**Response by the Council for Licensed Conveyancers**

**Consultation from the Office of Legal Complaints on Scheme Rules**

***April 2022***

## Summary

The Council for Licensed Conveyancers (CLC) welcomes this consultation from the Office of Legal Complaints (OLC) on how reforms to some of its Scheme Rules and we would also like the recognise the ambition and commitment behind them.

We have offered analysis and recommendations to the Ombudsman and others working on these issues in the past, and we will support the OLC in any developments that improve outcomes for consumers to access justice.

After reviewing the recommendations in this consultation we believe that they:

- Are generally positive.
- Require consistency – as they are very wide-ranging there is a need to ensure clarity and similarity between how they are implemented to ensure that complainants are treated fairly.
- Must be communicated well - it is critical that any possible changes to existing Rules, and new Rules, are both signalled as clearly as possible.
- Should be tracked for impact – the CLC is keen to see an easily digestible performance dashboard from the OLC to support stakeholder confidence in the recovery programme as it progresses.

## Introduction

Our responses below have been considered with the CLC's duties as a regulator in mind and in light of the Regulatory Objective, notably, but not exclusively, regulatory objectives **1, 3,4, 7 and 8**. (See Annex A for further details).

The CLC is broadly supportive of these proposed reforms to the OLC's Scheme Rules, in order to support making access to resolution and/or redress more efficient and more effective. The CLC and other regulators have raised a range of issues with the OLC in recent years, (for example, in our response to the OLC Business Plan 2022-23 Consultation in December 2021) and we are pleased that the OLCs final business plan for the year and this consultation reflects the points made.

We are encouraged by the adoption of some of the proposals that have been put forward by stakeholders, and that the scope of change appears to be widespread and ambitious. While that is to be welcomed, any large-scale change can leave inadvertent gaps. In our response we have flagged risks that even positive changes could lead to if not addressed. We would encourage the OLC to carefully monitor and mitigate these where possible.

We believe that delivering a revised framework will offer greater certainty and efficiencies to the sector. To help ensure that, there also needs to be a clear and consistent view of exemptions that would apply. Along with a communications plan around informing the regulated community, consumers and related organisations about any changes once approved. We would welcome discussions and an early long-range plan of how both these points are addressed for all **parties**, including the OLC team itself staff, legal service providers and their clients. This should be mapped alongside any general implementation process.

There is also a related issue around communicating *data,* as opposed to new Rules. As noted in our OLC Business Plan consultation response we would urge OLC to seek appropriate key indicators for its performance, perhaps benchmarked with other, similar bodies. The use and review of a performance dashboard (or similar tool) would from a critical part of ensuring that these – and other - changes can be evaluated in real time and inform the evolution of the OLC.

Overall, having analysed the OLC's proposals we believe most of the recommendations could be beneficial (noting the caveats above) as long as they can be launched, rolled out and communicated in a clear manner.

## Response to Questions

**Question 1: Do you agree that there is merit in reducing the time limit for complaints to be brought to the Legal Ombudsman to one year from the date of act/omission or date of awareness (whichever is the later)?**

**This proposal relates to two Rules:**
-Rule 4.5 – which requires a complaint to be brought within either six years of the act/omission. Or three years of the date of awareness (*if* the date of the act/omission was more than six years ago).
-Rule 4.7 – this rule provides the Ombudsman with discretion to extend the time limits, e.g. if serious illness delayed sending a complaint.

**We broadly welcome the changes in principle to Rule 4, though with three important considerations.**

*Timing* – Further work around the one year limit would be helpful. We would encourage a cost-benefit analysis and impact assessment on moving the limit to 12, 18 and 24 months. This should include lessons taken from a comparative Ombudsman in the UK, and other jurisdictions, and a further round of engagement specifically with consumers and consumer organisations on this point.

We would also suggest that should the one year limit be implemented information is tracked as to numbers and types of excluded cases so that a recalibration can be made if necessary.

