Presentation to

Joint Oireachtas Committee on Finance, Public Expenditure & Reform

on

pre-legislative scrutiny of proposals for reform of financial services & Pensions Ombudsman legislation

FLAC

27 October 2016

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FLAC: Presentation on pre-legislative scrutiny of reform proposals re Financial Services & Pensions Ombudsman legislation

(27 October 2016)

Introduction

On behalf of the Council and staff of FLAC (Free Legal Advice Centres), I would like to thank the Chair and members of the Committee for the opportunity to address you today concerning the forthcoming merger of the Financial Services and Pensions Ombudsman and the legislative reform that will necessitate.

We would like to especially record our thanks to Deputy Pearse Doherty for the interest he has shown in our 2014 report, 'Redressing the Imbalance' (of which more below), which led to a number of the proposals for reform outlined in his Private Members Bill – the Central Bank and Financial Services Authority of Ireland (Amendment Bill) 2014 – on this subject.

We also note from the recent Dáil discussion of 6 October that there is relatively widespread agreement on all sides that some reform is required, though there are different views on the extent of the required reform.

I should also point out that this short submission has been somewhat hastily assembled and FLAC would welcome the opportunity to further contribute to the ongoing discussion in due course if requested.

Redressing the Imbalance

Following the enactment in 2012 of personal insolvency legislation designed as an attempt to resolve chronic over-indebtedness levels arising from the personal debt crisis (and which has, so far, had less than the desired impact on our view), FLAC felt it was time to explore corresponding legal protections, particularly in the provision of credit and related financial services. In order to try to prevent a similar debt crisis in the future, there was a need to understand the context to the boom/bust cycle and what we perceived in our work to be the imbalance of power between providers of financial services and consumers. It is commonly accepted, for example, that the latter years of the credit boom in particular entailed substantial amounts of reckless lending, promoted in many instances by a very loosely regulated network of mortgage brokers. Moreover, individual consumers (and the taxpayer generally) continue to suffer the consequences for this without access to any tangible remedy. This part of the report entailed a critical analysis of relevant European directives and domestic legislation and codes, as well as the approach of bodies that enforce them.

FLAC had also become aware though its own outreach services (a national telephone helpline and network of free legal advice clinics) and through our support to the Money Advice and Budgeting Service (MABS) of some consumers' negative experiences of systems that had, in theory, been put in place to

protect and assist them. Thus, a number of people who had made complaints to the Financial Services Ombudsman and some of their advocates were interviewed for the purpose of this study about their experiences of that complaints process. These interviews were conducted by our colleague Dr Stuart Stamp, Independent Social Researcher and Research Associate at NUI Maynooth, who also collaborated on editing the final report and recommendations. We should stress at this point that our report did not look at the Pensions Ombudsman.

Redressing the Imbalance contains a number of proposals to address the flaws and gaps FLAC has identified in the infrastructure protecting consumers of credit and other financial products. It takes as its starting point the view that through paying for financial services, consumers take economic risks that help to contribute to economic growth of the society in which they live. Thus, for example, it is now almost impossible to avoid availing of a wide range of insurance services and borrowing money with interest at some point to purchase goods or services is also universal. Equally, those lucky enough to have money to invest must invest it somewhere.

To be fit for purpose, therefore, our view is that a regulatory system must equally safeguard the rights of consumers when facilitating the provision of financial services. The rights of consumers are in FLAC's view a fundamental part of the broader right of access to justice. This includes the right to adequate protection by the State of its people, the right to fair redress systems where disputes arise, and the right to timely and adequate advice and information. Our report, however, suggested that a systemic approach had evolved which consistently served to prioritise the interests of financial institutions over those of consumers.

Some conclusions concerning FSO legislation and operations

Insofar as it concerned the legislation establishing the Financial Service Ombudsman, *Redressing the Imbalance* identified a number of perceived problem areas. These included the exclusion of many legitimate complaints because of the six-year time limit on complaints, the ambiguous wording concerning the Ombudsman's mandate, the problematic definition of consumer, the classification of findings and the limited and prohibitive avenue of appeal to the High Court, especially for consumers. These are discussed in more detail below under the pre-legislative scrutiny heading.

In terms of the core complaints process, the report reflected the views of a number of complainants interviewed who were unhappy by what they felt was an over-reliance on the exchange of often complex paperwork that provided institutions with a substantial advantage and also operated to deny the consumer the opportunity to be listened to and articulate his or her complaint in a live forum. We should say at this point that our view is that this problem is not always cured by having access to mediation. These perceived imbalances are certainly not helped by the lack of access to assistance for ordinary consumers taking on financial institutions. Testimony from consumers and MABS money advisors bears this out, with a notable emphasis on the lack of concrete assistance for consumers to

frame their complaints, as well as to make submissions and evaluate proposed settlements or resolutions.

