



Northern Ireland
Assembly

Committee for Enterprise, Trade and
Investment

OFFICIAL REPORT (Hansard)

Dispute Resolution:
Consumer Council for Northern Ireland

19 June 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Patsy McGlone (Chairperson)
Mr Phil Flanagan (Deputy Chairperson)
Mr Sammy Douglas
Mr Gordon Dunne
Mr Fearghal McKinney
Mr Mitchel McLaughlin
Mrs Sandra Overend

Witnesses:

Mr Don Leeson	Consumer Council
Mr Aodhan O'Donnell	Consumer Council

The Chairperson: With us today to brief the Committee are Mr Don Leeson, the director of operations at the Consumer Council, and Mr Aodhan O'Donnell, its interim chief executive. You are both very welcome. Thanks for coming along to be with us today. You know the way it works. You have up to 10 minutes to make the opening statement, and then we will have a question-and-answer session with members.

Mr Aodhan O'Donnell (Consumer Council): Thanks very much, and thanks to the Committee for taking an interest in the alternative dispute resolution (ADR) proposals. We made a submission to the Department for Business, Innovation and Skills (BIS) consultation and shared it with you last week, so it is really good to get a chance to speak to you in more detail about the concerns that we have.

Before I mention ADR, I want to place on record my appreciation and that of the staff and the board to the Committee for the interest it has shown in the ministerial review over the last period of time.

The Chairperson: Thanks for that, Aodhan.

Mr Dunne: The future is bright, then.

Mr O'Donnell: It is a lot more secure. The uncertainty has been lifted for a lot of staff, which is very welcome and is a positive step for us. Thanks for the interest in that.

As for ADR, we have more questions than answers in relation to the proposals from the consultation, which may not be what you want to hear. Certainly, the recent consultation by BIS did not address all the relevant issues, which raises concerns with us, as a consumer council, about how that is going to impact upon consumers and businesses. We have equal concern for both in that respect.

The alternative dispute resolution directive requires EU member states to put in place, by July 2015, a comprehensive framework of alternative dispute resolution services. That is for dealing with consumer complaints across all markets. That could be mediation or arbitration: it makes provision for both of them. The whole ethos of ADR, which is to resolve issues without having to resort to legal proceedings, is worthy and is to the benefit of the business and the consumer in saving the time, hassle, stress and cost of going down the legal route.

The Consumer Council handles complaints through mediation. We cannot impose a settlement on the business or the consumer, so we try to mediate and reach a mutually agreeable solution for both. That would probably change under the ADR directive.

As I mentioned, BIS completed its consultation last week. It definitely did not provide enough detail or certainty on the issues that we felt needed to be addressed. Indeed, our view is that the proposals are regressive given the current consumer protection framework that is in place. From talking to other stakeholders and consumer groups, we know that many of them felt that there was not enough detail and was too much uncertainty for them to provide a meaningful response. That is a worry for us.

BIS intends to engage further regarding Northern Ireland-specific issues with DFP and DETI. We wish to be involved in those discussions, and I am sure that the Committee will wish to be involved and take an interest in that as well. Whilst responsibility for consumer affairs is devolved, it is the intention of BIS, from its consultation, to implement the directive through regulations made under the European Communities Act 1972. We will touch on some of the high-level and significant implications for consumer protection and the concerns that we have with the proposals and their shortcomings. We recommend that the directive is considered and implemented locally in Northern Ireland through legislation passed by the Assembly.

We will touch on some of the high-level concerns, but I want to set out that we are not at odds with the principles of ADR. We think that it is a positive development and a positive scheme, but the issue is about how the proposals are being brought forward and implemented. If it is done properly and implemented effectively, it can provide benefits to both consumers and businesses, and it can be a quick and inexpensive way of dealing with complaints and resolving them in a way that is satisfactory for both parties. That depends on some of the issues, which Don will highlight, being effectively addressed.

