



Review and remediation programs

ASIC Consultation Paper 247

Financial Ombudsman Service Australia Submission

March 2016



Contents

Executive summary	3
1 Introduction	6
2 Overview	7
2.1 <i>Scope of guidance</i>	7
2.2 <i>Application to personal advice matters</i>	8
2.3 <i>Application beyond personal advice matters</i>	8
3 Establishing a program	8
3.1 <i>Interaction with IDR and EDR obligations</i>	8
3.2 <i>Interaction with licensing obligations</i>	9
3.3 <i>ASIC's role</i>	9
4 Determining the scope of a program	10
4.1 <i>Period of time that program must cover</i>	10
4.2 <i>Retention of records</i>	10
5 Design and implementation	10
5.1 <i>Giving clients the benefit of the doubt</i>	10
5.2 <i>Standards that program must meet</i>	11
5.3 <i>Key principles in developing processes</i>	12
5.4 <i>Reviewing advice</i>	12
5.5 <i>Oversight, governance and assurance arrangements</i>	14
5.6 <i>Record keeping</i>	16
6 Communicating with clients	16
6.1 <i>Key principles when communicating with clients</i>	16
6.2 <i>Initial communications with clients</i>	17
6.3 <i>Timeframes for client responses</i>	17
7 Ensuring clients have access to external review of decisions	17
7.1 <i>Complaints about programs</i>	17
7.2 <i>Agreements between licensees and EDR schemes</i>	18
7.3 <i>Waiver of limits on jurisdiction of EDR schemes</i>	18
7.4 <i>Assistance for clients accessing external reviews</i>	19
8 Proposed amendments to record-keeping requirements	19
9 Misconduct	19
9.1 <i>Definition of 'misconduct'</i>	19
9.2 <i>Use of the term 'misconduct'</i>	19

Executive summary

Financial Ombudsman Service Australia (FOS) is an ASIC-approved independent external dispute resolution (EDR) scheme that covers disputes across the financial sector.¹

FOS welcomes the opportunity to respond to ASIC's Consultation Paper 247, *Client review and remediation programs and update to record-keeping requirements*.

FOS supports ASIC's initiatives to strengthen remediation arrangements. The proposed guidance in the Consultation Paper will in our view contribute to the achievement of important objectives such as enhancing:

- consumer protection and
- consumers' rights to independent, efficient, fair and accessible remediation.

We agree generally with the approach taken in the proposed guidance. We strongly support mechanisms to ensure that new remediation arrangements will not undermine or reduce the standards for internal dispute resolution (IDR) and EDR.

We emphasise that, when a licensee establishes a review and remediation program, it will be most important for the licensee to engage constructively with its EDR scheme in early discussions and agree satisfactory arrangements for the program. The agreement between the licensee and its EDR scheme will need to provide for matters including:

- how the review and remediation program interacts with IDR and EDR
For example, the agreement will need to establish streamlined and efficient mechanisms to refer matters requiring external review to the scheme.
- any waiver of limits on the jurisdiction of the scheme, such as time and monetary limits and compensation caps, and any alternative limits agreed
- timeframes and
- measures to address concerns of affected clients about the operation of the program such as delays in considering a case.

Key points made in this submission² are noted briefly below, with references to the sections of the submission in which they are addressed.

¹ FOS is approved by ASIC under its [Regulatory Guide 139](#).

² This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of the Board of FOS. It draws on the experience of FOS and its predecessor schemes in the resolution of disputes about financial services.

The guidance should include a definition of 'systemic issue' that separates the means by which an issue is identified from the impact of that issue on clients.

