



Remapping consumer redress

Submission to the BIS call for evidence on
implementing the ADR Directive

June 2014

Consumer challenge



About Consumer Challenge

Our Consumer Challenge series is designed to create a space for fresh thinking where the Legal Services Consumer Panel can stimulate debate, question the received wisdom and propose new solutions to old policy issues. These documents do not necessarily represent the Panel's final policy position, but instead allow us to test ideas and spark discussion.

Previous titles in the series:

- Third party complaints
- Legal Education and Training Review
- Empowering consumers: Phase One report to the Legal Services Board
- Risk and responsibility
- Breaking the maze: Simplifying legal services regulation
- The consumer interest

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1 Executive summary

Rethinking consumer redress

- 1.1. This document forms the Panel's response to the call for evidence issued by the Department for Business, Innovation and Skills as part of its consultation on how the UK should implement the new EU Directive on Alternative Dispute Resolution.
- 1.2. ADR has replaced the courts as the main forum for resolving disputes between consumers and businesses and is of key strategic importance. Effective dispute resolution matters for four main reasons: it goes to the heart of our sense of a fair society, supports the rule of law and underpins public confidence in the consumer protection framework; the feedback from complaints enables service improvements and identifies systemic problems; enhances competitiveness and growth; and sets expectations of market behaviour and alleviates significant consumer detriment.
- 1.3. Yet the strategic importance of ADR has not been matched by a strategic approach towards ADR within government. Although broadly a success, its history is of organic growth on a sectoral basis which has led to some problems that are becoming increasingly urgent to fix. These problems are felt acutely in legal services, but there is evidence they are common elsewhere. The Directive is a timely opportunity to take a step back and rethink the long-term provision of consumer redress.
- 1.4. The paper highlights three key failings of the current system:
 - Gaps in redress that mean many consumers cannot turn to ADR despite the Directive creating an expectation they will be able to do so. These gaps are not based on any logic, but historical accident. A misguided complaints culture prevents voluntary take up. *BIS should fill gaps in redress in major*

markets, complete coverage where it is patchy in individual sectors and give Ministers reserve powers to make ADR mandatory for specific traders

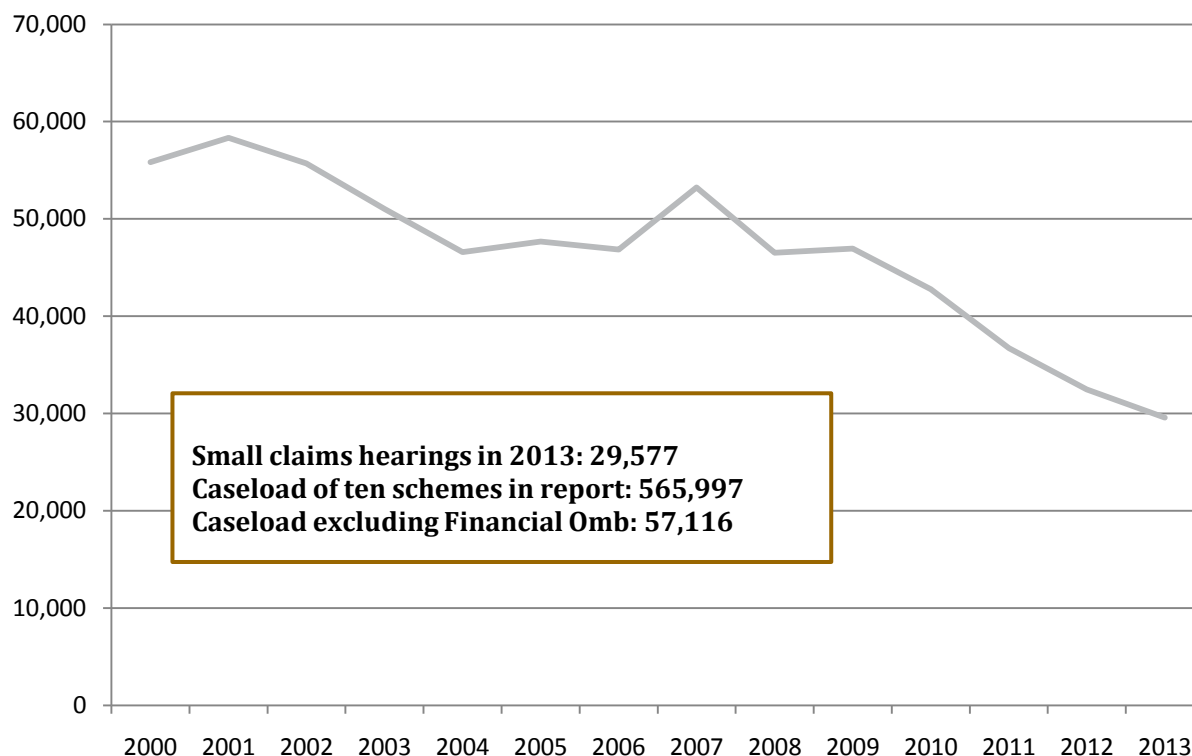
- A confusing complaints maze with too many ADR schemes and a landscape which reflects artificial regulatory boundaries rather than how consumers purchase goods and services. This patchwork of arrangements is also a burden on business. *In the short-term, the proposed complaints helpdesk, which should be operated by Citizens Advice, would help to mask complexity behind the scenes. In the longer-term, complaints responsibilities should be brought together into a small number of large groupings that make intuitive sense from a consumer journey perspective, but with flexibility to tailor approaches to the needs of individual sectors via service level agreements negotiated with purchasers*
 - Competition between multiple ADR schemes in individual sectors creates the wrong incentives and risks a race to the bottom. *The competition model needs to be turned on its head to work in the consumer interest. Purchasers might award fixed-term contracts for redress based on criteria, including factors outside of resolving disputes, such as using data to raise standards, within a minimum framework set by the competent authority*
- 1.5. The ombudsman model of redress should be cherished, but it can be expensive – too much so in an environment where participation in ADR will remain voluntary. Turning to an ombudsman will continue to be desirable in some sectors; legal services is one of these. However, the evidence suggests that alternative models can offer relatively quick, cheap and fair redress. *Taking a pragmatic view, where appropriate, about dispute resolution models could bring greater access to justice. The possibilities offered by online dispute resolution should also be explored.*
- 1.6. The Directive envisages competent authorities will have quite a narrow audit role. However, this would be a missed opportunity for the UK to remedy the flaws we describe. *A single competent authority should take on a more strategic oversight role, champion ADR and lead a project to rationalise the overall UK consumer redress landscape.*

