

# **The Hunt Review**

**The Independent Review of the Financial Ombudsman Service**

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## **OPENING UP, REACHING OUT AND AIMING HIGH**

**An Agenda for Accessibility and  
Excellence in the Financial  
Ombudsman Service**

**The report of an independent review of the Financial  
Ombudsman Service by Rt Hon Lord Hunt of Wirral MBE**

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## FOREWORD

When the Board of the Financial Ombudsman Service (FOS) asked me to undertake the second independent review of the organisation, I knew at once it would be a challenging, but also rewarding and worthwhile, task. As I observed in my call for evidence document, this undertaking combines my ongoing professional interests as Chairman of Financial Services at Beachcroft LLP with my former ministerial responsibilities for improving accessibility and performance in public services. I believe the Board are to be congratulated for commissioning such reviews and, in this particular instance, for giving me so clear a focus on issues of accessibility and transparency, the vital importance of which became increasingly apparent as my work progressed.

The Financial Services and Markets Act 2000 (FSMA) sets out concisely and clearly the intended role of the FOS: to establish “*a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person*”. That statement is refreshingly direct and, as I have undertaken this Review, I have sought always to bear in mind those three crucial qualities – speed, informality and independence – and also to retain that clarity of purpose and intention.

As well as refreshing my acquaintance with the FSMA, I also looked again at the excellent predecessor to this report, namely *Fair and reasonable – An assessment of the Financial Ombudsman Service*, published in 2004 by Professor Elaine Kempson and her colleagues from the Personal Finance Research Centre at Bristol University. The brief for that first independent review of the FOS focused on internal processes rather than accessibility, but the questions are intimately intertwined. Professor Kempson's recommendations, particularly on quality, are as important now as they ever were, and I revisit them in my Report.

In order to command trust and do its job effectively, the FOS must be competently and efficiently run; and it must be *seen* to be competently and efficiently run. It must also be demonstrably even-handed in its processes and judgements, and it must achieve balance between a series of seemingly competing objectives: exercising discretion in its decisions without falling prey to charges of arbitrary or capricious behaviour; adhering to consistent, fair and reasonable principles whilst always treating every individual case on its individual merits; offering an informal alternative to the courts whilst also operating within the rule of law; and playing its full part in the statutory and regulatory landscape, without ever falling into the trap of attempting to usurp or supplant lawmakers, courts or regulators.

The world in which the FOS operates today is already very different to that at the end of the last century, when it was conceived. The number of cases it considers – 111,673 in 2006-07 – is far higher than was ever envisaged. Furthermore, its potential clients are more diverse in their backgrounds and levels of financial literacy than anyone foresaw. The Internet is transforming how people interact with financial services firms, and how they expect to interact with public bodies as well. Expectations of speed and of openness are also far greater than they were a decade ago. Regulation is moving away from detailed and prescriptive rulebooks, to high-level principles. The FOS now operates in a world where the presence of aggressive advertising by claims management companies has radically changed the terms of engagement between complainants, firms and the Ombudsman.

Much of the work done by the FOS is highly impressive, but there is always room for improvement. My core brief has been to consider accessibility and, in my view, the FOS still looks too much like a middle-class service, for middle-class people. If my conclusions are accepted and my recommendations implemented, I believe the profile of those using the FOS should, must and will evolve, as the organisation thinks not only in terms of its traditional areas of activity – dealing with matters such as mortgages, insurance and

pensions products – but also in terms of the problems that typically afflict our less affluent citizens. Difficulties with debt management are only likely to increase in scale and numbers as the current economic difficulties mount. The sums of money involved may generally be on the low side by FOS standards, but the human misery attendant upon them can be devastating. Accessibility is no abstract concept.

At the FOS today I see a model that can seem intimidating and unwelcoming to the less educated, more vulnerable complainant and at times frustrating even for the more articulate and self-confident; I see a service which has been slow to share its thinking and processes more widely for fear of being perceived as a quasi-regulator; and I see a service whose perceived constituency needs to expand radically.

I should like to see the FOS shift its style. It needs to become more outward-looking; focused on emerging trends as much as on present needs; and robust and open in debate. Above all, I want to see it working ever harder to achieve a demonstrable consistency of approach to cases, whilst simultaneously meeting the changing needs of different users.

The issues of transparency and accessibility, on which I was asked to focus, are ever more crucial if this is to be achieved. As it addresses the challenges it has itself identified, the FOS will find it has sound foundations upon which to build. It boasts an imaginative and genuinely creative (if small) communications team and well-regarded media partnerships; and controls a mass of powerful information. All is flux in the modern world, however, and the FOS needs to keep ahead of the times, pre-empting change and not merely reacting to it.

So the FOS needs to work hard to reach a more diverse clientele. It must make greater investment in its communications efforts; develop a more strategic approach in its planning and evaluation; become more aggressive in advertising; and consider seriously whether a new and more "user-friendly " brand or trading name would give it greater impact.

Extending opening hours and improving e-enablement self-evidently carry cost implications. My 73 recommendations also call for more investment in communications, systems and data analysis. It was not part of my brief to commission detailed costings for my recommendations, or to identify off-setting savings, but I do not believe they have any prohibitively expensive implications. I was also heartened by the willingness of most industry respondents to bear an increased burden for an improved service. The FOS will have to assess costs in detail and make sensible prioritisation decisions, but investment to spread learning from the FOS's practice throughout the industry, and achieve more rapid handling of cases, seems certain to show significant net benefit overall in the longer term.

It is at the level of internal systems where I believe the real challenges on accessibility lie and I would give the highest priority to early progress on these issues. The FOS's existing work on quality, and its plans to update its core systems, represent a positive start in making it more accessible, but there is a long way to go. It must extend its opening hours; more comprehensively e-enable itself; communicate more effectively about timings; develop new systems for "fast-tracking" lower-value debt- and credit-related cases; and experiment with different methods of working, including facilitated mediation and "case advisers" to support vulnerable complainants through its processes.

This does not mean the fundamental statutory basis or business model of the FOS is flawed. The "fair and reasonable in all the circumstances" test remains just that – fair and reasonable – and greater alignment with the legal system might jeopardise that. The case for external appeals is not convincing; and it would be hard to think of any measure that would damage accessibility more comprehensively than would the introduction of fees for complainants.

I do not, however, want the FOS ever again to be accused of "making it up as it goes along", to quote a phrase used by one of the more thoughtful and respected respondents to this Review. There must be more transparency on both cases and practices, which will help set realistic expectations for consumers and their advisers, spread best practice within the industry in order to prevent complaints coming to the FOS in the first place, and also achieve greater consistency in decision-making without compromising the current jurisdiction.

I suggest this should be achieved by means of regular, independently-edited selections of anonymised case reports and a new interactive "FOSBOOK" system, to provide comprehensive data on the FOS's approach to families of cases and facilitate regular, informal two-way feedback. An "openness revolution" of this kind will ultimately be far more useful to both consumers and the industry itself than "league tables" on their own would be.

Nothing I write or say could possibly draw a final line under the long-standing debate over how much performance information by firm can or should be made publicly available, but transparency must be a two-way street: providers cannot demand more information from the FOS to help remove risk from their own processes, without also accepting a greater degree of public scrutiny of their own performances. The practical difficulties are real and I do not belittle them, but I see no reason *en principe* for preventing such data being disclosed.

I propose, as a first step, that the FOS should publish more in the way of anonymised, benchmarked data, alongside a new award scheme to identify and reward best practice, matched by a "wooden spoon" for the worst performers. It should also work with the FSA to ensure that more robust, company-specific data is made available for complaints handling within all parts of the system. Most of the reasons for inaction or delay in this area are purely practical and they can and must be overcome. In the twenty-first century, the openness revolution is here to stay and it is ongoing. The status quo is simply not an option and my instinctive approach is probably best described as "publish and be praised".

This is an area in which my conclusions necessarily range beyond the confines of the FOS itself. The FOS does not operate in a vacuum and some of the challenges it has faced necessarily emerge from the action, or inaction, of regulators. I am not in a position to make recommendations directly to other bodies, but the interaction between the FOS and the relevant regulators does undoubtedly need to improve.

I stress, in particular, the need for prompt regulatory action to find generic regulatory (or, if necessary, statutory) solutions to future issues which have the potential to generate complaints in large volumes. Mass-produced Alternative Dispute Resolution is rarely, if ever, a satisfactory and sustainable solution in such cases. We must be realistic about the tasks that the FOS may, and may not, be required to undertake within a complex regulatory and legal environment.

The FOS therefore needs to maintain and develop partnerships with complementary organisations, whilst also remaining robustly independent and firm of purpose whenever it encounters issues that cry out for regulatory solution. To help achieve this, I offer proposals to make both the role and activities of the FOS Board, and also FOS communication with the FSA and OFT, considerably more transparent.

In other areas, I recommend that the FOS should press regulators to take action, for instance in relation to achieving "through handling" of complaints across the entire system, and also by making advertising by claims management companies more transparent, informative and scrupulous. Even in areas that are outwith its remit, the FOS has experience and wise counsel to offer.

Speaking of wisdom and experience, I think my most heartfelt words of advice to the FOS relate to its Board. The FOS Board brings together a group of hugely talented individuals, with wide and deep knowledge of the financial services world, regulation and also ADR. They offer a wonderful resource that could be harnessed more effectively both internally and externally. I am convinced that, were members of the Board to engage more and play an enhanced role in developing the policies of the FOS, the reputation and prestige of the FOS would be enormously enhanced. Individuals of this calibre are no mere adornments; or at least they should and must be far, far more than that. The recent reconstitution of the Board presents an excellent opportunity to reinvigorate and extend the role it plays. I sincerely hope the FOS seizes that opportunity with both hands.

The potential of the FOS as an organisation is considerable. I end my report with a discussion of whether extending the FOS's jurisdiction would improve accessibility and transparency across the board. I believe it would, but there is much work to be done first. That is why I style my report as an agenda for change. I very much hope the FOS and its Board have the necessary confidence to seize the great opportunity that lies before them.

**Rt Hon the Lord Hunt of Wirral MBE**  
*Beachcroft LLP*

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

### Chapter 2

1. The FOS should establish a Board-led Communications Taskforce to drive improvements in accessibility. It should:
  - spell out the FOS's overall positioning, reasserting and emphasising its independence from industry, regulators and consumer bodies, and the impartial nature of its internal processes;
  - develop and publish a specific annual programme, with clear objectives and targets and contributions expected from other organisations for each individual task;
  - identify, within that programme, permanent "baseline" activities and shorter-term "campaign" projects.
  - evaluate the impact of campaigns to enable the outcomes to be added to baseline activity if appropriate.
2. The FOS should make a significant increase in investment in communication, *provided* that it is properly targeted and evaluated.
3. The FOS should press the claims management regulator operating under the aegis of the Ministry of Justice, in close consultation with the Advertising Standards Authority, to insist that advertising by claims management companies makes clear the level of charges faced by consumers and also the fact that the FOS service itself is available free of charge.
4. The FOS should:
  - intensify both its direct work with consumers and also its third-party contacts;
  - monitor the level and nature of marketing activity by claims management companies by media, region and subject, to identify where specific responses are needed;
  - develop a range of advertising vehicles, notably through local media and daytime television, in order to ensure that the message about free resolution is heard by vulnerable consumers;
  - work with Consumer Direct's regional communications leads to increase editorial penetration in local media;
  - develop partnerships to encourage relevant storylines in radio and television soap operas;
  - develop a "portal strategy" to ensure that its service is readily available through links on relevant sites – for instance Directgov;
  - do whatever it can to ensure that its name consistently appears at the top of search engine lists for the widest possible variety of relevant search terms;
  - press the FSA to include the FOS logo on the letterheads and websites of authorised firms.

5. The FOS website is excellent, so far as it goes, but the FOS now needs to take a policy decision to fund an extensive renovation of its website, making it more user-friendly, more cheerful and more welcoming. The excellent existing FOS team is more than capable of undertaking this and making a success of it, given the requisite level of financial, administrative and political support from the top of the organisation.
  
6. The FOS should:
  - develop a system of named contacts or relationship managers for local and national voluntary bodies;
  - further develop, for major advice-giving bodies, both online and phone-based services through the Technical Advice Desk to provide immediate support to those giving face-to-face advice;
  - work to promulgate practical information about the FOS and its processes within such organisations, encouraging them to develop and promote specific skills within the organisations' ongoing training strategies, designed to help front-line staff to support clients, rather than relying on one-off interventions;
  - appoint and promote the role of a relationship manager for elected representatives in the Westminster and Scottish Parliaments and in the devolved assemblies in Wales and Northern Ireland, to assist them and their staffs in helping constituents navigate their way through the system;
  - produce suitable tools to enable trusted staff, for example in the education system, housing associations and benefit offices, welfare rights organisations, caring services, trades unions, to give relevant guidance.

In some cases, this will involve following through existing pilot initiatives and ensuring that these initiatives are given a greater profile.

7. The FOS should work with the FSA, government and others to ensure that communication strategies for financial policy initiatives targeting lower earners and vulnerable groups take account of the specific role of the FOS.
8. The FOS should also develop relationships with business advisory services to provide appropriate guidance to smaller firms as possible complainants.
9. The FOS should continue to develop close working relationships with the wide range of trade bodies whose members offer consumer credit.
10. The FOS should commission a more "user-friendly", readily understood and enticing trading or brand name (or names) to convey its activities to the public more effectively, whilst also clearly retaining its role and legal identity as an ombudsman service. My own suggestion is that "Financial Complaints Service" may be an appropriate starting point.



### Chapter Three

11. A single, publicly named and authoritative individual, reporting directly to both the Chief Ombudsman and the chair of the new Board Quality Sub-Committee, should be personally responsible for monitoring and maintaining quality within the FOS.
12. The FOS should not pursue the issue of regional offices in the foreseeable future.
13. The FOS should provide a phone line service between 8am and 8pm on weekdays and on Saturday mornings.
14. The FOS should ensure that out-of-hours callers can leave their details by means of voicemail or text, and request a call back.
15. The FOS should offer a freephone service, at least for initial enquiries and complaints.
16. The FOS should give greater publicity to their practice of returning calls to mobile numbers where this is requested.
17. The FOS should develop and pilot a "case adviser" system, to ensure that vulnerable consumers feel confident about using the FOS dispute resolution service.
18. The case for a general reduction in the 8-week deadline is far from conclusive.
19. The FOS should establish a system of follow-up letters and calls to those complainants it has referred back to companies.
20. The FOS should:
  - identify how best to "fast track" complaints on consumer credit, which, although of relatively low value, are often of pressing urgency to complainants;
  - take every opportunity to remind firms that the first expression of dissatisfaction by a customer marks the start of the initial 8-week complaint period;
  - press regulators to shorten the 8-week deadline for companies to resolve simpler debt- and credit-linked complaints.
21. The FOS should take the lead, working with the FSA, trade and consumer bodies and individual companies, to develop common forms of complaint template to enable the relevant information to be collected "right first time" for use at all stages of the complaints process by all parties. The parties should
  - seek to keep all such forms to a maximum length of 4 sides;
  - use "plain English";
  - ensure that the material is available in web friendly and hard copy versions.
22. The FOS should ensure that staffing levels are constantly re-evaluated in the light of looming changes in demand, as recommended in the Kempson Report, and also that
  - clear targets are set to minimise delays in passing cases to adjudicators and

adjudicators communicate an expected timetable for decision to both parties;

- similar processes are followed when cases are referred to an Ombudsman;
  - the Board reports performance against these standards in the Annual Report.
23. The FOS should e-enable its firm- and complainant-facing operations, so that firms and complainants can submit evidence electronically and track the progress of complaints in real time.
24. The FOS should consider revising the style of its decision letters in the light of its changing client base.
25. The FOS should seek to ensure decision letters always contain the proposed amount of compensation (if any), rather than a formula.
26. To improve service to small businesses, the FOS should ensure that
- the Small Business Taskforce continues its work to ensure that the entire organisation is sensitive to the particular needs of smaller businesses;
  - the membership of the Taskforce is expanded to include external representatives of smaller financial sector firms;
  - the Taskforce develops and publishes its communications strategy to explain the outcomes of its work and communicate good practice in handling complaints within smaller firms;
  - the service of the Technical Advice Desk continues to be promoted widely to smaller firms and its resourcing reviewed to ensure it can meet increased demand in relation to smaller consumer credit and advisory firms.
  - the performance standards for the Technical Advice Desk are aligned with the slightly tougher targets for CCD.
27. The FOS should pilot facilitated meetings and calls in the early stages of complaints, on a limited basis.
28. The FOS should not make any changes to its approach on hearings.
29. As a general rule the FOS should disclose to the other party to a complaint the documents on which it has relied in reaching its final decision.

#### **Chapter Four**

30. The FOS should maintain a system based on the principles of Alternative Dispute Resolution and should not align itself to court processes.
31. The FOS should not establish an appeals mechanism.
32. The FOS should:
- make more explicit the internal appeals procedure that already exists, in the form of the right for either party in a dispute to seek a second decision on the case from an Ombudsman, emphasising that this second decision involves reviewing the full facts

of the case *ab initio*;

- ensure that, in any case where an Ombudsman has offered an informal view, the same Ombudsman is not involved in the final adjudication of a case;
  - continue to ensure that the appointment of the Independent Assessor follows an openly advertised "Nolan"-based process.
33. The FOS should have the discretion fully to reopen a decision in the very rare cases where relevant information emerges after a decision has been made, including through the work of the Service Review Team and Independent Assessor.

## **Chapter Five**

34. The FOS should develop a public interactive system – which I call "FOSBOOK" – as the main means of recording and promulgating details of its developing practice and decisions. This new resource should also, as recommended in the Kempson Report in 2004, be sufficiently comprehensive to "enable staff to develop their knowledge of products and to keep up-to-date with changes".
35. "FOSBOOK" should contain "mock-ups" of how the FOS might respond to possible future complaints categories to guide the development of industry practice.
36. The Communications Taskforce should take an active interest in the development and evolution of "FOSBOOK".
37. The FOS should ensure that decisions draw upon and explicitly refer to the guidance in FOSBOOK, and explain any variation from it, by reference to the facts of the individual case.
38. The FOS should define and publish ahead of the development of "FOSBOOK" the criteria by which it decides when to commission independent technical advice; and individual decisions should make clear how these criteria have been applied in practice.
39. The FOS should:
- select and publish suitable decisions in full, but anonymised, form in FOSBOOK, to show the relationships between the broad principles applied to resolution of categories of cases and their application in practice;
  - commission and publish regular academic analysis of the full range of Ombudsman decisions alongside future independent reviews.
40. The FOS should also consider changes to common authoring standards/templates and so forth, to facilitate publication and comparison; and identify suitable ways of involving independent bodies, such as the Society of Court Reporters, in the process of selection and analysis of decisions.
41. The FOS should work with the FSA to subsume the role of the Industry Liaison Groups into those of the Financial Services Practitioner Panel and Smaller Businesses Practitioner Panel, with the Financial Services Consumer Panel providing consumer input.

42. The FOS should continue to pursue detailed issues through continued bilateral contact with trade associations and consumer bodies, with the Banking Advisory Panel maintaining its current technical advisory role.
43. *Ombudsman News* should evolve into a fortnightly email news letter, aimed at front-line complaint handlers in companies and consumer advisers, covering:
  - FOS views of emerging issues;
  - specific examples of good practice/problems in complaint handling;
  - updates on changes to FOSBOOK;
  - news of specific changes of methodologies/logistics etc;
  - a letters page;
  - feedback form.
44. With suitable safeguards to protect confidentiality, the FOS should begin to develop secondment programmes with firms and consumer bodies to develop greater understanding and share best practice.

