

Consultation response

Legal Ombudsman: Scheme rules and case fee structure

Overview

1. The package of proposals that the Legal Ombudsman is consulting on would help close redress gaps for consumers.
2. More prospective customer complaints are likely as the Legal Ombudsman's jurisdiction expands to cover claims management companies and will-writers, and marketing of services becomes more prominent in the market overall due to competition reforms. Allowing such complaints should serve as an important deterrent against cold-calling and other undesirable sales techniques.
3. Third party complaints would extend routes to redress and create incentives for fair dealing. These are tricky issues and we do not argue that all third parties should be able to complain, but the current blanket prohibition is crude and shuts out legitimate grievances. The Legal Ombudsman cannot foresee all such complaints, so the best approach is to make third party complaints eligible except for specific types of cases that would be excluded, for example because it would impair the proper pursuit and administration of justice. The definition of a 'consumer' in the Legal Services Act could be used as a basis for defining third party complainants.
4. The time limits should be extended to the proposed 6 + 3 formulation. Longer timescales should be allowed to reflect the consumer's lack of expertise, length of case and emotional context of the law. It is important to remember that the vast majority of people will complain within a far shorter period, so this change would not 'open the floodgates'. However, we disagree with the proposal not to reset the clock after someone dies. A longer period to complain is appropriate to take account of bereavement; in the overall scheme of things such complaints are likely to be rare and narrowing pathways to redress would be an insensitive move.
5. The compensation limit should reflect the high potential level of consumer detriment. Increasing this to £50,000 is a step in the right direction, but we would challenge the Legal Ombudsman to go further and harmonise with the Financial Ombudsman. Again, this would be used in rare situations, whilst safeguards against the Legal Ombudsman acting outside its competence already exist.
6. The case fee structure should remain to reflect stakeholder consensus about the importance of the polluter pays regime. The 'free case' element should be removed given evidence suggests this change would not have perverse effects.

The proposals

7. The Legal Ombudsman is reviewing its scheme rules following 18 months of operational experience. It is also consulting on its case fee structure.

The Panel's response

8. The consultation questions are answered in turn below. In addition, the Panel has separately published a paper on the subject of third party complaints, which should be treated as an annex to this response.

Q1. Do you agree with these principles? Are they the right ones to guide this review of the Legal Ombudsman's scheme rules?

9. We do agree with the principles set out in the consultation document.
10. The Panel recognises the benefits of harmonisation, although we caution against a blanket policy of harmonisation for its own sake – each decision must work in the context of the legal services market. Any move towards harmonisation with other schemes must avoid reduced protection for consumers, in other words shifting to the lowest common denominator. With these caveats, greater harmonisation is supported to increase consistency between redress schemes in markets where the distinctions between legal and other services are increasingly blurred. This should reduce consumer confusion and mitigate the risk of consumers falling through the cracks where responsibility for redress overlaps. Finally, the Panel has previously signalled the possibility of greater cooperation between,

or even mergers of, ombudsmen in future. Harmonising approaches to redress would help remove barriers to such developments.

11. The principle of future proofing the scheme rules is also important. It seems likely that the Legal Ombudsman's jurisdiction will expand into other areas of legal activity like claims management and will-writing. These markets may attract a different pattern of complaints than the traditional profession. For example, proposals on prospective customer complaints are more likely to happen in these two markets given the higher emphasis on marketing of services. This is also likely to be true of ABS firms, while other developments, such as growth of online legal services, should also inform the development of the scheme rules.
12. The Panel is committed to evidence-based policy making and we support this principle. However, it may be difficult to find the evidence for every proposal. The Legal Ombudsman is the only body holding data in relation to people it has to turn away because they fall outside of jurisdiction. More generally there is a lack of data about the experience of consumers. Furthermore, by definition it is not possible to provide evidence for proposals that seek to future proof anticipated market changes.

Q2. Do you have views on these proposed changes to the scheme rules?

13. No (this question relates to Chapter 1 only).

Q3. Are there any additional changes to Chapter 1 that in your view are necessary? If so, please explain your reasons and provide evidence to support your view.

14. No changes are necessary.

Q4. How appropriate do you think the current £1million income/asset limit for charities and trusts is? Why do you think this? Can you provide any evidence to support your view?

