

STATES OF JERSEY



DRAFT FINANCIAL SERVICES OMBUDSMAN (JERSEY) LAW 201- (P.9/2014): COMMENTS

**Presented to the States on 26th March 2014
by the Economic Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

1. Panel membership and Review Terms of Reference

- 1.1 The Economic Affairs Scrutiny Panel is comprised of the following members –

Deputy S.G. Luce of St. Martin, Chairman
Connétable M.J. Paddock of St. Ouen, Vice-Chairman
Connétable S.W. Pallett of St. Brelade
Connétable J.E. Le Maistre of Grouville.

Review Advisers: Queen Margaret's University, Edinburgh

Due to the technical and legal nature of this review, the Panel selected a team of Advisers from the Consumer Insight Centre at Queen Margaret's University. The Consumer Insight Centre provides university accredited training for ombudsman and complaint handling organisations, both in the UK and abroad. The team included –

Ms. Carol Brennan
Ms. Carolyn Hirst
Mr. Nicholas O'Brien
Mr. Chris Gill.

- 1.2 Further information on the relevant qualifications and experience of the Panel's Advisers can be found at page 3 of the Report from Queen Margaret University annexed hereto at **Appendix 1**.
- 1.3 The following Terms of Reference were established for the Draft Financial Services Ombudsman (Jersey) Law 201-

1. *To examine key elements of the draft Financial Services Ombudsman legislation (Primary/Regulations/Orders), to assess whether it is appropriate to Jersey and fit for purpose, including:*
 - i. *the scope of the scheme (i.e. the financial services it would cover)*
 - ii. *the criteria for an eligible complaint*
 - iii. *the complaint process, awards, appeals and powers*
 - iv. *its independence from industry and government*
 - v. *its territorial scope*
 - vi. *the funding mechanism.*
2. *To assess whether the proposed Financial Services Ombudsman is compatible with the criteria established by the British and Irish Ombudsman Association and relevant European Union Alternative Dispute Resolution (ADR) standards.*
3. *To examine the rationale for, and implications of, the development of a joint Financial Services Ombudsman with Guernsey.*

1.4 The Economic Affairs Scrutiny Panel is conducting a 2 phase review. Phase 1 relates to the Draft Financial Services Ombudsman (Jersey) Law 201- to which this report refers. *Point 3* above was therefore not considered under Phase 1, being more appropriate for Phase 2. Phase 2 will relate to the Regulations and associated Orders of the Financial Services Ombudsman (Jersey) Law 201- which the Panel hopes to receive in final form shortly.

2. Comments

2.1 This report sets out the work undertaken by the Economic Affairs Scrutiny Panel on the Draft Financial Services Ombudsman (Jersey) Law 201-.

2.2 The Panel instructed the Advisers to provide a desk-based legal sense check of the draft legislation in line with the Terms of Reference above. The Panel is comforted that the Advisers' conclusion is that the draft Law is, on balance, fit for purpose and provides for independence, fairness, effectiveness, transparency and accountability.

2.3 However, the Advisers made recommendations to raise the draft Law to a gold standard. These recommendations are as follows.

2.4 **Independence:** Consideration should be given to whether the terms in which the ability of the Minister to give specific and general direction and to issue guidance, to the Financial Ombudsman Service ("FSO") sufficiently safeguards the independence of the Ombudsman from the Government.

2.5 **Chairman:** Consideration should be given to strengthening the independence of the FSO by requiring that the Board Member appointed as Chairman is not a financial services provider or person whose business involves representing financial services providers.

2.6 **Oversight:** Consideration should be given to the merit of having a mechanism for the annual report of the FSO to also be scrutinised by a relevant oversight Panel or Committee of the Assembly.

2.7 **Charging complainants:** Consideration should be given to whether the possibility of charging complainants, even in exceptional circumstances, creates a potential barrier to access for some, including those with the least access to independent resources.

2.8 **Referrals:** Consideration should be given to whether there is sufficient obligation on the part of the financial services industry to publicise to service users the possibility of referral of the complaint to the FSO.

2.9 **Shaping internal policy:** Consideration should be given to whether the FSO should have more explicit power directly to shape the design of internal complaints procedures adopted by the financial services industry.

2.10 **Method of complaint:** Consideration should be given to whether the form of referral of a complaint should be described explicitly.

2.11 **Recurring (systemic) issues:** Consideration should be given to whether suitable arrangements exist to provide systemic, as well as individual, remedy.

- 2.12 **FSO Complaints:** Consideration should be given to the possibility of including a mechanism for dissatisfied consumers to complain about the service provided by the FSO (as opposed to complaining about the judgement relating to the decision).
- 2.13 The Advisers' report was duly sent to the Minister for Economic Development who responded, as at **Appendix 2**, to the Panel on 24th February by way of a written response. For the avoidance of doubt, the Minister's responses are in bold type.
- 2.14 The Panel noted that the majority of the recommendations were addressed satisfactorily by the Minister, save as to 3, namely –
- Chairman
 - Charging Complainants
 - Recurring (Systemic) issues.
- 2.15 The Panel's concerns on these 3 areas were communicated to the Minister in a letter on 6th March, hereby annexed at **Appendix 3**, and in response the Minister responded further on 10th March as at **Appendix 4**. Following receipt of this letter, the Panel and the Minister held a meeting on Thursday 13th March to discuss the outstanding issues. The concerns addressed in this correspondence and meeting are outlined here.

Chairman

- 2.16 The Panel is of the opinion that it is fundamentally important to ensure the impartiality of the service. Although there is not a suggestion that the person appointed as Chairman could be influenced by the entities who fall under the remit of the Law, it is important that the independence of the FSO could not be called into question.
- 2.17 The Panel is keen to avoid any perception concerns, or issues of 'Agency Capture' which is the notion that it can be difficult for persons to divorce themselves from previous involvements, or if you have been in position for a while, becoming influenced and take on the views of the industry. The Panel is also mindful of the implications of small jurisdictions whereby decisions which appear 'normal' are in reality unfair but, culturally, have been accepted.
- 2.18 A Chairman not currently working within the financial industry could safeguard against such issues.
- 2.19 Although the Panel continues to believe that the Chairman should not be currently engaged within the financial services, the Panel was reassured that the Minister is committed to ensuring no conflict of interest will arise. As noted in the Panel's letter to the Minister at **Appendix 5**, further comfort is provided that should any States Member feel a proposed Chairman is inappropriate, Members have the opportunity to raise an objection should they so wish.

