

Sent by email only to consultations@legalombudsman.org.uk



13 April 2022

Dear Sir/Madam,

The Legal Services Consumer Panel (the Panel) welcomes the opportunity to respond to the Legal Ombudsman's Scheme Rules Consultation.

The Panel supports the need for this wide-ranging and significant review of the Scheme Rules. The huge backlogs and delays that have built up over recent years, despite LeO's many efforts to reduce them, have demonstrated that the system is not serving consumers well and that substantial changes are needed to make it fit for purpose.

We believe it would have been helpful if the consultation document had made it clear up front that the problems with the current Rules are of such significance requiring the Legal Ombudsman to make some tough trade-offs between different objectives. The key trade-off is between timeliness and comprehensiveness of coverage. While "justice delayed is justice denied", there are likely to be some complainants for whom the proposals to restrict access to the Scheme will also feel like "justice denied". There are also other trade-offs, for example between speeding the customer journey and maintaining a comprehensive picture of consumer complaints and what has led to them. Some of the proposals made in the Review are indeed radical, as they need to be, and we believe should only have been made after a detailed and well explained programme of consumer research and engagement, and more examination of alternative options.

Moreover, we are slightly concerned that the Legal Ombudsman has decided to lean heavily on the use or the extension of discretion to address contentious issues. We have reservations about the over-use of discretion. Discretion benefits those who can make a good case and are seen as worthy. Discretion can lead to poor outcomes for some groups through unconscious bias. In the Panel's view over-reliance on discretion to mitigate potential risk is not the right approach. At the very least the exercise of discretion must have safeguards, with excellent training for those who have the authority. This must be accompanied by robust and transparent monitoring, analysis, and crucially independent oversight.

The Panel would like to stress the importance of a stringent review following the implementation of any of the changes proposed. This should include an analysis of whether the expected benefits to consumers were realised, and to identify unintended consequences.

Reflections on the consultation questions

Do you agree that there are merits 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)?

The Panel agrees that there is considerable merit in reviewing the current time limit for complaints to be brought to the Legal Ombudsman. We note that the current time limit was set to align with the court time limits for contractual claims. This in itself can be argued to be counter-productive for a resolution system that was intended to be informal, and one that arguably offers minimal monetary awards, accompanied by prolonged delays.

That said, the proposed change is very significant and as such it should only be made based on proper research and analysis of the impact on consumers and of consumer preferences. There will be winners and losers: those whose complaints will end up being resolved quicker because of the change will gain; those who find themselves excluded from resorting to the Ombudsman process will lose out. LeO should be able to demonstrate clearly that the net impact on consumers is positive. Given the detriment caused by the current long delays in resolving complaints in general, this should not be too difficult to do, but it should not be presumed, on the basis of vague statements about earlier feedback.

There should also be more detailed exposition of the limits applied in comparable Ombudsman services; an analysis of LeO's existing data about the volume of complaints made within one, two or three years of the act complained about; and an articulation of areas other than conveyancing where impacts may only become apparent after a delay, with an analysis of how different types of consumers might be affected.

On the first point in the above paragraph, we note that at present, the Financial Ombudsman who arguably deal with similarly complex cases, accept complaints within 6 years of the problem occurring or three years of the consumer being aware of it. Given that LeO liaised with several other Ombudsman services, including the Financial Ombudsman Services as part of this review, it would have been useful to see an explanation around why it might need to deviate from those who have a longer time limit.

Evidence from our tracker survey shows that there are high numbers of silent sufferers in legal services i.e those who are dissatisfied with their legal services providers but who do not go on to make a complaint, particularly when compared to other sectors. While this is not in itself an argument for keeping a long time limit, it highlights that the sector is not getting nearly as many complaints as it ought to receive because many consumers are not complaining. As such, any proposal to curtail consumers' right to make a complaint must be robustly justified, beyond efficiency arguments or the need to reduce the backlog.

