

April 2011

Next steps consultation paper

Publishing our decisions: an evidence based approach

The logo for the Legal Ombudsman features the word "LEGAL" in a pink, serif font, with a large, stylized pink flourish above it. Below "LEGAL" is the word "OMBUDSMAN" in a black, sans-serif font.
LEGAL
OMBUDSMAN

Summary

The Legal Services Act allows us to publish reports of our investigations and determinations. We published a discussion paper on this topic in September 2010, asking you generally what sort of information you thought we should publish and particularly what you thought about us identifying individual law firms. We also asked two independent research companies to conduct some research on our behalf and held several panel debate events

We'd like to thank everyone who participated in the first stage of our consultation on this issue. Based on the evidence received, we have now decided what we think it is appropriate for us to do next. This paper summarises our preferred approach to publishing our decisions, 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

We would like to invite you to input your views on our preferred approach. Please send your comments and suggestions to: consultations@legalombudsman.org.uk by 30 June 2011

If you want to find out more about the responses we received as part of the first stage of our consultation, you will find feedback on this in appendix one.

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1 Introduction

The Legal Services Act allows us to publish reports of our investigations and determinations. We published a ‘discussion paper’ on this topic in September 2010, asking you what sort of information you thought we should publish and particularly what you thought about our identifying individual law firms. We also asked two independent research companies to conduct some research on our behalf and held several panel debate events. We made it clear that we had not yet made our mind up, and that we would consider all responses and evidence before putting together some firm proposals and consulting our stakeholders for a second time.

This paper describes the approach we have decided on, based on the evidence received. It also explains how you can continue to contribute your views and suggestions to help us develop our approach further.

It’s important to mention that the responses to the first stage of the consultation revealed that there are some aspects of our approach to publication on which there is very strong agreement. In these areas, we have therefore decided to go straight ahead with what you told us, as we see no reason to consult again on issues you all seem to agree on. However, there are other aspects of our preferred approach that we know are more complex, and so we would like to ask you again for your input in these specific areas.

2 The thinking behind our preferred approach

1.1 Legal basis

The Legal Services Act 2007 allows us to publish reports of investigations or Ombudsman decisions if we consider it “*appropriate to do so in any particular case*”. In deciding on what we consider to be ‘appropriate’, we are guided by the regulatory objectives in the Legal Services Act which include:

- protecting and promoting the public interest;
- protecting and promoting the interests of consumers; and
- encouraging an independent, strong, diverse and effective legal profession.

1.2 Good practice

In addition to the regulatory objectives set out above, we also take into account the principles of the British and Irish Ombudsman Association (BIOA)¹, which say that good Ombudsman schemes should:

1. Establish measures to feed back information and systemic advice;
2. Give feedback to organisations on their performances at periodic intervals;
3. Be aware of the wider public benefit that they can provide, including adding value for stakeholders such as by holding organisations to account for the ways in which they deal with people and respond to their complaints; and
4. Ensure that learning is widely spread across the sector and generally raise standards.

1.3 Our principles

We have developed six principles which we want to take into account when we decide how to approach publishing our decisions. These are based on the regulatory objectives and BIOA principles set out above, as well as on our own organisational values. We asked for views on these principles as part of the first stage of our consultation on this issue, and as the vast majority of respondents agreed with them, we have decided to continue to use them to guide us in our thinking. They are:

- Openness
- Being clear about how we work
- Helping lawyers

¹ British and Irish Ombudsman Association. (2007). 'Guide to principles of good complaint handling. British and Irish Ombudsman Association'.

- Helping consumers
- Publishing the right amount of information
- Managing the impact on the legal profession

1.4 Responding to opposing views from stakeholders

The evidence we gathered showed general consensus about some aspects of our approach to publication, in particular the vast majority of our stakeholders agree that we should publish anonymous information about our work. However, as we expected, we found opposing views amongst our stakeholders regarding the question of whether we should identify lawyers or firms. Broadly, representatives from consumer bodies strongly support our systematically publishing information that identifies individual lawyers or firms, whereas the legal profession strongly oppose us doing so. Although there are some important exceptions to this, the overall disagreement leaves us with a difficult decision to make.

We have decided to go back to our principles to help us to make this decision. This means that our starting point is that we want to be open, and we want to follow our principles of providing information that will help consumers and lawyers. However, it also means that we want to balance this against the need to manage the impact on access to justice, and ensure that what we publish is meaningful and useful for our stakeholders.

1.5 A staged approach

We have therefore decided that our preference is for a staged approach. We consider that this is in line with our principles, as it will allow us to quickly begin to publish information that will enable us to be open about how we work and that will help lawyers and consumers. However, it also means we can take the time needed to gather the evidence required to develop some of the more difficult aspects of our approach, such as whether we identify law firms or lawyers.

In implementing a staged approach, we make a commitment that, once we decide to publish a certain type of information, we will not go back on it. This means that at each stage, we will take care to make fair and evidence-based decisions that are in the interests of the legal services sector as a whole.

The following sections of this paper set out how this staged approach will work, explaining the decisions and actions we hope to take at each stage and the issues we invite you to comment on.

3 Stage one: to begin as soon as possible

Publish anonymous case studies that are based on real cases.

How we will implement this stage

We will regularly produce case studies that are useful for learning purposes, by selecting cases that are examples of particular types of common complaints or trends. We will include cases resolved both formally and informally, and where remedies are awarded and where they are not. We will also take care to select a range of cases that reflect the broad range of work we do, including the areas of law, types of complaint and types of lawyer that we deal with. By setting up a search system on our website, it will be possible to search for case studies according to the type of complaint and whether a remedy has been awarded.

