



**Law Society**

**Green Paper on 21<sup>st</sup> Century Justice**

**19 December 2023**

This response is submitted on behalf of Dispute Resolution Ombudsman (DRO). We read the Green paper with interest and are pleased to be able to provide some insight into the current and ongoing policy considerations in the sphere of (Alternative) Dispute Resolution ((A)DR), particularly within the small claims jurisdiction which more closely mirrors the financial values of the majority of the disputes that the Ombudsman considers across the schemes it operates.

We have focused our responses on the areas referenced in Q4 and 5 which we consider are most relevant to our expertise where we feel we can add real value to assist the Law Society in forming its thinking based upon our experience in the consumer (A)DR Sector.

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**

**(On behalf of the Furniture & Home Improvement Ombudsman (FHIO), Dispute Resolution Ombudsman (DRO) and Rail Ombudsman).**



**Dispute Resolution**  
Ombudsman



**Furniture &  
Home Improvement**  
Ombudsman

**The Rail**  
Ombudsman 

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**Q4: What more can be done to make Ombuds a more effective remedy for consumers?**

**If a proactive role in promoting the extra-judicial routes that exist to facilitate settlement even before the parties consider legal routes is taken by the legal profession, this would have a knock-on effect of driving complaints to the earliest possible point of resolution and away from the court system.** In the consumer dispute resolution landscape, (A)DR is voluntary for consumers, although binding on the traders where they have signed up to an Ombudsman scheme or otherwise via trade association codes of practice etc. For their business clients, participation should be viewed through a broad lens; it can inspire consumer confidence, it can provide helpful management information and it can save businesses costs and for both parties it provides access to early, flexible routes of resolution.

Educating both businesses and consumers will be the key and both businesses and Ombudsman schemes and will require the support of the profession as a whole, working in a joined-up way, to ensure people are signposted to the most appropriate route of redress. There may also be a route for a more focused approach to CPD to ensure that the profession has the necessary information to enable it to play a key role in signposting the best pathway for each individual client/dispute. Using a "Solutions Explorer" may well be a means by which to do this, but will require buy-in from all stakeholders involved including the Ombudsman Association, CTSI and other Competent Authorities and the schemes themselves. Such considerations may influence where such a platform is hosted.

**A better understanding of the wider role an Ombudsman plays and the advantages of early resolution and rates of compliance, should provide additional confidence in the use of an Ombudsman as a trusted mechanism. We have provided some examples in the paragraph below.**

In terms of consumer access, the availability of (A)DR should be viewed as an important filter to enable the parties to negotiate an outcome or to assist them in narrowing the issues. FHIO and DRO processes include a final adjudication based on expert evidence which is compliant with Part 35 of the Civil Procedure Rules. This is an important mechanism as it ensures that the parties have a final, written decision, based on expert opinion and which is binding on the trader and our (anecdotal) experience is that very few cases are then escalated via the court system.

In addition, FHIO and DRO sees a very high proportion of cases that settle at conciliation (as to which see Annual Reviews: [Annual Reviews - The Furniture & Home Improvement Ombudsman \(fhio.org\)](#)). This is another indicator that early resolution is an important factor in the parties' motivations when considering dispute resolution and this should be a key facet of any overarching triage mechanism. Complaints featuring ongoing contractual relationships, such as those between retailer/manufacturer customer/utility company (whether household or non-household), are better suited to less adversarial forums and disputes arising out of these are best resolved at the earliest point in time, ideally without issuing proceedings. This is one of the recognised challenges in addressing the unmet legal needs of small businesses.

Further, in our experience, it is rare for a case to be deemed inappropriate for (A)DR and to be referred straight to the courts by the Ombudsman. Since our processes include conciliation, there is always the opportunity to reach a negotiated settlement

notwithstanding any technical complexities. The grounds for refusal of a dispute under the (A)DR Regulations include claims that would seriously impair the effectiveness of the (A)DR entity and it can be seen from the Schedule 5 Report accounted to CTSI<sup>i</sup> annually, that this number is typically very low.

