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Models of Alternative Dispute Resolution (ADR)

A report for the Legal Ombudsman

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Chris Gill, Jane Williams, Carol Brennan and Carolyn Hirst

Executive summary

The aim of this research was to investigate what the Legal Ombudsman can learn from other Alternative Dispute Resolution (ADR) providers. The research was commissioned by the Legal Ombudsman to help it review and develop its dispute resolution model and ensure it remains fit-for-purpose. The research involved a case study design and fieldwork was conducted with ten organisations: four in the UK, one in Ireland, two in New Zealand, one in Australia, one in Canada and one in the USA. The research highlighted a range of dispute resolution practices and illustrated some of the key design choices that ADR providers need to make when designing or reviewing a dispute resolution scheme. These fell within four areas: the use of online dispute resolution; the early stages of dispute resolution processes; mediation approaches; and the later stages of dispute resolution and building influence.

Online dispute resolution

There is significant potential for ombudsman schemes to develop in this area. The case study of **eBay** shows how disputes between buyers and sellers can be resolved by a semi-automated system which is able to resolve the vast majority of cases by providing options for settlement and encouraging parties to reach a view for themselves. One of the benefits of ODR platforms, such as that used by eBay, may be their accessibility and transparency, as well as being able to provide trusted information which enables parties to reach their own conclusions. A fascinating area of future development involves “crowdsourcing” decisions, where a panel of experienced buyers and sellers determine the outcome of a case.

The early stages of dispute resolution

While there was a reasonable amount of commonality between the case studies in terms of the fundamental activities they undertook at the early stages of their dispute resolution processes, a range of practices were identified. The **Ontario Ombudsman** follows an “issue based” approach, which demonstrates the value of ensuring that, however a process is designed, case workers are given sufficient freedom to bring about flexible and creative solutions to problems. The **New Zealand Banking Ombudsman’s** approach incentivises resolution during their facilitation stage and provides an interesting example of the way in which a fee system can encourage resolution at the earliest stages of the ADR body’s processes. The **Furniture Ombudsman** provides a good insight into a scheme that operates two distinct processes (called conciliation and adjudication), but where the caseworker rather than the parties decides on the process to be followed. Empowering caseworkers to control the process may have benefits in ensuring that cases are dealt with proportionately.

The **New Zealand Law Society’s Lawyers Complaint Service’s Early Resolution Service** shows how resolution can be overseen in order to provide assurances as to its fairness. In this case, a standards committee with mixed legal/lay representation is used both to decide which cases are suitable for early resolution and to approve the outcomes of early resolution. Not all of the schemes we considered in the research had decision making powers. The **UK European Consumer Centre**, for example, illustrates how effective resolutions can be achieved even in the absence of such powers, using persuasion skills and knowledge of the law. Finally, the **Australian Financial Ombudsman**

Service's telephone conferences provide a useful example of the way in which a classic ADR mechanism (conciliation) can be adapted to an ombudsman context and rolled out for use in a reasonably high volume of cases.

Mediation approaches

There is ongoing interest within the civil justice system in the potential to incorporate mediation into existing dispute resolution processes in order to help manage caseloads effectively and proportionately. There appears to be some potential for the use of mediation processes in ombudsman schemes and the case studies provide helpful illustrations to show how a mediation approach can be adapted to meet different needs. The *Irish Financial Services Ombudsman's* mediation process is a formal, classic mediation process. This involves face to face mediation, with the parties and the mediator needing to devote significant time to resolution. The Irish Financial Services Ombudsman model is likely to be suited to high value, difficult cases that would otherwise slow down processes of adjudication.

A contrasting example was provided by the *Small Claims Mediation Service*, demonstrating how a high volume mediation service may be set up. Using a bank of telephone mediators, each able to deal with up to 25 cases a week, appears to work very successfully in the context of small claims. The use of time limited sessions and the relatively low comparative cost to the parties and the ADR provider are attractive features of this approach. Particularly impressive were the very high levels of party satisfaction with the process (both for those whose cases settled and for those that did not). There could well be a place for this kind of telephone mediation approach in ombudsman schemes dealing with relatively low value claims.

The later stages of dispute resolution processes and building influence

The processes used by ADR schemes when making formal decisions on cases are perhaps better known and less contentious than those used at the earlier stages of dispute resolution. One issue raised by the case studies relates to whether a scheme employs largely inquisitorial or adversarial procedures. The *Irish Financial Services Ombudsman* is an unusual example of an ombudsman scheme using adversarial and highly formal processes. The benefits of this approach are the transparency of the process and high degree of participation it allows the parties, although this is likely to lead to higher costs and prolonged dispute resolution. In contrast, the *Ontario Ombudsman's* Special Ombudsman Response Team employs ultra-inquisitorial processes as part of its work. Such robust processes of investigation, going wide enough to establish broader patterns, issues and problems than investigating a single complaint ever could, may be effective in preventing future disputes from arising.

Whether a dispute resolution process is predominantly adversarial or inquisitorial, one issue is how the decision making itself should be organised. The *Furniture Ombudsman* provides an example of the single decision maker model, where a single case worker is responsible for decisions (occasionally assisted with the provision of independent expert advice from consultants). Other decision making approaches are to use decision making panels. Here, a range of expertise or backgrounds can be combined so that the decision makers are able to draw on a range of internal resources in reaching their decisions. In the *Australian Financial Ombudsman Service's* approach, where panels are used, they involve a mix of industry and consumer representatives allowing each

party to see very visibly that their interests are represented. Interestingly, in the **PhonepayPlus** system, the tribunal is used to deal with non complaint behaviour but equally used as a deterrent and encouragement for parties to take steps to ensure compliance and co-operation with PhonePayPlus.

In terms of building their influence, the case studies reported a range of approaches. The **Irish Financial Services Ombudsman** publishes case information about businesses, so that an incentive exists (in terms of negative publicity and, ultimately, possible impact on profits) to resolve and handle complaints well without the ombudsman's intervention. In some contexts, such as voluntary jurisdictions, however, the ability to publish case information may not be available. The **Furniture Ombudsman** demonstrates how the use of soft, cooperative power is essential where participation in an ADR scheme is voluntary. Closely linked to the building of influence is whether the ADR body should combine regulatory functions, an example of which was provided by **PhonepayPlus**. While models which combine regulation and dispute resolution are contentious, in some sectors this may prove effective, especially where there is a proportion of 'non-compliant' businesses in an industry.

Conclusions: a model for ADR design

As well as highlighting notable approaches to inform the Legal Ombudsman's review of their current model, the case studies suggest a range of design choices that are open to ADR bodies. For example, at the early stages of the dispute resolution process an important design choice might involve the extent to which caseworkers are constrained by strict procedures or, alternatively, given discretion to resolve cases in what they consider the most effective way. Another design choice might relate to the use of mediation processes and whether these should be calibrated to allow for the resolution of high volume, low value claims or, alternatively, low volume, high value claims. The conclusions to the report highlight these and other important design choices and propose a model for ADR design which sees design choices as residing along ten different spectra. Each spectrum illustrates a decision that designers or reviewers of ADR schemes will need to make. The ten spectra are:

- Funding (public/ private)
- Jurisdiction (voluntary/ compulsory)
- Goals (redress/ prevention)
- Emphasis (public interest/ party interest)
- Structure (single stage/ multi-stage)
- Process (inquisitorial/ adversarial)
- Decision maker(s) (individual/ panel)
- Technology (high tech/ low tech)
- Settlement type (imposed decision/ party agreement)
- Outcome (binding/ not binding)

Based on this model for ADR design, the report concludes by offering an ADR design toolkit, which aims to provide a practical tool for implementing the learning from this report. The toolkit can be found in Annex 4.

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The Research Team



Carol Brennan is a Reader in Consumer Policy and Director of the Consumer Insight Centre at Queen Margaret University. Carol is an experienced academic and has provided leadership for several research and commercial projects. Her research interests are mainly in the field of consumer policy with particular reference to consumer empowerment, complaint handling and customer service. Carol's recent publications are *Grumbles, Gripes and Grievances; the role of complaints in transforming public services* published by Nesta in April 2013; *The future of ombudsman schemes: drivers for change and strategic responses* published by the Legal Ombudsman in July 2013 and the *Outcome of complaints research for the Care Inspectorate* published in September 2013. Carol is developing the Consumer Insight Centre at QMU as a centre of excellence for training, research, knowledge exchange, and consultancy in Ombudsman and complaint handling practice and consumer affairs.



Chris Gill is a Lecturer in Administrative Justice. Prior to joining Queen Margaret University, he worked for the office of the Scottish Public Services Ombudsman (SPSO) in a variety of roles including investigation, quality assurance, case reviews and training. He remains actively engaged in dispute resolution, being an associate of the Chartered Institute of Arbitrators and, currently, Independent Assessor for Ombudsman Services. Chris sits on the Law Society of Scotland's Administrative Justice Committee and is a core team member of the Nuffield-funded UK Administrative Justice Institute. Chris teaches on a range of Ombudsman Association approved courses and has worked with ombudsman organisations across the UK and internationally. He is a socio-legal researcher whose current research focuses on the impact of ombudsmen and other administrative justice institutions. Chris has recently completed research and consultancy projects for the Care Inspectorate, the Legal Ombudsman, the Welsh Language Commissioner and the States of Jersey. He is programme leader for the MSc in Dispute Resolution programme and leads on the delivery of courses for public sector complaint handlers.



Carolyn Hirst has expertise in dispute prevention, management and resolution. As well as running her own consultancy, she is a Lecturer at Queen Margaret University where she provides leadership for the content and delivery of a number of short courses, including the Professional Award and Certificate in Ombudsman and Complaint Handling Practice. Carolyn is a former Deputy Scottish Public Services Ombudsman, a post held from the formation of this Office in September 2002 until 2007. Before that she worked in Social Rented Housing for nearly 20 years, latterly as a Deputy Director of a Housing and Care Organisation. Carolyn is an accredited and practising Mediator. She is a member of the Scottish Legal Complaints Commission Mediation Panel and the Edinburgh Sheriff Court Mediation Panel. Carolyn's current research focuses on the use of informal resolution by ombudsman schemes as part of a Nuffield Foundation funded study.



Jane Williams is a lecturer in consumer law at Queen Margaret University and was previously employed within the Trading Standards Service in a managerial capacity. As a senior Trading Standards Manager in Edinburgh, she has direct experience of complaint investigation and the operational and strategic issues surrounding resource allocation in a major UK local authority. Jane has strong links within the Trading Standards field across the UK and extensive experience of running short courses for professionals within that field. Jane is a member of the Trading Standards Institute and has worked as a consultant on behalf of the Institute. Jane is also a professional examiner. Her research interests relate to ombudsman and complaint handling practice and to the implementation of the Unfair Commercial Practices Directive in the UK.

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Introduction

This introduction explains the aim of the research and provides an overview of the case studies covered in the report. It explains how the research addresses current issues facing the Legal Ombudsman and the broader world of alternative dispute resolution.

Aim

The aim of the research was to examine a range of alternative dispute resolution processes and mechanisms, in order to identify interesting examples of practice from which the Legal Ombudsman could learn in developing its own model of dispute resolution. This included identifying case studies from within the ombudsman sector, as well as looking beyond this to examine practices used in other dispute resolution schemes.

The case studies

We selected ten case studies for participation in the research. Case selection was purposive and on the basis of whether the research team (in consultation with the Legal Ombudsman) considered it likely that an organisation would exhibit features from which the Legal Ombudsman could learn. We also aimed to select international as well as UK cases.

The overall aim of case selection was to illustrate some key approaches to alternative dispute resolution and exemplify different ways that redress systems could be designed. Table 1, over the page, provides a summary of the case study organisations selected and the reasons for selecting them. Annex 1 provides a more detailed description of the research methodology and Annex 3 provides the factual background for each case study.

Challenges facing the Legal Ombudsman

In terms of the Legal Ombudsman's specific operational context, there are a number of issues that have guided the focus of the research. Their latest annual report (Legal Ombudsman 2013) highlights the following context-specific issues:

- Lower than expected demand for the service, with fewer complaints received than expected;
- A need to focus on the unit cost of dealing with complaints, due in part to the lower than expected demand;
- The expansion of the Legal Ombudsman's statutory jurisdiction to cover aligned areas such as Claims Management Companies (CMCs – these are commercial organisations that pursue and manage claims on behalf of consumers);
- The possible creation of voluntary jurisdiction(s) for the Legal Ombudsman, to allow the organisation to consider complaints about other professional services; *and*
- Diversification of legal services and closer relationships with other professional services, with potential complications in terms of overlap for sectoral regulators and redress bodies.

Table 1: case study summary

| Organisation | Reason selected |
|--|---|
| Ontario Ombudsman | Example of combining early resolution and high profile systemic investigation approaches. |
| Irish Financial Services Ombudsman | Example of formal mediation being incorporated into an adversarial, quasi-legal ADR scheme. |
| New Zealand Banking Ombudsman | Example of facilitation and conciliation approaches and using case fees to incentivise resolutions. |
| Small Claims Mediation Service (Her Majesty's Court and Tribunals Service) | Example of high volume, court-annexed telephone mediation service. |
| Furniture Ombudsman | Example of voluntary ADR mechanism, adjudicating on an industry code of practice. |
| eBay/PayPal | Example of high volume online dispute resolution. |
| UK European Consumer Centre | Example of a consumer conciliation and advocacy approach. |
| PhonepayPlus | Example of a scheme focused on regulation, and combining conciliation with formal adjudication using panel decisions. |
| New Zealand Law Society's Lawyers Complaint Service's Early Resolution Service | Example of an approach in a legal jurisdiction, focusing on early resolution of disputes. |
| Australian Financial Ombudsman Service | Example of telephone conciliation conferences and panel decision making. |

The Legal Ombudsman's strategy for 2014-2017 outlines how some of these issues will be addressed (Legal Ombudsman 2014). This includes using casework outcomes and working with others to help ensure better performance of the marketplace and investing in the skills required to resolve a greater proportion of cases informally. In terms of what the organisation is planning to do in the period 2014 to 2017, the strategy highlights that the Legal Ombudsman will:

- Expand its jurisdiction and begin dealing with complaints about CMCs;
- Respond appropriately to changes in the way professional services are being delivered and in the way in which the broader landscape of redress is organised;

- Continue to find better ways of doing things to ensure good practice and that appropriate standards are set for service providers; *and*
- Work with stakeholders to provide a simple and coherent approach to redress.

The Legal Ombudsman was also included in a recent benchmarking exercise conducted by the Legal Services Consumer Panel (Legal Services Consumer Panel 2013). This report highlighted perceived strengths and weaknesses of the Legal Ombudsman when compared to other dispute resolution schemes. The report's conclusions were that:

- There was a lower rate than in some other schemes of contacts from consumers converting into complaints. This was due to consumer confusion and consumers arriving 'at the wrong door', as well as gaps in the Legal Ombudsman's jurisdiction. A high level of premature complaints (those not initially made to law firms) was seen to indicate low confidence in the handling of complaints by firms themselves.
- The scheme performed well on timeliness compared to similar schemes. Cases that took longer were those which required formal decisions by an ombudsman (which occurred in 39% of cases). While there was a focus on trying to resolve a greater proportion of cases informally, this was not always what consumers would want. In some cases they would want detailed investigation and a formal decision even if it took longer.
- Perceptions of the fairness of the Legal Ombudsman's decisions compared well with other schemes, particularly given that it upholds a smaller percentage of consumer complaints than some others. Advocacy rates (whether consumers would recommend the scheme to others) are lower than for other schemes considered in the benchmarking, which may reflect the lower uphold rates. Feedback from consumers is consistent in highlighting the need to keep consumers informed about their complaint and to demonstrate that the complaint has been understood.
- The unit cost of the Legal Ombudsman was higher than other schemes considered in the report. This was due to the complexity of the disputes and the fact that the high stakes that could be involved meant cases were more likely to go to an ombudsman for decision. It was noted that a high unit cost had implications for the Legal Ombudsman's ambition to expand its work into voluntary jurisdictions. The report noted that reductions in unit cost should not be achieved by reducing the work of the Legal Ombudsman in raising standards in the legal services sector.

The context for the present research, therefore, is one where the Legal Ombudsman is grappling with the following key questions:

- How to reduce unit costs and make itself more attractive to voluntary jurisdictions?
- How to make greater use of informal dispute resolution processes?
- How to increase its standard-raising work?
- How to design its processes in order to respond to and pre-empt developments in the legal services sector and within the broader ADR landscape?

It is beyond the scope of this research to provide answers to all of these questions; however, in determining what the Legal Ombudsman can learn from other ADR schemes, we have paid particular attention to identifying practices, processes and models that address the questions highlighted here

and the challenges facing the organisation. Annex 2 provides a summary of the Legal Ombudsman's current approach to dispute resolution.

The broader context

While predominantly focusing on what the Legal Ombudsman can learn, the research is also timely in terms of developments in the ombudsman and ADR landscape. The following paragraphs provide a brief overview of the broader context in which the research sits and of some of the wider, fundamental questions which arise from it.

The 'ombudsman technique' (Buck *et al* 2011) has long been recognised as a flexible form of dispute resolution, capable of adapting to different political, cultural and legal systems and proving equally capable of covering private and public service jurisdictions. The flexibility of ombudsman schemes, and their ability to vary procedural approaches to suit diverse jurisdictions and the particular needs of their stakeholders, has been seen as a strength of the institution (Reif 2004).

The pragmatic, tailored approach of ombudsman schemes has, however, resulted in a multiplicity of approaches within the ombudsman world: different schemes use different processes and methods to resolve disputes. While such heterogeneity is a core feature of the 'ombudsman technique', there have been recent calls for a harmonisation of approach and process between ombudsman schemes (Shand Smith and Vivian 2014). It is hard to disagree that – while maintaining their traditional flexibility – ombudsman schemes will increasingly need to provide citizens and consumers with processes that are consistent enough to allow for their expectations to be met when approaching *any* ombudsman.

Questions of consistency and harmonisation are also brought to the fore by the EU's Consumer Alternative Dispute Resolution Directive (EU 2013), which is currently in the process of being implemented by nation states. The Directive sets out minimum standards for ADR providers and calls for the creation of competent authorities to oversee providers. The question of what processes ombudsman schemes should be using and which are most effective has, therefore, gone from being an essentially internal matter for individual ADR schemes to decide (within the limits of their terms of reference) to one which is in the public spotlight.

Advances in technology also present new opportunities and challenges for dispute resolution. Online Dispute Resolution (ODR) is viewed by Katsh and Rifkin (2001) as the 'fourth party' as it can replicate the role of a neutral third party in dispute resolution (Cortes 2014). Using technology to resolve consumer disputes is growing quickly and becoming more sophisticated, with data tracking analytics and automated systems meaning transactions are dealt with more rapidly than with more traditional methods. Technology can make handling time consuming paperwork more efficient and reduce the timescales and staff required to resolve large numbers of similar disputes.

Academics are increasingly interested in the nature and quality of ombudsman and ADR processes. Bondy *et al* (2014) have recently completed a Nuffield Foundation funded study seeking to understand and map the use of 'informal resolution' by ombudsman schemes in the UK and Ireland. Their early findings suggest that the language used to describe these processes is highly inconsistent between schemes. Creutzfeldt (2013) is investigating ombudsman decision making and perceived fairness, seeking to assess how consumers perceive the fairness of various

ombudsman schemes in Europe. Others have called for the ‘black box’ of informal resolution to be opened to scrutiny and are seeking to develop a more critical approach to ombudsman studies (Cathcart 2013).

The key questions that arise in this context are as follows:

- What might a perfectly designed ADR scheme look like?
- What mix of dispute resolution processes might be most effective?
- If harmonisation between schemes is to occur, what form should it take?

This report seeks to address these questions and, in doing so, to build on Bondy and Le Sueur’s (2012) work on ‘redress design’ in the specific context of ombudsman and ADR schemes. In a previous report (Gill *et al* 2013) we described the lack of coherence in the UK ombudsman landscape and the fact that its development had been *ad hoc*, piecemeal and uncoordinated. In this report, our ambition is to provide an insight into the range of dispute resolution processes and methodologies available to ombudsman schemes, and to provide a foundation for thinking about what an ideal redress architecture might look like in this area.

Structure of the report

The report is in five main sections. Following this introduction, the second section provides an overview of the main forms of alternative dispute resolution and considers the issue of redress design. It provides the core conceptual framework for the research. The third section addresses the question of how technology may change the design of ADR systems and looks in detail at Online Dispute Resolution. The fourth section reports the empirical findings of the research and shares the key insights provided by the case study organisations. Finally, section five presents the report’s conclusions and introduces a toolkit for ADR design.

Design choices for Alternative Dispute Resolution

This section provides a brief introduction to some of the key processes that exist to resolve disputes: from adjudication to the negotiation of settlements. It assesses the relative strengths and weaknesses of different approaches and outlines criteria which have been seen as important in deciding on the best way to resolve particular disputes. The section ends by looking at the concept of redress design (Bondy and Le Sueur 2012) and asks what an ideal redress architecture might look like for an ombudsman scheme.

A unique world

Consumer Alternative Dispute Resolution (CADR) – a development of ADR which includes private sector ombudsman schemes – has recently been described as ‘its own unique world, with its own unique architecture’ (Hodges *et al* 2012, p.200). CADR is distinguished from other forms of ADR by the particular focus of the disputes that it seeks to resolve: those between consumers and businesses and which are generally of relatively low value. A major book on CADR in Europe has recently highlighted the great variety of forms which CADR can take (Hodges *et al* 2012a).

At the same time, for all the diversity which exists in terms of the overall structure of national CADR and ombudsman systems, the fundamental dispute resolution processes of individual schemes can be seen to coalesce around the following features:

- The provision of advice and information to consumers and businesses; *and/or*
- Attempts to resolve, conciliate or mediate disputes; *and/or*
- The provision of a decision (which may vary in the extent to which it is binding).

Different CADR schemes will lay different emphases on these elements and not everyone will do all of them. However, in broad terms and at the risk of oversimplification, these three features can be seen as core process characteristics around which individual CADR schemes vary in emphasis.

As noted in the introduction, ombudsman schemes are perhaps unique amongst systems of dispute resolution in the extent to which they allow for a high degree of procedural flexibility in resolving disputes. In the UK, ombudsman schemes have come a long way from their initial creation in the public sector, where they focused on the conduct of a limited number of in-depth investigations and the production of formal decision reports. Ombudsman schemes have for some time now shifted from an emphasis on formal reporting, to an emphasis on resolving disputes by the most appropriate means available (Seneviratne 2002) although that may be shifting back to formal reporting in some schemes. In a drive to provide more impact for more people, for example, the Parliamentary and Health Service Ombudsman investigated 2,199 cases in 2013/14 compared to 384 the previous financial year (Parliamentary and Health Service Ombudsman 2014).

Nevertheless, in shifting to an approach that emphasises the resolution of complaints, ombudsman schemes can be seen to have borrowed inspiration from other forms of ADR – many ombudsman schemes will now be drawing on skills and approaches that would be familiar to negotiators, conciliators and mediators. This leaves the more traditional approach of the investigator and adjudicator as the secondary recourse if resolutions cannot be agreed by other means. Our recent

report – based on interviews with UK ombudsman schemes – suggested that ombudsman schemes would need to continue to move towards informal approaches to dispute resolution in order to respond to pressures from a changing consumer, business and policy environment (Gill *et al* 2013).

So, ombudsman schemes can incorporate a range of dispute resolution techniques and processes; from highly formal, adjudicative methods at one end, to highly informal, negotiated methods at the other. The rest of the sections provides a brief description of the forms of dispute resolution that may be available to ombudsman schemes.

