



Department  
for Business  
Innovation & Skills

**ENTERPRISE BILL**

**A SMALL BUSINESS  
COMMISSIONER**

26 JULY 2015

# Contents

<b>Contents</b> .....	<b>2</b>
Foreword from Anna Soubry, Minister of State for Small Business, Industry and Enterprise .....	3
2. Executive summary .....	4
3. How to respond .....	7
4. Confidentiality & data protection .....	8
5. Help with queries.....	8
6. The problems faced by small businesses .....	9
7. A small business commissioner .....	16
8: Costs and benefits .....	23
9. What happens next? .....	25
Annex A: Consultation principles.....	26
Annex B: List of Individuals/Organisations consulted .....	26

# Foreword from Anna Soubry



Small businesses are vital to our economic growth. They are responsible for 48% of UK private sector employment. And they are responsible for around a third of private sector turnover. So it is in *all* of our interests that we have a business environment where they can carry out their day to day business and thrive.

But sometimes small business owners can struggle in their commercial dealings with larger firms. These businesses can feel they are treated unfairly where they have weaker bargaining power. Issues small businesses are concerned about often include payment practices but can involve other aspects of their contractual supply chain relationship with another business. Disputes between two firms can be a drain on both parties but the biggest impact is likely to be on the small firm.

Good businesses know the value of maintaining healthy supply chains. I want to set up a Small Business Commissioner to help bring about a change in how businesses deal with each other – a long-lasting culture change - to ensure fair treatment for all. I want the Commissioner to help small businesses settle disputes quickly and cheaply so they can spend the maximum time possible running their business, while still preserving their commercial relationships. And I would like you to help me build this service.

I have been fascinated to learn more about similar services operating in other countries. In Australia, the Victorian Small Business Commissioner is having a real impact on the ground. This document is the first step to setting up a service that will be an effective and fair solution here. Our Small Business Commissioner would provide direct support to small businesses, to help them orientate the many excellent services already available. It would encourage a culture where more disputes are avoided. And where they occur, it would empower small businesses to take action knowing they can deal with disputes in a way that is quicker and cheaper than going to court.

I want you to tell us what you've experienced. Tell us what you think of our possible solutions. And I don't just want to hear from small business. I want to hear from businesses of all sizes. Most large firms trade fairly and value and recognise the importance of a having healthy supply chains. I believe that the best result will come about by everyone working together on this. Fixing problems quickly and fairly is good business for everyone. So help us build a Small Business Commissioner service that works for you.

## **ANNA SOUBRY MP**

Minister of State for Small Business, Industry and Enterprise

## 2. Executive summary

- 2.1 Small businesses are not always sure where to turn to help them sort out disputes with other businesses. There are existing dispute resolution bodies which provide valuable services. But for general contractual issues, including where smaller businesses feel that other businesses treat them unfairly, the Government is concerned that not enough small businesses are able to settle their problems with larger corporations sufficiently quickly and inexpensively while maintaining their business relationships.
- 2.2 We know that some small firms suffer because of an imbalance in bargaining power when dealing with larger businesses. They may feel unable to challenge contract terms proposed by larger businesses for fear of damaging their commercial relationship. They may not have the time, money nor expertise to make a legal challenge where they believe practices are against the law. These issues can put them under additional pressure, limiting their opportunity for growth, and in some circumstances, putting their business at risk.
- 2.3 The Government is determined to see small businesses thrive and grow, to help support our economy, both locally and nationally. We are proposing to establish a service to complement existing provision and lead a culture change in how businesses resolve – and ultimately avoid - commercial disputes. We have used a number of international models to inform our thinking about how to create an effective solution for businesses here, including the Victorian Small Business Commissioner (VSBC) in Australia.
- 2.4 The new Small Business Commissioner<sup>1</sup> ('the Commissioner') would handle disputes – including about late payment – between small businesses and larger businesses with which they have a contractual relationship. These disputes may relate to pre-contractual negotiations as well as terms of the contract and new arrangements proposed once a contract is in place; for instance, if a firm feels it is being harmed by the other party's unfair behaviour.

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<sup>1</sup> This fulfils the Government's manifesto commitment to establish a Small Business Conciliation Service. We have decided to give this new service the working title of "Small Business Commissioner" to reflect its proposed remit.

## How would it work?

- 2.5 We propose that the Commissioner's services will enable smaller firms to resolve disputes with other businesses and, in some circumstances, public bodies quickly and easily, preserving important commercial relationships and without the need to go to Court.
- 2.6 Its key functions will be:
- **Providing information, general advice and signposting**
  - **Offering mediation to resolve disputes**
  - **Dealing with complaints**

### ***Providing information, general advice and signposting***

This will usually be the first point of contact for small businesses. They will be offered information and general advice on how to avoid contractual situations that leave them powerless to protect their interests. Then, if things do go wrong, they can find out about ways to resolve disputes themselves, where possible. If needed, the small business will be signposted to a relevant external dispute resolution service (e.g. an Ombudsman) or may be offered mediation or the Commissioner's own complaint handling service.

