

Aviation Consumer Policy Team
4th Floor, Great Minster House,
33 Horseferry Road,
London, SW1P 4DR

25 March 2022

By email to: AviationConsumerConsultation@dft.gov.uk

Dear Sir / Madam,

Aviation Consumer Policy Reform

We are writing in response to the Department for Transport's consultation on Aviation Consumer Policy Reform. We have restricted our comments to our areas of expertise and the best practice model of an ombudsman.

Summary

1. The Ombudsman Association welcomes the Department's aim to ensure that consumers are protected and treated fairly, and that best practice becomes commonplace in the industry.
2. Charging consumers a fee to access redress is incompatible with best practice.
3. Introducing mandatory ADR, with either multiple ADR bodies or a nominal fee, will not deliver the aims of strengthening access to redress and increasing consumer confidence and will place a financial cost on the industry without the benefit of providing learning to the sector to drive improvements.
4. The most effective way to achieve benefits for both consumers and the sector is to have a single mandatory ombudsman to provide comprehensive and effective redress for all consumers and to enable holistic feedback to the sector.

Background

5. 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.
6. 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.
7. 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.

8. 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.

Response to consultation questions

- ***Q1. What, if any, additional powers to enforce aviation consumer protection laws directly through civil sanctions should the CAA have? What specific issues would these powers address beyond the enforcement powers already available to the CAA?***
 - ***Q2. If the CAA were to have increased enforcement powers, should their enforcement remit remain as it is currently, i.e. only for cases of collective harm? What would be the advantages and disadvantages of the CAA having increased powers to enforce consumer laws in individual cases?***
 - ***Q6. How successful are the current compliance and enforcement mechanisms for the voluntary ADR schemes, and what alternative enforcement mechanisms should be in place to ensure compliance with any determinations made by an ADR body?***
 - ***Q7. What mechanisms could be put in place to ensure compliance with mandatory ADR for non-UK registered airlines?***
9. An ombudsman scheme is just one piece of the puzzle in ensuring consumers are treated fairly, and they 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.
10. An ombudsman is not an enforcement body itself but rather focused, through individual redress, on learning and driving best practice. That needs to be counter balanced by a regulator with the power to enforce compliance and to withdraw a license to operate if a business does not comply.
11. The Civil Aviation Authority's (CAA) novel proposal in their *Policy for ADR applicants and approved ADR entities*, to allow an ADR body to hold funds on behalf of an airline for the purpose of paying consumer awards, appeared to be a recognition that the airlines are not complying with the existing ADR bodies' binding decisions in a timely manner.
12. That they are apparently failing to do so suggests a lack of 'ownership' by the airlines 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.
13. 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, which are binding on the business if accepted by the consumer.
14. For example, in the property sector it is compulsory for an estate agent to belong to an approved ADR body. If an estate agent did not comply with the decision of the Property Ombudsman they would be expelled from the scheme, meaning they could no longer legally trade. The relevant regulatory body, the National Trading Standards Estate and Letting Agency Team, would be notified to carry out enforcement action.

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

15. Establishing compliance with a mandatory ombudsman scheme has also been achieved in the rail sector, without primary legislation, via a modification to the passenger licence conditions by the regulator, the Office of Rail and Road, to mandate membership of an approved ADR scheme.
16. The CAA should have the necessary powers to ensure compliance, and to withdraw a license to operate, if necessary.
 - **Q4. Should ADR be mandatory for all airlines flying to and from the UK? Please explain the reasons for your answer.**
 - **Q8. Are there any other alternatives to mandatory ADR? What incentives could be used to encourage more airlines to voluntarily utilise ADR?**
 - **Q10. What, if any, considerations should be had in relation to whether ADR should be mandatory for airports in relation to complaints around services for disabled passengers and those with reduced mobility?**
 - **Q11. What incentives could be used to encourage more airports to voluntarily use ADR?**
17. There is ample evidence, notably that compiled by *Which?*³, that the current framework and policy in the aviation sector is not providing the redress that consumers need, resulting in little confidence in the current system. This stems from ADR not being mandatory for airlines and having more than one ADR body in the sector. That diagnosis is supported by evidence from other sectors.
18. The position that there should be one mandatory redress provider within a sector, and preferably an ombudsman, has been reinforced by several 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.
19. We note that the Impact Assessment⁵ published alongside this consultation sets out that the Government “do not anticipate that the underprovision of ADR will be solved by the market” and “do not expect there to be further uptake of voluntary ADR”.
20. That analysis is reinforced by research published alongside the UK Government’s Consumer Green Paper, which showed that relying on individual businesses to sign up to ADR voluntarily has not been successful across the consumer sector. The research undertaken by ICF highlighted that 70% of consumers who went to Court did so because the trader refused to participate in ADR.⁶
21. The reported backlog of 5,000 claims 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 ADR, shows the scale of failure of the non-mandatory approach in aviation. That Ryanair re-joined an ADR scheme after a two-year absence should not be seen as a sign of success, but rather as an example that without mandatory ADR the rights of consumers are only theoretical and dependent on the whims of individual airlines.

