

By email to: Disputeresolution.enquiries.evidence@justice.gov.uk

Dispute Resolution Team
Ministry of Justice
102 Petty France,
London, SW1H 9AJ

29 October 2021

Dear Sir / Madam,

Dispute Resolution in England and Wales

I am writing in response to the Call for Evidence on Dispute Resolution in England and Wales. We have restricted our comments to the Ombudsman Association's areas of expertise. Several of our members will be replying separately with detailed information about their own schemes.

Summary

1. We welcome the Ministry of Justice's intention to encourage greater use of non-adversarial dispute resolution and the potential for a more joined-up approach across Government.
2. The most effective way to achieve benefits for both parties is to have a single mandatory ombudsman in each sector, to provide comprehensive and effective redress for all individuals and to enable holistic feedback to both the sector and policy makers.

Background

3. The Ombudsman Association's (OA) members include all public and private sector Ombudsman schemes and major complaint handling bodies in the UK, 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 sectors that they cover; by providing free, 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 criteria¹ are recognised as representing best practice, as reflected in the Cabinet Office's guidance,² which addresses the point of when it is appropriate to use the title 'ombudsman', and in the Companies House criteria on when a company can use the protected term 'ombudsman'.³

¹ www.ombudsmanassociation.org/about-us/join-ombudsman-association

² www.gov.uk/government/publications/new-ombudsman-schemes-guidance

³ www.gov.uk/government/publications/incorporation-and-names/annex-a-sensitive-words-and-expressions-or-words-that-could-imply-a-connection-with-government

1). Drivers of engagement and settlement

Q1. Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?

Q2. Do you have any experience or evidence of the types of incentives that help motivate parties to participate in dispute resolution processes? Do you have evidence of what does not work?

Q5. Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?

7. Uptake of dispute resolution is low when that redress is not easily accessible. The research undertaken by ICF and published in 2018 alongside the UK Government's Consumer Green Paper highlighted that 70% of consumers who went to the courts did so because the trader refused to participate in ADR.⁴ The Impact Assessment for the recent consultation paper on *Reforming Competition and Consumer Policy* set out that, "ADR is currently used only in few cases, because of inconsistent standards, a confusing landscape, and insufficient incentives for businesses to participate".⁵
8. Whilst ombudsman schemes are often thought of as an 'alternative to the courts', in many cases there are in fact an alternative to no justice at all. It is therefore doubly concerning when there is low uptake, for example that the Public Services Ombudsman for Wales (PSOW) did not receive any complaints about homelessness in 2020/21. PSOW's subsequent own initiative investigation⁶ showed that vulnerable people were suffering injustice but were either unaware of their rights, did not understand them, or were unable to exercise their right to escalate their complaint.
9. In these scenarios, low uptake of dispute resolution does not evidence that it is more appropriate to seek resolution through the Courts, but rather that there are multiple barriers to accessing any form of redress that leaves people disenfranchised.

Q6. In your experience, at what points in the development of a dispute could extra support and information be targeted to incentivise a resolution outside of court? What type of dispute does your experience relate to?

Q7. Do you have any evidence about common misconceptions by parties involved in dispute resolution processes? Are there examples of how these can be mitigated?

10. There is still a relatively low understanding amongst the public of what an ombudsman can and cannot deliver, and the rights that people have to take their complaint to an ombudsman. Education and communication is key, both in terms of understanding those rights and being signposted, by the organisation the dispute is with and the advice and advocacy sector.
11. Having greater awareness of their rights should encourage people to raise a complaint in the first place, knowing that they can access independent redress if the issue is not resolved (and thereby increasing uptake). Ideally a dispute should be resolved at the outset, meaning there will be no need to escalate it to an ombudsman or to the courts. There should be an increased focus on 'right first time'⁷ to avoid disputes arising in the first place, and to resolve them swiftly if they do occur. The ombudsman model, with an inquisitorial rather than adversarial approach, works with service providers and businesses to drive improvements by providing that feedback loop.

