

Towards establishing the Office for Legal Complaints

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Preface

**Elizabeth France,
Chair OLC**

This is an interesting time to have been appointed to set up a new Non-Departmental Public Body, but the Board of the Office for Legal Complaints is ready for the challenge. The Legal Services Act 2007 set out the framework for reform, which included setting up a Legal Services Board and an Office for Legal Complaints. With all party support it described structures appropriate to the functions to be carried out.

Our task is very clear. We have one thing to do and to do well. We must create an Ombudsman service which meets the needs of legal practitioners and all those who use their services. Ombudsmen have been set up on a variety of statutory and non-statutory bases but whatever the technical and legal devices used there are key characteristics of all the schemes which meet the best practice criteria of the British and Irish Ombudsman Association. Crucial among these is that they must be able to demonstrate independence. There must be independence from government, from relevant regulators and from the bodies in jurisdiction.

The governance of the OLC is complex. Since the money we receive comes via the Ministry of Justice, the Ombudsman will be an Accounting Officer and the OLC is formally counted as an NDPB. The Board of the OLC is appointed by the Legal Services Board, which will also set key performance targets for the service we establish. Finally, the cost of the new service will ultimately be recovered from legal practitioners themselves, to whom we owe a clear responsibility for its use.

Balancing these different pressures while ensuring clear independence for the Ombudsman and his staff to make their decisions has not been an easy task. However, it is one which we believe we have achieved. The lines of accountability which we have created with our partner organisations are set out in the Management Statement (available on the OLC website).

Ultimately, the Ombudsman will be answerable for decisions taken in individual cases only to the courts. We hope challenge of decisions will be rare. An Ombudsman service is an alternative to the courts and not an alternative court and its aim should be to resolve complaints without the need for either party to have recourse to the formal legal process. The process must be easily accessible and easy to use. The emphasis should be on resolving disputes, not attributing blame. For our scheme to be successful the rules which provide the basis for the service and the approach to be taken need to be widely understood and accepted. That is why we want time for input on our discussion draft before formal consultation.

One of our first actions was to appoint the Chief Ombudsman. I am pleased that this document allows me to welcome him to his post. Adam Sampson and his set-up team have begun their work with a pace and vigour I am confident will be maintained. With the help and support of the OLC Board, which met formally for the first time on 13 July 2009, they have developed an approach on which we are keen to have your views.

Elizabeth France,
Chair OLC



In pursuit of fairer dispute resolution

**Adam Sampson,
CEO OLC/Chief Ombudsman**

The law and the people

“For reasons of independence, simplicity, consistency and flexibility, I conclude that a single independent complaints handling body for all consumer complaints is the best way forward. This should be no more expensive than the current system and might be cheaper.”

Sir David Clementi

For the law to command real public support, it has to be open, transparent, easy to understand and, above all, fair to everyone in the way it operates. That places a heavy burden of expectation on every one of the legal professionals who serves the interests of individual consumers, day after day, right across the country.

Providing a high quality legal service is a responsible and difficult task. Most people only call on the services of legal professionals at times when they are under stress or in a vulnerable position. It could be when they are buying a house, divorcing, or facing criminal prosecution. Such events demonstrate the importance of the relationships forged between individual consumers and their legal advisers. People expect their lawyers to be knowledgeable experts, with the ability both to interpret legal complexities and act as a trusted mentor and guide.

Maintaining standards

People have the right to expect the highest possible standards both of customer service and fairness from our legal profession and, for most people, at most times, this is what they receive. Some may feel disappointed, hurt or disadvantaged by shortcomings in the service they receive. Given the sheer volume of activity in the legal system this is not surprising. It is also important to recognise that on occasion the disappointment is not with the service but with the outcome of their engagement with the legal process, no matter how good a service they received.

There is now a general expectation that there will be an effective system for reviewing problems and providing redress, and where the legal profession is concerned, this can be a delicate matter. Whenever members of the profession are charged with managing and operating the system of dispute resolution, any shortcomings, no matter how well-intentioned, risk damaging the reputation of the profession as a whole. Mounting concerns about the general performance of existing methods culminated in the decision to carry out a formal review, led by Sir David Clementi. The findings of his review led directly to the creation of the Office for Legal Complaints.

The Issues

“There is considerable concern about how consumer complaints are dealt with. The concern arises at a number of levels: at an operating level, there is an issue about the efficiency with which the systems are run; at an oversight level, there is a concern about the overlapping powers of the oversight bodies; and at a level of principle, there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence. A large number of the responses to the Consultation Paper expressed dissatisfaction with the current arrangements.”

Sir David Clementi

The Clementi report identified several causes for concern. Separate systems of handling consumer complaints had been run by the different approved regulators, including the Law Society and the Bar Council. This led to inconsistent methods and varying standards of efficiency, with unnecessary cost and delay, and to dispute resolution methods in the legal profession failing to keep pace with latest developments. In addition, Clementi argued, current schemes did not properly separate the different functions of regulation, complaints handling and professional representation. Overlaps existed in some key areas, and this drove public anxiety about transparency and objectivity, particularly since the investigation of customer complaints about legal service was perceived to be in the hands of lawyers themselves. Public trust was then, as a direct result of such concerns, at an unacceptably low level, and this was potentially damaging to the interests, not just of individual citizens, but of the entire legal profession.

A new deal

“There are also concerns about the independence of complaints handling systems operated by the front-line regulatory bodies. Many of the responses to the Consultation Paper from members of the public or organisations representing them indicated that this was contributing to a lack of public confidence in the legal professions... The lack of independence adds to the feeling held by many consumers that they are at a particular disadvantage in raising a complaint against a lawyer.”

Sir David Clementi

The Clementi report suggested simple but effective remedies to existing problems, and the Legal Services Act was passed as a direct result of these recommendations. Even in advance of the Act, the profession had begun to restructure many of its arrangements to take account of the approach suggested by Clementi. But the Act introduced what was perhaps the most important change by creating of a single regulator, the Legal Services Board (LSB), for the entire legal profession, covering solicitors, barristers and all other providers of legal services. The Act also enshrined as a fundamental principle that, once a complaint has been dealt with by an existing legal provider, a customer who remains dissatisfied has the right to ask for and receive an investigation into the issue by a body which is demonstrably independent of the profession.

The Act, therefore, created the Office for Legal Complaints to take full responsibility for carrying out and managing independent reviews of all legal complaints regarding poor service; complaints about the conduct of legal professionals, however, would continue to be in the hands of the approved regulators. The OLC was charged with establishing an Ombudsman scheme to ensure effective customer complaints handling arrangements which accord to the principles of best practice among Ombudsman schemes.

The Act was carefully structured to ensure that access would be free to consumers, with funding managed through a levy on the profession itself together with case fees charged to the legal entity in individual cases. The regulating body, the LSB, was given the task of setting the OLC's objectives and providing performance oversight and audit. The principles behind these new arrangements are enshrined in a Management Statement and Financial Memorandum, which now appear on the OLC's website.

Following the passage of the Act, the LSB appointed the Chair and Board of the OLC, which in turn appointed the OLC CEO and Chief Ombudsman designate. Once the formalities for financial handover had been successfully completed, the new organisation formally came into being on 1 July 2009, charged with responsibility for creating and running the proposed new Ombudsman scheme.

Context

The OLC Board and the Ombudsman are together developing an approach to the way the scheme will do its work. We are informed by our statutory role to provide a scheme which will resolve disputes quickly and with minimum formality.

We are conscious of the regulatory objectives of the Act which set out what Parliament saw as the main aims of its package of reforms. The new Ombudsman scheme will contribute to achieving these objectives and these also set the broader context for the OLC. We are in the process of developing our formal statements setting out our vision, values and mission. However, we believe the following statement sets the context for the OLC:

the Legal Services Act aims to provide an open and accessible system of justice through an independent, strong, diverse and effective legal profession operating to high standards and to protect and promote the interests of the public and consumers.

Within this, the role of the OLC is to be an independent body to resolve disputes between the legal profession and its clients, fairly and effectively with minimum formality.

Scheme rules

The Legal Services Act sets out clear intentions and is prescriptive about some elements of what the scheme must do, but the next step is to turn the guidelines it contains into a detailed, practical set of rules. This is not an easy task, and it requires input from the legal profession and consumer representatives, which is why we are approaching it with a two-stage process. This paper is a draft for discussion, and it will be followed by a formal consultation later in the year, with the final version approved and any secondary legislation that is required in place in 2010.

Within what the Act sets out, the draft rules are designed to be as flexible as possible and to be guided by a sound, commonsense approach. This has led to series of proposals targeted at delivering the right balance between competing pressures.

To give one or two key examples:

- Within the boundaries laid down in the Act, we have attempted to take a broad view of who is to have the right to make a complaint, avoiding an over-restrictive approach.
- We have connected this to precision and clarity about operational rules, so that flexibility cannot lead to loss of control.
- This drive for clarity, for example, includes definitions of complaints that will fall outside the scope of the scheme, aiming to reduce the ambiguity that inevitably arises in this key area.

- Finally, we have set generous proposed parameters governing both the time limits in which consumers can bring their complaints to us, and the time that practitioners are given for response, while trying to ensure that such an approach does not lead to unnecessary delay.

Operational rules are of critical importance but equally sensitive is the question how to structure the case fees payable under the terms of the Act by legal practitioners to the Ombudsman. The core principle laid down by the Act, where payment is concerned, is based on a combination of levy and case fee. While it is important that those whose complaint handling leads to a higher than expected use of the service should make an appropriate contribution to its funding, that must not prejudice the aim of the Ombudsman scheme to resolve complaints rather than to attribute blame. Any association between use and outcome needs therefore to be minimised. The OLC's aim is to use a simple and transparent mechanism of charging. It is too early for us to set out the details of complete funding model. However, we are minded to suggest collecting the majority of our funding through the overall levy, with a relatively low case fee payable after an individual entity has been subject to a predetermined number of complaints in any one year.

