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I am pleased to have the opportunity to contribute to the important and timely work of the Commission.

A HOLISTIC SYSTEM

I have just completed a major review of all main types of dispute resolution in England (and partly Wales), encompassing courts, the proposed Online Court, Tribunals, public and private Ombudsmen and other ADRs, injury compensation schemes, and so on, covering consumer, family, employment, claims involving SMEs, property, personal injury (the Injury Portal and claims against the NHS) and claims against the State (judicial review, Tribunals, Public Inquiries, Coroners, PHSO and LGSCO). The extensive factual analysis and recommendations will be published in due course² but I am happy to summarise some points here.

I view justice as something that needs to be *delivered* when people need it. The extent to which it is delivered often falls short of what is needed, and is obscured by debates about increasing access to justice. I believe that delivery of justice is a more important consideration than accessing it. Extensive statistics (from the Paths to Justice studies, and those involving consumers, SMEs, citizens and tenants) show that too many problems are not in fact raised or resolved when they ought to be.

It follows that our traditional silos of courts, tribunals, regulatory authorities, arbitrators, mediators, ombudsmen, other forms of ADR, or anything else, should all be regarded as parts of a *single* system of justice. They should be integrated accordingly to ensure that justice is delivered where and when needed.

My conclusions are that three main areas need to be addressed.

- (a) the system for providing information, advice, assistance, filtering and triage to people. There is obviously a major move to digitisation, but many people still need someone to talk to, and some people (who can have serious and multiple problems but limited ability to address them) need a lot of face-to-face help.
- (b) dispute resolution pathways that are easy to identify and use, and deliver good, swift and cheap outcomes for people and businesses, and
- (b) reduction in the incidence of problems.

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He is also a Member of the Ministry of Housing, Communities and Local Government's Working Party on Regulation of Property Agents.

² C Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart, 2019).

In relation to (a), what is needed is a strategy for provision of advice and legal support on social welfare law at local level,³ which I think needs multiple expert services being available based on easily-identifiable local access points, probably based around High Street Citizens Advice centres, but linked with GP surgeries and other places where people go for help. I think that having separate outlets each focusing on individual issues (such as law centres, property centres, family law centres, and so on) provides enough identifiability or delivery of expertise.

In relation to (b), it is striking that there is considerable convergence on an efficient modern digital model of processing the vast majority of small disputes (for consumers and SMEs), in the consumer Ombudsman system, the Online Court model, and the emerging model in Tribunals. I set out below the Ombudsman model, and merely make the points here that mediation is automatically in the pathway and takes place virtually as part of the process of investigating the facts and positions of the parties.

In relation to (c), the two essential elements are to be able to identify problems that have wide relevance and to have the right means of intervening to reduce the risk of reoccurrence of those problems. The idea is that prevention is better—and much cheaper—than cure. But some systems do not have the ability to identify something systemic or to be able to intervene so as to affect effective changes in performance, behaviour or culture that are needed to prevent recurrence.

In the rest of this note, I will concentrate on Consumer Ombudsmen, since I was initially asked to address that topic, and it may be one that is less familiar to some. But the Consumer Ombudsmen system, working together with regulatory authorities, shows exactly how aspects (b) and (c) above, and at least partly (a), can be achieved well. The model may provide some inspiration for how things might be done in other sectors, perhaps with some adjustments.

In the NHS and public sector, for example, regulatory authorities either do not exist or are less effective in affecting performance, behaviour and culture. I believe that refocusing the Public Ombudsmen, with the NAO, on the performance, behaviour and culture of public organisations, would be effective. At present, there is a risk that having to process many individual complaints can deflect the Public Ombudsmen from that higher vision. Many current complaints relate to the NHS, and I would urge healthcare complaints to be shifted to a Nordic-style administrative redress scheme,⁴ since that would enable the NHS to achieve its goal⁵ of becoming an ‘open culture’ that learns and improves.