2 ADR's strategic importance

Moving into the mainstream

- 2.1. ADR has now replaced the courts as the main forum for resolving disputes between consumers and businesses. Over a twelve month reporting period, ten ADR schemes in a benchmarking report conducted by the Panel investigated 565,997 complaints, while there were around 30,000 small claims hearings. Numbers of small claims hearings fell from 55,836 to 29,577 between 2000 and 2013, yet some ADR schemes have seen increases of nearly 150% in the space of three years.
- 2.2. Government has rightly embarked on a strategy to remove disputes of all sorts away from the world of courts and lawyers. ADR offers consumers and traders a relatively quick, cheap and informal means of resolving disputes when compared to going to court. Despite efforts to make the courts more accessible, to ordinary citizens they remain an alien and intimidating environment, and involve costs beyond their means or out of proportion to the value of the dispute. Were consumer ADR schemes to be taken away, it is unimaginable that the courts would receive anywhere near similar volumes of claims - indeed, they couldn't cope if they did.

Small claims hearings, 2000-2013



Complaints matter

2.3. Complaints matter:

- The ability to obtain a remedy - an apology, having the problem put right, compensation - when consumers are harmed by traders goes to the heart of our sense of a fair society, supports the rule of law and underpins public confidence in the UK's consumer protection framework
- People often decide to complain to make sure that the harm they experienced does not affect others. The feedback from complaints enables companies to improve their services and helps regulators and government identify systemic problems that might require their intervention
- Consumer complaints bring economic benefits - by improving consumer confidence, raising industry standards, preventing a minority of businesses

getting away with bad behaviour and creating a more level playing field, ADR can enhance competitiveness and growth

- Through the decisions they take ADR schemes can set expectations of market behaviour and make remedies that can alleviate significant consumer detriment - as with the PPI scandal

2.4. ADR thus promotes access to justice and fair trading. It is an integral part of our justice system and is of key economic importance. The term 'alternative' is now misleading - ADR is the mainstream. Yet the strategic importance of ADR has not been matched by a strategic approach towards ADR within government. While broadly a success story, the history of the development of consumer ADR is one of organic growth on a sector by sector basis, lacking any overall sense of direction. Responsibility for ADR has been split across departments and agencies, with each doing things differently and no-one pulling the threads together. The results of this absence of leadership and strategy have created problems which we highlight in this paper - gaps in redress, overlapping arrangements at odds with how people consume services and a flawed competition model which allows businesses to game the system.

The need for a strategic approach

2.5. However, the ADR Directive provides an opportunity to begin putting these problems right. Implementation of the key legislative provisions before the July 2015 deadline must be the first priority, but this process should also fire the starting gun on a wider and longer-term programme to redesign the consumer redress landscape. The Government has already streamlined the provision of consumer information, education and advice through Citizens Advice. The Consumer Rights Bill represents a major step to enhance and simplify consumer law for the digital age. Yet, to borrow an old slogan from the consumer movement, 'there are no rights without redress'. Consumer redress is the missing piece in the reform jigsaw. The impact of the other very welcome reforms will be lessened unless there are also changes to deliver a simpler system for resolving disputes.

- 2.6. During 2013-14 the Legal Ombudsman investigated 8,430 complaints and is one of the largest ADR schemes based on case volumes. The Legal Services Consumer Panel therefore takes a keen interest in the development of the wider consumer redress landscape within which the Legal Ombudsman sits. As the sectoral consumer organisation which engages with issues of access to justice and dispute resolution on a daily basis, and with considerable expertise in complaints handling within our membership, we are well placed to contribute to the current call for evidence. The ADR Directive presents a timely opportunity to rethink the provision of consumer redress and this document offers a brief analysis of current issues and suggests possible ways forward.
- 2.7. If the problems we describe were confined to legal services, they could be remedied by changes to our sectoral legislation. However, based on our discussions with stakeholders, participation in conferences and undertaking our benchmarking study which looked across a range of sectors, the legal services market is evidently not an isolated case. While the analysis in the following sections draws primarily on the arena we know best, we also draw some parallels with other sectors.

3 Gaps in redress

Mind the gaps

- 3.1. Research tells us that consumers think all legal services are regulated. This assumption isn't unreasonable when you think about the important situations when people need legal advice to help deal with life's everyday problems - moving home, relationship breakdown, dealing with the estate of a loved one, a dispute with a neighbour or landlord, setting up a business, and so on. Often the personal and financial stakes in these situations can be life-changing.
- 3.2. In reality, however, the consumer's ability to access redress depends on who they buy their legal services from, rather than the type of legal service they receive. Go to a regulated lawyer, such a solicitor and barrister, and the situation is simple - the Legal Ombudsman has them covered for all the various types of legal services they provide. However, to most people's surprise there are, in fact, only a small number of legal activities which only regulated lawyers are permitted to provide. Giving the public general legal advice about fighting for custody of their children or claiming against an employer for unfair dismissal, or carrying out some specific activities such as making a will or preparing a power of attorney, are all unregulated. Anyone could set up in business tomorrow to offer these services, but with no recourse to redress for the unsuspecting consumer.
- 3.3. This is not merely a theoretical problem. The Legal Services Board has estimated that only 20% of all legal advice needs are met by regulated lawyers.¹ A report for

¹ BDRC Continental, Legal Services Benchmarking, June 2012.

the Legal Ombudsman estimates some 130,000 service providers operate outside of regulation.² In some markets, unregulated businesses have made significant inroads - only about two-thirds of consumers go directly to a solicitors firm to make their will. Like other markets, legal services are increasingly being delivered online and consumers are responding to the benefits of innovative, cheap and convenient solutions on offer. The internet is expanding the legal services market by enabling new products, not just sharing the pie out differently. While these are welcome developments, one consequence is that growing numbers of legal services transactions fall outside of the Legal Ombudsman's remit.

