

## CIVIL JUSTICE REFORM: AN OMBUDSMAN PERSPECTIVE

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### **Abstract**

Ombudsman schemes have been viewed with interest for their efficiency, speed, cost and use of technology. As Sir Geoffrey Vos seeks to integrate alternative dispute resolution as part of a civil justice funnel, it is important to recognize that ombudsman schemes fulfil different functions than the courts. This paper suggests that dispute resolution is only one of the functions of a civil justice system. Court efficiency should not be the predominant organizing principle. Recognizing the variety of functions and legitimate interests contained within the civil justice system rather than conceiving a hierarchical structure presided over by courts could offer an outcome-based perspective on reform.

**Keywords:** ombudsman; dispute resolution; technology; justice systems; prevention.

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### [A] CIVIL JUSTICE REFORM

As a recent publication by the Social Market Foundation noted: the civil courts of England and Wales have been inefficient and ineffective for a long time, especially for those who tend to have relatively low value 'civil legal problems'. The failure of the courts to serve the majority of the population sufficiently well contributes to a substantial 'civil justice gap' across England and Wales (Hyde 2022: 14).

Such observations, while current, are not new. In 2014, a report commissioned by the Legal Services Board concluded:

while there are evident obstacles to accessing advice and the courts, for the most part the law and traditional legal professions are simply peripheral to much everyday justice. While the public facing practice of traditional legal professionals extends to a largely unchanged (over

the past half-century) and relatively narrow range of legal problems, the public's experience is centred on a far broader range of welfare and consumer related issues that have become fundamental to civil justice (Pleasence & Balmer 2014: 99).

The Interim Report of the Civil Court Structure Review by Lord Briggs in 2015 agreed that 'most ordinary people and small businesses struggle to benefit from the strengths of our civil justice system'. Briggs characterized civil courts as 'places designed by lawyers for use by lawyers' (Briggs 2015: 51). He proposed a digital solution with the establishment of the Online Court, 'a court for the resolution of appropriate civil disputes without recourse to lawyers' (Briggs 2015: 68).

The Interim Report conceded that, 'A very large number of disputes about civil rights are resolved by a range of ombudsman services' but analysis of such services was scant and confined to a section dealing with the boundaries of the court system. Briggs noted that the relationship between courts and alternative dispute resolution (ADR) was 'semi-detached'. He continued:

This is, in many ways, both understandable and as it should be ... the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service .... Save when occasionally ruling upon the legality of the processes of various ombudsmen, by way of judicial review, the civil courts have no formal link with ombudsmen services. But they remain, for the reasons already given, a vital last resort and upholder of the rule of law, without which those services would be deprived of at last [sic] part of their effectiveness (Briggs 2015: 28-29).

Since his appointment as Master of the Rolls in January 2021, Sir Geoffrey Vos has made a series of speeches on civil justice reform. There are many areas where he continues Briggs' line of thought but some substantive departures too.

Vos argues that the civil justice system should be 'devoted towards resolving disputes at the earliest possible stage ... because of the huge economic and psychological disadvantages of continuing disputes' (Vos 17 March 2022). To achieve this aim, Vos imagines 'a cohesive online funnel with a large number of cases starting online and being resolved by integrated ADR mechanisms leaving a few to enter the court system—also online—and ultimate judicial resolution where necessary' (Vos June 2022).

In contrast to Briggs, he redraws the relationship between the courts and ADR, commenting:

Historically, we have always allowed our thinking to concentrate on the very small number of cases at that high end extreme. That is letting the tail wag the dog. It is necessary in thinking about the future to consider the entire picture (Vos June 2021).

Vos intends to:

take the ‘alternative’ out of ADR, to focus on hard data and make sure that every dispute is tackled at every stage with the intention of bringing about its compromise. This can be done very effectively online and I believe that the onset of online dispute resolution in most bulk areas will allow far more cases to be resolved far earlier and far more cheaply (Vos March 2021).

