



Reforming Competition and Consumer Policy
Department for Business, Energy and Industrial Strategy Consultation
1 October 2021

This response is submitted on behalf of Dispute Resolution Ombudsman Limited. We read the consultation with interest and welcome the opportunity for open debate regarding the current provision of Alternative Dispute Resolution (ADR), plans for improvement, promotion and to mandate and/or encourage greater uptake for the benefit of both businesses and consumers.

We have focused our responses on the areas most relevant to our expertise where we feel we can add real value to assist Government in forming its thinking based upon our experience in the ADR Sector. Our responses therefore begin at Question 65 and focus on Chapter 3, although we appreciate our responses may hold relevance elsewhere.

Thank you for enabling our participation in this very important debate. We welcome further engagement and are more than willing to provide additional information or amplification if required.

Dispute Resolution Ombudsman Limited

(Operating the Furniture & Home Improvement Ombudsman, Dispute Resolution Ombudsman and Rail Ombudsman)



Dispute Resolution
Ombudsman



**Furniture &
Home Improvement**
Ombudsman

The Rail
Ombudsman 

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ADR Responses (Pages 116 to 127)

Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

Government should consider the effect of the proliferation of ADR provision, enhanced and earlier signposting to vulnerable consumers and the need for better education for businesses to enable them to understand and comply with their obligations.

The current availability of multiple ADR providers, particularly in the home improvement sector has the potential to be confusing for consumers and, probably, more so for vulnerable consumers. This over complicates ADR, meaning consumers may not be aware of its availability and how they can access it.

The use of online technology has the potential to improve access to ADR for consumers and businesses alike, but there is a trade-off between this and ensuring proper access for those who cannot work online at all or without appropriate assistance. Technological solutions should be geared to ensure that the majority of applicants can access ADR via this means, ensuring that ADR providers can adequately resource assistance for those who are digitally excluded or who need other reasonable adjustments and/or routes to access ADR.

Businesses need to be aware of the needs of consumers, with reference to those who might be vulnerable, recognising that ADR and a proper complaints policy is for their benefit as well as for their customers. Enhanced signposting obligations, for example signposting vulnerable consumers sooner, could offer a solution to businesses without the resource and infrastructure to meaningfully deal with vulnerable people effectively; ADR providers may be better equipped to do so.

In addition, clear, consistent information available to signposting bodies, particularly those who also provide referrals, is crucial in getting people to the right place at the right time.

The Ombudsman model provides both support to vulnerable consumers to access their schemes, along with additional insight to businesses within jurisdiction by way of training, feedback via case-led intelligence and initiatives to improve access.

Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

Government should consider that there is a balance to be struck to ensure a proper opportunity to investigate and resolve a complaint whilst ensuring a swift path to ADR and resolution. Therefore, timescales may need to be sector specific, and allow for situations where a longer period may be more appropriate, for example in the furniture and home improvement sector when remedial works or replacement parts are required to complete a resolution. Promoting the importance of good complaint handling will also assist, keeping the consumer informed and empowering them to make an informed choice as to when the business's internal complaints process is genuinely exhausted.

Our experience is that retailers are more often than not expedient in the way that they try to resolve complaints. This helps to preserve relationships between business and customer. Businesses want these matters resolved as much as the consumer does and will signpost to ADR prior to the expiration of the deadlock period. Further, the potential challenge in the paragraph above can be overcome with good customer service communication which is identified via case-led intelligence and feedback to businesses, thus leading to improvements in future interactions.

A complaint is best dealt with between business and customer; only when they are unresolvable and then escalate into a dispute, should an ADR body become involved. Ombudsman can help businesses informally to resolve complaints through advice and training thus preventing a complaint from turning into a dispute.

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?

Government should consider that there is no requirement to overhaul the powers of a Competent Authority wholesale if the Ombudsman Association one-Ombudsman per sector model is adopted and reinforced in the private sector as the validation would sit with the Ombudsman Association in accordance with its validation criteria.ⁱ

That said, for non-Ombudsman accreditations, Competent Authorities should be empowered to carry out more robust oversight and their funding should not be to the detriment of the ADR providers. In particular, the assessment should include the fitness (by way of the fit and proper persons test cited), as well as the competence, of those running the body and their ADR Officials.

Further, strengthening the audit criteria, giving Competent Authorities more visibility to verify case numbers, processes and complaints about service, would increase transparency and confidence in ADR. In addition, consideration to the publication of the fact of the audit and an ADR scheme's compliance should be made. A single auditing/oversight body for the competent authorities would ensure consistency of approach since it is unclear who audits the Competent Authorities presently and/or whether there is collaboration or shared best-practice on any level.

Steps should be taken to mitigate any financial incentives for Competent Authorities to approve more schemes.

Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

Government should consider carefully how best to achieve its aims in this regard to avoid proliferation of ADR provision which may undermine the system and cause greater consumer confusion.