- 3.4. Yet major gaps in redress exist beyond the legal services market too. As the table overleaf shows, which records enquiries made to the Citizens Advice Consumer Service over the last three months of 2013, there is no ADR mechanism for many of the issues which cause most consumer concern. Alternatively it is a lottery - consumers may complain but only if the business they use happens to be a member of a trade association that has set up an ADR mechanism. And even where there is a sectoral scheme, its coverage may not be universal. For example, disgruntled university students can complain to an ombudsman but not students studying at further education colleges.

Lacking logic

- 3.5. One of the features of legal services is that those activities which are regulated are not based on any consumer protection rationale; instead the list of 'reserved activities' is an accident of history. However, the same might be said about other economic sectors. What explains why consumers can go to ADR about their lawyer but not their accountant, their energy provider but not their water company, or their surgeon but not their vet? Certainly, the answer isn't to be found in the varying standards of service received by consumers in these sectors, or the degree of

² Northumbria University, Redress for legal services: a report for the Legal Ombudsman, May 2013.

financial or other harm they might suffer if something went wrong. Instead, the creation of ADR bodies was often the result of specific responses by individual government departments at a moment in time, prompted by proactive reviews of regulatory frameworks and/or reaction to pressure from consumer groups.

Top 10 consumer issues recorded by Citizens Advice's Consumer Service in Q3 2013/14

Market (tier 2)	Issues	Redress provision
Second hand cars	15,006	None
Home maintenance and improvements	13,807	Some, if members of self-regulation, e.g. TrustMark
Telecommunications	9,397	Yes - Ombudsman Services or CISAS
Furniture	7,938	Some, if members of Furniture Ombudsman
Professional services	5,514	Some: legal services, not architects, accountants
PCs, accessories, software and services	5,049	None
Other personal goods and services	5,015	Category too broad to say
Large domestic appliances	4,617	None
Clothing and clothing fabric	4,172	None
Car repairs and servicing	3,513	Some, if members of self-regulation, e.g. Motor Codes

Source: Citizens Advice: Advice Trends quarter three 2013/14

- 3.6. The Directive requires ADR to be available for any dispute regarding contractual obligations that a consumer has with a business. However, unless national governments mandate otherwise, it will be voluntary for traders to participate. This will cause frustration for consumers who seek to assert their rights, but get turned away. In fact, for the reasons outlined at the start of this paper, ADR is good news for both consumers and fair trading businesses. However, especially in the current economic climate, there is a risk of ADR being seen as a cost of regulation, and

hence a burden on business that is to be avoided. Away from the consumer arena, two landmark reports by the Public Administration Select Committee (PASC) are setting a new tone for public services which recognises the full value of complaints. BIS should show similar leadership to bring about the same shift in attitudes within industry recognising the link between empowered consumers and growth. To echo the title of the first PASC report, the mantra should be: 'More Complaints Please!'.³

- 3.7. There is solid evidence that effective complaints-handling makes good business sense. Research for the Legal Ombudsman highlights that improving first-tier complaints handling, which ADR contributes to, is likely to increase law firm profitability - and that there may be potential net benefits to the industry of between £53m and £80m over 10 years.⁴ A study on dispute resolution for e-commerce suggests that even buyers who 'lost' their dispute were more likely to increase their shopping activity than buyers who didn't make a complaint at all. The author concluded this could be explained by the increased trust in the market that ensued due to awareness of the existence of a mechanism to resolve disputes quickly and effectively.⁵

A proportionate solution

- 3.8. Despite this there seems no prospect of the Government requiring all businesses to participate in ADR. The Panel's response to the consultation suggests various steps which Government and others could take to encourage businesses to use a voluntary ADR scheme. But bringing about the culture change we describe and use of smart incentives will not always be sufficient to win hearts and minds, especially in problem industries. The full panoply of regulation may be a sledgehammer to

³ Public Administration Select Committee, More complaints please!, March 2014.

⁴ Economic Insight, A business case for good complaint handling, November 2013.

⁵ Colin Rule, Quantifying the economic benefits of effective redress: large e-commerce data sets and the cost-benefit case for investing in dispute resolution.

crack a nut in some situations, but requiring participation in ADR may offer a more proportionate approach which empowers consumers to discipline these markets.

- 3.9. Over the years, governments have responded to persistent consumer detriment by legislating to require all businesses doing certain economic activities to subscribe to an externally approved independent redress scheme. Letting agents is the most recent example of this. However, this was a drawn out process and each addition to the redress landscape would require primary legislation. We think the Government should use the ADR Directive to introduce a reserve power mechanism that would allow Ministers to react to consumer detriment quickly and in a targeted fashion by requiring certain categories of traders to participate in one of the certified ADR schemes.
- 3.10. The majority of ombudsman schemes are based in statute and the presence of a sectoral regulator is important to encourage providers to cooperate with the scheme and payout awards. Where voluntary ADR schemes operate, especially where no regulator provides a backstop, there will be the issue of unpaid awards to deal with. The large majority of businesses are likely to comply, but there will be a minority of ill-intentioned firms or weak trade associations. Indeed, the Funerals Ombudsman collapsed when one of the trade associations withdrew funding support after a series of adverse decisions. There is a danger that unpaid ADR awards will mirror the problem of unpaid county court judgments, which would undermine consumer confidence and limit the ability of consumer behaviour to discipline markets. However, there are existing solutions which BIS could consider. For example, HMCTS has a fast track procedure to enforce employment tribunal awards when bosses don't pay. And the Legal Ombudsman has statutory powers to issue proceedings for the court's permission to enforce its decisions as if it were a court judgment. These mechanisms reduce the risk for consumers and also create additional incentives on businesses to payout awards, for example they end up paying the enforcement costs as well as the original compensation amount, in the same way as defaulters must pay bailiffs' fees in addition to the original debt. Further measures could tighten this further, for example publishing a list of non-payers and action by trading standards to deal with persistent non-payers.