Forms of Alternative Dispute Resolution

At the simplest level, and in the ADR context under discussion, there are two ways in which a third party to a dispute can resolve the dispute: they can impose/recommend an outcome or they can assist the parties in agreeing an outcome between themselves. As we shall see, there are several ways in which these approaches manifest themselves, but it is important to remember that underlying the multitude of dispute resolution approaches lies a very simple dichotomy between resolution of disputes by decision and resolution of disputes by agreement.

As shown in Figure 1, agreement based approaches include negotiation and mediation, while decision based approaches include expert determination, arbitration and adjudication. Some approaches fall somewhere in between these two ends of the spectrum. Early neutral evaluation and conciliation, for example, involve an evaluative approach which seeks to help parties make their own minds up without imposing a formal decision. Other forms of dispute resolution exist, but these have been focused on as they illustrate the major approaches to dispute resolution.

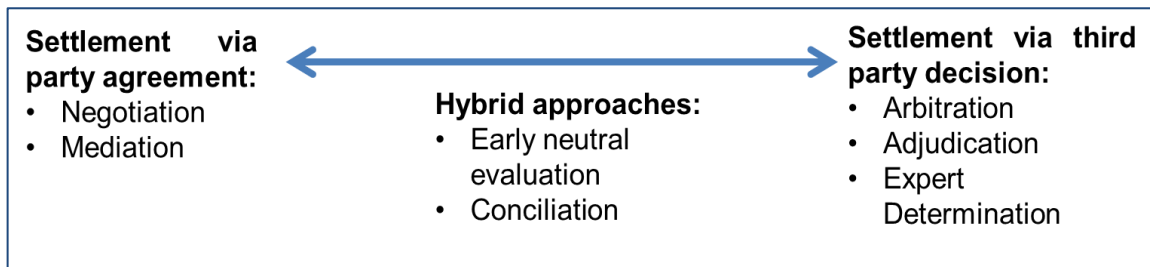


Figure 1: key forms of alternative dispute resolution

Table 2, over the page, sets out some of the important characteristics of each key form of dispute resolution.

Table 2: dispute resolution forms and characteristics

| Form of dispute resolution | Characteristics |
|---------------------------------|--|
| Negotiation | The most common form of dispute resolution, which involves a relatively informal process where parties discuss issues amongst themselves with a view to resolving them by agreement. There is no set procedure and negotiations can vary from simple exchanges between the parties to structured settlement meetings. |
| Mediation | Involves the use of a neutral third party who facilitates a negotiation to resolve a dispute. Details of the process to be followed are usually set out in an agreement to mediate which is agreed to by the parties beforehand. Mediations can be face to face or on the telephone and tend to involve both separate meetings between the mediator and the parties and joint meetings where all are present. |
| Conciliation | This is generally accepted to involve a neutral third party taking an active role in putting forward suggestions for settlement or an opinion on the case. The conciliator might facilitate a negotiation between parties where possible on their own terms or suggest a potential resolution if the parties cannot agree. This proposal may be in writing. |
| Early Neutral Evaluation | The neutral evaluator provides an opinion at an early stage on the likely outcome of a case if it were to be litigated. The evaluator seeks to bring the parties together and assist them in finding an agreement by common consent. This provides more insight into the strengths and weaknesses of the dispute and helps the parties identify areas of agreement and focus the issues that remain for resolution. It can provide a 'reality check' for the parties and lead to more focused and less costly dispute resolution. |
| Arbitration | Arbitration involves an independent third party (the arbitrator) reaching an independent decision on a dispute. The process of arbitration can vary depending on circumstances, but must be agreed in advance in an arbitration agreement. Some arbitrations may involve hearings similar to those used in a court trial, while others will involve only written submissions. In most cases the arbitrator's decision is legally binding on both sides. The use of arbitration in England and Wales is formally regulated by the Arbitration Act 1996. |
| Adjudication | Adjudication involves an independent third party with specialist knowledge (the adjudicator) reaching an independent decision on a dispute. Although similar to arbitration, adjudication processes can be simpler, and usually produce decisions that are binding on the company but not on the consumer. They can be more flexible and adjustable to meet specific commercial or other needs. |
| Expert determination | This involves the use of an independent expert to resolve a dispute. There are several forms of expert determination: an independent expert can be appointed to reach a binding decision; an independent expert can be appointed to provide expert advice to an adjudicator who is charged with reaching a decision on the dispute; or the parties may each commission independent expert reports to provide to the adjudicator. |

(Adapted from Blake *et al* 2013, pp. 11-17 and Office of Fair Trading 2010, pp. 1-2)

The relative merits of any form of dispute resolution will depend on a range of factors including the specific processes employed, the nature of the dispute and the needs of the parties. However, there are some general advantages and disadvantages to dispute resolution by agreement on the one hand and dispute resolution by decision on the other. Table 3, below, highlights some of the perceived advantages and disadvantages of ADR forms which result in agreements. Table 4, over the page, highlights some of the perceived advantages and disadvantages of ADR forms which result in decisions.

Table 3: advantages and disadvantages of agreement-based ADR

| | Advantages | Disadvantages |
|---------------------|---|---|
| Negotiation | <ul style="list-style-type: none"> • Very flexible, conducted by parties themselves • Cost effective, only limited preparation required • Parties retain control of outcome | <ul style="list-style-type: none"> • Success depends on how well case has been researched • Depends on the skill of the negotiators • Can lead to poor outcomes for some parties if they are unable to put forward the strength of their case • Can involve confusion over process due to informality of negotiation • Can fail if parties have unrealistic expectations or entrenched views |
| Mediation | <ul style="list-style-type: none"> • Can help parties see the strengths and weakness of their cases more clearly • Can help parties overcome adversarial and entrenched positions • Can make offers and concessions look more acceptable • Can suggest outcomes even in intractable disputes • Structure of mediation allows periods of review to consider offers and positions • Good success rates and party satisfaction | <ul style="list-style-type: none"> • Depends on the abilities of the mediator • Can increase costs if mediation fails • Needs skilled mediator to avoid leading to unjust outcomes • May not work if parties are very antagonistic • Can be difficult if parties are not represented (in the sense that they may not know what to expect) or otherwise prepared in advance |
| Conciliation | <ul style="list-style-type: none"> • Similar to mediation in most respects • Usually free • Experienced conciliator proposes a flexible solution • Neutral third party can provide an opinion • Informal and can be achieved in a short time • If the parties accept the recommendations, they become binding | <ul style="list-style-type: none"> • Similar to mediation in most respects • Both parties may be asked to explain the dispute in writing • May not provide evidence that would become available with investigation • May be concerns about impartiality |

Table 4: advantages and disadvantages of decision-based ADR

| | Advantages | Disadvantages |
|-----------------------------|---|---|
| Arbitration | <ul style="list-style-type: none"> • Parties can select arbitrator with appropriate expertise and experience • Process is private • Aspects of the process can be tailored to dispute • Process can be very structured and formal if parties want it to be • Can be simple and cost effective if decision is on written submissions only | <ul style="list-style-type: none"> • Will not save costs if a formal, trial like process is used • Parties have no control over the outcome • Arbitrators do not have the power of judges if a party fails to cooperate • Arbitrators need to be carefully selected to make sure they have the confidence of both parties |
| Adjudication | <ul style="list-style-type: none"> • Can be carefully adjusted to meet commercial needs • More flexible and cost effective than arbitration | <ul style="list-style-type: none"> • Not necessarily low cost if experts are in dispute • Decisions may not be binding, meaning that further litigation or arbitration may be necessary |
| Expert determination | <ul style="list-style-type: none"> • Can save cost and time if the dispute would normally require expert witnesses in a litigation • Offers flexibility as the terms of the expert determination can be agreed in advance | <ul style="list-style-type: none"> • Although it should cost less than litigation, it can be costly to appoint an expert to determine a dispute • The determination is normally binding even if flawed (e.g. by a mistake of fact) |

(Adapted from Blake *et al* 2013, pp. 11-17)

Criteria for choosing a dispute resolution method

Considering the relative strengths and weaknesses of dispute resolution processes in the abstract is not enough, since an essential consideration in choosing a dispute resolution process is to consider the type of dispute to be resolved. Indeed, the notion that different dispute resolution processes will be required depending on the particular nature and circumstances of a case is now widely accepted.

The Woolf reforms of English civil procedure of the mid-1990s suggested that the processes used to resolve disputes should be proportionate to the value of the dispute under consideration. This idea was subsequently taken forward by the Department for Constitutional Affairs, whose White Paper on redress (subsequently enacted in the Tribunals, Courts and Enforcement Act 2007) first used the phrase ‘Proportionate Dispute Resolution’ or PDR. The White Paper explained the concept of PDR as follows:

‘[Our strategy]... starts... with the real world problems people face. The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provides tailored solutions to resolve the dispute as quickly and cost effectively as possible. It can be summed up as ‘Proportionate Dispute Resolution’. (Department for Constitutional Affairs 2004, p. 6).

PDR, therefore, involves the resolution of disputes in a way that is quick, cheap and tailored to the particular dispute. The recent Jackson reforms of civil procedure have further emphasised the need for parties in dispute to consider alternatives to traditional litigation, so that since 1 April 2013 resolving disputes through ADR has needed to be given serious consideration in almost all civil claims in England and Wales (Blake *et al* 2013).

While the notion of PDR and an approach that sees the justice system as needing to provide a 'horses for courses' menu of options for resolving disputes is accepted, there remains uncertainty over what this means in practice. While it is accepted that different disputes may require different resolution processes, it is not always clear how decisions can be made about matching disputes to processes nor who should be responsible for making those decisions.

This was one of the questions which the Administrative Justice and Tribunal Council's (AJTC's) report on developing a strategic approach to administrative justice sought to grapple with: how should the system of redress be designed to ensure that it efficiently married up the varied disputes that citizens might wish to raise with the most appropriate resolution mechanism to address that dispute (AJTC 2012). The AJTC put it as follows:

'The key question in the search for a more proportionate dispute resolution system is "which techniques, or types of scheme, are suitable for which type of case?" More colloquially, "which horses for which courses?"' (AJTC 2012, p. 33).

In order to answer this question, the AJTC suggested a range of 'mapping factors' which could help to inform decisions about the most appropriate redress options available. The overall factors suggested in deciding which mechanism to use were as follows:

- capacity of the parties to participate effectively;
- whether and how the parties are represented;
- context of the case, including the history of past disputes;
- any identified need for urgency;
- nature, importance and complexity of the issues in dispute;
- the likelihood of an agreed outcome; *and*
- cost to the parties and to the taxpayer. (AJTC 2012, p.36)

As well as providing these general factors, the AJTC highlighted a number of issues that would tend to argue towards a specific form of dispute resolution. An adapted version of these factors is shown in table 5, over the page.

Table 5: mapping factors in selecting a dispute resolution process

| Process | Factors favouring process |
|-------------------------------------|---|
| Traditional hearing | <ul style="list-style-type: none"> • Involves fundamental legal rights • Allegations of fraud/disputes over issues of fact or where reliability of testimony requires to be tested • Cases where the presence of the parties is essential • Cases where there are allegations and counter allegations about conduct |
| Adjudication without hearing | <ul style="list-style-type: none"> • Where a dispute involves service failure or maladministration • The dispute is about the quantum of a financial claim • Dispute about entitlement to a financial claim • Findings of fact can be made by written and telephone enquiries • The dispute does not affect the livelihood or reputation of the parties and is objectively of low priority |
| Mediation | <ul style="list-style-type: none"> • There is an ongoing relationship between the parties • An apology, concession or explanation could help resolution • Flexible options need to be explored • The matter is complex and lengthy • Involves more than two parties • Process needs to be confidential |

(Adapted from AJTC 2012, p.36)

The literature on ADR suggests a range of further criteria that may be necessary to consider when deciding what kind of dispute resolution process will be most suitable to any given dispute. Table 6, below, provides a summary.

Table 6: criteria for the selection of an ADR option

| Criteria | Comments |
|----------------------|---|
| Cost | In low value cases, there will be a need to keep costs proportionate to the dispute. Negotiation and mediation can be cost effective in that context. In higher value cases, negotiation, mediation or expert determination might be cost effective, depending on the dispute. |
| Speed | If quick resolution is important, a non-adjudicative option such as negotiation or mediation might be effective. In appropriate cases adjudication or expert determination can also be conducted fairly quickly. |
| Party control | Parties may want control over both the process and outcome of their dispute. In non-adjudicative ADR they have control over the outcome, as this requires an agreement to be reached. In adjudicative ADR, while the outcome is beyond the control of the parties, they can retain varying degrees of control over the process. |

| | |
|------------------------------------|--|
| Objectives | Different objectives can be best achieved in a range of ways. If the objective is financial, any form of ADR can be used. However, if the objective is non-financial in whole or in part, methods such as mediation may be more helpful because of the degree of discussion between the parties. |
| Ongoing relationship | If an ongoing relationship exists, such as a family or commercial relationship, a non-adjudicative option is likely to produce the most successful outcome as terms can be fully discussed and agreed. |
| Need for expertise | If expert opinion is important then expert determination may be considered. Using expert evidence in litigation is almost inevitably more expensive and time consuming. |
| Need for neutral assistance | If parties become focused on 'winning' their case they may find it difficult to compromise. In such cases adjudicative processes may be the only option, although an effective mediator may be able to help parties assess the strengths and weaknesses of a case more objectively. |

(Adapted from Blake *et al* 2012, pp. 20-22)

Designing redress for ADR schemes

It will be clear that there are a number of ways of resolving disputes, each with their own advantages and disadvantages, and each with different factors arguing for them depending on a wide range of circumstances. As noted above, ombudsman schemes generally have considerable flexibility to shape their processes in ways that will allow them to resolve disputes in the most appropriate fashion.

Ombudsman schemes are able, therefore, to provide parties to a dispute with a range of options as part of their dispute resolution processes; this can include information giving, conciliation, formal mediation, use of experts, adjudicative approaches and, in some cases, use of formal hearings. The exact processes used and overall shape of the ADR scheme will be determined by issues such as the nature of the dispute and the regulatory or statutory context in which the scheme operates.

Hodges *et al* (2012) in their study of Consumer ADR in Europe proposed three different models to show the ways schemes they studied tended to organise their dispute resolution processes. The first shows how a scheme can integrate a range of techniques for dispute resolution into its overall structure, initially through direct negotiation between the parties, then by some kind of attempt to conciliate by the ADR scheme and finally with the provision of a final decision. Figure 2 below shows this model.

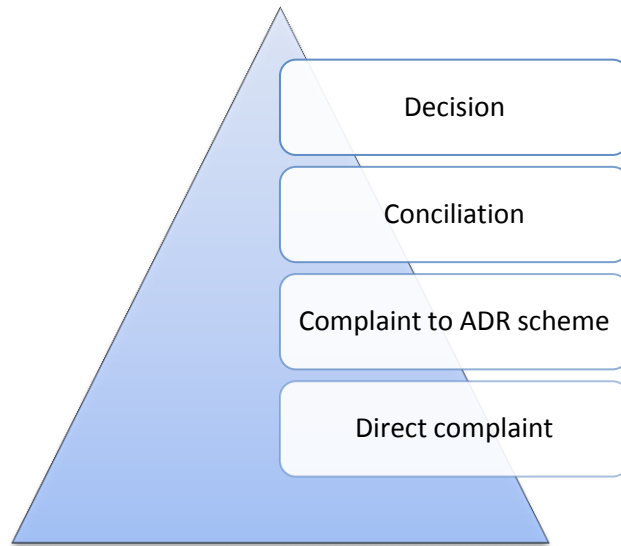


Figure 2: Integrated use of techniques by ADR providers (Hodges et al 2012, p. 406)

The next model is an elaboration of the model proposed in figure 2 and involves a more sophisticated and complex structure of dispute resolution. This model demonstrates the kind of internal processes and safeguards that ombudsman schemes can devise to work towards consistency and quality of decision making.

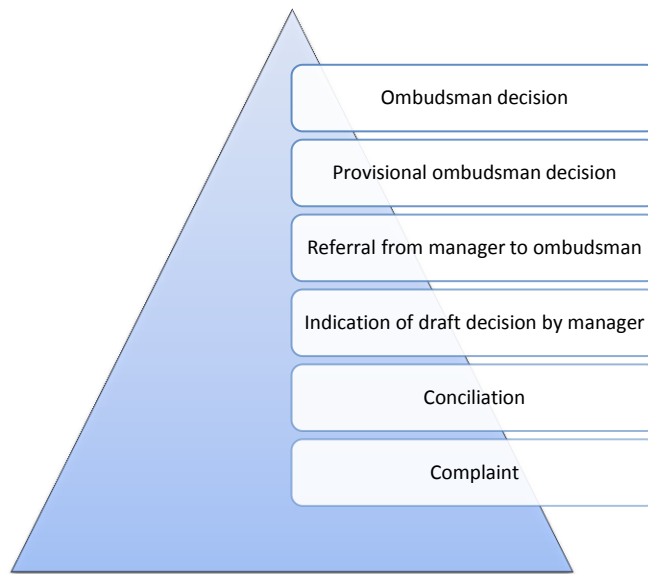


Figure 3: More sophisticated model for escalated techniques (Hodges et al 2012, p.406)

A final model proposed by Hodges et al describes the kind of process often used by trade associations operating a conciliation service for their members and their customers. This involves a referral being made to the trade association, which will try to reach a settlement between the parties.

If this fails, then reference can be made to a third party ADR scheme to take a final binding decision. The model is shown in figure 4.

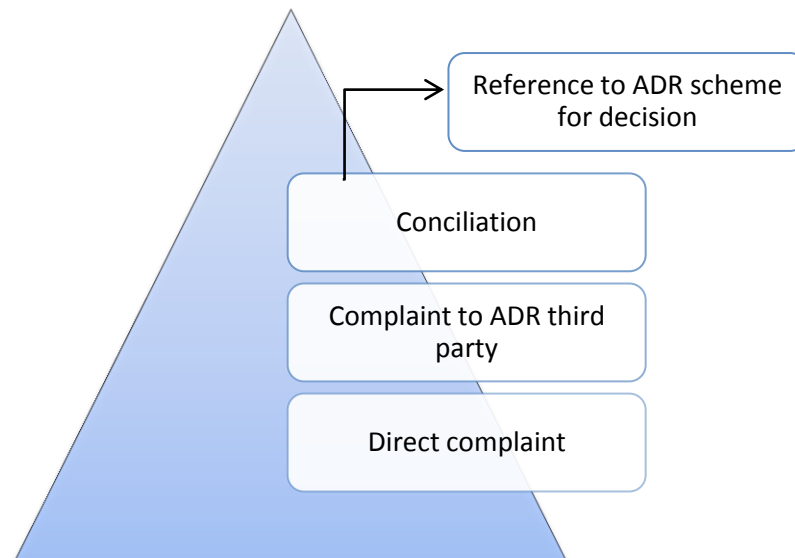


Figure 4: Escalation model with an outsourced decision function (Hodges et al 2012, p.406)

As Hodges *et al* point out, a key goal of providing different techniques and stages of dispute resolution is to try to ensure that disputes that can be resolved quickly and easily are resolved at as early a stage as possible. Proportionality is a key aim of this kind of triage mechanism.

In terms of the overall design of a redress system, Bondy and LeSueur (2012) have proposed (amongst others) two more abstract models for explaining how the internal processes of a dispute resolution mechanism might be set up: the filtering model and the resolution model. The filtering model explains how redress schemes may aim to ration access to their more robust, detailed and costly processes by filtering out those disputes which are not suitable. Common reasons for cases to be filtered out include a lack of jurisdiction, the fact that a dispute has not been made first to the body complained about and, finally, because disputes are thought to lack merit based on an initial assessment of a case. The filtering model can also involve an element of signposting, where members of the public are guided towards a more appropriate mechanism. The filtering model is shown in figure 5 below:

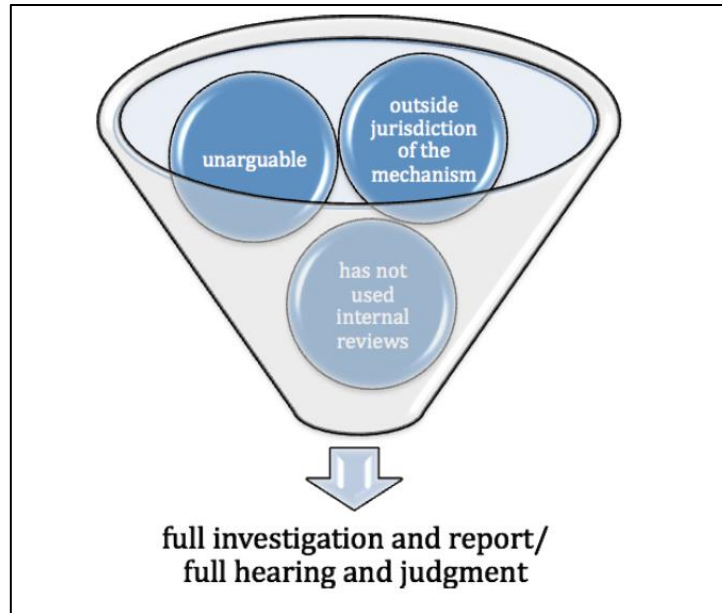


Figure 5: the filtering model (source: Bondy and Le Sueur 2012, p.11)

Most, if not all, ombudsman schemes will conform to the filtering model and Bondy and Le Sueur note that filtering is a major part of the work of all external grievance handlers. The second model described by Bondy and Le Sueur is the 'resolution model', with resolution being a relatively novel concept in the world of administrative justice if not in consumer oriented ombudsman schemes. The overriding purpose of this model is to try to resolve disputes at the earliest opportunity. Bondy and Le Sueur suggest that, for established redress mechanisms, this model involves the introduction of facilitative dispute resolution approaches to bypass the need for a full investigation, a formal decision or a hearing. Examples of the kind of approaches that might be introduced include negotiation, early neutral evaluation, mediation and local settlements. Figure 6 provides a visual representation of this model.

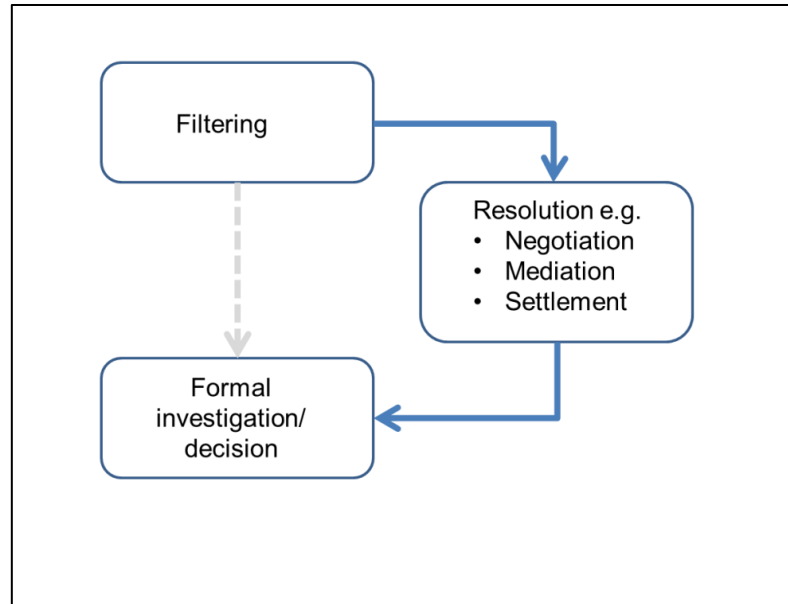


Figure 6: the resolution model (Based on: Bondy and Le Sueur 2012)

We propose a further model that may be introduced to build on Bondy and Le Sueur’s work: the prevention model. In this model, the actual processes of dispute resolution exist not only as ends in themselves but for the purpose of providing dispute resolution schemes with the material and expertise with which to perform a preventative role in the resolution of disputes. Figure 7 shows this model.