Our aim is to achieve strong support and buy-in for a practical, down to earth approach in which the right outcomes for all are the ultimate measure for success. We expect a wide range of responses to these proposals and we shall use the months ahead to ensure that the rules set in place for the formal launch of the OLC are as robust as possible, that we have taken on board suggestions and criticisms of our proposals, and that our conclusions have been tested thoroughly and have the confidence of consumers and the legal profession alike.

As part of the detailed consultation process now taking place, a series of questions has been sent to key organisations inside and outside the legal profession; we are circulating these widely and intend to provide opportunities for face-to-face discussion over the next two months. These can be found in full at the end of this document and on the OLC website.

Complaints handling processes

"In its response to Sir David Clementi's consultation, the Society acknowledged that, although bias in decision making is rarely alleged by individual consumers or by the Legal Services Ombudsman, if handling of service complaints remained with professional bodies there was a risk that it would be perceived as biased by the public generally. The Society supported the subsequent proposal by Sir David Clementi that there should be an independent body for handling services complaints about lawyers."

The Law Society

The OLC's main reason for existence is to deal with possible failings in customer service provided by others, so it cannot afford to be less than excellent in the service it offers. We must also retain the confidence of the legal profession, which provides the money needed to fund the scheme, that we will spend their money wisely in pursuit of that objective.

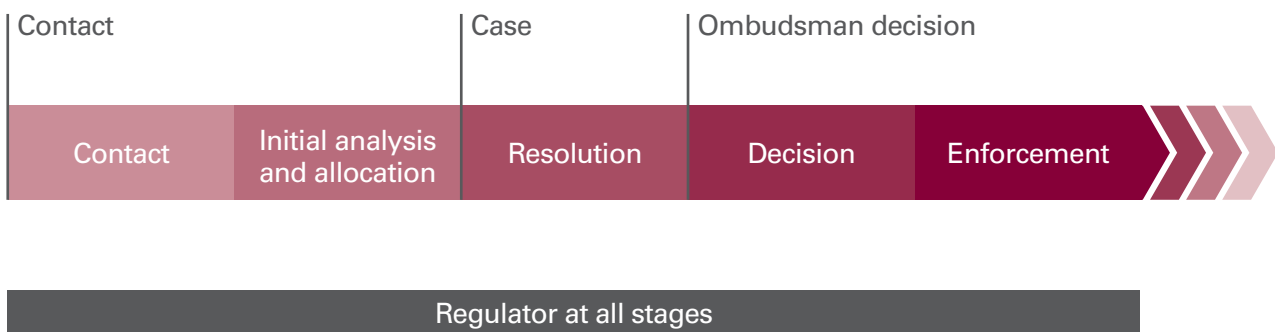
The process for handling disputes we are developing is built upon the principles of good complaint handling published as guidance by the British and Irish Ombudsman Association. These require us to be:

- *Clear* in our purpose so that everyone knows what we offer.
- *Accessible*, so that we are our service is open to everyone who needs it.
- *Flexible* with procedures which are responsive to the needs of individuals.
- *Open and transparent*, making publicly available information, which demystifies our service.
- *Proportional* in our responses, with process and resolution that is appropriate to the complaint.
- *Efficient*, providing a service that strives to meet challenging standards of good administration.
- Giving *quality outcomes*, with complaint resolution which leads to positive change.

In designing the process and the systems we shall use we shall also keep in mind the need to be modern in our use of technology, avoiding where possible the use of paper in favour of virtual file keeping and virtual communication. We are also intent on taking an informal approach to the work, seeking wherever possible to settle disputes by mutual agreement. By virtue of the fact that we are part of a wider response to professional shortcomings, with the approved regulators taking responsibility for dealing with matters of professional misconduct, we need to be supportive of those regulators, ensuring issues that raise questions about the conduct of practitioners are referred to them as quickly as possible so that those regulators are enabled to progress their handling of conduct issues effectively. Finally, we clearly need to be timely in our outcomes, ensuring that justice delayed is not justice denied.

Our current thinking suggests a high level process which will include five main stages.

The OLC business process



Organisation

“If the OLC is to meet the Government’s objective of providing quick and fair redress, it must avoid over elaborate processes and multiple layers of decision making. These are among the factors which have sometimes caused dissatisfaction with existing legal complaints handling arrangements, on the part of both consumers and practitioners.”

The Law Society.

If the intentions of the Legal Services Act are to be delivered, the OLC and the Ombudsman scheme it will administer must be fundamentally new creations, representing a break from the past. To build an organisation capable of delivering our goals, we need to make assumptions about volume of work and the mix of skills required. We have therefore worked closely with the existing complaints handling bodies to review basic data about the number of complaints received and the proportion taken through to full decision.

This is not an exact science, however, as these data are currently counted in different ways, making direct comparisons difficult. It is also hard to predict how total complaint numbers will be affected by the double impact of launching a new Ombudsman scheme (which may tend to drive up new cases), and the development of improved mechanisms within legal practitioners for complaints handling before escalation to the Ombudsman (which may reduce demand). The pace of change within the legal profession and the general economic outlook may also both affect demand.

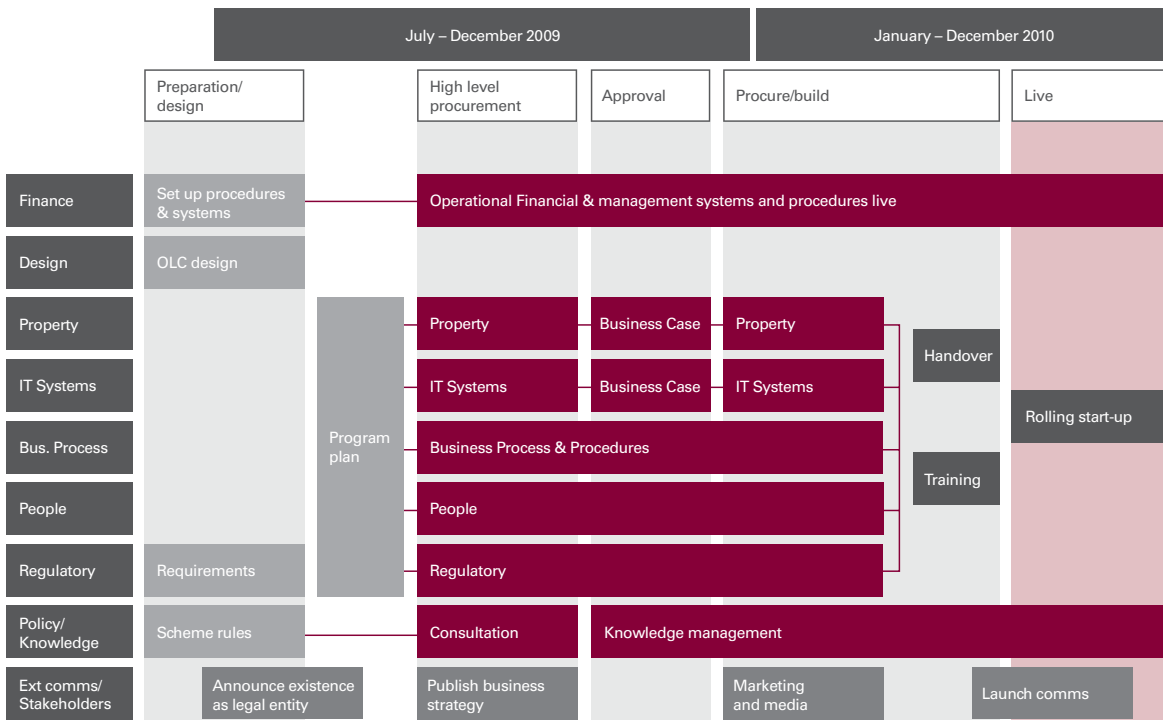
The size, shape and cost of the proposed organisation are therefore likely to change significantly over the planning and implementation phase of the new scheme. However, evidence gathered from other schemes means that the underlying complaint handling processes, together with the skills required and the consequent organisational structure, can be proposed with some confidence.

Reviewing best practice in other modern Ombudsman schemes and within existing legal complaints schemes suggests that there are real benefits to be gained from taking all complaints received through a common process. We believe this will be more efficient and effective than one built around any specialisms, as long as rapid access to specialised skills (potentially from outside the OLC itself) is guaranteed. It also builds in resilience in relation to fluctuating case volumes.

In addition, one of the key objectives for the new organisation is the intention to facilitate informal dispute settlement whenever possible. The new organisation, therefore, will need people with the skills to deliver an effective service in this area.

Finally, the new scheme must do more than simply deal with individual disputes. Its goal is to be part of a mechanism for improving performance in the legal profession permanently. It will do this by showing the profession where common customer services failures tend to occur and how these can be systematically reduced through improved practice.

Timeline



While the Office for Legal Complaints gained formal status on 1 July 2009, the Ombudsman scheme is not yet ready to receive complaints. Before we begin operations, a number of key steps have to be completed:

- There must be formal consultation and agreement on the scheme rules and our business plan.
- We must finalise our processes, which will involve:
 - Design, purchase and test of our IT
 - Find and fit out an office
 - Recruit, train and deploy a staff team
 - Inform the public and the profession of our existence.
- Last, and not least, we must also be empowered to act by secondary legislation laid before Parliament.

