

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

**Legal Ombudsman review of the scheme rules and case fee structure**

**BSB Response**

The Bar Standards Board (BSB) welcomes the opportunity to comment on the Legal Ombudsman's review of the scheme rules and case fee structure.

**Q1: Do you agree with these principles? Are they the right ones to guide this review of the Legal Ombudsman's scheme rules?**

We agree with the principles guiding the Ombudsman's consultation and in particular the need to harmonise the rules to aid operational efficiency and minimise confusion to the industry and consumers.

**Q2: Do you have any views on these proposed changes to the scheme rules?**

The changes made to Chapter 1 appear to us to be uncontroversial and sufficient to incorporate ABSs as well as other business structures within the scheme rules.

**Q3: Are there any additional changes to Chapter 1 that in your view are necessary? If so, please explain your reasons and provide evidence to support your view**

We do not consider any additional changes to Chapter 1 are necessary.

**Q4: How appropriate do you think the current £1 million income/asset limit for charities and trusts is? Why do you think this? Can you provide any evidence to support your view?**

On the basis that any change to the rules should be properly evidence based with a clear regulatory need and bearing in mind that the Ombudsman has seen little evidence for changing the income/asset limit, we agree that the current £1 million

income/asset limit remains appropriate. We have seen no evidence that charities and trusts with income or assets over that limit have had any difficulty in seeking redress through the courts where necessary.

**Q5: Do you agree with our proposal to bring our service in line with other Ombudsman schemes and accept complaints from prospective customers? Why do you think this? Please include evidence.**

We have not been convinced by the commentary preceding this question that the case for extending the Ombudsman service to 'prospective customers' is fully made out. There appears to be some anecdotal evidence that there is a gap in the rules, however the Ombudsman has not provided clear evidence to support this extensive based on its own experience of receiving such complaints and of having to reject them.

In the case of the self-employed Bar, "prospective clients" would be limited to people from whom a barrister refused to accept instructions. To date, so far as the BSB is aware, we have not received either via the Ombudsman or signposted by the Ombudsman any complaints where a barrister has improperly refused instructions and indeed the BSB has over the years received very few complaints that a barrister has improperly refused instructions. It is arguable that should there be evidence of this kind of behaviour towards prospective clients, the regulatory and disciplinary processes of the authorised regulators ought to suffice.

Extending the scheme rules to include prospective clients may of course be more relevant to the other legal professions. Nevertheless the Ombudsman has not provided any compelling evidence to support the move. We note that the intention is to "harmonise the Legal Ombudsman Scheme with others Ombudsman's services", however, the only service cited is the Financial Ombudsman: it would be helpful to know which other Ombudsman include prospective clients/customers within their remit.

**Q6: Do you think there is evidence to support a change to the rules to include a list of specific categories of third parties who may complain to the Ombudsman? Which categories would you favour? Why? Please provide evidence to support your view.**

We do not consider that any clear evidence has been put forward to support a change in the rules to enable certain categories of non client to complain to the Ombudsman and it is not entirely clear from the paper what kinds of non client case the Ombudsman it would envisage dealing with were there to be a change in the rule. On other hand the paper identifies some of the problems associated with third-party/non-client complaints and from our experience these real and practical difficulties should not be underestimated. There is considerable evidence in the area

of self representing clients of a lack of understanding of the role of a lawyer and the lawyer's duties to their client and to the court, and of their own responsibilities and those of the court, particularly in adversarial legal proceedings. A lawyer owes no particular duty of care to his client's opponent and any extension of the Ombudsman scheme in the way suggested risks creating a 'duty' where previously none existed and may even place the lawyer in conflict with his duty to his own client. Extending the Ombudsman scheme to certain categories of non client also has a real potential for collateral proceedings and for confusion in the operation of the Ombudsman scheme.

We therefore support option 1 but if there is to be extension we would advocate that the only viable option would be 2. However, in terms of the Bar we cannot think of any appropriate categories or circumstances that could realistically be included in the Rules. Should the Ombudsman move ahead with this proposal, we would like a further opportunity to comment on the categories chosen in order to better assess the impact on the regulation of the Bar.

**Q7: Are there any additional changes to Chapter 2 that in your view are necessary? If so, please explain your reasons and provide evidence to support your view.** Again the issue of "successors" is one of limited application to the Bar particularly the self-employed Bar, However, with the increased employment of barristers in solicitors' firms as well as the introduction of ABSs and other types of legal business, the issue of successor firms may well become a more significant problem. We therefore have no objection to the proposed change to the scheme rules.

**Q8: Do you agree with the proposed change so that complaints can be accepted up to six years from the event or three years from the knowledge of the event? Please provide evidence to support your view. If you think the current arrangements are problematic, please provide solutions you would find appropriate.**

We are aware of some of the practical difficulties which the Ombudsman has, on occasions, had in responding to and dealing with out of time complaints, but feel that these can be overcome without extending the one year time limit to six years. Whilst we would in principle agree with a relaxation or being more flexible so far as the current time limits, we do not believe that the case has been made for such a significant increase in the time limit from one to six years. Our understanding from the paper is that there is no suggestion that the '6 month rule' (six months from the authorised person sending the consumer/client a final response) is to be changed).

