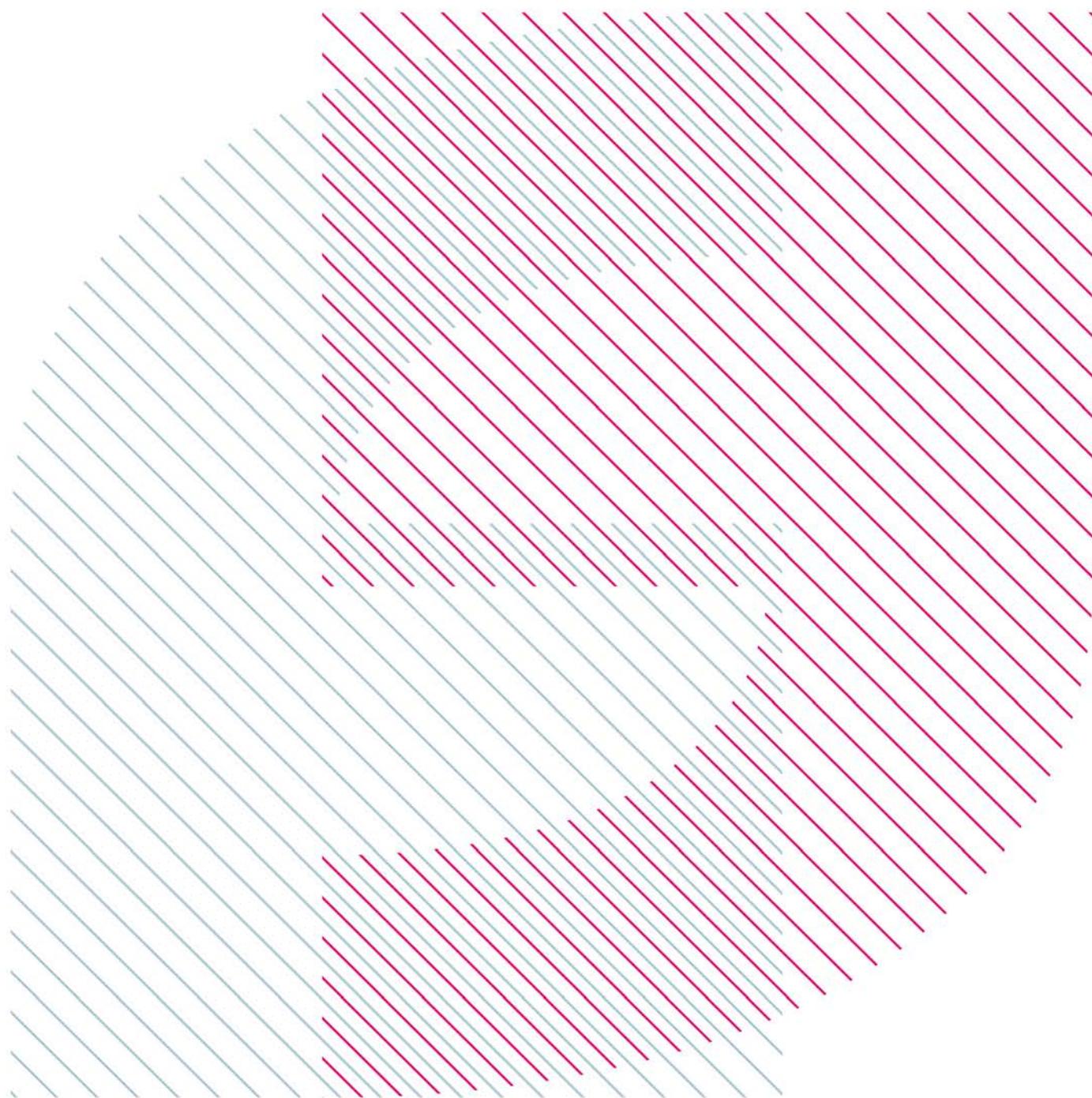




Consultation

**Proposed ADR  
Scheme Rules**



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## Summary and purpose

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The purpose of this document is to enable the Office for Legal Complaints to consult on the principle, detail and drafting of the modifications to its Scheme Rules that would be necessary for the Legal Ombudsman scheme to comply with the requirements to become a certified Alternative Dispute Resolution entity.