⁴ [Resolving consumer disputes: alternative dispute resolution and the court system - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/684222/Resolving_consumer_disputes_alternative_dispute_resolution_and_the_court_system_-_GOV.UK_(www.gov.uk).pdf)

⁵ [Alternative Dispute Resolution impact assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684222/Alternative_Dispute_Resolution_impact_assessment_(publishing.service.gov.uk).pdf)

⁶ [Ombudsman publishes his first-ever own initiative investigation into the homelessness review process in Wales, finding evidence of "systemic maladministration" by local authorities](https://www.ombudsman.gov.uk/news/ombudsman-publishes-his-first-ever-own-initiative-investigation-into-the-homelessness-review-process-in-wales-finding-evidence-of-systemic-maladministration-by-local-authorities)

⁷ [House of Commons - Public Accounts: Written evidence from Administrative Justice & Tribunals Council \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts/written-evidence-from-administrative-justice-and-tribunals-council/)

12. Ombudsman schemes can also do more to address the misconceptions about them. Research by Professor Naomi Creutzfeldt identified the key issue of trust.⁸ The OA's Service Standards Framework⁹ clarifies what people can expect when they use an ombudsman. In that way it acts as a tool with which to manage expectations and build trust and confidence in an ombudsman office.
13. The problems with the current redress landscape, including having multiple providers of varying quality, gaps in redress, and different rules as to whether redress is free to access or not, causes considerable confusion for the public, as set out in the *Confusion, gaps, and overlaps* report¹⁰. The Impact Assessment for the *Reforming Competition and Consumer Policy* consultation highlighted that unless that system was changed, take up of dispute resolution would not increase.¹¹ As is discussed further below, making redress mandatory and having a single ombudsman in each sector is part of the solution.

2). Quality and outcomes

Q8. Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?

Q9. Do you have evidence of where settlements reached in dispute resolution processes were more or less likely to fully resolve the problem and help avoid further problems in future?

Q10. How can we assess the quality of case outcomes across different jurisdictions using dispute resolution mechanisms, by case types for example, and for the individuals and organisations involved?

14. It is not clear that there is significant evidence on the outcomes achieved through the courts, or the 'quality' of those outcomes, in order to compare those against the outcomes achieved by ombudsman schemes or via other 'alternative' dispute resolution. Further research, both qualitative and quantitative, should be undertaken to try and address this point.
15. As ombudsman schemes are often an alternative to no redress at all, rather than an alternative to the courts, it may prove difficult to directly compare the costs / outcomes / quality. Statistics around satisfaction with service and uphold rates may provide a starting point for that further qualitative and quantitative research.
16. The framework that ombudsman schemes operate within should provide some reassurance. The OA's criteria for ombudsman schemes is set at a considerably higher level than that for approved ADR entities. One element of the OA's criteria is that all ombudsman schemes should have a quality assurance mechanism in place and should conduct regular auditing of outcomes.

Q11. What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view.

17. The OA's long held position is that people should have access to a mandatory ombudsman in all areas of public services and consumer goods. The known benefit of compulsion is reflected in the long-standing policy positions in terms of the Financial Ombudsman Service, and the Energy Ombudsman.
18. That recognition of that as the 'gold standard' for redress has been further reflected in recent UK Government policy to establish single mandatory ombudsman schemes in both the rail

⁸ [A voice for change? Trust relationships between ombudsmen, individuals and public service providers: Journal of Social Welfare and Family Law: Vol 38, No 4 \(tandfonline.com\)](#)

⁹ www.ombudsmanassociation.org/best-practice-and-publications/oa-service-standard-framework

¹⁰ [Confusiongapsandoverlaps-Original1.docx.pdf \(citizensadvice.org.uk\)](#)

¹¹ [Alternative Dispute Resolution impact assessment \(publishing.service.gov.uk\)](#)

sector and the new homes sector. In those two examples that has been achieved without primary legislation. In terms of the rail sector, it was delivered via a modification to the passenger licence conditions 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.

19. As referenced above, the Impact Assessment for the UK Government's *Reforming Competition and Consumer Policy* consultation states clearly that "*We believe that voluntary actions are unlikely to increase ADR take-up by much in sectors in which business participation in ADR is not mandatory.*"

Q12. Do you have evidence of how unrepresented parties are affected in dispute resolution processes such as mediation and conciliation?

20. It is integral to the concept of an ombudsman, and the inquisitorial approach they take (as opposed to the adversarial approach in the courts), that people do not need a lawyer to access their service.

Q13. Do you have evidence of negative impacts or unintended consequences associated with dispute resolution schemes? Do you have evidence of how they were mitigated and how?