15. We can confirm from our research that the vast majority of charities fall within the existing threshold used by the Legal Ombudsman, while the Small Charities Coalition also uses this figure. However, our discussions with charity finance experts suggest that £3 million would be a more appropriate figure as charities with income under this level are unlikely to have access to adequate resources to make claims through formal court processes.
16. The Panel's research, as far as we know, was the first to explore the legal needs and experiences of this consumer group. There was low awareness about the complaints system, but small charities were confident they would be able to find out about the process and to make complaints should they need to. Only 2% of charities have actually complained to their provider, yet half of these said the complaint was not dealt with to their satisfaction. The small sample size means this last figure should be treated with caution, but it justifies giving small charities, which share many of the characteristics of individual consumers –

e.g. lack of knowledge, infrequent use – a right to complain to the Legal Ombudsman.

Q5. Do you agree with our proposal to bring our service in line with other Ombudsman schemes and accept complaints from prospective customers? Why do you think this? Please include evidence.

17. The Panel supports the proposal to accept complaints from prospective customers. We have seen the following examples where the access to the Legal Ombudsman would have helped consumers:
- Our research with deaf and hard of hearing people included examples of providers refusing to accept work from this vulnerable consumer group;
 - Our will-writing investigation highlighted an undercurrent of sales pressure that plays on people's fears and a lack of transparency about what consumers are committing to and the costs. Our case studies demonstrate that consumers can end up paying enormous sums for services they do not need or which they could find far cheaper elsewhere; and
 - Our work on referral fees suggests there are instances of personal details being forwarded without consent.
18. In each of these examples, the practices are likely to have breached general law but consumers lack a means of obtaining redress. For example, some forms of pressure selling are illegal under the Consumer Protection Regulations, but consumers currently do not have a private right of action under this legislation. The

Information Commissioner can penalise firms which misuse personal data, but he has no redress awarding powers.

19. Cold-calling and other sales techniques are widely acknowledged as a major problem in the claims management industry. Although the primary reason for bringing this market under the Legal Ombudsman's jurisdiction is to provide remedies for consumers who experience poor service, an important secondary benefit is to deter bad practices by creating better incentives for fair dealing. The prospect of paying case fees should alter the mindset of claims management companies that use these techniques.
20. Law firms have traditionally been reluctant to market their services. The emergence of legal brands and comparison websites look set to change this. Not only is it likely that new entrants will heavily advertise offers, but incumbents may have to respond in kind in order to compete. Therefore, the profile of complaints is likely to change as the market adapts and it is important that the Legal Ombudsman's scheme rules anticipate, not respond, to this shift.
21. This raises an issue, which also occurs with third party disputes, that as the Legal Ombudsman's eligibility rules develop they may become inconsistent with approved regulator code of conduct requirements on first-tier complaints. The general policy is that consumers must first complain to their provider, so it is unhelpful if providers are not obliged by their rules to engage with a consumer, but they would be captured within the Legal Ombudsman's jurisdiction. Approved regulators should harmonise their rulebooks with the updated Scheme Rules.

Q6. Do you think there is evidence to support a change to the rules to include a list of specific categories of third parties who may complain to the Ombudsman? Which categories would you favour? Why? Please provide evidence to support your view.

22. The Panel has published a separate paper on third party complaints, which is annexed to this response. In summary, our goal is to extend routes to redress for legitimate grievances and create the incentives for the market to work well for consumers. There is strong evidence that the absence of redress is frustrating the intention of consumer contracts on which people rely in good faith and encourages firms to set up complex business structures to escape regulation.
23. We recognise these are tricky issues as lawyers must act in the best interests of their client. As such, we acknowledge the need to avoid creating conflicts of interest or impairing the proper pursuit of justice. These are legitimate concerns, but the current system is a crude one, as it creates a blanket prohibition on all third party complaints so that parties with legitimate grievances are shut out from seeking redress (unless they have the means to go to court). The Panel has identified a list of third party complaint scenarios to consider in this consultation exercise, as follows:
 - Where legal work is intended to benefit consumers, but they are treated as third parties due to the nature of the contract or business structure, e.g. a remortgage when the legal work is arranged by the lender, and sub-contracting

arrangements by unregulated businesses;

