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Response to Legal Services Market Study Interim Report

Contents

Introduction 2

Effectiveness of existing redress mechanisms 2

Third Party complaints 3

Micro-businesses and Small businesses 4

Alternative Dispute Resolution 4

Unregulated providers and redress 5

Conclusion 6

About the Legal Ombudsman 6

Introduction

1. In this document, we (the Legal Ombudsman) respond to the Competition and Markets Authority's (CMA) Legal Services Market Study Interim Report.
2. This response is from Kathryn Stone OBE, Chief Legal Ombudsman informed by consultation with the OLC board.
3. In this response we have focused our views on the questions about redress.
4. We welcome the opportunity to respond to the interim report and for the opportunity to have met with the CMA throughout the early stages of the market study.

Effectiveness of existing redress mechanisms

5. Ensuring all that all consumers are informed about their rights to access effective redress is an area upon which we will continue to work with the Legal Services Board, the Legal Regulators and the profession to improve.
6. The recent Legal Services Consumer Panel tracker survey has shown a slight decline in the public's confidence in making a complaint from the survey undertaken in 2015. 43% of consumers would be confident in making a complaint about a service from a lawyer, down from 48%¹.
7. Positively the number of silent sufferers, people who had a complaint but did nothing about it, has dropped from 42% in 2015 to 35% in 2016².
8. We will continue to highlight our signposting guidance to help lawyers meet their requirements and will monitor this area of work closely. Our media campaign on 18 August was part of this work³.
9. We are developing guidance to the profession to help them deal more effectively with premature complaints. Over the next six months we will also be looking at providing relationship management for a small number of firms to enable us to work together to improve complaint handling.

¹http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/LegalServiceBoardReportbyYouGovV4.pdf

²http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Howconsumersareusing.pdf

³ <http://www.legalombudsman.org.uk/signposting-figures-show-room-for-improvement/>

Third Party complaints

10. The Legal Ombudsman ordinarily only accepts complaints from individuals about a service that was provided directly to them by a regulated service provider. However, we already have a specific exemption, provided by statute⁴, to allow us to take on third party complaints from beneficiaries, even though they are not strictly speaking either the client or funder of the service being provided. We do not record these separately on our system as third party complaints.
11. In 2012, we reviewed and consulted on our scheme rules⁵. Consideration of complaints from third parties was highlighted, our consultation proposals illustrated the potential complexity around defining third party complaints and what might fit appropriately within our remit.
12. Complaints from third parties has been an area of considerable debate. Consumer groups and professionals have strongly held conflicting views about its definition.
13. We do understand that there is more work to be undertaken in this area. Following the scheme rules consultation in 2012 it was decided that there was not enough evidence on whether we should deal with third party complaints. We anticipated that the more evidence we gather on these type of complaints, the more confident we would become on where the boundaries of our jurisdiction should lie. This has not, however, proved to be the case and the position remains confused. Over the last year we have been developing a set of draft criteria to explore how we could deal with third party complaints. Our draft criteria includes the following which would enable us to assess whether a complaint fell within eligibility requirements as intended by the Act:
- The existence of a contract
 - A financial transaction taking place
 - The consumer having a right to give instructions
 - The lawyer's work is intended to benefit the consumer and
 - Where a duty of care can be said to exist.
14. It is part of our business plan to look again at the issue of third party complaints during the current business year which will include reviewing the draft criteria. In doing so we will happily take account of any views expressed by the CMA.
15. In the meantime the Legal Ombudsman will engage with the Scottish Legal Complaints Commission, who are enabled under their act to undertake third party complaints, to understand what the impact of these changes would be and the differences in application for our scheme. We will also use this opportunity to further

⁴ The Legal Services Act 2007 (Legal Complaints)(Parties) Order 2010 made by the Lord Chancellor

⁵ <http://www.legalombudsman.org.uk/downloads/documents/publications/Scheme-Rules.pdf>

explore their work around mediation and how we could use this within our informal resolution process.

Micro-businesses and Small businesses

16. Our current definition was chosen in 2010, and was submitted to the Lord Chancellor for her approval prior to secondary legislation.
17. We will look into changing the definition to that set out in the Small Business, Enterprise and Employment Act 2015, Section 33⁶.
18. In general, ombudsmen exist to deal with complaints from ordinary citizens and consumers. Most ombudsmen limit their scheme to deal with micro enterprises. Any proposed change to our jurisdiction would need to be submitted to the Lord Chancellor for her approval. We are planning a review of our Scheme Rules in the near future and will consider this suggestion as part of that review.
19. In considering any possible extension of our jurisdiction to cover small businesses we will be mindful of the research by the Legal Services Board on 'The legal needs of small businesses'.