The consultation period runs from Monday 7 September to Monday 2 November 2015.

### Background

In May 2013 the European Parliament published a Directive on alternative dispute resolution (ADR),<sup>1</sup> which is being implemented in the UK through Regulations<sup>2</sup> laid in March and June 2015.

The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. The Directive is without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.<sup>3</sup>

From 1 October 2015, regulated legal services and authorised claims management providers will be required to signpost consumers to an “ADR entity”<sup>4</sup> that is competent (as set out in the Regulations) to handle their complaint. This requirement will be in addition to the existing requirement under the Legal Services Act 2007 to signpost the Legal Ombudsman scheme.

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<sup>1</sup> Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0011>

<sup>2</sup> The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 No. 542 <http://www.legislation.gov.uk/ukSI/2015/542> and The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 No. 1392 <http://www.legislation.gov.uk/ukSI/2015/1392>

<sup>3</sup> Article 1, Directive 2013/11/EU on alternative dispute resolution for consumer disputes

<sup>4</sup> The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 No. 542 <http://www.legislation.gov.uk/ukSI/2015/542> Part 1(4).

It is the view of the Office for Legal Complaints (OLC) that it would be in the best interests of service providers and consumers for the Legal Ombudsman scheme to be certified as the “ADR entity” for complaints about legal services and claims management companies (CMCs). If the Legal Ombudsman scheme does not become an approved ADR entity the profession will be required to signpost to another certified ADR organisation.<sup>5</sup> While it is voluntary for each service provider to decide whether they want to use a certified ADR provider they must advertise the existence of an ADR body. The OLC is of the view that this could increase both consumer confusion and the burden on businesses. Further details on the background and reasoning behind our proposed application can be found in Appendix A.

In order for the Legal Ombudsman scheme to be certified as an ADR entity, that is approved following a successful application to the Legal Services Board (LSB), it must be compliant with the ADR Regulations, within a reasonable time. To comply, it will be necessary to change the Legal Ombudsman’s Scheme Rules. If Scheme Rules are changed, we propose to implement these changes on 1 April 2016. If the Scheme Rules are not changed, the Legal Ombudsman scheme will not be able to become a certified ADR entity.

## Consultation

This discussion document sets out the modifications to the Legal Ombudsman’s Scheme Rules proposed to comply with the requirements of the ADR Regulations while also ensuring that we operate fairly, efficiently, effectively and with minimum formality. We will also host a roundtable discussion with regulators, professional associations and consumer groups to consider their views on this consultation paper.

Each section of this consultation contains questions upon which we are specifically seeking views, and these are replicated in the summary at the end of the document. However, we also welcome general views and comments.

ADR Regulations are set out in light blue boxes with a bold claret outline; current rules are highlighted in grey boxes with a pink outline and proposed new rule changes which would be necessary to meet the ADR requirements are set out in yellow boxes with a blue outline. Wording deletions are presented in ~~strike through~~; additions are presented in **bold**.

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<sup>5</sup> <https://www.gov.uk/government/publications/alternative-dispute-resolution-for-consumers/alternative-dispute-resolution-for-consumers>

The Legal Ombudsman is also considering making wider changes to its scheme rules, and will consult on these separately in 2016. For clarity and expediency this document is limited to changes necessary to meet the requirements of the ADR Regulations to enable it to be approved as a certified ADR entity.

## **Timescale**

Consultation issued 7 September 2015.

Consultation closes 2 November 2015.

Consultation response presented to OLC board 9 December 2015.

