LEGAL SERVICES CONSUMER PANEL

Consultation response

BIS: Implementing the ADR Directive

Overview

1. **The Panel's response is focused on the implications of the Directive for legal services consumers. A separate paper responds to the call for evidence.**

2. **There is a significant unregulated legal sector so the voluntary nature of the Directive would leave gaps in redress. There is a strong case for requiring all legal businesses to participate in ADR. However, in the absence of this, we suggest steps – such as research on the business case for ADR, a flexible approach by the residual body, effective signposting and use of procurement policies – to encourage take up.**

3. **The ombudsman model has very many benefits and is well-suited to sectors where an inquisitorial process is needed to reach fair decisions due to gaps of information and power. However, it can also be expensive and a pragmatic view would accept alternative models in return for wider industry participation.**

4. **We suggest a single residual ADR scheme to be appointed following a competitive tender process, which would have the freedom to negotiate individual packages with purchasers such as trade associations, regulators and government departments.**

5. **Minimum settlement values would not be appropriate for legal services where the emotional, rather than financial harm, could be the most relevant issue.**

6. **We support the idea of a complaints helpdesk, which would raise general consumer awareness of ADR and mask the complexity of current arrangements. This would not replace sectoral rules on signposting of outreach by existing ADR schemes. Citizens Advice is the obvious candidate to operate the helpdesk.**

7. **A single competent authority, rather than multiple bodies, would best enable collection and reporting of data on a consistent basis. This would need to sit alongside sectoral monitoring systems for statutory bodies. We envisage a more ambitious role for the competent authority than the basic audit function described in the consultation. In summary, we see this body as being responsible for maintaining a strategic overview of the UK consumer redress landscape, leading a programme to rationalise the existing arrangements and championing participation in ADR.**

8. **BIS should maintain its positions on not recognising in-house mediation and not allowing businesses to complain about consumers through the ODR Regulation.**

The proposals

9. The consultation sets out proposals for transposing the requirements of the EU Directive on Alternative Dispute Resolution (ADR) into national law. The main requirement of the Directive on which BIS is seeking views is how to ensure ADR is available for any dispute regarding contractual obligations that a consumer has with a business. It considers that introducing a residual ADR scheme which would operate alongside existing schemes and deal with any dispute not currently covered would be the simplest way of fulfilling this objective.

10. In particular, BIS is seeking views on:

- Whether it would be better to have more than one ADR body operating as part of a residual ADR scheme
- Whether a particular operating model would work best
- How businesses could be encouraged to use a voluntary scheme
- An appropriate fee structure and whether it would be feasible for businesses to access a residual ADR scheme on a case by case basis, and what an appropriate minimum and maximum claim value would be
- Whether it would be beneficial to set up a complaints helpdesk to help consumers and businesses access ADR

11. BIS is also using the consultation as a call for evidence for possible, much broader reform of the ADR landscape. It asks whether a rationalisation of the ADR landscape is necessary and feasible, and further evidence to weigh up the costs and benefits.

12. The Panel's comments, given its statutory remit, are limited to those proposals that have implications for consumers of legal services. This document focuses on those questions related directly to implementation of the ADR Directive by July 2015. We have contributed a wider document on the call for evidence.

The Panel's response

UK ADR LANDSCAPE

Q1.Do you think there are any significant gaps in the provision of ADR in the UK? Please identify any sectors where you think the provision of ADR is insufficient.

13. The Legal Ombudsman is the statutory redress scheme for legal services in England and Wales. Authorised persons, such as solicitors and barristers, are subject to the Legal Ombudsman's jurisdiction for all legal activities they provide. However, common legal activities, such as will-writing, powers of attorney, online DIY products such as tenancy agreements, and advice on matters such as employment disputes and divorce, are not regulated and thus can be provided by anyone. These unregulated providers, which have gained a foothold in some markets, fall outside of the Legal Ombudsman's jurisdiction. A report for the ombudsman estimates some 130,000 service providers in England and Wales operate outside the regulated domain.[1]

14. Thus there are many potential gaps in ADR in the legal services sector. The Act contains provision for a voluntary scheme, but although the Legal Ombudsman has consulted on this, it has yet to announce its intentions and implementation before July

2015 is highly unlikely. All this means that unregulated legal businesses would have the option of using a residual ADR scheme, possibly the Legal Ombudsman's voluntary scheme, in future, or of course, continue to remain outside of ADR altogether. Further complicating matters, one trade body for will-writers is a member of the Consumer Codes Approval Scheme (CCAS) and has its own conciliation and arbitration scheme.

