

Civil Aviation Authority
Aviation House
Gatwick Airport South
West Sussex, RH6 0YR

Chair: Anthony Arter
Director: Donal Galligan

By email to: consumerenforcement@caa.co.uk

19 November 2020

Dear Sir / Madam,

Policy for ADR applicants and approved ADR entities

I am writing in response to the Civil Aviation Authority's (CAA) consultation on the update to the Policy for ADR applicants and approved ADR entities.

Summary

1. The Ombudsman Association welcomes the CAA's desire to strengthen the current system of redress in the aviation sector, however, the changes proposed to the CAA's policy do not go far enough to meet the needs of aviation consumers.
2. A single, mandatory, aviation ombudsman should be established to provide comprehensive and effective redress for all aviation consumers and enable holistic feedback to both the airline sector and the CAA.

Background

3. The Ombudsman Association (OA) was established in 1993 and includes as members all public and private sector Ombudsman schemes and major complaint handling bodies in the United Kingdom, Ireland, the British Crown Dependencies and the British Overseas Territories.
4. The Vision of the OA 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.
5. An Ombudsman helps to underpin public confidence in the organisations 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.
6. The OA's membership criteria are recognised 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 to use the title 'ombudsman', and in the criteria used by Companies House on when a company can use the protected term 'ombudsman'².

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

Current issues – the need for a single mandatory ombudsman

7. The 'General statement' of the consultation document sets out that the purpose of the CAA's policy is to "approve...the alternative dispute resolution services that are *needed* by aviation consumers" and also notes that "consumer and trader confidence is vital to the success of ADR within the aviation sector".
8. Unfortunately, there is ample evidence, notably that compiled by *Which?*³, that the current framework and policy in the aviation sector is not providing the resolution services that aviation consumers need and that there is little confidence in the current system.
9. There are a number of small alterations proposed in the CAA's consultation to strengthen redress, and our response will touch on those later, but those proposals only seek to address the symptoms rather than the cause; which stems from a policy of ADR not being mandatory for airlines and of having more than one redress body in the sector. That diagnosis is supported by evidence from other sectors.
10. 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, including the 2017 Citizens Advice report *Confusion, gaps and overlaps*⁴. Those 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. The CAA's identification of the need to mitigate the confusion caused by the activities of non-regulated ADR schemes in the aviation sector underscores this point.
11. 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 what is recognised to be best practice; both consumer representatives and the energy companies themselves highlighted that having multiple redress providers did not benefit either consumers or businesses.⁵
12. Furthermore, research published alongside the UK Government's Consumer Green Paper has shown that relying on individual businesses to sign up to ADR voluntarily has not been successful across the consumer sector. 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 ADR.⁶ The apparent 5,000 claims waiting at Luton County Court, regarding easyJet and Tui, and the need to resort to using bailiffs⁷, alongside the high profile decisions taken by Ryanair, Emirates, and Norwegian not to engage with the ADR process at all, shows the scale of failure of the current approach in aviation to ADR.
13. Whilst the failings of voluntary ADR, delivered by multiple providers, are well known, so is the solution; having a single, mandatory, ombudsman.
14. A single mandatory ombudsman not only provides clarity for consumers. Having a holistic view of complaints across the sector enables the ombudsman to spot systemic issues both within a single organisation and across several different organisations, providing the feedback to the sector to help drive improvements in service delivery and customer service, and to inform the regulator's activities.

³ www.which.co.uk/news/2020/10/more-airline-passenger-misery-as-court-cases-could-take-years/

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

⁵ www.ofgem.gov.uk/publications-and-updates/application-utilities-adr-be-certified-adr-provider-energy-sector-ofgem-decision-following-responses-our-open-letter

⁶ www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system

⁷ www.which.co.uk/news/2020/10/more-airline-passenger-misery-as-court-cases-could-take-years/

15. 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 shares relevant information with Ofgem to inform their regulatory activities and ensure enforcement.
16. Several of CAA's fellow regulators have recognised the benefit of having a single mandatory ombudsman, reflected in the long-standing positions of the Financial Conduct Authority in terms of the Financial Ombudsman Service, and Ofgem in terms of the Energy Ombudsman – with the latter's position recently reinforced by the rejection of an application from an additional redress provider to enter the regulated energy market.
17. That recognition of it as the 'gold standard' for consumer redress has been further reflected in recent Government policy to establish single mandatory ombudsman schemes in both the rail sector and the new homes sector. In those two scenarios that has been achieved without primary legislation.
18. In terms of the rail sector, that was delivered via a modification to the passenger licence conditions by the Office of Rail and Road to mandate membership of an approved ADR scheme. In the new homes sector, that is being achieved by making it a condition of commercial lending that developers are registered members of the proposed ombudsman. In both instances that approach is supported by the relevant Government department, respectively the Department for Transport and the Ministry of Housing, Communities & Local Government.