Mr Don Leeson (Consumer Council): Good morning. The key point is that this is a comprehensive directive that is coming in, making ADR provision across the piece, so it touches on all complaints-handling bodies as well as us. It is not just consumer council complaints. It is touching on every other ombudsman-type organisation that deals with consumer complaints. The aim is that it builds on existing ADR provision. I think that the crucial point is that it should be building and not be regressive in nature. My concern is that the proposals put forward by BIS at the moment will go back and repeal some of the strengths of our current system.

I will give you some examples of where we think that it is a potential threat. Both the Energy Order 2003 and the Water and Sewerage Services Order require energy and water service providers to engage with the Consumer Council to resolve consumer complaints. The BIS proposals will make ADR participation voluntary for businesses. We believe that it should be mandatory, as it is in those sectors. Otherwise, we know from our research that fewer than 5% of organisations are very likely to actually undertake an ADR process. It is something that is generally shunned by businesses at the moment, unless there is some compulsion in there.

A key issue for us is that business-to-business complaints are excluded. That includes businesses that are acting as a consumer. Our own legislation makes no distinction between that, but that would be repealed under the proposals as they currently stand. Some of our notable successes recently, such as when we got £285,000 returned to Altnagelvin Area Hospital, would not fall under ADR in the future. We are particularly concerned about the impact on small to medium-sized enterprises, because they do not generally have access to or can afford legal support to deal with cases. That is an issue that, we think, ought to be addressed as well. There are other issues like vulnerable consumers. Additional support for vulnerable consumers is excluded and not mentioned in the directive. Our own legislation makes provision for additional support for those.

I think that BIS anticipates this being a commercial venture and being delivered by private sector providers in large part, and therefore it is looking at minimum thresholds for entry into the ADR process. We do not set such a threshold as a complaints-handling body, and often we find that consumers come to us just looking for an apology or to change a policy or practice in an organisation.

They are not necessarily looking for compensation. It is also problematic for postal services, where complaints generally deal with very low value issues. They would potentially be excluded as well. So, we are concerned that those issues have not really been addressed.

There are other unanswered questions. There is no detail about what type of ADR process will be undertaken and concerns about how independence and impartiality of ADR providers will be protected, particularly where it is a commercial venture. There is no mention of appeals or of how binding agreements will be enforced. There are a lot of unanswered questions around that.

Lastly, there are various infrastructure changes envisaged by BIS, bringing into play new bodies such as a competent authority to oversee each ADR provider. BIS proposals at the moment envisage a competent authority for each sector, so in an organisation such as the Consumer Council, we could find ourselves reporting to several different competent authorities, all with their own different quality standards and so on. There are problems around that. Our view is that that could be implemented much more simply in Northern Ireland with a single competent authority looking across the piece at all of the standards. There are also recommendations for a single complaints help desk and an online dispute resolution (ODR) contact point. There are already mechanisms in place to handle those rather than inventing new bodies.

That is just a flavour of some of the concerns that we have set out in our consultation document. I will hand back to Aodhan.

Mr O'Donnell: The paper that we have provided sets those out. We are in a tight timescale, because this has to be implemented in July 2015. We know that that provides a lot of pressure in getting the solutions in place, but our position is that the proposals that BIS has put forward do not cater effectively or sufficiently for the situation that consumers and businesses find themselves in here. We think that it requires a local focus to find a solution that really works for people here. There is time to start addressing that, but the clock is ticking. That is what we are flagging up to the Committee. July will be quick coming around.

The Chairperson: Just a couple of quick points. You mentioned business versus business, where, in effect, the business is the consumer. There is no reason why a business should not be a consumer, if it is buying a product or service.

Mr Leeson: We believe that that should be the case, but that is not the view of BIS at the moment.

The Chairperson: Really.

Mr O'Donnell: For example, for a business using water and energy, we would not be able to take that complaint or enquiry through if the proposals go forward. Look at where we sit on water. It is mainly non-domestic complaints and enquiries. There are obviously customer service issues, but, when it comes down to meter bills and readings, it is the business that we support.

The Chairperson: So, that would rule out a farmer who has domestic supply but is metered to serve the rest of the farm coming to you, because that farmer would be interpreted as being a business.

Mr O'Donnell: Yes.

