

4 July 2018

Modernising Consumer Markets: Consumer Green Paper

I am writing in response to the consultation on the Consumer Green Paper. We have restricted our comments to the issues addressed in Chapter 4 – Improving enforcement of consumer rights.

Summary

1. The Ombudsman Association welcomes the Government's commitment to ensure consumers can easily get redress when things go wrong, which unfortunately is not the case at the moment.
2. It is in the interests of consumers that they have access to an ombudsman in all areas of consumer markets.
3. Access to redress should be simplified for consumers with a single, mandatory, ombudsman covering each sector.
4. To be effective an ombudsman needs to work in a well-regulated environment, with clear common standards to measure against, and should liaise closely with enforcement bodies.

Background

5. The Ombudsman Association was established in 1993 and includes as members all public and private sector Ombudsman schemes and major complaint handling bodies in the United Kingdom, the Republic of Ireland, the British Crown Dependencies and the British Overseas Territories.
6. The Vision of the Association is that throughout the public and private sectors:
 - It is straightforward and simple for people to complain.
 - People making a complaint are listened to and treated fairly.
 - A complaint is dealt with quickly, fairly and effectively at the earliest stage by suitably trained staff.
 - People have access to an ombudsman in all areas of consumer and public services.
 - The learning from a complaint is used to improve services.
7. An Ombudsman helps to underpin public confidence in the institutions that they cover; by providing accessible and effective redress, and by feeding back the lessons from their work in order to help improve service delivery and complaints-management for the future.
8. The Association's membership criteria are recognised both internationally and by the UK Government as representing best practice. This is reflected in the Cabinet Office's *Guidance for government departments on setting up Ombudsman schemes*¹, which addresses the point of when it is appropriate for a public body to use the title 'ombudsman', and in the criteria used by Companies House as to when a company can use the protected term 'ombudsman'².
9. The Association's Validation Committee scrutinises both applications for membership and the 5-yearly re-validation of existing members against our membership criteria.³ The Validation Committee has a majority of independent members who are appointed

via an open recruitment process for their knowledge and expertise of the ombudsman sector.

Question 12. How can we improve consumer awareness and take-up of alternative dispute resolution?

10. The overall problem with redress in the consumer sector flows from the combination of having multiple competing redress schemes whilst at the same time having gaps in coverage. The result is that for consumers it is not clear how, or who, to raise a complaint with, there are gaps in who can access redress, access is sometimes restricted even where redress does exist, and the proliferation of schemes means there are inconsistencies in how complaints are handled.
11. Many of the criticisms of having multiple redress providers within a sector is that the company chooses which one to work with. This means that no single Ombudsman scheme / redress provider has a holistic overview of the issues in the sector and the regulator / competent authority does not have a single partner to work with to drive improvements. The lack of clarity often puts consumers off complaining. There is also a perception amongst the public that as the business chooses which independent redress scheme to work with the redress provider is not truly independent and may side with the organisation complained about to retain their business. Regardless of whether there is any evidence to support that view, the perception puts consumers off taking their complaint further.
12. The Ombudsman Association's long-standing position is that people should have access to an ombudsman in all areas of consumer and public services, and that there should be a single ombudsman within a sector.
13. This principle, supported by current thinking in consumer policy, is based on the commonly held position that it is in the interests of consumers for access to redress to be simple and straightforward, and that having more than one ombudsman scheme (or redress provider) within a sector creates consumer confusion and uncertainty.
14. The position that there should only be one redress provider within a sector, and preferably an ombudsman, has been reinforced by a number of recent reports into the redress sector, including the 2017 Citizens Advice report *Confusion, gaps and overlaps*⁴ and the report by MoneySavingExpert⁵ Both reports are clear that it is in the interests of consumers for access to redress to be simple and straightforward and that confusion is caused by having multiple providers, without any clear evidence of the benefits.
15. This has been echoed by the Gambling Commission who have reiterated their intention to move towards a single ombudsman for the sector, following their report in 2017⁶ that having multiple redress schemes in the gambling sector caused confusion for the public and did not result in additional benefits. The recent consultation⁷ by the Ministry of Housing, Communities & Local Government to strengthen consumer redress in the housing market by reducing the number of ombudsman schemes and ADR approved redress bodies, from four to one, further reinforces this position as best practice, as the Consumer Green paper notes.