## **Chapter Six**

45. I see no legitimate justification for withholding information about complaint performance as a matter of principle.
46. The FOS should:
  - broaden the current recipients of its anonymised, benchmarked “Working Together” information to include all 45 of the groups for whom it has relationship managers;
  - make these anonymised data public;
  - develop that dataset in dialogue with industry on the basis of the proposals put forward in March 2007.
47. The FOS should set up an Awards scheme to acknowledge firms that have achieved exceptional improvements in their complaints handling.
48. The FOS should announce each year the worst performer in terms of uphold rates in each of the categories of retail banking; investments; general insurance; intermediation in investments; and intermediation in general insurance. It should refrain from announcing such a name or names in certain, special circumstances, such as where a firm’s performance is rapidly improving.
49. The FOS should work with the FSA, industry and consumer stakeholders to define a common complaints dataset to enable joint publication of performance data on a firm-specific basis in the medium term.

## Chapter Seven

50. To improve transparency of the FOS's governance the FOS Board should:
- publish its minutes as a matter of routine, in line with best public-sector practice (but with appropriate arrangements to cover genuinely confidential matters);
  - encourage the attendance at its meetings of at least one senior representative from the FOS's sponsoring body (the FSA) and possibly also from the NAO;
  - publish full reports from relevant Board sub-committees in the Annual Report;
  - make a formal public response to the Annual Report of the Independent Assessor in the context of the FOS Annual Report;
  - instruct the Internal Service Review team to make a public report, similar in form to that of the Independent Assessor.
51. The FOS Board should constantly be on its guard for any instances where the FOS is in danger of becoming a quasi-regulator or quasi-legislator as a consequence of gaps in either the regulatory structure or the law, drawing such instances urgently to the attention of the relevant public body and detailing them as a matter of course in the FOS Annual Report.
52. With the exception of any communication relating to specific enforcement investigation, the FOS should place all formal communication with regulators on the public record.
53. The Wider Implications (WI) process should be improved in the following ways:
- the FOS should be totally insulated from all aspects of any regulatory decision-making within the process;
  - the Financial Services Practitioner and Consumer Panels should have the right, not merely to submit an issue for consideration as to whether it has wider implications, but also to trigger a full examination of the substance of the issue or issues they have raised;
  - time limits should be set for resolution of issues by the FSA or OFT and the process should be regarded as ending once the relevant regulator has reached a decision on whether regulatory change is needed;
  - the relationship between the WI process and the FOS's approach to "lead cases" should be reviewed and made more explicit;
  - the FOS, the FSA and the OFT should produce a short annual report to supplement the web material, detailing how the process has been used over the preceding twelve months;
  - studies on cases which are not accepted under the WI procedure should be more explicitly related back to the criteria for acceptance.
54. The FOS should work to identify where its practice diverges from regulatory rules and work with regulators to achieve alignment where the divergence causes cost and uncertainty.
55. The FOS should work with the FSA to ensure coordinated communication on the development of the "Treating Customers Fairly" strategy.

56. The FOS should work with the regulators to maintain a common approach to the treatment and recognition of industry guidance.
57. The FOS and regulators should communicate with firms and consumers in a coordinated manner whenever a single category of case begins to generate a disproportionate amount of the FOS's caseload.
58. The FOS should work with self-regulatory bodies such as the Banking Code Standards Board, to ensure proportionate arrangements for communication and formal and informal liaison, similar to those for statutory regulators, are put in place and communicated to stakeholders.
59. The FOS should clearly document in "FOSBOOK" its general approach in approaching the assessment of evidence in cases relating to sales made over 6 years ago.
60. The FOS's Memoranda of Understanding with regulators should be updated in the light of this Report.
61. The FOS should take an active role in the development of the "Stakes in the Ground" concept and make clear in FOSBOOK how it regards specific guidance produced through that process as it emerges.
62. The FOS should work with regulators to identify how Ombudsman experience and regulatory supervision practice can best inform each other, identifying possible initiatives such as short-term secondments between the two organisations to develop skills and buttress mutual understanding.
63. The FOS Board should consult stakeholders before deciding the scope of future independent reviews, also committing in advance to the publication of the outcome of those reviews and their responses to them.
64. I recommend that the next independent review of the FOS should focus principally on questions of efficiency, as suggested by the House of Lords Select Committee report on economic regulation. I also believe the FOS Board would be well advised to select the NAO for that review.

## Chapter Eight

65. Any review of compensation limits should cover, *inter alia*:
  - how many enquiries are received by the FOS, in which the consumer alleges losses of over £100,000;
  - how many of these enquiries subsequently turn into cases and what the outcome of those cases is;
  - the number and proportion of cases in which the FOS uses its discretion to recommend compensation payments over the £100,000 limit and the number of cases in which this is accepted or rejected by companies;
  - establishing the number of court cases involving financial services complaints in the £100,000-250,000 level, with a view to estimating how many might have been suitable for ADR by the FOS;
  - whether there is a case for the turnover limit of £1 million for small businesses to bring their cases to the FOS also to be increased
  - a cost-benefit analysis of any widening of jurisdiction;
  - what form of indexation, if any, would be appropriate in future;

- what issues arise from the variation in limits between the FOS and the Financial Services Compensation Scheme. (I should add that, although this is strictly outwith my remit, I share the surprise of some that the FSCS sees fit to reinvestigate cases where the FOS has found against a company that has subsequently gone bankrupt without paying the compensation);
  - and what issues may arise following the FOS's merger with the Pensions Ombudsman, which currently has no limit on the compensation it can order.
66. The FOS should not introduce fees for consumers.
67. The FOS should introduce a case fee for vexatious claims put forward by claims management companies and work with the Ministry of Justice to put protection in place to prevent such fees being passed to consumers.
68. The FOS should work with the FSA and the Ministry of Justice to broaden the base of FOS levy-payers to include regulated claims managers.
69. The dangers of making a radical shift to outcome-related case fees, sometimes referred to as "polluter pays" funding) would outweigh the putative benefits.
70. The FOS should:
- continue its current practice of summarily dismissing complaints in appropriate circumstances, identifying separately those that it judges to be vexatious and publishing its criteria for so doing and the numbers so dismissed each year;
  - move as quickly as possible to a general policy of not charging a case fee in all cases found to be outside its jurisdiction, even if investigation is needed to establish this fact;
  - document its practice thoroughly on "FOSBOOK."
71. The FOS should introduce a higher case fee for "enforced deadlock" cases with effect from 2009-10 and report on the numbers of cases.
72. The FOS should investigate the option of differential fees for "assessment" and "investigation" cases as distinct from simple fast-tracked consumer credit cases.
73. The FOS Board should assess the impact on accessibility and transparency for all its work when it considers the scope for extending its jurisdiction.

## CHAPTER 1 INTRODUCTION

### Background to the Review

- 1.1 The Board of the Financial Ombudsman Service (FOS) decided in 2003 that the organisation should undergo regular external scrutiny through three-yearly independent reviews. As chairman of financial services at Beachcroft LLP I was asked in August 2007 to lead the review team for the second such review, and began work in mid September. I have been supported by a team comprising Chris Kenny, formerly Director of Life and Pensions at the Association of British Insurers; and Richard Hobbs and Michael McManus, close colleagues at Beachcroft. We have also been able to call upon the ready and invaluable assistance and support of other colleagues at Beachcroft, most notably Andrew Parker, Robin Fry, Tony Child, Eleanor Tunnicliffe, Claire Larnder, Karen Summers, Margaret Simms, Tracey Field and Danielle Thompson. All in all, they are quite a team.
- 1.2 I described the background to the Review in the Call for Evidence document, which I published on 16 October 2007. For ease of reference, I repeat the relevant sections below.

#### Extract from Call for Evidence Document, 16 October 2007

2.4 Chapter 4 of the Financial Ombudsman Service's current corporate plan sets out four objectives for the organisation in 2007-08 and beyond:

- *"continuous improvement of our processes and systems, so that they remain capable of delivering a cost-effective redress service which meets ever-rising expectations;*
- *to manage staff and other resources so as to provide an efficient and effective service, irrespective of future fluctuations in numbers and types of cases.*
- *to enhance dialogue with our stakeholders so that we remain responsive to their needs and to the public interest, while continuing to provide an impartial service; and*
- *to help secure wider public benefits by using our expertise and resources to help enhance and extend accessible and effective dispute-resolution."*

2.5 The scope of the external review is defined as follows:

- *"..... to inform the work of our accessibility taskforce – by considering, from an external perspective, whether the ombudsman service ought to do more in order to be visible and accessible to those it is designed to serve*
- *. .... [to] consider whether the ombudsman service is making the most effective use of the information and experience derived from its dispute-resolution work, in order to add value for the benefit of industry, consumers and regulators."*



2.6 These terms of reference are clearly particularly relevant to the third and fourth of the objectives set out in para 2.4. But achieving effective public and industry engagement can also contribute to the organisation's overall efficiency in case handling and resource allocation by helping to

- reduce the likelihood of consumers approaching the FOS at the wrong stage or with an inadequate understanding of its role;
- reduce the number of complaints by facilitating learning within the industry about the root causes of complaints;
- set reasonable expectations on both sides of the dispute about the FOS's approach.

These are the issues which the Review has set out to tackle systematically throughout its work.

### **How the Review was Conducted**

1.3 My work has fallen into four phases:

- intensive desk research and discussion with FOS staff to understand current practice – as well as senior managers, I was most grateful to staff in the Communications team and Customer Contact Division in particular, who described their work in considerable detail with both professionalism and enthusiasm;
- publication of the "Call for Evidence". This initial document deliberately did not seek to test specific views or air options, but instead aimed simply to:
  - describe current practice in the FOS and the reasons for it;
  - highlight changes in the external environment which may have an impact;
  - set out the broad issues and specific questions for the review to tackle.

The document attracted 151 responses from members of the public and 87 from organisations, suggesting that it served its purpose;

- meetings and discussions with stakeholders. In total, members of my team and I held 61 separate discussions with individual firms; trade associations; consumer bodies, parliamentarians; ministers and officials; and regulators. These discussions proved invaluable in allowing me to understand fully the various views expressed and to test my own emerging thinking;
- analysis of responses and preparation of the final report.

1.4 I am grateful to all who contributed to the work of the Review, but I should like to highlight four contributions in particular:

- first, the All-Party Parliamentary Group on Insurance and Financial Services, chaired by my friend and colleague John Greenway MP, held three public hearings with a variety of consumer and industry groups, which provided the foundations of a very thoughtful and illuminating paper which I have found very helpful indeed in framing my conclusions. I am grateful to the Group and its support staff for their hard work;
- secondly, Citizens Advice not only provided a helpful paper, but also organised a visit to their Greenwich Office to meet staff in the Greenwich Money Advice Service. This taste of services "at the sharp end" was invaluable in helping to test the practicality of some of the solutions I had been exploring. I am most grateful to Peter Lee, the chairman of the trustees, and to Sue Edwards and all her team for taking so much time and trouble in speaking to us and sharing their experiences;
- thirdly, a number of journalists were kind enough in the early stages of my work not only to give me their own views on how the FOS was serving the needs of its clients, but also to allow me to use their columns to solicit views from members of the public who had used the FOS. This considerably broadened the base of evidence I was able to collect and I am most grateful;
- Finally, I should thank Alison Hoyland of the FOS, who was an exemplary "link-person" throughout the duration of the Review process and could not have been, in the spirit of the review itself, more open or accessible. Sally Young, also of the FOS, maintained our website expertly and cheerfully throughout the Review. Publication of responses from major organisations helped to enrich the debate, particularly in its final stages, and I am grateful to Sally for making this possible.

1.5 I should note one point of process in relation to the submissions I received from members of the public. Many of my correspondents wished me to examine their cases in detail and offer detailed specific comments on them. I have not done so. As I explained in the call for evidence document, it was not within my remit to repeat the work which Professor Elaine Kempson and her team carried out in 2004 in looking at the FOS's casework practice in detail, nor was I charged with undertaking detailed case reviews in order to comment on the quality of decision-making. My focus has been on the FOS's policy and practice in relation to accessibility and transparency. Comments from the public about their cases have informed my work and I hope many of my correspondents will be able to recognise aspects of their experience in some of my commentary and recommendations, but it would not have been appropriate to go further in using individual cases to illustrate specific points.

## **FOS – the operational background**

1.6 I was asked to undertake my work at an interesting time for the FOS, as the relentless surge of activity seen in the first years of its operation may be slowing. The scale of the operation is still considerable, however, for in 2006-07 the FOS

- handled 672,814 calls and enquiries from the public and some 15,000 calls from firms and consumer advisors to the Technical Advice Desk;
- opened 94,392 cases;
- resolved 111,673 complaints – 104,831 (94 per cent) of them informally at the adjudication stage, with 6,842 being referred to an ombudsman;
- had a budget of £59 million and an average staff complement of 960.

This makes the FOS, by some way, the largest Financial Ombudsman Service in the world and the largest Ombudsman service of any kind in the UK. Its work rate is similarly higher than any other service ever sees – at its peak in 2005-06, some 250 new mortgage endowment complaints were being received every working day.

1.7 The number of businesses covered is far higher than is the case for any other scheme. There were 22,823 businesses covered at 31 March 2007. This figure increased dramatically in autumn 2007 with the addition of some 80,000 consumer credit licensees not previously covered. This will rise further over coming years with

- the broadening of the consumer credit jurisdiction in October 2008 to cover debt administration and credit information firms;
- implementation of the Payment Services Directive in 2009;
- the Government's plans in response to the Thornton Review, to merge the FOS and the Pensions Ombudsman.

1.8 The FOS expects case numbers to fall in 2008-09, however, as time-barring of mortgage endowment cases starts to take effect and has started to restructure itself accordingly. But it would be rash to conclude that the service is in any kind of "steady state". Changing consumer expectations, the activities of claims management companies and regulatory changes are all having effects – and can be expected to continue to do so in coming years. The FOS's corporate plan for 2008-09 predicts that the service will receive 103,300 new complaints in 2007-08, compared to an initial estimate of 80,000; and that around 94,000 cases will be closed, compared with an estimate of 106,500. For 2008-09, the current estimate is for 72,000 new cases, with 80 per cent of these resolved within six months. The outcome of cases currently on hold pending a court decision on bank charges remains uncertain, however, and recent months have brought a noticeable increase in cases relating to Payment Protection Insurance. As we were going to press, the FOS reported a 50 per cent increase in such cases in the space of just one month.

1.9 My review has therefore taken place against a somewhat uncertain background. My aim has been to produce recommendations which make the FOS fit for the future by managing the tension between two objectives, which must underpin its operations:

- first, providing a service which is personalised for individual complainants and companies, allowing a proper response to the circumstances of each individual case in all its complexity;
- secondly, providing a service which is reasonably consistent in its quality and fairly predictable, communicating clearly across its wide spread of activity to achieve fair and consistent outcomes, in a way which sets sensible expectations for consumers and helps firms get complaints handling right first time.

That means moving the FOS's practice forward on the related issues of accessibility and transparency. I present my analysis on both issues in the firm belief that this report must be followed by concerted action.

## CHAPTER 2 ACCESSIBILITY - PUBLICITY

2.1 I have considered two main issues in looking at the accessibility of the FOS:

- **publicity** - how effectively does the FOS reach potential complainants and communicate its role to them and to the firms complained against? How strong are its liaison networks with industry and other stakeholders?
- **processes** – how far do the FOS's practices help or hinder understanding and accessibility at all stages of the process?

This chapter considers the first of these.

### Current Activity

2.2 The FOS currently has a small communication team, which

- produces “Ombudsman News” and all the FOS’s other printed publicity material;
- authors and maintains the website in-house;
- manages the Technical Help Desk and, using the same staff, the system of relationship managers for the 45 largest companies;
- manages day-to-day and strategic media liaison;
- provides speakers for a wide range of industry and voluntary sector events;
- provides informal training to consumer bodies, trading standards officers, Consumer Direct and others;
- leads specific communication initiatives, with recent activity focusing on reaching young people and, through an innovative partnership with Zee TV, the South Asian community;
- prepares the benchmarked “Working Together” data for discussion with the largest companies (see chapter 6 below).

A separate team manages the FOS’s regular market research and ad hoc exercises.

2.3 This activity is planned annually, with quarterly updates. Its total cost is less than £1.25 million in 2007-08 – under 2½ per cent of the total spend on the FOS as a whole – and the very modest sum of around £17,000 per year is spent on market research on accessibility and awareness. This all represents extremely good value for money, but self-evidently more could usefully be done. The press team is very well regarded by the media representatives to whom I spoke in the course of the Review. Responses to the call for evidence spoke positively of the Technical Advice Desk and many trade and voluntary bodies were appreciative of the FOS’s willingness to provide speakers for conferences, training sessions and the like. I share this positive opinion.

2.4 One of the main issues for my Review is whether this scale of relatively thinly-spread activity can meet the needs of the diverse consumer base the FOS should be serving, and the changing nature of the complaints landscape. My clear conclusion is that it does not. This chimes with the recommendation of the All-Party Group on Financial Services that the FOS should take a more pro-active stance in communicating its role.

- 2.5 I should make one general point in framing this discussion. Many industry commentators have put it to me that trust in the FOS process is being undermined by the organisation, consciously or unconsciously, positioning itself as a "consumer champion". The evidence of the FOS doing this is not very strong, but the perception is clearly unhelpful, as the credibility of the service depends on it maintaining the trust of all its stakeholders in the even-handedness of its adjudications.
- 2.6 This does not mean, however, that the organisation should make a vow of silence or cease to help complainants find their way through a complex system. There are asymmetries of information, knowledge and power between companies and consumers and I firmly believe that, with appropriate leadership and board level monitoring, it is possible for the FOS to address these in its practices and publicity without losing the reputation for impartiality which it must maintain at all costs. An outward-looking and ambitious communications strategy can perfectly well co-exist with internal ADR systems that are fair and balanced and are also recognised by all concerned as being fair and balanced. The goal requires robust management systems, transparency and a certain degree of human ingenuity, but it is perfectly attainable.

### **The Need for a Comprehensive Communications Strategy**

- 2.7 There are at least four factors which make the public communications task facing the Ombudsman Service significantly more challenging in the future than it has been historically:
- first, the need to become accessible to a wider number of consumers, many of whom are likely to be significantly less financially capable and often less literate than many current users of the service;
  - secondly, the fact the FOS needs to compete with claims management companies for "share of voice" in reaching potential users;
  - thirdly, the need to ensure that the distinctive role of the FOS is conveyed clearly at a time when a variety of public agencies – the FSA through its Financial Capability work, possibly a new Money Guidance service as proposed by the Thoresen Review, possibly the Personal Accounts Delivery Authority – are all addressing essentially the same audience with what could easily be perceived as overlapping messages;
  - fourthly, the evidence from the FOS's own consumer surveys suggest that, although helpful, the efforts of third parties and industry alone are not sufficient to alert consumers to its role.
- 2.8 This changing landscape justifies a higher level of leadership from the Board of the FOS and from top management. I welcome the addition of specific communications expertise in the recent Board membership changes. To build on this further, I recommend that **the FOS should establish a Board-led Communications Taskforce to drive improvements in accessibility. It should:**
- **spell out the FOS's overall positioning, reasserting and emphasising its independence from industry, regulators and consumer bodies, and the impartial nature of its internal processes;**

- **develop and publish a specific annual programme, with clear objectives and targets and contributions expected from other organisations for each individual task;**
- **identify, within that programme, permanent "baseline" activities and shorter-term "campaign" projects.**
- **evaluate the impact of campaigns to enable the outcomes to be added to baseline activity if appropriate.**

2.9 Any such programme is likely to call for more resources than the present low baseline, but the changing nature of the FOS clientele justifies this. **I recommend that the FOS should make a significant increase in investment in communication, *provided that it is properly targeted and evaluated.***

2.10 The remainder of this chapter gives some suggestions on possible elements of such a strategy.

### **The Case for Advertising**

2.11 Had I been conducting this review five or even three years ago, it is unlikely I would have even raised the issue of whether advertising could be justified. To generalise, the FOS dealt primarily with articulate consumers, who were clear about the redress routes open to them and who could be relied upon to use the information prescribed by the regulator to pursue their complaint with their company and then, if they were still in search of satisfaction, the FOS. To have suggested advertising in those circumstances would have been seen as adding inappropriate cost to business and possibly confusing consumers by causing expectations that the FOS would act as a "consumer champion" rather than as an ADR scheme seeking to resolve complaints.

