



The Law Society

Legal Ombudsman Consultation on Publishing our Decisions

Law Society response
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supporting
solicitors

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The Law Society response to the Legal Ombudsman's consultation on 'Publishing our Decisions'

This response has been prepared by the Law Society, the representative body for over 140,000 solicitors qualified in England and Wales, working at home and around the world. The Law Society negotiates on behalf of the profession and lobbies regulators, government and others.

The Law Society welcomes the Legal Ombudsman's consultation on this subject and in particular the open-minded approach set out within the discussion paper. The Law Society is committed to helping solicitors pursue excellence in client service including complaints handling. We would welcome the opportunity to work with the Legal Ombudsman to build on the Law Society initiatives in this area.

We believe that publication of information such as case studies by the Legal Ombudsman could be used to drive up standards of complaints handling across the sector and strikes the right balance in providing information which is informative. We do not believe that publishing firms' complaints records will improve complaints handling or provide clients with useful information which will allow them to make an informed choice about which legal service provider to use.

We have set out our views in more detail below.

1. Do you agree that these are the right principles to guide us in thinking about publishing decisions? Please give your reasons.

The Legal Ombudsman has set out six principles which will guide their thinking about publishing decisions. These are:

- 1 Openness
- 2 Being clear about the way they work
- 3 Helping lawyers
- 4 Helping consumers
- 5 Publishing the right amount of information
- 6 Managing the impact on the legal profession

We believe that these principles are helpful and appropriate but there are clearly tensions between them and it will be important for the Legal Ombudsman to indicate how it proposes to resolve those tensions to ensure that a proper balance is struck.

The Law Society believes that it will be important that the Legal Ombudsman is open and transparent about its decision making processes in order to gain the confidence of both legal sector and clients, in the fairness of its processes. The relative openness, in comparison with other public bodies, of the Legal Ombudsman should not hinge on whether it names lawyers, or not, which is a relatively minor issue in the context of the purpose of the Legal Ombudsman. Openness is a much wider concept involving transparency in dealing with lawyers and clients and openness about processes,

procedures and policies. We believe that the principle of openness should be viewed in this light. For these reasons we see the second principle as being closely interrelated to the first.

We are pleased that the Legal Ombudsman has highlighted the regulatory duties of 'improving access to justice' and 'encouraging a strong and effective legal profession'. We believe that there is an opportunity for us to work with the Legal Ombudsman to improve complaints handling by solicitors. We also believe that information collected by the Legal Ombudsman will be an important tool in doing so. Greater information about the causes behind complaints would allow the Law Society to target its advice and guidance more effectively. Anonymised case studies would help solicitors understand the Legal Ombudsman's approach to complaints and thus how they should approach complaints resolution. They may also assist them in avoiding complaints arising in the first place. Statistics on the number of complaints and the type of firm they come from may allow firms to benchmark themselves, depending of the statistical validity of the data, and thus act as an incentive to improve complaints handling.

We recognise that the Legal Ombudsman has a role in helping clients who have a complaint. We also agree that the Legal Ombudsman has a key role to play in helping clients understand what poor service might be and what they can expect from a lawyer both in terms of service and when making a complaint. We believe that anonymised case studies provide a powerful tool for clients to use to assess whether their complaint about poor service is likely to be upheld and to assess whether the remedy offered by the solicitor is appropriate.

We do not believe that it is the Legal Ombudsman's role to help clients choose a solicitor. An Ombudsman's aim should be to create an effective complaints handling scheme in which all stakeholders have confidence and trust. If the Legal Ombudsman is to widen the help it provides clients, beyond that required to allow it to be an effective complaints handler, then this may jeopardise the perceived independence of the Ombudsman and thus the effectiveness of the complaints handling system.

We agree that publishing the right amount of information is important. We believe that publication of anonymised case studies would meet this balance. However, we think the principle should be wider than this. Any information published should be useful to stakeholders and should not, so far as possible, cause misunderstandings. There is little point in publishing data if it is either meaningless because there is no contextual information which enables the user to assess it or published in a format that makes it unwieldy to use. We note the Legal Ombudsman's comments on proportionality, we believe that proportionality should be specifically mentioned within a principle.

The principles should also address the format of the published information seeking to ensure it is easily understandable and considers various preferred styles of consuming information and variations in literacy levels present in the consumer population.

