

## Implementation of the ADR Directive

The implementation of the ADR Directive gives Ireland an opportunity to provide consumers and users of public services with access to independent redress in a consistent and straightforward fashion. The spirit of the ADR Directive is ambitious and visionary. It envisages properly independent ADR entities covering the consumer landscape, including both commercial entities and privatised public services. The proposals for implementation should not be minimalist and serve only to tick the box. There is an opportunity here which should not be missed.

A clear vision, in line with that being adopted by some forward thinking countries, would set out to develop an uncluttered landscape of ADR access. It would avoid the risk of having a proliferation of ADR entities which would serve only to confuse the consumer and limit their impact.

In Ireland, thus far, there is little or no independent redress available to consumers, and changes in public service delivery has seen many services removed from the Ombudsman's jurisdiction. There has been a partial response to this removal by allowing some regulators to deal with complaints from individuals. This approach has limited validity and is questionable in the context of the directive. In other services, there is proper separation between regulation and redress. Examples include the financial services sector where the regulator is the Central Bank and redress is provided by the Financial Service Ombudsman, and public healthcare where regulation is provided by HIQA and redress by the Ombudsman.

The vision for Ireland should see a new Consumer Ombudsman dealing with the wholly commercial sector, the Financial Services Ombudsman continuing to offer redress in this specialised area and the Public Services Ombudsman dealing with redress for users of public services, whether provided by the public sector, semi-state companies or the private sector. Such a simplified landscape would require legislative under-pinning with key services such as utilities being required to participate, in the same way as financial service providers are presently and with funding being provided either by levy, by case fees or by a combination of both. There would be no ongoing call on public funds.

The answers to the questions which follow are predicated on such an approach. The Ombudsman also fully endorses the response put forward on behalf of the Irish Ombudsman community.

We have an opportunity to make a significant difference for all of the people of Ireland if we are ambitious in our approach. It's important that we do not squander it.

***Q.1 Do you think significant gaps exist in the provision of ADR in the State to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a trader, if so, where do you think they exist?***

There are gaps in the provision of ADR in the State. While some sectors have regulatory bodies established by legislation to provide oversight, a number of these statutory bodies do not have explicit statutory authority to pursue individual complaints from members of the public and to ensure the provision of individual redress in appropriate cases. An example would be Irish Water which is overseen by two separate regulatory bodies; the Commissioner for Energy Regulation (economic regulator) and the Environmental Protection Agency (environmental regulator), but neither body has the statutory power at present to seek redress on behalf of individual complainants. The functions carried out by Irish Water used to be carried out by local authorities which are subject to the Ombudsman's remit, but Irish Water does not come under the Ombudsman's remit which means that there has been an effective diminution of the rights of members of the public to have an independent forum to pursue complaints about water services. As a first step the Ombudsman's jurisdiction over water complaints should be immediately restored.

Over time there is an increasing tendency to out-source the delivery of public services to private entities which leads to less oversight and loss of truly independent complaint and redress mechanisms for the public. A recent example would be the wide spread privatisation of waste collection services by local authorities. The Ombudsman model has proven to be effective internationally in providing individual redress and in bringing about systemic improvements to services for the benefit of larger groups of service users.

***Q.2 Can you identify ADR entities which cover disputes in specific sectors? If so, in your opinion are these entities in a position to comply with the requirements of the Directive?***

It is noted that there are already five notified ADR entities in Ireland and a further ten non-notified or informal ADR schemes.

***Q.3 In your view, is there an existing body which could fill the lacuna in ADR coverage?***

Yes, the Office of the Ombudsman is well placed to fill the gaps in ADR coverage as it affects public services. The office has operated as an independent complaints handling body for 30 years and has built up vast expertise in resolving complaints in a fair and impartial manner and obtaining appropriate redress for members of the public when warranted with 90,000 complaints being fully examined and assistance

being provided with hundreds of thousands of other enquiries. It has wide public acceptance with an established authority in dispute resolution.

**Q.4 Can you propose a specific model the State may use to implement the Directive?**

Yes, over the years, many services formerly in the public sector have been privatised, including for example, waste management, energy suppliers and telecoms. These often fall into the category of *networked services*.

When all services are provided by the State, there is little issue about access to redress. The Public Sector Ombudsman provides a free and accessible ADR service to all members of the public availing of those services. However, when services are privatised, then access to redress can be lost. For example, if the railways were to be run by a private company, would they stop being a public service? Is the citizen less deserving of a good redress mechanism when they avail of a public service provided by a private company versus as a public body?