2.12 As discussed in paragraph 2.7, however, the context is now very different and FOS practice must adapt to keep pace with it. The case against advertising is far less clear-cut than it was. In particular, I am mindful that complainants, in particular the less wealthy and less articulate amongst them, need to be aware they are under no compulsion to use claims management companies in approaching the FOS and that, unlike claims management companies (CMCs), the FOS provides a free service. It is far from clear that many consumers are aware of this. As I mention later in this report, claims management companies can provide an element of expertise and partisan advocacy that may otherwise be lacking within the process, but the fact remains that, in almost all instances, the ADR process itself can operate perfectly well without them, at no cost to the consumer. As the FOS itself states on its website, "experience shows no difference in the outcome of complaints – whether consumers bring them to us themselves, or use a claims-management company to complain on their behalf". That message is crucially important to a great many people and deserves far wider proliferation. I should also add in passing that the group of vulnerable consumers whom the FOS may not currently be reaching will often be making claims of relatively low value. For better or for worse, claims management companies are profit-making outfits and such claims are likely to be of little or no interest to them. Other routes must be identified and explored.

- 2.13 **I therefore recommend that the FOS should press the claims management regulator operating under the aegis of the Ministry of Justice in close consultation with the Advertising Standards Authority, to insist that advertising by claims management companies makes clear the level of charges faced by consumers and also the fact that the FOS service itself is available free of charge.** I see no reason why advertisements from CMCs should not carry a "wealth warning" to alert possible users of their services to the full cost and alternatives available. I make further recommendations in relation to FOS interaction with CMCs in chapter 8.
- 2.14 I am also mindful of the fact that FOS research shows that users learn about the Service and approach it in many different ways. Interestingly, only around 5 per cent of complaints come via consumer advisory bodies such as trading standards or Citizens Advice, whereas 18 per cent of complaints in 2006-07 were made via a claims management company. Perhaps surprisingly, only 19 per cent of people say they learned about the FOS from the financial services industry itself, which I take to be indicative not as evidence of widespread non-compliance, but rather of inadequate signposting to the FOS within the mass of documentation provided at point of sale. In contrast, 40 per cent of people using the FOS learned of its existence via the media. It is likely that the majority of these, despite the good links achieved by the FOS with some tabloid titles, will have been via the broadsheet print media. It is not clear to me that the FOS effectively reaches enough of the audience targeted by CMCs, in particular those who derive much of their information from television, online sources, local media (both radio and papers) and mass market titles. It needs to address this audience directly, rather than relying on third parties.
- 2.15 The FOS needs to be both pragmatic and opportunistic in responding to these challenges. **I recommend that the FOS should:**
- **intensify both its direct work with consumers and also its third-party contacts;**
  - **monitor the level and nature of marketing activity by claims management companies by media, region and subject, to identify where specific responses are needed;**
  - **develop a range of advertising vehicles, notably through local media and daytime television, in order to ensure that the message about free resolution is heard by vulnerable consumers;**
  - **work with Consumer Direct's regional communications leads to increase editorial penetration in local media;**
  - **develop partnerships to encourage relevant storylines in radio and television soap operas;**
  - **develop a "portal strategy" to ensure that its service is readily available through links on relevant sites – eg Directgov;**
  - **do whatever it can to ensure that its name consistently appears at the top of search engine lists for the widest possible variety of relevant search terms.** I was particularly struck by a comment from a personal finance journalist that the

“googleability” could be improved. In fact, I found considerable improvements in the course of my review, although visibility is still low for some search terms. This issue has to stay on the agenda - such visibility is no longer an optional extra;

- **press the FSA and OFT to include the FOS logo on the letterheads and websites of authorised firms.** The information that there is an organisation established to resolve complaints is arguably of more use to the average consumer than the knowledge that an organisation is authorised by its regulator.

2.16 I do not go so far as to accept the argument put forward by the National Consumer Council that the FOS should consider the positive encouragement of complaints to be part of its role. That would run counter to the founding principles of the organisation, turning it into a "consumer champion" rather than an impartial "honest broker" providing ADR. The FOS must therefore take care to advertise defensively, rather than aggressively. It also needs, in the first instance, to point consumers clearly back to the firm providing the alleged poor service, to ensure that attempts at resolution can begin quickly at the most appropriate level. The need to set expectations appropriately is also important. These are points to be factored into implementation, not a reason to retain the status quo. Many consumers are ignorant of the detail of how the financial services industry works and now face information about how to complain which may be both incomplete and partial in its presentation. "Promoting public understanding of the financial system" is, of course a statutory objective of the FSA, but the FOS also needs to play its own important part in addressing this information gap.

2.17 I discuss other reasons why members of the public might choose to use claims management companies and how the FOS should respond in the next chapter.

2.18 Estimates vary, but something between 60 per cent and 70 per cent of the UK population now has access to the Internet. It is no longer the exclusive preserve of the relatively wealthy. Many libraries and other local authority or charitable institutions offer free online access. That underlines the point that the FOS website must be regarded as a major – perhaps the major – tool in its accessibility policy. **The FOS website is excellent, so far as it goes, but I believe a policy decision now needs to be taken to fund an extensive renovation of it, making it more user-friendly and simply more cheerful and welcoming. The excellent existing FOS team seems to me to be more than capable of undertaking this and making a success of it, given the requisite level of financial, administrative and political support from the top of the organisation.**

### **Working with Third Parties**

2.19 The FOS must develop and actively maintain and refresh strong partnerships with a wide range of other agencies in seeking to alert vulnerable consumers to its work. There are a number of reasons for this:

- As I discuss in the next chapter, I do not believe that there is a strong case for the FOS to develop a regional infrastructure. Hence, much face-to-face explanation of its role will be done by third parties;
- It is possible that some of the traditional “trusted intermediaries”, such as Trading Standards and Citizens Advice offices, may themselves not always be uniformly accessible to all groups, so a variety of approaches and partners may be needed;



- In reaching more vulnerable groups, even allowing for the simplifications I suggest in the next chapter, it is likely that many individuals will need significant face-to-face help and support through the process of making a complaint, rather than simply information to do so themselves. The nature of the support available to third parties needs to change to reflect this.

2.20 As with communications, I suggest some pragmatic elements for an outreach strategy, some of which reflect an intensification of existing activity, some of which are wholly new. Much of my thinking was underpinned by the helpful submission from Citizens Advice, which talked about developing an engagement strategy, covering "engagement by information, engagement by training and engagement by stakeholder relationship". I **recommend that the FOS should:**

- **develop a system of named contacts or relationship managers for local and national voluntary bodies.** As for relationship managers for firms, these roles should be proactive in their nature, seeking to establish two-way flows of both "hard" evidence and "soft" intelligence on emerging issues. This system should go beyond national bodies such as Citizens Advice to include bodies, such as carers' support groups, which may be the first port of call for a vulnerable person;
- **for major advice-giving bodies, further develop both online and phone-based services through the Technical Advice Desk to provide immediate support to those giving face-to-face advice.** There is also a challenge for the organisations concerned to make sure that this information is communicated effectively to their own front-line staff;
- **work to promulgate practical information about the FOS and its processes within such organisations, encouraging them to develop and promote specific skills within the organisations' ongoing training strategies, designed to help front-line staff to support clients, rather than relying on one-off interventions;**
- **appoint and promote the role of a relationship manager for elected representatives in the Westminster and Scottish Parliaments and in the devolved assemblies in Wales and Northern Ireland, to assist them and their staffs in helping constituents navigate their way through the system.** There is scope for this role to develop imaginatively. For example, a member of FOS staff visiting an MP's surgery could generate helpful local media coverage raising the profile of the service generally;
- **produce suitable tools to enable trusted staff, for example in the education system, housing associations and benefit offices, welfare rights organisations, caring services, trades unions, to give relevant guidance.**

In some cases, this will involve following through existing pilot initiatives and ensuring that these initiatives are given a greater profile.

2.21 As with other elements of the communications strategy, these are not cost-free proposals. Detailed assessment will be needed, but the improvements in productivity which can result from the information being "right first time" as a result of such support being available would make the relatively limited investment needed more than worthwhile. I return to the issue of "right first time" in the next chapter.

## The need for coordination

- 2.22 I commented in para 2.7 about the potential proliferation of “official” sources of financial information to disadvantaged groups. This presents both a challenge and an opportunity to the FOS and to policy makers generally. The picture that could emerge is one of fragmentation, with each organisation taking a narrow view of its role, and gaps and overlaps arising as a result. The opportunity does, however, exist to provide genuinely diverse routes, providing different individuals with the support they need to tackle their financial issues, alongside different organisations working from a common information base.
- 2.23 This is not, of course, primarily a task for the FOS, but I believe that both the nature of its work and the quality of its current communications efforts do demonstrate that it has a major contribution to make in ensuring that the necessary coordination with both the FSA’s financial capability strategy and the development of a generic advisory service takes place. **I recommend that the FOS should work with the FSA, government and others to ensure that communication strategies for financial policy initiatives targeting lower earners and vulnerable groups take account of the specific role of the FOS.**

## Small Businesses

- 2.24 Although the main focus of the proposed outreach strategy should be on the potentially vulnerable consumer, the FOS should also be mindful of the needs of small businesses as potential users of the service. The Federation of Small Business pointed out to me that it would be wrong to assume a high level of financial sophistication in many micro businesses. **I therefore recommend that the FOS should also develop relationships with business advisory services to provide appropriate guidance to smaller firms as possible complainants.**
- 2.25 It was put to me that new entrants to those markets where credit is often offered as a related product need particular help in understanding the role of the FOS. I have been impressed by the efforts that the FOS made to work with no fewer than 150 trade bodies representing firms offering consumer credit in preparing to undertake that jurisdiction. **I recommend that the FOS should also continue to develop close working relationships with the wide range of trade bodies whose members offer consumer credit.**
- 2.26 I discuss the different issue of whether the FOS should have a separate Small Business Division in the next chapter.

## A New Name?

- 2.27 I leave my most radical recommendation to the end of the chapter.
- 2.28 At one level, it can be argued that the name of the Financial Ombudsman Service is not a barrier to accessibility at all. The number of cases has risen enormously in the course of its existence. Its Annual Report and its programme of market research shows

a reasonably high level of public knowledge of its existence and role, much of it due to its own efforts. There are also plenty of failed examples of rebranding in both public and private sectors to make sensitive territory. Nobody wants the FOS to be the next "Consignia"! The opportunity cost of senior management time is also an important factor to be considered.

2.29 All that having been rehearsed, the word "Ombudsman" is not an inviting one to the general public, nor is "FOS" especially attractive or informative as an acronym. Although I am not aware of any specific research on the impact of the name on vulnerable consumers in particular, a number of parliamentary colleagues have commented on the issue. It was argued that the name was meaningless to some and intimidating to others, who saw it as signalling a pompous, impersonal "establishment" body. Ironically, the image created was more akin to that of the courts rather than of an informal alternative to them. This suggests the current name is not simply sub-optimal, but positively inimical to positive perceptions of the nature of the service offered, particularly for potential consumer credit complainants.

2.30 **I therefore recommend that the FOS should commission a more "user-friendly", readily understood and enticing trading or brand name (or names) to convey its activities to the public more effectively, whilst also clearly retaining its role and legal identity as an ombudsman service. My own suggestion is that "Financial Complaints Service" may be an appropriate starting point.**

## **Conclusion**

2.31 Taken together, I believe that the suggestions in this chapter can materially build on the good work already undertaken by the FOS to develop greater understanding of its role and work within the financial services world and more widely amongst the general public. This will all be wasted activity, however, unless the activities of the FOS are also readily accessible to its users. I turn to this issue in my next chapter.

## CHAPTER 3 ACCESSIBILITY – PROCESSES

3.1 Accessibility is not simply a matter of hearing about the FOS, but also of ensuring that its service is genuinely responsive at all stages of its interactions with complainants and firms. In this chapter, I therefore consider:

- office infrastructure and opening hours;
- the support available for vulnerable complainants;
- the 8-week limit;
- information gathering;
- duration of a complaint;
- e-enabling the FOS;
- the form in which decisions are communicated;
- the case for a small business division;
- the case for public hearings.

3.2 I should add that my consideration has been solely from the point of view of transparency. I have not sought to duplicate the detailed examination of processes undertaken by Professor Elaine Kempson in her review of 2004, but it soon became clear to me that her broad conclusions continue to be relevant. In particular, her dual emphasis on the need to maintain a strong Board and top management focus on quality remains vital. Consistently high quality and demonstrable impartiality are the twin foundations for the FOS. Firms are bound by the decisions of the FOS and they must be able to have the utmost confidence in the quality, the even-handedness and the integrity of its internal processes. The view of the Kempson Report was that quality in the context of the FOS can be defined in terms of "the extent to which the service provided adheres to the organisation's core values". The Report's conclusion was that this question was so important that a single, named individual should be "given overall responsibility for managing quality across the organisation" and that this should be "a member of the executive team". This recommendation was acted upon initially, but this is an area of such importance that reiteration and reinforcement is continuously required. **I recommend that a single, named and authoritative individual, reporting directly to both the Chief Ombudsman and the chair of the new Board Quality Sub-Committee, should be personally responsible for monitoring and maintaining quality within the FOS.**

### Office Infrastructure

3.3 The FOS is rightly sensitive to the need to offer its services to consumers equitably across the UK. It therefore regularly surveys usage by region. The latest results, documented in its Annual Report, do not indicate any significant inequity, but this is clearly an area which should be constantly monitored.

3.4 I was asked to consider whether the introduction of regional offices might add a further guarantee of equality of access. I saw no evidence of demand for such offices in responses to my call for evidence. Nor do I see any operational advantage in multiple site working. The FOS is not a face-to-face service and, other than in the most exceptional of cases, has no reason to become one. Consequently physical access to complainants is not an issue. Locating decision-making work outside London would create new issues of managing consistency of decision-making and performance

between sites and ensuring equal access internally to senior management time for informal guidance and quality control. The case for a small number of offices focused on outreach and consumer support work is slightly stronger, but my overall judgement is that the FOS will achieve maximum impact in this area by increasing its media and web profile and by partnerships with a wide range of local bodies, rather than developing its own direct geographically-based services. **I recommend that the FOS should not pursue the issue of regional offices in the foreseeable future.**

- 3.5 I noted in my call for evidence document that the FOS currently operates a rather traditional weekday-only service, accessible to the public between 9am and 5pm. This seemed to surprise respondents. A large number of industry respondents said their own contact centres were often at their most active in the early evening. Many positively recommended moving to a pattern of 8am-8pm opening on weekdays and on Saturday mornings. Consumer bodies generally made the same point and argued persuasively that many individuals may find it difficult to discuss a complaint at the necessary length in the course of a working day. Conversely, the FOS reports that comparatively few calls are currently made out of hours and Consumer Direct, whose services are available on Saturday mornings, report this as a comparatively quiet time both for their core activities and in relation to the Generic Advice pilot they have recently undertaken as part of the Thoresen review.
- 3.6 In my view, however, the clear balance of advantage lies in moving to wider opening times. Precise levels of investment and the optimum split between staffing in the Consumer Contact Division and those involved in investigations can be determined in the light of experience. Differing levels of use of other services may say as much about consumer expectations of the relative inaccessibility of public services in general as they do about absence of demand per se. I see no case for a "24/7" service, **I therefore recommend that the FOS should provide a phone line service between 8am and 8pm on weekdays and on Saturday mornings.**
- 3.7 It is also important that the FOS should be accessible out of hours. I was struck by the fact that it is not possible to leave a voicemail out of hours or to text a request for a call back on the following day to discuss a potential complaint. The Danish Mortgage Credit Complaint Board described a system of "booking a call", which seemed capable of relatively easy replication. **I therefore recommend that the FOS should ensure that out-of-hours callers can leave their details by means of voicemail or text, and request a call back.**
- 3.8 A number of respondents asked whether the FOS might adopt an 0800 freephone number. At first glance this might appear to be unnecessary for the bulk of users of the service; and one might even argue there are more worthy priorities for expenditure on improving access. On balance, however, I do not share that view because the expense would not be so great; and also because I think it misses the point. Email enquiries are free of charge and it seems to me inequitable that telephone enquiries should be treated differently. Furthermore, the initial point of contact is all-important and, for the most vulnerable and least affluent would-be complainants, every potential barrier or discouragement should be removed, including any cost associated with making that initial enquiry. **I therefore recommend that the FOS should offer a freephone service, at least for initial enquiries and complaints.**

- 3.9 I am mindful, however, of the fact that an increasing number of people rely only on mobile phones, rather than landlines. Mobile networks rarely allow access to freephone numbers and users of mobile services alone are often people on lower incomes. **I therefore recommend that the FOS should give greater publicity to their practice of returning calls to mobile numbers where this is requested.**

### **The Support Available for Vulnerable Consumers**

- 3.10 In considering the needs of the most vulnerable complainants to the FOS, I have been struck by how often such complainants turn to claims management companies to advance their claims. There are at least four reasons for this:

- the low level of intrinsic financial capability, which makes some people wish to have a third party to advance their claim;
- the fear that many such people have in dealing with any kind of official body;
- positive perceptions of the customer care that a claims management company will give;
- ignorance of the fact that the FOS is a free service.

- 3.11 CPH Financial Advisory Services, a complaints handling company, told me that those who used their services in complaining both to individual firms and to the FOS included those who

- "Are afraid to be seen directly criticising a large financial institution with whom they may still have a financial indebtedness;
- are put off by the complexity of the process;
- are afraid of completing forms;
- lack clarity in how compensation is calculated;
- would not know about how to go about starting a complaint;
- find that dealing with a complaint is too complex;
- and believe that they would be rejected as the system is stacked against the individual".

Independent research done on behalf of the FSA Consumer Panel also suggested that, for some consumers at least, the decision to use a claims management company was driven by worries about the opacity of the complaints process within firms and the FOS.

- 3.12 The FOS clearly needs to address all these perceptions – irrespective of whether they accurately reflect the reality or not - in the manner in which it deals with complainants. I have no wish to remove people's ability to choose to go to claims management companies, but it is important that the FOS's communications and processes ensure that people make such a decision with their eyes wide open. The FOS also needs to recognise changes in the type of people who use its service, and the type of problems and needs they will have. Many of these problems will relate not to relatively familiar insurance, mortgage or private pension products, but to the alleged mis-selling of debt management products, with the sums of money involved usually being comparatively modest. To the people who are bringing the complaints, however, the sums may seem formidable and the need for resolution is likely to be urgent.