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 [Mandatory alternative dispute resolution \(ADR\): impact assessment \(publishing.service.gov.uk\)](http://publishing.service.gov.uk/Mandatory-alternative-dispute-resolution-(ADR)-impact-assessment)

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/

22. We do not believe it would be ‘disproportionate’ for ADR to be made mandatory for airports. Similar arguments were put forward in the past as to why ADR should not be mandatory for airlines. The Department’s consultation has already set out the detailed case as to how difficult it is for consumers to enforce their rights in the absence of mandatory ADR. Passengers will not distinguish between whether unresolved issues were the fault of an airline or the airport; their confidence to fly will be affected by problems with either. The Government now has the opportunity to reinforce consumer confidence, and thereby strengthen the aviation industry, by taking a holistic approach to mandatory redress based on the full consumer experience of flying.
- **Q12. Should ADR be completely free for consumers or would an ‘nominal fee’ in the event of an unsuccessful claim across ADR be advantageous to deterring frivolous claims?**
 - **Q30. Please provide an indication of how you think the policies set out in this consultation would affect people who share the following protected characteristics.**
23. As the consultation paper noted, it is best practice for access to redress to be free for consumers at the point of service, as is the case in other regulated sectors.
24. We note that the Impact Assessment highlighted that *“Ranked against other service sectors in terms of severity of detriment, airline services rank third, behind only the home insurance and mortgages sectors.”* With such a high severity of detriment, and a clear analysis that in the current system some consumers have limited options to seek redress, with court action being costly and time consuming, it is unclear how the Department’s stated policy objective could be achieved if additional financial barriers are put in place.
25. The concerns around ‘frivolous’ cases do not appear to be backed up by evidence either within the current system or in other sectors.
26. In the current system one of the two approved ADR bodies is free to access, as is the CAA’s Passenger Advice and Complaints Team (PACT). If there was any truth to the supposed risk of frivolous cases when access to redress is free, we would expect to see a low uphold rate for these two services. Yet, as the Impact Assessment notes, in 2018, 66% of ADR cases and 63% of PACT cases were resolved in favour of the consumer, with an average award of £690.⁸
27. A suggestion could be made that the higher profile and public awareness that the establishment of an ombudsman would bring might trigger the supposed avalanche of frivolous cases. The experience of the recent establishment of the Rail Ombudsman proves that it is not the case in other sectors; with access being free and well publicised, and with the scheme in its third year of operation, consumers received a remedy in 75% of the complaints resolved.⁹
28. Unfortunately, it is the reverse that is often true; that across all sectors people are often hesitant to pursue a complaint. For example, less than 20% of respondents to a recent survey thought complaining about UK public services would make a difference.¹⁰ In 2020/21, the Public Services Ombudsman for Wales did not receive a single complaint about homelessness. Yet their subsequent own initiative investigation 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.¹¹

⁸ [Mandatory alternative dispute resolution \(ADR\): impact assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/90122/2021-22_Q2_finalb.pdf)

⁹ [2021-22_Q2_finalb.pdf \(railombudsman.org\)](https://railombudsman.org/2021-22_Q2_finalb.pdf)

¹⁰ [Have your say on improving UK government complaint handling | Parliamentary and Health Service Ombudsman \(PHSO\)](https://www.parliament.uk/business/committees/committees-a-z/commons-cross/parliamentary-and-health-service-ombudsman/parliamentary-and-health-service-ombudsman-phso/)

¹¹ [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.parliament.uk/business/committees/committees-a-z/commons-cross/parliamentary-and-health-service-ombudsman/parliamentary-and-health-service-ombudsman-phso/)