The Legal Services Board report found that consumer disputes accounted for the largest proportion of legal need at 17.5% (Pleasence & Balmer 2014: 19). Vos recognizes that ‘Ombuds processes are ... extremely successful for disputes between consumers and utilities and public and other authorities .... Vast numbers of claims are settled by these processes without the need for legal proceedings’ (Vos March 2021).

He conceives of this as a fundamental change in approach:

Lord Woolf shifted the paradigm of the courts from seeing their role as searching for perfect justice, to one where they had to seek expedient and proportionate justice. I hope to shift the paradigm again towards a focus on resolution rather than dispute (Vos 30 March 2022).

Vos’ thinking on the relationship between the courts and ADR and ombudsman schemes replaces Briggs’ boundaries and partial detachment with a more cohesive and integrated view of the civil justice landscape. However, the hegemony of the court at the apex of Vos’ funnel remains intact and apparent. In addition, the attraction of a more integrated system is couched in terms of efficiency, speed and cost.

These benefits are evident. The Social Market Foundation report noted how “user-friendly” (especially for those with no representation), low-cost, and efficient the best ombudsman services can be’ (Hyde 2022: 62). At the expert roundtable which informed the report, I commented on the progress made by Ombudsman Services in resolving energy and telecoms disputes:

everyone is self-represented, none of it’s done face-to-face, about 90% is done digitally, although ... some are still done by mail ... but predominantly it’s done through ... portal(s) ... unit costs have halved and are about £250 a case.

The speed of resolution ... is dealing with about 95% of cases inside of twelve weeks (Hyde 2022: 62).

Although unit costs and resolution times vary across ombudsman schemes, the overall comparison with the civil courts remains favourable as a review conducted into the rail ombudsman scheme indicated (Lucerna Partners 2022: 34-35). However, the value of the ombudsman approach is not solely in more effective dispute resolution as this paper will argue.

Section [B] examines ombudsman dispute resolution practices and section [C] draws parallels between these developments and some of the ambitions for the online court which have yet to be realized. Sections [D] and [E] contend that the value of ombudsman schemes is wider than dispute resolution because of a broader range of functions which are fulfilled. Section [F] draws some conclusions on the distinct functions of ombudsman schemes and courts and suggests some provocations around the underlying philosophy of civil justice reform.

## [B] OMBUDSMAN SCHEMES AND DISPUTE RESOLUTION

There are 19 ombudsman schemes operating in the United Kingdom according to the latest Annual Report of the Ombudsman Association (Ombudsman Association 2022: 10). In order to use the term ombudsman, an organization must be approved by the Ombudsman Association and meet its criteria of independence; fairness; effectiveness, openness and transparency; and accountability.

In general, there are three routes by which ombudsman schemes have been established. Some have been set up by Parliament as statutory bodies with mandatory jurisdiction in an area (eg the Parliamentary and Health Services Ombudsman and the Legal Ombudsman (LeO)). In other cases, there is a requirement in legislation for a sector to be covered by an ombudsman, but the organization providing the ombudsman service is a private not-for-profit business and not a statutory body (eg Ombudsman Service in Energy). Finally, some voluntary ombudsman schemes have been set up, sometimes with support from a trade association or industry body (eg the Motor Ombudsman and the Furniture and Home Improvement Ombudsman: see [Ombudsman Association website](#)).

The recommendations made by schemes covering public services are usually accepted, although it is not common for them to be legally binding. The decisions made by ombudsman schemes in complaints about private businesses are legally binding if the complainant accepts the ombudsman's decision. If they do not, then the dispute can be pursued in court. Compliance with ombudsman decisions is generally

high, especially in those schemes in regulated industries where a failure to comply can be a cause for regulatory enforcement action.

The term ombudsman covers a range of organizations whose mandates may be voluntary or compulsory, whose powers may be legally binding or not and which may be statutory bodies or private not-for-profit businesses. There are some significant differences between schemes which are often obscured by the use of ombudsman as a category of catch-all term (see All Party Parliamentary Group on Consumer Protection 2019).