Section 2.1

When describing how a licensee's review and remediation program interacts with EDR, the guidance should state that the licensee should base its approach to compensation on the principles used by its EDR scheme. *Section 3.1*

Review and remediation programs should adopt protocols to deal with cases where licensees do not have all relevant records. A review should not be limited to the period covered by the records the licensee has retained. *Section 4.1*

If there is a 'prima facie' case that a client is affected by misconduct covered by a review and remediation program, and may have suffered loss as a result, it is fair to give the client the benefit of the doubt in any review process. The licensee should bear the onus to establish it has done the right thing and has not caused the client loss or detriment. The guidance should explain this onus. *Section 5.1*

The guidance should clarify how compensation caps will be established and communicated to affected clients as part of a review and remediation program.

Section 5.4

Some of the proposed timeframes applying to licensees and clients should be made tighter. *Sections 5.4 and 6.3*

The proposed guidance on independent oversight should be restructured to more generally address oversight, governance and assurance arrangements for a review and remediation program. The guidance should clarify the roles of ASIC, the licensee, its EDR scheme and external experts. *Section 5.5*

The design of a review and remediation program should include measures to address concerns of affected clients about the operation of the program, including delays in having a matter considered. The measures should be explained clearly to the clients. *Section 5.5*

The guidance should make clear that, in relation to complaints about a review and remediation program, an EDR scheme has a limited role in reviewing how the program is conducted and aspects of the program such as processes and timelines.

Section 7.1

A licensee establishing a review and remediation program and its EDR scheme will need to reach an agreement about relevant documentation, timelines and other arrangements for the program. The guidance should require the agreement to outline any waiver of limits on the jurisdiction of the EDR scheme such as time and monetary limits and compensation caps and any alternative limits agreed. *Sections 7.2 and 7.3*

Record-keeping requirements should ensure licensees can, without delay, access any documents they are required to retain. It is important to take into account the latest developments in technology when considering the proposed amendments to record-keeping requirements. *Section 8*

If FOS can provide further input or assistance, please contact us.

1 Introduction

FOS is an independent EDR scheme, approved and overseen by ASIC, that handles disputes across the financial sector. Our service is free to consumers and is funded through a combination of levies and case fees paid by our members, which are financial services providers.

FOS and its predecessor schemes have over 20 years' experience in providing dispute resolution services in the financial sector. In addition to our functions in relation to dispute resolution, we have responsibilities to identify and resolve systemic issues and obligations to report to ASIC. FOS also provides code monitoring, administration and secretariat services to four Code Compliance Committees that monitor financial services providers' compliance with industry codes of practice.

Information about FOS is set out in full on our website at www.fos.org.au. Information about our role and experience in relation to systemic issues is particularly relevant.³

As the largest ASIC-approved EDR scheme in Australia, FOS will play a key role in review and remediation programs of licensees under the proposed guidance. For example:

- when a licensee that is a member of FOS establishes a program, FOS and the member will need to agree on documentation, timelines and other arrangements for the program and
- for a program conducted by a member of FOS –
 - FOS will conduct any external reviews of decisions sought by clients and
 - FOS will handle certain complaints made about the program by clients.

Sections 2 to 9 of this submission provide feedback on the proposed guidance in the Consultation Paper as follows:

- Sections 2 to 8 address sections B to H of the Consultation Paper and
- Section 9 relates to the key term 'misconduct'.

³ See [FOS Annual Review 2014-2015](#), pages 95 -99.

2 Overview

2.1 Scope of guidance

The Consultation Paper explains the proposed scope of the guidance using the terms 'systemic issue' and 'personal advice'.

While we generally support the approach taken, we have a number of technical comments on the proposed scope of the guidance.

Definition of Systemic Issue

We consider it would be useful to separate in the definition of systemic issue the means by which an issue is identified from the impact of that issue on multiple clients of a licensee.

The concept of systemic issue in the proposed guidance is based on ASIC's policy in Regulatory Guide 139 and defined as an issue that may have implications beyond the immediate rights of the parties *to a complaint or dispute*. The definition was established for the purposes of the obligations of an EDR scheme whose primary role is handling individual complaints and disputes. It combines the way in which an issue is identified with the impact of that issue on multiple consumers.