If, after consideration of representations duly made, the OLC proposes to make changes to the Legal Ombudsman's Scheme Rules they will be submitted to the LSB for approval as required by Section 155 of the Legal Services Act, with the intention of implementing the changes from 1 April 2016.

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# Requirements of the ADR Regulations

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## Changes to our Scheme Rules

There are two principal areas in which the Legal Ombudsman's Scheme Rules would need to change to achieve compliance with the ADR Regulations. These are the time limits for accepting complaints (section 1) and the grounds we can use to dismiss complaints (section 2). In addition there are consequential amendments which are set out in section 3. In each section we have set out the current Scheme Rules, the ADR regulation requirements and the approach that we propose to take to incorporate the Regulations into our Scheme Rules.

### 1. Time Limits

The only time limit the ADR Regulations allow relates to the period within which a consumer must refer the complaint to the ADR entity, following referral of their complaint by the service provider.

Specifically, the Regulations allow an ADR entity to refuse to deal with a dispute on the grounds that:

“The consumer has not submitted the complaint to the person within the time period specified by the person, which shall not be less than the prescribed period.

(1) Subject to sub-paragraph (2), the “prescribed period” is 12 months from the date on which the trader informs the consumer that the trader is unable to resolve the consumer’s complaint (the “notice date”).

(2) Where the notice date occurred prior to the date on which the relevant competent authority approved the person as an ADR entity, under regulation 9(4), the “prescribed period” is the time period for submission of complaints as set out in the rules operated by that person on the notice date” .

ADR Regulations

Our current Scheme Rules currently contain two types of time limit.

(i) The first relates to the period within which a complaint must ordinarily be referred to the Legal Ombudsman scheme following completion of the service provider's complaints procedure.

In our current Scheme Rules this is set out as follows:

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

*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*

Current Scheme Rules

In order to comply with the provisions of the ADR Regulations, the Legal Ombudsman proposes to:

Amend Rule 4.4 as follows:

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

*4.4a) 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 **no later than twelve months from** 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~~ **no later than twelve** ~~six months of~~ **from** the date of that written response **(or six months if the written response was issued before [Implementation date to be inserted].***

Proposed new rule changes

For example:

If the written response from the service provider to the consumer was dated 1 April 2016, and this response both signposted the Legal Ombudsman AND advised that complaints must be referred to the Legal Ombudsman no later than 12 months from the date of the letter, the final date on which it would ordinarily be accepted would be 1 April 2017.

However, if the written response was dated 1 April 2016, and this response did not signpost the Legal Ombudsman OR advise that complaints must be referred no later than 12 months from the date of the letter, there would be no final date on which it would ordinarily be accepted.

Firms would need to make this change to any final response letter sent following the implementation date.

(ii) The second time limit relates to the time that has passed since the act/omission that gave rise to the complaint or date of awareness of the act/omission.

In the current Scheme Rules this is set out as follows:

***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*

***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.*

Current Scheme Rules

These changes, if adopted, would have implications for how we operate our scheme. To help understand our proposed approach we have set out examples of how we currently deal with cases and how, with the changes proposed to our rules, we propose we would deal with these cases in the future.

### **Case example 1**

A complainant brings a complaint to the Ombudsman about an act or omission that took place in 2005. The complainant was aware of the act/omission at the time, but only made a complaint to the legal services provider in July 2015. There is no good reason given by the complainant as to why they could not have brought the complaint sooner.

#### Approach under current Scheme Rules:

The complaint would ordinarily be treated as “out of time” under Rule 4.5, and it would not be processed.

#### Approach under proposed modified Scheme Rules:

The Regulations do not permit ADR entities to operate Rules which allow them to refuse to deal with cases based on the timing of the act or omission, or of their awareness of it.