This paper focuses predominantly on the ombudsman schemes operating in regulated sectors (financial services, legal services, energy, telecoms and rail). While these schemes account for the majority of consumer disputes resolved by ombudsman organizations, the workload of other consumer schemes remains considerable. They too make innovative use of technology and informal dispute resolution techniques. However, the regulatory context of the schemes explored below has distinctive implications for Vos' integrated funnel.

The Financial Ombudsman Service (FOS), LeO and the energy and telecoms ombudsman schemes (both provided by Ombudsman Services) were set up in the span of a decade around the millennium. They were designed to be informal and accessible to consumers with no legal knowledge or representation. In their most recent annual reports, the four schemes stated that they had received 700,000 enquiries (Ombudsman Services 2021; Financial Ombudsman Service 2022; LeO 2022). Consumers can approach the schemes via email, online portals, white mail and phone and are able to speak directly to advisers who will help to formulate and submit complaints. Where the scheme in question does not have jurisdiction over the complaint, the complainant is given assistance in identifying the competent organization to receive the complaint and in reaching other sources of advice and advocacy support (for example, Citizens Advice or charities who give specialist support around areas such as mental welfare, debt or social services).

There is no charge for consumers to make enquiries or to raise complaints, regardless of the outcome of the dispute. Where a complaint meets the criteria for acceptance by the scheme, the complainant must also show that the business being complained about has had sufficient time to resolve the complaint (typically eight weeks) or has reached deadlock. Ombudsman processes and practice are designed to encourage businesses to resolve disputes in the first instance rather than to abdicate this responsibility to the scheme. A case fee is usually payable by the business when the scheme accepts a case.

In comparison with both the civil court process and other consumer adjudication and arbitration approaches, the ombudsman schemes in regulated sectors invest more resources into encouraging first-tier resolution. Both the FOS and LeO have technical help desks where businesses can ask for advice on the approach which the ombudsman is likely to take on a complaint before it escalates. Ombudsman Services has run some trials with algorithms to help businesses predict which complaints are most likely to escalate so that more effective and tailored resolution efforts can be made at the first tier. These form part of the wider preventative functions which will be discussed at greater length in section [E].

The resolution techniques used by ombudsman schemes are diverse, including conciliation, mediation and adjudication. The investigative approach is inquisitorial and informal rather than adversarial. Although ombudsman schemes take into account consumer law, regulations and industry codes and standards, decisions are reached by applying a fair and reasonable test. This is significant because the trend in regulation has been away from detailed prescription and towards principles and outcomes.

For example, the Financial Conduct Authority's policy statement on the introduction of a new consumer duty states:

Outcomes-based regulation can be applied more easily to technological change and market developments than detailed and prescriptive rules. This means consumers are better protected from new and emerging harms. Firms can also innovate to find new ways of serving their customers with certainty of our regulatory expectations (Financial Conduct Authority 2022: 3).

In 2019 Ofcom (Office of Communications) published a set of fairness commitments to 'complement our rules and voluntary schemes, to encourage signatories to embed fairness more deeply across their businesses—from the boardroom to customer service teams—and to go beyond compliance with regulatory minimums' (Ofcom 2021: 3).

This broader perspective on outcomes and cultural change rather than tightly defined rules and compliance aligns more closely with the flexibility of a fair and reasonable test. This raises the question of how to harmonize the philosophies and tests which regulators, ombudsman schemes and the civil courts might rely on within a single funnel. Since each can claim institutional legitimacy, none ought to claim a monopoly of civil justice.

Perhaps rather than a single funnel, an alternative is a people-centred

civil justice system collaborating to deliver a suite of functions and outcomes. Rather than a neatly designed, hierarchical structure which serves our need for order, a curated and connected system of distributed and decentralized justice might better serve end users—the businesses and people in the civil justice gap. As Dame Hazel Genn observed:

Put simply, people want different things depending on their problem and we need a system that is sensitive to that .... In terms of objectives and resolution preference, what research tells us is that what people want is not to have the problem. They do not crave involvement with legal processes (Genn 2017: 7-8).