Proposed amendments

19. The OA welcomes the CAA's acknowledgement that changes are required to strengthen redress in the aviation sector, and two of the proposed changes would appear to be attempts to plug the gaps that exist when a straightforward adjudication process is opted for rather than an ombudsman.

Post-decision review process

20. It is a requirement of all ombudsman schemes, as set out in the OA's criteria, to have a quality assurance mechanism in place. An ombudsman is the final stage of the administrative complaints process and as such it is best practice for an ombudsman to have internal quality control processes to consider any complaints that are made either about the service they provided, or if factual errors or a failure to consider certain evidence has impacted on the decision. We welcome that the CAA recognise this is best practice.

Complex and novel issues

21. The proposals CAA have put forward appear to recognise that the straightforward adjudication process that is currently in place, rather than the inquisitorial approach taken by an ombudsman, has left a significant gap in terms of 'complex and novel' issues. That the current approach is 'transactional' would appear to be evidenced by the concern that an issue would arise if there was 'no established case law'. Case law is of course a matter for the courts; alternative dispute resolution, and ombudsman in particular, should be more concerned with principles of 'fairness'. It is not unusual for ombudsman schemes, in all sectors, to deal with complex and novel issues; it is through their inquisitorial approach to investigations and their conclusion as to whether something was 'fair' or not that these issues are addressed.
22. The proposed approach, in designating that the airlines themselves make an initial decision as to whether something is too 'complex and novel' for ADR, and the suggested 'mediated' approach afterwards between the airline, the ADR body, and the CAA, would appear to give far too much influence to the organisation complained about. For comparison; it is for an ombudsman to determine whether something is within their jurisdiction and whether to investigate. There are of course occasions when an ombudsman might determine that an issue is best pursued through the courts, or that clarification on a point of law is required, but it is not for the organisation complained about to determine how that complaint should be dealt with by an independent adjudicator.

Paying consumer awards

23. The novel proposal to allow an ADR body to hold funds on behalf of an airline for the purpose of paying consumer awards appears to be a recognition that the airlines are not complying with the ADR bodies' binding decisions in a timely manner.
24. Having identified this as a failing, the goal should be to ensure that airlines respect the decisions made by the ADR body, take responsibility for whatever mistakes have been made, and comply with the binding decisions in a timely fashion. That they are apparently failing to do so suggests a lack of 'ownership' and raises further questions about whether they are taking on board the lessons that should be learnt and making the necessary changes to improve their service and avoid the same issues arising again. 'Delegating' responsibility for refunding their customers for the mistakes the airline has made is likely to compound those issues.
25. In other sectors, ombudsman schemes do not hold funds on behalf of the organisations under their jurisdiction. There are specific deadlines set for the organisations to comply with the decisions made. If they are not complied with, the ombudsman would raise the non-compliance with the relevant regulatory / oversight body for enforcement action, which can include suspension of trading.

Other elements of the existing policy

26. Two elements of the CAA's existing policy do not reflect best practice: allowing an ADR provider to charge a fee for use of the service, and making consumers wait 8 weeks before they can access redress. On the former, the airline industry was open in admitting that their call for a fee to be put in place was simply to deter consumers from making a complaint. There should never be a financial barrier put in place to discourage consumers from accessing their statutory rights; the CAA should immediately end this anomaly.
27. In regard to the '8-week period', there has been much attention drawn to the unfairness of the delay this causes, notably by Money Saving Expert⁸, and this should be reduced in line with changes in other consumer sectors.

It is welcome that, having recognised the deficiencies in the current system, the CAA is trying to identify ways in which to strengthen it. However, there is no need to reinvent the wheel; these issues are already addressed in other sectors by having a strong ombudsman working in tandem with a proactive regulator. Having a single mandatory ombudsman provides more effective consumer protection, facilitates more effective feedback to the sector, and supports the regulator in performing their duties.

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

Yours sincerely

Donal Galligan
Chief Executive

⁸ www.moneysavingexpert.com/pressoffice/2019/11/time-to-scrap-8-week-ombudsman-rule-and-drag-it-into-21st-centur/