15. As we have set out previously, we consider consumers should be able to use ADR for all their legal services transactions.[2] This would match with people's expectations of what happens and would be a proportionate regulatory response in legal services based on the imbalance of knowledge and power suffered by consumers. It is in the public interest to have a trusted legal services market where there are effective controls over the quality of work – guaranteed access to redress would contribute to this. Our submission to the call for evidence suggests a model where ministers are given order making powers to require certain categories of traders to sign up to a certified ADR scheme, which could be used to fill redress gaps in a range of markets.

ADR FOR EVERY CONSUMER DISPUTE

Q2. Do you agree that the current provision of ADR in the UK is not enough to meet our obligation to have ADR available for all consumer disputes? If you disagree, can you advise which ADR schemes are suitable to handle all disputes, and whether there are limitations to the number of disputes or type of dispute that these schemes could handle? Would these schemes be able to process an increased volume of disputes within the 90 day deadline for concluding disputes set by the Directive?

16. The Legal Ombudsman could in theory absorb greater complaints volumes if it became compulsory for all traders providing legal services to subscribe to it. However, the Legal Ombudsman's unit cost, which is around £2,000, would be unaffordable for unregulated legal businesses. The Legal Ombudsman's unit cost is partly driven by the style of complaints handling which its establishing legislation imposes. It is free to use alternative resolution processes under a voluntary scheme and has raised this as a possibility. However, as described above, this is a longer-term and uncertain prospect and interim measures are needed.

17. There is an existing private market for redress, which we presume would gladly welcome unregulated legal businesses at a price they could afford. We are not in a position to state whether these providers meet the quality criteria in the Directive; that is for the competent authority to determine. As we explore in the other document and Q5, a further issue is the type of resolution model that is appropriate in individual sectors. We do not think the ombudsman model is needed in every market. However, wherever practicable, features of the legal services market, such as the imbalance of knowledge and power, the high emotional and financial stakes, and the importance of ethical and competent legal services to the economy and society, in our view justify investment in an inquisitorial style of complaints resolution which is at the heart of the ombudsman model of redress.

RESIDUAL ADR

Q3. Can we expect businesses not currently obliged to use an ADR scheme, to refer complaints to a voluntary residual ADR scheme? What steps could Government and others take to encourage businesses to use a voluntary ADR scheme?

18. We think it is unlikely that most unregulated legal services businesses would voluntarily refer complaints to a residual scheme. Our research shows consumers falsely assume that all legal services are regulated so an absence of redress is unlikely to influence choice of provider and thus create a commercial incentive for participation. While ADR is a more appealing prospect than being taken to court, businesses can be expected to weigh this against the low likelihood of consumers taking this step. In legal services, the prospect of taking on lawyers in their own back yard is an added barrier to complaining for consumers. As stated, we think participation in ADR should be mandatory in legal services. But in the absence of this, government must put the right incentives in place.

19. Measures that could help, include:

- Carrying out research that demonstrates ADR makes sound business sense
- Effective signposting rules (see Q.11)
- Giving the residual body the flexibility to tailor its redress provision to the needs of individual business sectors
- Making it easy for consumers to check access to redress, for example through an online register of subscribers
- Innovative funding mechanisms, e.g. a 'first case free' policy may encourage small businesses to see the benefits and refer future 'paid for' cases
- Use of procurement policies, e.g. government should only issue contracts to businesses which subscribe

Q4. What volume of enquiries and/or disputes could we expect a voluntary residual ADR scheme to receive?

20. We have no comment on this question.

Q5. Is there a specific operating model that a residual ADR scheme should adopt (e.g. mirror existing ombudsman models)?

21. The ombudsman model has many benefits: it is free of charge to consumers; decisions are binding; the inquisitorial process deals with asymmetries of information and power and so is likely to produce fairer decisions; and an explicit part of this model is to use the intelligence from complaints to help raise standards in their industry sector.