Suggestions

- Fill gaps in redress in major consumer markets
- Complete the coverage of ADR where there are gaps in certain markets
- Create a reserve power for Ministers to require specific traders to participate in ADR
- Think creatively about solutions to enforce awards, for example by giving ADR schemes enforcement powers and publishing lists of non-payers

4 The complaints maze

Overlapping arrangements

- 4.1. The consultation document lists over 70 ADR schemes of various guises. In some cases there is more than one scheme in each market. The ADR Directive has stoked appetite for further schemes with regulators in some key sectors currently developing proposals to introduce new mechanisms. ADR is becoming a victim of its own success - so many schemes are being created that the overall redress landscape is looking increasingly fragmented and is confusing for consumers to navigate. Those not knowing where to turn, may give up rather than try to find their way through the maze. Analysis of large scale quantitative surveys on resolving legal problems has demonstrated the powerful effect of referral fatigue – the more agencies involved, the less likely resolution becomes.⁶

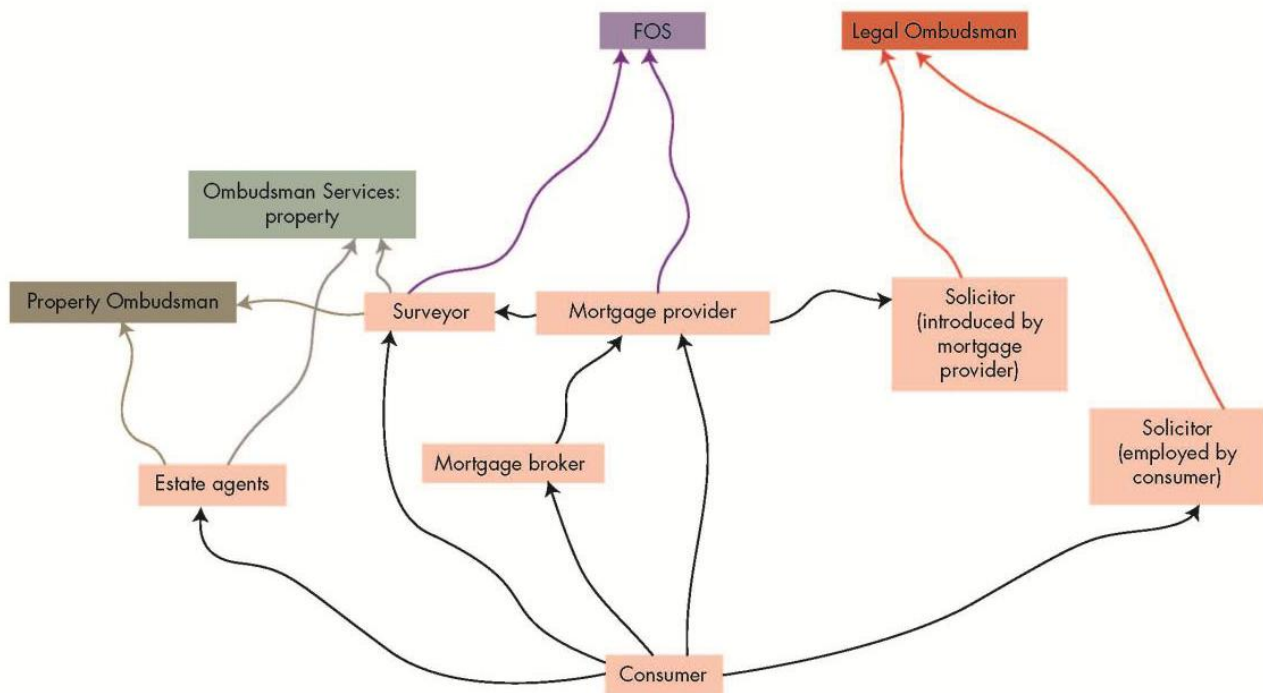
The need to take a consumer journey perspective

- 4.2. The ADR landscape tends to mirror regulatory boundaries, thus encouraging a sector by sector approach to things. Yet this organising principle does not reflect how businesses increasingly are delivering services to consumers. Today's consumer is time-poor and values the convenience and other benefits of buying bundled products and going to one provider to meet their various needs. To see evidence of this you need only to walk into a supermarket or bank and reflect on the sheer range of product lines and services being sold outside the company's traditional offering.

⁶ Professor Pascoe Pleasence and Dr Nigel. J. Balmer, How People Resolve 'Legal' Problems, May 2014.

- 4.3. Instead of thinking in terms of current regulatory architecture, we need to think about consumer pathways. The diagram below, taken from a report commissioned by the Legal Ombudsman, shows how someone moving house might have to deal with four separate ADR bodies. In fact, consumers may arrange the various aspects of the transaction - estate agency, mortgage, energy performance certificate, the survey, insurance, legal work, even the removals company - all via the estate agent. Consumers must untangle the complex web of business models and redress providers sitting underneath what on the surface is a joined-up service marketed for its simplicity.

The complaints maze: where to complain when buying a home



Source: Centre for Consumers and Essential Services at University of Leicester, Mapping potential consumer confusion in a changing legal market - report for the Legal Ombudsman, October 2011.

- 4.4. As the modern way of doing businesses rubs up against regulatory boundaries, ADR schemes are finding their responsibilities overlap. As the Legal Ombudsman explains, issues can arise due to the different organising principles that underpin

separate regulatory regimes, yet at a time when markets are converging. The boundaries of some bodies providing redress are based on types of entities (as, for example, with the Legal Ombudsman) and other organisation's boundaries are based on types of activities (as, for example, with the Financial Ombudsman Service).⁷ Consumers getting a will through their bank could complain to the Legal Ombudsman or the Financial Ombudsman depending on how the service was provided. Consumers seeking to complain about legal expenses insurance might either need the assistance of the Financial or Legal Ombudsman depending on whether the complaint was about the sale of the insurance or the legal advice gained after the insurance had been activated to make a claim.⁸

4.5. But, again, these problems are not confined to legal services:

- If someone has a complaint about their care home or home care agency, there are up to five different bodies they could report this to: their provider, the local authority, the Local Government Ombudsman, the Care Quality Commission or Local Healthwatch⁹
- The boundaries between public and private services are breaking down - the Parliamentary and Health Service Ombudsman deals with complaints about the NHS but not private healthcare
- Developments like mobile payments are complicating matters further since the root cause of the complaint could either be a financial services or communications issue

⁷ Legal Ombudsman, Discussion paper: Access to redress for legal and other professional services, July 2013.

