

<b>Meeting</b>	OLC Board	<b>Agenda Item No. Paper no.</b>	11 124.9
<b>Date of meeting</b>	15 December 2022	<b>Time required</b>	20 Minutes

<b>Title</b>	Annual Assurance on Legal Enforcement and Legal Work
<b>Sponsor</b>	Paul McFadden
<b>Status</b>	OFFICIAL

### **Executive summary**

The purpose of this paper is to provide the OLC Board with assurance around the work of the Legal Ombudsman's Legal Team, including the level of enforcement activity undertaken and also around the number of cases where a decision has been taken not to enforce an Ombudsman directed remedy. The report also provides an overview of the work of the Legal Team and a summary of the number of legal challenges faced by the Legal Ombudsman.

This paper will cover two periods: 1 April 2021 to 31 March 2022; and 1 April 2022 to 31 October 2022.

This paper provides OLC Board with assurance that the majority of service providers comply with Legal Ombudsman's decisions without the need for any enforcement activity (only 36 referrals to commence enforcement action in 21/22 and 17 referrals year to date). Only a small proportion of matters result in a decision by the Legal Ombudsman not to take enforcement action (0 in 21/22 and 3 year to date).

Based on the available data, the Legal Ombudsman's assessment remains that its strategic approach to enforcement is effective in ensuring that, wherever practicable, steps are taken to ensure that complainants receive the remedies that have been directed by an Ombudsman. This is part of ensuring that the Legal Ombudsman acts in a way that is compatible with the regulatory objectives set out in the Legal Services Act 2007.

The number of judicial review claims remain roughly consistent when compared to previous years. The Legal Ombudsman will continue to seek to robustly defend such challenges where it is appropriate to do so.

### **Recommendation / action required**

Board is asked to NOTE the paper

## **Annual Report from the Legal Team**

### **Introduction**

In September 2018, the Board approved the Legal Ombudsman's 'Strategic approach to enforcement' which is annexed to this paper. The default approach is to enforce all remedies, unless an ombudsman considers enforcement not to be appropriate. In arriving at a decision not to enforce, ombudsmen refer to a 'decision-tree', which was devised and appended to the 'Strategic approach to enforcement' paper. The decision-tree lists all the relevant factors and questions for an ombudsman to consider before deciding whether to enforce a particular remedy.

This update relates to enforcement matters in the period 1 April 2021 to 31 March 2022 and also provides a year-to-date update for 2022.

To ensure our customers are as informed as possible the Legal Team, with the assistance of the Operational Team, have prepared an enforcement factsheet that will be sent out to complainants when they notify us that a service provider has not complied. This was implemented in November 2022.

### **Enforcement data for the period 1 April 2021 – 31 March 2022**

By way of context, between 1 April 2021 and 31 March 2022 the Legal Ombudsman made 1643 final ombudsman decisions of which 819 included a direction that the service provider provide a financial remedy only. Of those 819 decisions, 541 were accepted by the complainant making them legally binding. In the same period the Legal Team received 36 referrals to commence enforcement action to require service providers to comply with an ombudsman's directed remedy (although it should be noted that some of the requests to enforce will have related to decisions made by an ombudsman in the preceding financial year). During 2021/2022, there were 0 decisions not to commence enforcement proceedings.

### **Enforcement data for the period 1 April 2022 – 31 October 2022**

By way of context, between 1 April 2021 and 31 October 2022 the Legal Ombudsman made 754 final ombudsman decisions of which 395 included a direction that the service provider provide a financial remedy only. Of those 395 decisions, 246 were accepted by the complainant making them legally binding. In the same period, the Legal Team received 17 referrals to commence enforcement action to require service providers to comply with an ombudsman's directed remedy. There have been 3 decisions not to enforce as it was considered by the Ombudsman to be inappropriate. Whilst this is more than the previous year, the number compared to the amount of final decisions made is still low. Those decisions were made in line with the principles and

criteria outlined in the Strategic Approach to Enforcement decision tree. As of 1 November 2022, the legal team had 22 open enforcement cases.