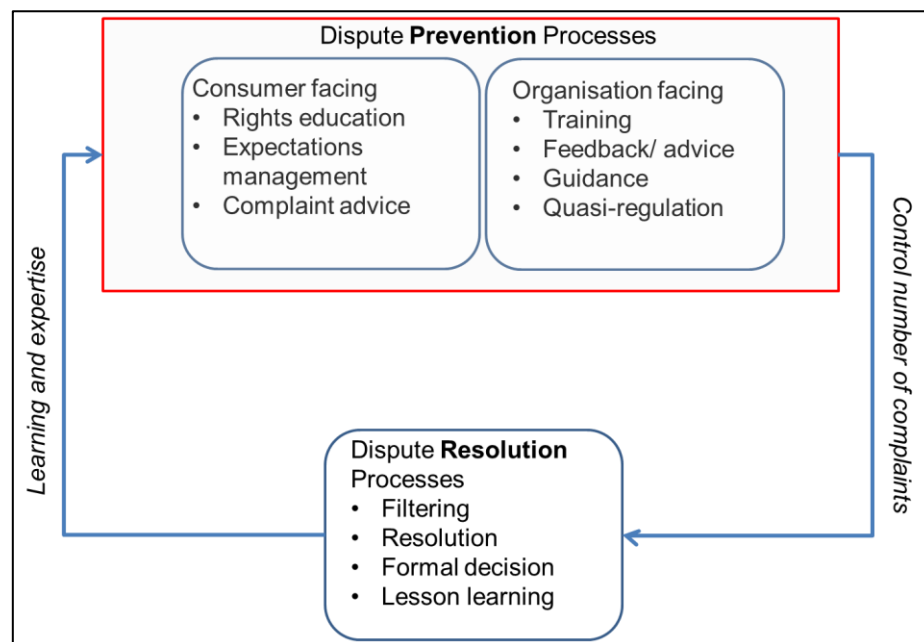


Figure 7: the prevention model

The prevention model fits with the vision of dispute resolution set forth by the AJTC when they described a 'strategic approach to administrative justice' (AJTC 2012, p.1). It has two focuses: on consumer empowerment and education, and on helping organisations to improve. By providing advice and guidance and by helping consumers to understand issues with service delivery, ombudsman schemes can help consumers understand the strength of their cases. They can also be helped to complain to organisations effectively, in ways that maximise the chances of successful outcomes.

At the same time, dispute resolution schemes can assist organisations to improve the services they provide and the way in which they handle disputes. This can involve relatively informal feedback and advice or the publication of more formal advice and guidance. In Scotland, the prevention model has been taken to the next level by providing the Scottish Public Services Ombudsman with quasi-regulatory powers in relation to public services complaint handling (Gill 2014). The prevention model attempts to capture the 'added value' that ombudsman schemes, in particular, are often said to be well placed to deliver in addition to a basic dispute resolution service.

It will be clear that the models discussed above provide a simplified and partial account of how dispute resolution schemes might be organised. However, they are helpful in providing an analytical structure within which issues of redress design can be considered and provide the context within which the case studies discussed later in this report may be understood.

Summary

Ombudsman schemes inhabit the unique world of Consumer ADR, a key feature of which is significant variety and flexibility in terms of structure and process. In addition to investigation and reporting, a range of alternative dispute resolution approaches and processes are available to them in order to resolve disputes.

Each approach has particular advantages and disadvantages, as well as certain criteria which argue in favour of them being used to resolve a particular type of dispute. There are also a number of models which can be identified to help explain the role that various forms of ADR process might have to play within the design of a traditional ombudsman scheme. Ultimately, the key questions this section has addressed are: what options are available in the design of a dispute resolution scheme and how might choices be made to ensure such a scheme is appropriately designed? We will return to these questions in the concluding section, where a model will be proposed to clarify the design choices available to ADR providers.

A key area where there is scope for further consideration relates to the impact of technology on dispute processes. In a world that is increasingly moving online, how might dispute resolution adapt in order to keep pace with change but also exploit the potential of technology to speed up procedures, improve access to information and even assist the process of decision making? The next section considers these questions.

ADR design in an online world

Introduction

Online Dispute Resolution (ODR) is the use of information and communications technology to help disputants find resolutions to their disputes and is emerging as an increasingly important approach for resolving consumer complaints. Initially designed to resolve high volume and low cost consumer e-commerce disputes, ODR has developed to enable its use for complaints about financial services, property tax and complaints to Ombudsman organisations, such as the Internet Corporation for Assigned Names and Numbers (ICANN). According to Fowlie (2011), the inaugural ICANN Ombudsman, ODR is a process that can be used to improve or supplement most ADR techniques. It applies both to online disputes and to real world complaints and can be *technology-based* or *technology-assisted*. In technology-based ODR, parties are helped through, for example, blind-bidding systems to arrive at an optimal outcome. Technology-assisted ODR uses tools to increase the efficiency of human-based approaches such as investigation, questioning, presenting options and communicating findings and may be particularly attractive to ombudsman and ADR organisations. This section gives an analysis of the key issues associated with ODR and assesses its potential, drawing from a case study looking at eBay's system of dispute resolution.

Definition of ODR

ODR refers to the settlement of disputes in an electronic environment using information technology. It is defined as a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology (Philippe 2014). According to Kolar (2014) this is a new way to resolve disputes, giving those with a need for ADR different opportunities and processes on which to draw. Flexible scheduling, asynchronous communication, privacy and real-time dialogue may make this attractive for modern, tech-savvy consumers. Kolar also identifies anonymity as a useful feature of ODR, acknowledging that face to face confrontation can be stressful and intimidating, whereas resolving a complaint online eliminates that concern.

Types of service which may be offered in an ODR system include:

- Automated and assisted negotiation;
- Online mediation (may be text based or involve virtual meetings);
- Online arbitration (may be text based or involve virtual hearings);
- Online ombudsman schemes (essentially ombudsman schemes that operate using an online platform for the exchange of information between all parties); *and*
- Problem diagnosis, pre-negotiation solution wizards, and online filing/ case management.

ODR platforms

An ODR platform is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications – it is also a case management system, in addition to a communications platform (Philippe 2014). When designing an effective ODR tool, the core case management functions should be automated, including registration, acknowledgement, notifying the

ADR organisation, reminders for deadlines and recording of outcomes. A well designed ODR platform emphasises the transparency of the dispute resolution process which may give parties a sense of fairness which in turn may increase trust in the system. ODR systems can be designed to settle the majority of complaints without the intervention of independent third parties. In automated systems:

- Most disputes are resolved at the first stage after parties have exchanged all of the relevant information; *and*
- A small proportion will then progress to the next stage, such as an ombudsman or other form of adjudicator (Cortes 2014).

Rabinovich-Einy and Katsh (2012) provide some guidance for organisations on the verge of creating an ODR platform. They are advised to be clear on:

- (1) The role of the dispute systems designer;
- (2) The goals and incentives of the organisation in setting up the dispute resolution system;
- (3) The needs and interests of the stakeholders; *and*
- (4) The nature, characteristics and suitability of different dispute resolution processes and tools.

The profile of ODR and the use of online dispute resolution platforms is about to expand significantly in light of the EU's ODR regulation. This will involve the creation of a new ODR platform for disputes that arise from online transactions (Hodges *et al* 2012). It will provide an interactive website with a single point of entry for consumers who seek to resolve disputes out-of-court. The platform will link all the national alternative dispute resolution entities and will operate in all EU languages. This platform will direct consumers to the relevant ADR provider and is expected to be operational in January 2016.

ODR example: blind-bidding negotiation

In blind-bidding negotiation, confidential offers are made by both parties and are only disclosed when they match certain standards (normally between 5% and 30%) or a specific amount of money. The dispute is settled at the mid-point of the two offers (Cortes *et al* 2012). Rabinovich-Einy and Katsh's study view these innovations as having cut out a laborious process using technology. An early example of this type of ODR was developed by Cybersettle. Cybersettle provided a consumer settlement and payment platform enabling high transaction volumes in a secure cloud computing environment. They used this approach in complex areas of healthcare to recover payments and in insurance to increase productivity in claims management. Cybersettle suggest this reduces backlogs of complaints, reduces settlement costs and improves negotiation productivity (Cybersettle 2014). SmartSettle are a Canadian organisation that also use game theory to assist the mediator in identifying the true needs of the parties and encouraging trade-offs (Ross 2014). In commenting on a draft of this report, one of the experts we spoke with noted that this kind of blind bidding approach had fallen out of favour and that the industry was looking at more nuanced approaches to dispute resolution.

The advantages of ODR

Table 7 below highlights some of the possible advantages in using ODR to resolve disputes.

| Possible advantages of Online Dispute Resolution |
|---|
| Enhances consumer confidence |
| Solutions and resolution are prioritised over blame |
| Costs are lower and technology adds value |
| Aids communication |
| Easy for parties to track progress |
| Consumers may prefer no face to face contact, consistent with their transaction |
| Consumers may be empowered through anonymity |
| More flexibility – people want to complain when it is convenient |
| Helps reduce jurisdiction barriers, particularly useful for cross-border commerce |
| Works well for straightforward money disputes about products and services |
| More consistent outcomes for investigators – guides thinking |
| Exit satisfaction surveys can be used to scale customer views |
| Encourages learning from data |
| Pre-designed text helps complainants to frame their complaints - avoids free text |
| Speedy response means complainants are less likely to post adverse reviews |

The disadvantages of ODR

Table 8 below highlights some of the possible disadvantages in using ODR to resolve disputes.

| Possible disadvantages of Online Dispute Resolution |
|--|
| ODR systems can appear impersonal |
| May prove inaccessible for some due to variances of computer ownership along with knowledge of, ability to use, and connection speeds of, the internet |
| Does not work as well for more complex disputes |
| The dispute resolution may be limited to money back as is the case with eBay |
| Disputants are unable to vent their emotions (but may do so in online <i>fora</i>) |
| Meaningful empathy can be lost in print |
| Consumer ignorance of ODR |
| Mistrust of ODR providers |
| Issues of confidentiality |

The suitability of ODR approaches

ODR is likely to be most suitable in the following situations where disputes are:

- Occurring between internet users;
- Of low value;
- High volume;
- Cross-border; *and*
- From the younger generation.

(Cortes 2014, Hodges *et al* 2011, Kolar 2014).

An example of an area where ODR is particular suitable and effective is eBay's dispute resolution processes. This is highlighted over the page in the first of the report's 'case study insights'.



Case study insight: ODR in practice

eBay is an online auction site which provides a marketplace for the selling and buying of goods. It operates an online dispute resolution system for resolving disputes between buyers and sellers. Effective dispute resolution is essential to maintain consumer confidence and ensure that both parties in the transaction feel adequately protected.

The process of dispute resolution begins by eBay asking the buyer to diagnose the specifics of their complaint, and to suggest their preferred solution. Buyers and sellers are encouraged to communicate directly through its messaging platform – this is an ODR platform that allows for the exchange of information between the parties.

If the dispute cannot be resolved, it is escalated to the Resolution Services team within Customer Support for a decision. There is also a money back guarantee – recovery is limited to the purchase price for the buyer, and full reimbursement for the seller. The money involved in the dispute is frozen by PayPal, ensuring enforcement of the final decision. Over 60 million disputes are resolved every year (Hodges *et al* 2011). There is no payment of damages (Del Duca *et al* 2014).

Eighty per cent of the disputes dealt with through the ODR process are resolved automatically. Built in analytics help to identify any underlying issues which, if addressed effectively, will reduce further complaints (Rule 2008). The ODR platform used by eBay employs technology to identify patterns of market failure and poor service such as not responding effectively to complaints.

eBay's model of dispute resolution places significant emphasis on consumer insight, for example, it also has an innovation research lab, which has a focus on gaining insight into consumer issues affecting the operation of the online marketplace. This lab uses different methods to research consumer satisfaction and usage of systems, by gathering and analysing data. There is also a customer forum for sellers and buyers to share experiences and advice between each other. They also offer assistance in understanding eBay's process.

eBay is innovating in terms of its processes and evolving how it resolves disputes. One innovation is the use of crowdsourcing to assist in dispute resolution. This involves inviting experienced sellers and regular buyers to join a community court. When a case goes to this court, 100 members of the court receive the information and this generates a crowdsourced outcome (Rule 2010).

Consumers receive very quick responses for eBay disputes. Research at eBay shows that suppliers prefer to lose a case in a small number of days than spend weeks in a complaint that they eventually win (Rule 2011). An incentive is to reduce the case fees to reward parties who settle complaints early. Further, the opportunity to have adverse feedback removed in exchange for dispute settlement within eBay incentivises parties to participate in the process.



Some points to note:

- Using an online dispute resolution platform to provide accessible, transparent and facilitative dispute resolution
- Providing options for settlement and a list of possible solutions to assist and encourage the settlement of disputes
- Maximising the opportunities for the exchange of information and developing shared understanding during the negotiation stage
- Providing access to independent third party adjudication where necessary
- Innovating by using crowdsourced outcomes and by building consumer feedback and exchange into the process

Summary

Following their analysis of ODR, Betancourt and Zlatanska (2013) conclude that, while it might be the best option for some complaints, it is not a panacea. Nevertheless, ODR is increasingly being used by arbitrators and mediators. Ombudsman organisations may find ODR an attractive option for the future, particularly for their higher volume, lower value cases and for assisting decision makers in more complex cases. New ADR schemes or schemes in the process of reviewing their current approaches should be giving careful thought to the potential for technology to facilitate and improve the way in which certain disputes can be resolved. This report now turns to the case studies and provides a description of the data obtained in the course of the research.

The case studies: early stages of dispute resolution

The next three sections present the empirical findings of the research and highlight some of the key insights gained from the case study organisations. The factual background for each case study organisation is provided in Annex 3. In presenting information about each case study, the aim has not been to provide a holistic description of each dispute resolution model. Rather, the report identifies ‘case insights’, where a particular process, practice or approach seems either to provide a good illustration of a certain approach to ADR or appears to provide an interesting and distinctive take on dispute resolution. For each ‘case insight’ we have listed some ‘points to note’ which draw out some of the key issues that arise from a particular case.

As noted in previous sections, most ombudsman and ADR schemes attempt to resolve complaints at as early a stage as possible. To do this, they employ a range of techniques such as shuttle negotiation, facilitated discussion, expectation management and conciliation. As Hodges *et al* (2012, p.452) comment, most consumer ADR schemes follow a series of simple steps:

- a. Consumer contacts trader;
- b. Consumer contacts the Consumer ADR body, or is referred by the trader;
- c. Consumer ADR body tries to conciliate; *and/or*
- d. Consumer ADR body makes a formal determination on a fair solution.

This section looks at case study examples of approaches used by ADR schemes at an early stage and is concerned with step ‘c’ in the sequence above. While conciliation forms an apparently straightforward part of the overall process used by ombudsman and ADR schemes, it should be noted that there remains uncertainty about what this process looks like. For example, Bondy *et al* (2014) have found a lack of consistency in relation to the terminology used to describe their processes at this stage. Some refer to conciliation, some to facilitation and others to informal resolution. Our aim here is not to replicate Bondy *et al*’s work in mapping out and making sense of processes used across the board; instead, we provide illustrations of different approaches used to informal resolution amongst the case study organisations included in our research.

In terms of the different approaches that can be identified at stage ‘c’ of ADR scheme processes, these can be grouped into the following categories:

- *Evaluative approach*: a caseworker establishes and evaluates the basic facts of a case and provides the parties with a provisional view or decision which can be appealed to a more senior caseworker. The key feature of this approach is that it is fact based and involves an evaluation of the merits of a case.
- *Facilitative approach*: a caseworker does not evaluate the facts of the case but looks for common ground between the parties and opportunities to suggest options for resolving a dispute. If possible solutions are not evident or if proposed solutions are not accepted

by the parties, then the caseworker proceeds to a more evaluative approach. The key feature of this approach is that it is solution focused and forward looking; it is not concerned with the merits of a dispute, only with how a solution could be found to overcome it.

- *Conciliatory approach*: the caseworker brings parties together and gives them the time and space to reach an agreement amongst themselves. This approach is similar to mediation (see next section), except that the caseworker is able to provide an opinion on the merits of the dispute, and to make proactive suggestions about what a reasonable outcome would be. The key feature of this approach is that parties are expected to be more engaged in finding a solution for themselves, with the caseworker intervening only to overcome impasses.

Many of the case studies included in the research demonstrated practices which fell within these categories, and this section discusses examples of different ways in which disputes are resolved at an early stage.

An important issue when discussing such approaches relates to the extent to which clearly defined procedures are desirable and effective when seeking early resolution to disputes. One might argue that what is required to resolve cases is the creativity and flexibility to find appropriate solutions to what are often very different and unique sets of circumstances. An overly procedural or mechanical approach might be seen as limiting and constraining the potential of an ADR body to achieve quick, tailored solutions to problems. The Ontario Ombudsman's Early Resolution Team illustrates this issue by laying emphasis on an "issue based" rather than a "process based" approach to the early resolution of complaints. The paragraphs below provide a summary of the Ontario Ombudsman's approach.



Case study insight: an "issue based" approach

The Ontario Ombudsman is one of Canada's provincial public service ombudsman schemes (the factual background to the organisation is in Annex 3). Of the 50 members of staff involved in frontline case handling, 27 work in the Early Resolution teams; there are three teams, each with one manager and all led by a Head of Early Resolution. In 2013-2014, 72% of complaints were dealt with within two weeks, and the Early Resolution teams were responsible for handling the bulk of the 26,999 complaints received.

The process followed by the Early Resolution teams is described as 'shuttle negotiation' by the organisation. An interviewee told us the Early Resolution teams were 'critical to the organisation's success' with great emphasis placed on the fact that frontline staff are highly trained and knowledgeable. When members of the public call the office, they reach Early Resolution Officers immediately (rather than administrative or call handling staff) and have direct access to expert advice at the frontline:

“When somebody contacts our office they’re not bumped through to different departments... It’s one stop shopping with highly qualified individuals... So I think that that’s fairly innovative as far as, you know, having these really qualified individuals upfront that do the bulk of the work.” (Interviewee)

A key part of the work of the Early Resolution teams is assessment and triage, with cases being screened to determine the most appropriate way to deal with them. Some cases could be dealt with very quickly, others would be referred to the investigations team if more complex or to the Special Ombudsman Response Team if it was clear they involved systemic issues. Again, investment in high quality staff at the frontline was seen as essential to the organisation’s effectiveness in triaging cases.

An important feature of the Early Resolution teams’ work was described by an interviewee as an ‘issue based’ approach to dispute resolution, which tried to avoid over reliance on process in favour of finding creative and appropriate ways to deal with problems. For example, while there was an expectation that cases would be dealt with quickly, the organisation was not driven by managerial concerns around timeliness:

“We don’t really have set timelines or procedures as far as how long cases should take, and I think that’s one of the unique features of our organisation is that we’re not process oriented as far as, you know, trying to set timelines as to how long a case should take. The reason being is that we’re very issue based and the expectation is that, and a sort of key approach to the work is that all cases are dealt with in a timely way, that they’re relevant and that we are responsive.” (Interviewee)

The issue based approach was seen as ‘liberating’ and being important to the ombudsman’s mission in ensuring administrative fairness:

“We’re not process based as are a lot of organisations that we investigate... that’s some of the things that the ombudsman speaks out against quite regularly as far as... trying to get organisations to get over rules... those are fine, obviously, and there has to be some structure but the focus is really on... what is the significance of the issue and what is the impact of the issue... it’s not the type of work that is conducive to... rigid rules and procedures. They [case officers] have to think outside the box. They have to be highly analytical and creative in their approach” (Interviewee)

While flexibility and allowing themselves to be guided by the issues rather than process is a key feature of the organisation’s approach, there were nonetheless some common features to how the Early Resolution teams went about achieving resolutions. Although described as shuttle negotiation, it did not appear that the process involved attempts to get the parties in dispute to agree a resolution amongst themselves. Instead, the process of early resolution was fundamentally evaluative, with Early Resolution Officers gathering and assessing facts and then pushing for resolutions based on their factual understanding of a case:

“I mean our goal, ultimately, is to resolve complaints efficiently and effectively. So that means going to the right... people. Usually once you’re able to present the facts, once you’ve

done your homework, and present them to the right individuals at the right level within a particular Government organisation that's where we can achieve results.” (Interviewee)

The process of resolution seemed to be less defined by attempts to get the parties to agree amongst themselves, therefore, and more concerned with persuading the parties (both the complainant and the public body) that the Early Resolution Teams’ assessment of the facts meant a particular outcome was required:

“It’s focused, it’s through the fact gathering, the fact finding, the moral suasion, a lot of it is informal enquiries or investigations and escalating enquiries up the chain as necessary and, you know, speaking to the people that we need to speak to as opposed to relying on protocols or contacts, et cetera.”



Some points to note:

- **Emphasising creativity and flexibility over procedural rules as the best way to achieve satisfactory dispute resolutions**
- **Empowering highly qualified staff at the ‘front end’ of a dispute resolution process to maximise the effectiveness of triage and early resolution and provide a ‘one stop’ experience to consumers**

An interesting contrast to the Ontario Ombudsman’s approach – where acceptance of an early resolution is largely predicated on the threat of a formal investigation and the persuasion skills of the caseworker – is the approach used by the New Zealand Banking Ombudsman. Here, a sophisticated system of case fees helps to provide an incentive for complaints to be resolved at as early a stage as possible. While case fees are a feature of a number of private sector ombudsman schemes in the UK, the use of a sliding scale of fees provides a useful example of the way in which a fee-model can be calibrated to promote the quick and efficient resolution of disputes. The paragraphs over the page summarise the New Zealand Banking Ombudsman’s approach.



Case study insight: incentivised facilitation

The New Zealand Banking Ombudsman is one of four ombudsman schemes dealing with disputes about banking in New Zealand. A particularly interesting feature of this scheme was the sophisticated system it operated for incentivising the early resolution of disputes. Fees are charged annually, calculated on the following basis:

- 25% based on the market share of the financial service provider;
- 75% based on the complaint handling performance of the service provider in the previous year – this includes:
 - 8% based on the number of complaints received by the ombudsman that had to be referred back to service providers; and
 - 67% based on cases resolved by the ombudsman, classified according to a seven point scale depending on how far they had to be escalated. For example, point 1 on the scale referred to a straightforward closure based on jurisdictional grounds, point 2 to a facilitated outcome, while point 5 referred to initial written assessments and point 6 to formal decisions and recommendations.

The effect of this structure was to engender pragmatism and a greater likelihood of early resolution:

“So they’re incentivised to try and resolve them and what that does lead to is I think a greater willingness of the participants to try and find a resolution. To be honest, it drives some participants to pay their complainants off. They would rather sustain the extra 500 or 1000 dollars to make something go away than pay the 6000 or 7000 dollars it might cost to go right through to a written assessment. So it does engender some pragmatism.”
(Interviewee)

The facilitation process employed by the organisation is similar in some respects to that described in the case of the Ontario Ombudsman, particularly in relation to the way it operates as an evaluative process:

“Before you attempt facilitation, you’ll read the whole file and get a feel for what you think the outcome would be if it went right through our process, and then it does turn into a little bit of a shuttle negotiation so then you share your view as an investigator with both the complainant and the participant. So it might be explaining to the complainant that based on previous cases we’ve had here and the particular circumstances of your complaint, I can’t see that this would be upheld.” (Interviewee)

The facilitation process was, therefore, an early attempt to persuade the parties that a particular outcome was required and to the extent that it involved negotiation, this was a matter of negotiating acceptance between the case handler and the party to whom a likely adverse finding was being communicated.