Compliance: In the furniture and home improvement sector currently, members sign up to FHIO's Code of Practice and decisions made by FHIO are therefore enforceable via the Consumer Protection from Unfair Trading Regulations 2008. That said, given the voluntary nature of the scheme currently, compliance issues are very minimalⁱⁱ. Therefore, in mandating ADR in this sector, more consideration needs to be given to enforcement and compliance in order to maintain trust and confidence in ADR.

Cost: Any attempts to mandate ADR in these sectors, should not lead to further fragmentation of ADR provision and a *race to the bottom* as was seen when the ADR Regulations were implemented in 2015. This, in our opinion, would be the case were a pay as you go model to be implemented.

Membership to the Ombudsman should not be viewed purely through the lens of cost - when consumers feel safe and confident with a business they are more likely to spend. This then helps to stimulate growth and the economy. The Government has very recent experience of provoking consumers to feel confident and spent during the pandemic when it got behind the *Eat Out to Help Out*. When consumers are encouraged and incentivised either financially or otherwise, they are more likely to spend. The Government should promote businesses who offer this additional assurance to consumers. Government should therefore promote ADR to businesses as a *unique selling point* to customers, inspiring consumers to spend with that trader. Consumers should feel empowered when purchasing goods and services from a business that is registered with an Ombudsman, and those businesses should be encouraged to promote their registration at point of sale.

A pay as you go model shifts all of the power into the hands of the business, immediately distorting the perception of fairness and independence - where only one party has the choice of the ADR provider. A pay as you go model will encourage businesses to flip-flop between ADR providers - dissolving the Government's ability to obtain consistent data from a single ADR provider and creating more unnecessary confusion for consumers at the point of entry. A single appointed Ombudsman places both the business and the complainant on the same footing from the start of the case - there is already a perception that Ombudsman schemes are biased because businesses bear the cost - giving only businesses the choice over the ADR provider will do nothing to change this perception and creates the unhelpful situation where, following a complaint about its goods or services, the business then has the power to select where the consumer must go to complain. A single Ombudsman removes this unnecessary obstruction.

Other Advantages of the Ombudsman Model

- **Advice** on ad hoc issues, aiming to prevent a complaint becoming a dispute at the earliest point;
- **Training** in respect of business's obligations and developments in consumer law;
- **Consultation**, for example on the consumer journey, business practices and drafting compliant and fair terms and conditions.
- **Data**: a single body per sector would enhance data collection and drive improvements across the industry as a whole which would benefit from learnings. There are examples of Case Management Systems currently that enable an individual a business to self-serve its own complaints data, which can also be used industry-wide. This means that the individual consumer receives redress via the ADR mechanism, and others are served by helping the sector prevent issues arising for other consumers.

Algorithms that take into consideration size and complexity of a business would add context to data and not distort the appearance of complaint volumes. This could not be achieved were the ADR market to become further fragmented.

There are, therefore, many advantages to a business joining an Ombudsman scheme and, in our experience, a proportion of members who join have no or minimal numbers of cases, but take advantage of these other elements to the benefit of their consumers.

Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?

Government should carefully consider the impact of any fee on access to justice and the effect of essentially disenfranchising a large section of society. Ombudsman schemes are the most established and well-known forum for ADR globally where standards are high and access is free. This is a model that the Government should view as hard to resist.

Prior to its achieving full member status of the Ombudsman Association, FHIO had experience of making a charge to consumers when an adjudication was required in order to determine an issue with a physical product or installation. A consultant was sent who provided a Part 35 Compliant Report and the consumer contributed £50 to this. In 2014, ahead of the implementation of the ADR Regulations and at the time FHIO became a full member of the Ombudsman Association, this charge to consumers was no longer levied. This received no negative reaction from members who were prepared to bear the full cost of the adjudication. We have also seen a decline in the numbers of cases proceeding to adjudication (from 5.5.% in 2014 down to 2.2% in 2015 0.9% in 2016 and circa 1-2% in subsequent yearsⁱⁱⁱ) thereby crucially indicating that the removal of the fee did not open the floodgates and see more consumers moving to the final part of the process at the expense of more informal routes to remedy.

There is an argument that what is nominal has a relationship with the contract or remedy value. The inclusion of nominal fees for complainants is an unnecessary complication - and critically has the potential to exclude vulnerable consumers on no and low incomes from complaining. It could also have the undesired effect of incentivising new or existing ADR Companies to enter a *race to the bottom* on fees which could have a seriously detrimental effect on quality. This is a serious issue, especially as litigants are now compelled to use ADR prior to formal court action - a failing ADR provider could have a detrimental impact on justice.

Although there is an argument that a nominal fee would deter vexatious consumers, it is our experience (partially borne out by the adjudication data referenced above) that these consumers would not be deterred by a nominal fee and would continue with their dispute, potentially even more invested in it having paid to access the process. In addition, those with genuine low-value claims are still entitled to take their case via the courts and are potentially more likely to do so if a fee was levied to access ADR, thus also increasing the cost to business as well as the risk to both parties that comes with an adversarial process. The cost to business in terms of time and resource in dealing with low-value complaints cannot be understated and businesses need to be educated as to the benefits of good complaint handling with an independent route via which to signpost complaints.

