



Law Society response:

**Legal Ombudsman Review of Scheme Rules
2022**

Consultation

April 2022



Introduction

1. The Law Society is responding to the consultation in its representative capacity as the independent professional body for solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.
2. The Law Society welcomes the opportunity to respond to the Legal Ombudsman's (LeO) Scheme Rules Review 2022 Consultation.¹
3. We appreciate the approach that both the Chair of the Office of Legal Complaints and the LeO leadership team have taken in engaging with the Law Society as well as other relevant stakeholders over the past two years. We are also pleased that several amendments proposed to the Scheme Rules reflect the reforms that we have advocated for such as the early triaging of complaints to sift out complaints which are outside LeO's jurisdiction, before acceptance for investigation²; situations when LeO may exercise a discretion to dismiss or discontinue complaints, for example where a service provider has made a reasonable offer,³ and wider delegation of decision making in certain circumstances. These will all assist in swifter outcomes, reduced customer journey times and prevent more cases building up in the Pre-Assessment Pool (the backlog of cases waiting to be investigated).
4. We are, therefore, broadly supportive of the proposals in the consultation. We agree that a review of LeO's Scheme Rules ('the Scheme Rules') is long overdue, bearing in mind the time that has elapsed since the last comprehensive review and the existing concerns about LeO's performance, which, as LeO acknowledges, necessitate '*significant and radical changes to the Scheme ... with pace and urgency...*'⁴
5. The Consultation proposes changes to six key areas of the Scheme Rules together with some additional minor technical changes. The key changes proposed are: -
 - o a review of the applicable time limits for making a complaint
 - o situations when LeO may decline to accept a complaint
 - o when an Ombudsman can exercise a discretion to dismiss or discontinue a complaint
 - o wider delegation of decision making
 - o escalation of cases to an Ombudsman
 - o case fees

¹ [Legal Ombudsman Scheme Rules Review 2022 Consultation February 2022](#)

² [Law Society Response to OLC's Business Plan & Budget 2022-23 \(p5\)](#)

³ [Law Society Response to OLC's Business Plan & Budget 2022-23 \(p3-4\)](#)

⁴ [Legal Ombudsman Scheme Rules Review 2022 Consultation February 2022 \(p4\)](#)

6. The consultation paper poses several questions and we have provided our response to these below.

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)?

7. Yes, we support the proposal to reduce the time limit for complaints to LeO to one year from the date of act/omission or date of awareness, whichever is later. This is a reasonable time within which to bring a complaint.
8. The retention of R4.7, allowing an Ombudsman to exercise their discretion, to extend the one-year time limit if there are '*exceptional circumstances*', if he/she considers it to be fair, should reduce concerns about access to justice. However, it would be helpful to understand how LeO defines '*exceptional circumstances*'. Some examples would assist with that understanding.
9. We agree that it would be unfair to apply these time limits retrospectively to complaints which have already been lodged with LeO, and that the transition provisions should be clear and be published well in advance to both complainants and legal service providers, including the date on which the time limits come into force. Service providers will also need sufficient notice to enable them to make any changes to their terms of business and information for clients as well as making any changes to their internal processes.

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

10. Yes, we support the revised R2.11 as proposed. However, we believe that it would appear more logical for the clause to appear under a separate heading (e.g. "Grounds for not investigating") in Chapter 5 – First contact from a complainant.
11. Under the current Scheme Rules a complaint can only be dismissed or discontinued by an Ombudsman after it has been accepted for investigation. This means that customers can wait several months for a case to be accepted for investigation only to then be told that it lacks merit.
12. If the proposed new rule was introduced such cases would be identified much sooner and an Ombudsman could decline to accept a new case for investigation. The introduction of such a rule would be a better process for rejecting frivolous/unmeritorious complaints at an early stage and should reduce the likelihood of those cases being accepted in the first place. This type of triaging is common in other redress sector organisations and would result in much swifter decisions as well as being less stressful for all parties concerned. It would also result in greater investigator capacity for those cases which do require a full investigation.
13. We note that this methodology has been tested by LeO in relation to cases currently in its Pre-Assessment Pool ('the PAP' - the backlog of cases waiting for an investigation) and that it is confident that it can carry out similar assessments on new cases.
14. We are pleased to note that LeO has considered and appreciates the risks of the introduction of such a process, for example, the risk that a complainant may have been unable to articulate their complaint because English is not their first language. To mitigate this risk, LeO states that a complainant will be given an opportunity to explain why the complaint should not be dismissed. Any such representations would be considered by the Ombudsman in deciding how to proceed. Importantly, requests for reasonable adjustments would also be considered and accommodated to ensure fairness.