⁸ Legal Ombudsman, Response to Public Administration Committee enquiry – 'Complaints: do they make a difference?' May 2013.

⁹ Which? evidence to PASC inquiry, More complaints please!

A 'win-win' for consumers and business

- 4.6. This is a problem for businesses too since each new area they add to their portfolio might involve another redress scheme - each with its own rules, procedures, compensation limits and so forth. There is a danger that the fragmented redress landscape acts as a barrier to entry and innovation by creating unnecessarily duplicative and burdensome requirements. Legal services is at the vanguard of competition reforms designed to make it easier for law firms and other types of businesses to form one-stop shops. Yet applications from such multi-disciplinary partnerships, as they are known, are lower in number than had been hoped. One of the regulators which licenses these business structures has identified as a barrier the requirement for businesses to be subject to multiple regulators for the same activity. In some cases, obtaining a licence may inadvertently draw them within the Legal Ombudsman's scope, for example accountants providing tax advice.¹⁰
- 4.7. Overlapping complaints arrangements add needless costs and confusion to the system as ADR bodies are forced to respond to enquiries they can't deal with and signpost consumers elsewhere. Less than a quarter of new contacts to the Legal Ombudsman end up as investigations. Similarly, Ombudsman Services reports that 80% of all contacts fall outside of its terms of reference.¹¹
- 4.8. The piecemeal and complex coverage of ADR we have described above is surely not sustainable. Simplification could be a win-win for consumers and business alike. As BIS states, we acknowledge that unpicking the various statutes underpinning ADR arrangements would be a difficult and complicated task. However, the longer this situation continues and the more complex the tapestry becomes as new schemes emerge, the harder it will become for Government to unravel the regulatory knitting. Therefore, a combination of approaches is needed:

¹⁰ Solicitors Regulation Authority, Multi-disciplinary practices: Consultation paper. May 2014.

¹¹ Legal Services Consumer Panel, Benchmarking the Legal Ombudsman, November 2013.

help for consumers to find their way through the maze in the short-term; and a rationalisation of the overall landscape in the longer-term.

Short-term: the complaints helpdesk

- 4.9. The proposed 'complaints helpdesk' offers a good solution in the short-term. Crucially this would mask the complexity behind the scenes leaving it to qualified advisers to work out which scheme the complaint should be handled by. We would not see this replacing any signposting requirements on businesses put in place by sectoral regulators or lead existing ADR bodies to reduce their own outreach activities. Instead, the helpdesk would complement these activities, raise overall public awareness of ADR and assist consumers who get lost in the system. This move would be fully consistent with other measures to streamline and simplify the provision of consumer advice. Indeed, we would suggest Citizens Advice is the obvious home for this service.
- 4.10. While a helpdesk would make life simpler for consumers, in truth it would obscure deeper issues that from time to time will come to the surface - consumers could still fall between the cracks where gaps exist and case outcomes could differ depending on which ADR body handles the complaint. Further, businesses would still have the burden of multiple different arrangements to engage with. A project to harmonise procedural arrangements and promote cooperation between schemes could ameliorate some of these issues over time. Ultimately, however, we suspect that redrawing the redress map would provide the best solution. The growing clamour for such an exercise within the ADR community is perhaps a good indicator of the necessity of this task.

The longer-term: remapping consumer redress

- 4.11. Perhaps the simplest approach would be to create a single consumer ombudsman covering all economic activity. However, this could be too large for the country the size of the UK and such a one-size-fits-all approach might fail to address the needs of specific sectors. A better approach might be to bring together complaints responsibilities into a small number of large groupings that make intuitive sense

from a consumer journey perspective. As we explain in the next section, such ADR bodies should have flexibility to tailor their approach to the needs of individual sectors, via service level agreements negotiated with individual purchasers, but if the sectors are sufficiently similar this should be manageable. Purchasers might include government departments, regulators and trade associations. We imagine that BIS or the competent authority would act as purchaser for the residual ADR scheme(s). Identifying precisely which sector should go into which box would be an unwelcome distraction, so we have left the groupings deliberately blank.

4.12. We suggest this approach has some clear immediate attractions: economies of scale and the critical mass to carry out those activities which add value to the core task of complaints-handling; concentrations of expertise that can feed back into regulatory processes and improve standards; greater consistency in approach and outcomes; a far simpler landscape for consumers to navigate and businesses to engage with; and a reduction of gaps and overlaps in redress.

Suggestions

- Proceed with the idea to create a single complaints helpdesk to help consumers navigate the complaints maze. This should be operated by Citizens Advice
- Begin a longer-term project to redraw the consumer redress landscape. One model is where responsibilities for complaints-handling are divided into a small number of large groupings that make intuitive sense from a consumer journey perspective
- These ADR bodies should have flexibility to tailor their approach to the needs of individual sectors, for example through Service Level Agreements

5 Safe competition

The market for consumer redress

5.1. The regulatory framework within which ADR schemes sit differs across markets, for example:

- A single statutory ombudsman in markets such as financial services
- A statutory requirement on traders to participate in an ADR scheme approved by an external body, such as a regulator. Some regulators, such as Ofgem have appointed a single scheme, while others, such as Ofcom have approved multiple schemes, thus giving traders a choice about which one to join and certain freedom to switch between schemes
- The Consumer Codes Approval Scheme (CCAS) operated by the Trading Standards Institute requires code members either to participate in one of two ADR schemes which it has formally recognised or alternatively to establish a scheme meeting its core criteria
- Pure self-regulatory arrangements in which industries establish a bespoke ADR scheme or select an existing scheme which offers redress services across a range of markets

5.2. Therefore outside the single statutory schemes, there is a market for redress services with a range of purchasers including government departments, regulators, trade associations and individual businesses making choices between various providers. These providers offer a variety of dispute resolution/investigation models with the ombudsman style of redress being just one of many. Where the regulatory framework is fragmented a combination of models exist. For example, while regulated lawyers must have their complaints investigated by the Legal

Ombudsman, members of the CCAS approved Institute of Professional Willwriters participate in an arbitration scheme.