- 3.13 I am impressed by the skill and sensitivity with which the FOS's Customer Contact Division (CCD) handles initial contacts and seeks to capture the core of a complaint from what can be a lengthy and sometimes confused conversation. The fact that staff can populate the complaints form from information supplied by the complainant is helpful, as is the fact that interpretation services in 20 languages and support for people with disabilities are readily available, but staff are – understandably – constrained in the nature of advice they can offer. The question therefore arises, for the least capable consumer, of whether a more interventionist service is needed within the FOS itself.
- 3.14 I believe that such a model should be explored in more depth. I envisage the FOS establishing a cadre of specially trained staff within CCD who would effectively act as "case advisers" for the most vulnerable consumers in progressing their complaint through the adjudication and decision process.
- 3.15 The case adviser would assist in
- framing the complaint;
  - progress chasing it through the system;
  - explaining adjudicator requests for further information;
  - explaining decisions and advising on whether there would be merit in seeking a review by an Ombudsman.
- 3.16 Considerable care would need to be taken in running such a system. In particular, I am very clear that it must not tip the FOS into the role of a partial "consumer champion". The role would certainly fall short of pure advocacy, as the adviser would need to give advice about the weakness as well as the strength of the case. Clear criteria would be needed in identifying the consumers (potentially including some micro-businesses) who most need such a service. The consumer would also need to understand that the sponsor would not be involved in decision-making on the case, so as not to compromise the impartiality of the service. Overall, volumes and timeliness would need to be monitored to ensure that a "two-tier" service did not arise.
- 3.17 These are serious points, but they are arguments for careful piloting and evaluation, rather than for inaction. Cash-rich and time-poor consumers may decide to advance their claim through a claims management company as a matter of conscious choice, but it is unacceptable if less affluent consumers feel they have no alternative but to use these expensive services because of the perceived difficulty of dealing with the "system". **I therefore recommend that the FOS should develop and pilot a "case adviser" system, to ensure that vulnerable consumers feel confident about using the FOS dispute resolution service.**
- 3.18 In parallel with exploring the development of such a service in-house, I believe the FOS should intensify its efforts to equip staff in voluntary organisations with the skills necessary to offer a similar service. This is in line with my earlier recommendations about developing a more extensive role in actively training, rather simply communicating with, voluntary sector partner bodies and in ensuring clear coordination with "Money Guidance" services.

## The 8-Week Limit

- 3.19 My call for evidence document asked for views on whether the current 8-week period given to firms to resolve the complaint before it can be referred to the FOS was a barrier to access. As might have been anticipated, views were mixed. The NCC noted strong evidence from other sectors that consumers' willingness to complain declined over time. *Which?* argued for a shortening of the limit and Citizens Advice suggested it be reduced to two weeks. The Energy and Water Ombudsman of Victoria explained that, rather than running a time limit, her office looks for evidence that a company has twice failed to satisfy a complainant before a case is accepted. Company and trade association responses, on the other hand, highlighted the importance for confidence in the general financial services market of firms themselves having the opportunity to identify issues and put them right without third party intervention.
- 3.20 There is considerable force in both sets of arguments. To take industry's points first, it does create the wrong incentives for effective customer care if there is no onus on firms to resolve issues themselves. A disproportionate shortening of the deadline would also lead to additional costs for the FOS – and hence industry and ultimately consumers – with little discernible gain. I also note that other regulated industries are some way behind financial services in respect of such deadlines – both Ofgem and Ofcom are considering moving to an 8-week deadline from 12 weeks. Additionally, the proportion of "forced deadlock" cases – i.e. where the firm has not responded at all within 8 weeks as opposed to providing a response judged unsatisfactory by the consumer – is lower in the case of the FOS than for some other comparable Ombudsman services. **I therefore conclude that the case for a general reduction in the 8-week deadline is far from conclusive.** (I discuss "forced deadlock" in relation to the fee structure at para 8.14).
- 3.21 I was struck very forcefully in discussion, both with front-line Citizens Advice staff and with my parliamentary colleagues, by the difficulties that the timescale can cause for their less affluent clients and constituents, in particular in relation to consumer credit cases. Urgency of need should in no way be equated to the scale of the sum in dispute. In some cases, firms need to resolve such complaints in days, rather than weeks, to save the complainant from genuine distress. It was suggested that the legalistic approach taken by some firms to defining when a complaint had officially "started" for the purpose of the 8-week rule added a further layer of disadvantage. Any perception of further delay within the FOS would simply lead to such complainants not coming forward in the first place. Shortening of the time limit would, of course, require a full cost-benefit analysis, but, *prima facie*, the case for change appears very powerful.
- 3.22 I conclude therefore that a "one size fits all" approach to regulatory time limits for complaint handling – and to the FOS's own processing of complaints – no longer makes sense in the light of their new responsibilities. I therefore differentiate my recommendations between the FOS's established core jurisdiction and its new Consumer Credit role.
- 3.23 On the former, I believe it would both help individual consumers and provide good incentives to firms if the FOS were to follow up pro-actively with those complainants, whom it has referred to the relevant business for their complaint to be considered, after 8 weeks have elapsed, to see if they have pursued their complaints, what outcomes



have been achieved – and to remind them of their right to take complaints further with the FOS, where that applies. This was a point made persuasively by the consumer journalists I met in the course of the review. This should be an information-giving approach and not, in marketing terms, a "call to action". Complainants should be able to specify if they prefer a call or letters. **I recommend that the FOS should establish a system of follow-up letters and calls to those complainants it has referred back to companies.**

3.24 On the latter, **I recommend that the FOS should:**

- **identify how best to “fast track” complaints on consumer credit, which, although of relatively low value, are often of pressing urgency to complainants;**
- **take every opportunity to remind firms that the first expression of dissatisfaction by a customer marks the start of the initial 8-week complaint period;**
- **press regulators to shorten the 8-week deadline for companies to resolve simpler debt- and credit-linked complaints.**

### **Information Gathering**

3.25 Consideration of the 8-week limit inevitably raises questions of the interaction of FOS practice and that within individual companies. From the point of view of the consumer, the complaints process needs to be as seamless as possible. The fact that the FOS has seen the need to produce a 10-page form for mortgage endowment complainants suggests that, in that area at least, we are some way from achieving this. I do, however, regard it as a perfectly reasonable expectation on the part of consumers that they will need to produce their evidence once and once only and that it will then be accessible to all those who investigate the complaint, whether within any individual company or the FOS.

3.26 This is not simply a matter of reducing inconvenience for the consumer. Ensuring that a common body of evidence is collected quickly at the stage of the initial data gathering by the firm:

- increases the likelihood of the firm making the right decision first time;
- reduces delay in the FOS handling the complaint by ensuring that all the relevant information is available immediately to adjudicators, without the need for further information requests;
- reduces costs for both the firm and the FOS by removing or more sharply defining the areas for debate between them in the course of processing the case;
- helps to establish, for the complainant, the likely sum at stake at the earliest stage of a complaint.

3.27 **I therefore recommend that the FOS should take the lead, working with the FSA, trade and consumer bodies and individual companies, to develop common forms of complaint template to enable the relevant information to be collected "right first time" for use at all stages of the complaints process by all parties.** I envisage that firms may want to place their own corporate identity on such forms, but I foresee the core data collected as being common.

3.28 In pursuing such an aim, I take it as read that the parties should

- **seek to keep all such forms to a maximum length of 4 sides**
- **use "plain English"**
- **ensure that the material is available in web friendly and hard copy versions.**

### **Duration of a Case**

3.29 In the course of the Review, I specifically asked members of the public to let me know about their experiences of the FOS. I received 151 letters. As perhaps might be expected, the majority of these were critical, coming as they did predominantly from individuals who had "lost" their claims. Such evidence has to be considered in counterpoint with the reasonably strong overall satisfaction ratings recorded in the FOS's Annual Report and tracked through its regular consumer surveys. Nonetheless, if there was one consistent theme that did emerge during the review, it was delay, and this does rather correlate with the general consumer survey, the evidence of the Independent Assessor's Annual Report and the views of industry respondents to the consultation. It also greatly exercised Elaine Kempson in her review in 2004. I have some sympathy with the critical view from many in industry that firms face a specific regulatory time limit and tight deadlines for submission of evidence to the FOS, but that similar disciplines are not placed on the FOS itself.

3.30 This is an accessibility issue, quite as much as an efficiency one. It is not simply a case of "Justice delayed is justice denied". Not only can it cause uncertainty and distress for individuals (and business risk for micro-businesses in some circumstances) to have to wait for extended periods for their cases to be resolved. By reducing trust in the effectiveness of the FOS as a whole, it can also deter other complainants from coming forward or advice agencies from making proper referrals.

3.31 There can, of course, be legitimate issues for delay, for example in relation to the need for the regulatory or legal position to be clarified before a decision can be made. I certainly do not want to see a fall in the quality of decision-making in order to meet an artificial deadline. As "all the circumstances" of a case can vary significantly, so can the time taken to assess properly what is "fair and reasonable" in any given case. Equally duration can depend as much on the attitude of the parties in some circumstances as on intrinsic complexity. As the Kempson Report argued, however, it is sensible to ensure that expectations are set as accurately as possible at the start of a case, for all the parties to it, and that pressure is maintained to ensure continuous improvement in performance overall.

3.32 **I therefore recommend that, to reduce delays within the system, the FOS should ensure that staffing levels are constantly re-evaluated in the light of looming changes in demand, as recommended in the Kempson Report, and also that:**

- **Clear targets are set to minimise delays in passing cases to adjudicators.** These should only be breached in cases, such as bank charges, where legal/regulatory developments are clearly going to affect the outcome;

- Having received an initial response to a complaint from the company, **adjudicators communicate an expected timetable for decision to both parties;**
- **Similar processes are followed when cases are referred to an Ombudsman;**
- **The Board reports performance against these standards in the Annual Report.**

### **e-Enabling the FOS**

- 3.33 A recurring theme in many of the responses to the call for evidence was the need for the FOS to make better use of technology in handling its work. A number of organisations commented on the benefits of being able to submit documents electronically, rather than in hard copy and many questioned the value of insisting on a physical, rather than electronic, signature being used at the initiation of a case. This has highlighted a real issue.
- 3.34 Although my review has not, in any sense, been an IT systems audit of the FOS, I have been impressed by the robustness of the systems I have seen. In particular, I have little doubt that developments following the Kempson Report have led to significant improvements in the quality of management information. This gives the new Board Quality Committee a good base for further progress, but it is equally true to say that these improvements have been essentially about internal processing, rather than interaction with firms and complainants. The time is now right to take the next step.
- 3.35 I see a number of possible process benefits emerging from making interaction with firms and consumers more interactive:
- first, it would enable a more prompt start to the processing of many complaints, particularly those initiated by CCD pre-populating the complaints form for the complainant;
  - secondly, there could be cost savings for both firms and the FOS in terms of record management requirements;
  - thirdly, enabling complainants and companies to track the progress of complaints on-line could both improve service and ensure that the long gaps in communication perceived by many of my correspondents become a thing of the past.
- 3.36 Above all, by automating more of the interaction for the majority of simple complaints, I believe scope would be created for freeing resources to provide the more personalised service needed by the most vulnerable complainants. It is vital that this aspect is given proper weight in planning implementation: it would not be acceptable for a move to greater e-enablement to be achieved at the expense of poorer service to the still considerable number of the population without the access or skills to manage their complaint on-line.

- 3.37 Finally, some intangible benefits will arise. Making more of its own work interactive will help give the FOS better understanding of the changing multi-channel business models of the firms within its jurisdiction. It will also build corporate understanding within the FOS of the changing consumer dynamic within online financial services. Although impossible to quantify, this cultural gain should be significant.
- 3.38 Although these reforms would undoubtedly be complex, many examples of systems of greater complexity exist in the private sector, for example in the technology which enables online monitoring and payment of telephone accounts. Strong password systems with appropriate "anti-phishing" controls will be needed. There will also be some complex issues arising from the legacy systems within many companies. Help services may be needed for both firms and complainants, many of whom will want, and need, to submit some evidence on paper. These are fundamentally implementation issues, however, rather than reasons for the FOS to be more cautious in its ambitions. The already planned revamp of the organisation's core systems which will be taking place in the course of 2008 gives a good base for taking this work forward, ideally in parallel with progress on the common complaint templates recommended in 3.23.
- 3.39 **I therefore recommend that the FOS should e-enable its firm- and complainant-facing operations, so that firms and complainants can submit evidence electronically and track the progress of complaints in real time.**
- 3.40 I consider use of the website as a tool for greater transparency more generally in chapter 5.

### **The Form in Which Decisions are Communicated**

- 3.41 A number of responses spoke favourably about the quality of the FOS's decision letters in terms of the thoroughness of the explanations offered and the general clarity of the language. I understand that this is principally an issue for internal quality control procedures, not least the sampling of cases by the Board, and I concur with the generally favourable view of my correspondents. Some changes to house style may be needed to reflect the changing nature of the service's clients. A less formal style and a warmer, more personal, tone may become appropriate for a growing number of complainants. **I recommend that the FOS should consider revising the style of its decision letters in the light of its changing client base.**
- 3.42 I comment more generally on the presentation of reasoning in decision letters in chapter 5.
- 3.43 Two members of the public raised a specific issue which has also been the subject of comment by the Independent Assessor in his Annual Reports, namely the practice of the FOS, particularly on matters such as mortgage endowments complaints, of detailing in its decisions the formula by which redress should be calculated, rather than specifying the amount. I can understand why this has been done in some cases to prevent delay arising and to avoid stretching some of the FOS's professional resources very thinly, but there is a significant policy question about whether the FOS should be handling cases in such volumes that it cannot offer a personalised service. I share the view that the practice of formula awards is inherently unsatisfactory. It cannot be

acceptable for a complainant to be faced with a decision about whether to accept a FOS decision without knowing how much is involved or, indeed, having the calculation performed by the firm in which the consumer has no confidence; nor, particularly in cases where business has been "sold on", are advisory firms always able to make the necessary calculation and make an informed decision on it. I am conscious that the resource implications inherent in this proposal may be considerable, but **I recommend nonetheless that the FOS should seek to ensure decision letters always contain the proposed amount of compensation (if any), rather than a formula.**

### **The Case for a Small Business Division**

3.44 My comments so far have focused primarily on accessibility for complainants, but accessibility is also important for small financial services companies, who interact rarely with the FOS. As the Annual Report shows, the overwhelming majority of firms have no complaints made about them in a given year and the bulk of the remainder have ten or fewer. In those circumstances, it is understandable that firms may have difficulty in dealing with the process.

3.45 I can therefore see why the Association of Independent Financial Advisers and some other intermediary bodies have put forward well-argued cases for the establishment of a Small Business Division to handle complaints about small firms, arguing that the Small Firms Division of the FSA is a successful model from which the FOS can learn. The All-Party Group also suggested there was a strong case for such a change, especially if such an organisation were to be given a brief to spread good practice. The FOS has so far resisted this argument, but has established a Small Business Taskforce to help make all its operations more accessible to smaller companies. I also note, slightly to my surprise, that trade bodies in the consumer credit field have not chosen to make the argument for a separate division.

3.46 On balance, I conclude that the FOS's current approach is the right one. I have a number of reasons for this:

- first, it is not the size of the firm, but rather the nature of the complaint, that should determine the FOS's response. The two will not necessarily be related;
- secondly, there is a danger that the creation of a specialist division would curtail the understanding of small business models across the organisation as a whole. This would not be desirable, particularly if the FOS were to face a "spike" in numbers of complaints about small firms;
- thirdly, the appearance of one part of the industry apparently being handled differently from others could have unpredictable and unintended effects on the perception of the FOS on the part of both consumers and firms.

3.47 It is right, however, that the issue of accessibility for small businesses should remain high on the FOS's agenda and **I therefore recommend, to improve service to small businesses, that the FOS should ensure that:**

- **the Small Business Taskforce continues its work to ensure that the entire organisation is sensitive to the particular needs of smaller businesses;**

- the membership of the Taskforce is expanded to include external representatives of smaller financial sector firms;
- the Taskforce develops and publishes its communications strategy to explain the outcomes of its work and communicate good practice in handling complaints within smaller firms;
- the service of the Technical Advice Desk continues to be promoted widely to smaller firms and its resourcing reviewed to ensure it can meet increased demand in relation to smaller consumer credit and advisory firms.
- the performance standards for the Technical Advice Desk are aligned with the slightly tougher targets for CCD.

3.48 More generally, it is clear from the evidence I have received from many in the IFA community that there is a misapprehension that IFAs are particularly likely to receive adverse decisions from the FOS. This is not borne out by the data. The FOS should communicate this fact clearly to the market.

### **The Case for "Hearings"**

3.49 I consider this subject here in relation to accessibility, although it is, of course, also linked to the questions of transparency. Two issues in particular have been raised.

3.50 A Bank, which wished its submission to be confidential, suggested that the FOS should be prepared to facilitate meetings or telephone conversations between complainants and a firm at an early stage of proceedings on a complaint with a view to achieving a negotiated settlement. FOS practice to date has been to focus on adding value by making an intellectual contribution to a case, rather than on "brokering a deal." Some FOS staff argued that, if a firm is prepared to enter into that kind of bargaining conversation with a complainant, it should do so long before the complaint goes anywhere near the FOS.

3.51 I have some sympathy with this view. Such active "facilitated mediation" should not be a common occurrence and, were it to become one with any single firm, it would raise questions about the adequacy of its complaint-handling processes. I also note the point made by the Advice Services Alliance that it is important to monitor the outcome of disputes resolved at the earliest stage of the FOS process to ensure that a commendable desire to achieve speedy resolution does not compromise standards, but it would be equally wrong to reject the option out of hand. Achieving a satisfactory outcome for both parties should be the objective at the first stage of the FOS's work and there is no reason to restrict the routes by which that may be achieved. In cases where the gap between the positions of the parties appears to be narrow or where there is a clear miscommunication, this kind of facilitated call or meeting could be helpful in achieving early resolution. **I recommend that the FOS should pilot facilitated meetings and calls in the early stages of complaints, on a limited basis.**

- 3.52 A point more generally raised in the responses was the desirability of more formal "hearings" at a later stage in the process. This point was often raised by those who argued for a more legally-based process for the FOS and who, in particular, considered that decisions in complex cases should not be made until the parties "had had their day in court". Many made reference to their view that FOS practice was not compatible with the European Convention on Human Rights. A particularly interesting version of the case was made by Kevin Carr of Lifesearch. At one of the All-Party Group hearings, he argued that both parties should have the right to a hearing, but only if they were prepared to meet the full costs themselves, in order to deter frivolous or vexatious requests.
- 3.53 The FOS does have the facility to hold oral hearings at the Ombudsman's discretion: either party may request a hearing or one can be initiated by the Ombudsman. In practice, however, as is pointed out clearly in the FOS's documentation, the facility is rarely used. The FOS considers that the majority of decisions can be made on the basis of paper evidence and bilateral discussion.
- 3.54 Although I understand the desire to set out one's case in full and in a formal setting, I believe the current approach is the right one. To move to a system of significantly more hearings would not merely delay the individual case under consideration; it would also have a knock-on effect on the wider caseload, bearing in mind the impact on the time of the most senior staff in the service. I am also very mindful of the fact that legal aid would not be available for such hearings and hence complainants could very well be at a marked disadvantage in such a setting. To the extent that a party to a complaint believes the failure to hold a hearing has prejudiced his or her ability to present evidence which would have led the Ombudsman to reach a different conclusion, then judicial review provides a strong remedy to test the reasonableness of that decision. **I therefore recommend that the FOS should not make any changes to its approach on hearings.**

### **Disclosure of Documents**

- 3.55 A number of members of the public and firms raised the question of disclosure of documents by the FOS in the course of investigations. The former tended to argue that their complaints in detail had been passed to the firm complained against, but that they had not seen the material the firm returned to the FOS. Firms who argued for alignment with court processes often argued for equal standards of disclosure to those which a court would apply.
- 3.56 I believe both cases are over-stated. To place comprehensive court-like rules of disclosure on the FOS would add delay and cost to the process for all parties and make sharp definition and early resolution of complaints by the FOS considerably more difficult to achieve. I do, however, agree with the Independent Assessor, Michael Barnes, that the normal approach should be to disclose those documents on which the assessor or Ombudsman has relied in making his or her final decision and **I recommend that the FOS should as a general rule disclose to the other party to a complaint the documents on which it has relied in reaching its final decision.**

## **Conclusion**

3.57 In short, my overall conclusion is that the FOS does recognise the need to make its processes accessible and works hard to achieve this, but it does need to guard against the tendency of any bureaucracy of any appreciable size to begin to devise practices which address its own needs, rather than those of the users of the service. The current reshaping of the service in the light of declining numbers of endowment complaints provides an ideal opportunity to refresh its practices to ensure this does not happen. I believe that putting the changes in place I have recommended will help liberate creativity in staff and enable even more improvement in future.