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

15. We broadly support the proposed amendments to R5.7 and have set out our views about the specific paragraphs below. This rule sets out the grounds on which an Ombudsman can consider exercising their discretion to dismiss or discontinue a complaint in full or in part after it has been accepted for investigation by LeO.
16. Rule 5.7(b) currently permits an Ombudsman to consider dismissing a complaint where they are satisfied that the complainant has not suffered any financial loss, distress, inconvenience, or other detriment.
17. The threshold for this test is high and prevents LeO from considering whether carrying out a full investigation is a proportionate use of its resource. Accordingly, LeO is proposing to amend this by the insertion of the word '*significant*' within R5.7(b). This would enable an Ombudsman to consider whether investigating a complaint is a proportionate use of resource, given the likely impact on the customer. An Ombudsman would still retain his/her discretion to dismiss a matter or not after the parties have been given the opportunity to make representations.
18. The consultation indicates that what will amount to '*significant*' will vary depending on the circumstances of the complaint and lists some examples. It states that detailed criteria will need to be developed to ensure that there is a fair and consistent application of the rule. The criteria for the exercise of this discretion will need to be carefully thought through by LeO to ensure that it achieves the desired effect and avoids protracted engagement with the parties as to why a particular complaint is not appropriate for further investigation. Failure to develop sufficiently detailed criteria could result in any gains made by introducing the discretion being quickly lost.
19. LeO states that these criteria would need to be flexible to adapt to changes in the economy and the community and would sit outside of the Scheme Rules. However, if they are to exist outside of the Scheme Rules, they must be part of a clear policy and made publicly available as part of the information that accompanies the application process.
20. Rule 5.7 (c) currently allows an Ombudsman to dismiss a complaint if they are satisfied that the complainant has rejected a fair and reasonable offer which the service provider made under their own internal complaint handling procedure, and the offer remains open for acceptance.
21. The proposed change would ensure that unless there had been some significant intervening event, customers who have already accepted an offer during their service provider's internal complaints handling process would not be able to have that agreement overturned in the hope of securing a better outcome. LeO believes that it is in the interests of fairness and certainty for all parties, that matters which have been reasonably resolved through a service provider's complaint handling process should not be reopened for LeO to carry out a further investigation. We agree with this proposal.
22. However, the proposed revised wording to R5.7(c) appears confusing. In circumstances where a reasonable offer has been made by the authorised person in respect of a complaint during the internal complaints process and accepted by the complainant, then no further complaint to LeO should be accepted. There is no need to accept a complaint for investigation where a reasonable offer has been made and accepted, because the complaint has been resolved by the acceptance of the offer.
23. LeO is also proposing to extend the scope of R5.7(c) to allow an Ombudsman to consider whether a case should be dismissed if a reasonable revised / increased offer is

made by the service provider during the course of an ongoing investigation and the complainant decides to reject that revised offer. It believes that this could encourage service providers to try to settle complaints even after a complaint has been accepted for investigation. Securing an early outcome in this manner would reduce the risk of the case going to an Ombudsman's decision and being published on the Legal Ombudsman's website. The prospect of reducing potential adverse publicity may incentivise service providers to make increased offers. An Ombudsman considering whether to dismiss will need to be assured that the revised remedy offered by the service provider is reasonable in all the circumstances. We agree that enabling a case to be dismissed when a reasonable revised offer is made may encourage some service providers to engage more readily with the investigation process in the hope of securing an early resolution. Also, under the proposal, if a case is dismissed during the investigation process because of a reasonable offer being made, the case fee would not be applied. The proposed new measures would be beneficial to all parties to the complaint as they seem likely to shorten the overall customer journey.

