

European Civil
Justice Systems

The Impact and Legitimacy of Ombudsman and ADR Schemes in the UK

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Policy Brief

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The Foundation for Law, Justice and Society

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The Foundation for Law, Justice and Society

European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration, and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.

Executive Summary

To improve access to justice for consumers in the European single market, an EU Directive on consumer Alternative Dispute Resolution (ADR) (2013/11/EU) was introduced in May 2013, and will come into force in every EU member state by July 2015.

A conference held at Wolfson College, Oxford on 30 April 2014 brought together key players in the field of ADR from the UK, Europe, and beyond to consider how the legislation will affect the legitimacy of ombudsman and ADR schemes, how best to evaluate the effectiveness of such schemes, and how to adapt to the evolving policy environment and consumer expectations.

Key findings:

- There is a lack of clarity in informal processes used by ombudsman and ADR schemes and a need to develop a more coherent way of explaining ombudsman and ADR models to the public. Lack of public understanding has the potential to undermine the legitimacy of ombudsman schemes.
- Public trust in ombudsman and ADR schemes can be maintained by the continued provision of services according to the principles of independence, honesty, and competence. However, the reputation of resolution schemes will be subject to increasing pressures as higher case loads, more demanding consumers, and technological change lead to greater scrutiny by consumers and the public at large.
- Ombudsman and ADR schemes should develop processes that account for the emotional responses of consumers as well as producing technically correct decisions, and continue to track and respond to changes in consumer demand. More could be done to understand the different needs of consumers and to engage them as partners in the task of identifying gaps in provision and delivering improved services.
- Efforts to standardize the practices of resolution schemes through a best practice model are in the early stages, and it remains to be seen whether encouraging competition between public services providers to improve efficiency and innovation will prove successful.
- More sophisticated and commonly shared frameworks for evaluating ombudsman and ADR schemes are required in order to provide public assurance of their effectiveness, as well as to defend them from unfair criticism and provide greater opportunities for shared learning and improvement across the sector. These would incorporate considerations of user experience and consumer trust.

The Impact and Legitimacy of Ombudsman and ADR Schemes in the UK

To improve access to justice for consumers in the European single market, an EU Directive on consumer Alternative Dispute Resolution (ADR) (2013/11/EU) was introduced in May 2013, and will come into force in every EU member state by July 2015. This poses various challenges and brings to the fore some of the existing issues facing policymakers and practitioners working in this field. One particular set of issues relates to the impact and legitimacy of ombudsman and ADR schemes: how should their effectiveness be assessed and how can their continued legitimacy be guaranteed?

A conference held at Wolfson College, Oxford on 30 April 2014 brought together key players in the field of ADR from the UK, Europe, and beyond to consider these issues. Papers were presented and discussed by academics, practitioners, and policymakers with the aim of identifying key challenges in this area and considering ways in which they could be overcome.

The conference organizers would like to thank all those who presented papers and all the attendees who contributed to the excellent and stimulating discussions during the day.

The use of early resolution in ombudsman and ADR schemes

Ombudsman and ADR schemes have a long-standing tradition of promoting informality in their dispute resolution processes. This improves consumer access and can speed up the process of resolving disputes, although some have argued that it can reduce the certainty that accompanies more formal processes. **Varda Bondy** (Senior Research fellow at De Montfort University), **Margaret Doyle**, and **Carolyn Hirst** (independent consultants) presented the preliminary findings of a Nuffield-funded mapping study which assesses ombudsman and ADR schemes in the UK. They

found that there is no commonly agreed definition of terms used to describe ombudsman procedures such as informal resolution, conciliation, and settlement, for example. Their research also demonstrated that the criteria used for deciding which cases were suitable for informal approaches were unclear, with only one scheme identified in the research as having formal criteria in place. An unexpected finding of the study was that there were disparities across ADR and ombudsman schemes in what is meant by the term 'investigation': some schemes appear to follow a traditional inquisitorial approach, while others use a review approach which simply adjudicates on submissions provided by the parties.

Presenting the practitioner's point of view, **Adam Sampson** (Chief Ombudsman at the Office of the Legal Ombudsman) described the pressures faced by the Legal Ombudsman in relation to the cost of dealing with complaints. He noted that formal investigations are expensive and that a toolbox of cheaper and quicker procedures is increasingly required to deliver an effective service to consumers. He noted that, even within his scheme, it is not always clear on what basis informal procedures are being used and why some complaints are resolved promptly and others are not. A particular concern was whether the provision of brokered or negotiated settlements between consumers and legal service providers could be said to constitute justice. It was suggested that one danger of the increased use of informal resolution methods is that ombudsman and ADR schemes would focus too much on dispute resolution as opposed to the provision of justice.