21. Free and direct access to an ombudsman scheme is essential for it to be effective. A concerning development is the proposal in the *Reforming Competition and Consumer Policy* consultation that 'nominal fees' or 'lower limits' on the value of a claim should be introduced in order to limit the uptake of dispute resolution. This proposed approach would appear to be a direct contradiction of the Ministry of Justice's stated policy aim to increase the uptake of less adversarial options.
22. Other barriers can also prevent people accessing an ombudsman, such as the 'MP filter' for the Parliamentary and Health Service Ombudsman (PHSO). People complaining about a UK Government Department (or public body) cannot directly access PHSO, but instead need to contact their MP who then decides whether to pass their complaint on. This deters some people from seeking redress, either because they do not want to approach their MP, for various reasons, or due to 'complaint fatigue' as a result of the additional stage. The PHSO is the only ombudsman scheme in the world where this barrier exists, and citizens of England are disproportionately disadvantaged compared to their fellow citizens in Wales, Scotland, and Northern Ireland (there are no restrictions on access to the three relevant public services ombudsman regarding devolved services).
23. Ombudsman schemes are free for the public to use as they are funded either through public funds or via a levy on the industry. This can however raise concerns about bias and independence. The OA's robust criteria around governance and finances ensures the independence of an ombudsman from the sector it considers complaints about.
24. However, the criteria in the ADR Regulations is set at a considerably lower level and the competitive environment between ADR providers, in which the business itself chooses their own 'judge and jury', means that a business can switch ADR providers if they are unhappy with the number of decisions that go against them. As highlighted above, the solution is to have a single mandated ombudsman in each sector.

Q14. Do you have evidence of how frequently dispute resolution settlements are complied with, or not? In situations where the agreement was not complied with, how was that resolved?

25. A further element of the OA's criteria is that an ombudsman should have procedures in place for following up on decisions and recommendations to ensure that they have been complied with and, if necessary, what steps to take to ensure compliance.

26. An ombudsman is not an enforcement body, so in the rare instances where a decision is not complied with they will work with those that do have enforcement powers – often regulators, sometimes the courts – to ensure their decisions are implemented. The approach taken is different in different sectors and in some instances is defined in legislation.
27. For example, if a lawyer refused to implement a decision by the Legal Ombudsman, the ombudsman would inform the relevant professional regulator to take regulatory / disciplinary action - those ombudsman schemes working in other regulated sectors, e.g. the Financial Ombudsman Service and the Energy Ombudsman, can take a similar approach. The Legal Ombudsman and the Financial Ombudsman Service can also undertake court action themselves to enforce compliance.
28. In the property sector it is mandatory for an estate agent to belong to a redress body. In 2020, the Property Ombudsman had a 99% compliance rate. If an estate agent refuses to implement the Property Ombudsman's decision they are expelled from the scheme, meaning that the estate agent can no longer legally trade. That would be enforced by the sector regulator.
29. For those ombudsman schemes operating in sectors where it is not compulsory for all businesses to be signed up to an ombudsman, such as the Furniture & Home Improvement Ombudsman, compliance with their decisions is often a contractual requirement, which they can enforce via the courts if necessary.
30. The recommendations of ombudsman schemes that deal with complaints about public services are not binding but, across the four nations of the UK, over 99% of their recommendations are accepted. If they are not, an ombudsman has a power for their report to be considered by parliament; this allows parliament to carry out their duty of scrutinising government and holding them to account.

3). Dispute resolution service providers

Q16. Do you have evidence which demonstrates whether the standards needed to provide effective dispute resolution services are well understood?

Q18. Do you have evidence of how complaints procedure frameworks for mediators and other dispute resolution service providers are applied? Do you have evidence of the effectiveness of the complaints' procedure frameworks?

Q19. Do you think there are the necessary safeguards in place for parties (e.g. where there has been professional misconduct) in their engagement with dispute resolution services?

Q20. What role is there for continuing professional development for mediators or those providing related services and should this be standardised?

31. In the UK, the majority of ombudsman themselves and their investigators are not legally qualified; a deliberate approach in line with the concept that the ombudsman system is concerned more with 'fairness' than what is simply legally correct.
32. However, as a result one of the criticisms sometimes aimed at ombudsman schemes, especially if someone is unhappy with their decision, is 'how are you qualified to make that decision?' The OA's Caseworker Competency Framework¹², which applies to all those involved in the casework functions of an ombudsman, addresses that point and in doing so helps drive the 'professionalism' of the ombudsman sector.
33. The OA's Caseworker Competency Framework is a sister document to the Service Standards Framework, which provides a 'roadmap' that the OA's members can use to raise their own performance, embed good practice in their organisation, and demonstrate the quality of the service they provide. One of the requirements in the Service Standards Framework is that '*Members should ensure that the staff who consider complaints have the relevant knowledge, training and skills to make decisions, or have access to suitable professional advice*'.