The obligation on consumers to first make a complaint through the provider's internal complaints process under the terms of the Consumer Protection Code (CPC) also causes difficulties. There was a sense that some providers were just going 'through the motions' and ultimately using the Financial Services Ombudsman office as an extension of their complaints departments. A regulated entity has up to 40 business days to attempt to resolve a complaint under the CPC. Anecdotally, however, it is apparent that this deadline is often not met and the frustration that consumers feel is palpable when their complaint is eventually dismissed or is in their view inadequately addressed by the provider and they must reframe the complaint to the FSO and face further time delays.

An examination of a number of the FSO annual reports from 2006 – 2012 also revealed a number of other areas of concern. These included the number of initial complaints that were 'disappearing off the radar' due to no further contact without apparent explanation being sought by FSO staff, the assumption that settlements were automatically complaints 'resolved in the complainant's favour', the low (and declining) success rate for complaints proceeding to adjudication (10% upheld, 17% partially upheld, 73% declined in 2012) and the low levels of compensation awarded to complainants.

To be fair, we should point out that current Ombudsman has demonstrated greater concern about these issues since his appointment and has been pro-active in terms of amending data gathering processes and in terms of improving communication with complainants. We should also say that the Ombudsman has demonstrated a willingness to discuss and take on board a number of the recommendations and suggestions made in our report. Nonetheless, it is still a concern that so many complaints are closed due to no further contact (1731 or 35% in 2015) and we would suggest that in a number of instances, this may be linked to a perception that the odds are substantially against the complainant.

Pre-legislative scrutiny issues

- **Six-year time limit on complaints**

On this question, there is broad agreement between Deputy Doherty's Bill, Deputy McGrath's Bill and the Government's bill that reform is required. In the debate of 6 October 2016, Minister Dara Murphy suggested that the heads did in fact go further as it may be a retrospective amendment, i.e. it will apply to complaints made in relation to products already provided. It provides for an alternative period (to the current period of six years from the provider's conduct) of three years (as opposed to two in Deputy Doherty's Bill) to make a complaint either from the date on which the complainant became aware of the provider's conduct, or from the date the complainant 'ought to have been aware' of the provider's conduct, whichever was earlier. Deputy Doherty's Bill simply provided for an alternative of two years from the date of awareness.

This alternative period in the heads however is only available where the complaint is against pension providers or financial services providers of long-term financial products. A 'long-term financial service' means a financial service within the meaning of the Central Bank Act 1942, as amended, the term of which exceeds 6 years and is not subject to annual renewal, sold to a consumer by a regulated financial service provider.

In our view, great care would have to be taken that this definition does not exclude legitimate complaints. For example, we would ask whether it is sufficient to cover payment protection policies associated with drawing down mortgage credit, particularly in relation to the requirement that the term must exceed 6 years. We would also question what criteria will be used to assess at what point the clock starts to run in terms of the point the complainant ought to have been aware of the provider's conduct.

- **The Ombudsman's functions**

The thrust of Deputy Doherty's proposed amendment in relation to the core functions of the Ombudsman is to simplify an overly wordy and arguably confusing remit by simply stating that when dealing with complaints, the FSO is required to act according to 'equity, good conscience and the substantial merits of the complaint'. The current additional requirements to 'act in an informal manner' and particularly the requirement to act 'without regard to technicality or legal form' unnecessarily constrain and limit the FSO.

In FLAC's view, the degree of informality should depend on the method used to resolve the complaint and does not need to be explicitly stated. In relation to technicality or legal form, Minister Murphy suggests in the debate of 6 October 2016 that the Government's proposed solution is to insert 'undue' as in 'without **undue** regard to technicality or legal form'.

In a number of appeals, however, the High Court has consistently held that it will overturn decisions of the FSO where that office has incorrectly interpreted or applied the law; FLAC itself has been involved in a few such cases. It is the nature of an alternative dispute resolution office such as the FSO that issues of law will regularly arise in the course of resolving complaints. In our view, the FSO cannot therefore carry out his remit without having regard to technicality or legal form where it arises.

- **The problematic definition of consumer**

Regulations of the FSO Council not long after the legislation was first put in place broadened the definition of consumer to include a person, group of persons or a company with an annual turnover not in excess of €3 million. Deputy Doherty suggests in the debate of 6 October that '*As it currently stands, it has been argued that by defining a consumer as including a company with a turnover of less than €3*

million, the possibility exists that the role of the Financial Services Ombudsman in standing up for the small individual might be diluted by larger groups using up many of the limited resources of the office'.

In this regard, we refer on page 109 of '*Redressing the Imbalance'* to the comment made by then judge of the High Court, Mr Justice Hogan in the *Lyons & Murray*[1] case that '*At first blush it may seem surprising that a complaint of this nature would come within the remit of the FSO, rather than being the subject of litigation in the Commercial Court';* he went on to suggest that constitutional issues might potentially arise here. The subject of the complaint to the FSO in this case concerned a dispute as to whether €17 million worth of property loans were or were not provided on an interest-only basis.