The rate of compliance with the Ombudsman's decisions is very high across all schemes that we operate as is reported in the Schedule 5 Reports submitted to CTSI annually (see above) and we have very few examples of cases proceeding to court indicating either a lack of appetite to do so once the Ombudsman process is complete and a decision made which is either acceptable or indicative that there may be no case to answer, or satisfaction with the end result. Where membership of FHIO and DRO is voluntary, we note a steady increase in membership year on year, also indicating business satisfaction with the process and outcomes for them and their customers. In addition, successive Annual Reviews provide examples of how businesses leverage their membership of the Ombudsman<sup>ii</sup>.

Having received recent judicial consideration by Senior Master Fontaine in the case of *Hamon v UCL*<sup>iii</sup>, the various advantages of the Ombudsman model, were cited. That an Ombudsman plays a bigger role than case resolution is an important consideration which needs to be emphasised. It was recognised importantly within that judgement, which was considering a stay to enable ADR, previously resisted by the Claimants, to be considered, that an Ombudsman has the advantage of being able to produce outcomes that are "more flexible, constructive and acceptable to both sides"<sup>iv</sup>. Although certain concerns regarding surge and legal complexities, were raised, it is well established within the Ombudsman sector that these can be overcome and other advantages of the model should not be underplayed, for example, being free for complainants to use, they represent a crucial antidote to what is "fast becoming a luxury of legal advice and representation"<sup>v</sup>. More can be done to promote these facets.

Another key difference is the inquisitorial approach that an ombudsman takes. Not just considering the evidence before it, an ombudsman will seek that which is missing and assist the parties to gather the evidence they need to support their claim. In the case of vulnerable consumers, this can place an Ombudsman in a uniquely valuable space in the eyes of stakeholders.

When considering a case, an Ombudsman will have regard to the relevant law. However, to remain effective, it may also consider other non-legal factors that might reasonably be taken into account when deciding the outcome of a case. This means that Ombudsman decisions can have regard to what is fair and reasonable; practical and proportionate, going above what the law may prescribe to resolve a claim to the satisfaction of the parties. This leads to a number of non-legal remedies that are used to resolve issues to the satisfaction of both parties, as referenced above.

Given the emphasis on the climate of (A)DR, the measures set out in the Practice Direction- Pre- Action Conduct and Protocols on the use of (A)DR in pre-action settlements, and the existence of Ombudsman Schemes, particularly for lower value claims the Ombudsman considers that more onus should be placed on regulated legal service providers to proactively encourage consumers and SMEs to explore these alternative channels. We have seen examples of where consumers are being signposted to our service utilising this in conjunction with chargeable legal representation. Given that (A)DR is free to

consumers who use an Ombudsman, it would appear to be contrary to the intentions of the Pre-Action Protocol and the (A)DR Regulations for consumers to be charged a fee by their legal representative to access an otherwise free service, particularly where issues are not considered to be legally complex.

Ombudsman schemes offer a solution which is of low-cost to the business and free to consumers and, as noted above, Ombudsman schemes are designed to provide ease of access without the need for legal representation which provides real, alternative solutions to unrepresented parties and addresses any issues of inequalities of arms. The claimant reserves their position as the Ombudsman's decision is not binding on them, so they can pursue the matter via the courts or some other tribunal. For this reason, we welcome the inclusion of Ombudsman schemes on the non-exhaustive list of good faith steps that parties could take both in recent revisions to the Pre-Action Protocol and any guidance to the parties regarding steps they could take prior to issuing. The legal profession, taking a joined up approach should be viewed as instrumental in this endeavour,

In Summary, therefore Ombudsman schemes are the most established and well-known forum for (A)DR globally where standards are high and access is free for consumers. This is a model that could have received greater prominence within the Green Paper itself and it is submitted that the profession should play a greater role in promoting Ombudsman as an extra-judicial pathway.

