

Janet Edwards
Legal Ombudsman
Sent by email

28 June 2011

Dear Ms Edwards

Publishing our decisions: an evidence based approach

The Consumer Panel welcomes the opportunity to respond to the Legal Ombudsman's second consultation on publishing decisions. We made a substantial submission to the first consultation, which focused on whether individual law firms should be identified. The current consultation seeks views on the Legal Ombudsman's preferred approach, which involves:

- Stage one: publishing anonymous case studies immediately.
- Stage two: publishing anonymous summaries of all formal decisions in the summer of 2011.
- Stage three: tracking our data over the next nine months, with a view to making a decision about whether we identify individual firms in early 2012.

As there is agreement among stakeholders about the publication of anonymous case studies and formal decisions, this response mostly addresses the more contentious issue of identifying lawyers.

Developments since the first consultation

The Consumer Panel was extremely disappointed by the announcement on 31 March to delay making a decision about identifying firms until 2012. The Panel considers that the Legal Ombudsman had all the information it needed to make a positive decision to identify firms. Introducing a delay was itself a decision and has served to undermine the organisation's credibility among consumers.

There is no need to repeat the arguments and evidence presented in our first submission, which we stand by. Developments since our response have strengthened the arguments in favour of publication:

- Findings of qualitative research jointly commissioned by the Legal Ombudsman and the Panel have demonstrated an appetite among consumers for complaints data. Although participants did not expect that the Legal Ombudsman would publish (as they were unaware of similar organisations doing so), most considered that lawyers who had been subject to complaints which had been upheld by the Legal Ombudsman should be named. Consumers saw that this would encourage firms to improve their service, enhance solicitor accountability and also help consumers both to identify firms providing less satisfactory service and to assist in finding “good” solicitors.
- The Government’s new consumer strategy sets an expectation that regulators, departments and public service providers release complaints data. Legal services are pointedly mentioned as an area where such data is currently unavailable.
- The Legal Services Board’s response to the Panel’s report, *Quality in legal services*, accepted our recommendation that regulatory bodies should harness consumer power to exert reputational pressure on lawyers to maintain standards. The Board said this could include complaints data and that it will ‘discuss with the Legal Ombudsman how the information they gather and publish could best be harnessed by consumers.’
- Ofcom has started to publish first-tier complaints data – the latest major organisation in the regulatory and complaints-handling landscape to support informed consumer choice in this way.

Arguments against publication

The consultation gives little information as to why the Legal Ombudsman delayed a decision. We are glad that it considers that some of the profession’s concerns are overstated. Our reading of the submissions was that they contained theoretical objections, none of which were supported by hard evidence. The Legal Ombudsman declared that its starting position was to favour openness. This being the case, any decision not to identify firms should only follow strong evidence against such a step.

The Legal Ombudsman’s main concern appears to relate to reduced access to legal advice for some consumers because particular fields of law or types of firms are more likely to attract complaints. We have little doubt that some areas of legal work by their nature will generate more complaints, but this is not a good reason to withhold identification of the firms concerned (or indeed affect the much wider range of services and consumers). The Panel is proposing that only cases leading to a remedy three or more times should be published (see below). This means both that something has gone wrong and that the firm failed to provide satisfactory redress to the consumer at the internal complaints-handling stage. Moreover, these areas of work – typically social welfare law – are exactly those dealing with some of the most vulnerable clients, where it is even more important to identify firms which repeatedly let down such consumers, to avoid serious consumer detriment.

The Consumer Panel is of the firm view that all consumers have a right to know whether the provider with whom they are thinking of engaging to help them resolve their important legal matter has a poor complaints track record. The Legal Ombudsman will have a heavy conscience if consumers suffer serious detriment which could have been avoided.

The risk that a high number of complaints in social welfare law would harm firms' ability to attract more work in other areas, such as conveyancing, could be easily managed by effective presentation of the data. The research suggests that consumers would use complaints data to help them make choices between competing providers. In order to facilitate this, the Legal Ombudsman should organise data by legal activity. In this scenario, consumers would be able to compare complaint volumes for one field of law across the different providers they are considering. The Financial Ombudsman Services enables such comparisons and we see no reason why the Legal Ombudsman cannot do so.

The Legal Ombudsman has helpfully set out the arguments provided by respondents about the pros and cons of identifying individual firms in Appendix 3 of the consultation document. The first critique – it is not the organisation's role to help consumers choose a lawyer – raises important issues. The Legal Ombudsman must be aware of the consequences of policy decisions that go beyond its functions, so as to avoid creating unintended negative impacts. In this case, helping consumers to choose good lawyers and avoid the minority of poor lawyers are positive outcomes. The Panel sees helping consumers to choose lawyers as being fully consistent with the accepted role of all ombudsman schemes to raise industry standards. Lawyers are more likely to treat consumers fairly if publication of complaints data hits their bottom line. Should the Legal Ombudsman decide that helping consumers to choose a good lawyer is not a part of its role, but rather is the responsibility of regulatory bodies, it should pass its complaints data to the Approved Regulators so that they can publish it.

