

March 2018

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## Scheme rules changes: cover paper

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### **For the attention of the Legal Services Board**

These papers are submitted by the Office for Legal Complaints (OLC) to the Legal Services Board (LSB), for its approval. We believe that the submission meets your key criteria and we have addressed these in more detail below.

In making our proposals for Scheme Rules changes we have followed a proportionate consultation process and have considered the responses we received. Our proposals amount only to minor changes of wording in the rules, rather than substantive revisions, and so we were advised that a period of representations would be appropriate, rather than a full consultation.

The proposed changes are as follows:

- “informal resolution” to become “agreed outcome”
- “preliminary decision” to become “case decision”
- “ombudsman decision” to become “final decision”

We would like to take the opportunity to thank staff at the LSB and the LSCP for their help and support in formulating the changes.

The LSB is asked to consent to the Scheme Rules changes as specified in this submission.

We have been advised that there is precedent for minor changes to the Scheme Rules to be considered without OLC or Legal Ombudsman (LeO) attendance at the Board meeting. On the basis that the suggested changes on this occasion are minor, we have agreed to take this approach with this application.

The amendments being proposed arise not from a change in policy but a change in terminology. They reflect the recommendations that came out of our Language of Complaints research, published in late 2017.

Annex 1 contains a full copy of the proposed edits to the Scheme Rules, shown as tracked changes.

***Acceptance criteria one: an explanation of how the proposals have evolved in the light of the consultation process, covering in particular, the extent to which any input from the Consumer Panel has been taken into account***

In November 2017, the Legal Ombudsman published a report (commissioned through IFF Research) on the Language of Complaints. This piece of work looked at the terminology used both at firm-level in their first-tier complaints process, and at LeO itself in the second-tier process. The research generated a number of findings, indicating particular language that was confusing to consumers.

The findings which related to LeO's terminology in particular highlighted that there were four terms used externally which complainants and the general public found to be confusing or even misleading. These were:

- 'Informal Resolution'
- 'Preliminary Decision'
- 'Remedy'
- 'Ombudsman Decision'

There were other terms which were highlighted and discussed in the research, but these are used internally only, and as such are not relevant here.

In response to these findings, and as part of our ongoing 'Modernising LeO' project, it was proposed that these terms be changed to simpler, more understandable phrases in all of our external correspondence. To ensure consistency, aid comprehension, and ensure that we are compliant with legislation and OLC rules, this meant we would need to make minor linguistic alternations to our Scheme Rules.

It is these minor alterations which we present to the Legal Services Board (LSB) in this submission.

In order to develop appropriate phrases to replace those listed above, extensive discussions were had by our Operational Management Team and executive-level staff. These discussions centred on organisational experience of dealing with complainants and service providers over the last seven and a half years. This includes insight gathered from communication in the usual course of assessment and investigation, as well as comments received through formal feedback processes.

Moreover, these conversations arose from a commitment to 'Plain English' following the outcome of the Language of Complaints research. It was evident that our terminology was not as clear as we believed it to be, and so we invited an external trainer to provide Plain English training to all staff members at LeO. Both our internal and external communications were examined in light of this, and phrases developed to ensure that

we say what we mean so that all of our service users are clearer about what we do and how we do it. It is as a result of both this training and our own operational insight that these phrases were decided upon by senior staff.

The proposed new terminology is as follows:

- “informal resolution” to become “agreed outcome”
- “preliminary decision” to become “case decision”
- “ombudsman decision” to become “final decision”  
(For this last term we are proposing to add a definition to Chapter 1 to make it clear that a “determination” means a “final decision”, rather than changing all instances of “determination” in the Scheme Rules.)

*N.B. Changes proposed during our period of representations included a new term for ‘remedy’. However, this no longer forms part of our application for reasons laid out below.*

We did not run a formal consultation on the proposed changes. This was on the basis that the changes are minor and do not make any alteration to the substance of the rules. However, in order to fulfil statutory obligations under section 205 of the Legal Services Act 2007, a draft copy of these changes was published on LeO’s website for a period of representations, which ran from 2 February until 2 March 2018. The covering document included a short explanation of the reasoning behind the proposals and the remit of the changes, draft changes to the rules, and a request for comments from stakeholders.

Key stakeholders were emailed about the period of representations and it was brought to the attention of the Regulators Forum in February 2018. We received no formal written responses from any stakeholders, but informal feedback from colleagues at the LSB was influential upon the development of the final proposals.

In particular, the change to the word ‘remedy’ in section 3.3(b) formerly proposed has now been discarded. Following a query made by LSB colleagues and on the advice of internal counsel, we have decided not to alter this wording in the Scheme Rules, as this section is simply a summary of the LSB’s requirements and guidance for regulators. The word as used in this instance does not refer specifically to any of our internal procedures and so we consider that our justification for the changes does not apply in this case.

We have also made some minor corrections of typographical errors and updated the names of various approved regulators who have changed their operating titles since the Scheme Rules were last revised.

Given that the changes are intended to make our service more accessible and consumer-friendly, we also engaged in direct, informal consultation with the Legal



Services Consumer Panel (LSCP) as part of this process. Again, the informal nature of this was pursued as a proportionate approach. Earlier in the year, the LSCP had also been involved in conversations with us around the findings of the Language of Complaints research.

The LSB has asked in particular the extent to which any input from the Consumer Panel has been taken into account. In this case, their response was appropriately concise: that these changes certainly seem sensible and are likely to simplify the meaning of technical language to consumers. We therefore proceeded with our changes as planned.