All of this will take time. There is an expectation that the new service should open its doors to complainants by the end of December 2010. There are plainly good reasons – moral, practical and financial – to beat this timetable, if possible. Given the complex hurdles we have to clear, however, it is not yet possible to give any commitment to a particular date. Since the passage of enabling legislation is not in our gift, our precise start date could easily be directly affected by the pressures on the parliamentary timetable.

While these factors mean that the actual launch date cannot yet be determined, our activity is easier to predict. Informal consultation on our scheme rules will run between late July and mid September 2009, with the formal consultation on the scheme rules and our business plan lasting from late September to early December 2009. This opens the possibility of laying enabling legislation before Parliament in early 2010, permitting the Ombudsman scheme to begin operations on schedule.

A fresh start

The Office for Legal Complaints and the Ombudsman scheme are new features of the legal landscape, but we must take account of what is there already. Each of the individual regulators has been running their own complaints handling schemes for many years, with the Legal Complaints Service for solicitors, the Bar Standards Board for barristers, and smaller regulators such as the Licenced Conveyancers and ILEX dealing with complaints in their sectors. The Office of the Legal Services Ombudsman currently sits above them, reviewing decisions made, while the Legal Services Complaints Commissioner sets standards.

There is a critical transition period while the new landscape takes shape. Existing organisations must all continue to handle complaints until the new Ombudsman service begins its work; even thereafter, bodies such as the Solicitors Regulation Authority and the Bar Standards Board will continue to handle complaints about the conduct of lawyers. Launch of the new scheme must not penalise individuals whose complaints are already in the system nor those about whom the complaints have been made.

The spirit and letter of the Act make it clear that a fresh start in everything to do with complaints handling is now needed. For this reason the OLC represents a deliberate break with the past. The new scheme will have a different legal basis, will carry out different tasks, requiring different skills and following a different approach. It is not a rebranding of any existing service.

The same argument applies to the management of existing complaints. It is important that complainants, and those complained about, should be offered a continuity of service. The legal basis of the new scheme, however, together with the manner in which it will approach its task, will differ from what has gone before.

For example, the new Ombudsman scheme has the power to require redress at a far higher level than can be ordered by the LCS. This raises both ethical and legal questions about having cases accepted into one scheme finally determined by its successor. The determining factor must be the date on which the matter complained of came to light. The new Ombudsman scheme must leave any older complaints to be dealt with by the existing bodies. In doing so it is, however, essential to avoid disruption to those making complaints and to legal practitioners, as a result of the move to the new system. Both the public and the profession need to know what rules will apply at what date, so that they can make informed decisions about how to respond to the new situation.

It will be particularly important to ensure that the impending arrival of the new scheme does not undermine the effectiveness of organisations like the LCS and OLSO in handling complaints, and it would be damaging if the productivity and quality of existing entities were to suffer during the period of wind down.

Managing the transition between the existing complaints handling arrangements and the future ones is clearly a complex task. The key requirement in all the discussions which will be needed is to build on the best of the past while maintaining the goal of building a genuinely new organisation, pursuing a new vision, with the most advanced methods and processes, all focused on delivering a higher quality of service to the public and the profession than before.

Facing the future

Consumers and members of the legal profession have a significant stake in making sure that the OLC and the new Ombudsman scheme it administers prove to be immediately successful. The over-riding ambition of the OLC is to ensure that disputes, areas of concern and complaints are resolved fairly and appropriately. By doing this, we will remove causes for bad feeling and suspicion, creating the conditions for a more positive and fruitful relationship between all legal practitioners and their customers.

The creation of the OLC provides a rare opportunity to set services and relationships on a new footing. The public will know that their concerns are being dealt with objectively and promptly by a service dedicated to the best possible levels of performance. The legal profession will know that a fair and expert complaints service exists in which dispute resolution is the key, reducing the risk of finger-pointing, blame and suspicion.

The OLC gives all those interested in an effective legal profession the prospect of a fresh start and a better approach to higher service standards and better relationships between practitioners and customers. We hope that everyone will now want to take an active part in making the new system the success it needs to be.



Adam Sampson,
CEO OLC/Chief Ombudsman

Scheme rules discussion paper

Introduction

The Office for Legal Complaints has been established by the Legal Services Act 2007 to make sure users of legal services can go to an independent and impartial Ombudsman scheme to resolve disputes involving their lawyer. We will be the single point of entry for all consumer legal complaints.

The Act sought to put in place the recommendations of the Clementi review which encouraged radical change in regulation of the legal services market. We want to make the aims of the Act real so that users of legal services and their lawyers will have confidence in how complaints are resolved.

Putting in place our scheme rules is the first key step in doing this. Everything else we do will flow from how we set out our role as Ombudsman in the rules. The scheme rules themselves provide the framework for how we will resolve disputes and, drawing on the learning from complaints, inform good practice. The rules will underpin our decisions and our process.

We are keen to ensure that we get our scheme rules right both legally and to ensure that they capture the spirit of the Act, not just the words. The discussion draft of the scheme rules which we have set out here aims to fulfil the requirements of an Ombudsman scheme that resolves disputes impartially, quickly and fairly – we want to embody Ombudsman best practice. In addition to being independent, we have tried to make sure the rules reflect that we will be accessible, clear about our role, proportionate and efficient. These are key principles identified by the British and Irish Ombudsman Association as central to good complaints handling.

We are aware that there are a significant number of important decisions that will affect the scheme rules and how the Ombudsman scheme operates. For instance, we want people to be able to use our service, and so have tried to define who can come to us as broadly as we can. And we want to make sure that the Scheme Rules will work for us as we open our doors as well as into the future.

As many of these decisions are wide ranging and possibly complex we wanted to set out our thinking early in an informal way to ask for comments from a range of people to help us refine the rules. We have set out some broad questions to show some areas we are still thinking about – and we would like to work in an open, transparent and collaborative way with everyone who is interested to further develop the scheme rules.

We will consult formally as we are required to under the Act later in the autumn. We wanted to start discussion about our scheme rules with an informal consultation that includes a first draft of the scheme rules.

Principles for in-house complaints handling

Office for Legal Complaints



LEGAL SERVICES
BOARD

For consumers of legal services and their lawyers, a dispute starts before the Ombudsman gets involved. It starts when the client raises an issue with their lawyer – with the expectation that their concerns will be dealt with there and then. Our view is that most lawyers welcome this chance to put things right and that it is good for everyone involved to resolve these disputes quickly.

We think that it is important that the Ombudsman scheme helps to underpin principles of good in-house complaints handling and we are considering whether the scheme rules should include a chapter that focuses on how lawyers should handle a complaint when a client first raises one with them.

We have agreed with the Legal Services Board, the oversight regulator for legal services, that this discussion document represents a good opportunity for gathering views on what good principles for in-house complaints handling might be.

Ensuring that the entire legal services profession embeds principles of good in-house complaints handling is of significant interest to the LSB. In its Business Plan for 2009/10, the LSB describes a programme of work to improve the service delivered to consumers by making sure complaints are resolved effectively. One of the ways the LSB may do this is to exercise its power under section 112 of the Act to set requirements for in-house complaints handling procedures to be included in the rules set by Approved Regulators (ARs).

From an OLC perspective, we are aware that we will be asked to resolve complaints about a range of legal practitioners and firms who in turn work within differing regulatory frameworks. Both the LSB and the OLC believe that the systems that firms have in place for handling complaints will depend on their own circumstances and the requirements of the ARs. However, certain principles to inform good complaints handling should be common to all.

To help guide the discussion, we, the OLC and LSB, have described [below] some suggested principles for in-house complaints handling which might in turn develop into a common framework to guide

complaints handling across the profession. We would like to hear what you think of them and how far you think the rules of the ARs already comply with these principles.

Our starting point, which we believe that the profession, consumers and the ARs alike agree with, is that everyone has the right to expect a good service from their lawyer and to have things put right if they go wrong. The Act makes this point clear and so our scheme rules state that a lawyer should have an opportunity to resolve a complaint before the Ombudsman gets involved. The principles set out here propose that the process for handling a complaint should be clear and readily accessible to clients, as well as sensitive to their needs. They also make clear that the process should be well managed throughout, so that decisions are taken quickly and things put right where necessary.

Ultimately, we want in-house complaints handling and the system used by the Ombudsman to be co-ordinated so that complaints can be resolved swiftly and so that everyone involved clearly understands what they can expect at each stage of a complaint.

Both the OLC and the LSB would welcome comments on the suggested principles. We would be particularly interested to hear views about how far the ARs current rules already meet these principles and, if there are any gaps between current rules and suggested principles, whether there are any plans by the ARs to amend them. The LSB will, depending on the response to this consultation and the work identified in the LSB Business Plan, look at whether or not there is a need to introduce any requirements in this area.

Discussion draft – Principles for in-house complaints handling

1. Legal practitioners must comply with their Approved Regulator's rules on handling complaints. The Approved Regulator's rules must include any requirements set by the Legal Services Board.
2. Legal practitioners must:
 - have an easily accessible, effective and transparent procedure for handling complaints promptly and fairly;
 - ensure that the procedure makes clear who is responsible for dealing with complaints in relation to services which are subcontracted or referred to another practitioner;
 - ensure and be able to demonstrate that all customer-facing members of staff know about, and act in accordance with, that procedure;

- ensure that, unless totally impracticable for operational reasons, the procedure ensures that complaints are dealt with by someone other than the person complained against;
 - enable a complainant – including someone representing a client, such as a relative, advisory body or trades union or another practitioner who has made a referral – to make a complaint by any reasonable means.
3. Legal practitioners must communicate that procedure to clients by:
 - producing a clear, simple, short written summary (available on their websites where the entity and/or individual has one) which must include a postal address, phone number, fax number and e-mail address by which any complaint can be made and explain the availability of the Ombudsman service;
 - referring to the availability of that summary in any document that presents their services in detail;
 - telling relevant clients in writing about the availability of that summary when accepting instructions (unless the client has already been notified within the previous year);
 - telling relevant beneficiaries in writing about the availability of that summary when first contacting them about the estate/trust; and
 - providing relevant clients and beneficiaries with a copy of that summary on request, or if they make a complaint.