Why we have decided this

The responses to the consultation show almost universal support for anonymous case studies. Case studies will allow us to help consumers to learn what to expect from their lawyers and from us, and will help the legal profession to raise standards in service.

As the responses to the first stage consultation show so much support for anonymous case studies and statistics, we have taken the decision to proceed with this stage as soon as possible. However, we would still welcome any comments or suggestions from you about the types of case studies you would find most useful and how the search function might work.

4 Stage two: to begin in summer 2011

Publish anonymous summaries of all cases that are resolved formally by an Ombudsman decision.

How we will do implement this stage

We will produce a standard format for summarising all cases that are resolved formally by an Ombudsman decision. We will ensure that the summaries include enough detail to help people to understand how our Ombudsmen make decisions and the key facts and context of each case. We will also include details such as the remedies awarded, by using financial bands to illustrate the level of financial award involved in different types of cases. However, we will take care to anonymise the summaries so that names and geographical locations are not included, and any other personal details which might make it possible for individuals to be identified are removed. A search system on our website will enable the summaries to be searched according to the type of complaint and whether a remedy has been awarded.

Why we have decided this

The responses to the first stage consultation show that most of you support our publishing anonymous case summaries and that you are particularly interested in the formal decisions that we make. By publishing summaries of all the formal decisions we make, it will help to show how our decisions are made and this supports our principle of being clear about how we work and helping lawyers to learn from complaints and improve their practice. By including complaints where our Ombudsmen find that no remedy needs to be awarded, we will also be demonstrating what good service looks like.

We have decided to publish summaries rather than full Ombudsman decisions, because the independent research we commissioned showed that most consumers supported us publishing brief information.

As the responses to the consultation show strong support for anonymous case summaries, we have taken the decision to proceed with this stage in the summer. However, we would still welcome any comments or suggestions from our stakeholders about the format of

case summaries you would find most useful, and again, how the search function might work.

5 Stage three: until February 2012

Track our data over nine months, and use this information to decide whether we should consider adopting a policy of publishing information that identifies law firms or lawyers.

How we will implement this stage

We will use our existing reporting tools to track certain types of complaints and law firms through our system over the next nine months (including this period of consultation). In general we will track against firm name; however for some lawyers, such as barristers and sole practitioners, the tracking will be against the individual's name as there is no wider firm.

We plan to focus on the types and numbers of firms that fall into certain criteria that we have developed, based on the responses and suggestions received in the first stage of the consultation. The criteria are:

1. firms involved in cases that our Ombudsmen consider indicate an exceptionally severe degree of service failure;
2. firms that our Ombudsmen consider have demonstrated particularly good practice in resolving a complaint;
3. firms that our Ombudsmen consider have a very exceptionally high level of complaints given the size and nature of the business;
4. firms involved in complaints that are resolved formally;

5. firms with more than three complaints where a remedy is awarded in a twelve month period;
6. firms involved in complaints where a remedy is awarded; and
7. firms with more than three complaints investigated by us in a twelve month period.

It's worth noting for clarity that the decision to publish would be for us, the Office for Legal Complaints, and not an individual Ombudsman.

We will look at the types of firms that would be affected if these criteria were used, and this will include considering what the potential impact on these firms might be if they were identified individually, and whether we think there might be any wider consequences on access to justice. We will also share the (anonymous) data we gather with approved regulators, who we hope will be able to tell us more about the firms that would be affected, for example by telling us what bands they fit into in terms of financial turnover and number of transactions per year so we can see if this is relevant context to add.

In early 2012 we will invite a selection of our stakeholders to a workshop to review all the anonymous data we have tracked. Following this we will make a decision about whether we should identify firms or not, and if so which criteria would trigger publication.

If we did decide to adopt a policy of identifying individual firms, it is likely that the first stage would be to identify firms (or lawyers) where we felt it was in the public interest to do so (in reference to the first three criteria listed above). Following this, we would consider applying other criteria. We would want to identify law firms rather than individual lawyers as far as this is possible, and we will not publish the identity of firms involved in complaints that we investigate before we decide on the policy.

Why we have decided this

Whilst there is strong support among consumers for us publishing information identifying individual law firms, there are also many concerns about this approach expressed by the legal profession. Although in our view some of these concerns may be overstated, we do think there is a need to obtain more substantial data in some of

these areas, in particular to test out the numbers and types of individual firms that would be affected by a policy of identification. This will allow us to consider whether there might be an impact on particular fields of law or types of firms, and in turn whether this could result in reduced access to legal advice for some consumers. By allowing time to track our data, we will be able to make a more informed decision about our approach to identification based on clear evidence.

We also think that before we set out our policy on identification, it will be helpful for lawyers to get a chance to see the decisions we are making through the case summaries we will be publishing in the summer.

We have developed the criteria to track based on responses to the first stage of the consultation. As well as general criteria for categorising cases, we are also proposing to look at criteria that identify circumstances in which there might be a public interest to raise awareness about a particular firm or issue.

What we need to know from you

As well as your general comments on our proposed approach, we would also like to hear from you about what data you think we should track and the criteria you think it would be useful to for us to consider.

Q1. Do you have any comments or suggestions about stage three of our approach?

Q2. What data do you think it would be most useful for us to track?

Q3. Have we proposed to track the right criteria? Do you have any other suggestions for criteria that could be used to trigger publication?

