



The Bar Council

Bar Council response to the Legal Ombudsman Scheme Rules consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Ombudsman consultation paper on Scheme Rules.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Q1. Do you agree that there is merit in reducing the time limit for complaints to be brought to the Legal Ombudsman to one year from the date of act/omission or date of awareness (whichever is the later)?

4. We broadly welcome the proposal to reduce the time limits of 6 and 3 years from act/omission or date of awareness to 1 year, provided there is discretion retained to allow for late complaints to be pursued in relevant circumstances. We consider the circumstances laid out in paragraph 46 of the consultation document to be fair when looking at what factors might be considered when exercising discretion.
5. The consultation paper at paragraph 41 states that "a significant number of ombudsman schemes in England and other devolved public services ombudsman schemes across the nation do apply a one-year time limit." It would be useful to know what

¹ <https://www.legalombudsman.org.uk/media/nahtpyypc/olc-scheme-rules-consultation-feb-2022.pdf>

ombudsman services those are, but to also bear in mind that just because other ombudsman services apply a one-year time limit, it doesn't necessarily make it the right decision for the Legal Ombudsman to do so.

6. We are pleased that discretion is being kept by an Ombudsman under rule 4.7 to extend the one-year time limit for specific customers if, on the evidence, it was fair to do so. We agree with discretion but are concerned that only the Ombudsman can exercise this discretion. We query whether this means that cases reaching the pre-assessment-pool would have to be escalated to the Ombudsman to see whether an extension to the one-year time limit is to be permitted, and if they do not, would go back into the pool. It might be a more economical use of resources to use investigators in these circumstances generally to decide about an extension to these time limits, rather than this being only exercisable by an Ombudsman, and thereby in keeping with the move towards delegation of powers.

7. As stated, the factors outlined at paragraph 46 that might fall under discretion seem reasonable. However, it is not clear where these factors might be written down for consideration. In the interests of transparency, for example, it might be appropriate for the factors to be available for consumers when bringing a complaint to the Legal Ombudsman so that they know what to expect, or for these to be included as factors under rule 4.8.

Q.2 Do you agree that there is benefit in introducing a new Rule 2.11?

8. In principle, we agree that it would be beneficial to introduce a new rule which would enable an Ombudsman to exercise their discretion to dismiss a complaint, if specific criteria are met, without the need to first accept that new case for investigation. Indeed, reforms should be aiming towards filtering out disproportionate or meritless/frivolous complaints earlier which would allow resources to be deployed on serious and substantial complaints, and to reduce the backlog and journey times for customers.

9. However, we have some suggested amendments to the new Rule 2.11, which appear as an Annex to this response. We consider that it is unnecessary to include express reference to the requirement for dismissing a complaint to be "in an Ombudsman's reasonable opinion" because this element is implicit in how an Ombudsman interprets the rules. In our view including this expressly would provide an additional avenue for challenge to a potential complainant, thus impeding the aim of filtering out disproportionate complaints, reducing backlog and ensuring resources are deployed appropriately.

10. We also consider that the elements "lacks merit" or "involves no significant detriment" ought not to be including in the new rule, since it would not be possible to determine this at the outset without a detailed investigation of the merits and circumstances of the complaint (save in an extreme scenario) and is therefore again contrary to the stated aims of introducing the rule. Where the previous formulation is preferred, then the composition "lacks any merit" would be preferred in our view. We also consider it prudent to provide in the rule where

another court or tribunal is better placed to deal with a complaint so that it may again be filtered out accordingly at an early stage in the complaints handling process.

11. We agree with the mitigation of the rule proposed that before any complaint is dismissed, the complainant would be provided with an opportunity to explain why the complaint should not be dismissed and that explanation would be considered by an Ombudsman when deciding what action to take. It is important that complainants would be able to outline their concerns before the complaint was dismissed in a format that would be most comfortable for them. Some complainants, for example where English is not their first language, might find it more difficult to explain in writing and that consideration should be taken into account.

Q3: Do you support the proposed amendments under Scheme Rule 5.7?

Q4. Do you have any concerns about the implications of the changes to Rule 5.7?