While the organisation could see a place for more agreement-based procedures being used in their dispute resolution scheme, they pointed out that consumers and participating banks came to the ombudsman expecting an expert opinion on a case and that, by the time a case came to the ombudsman, consumers would be expecting an authoritative view on the merits of a case:

“I think there may well be room for a more pure mediation approach in ombudsman schemes but in my experience a lot of times consumers are looking for guidance and expertise when they come to a scheme like ours and so they want to know what the likely outcome might be or they want our expertise and experience, and particularly given that it’s a relatively informal process. They often haven’t had professional legal advice. They may not really have a good sense of what is fair or what is right and so we often fill quite an important role in helping to inform customers about what the fair outcome would be because we see these sorts of things every day and for them, they may never have dealt with an issue like this before.” (Interviewee)

In common with other financial services ombudsman schemes around the world, the organisation included the option for consumers and service providers to reject suggested outcomes during the facilitation stage. This was seen as an important safeguard to ensure fairness and is different to the model generally used by public service ombudsman schemes:

“I think the other important thing that we do in our facilitation process is that we always make it clear to the parties that they have the option of going through to the formal written decision. So the investigator may express their view that a certain outcome would be a fair and reasonable one, but the complainant is always informed they don’t have to accept that and they can get the ombudsman’s decision so they always know that that option is there.” (Interviewee)

The process of facilitation was very much telephone-based and direct contact with complainants was seen as key to ensuring a good understanding of issues and allowing complainants to feel heard. Feedback received by the organisation from consumers was that a personal touch was appreciated. Interestingly, the organisation also offered a conciliation process as part of its approach to dispute resolution, however, this was little used as the facilitation process was found to be a flexible solution to most cases.



Some points to note:

- **Using a sliding scale of fees to ensure that businesses are incentivised to resolve disputes at the earlier stages of the process**
- **Emphasising telephone facilitation as a more effective approach to dispute resolution than face to face conciliation**
- **Ensuring that consumers still have access to a formal decision if facilitation fails**

A central design feature of the New Zealand Banking Ombudsman scheme (and one which is shared by many UK private sector ombudsman schemes) is a two stage process where the initial decision of a caseworker can be appealed to a more senior decision maker.¹ This is the model broadly described by Hodges *et al* at page 33 above.

While this feature can be seen as a measure to ensure the robustness of decision making and to provide a procedural safeguard for the parties, some of the case study organisations used a system whereby – although there were two stages to the process – access to the second stage was controlled by the caseworker rather than the parties. Progress was not based on whether or not the parties accepted an initial decision, but on a caseworker’s assessment of the complexity of the case and whether, on the presenting facts and circumstances, it required the use of a more formal procedure.

This is the approach used by the Furniture Ombudsman, where caseworkers are in control of the process to be followed and where the caseworker’s decision (whether taken at the conciliation or adjudication phase of the process) is essentially final. The granting of discretion and authority to caseworkers was seen as a key feature in achieving quick and proportionate resolutions to complaints. This shares some similarity with the Ontario Ombudsman’s “issue based” approach, in that frontline caseworkers are trusted and empowered to reach appropriate decisions at an early stage of the complaint process. The paragraphs below describe the Furniture Ombudsman’s approach.



Case study insight: empowered caseworkers

The Furniture Ombudsman is a small (9 members of staff), voluntary membership-based dispute resolution scheme dealing with complaints from consumers about furniture and home improvement services. The Furniture Ombudsman has a conciliation stage and a formal adjudication stage in their process. In 2012-2013, 90% of cases were dealt with at the conciliation stage of the process. The organisation aims to conclude cases in 90 days, with the conciliation stage aiming to conclude in 30 days (at present more like 40 to 60 days). At the time of the researcher’s visit to the office one ombudsman² had 180 open cases, with high case loads of around 150 open cases per ombudsman being the norm.

An important design feature of the organisation’s process is that cases are dealt with by the same caseworker, whether a case is conciliated or adjudicated.

“My perception is that if you give a complainant a two stage process and you say ‘this is my decision, but if you don’t like my decision you can go to somebody else’, if there’s no cost implication, why wouldn’t you go all of the way? I also think that from a staff point of view it’s

¹ While the process generally follows a sequential two stage process, case workers can proceed directly to a written adjudication report if that appears to be the most appropriate way of dealing with a complaint.

² Caseworkers in the office of the Furniture Ombudsman are now called ‘ombudsmen’. The office includes 2 ombudsmen, 2 senior ombudsmen and 1 chief ombudsman

important that you empower your staff... and that you say: 'You have absolute power in this case. You're not a cog'." (Interviewee)

The approach of having a single caseworker dealing with both the conciliation and adjudication process was that it avoided duplicate work, prevented mistakes through handover and allowed the case handler to manage expectations more effectively. Another key feature of the organisation's process is that the decision on whether cases should be settled through conciliation or adjudication is entirely up to the caseworker: he or she controls the dispute resolution process. The parties do not have a say in how cases are dealt with and cannot, for example, request a formal adjudication if the caseworker does not consider that that would be the best way of dealing with a case.

"It is totally in the hands of the [caseworker]. Even if a retailer comes and says 'I would like it to go to adjudication', we would always look to see whether it needs to go to adjudication or not." (Interviewee)

Effectively, cases will only progress to formal adjudication where a consumer's case appears reasonably strong and there are conflicts in evidence or other important points of contention requiring expert independent opinion in order to resolve the dispute:

"If we think that there's an issue based on our experience or that the consumer has done enough to get their case off the ground but the retailer still won't make any offers and stands by their report, that's when we might proceed to adjudication. The independent inspections are another stage of evidence gathering that allow us to make... a formal decision at that point." (Interviewee)

The process of conciliation itself shares similarities with those of the New Zealand Banking Ombudsman and the Ontario Ombudsman in that it is, generally, an evaluative process where caseworkers collect evidence and make a decision on whether a complaint has any merit and, if it has, whether any existing offers from the business are reasonable. Many of the cases could be dealt with quite quickly, either by providing independent confirmation to consumers that the business acted correctly, or that their offer of redress was reasonable, or by reaching a decision on the facts established during the business' internal complaints process.

"The first part from the point of view of the [caseworker] is to get the information in. So that would be forms from both parties, any inspection reports that have been carried out, and any photographs. And from that we can sometimes make a judgement, for example, in cases where certain problems are more characteristics than faults. In those cases, it's your job to go and explain why there isn't a case and why you're not going to compel the retailer to make any offers." (Interviewee)

The process can, however, involve an element of negotiation, particularly where cases are not clear cut, with businesses being asked whether they wish to make further offers even where a consumer's case is not strong:

"Sometimes there are things that are less clear cut, for example, there might be a repair already being offered and the consumer doesn't want to accept a repair, but would like a different remedy. You're always going to go back to the retailer in such a case and say 'the

consumer doesn't want to accept that, this is the reason they've given; are there any alternative offers you'd be willing to make?'... So from that point of view, even if you look at a case and you actually think the consumer's not got a good case, you would probably approach a retailer and say 'I see where you're coming from but in the spirit of conciliation we'd quite like to see... are there any offers?'" (Interviewee)

One interviewee, comparing experiences in other ombudsman schemes, commented that the flexibility and authority given to the caseworker was a helpful feature of the organisation's process. This helped to ensure credibility with consumers and meant that cases could be dealt with in the most appropriate way. This was seen by the interviewee to compare favourably to other ombudsman schemes with internal appeal stages where the initial decision maker had less discretion and authority.

Caseworkers are assisted in the timely resolution of cases and in dealing with high volumes by a case management system which could be accessed directly by businesses who were members of the scheme. Documents could be uploaded directly by scheme members and progress could be checked. The system also flagged cases which exceeded timescales so that businesses could follow these up. The system was not accessible to consumers; however, consumers received automated text messages and emails at various touch points in the process. The system also offered a facility whereby short standardised text messages could be sent to consumers to provide quick updates on case progress, thus saving the need to write letters and emails.



Some points to note:

- Empowering caseworkers to control the dispute resolution process to ensure that cases are dealt with in the most appropriate manner
- Reducing the cost of dispute resolution by minimising the number of internal stages in the dispute resolution process and controlling access to those stages
- Using quick and semi-automated methods of communication in order to reduce time spent providing updates (e.g. providing text messages)
- Providing access to the case management system for businesses through an online platform reducing the need to provide updates and simplifies the process of exchanging information (although only the business is allowed access at present)

A very different approach is exemplified by the New Zealand Law Society's Lawyers Complaints Service, which operates an Early Resolution Service as part of its process for dealing with complaints about legal service providers. Here, much greater emphasis is placed on ensuring that strong procedural safeguards are in place to manage the early resolution process. Rather than providing high levels of discretion and autonomy to caseworkers as in the examples shown above, here resolution is overseen by a committee system, which both helps identify cases that are suitable for resolution and approves any decisions reached in the course of an early resolution process.



Case study insight: committee oversight of early resolution

The New Zealand Law Society is responsible for regulating lawyers who practise law in New Zealand. It operates the Lawyers Complaints Service which receives all complaints against lawyers and is obliged to investigate all complaints brought before it. The Lawyers Complaint Service was established by The Lawyers and Conveyancers Act 2006. This Act and related regulations set out the process for investigating complaints against lawyers. The Lawyers's Complaint Service has 24 Standards Committees around New Zealand, with at least one in each of the regions covered by a New Zealand Law Society branch.

In November 2011, the New Zealand Law Society's Lawyers Complaints Service commenced a trial of an Early Resolution Service (the NZLS Lawyers Complaint Service ERS) involving complaints from four of the main centres. From 1 February 2013, this was extended nationally. All new complaints are assessed by an initial triage committee for suitability for early resolution:

"Each day all complaints received are reviewed and triaged into either a standard track or the Early Resolution Service (ERS) track. Where appropriate, complaints are referred to mediation using an external facilitator through the formal standard track complaints process. After triage, any complaints allocated to ERS then go to an ERS Standards Committee to consider the complaint and whether it should be accepted by ERS"

And

"The ERS identifies and deals with complaints using alternative dispute resolution techniques. Complaints within the process are dealt with by staff who are trained in ADR, called resolvers, and they undertake telephone facilitation between the parties or explain the process and options to both the lawyer and complainant in cases where there has been a decision by the Standards Committee that the complaint should not go any further."

So essentially, each complaint goes through a 'double triage': an initial triage where staff determine whether the complaint is suitable for early resolution, and a second triage where the Standards Committee gives further consideration to its suitability.

At the time of responding, the NZLS Lawyers Complaint Service ERS employed three part time resolvers and two full time administrative staff. They described their current stance and approach as follows:

"The ERS team presently aims to resolve its complaints within 20 working days. Progress toward that has been achieved but currently complaints within the ERS team are taking an average of 30 days to resolve. If a matter is resolved between the parties with the assistance of an ERS resolver, that agreement must be approved by the Committee. This is a safety net to ensure that only appropriate complaints are accepted into ERS and also that

the agreements reached are acceptable not only to the ERS staff but also to the Standards Committee. That committee is made up of practising lawyers and lay persons and provides useful guidance to the resolvers both as to the substantive issue and process.”

The kinds of cases or disputes which are most likely to resolve through ERS are:

“Minor costs and consumer disputes. It is also easier to resolve a complaint between a lawyer and client than complaints made by third parties against lawyers on the other side. Some lawyer v lawyer complaints are able to be resolved. A number of complaints are received from prison inmates. Taking the time to call these complainants and assist with contacting their lawyers regarding appeals and the like may result in a resolution.”

Parties to a complaint have control over the process, but not always over the outcome:

“If the parties do not agree to the process or are unable to reach an agreement the complaint follows a standard track process. For a resolution of a complaint the outcome needs to be agreed and this may result in the complaint being withdrawn. All agreements are subject to full approval by the Standards Committee. Matters involving misconduct, requiring a more “disciplinary” approach or which indicate protection of consumers is necessary, may be taken further even if the complainant indicates he or she wishes to withdraw the complaint.”

The NZLS Lawyers Complaint Service ERS considers the particular strengths of their ERS model to be:

“Standards Committees made up of lawyers and lay persons deciding whether or not to accept a complaint for early resolution or NFA [no further action] provides a good safety net and provides the resolvers with some teeth. It also allows the resolvers to adjourn a matter if necessary to seek instructions. Telephoning both parties to advise the reason for taking NFA has also assisted parties to understand the process and suggest other options to them. Timeliness is crucial. The evaluation of all complaints provides important feedback. Evaluations indicate a much higher level of satisfaction with ERS handling of complaints than standard track.”



Some points to note:

- Using a Committee to oversee the early resolution stage and managing to maintain good levels of timeliness despite involvement of committee
- Improving levels of satisfaction by making greater use of telephone facilitation techniques
- The faster resolution of complaints through use of the early resolution process

The case study examples referred to so far in this section have concerned adjudicative ADR schemes which use some form of early resolution as part of their overall process. An example of an organisation which does not have the power to adjudicate on disputes and which relies solely on attempts to resolve by persuasion is the UK European Consumer Centre (UK-ECC).

In this case, because it is unable to provide a decision on a complaint, the UK-ECC relies to a much greater extent on the use of persuasion techniques. In common with the other case studies considered so far, the approach is fundamentally evaluative, however, since the UK-ECC needs to establish that there is *prima facie* evidence of a legal breach before getting involved in a complaint. The paragraphs below highlight the approach followed by the UK-ECC.



Case study insight: complaint handling without powers

The UK's European Consumer Centre (UK-ECC) deals with cross border consumer complaints and is a member of a network of 30 consumer centres located across Europe providing advice, information and assistance to consumers. The team of 6.5 staff is funded jointly by the EU and the Department of Business, Innovation and Skills and is delivered in the UK by the Trading Standards Institute, the body representing the interests of trading standards professionals in the UK. The UK-ECC is the busiest consumer centre in the Network. In 2013, they dealt with 9840 enquiries, 4394 of which were classified as complaints.

The lack of any adjudicative or enforcement powers means that the UK-ECC has to use other methods to persuade the parties to settle their disputes. Their website refers to this as being “mediation” but the Director indicated that what they really meant by this was “informal mediation”, not least because each individual European Centre deals with only one of the parties.

“We might use mediation but I think we would clarify that as informal mediation, especially with the ADR and ODR work recently, where actually you were suddenly in an environment where people have a firm view of what mediation is”. (Interviewee)

Complaints will only be considered after the consumer has first complained in writing to the trader and if the consumer has a “*prima facie* legal claim” (Article 3(2) (c) Protocol on Case Handling for the European Consumer Centres’ Network (ECC-Net) 01.7.2010). Communications with traders are relatively robust in making clear the legal position - if the consumer’s allegations are correct. Legal principle was seen as adding weight to their argument when attempting to facilitate a resolution to the complaint, one adviser commenting that the law was often the only pressure they could bring to bear. The link with Trading Standards was also viewed as an important aspect which helped add weight when they contacted traders as indicated below,

“Actually, what we'll do is phone up, say we're phoning from Trading Standards and hope to have a chat and sort it out. And that, at a very simple level, is what we do. You know, we're more informed, we can talk about the law, so we have more authority, if you like, in that sense, a bit more authoritative in that sense... I think we would say we would go further than

negotiation because we are suggesting that there has been a breach here, on the facts that we've been presented with.” (Interviewee)

Managing the expectations of what the UK-ECC can do whilst also not unnecessarily putting off consumers making contact in the first place was seen as a key issue.

“We know that we have quite a high resolution rate anecdotally, just by having the right approach to the trader, the right contact channels and the right knowledge, etc. etc. And that often works. But you don't want to say... I'm trying not to use this phrase - we've got no enforcement powers to put people off actually contacting us.” (Interviewee)

The UK-ECC is an example of how a complaint handling organisation operates when they do not have any formal powers. The techniques they are using are similar to other schemes using early resolution techniques. The relative success that they have despite not having any powers to adjudicate in this area provide a useful way of thinking about whether dispute resolution schemes which do not have the same limitations as the UK-ECC are fully maximising those advantages.



Some points to note:

- **Providing successful outcomes for consumers using powers of persuasion alone**
- **Demonstrating credibility and expertise to convince businesses to settle cases**
- **Demonstrates the need consumers have for advice and information and highlights the question of who should fund this role. In the case of the European Consumer Centres this advice role is publicly funded. ADR schemes may have to fund this via their members.**

It will be evident that, in the cases discussed so far in the report, evaluative approaches tend to be preferred so that, effectively, early resolution refers to a decision taken at an early stage of the process rather than an attempt to foster agreement between the parties.

There were, however, some examples of organisations using processes that aimed to encourage parties to settle issues amongst themselves, with the caseworker facilitating that process rather than imposing a decision as in the evaluative approach. The New Zealand Banking Ombudsman and the Australian Financial Ombudsman, for example, both employ a conciliation process as part of their schemes.

The New Zealand Banking Ombudsman provides a face-to-face conciliation service, which is used infrequently since they find that they are able to resolve the vast majority of their complaints through the facilitation process described above. For the New Zealand Banking Ombudsman, there was some questioning of the extent to which agreement based approaches were useful in their particular context, since they found that consumers were coming to the ombudsman for guidance, expertise and a view on the merits of their case. Asking them to go back to reaching an agreement with the

party with whom they were in dispute would not, in many cases, be particularly desirable for the consumer. It seems, for this reason, the conciliation process is very rarely used.

The Australian Financial Ombudsman operates a telephone conciliation service, which it uses on a more frequent basis and which appears to work successfully. The use of the telephone rather than reliance on face to face conciliation clearly increases the flexibility of the approach and may have an influence on the extent to which it will be appealing to consumers. At the same time, particular jurisdictional requirements are likely to explain the greater degree to which the Australian Financial Ombudsman uses conciliation: all financial hardship cases must be subject to conciliation, thereby ensuring that the process is regularly used. Interestingly, although this approach emphasises the seeking of agreement between the parties (with directions by the case worker encouraging rather than imposing resolution), it appears that the Australian Financial Ombudsman is moving towards a more directive and evaluative system.



Case study insight: telephone conciliation conferences

The Financial Ombudsman Service (FOS) Australia is a dispute resolution service approved by the Australian Securities and Investments Commission (ASIC). FOS Australia is making increasing use of “conciliation conference” procedures to resolve cases over the telephone.

Conciliation conferences are compulsory for financial difficulty cases. However, they can be used in any dispute if they are considered suitable and both parties agree and in that case they will also be allocated to the conciliation team. There has been increasing uptake of conciliation in recent years, in particular in the area of general insurance which traditionally had made little use of it (FOS 2013). If conciliation is not appropriate or the parties do not agree to conciliation the case is allocated instead to a “dispute analyst”, who will use more traditional negotiation techniques to attempt an early resolution.

The telephone conciliation service was described as essentially a three way telephone ‘hook up’ between the applicant, the financial services business and the FOS conciliator. The conciliators have all been trained, and have received at least three days of training on mediation in addition to their usual adjudicator training. Despite this, FOS Australia were clear that the service they provided was conciliation, not mediation, with the conciliator taking a role in facilitating resolution. Satisfaction rates appear very good – 89% of people who went through the process said their experience was positive (FOS 2013). Perceived advantages included the opportunities it gave to address the emotional needs of the complainant particularly in financial distress cases where, for example, the complainant was facing the loss of their family home, and to facilitate apology without admission of legal liability. According to an interviewee, in approximately 70% of cases the conciliation conference resulted in a successful agreement. The funding model for FOS Australia also ensures that there are clear financial incentives to the member for resolving the complaint at the conciliation or negotiation stage.

FOS Australia have recently piloted a new Fast Track Procedure for single issue low value banking and finance complaints (under 10,000 Australian Dollars) which aims to resolve complaints within

60 days. The fast track procedure includes a truncated version of the existing telephone conciliation called telephone “case conferences” (in order to distinguish them from the existing conciliation conferences model). Here, the call with both parties will take a maximum time of one hour. Since these cases should be relatively straightforward, the conciliator will make known their initial view on the dispute, seek comments, and attempt to conciliate a mutually acceptable agreement. If no agreement is reached under the new fast track procedure the same case handler will issue a decision. This is very different from the existing conciliation conference procedure, which emphasises the confidentiality of anything discussed during the conciliation conference, and where if the conciliation is unsuccessful the case is referred on for investigation.

The success of the pilot is currently being evaluated but it is expected that its lessons will be applied elsewhere in the organisation and the pilot will be extended. According to an interviewee, of the 183 cases dealt with under the fast track pilot, 120 cases were settled at this stage.



Some points to note:

- Using three way telephone conferences to bring parties together to discuss and resolve complaints
- Using truncated case conferences which are more directive and involve greater input from case workers in relation to outcomes
- Ensuring a sense of openness and transparency by talking to both parties at the same time (rather than shuttle negotiation)

The case studies: mediation

The definition of mediation used in this report is a process which ‘involves the use of a neutral third party who facilitates a negotiation to resolve a dispute’ (Blake *et al* 2013, pp. 11-17). This definition implies that the mediator is both impartial and independent, and that their role is to assist the parties in dispute find a solution to their problem.

On their web site, the Scottish Mediation Network describes mediation as being ‘a voluntary process’ and say that it ‘only takes place if both parties agree that they want to find a solution. It is a confidential process where the terms of discussion are not disclosed to any party outside the mediation hearing’ (Scottish Mediation Network 2014). Mediation itself is a non-binding process. However, a mediation agreement can be made binding if there is a signed mediation agreement.

It is not unusual for ombudsman schemes to say that they use mediation, particularly in the earlier stages of their complaint handling processes. However, a closer examination of their methods finds that case officers in these schemes are often employing a form of shuttle negotiation, with a view to facilitating a settlement of the complaint that is mutually acceptable to both parties. This is a legitimate form of dispute resolution, but it is not mediation as defined above and earlier in this report. For example, the ombudsman scheme and not the parties is in charge of the process and it is often the ombudsman who decides whether mediation will take place.

Also, in some ombudsman schemes, the case officers cannot be described as being either independent or impartial and the mediation is not a confidential process. If the complaint does not settle at ‘mediation’, it is often the same case officer who then goes on to propose a resolution or decision in relation to the complaint. It is likely that they will do this using the knowledge or information they have gained as part of their earlier involvement in the complaint. Very few ombudsman schemes, therefore, use mediation in its true sense and, instead, when mediation is mentioned it is more likely to be a form of dispute resolution close to that which was described in the previous section of this report looking at the early stages of the dispute resolution process.

There are, however, some instances of mediation being formally used as a distinct dispute resolution process within ombudsman schemes. The Scottish Legal Complaints Commission (SLCC) is an example of a UK scheme which has mediation as a discrete stage in the complaint handling process. Section 8(4) of their founding legislation (the Legal Profession and Legal Aid (Scotland) Act 2007) says ‘Where the Commission considers it appropriate to do so, it may, by notice in writing to the complainer and the practitioner, offer to mediate in relation to the complaint.’

The SLCC has a four stage process: Eligibility, Mediation, Investigation and Determination. At the Mediation stage, it calls on a panel of external independent mediators and the mediation process is administered by a Mediation Co-ordinator. If a complaint does not resolve at mediation, the Mediation Coordinator writes to both parties to inform them that a Case Investigator will now be allocated to their complaint in order to undertake an investigation. The mediation case file is confidential and information relating to the mediation is not passed on to the Case Investigator.

One of the questions in relation to the use of mediation within ombudsman schemes, is whether this is appropriate in principle. This was touched upon in the previous section looking at conciliation

where it was pointed out that parties may come to an ombudsman expecting a decision, and may be disappointed if they are offered mediation instead. This is particularly so given that disputes considered by an ombudsman scheme will already have been considered as part of an organisation's internal complaints procedure. One would expect that cases that could easily resolve would do so at that stage, while complaints that reached an ombudsman would be more intractable and less amenable to an agreed solution.