Under the EU ADR directive, all of the networked services, including post, electricity, gas, public transport, and telecoms will have to come within the jurisdiction of an ADR entity. These utilities should come within the jurisdiction of the Ombudsman, to offer a one stop shop approach to redress for people who have not been treated properly by public services. The role of the Public Services Ombudsman should be complemented by the creation of a Consumer Ombudsman to cover other commercial transactions, thus providing a simple and straightforward route to redress in compliance with the Directive.

Under such a development, the Ombudsman's office would then cover a mixture of state, independent and private bodies - a so-called hybrid model. This would not be an entirely new development as many services already under jurisdiction are provided by independent or private bodies on behalf of the State and its agencies, while the new provision in the Ombudsman (Amendment) Act 2012 to draw in *significantly funded* bodies will draw in many more, so the template is already in place. However, a more fully evolved hybrid model would need to see changes in the way the Office of the Ombudsman operates.

At the moment, the Ombudsman makes recommendations, rather than having binding powers and is funded from the public purse, rather than by bodies in his jurisdiction. Private Sector Ombudsmen (such as the Financial Services Ombudsman) can be established by law and organisations in their jurisdiction can be required in law to cooperate with them.

One important distinction from public services Ombudsmen is that although such schemes can be created by statute, their funding is usually provided by the industry

sector in which they operate, and not by the State. In a hybrid model, it is likely that binding powers (findings and recommendations) would be needed in respect of private providers, who would be less susceptible to the democratic process and criticism by the Oireachtas.

***Q.5 How would the model proposed under Q.4 be funded (public funds, business, business organisations, case fees or a mixture)?***

If the Ombudsman is to deal with privatised services, funding would need to come from the industry, whether through a levy, a charge per case, or a combination of both. The cost should not fall to the public purse. The cost can act as an incentive to get things right in the first place – the so-called “polluter pays” principle.

Such hybrid Ombudsman schemes operate successfully in Australia and elsewhere, and Ireland now has an opportunity to follow their example. It is the job of the State to ensure that citizens have access to public services. It is also widely accepted that citizens should have access to independent redress in the shape of Ombudsmen. Growing complexity in service provision should be counterbalanced by simplicity in accessing redress.

A Consumer Ombudsman should be funded by the bodies in its jurisdiction, again, through a levy, a case fee, or a combination of both.

***Q.6 What are your views on relying on an ADR entity/entities established in another Member State or regional, transnational or pan-European dispute resolution entities?***

It is difficult to envisage how external ADR entities could provide as an effective, efficient and informed service as appropriate entities already operating within the State which could be suitable for designation as ADR service providers. Other jurisdictions have suffered from an unregulated development of such entities and much confusion for members of the public has ensued.

***Q.7 In your view, should the implementing legislation provide for ADR procedures where the person(s) in charge of such procedures are employed or remunerated exclusively by the individual trader to be covered by the Directive provided they meet specific requirements?***

No. This would give rise to a clear perception of conflict of interest.

***Q.8 Can you identify any specific ADR procedures which may fall under this category?***

No

**Q.9 Should the implementing legislation provide for ADR entities to use all, some or none of the exemptions in its procedural rules as provided for in the Directive? Please provide an explanation for your suggestions.**

- a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader;**
- b) the dispute is frivolous or vexatious;**
- c) the dispute is being or has previously been considered by another ADR entity or by a court;**
- d) the value of the claim falls below or above a pre-specified monetary threshold;**
- e) the consumer has not submitted the complaint to the ADR entity within a prespecified time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader;**
- f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity.**

In answering this question it is assumed that the exclusions in question may be exercised on a discretionary basis by the ADR entity having regard to the circumstances of the case.

- a) This provision should be included and reflects a similar provision in Ombudsman legislation.
- b) This provision should be included and reflects a similar provision in Ombudsman legislation.
- c) This provision should be included and reflects a similar provision in Ombudsman legislation.
- d) Agreed -see also reply to Q10.
- e) This provision should be included and reflects a similar provision in Ombudsman legislation.
- f) It is not entirely clear the type of scenario that is envisaged as falling into this category of exclusion. There is no similar provision in Ombudsman legislation.

**Q.10 Should the State prescribe minimum and maximum claim thresholds, if so, how much and the reason for the stated amounts.**

It is suggested that a minimum threshold of €50 should apply.

***Q.11 Should ADR procedures be free of charge to the consumer or should a nominal fee be charged, if so, how much and why?***

This Office would recommend that the service should be provided free of charge to consumers.

***Q.12 Should the implementing legislation provide that the decisions of notified ADR entities, which aim at resolving a dispute by imposing a solution, are binding on traders?***

Yes.