22. However, these features come at a price: our benchmarking study[3] reveals that the cheapest ombudsman model has a unit cost of around £400. This is unaffordable for many small businesses and would lead many to self-exclude from the residual ADR body. Further, the same dispute resolution process is unlikely to be suitable for the wide variety of market sectors. The residual scheme should not be required to use a blanket model of redress, but should have the flexibility to develop 'packages' suitable for the needs of individual sectors. The minimum quality criteria and consumer

input within the governance structures of the competent authority should safeguard against inappropriate redress models.

23. In some sectors there is a good case for investing in the ombudsman model of redress. However, in these situations, we consider it should be mandatory for traders to participate and this could be achieved by adding to existing ombudsman schemes rather than bringing these traders within the residual ADR body. We say more about this set of issues in the call for evidence paper.

Q6. Can you suggest what an appropriate maximum and minimum settlement value for a residual ADR scheme should be? How have you arrived at these figures?

24. The Legal Ombudsman currently has a maximum compensation limit of £50,000. We would not wish to see a lower maximum limit, which would create an unlevel playing field and/or a race to the bottom.

25. The compensation limit should be set to reflect potential levels of detriment suffered by consumers. This can be high in legal services, e.g. disputes involving property. If the limit is too low consumers may not make a complaint because they perceive the value of their dispute exceeds the limit. Equally, there is an incentive for firms to reject a complaint if the potential redress exceeds the limit – they can let a complaint drag out in the knowledge they will not meet their full liability if the ADR route is pursued.

26. Upper compensation limits do not reflect the average award amount, but allow consumers to obtain full redress from an out-of-court process. Redress schemes are compensatory in nature, not punitive. Scheme data shows that maximum awards are very rare, but a high limit is needed to deal with the few instances of serious detriment. Ombudsmen experience also shows it is possible to award high levels of compensation without adopting legalistic processes that defeat the object of ADR. Setting a maximum limit may be needed to give certainty to the market, but guidelines on how compensation is calculated and routine publication of data on case outcomes should offer sufficient assurance for traders about their level of exposure.

27. There is no minimum settlement value for legal services disputes and we would not wish to see one introduced for complaints about unregulated legal services providers which the residual scheme might handle. We can see the argument that it would be disproportionate to have ADR for very low value and relatively trivial matters. However, in some sectors financial value is not always the relevant consideration. The harm that legal services consumers suffer is often emotional rather than financial in nature, especially given the situations involved – a bereavement or relationship breakdown, for example. The residual ADR body should, like the Legal Ombudsman, be able to order a range of remedies including an apology.

Q7. What funding model would be appropriate for a residual ADR scheme? Can an ADR provider operate effectively if it is reliant on case fees rather than annual fees?

28. Case fees are likely to have the strongest incentive effects on providers to handle

complaints well at the first-tier so referral to ADR becomes unnecessary. This has to be balanced against the need for schemes to have sufficient funding certainty. We agree that a mixture of annual and case fees is the best approach. The relevant proportions might change over time, i.e. the balance of income from case fees could get higher as case volumes become more predictable. This could be highly unpredictable initially.

29. We would not wish to exclude providers from making ad-hoc referrals, but this should be discouraged in favour of regular subscriptions. It would be confusing for consumers and could allow traders to game the system – only referring to ADR when they think they can win, but benefiting from being able to claim they take part in ADR. We can also see issues around 'bad debt', although one way around this could be to require a deposit from the business before an investigation begins.

30. We would encourage BIS to resist calls for solutions that involve refunds on case fees in the event that the business 'wins' their case. This is likely to make financing the scheme too unpredictable given the wide range of sectors it might deal with and lessen the incentive to deal with a complaint at the first-tier.

31. **Q8. Should a standard case fee be adopted? What would be an appropriate level? If not, how should the amount charged for each dispute be determined?**

32. We have no comment on this question.

Q9. Would it be better to have a single ADR body or several ADR bodies operating a residual ADR scheme? What would be the ideal number and what are the reasons for this?