- 5.3. In principle, competition should be seen as an inherently healthy process. There is no single right method of delivering redress across the very wide range of goods and services industries, so it's sensible to allow a system in which redress schemes can be tailored to meet sector-specific needs. There is evidence of ADR schemes, such as the Tenancy Deposit Scheme, showing genuine innovation and coming up with new solutions. Competition encourages greater efficiency and bears down on costs - although industry writes the cheque, ultimately these are passed on to consumers. In the Panel's benchmarking exercise, alternatives to the traditional model were seen to provide relatively quick and cheap redress, and consumers perceived their decisions to be fair.

From a race to the bottom to a race to the top

- 5.4. However, the model of competition whereby businesses choose and switch between multiple redress schemes has not worked in the consumer interest. Firstly, it is one cause of an increasingly fragmented redress landscape which causes consumer confusion, as described above. But more to the point, since the right to choose lies with the business, not the consumer, this risks a race to the bottom or lowest common denominator approach. Recent experience at Ombudsman Services has highlighted this issue: when consulting on a publication policy last year, it decided to name individual energy firms involved in disputes, where it has a monopoly over redress, but not to name communications companies, due to fear they might walk to the rival scheme that does not name providers. Arguably, the regulator should ensure this doesn't happen by setting common minimum standards, monitoring performance and holding the ultimate sanction of withdrawing its approval. In practice, however, this did not happen. In the example above, BIS policy objectives were frustrated: its consumer empowerment strategy established as a default principle that redress schemes should name providers involved in cases, in order to promote informed consumer choice.

- 5.5. In our view, the problem isn't so much with redress schemes competing with one another, but with the terms on which competition takes place. Competition needs to be turned on its head to work in the consumer interest. Imagine for a moment that the purchaser has a single contract for redress services to award covering a specified group of traders which will last for a fixed period, say of five years. In tendering for the scheme, the purchaser awards the contract based on criteria that matter to consumers. This could go beyond complaint handling performance, by covering plans to achieve high customer satisfaction, improve accessibility to under-represented groups and close the feedback loop to raise industry standards. The scheme's performance in delivering against these objectives would be influential in renewing its contract once the initial term has expired. One possibility to ensure that competition works in the consumer interest in this model is for the competent authority to set a minimum framework for such contracts. In time this might mandate policies that support government objectives, for example publication of complaints data. This approach isn't dissimilar to the contracting model currently used by regulators such as Ofgem and RICS, but with added safeguards which place consumer interests at centre-stage.
- 5.6. This model of safe competition - when working in harness with our other suggestions of a single portal and some large intuitive blocs - could square the circle of making the redress landscape easier for consumers to find their way around, but which also creates the right incentives for redress schemes to be efficient and look to continually innovate and improve.

Suggestions

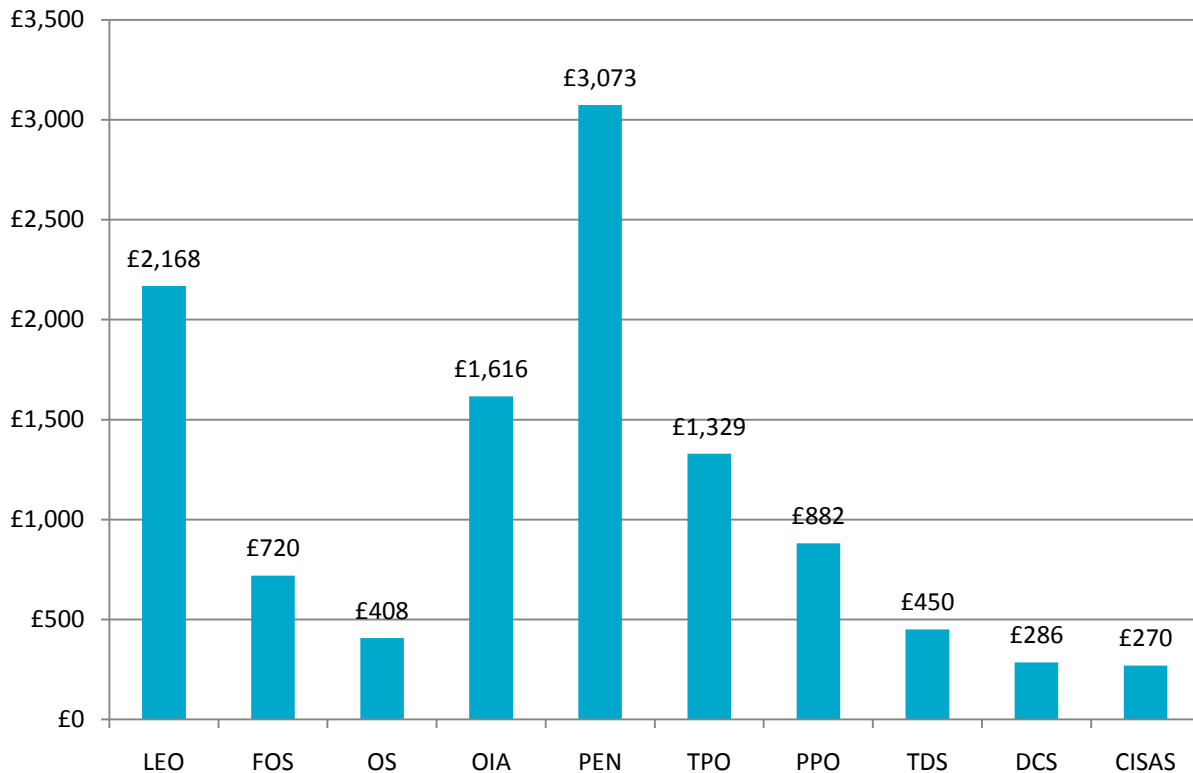
- The model of businesses choosing between multiple redress schemes should be replaced by one where purchasers award fixed-term contracts to a single redress provider within a framework of minimum conditions set by the competent authority
- Contracts should be awarded and re-awarded based on criteria that deliver for consumers in the round, for example performance in raising industry standards