As paragraph 39 of the Consultation Paper notes, a systemic issue may not always be identified through complaints-handling processes. Identification could occur by means of a regular compliance check or audit even where there is no client complaint or dispute involved. Other ways that a systemic issue might be identified are by whistle-blowers, ASIC supervision, media commentary, concerns identified in another jurisdiction or by means of a decision by a court or other tribunal.

Secondly, a systemic issue for an EDR scheme involves specific obligations in terms of processes, outcomes and reporting to ASIC. This extends beyond seeking redress for individual clients to seeking re-assurance from the licensee that it has addressed the underlying causes so that the detriment to the licensee's clients do not re-occur.

We suggest that 'systemic issue' should be defined for the purposes of review and remediation programs more generally by reference to the impact of the conduct on clients rather than by the way in which such conduct may be identified. We would suggest something along the lines of actual or potential detriment for a number of clients resulting from the misconduct or other compliance failures by the licensee or its agents.

Paragraphs 38 and 39 could be supplemented by examples of the various ways such conduct could be identified. The conduct could be identified, for example, by means of complaints or disputes, internal audit review, regulatory action, whistleblowing, the systemic issues process by an EDR scheme or by the other means set out above.

2.2 Application to personal advice matters

Inadequate risk disclosure is often an issue in matters we consider. Although it might be covered by paragraph 42(e), we suggest that failure to provide adequate risk disclosure should be listed separately as one of the first examples in paragraph 42 given its prevalence.

2.3 Application beyond personal advice matters

We agree that the principles in the proposed guidance should apply to review and remediation programs that do not relate to personal advice (as well as programs that do relate to personal advice). There are a wide range of circumstances where a review and remediation program would be appropriate.

Question of whether advice is personal or general

The proposed guidance is to apply to licensees conducting a program to address systemic issues that relate to **personal advice**. The question of whether to characterise advice as personal or general arises regularly in matters we consider and can be difficult to determine.

We consider it would be useful to make clear that the guidance also applies in all cases where there is a question about whether advice should be characterised as personal or general.

Misconduct not relating to advice

Paragraph 43(c) refers to misconduct that does not relate to personal advice. To make it a more helpful example, we suggest that wording such as ‘or to any form of advice’ should be added after ‘personal advice’.

3 Establishing a program

3.1 Interaction with IDR and EDR obligations

When developing a review and remediation program, a licensee will need to carefully consider the relationships and interaction with IDR and EDR arrangements.

While the key issues to be considered should be set out in the guidance, some aspects of the detailed arrangements will need to be considered and agreed between the licensee and its EDR scheme in the context of the specifics of each program.

Accordingly, we support the proposal that there be early discussion and agreement by a licensee and EDR scheme as part of the design of a review and remediation program.

Description of relationships

We suggest the first sentence of paragraph 52, which uses the general terms ‘alongside’ and ‘under’ should be amended to refer to important interactions and

interrelationship with IDR and EDR. The nature of these interactions and relationships can then be specifically set out in the guidance.

Calculation of compensation

An important point of interaction with EDR is the way in which a review and remediation program will calculate any compensation payable. This is not currently addressed in Paragraph 52. We suggest paragraph 52 should either state that the licensee should base its approach to compensation on the principles used by its EDR scheme (listing this as an item in addition to items (a) to (c)) or include a cross reference to paragraph 122, which explains the point.

External review arrangements

The use of the word 'generally' in paragraph 52(c) suggests that external reviews of decisions in an individual dispute may be conducted by a person or body other than the licensee's EDR scheme. This is not explained elsewhere in the Consultation Paper. We assume this is a reference to review by a court for a matter outside FOS's jurisdiction or where the clients (or class of clients) choose to take action in the courts. If this is what is intended, then we suggest this should be clarified.

3.2 Interaction with licensing obligations

Professional indemnity insurance

Consultation questions C3Q2 and C3Q3 ask about the impact a review and remediation program may have on the licensee's ability to make claims under its professional indemnity insurance (PII).

