EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (LEGAL COMPLAINTS) (PARTIES) ORDER 2012

2012 No. 3092

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument extends the conditions under which a complainant as defined in section 128 of the Legal Services Act 2007 ("the 2007 Act") may bring a complaint under the Office for Legal Complaints ("the OLC") ombudsman scheme. It specifically allows a complainant (who otherwise satisfies the requirements of section 128(2)) to bring a complaint if the services to which the complaint relates were either offered or refused by the authorised person (for example a solicitor, barrister or solicitors' firm) to the complainant.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The 2007 Act sets out the framework for the regulation of legal services in England and Wales. Part 6 of the 2007 Act established the OLC as a new independent complaints handling body and provided for an ombudsman scheme (operating as the Legal Ombudsman) as the single point of contact for all service complaints about authorised persons.

4.2 Section 125 of the 2007 Act provides that a complaint falls within the jurisdiction of the Legal Ombudsman if, among other things, the complainant is within section 128 and wishes to have the complaint dealt with under the scheme (section 125(1)(c)). Section 128(2) states that in order to be within this section a complainant must satisfy both the conditions listed under subsections (3) and (4) and not be excluded under subsection (5) (which excludes complainants where the services were procured on behalf of a third party, the complainant is a public body or as otherwise prescribed by order). Subsection (3) states that that the complainant must either be an individual or if not an individual a person prescribed by Order of the Lord Chancellor. Subsection (4) prescribes the conditions which must be satisfied in relation to the services to which a complaint relates. It includes a provision at paragraph (d) for the Lord Chancellor to prescribe by Order such other conditions in relation to the services to which the

complaint relates on the recommendation of an interested body (the OLC, the Legal Services Board or the Legal Services Consumer Panel).

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The OLC and the Legal Ombudsman became operational on 6 October 2010. When the scheme rules were first drafted by the OLC, they were based on a number of assumptions about the legal services market and the complaints that would be made. Following 18 months of operational experience, the OLC reviewed the scheme rules in March 2012 and identified a number of changes and improvements it wished to make and which it considers will: promote and protect the interests of consumers; take account of changes to the market particularly the emergence of new business structures; and allow the Legal Ombudsman to operate more effectively and efficiently.

7.2 Currently, the Legal Ombudsman can accept and investigate complaints only if the service which is the subject of the complaint has actually been provided by an authorised person. As part of its review of the scheme rules, it has become apparent to the Legal Ombudsman that consumers should have access to redress for loss, inconvenience or distress caused in circumstances where the service has not yet been provided.

7.3 The first of these is when a consumer is unreasonably refused a legal service e.g. due to discrimination. The second situation is when a consumer has been unreasonably and persistently offered an unwanted service by an authorised person, for example where an authorised person continues to make unsolicited phone calls to a consumer despite being asked to stop. Inclusion of the latter within the Legal Ombudsman's jurisdiction is, in part, in anticipation of its assumption of responsibility for handling complaints about claims management companies during 2013. The Legal Ombudsman has identified these as the most common but not the only circumstances in which it would be appropriate to consider complaints concerning legal services which have been offered or refused and this is reflected in the drafting of the Order.

7.4 The Legal Ombudsman does not currently collect evidence about this type of complaint, and therefore accurate volumes are not available. However, it has carried out some analysis to gauge potential volumes which suggests that the additional number of cases investigated as a result of this change will be low. In 2011-2012 around 35 cases out of a total of 7,800 cases investigated included a complaint about discrimination which suggests that this is a relatively small problem for existing customers of providers and there is no evidence available to suggest that this would be a significantly larger problem amongst an authorised person's prospective customers. Futher anecdotal evidence collected by the Legal Ombudsman suggests around an average of four calls per week would relate to potential customers not all of which would lead to a full investigation.

7.5 Whilst consumers can complain to the relevant approved regulator about the conduct of the authorised person if refused or offered an unwanted service and the approved regulator can take action against the authorised person, it cannot award redress to the consumer for any distress or inconvenience caused.

7.6 A further reason for the change is that since the Legal Ombudsman became operational new types of business entities have been emerging as a result of the alternative business structures' regime becoming operational in October 2011. Alternative business structures are firms which are partly or wholly owned or controlled by non-lawyer to provide legal services or a mixture of legal and non-legal services. Because alternative business structures could generate complaints not just about legal services but financial and other types of service (in respect of which other ombudsmen have jurisdiction), the Legal Ombudsman has been in discussions with other ombudsman schemes aimed at mitigating the risk of cross jurisdictional issues that may emerge to avoid delays and gaps in dealing with complaints which fall under more than one ombudsman scheme. These discussions have included the Financial Ombudsman, which can currently accept complaints from prospective clients. As a result it is considered appropriate to harmonise the jurisdiction of the Legal Ombudsman by expanding its jurisdiction to prospective clients as well.