### ***Resolving disputes through mediation***

If the two sides can't agree on a contractual issue, the Commissioner will offer a voluntary mediation process. This should help small businesses sort out issues quickly and affordably without having to take legal action.

### ***Dealing with complaints***

The Commissioner will be able to look into complaints and declare its findings. This will prove particularly useful where one of the parties is unwilling to take part in voluntary mediation or if a small firm alleges that unfair business practices are causing it harm but the issues in dispute are not legal issues. An independent view may well help to resolve the problem.

## Your views matter

- 2.7 The Government wants the UK to be the best place to start and grow a business. Small businesses are the lifeblood of our economy, both nationally and locally; but we want to hear what businesses of all sizes feel about the issues and solutions set out here.
- 2.8 We recognise that the matters discussed in this paper could potentially impact on both reserved and devolved areas of policy responsibility across the UK's family of nations. The Government will engage with the Devolved

Administrations, and welcomes evidence and contributions from the Devolved Administrations, businesses and business associations, and other interested stakeholders in Scotland, Wales and Northern Ireland.

- 2.9 Once it's up and running, we want the Commissioner to act as a strong disincentive to poor practices. This Discussion Paper sets out the Government's current understanding of the problems that small businesses face and our thinking about possible solutions. Have we got it right? Could we improve our proposals? We're asking for views and further evidence about the problems and how the proposed Commissioner can help.
- 2.10 This document reflects Government's current thinking about the Commissioner and the functions it could offer. Our final proposals and details will depend on any further evidence and factors including cost implications, as well as views received in response to this paper.

## 3. How to respond

- 3.1 The consultation will begin on 26 July 2015, and will run for four weeks, closing on 21 August 2015.
- 3.2 When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.
- 3.3 You can reply to this consultation online at :  
<https://bisgovuk.citizenspace.com/enterprise-directorate/sbcommissioner>
- 3.4 You can also email your submissions of evidence to [latepayment@bis.gsi.gov.uk](mailto:latepayment@bis.gsi.gov.uk) clearly marked as a response to the 'Small Business Commissioner Consultation'. This mail box will be monitored on a daily basis. If further information or clarification is required, we will make contact as appropriate.
- 3.5 The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/small-business-commissioner-role> (until the consultation closes). You can also send a response to: You can also send a response to:

Small Business Commissioner Consultation  
Enterprise Directorate  
Department for Business, Innovation and Skills  
2<sup>nd</sup> Floor, Orchard 2  
1 Victoria Street  
Westminster  
SW1H 0ET

- 3.6 A list of those organisations and individuals to be consulted is in Annex B. We would welcome suggestions of others who may wish to be involved in this consultation process.

## 4. Confidentiality & data protection

- 4.1 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 4.2 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

## 5. Help with queries

If you have questions about the policy issues raised in this document, please use the contact details above.

The consultation principles are in Annex A.

## 6. The problems faced by small businesses

- 6.1 The Government is seeking views on whether the new Small Business Commissioner should focus exclusively on payment-related issues or whether it should also deal with wider supply chain contractual issues. We propose that the Commissioner could cover issues, including some business practices which are against the law (e.g. breaches of contract such as late payment) and also some which are generally lawful but may be considered unfair (e.g. mutually agreed, but long, payment terms).
- 6.2 Our starting point is that the Commissioner should be able to assist small businesses with contractual supply chain disputes with another firm, related to an existing or future contract, where that other business is large or medium-sized.
- 6.3 Small businesses are more vulnerable to unfavourable or unfair practices and often do not have the resources to challenge them. We therefore propose that the new Commissioner should aim to offer support to small businesses for disputes they have with any large or medium-sized supplier or business customer based in the UK.
- 6.4 We propose that the Small Business Commissioner should be accessible by sole traders and businesses which have - or, if the business is part of a corporate group, where the group has - fewer than 50 employees and which meet one of two financial thresholds (turnover and balance sheet total).
- 6.5 The Commissioner would cover disputes between small businesses and medium-sized or large businesses, provided that the firm raising the complaint to the Commissioner meets the definition. This would enable small firms to seek advice and support from the Commissioner for disputes or for complaints made by or against them.
- 6.6 We propose that the Commissioner should be able to get involved at an early stage, when the prospect of retaining the two businesses' relationship with each other is greatest. So it could deal with a disputed term for a future contract, say a payment term at contract negotiation stage, or with dispute about arrangements within a contract that has already been agreed.
- 6.7 For complaints by small businesses which would be within remit of the Mystery Shopper service, the government will explore how the Commissioner, Mystery Shopper service and existing dispute resolution processes should interact.

6.8 We understand that for a small firm it can be daunting to take action against another business, especially a larger firm. We are looking for further evidence of how small businesses currently deal with these issues, including anything stopping them from taking formal action. We want to ensure the new Commissioner is accessible, is able to resolve problems quickly and easily and does so in a way that protects commercial relationships critical to the small firm's survival.

## Negotiating and Making Changes to Contracts

6.9 For small firms, negotiating a contract with a larger business can be challenging. Difficult issues can arise during initial negotiation of terms, or where the small business is asked to agree to vary or include new commitments in an existing contract. We have been told that small businesses often feel intimidated and accept such terms (rather than walking away from a proposed contract or refusing to agree to a change) and there is concern that larger firms sometimes use their economic power to impose unfavourable terms.