*Exemptions* –
We believe it is important for the OLC to have some discretion in this matter, e.g. if someone is vulnerable. At the same time we would encourage an approach that carefully monitors and tracks how that discretion is applied (on subject matter and claimant). It is important to have some flexibility while ensuring the bar is set in the right place on this issue, and regularly recalibrated if not.

*Communication* - Regardless of the findings of such an exercise, it will be important to have a clear guide to exemptions (see above), for both OLC staff and consumers. Not least to ensure consistency (especially if work is to be delegated – re: questions 5-7 below).

**Question 2: Do you agree that there is benefit in introducing a new Rule 2.11?**

**Re: Declining to accept a complaint for investigation.**
Under current Rules the Ombudsman can only dismiss a complaint *after* it has been accepted for investigation. The consultation notes that it is sometimes possible to identify at the beginning of a case that there is little or no benefit in progressing to a full-scale investigation. For example, if the substance of the complaint is without merit or possibly vexatious. The new proposal aims to offer this option, and allow an early dismissal.

**We would broadly support this measure**.

It seems sensible that any organisation should be able to dismiss if a matter can be seen as without merit or meeting acceptance criteria. To ensure its effectiveness and reasonable application there should be a focus on ensuring there is consistency across cases, particularly around exemptions. These should be looked at particularly carefully before any potential dismissal.

Again some monitoring in the early years of implementation would be valuable in case any recalibration was necessary.

**Question 3: Do you support the proposed amendments under Scheme Rule 5.7?**

**Question 4: Do you have any concerns about the implications of the changes to Rule 5.7?**

These relate to a range of constraints around dismissals of a case (once it has been accepted).

Under the current Rule 5.7 (b), an Ombudsman can consider dismissing a case if they are satisfied the complainant has not suffered any financial loss, distress, inconvenience, or other detriment. The threshold for this is high, and it does not allow for proportionate use of resources as a criteria for dismissal. The proposed change would allow for this. (It would only be applied after the parties have been given the chance to explain why the complaint should not be dismissed).

Under Rule 5.7(c) an Ombudsman can dismiss a complaint if they are satisfied that the complainant has rejected an earlier current fair and reasonable offer. The consultation proposal is that an Ombudsman can consider if a case should be dismissed if: i) a reasonable *revised* or increased offer is made; ii) the complainant decides to reject that. (It is noted that this could encourage service providers to try to settle complaints after a complaint has been accepted for investigation).

Rule 5.7 (q) is a proposed new rule which would allow an Ombudsman to dismiss a complaint if there has been undue delay with raising points. Under existing time limits there is large window for complainants to raise new or additional points, including those they may have been aware of some years previously. The consultation proposes that it is in both parties' interests for all *known* complaints to be raised and reviewed at the same time. (If new issues which they were unaware of come to light at a later point, then they will be investigated – the change would not restrict that right). In effect, if a complainant has taken a conscious decision not to pursue certain issues in their complaint, this rule would provide the ability to dismiss those issues if they were then raised later.

**We are broadly in support of these measures**, and note OLC's wider highlighting of public interest, vulnerable consumers, and significant detriment. This further reinforces our call for a core, consistent summary of such criteria, which is cohesive across all the OLC's decisions. (With additional considerations being carefully added, as may be appropriate under a complex and particularly notable list of Rules such as 5.7).

In particular, we would support the recommended measures on **undue delay** (noting there should be clearer provision made for those who may have compelling reasons for not following this Rule). We would support the OLC in any plan to communicate the importance of checking and sharing all relevant information early in the process. And notifying all sides of the risks of not doing so. Active encouragement of involved parties should be fostered from early on, to publicise and embed this new approach.

Overall, we believe this set of changes to Rule 5.7 could and should be effective. We would welcome further steps to ensure that theory and practice operates in tandem. For example, the case study was helpful in the consultation, and we would request further examples, as part of wider plan to consider these changes in further depth as well as close observation of the impact of the changes.