33. In the call for evidence document we set out a proposal for a single residual ADR scheme to be appointed following a competitive tender process, which would have the freedom to negotiate individual packages with purchasers such as trade associations, regulators and government departments. We consider this would turn the current model of competition between redress schemes on its head, moving away from a race to the bottom and instead creating incentives that benefit consumers.

BETTER SIGNPOSTING FOR CONSUMERS – A COMPLAINTS "HELPDESK"

Q10. In light of the other requirements in the ADR Directive which are intended to assist consumers, would a consumer-facing complaints helpdesk be beneficial?

34. We share the concern expressed in the consultation document that multiple ADR bodies makes the landscape difficult to navigate and this could limit the use of ADR. The Panel favours rationalisation of the existing redress landscape, but this is a long-term project and we would still see a place for a 'helpdesk' even in this scenario.

35. With the exception of the largest schemes, consumer awareness of ADR bodies is low. Many schemes do not have the budget to widely promote their services, while there is also a reluctance among the schemes to

'advertise' for complaints due to fear this could compromise their impartiality. Having a single helpdesk would help to pool these resources and alert consumers about their right to complain. A helpdesk would also mask the complexity of overlapping redress arrangements behind the scenes, leaving it to trained staff to make sure complaints are directed to the appropriate body. Creating such a helpdesk would be consistent with wider BIS priorities to streamline and simplify the provision of consumer advice. We acknowledge this would not be easy to pull off given the range of sectors and the complexities of overlapping boundaries, although technology could assist in providing an element of online triage.

36. The largest ombudsman schemes put considerable effort and resources into outreach activities, including that aimed at vulnerable consumers. This may not be matched by the resources available to the helpdesk. Ombudsmen might also worry that helpdesk staff lack sectoral expertise to provide an accurate triage service. We do not see the helpdesk as replacing the promotional and outreach activities of existing sectoral redress schemes. These brands and contact numbers will continue to exist and should remain signposted on company literature, as now.

37. **Q11. Do you have any comments on the type of service it should provide and the extent to which it should examine the enquiries it receives?**

38. We envisage the helpdesk would provide at the least a basic triage service, which would advise consumers whether their complaint is eligible (i.e. the trader is participating and the complaint meets any thresholds) and directs them to the appropriate ADR body. This should be capable of happening in a automated way, i.e. a seamless referral rather than asking the consumer to put the phone down and initiate a separate contact.

39. Any additional range of services could be consulted on at a later point. It is possible that this might vary depending on the ADR scheme responsible for the complaint, as some ADR bodies may want to keep as much as they can in-house while others may wish to outsource preliminary elements of casework. These roles might include:

- Assisting consumers in preparing their complaint, for example by helping them to describe what happened in writing (not intervening on their behalf)
- Acting as a progression agent would in a house sale, e.g. keeping consumers and traders updated on progress, prompting for paperwork etc
- Referring consumers and traders to information about their rights which might enable them to resolve their dispute without recourse to ADR

Q12. Rather than attempt to create a new service, which existing service or body is best placed to provide this function?

40. Citizens Advice is a strong candidate for providing this service. When it streamlined the institutional consumer landscape, BIS wanted to provide a simple message to consumers: "if you need information or advice go to Citizens Advice".[4] Citizens Advice is a well-known and trusted brand and is already the focal point for consumer

enquiries through the helpline it has taken over from the Office of Fair Trading.

41. Citizens Advice is a consumer champion, whereas ADR bodies are strictly impartial. This should not be a problem if Citizens Advice provided a triage service, but it might not be appropriate to ask it to conduct preliminary work on cases, e.g. to assess the merits of individual cases.

Q13. How could a helpdesk be funded?

42. The helpdesk could be funded via a slice of subscription/case fees collected by the competent authority from the residual ADR body and contributions from other certified schemes. The size of contributions could be proportionate to case volumes. This reflects the principle that industry should bear the cost of its own regulation and benefits from the availability of ADR.

APPOINTING A COMPETENT AUTHORITY

Q14. Do you agree that regulators should act as competent authorities for the ADR schemes that operate in their sectors?

43. The function of the competent authority is to assess whether bodies wishing to quality as a certified ADR provider meet the requirements of the Directive. It must then monitor and maintain a list of certified ADR providers and notify any changes to the list to the European Commission.

