



Response from the General Council of the Bar to the Legal Ombudsman's Next Steps Consultation Paper (April 2011)

Background

1. In September 2010, the Legal Ombudsman published a discussion paper to consult on what it should publish.
2. We submitted a response. Our view was in summary:-
 - a. The Legal Ombudsman should publish some formal decisions in full, but anonymised, form in order to show the broad principles applied to resolution of categories of cases and their application in practice.
 - b. The Legal Ombudsman should not name individual lawyers or firms.
3. In April 2011, the Legal Ombudsman published a "Next Steps Consultation Paper". This is our response to the topics raised therein.

Summary

4. We welcome many aspects of the thinking now set out by the Legal Ombudsman. However, in one respect the proposals quite unnecessarily negate the benefits which are sought – that is, the proposal that the publication of anonymised formal decisions should be in the form of summaries drafted by the Legal Ombudsman, rather than the actual decision itself.

Why have publication at all?

5. In order to explain why the value of the publication of a decision depends on it being the actual decision (albeit with the names of the parties anonymised), it may be helpful to recall the reason why we previously argued that decisions should be published.

6. The Legal Ombudsman's determinations will, in some cases, involve significant financial orders against individual lawyers. The jurisdiction involves (a) compensation, subject to a limit of £30,000¹, and (b) repayment of fees, without any financial limit.
7. Unlike any previous disciplinary or regulatory powers affecting the legal profession, a payment order by the Legal Ombudsman is enforceable through the court system effectively in the same way as a court judgment².
8. In exercising these financial orders, the Legal Ombudsman is not required to assess liability in accordance with the law of England. The power of the Ombudsman to make a payment order is not confined to cases where the complainant may have a cause of action against the respondent for negligence. On the contrary, by s.137(1) the determination is to be on the basis of whatever the Ombudsman considers "fair and reasonable".
9. It is in accordance with the rule of law that the basis of such decisions should be known. This consideration was not mentioned at all in the Legal Ombudsman's earlier Discussion Paper, and so was developed in our response.
10. It is a facet of the rule of law that the law be in the words of Lord Bingham "accessible and so far as possible intelligible, clear and predictable". By s.1(1) of the Act one of the regulatory objectives is "supporting the constitutional principle of the rule of law".
11. Publication of decisions will promote accessibility, and will enable those outside the Legal Ombudsman's office to form a judgment on whether predictability and consistency are being achieved.
12. Another way of expressing the same aim is to refer to the first and second of the six principles which the Legal Ombudsman says is guiding him –
 - *Openness*
 - *Being clear about how we work.*

Why will summaries drafted by the Legal Ombudsman not achieve this objective?

13. There are two reasons why summaries drafted by the Legal Ombudsman will be inadequate to achieve the aim of accessibility:-

¹ We commented in our earlier paper that the Act contains a "Henry VIII" clause whereby the Lord Chancellor has a wide discretion to raise this limit, fettered only by features creating a bias in favour of increases. We commented also on the observable tendency for such limits in comparable situations to be raised much faster than inflation.

² s.141 of the 2007 Act.

- a. They will be only summaries.
- b. The author of the summary will be the Legal Ombudsman himself.

14. A summary is never a substitute for a full decision. That is so for a number of reasons:-

- a. Many decisions are fact-sensitive. To understand the basis for the decision and to form an independent judgment on its quality, one needs to know the full facts. These may be expected to be set out, in so far as they have influenced the decision-maker, in the decision. If they are abbreviated, the observer is denied the opportunity of independent judgment.
- b. Reasons are at the heart of the explanation of any decision. If the reasoning which has led to the conclusion is abbreviated, then again scrutiny of the decision is frustrated. Robbed of a full exposition of the reasoning, the observer's ability to assess whether the Legal Ombudsman is achieving consistency is diminished.
- c. Perhaps even more important: the practising lawyer is entitled to be able to predict what activity will incur the financial sanctions which the Legal Ombudsman has such wide power to impose. He is frustrated in his ability to do that, if he is denied access to the full reasons for past decisions.

15. The drawbacks of a mere summary become even greater if the summary is prepared by the decision-maker himself. Most judges, if asked to provide a short summary of their judgments, would be able to do so in terms which made them sound eminently reasonable; but occasionally higher courts find flaws in the judgments of even the best judges. Frequently, the flaw in the judge's approach is found by a detailed consideration of the judgment.

16. Take an oversimplified example to make the point. The summary may say, "The manner of which the barrister dealt with his client outside court was excessively formal, and left him feeling intimidated". That sounds a fair criticism. But if the detailed facts (omitted from the summary) were that the reasons the client felt intimidated was that the barrister was wearing a wig and robes and carrying a big pile of books, then observers might conclude that the decision-maker had insufficient understanding of the realities of life in the courts.

17. The principle of openness, which the Legal Ombudsman espouses, requires that the Legal Ombudsman himself be sufficiently open to enable informed evaluation, discussion and criticism of his office's work.

The flawed justification for summaries

18. The explanation offered by the Legal Ombudsman is:-

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.