The principles included here incorporate recognised good practice in adopting articles 27.1 and 27.4 of the European services directive 2006/123/EC in order that people know how to raise a concern if they have one.

We also wish to be pragmatic, and in circumstances where a client uses a lawyer regularly we would not expect multiple notifications of how to contact their lawyer with any concerns.

4. Many complaints can be resolved quickly and informally to the complainant's satisfaction. But if a complaint is not resolved to the complainant's satisfaction within five business days of being received, legal practitioners must:
 - send the complainant a prompt written acknowledgement which sets out the legal practitioner's understanding of the complaint, identifies who will be investigating the complaint, and then keep the complainant informed of progress;

- investigate the complaint promptly and fairly so as to assess whether it is justified and, if so, what remedy is appropriate;
- take into account any relevant legislation, regulatory or other relevant guidance and any relevant guidance or decisions on similar complaints by the Ombudsman service;
- give the complainant a clear and fair written response, explaining the outcome of the investigation and any remedy offered;
- include, in the written response, a prominent explanation that the Ombudsman service is available if the complainant remains dissatisfied or, if that is not the case, why it is not and the other options available, such as a complaint to the relevant legal regulator on conduct issues or legal action for claims over the £30,000 limit;
- include, in that explanation, full contact details for the Ombudsman service and a warning that the complaint must be referred to the Ombudsman service within six months;
- provide this written response as soon as reasonably possible, and (unless there are exceptional circumstances that make this impracticable) in any event within eight weeks from the original complaint;
- if the complainant accepts the remedy that has been offered, provide that remedy promptly;
- keep a record of any complaint received, and the steps taken to resolve it, for [six years] from the time the complaint was made; and
- analyse individual complaints in order to meet any regulatory reporting requirements and to identify and correct any common causes of complaints.

In this section we are not suggesting that lawyers will be required to resolve all complaints within five (5) business days. Just the opposite – we believe it is sound to introduce a principle that says where a lawyer resolves a complaint informally within five working days, the obligations would not be as onerous. However, if it will take longer than five working days to resolve a dispute we would suggest it is appropriate to introduce more formal obligations on a lawyer, in part to help him or her demonstrate they are handling the complaint appropriately.

If the LSB were to consider setting requirements for in-house complaints handling, there may be merit in making sure that the time limits for in-house complaints handling and resolution by the Ombudsman service fit together. More detail on the proposed time limits for the Ombudsman scheme is set out in the discussion draft of the scheme rules.

QA. What do you think about the suggested principles to guide in-house complaints handling?

QB. Do you think that the current rules of the Approved Regulators already meet these principles? Can any gaps be easily rectified?

QC. As well as requirements in relation to the obligations Approved Regulators place on persons authorised by them, should the LSB consider placing obligations directly on ARs in relation to monitoring the effectiveness of those obligations and/or their relationship with the OLC, for example, in relation to disseminating best practice emerging from its work?

The remainder of this covering paper focuses on the discussion draft of the OLC's scheme rules.

The scheme rules – discussion paper

Office for Legal Complaints

The OLC is required by section 115 of the Act to set scheme rules that put in place the framework for how we will propose to resolve disputes. We must say who can complain to us, what sorts of complaints we will and will not look at and also set out some procedures for how the scheme will operate in practice. These requirements are set out in the Act.

The discussion draft of the scheme rules sets out our proposed approach to our core role of resolving disputes involving lawyers. As we have focused on our core role, the rules do not propose to establish a voluntary jurisdiction at this stage (something that we may do so under section 164 of the Legal Services Act 2007).

The discussion draft that we have included here aims to bring together in one place a summary of the relevant provisions from the Act, relevant requirements from the LSB to approved regulators and the scheme rules made by the OLC.

The proposed scheme rules deal with complaints that are made after the OLC starts operating. Any transitional arrangements for complaints that are in process of being handled under the existing arrangements will be dealt with separately. Additionally, the provisions in the Act bringing claims management companies into the OLC jurisdiction are not due to come into effect at this stage.

We have aimed to provide enough (but not too much) detail on how we propose to handle complaints. This discussion draft does not cover, for instance, the way in which the rules are approved, how ombudsmen are appointed or how the OLC Board works. Additionally, while we set out our proposed approach to case fees in the rules, we are not consulting on our funding model.

As the primary version of the scheme rules will be published electronically on the OLC's website, defined terms are underlined. This indicates that there will be an electronic link directly to the relevant definition.

Structure of the scheme rules

We would like your comments on the discussion draft of the scheme rules which is included with this paper. It is worth noting that the Act is fairly prescriptive about what we must include in the scheme rules. We have chosen a few areas to seek specific comments on in relation to the discussion draft of the scheme rules. We are not seeking to limit the discussion in any way and we welcome views on any aspects of

the draft scheme rules. We would also be interested in comparative information about the existing arrangements.

Much of the draft scheme rules summarises what the Act requires us to include in the rules and which is not able to be changed. We would ask for your comments on the parts of the rules which have come from us – the paragraphs marked **R** in the draft. We would also be interested in your views about the paragraphs marked **B** which we have drawn from the proposed approach of the LSB. The rules themselves provide the framework for how the Ombudsman scheme will resolve disputes. They set out the requirements and guidance about our overall proposed approach.

We have tried to write the rules as clearly as possible while also making sure they are legally robust. We would also like them to be in a form that is easy to use. We would like your comments about how we have structured the rules and if you think there might be a better way of presenting the rules to make sure everyone who will use our service understand them and what they are for.

We have structured the rules in a way that we feel sets an appropriate framework for resolving disputes by an Ombudsman scheme. We would ask you to consider the rules in the context of how other Ombudsman schemes set out their rules. We are not a court and would ask you not to look at our rules as if they were court rules.

Q1. Do you think the scheme rules are in an appropriate format and structure? What ways do you think they could be improved?

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

Who can complain?

Under the Act, the OLC can take complaints from individuals. The Lord Chancellor can extend the OLC's jurisdiction to other types of complainant if we, the Legal Services Board or its consumer panel ask him to.

Part of our role is to provide an alternative means of dispute resolution which is easy to understand, quick, independent and free for consumers of legal services with a dispute they would like help resolving. For this reason we believe that limiting the scope of who can complain only to individuals may mean that some small businesses, sole traders and charities that do not have deep pockets may be disadvantaged if they are not able to access the Ombudsman service.

The OLC are provisionally minded to ask the Lord Chancellor to include the following in our jurisdiction:

- a micro-enterprise – broadly speaking, this would include businesses that have fewer than 10 staff and a turnover or balance sheet value not exceeding € million (European Recommendation 2003/361/EC of 6 May 2003);
- a charity with annual income less than £1 million; and
- a trustee of a trust with a net asset value less than £1 million.

These are all groups of people eligible to use the Financial Ombudsman Service (FOS), using the definitions that will apply from 1 November 2009, and we would seek to use the same definitions. Including these categories adheres to good practice across Ombudsman schemes.

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.

We would also like to know if anyone else should be included so that they can bring a complaint to us. The Act states that the OLC can consider a complaint about services provided:

- to the complainant – the person who used the legal service;
- to another legal practitioner who procured them on behalf of the complainant; or
- to (or as) a personal representative/trustee where the complainant is a beneficiary of the estate/trust.

The Lord Chancellor can include other people so that we can consider their complaints. We would like to hear views on whether anyone else should be included. In particular, we would like to include personal representatives and beneficiaries of estates so that if a person dies before referring a complaint to the Ombudsman scheme, another person may continue the complaint and see it resolved. This may be especially important where the subject of the complaint is related to the estate that remains.

We can also see scenarios where a person may need assistance to complain, or have a complaint made on their behalf, for instance by their guardian or carer. We would like views on whether the current scheme rules capture these potentially complex situations.

Q3. Should the OLC ask the Lord Chancellor to consider including anyone else and, if so, whom and why? What about receivers and guardians?

In addition, under the Act, the OLC cannot take complaints from a public body (or someone acting for a public body), or from a legal practitioner who procured the services on behalf of someone else. The Lord Chancellor can exclude others. At this stage we do not propose to exclude anyone else.

Q4. Should the OLC ask the Lord Chancellor to consider excluding anyone else and, if so, whom and why?

Excluded complaints

The Act states that in setting the scheme rules we may (but do not have to) exclude specified types of complaints. Even without this provision, the Act puts in place restrictions on the types of complaints the Ombudsman scheme can consider.

It is important to note here that the Ombudsman scheme has been established to resolve disputes about the service provided to a consumer by a lawyer. We have no role in investigating issues of misconduct or in disciplining lawyers – this is the role of regulators. We are committed to working with regulators to help them in their role.

We have included in the scheme rules at paragraph 5.7 an Ombudsman discretion to dismiss complaints without consideration of their merits. Beyond this, we have not yet identified any classes of complaint that we should exclude absolutely. For example, where a complaint is about professional negligence or judgement, we propose to consider (on a case-by-case basis) whether the issue is one that the Ombudsman scheme can deal with or whether the issue would be better dealt with in court.

Q5. Should the OLC consider excluding any other types of complaints from its jurisdiction? Please give your reasons why or why not.

Responding to a changing market

We are aware that we will be resolving complaints about a range of legal practitioners and firms and that we are also working in a changing legal market. We are seeing the first Legal Disciplinary Partnerships come into being and we have tried to anticipate the introduction of Alternative Business Structures and new ways of lawyers providing legal services.