6.10 Even though one party to a contract cannot make a valid variation to it without the agreement of the other, recent cases have shown that large businesses seem to have benefitted from the bargaining power imbalance to extract commercial advantages from small suppliers. In a Federation of Small Businesses (FSB) survey<sup>2</sup>, one in six small firms reported "supply chain bullying" in the past two years; and five per cent reported having to pay to join or stay on supplier lists ("pay to stay").

6.11 Such practices can increase costs and uncertainty for the small business, making it difficult to plan and invest. These firms often do not have the time, money or knowledge needed to take forward legal challenges.

*We are interested in evidence about initial contract negotiations as well as proposals/negotiations to vary existing contract terms.*

**Question 1: What evidence do you have of unfair or unfavourable treatment of small businesses in contract negotiations during the last 2 years?**

**Question 2: What circumstances can make these practices unfair to small businesses?**

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<sup>2</sup> <http://www.fsb.org.uk/news.aspx?rec=8838>

**Question 3: Have you ever tried to challenge proposed contract terms or arrangements, or refused to enter a contract including terms, that are unfavourable or you believe are unfair? If you have, under what circumstances and what was the outcome? If not, why not? Please provide specific examples (which may be anonymised) wherever possible.**

## Payment terms and practices

6.12 The table below sets out some of the payment practices which we believe cause disputes between small suppliers and larger customers.

<b>Extended payment terms</b>	Use of excessively long payment terms – whether proposed in the initial contract or by contract variation.
<b>Prompt Payment discounts</b>	Discounts businesses request for paying early or on time. For example, a firm that has agreed to pay 60 days following receipt of an invoice may also ask for an automatic discount of 3% if they pay on or before the 60th day.
<b>“Pay to Stay” clauses</b>	Flat charges which businesses levy on suppliers either as a requirement to be on a supplier list, or packaged as an investment into future business opportunities. It is often indicated that non-payment will result in de-listing.
<b>Retrospective discounting</b>	Some firms seek to apply retrospective discounts or ‘balance sheet bonuses’ to outstanding money owed to a supplier. This involves changes to the terms of the contract with the supplier after a contract has been agreed.
<b>Stocking &amp; listing fees</b>	A cash fee paid up-front by a supplier to guarantee shelf space for a new line. Alternatively, businesses may require suppliers to pay listing fees to cover the cost of the administration of introducing new product lines.
<b>Marketing contributions</b>	Payments by suppliers towards the cost of advertising certain products and/or to cover the cost of price promotions.
<b>Damage/waste payments</b>	Payments requested from suppliers to cover problems ranging from poor stacking of pallets to putting bar code stickers in the wrong place. The payments may include lost profits, the cost of rectifying the problem and an administrative charge.

**Question 4: Do you have concerns about any of the practices in the table above? Are there circumstances in which the practices are particularly problematic for the day-to-day running of your business?**

**Question 5: Are there circumstances in which the practices listed in the table above are acceptable? Are there circumstances in which they can benefit suppliers? If so, how?**

**Question 6: Have you ever experienced any of the practices listed in the table above? If yes, which ones, when and how many times? Did they benefit or harm you?**

**Question 7: Are there other unfavourable or unfair payment practices which you have encountered? Please provide examples (these may be anonymised).**

## **Breaches of contract**

6.13 Small firms can face significant problems when trying to challenge another firm's breach of contract. Breaches of contract can include non-payment for a service or not paying on time, failure to deliver services or goods, and being late with services without a reasonable excuse.

### **Late payment**

6.14 Late payment occurs when a business has been supplied goods or services on credit, but fails to pay within the agreed term.

6.15 Legally, if no explicit payment terms have been agreed, the business awaiting payment may charge statutory interest<sup>3</sup> after 30 days.

6.16 Every year, thousands of businesses experience severe administrative and financial burdens, simply because they are not paid on time. Late payment stops these businesses – small businesses in particular – from developing their ideas, investing in growth and creating new jobs. In the worst cases, late payment has driven them to insolvency.

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<sup>3</sup> Under the Late Payment of Commercial Debts (Interest) Act 1998 (as amended) <http://www.legislation.gov.uk/ukpga/1998/20/contents>

## ***How bad is the problem?***

- 6.17 In January 2015, BACS<sup>4</sup> reported that 59% of UK small and medium-sized businesses were impacted negatively by late payments, with a total debt burden of £32.4 billion. The average small business was waiting for £31,901 of overdue payments. Their research also showed that the volume of late payments had almost doubled since 2008<sup>5</sup>. In part that was due to the general economic climate but there was also a wider cultural trend of large businesses using late payment as a means to improve cashflow. In June 2015, BACS's most recent research showed that small and medium-sized businesses are still waiting for £26.8 billion of late payment debt<sup>6</sup>.
- 6.18 The FSB survey<sup>7</sup> of its members in 2014 revealed that 51% had experienced late payment within the previous 12 months.
- 6.19 Figures from by the Institute of Directors (IoD)<sup>8</sup> in December 2014 found that two-thirds of its small and medium-sized members were having problem getting timely payment of an invoice, with damaging knock-on effects: late payment by one business could push the problem farther down the supply chain, potentially affecting many more firms.
- 6.20 Although legislation imposing interest for late payment has been in place for some time, few businesses use it to tackle problems they are facing with other businesses. A recent private sector survey indicated only 10% have considered claiming interest under the late payment legislation despite 22% of businesses ending a relationship with a business customer because of continued late payment<sup>9</sup>.