## **Legal cases**

A judicial review claim (JR) is a challenge to the legality of the ombudsman's decision and/or process. The claim will be brought by whichever party is seeking to challenge the decision. The first stage of a judicial review claim is for the proposed claimant to write to the Legal Ombudsman setting out why they want to challenge the decision. This is known as the pre-action stage. Typically, we have more pre-action challenges from complainants than service providers. However, in some circumstances, a claim can be made without sending a pre-action letter. The next stage is for the Legal Team, with the support of the ombudsman, to respond to the pre-action letter. It is common for this to resolve matters. For those who remain dissatisfied they can make a formal claim to court. We will then respond accordingly. The court usually makes an initial decision on the papers without a hearing. Ordinarily, the claimant can ask for this to be reconsidered at an oral permission hearing if the decision does not go in their favour.

*Number of claims:* In 2021/22 the legal team received a total of 49 pre-action letters and a total of 12 judicial review claims. Of those 12 claims - 9 have been determined in the Legal Ombudsman's favour, 1 claim was withdrawn, 1 claim was settled, and 1 remains outstanding and/or is subject of appeal. This provides assurance that the Legal Ombudsman will seek to robustly defend such challenges where it is appropriate to do so.

The year-to-date position is that the legal team have received a total of 23 pre-action letters and a total of 8 judicial review claims. Of those 8 claims - 3 have been determined in the Legal Ombudsman's favour and 5 remain outstanding and/or are subject of appeal. Typically, most judicial review claims are brought by service providers. 3 of the 8 judicial review claims were brought by complainants whilst 5 of the claims were brought by service providers.

On occasion, the Legal Ombudsman are the defendant to money claims where the claimant is seeking damages for our actions and/or in action. Depending on the circumstances, the Legal Team will consider whether to defend, accept or apply to have the claim struck out. In 2021/22 there was one money claim and year to date there have been two money claims.

## **Legal costs**

Since April 2022 the Legal Team have undertaken a significant amount of work to review all legal costs owed to the Legal Ombudsman. As of 31 October 2022, in excess

of £32,000 has been recovered. The Legal Team continue to seek recovery of court costs where appropriate.

### **Money Claims Online (MCOL)**

In July 2021 the decision was taken that the recovery of outstanding case fees would be handled by the finance team through the MCOL system. The Legal Manager, in consultation with finance, has reconsidered the position and it has been agreed that the Legal Team will take over recovery of case fees from a pre-action stage whilst the Finance Team will continue to do the critical work of invoicing and sending reminders to debtors. This will continue to ensure that cases issued by the OLC are correctly brought and progressed.