Two case studies researched for this report shed some light on the potential for using mediation in ombudsman schemes and the circumstances in which this may be appropriate. The first is the Small Claims Mediation Service for small claims disputes in England and is a good illustration of a high volume telephone mediation service. The second is the Irish Financial Services Ombudsman which provides an example of low volume, formal mediation.



Case study insight: high volume telephone mediation

The Small Claims Mediation Service is run by Her Majesty's Court and Tribunals Service (HMCTS) and provides a court-annexed dispute resolution service for small claims disputes in England and Wales. The Service's main aim is to reduce the pressure of work on the courts by ensuring that cases that do not require judicial attention can be resolved more quickly, cheaply and informally. The Service has recently had its administration centralised and it now operates with an administrative staff of 17 based in Northampton and a complement of 17 mediators based throughout the country.

When a small claim is submitted, the parties are given information about mediation and asked to indicate whether they would be willing to use the Service. When both parties indicate that they are willing, this results in a booking request; about 1,200 booking requests are received a month. At present the Service does not currently have enough resources to accommodate all booking requests (35% of booking requests can be accommodated). Bookings need to be made within 28 days, otherwise the case is remitted back to the court. Mediations currently take place on average within 4.3 weeks of a booking being made.

A full time mediator normally completes between 20 to 25 mediations a week. Each mediator is expected to conclude 550 cases a year. Whilst mediators aim to settle every case, a settlement rate of 62% or more is seen as good performance. Mediators were recruited internally from HMCTS staff and were retrained in mediation. In terms of settlement trends, cases that involve two companies (rather than two consumers or a consumer and a company) are more likely to settle, as are those which involve smaller sums in dispute. The key driver for settlement was a desire from the parties to avoid the time and cost involved in the court process:

"The main thing from our point of view is the fact that not everyone wants to go to a court hearing, they don't want to spend their time travelling there. Some of them just want to get some resolution and I think this service is the only thing that provides them with it. Prior to the mediation existing, they'd have to go out to that hearing, sit before a district judge etc and both parties might have been quite likely to compromise. So, I think it's delivering a much better service for both parties." (Interviewee)

Interestingly, unlike the Irish Financial Services Ombudsman's approach to mediation (see below) – where cases of higher value were seen as more suitable for mediation and settlement – here the lower the value of the case the more likely it was to settle. The process of mediation involved the following key steps:

- Mediator phones defendant to check they are available, explains the process, asks whether they are entering mediation in good faith, emphasises that the aim is settlement, says will be phoning back and forth between the parties with 5-10 minute gaps.
- Mediator phones the claimant and explains things exactly as to the defendant. Asks claimant to explain claim and then summarises understanding back to the claimant.
- Mediator phones the defendant, summarises claim as put by the claimant and asks for a response to the claim. Summarises response back to the defendant (including highlighting any shared ground between the parties and pointing out issues that seem in contention). Says will go back to claimant and asks the defendant, in the meantime, to start thinking about what would settle claim for them.
- Mediator then continues to go backwards and forwards, relaying offers, highlighting differences in position, common ground, asking parties to consider the strength of their case, highlighting best case and worst case scenarios if it went to court, emphasising the benefits of settlement, and highlighting the possible disadvantages of a failure to settle.
- If an agreement is reached a verbal agreement is made and the parties are reminded it is binding at that stage. The verbal agreement is followed up by email which sets out the agreement reached in writing.

When the telephone mediation service was first piloted, it was subject to some criticism by commentators who questioned whether it truly was a mediation service and questioned its claim to effectiveness (Doyle and Reid 2007). Consumer Focus' (2010) assessment of the Service was more positive calling it "a relative success story". In more recent commentary on the Service, mediator and academic, Charlie Irvine, noted that the service "clearly works", commenting that all the key aspects of mediation were retained in the telephone mediation model:

"The 25 minute demonstration displayed the full repertoire of mediator moves, delivered with skill, speed and pleasantness. It was like watching a stripped-down, slicked-up commercial mediation without the posh accents." (Irvine 2011)

From the perspective of consumer satisfaction, the service appears very successful. Figures released in 2012 (HMCTS 2012) for the period 2007 to 2011 show that 94.4% of respondents said they would use the Service again (this fell to 85.9% for those whose cases did not settle during the mediation).

An interviewee commented that the fact that the mediations took place over the telephone and were quite short did not impede the process of mediation. Use of the telephone could actually be helpful to diffuse conflict and consumers were sometimes glad that they would not have to face or speak with the other party. This interviewee also made clear that in her view the service being provided was mediation rather than merely a 'settlement service':

“You know, there are strict, not strict, but you’ve got those five points [the 5 stages of mediation] that you need to cover with that because that is a mediation. Otherwise, if you’re not careful, you’re just a settlement officer just going forward and backwards with offers and it’s more than that. I mean you could easily... You know, I could ring somebody up and say, right, what are you offering here? All you’re doing is backwards and forwards. That’s not mediation. That’s just putting forward a settlement. I know it comes as part of it at the end, you know, because we are negotiating then but what we’ve done is gone through that whole procedure.” (Interviewee)

In terms of the administration of the service and the potential for it to be replicated in different contexts, there were no particular difficulties in setting up and operating this type of scheme. The key issue was determining whether mediation would be suitable for the particular types of dispute being dealt with:

“So, I think it’s more about, is the actual specific work suitable for mediation, rather than the setting up of it. I think the setting up of it is no concern at all, really” (Interviewee)

One other issue, highlighted by Irvine (2011) is whether the service is effective only because it deals with claims of low value (at the time Irvine was writing the upper limit for small claims was £5000, it has since increased to £15,000). Irvine comments:

“Of course these are small claims, with a maximum value of £5,000 (about 6,000 Euros). Perhaps they are not that complicated. However, monetary value is not the same as importance and these are often highly significant conflicts. The fact that so many settle in the time allotted should be a serious challenge to the rest of us [mediators].” (Irvine 2011)



Some points to note:

- Using short form telephone mediation to achieve settlements of relatively high volumes of low value disputes
- Increasing party satisfaction by providing a process that is significantly quicker than the alternative (going to court) and providing parties with control of outcomes
- Providing parties with flexibility and convenience by using the telephone and keeping sessions to within an hour
- Reaching settlements without the parties having to speak to each other directly, which some parties may prefer in cases where conflict has been difficult to manage
- May require a strong incentive (e.g. the threat of court) to achieve results

The other example of mediation considered in this report shows a very different approach and is much closer to classical notions of mediation. The Irish Financial Services Ombudsman conduct their mediations face to face and parties are generally advised to allow for a whole day to conduct the mediation. As we will note further below, the implications of setting up a mediation process in this way is that more significant costs are incurred both for the ADR scheme providing the mediator and for the parties in terms of travel and time costs. As a result, mediation was seen as being suitable for a quite different type of case in this particular context.



Case study insight: low volume, classical mediation

The Irish Financial Services Ombudsman is the statutory body dealing with complaints about financial service providers in the Republic of Ireland. It is empowered to offer mediation as part of its dispute resolution service and, following a high court judgement, now offers mediation in all cases. Take up of mediation is, however, very low. In 2012, out of 8125 complaints received, the organisation resolved only 5 cases through mediation. In general, the organisation carries out about 15 mediations a year. The cost of mediations is borne by the ombudsman. Mediations are currently carried out by three members of investigation staff who have received formal mediation training.

Mediations are conducted in person, at the Financial Services Ombudsman's office in Dublin. Parties are advised to be prepared to spend the day in mediation, although cases can frequently be resolved more quickly. In terms of process, the mediation begins with a joint session, explaining how mediation works, the role of the mediator and clarifying expectations. In particular, it is made clear that the mediator will not propose a solution but only try to get each party to 'think outside the box' in coming up with their own solutions. While the parties control the outcome, the mediator remains responsible for the process.

The joint session then involves opening statements, a summary of the issues by the mediator and an attempt to identify and resolve any issues that can be resolved immediately. After the joint session, individual sessions are held between the mediator and the parties to discuss the outstanding points of contention. The process can then repeat itself until agreement or deadlock is reached. In terms of the characterisation of this mediation process, an interviewee commented that it was a very formal approach:

"I mean, the mediation that we have at the moment, the format envisages the parties being here, two separate rooms; usually that involves negotiators on their behalf, you know, representatives on their behalf; again, tipping over into the slightly more formal, legalistic style, confrontational, adversarial." (Interviewee)

Because of the high cost to the parties in terms of time and potentially travel, the kinds of cases that tended to be mediated were ones which were higher value or which involved complex issues or grey areas:

"I would think that the class of cases that would be really amenable to mediation, first of all we're probably talking about...you're talking about the larger more complicated cases. Again it would be...it could take a day of someone's time, so if there's a dispute over a small

amount on someone's bank charges, well, that's not a case for mediation, but I think more complicated cases, cases where it's not cut and dried." (Interviewee)

In terms of the low take up of mediation, the service provider is usually the one who does not want to mediate, and this appears to be because they have satisfied themselves that their position is correct during their internal consideration of a complaint and, therefore, they are unwilling to give ground:

"It takes two parties to mediate and generally speaking the providers don't want to do it because I guess by the time it reaches that stage, the positions have somewhat hardened. Unless both parties are willing to mediate, it's pointless to go to mediation anyway." (Interviewee)

Nonetheless, mediation was seen as offering parties a number of benefits, such as allowing the parties to retain control of their dispute, helping to repair relationships and providing confidentiality in relation to the outcome. The latter could be particularly valuable to the providers, who might welcome the opportunity to reach confidential agreements in order to avoid publicity that could have a wider impact on business:

"Sometimes it's I think from the provider's perspective is we really don't want this to get out, we don't want anyone to know what has happened because it might make us look bad. It's more of an optics thing perhaps really for the provider. Maybe it's an issue where they say okay we want this to be confidential because maybe there's a potential snowball effect that if this gets out there might be... hundreds of these cases and they want to literally put a lid on it now, right come in here, settling the case and having a confidential agreement and that's the end of the matter as far as they're concerned. That might be one of their motivating factors." (Interviewee)

In relation to the success rate of the mediation process, this was reported by an interviewee to be around 60%. Generally, if parties agreed to come to mediation, it meant that there was a willingness to settle and try to ensure issues got resolved. As with the decision to participate in the mediation in the first place, the approach of the providers tended to be very important in terms of settlement since they inevitably were in a more powerful position than the consumer:

"The outcome will really ultimately be told by the provider because they're the ones who have the cheque book so to speak on the day and they're the ones who will provide that solution." (Interviewee)

While the mediation process was not designed to be high volume or to be a core part of the organisation's bulk dispute resolution process, it was nonetheless seen to be beneficial in a small number of high value and complex cases:

"What I constantly say is that mediation will never resolve the bulk of our cases, but it can certainly resolve more than ten or fifteen a year." (Interviewee)



Some points to note:

- Whilst not used in high volume this approach to face to face mediation may be successfully used to resolve complex, high value and contentious cases depending on the needs of the ADR scheme
- Even where used infrequently, mediation may reduce costs in cases whose complexity may otherwise lead to protracted investigation and subsequent appeal
- The confidentiality of mediation outcomes may be attractive to businesses in some contexts and is a selling point that can be emphasised to help ensure take up of mediation

The case studies: later stages of dispute resolution and building influence

Investigation and adjudication have traditionally been seen as the core business of ombudsman schemes. As noted above, ideas about using facilitative techniques and other forms of ADR as part of ombudsman processes are comparatively recent. Approaches to adjudication are therefore better known and less contentious. There are, however, a number of differing approaches available to ADR bodies when deciding how to structure the later stages of their dispute resolution procedures. Often these later stages are reserved for more significant casework and the process is partly designed to ensure the outcomes of this casework are more robust and influential. The key design issues here include:

- How is the decision making itself structured e.g. is decision making individual (a single caseworker) or group based (a panel of decision makers) and is any assistance provided by expert advisers?
- To what extent will the case worker operate an inquisitorial or adversarial approach? While ombudsman schemes have traditionally been seen as operating an inquisitorial mode of dispute resolution, there are likely to be variations in the intensity of investigations, as well as in the extent to which the parties are expected to be involved in establishing the merits of their cases.
- To what extent are the aims of dispute resolution to generate broader improvements in service as opposed to merely settling a dispute? Different schemes will adopt different approaches to this issue, although most schemes will combine elements of both.

The case studies highlighted in this section touch upon some of these design issues and highlight different approaches that may be adopted. The Irish Financial Services Ombudsman, for instance, provides an unusual example of an ombudsman scheme operating a largely adversarial model, where both parties are often legally represented and are heavily involved in the process of proving their respective cases. This model is heavily influenced by the procedural fairness requirements of the Irish courts and, as a result, operates in a manner which is different to many ADR schemes.



Case study insight: quasi-legal adjudication

One of the unique features of the Irish Financial Services Ombudsman is the extent to which its work is driven by legal considerations as a result of having its decisions being binding on both parties and being appealable to the High Court. This has been described as creating a “level of legal formality unique in the international ombudsman community” (Irish Financial Services Ombudsman 2013). This was commented on further by one interviewee, who explained:

“To put it in the international context, a simple way you would imagine to describe the way ADR works internationally is on a spectrum of formality versus informality, statutory versus voluntary, mediation versus binding dispute resolution. Now on all of those elements, we are very formal. I mean, my feeling is that we run the most formal ADR regime in the world; that reaches a point when you really can no longer call it ADR, if there’s a certain amount of formality.” (Interviewee)

The right of appeal to the High Court has meant that the organisation has had to adopt procedures that are closer to those of the court in order to withstand scrutiny in relation to matters of procedural fairness and constitutional rights. This has been referred to in the literature as a process whereby the organisation is ‘judicialised’ and limited in relation to the extent to which it can operate as an ADR scheme. Unlike other ombudsman schemes, all cases are dealt with by a formal process of adjudication and there is no preceding attempt to conciliate or provide a provisional view:

“In some regards, given the legal formality that we operate under, I would have a concern as to whether or not that would withstand judicial scrutiny. Someone would subsequently say, well, I was pressured into doing this by the Ombudsman.” (Interviewee)

The legal environment was described by an interviewee as the key challenge faced by the organisation and 20% of its budget was devoted to legal costs. At the time of the research, there were around 40 ongoing High Court appeals being considered as well as two cases in the Supreme Court.

The consequence of this for the organisation is a high degree of adversarialism as well as a very strict emphasis on procedural fairness. Parties are usually legally represented and the process essentially involves the exchange of submissions between the parties until such as a time as they have exhausted their arguments back and forth:

“From the point of view of a complainant it may seem more like arguing a case on affidavit before a High Court than it may be an informal ADR service, because they make a submission, it goes to the other side, and they get a response and it goes back and forth then back and forth and sometimes there are many exchanges before we bring that to an end.” (Interviewee)

While commenting that other ADR schemes were often “aghast” when they heard of the number of cases appealed to court and the resulting formality of the scheme, one interviewee pointed out that there could be some advantages to a highly formal adjudication taking place. These could include the quality and consistency of decision making, the fairness and transparency of the procedures and the degree of participation that the parties had in the course of the case being determined. One interviewee noted:

“I suppose the very fact that appeals against findings are made, and in some cases it is found that the Ombudsman has made an error, I think that in itself justifies... some form of appeal outside of the ADR... some form of appeal is definitely beneficial, I think, to the integrity of the overall system” (Interviewee)

Another interviewee commented on the fact that an advantage of the organisation's process was that it was demonstrably fair, even if this meant losing some of the advantages of timeliness:

"I feel that the complainant, who is perhaps suspicious of the larger better resourced financial service provider at the outset, can as far as I'm concerned, be sure in the knowledge that they are getting all of the evidence that we are getting. That there is no secret adjudication going on where I'm looking through a file quietly over here and I write something but there's no evidence to back that up from the complainant's point of view. So on balance I think it is a far more transparent and fairer procedure, albeit that that is at a cost of it taking a little bit longer" (Interviewee)

Nonetheless, one interviewee noted that a key lesson that the organisation held for other schemes was to 'be careful what you wish for' as with formal authority and binding powers came a degree of inflexibility that could make fulfilling the role of an ADR mechanism more challenging:

"Be careful what you want, because if you get a lot more power then suddenly you can find that you lose a lot of your informality, which is really critical to sometimes getting things done, so be careful what you wish for. That's the message." (Interviewee)



Some points to note:

- **Using adversarial, transparent procedures may have benefits in terms of perceived fairness and the participation of the parties**
- **Formality, while having some benefits, may seriously limit an ADR scheme's ability to provide accessible and speedy justice to consumers**

In the Irish Financial Services Ombudsman model, there is no need for expertise additional to that possessed by adjudicators, who have experience of financial services law. In some contexts, external expertise may be required to settle cases, particularly where those cases are complex and issues cannot be resolved at an earlier stage. The Furniture Ombudsman is an example of a scheme that uses independent experts, which it commissions to assist the process of adjudication for those cases that reach the formal adjudication stage. While less formal than the process followed by the Irish Financial Services Ombudsman, their approach also involves formal opportunities for comment and participation by the parties at this stage. This approach therefore includes an element of "expert determination", as defined earlier in this report, as well as adjudication.



Case study insight: expert advice and adjudication

As noted above, the Furniture Ombudsman employs a conciliation stage in which it determines the majority of the complaints it receives based on evidence submitted by and requested from the parties. In a small proportion of cases (around 10%) expert independent advice needs to be commissioned by an ombudsman in order to resolve matters; where this is the case, the formal adjudication process is followed.

This involves the commissioning of an independent expert from a pool of consultants retained by the Furniture Ombudsman. The expert would normally carry out an inspection of the furniture or installation being complained about before preparing a report. At this stage of the process, there is less flexibility than in the conciliation stage and the process is more formal:

“When we get to the adjudication stage of the process it does slow down because you're waiting for people to visit, to write reports, to get the report back to circulate to the parties. We then have to weigh up the evidence one last time and write the decision... So that does slow the process down.” (Interviewee)

The process involves the appointment of an expert who has 14 days to inspect and prepare a report. The report is then shared with the parties, who are given 14 days to provide their comments. The ombudsman then aims to adjudicate based on the expert report and further submissions within 30 days.



Some points to note:

- Commissioning of expert advice is more costly but can assist in providing a trusted third party view to assist the process of formal adjudication

A radically different approach to dispute resolution is adopted by the Ontario Ombudsman's Special Ombudsman Response Team. Here, the process is ultra-inquisitorial and involves significant resources being invested into broad investigations of particular issues, practices or government sectors. In this model, the approach is geared towards generating systemic change and maximising the influence of the ombudsman on the practices of the bodies under its jurisdiction. Another key feature of adopting this process is to facilitate the earlier resolution of other, less serious cases by providing a strong incentive for organisations to resolve issues and not be subjected to the public glare of a systemic investigation.



Case study insight: “ADR on steroids”

The Ontario Ombudsman has a Special Ombudsman Response Team (SORT) to conduct high profile systemic investigations; it has powers both to conduct systemic investigations in response to complaints and on its own motion (own motion powers are hardly ever used). Systemic investigations are high quality, resource intensive investigations which go significantly beyond the initial complaint to collect data on and analyse an issue which affects an important administrative system. They deal with complex problems that affect many citizens.

SORT is staffed by eight investigators and one director. In 2013-2014, SORT launched three new investigations, and has conducted 30 major investigations since 2005. SORT cases often involve the review of hundreds of complaints, conducting large numbers of interviews, exhaustive document reviews, the collection of expert advice and intensive fieldwork. An example of the scale of SORT's work can be seen in its current investigation into Hydro One (an energy business) which was described in the 2013-2014 Annual Report as involving:

- Interviews with Hydro One staff, customers, stakeholders and utilities in other jurisdictions;
- Site inspections at call centres;
- Obtaining 19,000 pieces of Hydro One documentation; *and*
- Meetings with stakeholders.

SORT looks at the systemic aspects of individual cases but the detail and remedy for individual cases is dealt with by the Early Resolution Team. The process followed by SORT is as follows:

- Assessment to decide suitability (seriousness of the issues, public interest, likelihood of making beneficial recommendations, assessment of pros and cons, how complex and difficult to investigate, and other compelling reasons);
- Planning of any investigation (what resources are required, what evidence will be needed, what problems and roadblocks are likely); *and*
- Gathering information (All interviews are digitally voice recorded, and paper and digital documents collected, and will often look at best practice in other areas to help make recommendations).

SORT investigate cases using a small team of investigators rather than a single individual, in order to allow for the greater breadth and depth of investigation required. The timescale for a SORT investigation varies according to the case but, as an example, the office set a timescale of nine months for the completion of the Hydro One investigation. An important feature of SORT's approach is to involve the media from the start of an investigation right up to the publication of the report to ensure that the issues being dealt with gain profile. The organisation also actively uses social media, for example, through the ombudsman's twitter account. The impact and profile of SORT

investigations was described by an interviewee as key in ensuring the public visibility and consequent influence of the organisation:

“If you'd gone out there ten years ago and you'd asked people at random on the street, have you ever heard of the Ontario Ombudsman? I'd be amazed if one in 20 had... I think if you did it now, you know, maybe one in three, maybe one in four, because...and they know what we do and what we don't do and how we can help and how we can't help. I think that's purely because... three or four times a year we get a front page of the newspaper here will sell three million copies, and a picture, big picture of [the ombudsman] on the front, you know, ombudsman tackles whatever, or scathing report on this, that or the other. And that has huge benefits from a visibility and viability perspective, and actually doing good.”
(Interviewee)

The systemic work done by SORT was seen by the interviewee to be a helpful factor in ensuring cooperation and compliance in other cases. The ability of the ombudsman to conduct high profile investigations, able to radically upset the *status quo*, meant that organisations would take the office seriously and be more likely to cooperate in resolving small cases.

“There's a tremendous incentive to get problems resolved on the front line before they come to the attention of the SORT team... you know, it's no fun for anybody, being investigated, especially at the kind of depth we go to. And it can be quite disruptive, but that's necessary to gather the evidence... People are much more amenable to resolving things knowing that, you know, there's potentially a big stick down the road.” (Interviewee)

While the breadth and scope of such systemic investigations might be seen as overlapping with work that might be conducted by auditors in the public sector or regulators in the private sector, an interviewee told us that there was little danger of overlap since the ombudsman's remit was to consider administrative fairness and this was not the main concern of other oversight and control bodies. The aim of the SORT team was to “add value” to the ombudsman's work both in terms of the office's value to ordinary citizens consuming public services, and also in terms of adding value for the organisations subject to investigation:

“Quite often, not always but quite often, the organisation that we investigate will be... not just [pay] lip service but be genuinely grateful for us pointing out systemic issues with what they're doing. Because they are then able to go to Cabinet, or to whoever controls the purse strings and say, look, you know, [even] if there's resource implications, if there's process implications, we need to do this.” (Interviewee)

The work of SORT was seen by the interviewee as bringing quantifiable benefits in terms of improvements to public administration and an interviewee gave an example of an organisation which used to be subject to hundreds of complaints a year being subject to only a few following on from a systemic investigation. The power of this approach led to an interviewee referring to the model employed by the organisation as “ADR on steroids”.



Some points to note:

- Using a robust and extensive inquisitorial process, which goes well beyond the individual parties to a dispute
- Making proactive use of the media to assist in the process of investigation
- Harnessing the high profile generated through systemic investigations to assist in the resolution of cases of lower value/ less significance
- Increasing accessibility, visibility and public confidence in the ADR mechanism by publicising changes brought about through systemic cases
- Being able to demonstrate impact and effectiveness to stakeholders
- There are questions over whether such an approach may be unique to public service ombudsmen schemes

In the examples considered so far, the decision making process is structured around the idea of having individual case workers working in an organisational context, taking decisions on cases. In some instances the decision maker may reach a decision entirely alone, although in many cases that decision may be reviewed or confirmed by a more senior decision maker within the organisation. Other ways of setting up decision making for ADR are possible, however, and these may have benefits both in terms of encouraging early resolution and in relation to the perceived quality and legitimacy of decisions. One particular way of organising decision making is through the use of panels. Examples of this approach from the research included the Australian Financial Ombudsman Service, PhonepayPlus and the *Geschillencommissie* (the Dutch complaint mechanism).