Q2. Do you think there is likely to be a potential impact on any particular group of lawyers, or on lawyers who work in specific areas of law (which might attract more complaints), or potential impact on diversity within the profession? Please give your reasons and provide any evidence that you think will help measure impact.

The Law Society and SRA data indicate that more complaints are received in some specific sectors of the law than others. Immigration and Asylum is an example of this. We know that BME firms, Sole practitioners, Nigerian and Indian Lawyers, and those qualified at the Bar attract a higher number of complaints; however, little is understood about the nature of the complaints and what the underlying reasons are. Since more ethnic minorities work in areas of the law which seem prone to higher levels of complaints there is a risk that publishing information containing the name of the firm and the lawyer will have a disproportionate effect on BME lawyers particularly, sole practitioners and firms with between 4-11 partners.

It is important also to remember that lawyers frequently deal with people who have significant mental disabilities, are under considerable stress, do not understand the full ramifications of the law or, in a small minority of cases, are simply malicious. We believe that these people are likely to need advice in areas of mental health and social welfare law, family and crime and that practitioners in these areas are particularly likely to receive complaints. Many of these areas are publicly funded and we understand that a substantial number of BME practitioners practise in these areas too.

Reporting the names of the firms or lawyers might also be other criteria by which risk for professional indemnity insurance (PII) is calculated, increasing the cost of PII to sole practitioners and BME firms who face disadvantage with the current PII renewals process. This would compound the disadvantages for these firms and could have a serious impact on diversity in the profession. In addition to this, those from lower socio-economic backgrounds or those entering the profession through alternative routes tend to practice in small firms and high street practices, given the difficulties in attaining training contracts with city firms due to restrictive recruitment criteria. There is a further risk of compounding this disadvantage by publishing the names of lawyers/firms, which in turn will limit opportunities of the above mentioned groups to practise the law. Further data to support this can be found within the:

- SRA Diversity Census
- SRA Complaints data
- The Law Society PII Report 10/11

Q3. We have set out five issues that we consider need to be taken into account in developing our approach to the publication of our decisions. Do you think these are the right issues to consider?

Yes. However, we believe a sixth issue needs to be incorporated into the thinking, the impact of publication on various diversity groups within the legal sector and consumer base.

Q4. Do you have any views on how we might approach the first three issues set out?

Issue 1: Whether any information is published at all

We agree with the Legal Ombudsman's conclusion. Our comparative analysis of other complaints handlers (annex A) highlights that most do publish some information, though very few publish names other than in relation to disciplinary proceedings.

Issue 2: The types of cases published

We do not believe that publishing all cases (whether anonymised or not) would be helpful to lawyers or clients. The amount of information being published is likely to be considerable, making it difficult to interpret and analyse and thus making it of limited value. It is also likely to be expensive to set up and maintain a public database containing this amount of information. Publishing all cases where a remedy has been provided would lead to similar consequences. We believe that publishing example case studies from particular areas of law where important issues have arisen or there is a particular trend is a more suitable means to allow lawyers and clients to learn from the experience of others. We do, however, recognise that such cases would not provide a basis to foster academic debate and discussion. That could be achieved by allowing researchers suitably anonymised access to individual cases.

Issue 3: The levels of decisions published

As noted above, we believe publishing all decisions where a remedy is provided is likely to lead to an overwhelming amount of data being published. Publishing details of all informal settlements will only likely to add to this problem. However we do believe that providing examples of settlements and information on the levels of compensation for distress and inconvenience would be helpful both to manage client expectations and to help solicitors come to a fair offer when trying to resolve a complaint.

Q5. Regarding issue 4, the key question is whether there are advantages in us identifying the lawyer or firm involved. Do you agree or disagree with this idea? Please give your reasons and specify any thoughts you have on how we might approach this issue.

Impact of publication on client knowledge

While the Law Society recognises that publication of solicitors or firms names may give an impression of greater openness by the regulator we do not believe this benefit outweighs the disadvantages. Nor do we believe that this information will be of benefit to the client.

It is important to remember that a single decision against a firm is highly unlikely, of itself, to say anything about that firm's competence or its ability to handle complaints.

The decisions of LeO are, at the moment, an unknown quantity. Firms may genuinely believe that they have handled a case correctly; they may feel that there is an issue of principle on which they need a decision; or they may simply have made a single mistake or be dealing with a particularly difficult or intransigent client.

