



Centre for Ethics & Law



## MEETING NOTE

### Are Ombudsmen ready for the future?

4 December 2013, UCL Moot Court, London

Chair: Professor Richard Moorhead, Director of UCL Centre for Ethics and Law

Speaker 1: Elisabeth Davies, Chair of Legal Services Consumer Panel

Speaker 2: Walter Merricks, former Chief Financial Ombudsman

#### Elisabeth Davies

Elisabeth explained that although the Panel's report examines the Legal Ombudsman's complaints handling performance compared to other dispute resolution schemes, the purpose of this event was to focus on the wider issues the study raises about the future of consumer redress in light of the ADR Directive.

Benchmarking ADR schemes proved every bit as challenging as the Panel expected. Some people had suggested it is an impossible exercise because ADR schemes are just too different. The Panel was alert to the risk of comparing apples and pears but was encouraged to hear the Parliamentary and Health Service Ombudsman suggest the sector should itself develop quality standards and benchmarks.

The first stage in a benchmarking exercise is to decide what you are going to measure and this gave the Panel an opportunity to think about the ingredients that make up a good consumer redress scheme. Using complaints data to raise standards and reaching out to under-represented groups are two critical aspects of redress schemes but the Panel decided they merited separate studies of their own.

The report grouped the data in four areas:

- Caseload: redress schemes should be able to investigate any reasonable complaint that a consumer brings, rather than have to turn them away because of gaps in, or quirks of, jurisdiction
- Timeliness: before complaining to the redress scheme, consumers may have already been through a drawn out process trying to resolve their complaint with the firm and might be out-of-pocket or just want an end to things

- Quality: this includes the accuracy and fairness of decisions and the service provided to complainants by the scheme
- Cost – industry picks up the bill, but these costs are ultimately passed on to consumers and so consumer organisations will want to know whether ADR schemes are working efficiently

The Panel's report ends with 12 questions designed to provoke discussion about the future direction of consumer redress. Elisabeth highlighted three for this event:

- How can ADR schemes achieve a higher profile without compromising their impartiality?
- How can Government simplify the consumer redress landscape while ensuring that ADR bodies innovate and become more efficient?
- When is the ombudsman model necessary, and when would other dispute resolution models suffice?

### **Walter Merricks**

Walter responded by speaking in a personal capacity rather than representing any of his current or former organisations.

While recognising the Panel's brief, the complaints-handling function of ombudsmen should not be seen an end in itself, but in terms of how it contributes to the ultimate goal of improving markets. It was therefore important to look at the performance of ombudsmen in the round. Walter challenged the view in the report that the standards-raising work of schemes was 'added value', or indeed that it came at any great financial cost. Instead this should be seen as an intrinsic feature of the ombudsman model.

He noted that the Panel's report criticises a lack of transparency among some schemes, but argued that ombudsmen are far more transparent about performance than the small claims court where hardly any data exists. More broadly, harmonising data across schemes would be challenging and it might be difficult for schemes to make the financial case for changing the way they measure and collect data.

The findings on premature complaints highlighted a consistent failure by regulators to properly police first-tier complaints-handling standards. This being the case, might ombudsmen evolve to take responsibility for improving performance here?

Looking to the future, the Panel's report speculated about how the Government could rationalise the redress landscape. Experience in the communications sector had shown one possible model – allowing businesses to choose between multiple ADR schemes in a single sector – should not be replicated. The second model –

where organisations could compete for a long-term contract to provide redress – a was worth exploring further. Overall, Walter preferred boosting accountability over greater competition as a means of encouraging efficiency and innovation.

Finally, responding to Elisabeth's final question about when the ombudsman model is necessary, turning this around Walter couldn't think of a market for which an ombudsman would not be suitable. He contrasted the success of ombudsman schemes with the relative failure of courts to remain accessible to ordinary consumers.