## CHAPTER 4 TRANSPARENCY – APPROACH AND CONTEXT

4.1 This chapter explains my overall approach to the questions of transparency and so provides context for my detailed recommendations in the next two chapters.

### "Fair and Reasonable"

4.2 It is not within my remit to recommend changes to the definition of Ombudsman jurisdiction in the Financial Services and Markets Act. If it were, I would not do so. The explicit test set for the FOS, of determining "what is fair and reasonable in all the circumstances of the case", is essential for underpinning its credibility as an alternative to the courts.

4.3 It is important to realise, however, that this jurisdiction does give the Ombudsman unusually wide powers of discretion. I have reviewed the relevant case law on cases raised against the FOS and note, in particular, the judgement in IFG Financial Services v Financial Ombudsman Services Ltd, which makes clear that, although the Ombudsman must have regard to the law, he is not bound to follow it to the exclusion of all other relevant circumstances. This gives the FOS wider freedom than almost any other public body..

4.4 A number of specific points flow from the nature of the FOS's discretion:

- first, in law, there can be no requirement for the Ombudsman to demonstrate that its decisions are absolutely "consistent". If all decisions turn on their individual circumstances, then there is necessarily scope for what John Howard, appearing on behalf of the Financial Services Consumer Panel, in his discussion with the All-Party Group termed "sensibly contrary decisions";
- secondly, it follows that no individual case is precedent-setting in the strict legal sense of the term, though there is scope for Ombudsman practice to evolve in the light of individual circumstances. These circumstances might be individual and related, for example, to the capability of the complainant. They may be time-specific, related to the legal, regulatory or market climate of the time of the complaint;
- thirdly, that lack of precedent does underline the point that the FOS is not a regulatory body and therefore does not automatically need to be bound by the consultation mechanisms put in place to ensure proportionate exercise of regulatory power.

The nature of this discretion is entirely consistent with two founding principles of the Ombudsman scheme. First, as I mention in my foreword, the overall objective as set out in section 225(1) of the Act [FSMA] is to provide "for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person." Secondly, the decision of the FOS is binding only on the firm, whereas the complainant is always free to reject the FOS's decision and proceed to seek a legal remedy against the firm through the courts.

- 4.5 It would be a matter for Parliament, rather than this report, to determine if that discretion is too wide. I personally do not believe it is, *provided* it is exercised in a way that is transparent *and* that the measures put in place to guarantee transparency do not prevent the FOS meeting its core dispute resolution duties. The challenge for the FOS is to achieve the right balance between discretion and consistency. What is required is a consistency of overall approach and an adherence to the founding principles of the FOS, with each case considered on its individual merits. In reaching decisions the FOS is entitled to exercise discretion, but it must never be capricious.

## Legal Alignment and Appeal Rights

- 4.6 Profound issues are raised when one considers the connected questions of alignment with the legal system in general, and appeal rights in particular. The FOS is, in essence, a bespoke Alternative Dispute Resolution scheme and, by their nature, ADR schemes do not admit of an appeal. To counter-balance that, however, the FOS system does differ quite fundamentally from most typical ADR schemes, in that firms have no discretion about whether or not they submit to its jurisdiction.
- 4.7 Although some of my respondents have been passionate in their advocacy of a more legally-based approach, **I wholeheartedly concur with the view of the majority of respondents that the FOS should maintain a system based on the principles of Alternative Dispute Resolution and should not align itself to court processes.** This judgement underpins my conclusions on a number of issues.
- 4.8 I considered and rejected proposals from a number of members of the public that complainants should have the option to accept parts of the Ombudsman's judgement, but contest other, disputed elements through the courts. I believe such a "pick and mix" attitude could fatally undermine the ADR approach, tipping the scales unfairly against firms.
- 4.9 The question of appeal rights is both perennial and tricky. Some of those to whom I spoke felt it was unbalanced and unfair that a firm's only form of recourse against an Ombudsman's decision was to go to judicial review, whereas a disgruntled complainant, having already used the FOS itself, could simply step out of ADR and back into the mainstream legal process by going to the lower courts. It should also be noted that the FOS does already have an extensive internal review mechanism. Having taken a preliminary view on a case, FOS adjudicators generally send out an assessment letter to the "losing" party. The "losing" party is then entitled either to accept or reject the assessment. If they accept it, all well and good; if they reject it, however, a process of reassessment is triggered. Nor is that necessarily the end of the affair, for, as the Kempson Report observes, "complainants or firms can ask for their case to be referred to an ombudsman if they are dissatisfied with the assessment or adjudication issued by an adjudicator". There is a view, however, that even this review mechanism is insufficiently differentiated from the initial adjudication process, because the system is entirely internal to the FOS.
- 4.10 A number of my correspondents drew my attention to the opinion of Lord Neill, prepared for the Equitable Life Action Group, which concluded that the absence of appeal rights is not compatible with Article 6 of the European Convention on Human Rights. I note, however, that the Government and FSA reached a different view in

undertaking the "N2+2 Review" in 2003-04 and that other legal opinions on the impact of the ECHR on Ombudsman schemes generally have been prepared for, among others, the British and Irish Ombudsman Association. This is clearly an area of contested legal interpretations, which may well ultimately be tested by the courts. My comments will therefore be directed purely at the policy issue of whether introducing formal appeal rights would contribute to making the FOS more accessible and transparent.

- 4.11 The most detailed and extensive case for a formal appeal right was made in a thoughtful paper by Freshfields Bruckhaus Deringer. The British Bankers' Association supported the proposal as did a number of major firms who wished to remain anonymous, though I must add in passing that I find such requests odd in relation to a review focused on transparency. The proposition was that firms, for reasons of managing business risk, tended to treat individual FOS decisions as definitive and effectively precedent-setting for all similar cases. Therefore, the limit of £100,000 on FOS remedies was an artificial construct: the actual limit was £100,000 times the number of cases to which the industry thought any decision was likely to apply.
- 4.12 In the light of that possible level of financial detriment, Freshfields argued that it is reasonable for firms to have access to a tribunal, probably the Financial Services and Markets Tribunal, which could review the merits of the overall approach taken to any category of case. There would be a clear gate-keeping system to prevent vexatious appeals. The question is whether this is the right solution to the diagnosis or whether other solutions would be more proportionate.
- 4.13 Would such a system enhance accessibility? My clear view is that it would not. Complainants could be directly deterred from approaching the FOS as a result of publicity generated by any lengthy appeal process. Perceptions of delay and uncertainty would, of themselves, reduce confidence and so tend to make the process less accessible. It is also plausible to assume that the existence of such appeal rights would in reality tend to make the FOS slower and more cautious in its decision-making, adding to internal process proliferation and cost.
- 4.14 Would such a system help transparency? Clearly it would do so in relation to the individual issues under debate, but the direct cost of achieving this would be considerable in any individual case and the indirect cost, in terms of slower and more cautious decision-making, would be even greater. The challenge is to achieve the benefits of greater transparency, for stakeholders and the FOS alike, on a far wider range of issues than those which might be considered by an appeal system, without incurring the risk and uncertainty inherent in the proposal.
- 4.15 It is not clear other remedies are as weak as Freshfields assert. Firms have been chary of using the Wider Implications (WI) process and in chapter 7 I suggest improvements to make that process more accessible to both industry and consumers. The scope of judicial review continues to expand and it is certainly possible for a firm to challenge the reasonableness of both the general principles underlying a decision and their application in the specific circumstances of a given case. The provision of an appeal process would in my view sit uncomfortably with the subjective element of the FOS's jurisdiction, well summarised in the judgement in the IFG Financial Services case. I have already noted that the discretion is widely drawn, enabling the FOS to

depart from established legal principles or remedies if it considers it appropriate. The exercise of such a wide discretion can really be capable of review by a Court or Tribunal only if it can be shown to be irrational: in other words by judicial review.

- 4.16 Above all, were there to be more effective regulatory action to deal with high-volume categories of cases, the perceived need for an appeal mechanism would fall away. The Freshfields paper, for example, draws attention to the FSA's ability to order restitution payments (Section 382 of the FSMA) and the appeal rights that exist in a case. Resolving what is appropriate for ADR and what is appropriate for regulatory enforcement action is a more appropriate response to the current tensions in the system than reducing the effectiveness of ADR by introducing appeal rights.
- 4.17 From the perspective of increasing transparency and accessibility, the case for an external, formal appeals mechanism is far from convincing. **I therefore conclude that the FOS should not establish an appeals mechanism.**
- 4.18 I do, however, make some specific recommendations to improve the efficiency of the current system. **The FOS should:**
- **make more explicit the internal appeals procedure that already exists, in the form of the right for either party in a dispute to seek a second decision on the case from an Ombudsman, emphasising that this second decision involves reviewing the full facts of the case *ab initio*.** Consumer journalists noted this as an area of real confusion for some consumers in our discussion and the FOS website is not very explicit, clear or helpful on this area of the process;
  - **ensure that, in any case where an Ombudsman has offered an informal view, the same Ombudsman is not involved in the final adjudication of a case.**
  - **continue to ensure that the appointment of the Independent Assessor follows an openly advertised "Nolan"-based process.** The Annual Reports of the current Assessor, Mr Michael Barnes, certainly demonstrate that he has operated independently of the FOS in his judgements. The transparent approach adopted for his appointment further reinforces confidence in his role and should be maintained for future appointments. I do not recommend a change in his current role of reviewing only alleged administrative failure and shortcomings in service by giving him appellate authority over the FOS.
- 4.19 Additionally, as suggested by the All-Party Group, **I recommend that the FOS should have the discretion fully to reopen a decision in the very rare cases where relevant information emerges after a decision has been made, including through the work of the Service Review Team and Independent Assessor.** In such cases, the onus should be placed on the requesting party to explain why the information was not produced in the course of the investigation.

## Conclusion

- 4.20 The absence of formal appeal rights, the need for rapid and effective case management and the breadth of the FOS's discretion, taken together, provide a compelling case for greater transparency. In particular, the need for publication of more material on questions of policy towards families of cases and of systematic information on methodologies adopted is compelling.
- 4.21 I do not see this as a question of the FOS issuing tablets of stone from the mountain top of South Quay; it follows from my earlier discussion that I agree with all those who have commented that a quasi-regulatory role is to be resisted. Instead, I urge a change in operating style to make the FOS much more open and interactive with all its users and stakeholders in developing its thinking and practice.
- 4.22 Transparency must be reciprocal. There have been strong representations from consumer bodies – and some companies and trade bodies, notably the Association of Independent Financial Advisers - that information about companies' performance before the FOS should be available to inform consumer decisions and incentivise better complaints handling. The bulk of industry comment, however, has been resolutely opposed to such an innovation.
- 4.23 This is a difficult issue in which issues of principle seem to point in one direction and issues of practicality in another, but the log jam has to be broken. My next two chapters consider these issues in more practical detail.

## CHAPTER 5 TRANSPARENCY - PRACTICES, DECISIONS AND MECHANISMS

### Current Practice

5.1 The FOS is not short of communications vehicles to convey how it approaches decisions. It currently uses:

- Standard fact sheets and frequently asked questions (FAQs) published on the website, about which I received little comment. These are helpful, but essentially describe processes rather than reasoning;
- *Ombudsman News*. This magazine is produced every 6/8 weeks and contains specific case summaries and items of general interest. My evidence suggested that it is generally very well regarded by its readership;
- Industry liaison groups. These separate groups meet regularly, to cover the banking, insurance, and mortgage and loans sectors. They do not seem to be popular gatherings. Companies and industry bodies often complained that the meetings consist only of "updates from the Ombudsman". Senior FOS staff complained that industry representation is at too junior a level for them to achieve the kind of debate they hope for;
- Consultation on individual issues. The annual work programme and budget is discussed closely with trade and consumer bodies, a process which, theoretically at least, could allow other issues to be raised. Other specific consultation exercises are undertaken, but infrequently;
- The Technical Advice Desk, about which I have made some specific recommendations in chapter 3. This provides a valuable mechanism for companies to receive hard information and informal advice about the FOS and, through logging of the calls it receives, a means of discovering issues of industry concern or lack of understanding. Current feedback mechanisms seem not to lead to consideration of general points about FOS practice, however, because they focus only on identifying the broad subjects of calls;
- Relationship managers. Staff on the Technical Advice Desk act as relationship managers for 45 of the FOS's larger user firms. The service seems to be highly valued by a number of firms and a number of staff received individual plaudits. Other companies did not refer to the relationship managers, however, and some denied knowledge of their existence. This may, of course, tell us more about internal communication within the company concerned than it does about any failing on the part of the FOS. However, overall, the system seemed to facilitate contact between complaints handlers and the FOS, rather than a strategic dialogue between FOS and company.
- The "Working Together" process in which senior FOS officials and managers from certain larger firms meet to discuss anonymous, benchmarked performance data;
- Dialogue with the Financial Services Practitioner, Smaller Businesses Practitioner and Consumer Panels. The Chief Ombudsman and senior colleagues have regular meetings with the panels, which are considered quite helpful on both sides.

5.2 This is a quite impressive list of activity. So it was surprising to find that the general tenor of evidence I received was that the FOS was not perceived as particularly open. I can see a number of reasons for this:

- what may look like admirable diversity of communication channels to one pair of eyes may look like fragmentation to others;
- it is not always clear when the FOS is communicating *ex cathedra*, looking for two way communication, seeking informal feedback or consulting more formally;
- consumer groups, notably *Which?* and Citizens Advice, consider they have less opportunity to make input than industry bodies; they may have a valid point;
- generalising widely and therefore a little unfairly, industry as a whole does not commit the seniority or volume of resource necessary to achieve an effective two-way dialogue.

5.3 In short, despite considerable effort, the activity may not quite amount to the apparent sum of its parts. I look below to modernise and streamline the FOS's current efforts, both in terms of structures and, more importantly, style.

#### **Transparency of Ombudsman Practice**

5.4 It follows from my earlier discussion that I believe that the FOS should be more open in publishing material about how it approaches categories of cases. *Ombudsman News* has many strengths but also some weaknesses. For example:

- it is a very "top down" document – the FOS uses it to convey their approach to categories of cases where clear decisions have been reached, but deliberately does not use it as a means of testing industry and consumer group thinking on emerging issues;
- it is not clear to the reader whether material in old issues represents current FOS thinking on the issues discussed;
- more generally, it is odd to use a magazine format as the main reference digest for significant decisions;
- it is not clear that a member of the public using the service for the first time would know what the magazine covered.

5.5 Even in a revamped form, this publication cannot improve communication to the extent required, so I also I recommend another, more radical, change, namely **that the FOS should develop a public interactive system – which I call "FOSBOOK" – as the main means of recording and promulgating details of its developing practice and decisions. This new resource should also, as recommended in the Kempson Report in 2004, be sufficiently comprehensive to "enable staff to develop their knowledge of products and to keep up-to-date with changes".**

5.6 The objectives of "FOSBOOK" should be two-fold:

- first, to ensure that everybody – FOS staff, industry, complainants and other stakeholders - start from a common understanding of what factors the FOS will weigh in specific cases. This will help businesses to decide whether to resolve a case before the consumer has approached the FOS. It will also help both firms and consumer advisers to decide whether to pursue a case to Ombudsman decision after an adverse adjudication;
- secondly, to provide a "real time" means of communicating significant case decisions as they are made, and to gather and respond to informal feedback. This will have the important benefit of creating a more responsive style within the FOS, without moving to full – and, in this context, inappropriate – mechanisms of formal consultation on the majority of issues. This is particularly important in areas where the FOS is heading into new territory, as it is starting to do, for example, in relation to cases which may involve reckless lending. In such cases, its approach will necessarily be evolutionary, but transparency can help accelerate the pace.

5.7 I envisage that the content will be very similar to that currently contained on the FOS's internal Knowledge and Information Toolkit, although the current material will need some degree of editing for this different and wider purpose and audience. The areas of coverage should include, as a minimum:

- jurisdictional issues;
- expected timescales for resolution;
- statements of general approach for categories of case;
- anonymised cases which the FOS regards as defining its normal practice for significant numbers of consumers. I comment further on publication of individual cases later in this chapter;
- policy on handling cases where fraud is suspected or alleged by either party to a complaint (A number of respondents, including the All-Party Group, noted this as an area of some uncertainty at present. I agree this should be resolved rapidly);
- model redress calculations;
- background material – eg on industry and regulatory practice in relation to specific products at specific times in the past. This would help address the common concern about so-called "retrospective" judgements, mentioned by a number of firms and the All-Party Group;
- issues on which the FOS would welcome formal or informal feedback;
- material on good practice on complaints handling, which might be developed in partnership with industry and consumer bodies.

5.8 FOSBOOK should be a forward looking document, as well as a work of reference. A large insurer told me that, as part of its stress testing of products, it prepares "mock-ups" of possible areas of complaint in order to consider how these can be avoided or responded to appropriately. As industry and consumers face new opportunities and challenges ahead, for example from the evolution of assisted sales as canvassed in the Retail Distribution Review, or the Government's plans for Personal Accounts, I can see merit in the FOS developing a similar approach to both guide and stimulate debate. **I therefore recommend that "FOSBOOK" should contain "mock-ups" of how the FOS might respond to possible future complaints categories to guide the development of industry practice.**



- 5.9 **I recommend that the Communications Taskforce should take an active interest in the development and evolution of "FOSBOOK"**. The Taskforce should have the opportunity to monitor and comment upon the content, as well as overseeing the process of production. I do not believe the Board taking a view on the broad approach to *categories* of case would infringe the FSMA requirement that the Ombudsman should be independent in the resolution of all *individual* cases in the light of what is fair and reasonable in the specific circumstances. It would clearly be neither helpful nor practical for the Board to seek to micro-manage every single element of the document. I do believe, however, that there is a real opportunity for Board members to add significant value to the work of the FOS by bringing their collective wisdom to bear on questions of how practice is evolving, and might best develop further, on a wide range of individual issues as the "FOSBOOK" develops over time.
- 5.10 It needs to be emphasised that such a manual, although a comprehensive picture of FOS practice, would not in any way be a regulatory document. It would not constitute a replacement for the Conduct of Business section of the FSA handbook, the DISP sourcebook nor for specific codes of practice prepared by industry bodies. Specific exclusive "rules" should not be inferred about industry practice from decisions; although the "FOSBOOK" material might indicate one means by which acceptable outcomes could be achieved, it would not be the only one. Each case would continue to be assessed in the light of all these circumstances. It would be a resource on which companies could draw in defining their actions in a world of principles-based regulation, not a means of undermining progress towards it.
- 5.11 For this reason, although I believe the FOS should work extensively with industry and consumer groups in preparing such a document, I do not believe it would be appropriate for it to be the subject of formal consultation. It would act as a resource to enable companies to work more effectively in a world of principles-based regulation, rather than seeking to introduce, or reintroduce, prescriptive rules by the back door.
- 5.12 Developing such a tool would have one important consequence for practice in decision-making. If FOSBOOK is developed, **I recommend that the FOS should ensure that decisions draw upon and explicitly refer to the guidance in FOSBOOK, and explain any variation from it, by reference to the facts of the individual case.** I believe that such a mechanism would help to encourage consistency, without diluting the "fair and reasonable" test. In so doing, it would strengthen decision-making within both the FOS and firms by establishing a clearer body of practice on the interplay of general principles and specific cases. It would also help to meet the concerns of those respondents, such as the IFA Defence Union and Highclere Financial Services, who produced interesting case studies of apparent variations in decision-making and interpretation of very similar evidence between different adjudicators.
- 5.13 I make one other comment on the form of decisions. I received representations from the Federation for Information Policy Research (FIPR) that the FOS was not equipped to handle cases involving assessment of technological issues in relation to cases involving alleged card fraud. It was too willing to accept evidence from banks and their trade bodies uncritically at face value. In response, FOS senior management said they looked at each individual case on its unique facts. They did not discount the possibility of technological fraud, but found that, in many cases, the overall balance of evidence

made a mistake on the part of the complainant a much more likely explanation. I saw no evidence that would lead me to dispute those claims and I note that this approach has much in common with the practice and findings of the premium rate telephony regulator PhonePay Plus (formerly ICSTIS).