***Acceptance criteria two: an explanation of how the scheme rules relate to best practice in the Ombudsman field, and, as far as possible, contribute to achievement of the Regulatory Objectives***

When considering whether the proposals should be adopted, we have taken into account how they fit with the regulatory objectives described in Section 1 of the Legal Services Act 2007 and the Ombudsman Association (OA) principles for good complaints handling. Section 116 of the Act asks that the OLC have regard to good practice in other ombudsman schemes and are mindful of the regulatory objectives.

On the basis that these changes are anticipated to make our processes clearer for all service users, we consider that they will contribute to the following regulatory objectives:

- protecting and promoting the public interest;
- improving access to justice;
- protecting and promoting the interests of consumers;
- increasing public understanding of citizens' legal rights and duties; and
- promoting and maintaining adherence to professional principles.

More specifically, we anticipate that changes to the Scheme Rules will ensure that all potential users of our service are fully able to understand how we work.

In so doing, this should break down any perceived barriers to seeking redress, or to engaging with our investigations. It is important that these changes will make our processes clearer to all parties – that is, complainants and service providers alike. We anticipate that this will therefore not only improve access to justice and offer better protection for consumers, but also aid the profession in their understanding of how we deal with complaints and ensure that they are given a fair hearing. We believe that this will build greater trust and confidence in the scheme with all parties.

We also see our Scheme Rules and operational communications as a model on which we hope service providers will base their processes at first tier. These proposed changes to adopt simpler, clearer language should demonstrate the importance of clear

communication at all stages, and the importance of avoiding jargon that may isolate or confuse consumers.

Taken together, we anticipate that both improved understanding of our process and modelling of best practice should lead to higher standards in the profession as a whole. In this we would be promoting the public interest and maintaining professional principles.

We have also had excellent feedback on our Language of Complaints research from other ombudsman schemes, including promotion of the findings through the Ombudsman Association. This includes a specific session planned for the 2018 OA Conference, which aims to pass on lessons from the research to other schemes as best practice in communications.

Moreover, the proposed changes relate specifically to section 1:5 and 2:4 of the OA principles for good complaints handling<sup>1</sup>:

#### **1:5 Clear communication**

*“Clarity of purpose is achieved by communicating well. Public information should explain the scheme’s vision and values, its objectives and service standards. **All publications must be easy to obtain and simple to read, using plain language and avoiding technical jargon.** Engagement with complainants and others should be designed to avoid doubt and misunderstanding about the reason for the contact and the information that is requested or provided.”*

#### **2.4 Literacy and language**

*“Differing levels of literacy and uneven communication skills may result in some complainants not understanding the jargon used in complaint forms, or having difficulty in articulating abstract concepts. **It is therefore important to ensure that documentation is written in plain language.** A scheme may also consider helping complainants complete their documentation.”*

The changes proposed in this application are made with this guidance in mind. We are confident that this will make our service more accessible and improve our clarity of purpose, as outlined in the OA principles for good complaints handling.

#### **Acceptance criteria three: a finalised Impact Assessment on the rules particularly as regards case fees that meets MoJ requirements**

We have been advised that an impact assessment is not necessary for changes as minor as these. The changes will have no bearing on the substance of the Scheme Rules and will not affect the current case fee structure.

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<sup>1</sup> The British and Irish Ombudsman Association, 2007. Available at: <http://www.ombudsmanassociation.org/docs/BIOAGoodComplaintHandling.pdf>

## ***Communication of changes***

Following our submission of this application, LeO will publish an updated draft of the Scheme Rules on our website. This draft will be accompanied by a note explaining that the submission has altered slightly in response to representations, detailing the differences between the previous draft and final submission, and announcing that it has been submitted for approval in that form.

Subject to LSB approval, the final version of the Scheme Rules will be published to our website with an accompanying news alert. All factsheets will be updated with the new terminology and upon publication of the new Scheme Rules, all staff within the Legal Ombudsman will cease to use old terminology in any external communications.

We anticipate that the 'go live' date for these changes will be Tuesday 3 April.

Please see Annex 1 for a full copy of the proposed edits to the Scheme Rules.

# ANNEX 1 - DRAFT RULES

~~28 January 2015~~ DATE TBC (2018)

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## Scheme Rules

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# 1 Introduction and definitions

## Contents

### 1.1

- These scheme rules are about complaints made from 6 October 2010 to authorised persons including legal practitioners and others, authorised in England and Wales.
- They explain which complaints are covered by the Legal Ombudsman and how it will deal with them.
- This version includes amendments that apply to complaints referred to the Legal Ombudsman from ~~28 January 2015~~ DATE TBC 2018.

### 1.2 Parliament, in the Act:

- created the Legal Services Board (to oversee Approved Regulators) and the Office for Legal Complaints (to establish the Legal Ombudsman);
- gave the Lord Chancellor power to make orders, including orders modifying who would be able to bring a complaint to the Legal Ombudsman; and extending the jurisdiction of the Legal Ombudsman to claims management services;<sup>1</sup>
- gave the Legal Services Board power to set requirements for the rules of Approved Regulators about how authorised persons handle complaints<sup>2</sup> and cooperate with an ombudsman<sup>3</sup>; and
- gave the Office for Legal Complaints power to make rules affecting which complaints can be handled by the Legal Ombudsman and how those complaints will be handled.

