

# Legal Ombudsman Consultation on Proposed Alternative Dispute Resolution Scheme Rules

A response by:

**CILEx Regulation**

1 November 2015

## **Introduction**

1. This response represents the views of CILEx Regulation, the regulatory body for Chartered Legal Executives. Chartered Legal Executives (Fellows) are members of the Chartered Institute of Legal Executives (CILEx). CILEx is the professional body representing 22,000 qualified and trainee Fellows and is an Approved Regulator under the Legal Services Act 2007. Fellows and Associate Prosecutor members of CILEx are authorised persons under the LSA.
2. CILEx is also an Approved Regulator for awarding practice rights in litigation, advocacy, immigration, conveyancing and probate. Individuals with practice rights are collectively referred to as CILEx Practitioners. CILEx is also an entity regulator.

## **ADR and the Legal Ombudsman (LeO)**

3. The European Directive on Alternative Dispute Resolution (ADR) which came into effect on 1 October 2015 requires service providers to signpost clients to a certified ADR provider. This is done once the client has exhausted the first tier complaint handling procedure of the service provider they are complaining about. The service provider then decides if they wish to engage in the ADR process, which they should confirm in writing to the consumer.
4. There are three providers, approved by Chartered Trading Standards Institute (CTSI), who are providing ADR. CILEx Regulation has signposted its regulated community to those ADR providers.
5. 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. In order for the LeO to be certified as an ADR entity, and to be approved by the Legal Services Board (LSB), it must be compliant with the ADR Regulations, within a reasonable timescale.

## **General comments**

6. CILEx Regulation understands from the roundtable events that LeO will use the same investigation procedure, rules and outcomes regardless of whether a matter is referred to it for ADR or as a service complaint.
7. LeO undertook research into the definition of ADR and was unable to establish a definition. Therefore it is possible for LeO to use its complaints procedure as ADR provider. LeO has taken the view that the Ombudsman scheme already fulfils the function of ADR and consequently apart from minor proposed rule changes they

do not need to take any different approach or introduce additional activities when acting as an ADR provider.

8. LeO will need to make some amendments to section 1.7 of the scheme rule which defines authorised persons. The list includes Chartered Legal Executives but also now needs to include CILEx Practitioners to reflect those to whom we award practice rights. Also in section 1.8 of the scheme rules, CILEx Regulation is referred as ILEX Professional Standards, which is our former name. We would be grateful if LeO could update this to CILEx Regulation.

### **Consumer perspective**

9. CILEx Regulation has reviewed the regulatory objectives regarding consumers in the context of this consultation. The proposed revisions to the Ombudsman rules are unclear on the routes that consumers can take. We refer to whether a consumer who follows the ADR route (through LeO or another ADR provider) can then make / not make a service complaint.
10. It seems that two clients of the same firm who have complaints could follow different routes, possibly with one pursuing ADR and the other raising a service complaint through the Ombudsman scheme. However, there is no difference in approach; just a difference in the title of the route taken by each client.
11. There is also further disparity in consumer protection, where an entity provides unregulated services. An unregulated service provider can signpost their clients to any of the other ADR providers that cover the legal sector, they will not be restricted to using LeO for ADR. However an entity that is providing reserved services has to signpost to LeO.

### **Costs**

12. It is noted that LeO states that it does not see there will be any increase in the number of complaints that they will be dealing with, either via the ADR or Ombudsman scheme, and therefore there will be no increase in their operational costs. This implies that there will be no increase in regulatory costs.

### **Requirements of the ADR Regulations**

#### ***Q1 - Is the description of our approach to the application of the rule clear?***

13. CILEx Regulation agrees with the principle for extending the time limit for complaints to be made to LeO from six to twelve months. This will provide consumers with longer timescales and flexibility to make a complaint.

#### ***Q2 - Do you foresee any difficulties in applying the above approach?***

14. While the time limits are clear, the actual application of the time limits is unclear and has the potential to create confusion for advisors and consumers alike as to whether their case falls within the ADR provision. This is evidenced by the range of scenarios and differing outcomes explored in the examples in the consultation.

***Q3 - 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?***

15. We believe it would be beneficial for both consumers and entities for a time period to be specified within which complaints have to be submitted to LeO. This would allow certainty for both consumers and entities and would be helpful in ensuring clarity in the complaints process while avoiding the need to deal with matters that are very old and therefore difficult to resolve due to factors such as the age and availability of evidence. A time limit will help achieve a proportionate and consistent approach. It also delivers transparency and certainty to consumers about what can be done with their complaints.

