LEGAL SERVICES BOARD

Meeting: Legal Services Board

Date: 19 July 2022

Item: Paper (22) 41

Title: OLC Scheme Rules changes

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Status: Official

Introduction

1. This paper sets out proposals by the Office for Legal Complaints (OLC) to amend the Legal Ombudsman's (LeO) Scheme Rules and seeks the Board's consent to those proposals.

Recommendations

2. The Board is invited to:

    a) **consider** the proposed amendments to the Scheme Rules against the approval criteria set out below; and

    b) **consent** to the proposed amendments.

3. The Board's decision will be issued to the OLC via correspondence after the meeting.

Background

The role of the Board in consenting to amendments

4. The LeO scheme is delivered in accordance with the OLC Scheme Rules. Under Section 155[1] of the Legal Services Act 2007, the OLC must obtain the consent of the LSB before making or modifying Scheme Rules. This is a decision reserved to the Board, which it takes in accordance with three non-statutory acceptance criteria:

    a) 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;

[1] https://www.legislation.gov.uk/ukpga/2007/29/section/155

b) 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; and

c) a finalised impact assessment on the rules particularly as regards case fees that meet MoJ requirements.[2]

5. In assessing the OLC's proposals against the acceptance criteria, we have been mindful of the OLC's expertise and, ultimately, its responsibility for operating the scheme. We have therefore taken the approach of considering whether the OLC's proposals are *capable* of receiving the Board's consent within the acceptance criteria, including compatibility with the regulatory objectives.

2022 Scheme Rules review

6. The OLC made a commitment to review the Scheme Rules in its 2021/22 Business Plan with an aim to reduce long wait times and improve the customer journey, while protecting the interests of consumers, service providers and the public. The Scheme Rules were last comprehensively reviewed in 2012.

7. As the Board is aware, the performance of the OLC has been under significant scrutiny in recent years and it has faced challenges in delivering a consistent, sustainable and acceptable level of performance. We have consistently encouraged the OLC to embrace radical change options to support necessary performance improvements and the proposed amendments to the Scheme Rules could go some way to achieving this.

8. In developing the proposals, the OLC sought advice from its Challenge and Advisory Group, which is comprised of representatives from the SRA, CLC, LSCP, ACSO, TLS and the Bar Council. It then carried out wider engagement and consultation, including calling for submissions from a range of stakeholders over an eight-week period starting February 2022. It received 24 formal responses, many of which supported the overall intent of the proposals.

9. Having conducted its analysis of feedback from stakeholders, the OLC submitted its application for amendments to the Scheme Rules on 8 June 2022.[3] Our statutory decisions team led the assessment of the application against the acceptance criteria and engaged with Board leads (Flora Page and Catherine Brown) on the proposals. While the process is unlike that for alterations to regulatory arrangements proposed by the approved regulators, we have applied a similar degree of scrutiny to the information provided by the OLC.

Summary of key proposals

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[2] There is no statutory process or criteria the Board must follow in consenting to changes in the OLC's Scheme Rules, unlike changes to regulatory arrangements proposed by the approved regulators. The acceptance criteria were agreed by the Board in 2009.

[3] Following consultation, the OLC concluded that some of its proposals should form part of a stage 2 review of the Scheme Rules, which it expects to begin later in 2022/23; more information is provided in the next steps section of this paper.

10. The OLC has proposed key amendments to reduce the time allowed to bring complaints (which would bring it in line with other ombudsman schemes) and to limit the grounds for escalation of cases to a more limited set of circumstances (as opposed to when any party disagrees with the findings).

11. It has also proposed to make amendments to (and thereby extend) the grounds for dismissal of complaints, including when there has not been significant financial loss, distress, inconvenience, or other detriment to the complainant; it would not be a proportionate use of ombudsman time to pursue the complaint; or there has been undue delay by the complainant in providing relevant information to support raising the complaint.

12. A table has been provided at Annex A that sets out the key proposed amendments, including reference to the current Scheme Rules. All of the proposed amendments, including more minor proposals, are set out in the application at Annex C.

Summary of key issues

13. In its application, the OLC says the amendments should reduce the wait time and improve the experience of consumers seeking redress, thereby promoting and protecting their interests and ability to access justice. This should also promote public confidence in the performance of the LeO Scheme overall. The OLC further sets out by investigating more cases and collecting better data, LeO will have greater insight into systemic issues facing the professions, including potential misconduct[4]. This will contribute to supporting an independent, strong, diverse and effective legal profession.

