Scottish Public Services Ombudsman Response to the Department for Business Innovation and Skills Consultation on the Implementation of the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation.

Background

In responding to this consultation, I concentrate on an issue which is not explicit in the documents. Given this, I felt it was more helpful to set my views in a separate response rather than to respond to the individual questions. The issue with which I am concerned is the possible unintended consequences of the Directive and Regulation in relation to the existing public sector Ombudsmen and complaint-handling bodies.

Since the creation of the office of the Scottish Public Services Ombudsman (SPSO) in 2002, Scotland has had a simplified system of public sector complaint handling. Public service delivery of services has, over the same period, become more complex with local authorities creating arms-length organisations (ALEOs) to deliver some services and increasing use of the private and third sector working in partnership with public bodies. This combination means that, while the laudable aim of the EU Directives is to simplify and improve standards, particular care needs to be taken in its implementation to ensure that it is not, in the context of this simplified complaint handling and complex service delivery landscape, counterproductive.

Roles of the SPSO

The SPSO has two key roles. It is the final complaint-handling or ADR body for a broad range of the Scottish public sector including the NHS, local authorities and the central Scottish Government and related public bodies including most of the Scottish regulators. A number of the organisations listed as ADR bodies in Annex B do not operate in Scotland because their role is undertaken either by the SPSO or another body. SPSO has responsibility for water complaints (Waterwatch listed in the consultation was abolished in 2011); further and higher education complaints (the Office of the Independent Adjudicator does not operate in Scotland); complaints about Registered Social Landlords, (the Housing Ombudsman does not operate in Scotland); and local authorities (the Local Government Ombudsman does not operate in Scotland). On this last point, it is important to note that it is the Care Inspectorate which currently undertakes the role of handling complaints about the quality of care provided by both socially-funded care and private care services in Scotland.

The second role that the SPSO has is that we are a Complaint Standards Authority (CSA). We have a specific role given to us by the Scottish Parliament to set and monitor the standards of complaints handling by all organisations under our

jurisdiction. This includes bodies who may be delivering services that are covered by the EU Directive and the Regulation.

In responding to this consultation, I set out below key issues and questions which need to be answered and used to test any proposed implementation plan to ensure that the implementation does not cause undue difficulties to existing schemes.

What services are covered by the Directive?

The first question that needs to be clearly answered is where and how the line is to be drawn between services covered and those not covered by the Directive and the Regulation. The definition of the excluded services in the ADR Directive is fairly narrow. The delivery of a service through publicly owned "trader" is clearly covered by article 4 (1) (b). It seems the key distinction between services covered and not covered relates to remuneration. This is complicated, since part or fully paid-for services are not uncommon in areas where the delivery is by a public body. This covers a broad range from special bin collections; certain library services; access to halls; leisure and cultural services; social care services where increasingly individuals manage their own budgets; additional education services (such as after-hours care or breakfast clubs or some music tuition); to the role of some students in funding higher education and whether that education is publicly delivered. As citizens interact increasingly online with public bodies, the ODR Regulation may also apply. Water services for the domestic market in Scotland are paid for separately from other public services but alongside the local council tax. Small non-domestic consumers of water may or may not be regarded as consumers in terms of the definition which excludes trader disputes but not dual purpose contracts (paragraph 18).

These are only the examples that have come to mind – clearly, though, the method, extent and scope of issues varies not only between the countries of the United Kingdom but even between local authority areas where what is paid for may vary as can the method of delivery from direct delivery to delivery through a wholly-owned trust or charity or by a third party following a procurement process. Further, in terms of the impact on business, there are organisations that may, because of the range of services they deliver both privately and publicly, find themselves subject to different ADR regimes for either different contracts or even parts of the same contract.

In terms of our own, current jurisdiction, it is, in particular, unclear to us at present whether: the way water services provided in Scotland by a single publicly owned provider to the domestic market; paid-for local authority services; or the way higher education is funded and established in Scotland, means that those sectors are or are not covered wholly or in part by the Directive and the Regulation. While that uncertainty relates to whole areas, the breadth of our jurisdiction means that there will remain uncertainty around individual services even when the sector (local authorities) is not included as a whole.

Before deciding on mechanisms or assessing the impact of the Directive and the Regulation, there is, in my view, a need for a detailed, legal analysis by BIS to provide clarity on what services are or are not covered. Only once that is established can the subsequent issues I raise below be fully dealt with.

Who should take complaints if there are public services covered by the Directive?

On our reading of the Directive and the Regulation, it is not possible to say that public services as delivered in the UK are currently excluded and, therefore, that public service complaint handling bodies are not covered. Even if not currently covered, changes in service delivery may mean that they become so which means there is a need to consider how they could implement the Directive. We would suggest that it would not be appropriate to further complicate the landscape, which means if we already are or will in the future take complaints which could be regarded as a dispute in terms of the ADR Directive, it would make sense to ensure we can fulfil the role as a suitable scheme.