19. We do not doubt that consumers like brief information. Whether consumers' desire for brief information entails information, albeit brief, on every individual Ombudsman case, is another matter. It may be that the kind of brief information which consumers want is at a higher level of generality than a summary of an individual case. If they do, then the brevity of information which consumers like will militate against the inclusion in a summary of the level of detail which lawyers will need to evaluate the decision-making of the Legal Ombudsman.

20. Be all that as it may, assuming that consumers want information on every case, but want it to be in brief form, the solution is obvious – publish both the full decision and the brief summary.

21. That approach would ensure that the quite different requirements of consumers and lawyers were both met by the publication practice.

22. Such a practice would not entail additional cost. It is inherent in what the Legal Ombudsman says that there will be a full decision, and presumably this will be sent to the parties. It is overwhelmingly probable that this decision will be on a word processor. The action of substituting "S" for "Smith" each time the name appears takes minimal time. Drafting the summary will add time to the time already taken in writing the decision, but that apparently is time which the Legal Ombudsman is happy to spend.

Comparable approaches

23. We urge the wisdom of the approach recommended by Lord Hunt of Wirral in his review for the Financial Ombudsman Service:-

I therefore recommend that the FOS should:

- *select and publish suitable decisions in full, but anonymised form...to show the relationships between the broad principles applied to resolution of categories of cases and their application in practice³*

³ Paragraph 5.20 Lord Hunt of Wirral's review (2008)

24. We draw attention also to the draft Financial Services Bill published by H M Treasury a few days ago which would insert a new s.230A into the Financial Services and Markets Act stating that Financial Ombudsman Service “must publish a report of any determination made”. This is subject to the complainant being anonymised, and a discretion not to publish all, or part, of a determination if the Ombudsman considers that it would be inappropriate to do so. The terms of this draft clause suggest to us that H M Government has in mind publication of the full (albeit anonymised) decision, not a brief summary.

Naming Lawyers

25. We made it clear in our earlier Response that we support the policy which the BSB has practised – namely, publication of the names of barristers if found guilty of professional misconduct, but not those who are guilty of no more than inadequate professional service. That is to say, the BSB policy has been to publish names in the more serious cases, but not in the less serious. The reason we suggested a simple policy on non-naming by the Legal Ombudsman was only because Parliament chose to withdraw from the Legal Ombudsman’s jurisdiction professional misconduct cases.

26. We now note that the Legal Ombudsman proposes to defer a decision on naming lawyers, and to reconsider the matter after 9 months experience after “tracking data” during that time. This seems perfectly sensible, and we are very happy to express support for what is proposed. We offer only a few comments.

27. It is suggested that a criterion which might guide the selection of persons to identify is those,

with more than three complaints investigated by us in a twelve month period
(emphasis supplied)

We hope that this actually meant to say,

with more than three complaints found proved by us in a twelve month period
(emphasis supplied)

We would be troubled by a policy of treating acquittals as black marks on a barrister’s record. It is worth reminding the Legal Ombudsman again just how vulnerable barristers are to client complaints. No other profession or service provider undertakes work which by its

nature leaves so many people unhappy. One side loses every case in court, and few people take their case as far as a contested hearing without believing in the rightness of their own position.

28. In response to the question what data should be tracked over the next 9 months, we suggest the factors which we previously mentioned. They are :-
- a. Whether the complaint related to a hearing in court. This is a potentially relevant factor because if the barrister is named, the case may be identified and the client's anonymity blown.
 - b. Whether the complaint relates to legally aided fields of work where the low level of fees is already a factor discouraging barristers from undertaking socially necessary work. This applies in particular to criminal and family cases.
 - c. Whether the complaint is one likely to attract only a small, if any, payment in compensation. This is relevant because if a barrister risks publication of his name on the internet upon a formal adverse finding by the Legal Ombudsman, there may be heavy pressure to settle a baseless complaint. Such a trend would encourage proliferation of baseless complaints if clients – and one has always to remember what a high proportion of the Bar's work is for criminal defendants – discover that a complaint to the Legal Ombudsman is an easy route to money.
 - d. Whether the complaint is one where a barrister, although personally blameless, accepts responsibility for a mistake by his clerk.
 - e. The nature and gravity of the conduct complained of. This is relevant as it may invalidate our assumption that serious complaints will of necessity be outside the jurisdiction of the Legal Ombudsman.

29. We hope that the Bar will be amongst the "stakeholders" selected to be involved in reviewing the data assembled over the first 9 months of experience. We note that it is proposed to invite selected persons to a "workshop": it is important that data is made available in advance so that it can be properly studied, not just placed on a table at one short meeting.

30. We note that the independent research by the Legal Ombudsman involved 58 consumers and 15 "high street lawyers". We assume that "high street lawyers" means solicitors. We venture to express the hope that the Bar, which will potentially be very much affected by the work of the Legal Ombudsman, will not be excluded from future independent research.

Conclusion

31. We regret that the many positive features of the Legal Ombudsman's proposals are spoiled by the plan to restrict publication to summaries prepared by the Ombudsman himself, and most strongly urge that the actual decisions (in anonymised form) be published, in addition, if wished, to a summary intended to meet the consumer interest in brief information.