¹ www.gov.uk/government/publications/new-ombudsman-schemes-guidance

² www.gov.uk/government/publications/incorporation-and-names/annex-a-sensitive-words-and-expressions-or-words-that-could-imply-a-connection-with-government

³ www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf

⁴ www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf

⁵ https://images6.moneysavingexpert.com/images/documents/MSE-Sharper_teeth_interactive.pdf

⁶ www.gamblingcommission.gov.uk/PDF/Complaints-processes-in-the-gambling-industry.pdf

16. Furthermore, the responses to Ofgem's call for evidence in 2018, on whether to allow an additional redress provider to operate in the energy sector alongside the Energy Ombudsman, further underlined this; with both consumer representatives and the energy companies themselves highlighting that having multiple redress providers did not benefit either consumers or businesses⁸.
17. The solutions therefore are clear and commonly agreed: simplifying redress by having one ombudsman in a sector, thereby making it easier to raise awareness of how to raise a complaint, to have consistency of standards and decision making, and to ensure holistic oversight of issues in that sector to help drive broader improvement.
18. However, an ombudsman is just one piece of the puzzle. Ombudsman schemes are most effective in sectors where they work closely with a regulator and other accountability bodies. This can be seen for example in the energy sector where the ombudsman works closely with Ofgem. In order to both improve services and hold organisations to account there needs to be clear common standards and commitments that an ombudsman can then measure organisations against, and effective relationships with regulators and other bodies in place to ensure enforcement.
19. There is also ample evidence that the 'complaints maze' across the consumer landscape is impenetrable for the ordinary citizen and that a single portal for all complaints, akin to the e-People system in South Korea⁹, could be the answer.
20. It is worth stressing that whilst the introduction of a single portal would greatly improve issues around signposting, it would not address the many criticisms of having multiple redress providers within a sector. Real improvement to consumer redress can only be achieved if there is a single ombudsman scheme with a holistic jurisdiction and overview of the issues in a sector, working effectively with the regulators / enforcement bodies to drive improvements.

Question 13. What model of alternative dispute resolution provision would deliver the best experience for consumers?

21. There are several different forms of ADR, including the 'negotiated justice' involved in mediation and conciliation, where the two parties agree on a solution between themselves, the legally binding arbitration process, and adjudication, where an independent person weighs the two arguments and makes a decision on the evidence.
22. Ombudsman schemes represent a form of inquisitorial adjudication. Whilst there are other redress providers who also offer adjudication, accredited by the various Competent Authorities under the ADR Directive, there are some significant differences between an ombudsman and those organisations providing what you could term 'straight-forward' adjudication:
 - Ombudsman schemes are always free for the public to access;
 - Ombudsman schemes provide advice and sign posting to the public;
 - Ombudsman schemes take an inquisitorial approach when investigating;
 - Ombudsman schemes make recommendations for improvement in service provision, beyond simply settling the individual dispute;
 - Ombudsman schemes have the ability to address systemic issues; and
 - Ombudsman schemes share data and information for use by regulatory and enforcement bodies

⁷www.gov.uk/government/uploads/system/uploads/attachment_data/file/682203/Strengthening_Consumer_Redress_in_the_Housing_Market_Consultation.pdf

⁸www.ofgem.gov.uk/publications-and-updates/application-utilities-adr-be-certified-adr-provider-energy-sector-ofgem-decision-following-responses-our-open-letter

