lodging a complaint; the consumer may need to seek assistance and evaluate advice; the consumer may first attempt to remedy any problem by other means without lodging a formal complaint. A year is rather too short.

On the other hand, too short a time limit may encourage hasty action: a desire to get in before the door closes and before proper reflection and examination have taken place.

We assume that any proposed limit would apply to the initial lodging of a complaint in-house and not to referring the matter to the Ombudsman.

We note that the Act states at 133(2) that ða complaint is to be entertained under the scheme rules **only** if the complainant has made the complaint under that scheme before the applicable time limit has expiredð and that the time limit may be extended

in *specified* circumstances. Under such conditions, we could see objections being raised to the acceptance of a complaint on grounds of the expiry of time limits with a possible result that this provision in the Act obstructs the Act's objective of putting consumers first, by failing to deliver an otherwise necessary and appropriate service. The original proposal echoed the court time limits for contractual disputes of three years from when the complainant should reasonably have known they had cause for complaint or six years from the act or omission complained of. In our view, these time scales were correct.

In any event, the safeguards referred to in the covering paper and rules 4.5 to 4.8. should be applied with consideration of the overriding objective of the Act.

QUESTION 5: The approach to resolving disputes set out in the scheme rules.

We agree the approach outlined in the covering paper: encouraging informal resolution of complaints where possible and avoiding formal procedures like the administration of oaths.

We cannot respond at this stage to all the draft rules as proposed but hope that we will be given an opportunity to respond further at a later date should we consider it helpful to do so. In the meantime we make the following observations:

§ 5.7: We do not see a specific reference in 5.7 to dismissing a complaint for lack of evidence. We have concerns about the application of 5.7(g)(h) (j)(m) and would like to consult further on them.

§ 5.8 & 5.9 (b): We assume that the costs of referring any matter to a court will be met by the OLC.

§ 5.14: We assume that others who may provide assistance to an ombudsman in the investigation or consideration of a dispute include consumer organisations.

§ 5.15 & 5.16: We would be grateful for clarification of the effect of these provisions on the rules governing time limits.

§ 5.17 & 5.18: We commend this approach and ask that we may consult on methods of informal resolution particularly if mediation is one intended method.

§ 5.24: We hope that transparency will be a guiding principle in the processing of complaints and the provision of evidence. It is not clear to us why court rules should apply here (5.24(d)).

§ 5.31: It may be advisable to include a provision for negotiation with the parties on procedural time limits.

§ 5.35: We would recommend that a small interim allowance be made payable for attendance at a hearing since some complainants will have very limited resources.

§ 5.37 (a) See above our comments on 5.24(d)

§ 5.41: Time limits should always be set

§ 5.45: We welcome the provisions in this rule.

§ 5.46; 5.51 & 5.52: We would like to consult further on unspecified times.

§ 5.55 We strongly advocate the publication of OLC determinations although it is not clear to us at this stage when or how they are to be published or what the publication would include, and how long the information will remain in the public domain.

§ 5.56-5.61 (Enforcement & misconduct): We approve the provisions in these rules.

QUESTION 7 Further points on the draft scheme rules

We have raised several points at the beginning of this letter and would just like to add two more:

1 When making our point about complaints about lawyers acting for another client, we noted that a complaint may be made about a solicitor acting for another with the Legal Complaints Service if the complaint appears to raise issues of misconduct, we should add that no compensation for detriment can be offered in such circumstances.

2 We would like to know how long records of OLC investigations, considerations and determinations will be held on file.

We thank you for this opportunity to help shape the OLC's scheme rules and look forward to further cooperation with the Office on its important role in improving the consumer experience of legal services.

Yours sincerely,

Lindsey Squire (Chair of the Legislation and Related Issues Committee NCF)

Anne Thomas (Member of the Legislation and Related Issues Committee NCF)

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