We are aware of at least one example where a licensee could lose the ability to make a PII claim if the licensee established a remediation program with compensation limits higher than the compensation caps set in the FOS Terms of Reference. However, we consider a review and remediation program should be designed to ensure the program provides appropriate redress for clients and not be constrained by any limit set by PII policy coverage.

Compensation arrangements

We are not clear what is meant by Paragraph 73. We suggest this should be either amended or deleted.

3.3 ASIC's role

We consider the guidance should clarify the division of roles among ASIC, the licensee's Board or management, the EDR scheme and other parties such as those referred to in paragraphs 132 to 138. Please see section 5.5 below.

4 Determining the scope of a program

4.1 Period of time that program must cover

We consider that a review should not be limited to the period covered by the records the licensee has retained.

We are concerned that paragraph 87 could discourage licensees from retaining records for longer than seven years and could allow licensees to benefit from not retaining records (by limiting the range of records reviewed).

We consider review and remediation programs should adopt protocols to deal with cases where licensees do not have all relevant records. The guidance could require licensees to put the protocols in place when establishing a review and remediation program or this could be one of the arrangements agreed between a licensee and its EDR scheme.

4.2 Retention of records

In our view, once a licensee becomes aware that a review and remediation program may be likely, the licensee should be required to retain all relevant records, even where they are, or will become, over seven years old. We suggest that the guidance should specify this requirement.

5 Design and implementation

5.1 Giving clients the benefit of the doubt

In paragraphs 100 and 120, the proposed guidance indicates that clients should be given the benefit of the doubt where relevant information is missing. In our view, the requirement to give clients the benefit of the doubt should apply more broadly in the design and implementation of a review and remediation program.

Such a program will exist only where the licensee has identified actual or potential misconduct resulting in client detriment. The licensee is better placed to have access to the relevant information, has carriage of the process of reviewing the conduct of the staff involved, and is responsible for actively identifying all potentially affected clients.

If there is a 'prima facie' case that a client is affected by the misconduct and may have suffered loss as a result, it is fair to give the client the benefit of the doubt in any review process.

A client may have a prima facie case that falls within the category of potential misconduct covered by a review and remediation program if the client is, for example:

- in a similar situation to other clients and evidence shows the misconduct affected the other clients or

- a client of an authorised representative with a track record of misconduct or failure to give proper advice.

In our experience, remediation programs generally consider conduct that occurred many years previously - often more than six years earlier. It is common for both licensees and clients to not retain records or only retain records of poor quality.

Where a client has a prima facie case, we consider they should be given the benefit of the doubt with the onus on the licensee to show that it has in fact done the right thing and its actions have not caused the client any loss or detriment. This also helps to address the concerns about inadequate record keeping referred to above.

We suggest that the guidance should explain the onus that licensees should bear in a review and remediation program based on the concept of giving clients the benefit of the doubt, particularly where the records of the licensee are incomplete or inadequate. This may involve reviewing provisions in the proposed guidance about reviews, such as paragraph 117.

5.2 Standards that program must meet

We recommend that the guidance should adopt consistent terminology to describe the standards expected in a review and remediation program and the standards that apply to activities conducted as part of the program.

The proposed guidance states, reflecting section 912A of the *Corporations Act 2001*, that a review and remediation program must be conducted in an efficient, honest and fair way⁴. In other statements about the standards programs or review activities under the program must meet, various terms are used. Examples are noted below.

- Paragraph 9 uses 'fair, consistent and transparent'.
- Paragraph 20 uses 'comprehensive, timely, fair and transparent' and 'simple for the client', and paragraph 106 uses very similar terms.
- Paragraph 107 uses 'efficient and timely'.
- Paragraph 100 provides more detail, and uses terms including 'consumer-focused' and 'objective, unbiased and equitable'.

Paragraph 100 explains that it sets out principles consistent with principles in ASIC's Regulatory Guide 165. This may create some confusion as to what is expected of a program under the guidance.