Q6. Are the draft scheme rules sufficient to allow us to handle complaints effectively and efficiently as changes to the legal services market happen? Please give your reasons why or why not.

Cooperating with the ombudsman service

We expect that the majority of the profession will co-operate with us as we try to resolve complaints. However, we are aware that in some cases we will look to the approved regulators to support us in asking lawyers for their assistance in an investigation. We have set out what we think are reasonable expectations for co-operating with us. We would welcome comments on these proposed requirements. We are also interested to hear views from the ARs and other stakeholders about how far current arrangements match these requirements.

Q7. What do you think about the suggested requirements for cooperating with the Ombudsman scheme? Do you think there is anything missing? If so, what is missing and why?

Q8. Do you think that the current rules of the Approved Regulators already meet these requirements?

Time-frames for bringing a complaint

In the discussion draft of the scheme rules we set out the timeframes in which we would generally expect a firm to resolve a complaint (within eight weeks) and the timeframes in which we would generally expect a consumer of legal services to make a complaint (within six years from the act/ omission or within three years from when the complainant should reasonably have known there was cause for complaint). The time limits from act/omission are similar, but not identical, to the court limitation period for contractual claims. These timeframes are also informed by good practice by other Ombudsman schemes.

We want to make sure people can access our service when things have gone wrong and believe that the time limits we propose are appropriate in the context of the nature of legal complaints. For instance, we know that we are likely to be asked to look at a lot of conveyancing complaints where problems often do not arise for many years after the event. Many consumers do not realise that there was poor service until they come to re-mortgage or sell their property. We do not want to exclude these potential complaints by being too prescriptive in our time limits.

We are aware that there will be a concern that evidence and memories disappear or become patchy over time and so there is a danger to long time frames in which to bring a complaint. However, we have said in the scheme rules that we should be able to dismiss a complaint if there is no evidence (see paragraph 5.7). With this, we think there is enough of a safeguard against a lack of evidence and therefore do not need to limit the timeframes for making a complaint in order to avoid this risk.

Q9. Is there any reason why the OLC time limits should be different? If you think it should be different, please say what time limits you would include and why.

How the Ombudsman will deal with complaints

This section of the discussion draft sets out when we may dismiss a complaint. We would be interested in your views about this section and in particular whether any aspects of it are too onerous or if there are any gaps.

In addition, we do not propose to exercise the power, under section 133(3)e) of the Act, to make a rule authorising the administration of oaths – we believe that it would be inconsistent with the informal nature of ombudsman proceedings to do this.

Q10. Do you think there are any gaps in the section of the scheme rules that sets out how we will deal with complaints? If you think there are any gaps, please give your reasons.

Informal resolution

The role of the OLC and Ombudsman scheme is to resolve disputes and to inform good practice based on the learning from those complaints.

We would like to encourage informal resolution of complaints where possible. The Act asks us to resolve complaints quickly, and we are aware that some forms of informal resolution are likely to be an option to resolve some complaints. We are looking to good practice among Ombudsman schemes to inform our approach. We are interested in your views about how we can promote informal resolution of disputes in the context of complaints about lawyers.

Q11. How can the Ombudsman for Legal Complaints promote informal resolution of complaints? Please give your reasons.

Case fees payable by legal practitioners

The scheme rules set out our proposed approach to case fees in chapter six. The rules set out the structure of the case fees, which we propose should be a flat fee. The structure of the case fee also includes the principle of a small number of 'free' cases each financial year. The Act asks us to include a case fee in the scheme rules and this structure would mean that the OLC would recover a proportion of its costs each year in this way.

We have not included amounts or numbers in this discussion draft of the scheme rules. We will consult on the figures at a later date. At this point we would like to hear views about the principles and structure of the case fee. We are aware that this is not the only

way of doing this, and are open to views about other ways in which the case fee could be structured.

Q12. Do you think our approach to the case fee is fair? Is there a better way of doing this? Please give your reasons.

General

The Act allows us, in Schedule 15, to make arrangements with approved regulators if we would like their assistance in investigating or resolving a complaint. We have not specifically included how we might do this in the scheme rules and would like your views about whether we should include some more detail about this in the scheme rules.

Q13. What, if anything, should we include in the scheme rules in relation to seeking assistance from approved regulators? If you think we should include something, what form should this take?

We would like your comments on the discussion draft of the scheme rules which is included with this paper. We have tried to capture everything we need to in the scheme rules but are aware that there may be gaps. As we mentioned before, we are interested in your comments about the scheme rules generally, as well as on those areas we have highlighted here.

Q14. 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.

Discussion draft questions on principles for in-house complaints handling (questions posed jointly with LSB)

QA. What do you think about the suggested principles to guide in-house complaints handling?

QB. Do you think that the current rules of the Approved Regulators already meet these principles? Can any gaps be easily rectified?

QC. As well as requirements in relation to the obligations Approved Regulators place on persons authorised by them, should the LSB consider placing obligations directly on ARs in relation to monitoring the effectiveness of those obligations and/or their relationship with the OLC, for example in relation to disseminating best practice emerging from its work?

Questions on the discussion draft of the scheme rules

Q1. Do you think the scheme rules are in an appropriate format and structure? What ways do you think they could be improved?

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.

Q3. Should the OLC ask the Lord Chancellor to consider including anyone else and, if so, whom and why? What about receivers and guardians?

Q4. Should the OLC ask the Lord Chancellor to consider excluding anyone else and, if so, whom and why?

Q5. Should the OLC consider excluding any other types of complaints from its jurisdiction? Please give your reasons why or why not.

Q6. Are the draft scheme rules sufficient to allow us to handle complaints effectively and efficiently as changes to the legal services market happen? Please give your reasons why or why not.

Q7. What do you think about the suggested requirements for cooperating with the Ombudsman scheme? Do you think there is anything missing? If so, what is missing and why?

Q8. Do you think that the current rules of the Approved Regulators already meet these requirements?

Q9. Is there any reason why the OLC time limits should be different? If you think it should be different, please say what time limits you would include and why.

Q10. Do you think there are any gaps in the section of the scheme rules that sets out how we will deal with complaints? If you think there are any gaps, please give your reasons.

Q11. How can the Ombudsman for Legal Complaints promote informal resolution of complaints? Please give your reasons.

Q12. Do you think our approach to the case fee is fair? Is there a better way of doing this? Please give your reasons.

Q13. What, if anything, should we include in the scheme rules in relation to seeking assistance from approved regulators? If you think we should include something, what form should this take?

Q14. 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.

How to respond

If you would like to send through your views on our this discussion draft of the scheme rules, our contact details are below. If possible, please send your responses electronically (in Microsoft word format) but hard copy responses by post or fax are also welcome.

This informal stage of our consultation will close on 4 September 2009. We will launch a formal consultation as we are required to under the Legal Services Act 2007 on 15 September 2009.

Email:

alison.robinson@officeforlegalcomplaints.org.uk

Post:

Alison Robinson
Office for Legal Complaints
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

As we indicated above, we are also keen to discuss the issues we have raised in this paper in other ways. We would welcome opportunities to meet stakeholders at discussion forums which we propose to hold or separately.

Proposed consultation timeline

We want to work be open, accessible and clear in how we develop and discuss our approach.

This consultation is an important one as it is about the core of our work. We hope that all stakeholders will produce usable evidence, ideas and comments so as to provide positive outcomes for consumers of legal services, the legal services profession and public alike.

We noted that we would consult as we are required under section 205 of the Legal Services Act 2007 in the Autumn. This will require us to publish a (more refined) draft of our proposed scheme rules and invite comment. To that end, we intend to work to the following timetable which covers this current stage as well as a formal consultation period:

24 July 2009 – 7 September 2009

Launch informal discussion draft of the scheme rules. Post on our website, send discussion draft to stakeholder organisations and stakeholder meetings.

15 September 2009 and through October 2009

Launch formal consultation with revised Scheme Rules. One-on-one meetings with stakeholders about the thrust of our proposals (leaving the detailed responses to come later in the consultation cycle). Consultation workshop(s) to refine the scheme rules. Consultation responses published as received.

8 December 2009

End of formal consultation period – deadline for detailed written submissions from stakeholders.

Mid December

Publication of consultation response summary and OLC response.

Late December 2009

Final Scheme Rules considered by OLC and LSB.

January/ February 2010

Scheme Rules to Ministry of Justice to seek Lord Chancellor approval for an inclusions/ exclusions under S128 and s130 and for any aspects to be included in the OLC Commencement Order.

Discussion draft of the scheme rules

1 Introduction and definitions

Contents of this book

- 1.1 This book is about complaints made to authorised persons including legal practitioners and others, authorised in England and Wales, from [commencement date]. It explains which complaints are covered by the Ombudsman service and how it will deal with them.¹
- 1.2 The Legal Services Act 2007 created the Legal Services Board (to oversee Approved Regulators) and the Office for Legal Complaints (to establish an Ombudsman service). This book includes a summary of relevant provisions in the Act, but it is the Act itself that counts.
- 1.3 The Act gave the Legal Services Board power to set requirements on how, under the rules of their Approved Regulators, authorised persons must handle complaints² and cooperate with an Ombudsman.³ Those requirements are included in this book, marked **B**.⁴
- 1.4 The Act gave the Office for Legal Complaints power to make rules affecting which complaints can be handled by the Ombudsman service and how those complaints will be handled. Those rules are included in this book, marked **R**.
- 1.5 This book also includes some general guidance. There are six (6) chapters –
 - Introduction and definitions: contents of this book; meaning of words that are underlined.
 - Who can complain about what: who can complain; what they can complain about.
 - What authorised persons must do: dealing with complaints themselves; cooperating with the Ombudsman service.
 - When complaints can be referred to the Ombudsman service: after complaining to the authorised person; time limit from act/omission; Ombudsman extending time limits.
 - how the Ombudsman service deals with complaints: first contact; grounds for dismissal; referring a complaint to court; referring to another complaints scheme; related complaints; informal resolution and investigation; evidence; procedural time limits; hearings; determinations and awards by an Ombudsman;

acceptance/rejection of determinations;
publication;
enforcement.