Mr Leeson: Or it would require a separate process for ADR and that would not make sense —

The Chairperson: I picked up on some stuff about an appeals mechanism. There, you are obviously talking about a situation where mediation fails. Talk me through how you envisage that that should operate, please.

Mr Leeson: It is particularly about arbitration. So, it is where mediation had not succeeded in trying to get a joint agreement and somebody has then had to take a decision as to who is right and who is wrong, whether it is the business or the consumer. Normally, in most arbitration systems — for example, in the employment field — there is an appeal mechanism. There is a safety valve. ADR is meant to be final and binding and that should be the end of the process. However, a safety valve is always needed for where something highly irregular has happened and people are very concerned about the process it has gone through. There needs to be that sort of safety valve —

The Chairperson: Maybe I have a different concept of alternative dispute resolution. I was of the mind that people come into a room and agree, without having to take recourse back to the courts or wherever.

Mr Leeson: That is how it should be in 99% of cases, but there always needs to be provision for those cases where there is some suspicion about the way that the arbitrator, the person taking the decision, has reached a highly irregular decision.

The Chairperson: So, it is a binding decision.

Mr Leeson: Yes.

Mr McKinney: I will not get into the arguments for, other than to say that, on the face of it, there does appear to be some room for saying that things should be different here. Given that it is a consultation, what is the potential for you to influence it to be sufficient to meet our needs at that level?

Mr O'Donnell: That is what we are trying to do. For the last year, we have been working through the proposals and have engaged with BIS. Since the consultation has been completed, we know that BIS has recognised that there are some issues within devolved nations that may need specific approaches and has committed to engaging with that through the Department and DFP. As long as we are involved in those discussions, we can bring some influence. There is a long way to go in making the proposals, as they sit in the BIS consultation, satisfactory for business and consumers. It has to work for both and provide adequate protection for both. The worry is that, with such a short timescale, the proposal to take it through existing legislation, the 1972 Act, might not give enough opportunity to scrutinise the proposals. That is the concern.

Mr McKinney: I am picking up on one comment you made in your last sentence. Are you being sufficiently listened to? Are you in the process, other than as a consultee?

Mr O'Donnell: We have been involved in the process. I do not think that there has been enough local engagement on the issue. At the moment, it is being taken from a national perspective by BIS. It is only starting to get into a series of motions that look at the impact of this on devolved Assemblies and local markets. If we can get involved in those discussions, we can be very clear and put forward where we have concerns. Whether those are being fully considered, we cannot answer until we have those discussions.

Mr McKinney: But you are proposing a bespoke legislative model. Is that different from the process that you are engaged with now in the consultation and the BIS process?

Mr Leeson: Yes. At the moment, there are two aspects. We are concerned about the lack of visibility of the directive coming in. Very few bodies in Northern Ireland seem to be aware of it coming in. Certainly, having spoken to industry, I know that it is not aware of it coming in. By having it on the agenda, hopefully this discussion will help that. As for what type of legislation it should be, if it comes through from regulations from BIS, it will be a one-size-fits-all approach. Obviously, our regulated markets are different from those in Great Britain. The make-up of our economy, with its preponderance of small and medium-sized enterprises, is different. I think that some of the protections that we have could be at risk of being rolled away if we take that one-size-fits-all approach.

Mr McKinney: What work would be involved in bespoke legislation, both in timescale and extent?

Mr Leeson: Personally, I do not think the extent is a particular burden. I think the timescale is a problem. There is a year to go, and I would have thought that the chances of getting primary legislation through would be pretty tough. We are probably looking at some kind of pragmatic solution with a view to further change down the line.

Mr McKinney: Could that happen beyond the deadline for this? For example, if you were not to win your arguments, could those arguments be won at a later stage by amendment or legislation as you propose?

Mr Leeson: I think that that would be the pragmatic solution. If we can protect the protections that we have at the moment and do not lose them in the current approach, that would be a great start, and then we can look at refining that to meet our own needs later on.

Mr McKinney: In the meantime, you are pulling the cord, if you like, or signalling the alarm to say that there are issues here that need to be resolved either at a BIS level or at a local legislative level.

