

FOIL

FORUM OF INSURANCE LAWYERS

the voice of the wider public interest

A Response by the Forum of
Insurance Lawyers to the
Legal Ombudsman's Next
Steps Consultation Paper on
Publishing Decisions

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FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL has over 5000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted following consultation with the membership.

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A Response by the Forum of Insurance Lawyers to the Legal Ombudsman's Next Steps Consultation Paper on Publishing Decisions

FOIL members have read with interest the next steps consultation paper on publishing decisions. This is an issue of significant importance to FOIL member firms, as it is to most lawyers.

FOIL supports the decision to adopt a staged approach on this issue. It supports the introduction of Stage One and Stage Two to provide information to the profession and to the public on the work and the decision making of the Legal Ombudsman.

Like many members of the legal profession FOIL has serious concerns about the proposals to identify firms and/or individual lawyers against whom complaints have been made or upheld.

Q1. Do you have any comments or suggestions about Stage Three of our approach?

It appears that the most important issue for the Legal Ombudsman in making a decision on publication is the disproportionate impact this may have upon particular types of firm doing particular types of work: that is clearly the rationale for gathering information on the type of firm coming before the LeO.

FOIL does not believe that this matter can be considered only from the point of view of the consumer or from the standpoint of access to justice. Law firms are not anonymous monoliths providing legal services in an impersonal vacuum: they are made up of, to a very large extent, of professional individuals who work hard to provide a good service, for whom a complaint is a serious matter. The identification of a firm, and especially an individual lawyer, will impact upon *any* lawyer who is responsible for an action which ultimately results in a complaint which is identified publically.

There is a real danger that public identification will cause disproportionate damage to the livelihood and reputation of a firm or an individual lawyer. We believe that, in addition to considering the impact upon consumers, the LeO's research should endeavour to identify what will happen to firms and lawyers who are identified. Will such firms find themselves identified in the press? Will solicitors from firms identified find it more difficult to move firms? Will inclusion on the list be used as an automatic filtering process for some types of client? Is there any experience in different jurisdictions or in different professions which could be used to examine the likely impact?

We do not believe that this issue is just about the collective impact. It is surely not appropriate to say, for example, that it does not matter if Firm X finds its business threatened after it appears on a list of firms with more than three complaints investigated against it over the year, because potential clients can merely transfer their instructions to Firm Y with no detrimental consumer impact. We believe that in this situation the individuals in Firm X have a right to be treated fairly and proportionately, and not have their reputation and business

damaged disproportionately for what may be relatively minor mistakes, or mistakes which occurred in a situation which has now been rectified.

We feel that the proposals do not sit well with the SRA's approach of outcomes focussed regulation. The SRA has indicated that it will seek to work with firms who fall down on regulatory requirements, and will be looking for good firms to show that they have rectified the position and have an ongoing commitment to avoid errors in the future. The approach outlined in Stage Three does not appear to place any weight on the response of firms who, for example, unexpectedly find themselves the subject of several complaints.

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

FOIL is concerned that encouraging consumers to rely upon the number of complaints as a mechanism for choosing a lawyer is a very blunt instrument. In our experience any firm can find itself the subject of a complaint, often without justification. The upholding of a complaint against a firm does not, of itself, indicate that the firm should be avoided by careful consumers. As part of the data gathering exercise we believe that it would be appropriate for the LeO to consider, in addition to its own data, other indicators of a poor quality firm, through liaison with the regulators and, where, possible, through the firm's professional indemnity record. Is there any correlation between firms which, for example, have been the subject of three complaints, and those which are clearly failing the public in other ways? In other words, are the firms falling within the criteria for public identification objectively "bad firms" or do they have other issues, for example, are they perhaps less skilled at handling complaints?

There is clearly a risk here that consumers will use any sort of complaints data as an overall health check against a firm. It would therefore seem appropriate for the LeO to investigate whether that judgment is reliable. If, in fact, the publication criteria do not identify "bad firms" in a more general sense, there is a risk that publication will be unhelpful for consumers and may be disproportionately damaging for firms and individuals.

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

Whilst we understand the rationale behind identifying firms which have demonstrated particularly good practice in resolving a complaint, bearing in mind that consumers are unlikely to consider the minutiae of the list, many firms will feel this is recognition that they do not wish to receive. We believe that this type of information should only be published in an anonymised way.

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?

As highlighted above, FOIL does not believe that a decision should be based purely on whether consumers want information on complaints or purely on the principle of transparency. FOIL believes that a more sophisticated approach should be adopted. How is the published data to be introduced?; will consumers understand the nature and context of an LeO remedy?: what conclusions will consumers draw from the inclusion of a firm on the list?; in general, will those conclusions be fair or disproportionate?; will publication actually provide more

protection to the public than at present?; are there other ways of using the complaints data which will provide more protection, but perhaps in a less headline grabbing manner?

As highlighted above we are concerned that publication may have a serious impact upon firms and individuals. Whilst it may be argued that the risk of that will encourage firms and individuals to take service and complaints seriously in order to avoid complaints, there is a real risk of unintended consequences here. Whether intentionally or not, identification of firms and individuals will almost certainly become a "punishment" as it is likely that public identification will cause damage to the firm or individual. FOIL believes that it would be inappropriate to inflict that harm unless the LeO is entirely satisfied that it does provide real protection to the consumer and is proportionate to the firm's error or omission.

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

Bearing in mind some of the issues which we believe the LeO should be considering, the commitment to publish a decision by March next year seems a tight deadline.