Q4. Once we have tracked our data, what do you think should be the basis of our eventual decision about whether we adopt a policy of identifying individual law firms?

Q5. Do you have any comments about the timetable we have suggested?

6 Ongoing review

We will regularly review the effectiveness of our approach. Although we have committed that once we publish a certain type of information we will not go back on this decision, we are also aware that we may need to adapt and fine-tune our approach as the legal market changes in the coming years.

7 How to respond

If you would like to send through your views on our preferred approach to publishing our decisions, our contact details are below. If possible, please send your responses electronically but hard copy responses by post are also welcome.

The deadline for receiving responses is 30 June 2011.

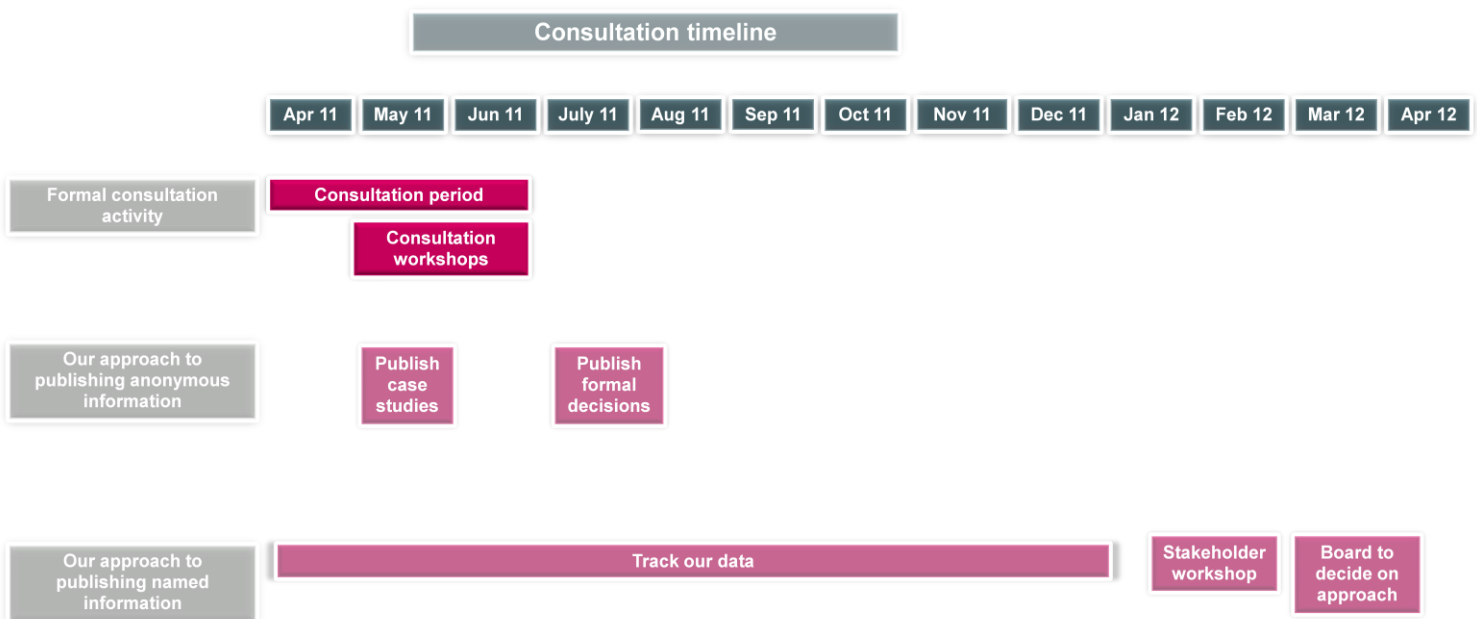
Email: consultations@legalombudsman.org.uk

Post: Janet Edwards
Legal Ombudsman
PO Box 15871
Birmingham
B30 9ED

Please note that we plan to publish all responses we receive in relation to this consultation paper. Unless you tell us you do not want your views published, we will assume you are happy for us to do so. We will discuss any concerns you have with you about publishing your response and are happy to be flexible in individual cases. If you would prefer not to have your response published we may note that you did not consent for publication.

If you would prefer to input your views in other ways, please let us know. We would welcome opportunities to meet people and organisations who are interested in commenting on our preferred approach in more detail, and we plan to run a series of regional consultation events too.

8 Consultation timeline



9 List of consultation questions

Q1. Do you have any comments or suggestions about stage three of our approach?

Q2. What data do you think it would be most useful for us to track?

Q3. Have we proposed to track the right criteria? Do you have any other suggestions for criteria that could be used to trigger publication?

Q4. Once we have tracked our data, what do you think should be the basis of our eventual decision about whether we adopt a policy of identifying individual law firms?

Q5. Do you have any comments about the timetable we have suggested?

Appendix one: feedback to our stakeholders on our first consultation

1 The responses and evidence we received

We received the following evidence as part of the first stage of our consultation on this issue:

- *32 written responses*: just over half of these were from the legal profession (law firms, representative bodies and regulators), around a third were from individual consumers and consumer groups, and the remainder were from government bodies and the press.
- *59 participants in the interactive consultation*: these included participants in three regional ‘panel debate’ events involving electronic voting, and a few people who gave their views by phone or in a web chat.
- *Two pieces of independent research*: focus groups with 58 consumers and interviews with 15 high street lawyers.