5.14 Thorough evaluation of the technical claims of the FIPR is beyond both my terms of reference and indeed the competence of my team, nor were we in a position to examine individual cases in depth. It is nonetheless unsatisfactory that such perceptions of systematic bias should exist, however, so **I recommend that**

- **the FOS should define and publish ahead of the development of "FOSBOOK" the criteria by which it decides when to commission independent technical advice; and**
- **individual decisions should make clear how these criteria have been applied in practice.**

5.15 It has been put to me that putting this volume of material about FOS practice in the public domain might encourage tendentious "case-making" by some complainants and claims management companies, as they seek to bend the facts of an individual case to the stated general approach. I can see that adjudicators and ombudsmen will need to be alert to this possibility, but I do not see that it invalidates the general approach. One might as well argue that statute and common law should be dispensed with because barristers will use the letter of the law to present the best case for their clients. The greater gains in terms of predictability and increased confidence will, in my view, more than outweigh any short-term attempts to abuse the system.

5.16 There is one important consequence of preparing FOSBOOK against this specification. The FOS usually and understandably handles cases in the order in which they are received. It is important, however, for it also to take a reasonable number of the most recent cases through to rapid decision in order for it rapidly to establish and communicate its approach to categories of case emerging in the market.

5.17 I note one other issue: the FOS is not currently subject to the provisions of the Freedom of Information Act (FOIA). I can see no particularly strong policy reason for this exemption, but that is a matter for the current FOIA review exercise being undertaken by the Ministry of Justice, rather than for this Review. Were my proposals on the development of "FOSBOOK" to be adopted, however, this would more than meet the spirit of the legislation and most, if not all, of the specific requirements of the Act, without compromising the crucial protections that exist for both individual and commercial data within it.

### **Publication of Individual Cases**

5.18 In the context of developing FOSBOOK, I have considered how far individual case decisions should be published. As I noted in my call for evidence document, FOS practice on this issue is relatively conservative compared to some of its sister services overseas, some of whom publish all decisions in full, and some other UK Ombudsmen who publish summaries of all their decisions. Swiss Re UK urged me to recommend full publication to help provide reassurance of consistency of decision-making, but they were a lone voice in the debate. Other respondents from both industry and consumer

worlds argued against. Some arguments were practical: volumes would simply be too large to manage. Others started from the principle that no decision should be seen as precedent-setting and argued that publication could create false and undesirable misapprehensions. I agree strongly with the practical point. I return to the second below, in discussing test cases.

5.19 I do not, however, see how the FOS can become more transparent without significantly more decisions being published, and those decisions being published in full, rather than in summary form. I believe that decisions need to be published for two purposes:

- first, in the context of FOSBOOK, to guide practitioners about developing FOS thinking and practice;
- secondly, to facilitate debate on the evolution of practice over time.

As the intention is to offer the cases as general guidance, however, rather than specific commentary on the practice of individual firms, it would not be appropriate to publish the names of either the firm or the complainant.

5.20 **I therefore recommend that the FOS should:**

- **select and publish suitable decisions in full, but anonymised, form in FOSBOOK, to show the relationships between the broad principles applied to resolution of categories of cases and their application in practice;**
- **commission and publish regular academic analysis of the full range of Ombudsman decisions alongside future independent reviews.**

5.21 In relation to both of the points above, **I further recommend that the FOS should:**

- **consider changes to common authoring standards/templates and so forth, to facilitate publication and comparison;**
- **identify suitable ways of involving independent bodies, such as the Society of Court Reporters, in the process of selection and analysis of decisions.**

### **Lead Cases**

5.22 The approach I have outlined above has implications for the way the FOS approaches the conduct of “lead cases”. This refers to the occasional practice of identifying a group of very similar cases, usually at the behest of a firm, but sometimes on the FOS’s own initiative and occasionally triggered by a consumer group or a claims management company, and holding back the investigation of all of them until a decision is made on a specific lead case. The FOS then seeks to resolve the other cases on a common basis, except where specific circumstances dictate a different outcome. These may not be precedents in the strict legal sense, but to firms they can feel very similar. This procedure was noted approvingly in the Kempson Report, as a helpful way to “avoid duplication of work and so speed up the decision-making process”. I did not receive many representations on this subject, but those I did receive indicated that industry found the process useful, if somewhat unclear. Additionally, one correspondent argued

that a way should be found to take account of the potential impact on third parties (i.e. other than the complainant and the firm complained against) and that this should be factored into the decision.

- 5.23 I agree that the current opacity around the subject – for example, the absence of general notification that such a case is being determined and clear timetables for decision-making on it and the lack of clarity about how such decisions interact with the Wider Implications (WI) process – is not helpful in building confidence. I touch on the latter point again in chapter 7 of this Report. Equally, dialogue on lead cases can be difficult. Some firms told me they have found the FOS difficult to engage with in the course of decision-making on a lead case. Senior FOS staff find themselves in difficulty when pressed to hold such a discussion if the complainant in the case is not present. I sense frustration on all sides. This needs to be tackled for the future. The FOS must also provide constant reassurance that, even where a high-profile lead case has been resolved, each similar case will continue to be considered on its individual merits.
- 5.24 The changes I am proposing ought to mean there are fewer lead cases on issues which cut across firms. Developing an interactive “FOSBOOK” model ought to allow the FOS to move more quickly to stating a general approach to categories of cases and allow a wider range of tools to be used in doing so. I agree, for example, with the comment from Zurich that the FOS should be prepared to consider using cost-benefit analysis on some occasions to buttress the quality of its decision-making. This change of approach would make it easier for industry, consumer bodies and other interested parties to debate the broader implications of certain matters by removing them from the specific context of an individual case. In short, it should become possible for the FOS to work “top down” from an overall approach, whilst also fulfilling its statutory role of producing individual determinations “bottom up” from the facts and circumstances of each individual case.
- 5.25 A need for some lead cases may remain, however, on very specific issues connected with individual companies. These are likely to be complex and raise particular sensitivities. It is right therefore for them to be handled with particular care and attention by the most senior staff in the organisation in order to ensure both that there is no undue delay in resolving the issue for the complainant and that the full circumstances and implications are reflected upon fully and appropriately. The FOS will need to be particularly alert to the relationship between the Ombudsman’s decision and any relevant ongoing regulatory and legal action, (whether directly or indirectly related to the precise circumstances of the dispute in the lead case). I am, however, sceptical about the need for any formal recognition of the rights of third parties or non-parties to a claim. To do this would potentially fundamentally alter the nature of the service, even if attempts were made to restrain such changes within very tightly defined bounds.

### **Liaison Groups**

- 5.26 As I discuss in 5.1, although the current FOS/industry liaison groups have potential value, they do not seem to be working effectively and are not highly regarded by participants. I also note, with some surprise, that there is no analogous FOS/consumer liaison mechanism. Development of a more interactive style through “FOSBOOK” will, over time, lessen their role even further.

- 5.27 Rather than a “relaunch”, **I therefore recommend that the FOS should work with the FSA to subsume the role of the Industry Liaison Groups into those of the current Financial Services Practitioner Panel and Smaller Businesses Practitioner Panel, with the Financial Services Consumer Panel providing consumer input.** With the FSA, the FOS should identify and tackle the practical implications of this change, not least how to strengthen the secretariats of the Panels in order to help them to discharge this enhanced role. I believe that giving this enhanced role to the Panels will ensure that dialogue takes place at a suitably strategic level and help to identify at the earliest stage any tension arising between the development of FOS practice and regulatory policy. I comment further about the role of the Panels in relation to the Wider Implications (WI) process in chapter 7.
- 5.28 There will, of course, be a need for a range of interaction with industry and consumer bodies on detailed issues. **I recommend that the FOS should continue to pursue detailed issues through continued bilateral contact with trade associations and consumer bodies.** The informal links currently in place appear to be valued highly by all parties. **I also recommend that the Banking Advisory Panel should maintain its current technical advisory role.**

#### **Future of *Ombudsman News***

- 5.29 In the light of the other changes recommended in this chapter, **I recommend that, over time, *Ombudsman News* should evolve into a fortnightly email news letter, aimed at front-line complaint handlers in companies and consumer advisers, covering:**
- **FOS views of emerging issues;**
  - **specific examples of good practice/problems in complaint handling;**
  - **updates on changes to FOSBOOK;**
  - **news of specific changes of methodologies/logistics etc**
  - **a letters page;**
  - **a feedback form.**

#### **The Technical Advice Desk and Relationship Managers**

- 5.30 As discussed in 5.1, my general conclusion is that these systems generally work well. It is important, however, that both should be seen consistently as channels for two-way communication. In particular, a number of my interlocutors urged the case for more bilateral exchange visits between the FOS and companies to increase understanding of how different complaint handling models worked with a view to sharing best practice. I agree with this and would extend the principle further. **I recommend that, with suitable safeguards to protect confidentiality, the FOS should begin to develop secondment programmes with firms and consumer bodies to develop greater understanding and share best practice.**

## **Conclusion**

5.31 Taken together, these proposals represent a significant change and one of more than academic benefit. Clearly identifying a general approach to a subject and specifically identifying reasons for variation should make it possible, not just to shorten and simplify decision documents, but to arrive at decisions more rapidly. In short, I believe the changes recommended in this chapter could lead to a step-change in the transparency of FOS practice and enable it to set a lead amongst Ombudsman schemes in the UK and internationally in becoming more interactive in its decision-making, without compromising its independence and the essential flexibility of its jurisdiction.

## CHAPTER 6 TRANSPARENCY – PERFORMANCE DATA

- 6.1 The question of what level of data about company performance should be in the public domain was, by some distance, the most contentious and difficult issue for this Review and certainly merits a chapter in its own right.
- 6.2 Comments to the Review, with only rare exceptions, fell into one of two categories. Consumer bodies generally said that the FOS should publish extensive and detailed data on uphold rates, arguing that this would be a helpful input to consumer buying decisions and so help the market to work more effectively. Some were explicit about their desire to "name and shame" poorly performing firms, on the basis that only such potentially brand-damaging disclosure would provide sufficient incentives to prompt necessary reforms to poor practices in the market.
- 6.3 Industry bodies and firms, in the main, argued that such data should not be published. They cited a variety of reasons:
- it would be difficult to produce metrics which would adequately adjust for different market shares;
  - it would be wrong in principle for an ADR scheme to be involved in publishing such information;
  - consumers would not understand the information and might be misled by it;
- Only a minority of firms and trade organisations called for greater transparency in order to build consumer confidence in their own performance and that of the sector they represented.
- 6.4 I find it disappointing that commentators have followed such limited and polarised lines of argument in an area of some complexity. My aim is to find a pragmatic way forward, rather than attempting to adjudicate between two entrenched positions.

### The Starting Point

- 6.5 As I explain in chapter 4, I start from a presumption of greater transparency. Economic theory tells us that the availability of *accurate* information to consumers helps to make markets as a whole work more effectively, irrespective of whether every piece of information is understood perfectly by each and every individual. I do not see why information on complaints data should be any more - or less - likely to be misunderstood than any other information provided by companies, either as part of their marketing efforts or as a response to regulatory rules. There can be little doubt that transparency can help to improve performance, particularly amongst weaker firms, by giving strong incentives to make visible, public progress. In short, if information is brought into the public domain sensibly, clearly and with all necessary caveats fully explained, it can have a major preventative effect. I therefore conclude that **information about complaint performance is one relevant factor that consumers may wish to take into account in making a purchasing decision and I see no legitimate justification for withholding it as a matter of principle.**

6.6 There are, however, practical problems in producing accurate information, including:

- the inefficiencies and unfairness which may arise from giving companies a possible incentive to settle a case to improve their "league table" standing, even when they believe that right is on their side;
- the problems of taking account of merger and acquisition activity. The question of how far a merged brand should receive adverse comment because of the activities of previous management outside its control is not clear cut;
- the possibly misleading inferences that might be drawn about performance in relation to one particular product, if highly aggregated information is prepared at the level of major financial groups. "Good" performance in one area and "poor" in another does not equate to "average" across the waterfront;
- the equally misleading inferences that might be drawn from combining data on products of a profoundly different nature. Complaints about banking services may well tell consumers something meaningful about a bank's current systems and culture because of the transactional nature of the service, but a complaint about an investment product sold over a decade ago will not admit of the same conclusion, though both categories of case may tell us something about the current effectiveness of companies' internal complaints systems;
- the need to achieve clear understanding and consensus across the market on the definition of when a complaint has been "upheld" or not. This will not be as simple as it may at first sound. It is quite common, for example, for the FOS to find many aspects of a complaint unjustified, but to recommend an apology and perhaps token compensation to take account of a breakdown in communication. Such cases do not necessarily lead themselves to easy classification in terms of a black white definition of "upheld" or "not upheld";
- the danger of misleading inferences being drawn if the FOS's data alone is published, in the absence of concomitant promulgation of the FSA's data on firms' handling of complaints. One might characterise the publication of FOS data only as showing only a small fraction of the iceberg visible above water.

6.7 Above all, policy-makers must be mindful of two types of consumer detriment. Regulatory thinking over the past decade has been dominated by the need to avoid mis-selling, which correlates strongly with a high level of justified complaints. Consumer detriment also arises, however, from not buying the right kind of product at the right time, possibly leaving individuals with insufficient pension provision or protection. If consumers are encouraged to believe that large numbers of firms in any sector have a poor complaints record and, as a result, fail to purchase perfectly good products, the resulting detriment may be far worse than would be the case were a limited number of individuals to make a series of marginally sub-optimal purchases.

## **A Way Forward**

6.8 All these serious issues must be faced squarely in going forward and I might, in light of them, have been expected to suggest a cautious approach, recommending that the FOS, the FSA and the OFT should do more work to overcome them before any final decision could be made. I am merely concerned that the "health warnings" may end up taking up more space than the data, generating more heat than light. Great care must



indeed be taken, but this process needs to be driven to a clear end point, not into the long grass. My analysis underlines the need to get publication right, but let me be clear: I do not think the arguments against any publication at all are remotely convincing. In my considered view, the reputational risk of being perceived to be withholding data would exceed any danger of possible misinterpretation in the short-term. I also believe that a more adventurous approach could be adopted very quickly which would already be sufficiently free from the problems enumerated above to be perfectly viable.

6.9 Helpfully, there is some good practice on which to build. Currently, the FOS compiles a benchmarking table showing the “top 11” financial groups, which in combination produce over half of the complaints it receives, ranking them in terms of the number of complaints referred about each, proportionate to their market share, and also in proportion to the number of cases where there is a substantial change in outcome between the group's decisions and those of the FOS. Twice a year the FOS shares an anonymised version of this with the firms in question. This table shows consistently that the best-performing group is approximately nine times “better” than the worst. That firm knows it is the best, and most of the others can guess which it is. In the words of the chief ombudsman in a speech on 29 January 2007, however, “the depressing fact is that the other firms seem to have no ambition to narrow the gap, or to compete on improving this area of customer service – despite the emphasis of the FSA’s “Treating Customers Fairly” initiative. Nor does the best firm seem to want to promote its performance positively”. A number of firms have called for this regular exercise to be extended to cover a wider range of companies and 10 of the firms covered in the present reports produced a memorandum of suggested changes in March 2007, asking for greater granularity in the information currently provided privately. Both of these are positive suggestions. I also believe there would be public benefit in making this anonymised information publicly available, which would make its preparation and publication a legitimate charge on the FOS levy. The fact of major variation in uphold rates is already in the public domain and giving greater information about the level of variation within individual product groups can only help to increase incentives for improvement.

6.10 **I therefore recommend that the FOS should begin by:**

- **broadening the current recipients of its anonymised benchmarked “Working Together” information to include all 45 of the groups for whom it has relationship managers;**
- **making these anonymised data public;**
- **developing that dataset in dialogue with industry on the basis of the proposals put forward in March 2007.**

6.11 Anonymised data, for a minority of firms is, however, unlikely to be sufficient on its own to make any great difference to standards. So, secondly, to help spread good practice, **I recommend that the FOS should set up an Awards scheme to acknowledge firms that have achieved exceptional improvements in their complaints handling.** The details of such a scheme would need to be developed with stakeholders, but might cover areas such as the quality of initial responses, low uphold rates and ability to demonstrate application of lessons from complaints or “spikes” of complaints. My experience in many sectors suggests that celebrating success where it is deserved would significantly strengthen incentives for continuous, ongoing improvements.

- 6.12 Award schemes on their own would have limited credibility, so I also suggest the FOS should regularly release details of the worst performers in terms of uphold rates in the categories of retail banking; investments; and general insurance. To those it might add intermediation within each of the latter two sectors. That would be five names in all, in five discrete categories. I believe this would incentivise the worst performers and minimise harm to others. To mitigate residual levels of unfairness to firms it would be acceptable for the FOS not to make a "wooden spoon" award in those where the whole market was improving rapidly and the worst performer in a sector had still done relatively well, or where the worst performer had made very significant improvements during the year. **I therefore recommend that the FOS should announce each year the worst performer in terms of uphold rates in each of the categories of retail banking; investments; general insurance; intermediation in investments; and intermediation in general insurance. It should refrain from announcing such a name or names in certain, special circumstances, such as where a firm's performance is rapidly improving.**
- 6.13 I believe these three steps could be taken forward quickly, but I hope that the FSA's separate consultation on transparency, which will begin shortly, will add even greater impetus to a campaign to tackle the agenda for action set out in paragraph 6.6 more systematically. Subject to proper cost-benefit analysis in the usual way, I see no reason why the regulatory information about timeliness of handling complaints and outcomes on a firm-specific basis should not be available widely, and for comparable FOS data to be similarly available to present a rounded picture. I believe this will make the market work better, by providing consumers and regulated firms with considerably more information, and also enabling more effective supervision by the FSA in relation to the "Treating Customers Fairly" initiative, as supervisors draw on a wider range of data. When a firm or number of firms consistently trails the field in terms of adverse FOS judgements, however, there is only so much that the FOS should (or may) do, for the all-important propriety of the distinction between a regulator and a provider of ADR must be maintained. When the FOS does see fit to award a "wooden spoon", however, it does seem highly probable that the processes and culture of the firm or firms involved would merit particularly close attention from the FSA on its supervisory visits. Once again I emphasise the role of the FOS as a partner, not a rival, to the FSA.
- 6.14 This data about the performance of individual firms should not be merely agglomerated into a crude "league table" form, however, not least because this could spread a misleadingly negative message about the financial services industry in general. If the FOS does decide that a dramatically greater degree of openness at all levels of the system is indeed desirable, it should work to ensure:
- consistency of practice on complaints data collection and classification in companies;
  - definitional clarity in relation to "uphold" and "reject" decisions;
  - proper definition of the denominator in the calculation to ensure that rates are stated as comparable percentages, rather than as raw numbers;
  - clarity as to the size of company to which this degree of discipline should be applied – it would clearly be highly disproportionate for this to be extended to the smallest businesses, which would make the results presented less useful for consumers;
  - clarity on the timescale of complaints considered, my instinct being that it would be sensible for such a scheme to be implemented on a strictly forward-looking basis to minimise the scope for misunderstanding in its early phase;

- validation and cross-checking with companies where necessary, to ensure maximum robustness in the quality of the data.