Charging complainants

- 2.20 The very core of an ombudsman service is ‘A service that is free, open and available to all that need it’. The draft legislation provided a vehicle for the ombudsman to charge complainants. There was an indication from the Minister’s response (Appendix 2) that the Economic Development Department considered the ability to charge complainants could be justified in specific circumstances.
- 2.21 In a further response (Appendix 4) the Minister referred to UK legislation which enables charging of complainants. It is important to note that there is a significant difference between the legislation referred to by the Minister and the draft Law which was proposed in Jersey. The UK Financial Ombudsman was created under the Financial Service and Markets Act 2000. Within this Act, the Financial Services Authority (“FSA”) gave the ombudsman service the ability to set up ‘costs rules’ which must be approved by the FSA prior to implementation. **No such costs rules were established or approved to charge complainants, and consequently the UK Ombudsman is unable to charge complainants.** Literature available from the UK Financial Ombudsman confirms this – an excerpt from one such publication is quoted below –
- “Why don’t consumers have to pay for taking a case to the ombudsman?”*
- The legislation that gives the Financial Ombudsman Service its powers – the Financial Services and Markets Act 2000 and the Consumer Credit Act 2006 – does not contain any power to charge consumers for using our service.*
- Parliament decided that the ombudsman should be funded by the businesses that we cover and that these businesses – not consumers – should meet the costs of resolving disputes.”*
- 2.22 The Panel understands the Minister’s desire to avoid vexatious, fraudulent and other irrelevant claims; however, the Panel believes that the ability to charge complainants will not deter persons likely to make such claims, but will undermine the spirit of the service and act as a barrier to innocent claimants. Further, provisions to enable the ombudsman to reject such claims exist within the draft legislation.
- 2.23 In addition, should an ability to charge complainants remain within the Law, there is potential for financial institutions to seek to criticise the ombudsman for ‘failing’ to charge complainants, resulting in unnecessary additions to the ombudsman’s workload. The Panel questioned whether it would be appropriate for the ombudsman to investigate claims which could fall under this area of the legislation, make a determination and an award of costs in its own favour, and, consequently pursue the same.
- 2.24 **Following the meeting on 13th March, in which the Panel was able to restate its concerns, the Minister agreed with the Panel’s and Advisers’ recommendation on this point, and the Panel notes that the appropriate amendment has been brought by the Minister to the draft Law to ensure that complainants cannot be charged under any circumstances.**

Systemic Remedy

- 2.25 Systemic breaches relate to a collection of recurring incidents, this could be within an individual organisation, a sector of the industry or the industry as a whole, as in the case of PPI mis-selling. Under UK law, the Financial Conduct Authority (previously the FSA) has the authority to decide if a ruling in relation to large-scale issues is required, and subsequently prescribes the remedy, with powers delegated to the Financial Ombudsman Service to enforce, as necessary.
- 2.26 During discussions with its Advisers, the Panel was made aware that the independent position of the ombudsman, and its ability to draw upon its direct interaction and experience of financial entities and complainants, provides it with a unique position to bring about positive change. The draft legislation provides that the ombudsman may provide 'information and guidance'. In the UK the Financial Ombudsman has the authority to make recommendations to assist the financial institution (or sector) and adjust such practices, which ultimately assists the financial organisation, guards against future complaints and reduces cases going to the ombudsman.
- 2.27 Presently there is **no organisation within Jersey with the authority to make any provision with regard to such systemic issues**, including the JFSC. Consequently a gap exists within Jersey's legislation.
- 2.28 The Panel is mindful that costs must be considered. The financial industry are likely to pay a case levy fee for each complaint; consequently, providing the ombudsman, or the JFSC, with the appropriate authorities would reduce such fees by providing the financial sector with a specific remedy to follow, which is not open to challenge by either the financial organisation or the complainant. This approach may also reduce the workload of the ombudsman, who would otherwise be required to deal repeatedly with many individual complaints regarding recurring issues.
- 2.29 The Panel has been informed by the Economic Development Department that discussions are continuing with the JFSC; however, no indication of the stage, content or timescale for these discussions has been provided.
- 2.30 **The Panel recommends that the Minister moves to close this gap as expediently as possible through the appropriate legislation.**
- 2.31 The Panel is aware of Deputy G.P. Southern of St. Helier's proposed amendment lodged *au Greffe* on 18th March 2014. States Members will note that this matter was raised with the Minister in the Panel's letter dated 6th March 2014. However, the Panel is also mindful of the advice provided to States Members in the 'Human Rights Notes on the draft Financial Services Ombudsman (Jersey) Law 201-' in relation to retrospectivity.

**FINANCIAL SERVICES OMBUDSMAN: PRIMARY
LEGISLATION REVIEW**

**REPORT FROM QUEEN MARGARET UNIVERSITY
ON THE DRAFT LAW**

14 February 2014

Carolyn Hirst, Nick O'Brien and Chris Gill



Queen Margaret University
CONSUMER INSIGHT CENTRE

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Preface: the report team

This Report has been produced by Queen Margaret University's Consumer Insight Centre.



Queen Margaret University
CONSUMER INSIGHT CENTRE

Queen Margaret University's Consumer Insight Centre is a specialist provider of university accredited training for ombudsman and complaint organisations in the UK and abroad. We have worked with most UK ombudsman organisations. We have also worked closely on the development of training with the Ombudsman Association and the International Ombudsman Institute, providing accredited training for over 1200 ombudsman colleagues and CPD training for 700 regulatory staff during the last three years.

The Consumer Insight Centre aims to be a nationally and internationally recognised leader in dynamic and innovative learning, knowledge exchange and research in consumer insight. Recent research and review projects include a study for the National Endowment for Science Technology and the Arts (Nesta) on using complaints as drivers for innovation in public services; a study of complaints outcomes for the Scottish Care Inspectorate; complaints process reviews for Audit Scotland and the Welsh Language Commissioner, and research on the future of ombudsman schemes for the Legal Ombudsman.

<http://www.qmu.ac.uk/be/Research/cic.htm>

Here are brief biographies of the Report team:

Carolyn Hirst is a Lecturer in Ombudsman and Complaint Handling Practice at Queen Margaret University. She is a former Deputy Scottish Public Services Ombudsman, a post she held from September 2002 until 2007. She is currently researching the use of informal dispute resolution in ombudsman schemes. Carolyn is an accredited and practising Mediator. She is a member of the Scottish Legal Complaints Commission Mediation Panel and also a member of the Edinburgh Sheriff Court Mediation Panel. She is a Lay Member of two tribunals: Employment Tribunals (Scotland) and the Home Owners Housing Panel.

Dr Nick O'Brien qualified as a solicitor in 1987. He was appointed Legal Adviser to the Legal Services Ombudsman for England and Wales and became Deputy Ombudsman in 1999. In 2000, Nick took up the post of Legal Director at the Disability Rights Commission. Between 2007 and 2012, he worked as part-time Legal Policy Adviser to the Parliamentary and Health Service Ombudsman. He is also a part-time Judge in the Mental Health Review Tribunal and an Honorary Research Fellow in the Law School at Liverpool University. Nick has given evidence to UK Parliamentary Committees and regularly represented the

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Parliamentary Ombudsman on the Administrative Justice and Tribunals Council and at Council of Europe and European Ombudsman events.

Chris Gill is a Lecturer in Administrative Justice at Queen Margaret University. Prior to joining the university, he worked for the office of the Scottish Public Services Ombudsman (SPSO) in a variety of roles including investigation, quality assurance, case reviews and training. Chris is a socio-legal researcher whose current research focuses on the impact of ombudsman schemes and other administrative justice institutions. He has conducted published research on the impact of the SPSO, the future of UK ombudsman schemes and the role of ombudsman schemes in relation to improving practice. He is currently conducting a large scale interview study investigating the influence of courts, tribunals and ombudsmen on local authority decision making in England. Chris teaches on a range of Ombudsman Association approved courses and has worked with ombudsman organisations across the UK and internationally. He is programme leader for the MSc in Dispute Resolution.