## [C] AMBULANCES AND FENCES

Efficient resolution and technological gains are of course of interest in civil justice systems, but there are other opportunities suggested by ombudsman schemes. The Social Market Foundation report reflected:

considerable concern that the current modernisation programme had become too narrowly focussed on technology as the ‘silver bullet’ and ignored the more ambitious possibilities offered by more ambitious plans to close the civil justice gap (Hyde 2022: 38).

It related an expert contributor’s comment that ‘All transformation projects end up as efficiency projects’ and noted that this was an apposite reflection on the programme of civil court reform (Hyde 2022: 51-52).

Yet ambitious possibilities were part of Briggs’ vision of the online court. It had been informed by the work of Richard Susskind and colleagues on the Civil Justice Council Online in 2015. The Council’s report conceived of access to justice under the three headings of dispute resolution, dispute containment and dispute avoidance. Dispute containment would ‘prevent disagreements that have arisen from escalating excessively’. Dispute avoidance would involve finding ways of ‘preventing legal problems from arising in the first place (putting a fence at the top of a cliff rather than an ambulance at the bottom)’.

The report argued that justice services were disproportionately weighted to resolution through the courts (Civil Justice Council 2015: 17). It proposed that:

the courts extend their scope—beyond dispute resolution to include both dispute containment and dispute avoidance. Our assumption is that better containment and avoidance of disputes will greatly reduce the number of disputes that need to be resolved by judges.

This would involve efforts ‘not just to streamline conventional courts

to save costs and increase access' but 'to embrace a more preventative philosophy' (Civil Justice Council 2015: 18).

A pyramid of three tiers was recommended to fulfil these additional functions. At the first tier there would be a free of charge 'information and diagnostic service' which would work 'alongside the many other valuable online legal services that are currently available to help users with their legal problems'. A second tier would employ 'a mix of ADR and advisory techniques ... in a, broadly speaking, inquisitorial rather than adversarial manner'. The third tier would provide 'a new and more efficient way for judges to work ... on an online basis, largely on the basis of papers submitted to them electronically, as part of a structured but still adversarial system of online pleading and argument' (Civil Justice Council 2015: 18-20).

There is much in common between the Civil Justice Council's approach and ombudsman practice, especially in the use of digitization, connection to other sources of advice and the use of a range of informal dispute techniques. The Online Court would not merely be a dispute resolution service. Nevertheless, adversarial processes were reasserted at the final tier. Fundamentally the Online Court remained a system designed to manage flows of case volumes through a pyramid (or funnel) to the court at the top. The primacy of court efficiency as the organizing design principle would be left largely undisturbed. Civil justice would remain recognizably designed for lawyers and by lawyers.

The Social Market Foundation noted that the experience of ombudsman schemes pointed to:

more than achieving marginal improvements in efficiency through the application of technology to speed up processes. The biggest gains came through identifying ways of adding value for users and re-engineering the entire process (Hyde 2022: 38).

As a contributor to the Foundation's report, I suggested that tackling the civil justice gap would involve thinking 'more widely about how you build capability, how you build intelligence, how you build resilience in the system. Technology is part of that but it's as much about mindset' (Hyde 2022: 38).



## [D] CONSUMER REDRESS FUNCTIONS

Attending to the functions required of the civil justice system as a whole, beyond the need for efficient and swift resolution, helps to liberate the mindset behind design. In their work on consumer redress mechanisms, Christopher Hodges and Stefaan Voet commented that ‘the ombudsman model and the regulatory model, especially where they operate in a parallel coordinated fashion, deliver significantly more functions than just dispute resolution’ (Hodges & Voet 2018: 300).