6 Redress models

Horses for courses

- 6.1. Another element of the contracting model we propose above is to allow ADR bodies to tailor their dispute resolution model to the needs of individual business sectors. We see no fundamental reason why an ADR scheme cannot accommodate variations in its approach. Indeed, today, Ombudsman Services does not impose one identical model on all its customers.
- 6.2. The ombudsman model has served UK consumers well and is to be cherished. There are some common features which are core to its self-identity: independent governance mechanisms; an inquisitorial process; the assistance given to consumers to make a complaint; the work done to reach out to vulnerable groups; and extracting the learning from complaints to raise standards. Together these features make the ombudsman a superior redress model.
- 6.3. However, these valuable features come at a price. As this chart from the Panel's benchmarking report on unit cost illustrates, even the cheapest ombudsman model costs around £400 per case. While justifiable in key economic sectors, it is a price that many small businesses cannot afford, even those who are committed to consumer protection and would voluntarily sign up to a redress scheme. Since the UK will implement the ADR Directive in such a way that it will be optional for traders to participate, the redress options need to make good commercial sense while at the same time satisfying minimum standards. It would be a pity to exclude fair-dealing firms from allowing their customers to access redress on cost grounds alone by insisting on the ombudsman model.

Unit cost of ADR schemes



Source: Legal Services Consumer Panel, Benchmarking the Legal Ombudsman, November 2013.

- 6.4. There will be times when parliament, regulators or purchasers of redress schemes will wish to choose the ombudsman model. Decision criteria might include, for example, when asymmetries of information and power between consumers and traders mean that an inquisitorial process is needed to arrive at fair outcomes; when the scale of financial and other detriment is potentially high; the size and importance of the sector to the UK economy; and a market structure which enables firms to absorb the costs. By contrast, when the facts of the matter are reasonably straightforward to establish, the value of disputes are relatively low, and the market in question is small or highly fragmented, then alternative models might suffice. Since consumers ultimately pay for the costs of ADR, it is not in the interests of consumers to have a more expensive system of redress than is justified by the circumstances. As consumer bodies, we must accept certain trade-offs between wide coverage of ADR and the ideal redress model.

- 6.5. We do not advocate pragmatism at all costs; in some sectors alternative models might offer only a very rough form of justice. Ombudsman schemes must also look to reduce their costs and increase efficiency. If improvements can be made to existing schemes to make them more attractive to potential voluntary members, this would allow the ombudsman model to be more widely adopted. Similarly, we would support giving ombudsmen some flexibility to adapt their model to suit the needs of particular sectors. At the same time, the features of this model of redress do come at a minimum cost that is genuinely unaffordable for sole traders and small businesses operating in certain sectors.
- 6.6. In any case, focusing on the 'ombudsman model' can be misleading. Today there are a range of dispute resolution models that have borrowed from the ombudsman model but added their unique twist. At the same time, ombudsmen have also been experimenting with alternative models of redress. There are concerns about whether some of the organisations which call themselves ombudsmen in fact merit this description, but in practice there is little that can be done about this. At a seminar the Panel held with UCL to launch the benchmarking report, one senior ombudsman asked whether there is such a thing as an ombudsman any more. Once the quality criteria in the ADR Directive are in force, to all intents and purposes, all certified schemes might be very close to what we understand to be an ombudsman. It might be better instead to focus on the activity and the quality of the user experience and outcomes, rather than organisational title.

Technology and dispute resolution

- 6.7. Finally, there is growing interest in the use of online dispute resolution (ODR) tools. It is something of a rite of passage for visitors to the Financial Ombudsman Service to take the lift to the top floor of their Canary Wharf headquarters and be shown the various skyscrapers their 3,000 plus staff occupy. While the 500,000 plus cases which the service handled last year never loses its impact, this is dwarfed by the 60 million disputes a year resolved through the automated online mechanisms used by eBay and PayPal - at a fraction of the cost. The Civil Justice Council has set up a working group, chaired by Professor Richard Susskind OBE, to advise government

on the role of ODR in a modernised civil justice system. ODR is unlikely to be suitable to resolve every dispute between consumers and traders, in particular where human intervention is needed to correct the power imbalance between the parties in order to reach fair decisions. However, as Professor Susskind politely reminds sceptical lawyers - his main target audience - it would surely be remarkable if IT was to revolutionise every aspect of our lives, but leave the world of ADR schemes untouched. When used in the right circumstances, ODR will have an important role to play in providing fair and cost-effective consumer dispute resolution. These mechanisms could contribute to encouraging the voluntary participation of ADR that BIS is seeking to bring about.

- 6.8. Technology could also help with finding more creative and cost-effective ways to maximise the learning from complaints to raise standards – a core feature of redress schemes, but one which often doesn't get the level of investment it merits. For example, some schemes now publish full written details about the cases they investigate alongside statistical information. Made available in the right format, ADR schemes, intermediaries, consumer groups, academics and others could use big data techniques to identify trends and causal relationships from this information.