In this situation we would have two options:

- a. If sufficient evidence was available, we would accept the complaint and deal with it; e.g. seek to informally resolve it or make a decision on it; or
- b. if sufficient evidence was not available to achieve a resolution or make a decision, we may:
  - i. “refuse to deal” with the case on the basis that due to the passage of time, it is not possible to come to a conclusion on the facts;
  - ii. refuse to deal with the case under the new “refuse to deal” rule below. This decision would need to be

made based on the specific facts of the individual case rather than a passage of time.

### **Grounds for refusing to deal with a dispute**

5.7 (d) Dealing with such a type of dispute would otherwise seriously impair the effective operation of the Legal Ombudsman scheme.

Proposed new rule changes

The Directive sets out “that ADR entities resolve disputes in a manner that is fair, practical and proportionate to both the consumer and the trader, on the basis of an objective assessment of the circumstances in which the complaint is made and with due regard to the rights of the parties”.<sup>6</sup> We propose to use this approach in dealing with complaints which we refuse to deal with on the grounds of 5.7 (d).

- Complaints we refused to deal with in these circumstances would not attract a case fee.

The Legal Ombudsman can already accept ‘complaints about acts or omissions that fall outside the time limits it currently operates, depending on the date of awareness (for instance, when the poor service was only uncovered when someone sells their house years after the original conveyancing) and currently does so effectively.

In our 2012 consultation on Scheme Rules we listed two case studies<sup>7</sup>:

In 2002, Ms X’s solicitor breached her confidentiality and shared personal information about her with a third party. She only became aware of this in July 2010. She came to the Legal Ombudsman as she wanted an explanation and an apology from the firm (rather than any financial compensation) but had not been able to resolve this with the firm directly. The solicitor who had been involved in the breach had left the firm in 2004. Following an investigation by the Legal Ombudsman, the firm and Ms X came to an informal agreement and Ms X received an apology from the firm along with £50 for the distress and inconvenience this caused her.

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<sup>6</sup> Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0011> Paragraph 31

<sup>7</sup><http://www.legalombudsman.org.uk/downloads/documents/consultations/Final%20draft%20scheme%20rules.pdf>

Ms W instructed a firm in 2005 to assist in the purchase of a house. In 2010, she chased the firm to provide her with share certificates for the property and lease. At this time it became apparent to Ms W that the lease on the property had not been extended as she had previously instructed. Ms W lodged a formal complaint and requested the deeds to her property—she was concerned that her lease might not be in order and that she hadn't seen the documents. The firm eventually sent her some copies of documents but she was not convinced that these were the correct ones. Our investigator recommended that the firm should pay to have another firm extend the lease, as this hadn't happened correctly. The Ombudsman agreed and Ms W accepted this decision.

In cases like these, the Legal Ombudsman was able to conduct investigations fairly and effectively, to resolve the complaint irrespective of the fact that the events that caused the complaint occurred some years ago.

In order to comply with the provisions of the ADR Regulations, the Legal Ombudsman proposes to, in summary:

- Amend rule 4.4;
- remove rules 4.5 and 4.6 on time limits (existing text above) as no blanket time-bar rules are permitted for ADR entities;
- make consequential amendments to rules 4.7 and 4.8. Full text of amendments available at end of consultation document;
- use an amended section 5.7(d) to refuse to deal with complaints. The full details of the revisions to Scheme Rule 5.7 are set out in a later section, however we propose to use an amended 5.7(d) to refuse to deal with certain complaints.

### Questions

1. Is the description of our approach to the application of the rule clear?
2. Do you foresee any difficulties in applying the above approach?
3. Should we explore specifying a period of time within b) i) beyond which the presumption should be that the investigation of the case would seriously impair the effective operation of the Scheme.
  - a) If so what should that period of time be?
4. Or do you consider that no time period should be set because the issues would be case specific?
5. Do you consider it would be reasonable to use the new rule 5.7(d) to refuse to deal with complaints about acts or omissions that took place so long ago that a fair practical and proportionate investigation can no longer be conducted and safe conclusions

cannot be reached at all, or without unreasonable or disproportionate commitment of time or resources?