14. However, it is clear that the proposed amendments will require some consumers to bring their complaints to LeO sooner than would be the case now, and that some complaints will no longer meet the criteria for redress from LeO. This may be detrimental on some individual consumers and was raised as a concern during consultation, including by the LSCP.

15. The OLC has provided assurance of how it will mitigate these impacts in its application.

16. It says that the proposals allow for discretion to be exercised more widely so that it can take account of consumers’ circumstances when determining whether Rules apply; and it has committed to monitoring and evaluation of the impact of the amendments post-implementation, so that LeO can identify and respond to any adverse impacts on consumers.

17. At Annex B, we have provided our detailed analysis of the OLC’s proposals against each of the acceptance criteria, including in the following key areas:

    a) Criteria for use of discretion

    b) Time limits

[4] Data gathered by LeO may inform our ongoing review of our 2016 guidance on first-tier complaints handling

c) Significance test

d) Regulatory objectives

e) Monitoring and evaluation

Conclusion and recommendation

18. OLC is confident that its proposals should result in an improved experience of redress for consumers and increased public confidence in the performance of LeO. We have interrogated OLC's proposals and recommend that they are capable of receiving the Board's consent in line with the acceptance criteria. In summary:

    a) we are satisfied that the OLC has considered properly how it will mitigate adverse impacts on consumers through the appropriate use of discretion, which we expect to be applied consistently. It will be important for the OLC to ensure that in its moderation and review of the use of discretion, it is evaluating whether it is, in fact, achieving the underlying intent of the Scheme Rules changes.

    b) The OLC has also committed to providing transparency of how it will apply discretion, including using case studies on its website, which is consistent with good practice in other ombudsman schemes. The OLC is reminded that transparency is crucial for the stakeholders with whom it should seek to be transparent.

    c) Further, there will be arrangements in place for monitoring and evaluating the impact of the changes, including on those with protected characteristics. It will be important for the OLC to ensure that the actions it has committed to, including the development of fit for purpose reporting metrics, are made available in the public interest.

19. We will hold OLC to account through our regular engagement, performance monitoring and budget approval processes. We receive regular assurance on the work of the OLC through its voluntary reporting on its performance. We expect the impact of these changes to be a focus of our engagement with the OLC once they are in force.

20. With this said, we consider the information provided in the application at Annex C meets the requirements of the acceptance criteria agreed by the Board. We recommend that the Board consent to the proposed alterations to the Scheme Rules.

Next Steps

21. We will arrange for the decision of the Board to be communicated to the OLC by correspondence from the Chair. If the Board does not consent to the proposals, we will set out the reasons for the refusal against the acceptance criteria and invite the OLC to engage with us on any further proposals.

Risks and mitigations	
Financial:	OLC has its own Accounting Officer and is required to comply with Managing Public Money requirements. The application states that LeO is confident the changes being proposed will contribute to an improved performance against its value for money metric.
Legal:	The Board's decision will carry with it a degree of risk of challenge. The policy team has taken steps to mitigate these.
Communications and engagement:	The OLC consulted on its proposals and attracted significant interest from across the sector and consumer groups. Generally, there is interest in improvement of the OLC's performance and we can expect there to be interest in the Board's decision.
Equality and diversity:	The OLC's application includes significant material considering the potential EDI impacts of its proposals, as well as a commitment to monitoring the real impact of its proposals once implemented.
Resource:	N/A.

Annexes

Annex A – Table of key proposed amendment to OLC Scheme Rules
Annex B – Analysis of OLC application for amendments to OLC Scheme Rules
Annex C – Application for amendments to OLC Scheme Rules

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
N/A	N/A	N/A

Annex A

1. The OLC is proposing the following key amendments to its Scheme Rules:

<u>Intention</u>	<u>Current rule</u>	<u>Proposed change</u>
Reduce time allowed to bring complaints (Rules 4.5; 4.7)	Requires a complaint to be brought within **six years** from the act/omission or **three years** of the date when the complainant should reasonably have known there was a cause for complaint. Provides for ombudsman **discretion** to be exercised to extend the time limits in **exceptional circumstances**.	Requires a complaint to be brought within **one year** from the act/omission or **one year** from when the complainant should reasonably have known there was a cause for complaint. Provides for **discretion** to be exercised in circumstances where it is **fair and reasonable** to do so.
Introduce no significant financial loss etc as grounds for dismissal (Rule 5.7(b))	Provides for ombudsman **discretion** to dismiss or discontinue a complaint if they consider the complainant has not suffered ***[any]*** financial loss, distress, inconvenience, or other detriment.	Provides for discretion if they consider a complainant has not suffered **significant** financial loss, distress, inconvenience, or detriment.
Introduce disproportionality as grounds for dismissal (Rule 5.7(p))		A **new rule** provides ombudsman discretion to dismiss or discontinue a complaint if they consider it would **not be a proportionate use of the ombudsman's time** to investigate the complaint due to the likely impact or due to its complexity, the amount of evidence provided or the conduct of the complainant during the investigation.

