

Consultation response

Legal Ombudsman: Publishing our decisions

Overview

1. **The Legal Services Consumer Panel strongly supports publication of complaints data which identifies lawyers and legal firms by name, because:**

- It would reflect a clear trend towards greater transparency in the operation of public and private institutions. Complaints data is published successfully by other organisations.
- Consumers lack information to make informed choices between providers; complaints data would help to fill the information deficit.
- Maintaining a good reputation is important to lawyers, so publishing complaints data should provide a strong incentive for them to maintain service standards and respond appropriately to complaints.
- Existing research indicates consumer demand for complaints data, although only a small number of active consumers would need to use this information for the economic effects to take place.
- It would help to manage the data appropriately rather than leave it in the hands of unofficial websites.

2. **Publication must be done in a way that is fair and meaningful. The Panel recognises the dangers of unintended consequences for consumers. However, whilst the Legal Ombudsman should be alert to the risks, it should not be distracted by theoretical objections. Those put forward are unconvincing,**

unsupported by evidence and can be managed through careful design of the publication scheme.

3. **Decisions about what information to publish and the format should be informed by consumer research. The Panel's preliminary view is that details of all cases that lead to a remedy should be published. This should be provided in a useful format that allows users to make comparisons and access different levels of detail according to their needs.**

The proposals

4. The Legal Services Act enables the Legal Ombudsman to publish reports of investigations or Ombudsman decisions where appropriate. Crucially, this includes naming the lawyer or firm involved.
5. The Legal Ombudsman has published a discussion paper about its overall approach to publishing its decisions. Responses to this paper will inform a second consultation, which will set out specific options. The paper discusses five issues:
 - Whether any information is published at all
 - The types of cases published
 - The levels of decisions published
 - Identifying lawyers and legal firms by name
 - The form of publication
6. The Legal Ombudsman has resolved the first issue, which would see the publication

of statistics and anonymised case studies at the very least. There is consensus that this information would serve a range of benefits, including helping the profession to raise standards by learning from complaints, increasing user understanding of the ombudsman scheme and providing accountability for the Legal Ombudsman in relation to the consistency of decisions.

The Panel's response

7. The Panel's response focuses on the issue of naming lawyers as this is where policy is contested. Our starting point is that the Legal Ombudsman should operate from an assumption of transparency. The burden of proof should lie with those who wish to limit transparency, rather than vice versa. The Panel is convinced that the benefits to consumers of naming lawyers who have failed their clients in some way outweigh the costs and that the risks identified by the profession are not founded in evidence. This submission contains some preliminary thinking on the principles that should underpin the detailed design of a publication scheme, but the preferences of consumers should inform decisions on the type of information published and the format. The Panel has jointly commissioned consumer research with the Legal Ombudsman that should assist with this.

An era of transparency

8. A clear trend is greater transparency in the operation of public and private institutions. Transparency is a defining theme of the Coalition Government. Indeed, the Government's new transparency website¹ declares: "we want to be the most open and transparent government in the world". Transparency is also closely linked to the Big Society as opening up information about how organisations operate enables a redistribution of power from the centre to ordinary citizens. Transparency also lies at

the heart of the Government's emerging consumer strategy. For instance, the Department for Business, Innovation and Skills' Business Plan includes a commitment to "introduce reforms to empower consumers through transparency of customer data and ease of feedback, and by improving information and advice".²

9. The drive to give individuals access to data previously kept private recognises two forces. Firstly, the need to tackle a climate of distrust created by the exposure of practices that were shrouded in secrecy, such as the MPs expenses system, by giving people information that allows them to hold businesses and public services to account. The second force is an opportunity to harness consumer power enabled by the ability of the internet to spread word of mouth rapidly and on large scale³. This is manifested in the use of price comparison websites, online customer reviews of services such as restaurants and hotels, and league tables in areas such as health and education.
10. Enhanced transparency is not a new trend, but rather an acceleration of an existing one. Freedom of Information laws changed expectations around access to information held by public bodies - indeed the Legal Ombudsman is covered by the legislation. Furthermore, transparency is one of the five principles of good regulation.
11. The Legal Ombudsman must have regard to good practice in other ombudsman schemes. Other ombudsmen already publish complaints data, as the consultation document acknowledges. Perhaps the most significant example is the Financial Ombudsman Service, which decided to identify firms following a careful review of the issues by Lord Hunt of the Wirral. He concluded: "*information about complaint performance is one relevant factor that consumers may wish to take into account in*

*making a purchasing decision and I see no legitimate justification for withholding it as a matter of principle”.*⁴

12. Arguably, the suppression of complaints information in legal services until now has led to websites such as www.solicitorsfromhell.com filling the vacuum. These sites have more potential to damage the profession than the well-managed and accurate release of complaints data ever will. The Legal Ombudsman has the opportunity to publish complaints data in a controlled way with appropriate contextual information. Indeed, it is possible that the Legal Ombudsman could be forced into publication following a freedom of information request.
13. The Legal Services Act gave the Legal Ombudsman the power to name lawyers following careful debate in Parliament. Therefore, this consultation is not about giving the Legal Ombudsman new powers, but rather merely in what form the Legal Ombudsman should switch on its existing powers. There would need to be very strong arguments should the Legal Ombudsman ultimately decide not to exercise powers granted to it after Parliamentary debate.