- case fees payable by authorised persons.

Meaning of words that are underlined

Complaint means an oral or written expression of dissatisfaction which:

- alleges that the complainant has suffered (or may suffer) financial loss, distress, inconvenience or other detriment; and
- is covered by chapter two (who can complain about what).⁵

Authorised person means:

someone authorised, in England and Wales, to carry out a reserved legal activity⁶ at the time of the relevant act/omission or covered under section 129 of the Act⁷, including:

- barristers;
- law costs draftsmen;
- legal executives;
- licensed conveyancers;
- notaries;
- patent attorneys;
- probate practitioners;
- registered European lawyers;
- solicitors;
- trade mark attorneys; and

R (under section 131 of the Act) includes:

- a business that is responsible for an act/omission of an employee; and
- a partnership that is responsible for an act/omission of a partner.⁸

1.8 Approved Regulator means:

a regulator approved under schedule 4 of the Act, including:

- the Association of Law Costs Draftsmen;
- the Bar Council (for barristers);
- the Chartered Institute of Patent Attorneys;
- the Council for Licensed Conveyancers;
- the Institute of Legal Executives;
- the Institute of Trade Mark Attorneys;
- the Law Society (for solicitors);
- the Master of the Faculties (for notaries).⁹

2 Who can complain about what

1.9 Ombudsman means:

- any Ombudsman from the Ombudsman service;¹⁰ and
- any Ombudsman service staff member to whom an Ombudsman has delegated the relevant functions (but an Ombudsman cannot delegate the functions of determining a complaint or dismissing it without consideration of its merits).¹¹

1.10 Ombudsman service means the Ombudsman for Legal Complaints, established by the Office for Legal Complaints.

1.11 **R** Party includes:

- a complainant (covered by chapter two);
- an authorised person (covered by chapter two) against whom the complaint is made;
- an authorised person (covered by chapter five) whom an Ombudsman treats as a joint respondent to a complaint.¹²

1.12 Public body means any government department, local authority or any other body constituted for the purposes of the public services, local government or the administration of justice.¹³

1.13 Reserved legal activity (as defined in schedule 2 of the Act) means:

- exercising a right of audience;
- conducting litigation;
- reserved instrument activities;
- probate activities;
- notarial activities; or
- administration of oaths.

1.14 The Act means the Legal Services Act 2007.

Who can complain

2.1 A complainant must be an individual.^{14 15}

2.2 A complainant must not have been, at the time of the act/omission to which the complaint relates:

- a public body (or acting for a public body) in relation to the services complained about; or
- an authorised person who procured the services complained about on behalf of someone else.^{16 17}

2.3 For example, where the complaint is about a barrister who was instructed by a solicitor on behalf of a consumer, the consumer is covered but the solicitor is not.

2.4 **R** A complainant can authorise someone else in writing to act for the complainant in pursuing a complaint, but the Ombudsman service remains free to contact the complainant direct where it considers that appropriate.¹⁸

2.5 **R** If a complainant who has referred a complaint to the Ombudsman service dies or is otherwise unable to act, the complaint can be continued by:¹⁹

- anyone authorised by law (for example:
- the executor of a complainant who has died; or
- someone with a lasting power of attorney from a complainant who is incapable); or
- the residuary beneficiaries of the estate of a complainant who has died.²⁰

What they can complain about

2.6 The complaint must relate to an act/omission by someone who was an authorised person at that time²¹ but:

- an act/omission by an employee is usually treated also as an act/omission by their employer, whether or not the employer knew or approved;²² and
- an act/omission by a partner is usually treated also as an act/omission by the partnership, unless the complainant knew (at the time of the act/omission) that the partner had no authority to act for the partnership.²³

2.7 The act/omission does not have to:

- relate to a reserved legal activity²⁴; nor
- be after the Act came into force²⁵ (but see the time limits in chapter four).

3 What authorised persons must do

- 2.8 The complaint must relate to services which the authorised person provided:
- to the complainant; or
 - to another authorised person who procured them on behalf of the complainant; or
 - to (or as) a personal representative/trustee where the complainant is a beneficiary of the estate/trust.^{26 27}
- 2.9 A complaint is not affected by any change in the membership of a partnership or other unincorporated body.²⁸
- 2.10 **R** Where authorised person A ceases to exist and B succeeds to the whole (or substantially the whole) of A's business:
- acts/omissions by A become acts/omissions of B;²⁹ and
 - complaints already outstanding against A become complaints against B.³⁰
- 2.11 **R** [The following complaints are excluded:]^{31 32}

Dealing with complaints themselves

- 3.1 Authorised persons including legal practitioners and others must comply with their Approved Regulator's rules on handling complaints that are covered by chapter two.
- 3.2 *[The Legal Services Act 2007 allows the Legal Services Board to make requirements to guide in-house complaints handling. If the Legal Services Board were to set requirements for in-house complaints handling, the OLC would include a summary of those principles here.]*
- 3.3 *[The cover paper describes what sound principles to guide in-house complaints handling might look like. We and the LSB would like to hear initial reaction and comment about these principles.]*

Cooperating with the Ombudsman service

- 3.4 Authorised persons must comply with their Approved Regulator's rules on cooperating with an Ombudsman. The Approved Regulator's rules must include any requirements that may be set by the Legal Services Board.³³

4 When complaints can be referred to the Ombudsman service

After complaining to the authorised person

- 4.1 Ordinarily, a complainant cannot use the Ombudsman service unless the complainant has first used the authorised person's complaints procedure (referred to in chapter three).³⁴
- 4.2 **R** But a complainant can use the Ombudsman service if:³⁵
- the complaint has not been resolved to the complainant's satisfaction within eight weeks of being made to the authorised person; or
 - an Ombudsman considers that there are exceptional reasons to consider the complaint sooner, or without it having been made first to the authorised person.
- 4.3 For example, an Ombudsman may decide that the Ombudsman service should consider the complaint where the authorised person has refused to consider it, or where delay would harm the complainant.
- 4.4 **R** Ordinarily, a complainant must refer a complaint to the Ombudsman service within six months of the date of the authorised person's written response (referred to in chapter three), if that written response included:
- a prominent explanation that the Ombudsman service was available if the complainant remained dissatisfied; and
 - full contact details for the Ombudsman service and a warning that the complaint must be referred to the Ombudsman service within six months.

Time limit from act/omission

- 4.5 **R** Ordinarily, a complainant must also refer a complaint to the Ombudsman service within:
- [six years] from the act/omission; or
 - three years] from when the complainant should reasonably have known there was cause for complaint (provided the complaint is referred within fifteen years from the act/omission);
 - whichever is later.³⁶

Ombudsman extending time limits

- 4.6 **R** If an Ombudsman considers that there are exceptional circumstances, he/she may extend any of these time limits to the extent that he/she considers fair.³⁷
- 4.7 For example, an Ombudsman might extend a time limit if the complainant was prevented from meeting the time limit as a result of serious illness.

5 How the Ombudsman service will deal with complaints³⁸

- 5.1 **R** The Ombudsman service may require a complainant to complete its complaint form.³⁹
- 5.2 **R** In the case of a partnership (or former partnership), it is sufficient for the Ombudsman service to communicate with any partner (or former partner).⁴⁰

First contact

- 5.3 **R** Unless:
- the authorised person has already had eight weeks to consider the complaint; or
 - the authorised person has already issued a written response to the complaint; or
 - an Ombudsman considers that there are exceptional reasons;
- the Ombudsman service will:
- refer the complaint to the authorised person;
 - notify the complainant; and
 - explain why to both of them.⁴¹
- 5.4 **R** If the authorised person's written response under chapter three claims that all or part of the complaint:
- is not covered by the Ombudsman service under chapter two; or
 - is out-of-time under chapter four; or
 - should be dismissed without considering its merits;
 - an Ombudsman will give all parties an opportunity to make representations before deciding.
- 5.5 **R** Otherwise, if an Ombudsman considers that all or part of the complaint:
- may not be covered by the Ombudsman service under chapter two; or
 - may be out-of-time under chapter four; or
 - may be one that should be dismissed without considering its merits;
- the Ombudsman will give the complainant an opportunity to make representations before deciding.
- 5.6 The Ombudsman will then give the complainant and the authorised person his/her decision and the reasons for it.⁴²

Grounds for dismissal⁴³

- 5.7 **R** An Ombudsman may (but does not have to) dismiss all or part of a complaint without considering its merits if, in his/her opinion:
- it does not have any reasonable prospect of success, or is frivolous or vexatious; or
 - the complainant has not suffered (and is unlikely to suffer) financial loss, distress, inconvenience or other detriment; or
 - the authorised person has already offered fair and reasonable redress in relation to the circumstances alleged by the complainant and the offer is still open for acceptance; or
 - the complainant has previously complained about the same issue to the Ombudsman service or a predecessor complaints scheme (unless the Ombudsman considers that material new evidence, likely to affect the outcome, only became available to the complainant afterwards); or
 - a comparable independent complaints (or costs-assessment) scheme or a court has already dealt with the same issue; or
 - a comparable independent complaints (or costs-assessment) scheme or a court is dealing with the same issue, unless those proceedings are first stayed (by the agreement of all parties or by a court order) so that the Ombudsman service can deal with the issue; or
 - it would be more suitable for the issue to be dealt with by a court, by arbitration or by another complaints (or costs-assessment) scheme;⁴⁴ or
 - the issue concerns an authorised person's decision when exercising a discretion under a will or trust; or
 - the issue concerns an authorised person's failure to consult a beneficiary before exercising a discretion under a will or trust, where there is no legal obligation to consult;
 - the issue involves someone else who has not complained and the Ombudsman considers that it would not be appropriate to deal with the issue without their consent; or
 - it is not practicable to investigate the issue fairly because of the time which has elapsed since the act/omission; or

- the issue concerns an act/omission outside England and Wales and the circumstances do not have a sufficient connection with England and Wales;⁴⁵ or
- there are other compelling reasons why it is inappropriate for the issue to be dealt with under the Ombudsman scheme.

