

Discussion paper: September 2010

Publishing our decisions

LEGAL
OMBUDSMAN

Summary

The Legal Services Act gives the Legal Ombudsman the power to publish reports of our investigations and determinations. We are therefore considering what sort of information we will publish, and particularly whether we should identify lawyers and firms when publishing the outcomes of investigations.

This is a contentious issue, and we are conscious of the need to balance being open and transparent with the impact on individual lawyers and firms. Publishing detailed information about our decisions might help consumers of legal services and drive up quality in the sector, but we also need to think about how we uphold our responsibility to provide a fair and independent Ombudsman scheme that does not have a disproportionate impact on certain parts of the profession.

This discussion paper forms the first stage of our consultation process on this issue. At this stage we have no firm proposals - we simply want to ask for views and ideas on how we might approach publishing our decisions. We will also be holding some workshops and conducting a piece of consumer research.

We are hoping to hear from anyone interested in or affected by the operation of the Legal Ombudsman, especially consumers of legal services, legal firms and lawyers, regulatory and representative bodies and consumer organisations.

Once we have reviewed the responses to this stage of the consultation, we will be able to put together a series of options for how we might approach publishing our decisions. We will then consult our stakeholders for a second time.

We hope that this discussion paper will help you to think through some of the issues, and we encourage everyone with an interest in this area to send in written responses to the questions in the document. If you would like to submit your views, please send them to:

consultations@legalombudsman.org.uk by 23 December 2010

Introduction

The Legal Ombudsman is being set up by the Office for Legal Complaints (OLC) under the Legal Services Act 2007 as an independent, impartial, 'single-point-of-entry' Ombudsman scheme for consumers' legal complaints.

When the then Government was considering establishing this new scheme, it stated that a central role for the new body would be to share information about complaints with consumers. In the 2005 White Paper, *The Future of Legal Services: Putting Consumers First*, it was argued that consumers might benefit from the Ombudsman making information available about complaints. The view was that this could be a useful source of information for consumers about the quality of legal services.

The Government strongly supported the principle of informing the public about providers' performance, urging our new scheme to make information accessible to consumers while maintaining the level of detail and sophistication necessary to make it genuinely meaningful. Government then stated that the Legal Ombudsman would be best placed to decide how to do this most fairly and effectively

The Legal Ombudsman will begin to take complaints from consumers in October 2010, and so we are now considering what our approach to publishing our decisions will be. Our starting point is the Legal Services Act, which allows us to publish a case (or a report of it) if we consider it appropriate to do so, and this includes naming the lawyer or firm involved. We know that the approach that we take on this issue will become a key aspect of our business process and our overall approach to resolving complaints.

This is a contentious issue, as identifying individual lawyers and firms by name could have an economic or reputational impact for them. However, we also recognise that there is a general thrust towards openness and transparency in the public sector, and the Freedom of Information Act requires us to ask the question – why not publish? We are clear that a balance needs to be found, and we hope that we can find this balance together with our stakeholders.

This discussion paper is about our overall approach to publishing our decisions, which includes the question whether we publish data that identifies lawyers and firms by name. The paper outlines the background to the subject, and then looks at the principles and issues that we think it important to consider. It focuses on promoting discussion and debate, rather than offering a technical overview of options. This is because this is the first stage of our consultation process on this issue, so we have no firm proposals, and simply want to ask for your general views and ideas. We will use the responses we receive to inform

the second stage of the consultation, in which we shall set out a number of clear options for your comment.

The context

In deciding on our approach to publication, we need to consider the context in which we are working. We have set out some of the most important aspects below.

The Act

Section 150 of the Legal Services Act 2007 states that we can publish reports of investigations or Ombudsman decisions. Whilst the Act allows us to publish reports if we consider it “*appropriate to do so in any particular case*”, it is good practice to set out in advance the criteria that would be likely to trigger publication.

The Act also sets out the limitations on the powers to share and publish information about complaints. Importantly, the Legal Ombudsman is not exempt from Freedom of Information and Data Protection legislation, and the Act sets out how this legislation applies to us. We are currently developing a Publication Scheme that follows the approach recommended by the Information Commissioner.

Finally, it is important to mention that the Act prohibits us from publishing the name of a complainant or any details which might mean a complainant is able to be identified, unless the complainant consents to this. We shall take care to ensure that we do not breach these requirements.

Learning from other schemes

The Act asks us to look to good practice by other Ombudsmen to inform what we do. We take this obligation seriously and have looked at how other schemes publish reports of cases. An overview of the approach taken by different schemes can be found in Appendix 2.