We suggest that the guidance should adopt consistent terminology to describe the standards expected in a review and remediation program. At a high level this is to ensure a licensee operates in an efficient, honest and fair way. The guidance could also set out a clear statement of principles around fairness, timeliness, transparency

⁴ For example, see paragraph 31.

and simplicity that should apply to design and implementation of the review activities under the program.

5.3 Key principles in developing processes

We recommend that there be a clear principle that arrangements for referral of matters to EDR be streamlined and efficient.

The key principles listed in paragraph 106 do not refer to any measure to ensure that the path from an initial review to any subsequent external review by an EDR scheme is streamlined and efficient for clients involved. An additional principle could include material set out in the 'key points' in section G of the Consultation Paper. Suggested wording for the principle is:

Advice licensees should engage with their EDR schemes when establishing a review and remediation program to ensure that the path to any external review is streamlined and efficient.

5.4 Reviewing advice

We recommend that a consistent set of principles should apply to the review of client concerns.

The proposed guidance uses various terms to explain how advice should be reviewed. For example, paragraph 112 requires advice to be reviewed 'consistently and fairly' and paragraph 113 requires reviews to be 'fair, objective and unbiased'.

While we agree with the intent of these paragraphs, we suggest replacing paragraphs 112 to 114 with a clear and consistent statement of principles for the review activities under a review and remediation program as discussed above.

Caps on compensation

The guidance should clarify how compensation caps will be established and communicated to affected clients as part of a review and remediation program.

The proposed guidance explains that a licensee should calculate compensation using the approach of its EDR scheme⁵. We agree that the licensee should use the EDR scheme's approach or an approach that would produce outcomes no less favourable to clients.

Table 1 on page 34 notes that Regulatory Guide 139 allows EDR schemes to impose certain compensation caps. We consider that the guidance should clarify that an EDR scheme's compensation caps should not be the default setting that applies in a review and remediation program conducted by a licensee who is a member of the EDR scheme.

There may be limited circumstances where it is appropriate for compensation caps to apply. If any caps are to apply in a program, they should be set when the program

⁵ See, for example, paragraph 122.

is established and disclosed to clients at an early stage. This is because clients may be entitled to more than any caps offered under the program.

If a client decides to pursue external review by an EDR scheme, the client should make that decision aware of the caps on compensation under the program and the extent to which any caps on compensation under an EDR's scheme have been waived.

Timeliness and interaction with EDR

The design and implementation of a review and remediation program should produce timely outcomes for clients. If clients face long delays in a program, they may 'opt out', reducing the program's effectiveness to the detriment of clients.

We consider the approach should be guided by ensuring that any arrangements should be kept as simple and streamlined as possible to ensure a fair, fast and efficient independent review of a client's dispute by the EDR scheme is not compromised. This means the approach by the EDR scheme to how it may handle disputes it receives may differ depending on the timeframes and approach proposed under a review and remediation program.

Where the timeframe for review and decision making under a review and remediation scheme is broadly consistent with normal IDR and EDR timeframes (such as the proposed 90 days in paragraph 116), we consider it would be sensible for any disputes received by the EDR scheme within the scope of the program to be referred for initial review as part of the program. This would help avoid duplication or matters being reviewed at the same time under two different processes.

However, where the timeframe for the review and remediation program is well beyond the normal IDR and EDR timeframes we would need to take into account what would be fair to the client in all the circumstances. This would involve looking at whether the dispute has been lodged with FOS directly or is currently in the program, the impact on any time limits under our Terms of Reference and any other relevant factors. We would want to make sure that, where a client seeks to have FOS deal with a matter directly, they understand all the implications for them, including the impact of any differences between the program and FOS processes in relation to compensation and time limits.

When FOS was approached recently by clients in a remediation program, we decided to handle their disputes directly instead of referring them to the program. We took this approach because FOS could resolve the disputes well before the program could produce outcomes for the clients.