Of course sole traders, small businesses and companies should have the facility to make complaints against financial service providers but whether they should be routed through the same complaints mechanism as consumers in the ordinary sense of the word or what the Consumer Protection Code refers to as 'personal consumers' is another matter. In the report we suggest that setting up a two tier complaints mechanism should be looked at and that for the moment a two tier definition of consumer should be introduced. This is reflected in Deputy Doherty's suggested amendment at Section 2 of his Bill. Perhaps 'personal consumer' and 'consumer' to accord with the definitions in the Consumer Protection Code (CPC) might be a preferable formula to 'consumer' and 'commercial consumer' in Deputy Doherty's Bill. The key question to be discussed here perhaps is to ask what kind of a Financial Ombudsman Service we want into the future and who it might prioritise.

The government Bill at Head No. 46 proposes to leave the current position unaltered.

- **The classification of findings**

A few of the interviewees in our study were surprised and indeed annoyed to find that their complaint had been recorded under the 'partly substantiated' heading when they felt that their complaint had in fact been rejected and only succeeded on a very minor technicality. This gave rise to a recommendation that these categories should be revised to upheld, substantially upheld, substantially rejected and rejected, to greater reflect the reality and this is reflected in Section 6 of Deputy Doherty's Bill.

The government Bill at head No.2 proposes to leave the current position unaltered.

- **The prohibitive avenue of appeal to the High Court**

The High Court has consistently ruled that an appeal from decisions of the FSO is limited in its scope, as

[1] [2011] IEHC 454

first set out in ***Ulster Bank Investment Funds v Financial Services Ombudsman***.[2] Many people appealing are unaware of these limitations and may believe the appeal to be a full rehearing of the case. In addition, any High Court appeal requires a very substantial commitment of resources if legal representation is to be obtained and the appellant runs a substantial risk of an adverse costs order. Further, a practice has developed whereby the FSO acts as the respondent in all such appeals, regardless of whether it is the consumer or the financial services provider appealing, and this may use up a significant portion of the FSO budget. FLAC suggested in the 2014 report that some of these resources might be better directed to increasing the decision-making expertise of the office based on an analysis of the occasional case in which we have been involved.

Deputy Doherty's Bill again based on recommendations made in our 2014 report suggest that a full appeal should be available to the Circuit Court and that 60 days should be allowed for this appeal rather than the notional 21 day period to appeal to the High Court.

The government Bill at head No.48 proposes to leave the current position unaltered.

The interesting discussion of 6 October in the Dáil on this question illustrates the difficult issues at stake here. Minister Murphy, for example, states in relation to the proposed amendment that "[*a*] de novo *appeal to the Circuit Court would involve the Ombudsman as a notice party only. This would mean that if the financial services provider appealed a decision that favoured the complainant, the complainant would have to defend the appeal in the Circuit Court, with all of the consequent or attendant expense."*

He goes on to further state that "*In the existing statutory appeal to the High Court, the complainant is shielded by the high threshold that is applied to the statutory appeal and by the fact that the Financial Services Ombudsman can be a party to the complaint and thus take the role of defending its own decision. Neither of these factors operates in a Circuit Court* de novo *appeal so the real effect is not only that the provider is in a stronger position on a case-by-case basis but also that the existence of the threat of an appeal by the provider operates as a deterrent to consumers generally."*

There is some validity to these points but perhaps they are based on some misconceptions. They appear to assume that the financial service provider is normally the party appealing. In fact, in 2012 for example, of 37 recorded appeals to the High Court the consumer was the appellant in 31 cases. Thus, it is currently more likely to be the financial service provider who is '*shielded by the high threshold that is applied to the statutory appeal'* while the consumer runs the risk of costs being awarded to the FSO against him or her. This notably caused one interviewee in our study to very reluctantly drop his High Court appeal even though he felt very strongly that the FSO's decision was incorrect.

[2] [2006] IEHC 323

In FLAC's view, there is an important access to justice issue at stake here. A consumer unhappy at the FSO's decision should have a proper right of appeal and, subject to an assessment of the merit of his or her case, should be entitled to civil legal aid from the State to bring such an appeal or defend an appeal by the provider.

Assistance for consumers to make and pursue complaints

Outside of the review of the legislation, one further vital matter needs to be urgently addressed.

FLAC supports the model of a Financial Service Ombudsman providing a free, independent service for consumers to make complaints against financial service providers. However, our experience is that many consumers are hindered by the absence of any source of any dedicated advice and assistance to help articulate their complaint and to refer to in the course of the complaint for further guidance and that this puts many at a substantial disadvantage.

We thank the Committee members for their attention.

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