The case load for the LCS for the financial year 2009 was 15069 complaints. There were 10,958 firms in England and Wales in 2009 thus averaging 1.4 complaints per firm. Of the cases received last year, 737 were adjudicated. Even if these adjudicated complaints were all upheld and were spread evenly across the profession they would relate to only 7 per cent of firms. Moreover these also reflect a tiny proportion of the number of cases undertaken by these firms. If these figures are reflected at the Legal Ombudsman, then publication of complaints where a remedy was provided would only provide clients with information about a very small segment of the legal market. It would provide only limited information to clients about the quality of service of the remaining 93 per cent of the profession. The effect of such publication is likely to be to deter clients from instructing that firm but on insufficient evidence or if, as may be the case in some publicly funded areas of law, of having an unjustified lack of confidence in what may be the only local firm offering the services the client needs.

The Legal Ombudsman has suggested that one option is to publish details of all complaints, not just those where a remedy is provided. As the Legal Ombudsman has noted, this would mean the publication of a large volume of data. Indeed, publication of the details of complaints with remedies alone would create a significant volume of data. Too much data can be as unhelpful to clients as too little, as sifting through the data and analysing it becomes a time consuming task.

The Legal Ombudsman recognises the danger of publishing too much information and thus makes an alternative suggestion of publishing statistics. The Legal Ombudsman has highlighted the work of the Financial Ombudsman Service (FOS) in this area. However, as it notes, the financial services sector is very different to the legal sector, with a small number of businesses providing the vast majority of its complaints. This has lead FOS to limit the firms it names to those who provide a large number of complaints. This is unlikely to be a model that Legal Ombudsman can follow given the much more disparate nature of the legal sector.

There have also been serious questions raised about the usefulness of the data provided by FOS. While the information provided allows sight of how many complaints have been made about a particular organisation, it provides no information about the size of the organisation or the number of account holders. Thus a consumer is unable to assess whether one organisation has a high level of complaints relative to another. Similar criticisms have been raised about many other forms of league tables. If statistics are to be useful to the client then they need to be set in context. However, there are a range of factors that affect the number of complaints a firm might generate including size, number of matters handled, whether there is capacity to review a complaint independently, the area of law and perhaps even the type of client. Thus setting statistics on complaints into context is a near impossible job. Even if it could be done effectively, the low level of complaints per firm might limit the significance of the data in many cases and its usefulness as a differentiator for clients. For instance, if on average most small to medium size firms receive one complaint every two years and the publication cycle is yearly, at any given time approximately 50 per cent of firms are going to have one complaint marked against them. It is possible to only publish information on

firms that have more than a certain number of complaints against them however, this unfairly penalises larger firms who are more likely to receive more complaints.

The Law Society has worked closely with the profession and others to put in place accreditation schemes such as Lexcel and those concerning specialist areas of law to help clients differentiate between different firms. We believe this type of information has much greater value to clients in identifying firms which provide high quality service than the limited information that would be available on complaints.

Impact on the profession of publishing

The Legal Ombudsman recognises it has role in helping lawyers. We have noted above that publication of case studies and statistics may help solicitors to resolve cases and allow them to benchmark their performance. However we do not believe that naming firms will necessarily help solicitors or improve complaints handling within the legal sector.

Complaints are a fact of life and no matter how good its service, no firm can guarantee that it will never receive a complaint. Unfortunately, there will be some clients who will never be satisfied with attempts to resolve a complaint. Where the client-solicitor relationship has broken down a solicitor should feel able to turn to the Legal Ombudsman for help in resolving a complaint. Similarly, if the complaint is on a borderline issue, or an issue that has not arisen before, the solicitor may wish to seek the Legal Ombudsman's considered opinion. Firms are unlikely to do so if they fear their names will be published.

Publishing names of firms is likely to reduce the number of complaints going to the Legal Ombudsman for resolution. Reputation is key for solicitors firm and such a publication policy is likely to drive many firms to compromise / conciliate complaints, regardless of whether they believe that the complaint has any merit the cost of the resolving it. However, this will not necessarily mean an improvement in the quality of work provided or the complaints handling process. Merely that firms will pay off complainants and sweep their complaints 'under the carpet' rather than dealing with the complaints and their cause adequately. Such practices are also likely to skew any data collected by the Legal Ombudsman thus making it of questionable value to clients and lawyers.