There is also a distinction to be drawn between fees and evidential costs. However, the risk and burden associated with evidential costs is mitigated by the inquisitorial approach taken by the Ombudsman. This makes the principle that access to the Ombudsman is free in the first place all the more important.

In conclusion on this important point, a fee of any kind could deter consumers, particularly those on lower incomes, from taking their case to ADR. We see the proposal of a nominal fee as a disincentive for consumers to use an ADR Scheme. Further, the Ombudsman Association rules state that those complaining to the Ombudsman should be entitled to do so free of charge. We believe that this is a vital corner-stone for access to justice, and the Government should consider carefully if it is desirable to introduce measures that will exclude Ombudsman schemes from providing their services to consumers (because they are prevented from charging a nominal fee under both the rules that they prescribe to and by global convention).



Ombudsman schemes exist to redress the balance of power between a business and the consumer. It would be disproportionate and an unnecessary measure to prevent an individual from enforcing their rights for free.

Q71. How can government best encourage businesses to comply with these changes?

Q75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?

Government should market the benefits to consumers of shopping with a member of an Ombudsman. This will encourage businesses to participate and include reference to their participation at point of sale which will help to stimulate the economy and swiftly shift the emphasis from cost of complaint to cost of sales. Participation should be viewed through a very different lens, it can inspire consumer confidence, it can provide helpful management information and it can save businesses costs. Educating both businesses and consumers will be the key and both businesses and ADR providers will require the support of Government to ensure the messages are received and understood.

The implementation of strengthened rights for data subjects in 2018 is an example as to how increased awareness amongst consumers generates the need for business to understand their compliance obligations and an appetite to get it right. The Information Commissioners Office has produced guidance which is accessible and clear for businesses and consumers alike and this should be emulated in implementing any changes such as those referenced in the guidance.

In our experience, where businesses struggle with compliance this is due to lack of coherent, consistent advice. This could be achieved using existing means, for example the Ombudsman model which provides ongoing training, advice and sectoral insights to assist in businesses understanding their obligations and how best to meet them, and we are happy to work with Government to develop resources and programmes to assist.

In addition, whilst businesses listen to the Government, they also listen to each other. There are many businesses who have successfully incorporated ADR in to their legal, complaints and marketing strategies. The Government should call upon these businesses to share their experience with others who currently do not participate.

Conclusion

ADR represents a strong means by which a consumer can access redress which is fair and proportionate to the issue at hand. Ombudsman represent the *gold-standard* of ADR provision, are accessible to all consumers, and businesses benefit from the wider remit with access to additional services enabling them to enhance their performance and comply with their obligations in law, with the assistance of training and advice. This also benefits the law enforcers both at national and local level, who can signpost consumers to such schemes, confident that both parties are getting a fair deal.

In conclusion therefore, we believe that ADR should be free to consumers, mandatory in all instances and ultimately, a consumer should have a route of appeal to an Ombudsman, regardless of whether they have used an ADR provider earlier in the process.

About us

The Furniture & Home Improvement Ombudsman (FHIO) (formerly Qualitas and The Furniture Ombudsman) has provided Alternative Dispute Resolution (ADR) Services to consumers and retailers in the furniture and home improvement sectors since it was established by industry groups and the Office of Fair Trading (OFT) in 1992, making it the longest established scheme of its kind in the country. At the request of several of our members following the enactment of The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (the ADR Regulations), we broadened the reach of our ADR services with the introduction of the more generic Dispute Resolution Ombudsman (DRO) scheme, which sits alongside FHIO. Both schemes are operated by Dispute Resolution Ombudsman Limited (DROL), a not-for-profit Company limited by guarantee.

In July 2018 DROL was successful with its tender submission to operate the first Rail Ombudsman in Great Britain, which has provided services to Train Operating Companies and their passengers. The Rail Ombudsman has been operating since 26 November 2018.

DROL therefore has experience both of a scheme that has operated successfully in a voluntary sector for nearly three decades, along with setting up the newest Ombudsman scheme which, although originally voluntary, is now mandated by a regulatory license condition.



**Furniture &
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ⁱ There are many key differences between Ombudsman and other types of ADR Schemes [<https://s3.eu-west-2.amazonaws.com/drotfo-public/production/downloadable-files/Annual-Review-2019.pdf>] and an Ombudsman is cited as the *gold-standard*.

ⁱⁱ [CTSI-schedule-5-and-6-2020-DRO-and-FHIO.pdf](https://www.disputeresolutionombudsman.org/publications/annual-review-2019)

ⁱⁱⁱ <https://www.disputeresolutionombudsman.org/publications/annual-review-2019>