



The Bar Council

Bar Council response to the Legal Ombudsman consultation on the Business Plan 2022-23

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 the Business Plan 2022-23.¹

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). Its members are subject to the complaints and resolution service provided by the Legal Ombudsman.

1) This document is being shared with you following a year of enhanced public accountability. What are your confidence levels in the Legal Ombudsman scheme compared to this time last year?

4. The Bar Council has been impressed by the efforts made by the Legal Ombudsman to be open and engaged with its stakeholders, including the Bar Council. The data and information produced including through blogs, shared agreed datasets and through the increased channels of communication at office and staff level at the Bar Council, have been robust and detailed. This openness goes up to the Board of the Office for Legal Complaints and regular contact and information sharing is taking place at governance, policy and operational levels. We would also commend the instigation of, and subject-matter covered by, the Challenge and Advisory

¹ <https://www.legalombudsman.org.uk/media/vygin4qv/olc-business-plan-and-budget-consultation-2022-23.pdf>

stakeholder group which is informative, and we hope useful to the Legal Ombudsman as well as stakeholders.

5. The Legal Ombudsman has been responsive, open and frank about what has been achieved, but challenges remain. These challenges are detailed in the business plan, including the difficult recruitment market, the high losses of staff (referred to as attrition), the structural challenges impacting on the recruitment 'offer' that can be made by LeO, a continued increase in demand and the ongoing impact of Covid. As noted at the OLC/LeO Business Plan Consultation Stakeholder meeting on 24th November 2021, confidence levels have increased in the Legal Ombudsman as it is clear that a range of methods are being used to seek to deal with the backlog and other performance measures at the Legal Ombudsman.

6. There is a substantial backlog and 'customer journey times', being the time between lodging a complaint with LeO and its resolution, remain high and too long respectively, we recognise that new methods to increase recruitment are firmly in place, and other strategies are being deployed. We do not doubt the commitment of the senior management team and have increased confidence in the LeO, but our concerns about the service provision remain.

2) Specificity is key for the credibility of the Business Plan but it is also important to avoid 'information overload'. What would you like to see more information or detail on in the final Business Plan issued in the New Year?

7. There is sufficient detail in the Business Plan for the Bar Council to understand the Legal Ombudsman's plans. As the Legal Ombudsman remains open to responding to particular questions or queries that the Bar Council may have, has held stakeholder sessions on the Business Plan and has a Challenge and Advisory Group with an open dialogue, there is no need for the provision of more information or detail in the final Business Plan to be issued in the New Year.

8. We do note though from the minutes of the meeting on 13th October from the Challenge and Advisory Group, that the Legal Ombudsman hoped to share an early version of the Business Plan consultation with the group. Whilst we understand this may have been difficult due to time constraints and getting the business plan signed off at the appropriate levels, we feel it is important in the future that the group be able to meet to discuss plans in advance of their publication.

9. There are questions around the Scheme Rules that we would like to be addressed, in particular regarding the suggestion of the introduction of case fees. We look forward to receiving more information about the possible application of case fees in the Scheme Rules consultation.

3) The Legal Ombudsman must avoid over-promising and under-delivering. To this end this document seeks to openly set out the different confidence levels in the impact of what is being proposed. Is this a helpful approach to adopt?

10. Setting out confidence levels is useful. The Bar Council does, however, suggest that given recent experience and the structural challenges faced, many of which only being partly in the control of LeO, which are frankly identified by the Legal Ombudsman in the Business Plan, the high confidence expressed towards obtaining a full establishment of investigators, full budget spend and a reduction in the backlog/increase in processing complaints is overly optimistic. The Legal Ombudsman has noted a number of factors that have resulted in the trajectory not previously being met including: a huge increase in demand, the challenging labour market outlook, the experience of staffing churn (or attrition), and the civil service/Legal Services Act limitations placed upon the Legal Ombudsman in relation to recruitment and terms and conditions. We are not of the view that all of these can be addressed to the degree identified within the relatively short timeframe specified.

11. The Bar Council welcomes the drive and ambition that the Business Plan represents and its focus on operation, but there remain structural challenges such as (i) demand (ii) strictures on employment of investigators (iii) challenging labour market in this sector that cannot be tackled, realistically, in just a year or two and (iv) high levels of attrition which is linked to (iii).