Public trust in ombudsman and ADR schemes

Ombudsman schemes have often been seen as a mechanism that can help to restore and improve the trust of consumers and citizens in the industries they oversee. In recent years, with the emergence of more

demanding consumers, the question of whether ombudsman and ADR schemes are themselves trusted to provide fair outcomes to disputes has been brought into focus. **Rob Behrens** (Chief Executive Officer of the Independent Adjudicator for Higher Education) discussed the issue in relation to the work of the Independent Adjudicator for Higher Education. While questioning the narrative that there has been a general decline in levels of public trust, he argued that generating and retaining public trust is one of the key functions of an ombudsman scheme, along with the provision of redress for individuals and contributing feedback on good practice. Trust involves a number of elements including honesty, independence, and competence. Providing effective guidance to universities, delivering an efficient dispute resolution service, and demonstrating trustworthy behaviour were identified as some of the principal ways that ombudsman services can foster public trust.

Chris Gill (Lecturer in Administrative Justice at Queen Margaret University, Edinburgh) and **Naomi Creutzfeldt** (ESRC Research Fellow at the Centre for Socio-Legal Studies, Oxford University) noted that there was little data on public trust in ombudsman and ADR schemes and that user satisfaction seems to vary significantly between schemes. Their paper examined the concerns of users of various ombudsman and ADR schemes who were dissatisfied with their experiences and who had taken to the internet, setting up websites, blogs, and twitter accounts to protest and campaign for change. These online activists — some of whom refer to themselves as ‘ombudsman watchers’ — could be seen either as dysfunctional vigilantes pursuing unreasonable ‘gripes’ or as engaged and empowered citizens pursuing legitimate protest. Their concerns in relation to ombudsman and ADR schemes include their perceived lack of independence, unfair procedures, lack of training, lack of competence, and a lack of accountability. While keeping an open mind in relation to the validity of these criticisms, it was suggested that — given the potential of ombudsman watchers to influence public trust in ombudsman schemes — research was required to establish:

- what ombudsman watchers were concerned about;

- how influential the ombudsman watchers might be in shaping public perceptions and discourse about ombudsman and ADR schemes; *and*
- whether the concerns they express provide any insights into the operation of ombudsman and ADR schemes and the informal justice system more broadly.

Consumer engagement in ombudsman and ADR schemes

The idea that the administrative justice system should be focused on the user has achieved rhetorical acceptance in recent UK government policy, such as the Ministry of Justice’s Strategy for Administrative Justice 2013-2016. However, it is not clear that this idea is a reality in all parts of the justice system. Ombudsman and ADR schemes may have more regard to the consumer experience of their services than other parts of the justice system, but what is the scope for further improvement in this area?

Carol Brennan (Senior Lecturer and Director of the Consumer Insight Centre at Queen Margaret University, Edinburgh) and **Richard Simmons** (Senior Lecturer at Stirling University) reported the findings of their recent research on consumer engagement in the dispute resolution sector. A project carried out on behalf of the Care Inspectorate that examined the outcome of complaints suggested that there was a need for greater clarity in relation to consumers’ desired outcomes from complaint investigations. The key desired service outcomes are *both* ‘hard’ and tangible (such as updating care plans, following procedures, and training staff), *and* ‘soft’ or intangible (such as the provision of services with empathy, compassion and to respect the dignity of the recipient of care). The research found that complainants want to see both ‘higher standards in operation’ and for providers to ‘start caring properly’. More widely, there is a need to recognize the significant differences between consumers who complain to ombudsman and ADR schemes and the potential effect that these differences might have on how consumers perceived the fairness of dispute resolution processes. Such an approach could help improve dispute resolution processes by providing a

more nuanced understanding of consumers' concerns and by treating consumers as 'improvement partners' in the task of generating service changes and highlighting to service providers and policymakers where shortfalls in service exist.

Carolyn Wayman (Principal Ombudsman and Legal Director at the Financial Ombudsman Service) noted that ombudsman and ADR schemes had to adapt to the demands of the modern world and pointed to the significant changes that the Financial Ombudsman Service has undergone in recent times, such as moving to a paperless office. She argued that consumers' needs are changing, and that complaint systems are now required to respond to people's frustrations and feelings, rather than simply to produce a 'yes' or 'no' response to a complaint. Here, the effect of increased consumer voice through the use of social media, whereby consumers can now bring about reforms to practices and alternative forms of resolution by voicing complaints publicly, cannot be underestimated. Other changes included consumers' expectations regarding the timeliness of dispute resolution: in a world in which it takes only fifteen minutes to apply for and receive a payday loan, consumers are not willing to wait for eight weeks for an answer when they have cause for complaint over it.

While ombudsman and ADR schemes could be regarded as primarily responsive and demand driven, it was suggested that they should be proactive in meeting the challenges posed by future consumers. An important part of this is to ensure increased awareness of, and confidence in, ombudsman and ADR schemes.