1.3 These scheme rules include:

- a summary of relevant provisions in the Act, as modified by orders made by the Lord Chancellor (though it is the Act and the orders themselves that count);
- a summary of requirements on complaint-handling made by the Legal Services Board under the powers given to it by the Act; and
- rules made by the Office for Legal Complaints under the powers given to it by the Act.

The endnotes identify the section of the Act that is being summarised, or under which an order, requirement or rule has been made; and which are the rules made by the Office ~~foref~~ Legal Complaints for the Legal Ombudsman.

1.4 This book also includes some general guidance. There are six chapters –

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1: Introduction and definitions:

- contents of this book;
- meaning of words that are underlined.

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2: Who can complain about what:

- who can complain;
- what they can complain about.

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3: What authorised persons must do:

- dealing with complaints themselves;
- cooperating with the Legal Ombudsman.

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4: When complaints can be referred to the Legal Ombudsman:

- after complaining to the authorised person;
- time limit from act/omission;
- ombudsman extending time limits.

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5: How the Legal Ombudsman 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.

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#### 6: case fees payable by authorised persons.

### Meaning of words that are underlined

1.5 The Act means the Legal Services Act 2007.

1.6 Complaint means an oral or written expression of dissatisfaction which:

- a) alleges that the complainant has suffered (or may suffer) financial loss, distress, inconvenience or other detriment; and
- b) is covered by chapter two (who can complain about what).<sup>4</sup>

1.7 Authorised person means:

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a) someone authorised, in England and Wales, to carry out a reserved legal activity<sup>5</sup> at the time of the relevant act/omission or covered under section 129 of the Act<sup>6</sup>, including:

- alternative business structures (licensed under part 5 of the Act);
- barristers;
- costs lawyers;
- chartered legal executives;
- licensed conveyancers;
- notaries;
- patent attorneys;
- probate practitioners;
- registered European lawyers;
- solicitors;
- trade mark attorneys; or

b) (for the purpose of these rules) someone authorised in England and Wales by the Claims Management Services Regulator;

c)(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.<sup>7</sup>

1.8 Approved Regulator means:

- a) a regulator approved under schedule 4 of the Act, including:
- the Association of Chartered Certified Accountants (for reserved probate activities);
  - the Association of Costs Lawyers, through the Costs Lawyer Standards Board;
  - the Bar Council, through the Bar Standards Board (for barristers);
  - the Chartered Institute of Patent Attorneys, through the Intellectual Property Regulation Board;
  - the Council for Licensed Conveyancers;
  - the Institute of Chartered Accountants in England and Wales (for reserved probate activities);
  - the Institute of Chartered Accountants in Scotland (for reserved probate activities);
  - ~~CILEX Regulation Professional Standards~~, through the Chartered Institute of Legal Executives;
  - ~~the~~The Chartered Institute of Trade Mark Attorneys, through the Intellectual Property Regulation Board;
  - the Law Society, through the Solicitors Regulation Authority;
  - the Master of the Faculties (for notaries); and
  - the Legal Services Board (but only for any alternative business structures it licenses directly);
- b) (for the purpose of these rules) the Claims Management ~~Services~~-Regulator (for claims management services).

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1.9 Determination<sup>8</sup> means a final decision that is made by an ombudsman on a complaint.

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4.91.10 Legal Ombudsman means the ombudsman scheme established by the Office for Legal Complaints.

4.101.11 Ombudsman means:

- a) any ombudsman from the Legal Ombudsman;<sup>9</sup> and  
 b) any Legal Ombudsman staff member to whom an

ombudsman has delegated the relevant functions (but an ombudsman cannot delegate the functions of determining a complaint or of dismissing or discontinuing it for any of the reasons under paragraph 5.7).<sup>10</sup>

4.141.12 Party includes:

- a) a complainant (covered by chapter two);
- b) an authorised person (covered by chapter two) against whom the complaint is made;
- c) an authorised person (covered by chapter five) whom an ombudsman treats as a joint respondent to a complaint.<sup>11</sup>

4.121.13 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.<sup>12</sup>

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

- a) exercising a right of audience;
- b) conducting litigation;
- c) reserved instrument activities;
- d) probate activities;
- e) notarial activities;
- f) administration of oaths.

## 2 Who can complain about what

### Who can complain

2.1 A complainant must be one of the following:<sup>13</sup>

- a) an individual;
- b) a business or enterprise that was a micro-enterprise (European Union definition) when it referred the complaint to the authorised person;<sup>14</sup>
- c) a charity that had an annual income net of tax of less than £1 million when it referred the complaint to the authorised person;
- d) a club/association/organisation, the affairs of which are managed by its members/a committee/a committee of its members, that had an annual income net of tax of less than £1 million when it referred the complaint to the authorised person;
- e) a trustee of a trust that had an asset value of less than £1 million when it referred the complaint to the authorised person;  
or
- f) a personal representative or beneficiary of the estate of a person who, before he/she died, had not referred the complaint to the Legal Ombudsman.

For (e) and (f) the condition is that the services to which the complaint relates were provided by the respondent to a person –

- a) who has subsequently died; and
- b) who had not by his or her death referred the complaint to the ombudsman scheme.

2.2 If a complainant who has referred a complaint to the Legal Ombudsman dies or is otherwise unable to act, the complaint can be continued by:<sup>15</sup>

- a) 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
- b) the residuary beneficiaries of the estate of a complainant

who has died.<sup>16</sup>

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

- a) a public body (or acting for a public body) in relation to the services complained about; or
- b) an authorised person who procured the services complained about on behalf of someone else.<sup>17,18</sup>

2.4 For example, where the complaint is about a barrister who was instructed by a solicitor on behalf of a consumer, the consumer can complain to the ombudsman but the solicitor cannot.