12. The Legal Ombudsman has been open about its high levels of attrition which seem unlikely to diminish in the immediate future. Whilst we appreciate all the measures that have been taken to tackle this, we would temper our confidence slightly that this can all be achieved in the short term. As noted in the Challenge and Advisory Group, there are a number of reasons for the high attrition including a lack of career progression, opportunities with alternative organisations, the public sector pay freeze, a candidate led market, pent up attrition and the impact of managing performance variation. These may be longer term issues that need to be tackled over a longer period than suggested in the business plan. Addressing performance variation continues to increase attrition, the removal of the public sector pay freeze brings challenges in itself and the recruitment of temporary workers can carry challenges with short notice periods and the training required to get new staff up to speed quickly.

13. We hope that the range of methods to encourage new recruits, including planned regional hub, changes towards a hybrid working model and working with the managed recruitment agency will increase staff performance, and overall levels of confidence. These measures have their own challenges, including whether staff will need to be trained remotely in these hubs (even if they are sharing offices with Ministry of Justice staff), which may take longer, and we do not yet know the exact impact of the recruitment agency. We do note that outsourcing is (through a change to primary legislation) another initiative that may be used to increase performance and productivity. We would support this in principle, as it may be possible to utilise legal professionals to look through casework quickly as part of outsourcing. In particular, for non-barrister complaints, the Legal Ombudsman could consider deploying the

independent Bar to process/investigate complaints on a cost limited basis. Again though, we view this as a longer-term possible solution that will take time, as it requires a change to primary legislation.

14. Plainly it is a question of judgment and projection, but the Bar Council suggests that the confidence levels ought to be reduced a level or two.

4) Historically there has been an emphasis on plans to tackle the size of the preassessment pool but there are better and more customer-centred ways of measuring sustainable acceptable performance. Should the Legal Ombudsman place more emphasis on individual customer experience, the value for money the service provides, the wider impact of the scheme or other measures?

15. The Bar Council is unclear about what is meant by a proposed change in measuring performance, in particular, “more emphasis on individual customer experience, the value for money the service provides, the wider impact of the scheme”. We would, however, generally disagree that there should be a change from a laser-like focus on the metrics of reducing the Pre-Assessment Pool (or backlog); waiting times prior to first assessment; and time from complaint to resolution.

16. When it comes to individual customer (or, as described in the Scheme Rules, complainant) experience the time between complaint made and resolution is presently the metric that we consider is most likely to impact on ‘experience’. We were concerned about the Mid-year review (provided in September 2021) which showed the position as to timeliness for low complexity cases likely to increase from 314 days to 325 days; medium complexity cases from 459 days to 500 days and high complexity cases presently being at 750 days, expected to reduce to 500 days. Even as projected, these are very long and, ultimately, unacceptable periods of time for processing complaints.

17. The last OLC consultation noted “Complainants tell the Legal Ombudsman they are concerned to have to wait for help, and service providers find it challenging to respond to a complaint many months after their first-tier process concluded.”² As the Legal Ombudsman will appreciate, delays in resolving complaints have an impact on the consumer, the service providers and ultimately a detrimental effect on public confidence as a whole in using regulated providers. We continue to believe that reducing wait times at pre-assessment is paramount. In response to the Legal Ombudsman draft business plan 2021-2022, we stated that “In our view, priority 1, with the aim of, “Maintaining stable operational delivery and reduc(ing) wait times at pre-assessment by the end of the strategy period”, should be focussed on at the present time.

² <https://www.barcouncil.org.uk/uploads/assets/7e174116-64e1-4a9f-a2518f5f77a8be27/Bar-Council-response-to-Legal-Ombudsman-draft-business-plan-2021-22-consultation.pdf>, page 6

This is due to the fact that it directly addresses the deterioration in wait times and the increase in unresolved cases, as well as the increase in length of time taken to resolve complaints.”³

18. Most of the complaints about the Bar are service complaints and a considerable proportion concern delay and, more widely, unresponsive service.⁴ It ought not to be the case that the complaints resolution body of last resort exhibits much higher levels of delays in processing than the authorised entities complained of. That, we consider, is most likely to impact on ‘experience’ and focussing on getting that down ought to be the primary ambition.

19. Value for money, particularly when funding the Legal Ombudsman is one of several costs borne by barristers, is a relevant consideration. The Bar Council wants the Legal Ombudsman to succeed as a cost effective timely ‘final tier’ complaints process. Value for money, however, can be understood by the information already provided by the Legal Ombudsman, such as the number of complaints resolved; budget management, such as through the present Business Plan consultation and analysis of our own contribution. We do not consider there needs to be any additional work stream in relation to that.