Mr O'Donnell: We have had discussions with a range of stakeholders. Some did not reply to this, because they did not feel that the consultation gave enough detail. I spoke to some business sector organisations yesterday, and they were not aware of this either. There is going to be a cost, potentially, for businesses to operate this, but also the business-to-business consumer issue should be flagged up. You are right; we need some visibility around this, and we need to shed some light on the proposals and what the impact will be for Northern Ireland.

Mr McKinney: Are you satisfied that the Enterprise Department is fully engaged with your concerns?

Mr O'Donnell: We have copied across our consultation responses, and we have engaged. We are going to meet them specifically on the issue on Friday.

Mr Flanagan: Thanks for the presentation at short notice. What is the logic behind the change, without asking you to speak for BIS?

Mr O'Donnell: The logic is probably worthy enough. It is trying to provide a mechanism that allows people and businesses to have recourse to handle their complaints without having to go to legal proceedings. That is its whole premise. I do not think that we would argue with that. If you can find an approach that allows businesses and consumers to resolve complaints in a satisfactory way without going down the legal route, that is better. However, if you take that as the high-level premise and what the directive was intended to achieve, the consultation has shifted and it is not really achieving that, because it leaves too much uncertainty of how that could be delivered. That is probably fair, is it not?

Mr Leeson: Yes. Absolutely.

Mr Flanagan: Does it remove the right for people to go to a court to seek redress if the ADR does not work out?

Mr Leeson: You have a choice. You can go down the formal legal route or you can go to alternative disputes.

Mr Flanagan: Can you go down both?

Mr Leeson: No.

Mr Flanagan: Following the consultation response, what are the chances that BIS might look at that again, or is that the whole purpose of the changes that it is making?

Mr Leeson: It is an EU directive, so it has to be brought in. Therefore, it is a question of how much it brings it in. At the moment, the proposal is a de minimis approach; it is the minimum possible approach that it can bring in. I think that the problem is —

Mr Flanagan: Sorry, Don, to interrupt you. Is the European directive about enhancing consumer rights or is it about reducing access to the courts?

Mr Leeson: Essentially, first and foremost, it is about a more effective way of consumers exerting their rights, getting complaints heard and getting them resolved quickly.

Mr Flanagan: What does the directive state about this? Does it specifically state that if you go down the route of alternative dispute resolution, you cannot then go to court?

Mr Leeson: I think that it does, yes. That is normally the approach of ADR. It is an alternative, but it is a sort of fork in the road. You have to decide which route you wish to pursue; you cannot back both horses, if you like.

Mr Flanagan: If somebody engages in ADR with somebody they have a problem with, what is there to stop the person who is in the wrong from saying, "No, I am not engaging with you; I am not participating. I am in the right and you are in the wrong, and you are getting nothing"? That person does not get redress.

Mr Leeson: If they go down the route of ADR and commit to using it, BIS is silent on the issue of how they then enforce the agreement or the decision that is made under ADR. There is no mention of that in the consultation document, so that is one of the concerns that we have flagged up.

Mr Flanagan: Will the ADR process be presided over by an independent panel or body that will make a determination, or is it up to the two parties to come to an agreed settlement?

Mr Leeson: There are two aspects to ADR. One is mediation, which is the facilitated discussion, where they hopefully come to a negotiated agreement. If that fails, it can go to arbitration, where an independent person will take a decision on who is right and who is wrong and make an award on the outcome of that.

Mr O'Donnell: There are a lot of issues around how the scheme will work. There are issues around who will be an ADR provider. There are areas of the market where there is none of that and where they talk about a residual ADR provider. Then, there are issues around competent authority and who can sign off. Those issues are touched upon in the consultation but, as we said at the start, we are flagging up that we have more questions than answers. Those are the kinds of questions that we are asking. There is not enough detail for us to be confident that the proposals being put forward are satisfactory. The big concern is that, if we go with this, with scant detail and limited discussion or engagement, we could get solutions that are not really right for us.

