

# **SUBMISSION TO DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION**

## **CONSULTATION ON IMPLEMENTATION OF THE EU DIRECTIVE/REGULATION CONSUMER ADR AND ODR**

1. We welcome the implementation of the EU Directive on Consumer ADR (“the Directive”) in Ireland. As existing Ombudsmen, we have extensive experience in administering ADR schemes in Ireland and have first-hand experience of dealing with complainants and stakeholders. This gives us a unique perspective on benefits of ADR schemes and what is necessary for them to be effective.
2. There is a common theme running through many of our complaints – the inaccessibility of the courts and of the legal process to many people in Ireland. For many, initiating legal procedures or even retaining a lawyer in relation to their complaint is simply not an option. Recurring themes in the initial contact our offices have with complainants include:
  - “We are coming to you because we have nowhere else to go;”
  - “I am not wealthy so I cannot afford a lawyer”;
  - “Going to court was never an option.”
  - “The bank has their lawyers, I don’t have any.”
3. Furthermore, it is quite clear that for the significant majority of consumer transactions, there is no existing ADR scheme available to an aggrieved consumer. The various Ombudsman schemes in existence each have their own distinct remit. For example, the Ombudsman handles complaints against public service providers. There are the Pensions and Financial Services Ombudsmen to deal with consumer complaints in the pensions and financial services sectors. In addition the White Paper includes: Scheme for Tour Operators, Chartered Institute of Arbitrators, the Advertising Standards Authority and the Direct Selling Association. However, despite these existing schemes, simply put, they do not provide anything near the broad coverage of consumer transactions envisaged under the Directive and the Regulation. Strong consideration should be given to including or returning privatised public services and those provided by semi-state companies to the jurisdiction of the Ombudsman, to provide a single point of access for redress on public services.
4. Accordingly, the implementation of the Directive and Regulation provides Ireland with an important opportunity to provide consumers with effective

redress – something which has been lacking to date in the majority of transactions. For us, the critical issues to be decided are twofold:

- (1) How should the new ADR be designed? and
- (2) what steps should be taken to ensure that they are effective?

## 5. Design

- a. Here, we see no need to create a new standard or to “reinvent the wheel” as the Principles of the Ombudsman Association already exist as a ready-made standard, tested in this jurisdiction and with broad applicability to ADR schemes of different types. These Principles not only meet the requirements of the Directive and the Regulation but also provide a sound framework for giving effective redress to new classes of aggrieved consumers.
- b. The Principles of the Ombudsman Association include:
  - i. Independence
  - ii. Openness and Transparency
  - iii. Accountability
  - iv. Integrity
  - v. Clarity of Purpose
  - vi. Effectiveness
- c. The Principle of Independence merits special mention as we believe it will be critical to the future credibility and success of any ADR scheme. Independence of the judiciary as a concept is well understood in Ireland. It is the independence of the judiciary which is accepted as the minimum necessary to give the public confidence in the impartiality of judges. We believe that for similar reasons the decision makers of ADR schemes must have independence from all bodies under their jurisdiction – and that this independence must be demonstrably so.
- d. Accordingly, Ombudsmen must have no financial interest in any bodies under jurisdiction. (While funding may come by way of case fee or levy, bodies should not be able to determine the funding levels as to do so might prevent the Ombudsman from properly investigating complaints). They must be appointed in an open and transparent process free from any undue influence of interested parties. They must be able to make decisions free from all interference and this must be apparent. In addition, they must have sufficient tenure to have the independent status necessary for impartial decision making – including a term of office of a minimum of 5 years.

- e. We have a concern that in the absence of necessary safeguards as to the independence of ADR schemes, that they will lack the necessary credibility to build support among stakeholders and the wider public. This will render the schemes unable to perform their function of providing the public with effective redress.

## 6. Effectiveness

- a. Ultimately, the success of any ADR scheme will be measured by the ability of the scheme to provide an aggrieved complainant with an adequate remedy. The essential question is whether the scheme will be able to direct adequate compensation to the complainant.
- b. Here, we have concern about the ability of any new scheme set up under the Directive to be effective. First, we note that participation by businesses is not mandatory. All that is mandatory is for businesses to inform consumers what particular ADR scheme covers a particular sector – it is not mandatory for a particular business to participate in that scheme.
- c. The Directive appears to be based on the premise that the simple requirement for business to inform a consumer of the existence of a scheme is taken to be sufficient incentive to encourage businesses to join such a scheme. We consider this to be an unproven business model in Ireland and believe it may result in the new schemes simply failing due to a lack of initial uptake by relevant businesses.
- d. Here we note that the private sector ADR schemes, of which we have the most experience in Ireland, are mandatory schemes – the Pensions Ombudsman and the Financial Services Ombudsman. In both schemes, the providers are under a legal obligation to not only notify complainants of the existence of the ADR schemes but also to participate fully in such schemes. Accordingly, the schemes are able to provide aggrieved complainants with an effective remedy.
- e. In addition, the Ombudsman also provides complainants with an effective remedy as to complaints dealing with the public sector. The public sector bodies fully cooperate with the Ombudsman and, with a few notable exceptions, have a good record of accepting and implementing the Ombudsman's recommendations
- f. We do not have the confidence that a similar result will be achieved in the private sector – in the absence of both a mandatory reporting and participating requirement. As an initial attempt to address this

challenge, we believe it would be appropriate to extend the remit of the Ombudsman to include areas over which it previously had jurisdiction only to have lost it due to privatisation of public services, such as water and refuse collection. This would be a simple way of providing greater uniformity of consumer access to complaint procedures over what remain essential public services, and leave complaint handling with a body most equipped and experienced to do it.

- g. In addition, we believe serious consideration should be given to what additional sectors of consumer transactions should be given to ADR schemes with mandatory reporting and participating requirements. Experiences in other jurisdictions here may prove illuminating and include complaints about professional services, real estate agencies and other areas where well established information asymmetries may disadvantage consumers. Extensive work may need to be done with businesses in the private sector before they will participate in sufficient numbers in the relevant ADR schemes to make such schemes viable, not to mention effective.
7. Finally, we would point out that there are risks associated with proliferation of ADR bodies. The danger of proliferation is that the consumer can become confused and doesn't know where to apply for redress. The model envisaged by the Directive would require that the consumer is given information, but does not require the provider to participate in the redress scheme, and there is always the problem of non-compliant providers. With regard to private sector complaints, consideration might be given to providing a single portal for consumer complaints, where complaints could be properly directed to the relevant specialists. The Directive will bring new pressures, which might best be met by a single consumer-facing body which can properly direct complaints.

Submitted by Kieran FitzGerald, Commissioner, Garda Síochána Ombudsman Commission, on behalf of The Ombudsman Forum which includes the following members

The Ombudsman and Information Commissioner  
The Garda Síochána Ombudsman Commission  
The Ombudsman for Children  
The Financial Services Ombudsman  
The Pensions Ombudsman  
An Coimisinéir Teanga  
The Ombudsman for the Defence Forces