The information deficit in legal services

14. Research consistently shows that consumers struggle to make an informed choice of lawyer. In one survey, 80% of consumers agreed with the statement ‘most people wouldn’t know how to tell a good provider of legal services from a bad one’.⁵ This is unsurprising as consumers use legal services rarely, and the law can be specialised. Consumers’ inability to distinguish between good and bad lawyers is bad news for good lawyers and the reputation of the wider profession. Developing a reputation for good quality enables lawyers to attract clients despite charging higher prices than rivals with lower prices but poorer quality service. By contrast, where these conditions do not exist, the incentives work towards a race to the bottom.
15. The Panel’s research on quality in legal services highlights that consumers are not playing their role in driving competition between lawyers, in part because they lack the very information they need to make sensible choices. Legal services are seen as standard products where quality and price do not vary much between providers. Brand, which acts as a proxy for quality in other markets, is not a strong feature in legal services. In similar vein, consumers assume all lawyers are competent and regard legal services as risk-free. This is concerning: if consumers do not appreciate what can go wrong, they will not take appropriate precautions, such as to ask basic questions of lawyers about their experience or regulatory protections.⁶
16. Complaints information – which provides an indication to consumers about quality of service – would help to bridge the information deficit. Although complaints are an imperfect indicator of customer dissatisfaction, as consumers lack the knowledge needed to assess the technical competence of work (and because only a minority of clients ever make formal complaints), consumers can infer the level of service provided. This could usefully inform their purchase decisions and alert people to the reality that legal services can be less than satisfactory.
17. Publication of complaints data should be particularly powerful in legal services due to the strong influence of recommendation on consumer choice. In addition, the role of peer pressure and sense of profession means that the desire to maintain a good reputation can be expected to exert a positive influence on lawyers’ behaviour. It

is striking that most complaints about lawyers involve avoidable service failures, such as delay and communication breakdown. Publishing complaints data would provide a strong incentive for lawyers to maintain good standards of service.

18. It should also provide a strong incentive for lawyers to deal with complaints when things occasionally go wrong. In financial services, there is evidence that publishing complaints data has improved first-tier complaint handling standards. In February 2010, David Thomas, then interim Chief Ombudsman at the Financial Ombudsman Service, said that *“while the number of cases referred by consumers to the ombudsman has continued to increase substantially, some businesses were committed to handling complaints better”*.⁷
19. A study commissioned by the Financial Services Authority examined the link between firm reputation and complaint numbers. Although the survey was small-scale, the correlation was as expected: those firms with higher annual complaint numbers were associated with comparably worse reputations. The study found a significant negative relationship between firm profitability and complaint numbers. Profitability, as determined by the ratio of retained profit to assets, decreased as complaint numbers increased. These results suggest that the fewer complaints a firm receives, the more profitable it is likely to be.⁸ If regulators want to harness consumer power to ensure quality, they must provide the necessary tools. There is no magic bullet, but complaints data can help empower consumers and create an incentive for firms to provide good client care to avoid a stain on their reputations.

Consumer demand for complaints data

20. Existing research indicates consumer support for publication of complaints data. When the Legal Complaints Service previously consulted on this issue, 91% of consumers said they would find publication of complaints information about solicitors' firms a helpful aid in decision-making. The qualitative element of their research suggested that consumers would mostly use this information to double-check the record of a lawyer they intended to use rather than to identify lawyers to avoid.⁹ This suggests that complaints data will be used as a positive rather than a negative tool, enabling consumers to choose lawyers with confidence. Furthermore, the Panel's research on quality in legal services showed that consumers prefer regulators to use 'harder' tools to police the market, including publication of complaints data.¹⁰
21. Moreover, it only needs some consumers (or indeed their advisors, be they the voluntary sector or the press) to use the information for it to have an impact as it forces firms to make service improvements that benefit all users. The Financial Services Authority made this point when discussing their approach to publishing complaints data: *“If firms change their behaviour in light of complaint publication, the benefits to the consumer may be realised independently of consumers' use of the available information. To change firms' behaviour it is not necessary that the information is important to a large proportion of consumers; it may be enough either that a sizeable minority of active consumers use the information, or that firms feel that the publication of unfavourable complaint numbers will damage their reputation”*.¹¹
22. Even should individual consumers not use complaints information, it is likely that other consumers would. For example, indemnity