- a) If not how do you think we should deal with these complaints?

## 2. Grounds for refusing to deal with a dispute

Under the ADR Regulations there would be limited circumstances in which we could refuse to deal with a complaint. As an ADR entity, we would also need to change the terminology which we use in these circumstances. The following definitions will be used in the next sections.

**Current use of “discontinue”** is similar in effect to dismissal without consideration of the merits of a complaint. The distinction was introduced following the first consultation on Scheme Rules. It has been used where some limited investigation has taken place and new information comes to light which would justify refusing to deal with on a summary dismissal basis.

**Proposed change of use of “discontinue”** As an ADR entity, we would only be able to “discontinue” for operational reasons. In practice, these are covered under the existing rule 5.24h and 5.32c. We would be able to refuse to deal with a complaint, if we find that one of the parties has fabricated evidence, sought to mislead or if the consumer lied to access the process.

**Dismiss** We use this to describe complaints which we summarily dismiss, without investigating the issues raised in the complaint. This is currently used in the scheme rules but would not be used under the proposed modifications to comply with the ADR Regulations.

**Refuse to deal** this would be used instead of dismiss and would have similar meaning. This term is used in the Regulations<sup>8</sup>.

**Complete complaint file** The Regulations state that a complete complaint file means all the relevant information relating to a dispute<sup>9</sup>. This would be defined as the date the last piece of evidence necessary to write a preliminary decision/recommendation report is received.

**Final submission** would be defined by us as the point at which we receive the complaint letter originally sent to the service provider, as well as the service providers’ final response.

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<sup>8</sup> *The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015* No. 542 <http://www.legislation.gov.uk/ukSI/2015/542>

<sup>9</sup> *The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015* No. 1392 <http://www.legislation.gov.uk/ukSI/2015/1392> Part 2. 5) (b)

## ADR Regulations on grounds for dismissal

Schedule 3 of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations sets out the circumstances in which an ADR entity can refuse to deal with a dispute. It may only do so on one of the following grounds.

- (a) prior to submitting the complaint to the body, the consumer has not attempted to contact the trader concerned in order to discuss the consumer's complaint and sought, as a first step, to resolve the matter directly with the trader;
- (b) the dispute is frivolous or vexatious;
- (c) the dispute is being, or has been previously, considered by another ADR entity or by a court;
- (d) the value of the claim falls below or above the monetary thresholds set by the body;
- (e) the consumer has not submitted the complaint to the body within the time period specified by the body, provided that such time period is not less than 12 months from the date upon which the trader has given notice to the consumer that the trader is unable to resolve the complaint with the consumer;
- (f) dealing with such a type of dispute would seriously impair the effective operation of the body<sup>10</sup>.

ADR Regulations

The current Scheme Rules set out fourteen grounds under which an ombudsman may dismiss or discontinue our consideration of a complaint which falls within our scheme.

*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*
- b) the complainant has not suffered (and is unlikely to suffer) financial loss, distress, inconvenience or other detriment; or*

<sup>10</sup> *The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 No 542* <http://www.legislation.gov.uk/uk/si/2015/542> – Schedule 3. 13

- 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; 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 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; or*
- 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*

Current Scheme Rules

## Our proposed approach and implications for the Legal Ombudsman scheme

We would no longer be able to dismiss or discontinue our consideration of a case under the fourteen grounds currently set out in our Scheme Rules.

We propose to remove all current 5.7 rules and replace them with the following:

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

- a) the dispute is frivolous or vexatious; or
- b) the dispute is being or has previously been considered by another Alternative Dispute Resolution entity or by a court
- c) the value of the claim falls below or above a pre-specified monetary threshold
- d) dealing with such a type of dispute would otherwise seriously impair the effective operation of the Legal Ombudsman scheme.