2.5 A complainant can authorise someone else in writing (including an authorised person) to act for the complainant in pursuing a complaint, but the Legal Ombudsman remains free to contact the complainant direct where it considers that appropriate.<sup>19</sup>

### **What they can complain about**

2.6 The complaint must relate to an act/omission by someone who was an authorised person at that time<sup>20</sup> but:

- a) 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;<sup>21</sup> and
- b) 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.<sup>22</sup>

2.7 The act/omission does not have to:

- a) relate to a reserved legal activity<sup>23</sup>; nor
- b) be after the Act came into force<sup>24</sup> (but see the time limits in chapter four).

2.8 The complaint must relate to services which the authorised person:

- a) provided to the complainant; or
- b) provided to another authorised person who procured them on behalf of the complainant; or
- c) provided to (or as) a personal representative/trustee where the complainant is a beneficiary of the estate/trust.<sup>25</sup>; or
- d) offered, or refused to provide, to the complainant.<sup>26</sup>

2.9 A complaint is not affected by any change in the membership of a partnership or other unincorporated body.<sup>27</sup>

2.10 Where authorised person A ceases to exist and B succeeds to the whole (or substantially the whole) of A's business:

- a) acts/omissions by A become acts/omissions of B;<sup>28</sup> and
- b) complaints already outstanding against A become complaints against B.<sup>29</sup>

Unless an Ombudsman decides that this is, in his/her opinion, not fair and reasonable in all the circumstances of the case.

## 3 What authorised persons must do

### Dealing with complaints themselves

- 3.1 Authorised persons including legal practitioners and others must comply with their Approved Regulator's rules on handling complaints, including any requirements specified by the Legal Services Board<sup>30</sup> or, for persons authorised by the Claims Management Services Regulator, any requirements specified by the Secretary of State<sup>31</sup>.
- 3.2 The Legal Services Board has required that:
- a) authorised persons tell all clients in writing at the time of engagement, or existing clients at the next appropriate opportunity that they can complain, how and to whom this can be done;
  - b) this must include that they can complain to the Legal Ombudsman at the end of the authorised person's complaints process, the timeframe for doing so and full details of how to contact the Legal Ombudsman; and
  - c) authorised persons tell all clients in writing at the end of the authorised person's complaints process that they can complain to the Legal Ombudsman, the timeframe for doing so and full details of how to contact the Legal Ombudsman.
- 3.3 The Legal Services Board expects that regulation of complaint-handling procedures by Approved Regulators will:
- a) give consumers confidence that:
    - effective safeguards will be provided; and
    - complaints will be dealt with comprehensively and swiftly, with appropriate redress where necessary;
  - b) provide processes that are:
    - convenient and easy to use (in particular for those that are vulnerable or have disabilities);
    - transparent, clear, well-publicised, free and allow complaints to be made by any reasonable means;
    - prompt and fair, with decisions based on sufficient investigation of the circumstances, and (where

appropriate) offer a suitable remedy.

### **Cooperating with the Legal Ombudsman**

- 3.4 Authorised persons must comply with their Approved Regulator's rules on cooperating with an ombudsman, including any requirements specified by the Legal Services Board or, for persons authorised by the Claims Management Services Regulator, the Secretary of State.<sup>32</sup>

## 4 When complaints can be referred to the Legal Ombudsman

### After complaining to the authorised person

- 4.1 Ordinarily, a complainant cannot use the Legal Ombudsman unless the complainant has first used the authorised person's complaints procedure (referred to in chapter three).<sup>33</sup>

### Time limit from authorised person's final response

- 4.2 But a complainant can use the Legal Ombudsman if:<sup>34</sup>
- a) the complaint has not been resolved to the complainant's satisfaction within eight weeks of being made to the authorised person; or
  - b) an ombudsman considers that there are exceptional reasons to consider the complaint sooner, or without it having been made first to the authorised person; or
  - c) where an ombudsman considers that in-house resolution is not possible due to irretrievable breakdown in the relationship between an authorised person and the person making the complaint.
- 4.3 For example, an ombudsman may decide that the Legal Ombudsman should consider the complaint where the authorised person has refused to consider it, or where delay would harm the complainant.
- 4.4
- a) This time limit applies only if the authorised person's written response to a complaint included prominently:
    - an explanation that the Legal Ombudsman was available if the complainant remained dissatisfied;
    - full contact details for the Legal Ombudsman; and
    - a warning that the complaint must be referred to the Legal Ombudsman within six months of the date of the written response;
  - b) If (but only if) the conditions in (a) are satisfied, a complainant must ordinarily refer the complaint to the Legal Ombudsman within six months of the date of that written response.

### Time limit from act/omission

#### 4.5 Ordinarily:

- a) the act or omission, or when the complainant should reasonably have known there was cause for complaint, must have been after 5 October 2010; and
- b) the complainant must refer the complaint to the Legal Ombudsman no later than:
  - six years from the act/omission; or
  - three years from when the complainant should reasonably have known there was cause for complaint.<sup>35</sup>

#### 4.6 In relation to 4.5(b):

- a) where a complaint is referred by a personal representative or beneficiary of the estate of a person who, before he/she died, had not referred the complaint to the Legal Ombudsman, the period runs from when the deceased should reasonably have known there was cause for complaint; and
- b) when the complainant (or the deceased) should reasonably have known there was a cause for complaint will be assessed on the basis of the complainant's (or the deceased's) own knowledge, disregarding what the complainant (or the deceased) might have been told if he/she had sought advice.