This raises a number of very specific questions around status, funding and legislation as well as the operational difficulties of managing a scheme where some complaints or even parts of some complaints may be covered but others are not. I use the SPSO as my main example but these issues may well relate to others.

The implications of existing public service ADR bodies being covered by the EU Directive and Regulation.

Is it contractual?

The Directive is clear that it is contractual obligations that are intended to be covered. ADR systems already in place do not necessarily use those standards. The standards that we use to assess service delivery are maladministration and service failure. Given the difference in definition, it is not clear whether in individual cases or areas, the SPSO is looking more widely or looking more narrowly. If more narrowly, consideration may need to be given as to whether that is appropriate given there are few organisations we can refer onto other than the courts.

If we are looking more broadly than simply contractual obligations, we would appreciate advice on whether we would be obliged to report fully to the notifying authority or should we only report the aspects of the complaint that we think are within the ADR Directive? And do the standards such as time limits only apply to the more narrow part or if an aspect of a complaint come within the Directive and is being dealt with as a single complaint does it apply to the whole?

Voluntary use of ADR

Organisations under our jurisdiction are not able to choose whether or not a concern can come to us; they cannot withdraw an issue; and the recommendations we make

about them are usually made in public. It would not be appropriate to allow the organisation to refuse to submit to the ADR process.

Status

The SPSO is fully independent. We are funded by and directly accountable to the Scottish Parliament, not to the Scottish Government. The Ombudsman is a Crown appointee and is nominated after a vote of the Scottish Parliament. Our legislation makes it clear we are not subject to direction in operational matters by the Parliament, Government or any organisation under our jurisdiction.

This status is important in our role as the independent complaints body for public services. It also makes the role and functions of the notifying authority a sensitive one. At present, the consultation suggests this role could be taken on by regulators. However, regulators funded by the Scottish Government such as the Water Industry Commission for Scotland and the Care Inspectorate are within our jurisdiction. It would be highly inappropriate for these organisations to take on the notifying role when we can take complaints about them. It would also be inappropriate in terms of our status as a Scottish Parliamentary body to be accountable to a Scottish or UK Government body. There remain options including for example a professional standards body such as the Ombudsman Association, but any discussion around this should involve not only the Scottish and UK Governments but the Scottish Parliament. While a UK solution may make sense for the non-reserved areas, devolved issues may require a separate Scottish solution.

A further problem results from our role as a Complaints Standards Authority in that we set standards for complaint handling by the bodies under our jurisdiction. We need to be sure that any notifying authority is not an organisation for whom we set standards.

Funding

The consultation suggests that ADR entities should fund the notifying authority. Our funding comes direct from the Scottish Parliament, and it would not be appropriate for that funding to be seen to subsidise a body whose main role is around private sector complaints. It may also be difficult to create a funding model when there may be confusion about to what extent the complaints we receive are or are not covered by the Directive and the Regulation.

Legal and operational issues

We are a statutory scheme with broad powers and discretion which we currently apply effectively to dispute resolution. In considering whether the existing provision is or is not suitable, however, there may need for an analysis of whether any aspects of our legislation may make compliance with the Directive difficult. It would clearly be regrettable if an existing statutory scheme was not accepted by the notifying

authority as suitable. We have provisionally identified a number of issues that we think it would be helpful to clarify prior to implementation.

- the Ombudsman is a personal office and a crown appointee. Restrictions on his qualifications and also the need to refer to another ADR body if there is a potential conflict of interest may require changes to the legislation or place requirements on the Scottish Parliament and may (in particular the need to refer) simply not be possible in a simplified landscape;
- as set out above, the extent to which our standards align with contractual obligations;
- there may also be some additional specific restrictions in our legislation by subject matter that may or may not limit our ability to look at "contractual obligations";
- the exclusions and reasons as to why we cannot or would decide not to take a complaint forward are not the same as the ones set out in the Directive - is this problematic?;
- the 12 month time limit we operate under is different from the Directive;
- we have a broad discretion on how we investigate and must do so in private subject to some restrictions. The Directive appears to be more restrictive; and
- requirements to share information between parties do not recognise our broad ability to compel information to be provided which means that, at times, we have information that could or should not be shared.

The legal points I have briefly highlighted above reflect one of the key operational problems which is the difference between the standards under which we currently operate and those of the Directive. Having to apply two sets of standards and operate two reporting regimes would lead to an additional administrative burden. While there is a logic to ensuring that all complaints are covered by one set of standards, if that were to mean that the SPSO provided a lesser or less independent service than at present because of the requirements to comply with the Directives, I would argue that this not the best solution for the public. Care will need to be taken to ensure that implementation does not lead to this outcome.

In closing, I have also noted there is no indication as to how a publicly funded ADR body covered by the Directive will be funded to cover additional administrative burdens or other impacts of the Directive. At present, we have no budget for this and therefore this aspect would need further discussion.

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