Proposed new rule changes

For instance:

- the issue involves someone else who has not complained and the ombudsman considers 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 that has elapsed since the act/omission; or
- there are other compelling reasons why it is inappropriate for the issue to be dealt with by the Legal Ombudsman

### Case example 2

A complaint about a CMC, who is now deauthorised and the company has been dissolved, failing to refund an upfront fee paid (and where a Credit Card Agreement Section 75 claim is not possible). As CMCs do not have liability insurance, under the current scheme rules, the case would be dismissed under 5.7(a)(i) No Reasonable Prospect of Success:

We propose to refuse to deal with cases like this under d) the dispute is frivolous or vexatious. As it is not a proper use of our funding and we could not enforce the remedy.

**Case example 3**

The lawyer has offered a remedy at first tier that, even if we were to find in the favour of the complainant on all of the complaints raised, would be considered more than reasonable **AND** this offer is still open for acceptance e.g. a full refund of fees in a probate matter following a complaint of a few weeks delay in distributing the estate. We would have dismissed this under 5.7(c) Fair and Reasonable Redress.

We propose to deal with cases like this by seeking an informal resolution, by explaining that the remedy is, in our view, fair and reasonable; or if that is not accepted, by making an ombudsman decision confirming the same.

**Case example 4**

The complaint is about an historic matter, which the complainant has stated they have just found out about. However, the lawyer provides evidence that the same matter was previously considered by the Legal Complaints Service

We would have dismissed this under 5.7(d) Previous Complaint.

We propose to refuse to deal with cases like this under b) the dispute is being or has previously been considered by another Alternative Dispute Resolution entity or by a court

**Case example – negligence**

Our job is not to decide whether what happened amounted to professional negligence or if there has been a 'legal wrong', such as breach of trust. We do not provide legal advice and normally we can not comment on the quality of service providers' legal advice either. Our job is to consider the level of customer service received from the service provider. The question for us is not whether they were negligent but whether the level of service they provided was acceptable and, if it was not, what the consequences were for the complainant. Clearly, if something a service provider has done (or not done) looks like negligence it is also likely, in many cases, to be poor service.

Coming to the Legal Ombudsman OR taking legal action for negligence are sometimes both remedies that could be pursued if something has gone wrong. Both options might be open to a consumer where the same set of circumstances and facts apply and the consumer must choose which of them to pursue.

We would not normally look at a complaint where the consumer was suing the service provider for negligence or where the court's decision had dealt with the same circumstances as the complaint to us. On the other hand, if a complainant brings a complaint to us and accepts our decision they cannot then bring a court case against the service provider about the same set of circumstances.

We do not propose to change this approach.

#### **Example cases we propose to deal with under 5.7 (d)**

- Someone says they are acting as a representative to the complainant, but written authority from the complainant for the representative to act is not forthcoming. We propose to refuse to deal with the complaint under the proposed 5.7(d). Our current approach is to use rule 5.7(j) No Authority.
- A conveyancing matter where the complainant has lived in the property for more than 20 years, and is now seeking to sell. There is a problem with the sale as there is a right of way over the land, of which the complainant was never advised. Given the time elapsed, the original conveyancing file, and all other associated evidence, have been destroyed. In these circumstances, it would be unfair and impracticable to investigate. This would currently be dismissed on the basis of 5.7(k) Time Elapsed.

#### **Remaining two grounds**

The ADR Regulations set out six grounds on which an ADR entity may refuse to deal with a dispute. As set out above, we are proposing to modify our scheme rules to incorporate four of these grounds. We do not propose to make changes in respect of the other two grounds, as these are already covered elsewhere in our scheme rules.

The first deals with premature complaints to the Legal Ombudsman. This is currently dealt with in Scheme Rule 4.1.

a) the complainant did not attempt to contact the authorised person concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the authorised person

**Current Scheme Rules**

The second deals with cases that are received after the period within which they need to be referred to the Legal Ombudsman has expired.