OMBUDSMEN

Contribution to Market Regulation and Behaviour

This section summarises the role that Consumer Ombudsmen play in consumer markets, and the role envisioned for a Property Ombudsman in the property market. Such Ombudsmen perform a series of essential functions in addition to that of dispute resolution. This extra functionality makes them (a) intermediaries of choice in designing both market regulatory and dispute resolution architectures and (b) highly efficient. These factors affect the choice of dispute resolution mechanism, and indicate

³ *Getting it Right in Social Welfare Law. The Low Commission's follow-up report* (The Low Commission, 2015).

⁴ S Macleod and C Hodges, *Redress Schemes for Personal Injuries* (Hart, 2017).

⁵ Rt Hon Jeremy Hunt MP, Speech at Global Patient Safety Summit, Lancaster House, 10 March 2016 <https://www.gov.uk/government/speeches/from-a-blame-culture-to-a-learning-culture>; House of Commons Public Administration and Constitutional Affairs Committee *Will the NHS ever learn? Follow-up to PHSO report 'Learning from Mistakes' on the NHS in England Seventh Report of Session 2016–17* (2018) HC 743, 17 January 2017.

advantages that well-designed Ombudsmen have over arbitration-based ADR schemes and some courts or tribunals.

Functions of the Market Control Mechanisms

In order to achieve a system that identifies and resolves problems, the following functions are needed:⁶

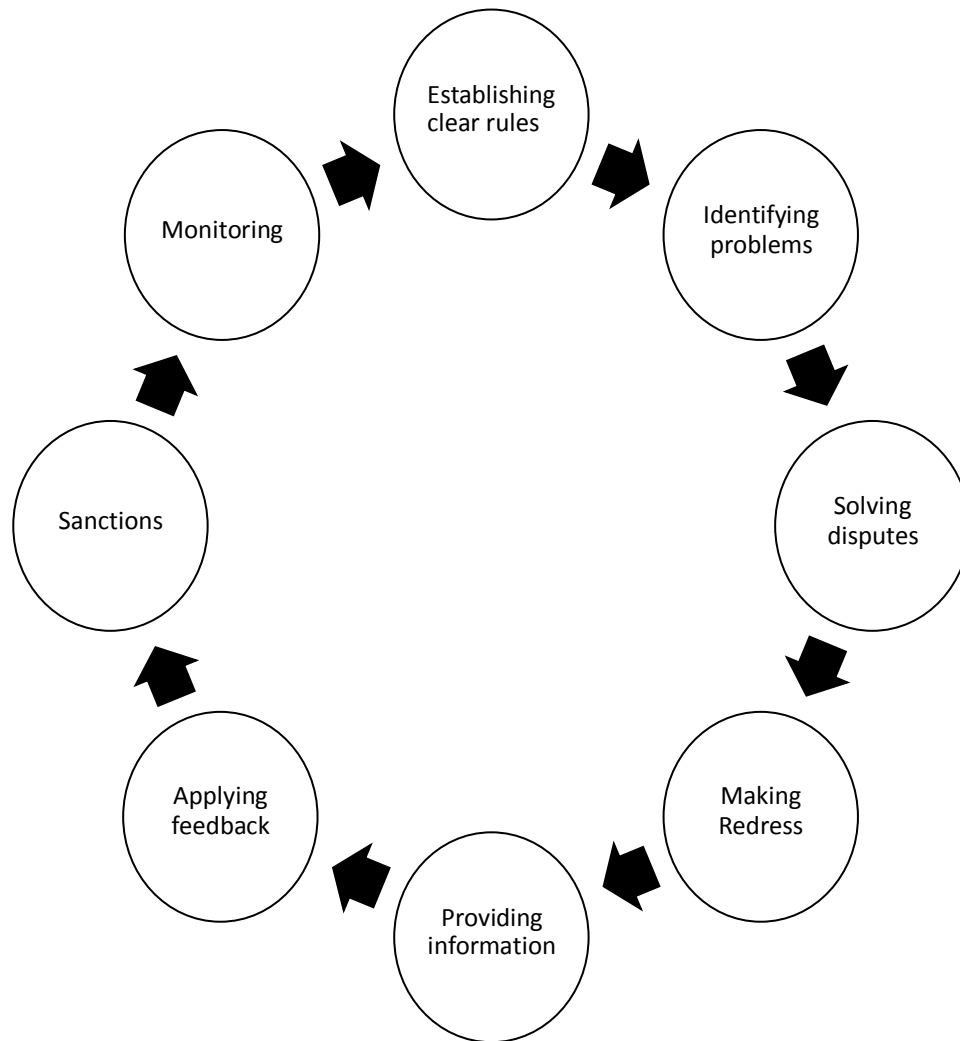
1. Establishing clear rules and their interpretation;
2. Support compliance;
3. Identification of individual and systemic problems, such as non-compliance or new problems that have not been catered for in the rules;
4. Decision on whether behaviour is illegal, unfair, or acceptable;
5. Cessation of illegality;
6. Resolving disputes swiftly and fairly;
7. Identification of the root cause of the problem and why it occurs;
8. Identification of what actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk;
9. Dissemination of information to all who might benefit;
10. Application of the actions (a) by identified actors (b) by other actors, either voluntarily or with assistance in changing behaviour, systems or culture so as to reduce risk of reoccurrence;
11. Putting things right where harm has been caused, eg by making redress;
12. Imposition of appropriate, proportionate and effective sanctions that support ethical compliance and protect society;
13. Ongoing oversight to verify that the intended actions have been taken, and any consequential action to ensure this or sanction non-compliance;
14. Ongoing monitoring of actions taken and any necessary corrective amendment of the strategy.