44. The Legal Services Board has oversight responsibilities for the Legal Ombudsman. It approves the organisation's budget and business plan. It agrees key performance indicators with the Legal Ombudsman's independent board and has reserve powers to set performance targets. We are aware that other sectoral regulators have similar relationships with redress schemes and that some 'approve' redress schemes.

45. The ADR Directive would not remove these statutory arrangements and we would wish to avoid duplication of functions. However, we strongly advise that BIS appoint a single competent authority for the purposes of the Directive. Our benchmarking exercise has shown that ADR bodies lack a common language, but instead use a wide range of definitions and report data in different ways. In order to fulfil the requirement to issue reports to the Commission, data will need to be collected on a consistent basis and this will only be possible if this is done centrally. Making sectoral regulators the competent authorities would not avoid certified ADR providers having to send similar reporting information to more than one body unless the reporting requirements are the same.

46. As set out in the call for evidence document the Panel envisages a more ambitious role for the competent authority than the basic audit function described in the consultation. In summary, we see this body as being responsible for maintaining a strategic overview of the UK consumer redress landscape, leading a programme to rationalise the existing arrangements and championing participation in ADR.

Q15. How should the fees paid by ADR providers to a competent authority be determined? Should the size of the fee depend on the size of the ADR provider (for example turnover or number of cases dealt with) or based on other factors?

47. We have no comment on this question.

PROCEDURAL RULES FOR REFUSING DISPUTES

Q16. Do you agree that the Government should allow UK ADR providers to use all of the procedural rules listed in Article 5(4) of the ADR Directive to reject inappropriate disputes? If not, please explain your reasons.

48. The Legal Ombudsman's scheme rules, most of which are rooted in the Legal Services Act, set out the circumstances when it may refuse complaints and this would be unaffected by the Directive.

49. As previously explained, some legal services disputes may end up being resolved by another certified body. While most of the procedural rules are consistent with the Legal Ombudsman's, the Legal Ombudsman benefits from discretionary powers to vary from these rules, which we recommend is more widely replicated. For example, while ordinarily consumers should first attempt to resolve the complaint directly with the business, this may be excepted if the relationship has totally broken down.

50. We do not consider a complaint should be automatically rejected if the value of the claim exceeds the upper compensation limit. In some existing schemes, the ADR body may award redress up to their upper limit and recommend to the trader that they voluntarily top-up this amount. Consumers should be given this choice and advised about the alternative of going to court.

51. The ability to reject a complaint on the grounds that it 'would otherwise seriously impair the effective operation of the ADR entity' is vague and open to abuse. We would like to see guidance on this point.

INFORMATION REQUIREMENTS

Q17. Would some suggested wording and guidance be useful in helping businesses meet these requirements? What kind of wording would be helpful?

52. Businesses that are participating in ADR will be required to provide information about their ADR provider on their website and, if applicable, in the terms and conditions of any sales or service contracts. Further information requirements will apply if a business is unable to resolve a complaint. At this point, all businesses, irrespective of whether they are obliged or intend to use a certified ADR provider, must firstly provide information (including relevant website details), on paper or another durable medium, about an appropriate certified ADR provider or providers who could handle that dispute. Secondly they must advise whether or not they intend to use this certified ADR provider in an attempt to settle the dispute.

53. As the consultation document suggests, it appears strange to require businesses to tell consumers about an ADR scheme they have no intention of using. Government commissioned research[5] suggests that

information remedies are unlikely to work when they run against the grain of business incentives – we fear this is one such case. This policy is likely to produce minimum compliance approaches, i.e. it will be hidden in the small print, or lead to high levels of non-compliance. It is unclear who will police compliance outside of regulated sectors – if trading standards, this is unlikely to be a high priority for them.

54. The Panel's benchmarking report found low levels of consumer recall about redress schemes even in sectors where compliance with signposting rules is apparently high. A recent research report by Ofgem[6] has also highlighted these challenges – consumers disengage from suppliers letters and there were concerns about tone, layout and lack of personalisation of letters. Some sort of model wording, if tested with consumers, may help matters somewhat. However, all the above adds to the case for creating a high-profile complaints helpdesk to alert consumers to their right to complain.