We would also adopt this approach for vulnerable clients or where delay in an outcome under the remediation program may have significant detrimental impact for the person involved.

Paragraph 116 states that advice should be reviewed in a timely way and as quickly as possible without compromising the quality of the review. We consider that an

equivalent standard should apply to all steps in a review and remediation program, including notification that a client is within the program's scope, notification of a decision about remediation and implementation of any redress.

Paragraph 116 indicates that licensees should decide whether to remediate a client within 90 days of notifying the client that they are within the scope of a program. In our view it would be reasonable to require the licensee to also notify the client of the decision within the 90 day period.

5.5 Oversight, governance and assurance arrangements

We consider the proposed guidance on independent oversight should be restructured to more generally address oversight, governance and assurance arrangements for a review and remediation program. We consider it important to clarify the roles of ASIC, the licensee, its EDR scheme and external experts in a review and remediation program. Our views on how this can best be done are set out below.

Oversight

ASIC has the primary oversight role for implementation of a review and remediation program and ensuring that a licensee is complying with its obligations under the relevant legislation. We acknowledge that paragraph 106 refers to ASIC's oversight role. However, further detail about this aspect of ASIC's role would be helpful. We suggest the term 'oversight' should only be used in the context of this formal regulatory role of ASIC.

Governance and accountability

The Board and senior management of the licensee are responsible for ensuring compliance with their obligations under the law. This means they should be clearly and directly accountable for implementation and conduct of any review and remediation program. This includes arrangements for any internal governance or review mechanisms. This accountability is not something that can be outsourced to an external party. We consider this needs to be set out in the proposed guidance.

Assurance arrangements

External experts can be used as one of the mechanisms to provide assurance to the Board and senior management, ASIC and the broader community on the conduct of the program. There are a variety of ways to structure such an assurance role. In our view it is important to not increase layering, complexity or time taken to review the client's issue.

Where a licensee appoints, or is required by ASIC to appoint, an external person to provide assurance about the operation of a program, the roles and responsibility of that person should be clearly spelt out in the relevant terms of appointment. In most cases this should include a clear line of independent reporting to ASIC.

We consider it important to make clear that where an external person is appointed to review individual client matters under the program they do so as an agent of the licensee, and are therefore part of the internal review process put in place by the licensee.

In addition, the third party assurance role should not be seen as a substitute for the accountability of the Board and senior management for the conduct and outcomes of a review and remediation program.

The appointment of an external person needs to be described in a way that does not confuse this assurance role with the role of an independent EDR scheme in resolving disputes.

Role of the EDR scheme

An EDR scheme has a role in independently reviewing disputes where a client is not satisfied with the outcomes from the review and remediation program. An EDR scheme also has obligations for systemic issues that it identifies in the course of its review of individual disputes.

We consider that the guidance should clearly distinguish this type of systemic issue review undertaken by an EDR scheme from the type of public review and remediation program provided for in the guidance.

We suggest that paragraph 134 should not use the term 'independent oversight'. This may confuse the role of an EDR scheme in handling disputes, its obligations of dealing with a systemic issue identified when resolving individual disputes and the general oversight, governance and accountability roles set out above.

The obligations of FOS in regard to systemic issues are specified in paragraph 11.2 of our Terms of Reference, which is explained in our Operational Guidelines⁶. Briefly, paragraph 11.2 requires us to:

- identify systemic issues and refer them to the relevant financial services provider for remedial action
- for each systemic issue, obtain a report from the financial services provider as to the remedial action undertaken and continue to monitor the matter until an acceptable resolution is achieved and
- report systemic issues to ASIC in accordance with its Regulatory Guide 139.

Further points that could be taken into account when reviewing paragraph 134 include:

- Where FOS determines an issue is definitely systemic in nature, we work with the financial services provider to ensure:

⁶ See the guideline to paragraph 11.2 in our [Operational Guidelines](#).