12. It seems sensible to allow Rule 5.7 to be extended to enable more cases to be concluded earlier in the process where it is fair and reasonable to do so. We agree that it is in the customer's best interest to understand at the earliest possible opportunity if there is a compelling reason why the Legal Ombudsman should not carry out an investigation. To indicate this in the drafting, we have proposed adding a reasonableness requirement (as 5.7(a)).² In our view, adding a reasonableness requirement here provides a benchmark to ensure that decisions are not made arbitrarily and so complainants and professionals can rely on determinations as having been decided by reasoning and good execution of policy.

13. We appreciate that currently rule 5.7(b) permits an Ombudsman to consider dismissing a complaint where they are satisfied that the complainant has not suffered (and is unlikely to suffer) any financial loss, distress, inconvenience, or other detriment. We note that the Legal Ombudsman have proposed the introduction of the word 'significant' thereby linking loss, detriment or impact to proportionality. However, we consider the additional use of the word 'significant' to be unnecessary as it does not expand on the meaning within 5.7(b) or condense the wording within the Rules for ease.

14. We note at paragraph 65 that the Legal Ombudsman recognises that the question of what is 'significant' will vary depending on the circumstances of the complaint and the complainant. If the word 'significant' is retained, we welcome the development of detailed criteria for an Ombudsman to refer to when considering dismissing a complaint. This should aim to ensure fair and consistent application of the rule.

15. Currently, rule 5.7(c) permits an Ombudsman to dismiss a complaint if they are satisfied that the complainant has rejected a fair and reasonable offer which the service provider made under their own internal complaint handling procedure, and which is still

² Please refer to page 18 on Annex 1

open for acceptance. We agree that extending this rule to include revised offers is a sensible suggestion and would hopefully encourage service providers to engage with the complaints process. We note that the Legal Ombudsman is also aware of the interaction with case fees, and it seems a good approach that under the revised rule, if a case is dismissed during the investigation process as a result of a reasonable offer being made, the case fee would not be applied.

16. We agree that there should be a means of filtering out low impact, low value complaints at the earliest possible stage, and a focus on proportionality would be a good way to achieve this. It would enable an Ombudsman to consider whether conducting an investigation into the complaints that have been raised, given the likely impact on the customer, is a proportionate use of resource. We are therefore in agreement with the proposed new rule of 5.7(p). However, we have added the proportionality requirement under a new rule 5.7(d) with an alternative wording. In particular, we have put the proportionality point wider to take into account the Legal Ombudsman, as opposed to a focus on the “ombudsman’s time” which is in the proposed rules in the consultation. We think the wider remit of proportionality for the Legal Ombudsman might be more helpful rather than a focus just on the Ombudsman’s time.

17. The introduction of 5.7(q) again seems a sensible rule, provided it is pursued with the discretion laid out at paragraph 86. Abuse by complainants might legitimately be clamped down on, especially where this is a free service to complainants. We are pleased this has been considered and is the subject of a new rule. New issues raised (which could have been raised at the start) causes severe delay and is oppressive for the authorised person complained of. Most importantly, it is also resource intensive and disruptive for the Legal Ombudsman who then has fewer resources to attend to other complaints and we are pleased that a new rule is being proposed to address this.

Rule 1.11- The wider delegation of decision making

18. We support the intention to look at widening the extent of the delegation of Ombudsman decision making powers. As recognised in the consultation paper, significant work would need to be undertaken to ensure that the delegation of powers does not result in any adverse consequences for customers – both complainants and service providers.

19. As significant work would need to be undertaken to ensure it does not result in adverse consequences, we wonder whether a pilot period or desk-based research for this rule change could be undertaken, before seeking a change to primary legislation. The Legal Ombudsman has previously suffered from difficulty recruiting people to the Legal Ombudsman, though this has changed recently (as particularly noted in the Challenge and Advisory Group meeting in February 2022) and a new cohort of investigators has started. Those given delegated powers would have to be sufficiently trained to ensure that the quality of decision making does not lessen with this rule, and significant oversight (at least when the

rule first comes into play) should be given. Further, we also note from paragraph 91 that delegation of Ombudsman powers is already employed by a number of other ombudsman schemes. As we noted in response to paragraph 41, we would be interested to know what other ombudsman schemes utilise this form of delegation of powers.