Referring a complaint to court

- 5.8 **R** Exceptionally (at the instance of an Ombudsman) where the Ombudsman considers that:
- resolution of a particular legal question is necessary in order to resolve a dispute; but
 - it is not more suitable for the whole dispute to be dealt with by a court;
 - the Ombudsman may (but does not have to) refer that legal question to court.
- 5.9 **R** Exceptionally, (at the instance of an authorised person) where:
- the authorised person requests, and also undertakes to pay the complainant's legal costs and disbursements on terms the Ombudsman considers appropriate; and
 - an Ombudsman considers that the whole dispute would be more suitably dealt with by a court as a test case between the complainant and the authorised person;
 - the Ombudsman may (but does not have to) dismiss the complaint without considering its merits, so that a court may consider it as a test case.⁴⁶
- 5.10 By way of example only, in relation to a test case (at the instance of an authorised person) the Ombudsman might require an undertaking in favour of the complainant that, if the complainant or the authorised person starts court proceedings against the other in respect of the complaint in any court in England and Wales within six months of the complaint being dismissed, the authorised person will:
- pay the complainant's reasonable costs and disbursements (to be assessed if not agreed on an indemnity basis);
 - pay these in connection with the proceedings at first instance and also any subsequent appeal made by the authorised person; and
 - make interim payments on account if and to the extent that it appears reasonable to do so.

- 5.11 **R** Factors the Ombudsman may take into account in considering whether to refer a legal question to court, or to dismiss a complaint so that it may be the subject of a test case in court, include (but are not limited to):
- any representations made by the authorised person or the complainant;
 - the stage already reached in consideration of the dispute.
 - how far the legal question is central to the outcome of the dispute;
 - how important or novel the legal question is in the context of the dispute;
 - the remedies that a court could impose;
 - the amount at stake; and
 - the significance for the authorised person (or similar authorised persons) or their clients.

Referring to another complaints scheme

- 5.12 **R** An Ombudsman may refer a complaint to another complaints scheme if:
- he/she considers it appropriate; and
 - the complainant agrees.⁴⁷
- 5.13 **R** If an Ombudsman refers a complaint to another complaints scheme, the Ombudsman will give the complainant and the authorised person reasons for the referral.⁴⁸

Arrangements for assistance

- 5.14 The Ombudsman service may make such arrangements as it considers appropriate (which may include paying fees) for Approved Regulators or others to provide assistance to an Ombudsman in the investigation or consideration of a complaint.⁴⁹

Related complaints

- 5.15 **R** The Ombudsman service may:
- tell a complainant that a related complaint could have been brought against some other authorised person;⁵⁰ or
 - treat someone else who was an authorised person at the time of the act/omission as a joint respondent to the complaint.⁵¹

- 5.16 **R** Where two or more complaints against different authorised persons relate to connected circumstances:
- the Ombudsman service may investigate them together, but an Ombudsman will make separate determinations;⁵² and
 - the determinations may require the authorised persons to contribute towards the overall redress in the proportions the Ombudsman considers appropriate.

Informal resolution

- 5.17 **R** The Ombudsman service will try to resolve complaints at the earliest possible stage, by whatever means it considers appropriate – including informal resolution (such as mediation).
- 5.18 If a complaint is settled, abandoned or withdrawn, an Ombudsman will tell both the complainant and the authorised person.⁵³

Investigation

- 5.19 **R** If the Ombudsman service considers that an investigation is necessary, it will:
- ensure both parties have been given an opportunity of making representations;
 - send the parties a provisional decision (which the Act calls an ‘assessment’), with a time limit for response; and
 - if any party indicates disagreement within that time limit, arrange for an Ombudsman to issue a final decision (which the Act calls a ‘determination’).
- 5.20 **R** If neither party indicates disagreement within that time limit, the Ombudsman service may treat the complaint as resolved by the provisional decision.

Evidence

- 5.21 **R** An apology will not of itself be treated as an admission of liability.⁵⁴
- 5.22 An Ombudsman cannot require anyone to produce any information or document which that person could not be compelled to produce in High Court civil proceedings, and the following provisions are subject to this.⁵⁵
- 5.23 **R** An Ombudsman may give directions on:
- the issues on which evidence is required; and
 - the way in which evidence should be given.

5.24 **R** An Ombudsman may:

- take into account evidence from Approved Regulators or the Legal Services Board;
- take into account evidence from other third parties;
- treat any finding of fact in disciplinary proceedings against the authorised person as conclusive;
- include/exclude evidence that would be inadmissible/admissible in court;
- accept information in confidence where he/she considers that is both necessary and fair;⁵⁶
- make a determination on the basis of what has been supplied;
- draw inferences from any party's failure to provide information requested; and
- dismiss a complaint if the complainant fails to provide information requested.

5.25 **R** An Ombudsman may require a party to attend to give evidence and produce documents at a time and place specified by the Ombudsman.⁵⁷

5.26 An Ombudsman may require a party to produce any information or document that the Ombudsman considers necessary for the determination of a complaint.⁵⁸

5.27 An Ombudsman may:

- specify the time within which this must be done;
- specify the manner or form in which the information is to be provided; and
- require the person producing the document to explain it.⁵⁹

5.28 If the document is not produced, an Ombudsman may require the relevant party to say, to the best of his/her knowledge and belief, where the document is.⁶⁰

5.29 If an authorised person fails to comply with a requirement to produce information or a document, the Ombudsman:

- will tell the relevant Approved Regulator;
- may require that Approved Regulator to tell the Ombudsman what action it will take; and
- may report any failure by that Approved Regulator to the Legal Services Board.⁶¹

5.30 Subject to this, if any party fails to comply with a requirement to produce information or a document, the Ombudsman may enforce the requirement through the High Court.⁶²

Procedural time limits

5.31 **R** An Ombudsman may fix (and may extend) a time limit for any stage of the investigation, consideration and determination of a complaint.

5.32 **R** If any party fails to comply with such a time limit, the Ombudsman may:

- proceed with the investigation, consideration and determination;
- draw inferences from the failure;
- where the failure is by the complainant, dismiss the complaint; or
- where the failure is by the authorised person, include compensation for any inconvenience caused to the complainant in any award.

Hearings

5.33 **R** An Ombudsman will only hold a hearing where he/she considers that the complaint cannot be fairly determined without one. In deciding whether (and how) to hold a hearing, the Ombudsman will take account of Article 6 in the European Convention on Human Rights.

5.34 **R** A party who wishes to request a hearing must do so in writing, setting out:

- the issues he/she wishes to raise; and
- (if appropriate) any reasons why the hearing should be in private;
- so the Ombudsman may consider whether:
 - the issues are material;
 - a hearing should take place; and
 - any hearing should be in public or private.

5.35 **R** A hearing may be held by any means the Ombudsman considers appropriate in the circumstances, including (for example) by phone.⁶³

Determinations and awards by an Ombudsman

5.36 An Ombudsman will determine a complaint by reference to what is, in his/her opinion, fair and reasonable in all the circumstances of the case.⁶⁴

5.37 **R** In determining what is fair and reasonable, the Ombudsman will take into account (but is not bound by):

- what decision a court might make;
- the relevant Approved Regulator's rules of conduct at the time of the act/omission; and
- what the Ombudsman considers to have been good practice at the time of the act/omission.⁶⁵

5.38 The Ombudsman's determination may contain one or more of the following directions to the authorised person in favour of the complainant:⁶⁶

- to apologise;
- to pay compensation of a specified amount for loss suffered;
- to pay interest on that compensation from a specified time;⁶⁷
- to pay compensation of a specified amount for inconvenience/distress caused;
- to ensure (and pay for) putting right any specified error, omission or other deficiency;
- to take (and pay for) any specified action in the interests of the complainant;
- to pay a specified amount for costs the complainant incurred in pursuing the complaint;^{68 69}
- to limit fees to a specified amount.

5.39 As a complainant does not usually need assistance to pursue a complaint with the Ombudsman service, awards of costs are likely to be rare.

5.40 If the determination contains a direction to limit fees to a specified amount, it may also require the authorised person to ensure that:⁷⁰

- all or part of any amount paid is refunded;
- interest is paid on that refund from a specified time;⁷¹
- all or part of the fees are remitted;
- the right to recover the fees is waived, wholly or to a specified extent; or
- any combination of these.

5.41 **R** An Ombudsman may set a time limit for the authorised person to comply with a determination (and may set different time limits for the authorised person to comply with different parts of a determination).

5.42 **R** Any interest payable under the determination will be at the rate:

- specified in the determination; or
- (if not specified) at the rate payable on High Court judgment debts.⁷²

5.43 There is a limit of £30,000 on the total value that can be awarded by the determination of a complaint in respect of:⁷³

- compensation for loss suffered;
- compensation for inconvenience/distress caused;
- the reasonable cost of putting right any error, omission or other deficiency; and
- the reasonable cost of any specified action in the interests of the complainant.