insurers might use complaints information to help set premiums, banks might exclude firms with bad complaints records from their panels or the Legal Services Commission could use the information when assessing bids for legal aid contracts. The Panel's research on quality in legal services showed that, whilst individual clients did not recognise or want quality marks, they were used by these other types of users. These actors are important because they account for large volumes of transactions and thus their behaviour indirectly benefits individual clients by filtering the market. In addition, consumer groups, journalists or other intermediaries are likely to produce their own analyses of the data, which could influence the choices of those consumers who do shop around.

23. Furthermore, the Legal Ombudsman should be aware of the possibility of suppressed demand, i.e. consumers might be lukewarm about an idea, or even say they disagree with it, but their behaviour changes once a service becomes available. For example, in healthcare, consumer behaviour changed in response to information about the quality of care. Publications such as Dr Foster, hospital ratings from the former Healthcare Commission and consumer feedback through NHS Choices, all empowered consumers to ask questions about the quality of medical advice.

Managing the risks

24. Ideally, the Legal Ombudsman will design a publication scheme that delivers benefits to consumers and commands the confidence of the profession. The vast majority of professionals that routinely provide good service to consumers should welcome any scheme that distinguishes them from rivals who provide poor service. Clearly, some lawyers are nervous about the implications. The Panel is prepared to work alongside the industry to try to identify consensus.

However, we return to our starting point that the presumption should be in favour of transparency and any limitations on disclosure must be evidence-based; the Legal Ombudsman should not be distracted by theoretical objections. It should not seek to broker a compromise which satisfies no-one, but instead make a clear decision that would best advance the regulatory objectives.

25. Complaints data should be published in a way that is fair and meaningful, and in a form that can be used by consumers and intermediaries. The Panel recognises the risks of unintended consequences. Indeed, it is not in the interests of consumers to receive misleading information as this could lead to poor choices. However, such concerns are exaggerated and are not supported by evidence. Moreover, the risks can be managed through the careful design of the publication scheme. Below the Panel addresses specific risks that have been identified in the consultation events.

Unfairly punishing lawyers

26. The risk that lawyers will be unfairly punished for a single mistake because consumers will vote with their feet is insulting to consumers and at variance with real behaviour. Should a lawyer make a single mistake, she or he is likely to recognise this, and respond appropriately at the first stage. Given that most consumers – in whatever field – in fact only make formal complaints in a minority of incidents of dissatisfaction, the chance of a single mishap finding its way right through to an ombudsman's remedy is very unlikely and should not drive policy in this area. Furthermore, publishing complaints data is not a novel or untested idea. Student ratings have not led to the closure of universities, mortality rates have not ended the careers of surgeons, nor have the risks identified by the financial services industry

materialised. Consumers are not stupid and complaints data will be one piece of information among many that they will use to inform choice.

27. The Legal Ombudsman must not fall into the trap of not publishing complaints data because it might be misinterpreted by some consumers. Perfect information is an impossible aim; rather policy-makers should have regard to the likely overall effect. Lord Hunt pointed out in his review: *“Economic theory tells us that the availability of accurate information to consumers helps to make markets as a whole work more effectively, irrespective of whether every piece of information is understood perfectly by each and every individual”*. He went on to say: *“My analysis underlines the need to get publication right, but let me be clear: I do not think the arguments against any publication at all are remotely convincing. In my considered view, the reputational risk of being perceived to be withholding data would exceed any danger of possible misinterpretation in the short-term”*.

Access to justice

28. An objection is that access to justice will suffer because lawyers will be reluctant to practise in areas of law, such as crime and mental health, which through their emotional and contentious nature, attract higher numbers of complaints. Similarly, it is argued that sole practitioners and BME lawyers could be disproportionately affected because more work in these areas. The Panel has seen no evidence to support such claims, and also considers that it is exactly such vulnerable clients who need access to lawyers who do not have a record of complaints against them. We would expect lawyers to continue operating in these practise areas as long as they present viable business opportunities.

29. This is an example where the presentation of the information can help to manage the risks. It is logical that consumers will prefer to compare the complaint histories of firms in the particular area of law where they are seeking advice, rather than across the firm’s entire business, in order to enable a meaningful comparison. The publication scheme should enable like-for-like comparisons. Moreover, publishing some details of the case and the reasons for the complaint outcome, rather than just a number, can provide useful information to assist choice.