## ***What Government is doing about it?***

- 6.21 The Small Business, Enterprise and Employment Act 2015 introduces a new reporting requirement for the UK's largest businesses to report on their payment policies and practices. This is intended to increase transparency, drive up standards and incentivise those businesses to pay on time.
- 6.22 We propose giving the new Small Business Commissioner the job of monitoring the published data: naming and shaming the poorer performing businesses and also naming and celebrating the top performers. This

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<sup>4</sup> [http://www.bacs.co.uk/Bacs/DocumentLibrary/PR\\_Late\\_payments\\_are\\_forcing\\_businesses\\_to\\_make\\_tough\\_decisions.pdf](http://www.bacs.co.uk/Bacs/DocumentLibrary/PR_Late_payments_are_forcing_businesses_to_make_tough_decisions.pdf)

<sup>5</sup> Bacs have used a different methodology since 2014 to compile this data which means the figures are not directly comparable

<sup>6</sup> [http://www.bacs.co.uk/Bacs/DocumentLibrary/PR\\_Late\\_payments\\_costing\\_SMEs\\_billions.pdf](http://www.bacs.co.uk/Bacs/DocumentLibrary/PR_Late_payments_costing_SMEs_billions.pdf)

<sup>7</sup> [www.fsb.org.uk/policy/assets/publications/fsb-member-survey-2013-uk.pdf](http://www.fsb.org.uk/policy/assets/publications/fsb-member-survey-2013-uk.pdf)

<sup>8</sup> [www.iod.com/influencing/press-office/press-releases/two-thirds-of-smes-are-suffering-from-late-payment-finds-new-iod-survey](http://www.iod.com/influencing/press-office/press-releases/two-thirds-of-smes-are-suffering-from-late-payment-finds-new-iod-survey)

<sup>9</sup> <http://www.managementtoday.co.uk/news/1076769/>

transparency should help small businesses negotiate fairer contract terms, challenge unfavourable ones and improve their planning on when to expect payment.

6.23 We know that late payment may not always be clear cut. When the goods or services being supplied are complex and hard to value, it can be difficult to reach agreement on exactly what is owed and at what time. But whether a contract is complex or straightforward, that is no excuse for the customer and supplier not to share clear expectations. There should be a transparent, fair process for clarifying issues and resolving disputes.

**Question 8: If you are a small business, or a representative organisation for small businesses, what could be done to encourage more businesses to claim interest and late payment charges where appropriate and create an environment in which this is considered the norm?**

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

## **Wider business to business contractual disputes**

6.24 Business to business disputes can arise on a range of contractual issues. Small firms may find themselves in dispute over supply chain issues regarding the interpretation of contract terms, logistics, sale of goods, dealing arrangements, and other claims involving the delivery of goods or the quality of a service. The Government is seeking views on whether the Commissioner's remit should cover disputes about general contractual issues within a supply chain relationship. This would not include non-supply chain contractual issues or issues other than regarding sale and supply of goods and services covered by specific legislation e.g. issues with leases.

**Question 10: Have you ever taken action to resolve disputes about these wider supply chain issues? If yes, under what circumstances and what was the outcome? If not, what deterred you? (Examples may be anonymised.)**

**Question 11: How could the new Commissioner be helpful in resolving those disputes?**

## Regulated Commercial Sectors

- 6.25 Some sectors are covered by specific regulatory provisions that provide protection through a separate legal framework and/or their own dispute resolution mechanisms. These sectors include financial services, construction and utilities (energy and water).
- 6.26 Many of the protections they offer are distinct to those sectors; and the dispute resolution bodies often have specific specialist expertise which the Small Business Commissioner would not have. Therefore, we propose that disputes relating to these matters should be outside the Commissioner's remit.

## Business to Public Sector disputes

- 6.27 A diverse landscape of redress schemes exists for complaints from business about the delivery of public sector service delivery. Many of these schemes are long established and have extensive specialist knowledge. The Small Business Commissioner will help businesses to identify the right route to take to resolve their issues in these areas.
- 6.28 The government 'Mystery Shopper' service investigates complaints from actual and potential government suppliers. Suppliers are able to raise concerns anonymously about public sector procurement practice, regarding a procurement process of which they have been part. The Mystery Shopper service then seeks to resolve the problems. Public procurement matters are specialised, so for cases within the remit of this service, the Government will explore how the Commissioner, Mystery Shopper service and existing dispute resolution processes should interact.