We are particularly concerned at the proposal that, even where a firm has been found not to be at fault, its name would appear on the Legal Ombudsman's website. It is highly likely that the mention of a firm's name on the Legal Ombudsman's website will be enough to dissuade clients from using them and will damage the firm's reputation, regardless of the facts of the case.

We do accept that some firms have an unacceptably high level of complaints made against them. We do not aim to protect or justify solicitors who consistently provide poor service to clients. However, we believe that consistent poor service is a conduct issue and is best dealt with by the SRA, who have considerable powers to discipline solicitors and to make such action public. We do not believe that naming and shaming of solicitors by the Legal Ombudsman should be used as a substitute for the proper processes for disciplining solicitors.

Impact on access to justice of publishing

The Legal Ombudsman has highlighted that publishing names also risks access to justice. We believe this is a very real threat. It is generally accepted that some areas of law, such as mental health and child protection, generate more complaints than others. Often these areas of law do not generate large profit margins. Firms working in these areas of law may be reluctant to continue to do so if they believe that complaints made against them could damage their reputation and effect other, possibly more profitable, types of work carried out by the firm.

We do not believe that enough is understood about the nature and reasons for complaints to ensure that the information is not skewed and further disadvantages sectors which are vulnerable to legal aid funding cuts and lawyers which undertake legal work such as Immigration and Asylum/Mental Health which are emotive attract higher number of complaints.

We are also concerned that solicitors will be reluctant to take on clients who they believe may be 'difficult' in order to reduce the risk of complaints being made against them. This may leave some clients struggling to find representation.

Impact on sole practitioners of publishing

It is more difficult for sole practitioners, and indeed small firms, to effectively resolve complaints themselves as they are sitting in judgement of their own conduct, and clients are less likely to accept that their complaint has been dealt with objectively or independently. Thus they are more likely to have complaints that go to the Legal Ombudsman. Publication of names of firms will therefore disproportionately affect sole practitioners.

Human rights

Article 8 of the European Charter of Human Rights provides the right of respect for a person's private life. This right has been interpreted by the European Court to extend to the right to respect for one's professional life and the right to not have one's professional reputation defamed. The Law Society is concerned to see that the rights of our members are appropriately respected.

We accept that the right contained in Article 8 does not confer a right to falsely retain an undeserved reputation. However, we are not convinced that the proposals, to publish full details of all complaints regardless of whether a remedy has been ordered, will truly serve the public interest in a way which provides useful information to clients without creating arbitrary anomalies for solicitors. We are concerned that the proposals may lead to innocent solicitors about whom incorrect adjudications are made having this right unjustifiably breached.

Other complaints handlers

In reviewing a wide range of UK and international complaints handling bodies, the vast majority provide some form of advice and guidance to the service providers they oversee. This includes the provision of guides, toolkits, training seminars and helplines. In terms of publication many complaints handling bodies favour publishing details of

complaint trends and anonymous case studies as ways to highlight good practice and areas in need of improvement, rather than singling out individual service providers for public criticism. This is the balance that we would favour. For more details see our separate comparative analysis, provided with this response (annex A).

Q6. Regarding issue 5, do you have any view on the form of publication? If so, what do you think would be advantages or disadvantages of the different options we mention?

It is difficult to answer this question before the Legal Ombudsman publishes further details regarding the type of data it intends to publish.

If the Legal Ombudsman chooses to publish the details of each case, or even just those where a remedy is provided, this would create a large amount of data which would be difficult to analyse. Publishing summaries would go some way to resolving this issue. However, summaries would need to reflect fairly the outcome of a case and this may prove difficult to achieve to the satisfaction of all parties. There is also a large cost associated with creating summaries which will be paid for by the profession and ultimately clients. Thus the Legal Ombudsman will need to carry out a full cost benefit analysis of this aspect of their approach.

We have already noted our concerns about publishing league tables given the difficulties of putting such data in context. We believe that it will be near impossible to publish any meaningful form of such a table.

We have noted that we believe that cases studies would prove useful both to help clients to understand what they can expect from a solicitor and the Ombudsman and to guide solicitors in settling complaints.

Q7. Are there any other points or issues you wish to raise in relation to this discussion paper about publishing our decisions? Do you think we have missed anything? Is there anything you disagree with? Please give your reasons.

We believe that any proposals should be subject to a full cost benefit analysis and a robust equality impact assessment.