Although we have looked at other Ombudsman schemes, we are also clear that the legal services market can be distinguished from other markets, and so it is not necessarily appropriate to follow the detail of their approaches. For example, the financial services market is dominated by a few very large players, whereas the legal services market is much more disparate.

It is particularly interesting to look at the approach taken to other schemes regarding the issue of naming individuals and firms. At present the Financial Ombudsman publishes accumulated statistics about cases that relate to one of the 150 individual businesses that make up 90% of its caseload, and this includes identifying businesses by name. In contrast, the Surveyors Ombudsman scheme, which receives a wider spread of practitioners each with fewer complaints, publishes only anonymised decisions.

Sharing information with other Ombudsmen

Our scheme rules set out how we can carry out joint work with and/or share information with other Ombudsman schemes. We are also looking to put in place Memoranda of Understanding with other Ombudsman schemes that set out clearly how we will work together and share information appropriately. The use of these information sharing powers is not covered by this consultation.

Principles to guide us

There are a number of principles which we consider should be taken into account as we decide how we approach publishing our decisions. These are described below.

Openness

There is a general thrust towards openness and transparency in the public sector. Openness can add a welcome layer of scrutiny from independent sources. For example, as Ombudsman schemes do not normally hear cases in public (unlike the courts), being open about decisions encourages debate among stakeholders such as consumer advisers and academics.

Other Ombudsman schemes are also reviewing their approaches to publication and naming, and there seems to be a trend towards publishing more information and being more open.

Being clear about how we work

The British and Irish Ombudsman Association requires Ombudsman schemes to make information available to explain how their service operates. For us, this involves helping consumers and lawyers to understand the application of our rules and policies and the reasons for the decisions that we make and remedies that we use. We are keen to make sure we uphold this requirement effectively.

Helping lawyers

The Legal Services Act asks us to contribute to improving access to justice and to encourage a strong and effective legal profession. It is also part of our role as an Ombudsman scheme to do more than simply deal with disputes, by being part of a mechanism for improving performance in the profession permanently. We think we can do this by showing the profession where common customer services failures tend to occur and how these can be systematically reduced through improved practice. To achieve this, we need to decide what sort of information lawyers may find valuable.

Helping consumers

As well as helping lawyers, we also want to use the information from our work to help consumers to understand what good quality legal services look like. This will help us to contribute towards promoting the interests of consumers and also to improving access to justice. One way in which we may be able to help consumers is by assisting them to choose a legal service provider. For example, it might be that publishing the outcomes of our decisions and identifying the lawyers and firms involved could give consumers more confidence and help them to make an informed decision. However, we need to be sure about exactly what sort of information consumers would find helpful and how they might use it.

Publishing the right amount of information

The British and Irish Ombudsman Association requires Ombudsman schemes to adhere to the principle of proportionality in the way that they work. When applied to our approach to publication, this means that we need to be aware of the pitfalls of publishing too much information as well as too little. We need to make sure that we focus on publishing what is helpful for consumers and lawyers.

Managing the impact on the legal profession

We are aware that our approach to publishing our decisions, and particularly to naming lawyers and firms, could have an impact on access to redress. This is because certain areas of the law, such as immigration, mental health, family, or criminal law, through their emotional and contentious nature, are likely to generate more complaints than other areas. Firms operating in these areas might hesitate to take on cases seen as contentious or clients who may be seen as potentially challenging, not wanting to incur the risk of accumulating complaints and a record of published decisions. This may be particularly true for small law firms, sole practitioners or barristers, whose economic viability may be

more vulnerable and who will therefore be particularly concerned about risk to reputation.

We need to make sure that we are aware of the impact our scheme has on the profession, and mitigate any negative impacts as far as possible. We plan to produce an equality impact statement following the responses to this consultation and would be interested in your views about these issues and any evidence that you are aware of.

Q1. Do you agree that these are the right principles to guide us in thinking about publishing decisions? Please give your reasons.

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 the 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 us measure any impact.

Building the evidence base

We want to make sure that we consider relevant evidence and research that might help us to decide on the best approach to publication.

Previous research studies

In order to understand the current context, we looked at some previous research findings to see if they would help us understand how people choose a lawyer when they need one. If a key aim of giving the Legal Ombudsman the power to publish is to assist consumers to understand what good legal services look like, then we need to explore whether or not publishing decisions would assist them in choosing a lawyer, and then in working effectively with a lawyer during the course of their business.

Research by MORI in 2004 (*Attitudes Towards Alternative Business Structures*) looked generally at perceptions of legal services. Its broad conclusions support the principle of naming as a mechanism to enable consumers to understand the standard of service provided by lawyers, and to promote quality in the profession.

