



RESPONSE TO THE BIS CONSULTATION ENTERPRISE BILL - A SMALL BUSINESS COMMISSIONER.

Introductory comments

Under section 6 of the Civil Procedure Act 1997, the Civil Justice Council's purpose is to review changes and developments in the civil justice system. With this in mind, the CJC is always keen to explore ways in which civil justice (and the avoidance and resolution of disputes generally) might be improved and made more accessible. For that reason, the CJC welcomes this opportunity to respond to the BIS consultation on a Small Business Commissioner ('the Commissioner') and the efforts being made by BIS to help small businesses avoid and, if not, settle contractual disputes quickly and cheaply.

Straightforward resolution of disputes

As the consultation paper notes, there are a number of good schemes already in existence to help small businesses resolve their disputes, including ombudsmen and the small claims mediation service. Further support is also offered to its members by professional bodies, such as the Federation of Small Businesses (FSB), and it is important that the new Commissioner should support and tie in with the resources already available. The CJC has noted, for example, that the FSB offers its members template legal documents, and links with organisations of that kind should be maintained to ensure that such guidance is updated to reflect any advice being given by the new Commissioner.

Similarities between issues facing small business and litigants in person (LIPs)

Many of the developments within the civil justice system during recent decades have been with the aim of offering simple and efficient ways of resolving civil disputes fairly. Examples of these changes include:

- the development of the jurisdiction of the small claims courts within the county courts,
- the growth and rationalisation of the tribunals system, and
- the establishment of a number of Ombudsman schemes for those business sectors subject to statutory regulation.

Often, the focus of these developments and changes have been the claimants and defendants who would otherwise find it difficult to pursue or defend a claim, and in particular those acting without the advice of a lawyer. Small and micro businesses, including of course sole traders, often face many of the same impediments as individual litigants when attempting to assess the merits of their own claim and understanding the options available to them in attempting to resolve disputes.

Predominant among those impediments are the speed and cost of resolving such disputes, and the complexity of the substantive law and its procedures. Like LIPs, small businesses need a fair, straightforward, quick and inexpensive system for the resolution of disputes. A more frequent concern for small businesses will often also be the preservation of commercial relationships – and the fast resolution of any disagreement in order to accommodate that.

In fact, the differences between individuals facing a dispute and small businesses are likely to relate more to the type and size of the claim than the nature of the claimant themselves. Indeed, small businesses can find themselves at a disadvantage, as they are unable to claim as a consumer, despite being in largely the same position as far as financial resources or legal knowledge goes.

Many of the same general principles of dispute resolution also apply – for example, the fact that, broadly speaking, it is quicker and cheaper for disputes to be resolved as close to its source as possible, before a third party is brought in to oversee the resolution of a dispute, with courts providing a last resort should all else fail.

Differences

Having looked at similarities, the proposals being made in the consultation paper for the role of a new Commissioner go wider than existing systems of dispute resolution, including the courts, in two respects. First, in suggesting advice in negotiation of contracts – long before any dispute has arisen, and second in relying on the application of good practice principles, rather than what is legally allowable.

The CJC welcomes both of these proposals. We have already mentioned that the resolution of disputes is best carried out as close to the source of the problem as possible – and it is entirely in keeping with that that efforts should be made to make sure that the contractual framework being built between parties reduces the possibility of those complaints arising in the first place. (We touch on dispute avoidance later in this response.)

The consistent application of principles of good practice is also to be welcomed and the Commissioner must consider carefully the ways in which its decisions – in particular those relating to the early neutral evaluation of cases – are published, allowing a body of decision-making to build up in the area, with a concurrent growth in understanding among small businesses of its rights in those areas.

Role of ODR

In paragraph 7.16 of the consultation paper, mention is made of the intention of the Department to explore the potential of ODR to form part of the services offered.

While the details of the Court and Tribunal Service (HMCTS) reform programme have not yet been finalised, it is hoped that it will include an element of online dispute resolution (ODR) – a system that would help small businesses resolve their disputes

as well. The CJC is keen to draw the Department's attention to its own report in the area – on ODR for Low Value Civil Claims – see www.judiciary.gov.uk/reviews/online-dispute-resolution/. The overlap with those proposals is striking, and both sets of recommendations share an emphasis on an initial online advice resource and on mediation to resolve disputes. The difference is that the Commissioner's 'third tier' involves a complaint handling scheme – rather than the judicial adjudication process envisaged by the CJC's report, with the advantages of a legally binding ruling touched on in the paragraphs below.