As this is an important change, it could also be beneficial to map a general support plan around this at an early stage. For example, workshops for OLC staff, new online FAQs for consumers, and a benchmarking study with / for regulators. (The CLC would be keen to support and assist in any further work where possible, alongside our regulatory partners).

**Question 5: Do you support the intention to look at being able to widen the extent of the delegation of Ombudsman decision making powers**?

**Question 6: Do you support the proposal to limit the right to an Ombudsman decision where no substantive issues are raised with the case decision?**

**Question 7: What factors should an Ombudsman consider when deciding whether a decision is required?**

***Interim Proposals***

This originates in Rule 1.11 - the wider delegation of decision making. The Legal Services Act 2007 states that although the function of the Ombudsman in making, investigating, and considering a complaint can be delegated to any member of staff, the function of *determining or dismissing* a complaint cannot be. Changing these decision-making powers, and Rule 1.11, cannot be implemented, or trialled, without an amendment to the primary legislation, which could take some time.

**In the interim** the consultation proposes changes to Rule 5.19 instead - which covers investigations and escalation to an Ombudsman. The proposals include escalating a case to an Ombudsman after findings have been issued and there has been a disagreement with them, but only such a disagreement is either based on new facts or evidence, or there has been error in law. The consultation proposes that these changes will improve efficiency.

In our response to the OLC's last Business Plan we noted that improving the use of resources and capacity should be looked at. **As such we would strongly support this measure and hope that the OLC approach the implementation of this change in a flexible and creative way.**

The OLC has recognised this change will take considerable focus. We agree with that viewpoint and would suggest that a strong focus at the start of this programme (if approved) will be very beneficial later. In particular it could be an area that could benefit from a range of quick pilots to first help communicate the change and secondly assess which combination of approaches work best.

These could, for example, cover; which staff could assist with preparing specific kinds of work beforehand; and how they are supported to so do; the set-up of formal and informal mentoring systems; how a new pool can be best be allocated to a backlog of cases; how individual staff within that pool can build specialisations and areas of focus; and what HR guidance helps advance this project or is outdated and hinders it.

We agree these related set of proposals could potential help clear the OLC's backlog and improve the management of future cases. As such, we support these changes in principle, with the following recommendations.

*In general* - escalation should be reserved for difficult or novel cases. Such a model should allow for efficiencies whilst offering clear pathways for referral. We would also encourage a data project to monitor and share the nature / scope of those cases that are accepted or rejected for upwards referral.

*Specifically* - different demographics. For example, elderly consumers may not be vulnerable, but have different requirements or expectations that interact with this new framework. These should be assessed to see what the impact would be under proposed changes to Rule 5.19.

***Permanent Proposals***

The OLC note that these proposals above relate to an interim solution until primary legislation can be amended. While we support a temporary measure, we would also **strongly** encourage a reconsideration of a more permanent approach.

There appear to be two solutions to the backlog. The first is operational (as covered directly above), i.e., to increase their Ombudsman decision making capacity and/or ensure the outputs from investigators are of sufficient quality to be capable of being signed off by Ombudsmen.

The second is legal. The OLC has stated that, in their view, work can only be carried out by employed staff, not contractors or agency staff. The CLC believes that parts of the LSA allow for some flexibility which should be explored further.

In our response to the OLC's last business case we noted that while the Legal Services Act 2007 (LSA) does refer to the 'appointment of staff' in Schedule 15, the following Schedule **also** states:

'*Arrangements for assistance.*
*18(1) The OLC may make arrangements with such persons as it considers appropriate for assistance to be provided to it or to an ombudsman.*
*(2) Arrangements may include the paying of fees to such persons.*
*(3) The persons with whom the OLC may make arrangements include approved regulators; and the arrangements it may make include arrangements for assistance to be provided to an ombudsman in relation to the investigation and consideration of a complaint.'*

Such provision would seem to us to allow the outsourcing of complaints investigation. It could mean that the OLC could: use immediate and fixed-term outsourcing arrangements to reduce the backlog; develop and test new, more efficient approaches to complaints handling; and improve the capacity to achieve its Value for Money (VFM) targets.