### **Technological Solutions – existing and future advances**

This is of relevance to the conversation and vital in ongoing monitoring and evaluating its success is the issue of the interface between the extra-judicial and judicial routes and should be a consideration in considering the next steps for any "Solutions Explorer". The Ombudsman has developed an innovative case management tool that is bespoke to our service and adapted to provide both accessible dispute resolution mechanisms for those in and investigating a dispute, but which also captures data to provide feedback and insight for other stakeholders.

The consumer and business gain access via a portal into which they can log dispute details and upload documents. They are also provided with log-in to access and view updates and send secure messages as well as receiving automated responses at various points in the process. The business can self-serve case data in order to track outcomes and spot trends. In the Rail Ombudsman scheme, stakeholders such as Government, the Regulator and consumer watchdogs have super-user access to anonymised data.

The case management system interfaces with other users and, for example facilitates the single-front door for rail passenger complaints (out of scope cases being triages elsewhere by the system). Additional enhancements to encourage even earlier resolution by way of a virtual mediation facilitator are under development with a software developer.

We are very happy to engage by way of a demonstration of this and would, indeed, encourage the Law Society to do so as this is an effective and accessible route into dispute resolution.

### Question 5: Opportunities to Combine Ombudsman Scheme.

**Membership of the Ombudsman Association, whose preference is for one Ombudsman per sector, ensures that consumers and those in their jurisdiction alike, have access to schemes with consistent and validated processes. This could play a vital role in the integration of such schemes with the courts systems, as single repositories with interfaced portals could transfer non-resolved claims to the relevant track and provide joined-up data.**

Opportunities should be sought to reduce gaps, mandate Ombudsman routes in certain high detriment areas, such as those being championed by consumer groups, such as Which? who has again recently reiterated this<sup>vi</sup>, for example in sectors where an Ombudsman is currently voluntary (such as home improvements and motor) and others where there is currently no Ombudsman available to hear consumer disputes (such as aviation).

### Conclusion

Ombudsman represent the *gold-standard* of (A)DR 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 the 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. More can be done via education of the profession as to the broader advantages of Ombudsman. An enhanced understanding of the remits and powers of the schemes will lead to greater confidence in promoting Ombudsman as an alternative to court. Further, the one Ombudsman per sector model which is encouraged by the Ombudsman Association, would lead to clearer routes which could then feed into and simplify the pathways via the "Solutions Explorer".

Ultimately, a consumer should have a route of appeal to an Ombudsman, regardless of whether they have used an (A)DR provider earlier in the process or that they then have the right to issue proceedings via the courts in the event they remain dissatisfied after having exhausted the Ombudsman's process, using technology to interface with Ombudsman in the minority of cases for which (A)DR is either unsuccessful or unsuitable. It is submitted that the legal profession as a whole can play a key role in this.

## About us

Part of the Ombuds Group, DRO is an independent, not-for-profit, government-approved Ombudsman scheme, providing Alternative Dispute Resolution (ADR) across a range of industries. Led by staff with both dispute resolution and legal qualifications, the Ombuds Group has a heritage of over 30 years having been established in 1992 by the Office of Fair Trading. Neither a consumer champion nor an industry body, we are independent and draw upon extensive experience in providing similar services across a broad range of regulated and unregulated sectors including furniture, rail, retail, licensing, logistics and home improvement. We also provide staff and expertise to the Independent Football Ombudsman which was set up and funded by the Premier League, EFL and Football Association.



**Furniture &  
Home Improvement**  
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<sup>i</sup> [CTSI-schedule-5-and-6-2020-DRO-and-FHIO.pdf](#)

<sup>ii</sup> [Annual Reviews - The Furniture & Home Improvement Ombudsman \(fhio.org\)](#)

<sup>iii</sup> [High Court Judgment Template \(nationalarchives.gov.uk\)](#)

<sup>iv</sup> per Mummery LJ in *R (Maxwell) v OIA* [2011] EWCA Civ 1236, [2012] P.T.S.R. 884 at [38].

<sup>v</sup> As vii

<sup>vi</sup> [Digital Markets, Competition & Consumers Bill - Second Reading Briefing - May 2023 \(which.co.uk\)](#)