The Report team would like to thank the Economic Affairs Scrutiny Panel of the States of Jersey for commissioning this work.

For further information about this Report, please contact Carolyn Hirst at chirst@gmu.ac.uk

Consumer Insight Centre
Queen Margaret University
14 February 2014



Executive summary

This report provides a desk-based legal sense check of the *Financial Services Ombudsman (Jersey) Law 201* (hereinafter referred to as 'the draft Law) and assesses the draft Law against the Ombudsman Association's criteria for ombudsman schemes and the European Union's ADR standards. The report's conclusion (re-stated in section 5 below) is that the key criteria common to the OA and the EU criteria are met by the draft Law wholly or in part:

- **Independence:** the draft Law is explicit in its proposed governance arrangements, funding mechanism, appointments procedure and complaint-handling process on the need for operational independence from both the financial services industry and government, and provides a structure that in large measure achieves that ambition.
- **Fairness:** the draft Law incorporates a series of checks and balances that ensures impartiality, promotes principles of fairness and a stated priority of ensuring access for those most likely to need the services of the scheme (separate advice obtained by the Panel confirms compatibility with human rights expectations).
- **Effectiveness:** the practical arrangements for running the scheme inaugurated by the draft Law are realistic, clear and straightforward, and create a scheme that has appropriate scope, discretion, powers of discovery, investigation, remedy and enforcement.
- **Openness and transparency:** the draft Law provides for, and does not otherwise impede, appropriate dissemination of the purpose of the scheme, its methods of working, its policies and the key outcomes of its investigative work that should be taken account of by the legislature, the financial industry, service-users and other stakeholders, including relevant regulatory agencies.
- **Accountability:** the draft Law establishes a credible chain of accountability, including for operational matters, decision-making and the stewardship of funds, through the Principal Ombudsman, the other designated Ombudsmen and the Board to the Minister.

More generally, it is our opinion that the draft Law is fit for purpose, judged against the criteria for an eligible complaint; the complaint process, awards, appeals and powers; independence from industry and government; territorial scope; and funding mechanism.



However, we note a number of areas where it might be possible to strengthen or clarify the provisions in the draft Law in order to ensure exemplary practice and we have set these out below for the attention of the EASP:

- Consideration should be given to whether the terms in which the ability of the Minister to give specific and general direction, and to issue guidance, to the OFSO sufficiently safeguard the independence of the Ombudsman from the Government.
- Consideration should be given to strengthening the independence of the OFSO by requiring that the Board Member appointed as Chairman is not a financial services provider or person whose business involves representing financial services providers.
- Consideration should be given to the merit of having a mechanism for the annual report of the OFSO to also be scrutinised by a relevant oversight Panel or Committee.
- Consideration should be given to whether the possibility of charging complainants, even in exceptional circumstances, creates a potential barrier to access for some, including those with the least access to independent resources. Our view, as supported by the work of Thomas and Frizon (2012), is that any fee could be a barrier to more vulnerable consumers. Also, the accessibility principle set out in the OA *Principles of Good Complaints Handling* refers to “A service that is free, open and available to all who need it”.
- Consideration should be given to whether there is sufficient obligation on the part of the financial services industry to publicise to service users the possibility of referral of complaints to the OFSO.
- Consideration should be given to whether the OFSO should have more explicit power directly to shape the design of internal complaints procedures adopted by the financial services industry. Multiple steps or stages in a complaint handling procedure can potentially serve as a ‘channel barrier’ with the potential for detrimental effects on consumers. An example of more explicit legislative power can be found in Section 119 of The Public Services Reform (Scotland) Act 2010¹ which has given the Scottish Public Services Ombudsman the power to require listed authorities to adopt a model complaint handling procedure.

¹ http://www.legislation.gov.uk/asp/2010/8/pdfs/asp_20100008_en.pdf



- Consideration should be given to whether the form of referral of a complaint should be described explicitly, and in particular, whether electronic means and other alternatives to complaints in writing are to be permissible.
- Consideration should be given to whether suitable arrangements exist to provide systemic, as well as individual, remedy. The EASP may want to have regard to recent amendments (through the UK Financial Services Act 2010²) to Section 404 of the UK Financial Services and Markets Act 2000, relating to large-scale consumer redress schemes.
- Consideration should be given to the possibility of including a mechanism for dissatisfied consumers to complain about the service provided by the OFSO (as opposed to complaining about judgement relating to the decision). Some UK and Irish Ombudsmen have procedures for dealing with service complaints, including the appointment of an external person to review complaints of this nature. For example, the UK Financial Ombudsman Service has an Independent Assessor, with explicit terms of reference³, who takes an independent view on whether a reasonable service has been provided in the investigation into a complaint about a financial business and publishes an annual report on the service complaints received⁴.

² <http://www.legislation.gov.uk/ukpga/2000/8/contents>

³ http://www.financial-ombudsman.org.uk/about/IA_terms_reference.htm#tr

⁴ <http://www.financial-ombudsman.org.uk/publications/directors-report-2012-13.pdf#page=78>



1. Introduction

- 1.1 The Economic Affairs Scrutiny Panel (EASP) of the States of Jersey is reviewing the *Financial Services Ombudsman (Jersey) Law 201-*. The Consumer Insight Centre at Queen Margaret University has been appointed to provide advice in respect of this draft legislation and the subsequent Regulations.
- 1.2 The purpose of this Report is to fulfil the requirement of the EASP for a desk-based legal 'sense check' assessment of the draft *Financial Services Ombudsman (Jersey) Law 201-* in order to determine whether it is fit for purpose.
- 1.3 Within this Report we will refer to the *Financial Services Ombudsman (Jersey) Law 201-* as 'the draft Law' and the Office of the Financial Service Ombudsman as 'the OFSO'.
- 1.4 This Report will have particular regard to assessing whether the proposed OFSO is compatible with the criteria established by the British and Irish Ombudsman Association (now known as the Ombudsman Association or OA) and relevant European Union Alternative Dispute Resolution (ADR) Standards.
- 1.5 This Report will also examine key elements of the draft Law to assess whether it is fit for purpose, including: the scope of the scheme (i.e. the financial services it would cover); the criteria for an eligible complaint; the complaint process, awards, appeals and powers; its independence from industry and government; its territorial scope; and the funding mechanism).⁵
- 1.6 Beyond these specific requirements, the Report is informed more generally, and by way of background context, by recent research and commentary on ombudsmen in the UK, including, for example:
 - the current inquiries into complaints about public services and about the future of the UK Parliamentary Ombudsman and Health Service Ombudsman for England;
 - the research into the future of Ombudsman Schemes conducted by Queen Margaret University in 2013 (Gill et al, 2013);
 - the external evaluation of the Local Government Ombudsman for England carried out 2013 (Thomas et al, 2013);

⁵ This Report is an assessment of the draft Law against the stated criteria and does not constitute legal advice or provide a definitive opinion on the accuracy and clarity of the drafting of the legislation.