Hodges’ previous research comprehensively explored the limitations of law in affecting corporate behaviour and in stimulating cultural change (see Hodges 2015). Central to the thesis he advanced with Voet was the need for redress to ‘affect the future behaviour of a defendant and of the market generally .... The empirical evidence for deterrence as a means of regulating individual or corporate behaviour is limited’ (Hodges & Voet 2018: 8). Instead, they suggested that 11 objectives are encompassed within the most effective regulatory systems. These included identifying individual and systemic problems and their root causes; identifying actions to prevent reoccurrence or mitigate risk; disseminating information to firms, consumers and other markets; and ongoing monitoring, oversight and amendment of the rules governing market activity. Of the 11 objectives ‘litigation primarily addresses redress alone, whereas the integrated co- and public-regulatory systems and ombudsman systems in some countries are able to address all items’ (Hodges & Voet 2018: 8-9).

We have already noted Dame Hazel Genn’s argument that end users have diverse needs from civil justice. Similarly, the Social Market Foundation observed:

Institutions such as the civil and criminal justice systems are made up of a number of components and are linked into a web of stakeholders that have an effect on the operation of (at least parts of) the system, each with their own interests and constraints (that influence how they act) (Hyde 2022: 48).

For legal problems relating to regulated consumer industries, there is a range of industry, consumer and regulatory stakeholder interests and constraints which should legitimately influence the design and delivery of redress and dispute resolution. It is in response to these functions and this environment that ombudsman practice has developed, as the next section of the paper demonstrates.

## [E] THE FOUR BOX MODEL

At Ombudsman Services, Lewis Shand Smith and I developed the four box model as a framework for the functions and activities which ombudsman schemes can fulfil in support of their role as part of a regulatory landscape. Under the model, capabilities around access, resolution, insight and engagement are combined to meet legal need in the wider sense expressed by Genn and to deliver systemic and preventative impact.

The first box, which has been discussed earlier in this paper, centres on *access*. Ombudsman schemes are designed to be inclusive and offer additional support to more vulnerable consumers in formulating their complaints. They are free to use, there is no requirement for legal knowledge or representation and there are developed processes and partnerships facilitating signposting to wider or alternative support.

On a complaint being accepted by the scheme, *resolution* techniques seek early resolution and, where required, investigations are informal and inquisitorial and use a 'fair and reasonable test'. At the root of many of the upheld complaints are issues around execution and operational delivery rather than intentional or wilful wrongdoing (an instructive comparison is with the traditional locus of public services ombudsman schemes in maladministration).

Consequently, it is important for the ombudsman scheme to collate qualitative and quantitative data on the complaints received to identify where there are systemic issues around policy, process and culture which lie at the root of consumer detriment. Alongside the role of dispute resolution, an ombudsman scheme can be a source of preventative *insight*.

Lastly, an ombudsman scheme should have effective channels of *engagement* so that the insights drawn from the data can be deployed across the ecosystem for preventative impact. For regulators and government, insights expand regulatory intelligence and facilitate the identification of risk (cf Hodges & Voet's regulatory framework in section [D] above). For consumer bodies, ombudsman schemes can be a valuable channel in providing advice and in building an evidence base to inform advocacy. For businesses, the insights can be used to strengthen capability, by promoting operational alignment and by suggesting where corporate cultures may be weak or misaligned.

The remit of an ombudsman scheme is therefore wider than the resolution of disaggregated individual complaints. Feedback can form part

of a reflective-leaning system generating suggestions for improvement and identifying the risks of systemic consumer detriment at an earlier stage.

The opportunities around insight and engagement, in particular, equip ombudsman schemes to make a more far-reaching, systemic and preventative impact than the Civil Justice Council's vision of dispute avoidance and dispute containment. Sector ombudsman schemes are much better equipped than the courts to capture and deploy meaningful and actionable data and insights, not least since the investigators and adjudicators have deeper expertise and experience around the sectoral context and the executional issues involved, as well as the relevant consumer law and codes.