Mr Flanagan: Legislation, such as the Energy Order 2003, gives consumers particular rights. Is it specifically stated in the consultation that that will now be undermined or become irrelevant?

Mr Leeson: No. That is an unforeseen consequence that BIS had not realised. When we spoke to representatives from BIS, we learned that that had not been flagged up before. We do not know how much contact DETI, for example, has had with BIS over this.

Mr Flanagan: Is BIS proposing to legislate for us on this or is it a case of, "Consumer rights is a devolved matter, so you can do whatever you want"?

Mr Leeson: At the moment, the proposals are that BIS will legislate, and that vehicle simply requires Executive agreement to allow the regulations to be made.

Mr Flanagan: Do you have a vision of what alternative system we would bring in as opposed to what BIS is proposing?

Mr Leeson: Yes. As we set out in the document, essentially we would keep what we have at the moment but extend it to other industry sectors. That would allow, for example, businesses as consumers to take part in the process and make it mandatory for businesses to take part in the process if the consumer wishes to use this route to resolve a complaint.

Mr Flanagan: As part of that process, could we also include giving your organisation the power to carry out investigations?

Mr Leeson: We have that already with water and —

Mr Flanagan: But only into regulated industries. What about other sectors and organisations?

Mr Leeson: That is not on our agenda at all. We just want to keep what we have at the moment in those particular industry sectors and not to lose that.

Mr Flanagan: Have any other representative bodies from the North responded, such as the likes of Citizens Advice or any housing rights outfits?

Mr O'Donnell: Not that I am aware of. I know that some organisations have not responded. We have raised it with a number of stakeholders. In most cases, they were unaware that this was coming through. We are concerned that the proposal has been a silent development. One thing we want from this Committee session is for it to be raised on the agenda. At least we know that, if we are working on it for the next year, we can start to address some of the issues. However, we were quite concerned that consumer organisations, business organisations and some regulators had not been aware that this was coming through.

Mr Flanagan: The Utility Regulator was a consultee. However, this evidence session has demonstrated the need for the Consumer Council to be retained as a statutory consultee on all government legislation. It is very important that that is retained, along with the Consumer Council.

The Chairperson: I want to get one thing clear in my head, even though I am clear about the nebulous nature of the proposals. Somebody goes to mediation; usually these things are about money — about a bill, the extent of the bill or a disagreement around that. The arbiter decides to adjudicate in favour of x or y or makes a determination. Say somebody says, "Get away with you, I don't agree with that". In the 1% or 2% of cases where that happens, who then should be responsible for the enforceability of that?

Mr Leeson: That is one of the questions that we have asked. It is not mentioned in the consultation document, but it needs to underpin this. We know that in the employment law field, for example, where arbitration and mediation is used extensively, and there is some carry-over from there, the Enforcement of Judgments Office will enforce those agreements. You would imagine having some sort of similar mechanism to that.

The Chairperson: OK. I am looking at the process to see how best we can inform ourselves on this, because, quite clearly, a number of concerning issues are coming up already, not least the fact that there is no clarity around what the process should be. Should the Assembly or the Department wish to make changes to this and the Executive say, "Sorry, we are not adopting this", is it over to the Department to start to make changes to it itself? Yes. That is OK, because that will inform us as to where we take it from here.

I have a final point. How was the consultation exercise done or how extensively was it consulted on? If you do not know, it does not matter. We can find that out.

Mr Leeson: We made it our business to keep informed and keep tabs on the directive, because we knew that it was coming in, so we kept in touch with BIS. Our sense is that very few other bodies have done the same. It has come as a surprise, and quite important bodies that we have spoken to have had no sight of it at all and were not even aware of the directive, let alone the implications for them.

The Chairperson: If members agree, Don, perhaps we should establish from the Department the level of consultation that it is aware of.

Mr Mitchel McLaughlin: Some of my questions have already been touched on, so I will be fairly brief. The alternative dispute resolution is applied here in the construction industry, is it not, to resolve disputes between contractors, subcontractors etc? What is that experience?

Mr O'Donnell: We have very limited experience of how that works in the construction industry. We have a bit more experience with the Financial Ombudsman Service and those services. It would be the most well known provider of those services. It works quite well.