- the current legislative review of the Northern Ireland Ombudsman being taken forward by the Northern Ireland Assembly;
 - the 2012 report on design criteria for the redress of grievances compiled by Varda Bondy and Andrew Le Sueur on behalf of the Public Law Project (Bondy and Le Sueur 2012); and
 - the practical guide on resolving disputes between consumers and financial businesses: fundamentals for a Financial Ombudsman, published by the World Bank (Thomas and Frizon 2012).
- 1.7 Consideration has also been given to comparable financial ombudsman legislation in the UK (Financial Services and Markets Act 2000), Ireland (Central Bank and Financial Services Authority of Ireland Bank 2004) and the Isle of Man (Financial Services Act 2008).
- 1.8 The report begins by setting out the relevant OA and EU criteria before assessing each part of the draft Law in turn. In terms of the report's structure, it summarises the key features of each part of the draft Law and provides a commentary against the relevant criteria. Where we consider that there are issues the EASP may want to give further thought to, we have highlighted these in grey boxes as 'areas for further enquiry by the EASP'. These areas are brought together in the concluding section of the report and have been summarised in the executive summary.



2. Relevant Criteria/Standards

Ombudsman Association (OA)

- 2.1 The OA (formerly BIOA) has five key Criteria for the Recognition of Ombudsman Offices (Annex 1 contains these Criteria in full):
- Independence
 - Fairness
 - Effectiveness
 - Openness and transparency
 - Accountability
- 2.2 The OA also expects that ombudsmen will comply with its *Principles of Good Governance*⁶ and operate in accordance with its *Principles of Good Complaint Handling*⁷

EU ADR Standards

- 2.3 The EU ADR Directive includes the following relevant standards:
- Article 5: Access to alternative dispute resolution
 - Article 6: Expertise and impartiality
 - Article 7: Transparency
 - Article 8: Effectiveness
 - Article 9: Fairness
 - Article 13: Co-operation between ADR entities on the resolution of cross-border disputes
 - Article 14: Co-operation between ADR entities and national authorities enforcing Union legislation on consumer protection
 - Article 15: Designation of competent authorities
 - Article 16: Information to be notified to competent authorities by ADR entities
 - Article 17: Role of the competent authorities and of the Commission
 - Article 18: Penalties
- 2.4 We have also had regard to the Administrative Justice and Tribunal Council's Principles of Administrative Justice, in particular Principle 1, which states that "A

⁶ http://www.ombudsmanassociation.org/docs/BIOA_GovernanceGuideOct09.pdf

⁷ <http://www.ombudsmanassociation.org/docs/BIOAGoodComplaintHandling.pdf>



good administrative justice system should make users and their needs central, treating them with fairness and respect at all times” (AJTC 2010, p.7).



3. Commentary on the compatibility of the draft Law with OA criteria and EU ADR Directive

Establishment and Functions of OFSO and Schedule 1 (Constitution of OFSO) and Schedule 2 (Finances of OFSO)

- 3.1 We have commented on the sections of the draft Law which deal with the Establishment and Functions of OFSO (Part 2) and Schedule 1 (Constitution of OFSO) and Schedule 2 (Finances of OFSO). The key criteria we have used to assess these sections are those of Independence, Accountability and Effectiveness.
- 3.2 Key features of the draft Law are:
- The draft Law establishes the OFSO as a body corporate with a Board of between 3 and 5 members including a Chairman.
 - The Board has an explicit duty to protect the independence of the OFSO, including the independence of the Ombudsmen, from the States and the Minister.
 - The Minister appoints the Chairman, having sought the views of the Appointments Commission, for a period coinciding with the Chairman's appointment as a board member.
 - The Chairman designates a Deputy Chairman.
 - The Minister appoints board members, subsequent to nomination by the Chairman.
 - Both Minister and Chairman must seek the views of the Appointments Commission before appointing and nominating, respectively, Board members.
 - The majority of Board members shall not be, or be representatives of, financial service providers.
 - The Minister will otherwise have regard to the desirability of securing on the Board a balance of financial services providers, users of financial services, those with experience of providing similar services, and those with experience of managing bodies similar to the OFSO.
 - Board members will be remunerated by the OFSO.
 - The term for board members will be between 3-5 years.



- o The Minister has right of termination of appointment of a Board member after consultation with the Chairman on grounds of absence, bankruptcy, incapacity or other inability or unfitness to discharge functions of a Board member.
- o The Board appoints the Principal Ombudsman, for at least 5 years, on other terms explicitly to promote the Ombudsman's independence.
- o The Board must also designate a sufficient number of persons as Ombudsmen, also on terms explicitly to promote the independence of the ombudsmen.
- o Funding is primarily by fee and levy of financial services providers, but in such a way that it preserves the independence of the OFSO.

Commentary on Independence

3.3 Our comments on Independence in relation to the Establishment and Functions of OFSO and Schedule 1 (Constitution of OFSO) and Schedule 2 (Finances of OFSO) are:

- 3.3.1 The Principal Ombudsman and other Ombudsmen are visibly and demonstrably independent of those they have power to investigate, to the extent that they are appointed, remunerated and subject to termination by the Board, which is in turn appointed by the Minister (OA 1(a)) (EU Art. 6 (1) and (2)).
- 3.3.2 Nevertheless, the Board will contain members who are financial services providers and so liable in that capacity to investigation by the OFSO. To that extent the independence of the Principal Ombudsman and other Ombudsmen is not absolute.
- 3.3.3 Such providers will, however, be in a minority and in any event subject to the duty to promote independence. Such minority representation of those subject to investigation on the appointing body is not excluded by OA, provided appointment by majority decision is permitted (OA 1(b)) (EU Art.6 (2)). We note that the draft Law does not specify whether the Chairman of the Board may be a financial services provider and we suggest that this possibility should be explicitly excluded.
- 3.3.4 The 5-year term of office is sufficient not to undermine independence and is compliant with OA's minimum stipulated term, albeit some UK ombudsmen (e.g. PHSO, LGO) enjoy a term of 7 years. Although there is no provision for renewal, this is not an explicit requirement of OA (OA 1(c)).



- 3.3.5 The grounds for termination are explicit, limited and acceptable, in essence being for incapacity, misconduct or other good cause (OA 1(e)) (EU Art.6 (1)(b)).
- 3.3.6 The independence of OFSO from Minister and States is explicitly guaranteed, at least in principle. However, the Minister has the power to give specific and general directions to the OFSO, as well as guidance, albeit with the proviso that such directions or guidance will not compromise the independence of the OFSO.
- 3.3.7 The funding mechanism (combination of levy on financial service providers and case fees) ensures operational independence for the OFSO and remuneration of the Ombudsman (OA 1 (d)).

Areas for further enquiry by the EASP:

- Consideration should be given to whether the terms in which the ability of the Minister to give specific and general direction, and to issue guidance, to the OFSO sufficiently safeguard the independence of the Ombudsman from the Government.
- Consideration should be given to strengthening the independence of the OFSO by requiring that the Board Member appointed as Chairman is not a financial services provider or person whose business involves representing financial services providers.