## **Discussion**

### *Becoming better known*

One area of discussion was how to make it easier for consumers to know who to complain to. There was significant support for the idea of a single portal through which consumers could be directed to the most appropriate scheme. On the positive side this would keep the complexity away from consumers and could itself drive a degree of simplification as schemes learnt to work with the portal. There was also some scepticism that it would be a short-term sticking plaster and more fundamental reform was needed and that there were some technical challenges posed by creating a portal. There were also concerns about the gatekeepers' competence in understanding someone's complaint and routing it to the correct dispute resolution body. There were some key questions too, for example should the portal only direct consumers to ombudsmen or would other types of ADR scheme also be signposted?

Ombudsmen have proven capable of operating across a wide variety of sectors and each goes about their business slightly differently. There are no single right or wrong approaches. This led one participant to ask whether there is such a thing as an ombudsman any more. Once all dispute resolution schemes are required to meet the quality criteria in the ADR Directive, to all intents and purposes they might all be very close to what we understand as an ombudsman. The distinctions between various types of scheme are in any event lost among the public, only a minority of whom know that an ombudsman has something to do with resolving complaints. The ADR Directive in fact presents an opportunity to rebrand the ombudsman model and give it the meaning we want so that it becomes better known and used by consumers.

### *Rationalising the redress landscape*

Debates about going the extra step and rationalising the institutional landscape were live in both the public and private sectors. In fact, blurring of responsibilities across the private and public sectors was both an added complexity and driver of reform – the two debates need to dovetail. In Wales and Scotland the creation of a single public services ombudsman has already happened and the SNP's manifesto for an independent Scotland calls for a single consumer ombudsman that would cover both

the private and public sectors. There were questions about whether a single scheme could have the competence to handle complaints covering a diverse range of areas and command public confidence, but it was reported that experience in schemes where diversity is already a defining feature suggest this is possible.

Participants generally shared Walter Merricks' concerns about competition between ADR schemes as a vehicle for driving improved performance and rationalisation, but also acknowledged that under the ADR Directive it is businesses who are the consumers of ADR services. One speaker warned that competition can inadvertently undermine other objectives such as transparency. Schemes are unlikely to be transparent about their performance if they have to compete against rivals. When thinking about policy on publication of decisions naming individual businesses, ADR bodies will inevitably worry about losing subscription fees.

All agreed this was a timely moment for change but would need political will to get anywhere – the Consumer Rights Bill could be a good vehicle for reform. We will know more when BIS consults on its plans to implement the ADR Directive in the new year. One participant warned that the Government sees redress as a form of regulation and extending access to redress goes against its deregulation agenda. However, the signs indicate that civil servants are at least listening seriously to calls to use the Directive as an opportunity to rethink. While there was support for rationalisation, there were also warnings that it wouldn't be simple to pull off in practice. For example, the Legal Ombudsman works within an entity based system while the Financial Ombudsman's remit is activity based – so revisiting the regulatory landscape is necessary in order to reform the ombudsman landscape.

#### *A business case for ombudsmen*

The most likely scenario once the ADR Directive is implemented is that industry participation in a scheme will remain voluntary outside of certain regulated industries. Therefore, the need to convince businesses to submit to an ADR scheme would still remain. One participant suggested that ADR needs to be seen as a reasonable cost of doing business in the modern world. This principle had recently been accepted by one professional group represented in the audience, while it was reported that extension of mandatory ADR to the letting agents arena had come about because Government saw there was a good business case.

Related to this, ombudsmen were challenged to evidence the common assertion that their work improves industry standards. This does come at some financial cost, for example in staff time, but work such as this and improving access to vulnerable groups comes under pressure when schemes are forced to bear down on their overall costs in order to be competitive and demonstrate greater efficiencies. One participant suggested that large companies, if they are properly set up, should already know what they are doing wrong, but small businesses might value feedback from complaints more. Another saw that regulators are a key customer for such data.

However, while complaints information is a rich seam to learn from, social media and customer feedback websites provide alternative sources of intelligence to mine.

Finally, the seminar had identified threats as well as opportunities for ombudsmen, but there should also be reason for optimism. Over time the ombudsman model has quickly grown and replaced the courts as the main vehicle for resolving disputes between consumers and businesses. It has proved to be a resilient, flexible and effective model that has gained the support of government, consumers and businesses and is well placed to meet the challenges ahead.