This is currently dealt with in Scheme Rule 4.4, which as set out on page 6, we propose to amend to extend the time period.

e) the complainant has not submitted the complaint to the Legal Ombudsman within twelve months from the date upon which the complainant submitted the complaint to the authorised person

ADR Regulations

### Time limits for refusing to deal with complaints

ADR entities must notify both parties once they have received a complete complaint file. Once they have done so, or after three weeks from the date of receiving the complete complaint file if they have not notified the parties of its receipt, they cannot refuse to deal with a complaint.

### Complaints outside our scheme

The following existing 5.7 rules (g,h,i, l and m) deal with complaints that we feel our scheme should not deal with. We propose to move these to chapter 4 of our scheme rules under a new sub section.

### Complaints not covered

Ordinarily, the following complaints would not be accepted by the Legal Ombudsman

- a) *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;*
- b) *The issue concerns an authorised person's decision when exercising a discretion under a will or trust;*
- c) *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;*
- d) *the issue concerns an act/omission outside England and Wales and the circumstances do not have a sufficient connection with England and Wales or*
- e) *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*

Proposed new rule changes

We have explored placing these in different areas of the Scheme Rules by moving it to chapter 4, previously “When complaints can be referred to the Legal Ombudsman” which would be re titled “Complaints being referred to the Legal Ombudsman”. We could deal with the practicalities of our scheme dealing with these complaints.

### **Discontinuing a complaint**

We will be able to discontinue our consideration of a case where there are good reasons for doing so.

- The Regulations allow ADR entities to discontinue the consideration of a dispute for procedural or operational reasons at any time in our process, for example if the complainant fails to provide information requested or fails to comply with a procedural time limit. These are currently dealt with under Rule 5.24h and 5.32c, and we do not propose to change this.

### **Questions**

6. Is the above description of our proposed approach clear?
7. Do you foresee any difficulties in applying the above approach?
8. As set out above, the ADR Regulations allow ADR entities to refuse to deal with disputes that do not meet a pre-determined minimum and maximum monetary threshold. Should we explore having prescribed monetary thresholds for the value of claims?
  - a. If so, what should the thresholds be?
  - b. How should we identify and verify the amount?
9. Do you have any other views on our proposed new sub section of chapter 4?
10. Are there any other grounds which you feel should be in the in the new subsection “complaints not covered”?

### 3. Consequential changes

These changes are consequential in nature and set out our approach to making any proposed changes. We will consider all responses and ensure any modifications to the Scheme Rules are clear, and that the Scheme Rules are consistent, and reflect the desired approach throughout. Wording deletions are presented in ~~strike through~~; additions are presented in **bold**.

#### 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.
- This version includes amendments that apply to complaints referred to the Legal Ombudsman from ~~28 January 2015~~ **[Implementation date]**.

1.3 The endnotes identify the section of the Act that is being summarised, or under which an order, requirement or rule has been made; requirements arising from Regulations to implement the ADR Directive; and which are the rules made by the Office of Legal Complaints for the Legal Ombudsman.

1.10 Ombudsman means:

- a) any ombudsman from the Legal Ombudsman; 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~~ **refusing to deal with** it for any of the reasons under paragraph 5.7).

#### Ombudsman extending time limits

4.7 If an ombudsman considers that there are exceptional circumstances, he/she may extend **this** time limit to the extent that he/she considers fair.

4.8 For example an Ombudsman:

- a) might extend **the** time limit if the complainant was prevented from meeting the time limit as a result of serious illness

#### Referring a complaint to court

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~~ **refusing to deal with** the complaint, so that a court may consider it as a test case.

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 **ombudsman refusing to deal with** 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~~ **refusing to deal with** 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.

### Evidence

5.24 An ombudsman may:

h) ~~dismiss~~ **discontinue** a complaint if the complainant fails to provide information requested.