24. Accordingly, bearing in mind what we say above we suggest editing the proposed wording for R5.7(c) as follows-

'c) the authorised person either offers fair and reasonable redress in relation to the circumstances alleged by the complainant during the ombudsman's investigation or 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 ...'.

25. We note that the proposals include the safeguard that if new evidence which has the potential to go to the heart of the complaint comes to light after the complaint had been resolved then LeO will encourage the customer to raise that new evidence with the service provider under their complaints handling procedure. If that approach is unsuccessful then LeO will retain the right to accept that matter for investigation.
26. We agree to the proposed amendments to R5.7(d) but would suggest that this rule may sit better if incorporated under the same heading as R2.11 (under Chapter 5) (see paragraph 9 above). If a complaint has already been looked at it should not be allowed to progress unless it is based on new evidence or perhaps new information indicating more serious loss.
27. We agree to the introduction of R5.7 (o) and (p) but are unsure whether the new paragraph (q) is correctly positioned. It would be helpful if LeO would define what it means by '*undue delay*' and possibly provide some examples. We consider that the reason for the '*undue delay*' in bringing the complaint should be considered before the complaint is accepted for investigation and suggest that there should be scope to consider this issue right at the outset as R2.11 addresses and not after the complaint has already been accepted for investigation. This would better manage the complainant's expectations.

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

28. No. Please see our response to question 3 above.

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

29. We are generally supportive of LeO's intention to look at widening the extent of its delegation powers to facilitate the efficient and proportionate investigation and resolution of complaints. The Law Society accepts that the Legal Services Act 2007 limits the scope for Ombudsmen's functions to be delegated and appreciates that this is a longer-term goal which will require amendment to primary legislation.
30. It is not clear whether the proposal set out in the consultation relates to delegating decision-making powers internally to existing staff members, or whether what is being suggested is a wider delegation to external consultants, or a hybrid of the two. In any of the possible scenarios, the amendment must contain sufficient safeguards, even if the delegation is solely to internal staff members, as we highlighted in our Response to the OLC's Business Plan & Budget 2022-23 Consultation⁵. There need to be transparent and adequate processes to ensure that matters are considered fairly and without delay by properly trained individuals. If external delegation is considered, then it is important to ensure that independence (which was a key element of the rationale behind the establishment of the Office for Legal Complaints) is retained and that outsourcing is utilised only to the extent and for the period necessary to deliver real improvement. LeO would also need to ensure that the work is outsourced to people with appropriate expertise, skills and knowledge to ensure fast results. In both instances the processes and people assigned to make decisions will need to carry the confidence of both consumers and the legal sector under LeO's jurisdiction. The Law Society would in principle support proposals to amend primary legislation but would need to have more detailed and specific information about what is being proposed.
31. The consultation paper provides that *'If delegations were extended more widely the Legal Ombudsman would introduce a development programme to provide suitable assurance as to the technical competence and expertise of those staff. Further, the quality of the work undertaken by those staff would be closely monitored both in terms of the service provided and the outcome delivered.'* We would welcome more information on what is being proposed in this regard.
32. Furthermore, not all cases will be appropriate for delegation and LeO acknowledges this in the consultation paper. It says that criteria will need to be developed which would enable cases to be escalated for Ombudsman decision, if that were considered necessary. Again, we would welcome more information on this aspect of the proposals.

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?

33. Rule 5.19 currently provides that once an investigator has concluded their investigation and shared their findings, either party can request that the complaint be escalated to an Ombudsman for a final decision if they disagree with the conclusions and recommendations made. There is currently no requirement for that disagreement to have a substantive basis. LeO states that in over 80% of the cases that are referred for an Ombudsman decision, the eventual outcome mirrors the conclusions outlined in the investigator's case decision.
34. LeO is therefore proposing a revision to R5.19(c) to enable an Ombudsman to conclude that a final decision is not needed on a case if no substantive issues (such as an error in fact or law, or the availability of additional new evidence which was not available before the investigator's decision) have been raised in response to the investigator's findings.