⁹www.epeople.go.kr/jsp/user/on/eng/intro01.jsp

23. One of the benefits that an ombudsman brings as opposed to straight-forward adjudication is its role in proactively influencing the service provision and complaints handling of the bodies in its jurisdiction. This can be undertaken through training, producing guidance materials, and providing feedback on patterns in type and numbers of complaints. The further benefit of having a single ombudsman covering an entire sector is that service is available to all businesses / organisations. This has been done most effectively by the Scottish Public Services Ombudsman through their Complaints Standards Authority role, which is also being adopted by the public services ombudsman schemes in Northern Ireland and in Wales.
24. The Association strongly believes that there should be increased harmonisation of powers and processes between ombudsman schemes in different sectors. Our membership includes ombudsman schemes operating in both the public and private sectors, and in various countries and territories. Our common membership criteria of Independence; Fairness; Effectiveness; Openness & Transparency; and Accountability¹⁰ apply to them all.
25. Members of the public should expect a similar level of service regardless of which service or organisation they complain about. In 2017, after a public consultation, we launched our Service Standards Framework¹¹ which sets out the public commitments and service standards that can be expected when using the services of an ombudsman. As set out in both our membership criteria and the Framework, all ombudsman schemes should publish how they perform against their stated service standards to enable policy makers, politicians, academics and the general public to hold them to account.
26. An ombudsman should have a range of options open to them with regards to their decisions, from recommendations to undertake training or change policies to awarding financial redress. They should have the power to share information with regulators and other bodies. As membership of an ombudsman scheme should be mandatory for a business, any serious issues such as non-compliance should be passed to the relevant regulator / enforcement body to take appropriate action.
27. It is accepted practice internationally that, in the private / consumer sector, an ombudsman's decision is binding on the organisation complained about (if the complainant accepts the decision) and this is reflected in our membership criteria. Consumers should always retain the right to take their dispute to court if they are unhappy with the ombudsman's decision. It is also important that the routes for enforcement of decisions against the business, through the regulator or the courts if necessary, are clear.
28. It is a key element of an ombudsman scheme that as well as providing individual redress they should also share information wherever possible to help the wider sector learn from complaints handling and to improve the provision of services. Transparency is one of our key membership criteria and the publication of information about decisions and the performance of individual companies and sub-sectors is an important tool to drive improvement in conjunction with regulators and policy makers.
29. Accessibility is another key element of an ombudsman scheme. Free, direct and immediate access to an ombudsman if the organisation does not resolve the complaint promptly is an accepted and essential feature of an ombudsman scheme. Ombudsman schemes pro- actively raise awareness of their services and ideally there should be a requirement on those in their jurisdiction to signpost to and inform consumers of their right to take their complaint to the ombudsman, as in, for example, the financial sector.
30. In advance of any legislative changes, policy and regulatory action could be taken by Government to reduce the number of redress schemes currently operating. Further consideration could also be given to exploring the introduction of a single portal for all consumer complaints.

¹⁰ www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf

¹¹ www.ombudsmanassociation.org/docs/OA17%20Service%20Standards%202017_Final.pdf

31. Our membership criteria of Independence; Fairness; Effectiveness; Openness & Transparency; and Accountability sets a higher bar for an ombudsman than the ADR Directive does for other redress bodies, especially around independence and access. However, an ombudsman is not a consumer champion. It is crucial that an ombudsman is truly independent from both complainants and those bodies in jurisdiction and our membership criteria ensures that is the case.

Question 14. How could we incentivise more businesses to participate in alternative dispute resolution?

32. The previous attempt by the Government when transposing the Alternative Dispute Resolution Directive, to 'nudge' businesses into engaging with ADR by forcing them to signpost to ADR providers, without the requirement to use them, has not been successful. The research undertaken by ICF and published alongside the Consumer Green Paper highlighted that 70% of consumers who went to Court did so because the trader refused to participate in ADR¹². The figures from redress providers are worse: the Consumer Ombudsman, which was set-up in line with the then Government's policy to create a 'residual body', reported that whilst they received 5,600 complaints in 2017, in only 6% of cases did the business agree to participate in ADR¹³.
33. The ICF research also showed that only 37% of those who used ADR received information on ADR providers from the trader, despite it being mandatory for traders to signpost consumers¹⁴.
34. There is a simple solution that is supported by Government policy and proven to work in other consumer sectors in the UK: a single mandatory ombudsman in each sector.

Question 15. Should there be an automatic right for consumers to access alternative dispute resolution in sectors with the highest levels of consumer harm?

35. Yes. As set out above, they should be an automatic right for consumers to access alternative dispute resolution in *all* sectors, not just those perceived to have the highest levels of consumer harm.
36. It is current Government policy that consumers should have the right of redress to an ombudsman scheme in multiple sectors, from housing to rail, and energy to financial. If the Government wants to ensure consumers can easily get redress when things go wrong they simply need to consistently and holistically apply their own policies across all consumer markets.

The Association would be happy to provide any further information or meet to discuss if you would find that helpful.

Yours sincerely

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¹² www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system

¹³ www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets

¹⁴ www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system