Introduce undue delay as grounds for dismissal (Rule 5.7(q))		A **new rule** provides ombudsman discretion to dismiss or discontinue a complaint if they consider there has been **undue delay** in the complainant raising the complaint, for example, where the complainant has provided additional information or new issues after the time it should have known about them.
Reduce scope allowed for escalation (Rule 5.19(c))	Provides for **any party** to disagree with the findings of an investigation and escalate this to a final decision.	Provides for escalation to an ombudsman for a final decision to be allowed only in **limited circumstances** e.g. where the disagreement is either based on new facts or evidence which may have a bearing on the investigator's findings or it would be fair and reasonable to issue a determination.

Annex B

<u>**Acceptance criteria**: 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</u>

Criteria for use of discretion

1. An overriding theme of the responses to the OLC consultation was on the need for clear criteria to underpin the application of Ombudsman discretion. The submission from the OLC provided at a set of indicative criteria for the application of criteria for the application of ombudsman discretion in relation to time limits; escalating cases for ombudsman decision and determining significance.

2. We questioned the OLC's omission of indicative criteria in relation to the discretion of an ombudsman to dismiss cases on proportionality grounds under proposed rule 5.7(p).

3. In its response the OLC stressed that its use of Rule 5.7(p) is anticipated to be infrequent and where possible the Legal Ombudsman would be committed to investigating complaints regardless of their complexity or the behaviours of the parties to the complaint. The OLC has developed a list of possible indicative criteria that an Ombudsman would reflect on when deciding whether a complaint might be dismissed on proportionality grounds. The OLC explained that the criteria for such a dismissal is intentionally limited to reflect the fact the rule is intended to be deployed infrequently.

4. We also considered that the indicative criteria provided as part of the submission was quite broad in nature. We asked the OLC how the criteria would work in practice so as not to undermine the intended impact of the change.

5. The OLC's response noted that Ombudsmen are used to exercising discretion but are limited in the circumstances when discretion can be used. The proposals introduce new situations where discretion might be exercised. The key test for the exercise of discretion is whether it is fair and reasonable to do so. This is a test that currently exists and is used within the existing Scheme Rules.

6. The OLC response also explained that it sees significant value in providing customers with examples of possible situations where an Ombudsman might consider exercising discretion.

7. Additionally, we asked the OLC to provide us with some assurance of how it intends to provide transparency to stakeholders over how it exercises the range of discretionary powers it proposes.

8. The OLC confirmed that it will ensure its external guidance and factsheets are updated when the new Scheme Rules are implemented to set out the change

of approach and to provide information about how the changes might be applied. It is also the case that the Scheme Rules already provide for an Ombudsman to provide the parties with reasons for decisions around the exercise of discretion.

9. Finally, the OLC confirmed that it will continue to report on its quality KPI and will monitor the results of service complaints and legal challenges. Any shifts in these metrics will be indicators for the OLC to assess whether the changes are because of amendments to the Scheme Rules and whether any further action is required.

Time limits

10. Consultation responses, including that of the Consumer Panel set out concerns at the lack of analysis provided by the OLC on how it had assessed the impact of other potential time limits such as a cut of at 2 or 3 years. We asked the OLC what consideration it gave to conducting such analysis.

11. The OLC explained that it conducted a high-level review of the impact should it set its time limits at 12, 18 or 24 months. It set out the percentage of current claimants that would fall outside of time limits as follows:

Time Limit	% of cases brought outside of time limit
12 months	30-40%
18 months	20-30%
24 months	15-20%

12. The OLC also confirmed that whether it set time limits at 12, 18 or 24 months there would be certain groups of customers who would be more likely to be impacted. The OLC has committed to keeping the impact of this proposed change under review.

13. The OLC has explained that the primary driver for a change in time limits is not to reduce case volumes but to ensure that the Legal Ombudsman is best placed to deal with cases quickly and efficiently, whilst evidence is still available. The OLC considers, anecdotally, that the quicker a complaint is escalated to the Legal Ombudsman after the end of a first-tier complaints process, the better the chances are of reaching a speedy resolution.