**We would urge the OLC to hold a further and more detailed review** of its position that legislative change is needed to enable outsourcing. (Alongside wider discussions with relevant regulators, government and consumer groups).

*If,* following such a review, the view of the OLC remains the same, then we would ask for a serious and ambitious plan on how best to deliver any changes to the legislation as soon as is practical. As part of this plan we would also encourage a review of how provisions from the statute might be transferred to a scheme which is regularly checked and approved by the LSB, to further improve efficiencies.

**Question 8: Are there any alternative ways in which the Legal Ombudsman could adjust the rules to achieve a reduction in the number of complaints going to final Ombudsman decision?**

**The CLC believes the collective Rule changes and additions proposed are a widespread, ambitious and generally welcome set of measures**.

We have no further suggestions at this stage but would welcome the opportunity to comment further as the project evolves. A suitable joint review could perhaps be set for late 2022 once these are embedded - to consider how the changes have gone, and to discuss future recommendations.

Beyond the Rules, we would also like to take this opportunity to reflect on our response to the Business Case, where we noted that LeO should: consider the application of temporary resource to tackle the backlog; potentially develop and test new processes with the input of the Challenge and Advisory Group; plus learning from other organisations that may have tackled backlogs.

We believe this combination of looking at **both** changed Rules and changed operations in the round could collectively support some robust changes.

**Question 9: Do you support a review of the case fees model with a view to implementing a model which better encourages early resolution of cases?**

Under Rule 6.2 case fees are potentially chargeable on all cases that are accepted for investigation. They can only be waived when specific criteria are met. *If* charged, it is set at a flat fee of £400, regardless of what stage of the process the complaint is resolved. The consultation notes that this does not motivate service providers to try to resolve complaints as early as possible.

**We agree with this proposal to review the case fee model.** During that review we would encourage the application of any relevant lessons from the OLC's early resolution pilot. And in particular any insights on the factors that help the resolution of cases. Alternative models would be useful to develop to better understand the impacts to the overall charging model. The CLC would also be interested in learning more about how this model is intended to work, including how it could affect behaviours / trends, and look forward to being involved in further discussions about its application.

**Question 10: Do you support the proposals outlined in the additional changes? If not, please outline which ones you do not support and your reasons why**

**We broadly support the list of measures noted**. Where there are points around some of the Rules these have been noted below.

**Re: Rule 2.8: Formalising the position on complaints by beneficiaries.**
The proposed change addresses an inconsistency in relation to beneficiaries' rights to complain. The Ombudsman states that it frequently sees service providers arguing that they do not owe a duty to the beneficiaries of the estate, only to their client (which in the case of a probate is the executor). It is the Ombudsman view that beneficiaries benefit from the service provided, and that they are entitled to raise a complaint about that service. This rule change would address that to clearly protect the interests of beneficiaries.

**We do not support this change**.

The issue of beneficiaries is a complex one given that they are not the client of the practice. and continues to raise a range of questions. We believe there is a need to address this more strategically and that it would not be appropriate to deal with it only at the complaint end. It goes to the heart of the lawyer's duty to their client. in absence of a system-wide position would recommend this Rule should not be included in the final Scheme changes.

**Re: Rule 5.20. Addressing situations where investigator's findings and recommendations are not accepted.**
The application of this Rule will support the more substantive changes proposed in relation to Rule 5.19 noted above. The Ombudsman intends to extend the wording to treat a complaint as having been resolved by the investigator's findings if neither party to the complaint has raised any substantive challenge.

**We generally support this proposal** and would request very clear communications be embedded from the start in such situations. Along with the consideration of how and when timing limits are applied for responses/clarification. And the possible addition of templates to respond.

**Rule 5.4: Addressing formal challenges to ongoing investigations.**
This relates to the circumstances under which service providers can challenge jurisdiction, or request that investigations be dismissed. It proposes that, in the absence of extenuating circumstances, any such challenge should be raised at the first possible opportunity. It notes that this will allow case closures to happen at an earlier stage and deliver a reduction in the customer journey time.