In this respect it is also important to note that the Consumer Panel was recently informed of new research from Refugee Action which highlighted the barriers facing

refugees in making complaints about legal services. The Panel has expressed concern to the relevant regulators about the issues discovered, including evidence that problems in this area of law are most likely severely under-reported. Refugee Action's research highlights three main issues: poor service, poor advice, and other negligence such as missing deadlines.

This research also makes it clear that the current complaint procedures are not working for asylum seekers because very few asylum seekers have the knowledge and confidence to identify where there is a problem with the legal service they are receiving. And it is even difficult for case workers and others who support them to identify legitimate complaints; asylum seekers feel afraid, powerless, and incapable of pursuing issues with their advisor or lawyer because they are often facing destitution; and the complaint system does not address their biggest issue, loss of status.

We highlight this research because the impact assessment does not note this group of people.

For the reasons outlined above the Panel agrees that there may be a good case for a significant reduction in the time limit but considers that more evidence is needed before it can be concluded that a one-year time limit is justified.

Do you agree that there is a benefit in introducing a new rule 2.11?

The Panel is persuaded by the arguments set out in the consultation document that in some cases there are justifiable reasons for dismissing a case early, though here again we would have expected to see some evidence of engagement with consumers about this.

The Panel would prefer that the Legal Ombudsman uses the language of dismissal and not 'early resolution' as this better reflects the action. We welcome the Legal Ombudsman's assessment of impact and agree that those who are not able to articulate themselves should not be at a disadvantage.

It will be imperative for the Legal Ombudsman to be transparent about the number of cases it dismisses on a quarterly basis. This information will be crucial for several reasons including understanding and managing consumers' expectations. As well as data, it will also be important for LeO to publish short reports on the nature of cases that it dismisses.

More importantly, we believe that the legal Ombudsman should consider or explore exempting certain type of cases from this new rule, specifically cases around asylum, refugee and immigration. This is because of the high number of vulnerable consumers in this area and the problems identified with making a complaint.

Do you support the proposed amendments under scheme rule 5.7?

The Panel is not convinced about the proposal under (5.7B).

At present, this rule permits an Ombudsman to dismiss a complaint where the complainant has not suffered any financial loss, distress, inconvenience, or other detriment. Under LeO's new proposal, it wishes to insert the word 'significant', so

that an Ombudsman can dismiss cases where he or she is satisfied that a consumer has not suffered significant loss.

We believe this change risks sending the wrong message to providers, damaging consumer confidence in the complaint process, and weakening the culture of complaint handling in the legal services sector. We are concerned that there is too much scope for subjective value judgement with this proposal. This appears to be a strange proposal from a sector that is charged with safeguarding the rule of law and fairness. If a loss has been suffered, because of a service provider's action, the consumer should not have to argue about the significance of the loss in order to claim compensation.

Rule 5.7(c)

The Panel agrees with the proposals under 5.7(c). We agree that an Ombudsman should be able to consider whether a case should be dismissed if a reasonable revised/increased offer is made by the service provider during an ongoing investigation and the complainant decides to reject that reasonable revised offer.

In this instance we agree that the Ombudsman should be able to use their professional judgement and data to determine what is a reasonable offer. We agree with the benefits of this approach to both providers and consumers. That said, it is important that the Legal Ombudsman records all cases where poor practice is suspected and monitor repeated incidents to identify poor performance and reserve the right to make this information available more publicly to protect professional standards, the standing of the law in the public eye and, most importantly, consumers from poor providers.

Rule 5.7 (p)

The Panel has concerns about the proposal for the Ombudsman to dismiss cases where the nature of the complaint, the scope of the complaint, the volume of evidence or indeed the conduct of the complainant is such that the Ombudsman deems it disproportionate for an investigation.

