

OLC Consultation on the draft Scheme Rules 15 September – 8 December 2009

Comments from ROCAS (Reform of Complaints Against Solicitors)

ROCAS is a body of people who have been campaigning since 1994 for a fair and effective independent system of investigating and adjudicating complaints against solicitors and barristers. The comments we make are based on our collective experiences, both in the past and to the present day.

1. *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.*

Additional guidance should include:

- a) Clients should be given a paper summary of the procedures for complaints before any work is undertaken and this should include details of the OLC and the right to complain about the actions of someone else's lawyer. It should be made clear that complaints about another person's lawyer have to be made to the relevant AR.
- b) The need for complaints where compensation of more than £250 is offered to be referred to the OLC
- c) The sharing of knowledge on monitoring complaints. The ARs should share knowledge with the OLC and the OLC should share knowledge with the ARs.

Ways to promote good customer service include:

- a) Being tough on offenders. For example there could be large fines and the suspension of practising certificates. There would need to be a link with disciplining which is still handled by the SDT.
- b) Investigating previous complaints that have not been properly investigated and where there is documentary evidence. This could help to discover offenders from the start of the scheme.
- c) Publish complaints records in order to protect consumers.

2. *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 reasons why or why not.*

Support for 2.1 and 2.2.

While it may increase the burden on the OLC to begin with, if justice is not made accessible for these groups they could become a loophole and suffer injustice.

Should any not for profit organisation be included regardless of income?

Should Trade Unions (which are not for profit organisations) be included as complainants?

They can help for example in cases of unfair dismissal and sex discrimination.

Should individual union members be able to complain about solicitors employed by unions?

3. Are there any gaps in who can come to the ombudsman scheme? Should we ask the Lord Chancellor to consider including anyone else and if so whom and why?

Under 2.8 include d) in exceptional circumstances, the ombudsman can allow a complaint against another person's lawyer.

There may be circumstances where a consumer is wronged by the actions of a lawyer who is working for someone else or for a corporate body.

2.4 Suggest the wording of 2.4 could be difficult to follow as complainants might not understand the meaning of "discovered". Would it be possible to say

"where the complaint is about a barrister who was instructed by a solicitor on behalf of a consumer, the consumer can complain but the solicitor cannot."

4. 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 indicate and why.

ROCAS strongly objects to the current proposal for time limits of 1 year and 1 year and asks that

- 1. Under 4.5 a) and b) the wording should revert to the 6 years and 3 years limits that are similar to the statutory limitation period for negligence.**
- 2. Support for 4.7 and 4.8 with the addition to 4.8 after "time limit if" add "for example" and after "illness" add "or for previous complaints that have documentary evidence and have not been adequately investigated."**

Reasons:

a) The ombudsman scheme for the OLC may need to differ from other ombudsman schemes in some respects because recourse to law is the citizen's last resort and legal complaints can differ from other complaints. With other complaints the citizen may enlist the help of a lawyer. Experience has shown that when a citizen has a complaint against a lawyer this help cannot be relied on, indeed it can be counter-productive and even more costly having seemed promising to begin with.

b) The drafting has been changed in response to lawyers' views that longer time

limits were impractical and may not lead to fair investigations or decisions. However the Act is for consumers and it is their comments that also need to be taken into account.

It may be noted that very few consumers seem to have been consulted at the preliminary stage. Also lawyers have resisted the change to an independent system all along. It seems their aim now is to ensure that it will not have teeth.

In the initial draft equality impact assessment of the draft Scheme Rules, it is noted that 4.5, 5.4 second bullet, and 5.31 second bullet all refer to lawyers; there appears to be no reference to consumers. Are the interests of consumers being kept in the forefront?

c) The sentence on page 7, "It is worth noting that the Ombudsman scheme will not accept complaints previously considered by one of the existing entities" is inconsistent with 2.7 and 5.7 (d) of the draft rules and s133 4 (e) of the Legal Services Act 2007.

d) Where complaints are well documented with written evidence the passage of time becomes less relevant. Those who have suffered injustice and financial loss do not forget it.

e) Not to allow previous complaints would be perceived to be going against the regulatory objectives of protecting and promoting the public interest and improving access to justice.

f) Allowing previous complaints could provide an opportunity for promoting good customer service in the legal profession by dealing with problems rather than letting them continue. Those who have persevered with their complaint have in most cases done so because they believe they have suffered injustice from a particular provider or providers of legal services and so far that provider has been protected by the previous systems where there has not been proper investigation. The Legal Services Ombudsman has not had the resources to re-investigate more than about 4 cases a year. If previous cases are properly investigated some of the offenders may come to light more quickly and improvements to customer service brought forward sooner.