20. We do not know what the Legal Ombudsman means by the wider impact of the scheme, but certainly feedback provided on the nature and number of complaints, areas of law, etc. is taken into account by the Bar Council and, we infer, the Bar Standards Board. Again, this is a case of continuing the good information provision that has certainly been exhibited in the last year or so.

21. We appreciate that an important tenet of the Legal Ombudsman’s work is providing feedback in line with priority three. As discussed at the Challenge and Advisory Group meeting in October 2021, providing targeted learning and insight for service providers may in time contribute to fewer complaints ultimately reaching the Legal Ombudsman as service providers understand more about dealing with complaints. We are also pleased to have the continued support of the Legal Ombudsman in the Bar Council’s Annual Complaints Handling Seminar, most recently delivered in November 2021, where one of the Ombudsmen was part of the panel of speakers.

22. We do to some degree, support a focus on priority three (of section 3) which includes a number of focus areas including targeted learning, publishing findings and using engagement opportunities to demonstrate the impact of the Legal Ombudsman. However, we do not support a sharp focus on this area as it could be to the detriment of the main priority of reducing the backlog. We recognise that providing feedback to the sector is important but given the sharp deterioration in service levels at the Legal Ombudsman in 2020 and the ongoing impact of Covid on the legal sector, the focus must be first and foremost on reducing the Pre-Assessment Pool.

³ <https://www.barcouncil.org.uk/uploads/assets/7e174116-64e1-4a9f-a2518f5f77a8be27/Bar-Council-response-to-Legal-Ombudsman-draft-business-plan-2021-22-consultation.pdf>, page 5

⁴ “Barrister complaint handling: A Legal Ombudsman perspective” presentation delivered by the Legal Ombudsman (Jason Chapman) on 2nd November 2021.

As we outlined in the Bar Council response to the 2021-2022 consultation, the Legal Ombudsman must first accomplish its core functions before investing in its second and third priorities. To attempt to focus on all three priority areas concurrently runs the risk of spreading resources too thinly and detracting from the urgent and core business of resolving complaints within a reasonable timeframe.⁵ As the performance trajectory is in fact further behind that previously predicted, we do not consider a change from the focus of reducing the Pre-Assessment Pool is the correct way forward.

5) What are your views about the proposed budget for 22/23? If you disagree with the proposed budget, what elements of the Business Plan should be changed in order to address this?

23. The Bar Council disagrees with the proposed additional budget beyond the 3.8% increase previously identified. We have noted in our response to the business plan consultation paper 2021-22 that Covid has had a far-reaching impact on the barrister profession, and the Bar are still feeling the effects of this.⁶ The Legal Ombudsman is primarily funded by a levy imposed on authorised legal professionals, including barristers. Any budget increase would be directly borne by them and would represent one of many regulatory costs. There is also a risk that increases in the Legal Ombudsman's costs would be passed onto consumers by practitioners raising their fees. Additionally, the perception or actuality of any increased costs as a practising barrister does have an impact on recruitment and retention, particularly for those working part time or in poorly remunerated areas.⁷ Therefore, any increase in regulatory costs borne by barristers, including the LeO levy, is likely to have a negative impact on the profession.

24. The Legal Ombudsman is behind its performance trajectory. We welcome the measures that LeO is taking to try to address its performance. However, we firmly believe that the priority needs to be on reducing wait times at pre-assessment at the core, and not looking at other ambitious work at this time. We have noted that the Legal Ombudsman in its priority 3 seems to be over-ambitious, such as in providing feedback to the profession and publishing cases. We also strongly disagree with the Legal Ombudsman supporting wider sector work on areas such as 'redress for the unregulated sector' which has been included in the business plan. Further details of this should be publicised and it seems clear that when the Legal Ombudsman remains underperforming, it should not be turning attention to the unregulated sector which are outside its jurisdiction and do not contribute to funding the Legal Ombudsman.

