

## Commission on Justice in Wales

### Oral Evidence Session

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Present	Commissioners	Secretariat
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1) How can access to justice for businesses and consumers be improved through the use of ombudsmen and similar arrangements?

DE – The Financial Ombudsman Service (FOS) was set up by statute, the Financial Services and Markets Act 2000, following previous schemes, and deals with complaints against all regulated financial businesses and a few others who choose to opt in subject to our jurisdiction. From 1 April 2019 the maximum award the FOS is able to make was increased from £150,000 to £350,000. It covers the whole of the UK and has the same reach in Scotland, taking account of Scottish law. Businesses co-operate with the FOS because it is an established part of the framework. It operates in a regulated sector with a strong regulator. Individuals and small businesses come to us. We see up to half a million complaints a year, with many payment protection insurance (PPI) mis-selling cases and increasing number of complaints for all financial products, including insurance, pensions and current accounts.

RG – I am involved in the appeals process for banks, with 25,000 appeals over the last

eight years and it is a very wide and open process in terms of what SMEs can appeal on and considers whether it is fair. Around 20% of appeals are upheld and in the last two years I have been involved in dealing with specific HBOS fraud cases. One of the challenges of SMEs and businesses is their belief in their side of the case and whether SMEs have a desire to abide by the decision of the ombudsman reviewing the case.

CH – I have just finished a large review of the major types of dispute resolution. I have looked at family, employment, claims against the state, including judicial review and complaints to government departments, personal injury including an insurers' portal, clinical negligence, SMEs' claims, consumer claims, property claims and alternatives to court. I will send it to the publishers tomorrow. My conclusions include that all the leading ombudsmen digitised 10 years ago, one of the reasons being to get data, and that their regulatory role is very important regarding the sort of alternative dispute resolution (ADR) mechanism you want. You need to look at the many different mechanisms that exist. The overall system is very disjointed. If we look back on Dame Hazel Genn's work on pathways, it is relatively easy now to use a platform with artificial intelligence, for example the way that Resolver operates at the start of consumer-trader disputes, and this usage is expanding all the time. In the consumer-trader process involving consumer ombudsmen, mediation also exists automatically in the pathway. If mediation does not work or is irrelevant, you move on to a decision. That simple pathway contrasts with that in family disputes, where you have to go to mediation information meetings and this is not in the pipeline, and it is the same for employment, with the Advisory, Conciliation and Arbitration Service and Employment Tribunals not being part of an integrated pathway. For disputes by citizens against the state, there are many possible options. The challenges faced here are, is it a complaint mechanism operated by a public body (and they are all different), is it judicial review, is it a tribunal, is it the Public Services Ombudsman for Wales or is it the Local Government Ombudsman? The whole system is too complicated. There should be one portal and a single pathway. Regarding affordability, the ombudsman is functionally replacing a lawyer on both sides, and a mediator and a judge, with one person in the middle (or maybe two) who is quicker, cheaper and more effective. Providing advice and assistance to people is a very important function. Dame Hazel Genn has confirmed people have problems and need

to go somewhere and the Low Commission report has confirmed that people often have multiple problems and we are too quick to think it is a legal problem. You need to deliver a place for people to go to. That place needs to be logged into a database system, but multiple assistance services need to be available from an integrated centre. For example, the Family Drug and Alcohol Courts offer judicial support co-ordinating addiction therapy and social support. A wider model would deal with mental health, debt, housing, social entitlement and other aspects and triage is essential. In relation to consumer ADR, I am convinced that the current system with consumer ombudsmen is the best model in the world. The problem is with the architecture of the model. There is not enough coverage across all sectors. SMEs may not sign up. They may not be interested or recognise they have disputes to sign up. But if you ask a different question – Do you have a problem with customers? – they say yes. We need to ask where SMEs get assistance and support from. The landscape for providing advice to SMEs is not fully focused, nor is the landscape of public officials or regulators who they have to deal with. Different regulators adopt different enforcement policies, which can seriously undermine SMEs. For example, the Competition and Markets Authority will respond to someone saying they have found a cartel by imposing a very large fine. That attitude contrasts with the approach of many local authorities, such as within the Primary Authority Scheme, whose basic approach is to support businesses to achieve compliance, not to hit them. The attitude of public authorities is not joined up. There have been changes in the landscape for SMEs in the last two to three years and new intermediary bodies have appeared to assist. They are part regulation and part mediation, for example for the grocery and pubs sectors and now the Small Business Commissioner.