¹² [OA Caseworker Competency Framework | Ombudsman Association](#)

34. The development of the Caseworker Competency Framework was informed by existing good practice, both within and outside of the ombudsman sector, and was shaped following a full public consultation. The Framework identifies six core competencies that an effective caseworker should display: Analytical; Impactful; Approachable; Professional; Open-minded; and Constructive.
35. The core competencies in the Framework are broken down into several competency areas, which together assist a caseworker in displaying the relevant core competency. For example, the areas within the 'analytical' competency are: methodical, questioning, perceptive and reflective. These are then supplemented by indicative behaviours, which provide examples of how a competency might be demonstrated (effective behaviours) or not demonstrated (ineffective behaviours) by a caseworker.
36. The overall result is a practical and flexible Caseworker Competency Framework that reflects current international good practice, and that can be adapted by organisations to meet their own needs. The Framework is used by members: in the recruitment of staff (in job descriptions, person specifications, and selection assessments); in the probation period (what behaviours are expected at different stages); in annual reviews and objective setting (to address any performance issues or identify areas of development); and to design training for staff.
37. This sits within a broader landscape framed by the OA's criteria, in which transparency and quality assurance systems drive learning and improvement.

4). Financial and economic costs/benefits of dispute resolution systems

Q22. What are the usual charges for parties seeking private dispute resolution approaches? How does this differ by case types?

Q23. Do you have evidence on the type of fee exemptions that different dispute resolution professionals apply?

Q24. Do you have evidence on the impact of the level of fees charged for the resolution process?

Q25. Do you have any data on evaluation of the cost-effectiveness or otherwise of dispute resolution processes demonstrating savings for parties versus litigation?

38. An Ombudsman is free for the public to access or use, being funded either from public funds or via a levy on the sector.

39. The Impact Assessment for the *Reforming Competition and Consumer Policy* consultation sets out the significant savings for both parties when using dispute resolution rather than litigation in the motor vehicle and home improvement sectors.¹³

5). Technology infrastructure and 6). Public Sector Equality Duty

Q26. Do you have evidence of how and to what extent technology has played an effective role in dispute resolution processes for citizens or businesses?

Q27. Do you have evidence on the relative effectiveness of different technologies to facilitate dispute resolution? What works well for different types of disputes?

Q28. Do you have evidence of how technology has caused barriers in resolving disputes?

Q29. Do you have evidence of how an online dispute resolution platform has been developed to continue to keep pace with technological advancement?

Q31. Do you have any evidence on how protected characteristics and socio-demographic differences impact upon interactions with dispute resolution processes?

Q32. Do you have any evidence on issues associated with population-level differences, experiences and inequalities that should be taken into consideration?

¹³ [Alternative Dispute Resolution impact assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

40. Our members will be able to provide detailed information on the technology they utilise to make their services more efficient and more accessible, including case management systems that enable people to submit their complaints online and to log-in to a portal to check updates.
41. However, there is a risk that if technology is seen purely as a means to reduce costs that the needs of the digitally excluded and other marginalised or vulnerable people are not taken into account. PSOW's own-initiative investigation into homelessness¹⁴ shows that not only is greater use of technology not necessarily the right answer in some scenarios, but that a 'full digitalisation' approach could actually lead to greater injustice if the support is not put in place to use it¹⁵.
42. Anecdotal evidence from the Property Ombudsman shows that the introduction of a 'live chat' function on their website has been well received and utilised, yet at the same time the number of contacts via telephone has not reduced. This suggests that rather than replacing existing forms of access, technology helps open additional routes to access justice and the 'traditional' routes should continue to remain open.

Conclusion

43. We welcome the Ministry of Justice's overarching review of dispute resolution. At the moment there is a piecemeal approach to redress across Government. For example, it is a source of confusion that several arms of Government recognise and adopt the 'gold standard' of redress via a single, mandatory ombudsman (e.g. in the financial sector, energy sector, rail sector), and yet other arms of Government, or sometimes different parts of the same Government Department, do not, for example in aviation or communications.
44. And at the same time that this piece of work seeks to expand and 'mainstream' the use of non-adversarial dispute resolution, the *Reforming Competition and Consumer Policy* consultation is proposing introducing barriers (nominal fees and 'lower limits') in order to deliberately discourage the uptake of dispute resolution.
45. There appears to be little, if any, central co-ordination of policy and sharing of best practice across UK Government. There is perhaps a role for the Ministry of Justice to play in addressing and leading that. We are very happy to engage further on any of the elements above if that would be helpful.

Yours sincerely



Donal Galligan
Chief Executive

¹⁴ [Own Initiative Reports \(ombudsman.wales\)](http://ombudsman.wales)

¹⁵ [Digitisation.pdf \(ajc-justice.co.uk\)](http://ajc-justice.co.uk)