### Ombudsman extending time limits

#### 4.7 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.<sup>36</sup>

#### 4.8 For example an Ombudsman:

- a) might extend a time limit if the complainant was prevented from meeting the time limit as a result of serious illness; and
- b) is likely to extend a time limit where the time limit had not expired when the complainant raised the complaint with the authorised person.

## 5 How the Legal Ombudsman will deal with complaints<sup>37</sup>

5.1 The Legal Ombudsman may require a complainant to complete its complaint form.<sup>38</sup>

5.2 In the case of a partnership (or former partnership), it is sufficient for the Legal Ombudsman to communicate with any partner (or former partner).<sup>39</sup>

### First contact

5.3 Unless:

- a) the authorised person has already had eight weeks to consider the complaint; or
- b) the authorised person has already issued a written response to the complaint; or
- c) an ombudsman considers that there are exceptional

reasons; the Legal Ombudsman will:

- a) refer the complaint to the authorised person;
- b) notify the complainant; and
- c) explain why to both of them.<sup>40</sup>

5.4 If the authorised person claims that all or part of the complaint:

- a) is not covered by the Legal Ombudsman under chapter two; or
- b) is out-of-time under chapter four; or
- c) should be dismissed under paragraph 5.7;

an ombudsman will give all parties an opportunity to make representations before deciding.<sup>41</sup>

5.5 Otherwise, if an ombudsman considers that all or part of the complaint:

- a) may not be covered by the Legal Ombudsman under chapter two; or
- b) may be out-of-time under chapter four; or
- c) should be dismissed under paragraph 5.7;

the ombudsman will give the complainant an opportunity to make representations before deciding.<sup>42</sup>

- 5.6 The ombudsman will then give the complainant and the authorised person his/her decision and the reasons for it.<sup>43</sup>

### **Grounds for dismissing or discontinuing a complaint<sup>44</sup>**

- 5.7 An ombudsman may (but does not have to) dismiss or discontinue all or part of a complaint if, in his/her opinion:

- a) it does not have any reasonable prospect of success, or is frivolous or vexatious; or
- b) the complainant has not suffered (and is unlikely to suffer) financial loss, distress, inconvenience or other detriment; or
- c) 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
- d) the complainant has previously complained about the same issue to the Legal Ombudsman 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
- e) a comparable independent complaints (or costs-assessment) scheme or a court has already dealt with the same issue; or
- f) 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 Legal Ombudsman can deal with the issue; or
- g) 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;<sup>45</sup> or
- h) the issue concerns an authorised person's decision when exercising a discretion under a will or trust; or
- i) 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;
- j) 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

- k) it is not practicable to investigate the issue fairly because of the time which has elapsed since the act/omission; or
- l) the issue concerns an act/omission outside England and Wales and the circumstances do not have a sufficient connection with England and Wales;<sup>46</sup>
- m) the complaint is about an authorised person's refusal to provide a service and the complainant has not produced evidence that the refusal was for other than legitimate or reasonable reasons; or
- n) there are other compelling reasons why it is inappropriate for the issue to be dealt with by the Legal Ombudsman.

### Referring a complaint to court

5.8 Exceptionally (at the instance of an ombudsman) where the ombudsman considers that:

- a) resolution of a particular legal question is necessary in order to resolve a dispute; but
- b) 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.<sup>47</sup>

5.9 Exceptionally, (at the instance of an authorised person) where:

- a) the authorised person requests, and also undertakes to pay the complainant's legal costs and disbursements on terms the ombudsman considers appropriate; and
- b) 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, so that a court may consider it as a test case.<sup>48</sup>

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:

- a) pay the complainant's reasonable costs and disbursements (to be assessed if not agreed on an indemnity basis);
- b) pay these in connection with the proceedings at first instance and also any subsequent appeal made by the authorised person; and
- c) make interim payments on account if and to the extent that it appears reasonable to do so.

5.11 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):

- a) any representations made by the authorised person or the complainant;
- b) the stage already reached in consideration of the dispute;
- c) how far the legal question is central to the outcome of the dispute;
- d) how important or novel the legal question is in the context of the dispute;
- e) the remedies that a court could impose;
- f) the amount at stake; and
- g) the significance for the authorised person (or similar authorised persons) or their clients.<sup>49</sup>

### **Referring to another complaints scheme**

5.12 An ombudsman may refer a complaint to another complaints scheme if:

- a) he/she considers it appropriate; and
- b) the complainant agrees.<sup>50</sup>

5.13 If an ombudsman refers a complaint to another complaints scheme, the ombudsman will give the complainant and the authorised person reasons for the referral.<sup>51</sup>

### **Arrangements for assistance**

5.14 The Legal Ombudsman 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.<sup>52</sup>

## Related complaints

- 5.15 The Legal Ombudsman may:
- a) tell a complainant that a related complaint could have been brought against some other authorised person;<sup>53</sup> or
  - b) treat someone else who was an authorised person at the time of the act/omission as a joint respondent to the complaint.<sup>54</sup>
- 5.16 Where two or more complaints against different authorised persons relate to connected circumstances:
- a) the Legal Ombudsman may investigate them together, but an ombudsman will make separate determinations;<sup>55</sup> and
  - b) the determinations may require the authorised persons to contribute towards the overall redress in the proportions the ombudsman considers appropriate.<sup>56</sup>