Other research conducted by the Solicitors Regulation Authority (SRA) found that that 84% of clients choose their solicitor on recommendation, and only 6% choose by reference to a solicitor's practicing history. Together this research raises the question whether publishing the outcomes and the names firms

involved in specific cases might be of assistance for people in either affirming a recommendation or as a contra-indicator.

More importantly, this research indicates that additional information in the public domain that can assist consumers become more sophisticated in their approach to engaging with legal services, should help improve standards across the profession for the benefit of everyone. The key seems to be to find a way of giving sufficient contextual information about a case in a way that is not overwhelming, and which avoids unforeseen adverse consequences to help people make informed decisions about using legal services.

This research is persuasive but not definitive. We would be interested to hear about any other research you know of that might help inform our approach to this issue.

Our own research

In addition to the existing research findings, we have decided to commission some independent research to allow us to better understand what information, if any, our Ombudsman scheme could publish to help consumers have greater confidence when using legal services.

Our broad aim in commissioning this research will be to add to the pool of evidence available to our Board in making a decision about what the approach of the Legal Ombudsman should be in this area. Access to objective evidence in the public domain will be important to ground this debate, and we hope to conduct this project in partnership with the Legal Services Consumer Panel.

We are especially interested to find out from high street lawyers, smaller firms and barristers what they think about this issue. We know from historic complaints data that we are likely to receive most complaints about firms with between three and 11 partners, and we are also aware that some barristers may also be particularly impacted by any decision to publish complaints. It is therefore important to find ways to ask these groups what they think.

The proposed objectives of the research will be to understand from consumers and lawyers what they see as the advantages and disadvantages of publishing information about Legal Ombudsman cases that identify the lawyer or firm involved. We also want to understand:

- from those that see a potential benefit, what they believe would be valuable and how information could be presented to ensure it is fair and useful;
- from those that see no benefit the reasons; and

- any potential unintended or adverse consequences of publication.

The Legal Complaints Service has shared with us the findings of the research it commissioned from NOP when it considered publishing its complaints data in 2008. The findings reveal a general wariness on the part of the solicitors' profession about the potential adverse consequences of publication, but they also show that there is some support among solicitors for publishing this information. The findings also indicate that consumers are in favour of publication for reasons of openness and transparency. Interestingly, the research did not seem to indicate that consumers saw a clear practical use for this information in choosing a lawyer, though many stated it would be a useful contra-indicator.

Our research proposal aims to build on this and other research rather than duplicate what already exists. We will look to receive findings from the research to coincide with the second stage of our consultation on this topic, which we will run following the response to this discussion paper.

Issues to consider

Here we have tried to set out the different issues that we think are most important to consider when deciding on our approach to publication.

We have identified five main issues:

Whether any information is published at all.

The types of cases published.

The levels of decisions published.

Identifying lawyers and legal firms by name.

The form of publication.

We are aware that these issues are interrelated, but to keep this paper clear and the responses manageable we have addressed them separately. At this stage we have no preferred way forward. We simply want to hear views and ideas to help us to build up a set of reasoned options that we can ask you about in the second stage of the consultation.

Issue 1: Whether any information is published at all

The first issue is whether we should in fact publish anything at all.

Here we do have a view. Practice, precedent and the principles we have set out support the publication of statistics and anonymised case studies at the very least. Case studies would benefit consumers and lawyers by providing a minimum level of information about how we work and what they can expect from our service. Additionally, the Legal Services Act specifically gives us the option to publish the outcome of a case if we believe it is appropriate to do so. To decide not to publish anything at all would not, it seems to us, be a viable option, but we would be interested in any arguments which may persuade us otherwise.

Issue 2: The types of cases published

If there is to be some publication, we then have a choice between publishing the outcomes of all cases or limiting publication only to those cases where a consumer received a remedy.

If all cases are included regardless of outcome, consumers and lawyers would have information from cases to assist them learn from the experiences of others. In addition, publishing all outcomes gives balance and context as well providing the basis for fostering academic debate and discussion which may help promote standards within the profession.

Alternatively, if we only publish those cases where a remedy has been provided, this would mean we would be focussing on those cases where there may be some learning that can be used to help drive up standards across the profession.

The disadvantage of publishing only those cases where a remedy has been provided is that it risks us being perceived as publishing in order to punish lawyers or firms. Our aim in considering publication is to promote openness and transparency and make available information that would assist consumers to have confidence in the legal profession. We must not be seen to take sides, as our role is to be an independent organisation.

We are interested to hear your views on this issue, and the two options available to us.

Issue 3: The levels of decisions published

The choice here is between publishing just Ombudsman decisions (formal decisions), or all decisions, including those cases where the parties have agreed to an informal resolution.