This first stage of the consultation was very useful as an evidence gathering exercise, especially as many of the individual responses are very detailed and of high quality. We’d like to thank everyone who participated and told us what they thought.

2 Principles to guide us

Responses received

We set out a number of principles which we considered should be taken into account when deciding how to approach publishing our decisions. We are really pleased that most of you agreed with these principles.

A few of you noted that some of the principles are likely to come into conflict with each other, and you suggested that certain principles should therefore have priority. For example the Association of Women Solicitors thought we should prioritise access to justice for the weakest and most vulnerable clients, and the Legal Services Commission thought we should prioritise being open.

The Bar Council mentioned that we should also seek to be predictable and accessible in our approach.

Our position

As the majority of you were happy with the principles we set out, we are continuing to use these to guide us in our decision making on this issue. We agree that there is some question about prioritisation, and this element of the debate has helped us shape the next stage of our consultation.

3 Impact on particular groups of lawyers

Responses received

Many of you told us that our approach to publication could impact on certain groups of lawyers and firms.

There was agreement that certain areas of law are likely to be complained about more and so are more likely to be affected by our decision to publish complaints. The areas of law mentioned included: family, immigration and publicly funded work. Several of you pointed out that in these areas "a loser will very often say it is the lawyer's fault, when obviously that is open to argument."

Several of you mentioned that there might be more complaints against small firms. You pointed out that such firms tend to be based outside of major cities, and BME groups tend to own and work in these types of firm. Some of you felt that the impact of complaints on small firms can be more significant; for example the Institute of Legal Executives pointed out: "even one complaint against a small firm can have a devastating effect on the firm's reputation and business".

The Law Society were concerned that if professional indemnity insurers had access to complaints data it might increase the costs of the insurance to certain types of lawyers and this could impact on diversity in the profession. Birmingham Law Society mentioned that lawyers working in areas funded by legal aid could be particularly affected; they were concerned that the wrong approach could "drive practitioners out of important areas of law upon which society as a whole is heavily dependent." An individual lawyer alerted us to a possible impact on larger firms who bid for public sector contracts; they felt that publishing complaints data might affect the business of such firms.

Some law firms were also concerned that there might be an impact on wider access to justice. They pointed out that firms might start to refuse cases from people they felt would be likely to complain in order to avoid having a complaint published. The types of consumers they felt who might be affected were those with mental health problems or social issues.

Finally, barristers felt that they would be particularly affected by our publications scheme, with the Chancery Bar Association explaining that: "the barrister, as an individual practitioner with a relatively small client base, would suffer far more from being named... than would other service providers."

It's worth adding that some of you felt that the effects described above could be exaggerated, for example the National Consumer Federation said "Whereas we acknowledge that publication could possibly impact unequally on particular groups of lawyers ... we do wonder if this is not overstated... "

Independent research findings

The high street solicitors that took part in the research said they were concerned that our approach to publication could impact on the reputation of local firms. Many raised the idea of what they described as the 'problem client' – a consumer who might purposely complain in order to damage a firm's reputation. The majority also thought there would be a larger impact on sole traders because they tend to

be known locally and rely on a smaller client base. Larger practices were thought to be better able to deal with complaints and so less likely to have a complaint presented to us. The solicitors we spoke to also raised the issue that damage to reputation could impact on whether solicitors were selected to be in lenders panels to conduct regular work relation to the home buying and selling process. They also argued that it might impact on professional indemnity fees and that firms might have to pay higher insurance premiums.

Our position

Having weighed up all the evidence, we can see that our approach to publication is likely to have an impact on the legal profession. There is a risk that it could have a disproportionate impact on certain types of firm or certain fields of law, and as a result it could reduce access to legal advice and assistance for some consumers. However, we also believe that the evidence in this area is limited – we cannot say from what we know, or what you have told us to date what the impact will be, as it is challenging to find robust evidence about the impact of an approach that has not been implemented yet.

We are keen to ensure that our processes are always fair, and so we are taking the time to gather more evidence on the potential impact of the different approaches available, before making a final decision about some of the more sensitive aspects of publication, such as identifying individual firms.

4 Issues to consider

Responses received

We set out five issues that we considered needed to be taken into account in developing our approach:

- Whether any information is published at all;
- The types of cases published;
- The levels of decisions published;
- Identifying lawyers and legal firms by name; and
- The form of publication.

We're pleased that all of you who commented on these issues, agreed that these were the right ones for us to think about.

Our position

We have decided to continue to look at these five issues. We set out the evidence received in relation to each issue in the rest of this paper.

5 Whether any information is published at all

Responses received

The first issue we asked you about was whether we should publish any information at all. We explained that we would like to publish anonymous information about our cases, but were interested in whether anyone disagreed with this as a starting point. A small minority of you did feel that the complaints process was a private one and that we should refrain from publishing any information about it. However, we are pleased that the majority of you agreed that it would be extremely valuable for us to publish this sort of information, with 88% of people who attended our panel debate events voting for this option. As the Chartered Institute of Patent Attorneys put it: "the benefits of publication include not only a more informed consumer of legal services, but also a more effective, and more consumer-oriented, provider."

Our position

We have decided to publish anonymous information about our cases. We plan to regularly produce case studies that are useful for learning purposes, by selecting cases that are examples of particular types of common complaints or trends. We hope this will help consumers to understand what to expect from their lawyers and from us, and that it will also help lawyers to understand how to raise standards in the service they provide. We have also decided to publish anonymous statistics about the numbers and types of complaints received, as we think this will help our stakeholders to understand the trends and patterns in the complaints made by consumers.