- Hounding tactics by lawyers acting on behalf of corporate clients;
 - Bad treatment of victims and witnesses in the criminal justice system;
 - Non-contentious matters where both the client and third party lose out, e.g. delay in a conveyancing transaction because the seller's lawyer loses some paperwork causing detriment to the buyer (a third party);
 - Personal information is compromised due to a data security breach;
 - Beneficiaries when they experience problems due to a defective will; and
 - Lawyers working on matters concerning groups of people where the work is arranged by a third party acting on their behalf or in their name, e.g. leaseholders or unsecured creditors.
24. The paper explains these in more detail. We consider it is not possible for the Legal Ombudsman to foresee all legitimate third party complaints. Therefore, the best approach is to make third party complaints eligible except for specific types of cases that would be excluded. The definition of a consumer in the Legal Services Act could be used as the basis for a definition. This embraces those '*who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons*' and those '*who have rights or interests which may be adversely affected by the use of such services by persons acting on their behalf or in a fiduciary capacity in relation to them.*'

Q7. Are there additional changes to Chapter 2 that in your view are necessary? If so, please explain your reasons and provide evidence to support your view.

25. No additional changes are required. However, we urge the Legal Ombudsman to publish a statement to explain how it will interpret the fair and reasonable test.
26. Please note that the Legal Services Board is to commission advice from the Panel in relation to financial protection regimes. The scope of this project is yet to be defined but this may include successor firms.

Q8. Do you agree with the proposed change so that complaints can be accepted up to six years from the event or three years from the knowledge of the event? Please provide evidence to support your view. If you think the current arrangements are problematic, please provide solutions you would find appropriate.

27. We agree with the 6 + 3 proposal. In many ways, the second of these periods is the most crucial – the point at which the complainant should reasonably have known there was cause for complaint without taking advice from a third party. This is because consumers may lack the expertise to assess the quality of work even after the event, e.g. a defective will or problem with title when buying a home. It may be longer than six years before these problems materialise, e.g. when the testator dies or the home buyer comes to sell the property.

28. It is important to extend the current one year limit to three years. Legal services are often used in traumatic circumstances and sometimes people will simply need a break and to come back to things later before they feel able to complain. In this context, having to confront the provider who might be the source, or just associated with, the original problem can be daunting. Furthermore, due to their lack of expertise, it may be more than twelve months, for example after talking to someone who has been through a similar experience, until consumers realise that they have a cause to complain.
29. Most people will complain within much earlier time limits so this would not open the floodgates; instead, the policy is needed for relatively rare occasions. However, the existing arrangements are unsatisfactory since the exceptions policy is being used to an extent that the exception is becoming the rule by the back door. The exceptions policy also seems expensive to operate. We also welcome the Legal Ombudsman's evidence that it is able to cope with older cases, as this deals with practical objections to extending the time limits, e.g. identifying old paperwork.
30. The Panel also agrees this is one area where it is sensible to harmonise with other redress schemes and note the proposals would be consistent with the Financial Ombudsman Service's time limits. There should be a mutual interest in countering the prospect of 'ombudsman shopping'. The proposals would also take pressure off the courts. Indeed, we hope the legal profession will see advantages in more complaints being dealt with by the Legal Ombudsman than in a court room.
- Importantly, the proposals would harmonise with the courts and not exceed the statutory time bars. Therefore, this does not create new rights for consumers, but allows more consumers to enforce existing rights.
31. If the 6 + 3 proposal is rejected, starting the clock from when the retainer ends is vital as legal matters can be prolonged and it is completely understandable that consumers are reluctant to complain while the work is ongoing, e.g. they may fear upsetting their lawyer could adversely affect the outcome or just simply not have the time to complain. Examples of where protracted cases might occur are a difficult probate, messy divorce or a serious personal injury case.
32. The one proposal with which we disagree is not to reset the clock after someone dies with an outstanding complaint. The last thing the bereaved will want to do is to complain about a legal matter; it would be appropriate to build in a longer period to take account of this difficult context. In the overall scheme of things, complaints falling into this category should be rare and it seems unnecessary to narrow pathways to seeking redress in such situations.
- Q9. What do you think our financial limit should be for compensation? Please provide evidence to support your view.**
33. The compensation limit should be set to reflect potential levels of detriment suffered by consumers. This can be high in legal services, e.g. disputes involving property. We see a risk that consumers are not bringing complaints because they perceive the value of these to exceed the current £30,000 limit. Equally there is an incentive

for firms to reject a complaint if the potential redress exceeds £30,000 as they can let a complaint drag out in the knowledge they will not meet their full liability should the consumer pursue the ombudsman route.