20. We appreciate that extending these delegations, and so requiring a change to primary legislation, is not something that could be implemented immediately. However, this should not deter the Legal Ombudsman from pressing ahead with the change (with the right protections in place for customers) as part of its long-term strategy of improvement and efficiency.

Rule 5.19 - Escalation of cases to an Ombudsman for decision

21. The Scheme Rules currently still provide customers with the option to escalate their complaint to an Ombudsman if they disagree with the investigator's views. The Legal Ombudsman is proposing a revision to Rule 5.19(c) to enable an Ombudsman to conclude that a final decision is not needed on a case if no substantive issues (such as an error in fact or law, or additional new evidence) have been raised in response to the investigator's findings.

22. It is also proposed that Rule 5.19(b) be amended to remove the requirement for an investigator to formalise the findings of their investigation in a case decision.

23. The process which would underpin this revised rule could require that, in each case where an investigator's findings are not accepted there is a high-level review by an Ombudsman to assess whether a final decision is required.

Q6: Do you support the proposal to limit the right to an Ombudsman decision where no substantive issues are raised with the investigator's findings?

24. The right to a full review of an investigator decision by an Ombudsman is one that is a procedural benefit to both complainants and authorised persons. Indeed, it is a hallmark of Ombudsman schemes more generally, so care does need to be taken with regard to the potential change of rule 5.19(c). We do recognise however, that it can be problematic that either party can request that the complaint be escalated to an Ombudsman for a final decision with no requirement for that disagreement to have a substantive basis. Therefore, we do not disagree with the need for the person seeking an escalation of their complaint to the Ombudsman to have to give some reason, provided it is not too high a test.

25. For the drafting of 5.19 and 5.20 we would propose using 5.19 and 5.20 as found in Annex 1 as attached to the Bar Council's consultation response. We would also propose minor amendments to the Legal Ombudsman's drafting of 5.20 (indicated in Annex 1 at 5.21) as follows:

“If neither party, in their response to the investigator’s findings, indicates disagreement within that time limit, or fails to provide a good reason for disagreement, the Legal Ombudsman may treat the complaint as resolved in accordance with the investigator’s findings.”

26. We agree the Ombudsman has reason to be confident of the advantages of a change in this rule, and that it would not cause detriment to customers as “the Legal Ombudsman takes confidence from the fact that in over 80% of the cases that are referred for an Ombudsman decision, the eventual outcome mirrors the conclusions outlined in the investigator’s case decision.”³ As with all rule changes, it will need careful consideration of how to ensure that the investigator decisions are of a consistent high quality so that customers are not unduly impacted by this rule, particularly with the new cohort of investigators that need training and upskilling.

27. We find the proposed change to rule 5.19(b) to be relatively uncontroversial though we do query how much time it would actually save investigators to not have to write their findings into a case decision. We have no objection in principle to investigators being able to use their experience of dealing with a case to choose the most appropriate way to communicate their decision. However, it should be borne in mind that a removal of case decisions being written could lead to inconsistency, which may be negative in the long term. We consider it is still important that the investigator shares their findings in writing, and then communicates their decision in the way they believe is the most appropriate. If a finding is only shared orally, we would be concerned this would be harder to challenge.

Q7: What factors should an Ombudsman consider when deciding whether a decision is required?

28. We agree with the factors as outlined in paragraph 111 of the consultation, that could be taken into account by an Ombudsman when deciding whether a final decision is required. An additional factor that might be incorporated, is the factor considered in paragraph 65 relating to the “value of providing learning and feedback to the service provider and sector as a whole”. As noted in the consultation, reducing the number of cases which are passed for Ombudsman decision would reduce the amount of cases published on the Legal Ombudsman’s website, which could in turn have an adverse impact on the learning and insight that can be gathered from the Ombudsman’s casework. If a decision by an Ombudsman may be beneficial to the public interest, it may be particularly important to take into account the value of providing learning and feedback to the service provider, which therefore could be added to the list of factors. As with all criteria which will be provided to the Ombudsman that will sit outside the Scheme Rules, we query whether these additional factors will be available to customers, which might be beneficial in the interests of transparency.

³ Paragraph 98 of the Legal Ombudsman consultation

Q8: Are there any alternative ways in which the Legal Ombudsman could adjust the rules to achieve a reduction in the number of complaints going to final Ombudsman decision?