5.44 **R** If (before or after the determination is issued) it appears that the total value will exceed £30,000, an Ombudsman may direct which part or parts of the award are to take preference.

5.45 That limit does not apply to:

- an apology;
- interest on specified compensation for loss suffered;⁷⁴
- a specified amount for costs the complainant incurred in pursuing the complaint;
- limiting fees to a specified amount; or
- interest on fees to be refunded.

Acceptance/rejection of determinations

5.46 The determination will:⁷⁵

- be in writing, signed by the Ombudsman;
- give reasons for the determination; and
- require the complainant to notify the Ombudsman, before a specified time, whether the complainant accepts or rejects the determination.

5.47 **R** The Ombudsman may require any acceptance or rejection to be in writing, but will have regard to any reason why the complainant may be unable to use writing.

5.48 The Ombudsman will send copies of the determination to the parties and the relevant Approved Regulator.⁷⁶

5.49 If the complainant tells the Ombudsman that he/she accepts the determination, it is binding on the parties and final.⁷⁷

5.50 Once a determination becomes binding and final, neither party may start or continue legal proceedings in respect of the subject matter of the complaint.

5.51 If the complainant does not tell the Ombudsman (before the specified time) that he/she accepts the determination, it treated as rejected unless:

- the complainant tells the Ombudsman (after the specified time) that he/she accepts the determination; and
- the complainant has not previously told the Ombudsman that he/she rejects the determination; and
- the Ombudsman is satisfied that there are sufficient reasons why the complainant did not respond in time.⁷⁸

5.52 If the complainant did not respond before the specified time, the Ombudsman will notify the parties and the relevant Approved Regulator of the outcome, describing the provisions concerning late acceptance that are set out above.⁷⁹

5.53 If the complainant accepts or rejects the determination, the Ombudsman will notify the parties and the relevant Approved Regulator of the outcome.⁸⁰

5.54 If a determination is rejected (or treated as rejected) by the complainant, it has no effect on the legal rights of any party.

Publication

5.55 The Ombudsman service may publish a report of its investigation, consideration and determination of a complaint. The report will not name (or otherwise identify) the complainant, unless the complainant agrees.⁸¹

Enforcement

5.56 A binding and final determination can be enforced through the High Court or a county court by the complainant.⁸²

5.57 **R** A binding and final determination can also be enforced through the High Court or a county court by an Ombudsman, if:

- the complainant agrees; and
- the Ombudsman considers it appropriate in all the circumstances.⁸³

5.58 A court which makes an enforcement order must tell the Ombudsman service, and then an Ombudsman:

- will tell the relevant Approved Regulator;
- may require that Approved Regulator to tell the Ombudsman what action it will take; and
- may report any failure by that Approved Regulator to the Legal Services Board.⁸⁴

Misconduct

5.59 If (at any stage after the Ombudsman service receives a complaint) an Ombudsman considers that the complaint discloses any alleged misconduct about which the relevant legal regulator should consider action against the authorised person, the Ombudsman:

- will tell the relevant Approved Regulator;
- will tell the complainant that the Approved Regulator has been told;
- may require that Approved Regulator to tell the Ombudsman what action it will take; and
- may report any failure by that Approved Regulator to the Legal Services Board.⁸⁵

5.60 If an Ombudsman considers that an authorised person has failed to cooperate with the Ombudsman service, the Ombudsman:

- will tell the relevant Approved Regulator;
- may require that Approved Regulator to tell the Ombudsman what action it will take; and
- may report any failure by that Approved Regulator to the Legal Services Board.⁸⁶

5.61 **R** An Ombudsman, the Ombudsman service and members of its staff will disclose to a Approved Regulator any information that it requests in order to investigate alleged misconduct or to fulfil its regulatory functions, so far as an Ombudsman considers that the information:

- is reasonably required by the Approved Regulator; and
- has regard to any right of privacy of any complainant involved.⁸⁷

6 Case fees payable by authorised persons

- 6.1 **R** No case fee is payable for the first *[number]* in-jurisdiction complaints against an authorised person closed during the Ombudsman service's financial year
- 6.2 **R** A case fee of *[£amount]* is payable by the authorised person for every additional in-jurisdiction complaint closed unless:
- the complaint was:
abandoned or withdrawn; or
settled, resolved or determined in favour of the authorised person; and
 - the Ombudsman is satisfied that the authorised person took all reasonable steps, under his/her complaints procedures, to try to resolve the complaint.
- 6.3 The remaining costs of running the Ombudsman service are covered by a levy on Approved Regulators by the Legal Services Board.⁸⁸
- 6.4 There is no charge to complainants.

- 1 This book is limited to complaint-handling. It does not cover the OLC's governance or complaint-prevention role.
- 2 Section 112.
- 3 Section 145.
- 4 The draft sets out proposed principles which the LSB and OLC think the separate rules of Approved Regulators should cover. We ask for comments on those principles. We also ask Approved Regulators to identify how far their existing rules do (or do not) comply with those principles. Insofar as they do not, and are not likely to be brought into line voluntarily before the OLC starts to operate, the LSB will consider whether to impose requirements.
- 5 We have sought to use a draft definition that is sufficient to distinguish complaints about service from those which relate solely to professional misconduct.
- 6 Sections 12 and 129.
- 7 This section covers the equivalent practitioners before the commencement of the Act.
- 8 Sections 133(8) and 147(7).
- 9 Some accountancy bodies have applied to become regulators for probate services, and will be added if and when appropriate.
- 10 Section 122(5).
- 11 Section 134.
- 12 Where it is apparent that another legal practitioner was also involved. Section 133(3)(c).
- 13 Section 128(7).
- 14 Section 128(3).
- 15 The Lord Chancellor can include others under section 130.
- 16 Section 128(5).
- 17 The Lord Chancellor can exclude others under section 130.
- 18 Section 133(1).
- 19 Section 132(4).
- 20 To save their having to take out a grant of representation if one is not otherwise required.
- 21 Section 128(1) part.
- 22 Section 131(1).
- 23 Section 131(2) and (3).
- 24 Section 128(1) part.
- 25 Section 125(2).
- 26 Section 128(4).
- 27 The Lord Chancellor can include others under section 130.
- 28 Section 132(1).
- 29 Section 132(2).
- 30 Section 132(3).
- 31 Section 127(1).
- 32 OLC scheme rules may (but do not have to) exclude specified complaints. Bearing in mind the restrictions already imposed by the Act, and the discretion to dismiss complaints without consideration of their merits in chapter 5, the OLC has not yet identified any classes of complaint that it should exclude absolutely. For example, where a complaint is about professional negligence or judgement, the OLC will consider (on a case-by-case basis) whether the issue is one that the OLC can deal with or whether the issue would be better dealt with in court.
- 33 Section 145.
- 34 Section 126(1).
- 35 Section 126(3).
- 36 For consultation.
- 37 Section 133(2)(b)
- 38 Section 133(1).
- 39 This gives the Ombudsman service the right to require a complaint form, but does not oblige it to do so.
- 40 To make it clear that the Ombudsman service does not have to communicate with each partner individually.
- 41 Section 135.
- 42 Section 135.
- 43 Section 133(3)(a).
- 44 Where a complaint is about professional negligence or judgement, the OLC will consider (on a case-by-case basis) whether the issue is one that the OLC can deal with or whether the issue would be better dealt with in court.
- 45 For example, a French client wishes to complain about advice on French law given in France by a French lawyer who is also qualified in England and Wales.
- 46 Paragraph 5.9 only applies if the legal practitioner so requests. The idea is that, in suitable cases, the legal practitioner can have his/her day in court, provided the complainant's legal costs are met. It is based on a similar provision in the rules of the Financial Ombudsman Service. In other circumstances, an Ombudsman cannot force a legal practitioner to pay the complainant's costs of going to court.
- 47 Section 133(3)(b).
- 48 Section 135.
- 49 Schedule 15, paragraph 18.
- 50 Where it is apparent that the complaint was made against the wrong legal practitioner.
- 51 Where it is apparent that another legal practitioner was also involved. Section 133(3)(c).
- 52 There need to be separate determinations because of the £30,000 limit.
- 53 Section 135.
- 54 To ensure legal practitioners are not discouraged from saying 'sorry'.
- 55 Sections 133(5) and 147(6).
- 56 Including, but not limited to, information which is "restricted information" under section 151.
- 57 Section 133(3)(e).
- 58 Section 147(1) and (3).
- 59 Section 147(2) and (4).

Endnotes – continued

- 60 Section 147(5).
- 61 Section 148.
- 62 Section 149.
- 63 The OLC does not propose to exercise the power in section 133(3)(g) enabling it to make a rule about the OLC awarding expenses in connection with attending a hearing.
- 64 Section 137(1)
- 65 Section 133(3)(f).
- 66 Section 137(2).
- 67 Section 137(4)(b).
- 68 Section 133(3)(h).
- 69 The OLC does not propose to exercise the power under section 133(3)(i) to make a rule requiring any party who has behaved unreasonably to pay costs to the Ombudsman service.
- 70 Section 137(2)(b)(ii).
- 71 Section 137(4)(b).
- 72 Section 137(4).
- 73 Section 138(1) and (2). The Lord Chancellor can increase the limit under section 139.
- 74 Section 138(3).
- 75 Section 140(1) and (2).
- 76 Section 140(3).
- 77 Section 140(4).
- 78 Section 140(5) and (6).
- 79 Section 140(7) and (8).
- 80 Section 140(7).
- 81 Section 150.
- 82 Section 141.
- 83 Section 141(5).
- 84 Section 142.
- 85 Section 143.
- 86 Section 146.
- 87 Section 144(1).
- 88 Sections 173 and 174.

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