### Procedural time limits

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

c) where the failure is by the complainant, ~~dismiss~~ **discontinue** the complaint

### Case fees payable by authorised persons

6.1 A complaint is potentially chargeable unless:

a) it is out of jurisdiction; or

b) **we have dismissed or discontinued refused to deal** with it under paragraph 5.7; or

**c) it was discontinued under paragraphs 5.24(h) or 5.32(c) of these Rules**

6.2 A case fee is payable by the business/partnership or individual authorised person for every potentially chargeable complaint when it is closed unless:

the complaint was:

**(i)** abandoned or withdrawn; **or**

**(ii)** settled, resolved or determined in favour of the authorised person;

**and**

**(iii)** the ombudsman is satisfied that the authorised person took all reasonable steps, under his/her complaints procedures, to try to resolve the complaint.

**Questions**

11. Are the consequential amendments clear?
12. Are there any further amendments you think we require?

## Full list of consultation questions

1. Is the description of our approach, in section 1, to the application of the rule clear?
2. Do you foresee any difficulties in applying the approach in section 1?
3. Should we explore specifying a period of time within b) i) beyond which the presumption should be that the investigation of the case would seriously impair the effective operation of the Scheme.
  - a) If so what should that period of time be?
4. Or do you consider that no time period should be set because the issues would be case specific?
5. Do you consider it would be reasonable to use the new rule 5.7(d) to refuse to deal with complaints about acts or omissions that took place so long ago that a fair practical and proportionate investigation can no longer be conducted and safe conclusions cannot be reached at all, or without unreasonable or disproportionate commitment of time or resources?
  - a) If not how do you think we should deal with these complaints?
6. Is the description of our proposed approach, in section 2, clear?
7. Do you foresee any difficulties in applying the approach in section 2?
8. As set out above, the ADR Regulations allow ADR entities to refuse to deal with disputes that do not meet a pre-determined minimum and maximum monetary threshold. Should we explore having prescribed monetary thresholds for the value of claims?
  - a. If so, what should the thresholds be?
  - b. How should we identify and verify the amount?
9. Do you have any other views on our proposed new sub section of chapter 4?
10. Are there any other grounds which you feel should be in the in the new subsection "complaints not covered"?
11. Are the consequential amendments clear?
12. Are there any further amendments you think we require?
13. Do you have any comments or observations related to this consultation which you would like the OLC to consider?

Thank you for taking the time to read and contribute to our consultation. We value your contribution and look forward to considering responses.

## How to respond

We welcome comments on our proposed approach. If possible, please send your responses electronically. Hard copy responses by post are also welcome.

Responses should reach us by Monday 2 November 2015.

### **Email:**

[consultations@legalombudsman.org.uk](mailto:consultations@legalombudsman.org.uk)

### **Post:**

Janet Edwards

Legal Ombudsman

PO Box 6803

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## Appendix A

The ADR Directive and the consequential Regulations are changing the consumer complaints landscape.

The Directive defines “consumer” as “any natural person who is acting for purposes which are outside his trade, business, craft or profession”, and “trader” as “any natural persons, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession”.

The Directive applies to sales and service contracts. “Service contract” is defined as “any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof”.

Complaints arising from a consumer’s contract with a legal service or a claims management provider are therefore, covered by the Directive.

Under the Directive and Regulations legal service and claims management providers are obliged to notify consumers of the available ADR entity.

Regulated legal service providers and authorised claims management companies are required by statute to signpost to the Legal Ombudsman.

If the Legal Ombudsman was certified as an ADR entity there would be one body available to deal with complaints that have exhausted internal procedures of regulated legal service providers or authorised claims management companies.

Once the ADR Regulations take effect, the Government will be obliged to ensure that consumer disputes can be submitted to an ADR entity which meets the requirement of the Directive.

If the Legal Ombudsman fulfils this role, regulated legal service and authorised claims management providers would not have to inform consumers about a different ADR entity. This would minimise confusion and uncertainty for consumers and avoid adding to the regulatory burden on legal service and claims management providers.