Alternative Dispute Resolution

20. In paragraph 5.62 the CMA refers to the general reluctance to use ADR as an alternative means for handling complaint. Whilst the Legal Ombudsman is not an ADR entity under the EU directive and subsequent UK regulations - an ombudsman scheme is, *de facto*, an alternative dispute provider.
21. As the statutory body for dealing with legal complaints we would be highly concerned at lawyers being required to use another ADR entity as well as ourselves.
22. Under the terms of the Legal Services Act, lawyers are already required to fund the Legal Ombudsman service to provide an alternative to the courts and are therefore unlikely to be keen pay a second time for a further ADR entity service. The Legal Ombudsman have also worked on making our processes easily accessible for consumers – dealing by telephone and writing our letters in plain English for example.
23. We have not, at this stage chosen to be accredited under the ADR regulations. The CMA may wish to note the fact that the SLCC have also not chosen to be accredited.
24. We would have preferred a situation where statutory Ombudsman schemes were automatically accepted into the new ADR regime. We are concerned that the current landscape, with ourselves not accredited and other accredited providers, looks incoherent and confusing to consumers.

⁶ <http://www.legislation.gov.uk/ukpga/2015/26/section/33/enacted>

25. However we are unsighted on the extent to which other ADR providers are being used by consumers/providers and their funding arrangements. We are a free at the point of delivery service (funded through a levy on providers) and this may be an area for further research in order to better understand the choices that providers and consumers are making.
26. As an ADR provider the Legal Ombudsman is the only body which has the power to make a binding determination in a complaint. This may clearly influence the choices made by consumers and may also influence the willingness of providers to agree to an informal resolution under our scheme.
27. An advantage of not being an accredited ADR scheme under the regulations is that we are able to consider complaints which have been to other accredited schemes but where resolution has not been achieved. If we became an accredited ADR entity we would not be able to retain this ability and consumers could miss out on access to a statutory ombudsman.
28. The Legal Ombudsman has provided signposting guidance to legal services providers which links to regulators guidance on meeting their ADR requirements.
29. The OLC will review their position to become an ADR scheme under the regulations again in 2017 and will take account of any views expressed by the CMA.

Unregulated providers and redress

30. One of the driving reasons for the Legal Services Act was the fact that the previous self-regulation of the mainstream legal sector and self-ownership of second tier redress did not command the confidence of the public or Parliament. If self-regulation was seen to have failed within the institutional framework of the regulated providers, it is unclear to us how it could be argued that such arrangements would be effective in the unregulated legal sector. We are concerned that self-regulation in the unregulated sector provides only limited protection for consumers who tend to have little understanding of the difference between a regulated and un-regulated provider.
31. If competition is improved the unregulated sector has further potential to grow and redress should be considered alongside any action to assist competition. We note the CMA assessment of the current size of the unregulated sector however it would be useful to also understand their analysis on whether or not (and at what rate) this sector is growing.
32. The changes in the market and the SRA's proposals for reforming our Professional Indemnity Insurance arrangements and for the Compensation Fund could also have

an impact on the unregulated sector and reduce our current reach – both in terms of protection for consumers and in feeding back for the profession.

33. The one option within the act for dealing with unregulated providers remains the creation of a voluntary scheme. This would need to be an area to be further explored in any review of the Legal Services Act 2007 due to the complexities of funding a voluntary scheme. Developing such a scheme would be an improper use of our levy funding and we are unable to raise alternative funding.
34. If competition in the sector is opened up further there is no mechanism of funding from the unregulated providers and the current funding structure would not allow us to consider complaints from these providers where they could be funded by the levy on the regulated sector.
35. When looking at the remedies, consideration could be given to a Kite marking scheme for service providers who come under the Legal Ombudsman scheme to highlight that they are covered by a redress scheme. This would be something we would welcome and support.

Conclusion

36. We welcome the work of the CMA in exploring this theme and look forward to working positively with the CMA to shape and contribute to any necessary remedies.

About the Legal Ombudsman

37. The Legal Ombudsman for England and Wales was set up by the Office for Legal Complaints (our Board) under the Legal Services Act 2007.
38. We are independent and impartial. This means that when we receive complaints, we will look at the facts in each case and weigh-up both sides of the story. We are not consumer champions or part of the legal profession, and we are also independent of government. There is no cost to the taxpayer and our service is also free to use.