Commentary on Accountability

- 3.4 Our comments on Accountability in relation to the Establishment and Functions of the OFSO and Schedule 1 (Constitution of OFSO) and Schedule 2 (Finances of OFSO) are:
- 3.4.1 The Ombudsman has sole power to decide whether or not a complaint is within jurisdiction and to determine it, subject only to review by the courts or other form of appeal specified by law (OA 5(a)).
- 3.4.2 The Ombudsman is accountable to the Board. The Board in turn has responsibility for safeguarding the independence of the Ombudsman and reports annually to the Minister, sending a copy of the report to the States and submitting audited annual accounts both to Minister and States.
- 3.4.3 These provisions effectively ensure that the OFSO is seen as responsible and accountable for its decisions and actions, including the stewardship of



funds, and that it publishes an annual report and accounts (OA 5(a) and (b)) (EU Art. 7(2)). We note, however, that the draft law currently does not require the submission of a report to an oversight panel or Committee of the Assembly; this may assist in providing political accountability, as well as providing an opportunity for the work of the OFSO to inform the legislature.

Area for further enquiry by the EASP:

- Consideration should be given to the merit of having a mechanism for the annual report of the OFSO to also be scrutinised by a relevant oversight Panel or Committee of the Assembly.

Commentary on Effectiveness

3.5 Our comments on Effectiveness in relation to the Establishment and Functions of the OFSO and Schedule 1 (Constitution of OFSO) and Schedule 2 (Finances of OFSO) are:

3.5.1 The funding and other arrangements ensure that there will be adequate staffing and funding to enable effective and expeditious investigation and resolution (OA 3(a))

Referral of Complaints to the OFSO and Schedule 3 (Relevant Pension Business) and Schedule 4 (Relevant Credit Business)

3.6 We have commented on the sections of the draft Law which deal with the Referral of Complaints to the OFSO (Part 3) and Schedule 3 (Relevant Pension Business) and Schedule 4 (Relevant Credit Business). The key criteria we have used to assess these sections are those of Accessibility and Effectiveness.

3.7 Key features of the draft Law:

- The scheme is available to clients of, transactors of business with, and recipients of advice from financial providers who are individuals, microenterprises, charities, trusts, foundations and others, including as specified by the Minister by Order on recommendation of the OFSO.
- The desirability of ensuring that the services of the OFSO are primarily available to persons likely to lack resources, expertise or other relevant characteristics is explicit.



- The Principal Ombudsman must keep under review guidance on the closeness of relationship with a provider that entails eligibility to complain, albeit certain categories of relationship must be included in any event.
- No connection with Jersey is required other than as established by the specified business relationship.
- The relevant financial services businesses are listed, subject to express exemption by the Minister.
- Liability passes to successor businesses and transferees.
- A general time-limit of 6 years applies or 2 years from date the complainant could reasonably have become aware of the offending act; an abbreviated time limit of 6 months from completion of internal complaint procedure; the respondent must have reasonable opportunity of no more than 3 months to deal with complaint by way of that internal procedure, subject to the OFSO's discretion to dispense with internal procedure.

Commentary on Accessibility

- 3.8 Our comments on Accessibility in relation to the Referral of Complaints to OFSO and Schedule 3 (Relevant Pension Business) and Schedule 4 (Relevant Credit Business) are:
- 3.8.1 Complainants have direct access to the OFSO, subject only to the acceptable condition that complainants should first exhaust internal complaints procedures, in turn subject to the OFSO discretionary waiver (OA 3(c)(ii) and 3(d)(i)).
- 3.8.2 Access is normally free of charge to complainants, although there is the possibility of costs penalty for vexatious or frivolous complainants (OA 3(c)(iv) (EU Art.8(c)). There is, however, no explicit obligation on providers to publicise the existence of the OFSO. We query whether the presence of penalty costs (even in limited circumstances) conflicts with the principles of accessibility. We also raise a question around how the existence of the OFSO will be publicised to consumers.
- 3.8.3 The described access arrangements as described are straightforward for complainants to understand and use (OA 3(c)(iii)) (EU Art. 8(a)).



Areas for further enquiry by the EASP:

- Consideration should be given to whether the possibility of charging complainants, even in exceptional circumstances, creates a potential barrier to access for some, including those with the least access to independent resources. Our view, as supported by the work of Thomas and Frizon (2012), is that any fee could be a barrier to more vulnerable consumers. Also, the accessibility principle set out in the OA Principles of Good Complaints Handling refers to “A service that is free, open and available to all who need it”.
- Consideration should be given to whether there is sufficient obligation on the part of the financial services industry to publicise to service users the possibility of referral of complaints to the OFSO.

3.9 Our comments on Effectiveness in relation to the Referral of Complaints to the OFSO and Schedule 3 (Relevant Pension Business) and Schedule 4 (Relevant Credit Business) are:

3.9.1 The requirements create the implicit expectation that those subject to investigation should have accessible and fair internal complaints procedures, although there is no explicit provision to that effect. The ability of the OFSO to waive prior recourse to internal procedures entails a measure of oversight and at least indirect censure if such procedures are deemed inadequate on grounds of inaccessibility and unfairness (OA 3(b)).

Area for further enquiry by the EASP:

- Consideration should be given to whether the OFSO should have more explicit power directly to shape the design of internal complaints procedures adopted by the financial services industry. Multiple steps or stages in a complaint handling procedure can potentially serve as a ‘channel barrier’ with the potential for detrimental effects on consumers. An example of more explicit legislative power can be found in Section 119 of The Public Services Reform (Scotland) Act 2010 which has given the Scottish Public Services Ombudsman the power to require listed authorities to adopt a model complaint handling procedure.



3.10 We have commented on the sections of the draft Law which deal with the Handling of Complaints by the OFSO (Part 4). The key criteria we have used to assess these sections are those of Fairness, Effectiveness, Transparency and Effective, Proportionate and Dissuasive Penalties.

3.11 Key features of the draft Law:

- The form of complaint referral is not prescribed (e.g. in writing).
- There is the possibility of rejection, by an Ombudsman or other staff member but not board member, on grounds of 'compelling reasons', including no prospect of success, subject matter dealt with elsewhere, availability of a more appropriate forum, subject matter inappropriate for the OFSO investigation, or investigation inappropriate for other reasons.
- A policy on rejection, delegation and review is to be published.
- There is wide discretion in relation to complaint handling if a complaint is accepted, either by way of mediation, referral, determination or resolution by other means.
- There is a duty to ensure 'just handling' of complaints and avoidance of formality or legal representation.
- Discretion on whether to investigate in public or in private, with or without a hearing, with scope for expression of provisional view and dissemination of preliminary report for comment.
- Disclosure of evidence to both parties, except in exceptional circumstances.
- Fair and reasonable determination of complaint reserved to an Ombudsman, but other functions, such as investigation, mediation or taking of a provisional view can be delegated to staff, free from interference except by Ombudsman or other delegated person.
- Remedy to include monetary award plus interest (recoverable as a debt, including with assistance in recovery by the OFSO) for financial loss, material distress or inconvenience, and any other loss or damage (subject to limit of £150,000 or maximum ordered by Minister, albeit with scope for ombudsman to recommend but not require payment of higher sum), and direction of steps to be taken in relation to the complainant, with possibility of further monetary award for failure to comply with directions.
- Discretion to require redaction of complainant's identity, including on request by the complainant, or exceptionally any other information, in case of disclosure to persons other than the parties.



