



The Law Society

# **Legal Ombudsman - Review of Scheme Rules and Case Fee Structure**

Law Society Response

June 18th 2012



## **Legal Ombudsman Scheme Rules and Case Fee Structure Consultation**

The Law Society is the professional body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the solicitors profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We support the Legal Ombudsman's intention to review its scheme rules. At the time of the original scheme rule consultation it had promised it would review after a period of 18 months and it is sensible to do so. We very much welcome the opportunity to provide a response.

Under the 2007 Act, the role of the Legal Ombudsman was intended to be the review body for clients with complaints about the standards of service being provided by lawyers. This should remain its key focus. Accordingly, we regard proposals to extend the jurisdiction of the Ombudsman to third parties and prospective clients as undesirable unless there is clear evidence of a real need and such extensions can take place without compromising solicitors' existing duties. Solicitors owe duties to their clients, subject always to a duty to the courts, and enabling third parties to seek redress risks creating ambiguity in the role of the lawyer. We would need to see much stronger evidence than is currently provided before we are convinced of the need to extend the Ombudsman's jurisdiction in this way.

With regard to the way that the Ombudsman is currently funded, we believe that it should recover as large a proportion of its costs from case fees as possible. We think the principle that those law firms that give cause for complaints, or who do not settle complaints effectively themselves, should meet the costs is a fair one. Those members of the profession that are able to avoid complaints, or who do handle complaints effectively, should not be paying the costs of those that do not.

### **Principles**

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

We broadly agree with the principles underlying this review of the scheme rules.

### **Chapter One**

**Q2: Do you have any views on these proposed changes to the scheme rules?**

We do not have any comments to make about the proposed changes to Chapter One.

**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.**

See above.

## **Chapter Two**

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

We believe that the current upper limit for charities and trusts should remain at £1 million for income/assets. We agree with the Legal Ombudsman's analysis of its original scheme rules consultation i.e. that this figure represents a reasonable cut off point, above which most such bodies should be well positioned to obtain redress through the courts system. Large charities operate in much the same way as corporations and it would not be appropriate to extend the provision of a free complaints handler to these bodies at the expense of the service providers.

**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.**

Prospective clients are entitled to report bad behaviour by a lawyer to the regulator. Behaviour that falls beneath the standards required in the Code of Conduct, which would include turning away potential clients on unreasonable grounds, is a disciplinary issue and each regulator should be armed to address it appropriately, using measures such as fines and restrictions on practice if necessary.

We are not convinced that redress is appropriate. If a solicitor is simply dilatory in responding to enquiries, it is likely that the client will go elsewhere and it is hard to see what other penalty, in a commercial market is appropriate given that a solicitor is under no duty to take on any client. If, by contrast, a solicitor behaves in a way which is discriminatory then a potential client will have the right to complain to the SRA and to the courts. Given the seriousness of a finding of discrimination, we consider that it is for the regulator and the courts to be left with deciding whether discrimination has taken place.

Extending the Ombudsman scheme to prospective clients would, in effect, impose extra duties to prospective clients in addition to those currently imposed by the regulatory regime and would encroach into the jurisdiction of the regulator. A solicitor's duty of service, subject to the duty to the courts, is to his or her clients, and it is this service that the Ombudsman is intended to review. Lawyers are entitled to decline to act for a prospective clients, provided their decision is not taken on discriminatory grounds. Moreover, it is unclear from the evidence available how loss could result from a prospective client not being taken on by a lawyer and on what basis the Ombudsman would make awards.

**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.**

We believe that the Legal Ombudsman needs to be very careful before it extends its jurisdiction to cover third parties who are not represented by the solicitor. Solicitors are subject to regulatory controls to ensure that they behave properly to third parties in what are often contentious and difficult situations. We do not see why those third parties should have any right to compensation which they could not obtain at law. Subject to duties to the court, lawyers owe their duties to their clients and enabling third parties to receive redress from solicitors who owe them no duty will introduce a potential conflict with the interests/instructions of their clients. A move in this direction would represent a radical change of principle.

In the discussions on this subject a distinction has been raised between providing redress and creating new legal rights. It is, technically correct, that the Ombudsman can require a solicitor to pay redress where the client would not be able to obtain redress in a court. However, this is an extension of general duties that a solicitor owes to clients. Enabling third parties to obtain redress against solicitors creates an avenue for third parties that, even if it does not specifically constitute a legal right, enables them to obtain redress which they would not otherwise have had. We cannot think of any situation where a service provider would be required to pay redress to a third party to whom no specific duty was owed.

Solicitors, apart from the duties owed to the court and prescribed by their Code of Conduct, owe their primary duty to their clients. Those clients are at liberty to behave in ways which may be dilatory, unattractive or contrary to the interests of third parties. Solicitors acting on these client's instructions are not, subject to other regulatory duties, behaving improperly. Provided that that behaviour is not illegal or does not require them to breach the Code of Conduct, solicitors are not required to police what their clients instruct them to do. Nor should they be distracted by the prospect of a complaint against them from following their clients' legitimate instructions.

There is one area where there is experience of an analogous scheme and that is the Wasted Costs jurisdiction in the courts where a court can order lawyers to pay costs wasted by the other side because of lawyers' failures. In the early years of the jurisdiction, a threat of applying for a wasted costs order was used as a tactic to intimidate lawyers in circumstances where they were behaving perfectly properly and so create an immediate tension and possibility of conflict with the duties owed to the client. Accordingly, the Court of Appeal established a very high bar before the courts would make such orders.