Publication options

The Legal Ombudsman plans to track data against seven criteria. The first stage would be to identify firms (or lawyers) where it felt it was in the public interest do so, which would mean the following three criteria would trigger publication:

- Firms involved in cases that Ombudsmen consider indicate an exceptionally severe degree of service failure.
- Firms that Ombudsmen consider have demonstrated particularly good practice in resolving a complaint.
- Firms that Ombudsmen consider have a very exceptionally high level of complaints given the size and nature of the business.

Based on this, only a very small number of firms (or lawyers) would be identified. We consider this is excessively cautious and would fail to assist consumers in making informed choices between providers.

The Panel's preference is option five: firms with more than three complaints where a remedy is awarded in a twelve month period. This should include complaints concluded through informal resolution as well as formal ombudsman decisions. It is important to include the former due to the expected small number of ombudsman decisions; a limited publication scheme would have a limited impact. The Legal Ombudsman wishes to avoid being seen to penalise the profession; however, the fewer the number of providers it identifies, the more punitive the scheme will appear to the public. Inclusion of such complaints is fair because the award of a remedy is acknowledgement that the provider has done something which has caused detriment – and has failed to address this at the first-tier stage.

This view is based on the findings of our joint consumer research, where participants said such an approach would represent a fair publication scheme. Consumers saw this course of action would avoid penalising the occasional lapse and it would also be relatively less onerous on small firms. We note that it would also mitigate the access to justice risks highlighted by the profession, although we do not accept these arguments. Data from the ombudsman scheme's first six months suggest there were a worrying 246 firms subject to at least three complaints. These figures suggest that publication would still identify a relatively small proportion of the market, but more than the three options above.

Panel staff attended the Legal Ombudsman's consultation workshop in London on 23 June. There was an interesting discussion as to whether the scheme should apply a quantitative threshold (e.g. option five) to trigger publication or qualitative criteria, such as risk to the public based on variables such as the severity of detriment and attitude of the provider. A further area of discussion was whether any threshold should vary according to the type of law or type of lawyer.

Our view is that there should be a simple numerical threshold across the scheme. We are uncomfortable with the Legal Ombudsman making judgements that individual providers pose a serious risk to the public. This is properly for regulators to determine, and they are likely to treat such cases as potential misconduct. Furthermore, as the stakes for providers in these rare circumstances would be so high given the likely commercial impact, such decisions are bound to be subject to legal challenge.

Setting a different numerical threshold for types of lawyer may have merit as barristers and members of the other smaller professions are unlikely to reach our proposed threshold of three complaints where a remedy is awarded. Nevertheless, the more complicated the scheme is the more difficult it will be for consumers to understand, and more costly to administer – costs which consumers would ultimately pay in higher bills. We also noted from the workshop that the Financial Ombudsman Service and the Local Government Ombudsman are moving towards simplifying their publication schemes as they have found that their existing measures have caused difficulties. Experience seems to suggest the best course is to 'keep things simple'. Moreover, this fits with the prevailing trend to publish as much information as possible.

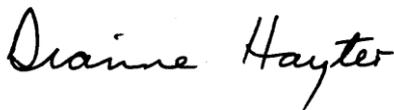
Other issues

Notwithstanding the above, we offer some brief comments on the Legal Ombudsman's proposed approach.

The consultation makes a commitment that, once a decision is taken to publish a certain type of information, the Legal Ombudsman will not go back on it. This offers some certainty that the organisation will not bow to future pressure to stop identifying firms, should it decide to do this. However, a blanket commitment risks putting the Legal Ombudsman in a straightjacket should a decision, for example to publish decisions of cases well handled by the provider, turn out to be a mistake for whatever reason.

We welcome publication of case summaries of formal ombudsman decisions in a standard format. Consumers and the profession will look to these as a guide to how similar future complaints might be considered. As these actions have the highest status, publication would provide a welcome measure of accountability. However, the Legal Ombudsman intends that only a relatively small number of cases will be resolved this way. Whilst this information will be supplemented by a selection of anonymous summaries of other cases that do not reach this stage, information about the bulk of the casework will not be in the public domain. The annual report is likely to provide high-level information about complaint trends, but this is unlikely to provide a sufficient level of detail to enable proper analysis for initiatives to raise standards. Therefore, we would encourage the Legal Ombudsman to explore making information available about all cases accepted for investigation, even if this is just statistical information in a fully searchable form about legal activities, complaint reasons and case outcomes. Whilst this would have resource implications, such costs should be viewed in context of the savings that could accrue from such transparency resulting in improved standards.

Yours sincerely,

A handwritten signature in black ink that reads "Dianne Hayter". The signature is written in a cursive, flowing style.

Dr Dianne Hayter
Chair