- all affected clients are identified and appropriately compensated for financial loss, if any, in a fair manner and
- a strategy is put in place to prevent the cause of the systemic issue from recurring.
- FOS provides an avenue of appeal for affected clients who claim they are entitled to be treated differently from other affected clients.
- If a definite systemic issue is not rectified as FOS requires, we will take further action that may include lodging a report with ASIC about the systemic issue, identifying the financial services provider.

In the work described above, FOS does not undertake an on-site audit or any similar process to verify matters. We rely on information provided to us by the financial services provider.

Clients dissatisfied with programs

Through our involvement in remediation programs, we have seen cases where clients are dissatisfied with the way programs are conducted, but cannot obtain satisfactory outcomes. Their dissatisfaction often stems from delays in having their matter reviewed under the program. Clients within programs have approached FOS, seeking a speedy resolution of matters not finalised by the programs.

However, we can only consider a dispute within our jurisdiction. Generally, this does not include considering a simple claim that a review and remediation program is too slow.

If a dispute does fall within our jurisdiction, there may be complication for the handling of that dispute due to differences in compensation caps that might apply or to duplication as disputes are considered under two separate processes.

The design of a review and remediation program should include measures to address concerns of affected clients about the operation of the program, including delays in having a matter considered. The measures should be explained clearly to the clients.

5.6 Record keeping

We suggest that paragraph 145 also notes that a licensee should keep records in a manner that allows for efficient transfer of relevant information to its EDR scheme whenever a transfer is required.

6 Communicating with clients

6.1 Key principles when communicating with clients

We suggest that the key principles listed in paragraph 154 should make clear that clients should be informed of applicable timeframes. This could be done by adding

wording such as ‘or timeframes that apply’ to the phrase in brackets in the penultimate dot point in paragraph 154.

6.2 Initial communications with clients

Item (d) in paragraph 165 may cover the right of clients to make submissions and present information to support their claims for remediation, but this is not clear. We suggest that wording such as ‘the right to make submissions and present information to support the client’s claim for remediation and’ be added after ‘e.g.’ in the bracket in item (d).

6.3 Timeframes for client responses

Our dispute resolution experience indicates that, to ensure processes are effective and efficient, it is reasonable to require client responses within timeframes. In our opinion, long timeframes – such as six months with the possibility of an extension and some flexibility to accommodate special circumstances - are preferable to open-ended arrangements. As we favour the approach of setting timeframes for client responses, we suggest that the second sentence of paragraph 175 should be deleted.

7 Ensuring clients have access to external review of decisions

7.1 Complaints about programs

The proposed guidance indicates that clients of a licensee should have access to its EDR scheme if the clients are not satisfied with an aspect of the review and remediation program or with the licensee’s decision. Statements to this effect are made, for example, in paragraphs 24, 56 and 179. They suggest there are two distinct categories of cases that EDR schemes should handle:

- external reviews of decisions made under a review and remediation program and
- complaints about such a program.

We consider that an EDR scheme is only in a position to handle complaints about a review and remediation program where the scheme is also in a position to make a decision in regard to remediation. For example, if a client complains that a licensee did not properly consider the client’s submission, the EDR scheme could make a decision on that complaint as well as the merits of the review. A complaint solely about process, such as a claim that the licensee did not use the client’s nominated method of communication or aspects of the review and remediation program are more appropriately considered as part of the governance and assurance arrangements rather than as a dispute that falls within the jurisdiction of the EDR scheme.

We suggest that the guidance should make clear that, in relation to complaints about a review and remediation program, an EDR scheme has a limited role in reviewing

how the program is conducted and aspects of the program such as processes and timelines.

7.2 Agreements between licensees and EDR schemes

Paragraph 181 includes this statement:

‘It is important that advice licensees engage with their EDR scheme when establishing a review and remediation program so that relevant documentation, timelines and other arrangements are agreed upfront between the licensee and its EDR scheme.’