6 Identifying lawyers by name

Responses received

As we expected there was strong disagreement around the question of identifying individual lawyers and firms, with roughly an equal number of you for and against identification, some with very passionate views. If we count all consultation responses (including the electronic voting), there are very slightly more of you who think we should identify in some circumstances (around 53%). The only area of agreement is that if we do identify, this should be focussed on entities (i.e. firms) and not on individual lawyers, apart from in the case of sole practitioners where the individual may be identified by default.

In general consumers tended to be in favour of identifying by name; you highlighted the desire for us to be open in our work and how identifying would help you to choose a lawyer and hopefully raise standards in legal services. One consumer said: *"it is essential to publish details of firms you have found against, as otherwise your decision could be just a minor irritation rather than a serious incentive to behave properly in future"*.

The Legal Services Consumer Panel said that the benefits to consumers far outweighed the costs, and reminded us of the current drive in society to *"harness consumer power enabled by the ability of the internet to spread word of mouth rapidly and on large scale"*. Meanwhile, the National Consumer Federation said: *"withholding information on firms complained about would deny consumers that access and restrict their ability to collectively play their necessary role in raising standards in the legal services market."*

Some of you mentioned the fact that information might get into the public domain anyway, for example Which? said they were concerned that: *"if there isn't more openness, then websites such as 'solicitors from hell' will just grow and grow; this is unregulated, unrepresentative and likely to be unfair and/or misleading to both lawyer and consumer"*. The Legal Service Commission argued that our complaints information would help them to do their job better so they have a full picture of the performance of the providers they use for publicly funded work. Guardian News and Media said that *"any restriction on the right to freedom of expression must be justified as necessary in the public interest, and our view is that the anonymising of complaints would be a disproportionate limitation on the right to information"*.

Conversely legal professionals tended to be strongly against identifying firms. Many of you argued that any data we publish would be misleading, for example you said that each case is very specific to individual circumstances so complaint records would not help consumers to choose good lawyers, and that whatever we publish would not be able to contain all the facts of each case and so it could be distorting. The Chartered Institute of Patent Attorneys was also concerned that we might be going beyond our remit if we were to start publishing information with the aim of helping consumers for select a lawyer, saying: *"there is a danger, if information published by the Legal Ombudsman is to be presented as a tool for selecting a legal adviser, that the Legal Ombudsman will effectively be providing a promotional opportunity for lawyers and legal firms to publicise their own achievements or their competitors' failures"*.

A number of you felt that identifying firms would be a form of 'punishment' for lawyers, and that it was unfair to name one party in a dispute and not the other. A few of you pointed out that it would be difficult for us to present information fairly, for example how would we distinguish between the seriousness of different complaints? Irwin Mitchell explained this further saying: *"it is easy to envisage a situation where the reputation damage caused by the publication of a complaint is out of all proportion to any finding made"*. Some of you also thought there might also be scope for misinterpretation, as larger firms are more likely to have more complaints than very small firms, but the data published might not be able to reflect this.

Several of you talked about the risk that identifying the lawyer might result in the complainant's name or personal details becoming public. Finally, some of you were worried about whether data could get misused by journalists who might publish it in the media or on the internet without the appropriate contextual information.

There were so many arguments and points made about this issue that we have only dealt with the most common ones in the text of this report. If you are interested to see a list of all the points raised, you might want to look at the table in appendix three.

Independent research findings:

The consumers who participated in our study were generally unaware of the Legal Ombudsman, and when told about us they did not expect us to publish the identities of individual law firms. Most had also never looked at the websites of other regulators or complaints handlers. However, when asked about it most said that they thought it would be a good idea for the Legal Ombudsman to publish the identities of firms

as it would raise solicitors' accountability, 'name and shame' persistently bad firms and could help consumers to choose a good solicitor. However, they mostly felt that it would be unfair to publish the identities of firms on the first complaint. Interestingly there was also view that consumers would be more likely to use the Legal Ombudsman's data if they could use it as a 'checklist': i.e. so they could search a list identifying all law firms in their local area, including those against whom no complaints had been made.

The high street solicitors who participated in our research were generally hostile to the idea of identifying law firms in our publications. They were particularly worried about losing control of the complaints made against them, and that if we did identify firms it might encourage 'problem' clients to complain in order to purposely damage the reputation of a firm. However, a small minority of the solicitors we spoke to were in favour of identifying as they thought it could improve the quality of service, and show clients that they were accountable for any mistakes or errors they make.

Our position

The strong disagreement in this area leaves us with a difficult decision to make. Our starting point is that we want to be open and share the learning from our work, as many people clearly think it would be useful for us to do this and it can be seen to be in the public interest. However, we are also mindful of the need to manage the impact of what we publish on access to justice, and to ensure the information we put out is going to be meaningful and useful for our stakeholders.

We have therefore decided not to make a decision straight away, but instead to track our data over nine months to enable us to make a more informed decision about our approach. By doing this, we will be able to get a better understanding of the potential impact of our approach on the market, and we can also start to think about the criteria that could potentially be used to trigger law firms being identified, if we decided to adopt this approach. At the end of the nine month period, we will decide whether we should adopt a policy of publishing information about cases that identifies individual law firms.

7 The levels and types of decisions

Responses received

Your views were mixed in this area. Some of you thought that all decisions should be published; saying that as there will only be a small number of formal decisions made it will not be representative to publish only these.