ONLINE DISPUTE RESOLUTION (ODR) CONTACT POINT

Q18. Do you agree that the ODR contact point should only be required to assist with cross border disputes involving a UK consumer or UK business?

Q19. Should the ODR contact point be allowed to assist with domestic complaints on a case-by-case basis?

55. In our view, the ODR contact point should be integrated with the suggested helpline so there is a single contact point for consumers for all types of dispute – domestic and overseas. When buying online it is not always clear to consumers when they are buying cross border or from a domestic trader. However, in the absence of this, we agree this would fit with the European Consumer Centre's role.

IMPACT ON LIMITATION AND PRECRIPTION PERIODS

Q20. Do you agree that, where applicable, we should extend the six year time limit for bringing disputes to court by eight weeks, and mirror the amendment made to implement the Mediation Directive? If not, please explain why a different extension period is preferable.

Q21. Are you aware of any sector specific legislation which contains time limits for bringing cases to court which we may also have to amend?

56. The Legal Ombudsman's scheme rules state complaints can be accepted up to six years from the event or three years from the knowledge of the event. The second of these periods is crucial – consumers may lack the expertise to assess the quality of work even after the event, e.g. a defective will or problem with title when buying a home and it may be longer than six years before these problems materialise, e.g. when the testator dies or the home buyer comes to sell the property.

57. In the Panel's view, the deadline for initiating litigation should reflect both elements of the time bar rules above.

SCOPE OF ADR: IN-HOUSE MEDIATION

Q22. Do you agree that in-house ADR should not form part of the UK's implementation of the ADR Directive? If you disagree can you please explain why?

58. 'In-house mediation' is where ADR is provided by the business against whom the complaint has been raised. This is not a feature of the current UK redress landscape and we would not wish to encourage such arrangements are they lack independence. We are pleased that the UK Government held this line in negotiations and had wide stakeholder support in doing so.

BINDING DECISIONS

Q23. Do you agree that the UK should allow certified ADR providers to make decisions that are binding? If you disagree can you please explain why?

59. The Legal Ombudsman's decisions are binding on providers, but not on consumers. The ADR Directive does not threaten this situation so we have no objections on this point. However, since responsibility for legal services redress could be split across a range of certified ADR schemes, this does provide another example of a lack of coherence that the ADR Directive could make worse and the need for the wider look and rationalisation of the landscape.

APPLYING THE ODR REGULATION TO DISPUTES INITIATED BY BUSINESSES

Q24. Do you agree that the ODR Regulation should only apply to disputes initiated by a consumer, and should not apply to disputes initiated by a business? If not, can you please explain why?

60. The ADR Directive rightly does not permit businesses to initiate complaints against consumers for domestic disputes and so we are pleased the UK Government does not intend to introduce this for cross border online transactions. As we said in response to an earlier BIS consultation, there is no precedent for this in the UK and research evidence shows that people feel intimidated by lawyers and lack confidence to complain. This situation would be made worse if consumers faced the prospect of their lawyer or, indeed, a lawyer representing another party in their case, filing a complaint about them. This would also be a recipe for counter-claiming.

CALL FOR EVIDENCE: SIMPLIFICATION AND ACCESS TO ADR

Questions 25 to 28

61. We have produced a separate document outlining our vision for rationalising the UK consumer redress landscape.

IMPACT ASSESSMENT

Q29. Do you have any views on the impacts of the options as laid out in the impact assessment?

Q30. Do you have any views on the key figures, assumptions and questions set out in Annex C?

62. No.

GENERAL POINTS

63. **Q31. Are there any other issues or areas on which you would like to comment? If so, we would welcome your views.**

64. No.

June 2014

---

1 Legal Ombudsman, Annual Report 2013-14.

2 Legal Services Consumer Panel, Response to Legal Services Board consultation: Enhancing consumer protection, reducing regulatory restrictions, November 2011.

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

4 BIS, Empowering and protecting consumers: Government response to the consultation on institutional reform, April 2012.

5 Better Regulation Executive and National Consumer Council, Warning! Too Much Information Can Harm, November 2007.

6 Ofgem, Complaints to Ombudsman Services: Energy, prepared by GfK NOP, December 2013.