Case study insight: panel based systems

At the Financial Ombudsman Service Australia (FOS Australia), if the early case management stage is not successful and the dispute is not resolved disputes are referred to a Case Manager. The case manager will investigate the dispute and make a recommendation. If either party rejects that recommendation then the complaint will be referred to an ombudsman or in some cases a panel for a determination. Decision on whether a case should be referred to an ombudsman or to a panel are made on consideration of the following issues:

- Types of disputes;
- The expertise required;
- The significance of the dispute; *and*

- Whether any strong preferences are expressed by the parties (although it is ultimately FOS Australia's decision).

Panels are chaired by an Ombudsman and include a representative from industry alongside a representative from a consumer background.

Panels are used mainly in insurance disputes and are popular with their members as they are seen as a way of ensuring industry practice and experience is being taken into account and useful for disputes which raise contentious industry wide issues or where difficult questions of fact exist. FOS Australia was only formed in 2008 following the merger of five existing schemes to form a single dispute resolution scheme covering all financial services. Panels were used in the predecessor schemes for general insurance and investments, life insurance and superannuation and they continue to be used in these areas today. In 2012/2013 of the 1480 general insurance complaints referred for determination 573 were decided by a panel (Cameron Ralph Navigator 2014). In other areas there has been a declining use of panels and ombudsman determination is the preferred decision making model.

Panels are also very successfully used to resolve disputes under the Dutch model of consumer ADR *Geschillencommissie* (Hodges *et al* 2014). Here, a panel of three is chaired by a legal expert – normally a former judge or law professor plus one business and consumer nomination each. This ensures that the panel can include both judicial and technical expertise and that the cases of both parties can be fully scrutinised. The hearing is informal, with parties able to attend if they wish. There are two locations in Holland where hearings are held. In the case of travel complaints, the consumer was present in 81% of cases, the business 75% (Hodges *et al* 2014). Panel decisions under the Dutch system are final and neither party can subsequently complain to the courts.

Hodges *et al* (2014) describe the *Geschillencommissie* as an outstanding success whilst also pointing out that it operates within a distinct culture of conflict avoidance and collaboration. In 2010, of the 5799 cases processed, 37% were settled and 52% resulted in “binding advice” being given by the panel. The appointment of an expert presents a further opportunity to settle as some of these experts are also qualified mediators and a further 289 cases settled at this stage. The party initiating the complaint pays a small fee which varies according to the sector and covers the cost of the arbitration as well as any expert report needed. For any ADR scheme thinking of adopting this model there are issues around the cost of panel decisions and the speed with which panel decisions can be reached. Mobile technologies may offer some possibilities for reducing both the carbon footprint and the difficulties of scheduling panels.

PhonepayPlus also uses tribunals to deal with non complaint behaviour and as a deterrent and encouragement for parties to take steps to ensure compliance and co-operation with PhonepayPlus. Currently PhonepayPlus plans to conduct 23 tribunal hearings per year and provide each tribunal with three cases to consider. However PhonepayPlus is flexible and if there is a need then it could add or reduce the number of tribunal hearings each year and bring in extra resources to deal with it. The tribunal also deals with breach of sanction cases (where the business has failed to pay any fine or deliver the redress required for example) and also prohibition cases against individuals to be banned from the industry. There is also an emergency procedure for serious breaches requiring urgent remedy. In 2013/2014 they dealt with 63 tribunal cases. It is a relatively fast process - the

average number of weeks that a case will take from allocation to the Tribunal is 16 weeks (PhonepayPlus 2014).

Tribunals consist of three members, the Chair who is legally qualified plus one lay member of the Code Compliance Panel and one person from PhonepayPlus's board members of the Code Compliance Panel. It is the tribunal's role to determine whether their code has been breached. The procedure is designed to be paper based but there is an opportunity for the business to attend who may address the tribunal briefly and many of them do.

"A case report, including the breach letter and any response from the relevant party will be presented to the tribunal. This usually happens a week in advance of the hearing, so that the members have time to read the papers before the tribunal meeting. Prior to the case being considered by the Tribunal, time will be given to the relevant party to make an informal representation to the Tribunal members. An informal representation is a chance for the relevant party to clarify its response or emphasise important parts of its response rather than present new evidence or arguments in addition to what is already in the papers. Providers usually have a half an hour period to provide the informal representations."
(Interviewee)

If a premium rate provider is unhappy with the tribunal outcome they can request a review or an oral hearing (PhonepayPlus 2011a)



Some points to note:

- Panel system may have benefits in terms of providing assurances to industry around the quality of decision making
- Panel decision making may help develop and share knowledge within the organisation
- Formal panels may work well to ensure that individual redress and regulatory objectives are achieved
- Formal panels can be used as a sanction to incentivise the earlier resolution of cases
- Panels with mixed composition provide a good way of demonstrating a range of perspectives are involved in decision making

We have already seen above that some dispute resolution systems are deliberately calibrated to maximise the influence of the ADR body over the organisations they investigate, such as in the example of the Ontario Ombudsman's SORT team. Other approaches to gaining influence were also suggested in the case studies. One of these was the PhonepayPlus model, where the provision of redress was integrated in a broader regulatory model. Research in the social care area has suggested that conjoining independent complaint handling with regulatory functions may provide a powerful model to ensure both the provision of authoritative dispute resolution and the achievement

of systemic change (Simmons *et al* 2013). This view is not one that is shared necessarily by both academics and ombudsmen who have concerns that the role of an ombudsman is not to regulate and that there are risks in combining regulation with redress (Legal Services Consumer Panel 2013; Seneviratne 2000).



Case study insight: integrated regulation and adjudication

PhonepayPlus describes itself as a “modern regulator” (PhonepayPlus 2011b, p3) and combines enforcement action with ensuring that individual consumers also receive redress for any harm suffered. It takes a proactive approach to monitoring the market it regulates and works closely with industry so that innovation is able to take place whilst also ensuring that a high level of consumer protection is maintained.

“We might find that we receive some complaints , which we believe indicates that there is a issue but following an initial investigation we consider it would be better dealt with by engaging with the industry members. It might be that a new service model has evolved, and whilst we want to support industry innovation, we must ensure that consumers are protected. In these circumstances, we may invite the relevant industry members to a meeting to discuss the services and the issues that have been identified, which provides industry members the opportunity to comment and give feedback but also assists us in trying to find a solution to the issue.” (Interviewee)

An interviewee described the model of providing regulation and redress as not fashionable but as one that worked in their industry and reported that it had been copied by a number of other countries when looking at how to regulate their own markets. They saw the key benefits of combining regulation and redress in the following terms,

“A organisation that only conducts complaint resolution and complainant redress may be able to identify an emerging trend in complaints; but by then the problem has already occurred and may have been ongoing for some time. While we also identify problems in this way, we have the added advantage of being able to proactively identify problems and stop them from happening – which is better for the consumer.” (Interviewee)

In terms of obtaining redress the relatively low value of most consumers’ complaints means that refunding the consumer is often a straightforward decision for the premium rate provider, many of whom offer a no quibble refund policy. Recent research carried out for PhonepayPlus suggested that the average complainant had been charged £32.14 by the organisations they are complaining about (PhonepayPlus / Jigsaw Research 2014). In contrast, fines can be up to £250,000. The maximum fine of £250,000 was imposed twice in August 2014.

There is a strong self-regulatory element to the model which contributes to its success. Most complaints are against what is known as “level 2 providers” which are the businesses who control or are responsible for the operation, content or promotion of the premium rate service. The level 2 providers will have contracted with a level 1 provider which provides the platform through which the premium rate service is accessed. The level 1 provider is copied into all correspondence with the

level 2 provider during an investigation and is expected to carry out due diligence and risk assessment on all their level 2 providers to mitigate any risk of wrong doing. There is, therefore, a strong incentive placed on level 1 providers to ensure that their level 2 providers comply with the code.

In addition, PhonepayPlus takes a proactive approach to monitoring the market and do not rely on complaints alone. The research market intelligence team recently spent some time looking at affiliate marketing which meant that,

“When we received the first complaints, the issue was not a new one to us as we had already gained some valuable knowledge and experience on the matter from our own investigative work. This can be very useful when working to tight deadlines that ensure cases are dealt with expeditiously to prevent further consumer harm. (Interviewee)”



Some points to note:

- Demonstrates that for some industries regulation combined with redress can work effectively particularly where compliance by a small proportion of businesses is an issue and/or individual losses small
- PhonepayPlus Tribunal's willingness to impose significant sanction as well as requiring individual redress
- Self-regulatory element as well as the risk of significant sanctions if this does not happen appear to help achieve good levels of timeliness when investigating complaints

Most ADR schemes are not able to draw upon regulatory powers to affect change where casework indicates that this may be warranted and will generally be limited to passing these issues on to a relevant sectoral regulator. However, most ombudsman schemes see a core part of their roles as involving standard-raising in the industries they oversee and, depending on context, may pursue different approaches to achieve this goal. One example is the Irish Financial Services Ombudsman, which uses its statutory power to publish casework outcomes to encourage improvements in the internal processes of financial service organisations.



Case study insight: “internalising the methodology”

The Irish Financial Services Ombudsman is laying increasing emphasis on helping the service providers under its jurisdiction to deal with complaints effectively themselves. One of the ways in which it has begun to do this is by publishing complaint information about service providers (so called ‘naming and shaming’), thus providing an incentive for firms to deal with complaints effectively themselves in the first instance. The organisation has also begun to be stricter in relation to accepting cases that have not exhausted the internal processes of providers; complaints are now routinely referred back so that it is clear to providers that they bear the primary responsibility for resolving their customers’ concerns.

“I think it’s fair to say that we really turned a corner in terms of managing complaints. Complaints are way down, largely because of changes that we have implemented. One is what other people call the naming and shaming. I mean, we don’t call it that. We say it’s the ability to report on the outcomes against individual providers. And then also we’ve been much more careful of only taking complaints after the provider has had a full opportunity to respond, and we found that we had slipped away from that.” (Interviewee)

An interviewee described the approach of the organisation as one which sought to ensure that service providers “internalised the methodology” of the ombudsman, so that the dispute resolution approach used by service providers would be the same and, therefore, prevent the escalation of disputes.

“The job of an ombudsman, it seems to me that there are two jobs and they are very much interdependent. One is to decide the cases correctly and the other, and this is the, you hope, direct result of deciding the cases correctly, is to influence the behaviour of the stakeholders. As I always say, you want them to internalise the methodologies of the office, so that they will deal with the complainants the way that you would, they will settle cases and then what you hope as well is that maybe they will change their behaviour at an earlier stage” (Interviewee)

The ombudsman had been subject to some parliamentary criticism in recent times over the apparently low number of complaints being upheld by the office, although an interviewee pointed out that this could be seen as a sign of success in that firms were able to predict, pre-empt and avoid adverse findings before it got to that stage. An interviewee commented that this required clear explanations to stakeholders so they could interpret the significance of uphold rates correctly:

“We have received a fair amount of political criticism for not upholding enough complaints. Well, gee, what it simply means to me is we have to do a better job of explaining what we do and why we do it.” (Interviewee)



Some points to note:

- Importance of using case outcomes to help change business behaviour
- Encouraging internal resolution of complaints by businesses, with potential to save on costs involved in third party dispute resolution

Having statutory powers to publish case information about organisations can be an important part of an ADR body's armoury to tackle systemic issues and raise standards within an industry. 'Naming and shaming' can effect behaviour and place a spotlight on organisations whose practices are inadequate, using the glare of publicity as a sanction and incentive to improve. Not all ADR bodies will have such a power, however, and where a scheme's jurisdiction is voluntary it may need to make greater use of alternative strategies to achieve influence over industry practices. An example of a voluntary scheme considered in the research is the Furniture Ombudsman, which explained that it needs to carefully balance efforts to help industry improve with fulfilling a core consumer protection role by encouraging businesses to remain a member of the ADR scheme. This involves having to keep costs low and provide a service to businesses that is seen as preferable to the alternative of going to court.



Case study insight: cooperative influence in a voluntary context

As a voluntary membership based scheme the Furniture Ombudsman does not rely on statutory powers to gain influence over the bodies it investigates. As a result, it has to work hard to make clear to existing and prospective members the benefits of membership. One of the restrictions on voluntary schemes is that the pricing of scheme membership has to be seen as competitive and representing good value by businesses. In turn, this means that the potential to conduct 'added value' work (such as thematic reporting or engaging in significant outreach aimed at raising standards) may be diminished. In a voluntary environment, costs that cannot be seen to clearly benefit the scheme members who are paying for the service are unlikely to be welcome.

"We're one of the lowest [cost ADR schemes]. Our fees I think have moved once since 1992.... My experience is that retailers are very happy to be a member of a scheme so far as it's low cost. If we were to change our case fee to hundreds of pounds, membership would go down. There is no retailer that I've ever met that would pay into triple figures for a conciliation. It would not be a viable business model for them... So I think that's one thing to bare in mind on in terms of the voluntary sector... We would lose the scheme and the door would be closed on all of those consumers that have relied on the scheme over the years."
(Interviewee)

At the same time as needing to focus on providing a low cost external dispute resolution service in order to ensure the survival of the scheme, the Furniture Ombudsman is clear that standard raising work is part of its role as an ombudsman. It clearly saw its role as going beyond dispute resolution:

“I don't think we would really be doing our job if we weren't trying to advise the industry how they can improve going forward. So I guess, let's take it back to basics: let's say a mediator gets involved with a case, they will try to resolve it and then move onto the next one. Whereas we're much more equipped and we're much more committed to raising standards as well... it's about trying to guide and educate business as well to say this is what went wrong in this case, can we give you some feedback. Are we able to help you to repair this process going forward?” (Interviewee)

To achieve standard-raising goals, the Furniture Ombudsman did not rely on publishing complaint data and, instead, focused on providing services that would be seen as helpful and adding value to the industry. This included the provision of training (again priced at a relatively low cost) and the provision of advice to scheme members:

“The other thing that the retailers like from a voluntary [scheme's] point of view is the training that we do. So not only do they come to us with their dispute issues, they come to us to help educate them and improve them and make them better which is great.” (Interviewee)

This was seen as more appropriate than publishing data, which in the context of a voluntary jurisdiction which did not cover a whole industry, could prove misleading and punitive:

“One of the issues to bare in mind with a voluntary scheme is that you don't want to be seen to penalise the businesses that are doing the right thing. Let's say, for example, you have five retailers here in the scheme, and you've got five retailers who are not in the scheme. So the five retailers outside the scheme are not resolving disputes with consumers and consumers' only route to resolution is by taking them to court. Well, if I publish my data about he five retailers inside the scheme, it looks like these five are really bad even though they are behaving responsibly by being members of an ADR scheme in the first place... By publishing data you'd be distorting what is happening in the industry.” (Interviewee)

While the voluntary nature of the scheme presented some limits on the kind of work the Furniture Ombudsman might do to raise standards, there were some advantages to having a voluntary jurisdiction in relation to the attitude of the businesses involved and their willingness to work cooperatively with the ombudsman:

“There's an absolute advantage with the fact that it's voluntary in that retailers are here because they want to be here and they trust us and they like us. There's no other reason.” (Interviewee)

While a key feature of the Furniture Ombudsman's approach to developing influence involved a cooperative approach and one which sought to align with the needs of industry, it was also clear that the authority of the organisation and its ability to be effective was significantly helped by its close relationship with Trading Standards.

“I think that we're unique in trading standards. They feel very invested in our service and they feel like they're a key stakeholder which is great.” (Interviewee)



Some points to note:

- Need to adapt methods and practices for raising standards when dealing with a voluntary jurisdiction
- Need to make greater use of soft power to keep industry on board, while achieving changes that suggest themselves in case work
- The provision of training and advice to industry is a more realistic way of raising standards in voluntary jurisdictions than publishing data
- There are advantages to voluntary jurisdictions, such as the increased commitment of businesses who have freely chosen to be members of a scheme

Conclusions

Learning from the case studies

The case studies covered in the previous section demonstrate a range of approaches to the business of dispute resolution. They illustrate a spectrum of practices which provide insight into how ADR schemes can adapt to serve the interests of varied environments. Practices and approaches are often very context specific and in presenting insights from the case studies we have been careful not to suggest that any approaches represent 'best' or even 'good' practice. Indeed, the point is that what may work very well in one context may work less well in another.

For schemes that are setting up from scratch or, like the Legal Ombudsman, are curious about what options may be available to amend their current practices, a number of design choices may help to shape the development of dispute resolution practices that will fit a particular context. The case studies illustrate and bring to life certain of these design choices and provide suggestions about what might work in various contexts. Later in this chapter, these illustrations will be drawn on to form the basis of a conceptual model and a practical toolkit for ADR design.

The early stages of dispute resolution

The case studies demonstrate a reasonable amount of common ground in terms of approaches used by schemes in the early stages of dispute resolution. By and large, the processes used involved case workers making early evaluations of cases and, based on a view of the likely outcome if the cases were to progress further, seeking to convince one or both parties that their early evaluation is correct. Although broadly similar in approach, several of the cases provided helpful insights into how the early stages of dispute resolution might be designed.

The Ontario Ombudsman's "issue based" approach demonstrates the value of ensuring that, however a process is designed, case workers are given sufficient freedom to bring about flexible and creative solutions to problems. This suggests that case workers need wide discretion if they are to achieve the goals of early resolution. A key feature of this system is that highly qualified staff are needed at the "frontline" since the task of finding solutions and persuading parties is a challenging and multi-faceted one. There may be broader learning here for ADR schemes who operate a multi-stage process, where the temptation might be to reserve more highly qualified staff for the more complex casework dealt with at the later stages of a dispute resolution process.

One approach which many private sector ADR schemes will already be familiar with is the idea of incentivising the resolution of cases through charging fees. Indeed, case fees are part of the systems used by many private sector ADR schemes in the UK. The New Zealand Banking Ombudsman's approach to incentivising resolution during their facilitation stage provides an interesting example of the way in which a fee system can not only incentivise businesses to resolve cases prior to them reaching an ADR body but also go further by incentivising resolution at the earliest stages of the ADR body's processes. Using a sliding scale of fees, an ADR body may be able to exert greater pressure on businesses to settle cases as soon as possible, particularly where the disputes are of lower value.

Such a system seems likely to provide a powerful addition to the ‘moral suasion’ techniques that ADR schemes might traditionally use to settle cases early. The New Zealand Banking Ombudsman’s scheme also provides a helpful illustration of how a such a system might be organised in practice.

A key question that arises in the design of dispute resolution processes relates to how many stages there should be, what the purpose of each stage is and who controls access to each step of the process. The Furniture Ombudsman provides a good example of a scheme that operates two distinct processes (called conciliation and adjudication), but where the caseworker rather than the parties decides on the process. This contrasts with the example of the New Zealand Banking Ombudsman, which provides consumers and businesses with the right to ask for a formal decision where they are dissatisfied with an outcome suggested as part of the facilitation process. Empowering caseworkers to control the process was seen by the Furniture Ombudsman to have benefits in ensuring that cases were dealt with proportionately and at the right stage. Clearly, reducing the number of stages in a process and providing case workers with control over access to those stages can result in more cost effective dispute resolution. The key question here, depending very much on the context for which the ADR mechanism is being designed, is what procedural safeguards are required to meet the needs of the types of cases being considered. High value disputes are more likely to require internal review stages.

In a previous report (Gill *et al* 2013) we noted that there were some concerns about the fairness of practices at the early resolution stage and we questioned whether early resolution approaches would be seen as demonstrably fair by consumers (and, indeed, businesses). While we noted above the potential benefits of flexibility and creativity in achieving successful resolutions, the NZLS Lawyers Complaints Service ERS provides an example of the way in which early resolution can be overseen in order to provide assurances as to its fairness. In this case, using a standards committee with mixed legal/lay representation to both decide which cases are suitable for early resolution and to approve the outcomes of early resolution shows an interesting approach. We will note again below that the use of decision making panels may have some advantages in terms of perceived fairness and acceptance of decisions; it may be that the use of some kind of committee may help to provide similar assurances in relation to the outcomes of early resolution.

Not all of the schemes we considered in the research had decision making powers. The UK European Consumer Centre suggested that effective resolutions could be achieved even in the absence of such powers. Using persuasion skills alone and their knowledge of the law, this case study provided an insight into how effective resolutions might be achieved. The insight from this case was, perhaps, that ADR schemes – which do have adjudicative powers – could be making more use of persuasion tactics early on in their dispute resolution processes.

The final example represents a quite different approach and provides one of the few examples in the research of an approach which sought to bring parties together in order to reach their own agreement on settling the dispute. The Australian Financial Ombudsman Service’s conciliation conferences provide a useful example of the way in which a classic ADR mechanism (conciliation) can be adapted to an ombudsman context and rolled out for use in a reasonably high volume of cases. With the right cases and in the right context, the benefits of this kind of approach include the transparency and openness of the process, the control that the parties have in shaping their own

outcomes and the ability of case workers to provide some direction and steer where there is a risk of deadlock. It is notable that the Australian Financial Ombudsman Service is currently experimenting with a more truncated and directive form of telephone conference and this may also be worth testing in other contexts.

Mediation

The case studies highlighting mediation practices provide helpful illustrations to show how a process can be adapted to meet different needs. The Irish Financial Services Ombudsman's mediation process is a formal, classic mediation process. This involves face to face mediation and the parties and the mediator needing to devote significant time to resolution. Costs are also involved in terms of travel, with mediations held at the ombudsman's office. Set up in this way, it is clear that mediation is unlikely to be a viable way to resolve the large number of disputes handled by most ombudsman schemes. This does not mean, however, that using such an approach to mediation cannot be useful. The key question here is what type of case would be appropriate for an ADR body which wishes to use mediation. The Irish Financial Services Ombudsman model is likely to be suited to high value, complex cases that may be very expensive for adjudication. Such a process could be successfully calibrated to deal with a low volume of difficult cases that would otherwise slow down processes of adjudication.

A contrasting example was provided by the Small Claims Mediation Service, demonstrating how a high volume mediation service may be set up. Using a bank of telephone mediators, each able to deal with up to 25 cases a week, works very successfully in the context of small claims. The use of time limited sessions and the relatively low comparative cost to the parties and the ADR provider are attractive features of this approach. Particularly impressive are the very high levels of party satisfaction with the process (both for those whose cases settled and for those that did not). It may be that the threat of going to court provides a strong incentive both for settlement and in relation to the positive perception of mediation. However, there could well be a place for this kind of telephone mediation approach in ombudsman schemes dealing with relatively low value claims.

The later stages of dispute resolution and building influence

The processes used by ADR schemes when making formal decisions on cases are perhaps better known and less contentious than those used at the earlier stages of dispute resolution. At the earlier stages, questions remain unanswered about the suitability of agreement based ADR, as well as how to balance the efficiency and fairness of dispute resolution. While less contentious, the later stages of an ADR scheme's dispute resolution process are also open to a number of design choices. One issue raised by the case studies relates to whether a scheme employed largely inquisitorial or adversarial procedures. Ombudsman schemes have traditionally been seen as inquisitorial bodies, although other ADR schemes, such as adjudication schemes, may employ more adversarial approaches. The Irish Financial Services Ombudsman is an unusual example of an ombudsman scheme using adversarial and highly formal processes. The benefits of this approach are the transparency of the process and high degree of participation it allows the parties. This may help to avoid a perception that may exist in inquisitorial systems that the investigator conducts her/his work behind closed doors and that fact finding may be selective. On the other hand, keeping to rigorous

standards of procedural fairness and allowing the parties to control the dispute resolution process, may lead to higher costs and prolonged dispute resolution. Given the traditional access to justice goals of ADR such approaches may be unsuitable elsewhere, albeit they raise interesting questions about the balance between fairness and accessibility that schemes need to be able to strike.