In 2015, Ofgem (Office of Gas and Electricity Markets) commissioned a review of the Energy Ombudsman scheme by Lucerna Partners which endorsed the value of such systemic and preventative work. The report suggested that ombudsman schemes address consumer detriment not only by resolving large volumes of individual cases, but by fulfilling two further roles. Schemes provide companies and regulators with insights around systemic issues at both the company and the industry level. The use of insights can effectively address legal need and expand and tackle the civil justice gap. This is because insights inform steps to build capability and secure compliance which benefit 'everyone, those who do complain, those who complain initially but do not pursue their claim further with the ombudsman, and the millions of people who do not' (Lucerna Partners 2015: 18-20).

The Wider Implications Framework which the FOS and others established in 2021 illustrates this point. Members of the financial services' 'regulatory family work with each other and other parties as appropriate on issues that could have a wider impact across the financial services industry' ([Financial Ombudsman website](#)). Ombudsman schemes are large second-tier dispute resolution mechanisms which meet legal need at a transactional level. They also integrate data, intelligence and engagement to inform regulatory practice and to shape execution and business culture in sectors. This position in the redress landscape is not one inhabited or coveted by courts, but it is important that it is valued, reflected on and preserved in the course of civil justice reform.

## [F] CONCLUSIONS

Consumer Dispute Resolution is distinct from civil litigation, and each should be valued for itself and not as substitutes for each other. Courts measure up well on quality criteria but poorly on other consumer principles of access, information, and value for money. In an expanding innovative universe, debate is to be expected, but a binary juxtaposition of courts and ADR is fallacious and polarizing (Hodges & Ors 2016: 5).

This paper does not argue that ombudsman schemes (or indeed Ombudsman Services) are more valuable than courts or are immune to challenges of costs, delays and operational pressures. Nor are ombudsman practice and powers monolithic (see Which? 2021). There are significant volumes of disputes covered by ombudsman schemes operating in regulated sectors, but mandatory coverage by such schemes is far from universal across the consumer landscape. Although consumer disputes represent the largest single category of legal problems, there are many other types of civil claims with their own context and dynamics.

Sir Geoffrey Vos has moved from Lord Briggs' semi-detached view of ADR. He is clear on the value of ADR and consequently seeks to integrate it into his vision of civil justice. Such integration will need to be approached carefully to avoid unintended consequences.

For consumers, the risk of adding further steps or complexity to their journey to the ombudsman must be considered. As Genn noted above, many do not wish to engage with legal processes; they simply want their problem resolved. For businesses, the adversarial and formal shadow of the court could invoke patterns of deterrence and defensiveness. This is less likely to deliver the desired outcomes around future behaviour from individuals and businesses. It could compromise regulatory intelligence and attenuate the influence which ombudsman schemes can have in affecting culture and capability. The ethos and design of ombudsman schemes are integral to the delivery of a broader system and market functions.

Courts and ombudsman schemes can learn from each other's use of techniques and technologies, but their functions are distinct. Having claimed one paradigm shift, Vos may contemplate another. His reflections 'with a large dollop of hindsight' on previous reforms are instructive:

At the time, I, like many of my colleagues, wondered whether 'Woolf would work', and whether we were potentially throwing the baby out with the bath water. As it turned out we were not. To take the analogy too far: there was plenty of bath water that we could have thrown out, but that was in fact left behind (Vos October 2019).

Vos' efforts to discern the contours of the landscape of blockchain, smart contracts and bitcoin ahead show no lack of foresight (Vos May 2021). And, in making the case for reform, Vos recognizes that outcomes and the needs of those people and businesses left in the civil justice gap should be pre-eminent:

many have asked the simple question: why? .... Surely, there is nothing wrong with the way we do things even if we do want to move on from sending things by post .... The underlying answer to all these questions is business and consumer confidence (Vos May 2022).

In an age where so much will be distributed and decentralized, pyramids and funnels may run the risk of being impossibly geometric. Designing civil justice from the edge, around the needs of users and outcomes rather than from a centre that will not hold, could bring fresh impetus and legitimacy to reform. It suggests an enterprise which is more collaborative and, at times, messier than an exercise in effective central planning. Reshaping civil justice will be as much about reassessing teleology as about harnessing technology.

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