## 7. A Small Business Commissioner

7.1 Our aim is to establish a new Small Business Commissioner that is a valuable addition to what is currently available for small businesses. We want to see culture change in how businesses resolve their commercial disputes. We want to see disputes avoided if possible, and when they do occur, resolved quickly, cheaply and in a way that preserves the best of the business relationship.

### The Current Landscape

7.2 In recent years the drive in the courts system to encourage alternatives to litigation has expanded the dispute resolution services available to businesses; so too have developments in redress schemes (such as ombudsmen) in regulated sectors of the economy. However, provision remains uneven, with different arrangements in different sectors and low awareness among small businesses. Where a dispute involves an alleged breach of the law, businesses currently have a number of options open to them<sup>1</sup>:

- The courts system urges potential litigants to consider a form of Alternative Dispute Resolution (ADR) rather than court action.
- If the potential litigants are prepared to participate in a process such as mediation, they are directed to information about providers; and for the small claims track (claims of up to £10,000) there is a free Small Claims Mediation telephone service.
- During court proceedings, the parties may be asked for evidence that they considered an alternative dispute resolution approach. Failure to respond to an invitation to participate or a refusal to participate might be considered unreasonable by the court and means they could face additional court costs.

7.3 For disputes that do not involve alleged breaches of the law, businesses can also access a variety of ADR services. In some sectors ombudsmen exist, some of whom – particularly in the regulated sectors – will consider complaints from microbusinesses (generally those with 0-9 employees although this can vary by ombudsman). This micro-business threshold covers more than 4.9 million of the just over 5.2 million businesses in the UK.

<sup>1</sup> The details listed below relate to England and Wales.

- 7.4 The Ministry of Justice provides a directory of private mediators<sup>10</sup>. Fees vary according to the amount of money in dispute – e.g. £50 per party (plus VAT) for a 1-hour session for claims under £5,000 or £425 per party (plus VAT) for a 4-hour session if the claim is between £15,000 and £50,000.
- 7.5 There are also ADR schemes to help resolve disputes relating to public sector service delivery and contracting with the public sector. For example, the Adjudicator Service handles disputes with HM Revenue and Customs, the Insolvency Service and the Valuation Office Agency.

## The Small Business Commissioner

- 7.6 We propose the Commissioner should offer three main services:
- General information and advice provided online, through social media and by telephone with the aim of helping small firms avoid disputes in the first place, or resolve them early, and signposting them to other bodies (e.g. regulators, ombudsmen) where appropriate;
  - Where appropriate, mediation or conciliation to assist parties to reach a resolution to a dispute;
  - A complaint handling function to look into complaints by small businesses about a medium or large business and act as an ‘honest broker’ between the two parties. As part of this function the Commissioner will monitor published data required under the Small Business, Enterprise and Employment Act 2015 on large firms’ payment policies and practices.
- 7.7 We propose that the Commissioner should be allowed to refuse to offer support in cases which are vexatious or unsuitable (for example, if there is little prospect of reaching a resolution or another type of provision would be more suitable to resolve the dispute).
- 7.8 We propose that the Commissioner should also publish an annual report and have the power to make recommendations to the Secretary of State for Business, Innovation and Skills.

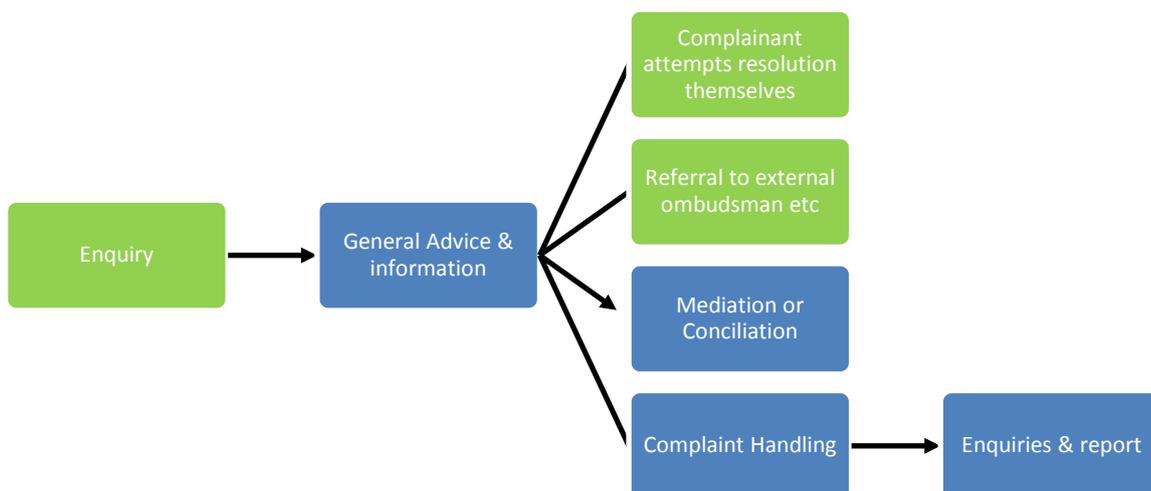
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<sup>10</sup> <http://www.civilmediation.justice.gov.uk/>

## General Advice and Information

- 7.9 The Government proposes that the Commissioner should provide general advice and information for small businesses on key issues which may relate to their dispute. This could include advice on general contract principles if they are in a contractual dispute or practical suggestions related to handling a complaint, which may help the small business resolve the issue itself. This would not include legal advice on the particulars of a case or advice on its legal merits.
- 7.10 The Commissioner may signpost a small business to another dispute resolution service that specialises in specific types of disputes. This might typically be an ombudsman. If no such service exists, the Commissioner would inform the small business about private sector provision and/or its services.
- 7.11 This initial advice would be provided on a confidential basis. At this point the Commissioner would not need to communicate with the business with which the smaller business is in dispute.
- 7.12 We envisage that this advice could be provided online as well as by telephone.