- Discretion to award costs, plus interest, recoverable as debt, against either party on grounds of causing additional cost or expenses by reason of improper or unreasonable conduct or unreasonable delay.
- Binding determinations by ombudsman, with written reasons, subject to acceptance by complainant within specified time-limit.
- No appeal against a binding determination, and no legal proceedings in respect of a matter which has attracted a binding determination certified as such by an ombudsman.

Area for further enquiry by the EASP:

- Consideration should be given to whether the form of referral of a complaint should be described explicitly, and in particular, whether electronic means and other alternatives to complaints in writing are to be permissible.

Commentary on Fairness

3.12 Our comments on Fairness in relation to the Handling of Complaints by the OFSO are:

3.12.1 There is explicit requirement for the just handling of complaints and for compliance with the conventional ombudsman standard of fair and reasonable decision-making. Cognisance of relevant law and good practice is an explicit requirement (OA 2(a) and (b)) (EU Art.9).

3.12.2 There is explicit obligation to notify the parties of the outcome and to give reasons, including in the event of a decision not to investigate (OA 2(c) and (d)).

Commentary on Effectiveness

3.13 Our comments on Effectiveness in relation to the Handling of Complaints by the OFSO are:

3.13.1 The process is free of charge to complainants, except in exceptional and specified circumstances (OA 3(c)(iv)) (EU Art.8(c)).

3.13.2 The OFSO has wide discretion on whether to accept a complaint or not, and of what process to adopt thereafter, including on matters of disclosure of information (OA 1(f) and 3(d)(i)).

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3.13.3 Decisions and their implementation are binding (OA 3(e)(i)).

Commentary on Transparency

3.14 Our comments on Transparency in relation to the Handling of Complaints by the OFSO are:

3.14.1 There is an explicit obligation to publish policy on key aspects of the process (OA 4(a))(EU Art.7).

Commentary on Effective, Persuasive and Proportionate Penalties

3.15 Our comments on Effective, Persuasive and Proportionate Penalties in relation to the Handling of Complaints by the OFSO are:

3.15.1 The penalties are clearly described and comprehensive, albeit light on systemic coverage as opposed to individual rectification. They are sufficiently flexible to enable the OFSO to impose a proportionate penalty in any given case (EU Art.18).

Area for further enquiry by the EASP:

- Consideration should be given to whether suitable arrangements exist to provide systemic, as well as individual, remedy. The EASP may want to have regard to recent amendments (through the UK Financial Services Act 2010¹) to Section 404 of the UK Financial Services and Markets Act 2000, relating to large-scale consumer redress schemes.

Information

3.16 We have commented on the sections of the draft Law which deal with Information (Part 5). The key criteria we have used to assess these sections are those of Effectiveness and Transparency.

3.17 Key features of the draft Law are:

- Ability to require production of documents, other information under threat of fine, subject to rules of legal professional privilege.
- Ability to require the Jersey Financial Services Commission to provide information relevant to exercise of levy on financial services providers.
- Ability to summarise and collect information for public dissemination, subject to anonymity requirements.

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- Ability to share information across borders and domestically in respect of investigation of a suspected offence or other proceedings.
- Ability to share general information, including about procedures, the OFSO's experience of complaints, about determinations by the OFSO, and about general patterns of complaints.

Commentary on Effectiveness

3.13 Our comments on Effectiveness in relation to the Handling of Complaints by the OFSO are:

3.13.1 The ability to share information about procedures makes it more likely that those procedures will be straightforward for complainants to use and understand (OA 3(c)(iii)).

3.13.2 The ability to require production of documents and other information meets the need to require all relevant information from those subject to investigation (OA 3(d)(ii)).

Commentary on Transparency

3.14 Our comments on Transparency in relation to the Handling of Complaints by the OFSO are:

3.14.1 The ability to publish anonymised reports and to publish general information about the scheme enables compliance with reasonable expectations of openness and transparency (OA 4(a)-(c)).

Miscellaneous and Final

3.15 We have commented on the sections of the draft Law which deal with Miscellaneous and Final (Part 6). The key criterion we have used to assess this section is that of Co-operation.

3.16 Key features of the draft Law

- Duty of co-operation between the OFSO and the Jersey Financial Services Commission, including by way of published memorandum of understanding.



Commentary on Co-operation

3.17 Our comments on Co-operation in relation to the Miscellaneous and Final section of the draft Law are:

3.17.1 The duty ensures the necessary degree of co-operation between the OFSO and the Jersey Financial Services Commission (EU Art.14).



4. Commentary on fitness for purpose more generally

4.1 Scope of the scheme

4.1.1 Art. 9 creates a very broad scope in principle, subject only to narrowing by ministerial order after consultation.

4.1.2 The scope includes business regulated by the Jersey Financial Services Commission (banking, alternative investment funds; trust companies and insurance business) as well as pension business and credit business, as defined in Schedules 3 and 4, and other business ancillary to the main business categories (e.g. banking extends to making loans, operating ATMs not just to the main business of deposit-taking).

4.2 The criteria for an eligible complaint

4.2.1 The focus in Art.8 is on individual clients of Jersey-based financial providers as eligible complainants, with extension to certain other small enterprises.

4.2.2 The purpose of that focus is to ensure access for those most likely to need the service in the absence of other resources or expertise that would make alternatives sources of redress realistic options.

4.2.3 There is also provision for third-party complaints in specified circumstances.

4.3 The complaint process, awards, appeals and powers

4.3.1 The process described in Art. 11 and in Part 4 includes appropriate time-limits, the need for prior recourse to internal complaint-handling forums where appropriate, wide and largely unfettered discretion for the OFSO to accept or reject complaints, and in cases of acceptance to determine the best path to resolution.

4.3.2 Art.16 establishes the basis for making monetary awards, with appropriate cap and enforcement mechanisms, supplemented by Art.17 on the award of costs in exceptional circumstances.

4.3.3 Art.18 requires written decision and reasons in cases of determination by ombudsman.

4.3.4 The powers of discovery of documents and other information are strong, as set out in Art.19.



4.3.5 The OFSO is in effect established as the final port of call and so the prospect of challenge to an OFSO decision other than by way of judicial review is discounted at Art.18(6). We note, however, that the draft Law does not make provision for the OFSO dealing with complaints about the service it has provided to businesses and consumers.

Area for further enquiry by the EASP:

- Consideration should be given to the possibility of including a mechanism for dissatisfied consumers to complain about the service provided by the OFSO (as opposed to complaining about judgement relating to the decision). Some UK and Irish Ombudsmen have procedures for dealing with service complaints, including the appointment of an external person to review complaints of this nature. For example, the UK Financial Ombudsman Service has an Independent Assessor, with explicit terms of reference, who takes an independent view on whether a reasonable service has been provided in the investigation into a complaint about a financial business and publishes an annual report on the service complaints received .

4.4 Independence from industry and government

4.4.1 Part 2 and Schedules 1 and 2 provide comprehensive coverage of the need for financial and operational independence from both industry service providers and from government.