The brief reference in the consultation document to the lack of harmonisation with the court limitation periods has not been explained and is in some respects is a bit of a red herring. The courts are concerned with issues of professional negligence and the terms professional negligence and poor service are not to be confused. The Ombudsman does not adjudicate on questions of law, but seeks to resolve promptly issues of poor service, and where possible ensure that the problem caused by an authorised person is put right. Often the complaint will be resolved by the lawyer apologising or making a relatively modest payment to the client for any distress or inconvenience caused by their poor service. The majority of complaints the Ombudsman deals with are resolved relatively promptly and informally without the need for a formal Ombudsman decision.

To extend the time limit to 6 years risks not only sending the wrong message to consumers about the importance of not delaying the making of a complaint if they consider that they have received a poor service, but also risks making it more difficult to resolve the complaint informally. A six year time limit does little to encourage prompt complaint resolution and seems to go against the Ombudsman's ethos of promoting speed and informality in complaints handling.

Whilst the Ombudsman has carried out an initial equality impact assessment, it is currently unclear as to the impact of any proposed extension of the time limit on small firms and sole practitioners compared with larger business entities. In particular there will inevitably be a need for first tier complaints handling procedures to be adapted to accommodate the change and this will inevitably have an impact.

It appears that one of the main drivers for proposing the change in time limit - which is intended to apply equally to all authorised persons - are concerns about the affect of ABSs coming into being. The Ombudsman currently, and understandably, has very little experience of dealing with such firms or evidence about types of complaints that will be received. In these circumstances, we consider more work needs to be done to assess the risks and believe that in the absence of this it is premature to be looking at a change of the kind proposed.

Further, the evidential basis for harmonising the time limits with those of the FOS scheme has not in our opinion been made out and some of the reasoning behind the suggested harmonisation appears to be speculative rather than evidence based. We also note that the intention is not just to harmonise with FOS but also "other schemes" but evidence has not been provided about the time limits of the other schemes in question and it would appear to us that many schemes do not operate such a lengthy time limit.

The paper cites examples of the Ombudsman being able to deal adequately with older complaints under the current rules. We consider that any problems the service has now or thinks that it might have in the future could be satisfactorily remedied by the Ombudsman having a wider discretion by reference to the regulatory objectives:

a discretion which it should not be averse to exercising. Whilst most issues of poor service will be identified by a client either during the period when the lawyer acting or within a short period of time after the lawyer ceases to act, in for example will writing cases or matrimonial financial dispute resolution cases a problem may only emerge or become apparent many years later. These situations are however already catered for under the current scheme rules.

We note the suggestion that if the time limit were to remain at one year that time should run from the end of the relevant “retainer” (which we understand to mean, from the time when the authorised practitioner’s instructions come to an end). We certainly agree that it would be helpful if the Ombudsman can judge the standard or service overall, and it is quite possible that the issue of concern may have in any event been resolved by the end of the lawyer’s involvement, thus avoiding the need for the Ombudsman to become involved. We would agree with such a change in the scheme rules.

We do not agree that the case for Alternative C is made out and our position is that a combination of alternatives B, D, & E will adequately address the issues identified. The issue of the time limit and the ABSs may need to be reviewed in the future in the light of experience and the collation of evidence.

Were any general extension of the time limit to be introduced in the near future, it would mean that complaints, because some complaints go back a long way, the Ombudsman would need to take account of rules that previously applied.

**Q9: What do you think our financial limit should be for compensation? Please provide evidence to support your view.**

The BSB does not object to the financial limit rising from £30,000 to £50,000 as we accept that the Ombudsman has examples of when the current limit has proved insufficient.

**Q10: Please express your preferences in relation to options 1 and 2? Please explain your reasons.**

It is difficult to determine on the limited information available in terms of financial impact, which option would be preferable. If there was compelling evidence that Option 2 would have a significant effect on where the financial burden lies, then this lend support to a move to removing the free cases but the indication is that it would only create a “small” increase in the amount collected. Option 2 would also, as identified, run the risk of more defaults on payments. It may well be that a reduction in free cases from two to one would increase revenue while at the same time retaining an incentive for professionals to learn from their first experience of the Ombudsman and endeavour to improve their complaints handling to avoid a case fee being paid in future. The BSB would not support removing the concept of “free” cases altogether. The matter therefore comes to down to whether there are one of two free cases and balancing the general needs of the professions against the

individuals subject to accepted complaints, it would seem reasonable to prefer Option 2 but on the basis that free cases are reduced rather than removed.

**Q11: Do you have any views about whether it would be worthwhile to consider a different approach to the collection of unpaid case fees through, for instance, the levy? Please explain your reasons why or why not.**

In principle it would seem reasonable that options should be explored with the LSB that might allow the impact of unpaid case fees to be distributed more fairly to avoid cross-subsidisation. However, without the benefit of more detailed figures regarding unpaid fees, it is difficult to determine whether such an exercise would be worthwhile

**Bar Standards Board**

**25 June 2012**