Figure 1 illustrates the customer journey.



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

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

### **Voluntary Mediation**

- 7.13 Where appropriate the Commissioner will propose mediation to resolve a dispute. The Government will consider further whether the Commissioner's mediation function should be provided by an external provider or in-house. Either way, it would need to comply with relevant industry and professional standards.
- 7.14 In line with standard voluntary mediation practices, neither party to the dispute will be compelled to participate and the proceedings will be confidential.
- 7.15 Initially, the parties would be brought together for a single session. Further sessions could then be offered if needed. An independent third party would work with both sides to identify a solution for them to sign up to. Whilst they would not be compelled to attend, having agreed to participate in mediation they would be expected to be bound by the terms of any solution.
- 7.16 On-line dispute resolution is now commonplace as a form of dispute resolution and the Government will explore its potential to form part of the services offered.

**Question 14: Would you consider using a mediation service to support you in settling a dispute with another business?**

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

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

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

## **Encouraging participation in Mediation**

- 7.17 Voluntary mediation works when two parties come together to agree a mutually satisfactory solution. The Government does not propose that the Commissioner should have power to compel businesses to attend mediation. The mediation route that businesses can follow instead of court action also works this way. However, in the court system there is a mechanism to incentivise the use of mediation as it can affect how costs are awarded in cases that do end up in court.
- 7.18 The Government proposes that the Commissioner could encourage businesses to choose mediation by:
- publishing advice and guidance highlighting good practice in dispute resolution;
  - providing ‘certificates’ where mediation has failed because one party unreasonably failed to participate, which could be considered in subsequent court proceedings in awarding costs.

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

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

## **Looking into complaints**

- 7.19 The Government is considering the scope of the complaints service. Small businesses could have the option of submitting a complaint to the Commissioner about a medium-sized or large business with which it has a contractual relationship or the service could be more tightly and expertly focused on payment issues only.
- 7.20 We want to avoid duplicating the coverage of existing dispute resolution services, such as the various ombudsman schemes in the regulated sectors, e.g. the Financial Ombudsman Service. Where these exist the complainant will be referred to these other relevant schemes. As stated above, the Commissioner would be allowed to refuse to offer support in cases which are vexatious or unsuitable.

- 7.21 For complaints that fall within the remit of the Commissioner, once accepted the complaint would be looked into by the Commissioner acting as an independent and neutral party. This would include contacting both parties and establishing the facts of a particular complaint (for example, what the parties have agreed or done), and whether the actions of either business were fair and reasonable. A report would be made which may recommend actions by either party to resolve the dispute.
- 7.22 The Commissioner would not have the power to require businesses to co-operate with its enquiries (e.g. to provide information) but even if it fails to obtain co-operation, it would still report on the complaint.
- 7.23 The complaint reports would be based on the facts that can be established (on the balance of probabilities) and what the Commissioner considers to be fair or reasonable in the particular circumstances of the case.
- 7.24 We consider that this enquiry function would need to have a clear scope and limits: consideration of a complaint would take into account such matters as the legal position, any industry codes and what the Commissioner might consider to have been good business practice in that sector at the time.
- 7.25 We do not propose that the Commissioner should have the power to award financial compensation. Rather, he or she may recommend action by the business against which a complaint has been made, e.g. this may be to restart negotiations with the business that made the complaint or to restore them to previously agreed terms. These recommendations would not be binding but they could be made public. Our intention is for the Commissioner to have the power to name the 'offending' company and maintain the anonymity of the complainant.
- 7.26 Complainants who do not accept the Commissioner's decision would remain free to pursue the matter through other channels. However, it is Government's aim that the Commissioner's decisions should be widely accepted as sufficiently independent and fair that matters will be resolved by the end of its complaints enquiry process.
- 7.27 The Commissioner would produce an annual report on its activities. This could include findings on specific complaints and specific respondent businesses. Our intention is that the power of the Commissioner to publish its findings and its duty to publish an annual report will encourage good practice and drive up standards.