**6.15 I therefore recommend that the FOS should work with the FSA, industry and consumer stakeholders to define a common complaints dataset to enable joint publication of performance data on a firm-specific basis in the medium-term.**

6.16 I have deliberately framed this recommendation in relation to areas of FOS jurisdiction covered by the FSA as regulator. In relation to consumer credit, the fact the OFT does not routinely collect data on complaints means the debate in that area will be slightly different in detail. The core issues are essentially the same, however, so I suggest that the FOS and the FSA should either involve the OFT directly in the work suggested above, or undertake an analogous process for this jurisdiction.

6.17 In the medium term, it may be possible to work towards some form of comparative publication. I have in mind, for example, an independently-hosted website which might contain for the largest companies:

- details of a firm's complaints procedure, including escalation;
- any reports prepared by the firm – for example through the public reports under the ABI's Customer Impact scheme – on its effectiveness;
- the FSA-mandated information on internal complaints performance;
- the comparable FOS data in the same subject categories.

6.18 I stress that I see this as one for the longer term. There would need to be much detailed evaluation of the impact of the anonymised data I recommend above, and of the use made of the common dataset information, before design decisions could safely be made, but I have no doubt this is a desirable aspiration.

## **Conclusion**

6.19 The proposals in this chapter may be too radical for some, but they represent a genuine attempt to break through the stereotyped views that so often bedevil debate on this issue.

6.20 Performance in complaints handling is a legitimate factor for customers to take into account when making decisions. Hence it is a legitimate area for competition between providers. It should also be an important consideration for the FSA's "Treating Customers Fairly" initiative. Handled correctly, the reputational impact of transparency in this area can only be beneficial in improving standards generally. I therefore consider openness both desirable and inevitable.

6.21 Such competition has to be on a fair basis, however, so I do not discount any of the practical points put forward about the difficulty of achieving greater openness immediately. Nonetheless, inertia must not be an option. The logistical issues are capable of being addressed. With strong partnership working, it should be possible to move rapidly to greater openness as the industry, the FSA and the FOS alike develop confidence in defining this crucially important material and presenting it to consumers.

6.22 It is self-evident that progress in this area depends on effective cooperation between the FOS and the relevant regulators. It is not unique in that regard. In the next chapter I address broader questions of cooperation with regulators, including the extent to which it should be an open process.

## CHAPTER 7 TRANSPARENCY – GOVERNANCE AND REGULATORY RELATIONSHIPS

- 7.1 My call for evidence document raised a number of specific issues in relation to the relationship between the FOS and the relevant regulators, the FSA and the OFT. These questions prompted interesting debate on the transparency of the governance of the FOS, as well as its regulatory relationships. This chapter covers both issues.

### The Role of the FOS Board

- 7.2 In legal terms, the FOS is unusual. Although its authority ultimately derives from statute, it is not itself a statutory body, but a company limited by guarantee. This is important in demonstrating its independence from Government, regulators, industry and consumer bodies alike, but it does mean that it lacks many of the various checks, balances and accountability mechanisms that statute normally puts in place to ensure oversight of a public body. Such oversight is usually justified by the need to secure proper accountability for public money. The FOS does not, of course, receive public funding, but it does fulfil an important public policy function. Parliament and taxpayers rightly need assurance on its stewardship. Likewise, in the absence of a Finance Board mechanism, as developed by other private sector ombudsmen to give member firms a degree of control on both the level of budget and how that budget is recouped, those who fund the FOS deserve strong assurances on its effectiveness. A combination of consultation on the Annual Budget and FSA scrutiny provides this to some extent, but is less comprehensive than the kind of scrutiny one might expect to find within the mainstream public sector. I therefore believe regular transparent scrutiny, broadly analogous to that given to a Non-Departmental Public Body or an Executive agency within government, would be appropriate to supplement the FOS Annual Report and occasional brief appearances by its senior executives before the House of Commons Treasury Select Committee.
- 7.3 A number of commentators raised questions about the role of the FOS Board in securing the transparency and independence of the Service. The role of the Board is certainly unusual, both in the functions that it covers and those it does not. The role in protecting the independence of the Ombudsman from outside pressure, whether from industry, consumers, regulators or government, is an important one, not normally found in the remit of a corporate body in either private or public sectors. Equally, the Financial Services and Markets Act (FSMA) makes clear that members of the Panel of Ombudsmen have autonomy in relation to their decisions in individual cases. As it would be in any public sector body, however, the role of the Board is crucial in giving stakeholders assurance about rigour and efficiency in the governance of the FOS. Transparency, in turn, is crucial in ensuring that the Board is seen to be discharging that function.
- 7.4 It is not my role to undertake a review of the effectiveness of the Board *per se*. I do, however, note that the Board recently undertook such an exercise with outside consultants and is planning to make some changes as a result. I have also been impressed with the seriousness of approach of both the retiring and new members of the Board whom I have met individually in the course of my Review. I therefore confine my remarks here to questions of transparency.

- 7.5 I believe a more visible role for the Board could be helpful in building stakeholder confidence in the independence and rigour of its corporate governance, In particular, **I recommend that, to improve transparency of the FOS's governance the FOS Board should:**
- **publish its minutes as a matter of routine, in line with best public-sector practice (but with appropriate arrangements to cover genuinely confidential matters);**
  - **encourage the attendance at its meetings of at least one senior representative from the FOS's sponsoring body (the FSA) and possibly also from the NAO;**
  - **publish full reports from relevant Board sub-committees in the Annual Report.** I consider it particularly important that the Quality Committee, which will begin its work shortly, achieves wide understanding of its role and a suitable profile for its work;
  - **make a formal public response to the Annual Report of the Independent Assessor in the context of the FOS Annual Report;**
  - **instruct the Internal Service Review team to make a public report, similar in form to that of the Independent Assessor.**
- 7.6 More generally, I believe the Board could have an important role to play in relation to some of the issues covered elsewhere in this report. I have already recommended the establishment of a Board-led Communications Taskforce to strengthen targeting and evaluation of communications activity and, in relation to FOSBOOK, the case for the Board to play a more visibly active role in considering and agreeing the principles that should guide categories of case. Additionally **I recommend that the FOS Board should constantly be on its guard for any instances where the FOS is in danger of becoming a quasi-regulator or quasi-legislator as a consequence of gaps in either the regulatory structure or the law, drawing such instances urgently to the attention of the relevant public body and detailing them as a matter of course in the FOS Annual Report.** I believe this approach, underlining the clear separation of roles between regulator and Ombudsman whilst also strengthening communication between them, would be more effective than having cross-membership of the FSA and FOS Boards, as proposed by the British Bankers' Association, which could unhelpfully blur accountability.
- 7.7 This recommendation is prompted in part by the helpful evidence of the Law Commission. The Commission's recent report on Insurance Contract Law has been heavily informed by Ombudsman practice. I regard it as a tribute to the fair-mindedness of FOS staff that its practice has received such a strong endorsement from so authoritative a body. It is surely unsatisfactory, however, for an ombudsman service to be forced systematically to make good the deficiencies of statute law. It is one thing for an individual complaint to be resolved in a way that skirts around a specific lacuna in legislation, but it is quite another for the FOS, in effect, to be in a position of evolving a new corpus of law or regulation in the absence of action by the appropriate body. The FOS should never have to "make it up as it goes along."

- 7.8 It is also prompted by concern about the impact on the FOS of individual "spikes" of work. These have occurred not only in relation to endowment mortgages, but also in relation to split capital investment trusts , current account charges and sales of Payment Protection Insurance. I have not examined in detail how well the FOS has responded in these instances, but it is clear these spikes have tested its general organisational resilience sharply. One FOS Board member told me he thought it was important for the FOS to have "an escape route" in such circumstances; others speculated about whether an ADR model was appropriate in the face of "industrial volumes" of complaints.
- 7.9 In each of these cases, there is or was a fundamental question to be asked about whether an ADR scheme, designed to offer a personalised service, is the most effective way of resolving issues quickly and satisfactorily for all concerned. I do not believe it is possible to have a general rule in such circumstances given the wide variety of possible causes, but clear decisions are needed. Regulators have rarely addressed such decisions in an open and transparent way, but more regulatory creativity is needed to find proportionate solutions. These should fall short of a full-scale Section 404 review, which would require explicit parliamentary authorisation, but must not simply, as many of my respondents put it, "dump the issue on the FOS". Failure to find such solutions may result in sub-optimal outcomes on individual cases and a decline in FOS's quality of service (and hence reputation and trust) overall, as rapid shifts in resource deployment cause short- or medium-term problems. The FOS Board therefore has a role in maintaining strategic oversight of activity to identify where there is a case for action by others. It is not the job of the FOS to provide a means of addressing systemic failures in regulation or industry by default.

### **Communication with Regulators**

- 7.10 As I have made clear throughout, I see the need for the FOS to be robust, visible and evidence-based in its general communications with all parties. I see no reason why communication with the FSA and OFT, as the relevant regulators, should not be conducted on the same terms, save only that the essential statutory bars on disclosure in the FSMA must, of course, be adhered to. Publication of a Memorandum of Understanding is no substitute for publication of the raw material itself.
- 7.11 The case for more open communication with regulators is particularly strong for a number of reasons:
- first, it helps to establish clarity of role in ensuring that the regulatory and dispute resolution functions of the respective bodies are not confused;
  - secondly, it helps to demonstrate the robust independence of the FOS, deriving from the FSMA, to the market, consumers and stakeholders;
  - thirdly, it provides a strong mechanism to ensure that lessons emerging from the work of the FOS are fed into policy development as well as day-to-day industry practice. Just as the FOS should regard itself as being under a remit to feed learning from its casework into regulatory policy development, so the regulators should be accountable for how they choose to apply such learning;

- fourthly, the experience of the FOS can and must provide crucial input to any assessment of the effectiveness of certain policies and initiatives, notably "Treating Customers Fairly" and whatever emerges from the Retail Distribution Review. The experience of the FOS will also be essential in helping the FSA determine how far it can progress towards the admirable goal of principles-based regulation and deciding in which areas, if any, there remain advantages in taking a more prescriptive approach to give the market certainty. This argues for more - and more open - communication with the FSA, as this experience needs to be part of a wider policy debate, not confined to the regulators alone;
- fifthly, it provides a means to enable and make visible debate about perceived differences of emphasis between FSA and FOS practice. For example, it is far from helpful that there is a common perception in industry that the FOS takes a wholly different view to that of the regulator on how time-bars for mortgage endowments should operate.

7.12 There are two important qualifications. First, as I explain in chapter 6, it is important that publication of complaints data shows the FSA and FOS data together, rather than separately. So it would not be appropriate for FOS management information, passed to the FSA or the OFT for such a publication, to be published separately. There should not, however, be a long gap between such data being passed on and its publication, not least in order that it may be used frankly in regulatory supervisory conversations where this is appropriate.

7.13 Secondly, and highly exceptionally, it may be that the FOS perceives a pattern of behaviour in an individual firm that may imply the presence of systemic regulatory breaches, which may not be immediately apparent from the performance data alone. It might be right for the FOS to alert the relevant regulator in these rare circumstances, but the FOS itself is not equipped, either in its statutory powers or in its resources and skills, to investigate these issues. As the FSMA rightly contains safeguards to protect commercial confidentiality and prevent market damage in the initial stages of any enforcement activity, it would be quite wrong for the FOS to make public such communication.

**7.14 I therefore recommend that, with the exception of any communication relating to specific enforcement investigation, the FOS should place all formal communications with regulators on the public record.**

### **The Wider Implications (WI) process**

7.15 My call for evidence document asked specifically why the Wider Implications (WI) process is so little used. Shortly after publication of that document, the FSA, FOS and OFT held a major event for trade associations and other stakeholders to announce a relaunch of the process, including updating its web presence with a jointly hosted website at [www.wider-implications.info](http://www.wider-implications.info). In the light of that effort, I find the repeated assertions in the evidence I received that the process is little known and inaccessible both surprising and disappointing. Improvements in the process are both possible and desirable, but there is an onus on industry to use the mechanism when it has concerns about any possible regulatory implications of actions on the part of the FOS.

7.16 In considering the WI process and its interaction with the activities of the FOS, I have found it very helpful indeed to go back to first principles and consider why such a process was established in the first place. The WI process exists to flag up newly-occurring issues that relate to or affect:

- a large number of consumers;
- a large number of businesses;
- the financial integrity of a large business;
- interpretation of FSA rules or guidance from the FSA or OFT; *or*
- a common practice by businesses.

However, the procedure is perceived as being both nebulous and excessively complicated. At first sight, this is rather odd: given that it supposedly involves no more than writing a letter to the FOS or the relevant regulator, it is arguably not really a formal "procedure" or "process" at all. However, my considered view is that problems do arise as a consequence of the process attempting to cover too much ground within poorly-defined parameters and thereby confusing the roles of regulators and the FOS.

7.17 Several submissions to this Review expressed varying degrees of discomfort with the fact that some combination of the FOS, the FSA or the OFT is currently responsible for deciding if and when the WI process can be triggered, and also for subsequently resolving what the eventual conclusion should be. My proposals about the role of the FOS Board seek to tighten responsibilities in this regard, but I am still very uncomfortable with the role the FOS is expected to play, as this creates a possible conflict, taking the FOS into the dangerous "No Man's Land" between dispute resolution and regulatory activity. Although clearly the FOS is an important partner in the process, not least in bringing issues to the attention of regulators where it spots them first, I do not think it is appropriate for the FOS to act either as a gatekeeper to, or as a formal part of, the regulatory decision-making process. Once the process has been triggered, the issues under discussion are essentially matters of FSA or OFT policy. Involving the FOS in such decisions takes it outside its appropriate sphere of activity and influence.

7.18 The Association of British Insurers proposed the creation of a new independent gatekeeper role for the process. I am reluctant to add further complexity to an already crowded regulatory landscape by creating a new body, but the principle identified is right. In chapter 5, I call for the strengthening of the roles of the Financial Services Practitioner and Consumer Panels. As part of this process, I believe they should have a special status, in being able to trigger a full examination of the substance of the issue or issues that they have raised.

7.19 I also believe the process itself should also become much more transparent and speedy. There would be merit in regulators publicly committing themselves to reaching a conclusion on the issues raised within a reasonably tight timetable in order to prevent users of the FOS facing "planning blight" in the consideration of their cases.

7.20 I believe any individual application of the Wider Implications process should be regarded as coming to an end once the relevant regulator has decided whether or not to act. If it does choose to act, the consequences of its actions for the FOS should be spelled out as part of that decision. If it chooses not to act, the initiative then passes



back to the FOS. The FOS may at that stage choose to follow parts of the current procedure – I have some sympathy with those who expressed disappointment that the more novel options such as commissioning reports from industry and consumer experts, have been used comparatively rarely – but I do not believe that it is helpful for such an initiative about ADR practice to be seen as part of a process which is ultimately about establishing regulatory certainty. It may be that the changes I recommend elsewhere in terms of both the communications culture and specific structures with the FOS mean that, over time, the need for a Wider Implications process falls away. It would clearly be foolish to discard it immediately, however, so **I recommend that the Wider Implications process should be improved in the following ways:**

- **the FOS should be totally insulated from all aspects of any regulatory decision-making within the process;**
- **the Financial Services Practitioner and Consumer Panels should have the right, not merely to submit an issue for consideration as to whether it has wider implications, but also to trigger a full examination of the substance of the issue or issues they have raised;**
- **time limits should be set for resolution of issues by the FSA or OFT and the process should be regarded as ending once the relevant regulator has reached a decision on whether regulatory change is needed;**
- **the relationship between the WI process and the FOS's approach to "lead cases" should be reviewed and made more explicit;**
- **the FOS, the FSA and the OFT should produce a short annual report to supplement the web material, detailing how the process has been used over the preceding twelve months;**
- **studies on cases which are not accepted under the WI procedure should be more explicitly related back to the criteria for acceptance.**

### **Alignment with Regulators**

7.21 I have stressed throughout this report the need for the functions of Regulator and Ombudsman to be kept strictly apart. I have also stressed the contribution that greater transparency can make in ensuring that this happens. This does not, of course, mean that communication or policy development should be wholly uncoordinated.

7.22 One issue merits specific comment. Although this was not a major theme in formal responses, a number of those who have spoken to me in the course of the Review have also raised the issue of whether the "fair and reasonable" test aligns with the expectations of the FSA when it assesses compliance with the principle of "Treating Customers Fairly". In the absence of any relevant case law, I do not yet perceive any material conflict arising between the two.

7.23 This issue was raised with us in a number of different guises. The British Bankers' Association (BBA) thought the FOS should consult before interpreting FSA regulatory standards in reaching decisions where that interpretation was of general application. The argument embraces the thought that the rules themselves are statutorily subject to consultation, as is varying them, so interpreting them should be too since the effect can be the same. I do, however, believe the role of the FOS should be kept as simple as possible and I do not want to create an obligation to consult.

7.24 Moreover, I believe that the BBA's suggestion implies a concern about a rather broader set of issues. There is a sense from an overall look at the representations I received

that industry feels the FOS tends to interpret FSA rules more often than it needs to. I consider that, although interpretation should be kept to a minimum, it cannot be eliminated entirely: at times, the Court must interpret what the Legislature intended when a question of statute law is brought before it. The question is whether the FSA's intention to move to a less prescriptive, principles-based regulatory regime will increase or diminish the need for interpretation. Only time will tell, but my expectation is that interpretation of rules in a world of principles-based regulation will primarily spring from questions about how the principles apply to the given facts of a case, rather than what the intention behind the principles may have been. The recommendations set out below should help to address this subject, and they should be read in especially close conjunction with my recommendation in paragraph 7.6.