Clearly openness is served by publishing all outcomes wherever they come in the process. Not only does this show exactly how the process is being used, it would also demonstrate whether remedies are significantly different if agreed informally or imposed through a formal decision.

The key downside within this issue is that either of the choices it presents may be overwhelming. To publish information about all Ombudsman decisions or all cases would mean we publish a high volume of cases. This could potentially nullify some of the advantages if consumers and lawyers were not able to usefully access the information and learning from these complaints.

Again, we are interested to hear your thoughts on this issue.

Issue 4: Identifying lawyers and legal firms by name

The Act requires us to make sure that the complainant cannot be identified by the way in which we publish information about a case, unless they consent. However, the Act empowers us to identify the lawyer or firm involved.

We could decide not to use this power and simply to publish anonymised case studies or digests of cases. Publishing the full details of cases without identifying the lawyer or firm avoids any negative consequences created by a naming policy, while discharging our duty to provide information which enables the profession to improve its practice. It would also demonstrate the extent to which the Ombudsman service was consistent in its approach and helps people to understand our role. Publishing anonymised cases may also have benefit for lawyers and firms seeking to learn from complaints to inform their own approach to resolving complaints in house.

Identifying the lawyer, on the other hand, would introduce an additional element of information that may be of benefit to consumers, in particular when looking to understand what they can learn from complaints. The available research indicates that consumers may seek to use any information we might publish as an affirmation or contra-indicator of a recommendation of a firm. This option could assist people to make informed decisions about what information is relevant to them and the legal issue they are looking to seek advice about. This is an area we are interested in hearing more about - what would be useful in practice rather than simply publishing for principled reasons alone.

A naming policy may also benefit lawyers as it would mean that, for instance, if a firm had demonstrated good practice in its approach to complaints, others could look to learn from the overall approach of that firm. It shares some similarities with the approach taken by the Local Government Ombudsman, which looks to use Ombudsman decisions to encourage councils to learn lessons from complaints or to encourage them to continue to provide high standards of service. It is worth adding that, even if we did not adopt a naming policy, a lawyer's identity may end up in the public domain through other means, for example through the complainant.

However, we are also conscious of the – often unintended – negative consequences of publishing the identity of a lawyer or firm. Thus, for example, we would not wish to discourage lawyers from signposting complainants to the Ombudsman scheme or encourage them to settle baseless complaints because they fear the possible reputational consequences of them being identified in an Ombudsman's report. We also do not want to do anything that we believe will prejudice the aim of the Legal Ombudsman to resolve complaints. Our role is to resolve disputes and put matters right, not to punish.

Another of our concerns is that identifying firms or lawyers may have a disproportionate impact on certain areas of the law that are likely to generate more complaints than other areas, and on sole practitioners and barristers.

One possible way to mitigate this problem could be to develop criteria for when a lawyer and firm would be named. For example, we could identify a lawyer or firm only if they receive three or more complaints in a year. This system matches the structure of our proposed approach to the case fee, and we wonder whether it might help encourage lawyers to think carefully about how they engage with complaints and to seek to find ways of improving standards of customer service and preventing future complaints. We are interested to hear views about whether setting such a threshold or using other criteria would be a useful approach.

Another option would be to identify lawyers and firms by name in relation to statistics only. This would mean that any case studies or detailed case reports would be anonymous, but that we would publish accumulated statistics of cases and their outcomes by individual lawyers and firms. This approach could help to mitigate any risk that the anonymity of the complainant may be compromised. Thus, for example, if a case related to a small high street practice, it might be obvious locally who the complainant was were we to publish a full report naming the lawyer.

Finally, if we were to adopt a policy of identifying lawyers or firms, another question that arises is how long this information should be in the public domain. Publishing information indefinitely might not be fair as things can change over

time. It might therefore be appropriate to adopt a policy where we would destroy case files after a certain agreed period.

We would like to hear your ideas about how we might approach the issues of identifying individual lawyers or firms. We are interested to know what you believe would be fair and would help us meet our objectives of being open and transparent and contributing to improved standards in legal services.

Issue 5: The form of publication

There are a number of choices to be made about the form and style we use to publish information about our decisions.

One decision to make is about the level of detail we publish. We think there is general agreement that details of the particular circumstances of the case are needed to make the outcomes of complaints meaningful as a tool for consumers and to be fair to the lawyers involved.

If we publish the report of a case in its entirety, this would make sure that all the nuances of a case are provided and would ensure that there is enough detail for people to come to a well-informed view about a particular case. On the other hand, this may reveal unnecessary detail and the burden of information in the public domain may be unwieldy and difficult to search. Publishing case studies or summaries of cases might be an alternative approach.