However, a slight majority of you (52% of those who attended the panel debate events) said that your preferred option would be for us to publish only formal decisions where a remedy is awarded. Frequently people mentioned that publishing complaints where no remedy is awarded could be seen as unfair, as it would still tarnish a firm's reputation even though they had done nothing wrong. The Bar Council also felt that informal resolution should remain confidential, as this type of mediation is more successful if it is kept private. Many of you also felt that there was a big difference between cases resolved formally and informally, and that only where a decision is imposed formally on a lawyer should it become public. The Law Society raised a different issue and asked us to consider the costs involved in publishing all cases, questioning whether the cost of collating information on all our cases would be justified.

A final view mentioned was that there might be some circumstances where it is in the public interest for us to publish certain information, for example when we identify really good or really bad practice. For example a lawyer participating in one of our panel debates thought we should consider publishing where it would be consumer detriment not to do so, saying: *"It may come out at some point that there have been 100 complaints about a particular firm, all of the same nature, and you will be asked why you have not told people about that"*.

Independent research findings

The consumers that participated in the research did not agree about this issue. Some felt that publishing names of firms where the complaint was dismissed was somewhat unfair as it could potentially stigmatise a firm or a solicitor who had been found not to have done anything wrong. However, others felt that only publishing the identities of firms where the complaint had been upheld could create the impression that the Legal Ombudsman was setting out to 'name and shame bad solicitors'. The consumers also did not agree about

whether we should publish only formal decisions or all decisions, as in general they were not especially concerned about whether complaints were resolved formally or informally.

The majority of the solicitors that participated in the research thought that we should publish only cases involving a remedy, but that both formal and informal decisions should be published. This is because they were concerned about creating a culture where larger firms did not play by the rules, offering consumers generous compensation in order to avoid a formal remedy.

Our position

We have decided to publish anonymised summaries of all formal decisions we make from summer 2011. Although we are keen to make sure we adopt an approach that allows us to publish information when it is in the public interest to do so, we have decided not to rush into a decision about whether we identify lawyers or not. Again, we will take the time to track our data over nine months so we have an understanding of what the different approaches would look like if we applied them to our existing caseload.

8 The form of publication

Responses received

Many of you supported the idea of us publishing case studies and reports; however there was some disagreement about what this might look like. Some of you thought that these should be quite brief in length, whereas others wanted them to be detailed so that people could understand the context of each case.

A good number of you liked the idea of us publishing tables of data, for example the Office of Fair Trading said they would “*recommend the data be presented in a format that facilitates making comparisons, based on performance, between different legal service providers*”. However, many of you said you were concerned that if data tables listed the names of firms, it might not be possible to provide the contextual information necessary for the information to be meaningful and fair to all types of law firm. The type of contextual information suggested included the number of lawyers in the firm and the area of law the complaint related to.

We also asked you whether we should have time limits for how long information is kept in the public domain. Many of you thought there should be time limits, and suggestions included two or three years and basing the time on the seriousness of the complaint.

Independent research findings

Consumers participating in the research said they felt that it was important for information to be easily searchable, particularly by local area (including local branches of large firms). They also like the idea of seeing some basic information in a table on a web page, and then being able to drill down to get more details about individual complaints. Most consumers did not want too much detailed information, as they were not interested in it and would not have time to read through long reports.

Solicitors participating in the research said it was paramount that any published information included enough detail about the context of each case. This was so that the reader could make a fair and impartial assessment of the complaint and that information could not be misinterpreted. They particularly requested that information should include: the size of the law firm, the seriousness of the complaint, an explanation of the role of the client, and a response from the solicitor. Most solicitors disliked the idea of presenting information in a table although thought it could be a good 'front page' to allow consumers to access more details about individual complaints.

Our position

As we have said, we have decided to publish anonymous case studies and tables of data, as there is clearly support for both formats. We will take the time to carefully consider the level of detail that should be included in published information, and will also make sure we include a good search function on our website so that all of this information is accessible. We are clear that the role of an Ombudsman scheme is to be independent and impartial, so we will focus on making sure that we always share our information in a fair and neutral way.

9 Other points and issues raised

We received some wider comments about our consultation and how we might approach publishing our decisions. The suggestions included:

- Publishing a statistic showing the number of complaints a firm has received per thousand clients – this was seen as fairer for larger firms.
- Offering firms the opportunity to make representations on the question of publishing their identity before the decision is made.
- Allowing three months before publication so that firms have time to bring a Judicial Review
- Publishing a list of all law firms operating in England and Wales, showing those with no complaints as well as those with complaints
- Postponing the decision until we have analysed our data for the first 12 months and have an idea about the types of cases that might fall into the different categories

Some of you raised specific points about the legality of our approach to publishing our decisions. We have sought legal advice in relation to all aspects of this consultation to ensure that we are aware of what we are able to publish. You can read our responses to these legal points below.

Response to the Law Society:

In its consultation response, the Law Society mentioned the possibility that if we were to publish the names of ‘innocent’ lawyers, this could be interpreted as defaming their professional reputation and therefore be a breach of the Human Rights Act (respect of private life). Our response to this is:

The issue only arises if we were to be publishing decisions in a manner by which the lawyer could be identified. That is not what we

intend to do at present. However, the legal point does call for a response now, in case the issue is reconsidered at some point.

Article 8 of the European Convention on Human Rights provides “Everyone has the right to respect for his private and family life, his home and his correspondence”. These rights are not to be interfered with by a public authority except “such as is in accordance with the law and is necessary in a democratic society in the interests of...national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The Legal Ombudsman does not find lawyers “guilty” or “innocent”. It investigates complaints within its jurisdiction and where applicable identifies appropriate remedies by way of redress.