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

Under 5.1 add, at the end "and can provide help with setting out the complaint."

Under 5.7 d) after "afterwards" add "or there has been insufficient investigation previously"

Under 5.7 k) after "omission" add "and there is no documentary evidence"

Under 5.34 b) after "place" add "near to where the complainant lives"

Under 5.35 Delete “including (for example) by phone”

There appears to be too much reliance on the post box system (written correspondence passed back and forth leading to misunderstandings) and not enough reliance on thorough investigation of the complaint from the start.

It may be considered that the complaint will be investigated through the in-house system but this may not always be the case. It is necessary for the OLC to start again with its own procedures. A common mistake in the past has been misinterpretation of the complaint, and this has gone on for years in some cases. Simple complaints have been made complex.

Unless the OLC can investigate with a trained non-legal independent officer interviewing the complainant and helping to set out the complaint, much time and effort will be wasted.

The investigation needs to be kept separate from the adjudication so that those who help with the investigation play no part in the adjudication.

There seems to be a misconception about hearings. Many complainants have longed to have hearings and to know what is going on. The process needs to be open and transparent. If the hearing is not near where the complainant lives, he/she needs to be given travelling expenses.

Under 5.35 where hearings by phone are mentioned, a complainant may be at a disadvantage in a teleconference if unfamiliar with this form of meeting.

Grounds for dismissal. Please see the changes requested above to 5.7 d) and k).

6. *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?*

Re Misconduct

Under 5.59 after the part in brackets, add “and after having dealt with the other issues,”

In 5.59 c) and d) and 5.60 b) and c) change “may” to “will”

Some complaints contain elements of service, negligence and misconduct. In cases where the misconduct is severe an AR may need to act quickly to revoke a practising certificate to protect the public. However, notifying the AR about misconduct should not stop the OLC from dealing with issues that it can deal with. Misconduct may also be poor service that the OLC can handle.

It is important that the OLC deals with the service issues. Moreover, all complaints should be considered up to the threshold of £30,000 compensation/costs. If there is misconduct this should be further reported to the AR.

7. *Are there any other points or issues that 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.*

ROCAS has four further points.

1. Case Fees.

It is understood that a further paper is being prepared for Case fees. We suggest turning 6.1 round so that fees are payable unless the ombudsman finds there are exceptional circumstances for allowing the first case/first two cases with no fee payable. If a provider of legal services is found to have behaved unreasonably, they should be required to pay costs to the Ombudsman Service. If a complainant behaves unreasonably their complaint can be dismissed.

2. Injustice caused to complainants and the need to investigate previous complaints.

In the experience of ROCAS, many complaints arise when consumers consult a solicitor over conveyancing/boundary disputes, divorce, wills and unfair dismissal. They may go to a solicitor who is a single practitioner or to a small firm for the first time in their life, or, as in the case of the miners, for example, they may consult a large firm. If things go wrong, they are often made more complex and there may be attempts to cover up a mistake. The consumer suffers. In some cases there is considerable financial loss and stress and the consumer can become intimidated. Injustice can be the worst form of stress.

ROCAS believes it is these types of complaint that need special attention, and this includes previous complaints that have not been adequately investigated, but where the complainant has persevered and has documentary evidence.

3. The need for measures to deal with instances where litigation is commenced and this holds up the investigation of a complaint.

In the past, solicitors have sued for their fees and this has effectively meant that the complaint handling has had to be put on hold.

What would the Ombudsman Service do if the resolution of a complaint is interrupted by the person complained of suing for fees or starting any other court action against the complainant?

4. The need for a clause allowing for rules to be amended/added should the need arise.

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