7.7 The Lord Chancellor considers that with the evidence available and the impact of the new alternative business structures and claims management complaints on complaints handling still unknown, widening the circumstances in which a complaint may be brought to the Legal Ombudsman is a proportionate and prudent policy decision. Moreover, it is sensible to tackle the issue early to avoid problems emerging in the future. It is also in line with the regulatory objectives of the 2007 Act to protect and promote the interests of the consumers and potentially offers a quicker, less costly and less stressful alternative to court for resolving disputes.

- Consolidation

7.8 There is no intention to consolidate the relevant legislation. An informal consolidated version of the Legal Services Act 2007 is available at http://www.legislation.gov.uk/.

8. Consultation outcome

8.1 Section 130(3) of the 2007 Act sets out that before an interested body, in this case the OLC, makes a recommendation to the Lord Chancellor it must publish a draft of the proposed recommendation, invite representations regarding the proposed recommendation and consider any representations that are made. The OLC discharged this duty by conducting a public consultation of the Legal Ombudsman's scheme rules which included the proposal on whether the Legal Ombudsman should accept complaints from prospective customers.

8.2 The OLC published its consultation document "*Review of the scheme rules and case fee structure: consultation paper and discussion draft*", on 26 March 2012. The consultation closed on 18 June 2012 and 18 written responses were received from a range of bodies including: the Law Society, Solicitors Regulation Authority and the Bar Standards Board; consumer bodies such as Which? and the Legal Services Consumer Panel; and individual firms and members of the public. In addition to the consultation paper, the OLC also held three workshops for stakeholders to discuss the changes to the scheme rules.

8.3 Six bodies responded to the following question in the consultation document: "Do you agree with our proposal to bring our service in line with other Ombudsman schemes and accept complaints from prospective customers?" Three of those respondents supported the proposal and three raised concerns. Supporters of the amendment emphasised the importance of covering prospective clients in light of future development, particularly given that the Legal Ombudsman's jurisdiction will be extended to include complaints about claims management companies. Some suggested that it is in the public interest for the Legal Ombudsman to be available to people who are impacted by actions of a lawyer, even if they have not engaged that lawyer. Those who were against the proposal were concerned that accepting complaints from prospective customers could create extra duties for lawyers. The Legal Ombudsman is confident that the concerns raised can be addressed in its scheme rules since any determination is subject to the standard of what is fair and reasonable in the circumstances of the case and the scheme rules will also allow for complaints to be dismissed without investigation where the complainant does not produce evidence that the service was refused by an authorised person for anything other than legitimate business reasons.

8.4 Details of the consultation and the responses can be found at http://www.legalombudsman.org.uk.

9. Guidance

9.1 The Legal Ombudsman will issue guidance and work with the approved regulators to make sure that the legal profession is aware of the changes to the scheme rules.

10. Impact

10.1 The impact on business, charities or voluntary bodies is likely to be small. Paragraphs 27-29 of the attached Impact Assessment identified that this reform will lead to a small increase in the total number of cases investigated by the Legal Ombudsman although it is difficult to estimate the number with precision because information on this type of case is currently not collected.

10.2 The impact on the public sector is expected to be negligible.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, clear guidance is provided by the Legal Ombudsman and approved regulators in respect of what complaints handling procedures should be put in place by individuals and firms providing legal services.

11.3 The basis for the final decision on what action to take to assist small business is informed by the consultation responses and the experience gained by the Legal Ombudsman in dealing with complaints about such bodies.

12. Monitoring & review

12.1 The Legal Ombudsman will monitor the impact of the changes to the scheme rules through its case management system.

12.2 More widely, the OLC is subject to parliamentary scrutiny since it is required to produce an annual report and accounts which must be laid before Parliament by the Lord Chancellor. The OLC functions will be reviewed in 2015 as part of its second triennial review, including the operation of the Legal Ombudsman.

13. Contact

13.1 Dawn Sanderson at the Ministry of Justice, Tel: 0203 334 4269 or email: Dawnm.sanderson@justice.gsi.gov.uk can answer any queries regarding the instrument.