34. As with time limits above, this would not open the floodgates as the current case profile suggests that only a small number of cases are reaching the upper limit. It should also not impact on insurance premiums: insurers realise these instances would be rare; it does not alter the size of insurers' liability since consumers could still claim the full amount against the policy; and insurers should prefer to avoid significantly greater costs of going to court. The change would also not lead to the Legal Ombudsman accepting complex cases that should be a matter for the courts as it must already refuse cases when it is not competent. The key decision criteria on eligibility should be the complexity not value of the claim.
35. With these considerations in mind, the proposal to increase the compensation limit to £50,000 is a welcome step in the right direction, but we would challenge the Legal Ombudsman to go even further. There may have to be a maximum limit to provide certainty for the market, but we see no compelling reason why award limits should not be harmonised with that available to the Financial Ombudsman Service. The size of consumer detriment could match this level, albeit in very rare situations. Indeed, there are strong reasons to harmonise given the growing overlaps between legal services and financial services. Without this, perverse consequences may result, such as 'ombudsman shopping' – consumers

choosing one dispute resolution service over another due to differing award limits.

36. The principle behind the compensation limit is not to reflect the average award amount, but to allow consumers to obtain full redress from an out-of-court process where this body is a competent authority to act. We note that the Financial Ombudsman Service operates within this limit yet has not needed to resort to legalistic processes.

Q10. Please express your preferences in relation to options 1 and 2? Please explain your reasons

37. There was a clear expectation in the Legal Services Act that the Legal Ombudsman would derive a large part of its income from case fees reflecting the "polluter pays" principle. The Legal Ombudsman would need strong evidence to depart from the wishes of Parliament, and, indeed, from the view of stakeholders – consumer bodies and the legal profession were united in their view that there should be a much higher proportion of case fee income than was proposed when this was first consulted on.
38. In the current consultation document, the Legal Ombudsman suggests there is no evidence that the case fee has an impact on the behaviour of firms, but it is unclear how this conclusion has been reached. Logic suggests that case fees should encourage lawyers to deal properly with complaints in the first instance. In fact, this may be one reason why case volumes are far lower than the Legal Ombudsman had planned for.

39. It is the level of fee (currently £400) that is probably the most crucial in influencing firm behaviour. The Legal Ombudsman's target unit cost is around £2,000 and we see that this might be disproportionate and could create perverse incentives to settle early. However, there would appear scope to increase the individual case fee amount to a level that is still reasonable, in order to achieve the higher proportion of case fee income that stakeholders wish to see.
40. We support the option to remove the 'free' case element altogether. We are reassured that the evidence suggests there would be no disproportionate impact in contentious areas of law and that the waiver system already provides appropriate flexibility. Our response to the original scheme rules consultation said that free cases were undesirable in principle as they may breed complacency among lawyers in first-tier complaint handling. This move would have the added advantage of increasing, albeit slightly, the proportion of case fee income.

Q11. Do you have any views about whether it would be worthwhile to consider a different approach to the collection of unpaid case fees through, for instance, the levy? Please explain your reasons why or why not.

41. Case fees should continue to be collected from firms in order to uphold the polluter pays principle, with the consumer benefits as described above. Collecting through the levy should be reserved for insolvent firms. The Legal Ombudsman and the approved regulators should take creative measures to reduce bad debt. For example, the Legal Ombudsman could publish a list of names

of non-payers to create peer pressure. Approved regulators should take tough disciplinary action against non-payers using their full sanctioning toolkits.

42. Failing firms account for 18% of case fees charged to date. Regulators should take note of this as it implies a link between poor client care and a law firm's prospects. Moreover, since the profession as a whole pays for unrecovered case fees through an increased levy, it should recognise the need for regulators to have access to information about firms' first and second-tier complaints data and support early intervention.

Other

43. Finally, the current scheme rules are confusing even for experts to interpret, let alone for consumers trying to work out what their rights are. We strongly urge the Legal Ombudsman to publish a plain language version of its scheme rules. The difficulties in terms of inadvertently creating wrong meaning by rewriting rules are appreciated, but it should not be beyond the skills of the staff team to produce such a document.

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