



Response to BEIS Consultation

Small Business Commissioner: Policy for Secondary Legislation

December 2016

Introductory and general remarks

The CJC welcomes the Department's consultation on the complaints process for the Small Business Commissioner (SBC) prior to its being brought into effect in regulations.

Although the material provided is clear and logical, it may have saved further consultation by appending a draft set of Regulations to provide a clearer illustration of their form, tone and content.

The question of appeal processes in relation to the SBC's decision-making or interpretation of the Regulations has not been addressed in the paper. This would cover internal reconsideration of dismissed complaints or external appeal processes or options that are the hallmark of most complaints or Ombudsman schemes.

The SBC should have powers to review the Regulations, and the Department should monitor and evaluate their efficacy after a period of twelve months, taking evidence from both complainants and respondents.

Although it is presumed the Regulations will not stipulate mediation or another form of ADR, it would be sensible for it to be suggested to parties by the SBC, and time limits could be extended while a case is undergoing an ADR process, returning to the SBC process if unresolved.

The paper is silent on the complainant's ability to withdraw their complaint, for example if the respondent makes them an offer to settle. It would seem prudent for this to be built into the Regulations.

The paper is also silent on whether time limits for the SBC and its office in processing and determining complaints. While this may not be necessary to be set as a requirement in the regulations, the SBC should publish performance targets for handling complaints.

Answers to specific questions

Question 1: Do you agree with the proposals set out in paragraphs 6.2 – 6.7 for how and when to calculate a business's staff headcount to determine whether they are a 'small business' which can use the Commissioner's services?*

Yes, clearly some criteria are required to establish that the user is a genuinely small business, and head count (with fluidity built in for average numbers employed, to take account of seasonal workers etc) is sensible. It is also important that it is in line with legislative standards on small business definitions.

Question 2: Are there any circumstances, instead of or in addition to those specified in paragraph 6.11, where it would be appropriate for the small business to complain to the Commissioner without first raising the issue with the respondent?

It is right that the general principle should be that the SBC will not investigate unless the complainant has first made an attempt to resolve the matter with the respondent. It is better for all parties if there is resolution as close to source as possible.

Question 3: What should be the time limit for complaints to be made to the Commissioner, should the Commissioner be able to extend it, and in what circumstances (other than those listed)?

We suggest that 12 months would be a reasonable time limit, six months may be too short a window for small businesses with cashflow problems. The SBC should have discretion to admit complaints in exceptional circumstances if they are satisfied the reason for the delay is reasonable e.g. incapacity through ill health.

Question 4: Do you agree that the complaints to the Commissioner should meet the requirements in paragraph 6.16? Please list any other requirements that should be considered.

Yes. The complainant should also give an assurance that they believe the terms of their complaint to be correct. An optional item for the form (but not a requirement) should be to provide details of any third party able to verify the complainant's complaint.

Question 5: Do you agree that the Commissioner should be able to dismiss a complaint in these instances? Please list any other circumstances where the Commissioner where the Commissioner should be able to dismiss a complaint.

We agree with the SBC's being able to decline to deal with complaints in line with the factors put forward in paragraph 6.18 of the consultation paper. Consideration should be given to the terminology to be used – where a case is not taken on because there are legal proceedings or the complaint is ineligible the term 'dismiss' seems inappropriate.

Question 6: Do you think that there are specified circumstances in which the Commissioner should be able to dismiss a complaint, which are not covered by the general factors listed above?

We agree that the SBC should have some form of discretion to be able to decline complaints beyond the specified reasons. The reasonableness of such decisions can be subject to other complaint processes.

Question 7: Do you agree that the Commissioner should be able to fix and extend time limits for any aspect of the complaints handling process?

Yes, such time limits help to ensure parties comply with the process and the SBC's requirements in seeking to resolve the complaints. The time limits must be reasonable themselves, and be consistent with comparable Ombudsman and court processes.

We agree the SBC should have the power to extend time limits to deal with exceptional circumstances, such as the ill health of the complainant or unforeseen resource pressures at the SBC's office.

Question 8: Do you agree that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or dismissed, and explain the reasons why it will not be considered?

Yes.

Question 9: When a complaint is not relevant, or dismissed, should the Commissioner be allowed but not required, to notify the person against whom a complaint is made?

Yes, for the reasons given in paragraph 6.22 of the consultation.

Question 10: Do you agree that the Regulations should require the Commissioner to take into account the conduct, behaviour and practice of the parties but that examples of these should not be listed in the Regulations, leaving the Commissioner to decide what to include in this consideration?*

Yes, but if not on the face of the Regulations the SBC must issue guidance for parties to provide examples of the types of conduct, behaviour and practice the SBC would take into account – both positive and negative. It would be very difficult to embed into regulations all the factors that the SBC may wish to take account of.

Question 11: If you answered No to Question 10 and think the Regulations should set out specific indicators of behaviour, conduct and practice and for the Commissioner to assess compliance with these, which of the above, or any other, indicators should be included?*

N/A

Question 12: Do you agree that the Commissioner should consider the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party when considering what is fair and reasonable?

Yes, one of the underpinning reasons for the SBC is to provide smaller businesses greater equality of arms in resolving disputes with larger enterprises. Clearly larger organisations will have greater resources, including greater access to legal advice than small businesses.

Question 13: Do you agree that the Commissioner should consider the impact of the act or omission when considering what is fair and reasonable but that particular impacts should not be listed in the Regulations?

Question 14: If you think particular types of impact should be listed, which should be included in the Regulations?

Question 15: Are there any other factors that should be included in the Regulations (in addition to the four proposed)?*

We agree that the SBC should be able to consider the impact of acts or omissions in determining complaints given the adverse effects that can follow. We also agree that these should not be listed in the regulations (three not four are given in the paper), but examples of what would constitute such an act or omission should be given in the SBC's guidance material.

Question 16: Do you agree that the Regulations should not list specific types of cases nor therefore corresponding additional factors that the Commissioner must take into account when determining what is fair and reasonable in those specific types of cases?

Yes, but examples should be given in the SBC's guidance material e.g. longstanding conventions on payment practices between the two parties.

Question 17: If you answered No to Question 16, what should the specified circumstances be? And what should the additional factors be in relation to those circumstances?

N/A

Question 18: Which factors (including but not confined to those above) should the Regulations set out for the Commissioner to take into account when considering whether to name respondent in a published report?

Paragraph 6.45 sets out some important examples of circumstances in which the SBC should decide to name or not name the respondent in cases at the outcome of the process. Given the lack of prescriptive powers the naming of respondents is one of the most effective sanctions the SBC can deploy. It is not an exhaustive list – for example whether any form of discriminatory behaviour was a factor and the SBC will need a discretionary decision making aspect to the Regulations.

Question: 19: If you disagree that there should be no specified circumstances that give rise to additional factors that the Commissioner must take into account when deciding whether to name a respondent, what should these circumstances be and what factors should the Commissioner consider?

N/A

Question 20: Is there anything else you consider the Regulations should cover or do you have any comments on the consultation?

See comments in opening remarks.