**We support this proposal**.

**Re: Rule 5.33: Addressing when an Ombudsman can direct that a hearing is required.**
The current wording of Rule 5.33 only permits a hearing when a complaint cannot be fairly determined without one. The proposed revision would permit an Ombudsman in future to hold a hearing on a complaint when they consider it fair and reasonable to do so.

**We broadly support this proposal but would recommend that virtual meetings should be the default where possible**. And that these changes also properly consider issues around: accessibility; those who may be on low-incomes / may not have the relevant IT; those in rural areas with either poor transport or IT; and especially any cases where alleged harassment or intimidating behaviour were noted in the case (especially if these are held face-to-face).

It would also be helpful to obtain further details on: whether either party can ask for a hearing (plus if there are any caveats on that); and any current / planned modelling of what impact this proposal could potentially have on case fees.

**Re: Rule 5.55: Allowing the Legal Ombudsman to rectify uncontested errors in Ombudsman decisions.**
This relates to instances where administrative or typographical mistakes are made on Ombudsman decisions. Currently, if any such erroneous decision is accepted by the complainant it is binding and can only be rectified by applying to have the decision quashed by a Court. The consultation proposes to include a new Rule which permits obvious errors to be rectified without the need for a formal application to the Courts.

**We would support this change, while recommending a limited time period for all sides to identify and flag any potential errors**. Any such window being clearly noted in relevant correspondence (for example, a response within 14 days).

**Re: Rule 5.7(a): Clarifying grounds for dismissal of a complaint**
The consultation proposes that the current Rule 5.7(a) be separated into two separate grounds: •
-5.7 (a) would enable an Ombudsman to dismiss a case if they were satisfied that the complaint had no reasonable prospect of success. •
-A new Rule 5.7 (o) would be created to focus on the dismissal of cases that were considered to be frivolous or vexatious.

**We support these measures**. And would encourage a high level of engagement and monitoring, to ensure checks and balances are working effectively.

**Annex A**

**Further Background on the CLC**

*Legal Background*
The CLC was established by Parliament under the Administration of Justice Act 1985. We are also bound by statutory regulatory objectives under the Legal Services Act 2007 which describe what we must aspire to achieve for the public, consumers and the regulated community. The CLC also has powers derived from the Courts and Legal Services Act 1990 and the Deregulation Act 2015.

*Role*
We licence and regulate licensed conveyancers and Practices in the provision of both reserved legal activities - currently conveyancing and probate services - and other non-reserved legal activities, including will writing. As a Licensing Authority we also authorised to license and regulate Alternative Business Structures (ABS). Our remit covers England and Wales.

To note, the CLC has no representative function, and has always been an independent regulator since its inception.

*Sector*
We regulate a diverse sector that last year consisted of over 200 firms, and over 1500 CLC Lawyers, working across a very wide range of property and probate issues.

*Regulatory Objectives*
As set out in Section 28 of the Legal Services Act 2007 the CLC must, so far as is reasonably practicable, act in a way which is compatible with the following 8 regulatory objectives:

1. protecting and promoting the public interest
2. supporting the constitutional principle of the rule of law
3. improving access to justice
4. protecting and promoting the interests of consumers
5. promoting competition in the provision of services by 'authorised persons' as defined in the Act
6. encouraging an independent, strong, diverse and effective legal profession
7. increasing public understanding of the citizen's legal rights and duties
8. promoting and maintaining adherence to the professional principles.

We also must have regard of regulatory principles, under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. (Alongside any other principle appearing to us to represent best regulatory practice).

*Regulatory Review*

Alongside our own processes, and to further support the delivery of these statutory objectives, our work is regularly analysed by two separate layers of scrutiny and advice. Firstly by an independent CLC Board - consisting of both professional and lay members - and secondly by the independent cross-sector regulator, the Legal Services Board (LSB).