14. The OLC considers that the greatest positive impact will be achieved by adjusting the time limit to 12 months as it will provide greater control over levels of demand and ensure that cases are more likely to be resolved faster.

15. We welcome the OLC’s commitment to keeping the impact of this proposed change under review. We expect the change to drive the behaviour of complainants to complain earlier, rather than to significantly reduce the case load of the Legal Ombudsman. We will closely monitor information the OLC shares with us on the impact of this change.

Significance test

16. Through consultation, the Consumer Panel had also expressed concerns about the application of a significance test to the impact on a consumer. We noted the barrier posed by a requirement to demonstrate significance and asked the OLC to provide us with more explanation as to its decision in this area. We also asked the OLC what other options it considered.

17. The OLC explained that this was an area of focus for its Board, with discussion around a test for “significance” or “insignificance”. The OLC has explained that it chose to adopt a significance test as it concluded that customer perception would be more likely to be negatively impacted if they were told their complaint was insignificant than if they were told it was not significant.

18. The OLC also set out that it reflected on the use of this type of test across other Ombudsman schemes and a number of other schemes specifically state that they reserved the right to dismiss cases if they were not satisfied or persuaded that the customer had suffered a significant impact/detriment.

<u>**Acceptance Criteria:** 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</u>

Regulatory Objectives

19. The section of the submission focused on the Regulatory Objectives was largely focused on positive impacts. During the course of our assessment, we asked the OLC to provide more information on how any negative impacts to the Regulatory Objectives would be mitigated and/or why the proposals were not overall prejudicial to the Regulatory Objectives despite any negative impacts.

20. The OLC’s response to this request provided its reflections on its overall view that its backlogs and wait times have been a clear hindrance to access to justice for its customers. The revised Scheme Rules aim to enable more customers to obtain access to justice in a timely manner. However, the OLC also acknowledged the negative impact that certain changes could have on access to justice for some customers. For example, changes to time limits could mean that certain customers are unable to bring their complaints and changes to Rule 5.7 might result in more cases being dismissed.

21. The OLC explained that these negative impacts are mitigated by the use of discretion where it is fair and reasonable. It explained that the presumption will remain that a complaint will be investigated unless there is a clear and compelling reason why that should not be the case. The OLC also reaffirmed its commitment to reviewing the impacts and implications of the proposed changes. Any significant adverse impacts will be addressed to ensure they are mitigated.

Acceptance Criteria: A finalised Impact assessment on the rules particularly as regards case fees that meet MoJ requirements

Evaluation and monitoring

22. The submission from OLC provides some information on plans for ongoing monitoring of the impact of the proposed changes, the quality and consistency of casework and EDI data to safeguard vulnerable customers. We asked the OLC how it will ensure that its tracking and monitoring is transparent.

23. The OLC explained that it has plans to build a new suite of reporting that will enable it to tack the implications of the changes on the levels of demand. This reporting will also enable it to monitor the impact of the changes on the nature and profile of its case work. The data will be reviewed by the Legal Ombudsman executive team each month and will also be used to provide the OLC Board with assurance around the impacts of the changes.

24. Additionally, the OLC will continue with its quarterly reviews of quality assurance checks and customer satisfaction surveys to better understand the impact of changes on customers. The reviews will continue to be reported at executive and OLC Board level. Finally, the OLC will be developing a set of reporting metrics and will agree a timescale to carry out a comprehensive review of all the proposed changes after the rules have been implemented.

25. We expect the OLC to be transparent in its publications on the data gathered through its tracking and monitoring work and would expect the OLC to set out a clear rationale for the timescale for its comprehensive review of all the proposed changes.

26. We also asked the OLC to provide us with more information about its proposed system of moderation and review to ensure discretion is being exercised consistently and effectively.

27. The OLC provided us with a series of actions it is committed to taking for future moderation and review of discretion:
    a) it will undertake a set of targeted reviews to focus on the application of the new grounds for discretion
    b) all new Ombudsman will have decisions subject to review by a more experienced Ombudsman to ensure the expected level of consistency in decision making
    c) each Ombudsman will go through a process to ensure they understand the ground of discretion being used and can apply it consistency.
    d) tracking of decision data will enable the OLC to identify outliers within its cohort of Ombudsman
    e) the OLC will hold moderation exercises with its Ombudsmen to ensure the range of decisions they make are within acceptable parameters.

28. We expect the OLC to be transparent in its reporting of any issues that arise in the consistent and effective use of discretion by its Ombudsman.

Annex C – to be attached