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

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

## **Proposed Funding Model**

- 7.28 We are considering how to fund the Commissioner. One of the proposals is that the Commissioner be funded via a combination of public funding and fees paid by those using its formal dispute resolution services.
- 7.29 Although there is evidence that small businesses are put off litigation by fear of the potential cost and time involved, we are not aware of similar concerns in regard to alternative means of dispute resolution, in particular mediation. The use of mediation in family law has increased in recent years, which has encouraged its rise in other civil disputes. Mediation sessions can cost as little as £50 per party (plus VAT) for a one-hour session; a four-hour session, according to the list published by the Ministry of Justice, costs £425 per party (plus VAT). It is possible for people to represent themselves in mediation, which is typical in the case of disputes regarding smaller claims.
- 7.30 In considering how to fund the Small Business Commissioner the Government is assuming that any provision of mediation services will be at a charge in line with the cost of mediation in the wider market.
- 7.31 We are also considering how to fund the other services offered by the Commissioner including the complaints handling function.

## 8. Costs and benefits

### Benefits to Business

- 8.1 The Commissioner will enable small firms to access information and advice to help them become 'smarter contractors'. The intention is that they will be able to negotiate more effectively with other businesses, avoiding many of the issues that arise now.
- 8.2 Where problems do arise, the experience of the Victoria Small Business Commissioner in Australia suggests that businesses will save both time and money. Over half the Victoria cases were successfully resolved, at 30% (or less) of the cost of litigation. In terms of time commitment, over half the complaints were resolved within one week, and 80% within 12 weeks.
- 8.3 The Centre for Effective Dispute Resolution (CEDR) claims that mediation provides businesses with significantly reduced timescales for settling disputes: 75% of cases undertaking mediation are settled on the first day, and a further 11% within 12 weeks (i.e. 86% compared to the Victoria Small Business Commissioner's total of 80%). CEDR also suggests significant financial benefits, with an estimated saving of £2.4 billion a year from avoiding wasted management time, damaged relationships, lost productivity and legal fees from disputes.<sup>11</sup>
- 8.4 Research by the Legal Services Board shows that those businesses that pay for independent advice are more likely to use mediation or conciliation to resolve a problem. The information and advice service therefore should increase awareness and take up of mediation services by those without the resources to use independent advisors.
- 8.5 By increasing the use of mediation and preserving more commercial relationships, we expect the Small Business Commissioner to deliver significant benefits for the UK's small firms. In addition to case-by-case dispute resolution, the services provided by the Commissioner are intended to deliver a broader culture change across the UK business landscape.
- 8.6 By being able to look into complaints the Commissioner will fill gaps in other services for business to business complaint handling and help small businesses resolve disputes that they may otherwise have allowed to continue or written off.

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<sup>11</sup> Centre for Effective Dispute Resolution, *The Sixth Mediation Audit: A survey of commercial mediator attitudes and experience*, 22 May 2014

## Costs to Business

- 8.7 The Government is not proposing at this stage to change the law to make particular practices unlawful. This is a proportionate approach, intended to encourage a culture change that balances the issues identified with the importance of businesses' freedom of contract. If future experience – including from the Commissioner's annual reports – shows that problems persist, the Government will be able to review whether changes to underlying law are then needed. But when the Small Business Commissioner is introduced, the only compliance costs for business will be in understanding how it operates, should a dispute involving their business be referred to it.
- 8.8 If a complaint is made to the Commissioner about a business, it will be asked to provide information relating to the complaint. Most will not be required to attend a hearing, as the vast majority of complaints will be dealt with online, by telephone or through an exchange of letters.
- 8.9 If a finding is made against a business, the Commissioner may make recommendations – such as restarting negotiations with the business that made the complaint or to restore them to previously agreed terms. The recommendations are not intended to be legally enforceable but the Commissioner will report on its activities and in doing so might highlight particularly poor practice by businesses in responding to its recommendations.
- 8.10 The net cost of business mediation will depend on the impact the Commissioner has on the number of mediations undertaken for the disputes in scope. It is assumed there will be an increase. This needs to be set alongside a potential decrease in litigation through the courts, the savings to both businesses involved in a dispute from resolving it quickly rather than letting it drag on and incur related staff costs, and also the savings and benefits from preserving important commercial relationships.

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

## 9. What happens next?

- 9.1 The Government will consider the views expressed in response to this paper, along with further evidence and consideration of other factors including cost implications to inform our final proposals
- 9.2 We will publish a summary of the views expressed and reasons given for decisions finally taken. This document will be published on [www.gov.uk](http://www.gov.uk) with paper copies available on request.

# Annex A: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess  
BIS Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone Angela on 020 7215 1661  
or e-mail to: [angela.rabess@bis.gsi.gov.uk](mailto:angela.rabess@bis.gsi.gov.uk)

**However if you wish to comment on the specific policy proposals you should contact the policy team (see section 3).**

## Annex B: List of Individuals/Organisations to be consulted

ADS Group

Advice UK

African Caribbean Business Network

Agri-technology Industry Advisory Group

Alliance of Industry Associations

Antiquarian Booksellers Association

Association of Accounting Technicians (AAT)

Association of African owned Businesses (UK)

Association of British Insurers

Association of British Mentors

Association of Business Schools

Association of Chartered Certified Accountants ( ACCA)

Association of Chief Executive of Voluntary Organisations (ACEVO)

Association of Convenience Stores

Association of Licensed Multiple Retailers

Association of Recruitment Consultancies (ARC)