The CJC Report focussed on low value disputes of up to £25,000, which would mean that it would have particular relevance for small businesses. Again, the benefits of such a system – and of rethinking access to justice – have as much relevance to small businesses as they do to individual litigants.

Dispute avoidance

The work of the CJC's ODR advisory group included discussion and consideration of 'dispute avoidance' – preventing disputes from arising in the first place - and of 'dispute containment' – using methods of facilitation to prevent disputes from escalating. As a result, the CJC welcomes and endorses the three tier approach outlined in this consultation paper.

The first tier - informational in style and approach - would be the place where links to other resources and sources of information would be made available, as well as the Commissioner's own guidance and that should include pointing users in the direction of advice and information for areas falling outside the remit of the Commissioner, e.g. those sectors (such as the utilities) with their own legal framework, business to public sector disputes – and non-contractual disputes between businesses, such as landlord and tenant matters. The second and third would allow a more inquisitorial style of approach –one where the decision-maker can investigate and ask questions.

Role of courts

It is important to acknowledge, however, that even with a comprehensive system of ADR and ODR, there is still a place for the courts in resolving disputes for more complex cases, those requiring a degree of case management (for example, collective actions) – as well as for those for whom ADR has failed to provide a satisfactory outcome. However, it should be acknowledged that the Commissioner is likely to be attractive to small businesses, particularly with the continuing increases in court fees, as a cheaper and quicker alternative to litigation.

It is perhaps worth noting that the changes in court fees this year (the fourth set of court fee increase proposals in the past two years) are likely to have a disproportionate effect on small businesses, and BIS will wish to keep abreast with the responses to the MoJ's current consultation exercise on the subject (see

www.gov.uk/government/consultations/enhanced-fees-response-and-consultation-on-further-fee-proposals).

The key difference between the decision of the courts and those of the Commissioner difference is, of course, that the Commissioner's decisions are not rulings that are binding or have legal force. The existence of a procedure for the enforcement of provisions within the civil courts must also be seen as an additional advantage of using that system by small businesses, keen not to simply win an argument, but to get a result.

Raising awareness

Any initiative of the kind outlined in the paper would have to be the subject of a far-reaching publicity campaign, ensuring that small businesses are aware of the availability of the service.

Responses on individual questions

Negotiating contracts (Questions 1-3)

No comments.

Payment terms and practices (Questions 4 – 7)

No comments.

Late payment

Question 8

No comments.

Question 9: How could the new Commissioner be helpful in resolving late payment disputes?

We have referred to the resolution of disputes at an early stage, encouraging parties themselves to speak to each other and reach agreement, and offering mediation services where that has not been fruitful. In the absence of such agreement, parties should then be able to apply escalating procedure in the way outlined in the paper – i.e. dealing with the complaint by making an early neutral evaluation of the legality of the firm's action, and also whether it fits in with good practice.

By publishing its decisions, the Commissioner will help develop a body of good practice and also encourage and inform the small businesses themselves on their own complaints and concerns. The CJC believes that all these processes should also be open to complaints between two small businesses.

Those members of the CJC with a familiarity with mediation and dispute resolution do point out, though, that however much dispute resolution processes and the level of access to and understanding of them are improved, acute differences in bargaining power will persist and inevitably assert themselves - unless there is a substantive remedy which actually levels the parties' positions, as for example where

the behaviour of the dominant party actually breaches competition rules. To give another example, the Groceries Adjudicator has the Groceries Code to enforce their decision, while it seems to be envisaged that the Commissioner will only have the existing law.

Wider business to business contractual disputes

Questions 10 & 11

No comments.

Question 12: Do you agree that the Commissioner should provide general information and advice to small businesses on a confidential basis, in relation to a dispute with businesses which are medium-sized or large?

Yes. As described in the introduction, the CJC agrees with the three tier approach, starting with the provision of information to users. It is important that that information and advice is made available on the phone as well – while the extent numbers of people without access to a computer is disputed, there is a sizeable proportion of the population to which such guidance would otherwise main inaccessible. The importance of a mobile website should also be emphasised, as more people now access internet on their phones than on a laptop.