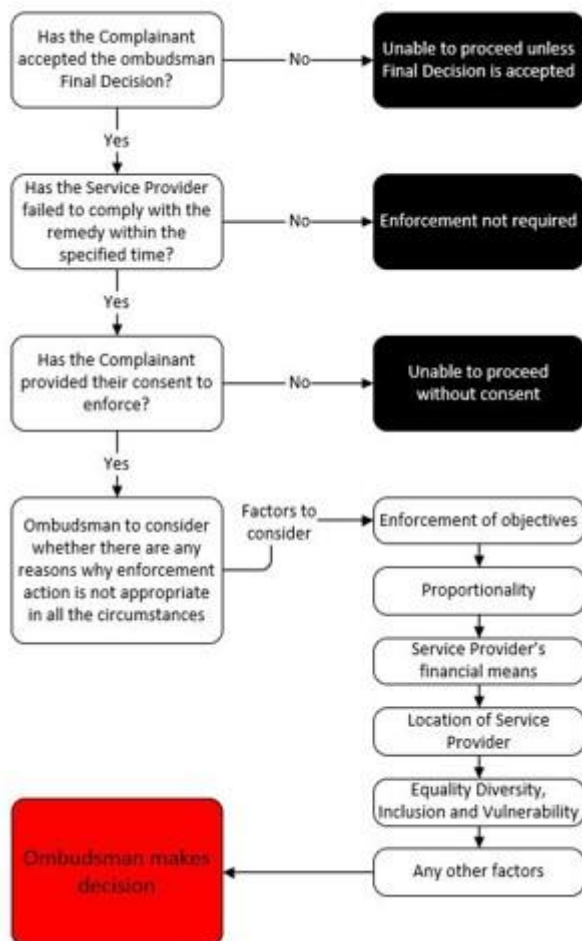
### **The Legal Team**

The team consists of four members – the Legal Manager, a solicitor (currently vacant) and two paralegals. The Legal Team has been through a period of transition. It is anticipated that recruitment will start for a solicitor in January. We are satisfied that with their appointment the team is adequately resourced to deal with demand both in terms of challenges to casework and enforcement. The Legal Team will continue to seek efficiencies and drive improvements. By way of example, recent improvements include: the section 142 LSA reporting process, feedback and guidance to decision makers, re-design of the legal team's intranet page and, in particular, the anticipated implementation of the CRM case management system for legal which will see legal cases integrated and allow for better reporting.

# Appendix A: Legal Ombudsman Strategic Approach to Enforcement

## Summary

In September 2018 The OLC Board approved, “*The OLC Strategic Approach to Enforcement*”. This paper set out the OLC’s enforcement objectives and powers, and proposed a strategic approach to making enforcement decisions. An accompanying decision-tree sets out the factors that an ombudsman will need to consider. This Guidance note builds on the paper presented to Board and will expand upon the factors to be taken into account by an ombudsman when deciding that enforcement is “**appropriate in all the circumstances**” (Scheme Rule 5.57).



### The decision-tree factors

We start with the presumption that **we will enforce all remedies** that have been directed by an ombudsman and to pursue all case fee debts using all the available options.

The decision-tree considers the following as **relevant factors** to be taken into account when making an enforcement decision. These factors are nonexhaustive.

### 2.1. Enforcement Objectives

The Enforcement Objectives are set out as follows:

- Ensure that any remedy directed by an ombudsman is complied with;
- Further the regulatory objective of “*Protecting and promoting the interests of consumers*”;
- Ensure that the enforcement of determinations is in line with the statutory aim of resolving complaints “*quickly and with minimum formality*”;
- Ensure complainants are not burdened with the formality and complexity of the court system; and
- Build trust and confidence in the effectiveness and fairness of the Legal Ombudsman scheme and act in the public interest in undertaking enforcement activity.

### 2.2. Proportionality

An ombudsman will consider:

- Whether the cost of enforcement action is proportionate to the remedy to be recovered. ‘Cost’ includes both time and monetary costs to the OLC, and the remedy may be either financial or non-financial.
- Whether there other potential routes of recovery for the complainant, for example can the complainant apply to the SRA compensation fund or to the firm’s insurance company.

### 2.3. Financial means of the Service Provider

A Service Provider may be an individual or an entity. An ombudsman will consider:

- The type of entity, for example the Service Provider may be a sole trader or a limited company, there are differences as to the liability that attaches to each.
- Whether the Service Provider has the means to pay or carry out the terms of any remedy.
- Whether the Service Provider owns property or has any other assets.
- Whether further information regarding the Service Provider’s finances is needed. If so, an ombudsman should discuss with the Legal Team the possibility of making an application to court for the Service Provider’s financial information.

## 2.4. Location of the Service Provider

Enforcement action against individuals based outside of the UK is complex. An ombudsman will consider:

- Whether the Service Provider is based in the UK, if not, are they likely to return?
- Whether there are any assets in the UK which could be used for enforcement purposes.

## 2.5. Equality, Diversity, Inclusion and

Vulnerability An ombudsman will consider:

- Whether any of the 'protected characteristics' (as defined by the Equality Act 2010) impact upon the Service Provider's ability to comply with a remedy.

## 2.6. Other relevant factors

An ombudsman will consider other factors that they consider to be relevant, which may include:

- Whether the Service Provider will be at risk of being evicted (and whether others are also likely to be affected).
- Whether enforcement action is likely to impact upon the Service Provider's employment (and whether others are also likely to be affected).