Association of Roofing Contractors

Association of Specialist Fire Protection (ASFP)

B&B Association

BALPPA (British Association of Leisure Parks, Piers & Attractions)

BBA – the voice of banking

Bedfordshire Asian Business Association

British Antique Dealers Association

British Association of Removers  
British Beer & Pub Association  
British Business Angel Association  
British Chambers of Commerce  
British Exporters Association  
British Healthcare Trades Association  
British Hospitality Association  
British Library  
British Pharmaceutical Industry  
British Plastics Federation  
British Ports Association (BPA)  
British Retail Consortium  
British Vehicle Rental and Leasing Association  
British Venture Capital Association  
Btube  
Business Disability Forum  
Business Doctors  
Business in the Community  
Business Support Helpline  
Business Visits & Events Partnership  
Carpet Foundation  
CBI  
Central Working  
Centre for Entrepreneurs  
Chairman's Network

Chartered Institute of Arbitrators

Chartered Institute of Credit Management (CICM)

Chartered Institute of Marketing (CIM)

Chartered Institute of Personnel & Development

Chartered Institute of Plumbing and Heating Engineering

Chartered Institute of Public Finance and Accountancy (CIPFA)

Chartered Institute of Purchasing & Supply

Chartered Institute of Taxation (CIOT)

Chemical Business Association

Civil Aviation Authority

Civil Mediation Council

Clear Company

Cockpit Arts Business Hub

Communications and Internet Services Adjudication Scheme  
(CISAS) Construction Equipment Association

Construction Products Association

Consumer Code for Home Builders

Consumer Council for Water

Consumer Credit Association UK

Consumer Credit Trade Association

Co-operative & Community Finance Association

Core Cities Group

Creative England

Crowd for Angels

Debt Managers Standards Association

Devon & Somerset Rural Growth Network

Digital Leaders

Digital Shoreditch

Direct Selling Association

Disability Rights UK

E2Exchange

EEF

Enterprise Nation

Enterprising Women

Entrepreneurs' Organisation

Entrepreneurs with Disabilities Network

Everywoman

Federation of Licensed Victuallers Association

Federation of Small Businesses

Finance and Leasing Association

Financial Ombudsman Service (FOS also provide ADR in some of the other sectors classified here, such as rental and leasing activities)

Fire Industry Association

Forum of Private Business

Forward Ladies

Freight Transport Association

Glass and Glazing Federation Double Glazing and Conservatory Ombudsman Scheme

Green Deal Ombudsman

Home Insulation and Energy Systems Assured Contractors Scheme

ICAEW

Impact Hub Westminster

Institute for Family Business

Institute for Small Business & Entrepreneurship

Institute of Chartered Accountants of England & Wales

Institute of Chartered Accountants of Scotland

Institute of Exporters

Institution of Engineering and Technology

IoD

IOEE

IPSE (Association of Professional & Self-Employed) ISBE

Keating Chambers

Kitchen Bathroom Bedroom Specialists Association Legal

Ombudsman

Local Government Association

London South Bank University

London Travel Watch

Mentor/Suffolk Enterprise

Motor Codes Ltd

Mumpreneur

Muslim Women's Network-UK

National Asian Business Association

National Black Women's Network

National Caravan Council

National Enterprise Network

National Federation of Retail Newsagents  
National Federation of Roofing Contractors  
National House Builders Council  
National Specialist Contractors Council  
New Entrepreneurs Foundation  
North West School for Social Entrepreneurs Northumberland  
Rural Growth Network  
Ombudsman Services  
Opportunity Peterborough  
Painting & Decorating Association  
Petrol Retailers Association  
Prince's Trust  
Radio Electrical and Television Retailers Association  
Removals Industry Ombudsman Scheme  
Renewable Energy Association  
Retail Motor Industry Federation  
Royal Institute of Chartered Surveyors (RICS)  
Safebuy  
Sage  
Scottish and Northern Ireland Plumbing Employers  
Federation Scottish Decorators Federation  
Screwfix  
Security Industry Authority  
SFEDI  
Social Enterprise UK  
Specialist Engineering Contractors Group

St John's Innovation Centre

Start up in Stilettoes

Start UpLoans

StartUp Britain

Start-up Loaded

Successful Sussex

Suffolk Enterprise Agency

Sussex Innovation

Swindon & Wiltshire Rural Growth Network

Tech City

The Arreca Group

The Business Circuit (London)

The Enterprise and Diversity Alliance

The Enterprise Diversity Alliance

The Entrepreneurs Network

The Furniture Ombudsman

The Glazing Ombudsman

The Pensions Ombudsman

The Postal Redress Service (POSTRS) The

Supper Club

The Virtual Entrepreneur

Tourism Alliance

Trade Association Forum

Trusted Shops

Trustmark Arbitration & Conciliation

Schemes

UK Fire Association

Ukinbound

Unltd

Vehicle Builders & Repairers Association Ltd.

(VBRA) Warwickshire Rural Growth Network

Waterwatch Scotland

WiRE

World Trade Centre Hull

X-Forces Ltd

Youth Enterprise Live

YTKO



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