These functions should operate as a cyclical quality system, illustrated below, based on data evidence.

The key elements are:

1. A Quality System
2. Circulation of data
3. Culture of organisations.

⁶ The definitive version of this list is from C Hodges, *Delivering Dispute Resolution: An Holistic Review of Models in England & Wales* (Hart, 2019). The list has been adopted by the *Report on Regulatory Powers and Corporate Offences* (Law Reform Commission of Ireland, 2018), and *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Australian Law Reform Commission, 2019). https://www.alrc.gov.au/sites/default/files/alrc_report_134_webaccess_2.pdf



The short propositions are that

- (a) Courts, tribunals and arbitration-style ADR only perform a dispute resolution function. But they and other elements can be designed so as to contribute to the wider system and to provide more functions.
- (b) A well-designed Ombudsman mechanism is not only quick, efficient and speedy at dispute resolution but can also perform several other functions, such as (i) providing consumer and trader information, (ii) a helpline, (iii) collection and aggregation of data, (iv) feedback of issues to traders, the market and regulators, and (v) quasi-regulatory intervention and support of traders in changing their behaviour and culture.
- (c) These functions can be significantly assisted where there is a single national website that provides (i) information to consumers and traders, (ii) a dispute resolution communication or signposting platform. Belgium has this (now provided by the Consumer Mediation Service) and the closest UK equivalent is resolver.co.uk, whose consumer traffic now exceed the volume of Citizens Advice.

Ethical Standards of Behaviour

1. Market behaviour needs to conform to the standards expected by the society within which actors operate.
2. Behaviour has fundamentally to be ethical, as defined by that society. In essence all commercial and public actors have to be seen to 'do the right thing'. This requires open demonstration to

society that expected standards apply and are observed, and that systems are in place and operated to achieve this.