⁵ <https://www.barcouncil.org.uk/uploads/assets/7e174116-64e1-4a9f-a2518f5f77a8be27/Bar-Council-response-to-Legal-Ombudsman-draft-business-plan-2021-22-consultation.pdf>, page 6

⁶ <https://www.barcouncil.org.uk/uploads/assets/7e174116-64e1-4a9f-a2518f5f77a8be27/Bar-Council-response-to-Legal-Ombudsman-draft-business-plan-2021-22-consultation.pdf>, page 2

⁷ As made clear in our response to the LeO transparency discussion paper in January 2020, <https://www.legalombudsman.org.uk/media/eh2h5pvh/bar-council-response-to-leo-transparency-jan-2020.pdf>

25. Given the challenges facing the legal sector, the 13% increase already provided (that has not substantially been used this year), and the programmed over-inflation 3.8% increase, there is no case for a yet further increase.

26. The Bar Council is less optimistic than the predictions put forward in the Business Plan about the ability of the Legal Ombudsman to obtain full establishment of investigators and, therefore, to use its budget spend. The Legal Ombudsman has noted in detail the difficulty of recruitment and high levels of attrition, and we believe the measures being taken will be a longer-term commitment rather than a measure that will work in the immediate future. We do not consider that a further budgetary increase would assist with these two difficulties. Retaining staff will need to be looked at in detail and it has been made clear that even addressing performance variation has led to increased levels of sickness (as noted in the C&AG) and attrition (as noted in business plan). We do not see how the additional budget could assist with this.

27. The Bar Council notes the underspend this year of over £600,000. From the stakeholder meeting and notes supplied subsequently, we understand that the underspend cannot be redeployed substantially on new demand management activities although we understood that there was some, limited, in-year flexibility permitted by reason of the under-spend. We would expect that full staff establishment is unlikely to take place certainly in the early part of the coming year, providing that limited flexibility once again, and potentially permitting some redeployment of senior Ombudsman resource to demand management activities.

28. Ultimately, however, LeO and we should bear in mind what it is fair and reasonable to ask often very hard-pressed authorised persons/ entities to pay, particularly as the sector remains in recovery from the Covid pandemic along with all of the other pre-existing pressures, given that there is already in train an above-inflation increase, following this year's very substantial budget increase.

6) Are there further measures that LeO should consider implementing in order to improve its performance?

29. The Bar Council is of the view that there should be a strong focus on analysis and possible change to the Scheme Rules. The Bar would be very willing to assist in relation to amendment to the Scheme Rules and potentially would be supportive in relation to structural changes such as a loosening of the employment restrictions concerning investigators. We note that in the last 20 years there have been a succession of changes in civil and criminal procedures, sometimes substantive in nature (for example, save in exceptional cases, the loss of the right in civil proceedings to renew an application for permission to appeal to a single Lord Justice of Appeal following refusal on a paper application), with the aim of reducing the pressures on the Court Service. The smoothing of the processes has been seen by Government and others as an acceptable price for a more efficient process to participants in the justice system overall. There is every reason to consider that the legal sector would support similar reforms in relation to the

sometimes clunky Ombudsman scheme rules. We would like to reiterate our offer that the Bar has expertise that may be able to assist the Legal Ombudsman in its possible analysis and change of the Scheme Rules.

30. We do need further details on possible amendments to the scheme rules and anticipate and welcome consultation on the amendment of Scheme Rules in due course.

31. We note under priority two in the Business Plan that early resolution and proportionality is part of the review of the Scheme Rules. We support review of the scope and application of scheme 5.7, and we suggest the introduction of 'de minimis' dismissal of complaints at an early stage. We also suggest that the Legal Ombudsman considers whether a higher proportion of costs are placed upon those professions/authorised entities that attract the most complaints and/or by reference to the numbers or proportion of complaints that are upheld – on the principle of 'the polluter pays'. As already noted, funding for the Legal Ombudsman is one of several regulatory costs borne by barristers and should not be viewed in isolation, particularly so when in 2020/21 complaints about barristers accounted for around 4% of the Legal Ombudsman's annual complaints resolved.⁸

32. Under priority two, another key area noted for review is "the application of case fees to incentivise early resolution". We understand from the Legal Ombudsman that case fees would be charged to the service provider and that you have no plans to charge case fees to complainants. As noted, we look forward to receiving more information around the suggestions about case fees. To make clear, we do not consider charging fees to complainants as useful or an avenue that will ever attract public or political support. We have not identified any consumer-based Ombudsman system that has taken this approach. We are therefore pleased to find it is not an area for consideration.

Bar Council

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⁸ As specified in the Legal Ombudsman's slides presented at the Complaints Handling Seminar in November 2021