29. The combination of the rules suggested seems to be the best way to achieve a reduction in the number of complaints going to final Ombudsman decision. Outside of the rules, effective communication to service providers and complainants on how complaints are dealt with at the very first point of contact with the Legal Ombudsman in the customer journey, might see confidence increased in the processes involved in reaching decisions, and thereby lead to a reduction in the number of requests going to the Ombudsman. The design and impact of rule changes to all stakeholders would need to be handled with care.

Q9: Do you support a review of the case fees model with a view to implementing a model which better encourages early resolution of cases?

30. We are concerned that, given the modest sums in issue, the time, costs and hassle of adding a tiered system for debate is worthwhile compared to the incentive to the authorised person to compromise. As noted, any introduction in alternative case fee structures could result in an increase in the number of case fee payment challenges from service providers. We envisage there could be numerous queries or challenges about whether the higher fee stage was reached, which would in effect mean there was no gain achieved through the revised process.

31. As an alternative, the Legal Ombudsman could consider whether to increase the level of case fees overall that are currently capped at £400. This might have the intended effect of incentivising service providers to resolve cases early, whilst also avoiding the possibility of case fee payment challenges from service providers that are likely to result from a tiered system.

32. As an addition and as an alternative to the tiered fee system, the Legal Ombudsman could consider introducing ‘unreasonable behaviour’ case fees that could be introduced by the investigator/ombudsman on each or both parties, based on a set of criteria met. This would be permitted by s133(3)(i) in the Legal Services Act 2007. Its advantage is that it might prevent a complainant using the otherwise free service to punish an authorised person for ‘unreasonable person behaviour’.⁴ This is more akin to a ‘polluter pay’ principle with the potential to redress the balance between the levy paid by all authorised persons to those

⁴ This is analogous to the Small Claims Track costs in the Courts (less than between £2,000- £5,000 depending on the nature of the case) and Civil Procedure Rules 27.14 (2) (g), above the level of (modest) fixed costs the Court may award “such further costs as the Court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.” In the Employment Tribunal it is the only means by which Respondents can obtain a costs award against a Claimant. There is jurisprudence that would provide guidance as to what might constitute unreasonable behaviour.

whose poor service/conduct results in the need for complaint. We recognise though that it could have an adverse effect of also leading to appeals by the service provider/complainant and will likely not pull in much money.

Q10: Do you support the proposals outlined in the additional changes? If not, please outline which ones you do not support and your reasons why.

33. We agree with the following proposed changes to the Scheme Rules which we view as sensible:

Rule 1.1: Removing reference to obsolete dates

Rule 2.1: Addressing historical drafting error

Rule 2.8: Formalising the position on complaints by beneficiaries

Rule 4.5: Removing reference to obsolete dates

Rule 5.4: Addressing formal challenges to ongoing investigations

Rule 5.5: Providing Ombudsmen with discretion when to accept a complaint for investigation

Rule 5.7(d): Clarifying grounds for dismissal of a complaint

Rule 5.55: Allowing the Legal Ombudsman to rectify uncontested errors in Ombudsman decisions (though in our drafting suggestion we have suggested the removal of the word 'reasonable')

Rule 5.62: Updating reference to relevant data protection legislation

34. We would provide the following comments on the additional amendments:

Rule 5.7(a): Clarifying grounds for dismissal of a complain

35. We agree that there should be a means of filtering out low impact, low value complaints at the earliest possible stage. We view it as sensible to separate into two grounds "frivolous or vexatious" claims or where "it does not have any reasonable prospect of success". Rule 5.7 (a): After "vexatious" add "or minimal in gravity or impact upon the complainant". In our suggested draft, we have separated out these to limbs into (a) and (b) though the two limbs can be placed where deemed necessary under rule 5.7.

36. Rule 5.20: Addressing situations where investigator's findings and recommendations are not accepted

37. We have addressed this in answer to questions 6 – 8.

38. Finally, we would suggest amending the rules to ensure consistency between references to "ombudsman" and "Ombudsman".

Bar Council

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For further information please contact

Eleanore Lamarque, Policy Manager, Regulatory Affairs, Law Reform & Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: ELamarque@BarCouncil.org.uk