If we report the outcomes identifying the lawyer then this deals with the question of how they have carried out their public functions in the administration of justice, often as officers of the court, on behalf of citizens or small organisations who are now dissatisfied with the service received. It is not a matter touching on their private or family life. Furthermore it is difficult to see how our decision is “defamatory” if it includes our decisions and reasons. The lawyer may neither like nor agree with our view, but that does not mean Article 8 is engaged.

We believe we are entitled, as a matter of law, to publish our decisions in a way that identifies the lawyer involved.

Response to the Chancery Bar Association

In their consultation response, the Chancery Bar Association were concerned that legal professional privilege could be broken if the complainant did not want information about their cases published. Our response to this is:

The first point to make is that the privilege is that of the client not the lawyer, and the client has chosen to raise the matter with us. If the referral occasions a waiver of privilege (which we doubt) then that was the client’s choice.

However we doubt that disclosure of our decisions will act as waiver of privilege. Firstly we are not identifying the client or details by which they are likely to be identified (see section 150 Legal Services Act).

Furthermore there are court decisions making clear that disclosures for the purposes of an investigation, such as a police case, the waiver is not more general.

We conclude that a complaint by a client intended to secure redress for poor service, the results of which are published in a form from which we think it is unlikely the client can be identified, does not constitute a waiver of professional legal privilege in the documents and information in the underlying transaction.

To take a different view would be to restrict publication to cases where the lawyer's client consented. This would fly in the face of the principles of openness, and the general principles of best practice in the field of ombudsman work, both of which we are enjoined by s. 116 and 117 to respect. Furthermore this alternative view appears to be in direct contradiction to the expectation of the Legal Services Act that we will be publishing details of our work, whilst respecting the complainant's anonymity to the wider world.

Appendix two: full list of respondents

Anthony Garrett

Association of Women Solicitors

Birmingham Law Society

C A Hughes

Chancery Bar Association

CIPA/ITMA

Consumer Focus

Fiona MacMillan

Guardian News and Media

ILEX Bar Standards Board

ILEX Professional Standards Ltd

Irwin Mitchell

Klaus Thymann

Law Society

Legal Services Commission

Legal Services Committee of the Bar Council

Legal Services Consumer Panel

Media Lawyers Association

National Consumer Federation

New Law Solicitors

Office of Fair Trading

Peter Seaman

Randle Thomas LLP

Robert Clark

Simon Rutherford

Sproul Solicitors

Stephen Scown Solicitors

Wards Solicitors

Which?

* Please note this list excludes one respondent who asked not to be named.

Appendix three: evidence provided by respondents about the pros and cons of identifying individual firms

PROS of identifying law firms:

Pros	Critique of the pros
<p>1. Named complaints information will help consumers to choose a lawyer:</p> <ul style="list-style-type: none"> • There is an information deficit in legal services compared to other sectors • Vulnerable clients need help to make informed decisions • Our research¹ found that many consumers support the publication of this type of data 	<ul style="list-style-type: none"> • It is not the Legal Ombudsman's role to help consumers choose a lawyer – if the Legal Ombudsman is seen as providing a promotional opportunity for firms it will go beyond its remit and purpose • There is a suspicion that information may be unwieldy and consumers may not to take the time to look at it • The information will be about a very small segment of the market and will not be able to include all the facts, so consumer choices could be inadequately informed • Our research² found little evidence of consumers visiting the websites of other regulators or complaint handlers.

¹ 12 focus groups with consumers commissioned by The Legal Ombudsman and conducted in December 2010 by an independent research company

² 12 focus groups with consumers commissioned by The Legal Ombudsman and conducted in December 2010 by an independent research company

<p>2. Named complaints information will help consumers to avoid employing 'bad' lawyers :</p> <ul style="list-style-type: none"> • The public have a right to know if a lawyer has been complained against in the past • If it came out that there were many complaints about the same firm, people will ask why they were not told 	<ul style="list-style-type: none"> • The Legal Ombudsman does not currently have adequate information about firm size and transaction volumes which would be needed to make data meaningful • Each complaint is very specific to individual circumstances so complaints records are not meaningful • It is difficult to distinguish between the seriousness of complaints • Certain lawyers will settle complaints which will skew the data • If the issue relates to an individual lawyer and they leave the firm, the firm will still be listed • Complaints listed per firm are not meaningful as they represent a small proportion of all cases managed by that firm • The Legal Ombudsman's decisions are not binary (there is no 'complaint upheld /not upheld') so data will be difficult to interpret
<p>3. This information will be published anyway on consumers' own websites or on solicitorsfromhell.co.uk and these sites could be misleading to consumers. The Legal Ombudsman must therefore make sure that information is regulated and published in a controlled way with appropriate contextual information.</p>	<ul style="list-style-type: none"> • The Legal Ombudsman will be seen as equivalent to solicitorsfromhell.co.uk and it will encourage other such websites to grow
<p>4. It will be an incentive for lawyers to improve their customer service.</p> <ul style="list-style-type: none"> • There is a climate of distrust in the legal profession and this will help to tackle it 	<ul style="list-style-type: none"> • There is no evidence that lawyers will learn more or improve their service if names are published
<p>5. There is a trend towards using the internet to harness consumer power (price comparison websites etc.)</p> <ul style="list-style-type: none"> • The Legal Ombudsman should be a part of this 	<ul style="list-style-type: none"> • There is no evidence that consumers will use this information • Our research¹ found that consumers do not currently expect