29. The time commitment required to pursue a complaint is another reason why legitimate complaints are not taken forward, and logically would explain why there is not an avalanche of frivolous complaints. As the research undertaken by ICF for the Consumer Green Paper, (and referenced in the Impact Assessment) shows, individuals using an ADR scheme incur a higher cost of lost time (£88) than the estimated average internal cost to airlines (£71).¹²
30. That explains why people who are experiencing vulnerability or on low incomes are often less likely to pursue a legitimate complaint. In addition, there is a risk that introducing a fee to access redress would disproportionately affect those with protected characteristics due to the ethnicity pay gap. Figures from the Office for National Statistics highlight that people of Pakistani heritage earn 15.5% less, and those of Bangladeshi heritage earn 15.3% less, than their White British counterparts - in London the ethnicity pay gap is 23.8%.¹³
31. The airline industry has been open in admitting that their call for a 'nominal' fee is 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 Department should end this anomaly in the aviation sector.
- **Q14. What are the advantages and disadvantages of CAA approved ADR entities as opposed to other options such as a single ombudsman? What benefits would there be to moving away from the current model?**
 - **Q31. Do you have any further information or evidence in response to the questions in the Impact Assessments published alongside this consultation?**
32. The ADR Regulations set a lower standard than the criteria for an ombudsman. They failed in their aim 'to promote high-quality consumer ADR schemes' because the standards were set too low, the 'competition' between providers resulted in a race to the bottom as businesses opted for low cost 'business-friendly' providers over independence and quality of decision making, and deliberate 'complaint suppression' tactics were permitted, such as charging a fee to access redress.
33. Aviation is not just a 'notable exception' compared to other regulated sectors because redress is not mandatory, it is also an outlier because it has multiple ADR bodies; it is formal UK Government policy in the financial sector, the energy sector, the rail sector, and for new homes, to have a single mandatory ombudsman. Having a holistic view of complaints across the sector enables an ombudsman to spot systemic issues both within a single organisation and across several different organisations, providing the insight to inform the regulator's activities.
34. 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.¹⁴
35. Regulation is about minimum standards. Basic ADR picks a 'winner'. Neither is aspirational. An ombudsman helps drive best practice and service improvement.
36. The proposals CAA put forward in their *Policy for ADR applicants and approved ADR entities* appeared to recognise that the simple 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. The transactional nature of the current approach 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

¹² [Mandatory alternative dispute resolution \(ADR\): impact assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674242/mandatory-adr-impact-assessment.pdf)

¹³ [Ethnicity pay gaps - Office for National Statistics \(ons.gov.uk\)](https://ons.gov.uk/people-and-work/ethnic-groups/ethnicity-pay-gaps)

¹⁴ www.ofgem.gov.uk/publications-and-updates/application-utilities-adr-be-certified-adr-provider-energy-sector-ofgem-decision-following-responses-our-open-letter

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.

37. Mandatory ADR should not be seen purely through the lens of cost on a business. It is that mindset that leads to proposals to simply block consumers from raising complaints, via nominal fees and 'lower limits', rather than preventing the complaint from arising in the first place or resolving it quickly through good customer service when it does occur.
38. Whilst the Impact Assessment identifies the potential costs to businesses of mandatory ADR, and the cost benefits to consumers, it does not take into account the additional advantages of the ombudsman model. The simple adjudication that currently exists in the aviation sector does little more than pick a winner in a dispute. Making that system mandatory will increase access to redress for consumers, but it will fail to deliver the benefits that drive service improvements.
39. An ombudsman is more a doctor than a police officer, diagnosing what is wrong and making recommendations to improve. The benefit for businesses covered by an ombudsman is the learning loop that it provides via training, setting standards for complaint handling, and providing data and insights on common issues industry wide. That enables businesses to improve their services, resulting in cost savings as issues are fixed / prevented rather than reoccurring, which helps drive consumer confidence. An ombudsman can also provide validation for the complaint handling of a business, helping close long running disputes and reinforcing a business' approach if they rule in their favour.
40. Having a single mandatory ombudsman also enables the ADR body itself to deliver efficiencies because of that mass coverage of the sector and therefore reduce their own costs and the corresponding costs that are borne by the sector.
41. Having multiple providers breaks that relationship and perpetuates the broken model that already exists of a fragmented race to the bottom on cost. Considering the high severity of detriment already referred to, there would appear to be little justification for why aviation consumers and the sector itself should be restricted to a lower quality service.

It is welcome that the Department is seeking to ensure that aviation consumers are protected and treated fairly. 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 and learning for 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