There are occasions where a client is, in effect, paying for work to be done in order to fulfil the legal requirements of a third party: for example to do with a lease or mortgage where the actual client has no particular interest in the work being carried out and where the solicitor is under pressure to do the work properly. Where that client is a regulated body (as many of them are) then it may be preferable for them to be subject to duties to ensure that work is carried out expeditiously.

Unless the category of third party cases is very tightly constrained, there is a significant danger that extending the jurisdiction will create significant costs. These costs would apply first within the Legal Ombudsman itself in dealing with such complaints, even to reject them, and then from firms responding to them and dealing with and, possibly, paying redress which they would not otherwise have to do. Ultimately these costs will be passed on by lawyers in the form of higher fees and, where those costs are paid by the firms involved, by clients who have no interest,

desire and might well be outraged that a portion of their fees were going to pay redress to people on the other side. This idea is wrong in principle and stems from a utopian notion that in some way solicitors should have regard to the interests of people to whom they owe no legal duty and from a misunderstanding of the difficulties and complexities of dealing with clients.

We recognise that there may be some special circumstances where there is no client with responsibility for overseeing the performance of a solicitor - for example where the solicitor is executor of the will where there might be an argument for enabling third parties to complain to the Ombudsman. In our view, if exceptions are made, it is essential that they are very tightly drawn indeed, and apply only to cases where there is no other avenue for the third party to take action and where there is no client able to oversee the solicitors' performance.

This, however, is the maximum extent that we believe that it is sensible to go. Solicitors' relationships with third parties are fully dealt with in their Code of Conduct and breaches can be investigated and dealt with by the SRA. The Legal Ombudsman was not established to deal with breaches of the Code but to investigate poor service to clients. Strong evidence would need to be presented before consulting on a change of this nature.

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

We do not believe there should be any other changes to chapter two.

## **Chapter Four**

**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.**

It is an axiom of good complaints management that complaints should be raised as soon as possible after the event. We do not think that it is reasonable to allow complainants up to six years after a complaint could be discovered to make their claim. Without clear evidence suggesting it is right to do so in the context of legal services we do not believe it should be the case that time limits of other ombudsmen schemes are absorbed by the Legal Ombudsman. This is particularly the case where complaints are about poor service, when there is often no actual loss suffered.

The six year time limit stems from the rules governing bringing some court proceedings. There are a number of good policy reasons for having longer timescales for bring actions to court. First, the courts require greater evidence gathering and preparation and cases are frequently complex – it may not be possible for this to be undertaken within a year or, indeed, for the extent of damage to be assessed. Secondly, on issuing proceedings, a litigant is accepting that they will be liable for the other side's costs if they lose. This represents a substantial risk and a litigant will want to be sure that they have as strong a case as possible before

issuing. They need time to instruct lawyers and take advice. Finally, there is no likely further avenue for redress if a case is out of time for the court's purposes: it is therefore appropriate for there to be a significant opportunity for litigants to decide whether or not to bring actions.

None of these considerations apply to the Legal Ombudsman. The process is intended to be swift, unlegalistic and to deal with relatively simple cases. There is no question of the complainant being liable for the other side's costs. There is no need for them to instruct lawyers or take advice. The Legal Ombudsman is not their only avenue for redress and generally the amounts at stake are relatively small and involve relatively low level matters. Moreover, the aim of complaints handling is not just to give redress but to enable firms to learn from their mistakes. After six years it is very likely that the individuals within the firm will have moved on and the lessons for customer service will be irrelevant. Accordingly, we do not think it is proportionate to give a complainant six years to bring these types of matters to the attention of the Ombudsman.

We think it would be more appropriate and proper for the Legal Ombudsman to maintain a one year time limit from the event, or from when the client could reasonably have had knowledge of the event. However, we would not object to the approach in 'Alternative D', including a time limit of one year in which to make a complaint running from the end of the lawyer's retainer.

## **Chapter Five**

**Q9: What do you think our financial limit should be for compensation? Please provide evidence to support your view.**

We question whether it is right for the compensation limit to be extended beyond current levels and have seen no evidence that supports an uplift. Any limit imposed will, by its nature, be artificial and there will always be some suitable cases on the wrong side of the line. The Legal Ombudsman cannot be a satisfactory substitute for a court in complex cases because it does not have the sorts of processes and procedures in place to ensure a decision on which an enforceable requirement to pay a significant sum of money can properly be based. To expose lawyers to very high awards which are not governed by the jurisdiction of the court and rules of evidence would be unreasonable and may impact upon the availability of services and the legal costs charged to clients of those services.

## **Chapter Six**

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

We continue to believe the Ombudsman should aim to recover as high a proportion of its costs as possible from the legal practitioners against whom complaints are made. There is no good reason why those practitioners whose work does not give rise to complaints – or who are able to resolve them direct with their clients – should have to meet costs incurred by those practitioners who fail to avoid or resolve complaints.

We do not support the provision of 'free' cases in each financial year. The cost of providing for that can only be met either through the levy, or by imposing higher case fees in the cases where cases fees were charged. Of the two options, therefore, we would support the second option which involves reducing the number of 'free' cases because this is likely to bring in greater income. We would, however, urge the Legal Ombudsman to be more radical and consider whether any free cases are necessary at all.

We note the arguments about the costs involved but we consider that any scheme which requires people to pay costs will have some defaulters. It is not appropriate for the rest of the profession to subsidise the investigation of complaints by solicitors who handle complaints badly and do not resolve them before they reach the Ombudsman.

**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.**

We would not support changing the current methodology for collecting unpaid case fees. The current system of collection is administratively simple and clearly understood by all participants in the scheme. Adding extra levels of complexity would not serve the interests of clients, lawyers or the approved regulators.