***Q.13 What are your views on the mandatory participation of traders in notified ADR procedures, which fulfil the requirements of the Directive, in other areas which are not already mandatorily required (eg. financial services)?***

In the event of making the participation of traders in ADR procedures mandatory this Office would pose the question as to how such a legislative provision could be practically implemented e.g. which oversight body would be responsible (in the absence of self declaration) for identifying all relevant traders and ensuring that they participate in the ADR processes?

***Q.14 Is the period beginning on the day on which the relevant dispute is referred to an ADR procedure and ending on the day which is 30 days after the ADR procedure has concluded sufficient time to extend the limitation period for taking judicial proceedings? If not, why?***

On the face of it the time limitation appears quite onerous. A range of factors may impinge on meeting such a deadline e.g. volume of complaints and resources available to the ADR entity at any particular time, time required to gather relevant information from all relevant parties and dealing with conflicting evidence, level of cooperation from traders etc. In the context of Ombudsman complaints while there is no legal limit set for turnaround times the majority of cases are completed within three months. There may be a case to be made to extend the Statute of Limitations limitation period.

***Q.15 Are you aware of any other Irish legislation where the limitation periods may require amendment in order to meet the requirements of the Directive?***

No

***Q.16 Do you have any views, on the designation of competent authorities? Should the State designate one competent authority or more (sectoral regulators responsible for particular areas)?***

If a multiplicity of competent authorities is created there may be difficulties in ensuring a consistency of approach as between the various authorities given the various elements attached to the role. If one competent authority is established then it must have the resources and expertise available to it to ensure compliance with the Directive.

***Q.17 In your view should disputes initiated by a trader against a consumer be included in the legislation giving effect to the Regulation. If so, why?***

No

***Q.18 The Department would welcome any other views on issues relating to the Directive and the Regulation which you may wish to provide.***

1. It is presumed that when the new ADR entities are established they will be confined to dealing with disputes arising from contracts/services which occurred on or after the date of establishment of the entities.
2. This Office has a number of suggestions in relation to how complaints processes generally in Ireland could be radically improved and these would serve to provide a more efficient and effective delivery of ADR services.

In many instances complaints considered by the Ombudsman's Office about the services provided by public bodies have been compounded by very poor complaint handling. People face delays, a lack of information, incomplete answers, defensive attitudes and no effective redress. Widely varying approaches to complaint handling abound, with no obvious rationale for the differences.

Introducing a standard approach to complaint handling across the public sector, setting out clear timescales, standards for responses, a common approach to redress and above all, a focus on tackling most dissatisfaction at the time it arises, can bring real dividends. The Ombudsman wishes to work with Government and public service providers to introduce a common complaints policy to be used across all public services in Ireland. This has the potential to lead to greatly improved complaint handling. It means that a single investigation can address complaints across multiple providers. It allows for standardised complaint training for staff of all public service providers. It gives complainants certainty about what they should expect. A model system would be streamlined and based on an "Investigate Once,

Investigate Well” approach. It would eliminate multiple stage processes which create work and delay resolution.

Making it easy for people to complain is essential if we are to improve public services. The Ombudsman wants people to be told as soon as they complain to any public service provider about their right to complain to the Ombudsman if they remain dissatisfied. He wants them to be able to complain in a way which they find convenient, in a language they are comfortable with and in a medium which suits them, whether that is in a letter; filling in a form by hand or on-line; on the phone or in person. As social media, smart phones and tablets are now common; we need to facilitate their use in contacting the Ombudsman's Office, while not neglecting the interests of those who prefer more traditional means. A standardised public sector complaint process would also make it easier for the agencies within jurisdiction with no need to reinvent the wheel and ready access to validated training modules, for example.

The complex pattern of public service delivery can also serve to confuse people who want to complain. They are not always sure where they should go and how they should make a complaint.

One way to address this confusion for members of the public who do not know who to complaint to is to provide a single portal for all public sector complaints. The website [www.healthcomplaints.ie](http://www.healthcomplaints.ie) which was developed by the Office of the Ombudsman in partnership with other bodies is a useful building block towards a telephone and online service which can signpost people who want to make a complaint about any public service, or capture that complaint and send it on their behalf. Already, the Office of the Ombudsman signposts many complainants to the appropriate agency or to another Ombudsman. Extending this service would cost money, and would need to be funded, but it is an idea which the Ombudsman is committed to pursuing. The Ombudsman has already appeared before the Public Oversight and Petitions Committee (PSOP) and discussed this issue and PSOP has expressed a wish to stimulate debate on these suggestions.

**Office of the Ombudsman**  
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