2) Can greater use be made of ombudsmen and similar arrangements as an alternative to using courts and tribunals, particularly in the light of the impact of LASPO and other justice reforms? How should these be aligned with the courts and tribunals system?

RG – These mechanisms I have been involved in are voluntary and were put in place by the banks, after discussions with the regulators, Treasury and companies. A lot of what customers were complaining about was a lack of conversation between the two. For example, they may blame the computer or the credit department. Now what we have is

better conversations between customers and banks. Consideration needs to be given to how to blend the voluntary scheme with the judicial scheme and there are frictions. In the voluntary scheme there are issues regarding disclosure, speed is a big factor, and cost where people may not be able to afford the legal costs. Regarding lending complaints, consideration is given to what is proved to be fair. Voluntary schemes across the sector work, but they can create friction with judicial schemes.

DE – We have to take account of the law and explain where we depart from it. The ombudsman has to explain what is fair and reasonable, taking into account law, regulation and good industry practice. We can hold businesses to the higher standards and they need to take account of our decisions, so there is a feedback loop. We operate under a statutory regulator, which sets us apart from other consumer sectors. It gives credibility and enforcement to what we do.

CH – These mechanisms don't relate much to the courts. Post-war there were the County Courts and small claims and we tried to introduce ADR under Lord Woolf's reforms. Certain areas of disputes have dropped out of the courts because consumer ombudsmen have arisen and been attractive to consumers for handling consumer claims. The property sector is likely to be the same. The majority of claims are brought by tenants, as landlords bring fewer claims. A new property regulator is being created in England, but claims will increasingly go to the ombudsman, as do requests for advice. One idea that is being discussed is to bring the property ombudsmen and the property tribunal together to provide one pathway. It would make it easier for people to know where to go, and for decisions to be made in particular parts of the system rather than decisions being made in more than one place. Different ombudsmen arrangements exist in different market sectors. Some ad hoc ADRs exist mandated by the banks, but they are essentially temporary structures. The main consumer ombudsmen are those in financial services, energy, communications, lawyers, rail and others. Sometimes these ombudsmen are created by statute, such as the FOS, the Legal Ombudsman and the Pensions Ombudsman. In energy and communications, the ombudsmen are appointed and regulated by OFGEM and OFCOM. Overall, consumers have moved out of the courts and property may be going the same

way. One integrated system is needed.

3) What powers do ombudsmen have to resolve complaints and disputes? Do ombudsmen need further powers?

DE – The FOS has the right powers, but not every ombudsman has these powers. One is to make binding decisions – decisions are only binding if the consumers accept them and I will send you data on this. If the business does not comply with the decision we refer them to the FCA, but you could argue that it would be helpful if we had the powers to directly enforce decisions. Consumers can also enforce our decisions through the courts, so they don't lose out. I expect the number who go to court is fairly small, but we don't have data. The maximum claim award was £150,000 and it has now been increased by the regulator to £350,000. We have the power to require parties to provide evidence and, if it is not provided, we can draw conclusions. We are satisfied we have all the powers we need.

RG – Regarding banks and financial disputes, what is meant by “binding”? It is important to get the business bringing the complaint to accept the decision. It may be difficult for the parties to accept any viewpoint other than their own. SMEs on the business side can go off in many different directions and they may bring in experts to help.

CH – Almost no one in the consumer field if they have gone to the ombudsman would go elsewhere. It is difficult to get hold of the figures from some ombudsmen regarding how many decisions are accepted, but it appears that subsequent enforcement is rarely needed as adherence by business is high. A determination by the FOS is binding on the bank if the consumer accepts it. Some other ombudsmen have different arrangements. The ombudsman model is evolving. Some ADR schemes are just arbitration and it may be necessary to commit and pay in advance. I would like the government to pull the whole system together. Some SMEs who were recently arguing for a tribunal asked if ombudsmen have the ability to get at the evidence. The FOS rules allow this and the result is similar to the courts being able to require it. Powers of ombudsmen isn't too much of a

problem. Enforcement may be more of an issue, but it's evolving. Some ombudsmen are publishing extensive and very useful data.