Business models and benchmarking of ombudsman and ADR schemes

There is significant variation between the business processes of ombudsman schemes in the UK, all of which have developed independently from each other. There are also different approaches within the consumer ADR field, with some schemes operating more in the manner of adjudicators than ombudsmen. Is it possible to identify a best practice model? Is standardization a worthwhile aim? Or does diversity lead to innovation?

Steve Brooker (Consumer Panel Manager at the Legal Services Consumer Panel) referred to the

situation faced by consumers of legal services in relation to redress. He argued that consumers need access to ADR for disputes about providers who are currently operating outside the regulated sector. This is potentially difficult, since it requires cooperation from service providers and a model of dispute resolution that is quick, flexible, and affordable enough to convince businesses that it is a worthwhile investment. At the same time, however, it is important to ensure that the overall system of redress for consumers of legal services is simple, clear, and coherent, in order to make it as easy as possible to access the means to redress. He noted that the current UK government is encouraging competition between public services providers and suggested that, although the idea of competition in this area of redress might raise concerns, it could be made to work on the consumer's terms if the system is designed appropriately. For instance, if there was a single public-facing gateway through which consumers could complain, individual schemes competing with each other could operate behind this in a way that did not affect the consumer experience of ADR. Such a system could achieve a balance between providing simplicity and accessibility for consumers and achieving benefits in terms of efficiency and innovation that might derive from competition. It was suggested, therefore, that the issue of competition between schemes and the further development of ombudsman and ADR models (through competition) are issues that should remain part of the ongoing debate in relation to the developing ADR landscape.

Christof Berlin (Head of Flight Division at Schlichtungsstelle für den öffentlichen Personenverkehr [SÖP], the German Conciliation Body for Public Transport) presented a case study that demonstrated how a particular model of ADR had developed in relation to passenger transport disputes in Germany. The key features of SÖP are that it is a private, independent, and voluntary conciliation scheme funded by participating companies and free of charge to the public. SÖP's process involves examining the consumer's claim and requesting statements and information from the business, before proposing a solution which is not binding on either party. A crucial aspect of SÖP's development was to ensure the participation of airlines, which proved difficult until legislation was

passed that imposed mandatory requirements that airlines participate in an ADR scheme. This was advanced as an example of how statutory regulation could bring about the use of ADR by a particular industry sector. In order for other industry sectors to adopt ADR schemes, therefore, it was suggested that three steps were necessary: members of an industry should *participate* in the scheme; *experience* of the scheme could then act as a catalyst to change an industry's perceptions of ADR; and, finally, this would lead to *acceptance* of ADR.

Evaluating ombudsman and ADR schemes

The introduction of the consumer ADR Directive places a greater onus than ever before on the effectiveness of dispute resolution schemes. But judging the success of ombudsman and ADR schemes is a complicated undertaking. What criteria should they be evaluated against? Are these criteria the same for all schemes? How should effectiveness be measured and are current approaches developed by individual schemes sufficient?

Richard Kirkham (Senior Lecturer in Public Law at Sheffield University) argued that the results of evaluation studies that reviewed the effectiveness of ombudsman schemes are far from conclusive. He noted that pressure on the ombudsman and ADR sector to demonstrate and prove its impact is increasing in line with the higher expectations of users of ombudsman schemes. Policy developments such as the incoming EU Directive on ADR and the current trend in government policy towards market-based interventions in areas previously overseen by public bodies has been responsible for driving dispute resolution ever more towards ADR, while the public services delivery model continues to evolve and be affected by cuts in operating budgets. A key requirement in evaluation efforts is to move away from narrow and piecemeal measures of success towards an evaluation of ombudsman and ADR schemes 'in the round'. In this regard, the development of an evaluation toolkit was recommended, which should include comprehensive measures across all areas of operation, including customer service, complaint handling, delivering fair and just decisions, promoting learning from complaints, and organizational effectiveness.

Mick King (Executive Director in the Office of the Local Government Ombudsman) argued that the task of evaluating the success of ombudsman and ADR schemes is both a continuous and a complex one, given the disparity among the schemes themselves and the stakeholders that they serve. Nevertheless, he identified certain common features of effective evaluation that had wide application across the sector as a whole:

- evaluation should measure and interpret success from different stakeholder viewpoints and multiple lenses of accountability;
- evaluation should avoid a mechanistic over-reliance on easily measurable, numerical data which may drive unhelpful behaviours;
- softer and more subjective data in relation to quality of outcomes and user perceptions should be given greater weight; and
- more sophisticated mechanisms should be developed to understand the drivers of trust and legitimacy in ombudsman and ADR schemes, rather than focusing on transactional service standards.