Perverse incentives

30. Lawyers are concerned that publication of complaints data might create perverse incentives, for example firms might challenge more decisions, or, alternatively, settle baseless complaints due to the reputational consequences. However, this risk should not materialise if lawyers trust the Legal Ombudsman’s processes to generate fair outcomes. Should a firm fight its case and the Legal Ombudsman agrees that no remedy is required there would be no damage its reputation, if, as we suggest, only cases leading to a remedy are named.
31. A greater risk to consumers is that firms lack the incentive to resolve complaints and leave them to the Legal Ombudsman to deal with. This delays consumers receiving redress and adds stress, whilst some consumers may give up before reaching a satisfactory outcome. The prospect of being named should give lawyers an appropriate commercial incentive to treat complaints seriously and handle them efficiently and fairly. Moreover, not naming lawyers gives them a weak incentive to improve their services to benefit future consumers.

Serial complainants

32. Lawyers have argued that publishing complaints data would encourage serial or vexatious complainants. However, if only complaints leading to a remedy are published, there would be no such encouragement. Furthermore, repeat complainants represent a tiny minority of users and it would be perverse to deny 99.9% of consumers the benefits of transparency because of their actions. Moreover, the Scheme Rules enable the Legal Ombudsman to quickly dismiss claims without opening an investigation.
33. The Panel is mindful of the barriers to making a complaint and supports measures that alert people to the opportunity to complain. In the wider economy, people can turn to a lawyer to help resolve a dispute with their provider, but seeking redress can feel especially daunting when the complaint is about a lawyer. Research comparing consumer behaviour across 50 markets shows that legal services rank among the worst for people who are minded to complain but do not end up doing so¹². Publication of complaints data can help consumers to identify when the Legal Ombudsman can assist them and so improve access to justice. It is also possible that transparency over decisions could discourage vexatious complaints, as potential complainants can understand the circumstances in which the Legal Ombudsman is unlikely to award a remedy.
35. One issue is the type of cases and level of decisions to publish. The Legal Ombudsman anticipates closing the vast majority of investigations through an informal resolution process. As the number of formal ombudsman decisions is likely to be very small, publishing details about only these would have limited consumer benefit and would not be a representative sample.
36. Publishing details of all cases that led to a remedy would be the most targeted approach. This is likely to maximise the reputational incentives for lawyers and mitigate the risks of perverse incentives as well as being the information that consumers would value most. If a lawyer was not listed, consumers could infer that the firm either had not been subject to a complaint or that a complaint was not justified as it did not warrant a remedy. Therefore, this approach would both enable consumers to make a positive confirmation about a lawyer they intended to use as well alert them to negative information. There would still be value in publishing anonymised cases not leading to a remedy, as these provide an insight into how ombudsmen make decisions and allow the profession to extract good practice.
37. It is essential that the information is published in an accessible form, striking the right balance between providing sufficient granularity whilst avoiding information overload. Some consumers will use the information to provide a quick reassurance before going ahead with a preferred provider, whilst others may want to read the full case report. This implies that two types of information should be provided: statistical data in searchable tables to facilitate comparisons; and details about cases including the reasons for the outcome. It should be possible to provide the information in a way that allows users to drill down to various levels of detail according to their preferences.

Presentation of information

34. The Panel wishes to learn the results of the consumer research before forming a final view on the design of a publication scheme. Therefore, the Panel will return to these detailed matters in responding to the second consultation; however, we set out some preliminary thinking below.

38. Finally, appropriate use of health warnings, for example that complaints are not necessarily a predictor of future behaviour, would provide useful context. This would aid consumer choice and help to address some of the perceived risks. It will be important to test such language with consumers to ensure that it is clear and of genuine assistance.

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¹ <http://transparency.number10.gov.uk/>

² <http://transparency.number10.gov.uk/transparency/srp/view-srp/44/100>

³ See, for example: Consumer Focus, *Unleashing the new consumer power*, 2010.

⁴ The Hunt Review, *Opening Up, Reaching Out and Aiming High: An agenda for accessibility and excellence in the Financial Ombudsman Service*, April 2008.

⁵ Ministry of Justice, *Baseline survey to assess the impact of legal services reform*, March 2010.

⁶ Legal Services Consumer Panel, *Quality in legal services*, November 2010.

⁷ <http://www.financialombudsman.org.uk/news/updates/complaints-data-Jul-Dec-10.html>

⁸ Financial Services Authority, *Transparency as a regulatory tool*, May 2008.

⁹ Legal Complaints Service, *Complaint Handling Improvement Project: Solicitors' Complaints Records*, October 2007.

¹⁰ See note 6.

¹¹ See note 8.

¹² European Commission, *The Consumer Markets Scoreboard: 4th edition*, October 2010.