4.4.2 These provisions, including the establishment of a non-executive Board, are largely successful in achieving that aim, although there is some scope for limitation of independence by the ability of the Minister to issue directions to the OFSO.

4.5 Territorial scope

4.5.1 Art.6 allows for separate operation of the scheme in Jersey alone or for joint operation in Jersey and Guernsey, with appropriate flexibility to accommodate a variety of different collaborative options.

4.6 Funding mechanism

4.6.1 Schedule 2 creates broad powers for the States to regulate for funding by a mixture of case-fee and levy on the industry in such a way that the OFSO retains effective independence from its funders.

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5. Summary of conclusions on the compatibility of the draft Law with OA and EU criteria and on fitness for purpose

5.1 Gill et al (2013), in their research on the future of ombudsman schemes, identified eight ways in which existing ombudsman schemes may need to shift their practices in order to respond to challenges, and capitalise on the many opportunities, they face. In summary, these involve ombudsman schemes becoming more:

- informal in terms of process;
- timely in the resolution of complaints;
- focused on oral/interactive communication with consumers;
- available to consumers online;
- visible and accessible to consumers;
- proactive and influential in the policy environment;
- strategic in influencing service provision; and
- integrated rather than sectoral.

5.2 It is our view that legislation to establish the OFSO is on track to meet many of these identified practices and that the draft Law to conforms well to the criteria established by OA and the EU ADR Standards, and represents a modern and forward-looking response to the need to establish a new ombudsman scheme in Jersey in the financial services sector.

5.3 In particular, the key criteria common to the OA and the EU criteria are met by the draft Law wholly or in part:

- **Independence:** the draft Law is explicit in its proposed governance arrangements, funding mechanism, appointments procedure and complaint-handling process on the need for operational independence from both the financial services industry and government, and provides a structure that in large measure achieves that ambition.
- **Fairness:** the draft Law incorporates a series of checks and balances that ensures impartiality, promotes principles of fairness and a stated priority of ensuring access for those most likely to need the services of the scheme (separate advice obtained by the Panel confirms compatibility with human rights expectations).
- **Effectiveness:** the practical arrangements for running the scheme inaugurated by the draft Law are realistic, clear and straightforward, and create a scheme that



has appropriate scope, discretion, powers of discovery, investigation, remedy and enforcement.

- **Openness and transparency:** the draft Law provides for, and does not otherwise impede, appropriate dissemination of the purpose of the scheme, its methods of working, its policies and the key outcomes of its investigative work that should be taken account of by the legislature, the financial industry, service-users and other stakeholders, including relevant regulatory agencies.
- **Accountability:** the draft Law establishes a credible chain of accountability, including for operational matters, decision-making and the stewardship of funds, through the Principal Ombudsman, the other designated Ombudsmen and the Board to the Minister.

5.4 More generally, it is our opinion that the draft Law is fit for purpose, judged against the criteria for an eligible complaint; the complaint process, awards, appeals and powers; independence from industry and government; territorial scope; and funding mechanism.

5.5 However, we note a number of areas where it might be possible to strengthen or clarify the provisions in the draft Law in order to ensure exemplary practice and have set these out below for the attention of the EASP:

5.5.1 Consideration should be given to whether the terms in which the ability of the Minister to give specific and general direction, and to issue guidance, to the OFSO sufficiently safeguard the independence of the Ombudsman from the Government.

5.5.2 Consideration should be given to strengthening the independence of the OFSO by requiring that the Board Member appointed as Chairman is not a financial services provider or person whose business involves representing financial services providers.

5.5.3 Consideration should be given to the merit of having a mechanism for the annual report of the OFSO to also be scrutinised by a relevant oversight Panel or Committee.

5.5.4 Consideration should be given to whether the possibility of charging complainants, even in exceptional circumstances, creates a potential barrier to access for some, including those with the least access to independent resources. Our view, as supported by the work of Thomas and Frizon (2012), is that any fee could be a barrier to more vulnerable consumers. Also, the accessibility principle set out in the OA *Principles of*

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Good Complaints Handling refers to “A service that is free, open and available to all who need it”.

- 5.5.5 Consideration should be given to whether there is sufficient obligation on the part of the financial services industry to publicise to service users the possibility of referral of complaints to the OFSO.
- 5.5.6 Consideration should be given to whether the OFSO should have more explicit power directly to shape the design of internal complaints procedures adopted by the financial services industry. Multiple steps or stages in a complaint handling procedure can potentially serve as a ‘channel barrier’ with the potential for detrimental effects on consumers. An example of more explicit legislative power can be found in Section 119 of The Public Services Reform (Scotland) Act 2010⁸ which has given the Scottish Public Services Ombudsman the power to require listed authorities to adopt a model complaint handling procedure.
- 5.5.7 Consideration should be given to whether the form of referral of a complaint should be described explicitly, and in particular, whether electronic means and other alternatives to complaints in writing are to be permissible.
- 5.5.8 Consideration should be given to whether suitable arrangements exist to provide systemic, as well as individual, remedy. The EASP may want to have regard to recent amendments (through the UK Financial Services Act 2010⁹) to Section 404 of the UK Financial Services and Markets Act 2000, relating to large-scale consumer redress schemes.
- 5.5.9 Consideration should be given to the possibility of including a mechanism for dissatisfied consumers to complain about the service provided by the OFSO (as opposed to complaining about judgement relating to the decision). Some UK and Irish Ombudsmen have procedures for dealing with service complaints, including the appointment of an external person to review complaints of this nature. For example, the UK Financial Ombudsman Service has an Independent Assessor, with explicit terms of reference¹⁰, who takes an independent view on whether a reasonable service has been provided in the investigation into a complaint about a

⁸ http://www.legislation.gov.uk/asp/2010/8/pdfs/asp_20100008_en.pdf

⁹ <http://www.legislation.gov.uk/ukpga/2000/8/contents>

¹⁰ http://www.financial-ombudsman.org.uk/about/IA_terms_reference.htm#tr



financial business and publishes an annual report on the service complaints received¹¹.

- 5.6 Finally, we would suggest to the EASP that it might be helpful to carry out a legislative comparison exercise (in order to identify and explore any significant differences in approach or emphasis) by setting the relevant clauses of the draft Law side by side with legislation relating to the establishment of the UK Financial Ombudsman Service, the Isle of Man Financial Services Ombudsman Scheme and the Irish Financial Services Ombudsman's Bureau. It would also be useful to have a detailed look at the finance industry responses to the 2011 consultation by the Economic Development Department on the proposed structure and funding of the proposed OFSO. We would be pleased to carry out both of these suggested activities if we are advising the EASP in the second phase of its work.

¹¹ <http://www.financial-ombudsman.org.uk/publications/directors-report-2012-13.pdf#page=78>).



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Annex 1 Ombudsman Association (formerly BIOA) Guide to principles of good governance

**OMBUDSMAN ASSOCIATION
SCHEDULE 1 TO THE RULES
CRITERIA FOR THE RECOGNITION OF OMBUDSMAN OFFICES**
<http://www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf>

A. GUIDING PRINCIPLES

The Association will afford recognition as Ombudsman Offices to those bodies whose core role is to investigate and resolve, determine or make recommendations with regard to complaints against those whom the Ombudsman is empowered to investigate; and which meet the detailed Criteria set out below.