Mr Mitchel McLaughlin: The construction one is relatively new. That is why I was interested.

Mr O'Donnell: We have not had much engagement with them in our area of work to know how that has been implemented.

Mr Mitchel McLaughlin: The positive — I suppose that it is a positive — is that you unclog the legal system and you avoid unnecessary delays, particularly for public works contracts etc, so there would

be plenty of motivational reasons for people to think that it might be a good idea. Being able to refer to experience is very important here, where it may not be in every circumstance the positive that is being presented. Is it the case that whoever is paying the piper has an advantage?

Mr O'Donnell: There is obviously an issue around that in how the schemes are funded, especially if they are commercial enterprises. The ADR is a European directive, and there are different levels of use, knowledge and experience of ADR schemes across different European countries. Some of them are more common than others. We totally support the principle that a positive ADR scheme could unclog the courts. That would be the right thing. It is also a quicker, more timely and more effective way to get consumer and business satisfaction, so there is nothing wrong with that at all. It is about making sure that that vision is translated into the right scheme, and the right mechanism for doing it is the bit that we have concerns with. The one-size-fits-all approach that is being adopted by BIS does not take account of local markets or our devolved consumer policy and the implications that it would have.

Mr Mitchel McLaughlin: You can see the steps. The alternative dispute resolution is, to an extent, a voluntary process where people agree to come and discuss the problem and see if they can work something out. It then moves on to an arbitration process. As I understand it — it was the reason for my question about the construction industry — unless both parties accept, there and then, the arbitration outcome, there is no prejudice to their right to access the legal process. Are you saying that that is going to be changed under this legislation?

Mr Leeson: We are saying that we do not know. It is silent on that at the moment, but that is an approach. It depends. Different industries and different businesses use different approaches. In the employment law field, arbitration is binding, but there is no mention of —

Mr Mitchel McLaughlin: Just to clarify, could you repeat that for me? Under this draft order, the arbitration outcome would be binding, irrespective of whether you signed up for it or not. A decision is made.

Mr Leeson: That is why you sign up for it. If you sign up for it, you sign up to —

The Chairperson: You sign up to the outcome.

Mr Mitchel McLaughlin: Yes, but the arbitration process that the construction industry is experimenting with involves the two parties getting together. If it is impossible for them to resolve the dispute, which, as you can imagine, it might well be, a third party is introduced as a facilitator and mediator. The third party is not necessarily someone who hands down a decision and says, "You won, and you lost"; you facilitate a resolution that has eluded the two parties. Presumably, that is the type of model of arbitration that you are thinking about. Maybe that is a role that you play at times.

Mr Leeson: That is what we practice at the moment in the fields of energy, water and transport. That sort of mediated outcome is what we work on at the moment. If arbitration came in, it would give us an additional responsibility of taking a decision if the mediation did not succeed in getting a result.

Mr Mitchel McLaughlin: I suppose that there is a difference between a decision and a recommendation.

Mr Leeson: Yes, very much so.

The Chairperson: Do any other members have anything further to add?

Thanks very much for drawing that to our attention. It is very important stuff in processing how we do that.

I think that it would be appropriate to have the departmental officials along to discuss this.

Mr Mitchel McLaughlin: Good idea.

The Chairperson: Obviously, this session has been recorded by Hansard. So, in advance of the officials attending, I propose that they be provided with the Hansard report so that they know about some of the issues that have come up. Are we agreed on that course of action?

Members indicated assent.

Mr Flanagan: Patsy, do we need to ask the Minister not to bring any papers to the Executive on this matter until the Committee has had an appropriate chance to scrutinise it?

The Chairperson: I hope that the results of the consultation exercise will come back to us.

Mr Flanagan: But it is not the Department doing it; it is BIS. We were not told that the initial consultation was happening.

The Chairperson: True. Fair point. Are members agreed that we flag up the urgency of the situation to the Department and to the Minister?

Members indicated assent.

The Chairperson: Right. That is grand. Thanks very much, Aodhan and Don.