DE – We usually share information received as a matter of natural justice, with exceptions for example commercially sensitive information and we would need to say why.

4) Is there adequate capacity in Wales to satisfactorily resolve complaints and disputes?

CH – I don't know if there is sufficient capacity in Wales to satisfactorily resolve complaints and disputes.

RG – I don't know either.

DE – The FOS has 17,000 complaints a year in Wales, which represents about 5% of the total number of complaints, and 86% of people surveyed in Wales knew about us.

Lord Thomas asked whether, when rented housing law in Wales is different, with rights enforced through the courts, it would be feasible to create an ombudsman system under the auspices of the Welsh Government.

CH – I am told it is an interesting system in Wales that works well and better than England, but I would need to consider it. A simple integrated pathway is needed. It starts with advice, such as through Shelter or Citizens Advice, where everyone has a place to go to with defined pathways, rather than having many charities. This is more difficult to get right because there are so many of them.

5) Can people access ombudsmen's services through the medium of the Welsh language?

DE – The FOS has Welsh translation and interpretation services, but the numbers are low and were around 100 last year. Services are available in Welsh, if required, on our web site.

6) Would dispute resolution mechanisms for SMEs' disputes regarding financial services assist in the prosperity of Wales?

RG – I am not sure, but I suspect not. SMEs are everywhere. For banks lending to businesses, if we pick up something systemic, it would benefit the banks through confidential conversations regarding how they do things better. It does assist the prosperity of Wales, as with other parts of the UK, by developing better relationships between the banks and businesses. It is a two way process. 40% of appeals were successful six years ago, but now only 20% of appeals are successful because banks do things better.

DE – We feed things back to the regulator regarding doing things better and putting things right. We were upholding between 80% ad 90% of PPI claims, but now around 30% of claims are upheld because the mis-selling businesses are putting things right now.

CH – Part of designing a better wider system is providing support to SMEs, through regulatory intervention. Lord Heseltine wrote a paper about the chambers of commerce in Germany, which have developed well. Our chambers of commerce are not organised this way, and there is enormous variation across the UK. Specific solutions have recently been developed to address specific issues for SMEs. For example, the Groceries Code Adjudicator and the Small Business Commissioner have developed systems for dealing with late payments. Businesses don't want to use Money Claims Online because they want to remain anonymous. We need people to go to the same place, with a single portal, rather than many different places. If we could do this, it would be very powerful economically. Belgium has a single consumer web site that covers advice and links to the main ombudsmen and has got the model right. We have too many players who need organising.

7) Do ombudsmen and similar arrangements have a role in enforcing the obligations of governmental bodies?

CH – Public ombudsmen like the Public Services Ombudsman for Wales were set up for

this, but the function has been somewhat diluted, partly because there are many health complaints and these should be dealt with elsewhere. The Nordic countries have effective administrative injury redress bodies, and feed data back to improve performance and practice. Here, all clinical negligence schemes should be shifted into administrative schemes. Public ombudsmen should be able to influence the behaviour of public bodies. They produce a lot of papers on what should be changed, but the public sector does not have a regulator and the public ombudsmen are bogged down in dealing with too many small complaints.

DE – This is outside the remit of the FOS, but I would agree with a lot of what CH says.

RG – In the energy market, one part of government may work against another in cutting across change. You need to understand the aims.

Lord Thomas asked about pupil exclusion and special educational needs.

CH – I have discussed this with Professor Robert Thomas of Manchester University. Quite a lot of problems are caused through local authorities' committees dealing with cases and they don't have communication and mediation in the system. They need the techniques of an independent person, and a shift into an ombudsman model. There could be closer relationships between tribunals and ombudsmen. Ten years ago, a study by the Australian Federal Attorney General considered the entire justice landscape, and suggested rationalisation as it was too complex, with too many options, and they were paying for all of it. You need to look at it from the perspectives of people and businesses, and to see it as part of one justice system.