7.25 I make five recommendations on regulatory alignment:

- first, **the FOS should work to identify where its practice diverges from regulatory rules and work with regulators to achieve alignment where the divergence causes cost and uncertainty.** Each such case of misalignment should be considered on its merits – the assumption should not be that FOS practice should automatically change to match that of the regulator;
- secondly, **the FOS should work with the FSA to ensure coordinated communication on the development of the "Treating Customers Fairly" strategy.** Just as I have suggested that the FSA should have a role in the production of "FOSBOOK", so the FOS should be clearly engaged in the production of case study material by the FSA. Indeed there would be merit in such material being derived from relevant FOS cases, where appropriate. Likewise, where FSA diagnostic mystery shopping work indicates the need for follow-up supervisory action, it would be appropriate for the relevant paper also to indicate in broad terms how the FOS is approaching, or would approach, cases in the same area of the market, referring to FOSBOOK material, where relevant;
- thirdly, **the FOS should work with the regulators to maintain a common approach to the treatment and recognition of industry guidance.** Welcome progress has been made in this area in recent months, but this is an area where policy and practice is likely to develop further as implementation of "Treating Customers Fairly" continues. The FOS should take account of recognition of industry guidance by FSA where this occurs, but, to the extent that regulatory compliance is an issue in an individual case, should not regard compliance with such guidance as the only way to meet a regulatory obligation. Of course, compliance with any such guidance will not be the only material issue in an individual decision;
- fourthly, **the FOS and regulators should communicate with firms and consumers in a coordinated manner whenever a single category of case begins to generate a disproportionate amount of the FOS's caseload.** This is a natural consequence of my discussion earlier in this chapter of the need for rapid decisions on whether ADR is an appropriate way of tackling consumer detriment in such cases. Whatever decision is taken, it obviously needs to be communicated consistently to consumers and all stakeholders;
- fifthly, **the FOS should work with self-regulatory bodies such as the Banking Code Standards Board, to ensure proportionate arrangements for communication and formal and informal liaison, similar to those for statutory regulators, are put in place and communicated to stakeholders.**

- 7.26 On the first issue, some respondents highlighted record-keeping as a particular area of tension where the FOS's ability to look back beyond 15 years is felt to create an obligation on companies to keep records for longer than the period specified by the FSA. I have some sympathy with advisers who have left the market some years ago, but feel that they remain at risk from complaints and hence maintain expensive professional indemnity cover. I do not believe, however, that it is possible to specify a "long stop" date beyond which complaints cannot be considered, because the point at which the customer becomes aware of possible detriment will vary significantly. The suggestion of the Association of British Insurers that a "long stop" could be introduced, but without any obligation on firms to notify consumers of its approach, is certainly untenable in terms of "Treating Customers Fairly". **I do, however, recommend that the FOS should clearly document in "FOSBOOK" its general approach in approaching the assessment of evidence in cases relating to sales made over 6 years ago** to establish greater certainty on the value placed on generic information on company practice and customer recollection.
- 7.27 The various changes proposed in this chapter have implications for the text of the current Memoranda of Understanding between the FOS and the FSA and OFT respectively. I believe that those documents need revision in any case to state more explicitly the role of regulator and ombudsman in making the market work more effectively for the benefit of consumers and firms, rather than focusing in a sterile fashion upon the administrative relations between the bodies concerned. **I therefore recommend that the FOS's Memoranda of Understanding with regulators should be updated in the light of this Report.**
- 7.28 I also commend the FOS for its support for the "Stakes in the Ground" concept pioneered by the Association for Independent Financial Advisers, which seeks to document what was regarded as acceptable practice in the past. The Retail Distribution Review may well give this process greater momentum. **I recommend that the FOS should take an active role in the development of the "Stakes in the Ground" concept and make clear in FOSBOOK how it regards specific guidance produced through that process as it emerges.**

### Regulatory "Outsourcing"

- 7.29 I have discussed earlier in this chapter the role the FOS should take in feeding into regulatory policy making and its very limited role in relation to enforcement. For the sake of completeness, I now consider the suggestion put to me that, over time, the FOS could become more directly active in regulatory supervision. Might it be possible, for example, to envisage the FSA choosing to base its assessment of strength of companies' complaints systems on reports from the FOS, for example, rather than tackling the issue through normal supervision, themed visits or the Arrow process?
- 7.30 I can see the idea has some attractions. It might arguably, for example:
- broaden the commercial and practical understanding of FOS staff;
  - enable greater focus on complaints handling overall by guaranteeing that the issue was not "squeezed out" by other priorities in the Arrow process;
  - help to enable FSA supervisory efforts to focus even more sharply on issues of systemic risk;

- aid the better identification and communication of best practice in complaint handling at a company level.

7.31 To recommend such a change now would, however, be at variance with the general tenor of my report, which is to respect and strengthen existing boundaries, rather than confuse them. Such a move would be a major change for both organisations, possibly requiring primary legislation. It is not immediately clear, in public policy terms, why complaints handling (as opposed to any other part of "Treating Customers Fairly" implementation) should merit such special treatment. Moreover, the management challenge and risk – for example, in terms of ensuring staff have the necessary skills and balancing resource allocation between supervisory activity and case resolution – could interfere with the FOS's core statutory role of dispute resolution.

7.32 There is, however, scope for closer working and **I recommend that the FOS should work with regulators to identify how Ombudsman experience and regulatory supervision practice can best inform each other, identifying possible initiatives such as short-term secondments between the two organisations to develop skills and buttress mutual understanding.** The case may be particularly strong in relation to the consumer credit jurisdiction, where the OFT currently lacks the resources to undertake supervision on the same scale as is undertaken by the FSA. The FOS may be better placed to promote best practice in that sector and even to assist in "hands-on" investigation of individual companies' complaints systems, where its scrutiny of complaints suggests there may be systemic weakness.

### **Wider Accountability**

7.33 A number of organisations called for wider accountability mechanisms for the FOS including

- the commissioning of independent reviews by the Treasury;
- regular efficiency reviews by the NAO;
- a one-off NAO review, as recommended by the House of Lords Select Committee on economic regulators, but recently rejected by the Government.

7.34 I have considered what value such proposals might add to the FOS Board's current commendable practice of commissioning and publishing regular independent reviews. Such reviews can potentially range more widely than a standard efficiency review would, so to strengthen the approach still further, **I recommend that**

- **the FOS Board should consult stakeholders before deciding the scope of future independent reviews; and**
- **commit in advance to the publication of the outcomes of those reviews and their responses to them.**

7.35 There is no clear statutory route by which scrutinies could be undertaken on a regular basis by the NAO, but Section 12 of the FSMA does enable the Treasury to appoint the NAO to review FSA activity. Consequently it might be argued that, since securing an ombudsman scheme is part of the functions of the FSA, the FOS too might be scrutinised indirectly via that route. Equally, Schedule 17 of the FSMA, which gives the FSA a power to take action to ensure that the FOS is capable of exercising its functions

under the FSMA, might also arguably be used *in extremis*. It would be easier and more elegant, however, for the FOS Board itself voluntarily to invite the NAO to conduct such a scrutiny or scrutinies. This would serve only to enhance confidence in the FOS.

- 7.36 My work has covered much, but by no means all, of the ground suggested by the Lords Select Committee. On balance, I am concerned that a further one-off scrutiny now might act to delay early management action on many of the proposals in this Report. There will be future reviews of the FOS, however, and **I recommend that the next independent review of the FOS should focus principally on questions of efficiency, as suggested by the House of Lords Select Committee report on economic regulation. I also believe the FOS Board would be well advised to select the NAO for that review.**

## Conclusion

- 7.37 As a package, these recommendations seek to address some of the confusion and worry which stakeholders perceive in the relationship between regulators and the FOS. My aim has been to use transparency to achieve the proverbial “clear blue water” between their roles. Although the FOS has a role to play in developing regulatory thinking, it must never serve as either a substitute or a “stalking horse” for regulatory intervention. Greater visibility of what it does in concert with regulators can only help to secure greater understanding of their complementary roles and so encourage both better regulation and better dispute resolution.

## CHAPTER 8 FUNDING AND JURISDICTION

8.1 In this chapter, I discuss other issues of funding and jurisdiction raised with the Review, which merit some comment from the perspective of accessibility and transparency.

### The Compensation Limit

8.2 The All-Party Group and various consumer bodies have argued forcefully that the existence of the £100,000 limit on compensation acts as a barrier to accessibility, particularly in relation to banking complaints. Conversely, businesses have argued that removing the limit would reduce the ability of the FOS to achieve mediated settlements, as industry would be inclined to take a legalistic approach in more cases to guard against perceived higher liability.

8.3 This appears to be an area which is heavy on assertion, but light on evidence. I saw little direct evidence of the limit acting as a deterrent in practice, but this was not an area I explored in great detail, given that the principal focus of my work on accessibility was on more vulnerable consumers, whose cases will never come anywhere near the existing limit. Given the concerns which have been expressed, however, the matter evidently needs to be reviewed by all concerned as a matter of some urgency.

8.4 I recommend that the issues to be considered in such a Review might include:

- **how many enquiries are received by the FOS, in which the consumer alleges losses of over £100,000;**
- **how many of these enquiries subsequently turn into cases and what the outcome of those cases is;**
- **the number and proportion of cases in which the FOS uses its discretion to recommend compensation payments over the £100,000 limit and the number of cases in which this is accepted or rejected by companies;**
- **establishing the number of court cases involving financial services complaints in the £100,000-250,000 level, with a view to estimating how many might have been suitable for ADR by the FOS;**
- **whether there is a case for the turnover limit of £1 million for small businesses to bring their cases to the FOS also to be increased**
- **a cost-benefit analysis of any widening of jurisdiction;**
- **what form of indexation, if any, would be appropriate in future;**
- **what issues arise from the variation in limits between the FOS and the Financial Services Compensation Scheme. (I should add that, although this is strictly outwith my remit, I share the surprise of some that the FSCS sees fit to reinvestigate cases where the FOS has found against a company that has subsequently gone bankrupt without paying the compensation);**
- **and what issues may arise following the FOS's merger with the Pensions Ombudsman, which currently has no limit on the compensation it can order.**

Where good data sources do not exist at present on some of these points, there may be a case for putting further research in hand before final decisions are made.

## Charging Complainants

- 8.5 A number of respondents to the call for evidence, including the Consumer Credit Association and Association of Independent Financial Advisers, urged me to recommend the introduction of charges for complainants to the FOS. Such fees, which would be refunded if a complaint were upheld, would, it is argued, deter vexatious complainants and so prevent businesses incurring case fees unfairly. On the other hand, I received strong representations from the All-Party Group and *Which?* warning that the introduction of case fees could not be justified.
- 8.6 I have some sympathy with both small businesses and the Ombudsman Service itself when faced with time-consuming vexatious complaints, but the way to handle such cases is through clear and transparent filtering rather than the blanket imposition of fees. I doubt whether many of the vexatious would truly be deterred – many would press their case regardless, whilst others would pursue legal action at potentially greater cost to the company. I think it far more probable that many complainants – including the most vulnerable – would be deterred from advancing even cases that have obvious merit, particularly in claims of comparatively low value. From the perspective of accessibility, this cannot be the right solution. We must not allow the tiresome minority of vexatious complainants to poison the well in a way that would disadvantage the honest majority. **I therefore recommend that the FOS should not introduce fees for consumers.**
- 8.7 I do, however, consider that there is a case for the FOS charging a case fee to claims management companies when they present a case which is judged to be vexatious. It is reasonable to expect that regulated companies should not inflict totally frivolous work on a statutory body. Regulation should ensure that the cost of such fees is not charged either to the complainant or to the firm or individual against whom the vexatious claim has been made. **I recommend that the FOS should introduce a case fee for vexatious claims put forward by claims management companies and work with the Ministry of Justice to put protection in place to prevent such fees being passed to consumers.**
- 8.8 More broadly, I believe that there is an increasingly strong case for claims management companies to contribute to the FOS levy, given the commercial benefit they derive from the existence of the service. **I recommend that the FOS should work with the FSA and the Ministry of Justice to broaden the base of FOS levy-payers to include regulated claims managers.**

## Transparency in Case Fees

- 8.9 In the course of the Review, a number of points have been put to me about the nature of case fees and, in particular, whether a flat rate is appropriate. It has been variously argued that case fees should be much more transparently related to the effort needed to resolve them, the level of claim involved, whether the claim is "won" or "lost" or some combination of two or more of these factors.
- 8.10 Some would go so far as to move to full financing through the "polluter pays" principle (that is, charging a case fee only when a firm "loses" a case) in order to achieve the

best incentives on companies to treat customers properly in the first instance and to improve their complaint handling. The question to ask is whether the theoretical benefits of such changes would actually have odd consequences in practice. Only last month (February 2008) a county court judge in the West Country ruled that it was unfair for the FOS to charge an adviser a case fee when a case has been rejected. This is subject to an appeal at the time of writing, but I have sought to consider the question on what I perceive to be its merits, entirely independently of that. Nonetheless, this does underline the fact that not everyone is content with the current charging regime.

- 8.11 To my mind there is a clear danger here of some perverse outcomes. Total "polluter pays" funding would change the incentives for firms. Why invest heavily in your own dispute resolution service if you can simply pass the work to FOS, secure in the knowledge that you will face no charge for the cases which you win? The incentives for FOS would be equally odd. If the organisation's cash-flow and ultimate survival depends wholly on a flow of "guilty" verdicts, there is a danger of economic incentives having an impact on decision-making that would be highly inappropriate. Taken with the practical difficulties about definition of "win" and "lose" and the challenges of cash-flow management in such a system, **I conclude that the dangers of making a radical shift to outcomes-based case fees, sometimes described as "polluter pays" funding, would outweigh the putative benefits.**
- 8.12 The challenge therefore is achieve the maximum fairness and transparency within the current flat rate system. **To achieve this, I recommend that the FOS should:**
- **continue its current practice of summarily dismissing complaints in appropriate circumstances, identifying separately those that it judges to be vexatious and publishing its criteria for so doing and the numbers so dismissed each year;**
  - **move as quickly as possible to a general policy of not charging a case fee in all cases found to be outside its jurisdiction, even if investigation is needed to establish this fact;**
  - **document its practice thoroughly on "FOSBOOK."**
- 8.13 I do, however, propose one move in the direction of "polluter pays". I do believe there is a strong case for penalising firms which, whether by deliberate decision or through plain incompetence, drag out the initial stages of complaints handling to the detriment of the customer and thereby generate additional costs for the FOS. It would be relatively easy to introduce a higher case fee rate for those cases where a firm has failed to meet its obligation under DISP to issue either a final response or a letter indicating when it expects to issue a final response within the initial 8-week period. Dealing with such cases of "enforced deadlock" is more labour-intensive for the FOS and delays a final decision for the consumer. In some cases, the FOS is put in the position of having to investigate the complaint virtually from the beginning. Taken with regulatory policing by FSA, it should also help to remove any perverse incentives on companies to handle complaints slowly in the first instance in the hope that consumers might allow their complaints to lapse. **I recommend that the FOS should introduce a higher case fee for "enforced deadlock" cases with effect from 2009-10 and report on the numbers of cases.**
- 8.14 The arguments to relate case fees either to the value of the claim, or to the amount of effort required to resolve it, are different in kind. For example, two trade bodies with



members active in the consumer credit sector have raised concerns that the size of the case fee relative to the small amounts often in dispute in their sector means that their members feel that they have to meet what they perceive as unjustified claims by consumers, rather than meet the additional cost of presenting a case to the Ombudsman, or else decide not to contest cases not because the complaints have merit, but because of the potential costs involved. Clearly this would not be a happy situation, but it is perhaps too early in the FOS's consumer credit jurisdiction to conclude that it is necessarily a major problem. It may be that increasing the number of "free cases" would be an appropriate first response.

- 8.15 I can, in principle, see the case for charging a lower rate for cases considered by the FOS's "Assessment" Unit, which handles more straight forward cases where little or no additional information has to be obtained and aims to achieve mediated settlement than to those which fall to the Investigation Unit, which routinely undertakes more intensive investigation. Likewise, if my proposals for fast-tracking low value consumer credit claims are adopted, it may well be appropriate to specify a lower case fee for that category of complaint. **I therefore recommend that the FOS should investigate the option of differential fees for "assessment" and "investigation" cases as distinct from simple fast-tracked consumer credit cases.**

### **Extensions to Jurisdiction**

- 8.16 One interesting part of the context for my work has been debate on the scope of Ombudsmen schemes in general, in particular, the issue of whether the jurisdiction of the FOS should be extended to cover third-party insurance claims was raised by one respondent to the Review and hotly debated at an event hosted by the "Claims Club" at which my support team spoke. There was a consensus that there was a need to offer an ADR scheme for such claims but no agreement on whether the FOS was the right organisation to offer such a service.
- 8.17 Two members of the public who wrote to me were concerned that the FOS currently has no jurisdiction in the case of share registrars. I share their surprise at this gap. SAFE pointed out that bank appointed receivers were not covered. I note also recent discussions in the Insolvency Profession about confused views as to the extent of FOS jurisdiction in this area and the need for ADR services. I understand additionally that the Government is beginning to consider the issue of how far the current variety of Ombudsmen schemes in different sectors of the economy helps or hinders vulnerable consumers to resolve issues in the context of its Review of Consumer Legislation.
- 8.18 This is primarily a matter for Government, and clearly many issues would need to be considered in making decisions on any proposition to extend jurisdiction, not least efficiency considerations in relation to the impact on the FOS's core activities. I offer three observations from the perspective of my Review:
- from the point of view of accessibility, a larger scheme with wider jurisdiction is probably better placed to reach the wider audience than a number of smaller schemes, the differences between which may not be easy to explain;
  - from the perspective of transparency, a larger scheme would be better placed not only to exploit economies of scale, but also to put in place the type of case

handling and communication infrastructure explored in this report;

- finally, although my report identifies many areas for change, there is a core of skilled expert resource at the FOS which would not easily be replicated if policy-makers were to decide to establish small, bespoke schemes for other aspects of the wider financial services industry. Speed and practicality of implementation therefore also point to a wider role for the FOS.

8.19 **I therefore recommend that the FOS Board should assess the impact on accessibility and transparency for all its work when it considers the scope for extending its jurisdiction. For the record, my assessment is that such extension is likely to be beneficial in those cases where there are obvious links with the current core expertise of the FOS.**

## CHAPTER 9 CONCLUSIONS

9.1 My 73 conclusions and recommendations are designed to constitute a strong action programme. Some are suitable for early action, whilst others would underpin strategic shifts over a period of years.

9.2 Two principles are at their heart:

- the FOS must ensure that it becomes **more personalised**, responding to the needs of new groups of users and engaging more creatively with firms and other stakeholders; and at the same time
- it must become **more predictable**, investing more in policy-making and communication in order to set realistic expectations of how it will react.

These must be seen as two complementary sides of the same coin, namely that of effective service for all.

9.3 I have throughout the report sought to differentiate between the decisions of principle that need to be made on the way ahead and the practical challenges that need to be tackled in implementing them. Everyone should keep this distinction in mind as debate progresses. We must not allow the best to become the enemy of the good.

9.4 In short, I regard the questions of "whether" accessibility and transparency are "a good thing" as uncontroversial. They are. There is room for further debate on the precise questions of "how", but these should not be allowed to impede progress overall. The need for action to secure benefits for consumers, industry, regulators and the FOS itself is too pressing to brook delaying tactics from any party.

## **Annex**

### **Organisations which responded to the Review**

Advice Services Alliance  
All-Party Parliamentary Group on Insurance and Financial Services  
Association of British Insurers  
Association of British Investigators  
Association of Finance Brokers  
Association of Friendly Societies  
Association of Independent Financial Advisers  
Association of Mortgage Intermediaries  
Association of Private Client Investment Managers and Stockbrokers  
Aviva PLC  
Axa UK  
Bank of America  
Banking Code Standards Board  
Barclays UK  
Brit Insurance  
Britannia Building Society  
British Bankers' Association  
British Insurance Brokers' Association  
British Vehicle Rental and Leasing Association  
Broker Direct  
BUPA  
Building Societies Association  
Caledonia Consultancy  
Cardiff Pinnacle  
Chartered Institute of Loss Adjusters  
CIFAS Ltd  
Citizens Advice  
Clarendon Financial Services  
Consumer Credit Association  
Council of Mortgage Lenders  
CPH Financial Advisory Services  
Danish Mortgage Credit Complaint Board  
David Severn Consulting  
Ecclesiastical Insurance  
Energy and Water Ombudsman (Victoria)  
Englands  
Equitable Members Action Group  
Eversheds LLP  
Finance and Leasing Association  
Finance Industry Standards Association  
Financial Escape Ltd  
Financial Services Authority  
Financial Services Consumer Panel  
Fortis UK  
Foundation for Information Policy Research  
Freshfields Bruckhaus Deringer LLP  
Friends Provident  
GDC Associates  
GE Money  
Handsworth Breakthrough Credit Union  
HBOS PLC

Highclere Financial Services  
HSBC  
IFA Defence Union  
Institute of Insurance Brokers  
Investment Interest  
Investment and Life Assurance Group  
Investment Management Association  
Law Commission  
Leeds Building Society  
Legal Complaints Service  
Legal and General  
Liban Compensation Services  
Lloyds TSB  
Mail Order Traders Association  
MLP Ltd  
MMA Insurance  
National Consumer Council  
Nationwide Building Society  
Ned Naylor and Co  
Oracle Financial Services  
Payments Council  
Prudential PLC  
Royal Bank of Scotland  
Royal and Sun Alliance  
SAFE (Struggle against Financial Exploitation)  
St Paul Travellers  
Sesame  
Scottish Widows  
Simpsons of Brighton  
Standard Financial Ltd  
Standard Life  
Swiss Re  
Tipton and Cosely Building Society  
Western Provident Association  
*Which?*  
Yorkshire Building Society  
Zurich