3. Regulation should comprise an effective mix of supervision by the state, convincing self-regulation by market actors, and transparency to users and society.
4. Consumers and market customers all play a critical role in providing feedback on market practice. The system needs to encourage, capture, recycle and apply this data.
5. This model supports good business practice, commercial reputation and growth, and optimal expenditure by both public and private sectors on regulatory costs (Better Regulation). It is collaborative and efficient.⁷

Ombudsmen play a major role in supporting ethical market behaviour. The basis of their decision-making is what seems *fair* to the Ombudsman in the context of society and of the legal and regulatory rules. There is some academic criticism of that standard, especially in Germany, but it is spreading widely across Europe and beyond, not least in the context that societies now demand behaviour that is fair, irrespective of whether a legal rule may exist or may perhaps state a more complex standard.

Operation of the Ombudsman

1. An Ombudsman is ideally a single body covering the entire sector, independent of regulator and agents, with a fully independent Board.
2. The Ombudsman will be a source of independent information for consumers and agents.
3. The Ombudsman is a single place that consumers may easily identify as being the source of information and help in resolving problems. The objectives of having a single source are to make the Ombudsman easily identifiable, to maximise consumer trust because of independence, to avoid competition that might undermine quality, and to maximise the creation of a database of information on the state of behaviour in the market.
4. Consumers may complain first to Actors and then to the Ombudsman. The time for Actors to respond to complaints, after which consumers have access to the Ombudsman, should be limited.
5. The Ombudsman process is free to consumers. It may be funded by the state and/or by business (this is acceptable as the Ombudsman will have independent structure and governance). There is a trend to charging on basis of recovery of overheads, replacing fees per case.
6. The Ombudsman process will involve the following stages: information and assistance, filtering and triage, facilitating communication between both sides (mediation), and decision: see Figure 2.
7. The Ombudsman will refer significant points of law to be resolved by a court (and case referred back, like the ECJ model), or to a regulator for amendment of guidance or rules, or to a legislature.
8. The Ombudsman's decision should be based on either (a) applying the law or (b) what seems fair to him/her in the circumstances of the individual case. The latter standard is more understandable by and acceptable to consumers.
9. The decision will not be binding on the consumer unless the consumer accepts it, whereupon it will be binding on the Agent. The consumer should have a right to bring a claim in court⁸ but the Ombudsman mechanism should be more attractive.
10. Business should confirm to the Ombudsman when it has implemented the decision in full. [This avoids additional enforcement action by the consumer in most cases. Non-compliant businesses should be reported to the Regulator.]
11. The Ombudsman will publish data on the incidence of problems and trends, without disclosing details of individual consumers.
12. Regulators, the Ombudsman, Actors and trade bodies will hold regular meetings to engage on what should be done to reduce the incidence of the problems that have been identified.

⁷ C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation and Enforcement* (Hart Publishing, 2015); C Hodges and R Steinholtz, *Ethical Business Practice and Regulation. A Behavioural and Values Based Approach to Compliance and Enforcement* (Hart 2017).

⁸ European Convention on Human Rights (ECHR), art 6; Charter of Fundamental Rights of the European Union (CFR), art 47.

13. Agents and will engage with appropriate Actors or associations in addressing the source of any problems and reducing future risk.
14. The Ombudsman might be either established by Statute or a not-for-profit body appointed by tender against quality criteria. It will be regulated under the Consumer ADR legislation.