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## Informal Resolution

- 5.17 The Legal Ombudsman will try to resolve complaints at the earliest possible stage, by whatever agreed outcome ~~means it is~~ considered appropriate ~~including informal resolution~~.<sup>57</sup>
- 5.18 If a complaint is settled, abandoned or withdrawn, an ombudsman will tell both the complainant and the authorised person.<sup>58</sup>

## Investigation

- 5.19 If the Legal Ombudsman considers that an investigation is necessary, it will:
- a) ensure both parties have been given an opportunity of making representations;
  - b) send the parties ~~either a recommendation report or a preliminary case~~ decision<sup>59</sup> (which the Act calls an 'assessment'), with a time limit for response; and
  - c) if any party indicates disagreement within that time limit, arrange for an ombudsman to issue a final decision (which the Act calls a 'determination').<sup>60</sup>
- 5.20 If neither party indicates disagreement within that time limit, the Legal Ombudsman may treat the complaint as resolved by the ~~recommendation report~~ case decision.<sup>61</sup>

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## Evidence

- 5.21 An apology will not of itself be treated as an admission of liability.<sup>62</sup>
- 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.<sup>63</sup>
- 5.23 An ombudsman may give directions on:
- a) the issues on which evidence is required; and
  - b) the way in which evidence should be given.<sup>64</sup>
- 5.24 An ombudsman may:
- a) take into account evidence from Approved Regulators or the Legal Services Board;
  - b) take into account evidence from other third parties;
  - c) treat any finding of fact in disciplinary proceedings against the authorised person as conclusive;
  - d) include/exclude evidence that would be inadmissible/admissible in court;
  - e) accept information in confidence where he/she considers that is both necessary and fair;<sup>65</sup>
  - f) make a determination on the basis of what has been supplied;
  - g) draw inferences from any party's failure to provide information requested; and
  - h) dismiss a complaint if the complainant fails to provide information requested.<sup>66</sup>
- 5.25 An ombudsman may require a party to attend to give evidence and produce documents at a time and place specified by the ombudsman.<sup>67</sup>
- 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.<sup>68</sup>
- 5.27 An ombudsman may:
- a) specify the time within which this must be done;
  - b) specify the manner or form in which the information is to

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be provided; and

c) require the person producing the document to explain it.<sup>69</sup>

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.<sup>70</sup>

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

a) will tell the relevant Approved Regulator;

b) may require that Approved Regulator to tell the ombudsman what action it will take; and

c) may report any failure by that Approved Regulator (other than the Claims Management Services Regulator) to the Legal Services Board.<sup>71</sup>

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.<sup>72</sup>

### Procedural time limits

5.31 An ombudsman may fix (and may extend) a time limit for any stage of the investigation, consideration and determination of a complaint.<sup>73</sup>

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

a) proceed with the investigation, consideration and determination;

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b) draw inferences from the failure;

c) where the failure is by the complainant, dismiss the complaint; or

d) where the failure is by the authorised person, include compensation for any inconvenience caused to the complainant in any award.<sup>74</sup>

### Hearings

5.33 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.<sup>75</sup>

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

- a) the issues he/she wishes to raise; and
- b) (if appropriate) any reasons why the hearing should be in private;

so the ombudsman may consider whether:

- a) the issues are material;
- b) a hearing should take place; and
- c) any hearing should be in public or private.<sup>76</sup>

5.35 A hearing may be held by any means the ombudsman considers appropriate in the circumstances, including (for example) by phone.<sup>77</sup>

#### **Determinations and awards by an ombudsman**

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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.<sup>78</sup>

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

- a) what decision a court might make;
- b) the relevant Approved Regulator's rules of conduct at the time of the act/omission; and
- c) what the ombudsman considers to have been good practice at the time of the act/omission.<sup>79</sup>

5.38 The ombudsman's determination may contain one or more of the following directions to the authorised person in favour of the complainant:<sup>80</sup>

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- a) to apologise;
- b) to pay compensation of a specified amount for loss suffered;
- c) to pay interest on that compensation from a specified time;<sup>81</sup>
- d) to pay compensation of a specified amount for inconvenience/distress caused;
- e) to ensure (and pay for) putting right any specified error,

omission or other deficiency;

- f) to take (and pay for) any specified action in the interests of the complainant;
- g) to pay a specified amount for costs the complainant incurred in pursuing the complaint.<sup>8283</sup>
- h) to limit fees to a specified amount.

5.39 As a complainant does not usually need assistance to pursue a complaint with the Legal Ombudsman, 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:<sup>84</sup>

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- a) all or part of any amount paid is refunded;
- b) interest is paid on that refund from a specified time;<sup>85</sup>
- c) all or part of the fees are remitted;
- d) the right to recover the fees is waived, wholly or to a specified extent; or
- e) any combination of these.

5.41 An ombudsman will set (and may extend) 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).<sup>86</sup>

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

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- a) specified in the determination; or
- b) (if not specified) at the rate payable on High Court judgment debts.<sup>87</sup>

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5.43 There is a limit of £50,000 on the total value that can be awarded by the determination of a complaint in respect of:<sup>88</sup>

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

5.44 If (before or after the determination is issued) it appears that the total value will exceed £50,000, an ombudsman may direct which part or parts of the award are to take preference.<sup>89</sup>

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5.45 That limit does not apply to:

- a) an apology;
- b) interest on specified compensation for loss suffered;<sup>90</sup>
- c) a specified amount for costs the complainant incurred in pursuing the complaint;
- d) limiting fees to a specified amount; or
- e) interest on fees to be refunded.