A counterpoint was provided by the example of the Ontario Ombudsman's Special Ombudsman Response Team, which employs ultra-inquisitorial processes as part of its work. Here the parties to a dispute are merely the impetus for a process of investigation which is wide ranging in its scope and depth. While such an investigative approach goes well beyond dispute resolution (and will be seen by some as encroaching on areas such as regulation) it nonetheless fits with the 'preventative' dispute resolution model we proposed earlier (see page 25). Such robust processes of investigation, going wide enough to establish broader patterns, issues and problems may be effective in preventing future disputes from arising. The Ontario Ombudsman certainly believes that its systemic work leads to very direct benefits in terms of reducing future complaints and changing organisational approaches. While such beliefs have yet to be systematically evaluated, this case provides an interesting illustration of a dispute resolution model which seeks to be very proactive. One question here is whether such a model would be possible in different political and social cultures. There is also a particular question around whether private sector ombudsman schemes, who generally are closely linked to sectoral regulators, would be able to take on a role with such potential to upset the status quo. In our view, there is a strong argument for ombudsman schemes in both the public and private sectors having such broad powers if they are used in the unique field in which the ombudsman is an expert: preventing consumer detriment and ensuring administrative fairness. The provision of such a role may also enable ombudsman schemes to redress the potential for 'regulatory capture' and to look holistically at industries (including pathologies that may arise from regulation itself).

Whether a dispute resolution process is predominantly adversarial or inquisitorial, one issue is how the decision making itself should be organised. The Furniture Ombudsman, for example, provides a classic example of the single decision maker model. A single case worker is responsible for decisions, occasionally assisted with the provision of independent expert advice from consultants. Expertise is drawn on, not by inviting an expert to reach a joint decision with the case worker, but by expertise being furnished and decision making power remaining with the caseworker. Other decision making approaches are to use decision making panels. Here a range of expertise or backgrounds can be combined so that the decision makers are able to draw on a range of internal resources in reaching their decisions. Panels are used by the Australian Financial Ombudsman Service and PhonepayPlus and may provide a good example of the way in which formal decision making can be structured to provide confidence in decision making. In the Australian Financial Ombudsman Service approach, panels have a mix of industry and consumer representatives allowing each party to see very visibly that their interests are represented. The benefits of such approaches over the use of single case workers whose background, experience and qualifications may be unknown appear to be significant, albeit panel based systems will tend to be more costly. Interestingly, in the PhonepayPlus system, the tribunal is used to deal with non-compliant behaviour but equally used as a deterrent and encouragement for parties to take steps to ensure compliance and co-operation with PhonepayPlus.

We have already noted that the Ontario Ombudsman's systemic role seeks to generate maximum influence over stakeholders and generate changes in behaviour. Other case studies provided insights in this area, using more traditional methods to achieve their goals. The Irish Financial Services Ombudsman talked about trying to assist businesses with the process of "internalising the methodology" and ensuring that the ombudsman's approach is followed by businesses. An important tool in this regard is the ability to publish case information about businesses, so that an incentive exists (in terms of negative publicity and, ultimately, possible impact on profits) to resolve cases and handle complaints well without the ombudsman's intervention. The ability to publish such case information and make maximum use of case outcomes certainly seems to be an important tool in an ombudsman's armoury for changing behaviours (in addition to others considered above such as moral suasion and using a sliding scale of fees). In some contexts, such as voluntary jurisdictions, however, the ability to publish case information may not be available. Here, attempts to influence behaviour must be aligned to exploiting businesses' self-interest and providing services (such as advice and training) which businesses are likely to see as helping them to deliver their goals. The pressure to ensure reduced costs in voluntary environments means that there are likely to be limits to the extent to which 'added value' activities can be carried out. However, the nature of voluntary business participation in schemes may be of benefit in building cooperative relationships with businesses and using soft power to influence behaviours.

Online Dispute Resolution

It was noteworthy that the schemes we spoke to in this research were not generally using online dispute resolution methods. The Furniture Ombudsman did show us its case management system, which could be accessed online by businesses and this provides an example of a developing ODR platform. There would appear to be significant potential for developments in this area for ombudsman schemes; indeed, we note that some schemes in the UK, such as Ombudsman Services, are now using ODR platforms to aid their dispute resolution. Looking outside the ombudsman world, the case of eBay provides an insight into how dispute resolution is organised in a very different context. Here disputes between buyers and sellers are resolved by a semi-automated system which is able to resolve the vast majority of cases by providing options for settlement and encouraging parties to reach a view for themselves. One of the benefits of ODR platforms may be their accessibility and transparency, as well as being able to provide trusted information which enables parties to resolve cases themselves. A fascinating area of future development involves "crowdsourcing" decisions, where a panel of experienced buyers and sellers determine the outcome of a case. Particularly in areas where ombudsman schemes are taking contestable decisions about the requirements of fairness, the assistance of crowdsourced advice (if not decisions) may be helpful. If such crowdsourcing approaches become accepted and widely used in other contexts, they may have some potential for future incorporation into the work of ADR bodies.

Design choices suggested by the case studies

The nature of case study research is that it does not provide the comprehensive overview that might be obtained through other types of research; rather it provides detailed examples that offer insights into particular facets of a topic and offers suggestive possibilities for future research. While this is so, the case studies do indicate a range of design choices for ADR that can be identified and which may

be adapted for general use. The table below suggests some of the design choices that are indicated by the case studies.

Table 9: Design choices suggested by the case studies

| Dispute resolution stage | Suggested design choices |
|--------------------------|--|
| Early stages | Outcome agreed by the parties or imposed by case worker? Strict process or creativity and flexibility? |
| Mediation | High volume or low volume? Face to face or telephone? |
| Later stages | Single decision maker or panel? Inquisitorial or adversarial? Redress or prevention? Sanction or cooperation? |
| General issues | Single stage or multiple stage? Online or traditional dispute resolution? |

As will be evident the design choices that suggest themselves will not generally be binary and instead may involve a mix of approaches. Indeed rather than seeing the issue of design choice in such terms it may be more helpful to conceptualise ADR design as being a series of choices made along spectra, with each choice involving a particular view being taken about how a dispute resolution system should look.

Model to assist ADR design

To expand on the insights provided by the case studies and to assist with the process of designing and reviewing ADR mechanisms, we have created the model in figure 8, which shows key design choices, each along a spectrum. The model shows ten important spectra along which an ADR scheme may wish to position itself depending on the particular context in which it operates. The first four spectra involve 1st order issues and fundamental questions about how schemes should be set up. The last six spectra are 2nd order issues and relate to the design of the scheme's ADR process.

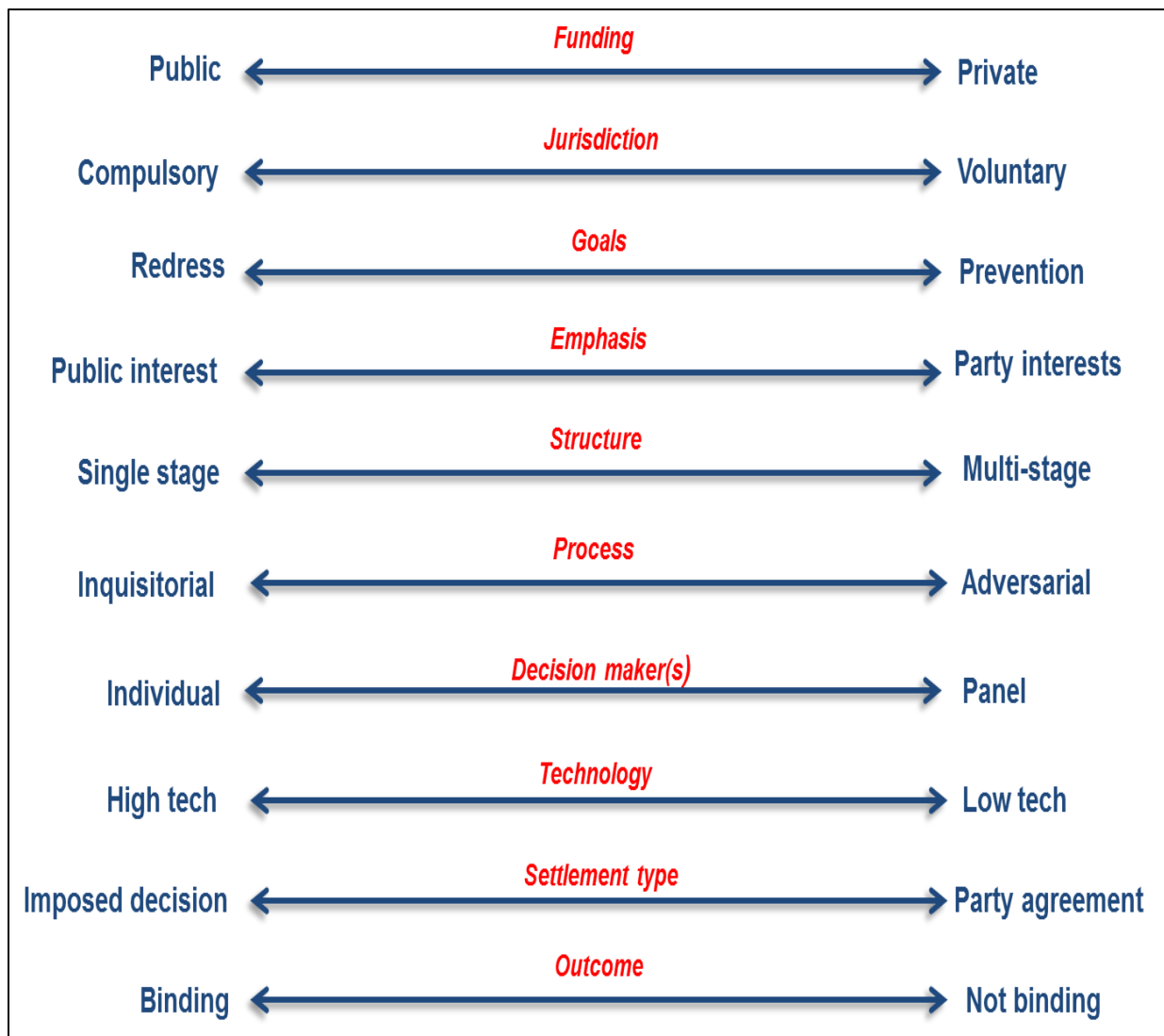


Figure 8: 10 spectra of ADR design

The rest of this section explains the model in figure 8 and describes in more detail the kind of design choices that must be made in creating or amending an ADR scheme.

Design choice 1: the funding mechanism

The key question here is whether funding for an ADR scheme will be met from the public purse or will be imposed on the industry. Public sector schemes are generally funded publicly, while private sector schemes tend to be paid for by the industries they oversee. Other more detailed choices require to be made about funding, such as whether to fund a scheme through general membership fees, levies, case fees or a combination of these. Important choices also need to be made with regard to whether the funding model is aligned to broader goals of the ADR scheme e.g. whether attempts will be made to use fees to incentivise dispute resolution at an early stage.

Design choice 2: the scheme's jurisdiction

Designers will need to be clear about the nature of the jurisdiction and whether it is compulsory or voluntary. Schemes with compulsory jurisdictions will have a significantly different relationship with the bodies they oversee compared to schemes with voluntary jurisdictions. In some instances there may be a statutory requirement for businesses to be part of an ADR scheme but no single statutory body set up to fulfil this function, which will lead to choice of ADR schemes and competition between them. Where competition is a factor, designing a scheme to be attractive to potential members while fulfilling the fundamental goals of independent redress may be particularly challenging. Some schemes, such as the Legal Ombudsman, may combine statutory and voluntary jurisdictions, in which case separate dispute resolution processes may need to be developed to accommodate each area.

Design choice 3: the scheme's goals

An important design goal relates to whether the scheme wishes to emphasise a redress focused model of dispute resolution or one that is focused on prevention. In the former case, the emphasis will be very much on the individual dispute under consideration and the core, traditional business of ADR. In the latter case, the scheme will take an interest in trying to prevent rather than only cure problems and will develop and deliver a range of additional services, functions and approaches. These functions are shown in figure 8 (on page 25) in the preventative dispute resolution model and include enhanced consumer-facing functions of advice and guidance, as well as enhanced business-facing functions concerned with generating behaviour change.

Design choice 4: the scheme's emphasis

Linked to design choice 3 is the issue of whose interests the scheme predominantly exists to serve and the extent to which the public interest is engaged in the work of the ADR body. For example, in areas of high potential consumer detriment a broad public interest is likely to exist in the operation of an effective ADR mechanism. There is also likely to be strong pressure in such areas for the ADR mechanism to undertake standard-raising work. In areas where the potential for consumer detriment is lower, dispute resolution may be considered to require a greater focus on meeting the needs of the private parties involved rather than any broader public interest. More generally, questions in this area may influence the extent to which schemes publish data on complaints.

Design choice 5: the scheme's structure

The number and type of discrete stages that should form a scheme's overall structure presents a number of challenges. Questions here include not only whether the process should be tiered to involve several stages of appeal or review, but also whether each tier should be using a different dispute resolution technique. It may be, for example, that the early stages of a process use mediation or conciliation, with later stages becoming more evaluative and directive until a formal decision is imposed. Alternatively, the process may simply involve the provision of a decision which then may or may not be subject to further internal review. Some of the important issues here relate

to procedural fairness and the robustness of decision making procedures; the higher the value of the cases, the more formality is likely to be required in later stages. Cost in general is likely to be an issue and the provision of several stages is only likely to be of benefit where the earlier stages are successful in dealing with a reasonable proportion of cases. An important issue here is also who controls the process if several stages exist; if the parties have a right to decide, this may increase costs as cases that – objectively – do not merit escalation, end up at the formal stages of the process.

Design choice 6: the scheme's process

A key choice here relates to the role of the case worker and whether they should be more similar to an investigator or to a judge. In the first case, providing a burden on the case worker to establish the facts through an inquisitorial process may have benefits of informality and speed, as the investigator is able to establish what evidence is required and make focused enquiries of the parties. This may be quicker and more efficient than relying on the parties to provide accounts of the case and their supporting evidence. One drawback of an inquisitorial approach may be that it reduces the participation of parties and may be less transparent than an adversarial process in which parties have had a full chance to make their case. Depending on the nature of the scheme, a more adversarial approach may result in quicker and cheaper dispute resolution; if the adjudicator is merely presented with each side's account and supporting evidence and asked to adjudicate based on those facts, quick decisions may be possible. On the other hand, the benefits of a more inquisitorial approach are that it helps redress the balance between consumers and businesses, and can help to ensure that the former are not disadvantaged by a lack of experience in how to put their case. One way to ensure the balance of arms is redressed within an adversarial system might be to impose the burden of proof on businesses. This model is used by the Advertising Standards Authority in relation to misleading advertising: advertisers must be able to demonstrate that the claims they have made are true and to provide evidence to the ASA to substantiate any claims. While unlikely to be popular with businesses, such a system could certainly redress the power of arms and reduce the costs imposed on the ADR mechanism since the process would simply involve determining whether or not a business has managed to prove its case.

Design choice 7: the scheme's decision makers

Many schemes involve single decision makers responsible for taking decisions, albeit they will often carry out their work in an organisational context which means that several individuals may be involved in a decision. For example, a case worker's decision may have to be signed off by a manager or, less formally, may be subject to discussion amongst peers on the office floor. Nonetheless, models in which decisions are made by a single individual may suffer in terms of perceived fairness compared to models in which decisions are seen to be made by panels including a broad range of interests. Using single decision makers is likely to have advantages in time and cost compared to panels and a choice is therefore required with regard to whether the potential benefits of panels would outweigh the costs. Panel systems may be particularly helpful in industries which are new to ADR and require participation and assurances regarding the fairness, balance and expertise of the decisions to which they will be subjected. In the absence of clear qualifications or training

requirements for ADR case workers, using panels for some decisions may be an effective way of providing public assurances with regard to the decision making process.

Design choice 8: the scheme's use of technology

The issue here largely relates to whether schemes will make extensive use of online dispute resolution or remain focused on more traditional dispute resolution channels. There is significant potential for ombudsman schemes to make greater use of technology and, at the very least, adopt the kind of ODR platform that allows consumers and businesses to upload information, track the progress of their case and obtain general information which is likely to have benefits for all schemes. Potentially such platforms can significantly cut down on the burden of case administration and may also be used to assist in the settlement of dispute themselves. For instance, if information about particular types of disputes and examples of relevant previous cases are provided in a targeted way to consumers and businesses, this may allow parties to clearly evaluate the strength of their case and may encourage settlement. An online system may also have some potential in terms of assisting caseworkers in determining whether cases are likely to be suitable for some kind of negotiated outcome (e.g. an automated form could ask both parties about their willingness to settle and the kind of options that might work, before suggesting to a case worker whether the case might be suitable). Online portals also have the potential to make use of intelligent technology to ensure that case workers have access to useful information when taking decisions (e.g. a system might recognise key words in a complaint and automatically suggest guidance notes, legislation and previous cases to assist the decision maker).

Design choice 9: the preferred type of settlement

This issue is core to the type of ADR mechanism that a scheme wishes to be: does it wish to foster agreements between parties, repair relationships and use predominantly facilitative techniques? Or is it more concerned with evaluating the merits of cases and providing objective decisions? Schemes may of course decide to use elements of both and to combine techniques, and choices here are likely to be determined again by the nature of the industries involved and the types of complaint being dealt with. Where there are ongoing relationships, in particular, there may be significant advantages in attempting a more consensual approach to dispute resolution. Such consensual approaches, when they work, may also bring broader benefits to the parties in terms of engagement and satisfaction. From the evidence of the case studies considered in this research, genuinely consensual approaches (e.g. conciliation, mediation) are used very little. There is significant scope to experiment in this area, for example by seeing if telephone conferences work in different contexts, or if one hour telephone mediations can be adapted. While this is the case, schemes must also consider carefully whether bringing other types of ADR into an ombudsman scheme risks extending the process and ultimately being more costly.

Design choice 10: the outcome of decisions

Questions here are about whether the decisions of the scheme will bind either or both parties. There has been significant debate in the past over whether ombudsman schemes in the public sector

require binding powers and the consensus has been that they are unnecessary in that context. Compliance rates tend to be very high and remedies recommended are implemented in most cases, with schemes relying on the quality of their reasoning, their moral authority and bad publicity to ensure compliance. Conversely, in the private sector there is recognition that binding powers are required. One choice is about whether decisions should bind both parties or only the business. Decisions also need to be taken about any appeal rights arising from decisions where they are binding. Where decisions are binding on both parties there are often appeal rights to courts (as in examples of the Irish Financial Services Ombudsman and the UK Pensions Ombudsman).

Conclusion: a design toolkit

The model for design choice described above offers some suggestions and guidance about key issues that need to be considered when deciding how a scheme might be designed. In terms of where any scheme should sit along these 10 spectra we suggest that there is no 'ideal' and that the particular context into which an ADR scheme is to fit will be crucially important in informing such choices. At the same time, we return to the notion discussed earlier around the harmonisation of ADR processes (Shand Smith and Vivian 2014) and note that broader consumer confidence requires an element of consistency between different bodies to ensure that the system (and its legitimacy) is understood and to have some assurance of its fairness. While it is beyond the scope of this report to suggest an ideal type of process around which ADR schemes might converge, the model we have suggested provides a starting point for discussing this issue. Finally, we have developed an ADR design toolkit (included in Annex 4) which the Legal Ombudsman (and other ADR schemes) may find helpful in the design and review of their processes. The toolkit aims to provide a practical tool for implementing the learning in this report.

Annex 1: research methodology

Research aims

The overall aim this project was to

- to identify interesting practices and approaches to dispute resolution used by other ADR providers, which LeO can learn from in developing its future dispute resolution process.

Within this overall aim, we identified two distinct sets of ADR providers:

- ADR schemes operating outwith the context of ombudsman and complaint handling schemes (e.g. adjudication schemes, mediation services, conciliation providers); *and*
- Ombudsman schemes in which elements of ADR have been successfully incorporated (e.g. mediation used as a distinct stage within an ombudsman scheme's dispute resolution process).

Research questions

In consultation with the Legal Ombudsman, the following research questions were devised.

Description and evaluation of ADR processes used by the ADR provider

- 1) What kind of ADR/innovative processes are being used by the ADR provider?
- 2) Where a choice of process exists, how does the ADR provider triage cases to ensure that cases are dealt with through the most appropriate resolution process? Are disputants offered a choice of process or is it imposed?
- 3) How successful are the ADR processes used by the ADR provider in relation to:
 - a) Cost?
 - b) Flexibility and responsiveness to changing needs?
 - c) Speed?
 - d) Consistency?
 - e) Confidentiality?
 - f) Ability to influence outcome/ disputant control?
 - g) Disputant satisfaction/ experience/ accessibility?
 - h) Enforcement?
- 4) What does the ADR provider consider to be the strengths and weaknesses of their ADR processes?

- 5) What plans does the ADR provider have to change their ADR processes? Do they need consent from regulators or service providers? Are their customers' expectations changing and will this require new processes in future? What might they look like? What does the ADR provider do to keep track of, and respond to, changing needs?
- 6) How does the ADR provider ensure that good practice arising from its ADR work is captured?
- 7) Does the ADR provider deal with hybrid complaints (that cross service sectors, where the bodies under jurisdiction operate in several sectors, or where there is overlap between service and conduct issues) and have their processes had to change to deal with those? How does the ADR provider maintain its coherence in these circumstances?
- 8) How are their services funded? Does the funding structure include a cost/charge/fee differential?

Broader issues

- 9) How does the ADR provider build their public profile?
- 10) How does the ADR provider increase their organisational impact?
- 11) How do they contribute to broader system improvement?
- 12) How is this measured?
- 13) How does the ADR provider encourage service provider to join the dispute resolution scheme?
- 14) How is the expertise of the ADR provider assessed/measured/regulated?

Methodology

Research design

The research used a case study design. This involved the selection of 10 case studies and the provision of in-depth, rounded descriptions of their approaches, processes and practices. Case study research aims to collect information from as broad a range of data sources as possible in order to provide a holistic picture of the case under consideration. Our methodology, therefore, included:

- a review of academic literature;
- desk research and documentary analysis; and
- interviews and observation.

Literature review

We conducted a review of the academic literature on:

- Types of ADR process;

- The advantages and disadvantages of various forms of ADR;
- Criteria for choosing different approaches and redress design; *and*
- The development of online dispute resolution and its use in a range of contexts.

The review helped us to design our research instruments (e.g. interview schedules, observation sheets) and provided a grounding for the research in relation to current knowledge of the subject.

Desk research and documentary analysis

The desk research involved the collection of publicly available information in relation to ADR providers that have been identified as suitable case studies. This included a range of sources such as: the ADR provider's website, annual reports, guidance documents, etc.

In some cases, we also asked case studies to provide relevant internal, unpublished documentation that may assist in building a full picture of the ADR processes being used. This included: internal guidelines/procedures/help notes, organisational structure documents, unpublished performance data and statistics, etc.

Interviews and observation

An interview schedule was prepared based on the research questions listed above. We requested interviews with two members of staff: a strategic manager/organisational leader and an operational manager. This was to ensure that relevant data can be collected both in relation to the detail of the ADR processes being used and how they work in practice, and in relation to the broader strategic environment and future practice. In practice, the research methods used with each case study varied significantly due to practical factors (the table over the page provides a summary of the fieldwork conducted with each case study). Interviews were tape recorded and professionally transcribed. They occurred either face to face, by telephone or by email.