It was suggested that ombudsman and ADR schemes should also develop common terminology, common metrics, and common standards so that performance could be benchmarked and be made more open to public scrutiny and accountability.

Where next for ombudsman and ADR schemes?

Nick O'Brien (Research Fellow at Liverpool University) argued that there were three key areas in which ombudsman and ADR schemes in the UK must develop to meet the challenges of the future. These relate to how they deal with users, the overall landscape for redress, and the provision of leadership in relation to ADR policy. With regard to consumers, it is important that ombudsman and ADR schemes become more accessible and that users of schemes are more representative of the general population. This reflects the fact that a lot of people are unaware of ADR schemes. For

organizations overseen by ombudsman and ADR schemes, a key demand is likely to be around greater transparency of procedural expectation and outcome. In relation to the system for consumer redress as a whole, the overriding trend would be towards rationalization, which might include consolidation of schemes and attempts to simplify the presently 'muddled' landscape. Another important innovation would be to clarify the professional contribution that ombudsman and ADR schemes make to the justice system, through the establishment of shared standards and practices and through the exhibition of accredited skills and competences. Stronger leadership and greater coordination between government departments responsible for ombudsman and ADR policy in the UK is required, and the ombudsman and ADR sector itself must show greater leadership and exert a stronger influence on the future direction of policy.

Lewis Shand Smith (Chief Ombudsman for Ombudsman Services) argued that, as a greater number of cases are dealt with by ombudsman and ADR schemes and fewer cases go to court, there is a danger that the development of legal principles through court adjudication would stagnate, with the effect that the judicial system might be weakened and the rule of law compromised. He noted that ombudsman and ADR schemes have a role to play, however, in the continuing development of principles and guidance to ensure fairness in the delivery of services. As ombudsman and ADR schemes become not only an alternative to courts but an essential part of the justice system, they need to communicate more coherently their contribution to the justice system and the value of that contribution. This would require a high public profile, greater accessibility, the harmonization of processes and standards, the continuing development of a professional workforce, and greater use of casework to provide guidance to service providers.

Conclusions

While there was not always a clear consensus of opinion during the conference, the organizers have drawn the following key conclusions that emerged from the discussions regarding the impact and legitimacy of ombudsman and ADR schemes. It is hoped that these will be of value to academics,

practitioners, and policymakers as the ombudsman and ADR landscape continues its development and as the ADR Directive is implemented in 2015.

- ADR bodies should develop a common terminology and definitions of their procedures to avoid consumer confusion. Lack of public understanding has the potential to undermine the legitimacy of ombudsman schemes. There is a lack of clarity in informal processes used by ombudsman and ADR schemes, and a need to develop a more coherent way of explaining ombudsman and ADR models to the public.
- Generating and retaining public trust is one of the key functions of an ombudsman scheme, along with providing redress for individuals and giving feedback on good practice. Trust in ombudsman and ADR schemes can be maintained by the ongoing provision of services in accordance with the principles of independence, honesty, and competence. However, the reputation of schemes will be subject to increasing pressures as higher case loads, more demanding consumers, and technological change lead to greater scrutiny by consumers and the public at large.
- Ombudsman and ADR schemes should develop complaint systems that are able to respond to people's frustrations and feelings as well as producing technically correct decisions. More could be done to understand the different needs of consumers and to treat them as partners in the task of delivering improved services and pointing out gaps in provision to service providers and policymakers.
- Ombudsman schemes should be evaluated against commonly adopted, comprehensive measures (customer service, complaint handling, delivering fair and just decisions, promoting learning from complaints, and organizational effectiveness) in order to provide public assurance of their effectiveness, as well as to defend them from unfair criticism and to provide greater opportunities for shared learning and

improvement across the sector. These would incorporate considerations of user experience and consumer trust.

- Softer and more subjective data in relation to quality of outcomes and user perceptions should not be ignored.

In addition to the points noted above, a number of key initiatives must be considered in developing future policy:

- strategies to raise public awareness of ombudsman and ADR schemes;
- the pursuit of decisions that provide greater certainty for organizations under the jurisdiction of ombudsman and ADR schemes;

- simplification of the ombudsman and ADR landscape for the user and better communication of the professional contribution they make to the wider justice system;

- development of a professional and suitably trained workforce;

- harmonization of standards and practices across the ADR bodies; and

- proactive leadership within government and the ombudsman and ADR community itself to bring about coherent change.



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Chris Gill is a Lecturer in Administrative Justice at Queen Margaret University, Edinburgh. He is a socio-legal researcher interested in administrative justice, alternative dispute resolution, and decision-making in organizations. Along with colleagues in the Consumer Insight Centre, he delivers professional training and development courses in dispute resolution and is programme leader for the MSc in Dispute Resolution.

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