#### Acceptance/rejection of determinations

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5.46 The determination will:<sup>91</sup>

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

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5.47 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.<sup>92</sup>

5.48 The ombudsman will send copies of the determination to the parties and the relevant Approved Regulator.<sup>93</sup>

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5.49 If the complainant tells the ombudsman that he/she accepts the determination, it is binding on the parties and final.<sup>94</sup>

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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.

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

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- a) the complainant tells the ombudsman (after the specified time) that he/she accepts the determination; and
- b) the complainant has not previously told the ombudsman that he/she rejects the determination; and

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c) the ombudsman is satisfied that there are sufficient reasons why the complainant did not respond in time.<sup>95</sup>

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.<sup>96</sup>

5.53 If the complainant accepts or rejects the determination, the ombudsman will notify the parties and the relevant Approved Regulator of the outcome.<sup>97</sup>

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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.

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### Publication

5.55 The Legal Ombudsman 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.<sup>98</sup>

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### Enforcement

5.56 A binding and final determination can be enforced through the High Court or a county court by the complainant.<sup>99</sup>

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

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- a) the complainant agrees; and
- b) the ombudsman considers it appropriate in all the circumstances.<sup>100</sup>

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

- a) will tell the relevant Approved Regulator;
- b) may require that Approved Regulator to tell the ombudsman what action it will take; and

- c) may report any failure by that Approved Regulator (other than the Claims Management Services Regulator) to the Legal Services Board.<sup>101</sup>

### **Misconduct**

- 5.59 If (at any stage after the Legal Ombudsman receives a complaint) an ombudsman considers that the complaint discloses any alleged misconduct about which the relevant Approved Regulator should consider action against the authorised person, the ombudsman:
- a) will tell the relevant Approved Regulator;
  - b) will tell the complainant that the Approved Regulator has been told;
  - c) may require that Approved Regulator to tell the ombudsman what action it will take; and
  - d) may report any failure by that Approved Regulator (other than the Claims Management Services Regulator) to the Legal Services Board.<sup>102</sup>
- 5.60 If an ombudsman considers that an authorised person has failed to cooperate with the Legal Ombudsman, the ombudsman:
- a) will tell the relevant Approved Regulator;
  - b) may require that Approved Regulator to tell the ombudsman what action it will take; and
  - c) may report any failure by that Approved Regulator (other than the Claims Management Services Regulator) to the Legal Services Board.<sup>103</sup>
- 5.61 An ombudsman, the Legal Ombudsman 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:
- a) is reasonably required by the Approved Regulator; and
  - b) has regard to any right of privacy of any complainant or third party involved (including rights of confidentiality or rights under the Data Protection Act 1998 or the Human Rights Act 1998).<sup>104</sup>

## 6 Case fees payable by authorised persons

- 6.1 A complaint is potentially chargeable unless:
- a) it is out of jurisdiction; or
  - b) it is dismissed or discontinued under paragraph 5.7.<sup>105</sup>
- 6.2 A case fee is payable by the business/partnership<sup>106</sup> or individual authorised person for every potentially chargeable complaint when it is closed unless:
- a) the complaint was:
    - abandoned or withdrawn; or
    - settled, resolved or determined in favour of the authorised person; and
  - b) the ombudsman is satisfied that the authorised person took all reasonable steps, under his/her complaints procedures, to try to resolve the complaint.<sup>107</sup>
- 6.3 The case fee is £400 for all chargeable complaints.<sup>108</sup>
- 6.4 The remaining costs of running the legal jurisdiction of the Legal Ombudsman are covered by a levy on Approved Regulators by the Legal Services Board.<sup>109</sup>
- 6.5 The remaining costs of running the claims management jurisdiction of the Legal Ombudsman are covered by the Lord Chancellor's fee collected by the Claims Management Services Regulator on behalf of the Lord Chancellor from the authorised claims management sector.
- 6.6 There is no charge to complainants.

## End notes

<sup>1</sup> Section 161

<sup>2</sup> Section 112.

<sup>3</sup> Section 145.

<sup>4</sup> To distinguish complaints about service from those which relate solely to professional misconduct.

<sup>5</sup> Sections 12 and 129.

<sup>6</sup> This section covers the equivalent practitioners before the commencement of the Act.

<sup>7</sup> [OLC rule] Sections 133(8) and 147(7).

<sup>8</sup> Section 137.

<sup>9</sup> Section 122(5).

<sup>10</sup> Section 134.

<sup>11</sup> [OLC rule]. Where it is apparent that another legal practitioner was also involved. Section 133(3)(c).

<sup>12</sup> Section 128(7).

<sup>13</sup> Individuals are covered under section 128(3). The others are covered under the Legal Services Act 2007 (Legal Complaints)(Parties) Order 2010 made by the Lord Chancellor.

<sup>14</sup> Defined in European Commission Recommendation 2003/361/EC – broadly a business or enterprise with fewer than 10 employees and turnover or assets not exceeding €2 million.

<sup>15</sup> [OLC rule] Section 132(4).

<sup>16</sup> To save their having to take out a grant of representation if one is not otherwise required.

<sup>17</sup> Section 128(5).

<sup>18</sup> The Lord Chancellor can exclude others under section 130.