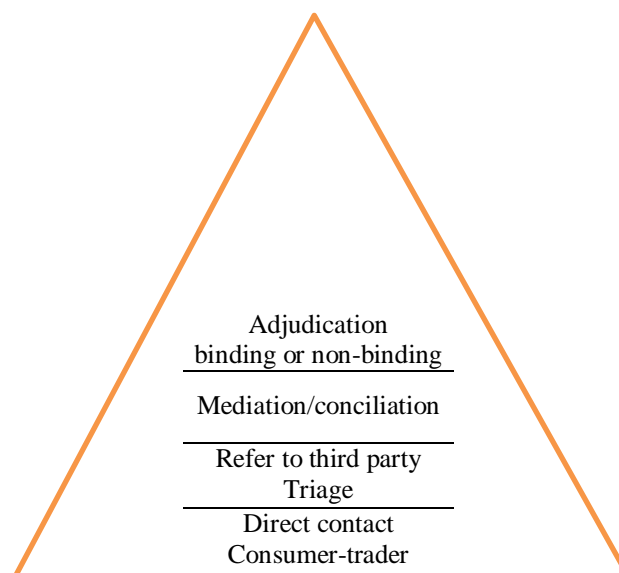


Figure 2: A consumer Ombudsman's escalating pyramid technique

Current UK Consumer Architecture

The UK currently has some of the most advanced and effective Consumer Ombudsmen in the world, covering a number of sectors, such as financial services, pensions, energy, communications, furniture, motor, and recently rail. It also has good quality arbitration-style ADR schemes that cover quite a few other sectors. But the landscape is not joined up or easy for consumers to identify or navigate. This issue was raised in a BEIS Consumer Green Paper in 2018.

In my view, various reforms should be made so that the system works well. We should complete the clear shift from courts to Ombudsmen in relation to consumer complaints. The structural recommendations for the new model are:

- A. There should be *a simple national system* for consumer complaints, involving basically the same framework model (whilst permitting some relevant divergence and innovation). The state of the art model is that of the Ombudsmen and that should be the standard model.
- B. There should be *a single integrated national architecture of consumer Ombudsmen*. This would comprise:
 - i. A single national website for providing consumer advice and signposting the relevant Ombudsman.
 - ii. An integrated national structure for providing advice to people locally face-to-face, involving Citizens Advice and the Ombudsmen.
 - iii. An integrated national structure for Ombudsmen, involving only a small number of Ombudsmen (fewer than at present).
- C. There should be a mechanism for referring points of law for decision by a court and reference back.

One of the current conundrums is how to engage SMEs in the consumer ADR system. Various innovative ideas are being discussed that might solve that problem.

Proposed Property Architecture

A similar model is emerging in the property sector. MHCLG has commissioned a working party to make proposals for the design of a single new regulator for property agents in England. The logic of that change would lead to expansion of the model to include landlords and properties: an attractive idea is for a single property portal.

Associated with the regulator would be a new single Ombudsman. There are currently several property ADRs and the landscape is too confused.

After a consultation in 2018 based on the premises that the landscape was confusing and had various gaps and inconsistencies,⁹ the Government set out in January 2019 a general vision for a new integrated ‘service to cover all housing consumers including tenants and leaseholders of social and private rented housing as well as purchasers of new build homes and users of all residential property agents’.¹⁰ The new structure would be constructed in stages, ideally involving voluntary action achieved with the agreement of relevant sectors, but against the threat of mandatory requirements from legislation if necessary. The main pillar of the new approach would be a Housing Complaints Resolution Service that would provide a single point of access for all current and future schemes that offer redress and ADR, and provide advice and triage as a first stage.

It has also been proposed to provide a single Property Portal (information, signposting of disputes), behind which would be relevant coordinated tracks involving the current First-tier Tribunal (Property Chamber) and a new independent Property Ombudsman. That would simplify the current position where landlords tend to start cases in the Tribunal and tenants go (if they can) to an Ombudsman/ADR, which can result in the same issues arising in different uncoordinated venues.

I am aware that a separate regulatory system for property agents has recently been put in place in Wales,¹¹ and that the County Courts are said to function well as the place for people to go to resolve property problems. I have not researched those very interesting aspects in sufficient detail, but they would indicate that a different approach to that which may emerge in England might be sensible, so as to build on the existing structures, as long as they work well enough.

⁹ *Strengthening consumer redress in the housing market. A Consultation* (Ministry of Housing, Communities & Local Government, 2018).

¹⁰ *Strengthening Consumer Redress in the Housing Market. Summary of responses to the consultation and the Government’s response* (Ministry of Housing, Communities & Local Government, 2019).

¹¹ The Housing (Wales) Act 2014 and Rent Smart Wales. I am aware of some criticisms of the system from national agents’ associations, but do not express a view here.