16. An ideal time period for considering complaints may be within the six years limitation period, this provides sufficient time for complaints to be presented to LeO either through the service complaints or ADR scheme. The time period is also in line with the document retention procedures of most legal firms.

***Q4 - Or do you consider that no time period should be set because the issues would be case specific?***

17. CILEx Regulation believes that there should be a time period.

***Q5 - 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?***

18. If LeO adopts a specified time period within which complaints have to be dealt with then there is no need to introduce the new rule 5.7(d). However if LeO decides to not introduce time limits then the new rule 5.7(d) is required, as it allows LeO the option to dismiss disputes which would impact on the operation of the scheme.

19. LeO will need to ensure it considers the interests of consumers adequately in its application of this rule.

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

### ***Q6 - Is the above description of our proposed approach clear?***

20. The new ADR Regulations provide limited circumstances in which a complaint can be refused. LeO is proposing to make changes to rule 5.7 to reduce the number of grounds for refusing to deal with a dispute.
21. CILEx Regulation reviewed the case examples developed by LeO to consider the application of the grounds. Case example 2 concludes that the complaint should be rejected on the ground that it is frivolous or vexatious where the reason is that the CMC firm has closed down. This may appear as strong terminology to a consumer and they may view it as implying criticism of their complaint whereas the refusal is due to a factual matter relating to the firm.
22. Case example 3 gives the indication that LeO may need to include an overarching ground for rejection on the basis that the resolution offered by the firm was fair. The proposal to deal with it by way of a LeO decision, where the firm had already offered the same outcome to the consumer, could penalise firms in respect of liability to pay case fees.
23. The case examples indicate that it might be necessary for LeO to issue guidance to users of its services on how the grounds of refusal may apply in cases.

### ***Q7 - Do you foresee any difficulties in applying the above approach?***

24. Rule 5.7 of the scheme rules is ambiguous, as it specifies, 'an Ombudsman *may* dismiss or discontinue or refuse to deal with all or part of a complaint.....b) the dispute is being or has previously been considered by another Alternative Dispute Resolution entity or by a court. This implies that the Ombudsman may refuse to deal with a claim which has been considered by another ADR provider, however the rule fails to clarify what would happen if LeO had previously considered the claim itself, as an ADR provider. Ideally the rules should clarify that once LeO has considered a claim as an ADR provider, a complainant cannot return back to the Ombudsman, as a service complainant.
25. There is therefore the risk that the rules create uncertainty for both consumers and entities. Entities will be in a difficult position as they are unable to provide their clients with a clear indication on their route for redress, undermining the aims of first tier complaints handling guidance.

### ***Q8 - 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?**

26. While CILEx Regulation recognises the value of introducing a pre-determined minimum monetary threshold for complaints it may not protect the consumer interest. It could ensure that extremely low value claims are not submitted to LeO where the cost of investigation or ADR outweighs the value of the claim.

27. However LeO will need to balance this against the right of the consumers to complain if they receive a poor service from their service provider, regardless of its value. At present LeO does not specify a minimum monetary threshold for its complaints scheme, CILEx Regulation would support LeO to continue with this approach and adopt it as an ADR entity.

28. It would be prudent for LeO to set a maximum monetary threshold for complaints. Ideally this should be in line with the current maximum threshold of £50,000 per claim; this would ensure consistency with the current rules and limit consumer confusion.

**Q9 - Do you have any other views on our proposed new sub section of chapter 4?**

29. We have no additional views on the proposed new sub section of chapter 4.

**Q10 - Are there any other grounds which you feel should be in the in the new subsection "complaints not covered"?**

30. CILEx Regulation has not identified any additional grounds.

### **Consequential changes**

**Q11 - Are the consequential amendments clear?**

31. The consequential amendments are clear and CILEx Regulation has no further comments to add.

**Q12 - Are there any further amendments you think we require?**

32. We have no additional views on the consequential changes.

**Q13 - Do you have any comments or observations related to this consultation which you would like the OLC to consider?**

33. CILEx Regulation has no further comments or observations to add related to this consultation.

### **Conclusion**

34. CILEx Regulation supports LeO's application to become a certified ADR provider. However it is important that the existing scheme rules are not compromised as a

result of LeO becoming an ADR provider. It is important that consumers and service providers clearly understand the role of LeO as a service complaint handling organisation and as an ADR entity and are able to distinguish and differentiate between the two schemes.

35. LeO has to be confident that merging the service complaint scheme rules with the ADR rules will operate successfully for the benefit of consumers.

**CILEx Regulation  
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