<sup>19</sup> [OLC rule] Section 133(1).

<sup>20</sup> Section 128(1) part.

<sup>21</sup> Section 131(1).

<sup>22</sup> Section 131(2) and (3).

<sup>23</sup> Section 128(1) part.

<sup>24</sup> Section 125(2).

<sup>25</sup> Section 128(4).

<sup>26</sup> The Lord Chancellor can include others under section 128. Note, Legal Services Act 2007 (Legal Complaints) (Parties) Order 2012.

<sup>27</sup> Section 132(1).

<sup>28</sup> [OLC rule] Section 132(2).

<sup>29</sup> [OLC rule] Section 132(3).

<sup>30</sup> Section 112(2).

<sup>31</sup> Compensations Act 2006, Schedule 11.

<sup>32</sup> Section 145.

<sup>33</sup> Section 126(1).

<sup>34</sup> [OLC rule] Section 126(3).

<sup>35</sup> [OLC rule].

<sup>36</sup> [OLC rule] Section 133(2)(b).

<sup>37</sup> Section 133(1).

<sup>38</sup> [OLC rule] This gives the Ombudsman service the right to require a complaint form, but does not oblige it to do so.

<sup>39</sup> [OLC rule] To make it clear that the Ombudsman service does not have to communicate with each partner individually.

<sup>40</sup> [OLC rule] Section 135.

<sup>41</sup> [OLC rule] Section 135.

<sup>42</sup> [OLC rule] Section 135.

<sup>43</sup> Section 135.

<sup>44</sup> [OLC rule] Section 133(3)(a).

<sup>45</sup> 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.

<sup>46</sup> [OLC rule] 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.

<sup>47</sup> [OLC rule].

<sup>48</sup> Paragraph 5.9 only applies if the legal practitioner so requests. The idea is that, in suitable cases, the legal practitioner can go to court, provided the complainant's legal costs are met. In other circumstances, an Ombudsman cannot force a legal practitioner to pay the complainant's costs of going to court.

<sup>49</sup> [OLC rule].

<sup>50</sup> [OLC rule] Section 133(3)(b).

<sup>51</sup> [OLC rule] Section 135.

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<sup>27</sup> Schedule 15, paragraph 18.

<sup>52</sup> Where it is apparent that the complaint was made against the wrong legal practitioner.

<sup>53</sup> [OLC rule] Where it is apparent that another legal practitioner was also involved. Section 133(3)(c).

<sup>54</sup> There need to be separate determinations because of the £50,000 limit.

<sup>55</sup> [OLC rule].

<sup>56</sup> [OLC rule].

<sup>57</sup> Section 135.

<sup>58</sup> [Previously referred to as a recommendation report or a preliminary decision.](#)

<sup>59</sup> [OLC rule].

<sup>60</sup> [OLC rule].

<sup>61</sup> [OLC rule].

<sup>62</sup> [OLC rule] To ensure legal practitioners are not discouraged from saying 'sorry'.

<sup>63</sup> Sections 133(5) and 147(6).

<sup>64</sup> [OLC rule].

<sup>65</sup> Including, but not limited to, information which is "restricted information" under section 151.

<sup>66</sup> [OLC rule].

<sup>67</sup> [OLC rule] Section 133(3)(e).

<sup>68</sup> Section 147(1) and (3).

<sup>69</sup> Section 147(2) and (4).

<sup>70</sup> Section 147(5).

<sup>71</sup> Section 148.

<sup>72</sup> Section 149.

<sup>73</sup> [OLC rule].

<sup>74</sup> [OLC rule].

<sup>75</sup> [OLC rule].

<sup>76</sup> [OLC rule].

<sup>77</sup> [OLC rule]. The OLC has not exercised the power in section 133(3)(g) enabling it to make a rule about the OLC awarding expenses in connection with attending a hearing.

<sup>78</sup> Section 137(1)

<sup>79</sup> [OLC rule] Section 133(3)(f).

<sup>80</sup> Section 137(2).

<sup>81</sup> Section 137(4)(b).

<sup>82</sup> [(g) is OLC rule] Section 133(3)(h).

<sup>83</sup> The OLC has not exercised 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

<sup>84</sup> Section 137(2)(b)(ii).

<sup>85</sup> Section 137(4)(b).

<sup>86</sup> [OLC rule].

<sup>87</sup> [OLC rule] Section 137(4).

<sup>88</sup> Section 138(1) and (2). The Lord Chancellor can increase the limit under section 139. Note, Legal Services Act 2007 (Alteration of Limit) Order 2012

<sup>89</sup> [OLC rule].

<sup>90</sup> Section 138(3).

<sup>91</sup> Section 140(1) and (2).

<sup>92</sup> [OLC rule].

<sup>93</sup> Section 140(3).

<sup>94</sup> Section 140(4).

<sup>95</sup> [(c) is OLC rule] Section 140(5) and (6).

<sup>96</sup> Section 140(7) and (8).

<sup>97</sup> Section 140(7).

<sup>98</sup> Section 150.

<sup>99</sup> Section 141.

<sup>100</sup> [OLC rule] Section 141(5).

<sup>101</sup> Section 142.

<sup>102</sup> Section 143.

<sup>103</sup> Section 146.

<sup>104</sup> [OLC rule] Section 144(1).

<sup>105</sup> [OLC rule].

<sup>106</sup> Note Section 131

<sup>107</sup> [OLC rule].

<sup>108</sup> [OLC rule].

<sup>109</sup> Sections 173 and 174.