We are confident that we will generally be able to reach agreement on sensible arrangements based on co-operation. This has been our experience to date. To provide for the possibility that a licensee and its EDR scheme cannot reach agreement, we suggest the guidance should indicate this would be brought to ASIC’s attention for appropriate action and public communication.

7.3 Waiver of limits on jurisdiction of EDR schemes

The proposed guidance does not include any definite guidance on waiver of limits on the jurisdiction of EDR schemes. Paragraph 179 merely states that licensees ‘may need to consider’ waiving these limits. Issues relating to waiver are raised in consultation questions G1Q1 and G1Q2.

To facilitate access to remediation by all affected clients, it may be appropriate to waive time, monetary or other limits that might constrain the jurisdiction of EDR schemes. Waivers may need to extend to clients who have previously entered into confidential settlements.

However, boundaries should be set. There are different ways to design the boundaries and we could draw on our experience in recent remediation to develop models or approaches for waivers.

If, in a review and remediation program, any limits on the jurisdiction of the EDR scheme are to be waived, we consider that the agreement between the licensee and the scheme should include a clear outline of the waiver and any alternative limits agreed. We suggest that the guidance should require the agreement to include this outline.

If limits are waived, the time or monetary limits in a review and remediation program may be significantly beyond those of the licensee’s EDR scheme. Even in this situation, we anticipate that FOS will be well placed in most cases to consider matters referred for external review. However, it may be helpful for the guidance to note that an EDR scheme may determine whether it is the appropriate forum to consider matters beyond its regular jurisdiction.

7.4 Assistance for clients accessing external reviews

To facilitate access to remediation by all affected clients, we consider that licensees should, in all review and remediation programs, offer clients assistance to help them review decisions by licensees and, if necessary, present their case for external review. The assistance could consist of, for example, paying a professional adviser's fees or providing for a qualified third party to support clients in external reviews.

We do not think item (c) in paragraph 183 should be retained. The present list of examples may suggest that the cost-free option in item (c) is equivalent to, or in all cases a satisfactory alternative to, the other options listed which would impose costs on licensees. Another factor is that a legal centre could be overwhelmed if clients in a large review and remediation program are directed to the centre.

8 Proposed amendments to record-keeping requirements

The record retention arrangements outlined in paragraph 189 can create difficulties in dispute resolution. It can be difficult for a licensee to provide documents required for disputes we consider if the documents have been stored by a former authorised representative of the licensee.

To support effective and efficient dispute resolution and review and remediation programs, we consider that record-keeping requirements should ensure licensees can, without delay, access any documents they are required to retain. In our view this is reasonable given the range of document storage options now available, including digital and cloud storage. It is important to take into account the latest developments in technology when considering the proposed amendments to record-keeping requirements.

As noted above, our view is that, once a licensee becomes aware that a review and remediation program may be likely, it should be required to retain all relevant records, even where they are, or will become, over seven years old.

9 Misconduct

9.1 Definition of 'misconduct'

In the proposed guidance, 'misconduct' is a key term. We note that 'misconduct' is not defined and suggest that a definition should be included.

9.2 Use of the term 'misconduct'

When referring to the behaviour of licensees to be addressed through remediation, the proposed guidance usually uses the term 'misconduct'. Examples appear in paragraphs 16, 18, 24, 34, 41, 49, 50, 76, 80, 81, 82, 85, 88, 90, 91, 92, 93, 94, 95, 117, 126 and 145.

However, the term 'misconduct' is not used in all of the references to this behaviour. Other terms used include:

- 'decisions and behaviour' of the licensee (see paragraphs 11, 42 and 48)
- 'actions' of the licensee (see paragraph 31)
- 'systemic issue' (see paragraphs 32 and 53)
- 'administrative errors' (see paragraph 43) and
- a 'problem' (see paragraph 40).

We suggest that all the references to 'misconduct' and similar concepts should be reviewed to ensure that the guidance uses terms consistently.