<ul style="list-style-type: none"> • Consumers will start to expect this information to be available 	<p>this information to be available.</p>
<p>6. Stakeholders such as indemnity insurers and banks would find such information useful</p>	
<p>7. It will enable news organisations to report to readers on matters of public interest in a fair and accurate manner.</p>	
<p>8. It is consistent with Freedom of Information Legislation:</p> <ul style="list-style-type: none"> • Other regulators and complaint handlers do it and so the legal sector should also be subject to the same scrutiny. • It will reduce the cost of responding to numerous Freedom of Information requests 	<ul style="list-style-type: none"> • Other regulators and complaint handlers do not name firms

CONS of identifying law firms:

Cons	Critique of the cons
<p>1. Named complaints information will have a negative impact on access to justice:</p> <ul style="list-style-type: none"> • Firms will refuse cases from people who they feel may complain, such as people with mental health problems • Firms may risk assess clients and potentially not take them on • Some firms may close and for in-demand areas of law this could lead to an 'advice desert' in certain localities 	<ul style="list-style-type: none"> • There is no robust evidence about this • Publication will improve access to justice by helping consumers to understand what good service looks like and how the Legal Ombudsman can assist them if they experience bad service
<p>2. Named complaints information will have a disproportionate impact on certain types of firm:</p> <ul style="list-style-type: none"> • Certain areas of law tend to create more complaints (family, immigration, litigation etc.) • Certain types of firms tend to work in the areas of law where more complaints are generated (BME owned, small firms) and so these will be more affected • People from some equality groups tend to practice in the areas most complained about. So publication may impact on diversity in the legal profession by deterring these groups from entering the profession or increasing the cost of their professional indemnity insurance so it becomes a barrier to practising. • Barristers will suffer more as they are individual practitioners with small client bases. • Multi disciplinary practices may be forced to discontinue certain areas 	<ul style="list-style-type: none"> • There is no robust evidence about this • Complaints tend to be about generic problems (delay, failure to keep informed etc) which do not relate to the area of law

<p>of work because of the effect on the practice as a whole.</p> <ul style="list-style-type: none"> • Firms with contracts with public bodies may be affected as public procurement looks at firms' complaint record 	
<p>3. Named complaints information will be unfair:</p> <ul style="list-style-type: none"> • It is not fair to name one party (the law firm) and not the other (the complainant) • Some legal service providers are not covered by the Legal Ombudsman but provide similar services, so it will lead to competitive disadvantage • It is not fair to name firms who make trivial mistakes and it is not possible to distinguish between the seriousness of different cases • Large firms will be disadvantaged as having a very small number of complaints will lead to publication and affect their reputation • Naming is a form of punishment, this is unfair as the lawyer will already have been made to comply with a remedy 	<ul style="list-style-type: none"> • It will only affect a minority of 'bad' law firms and not the majority of good firms
<p>4. Complaint data will not be meaningful:</p> <ul style="list-style-type: none"> • The Legal Ombudsman does not seem to currently have adequate information about firm size and transaction volumes which would be needed to make data meaningful • Each complaint is very specific to individual circumstances so complaints records are not meaningful • It is difficult to distinguish between the seriousness of complaints • Certain lawyers will settle complaints which will skew the data • If the issue relates to an individual lawyer and they leave the firm, the firm will still be listed • Complaints listed per firm are not meaningful as they can represent a small proportion of all cases managed by that firm 	<ul style="list-style-type: none"> • Perfect information is an impossible aim – it is important to think about the overall effect and the need for the Legal Ombudsman to be seen to be open • Named complaint data has been published successfully in other sectors (universities, hospitals) • The advantages of publication outweigh the disadvantages

<p>5. Other schemes do not name, particularly the Surveyors Ombudsman which is the most similar to the Legal Ombudsman</p>	<ul style="list-style-type: none"> • Many schemes do name, and the Surveyors Ombudsman is not necessarily the most similar scheme to the Legal Ombudsman
<p>6. It could encourage vexatious complaints and discourage complainants from settling</p>	<ul style="list-style-type: none"> • This should not happen if lawyers trust the Legal Ombudsman's processes to generate fair outcomes • Repeat complainants are a tiny minority
<p>7. It will put client confidentiality at risk:</p> <ul style="list-style-type: none"> • It risks very personal information about clients getting into the public domain, which is potentially a legal issue • If the complaint is against a firm in a small area, publication could risk the name of the complainant becoming obvious 	
<p>8. Journalists are likely to misuse the data by publishing without appropriate context.</p>	<ul style="list-style-type: none"> • Data can get into the public domain anyway • It is the Legal Ombudsman's role to make sure that information is regulated and published in a controlled way with appropriate contextual information.
<p>9. It will duplicate the work of the Solicitors Regulation Authority (SRA) – if a firm receives a large number of complaints this is a misconduct issue and so the SRA is likely to publish their name as part of their work</p>	<ul style="list-style-type: none"> • Naming should happen quickly, and it takes time for a misconduct case to be processed by the SRA and result in the firm being named
<p>10. It will be costly for the Legal Ombudsman to gather and publish this information.</p>	<ul style="list-style-type: none"> • This depends on the publication format
<p>11. The relationship between the Legal Ombudsman and the profession will suffer</p>	

12. It will affect the reputation, standing and respect of the legal profession generally

- The reputation of the profession is already affected by the number of complaints