⁵ [Law Society Response to OLC's Business Plan & Budget 2022-23](#)

In those circumstances, the case would be deemed to have been resolved by the investigator's findings, using an amended version of the existing R5.20.

35. We generally support the intention of the proposed amendments to R5.19 (c) to prevent duplication of work. However, we would suggest an amendment to the proposed rule as follows: -

'(c) if any party indicates disagreement within that time limit, arrange for an Ombudsman to issue a final determination only in circumstances where the disagreement is either based on a challenge of the facts and or evidence or a point of law on which the investigator's findings relies.'

36. We question the need for the additional wording: - *'in circumstances where the ombudsman determines it fair and reasonable to issue a determination.'* If it is included in any amended Rules, we would like to understand better why it is necessary.

37. We support the gist of the proposed amendments to R5.20 but suggest some editing for clarity. We propose the following wording: -

'If neither party, in their response to the investigator's findings, indicates disagreement within that time limit, the Legal Ombudsman may treat the complaint as resolved by the case decision in accordance with the investigator's findings.'

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

38. The consultation paper acknowledges that the process which would underpin this revised rule could require that, in each case where an investigator's findings are not accepted, there is a high-level review by an Ombudsman to assess whether a final decision is required. We would like to understand better what is meant by *'high-level review'*,⁶ what this would entail, and whether there would be a high-level review in all cases where findings are not accepted.

39. We note the types of factors which would be considered in any review as outlined in the consultation paper and broadly agree with those factors.

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?

40. Yes, the LeO guidance on compensation could be improved to achieve a possible reduction in the number of complaints going to a final Ombudsman decision. For example, in our Response to the OLC's Business & Budget 2022-23 consultation,⁷ we suggested that LeO's guidance on compensation could be made clearer and easier to locate on its website. More transparent guidance on compensation levels would help service providers to make reasonable offers as well as manage the expectations of consumers of legal services of the level of compensation they might receive. If the investigator's decision is in line with the guidance, then it is likely that neither of the parties will seek a final Ombudsman decision.

⁶ [Legal Ombudsman Scheme Rules Review 2022 Consultation February 2022 \(p25\)](#)

⁷ [Law Society Response to OLC's Business Plan & Budget 2022-23](#)

41. We believe that the Rules could be amended so that any parties wishing to make representations for a matter to go to an Ombudsman for a final decision must
- adhere to strict word limits and a specific timeframe. (This will make it easier for the Ombudsman to review the representation and avoid delays),
 - be provided with a specific form (this may need to be developed) to focus the minds of parties on the specific issues that will be considered as to whether a matter should be passed for an Ombudsman's final decision, and
 - be given a warning that if the Ombudsman considers that there was no good reason for the application from the investigator's decision that a deduction can be made from the final award (in the case of a complainant), or a sum will be added to the final award (in the case of a service provider). This would serve to deter unreasonable applications.

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?

42. Under the provisions of the current Scheme Rules, case fees are potentially chargeable on all cases that are accepted for investigation and can only be waived when specific criteria (set out in R6.2) are met. If chargeable, the case fee is currently set at a flat fee of £400 irrespective of how, or at what stage in the Legal Ombudsman process the complaint is resolved.
43. The Law Society supports the "polluter pays" principle and that law firms which give cause for complaints, or who do not settle complaints effectively themselves, should meet the costs. Those law firms which are able to avoid complaints, or deal with complaints effectively should not pay.
44. We appreciate that this is a longer-term proposal and will be subject to further consultation. The consultation paper suggests that a tiered case fee structure could be a possibility, based on the stage of the process when the complaint was resolved. We have reservations about such a proposal, as it appears complex in its application, and we can foresee arguments arising about what stage a process has reached. Accordingly, LeO may find it difficult to administer a tiered case fee structure and any potential challenges could be resource intensive. The idea may therefore prove to be counterproductive.
45. A simpler structure would be helpful, with greater flexibility to remove vexatious complaints early and to support small firms and those organisations which provide free advice. Vexatious complaints against solicitors must be resolved early in the process, leaving more time and resource available to deal with genuine cases of poor service. Where, following the internal complaints process, a service provider has made a reasonable offer to a complainant (which LeO also deems reasonable), then no case fee should be incurred. If the service provider increases their offer, during the course of an investigation, and LeO deems it to be a reasonable offer, then no case fee should be charged.
46. We would also ask LeO to consider introducing an exemption to the case fee in some limited circumstances, for example in relation to complaints against those who provide pro bono work where appropriate.