The guidance should include pointing people to disputes outside the remit of the Commissioner, as outlined in the introduction to this response, including towards existing ombudsmen. The CJC would like to highlight, however, the risk of the development of a confusing patchwork of different schemes, particularly as BIS works to extend the coverage of ADR and other ombudsman schemes. This in turn raises questions about how consistent and comparable the different systems will be – and whether there is a role in maintaining and eye on their consistency and function.

Question 13: If you are aware of other advice services for small businesses that assist with dispute resolution, have you used them? If yes, please describe your experience and whether it was positive or negative. If no, why did you decide not to use the advice service?

As described in the introduction, the CJC would draw many parallels between the experience of individual litigants and small businesses. One distinct disadvantage of the court system are court fees, particularly in the light of recent increases. More broadly, cost is a recurrent concern for all types of dispute resolution.

Question 14:

No comments.

Question 15: Are there any barriers that would prevent you from using a mediation service?

The CJC is concerned that a mediation process can sometimes reflect an imbalance of power – though properly mediated, this and other methods of ADR are to be welcomed. (Experience of the small claims mediation service is that the outcomes are often positive – with over 70% settling.) It is important that the mediation can be

carried out without too much delay, and that during the course of the mediation both parties retain the right to move the dispute onto a court process – while remaining bound by any eventual agreement.

Question 16: Do you agree that the Small Business Commissioner should offer mediation (whether in-house or via a third party)?

As the consultation paper acknowledges, there is substantial provision already available for mediation, the obvious ones being:

- (a) the small claims mediation services,
- (b) private mediation services such as those listed as approved by the Ministry of Justice,
- (c) conciliation services offered in various particular sectors, albeit typically concentrated on consumer disputes.

We see some difficulty and not very much advantage in the SBC actually providing its own mediation service, as opposed to simply signposting existing provision. How would this be superior to that already available? Would it not lack the necessary neutrality where the dispute was small business against large business and the SBC was perceived as the champion of the small business?

If yes, please say what specific gaps might it fill between other existing services or what specific added value might it offer?

Offering in-house mediation would mean developing expertise in specialised areas where no professional body currently exists. It would also mean that the Commissioner could feed the experience and expertise gained into the early neutral evaluation process it is suggesting as its third stage. The costs of mediation for small businesses will be a factor in their using services.

Encouraging participation in mediation

Question 17: Do you agree that the Small Business Commissioner should be able to adopt either or both of the measures set out above to encourage meaningful participation in mediation?

Yes – to incentivise the use of mediation, though the CJC has some concern about the power of the Commissioner to issue the certificate described, particularly in relation to the inability of the party concerned to appeal such a decision.

That process would be absolutely unprecedented in civil justice in this country, where courts have never sought to intervene in this way. Allegations of lack of good faith are frequently made in mediations and are highly subjective. Absent a very small number of extreme cases (such as cases of simple non-attendance on the given day) this is bound to be a contentious area and the CJC does not believe that mediators will welcome this potential intrusion into the confidentiality of the mediation day or the satellite arena it provides for the parties' grievances, which risk bringing the Commissioner and its role into disrepute.

Question 18: Are there any measures you think should not be used or others we have missed? Please explain your reasoning.

No.

Looking into complaints

Question 19: Do you agree with the framework set out above for:

- a. Looking into individual complaints?**
- b. Making recommendations including the factors to be taken into account? What factors do you think should be considered by a Commissioner in deciding if the behaviour of a business has been fair and reasonable?**
- c. Publishing information about specific findings?**
- d. Producing annual reports?**

The CJC agrees broadly with the framework set out for the work of the Commissioner, and would make the following specific points.

The Commissioner should have the remit to conduct an early neutral evaluation of individual complaints in the way described with the ambit of the complaint handling side of the Commissioner's work being extended to incorporate three of the most commonly encountered problems, as already described.

We have already touched on the desirability of the Commissioner having reference to good practice in making its decisions, and the importance of publishing those decisions, so that a body of common practice can be built up to which small businesses may refer.

Question 20: Comments on this outline of costs and benefits are welcome. For example are there any additional costs or benefits that you identify being associated with the establishment of the Service? Please provide any analysis you may have to inform our costs and benefits assessment.

The passage does not reflect the stated aim that small businesses will be the main ones bringing actions to the service, and this will have a cost, albeit likely to be small and proportionate. The paper is silent in this section on possible fees to be charged for using the service. There is certainly scope for the Commissioner to lead to savings, particularly for businesses which use this as an alternative to the courts.