Suggestions

- Decision criteria should be developed to inform judgements on when the ombudsman model of redress is desirable and when other dispute resolution models could suffice
- ADR bodies should be open to the advantages of online dispute resolution tools and engage with the current Civil Justice Council study
- ADR bodies should make datasets available in reusable format to allow use big data techniques to extract value from this information

7 The competent authority

Beyond audit: taking a strategic role

- 7.1. The ADR Directive requires the UK to appoint a competent authority or authorities. The function of the competent authority is to assess whether bodies wishing to qualify as a certified ADR provider meet the requirements of the Directive. The competent authority must then monitor and maintain a list of certified ADR providers and notify any changes to the list to the European Commission. Each competent authority will have to provide a report to the European Commission every four years, outlining the activities of the certified ADR providers they monitor.
- 7.2. The Panel's consultation response sets out why we think BIS should appoint a single competent authority. A key reason is to promote consistency: in how data is collected and in the assessment of ADR bodies against the requirements. A lesson from the Panel's benchmarking exercise is the huge variation in definitions and reporting conventions across schemes that ultimately carry out the same task of resolving disputes between consumers and businesses. A single competent authority would enable this to be translated into a common language and allow the production of reports on the performance of ADR schemes that would be genuinely informative and useful.
- 7.3. However, confining the competent authority to a narrow audit role would be a missed opportunity. The introductory paragraphs of this paper argue that the flaws in the current system are a product of organic growth on a sector by sector basis, with responsibility for ADR split across departments and no-one pulling the threads together. The Administrative Justice and Tribunals Council (AJTC) had such an oversight role during its brief existence. It maintained a panoramic view with the aim of preserving "a cohesive and integrated system which links together original decision-making by government, judicial and non-judicial redress mechanisms in a

coherent and holistic way”. The Ministry of Justice will take on the AJTC’s role and its Strategic Work Programme for the years until 2016 includes as an objective “Developing a strategic, UK-wide approach to the administrative justice system”. However, it is unlikely that consumer redress will be a central focus of this work.

7.4. We would like to see the competent authority take on a more strategic role. In addition to fulfilling the audit and reporting requirements in the ADR Directive, its functions could include:

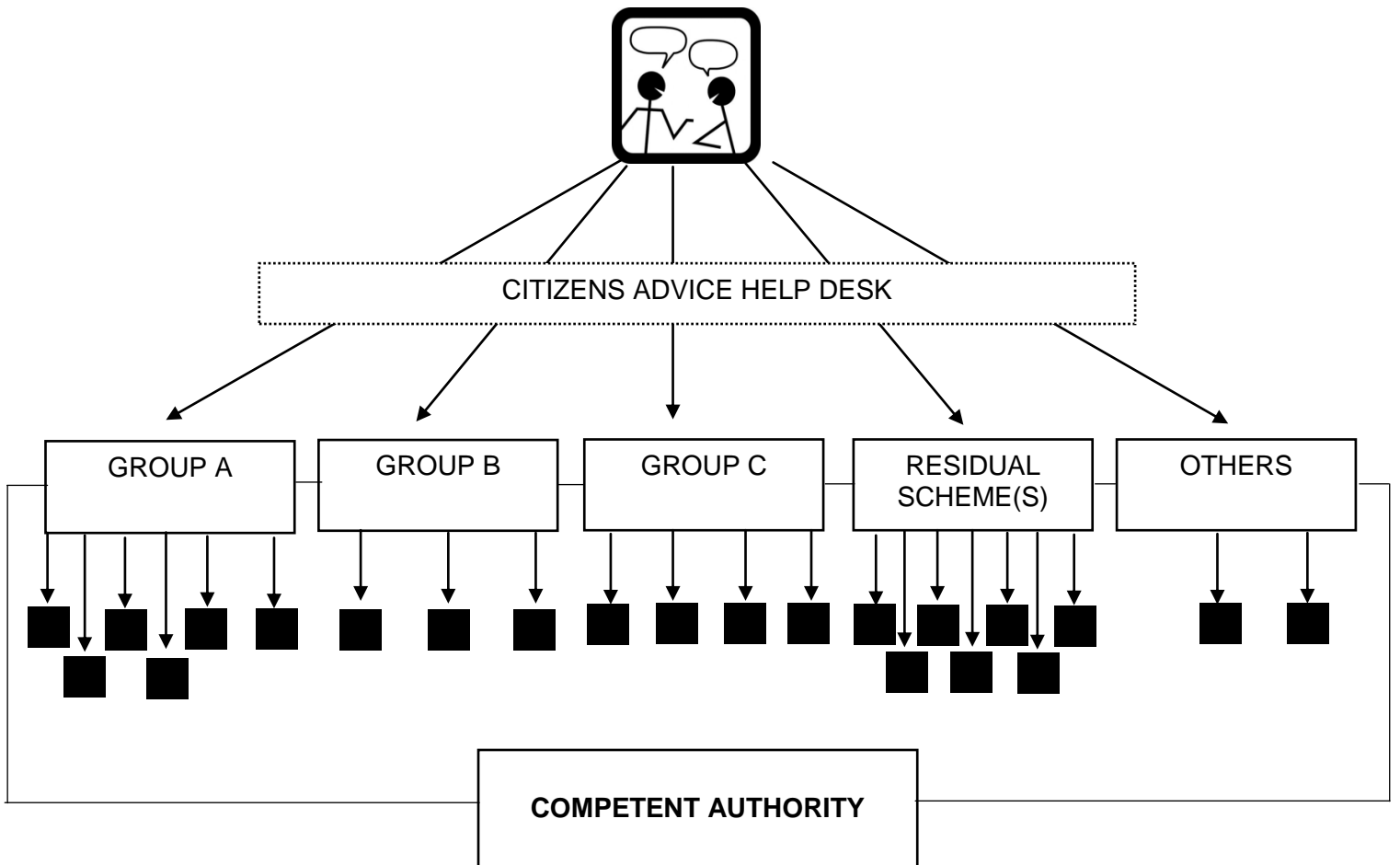
- Leading the longer-term project to rationalise the consumer redress landscape described previously
- Maintaining strategic oversight of the consumer redress framework and working closely with partners to deliver greater integration with the wider administrative justice landscape
- Championing consumer ADR and encouraging industry to participate
- Contributing to a competitive market for redress services which works in the consumer interest
- Commissioning research, identifying strengths and weaknesses of the consumer redress system and bringing forward proposals for its improvement in the interests of its users

7.5. This should be at no cost to taxpayers as we see funding coming from a levy which the competent authority would charge to ADR bodies, which in turn will be funded by industry contributions and in some cases nominal fees charged to complainants. All these stakeholders have an interest in the greater coherence and efficiencies which the competent authority’s work should help to deliver.

Suggestions

- A single competent authority should be given a strategic role in relation to consumer redress, in addition to the audit role required by the Directive

8 A new redress landscape?



■ Purchasers, e.g. departments, regulators, trade associations

The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.

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