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?

47. In relation to R5.55, we are concerned that the main body of the consultation paper indicates at paragraph 137 that the proposed amendments are to rectify trivial errors such as administrative or typographical mistakes, without application to the court. However, the example given at paragraph 138⁸, whilst being typographical cannot be classified as trivial.
48. The proposed R5.55 amendment will need further careful consideration and possibly additional wording or redrafting to clarify the scope of the proposed rule. It appears to address circumstances in which something substantive has gone wrong with the decision-making process itself, which is so serious that it renders the determination wrong or unsafe. The suggested additional rule provides that this would be as a result either of '*a procedural defect or a fundamental error*'. The defect must therefore be a serious one, but there is no indication of the level of seriousness that would be required in cases of procedural defects. LeO may wish to consider whether the power to make a fresh decision on grounds of procedural defect should only arise in relation to substantive procedural defects or where there have been repeated procedural errors that have a substantive effect on the safety or correctness of the determination.
49. LeO may wish to include an additional rule to address the correction of minor typographical errors that have an effect on the meaning of a determination, which is distinct from the issue of fresh decisions following the discovery of procedural defects and fundamental errors.
50. We have indicated our views to the other additional changes in our response above and the table at Annex A below. The Guidance to the Scheme Rules will need to be correspondingly amended in the light of any changes to the Scheme Rules.

⁸ [Legal Ombudsman Scheme Rules Review 2022 Consultation February 2022 \(p30\)](#)

Annex A - LeO Proposals to Amend Scheme Rules

Proposed amendments to Scheme Rules	Law Society Agree / Do not Agree	Comments
Introduction & Definitions		
R 1.1	Agree to amendments	
Who can complain?		
R 2.1	Agree to amendments	
What they can complain about?		
R 2.8 (c)	Agree to amendments	
R2.8 (d)	Agree to amendments	
R 2.11	Agree in essence to that suggested but please see our comments in this response.	We agree with the content of the new R2.11 but consider that it should be under a separate heading where LeO can decline a complaint at the outset and before a complaint has been accepted for investigation. We suggest that this should be under Chapter 5 First contact from a complainant.
Time Limit from act/ or omission		
R4.5 (a)	Agree to deletion	
R4.5 (b)	Agree to amendments	
R4.6	Agree to amendments	
How the Ombudsman will deal with complaints		
R 5.4	Agree to amendments	
R 5.5 (b)	Agree to amendments	
Grounds for dismissing or discontinuing a complaint		
R 5.7 (a)	Agree to amendments	
R 5.7 (b)	Agree to amendments	
R 5.7 (c)	Agree in essence to that suggested but please see our comments in this Response.	We have suggested edited wording to that proposed. Please see paragraph 21-23 above.
R 5.7 (d)	Agree to amendments	Consider moving this to Chapter 5. See paragraph 26 above.
R 5.7 (o)	Agree to amendments	
R 5.7 (p)	Agree to amendments	
R 5.7 (q)	Agree in essence to the proposal but please see	We are unsure whether the new paragraph (q) is correctly

	our comments in this Response.	positioned. We consider that the reason for the 'undue delay' in bringing the complaint should be considered before it is accepted for investigation and possibly move to Chapter 5. See paragraph 27 above.
Investigation		
R 5.19 (b)	Agree to amendments	
R 5.19 (c)	Agree to the proposal in principle but have suggested edited wording.	We have suggested edited wording to that proposed. Please see paragraph 34 above.
R 5.20	Agree to the proposal in principle but have suggested slightly amended wording.	We have suggested amended wording to that proposed. Please see paragraph 35 above.
Hearings		
R 5.33	Agree to amendments	
Acceptance/rejection of determinations		
R5.55	We have concerns about the amendments suggested.	Please see paragraph 47 to 49 above for more information.
Misconduct		
R5.62	Agree to amendments	