Another decision to make is whether we publish data in tables. For example, we could show the numbers of cases in a particular field of law or involving a certain named lawyer. We are aware that this has been suggested in relation to legal services previously and that there were significant concerns about how to give the right contextual information to make this kind of data meaningful.

To help us consider this option, we looked at how other Ombudsman schemes approached publishing tables of data. The model adopted by the Financial Ombudsman Service (FOS) most closely resembles this style. We also looked at how legal regulators publish information about disciplinary sanctions against lawyers. Both the SRA and the Bar Standards Board publish information about fines, suspensions and about solicitors and barristers who have been struck off. While this approach supports the general principles of openness and transparency, the remedies we offer are perhaps not as clear cut as the imposition of a specific fine or penalty on a lawyer, which might raise questions about its suitability for us.

We are interested to hear your views about what form of publication would be most informative or helpful and fit best with the principles that you believe should guide our thinking about this issue.

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?

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

Issue 1: Whether any information is published at all.

Issue 2: The types of cases published.

Issue 3: The levels of decisions published.

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 other thoughts you have on how we might approach this issue.

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

Conclusion

In this paper we have outlined the range of different issues that we think need to be considered in grappling with the question of how we publish our decisions. As the Legal Ombudsman is a new service, starting simply is important. There are many unknowns about how the scheme will work in practice and the volume of activity required to make sure the new scheme will be a success. Therefore, like many other aspects of our work, we will review our approach to publication after we are up and running.

Although we have tried to consider all the key issues that might be connected with this topic, we are aware that there may be gaps. We therefore look forward to hearing your responses to the questions we pose in this paper, as well as any other general comments or suggestions that you may have.

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.

How to respond

If you would like to send through your views on how we might approach 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 23 December 2010.

Email: consultations@legalombudsman.org.uk

Post: Pippa Bissett
Legal Ombudsman
PO Box 15871
Birmingham
B30 9ED

Please note that we plan to publish all responses we receive in relation to this discussion 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 with you any concerns you have 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 to publication.

We are also keen to discuss the issues we have raised in this paper in other ways. We would welcome opportunities to meet people and organisations who are interested in the idea of publishing decisions, and we will be holding workshop events for this purpose during the coming months.

Timeline

We are working to the following timetable:

Timeline	Engagement
September 2010	Publication of discussion paper.
September and October 2010	Meetings with stakeholders about the thrust of our proposals (leaving the detailed responses to come later in the consultation cycle) and consultation workshop(s) to refine our approach. Consultation responses published as received.
23 December 2010	Deadline for responses to the discussion paper.
January 2011	Publication of responses and report on how we will proceed.
February 2011	Publication of second consultation document, presenting a series of options for how we might approach publication.
April 2010	Deadline for responses to the second consultation document.

Appendix 1: Summary of questions

- Q1.** Do you agree that these are the right principles to guide us in thinking about publishing decisions? Please give your reasons.
- 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 the 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 us measure any impact.
- 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?
- Q4.** Do you have any views on how we might approach the first three issues we set out?

Issue 1: Whether any information is published at all.

Issue 2: The types of cases published.

Issue 3: The levels of decisions published.

- 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 other thoughts you have on how we might approach this issue.
- Q6.** Regarding issue 5, do you have a view on the form of publication? If so, what do you think would be the advantages or disadvantages of the different options we mention?
- 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.

Appendix 2: How other Ombudsman schemes approach publication

Scheme	Summary of Approach
Energy Ombudsman	Publishes a monthly selection of anonymous cases that have been investigated and closed.
Equality Tribunal	Publishes full case reports that identify all the parties by name.
Financial Ombudsman Service	150 individual businesses make up 90% of its caseload, and these businesses are identified by name alongside accumulated statistics. Other businesses are not named and full case reports are not published, however selected anonymous case studies are available.
Housing Ombudsman Service	Publishes anonymous 'case digests'.
Independent Police Complaints Commission	Publishes investigation reports which name individuals.
Local Government Ombudsman	Publishes formal investigation reports that identify organisations by name, as well as a selection of anonymous 'case digests' and special reports.
Parliamentary and Health Service Ombudsman	Publishes detailed reports of investigations to Parliament on individual or systemic examples of maladministration. These reports identify organisations by name.
Pensions Ombudsman	Publishes detailed determinations that identify organisations by name.
Surveyors Ombudsman Scheme	Publishes the final decisions of all cases investigated, and does not identify individual firms.
Telecommunications Ombudsman	Publishes anonymised decisions and accumulated statistics.