Where relevant and practical (i.e. where further information was required, where providers were based in the UK and where confidentiality measures allowed), we conducted observations of the ADR processes used by the provider.

Case selection and sampling

We selected ten studies for detailed consideration as part of the research. The sampling strategy was 'purposive'; this means that cases were selected not because they were representative of a broader population but because they had features that relate directly to the project's research aims and questions. The criteria for selecting case studies to take part included:

- Whether it appears, on the face of it, that the ADR provider is using interesting practices;
- The relevance of the ADR provider's work and practices to LeO;
- The ADR provider's willingness to take part in the research; and
- LeO's ideas about cases that would be most useful to learn from.

Table: Fieldwork summary

| Case Study | Fieldwork Summary |
|--|---|
| Australia Financial Ombudsman Service | 1 x 80 minute Skype group interview with 1 senior manager and 2 operational managers |
| Furniture Ombudsman | 1 X introductory presentation 2 x 45 minute to 1 hour face-to-face interviews with senior manager and caseworker Observation of case management system and informal conversations with staff |
| Irish Financial Services Ombudsman | 1 x introductory presentation 5 x 30 minutes to 1 hour face to face interviews with senior managers and adjudicative staff |
| New Zealand Banking Ombudsman | 1 x 2 hour group Skype interview with senior managers and adjudicative staff. |
| New Zealand Law Society's Lawyers Complaint Service's Early Resolution Service | Email interview with questions for Strategic Manager and Operational Manager |
| Ontario Ombudsman | 2 x 1 hour telephone interviews with senior managers |
| PhonepayPlus | 3 x 1 hour face to face interviews with senior manager, manager and legal officer Observation of case management and informal conversations with 3 additional members of staff in different roles |
| Small Claims Mediation Service | 1 x 1 hour telephone interview with manager 1 x 1 hour face to face interview with mediator Observation of two telephone mediations |
| UK European Consumer Centre | 1 x 100 minute face to face interview with Senior manager and operational manager Observations of case handling management system, listening to telephone calls with consumers and informal conversations with one complaint handler |
| eBay | 1 x 3 hour face to face interview with an industry expert 1 x 1 hour face to face interview with an industry expert 1 x 30 minute telephone interview with an industry expert 1 x 30 minute skype interview with an industry expert in India |

Annex 2: the Legal Ombudsman's current model

1. Maturity and jurisdiction checks

- Check that complaint has been made to legal service provider and that 8 weeks has been given to allow them to resolve the problem.
- Check that the complaint is eligible to be dealt with under the Legal Ombudsman's Scheme Rules.

2. Informal resolution and investigation

- After a complaint is accepted, it is allocated to an Investigator within 10 days. If it takes any longer than that, the consumer is informed.
- Once allocated, the Investigator contacts the consumer within five working days to discuss the complaint in more detail.
- The Investigator then gets in touch with the lawyer to get information and any evidence that might be needed.
- The Investigator will try to resolve the matter informally with both parties and to try to reach an amicable settlement.
- If that isn't possible, the Investigator will write a Recommendation Report. This covers the investigation, the views of both parties, and may also propose a remedy or action the lawyer should take.
- If the consumer and the lawyer agree with the recommendation made, the case will be closed as an informal resolution.

3. Ombudsman decision

- If the consumer or the lawyer disagrees with the Recommendation Report, they need to give reasons why within 10 working days.
- The comments given are summarised and sent, with the Recommendation Report, to an Ombudsman.
- The Ombudsman will read the report and any comments before making a decision. If the consumer accepts the decision, the lawyer must do what the Ombudsman has decided (if anything), or could face legal action.
- If the consumer accepts the decision and it's in their favour, they won't be able to take any further legal action about their complaint.

- If the consumer doesn't accept the decision that has been made, we will close the case. We aim to deal with all complaints we accept within 90 days.

4. Improvement and impact activities

- Publication of statistical data about legal service providers
- Publication of case summaries
- Publication of ombudsman decisions
- Commissioning research
- Guidance on good complaint handling
- Guidance on specific topics (e.g. costs)
- CPD courses on good complaint handling

(Source: based on Legal Ombudsman website)

Annex 3: case studies factual background

Australian Financial Ombudsman Service

| | |
|---------------|---|
| Country: | Australia |
| Jurisdiction: | Financial service providers |
| Case Volume: | 24,100 disputes were accepted as disputes in 2012/ 2013 |
| Staffing: | 305 FTE Staff |
| Funding: | Funded by levy on financial service providers and case fees |
| Status: | Membership scheme, participation voluntary (although all industry bodies must belong to a scheme) |
| Processes: | Conciliation, Negotiation, Adjudication by single ombudsman and panel decisions |

Furniture Ombudsman

| | |
|-------------------|--|
| Country: | UK |
| Jurisdiction: | Members of the furniture industry who opt in to scheme |
| Complaint Volume: | 1,817 complaints/ year in 2012-2013 |
| Staffing: | 9 staff |
| Funding: | Funded by membership fees |
| Status: | Voluntary, membership scheme |
| Processes: | Conciliation, Adjudication |

Irish Financial Services Ombudsman

| | |
|-------------------|---|
| Country: | Ireland |
| Jurisdiction: | Financial services providers |
| Complaint Volume: | 8125 complaints/year in 2012 |
| Staffing: | 34 |
| Funding: | Funded by levy on financial service providers |
| Status: | Statutory scheme with compulsory jurisdiction |
| Processes: | Mediation, Adjudication |

New Zealand Banking Ombudsman

| | |
|-------------------|---|
| Country: | New Zealand |
| Jurisdiction: | Members of the banking industry |
| Complaint Volume: | 2,592 complaints/year in 2012-2013 |
| Staffing: | 16 staff |
| Funding: | Funded by levy on members and case fees |
| Status: | Membership scheme, participation voluntary (although all industry bodies must belong to a scheme) |
| Processes: | Facilitation, Conciliation, Adjudication |

New Zealand Law Society's Lawyers Complaint Service's Early Resolution Service

| | |
|-------------------|---|
| Country: | New Zealand |
| Jurisdiction: | Lawyers |
| Complaint Volume: | 1,742 complaints in the year ending 31 January 2014 |
| Staffing: | Three part time resolvers and two administrative staff in the ERS |
| Funding: | Funded through the Law Society: lawyers pay annual practising certificate fees and levies |
| Status: | The Law Society regulates all lawyers, but membership of the Society is voluntary. All lawyers are subject to the complaints process. |
| Processes: | Early Resolution, Investigation, Adjudication |

Ontario Ombudsman

| | |
|-------------------|---|
| Country: | Canada |
| Jurisdiction: | Regional government |
| Complaint Volume: | 26,999 complaints /year in 2013-14 |
| Staffing: | 88 staff |
| Funding: | Publicly funded |
| Status: | Statutory ombudsman, compulsory |
| Processes: | Early Resolution, Investigation, Systemic Investigation |

PhonepayPlus

| | |
|---------------|--|
| Country: | UK |
| Jurisdiction: | Regulates premium rate or phone paid services in the UK and secures redress for consumers |
| Case Volume: | 15,836 complaints in 2013 /14, 8,250 of these complaints proceeded to some form of enforcement action. |
| Staffing: | 47 Staff |
| Funding: | Industry levy plus any fines imposed are used to subsidise the costs of the service |
| Status: | Compulsory |
| Processes: | Conciliation and Adjudication by Panel Decision |

Small Claims Mediation Service

| | |
|---------------|--|
| Country: | England |
| Jurisdiction: | Small claims disputes |
| Case Volume: | Approximately 14,400 booking requests a year |
| Staffing: | 34 staff |
| Funding: | Publicly funded |
| Status: | Voluntary dispute scheme for small claims |
| Processes: | Telephone mediation |

UK European Consumer Centre

| | |
|---------------|--|
| Country: | UK |
| Jurisdiction: | Cross border disputes between consumers and traders (non-financial disputes) |
| Case Volume: | 4394 complaints in 2013 |
| Staffing: | 6.5 Staff |
| Funding: | Publicly funded |
| Status: | Any trader who engages with the UK-ECC does so voluntarily |

Processes: Conciliation and Advocacy. Attempts to resolve complaints via persuasion.

eBay

Country: USA

Jurisdiction: All buyers and sellers using eBay

Case Volume: 60 million disputes each year

Staffing: Data not available

Funding: Funded by eBay

Status: Voluntary business scheme

Processes: ODR, Assisted Negotiation, Adjudication

Annex 4: ADR design toolkit

Step 1: Funding

Design choices

Public sector schemes are generally funded publicly out of general taxation, while private sector schemes tend to be paid for by the industries they oversee. Other more detailed choices require to be made about funding, such as whether to fund a scheme through general membership fees, levies, case fees or a combination of these. Important choices also need to be made with regard to whether the funding model is aligned to broader goals of the ADR scheme i.e. whether attempts will be made to use fees to incentivise dispute resolution at an early stage or to require those whose actions cause the most complaints to pay more.

Questions

- Is there a justification for public funding of the scheme (e.g. where government activity is overseen)?
- Should funding come from general levies on a sector (or the scheme's membership) or case fees or both?
- If a scheme uses both levies and case fees, what proportion of funding should come from each stream?
- To what extent will the funding mechanism be used in support of broader dispute resolution goals?
- Will case fees be differentiated depending on the stage at which a dispute is settled within the ADR process?

Case study examples and options

- Furniture Ombudsman (Annual membership fee, fee based on turnover + case fee)
- Ontario Ombudsman (Government funded from general taxation)
- New Zealand Banking Ombudsman (Membership fee based on turnover, case fees which increase at each stage of escalation)
- PhonepayPlus (funded by a levy on the industry. Fines imposed are carried forward to the next financial year and are used to reduce the levy).
- UK – European Consumer Centre (government and EU funded)

Step 2: Jurisdiction

Design choices

Designers need to be clear about the nature of the jurisdiction and whether it is compulsory or voluntary. Schemes with compulsory jurisdictions will have a significantly different relationship with the bodies they oversee compared to schemes with voluntary jurisdictions and their members. In some instances there may be a statutory requirement for businesses to be part of an ADR scheme but no single statutory body set up to fulfil this function. This may lead to choice of ADR schemes and competition between schemes. Where

Questions for designers

- Is there significant potential for consumer detriment in a particular sector, indicating a need for compulsory ADR?
- How effective and accessible are existing methods of dispute resolution in a given sector or industry?
- Is self-regulation and voluntary membership likely to be sufficient to address any potential for consumer detriment?
- If a statutory requirement is imposed on businesses in a sector to become

Case study examples and options

- Irish Financial Ombudsman Bureau (compulsory, high potential for detriment in financial services)
- New Zealand Banking Ombudsman (compulsory but with no single statutory ADR body)
- Australian Financial Ombudsman Service (compulsory but with no single statutory body)
- Furniture Ombudsman (voluntary)
- New Zealand Legal Complaints Service (compulsory)

competition is a factor, designing a scheme to be attractive to potential members while fulfilling the fundamental goals of independent redress may be particularly challenging. Some schemes such as the Legal Ombudsman, may combine statutory and voluntary jurisdictions in which case separate dispute resolution processes may need to be developed to accommodate each area.

members of a scheme, how will schemes be approved and regulated?

- Where there is competition between schemes in a sector, how will quality and standards remain consistent between schemes?
- Is there potential for voluntary and compulsory jurisdictions to be combined by the same ADR body and, if so, what are the risks associated with this?

Step 3: Goals

Design choices

An important design goal relates to whether the scheme wishes to emphasise a redress focused model of dispute resolution or one that is focused on prevention. In the former case, the emphasis will be very much on the individual dispute under consideration and the core, traditional business of ADR. In the latter case, the scheme will take an interest in trying to prevent rather than only cure problems and will develop a range of additional services, functions and approaches in order to deliver this. These functions include enhanced consumer facing functions of advice and guidance as well as enhanced business facing functions concerned with generating behaviour change.

Questions for designers

- Is the goal of the scheme to act as a straightforward alternative to court processes?
- Is the scheme operating in a sector which is regulated and where a regulator might be expected to undertake systemic improvement activities?
- Does the scheme operate in an area where there is existing consumer advice and education provided?
- Does the political, cultural or business environment the scheme operates in allow for the pursuit of preventative approaches?
- How will the cost of pursuing preventative approaches be met and what measures need to be taken to justify that cost?
- Can some preventative approaches (such as training and providing feedback/ consultancy/ advice) generate an income stream for the ADR body?

Case study examples and options

- Ontario Ombudsman (combines redress and prevention, but strong emphasis on catalysing systemic change)
- Furniture Ombudsman (emphasis on redress, with preventative work needing to be channelled through cooperative activities that directly benefit business)
- Irish Financial Ombudsman Bureau (publishing case data as part of a preventative approach)
- UK-ECC (mostly focused on redress but also a role in educating business and consumers on consumer rights)

Step 4: Emphasis

Design choices

Linked to step 3 above is the issue of whose interests the scheme predominantly exists to serve and the extent to which the public interest is addressed by the ADR body. For example, in areas of high potential consumer detriment a broad public interest is likely to exist in the operation of an effective ADR mechanism. There is also likely to be strong pressure in such areas for the ADR mechanism to fulfil standard raising in order to help safeguard the broader public interest. In areas where the potential for consumer detriment is lower, dispute resolution may be considered to require a greater focus on meeting the needs of the private parties involved rather than any broader public interest.

Questions for designers

- What levels of consumer detriment exist in the particular sector or industry in which a scheme operate?
- Do a range of social actors have an interest in the operation of an ADR scheme in a particular area?
- Where public interest in the efficient operation of a scheme is high, how will the scheme ensure it operates transparently (e.g. through the public reporting of casework and performance data)?
- Where dispute resolution is considered to be a largely private matter between parties, how can a scheme be adapted to meet their particular needs?
- Where public interest is lower, how can a scheme ensure that it is not dominated by the interests of industry at the expense of consumers?

Case study examples and options

- Australian Financial Ombudsman Service (as with other financial ADR bodies, high potential for detriment and strong public interest present)
- Furniture Ombudsman (although operating in an area where detriment exists, operates a self-regulatory, voluntary mode which emphasise the pursuit of private interests)
- PhonepayPlus (individual harm can be low however potential for harm to the collective consumer interest is high)

Step 5: Structure

Design choices

The number and type of discrete stages that should form a scheme's overall structure present a number of challenges. Questions here include not only whether the process should be tiered to involve several stages of appeal or review, but also whether each tier should be using a different dispute resolution technique. It may be, for example, that the early stages of a process use mediation or conciliation, with later stages becoming more evaluative and directive until a formal decision is imposed. Alternatively, the process may simply involve the provision

Questions for designers

- What is the value of the disputes being considered by the scheme and, if high value, does this indicate a need for formal appeal stages within a scheme's process?
- Is participation in a scheme voluntary or in an environment where schemes compete and, if so, does this indicate the use of single stage, cheaper processes?
- If several stages are used, are they used as a procedural safeguard/ right of

Case study examples and options

- Furniture Ombudsman (multi-process structure, where access to processes is controlled by the ADR body rather than the parties)
- New Zealand Law Society Early Resolution Service (multi-process structure, where access to the process is controlled by an oversight committee)
- Irish Financial Ombudsman Service Bureau (multi-process structure, with mediation provided as an option for all disputes but with low take up)

of a decision which then may or may not be subject to further internal review. Some of the important issues here relate to procedural fairness and the robustness of decision making procedures; the higher the value of the cases the more formality is likely to be required in later stages. Cost in general is likely to be an issue and the provision of several stages is only likely to be of benefit where the earlier stages are successful in dealing with a reasonable proportion of cases. An important issue here is also who controls the process if several stages exist.

appeal to be invoked by the parties, or are different procedures available at the discretion of the ADR body?

- Are ongoing relationships between consumers and businesses a feature of the industry covered by the ADR body? If so, what potential is there to use more consensual methods?

- Small Claims Mediation Service (single process structure, but with court as backstop)

- Ontario Ombudsman (multi-process structure, with an 'issue based' approach controlled by the ADR body and a special procedure for systemic cases)

Step 6: Process

Design choices

A key choice here relates to the role of the case worker and whether they should be more similar to an investigator or to a judge. In the first case, placing the burden on the case worker to establish the facts through an inquisitorial process may have benefits of informality and speed, as the investigator is able to establish what evidence is required and make focused enquiries of the parties. This may be quicker than relying on the parties to provide accounts of the case and their supporting evidence. The benefits of a more inquisitorial approach are that it helps redress the balance between consumers and businesses and can help to ensure that the former are not disadvantaged by a lack of experience in how to put their cases. One way to ensure any inequality of bargaining power is redressed within an adversarial system and to speed it up might be to impose the burden of proof on businesses.

Questions for designers?

- Will the process be primarily inquisitorial or adversarial?
- To what extent is there an imbalance of power between consumers and organisations in the area overseen by the ADR body?
- To what extent is the participation of the parties in the process of dispute resolution perceived to be beneficial in the area overseen by the ADR body?
- Will reversing the burden of proof be feasible/ acceptable to organisations being covered by the ADR body?

Case study examples and options

- Irish Financial Services Ombudsman (primarily adversarial system, although the case worker will set out the issues that they consider require to be addressed)
- Ontario Ombudsman (inquisitorial system, including processes for systemic investigation)
- UK-European Consumer Centre (system involving limited fact finding and using more suasion to obtain outcomes)
- Furniture Ombudsman (in some cases consumer law places the burden of proof on businesses dealt with by the Furniture Ombudsman)

Step 7: Decision Makers

Design choices

Many schemes involve single decision makers responsible for taking decisions, albeit they will often carry out their work in an organisational context which means that several individuals may be involved in a decision. For example, a case worker's decision may have to be signed off by a manager or, less formally, may be subject to discussion amongst peers in the office. For some areas the complaint may raise difficult questions of fact which require expert determination and a scheme's access to independent experts may be an effective way to resolve the dispute.

Questions for designers?

- Is acceptance of an ADR scheme by industry or by consumers likely to be particularly challenging?
- Is industry likely to prefer a low cost model (which would argue for a single decision maker) or one which emphasises industry participation and control (panel)?
- Will there be a role for panels in a small number of escalated cases?
- Will the complaint involve difficult questions of fact which require expert determination?

Case study examples and options

- Australian Financial Ombudsman Service (use of panels for some cases)
- PhonepayPlus (use of panel/ tribunal for some cases)
- Furniture Ombudsman (single decision maker with no internal right of appeal, access to independent experts where required)

Step 8: Technology

Design choices

The issue here largely relates to whether schemes will make extensive use of online dispute resolution or remain focused on more traditional dispute resolution channels. There is significant potential for ombudsman schemes to make greater use of technology and, at the very least, adopting the kind of ODR platform that allows consumers and businesses to upload information, track the progress of their case and obtain general information is likely to have benefits for all schemes. Potentially such platforms can significantly cut down on the burden of case administration and may also be used to assist in the settlement of dispute themselves. For instance, if information about particular types of disputes and examples of relevant previous cases are provided in a targeted way to consumers

Questions for designers

- Will all or part of the service make use of an online dispute resolution platform?
- Are there particular accessibility issues (in terms of access to the internet and IT literacy) which particularly effect the area in which the ADR body will operate?
- What alternative measures may be required to ensure accessibility of the ADR body?
- What volume of cases will the ADR body deal with and is investment in online dispute resolution platforms likely to be cost effective if volumes are low?
- Are the disputes of a type, value and level of complexity such that assisted settlements using automated systems are likely?
- Will the scheme make use of other technologies such as the telephone/

Case study examples and options

- Furniture Ombudsman (portal that can be accessed directly by businesses, and automated update system for consumers at key touch points)
- Ebay/ PayPal (sophisticated system for dealing with high volume disputes, with a high percentage of cases resolved through automated assisted settlement)
- Australian Financial Ombudsman Service (telephone conciliation conferences)

and businesses this may allow them to clearly evaluate the strength of their case and may encourage settlement. An online system may also have some potential in terms of assisting caseworkers in determining whether cases are likely to be suitable for some kind of negotiated outcome.

mobile/ Skype/ Adobe connect to bring parties together and to personalise the dispute resolution process?

- Are simple improvements to the speed and accessibility of communications (e.g. template text messages) available?

Step 9: Settlement

Design choices

This question is core to the type of ADR mechanism that a scheme wishes to be: does it wish to foster agreements between parties, repair relationships and use predominantly facilitative techniques? Or is it more concerned with evaluating the merits of cases and providing objective decisions? Schemes may of course decide to use elements of both and to combine techniques, and choices here are likely to be determined again by the nature of the industries involved and the types of complaint being dealt with. Where there are ongoing relationships, in particular, there may be significant advantages in attempting a more consensual approach to dispute resolution. Such consensual approaches, when they work, may also bring broader benefits to the parties in terms of engagement and satisfaction. From the evidence of the case studies considered in this research, genuinely consensual approaches (e.g. conciliation, mediation) were used relatively little.

Questions for designers?

- How cooperative is the particular industry or sector covered by the ADR body? Does it have a significant 'rogue' element?
- Are consumers in a specific sector particularly vulnerable and likely to settle for less than they are due if facilitative techniques are used?
- Is the industry or sector likely to favour formal, predictable decision making?
- Are there ongoing relationships which may be important to maintain?
- If a multi-process structure is created, are there particular types of cases that might be suitable for facilitated outcomes? Would this involve either large volumes of low value claims or low volumes of high value claims, depending on the process used?
- Unless the ADR body operates in a purely facilitative and consensual mode, is there a danger that overall costs will end being high if cases escalate through several processes?

Case study examples and options

- Small Claims Mediation Service (operates mediation service as an alternative to formal court adjudication)
- Financial Services Ombudsman in Ireland (low volume mediation service, generally for high value or complex cases)
- Australian Financial Ombudsman Service (operates a telephone conciliation services as well as using other negotiated and adjudicative methods)
- New Zealand Banking Ombudsman (combines facilitative methods with more formal adjudicative methods, in common with several of the other case studies)
- European Consumer Centre (by virtue of not having adjudicative powers, relies on consensual approaches to persuade businesses to take account of consumer rights)
- Furniture Ombudsman (use of experts in the formal stage of dispute resolution)

Step 10: Outcomes

Design choices

Questions here are about whether the decisions of the scheme will bind either or both parties. There has been significant debate in the past over whether ombudsman schemes in the public sector require binding powers and the consensus has been that they are unnecessary in that context. Compliance rates tend to be very high and remedies recommended are implemented in most cases with schemes relying on the quality of their reasoning, their moral authority and bad publicity to ensure compliance. In the private sector there is recognition that binding powers are required. One choice is about whether decisions should bind both parties or only the business. Decisions also need to be taken about any appeal rights arising from decisions where they are binding. Where decisions are binding on both parties there are often appeal rights to courts (as in examples of the Irish Financial Services Ombudsman and the UK Pensions Ombudsman).

Questions for designers?

- Are there particular concerns around compliance with decisions, such that decisions require to be legally binding and enforceable?
- If decisions are binding, will the ADR body or the consumer be responsible for enforcement action where a body refuses to comply?
- Might the benefits of binding decisions be outweighed by the relationship between the ADR body and industry becoming more confrontational and less cooperative?
- If decisions are to be binding, will they bind the business only or both the business and the consumer?
- Where ADR bodies bind both parties will there be a right of appeal to a judicial body (e.g. Irish Financial Ombudsman Bureau and Pensions Ombudsman)?

Case study examples and options

- Irish Financial Services Ombudsman (decisions binding on both parties)
- Furniture Ombudsman (decisions binding on the business)
- Ontario Ombudsman (decision not binding on either parties)
- Small Claims Mediation Service (decision agreed in the mediation agreement are binding on both parties)

Annex 5: references

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