Much has been said about the principle of proportionality throughout the consultation document, but this also applies in a slightly different manner here. In essence, we do not know how many of such complex or long cases LeO receives on a yearly basis. While LeO has set out one case study of a complicated and protracted case, there is nothing to demonstrate how many of these cases it receives every year. If they are quite rare, we consider that LeO should anticipate and plan for such cases within its resources.

If this proposal is to be taken forward, attention should be paid to the wording in paragraph 78, that LeO's discretion "would still enable a case to be investigated where there is a public interest, a vulnerable customer or significant detriment". The word "enable" is too permissive: it should be stipulated that this proposal "would not allow an investigation to be stopped" in these circumstances.

We are concerned that throughout the document LeO makes references to its strategic objectives and to other principles without much reference back to its statutory objectives which it also shares with the regulators. These objectives oblige

the Ombudsman to support the constitutional principles of the rule of law, improve access to justice, protect and promote the interests of consumers amongst others. The proposal under consideration does not make it clear how different statutory objectives have been weighted. To dismiss a case chiefly based on complexity or the length of time it would take to investigate might promote swifter resolution of cases in general (which is generally in the consumer interest) but only at the expense of hindering access, and of limiting its support for the constitutional principle of the rule of law.

5.7 (q)

The Panel agrees with the proposal under 5.7(q). We agree that once an investigation has started, delaying it to allow the complainant to pursue new issues with the providers and then adding it to an ongoing investigation is disproportionate. Communication to complainants would be key in this area; they must be clear that this would not be permitted.

Question 5

Do you support the intention to look at being able to widen the extent of the delegation of Ombudsman decision making powers?

Yes. The Panel supports this proposal for the reasons explained in the consultation document. We are convinced by the evidence which shows that up to 80% of all the cases referred to an Ombudsman for a final decision mirror the recommendation by the investigator.

The only consideration we ask is that the Ombudsman considers utilising only experienced investigators for this task. We are concerned with the high turnover at LeO, and such a proposal could be risky if new investigators are left to make these decisions. There should also be a transparent quality assurance process in place to ensure consistency and quality of decision making.

Question 6

Do you support the proposal to limit the right to an ombudsman decision where there are no substantive issues raised with the investigator's findings

The Panel agrees with the proposal to enable an Ombudsman to conclude that a final decision is not needed on a case if no substantive issues have been raised in response to the investigator's findings. We note that even in these cases the Ombudsman would continue to have a discretion to pass a case for a final decision if there were issues of vulnerability at play or if an Ombudsman decision is needed for insurance or enforcement purposes or if there was a point of public interest for consideration.

We are also reassured that a case can be reopened if a service provider refuses to honour an investigator's recommendations.

The Panel is fully in support of this proposal for the reasons articulated in the consultation paper. We strongly believe that this would reduce duplication and inefficiencies in the process. We are also satisfied with the safety net built into the

process, requiring a high-level review by an Ombudsman in cases where an investigator's findings are not accepted. This review will assess whether a final decision is required and take account of factors ranging from vulnerability to public interest.

Question 7

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

We agree with the factors outlined in the document but would also add specific areas of law where there is evidence that complainants struggle to complain eg refugee and or asylum and immigration law.

Question 9

Do you support a review of the case fee model with a view to implementing a model which better encourages early resolution of cases.

Yes, the Panel is in full support of a review of the case fee model for the reasons outlined in the consultation paper. The Legal Ombudsman may want to explore the merits of the principle 'the polluter pays'.

Question 10

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

The Panel broadly supports the proposals outlined in the additional changes. We are particularly supportive of the proposal to widen the circumstances in which a hearing can be held, and the proposal to clarify the position of beneficiaries, as outlined in the document. Clarifying the position of beneficiaries is particularly important and we welcome the attention being given to this.

Should you have any questions pertaining to this response, please contact Lola Bello, Consumer Panel Manager (lola.bello@legalservicesconsumerpanel.org.uk)

Yours sincerely,



Sarah Chambers
Chair
Legal Services Consumer Panel.