The Association will only give recognition to Ombudsman's Offices whose primary role is to handle complaints by individuals about maladministration, unfair treatment, poor service or other inequitable conduct by those subject to investigation.

The Association recognises and values the wide range of Ombudsmen schemes in the public and private sectors and the variations in their constitution, jurisdiction, powers and accountability. The Criteria for Recognition of Ombudsman's Offices have been drawn up with that in mind and the Association will apply the Criteria with sufficient flexibility to encompass those variations.

The Association expects users of Ombudsman schemes in the public and private sectors to have comprehensive and coherent coverage and clear and simple access to Ombudsmen and will take account of this when considering applications for membership of the Association.

In the case of private sector schemes, the Association is opposed to the fragmentation of redress schemes within a single industry. The Association prefers there to be a single Ombudsman within an industry. Where more than one scheme is established within an industry, the Association will normally only afford recognition to the scheme or schemes to which a substantial number of firms in the industry belong.

Criteria

The Association's Criteria for the Recognition of Ombudsman Offices are set out in detail in Part B below. The five key Criteria are:

- Independence
- Fairness
- Effectiveness
- Openness and transparency

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- Accountability

Governance

The Association expects Ombudsman Members to comply with its Principles of Good Governance (and any amendments thereto).

The Association expects Ombudsman Members to operate in accordance with its Principles of Good Complaint Handling (and any amendments thereto).

Use of the title of 'Ombudsman'

The title of 'Ombudsman' should not be used unless the Association's Criteria for Recognition of Ombudsman's Offices are met. The Association will not admit to Membership in any category organisations or individuals which use the title of 'Ombudsman' but do not meet the Association's Criteria.

The Association also hopes that, in the interests of users, organisations which meet the Criteria for Recognition of Ombudsman's Offices will use the title of 'Ombudsman' unless there is a good reason not to do so.

Recognition

The decision on whether a scheme is recognised as meeting the Criteria will be made at the discretion of the Executive Committee or by a General Meeting of the Association on the recommendation of the Validation Committee.

Review

The Validation Committee will also, when requested to do so by the Executive Committee or a General Meeting of the Association, review whether existing Ombudsman Members continue to meet the Criteria for Recognition and advise the Executive Committee accordingly.

B. CRITERIA

1. Independence

(a) The Ombudsman must be visibly and demonstrably independent from those whom the Ombudsman has the power to investigate.

(b) The persons who appoint the Ombudsman should be independent of those subject to investigation by the Ombudsman. This does not exclude minority representation of those subject to investigation on the appointing body, provided that the body is entitled to appoint by majority decision.

(c) The term of office should be of sufficient duration not to undermine independence. The appointment should be for a minimum of five years. It may be subject to renewal but the renewal process should not undermine or compromise the office holder's independence.



(d) The remuneration of the Ombudsman should not be subject to suspension or reduction by those subject to investigation, but this does not exclude their minority representation on the body authorised to determine it.

(e) The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated, although the nature of the grounds may vary from scheme to scheme. Those subject to investigation by the Ombudsman should not be entitled to exercise the power to terminate the Ombudsman's appointment, but this does not exclude their minority representation on the body which is authorised to terminate.

(f) The Ombudsman alone (or someone acting on his or her authority) must have the power to decide whether or not a complaint is within the Ombudsman's jurisdiction. If it is, the Ombudsman (or someone acting on his or her authority) must have the power to determine it. The Ombudsman's determination should be final and should not be able to be overturned other than by the courts or an appeal route provided for by law.

(g) Unless otherwise determined by statute the Ombudsman should be accountable to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the Ombudsman.

2. Fairness

(a) The Ombudsman should be impartial, proceed fairly and act in accordance with the principles of natural justice.

(b) The Ombudsman should make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.

(c) In all cases where it is decided not to accept the complaint for investigation, the Ombudsman should notify the complainant of that decision and the reasons for it.

(d) In all cases investigated, the Ombudsman should notify the parties concerned of the decision and the reasons for it.

3. Effectiveness

(a) The office of the Ombudsman must be adequately staffed and funded, either by those subject to investigation or from public funds, so that complaints can be effectively and expeditiously investigated and resolved.

(b) The Ombudsman should expect those subject to investigation to have accessible and fair internal complaints procedures.

(c) Accessibility



(i) The right to complain to the Ombudsman should be adequately publicised by those subject to investigation.

(ii) Complainants should normally have direct access to the Ombudsman scheme. If, exceptionally, this is prevented by law, the Ombudsman should seek to minimise the adverse impact on complainants.

(iii) The Ombudsman's procedures should be straightforward for complainants to understand and use.

(iv) Those complaining to the Ombudsman should be entitled to do so free of charge.

(d) Powers and procedures

The Ombudsman should:

(i) Be entitled to investigate any complaint made to the Ombudsman which is within the Ombudsman's jurisdiction without the need for any prior consent of the person or body against whom the complaint is made. This does not preclude a requirement that before the Ombudsman commences an investigation, the complainant should first have exhausted the internal complaints procedures of the person or body being investigated.

(ii) Save as otherwise provided by law, have the right to require all relevant information, documents and other materials from those subject to investigation.

(iii) Be entitled but not obliged, to disclose to the complainant or to the person being investigated such information, documents and other materials as shall have been obtained by the Ombudsman from the other of them unless there shall be some special reason for not making such disclosure, for example, where sensitive information is involved or disclosure would be a breach of the law.

(e) Implementation of Decisions

Either

(i) Those investigated should be bound by the decisions or recommendations of the Ombudsman; or

(ii) There should be a reasonable expectation that the Ombudsman's decisions or recommendations will be complied with. In all those cases where they are not complied with, the Ombudsman should have the power to publicise, or require the publication of such non-compliance at the expense of those investigated.

4. Openness and transparency

(a) The Ombudsman's Office should ensure openness and transparency so that members of the public and other stakeholders know why the scheme exists, what it does and what to



expect from it; and can have confidence in the decision making and management processes of the scheme.

(b) Information in the public domain should include a clear explanation of an Ombudsman scheme's legal constitution, governance and funding arrangements.

(c) The jurisdiction, the powers and the method of appointment of the Ombudsman should be matters of public knowledge.

(d) The Ombudsman should be entitled in the Annual Report, or elsewhere, to publish anonymised reports of investigations.

5. Accountability

(a) The Ombudsman, staff members and members of any governing body should be seen to be responsible and accountable for their decisions and actions, including the stewardship of funds.

(b) The Ombudsman should publish an Annual Report and Annual Accounts.



The QMU report judged that the draft Law is fit for purpose, judged against the criteria for an eligible complaint; the complaint process, awards, appeals and powers; independence from industry and government; territorial scope; and funding mechanism. The areas it raised were ones where it thought 'it might be possible to strengthen or clarify the provisions in the draft Law in order to ensure exemplary practice'.

5.5.1 Consideration should be given to whether the terms in which the ability of the Minister to give specific and general direction, and to issue guidance, to the OFSO sufficiently safeguard the independence of the Ombudsman from the Government.

The areas in which the Minister to give specific and general direction and/or guidance were carefully considered in order to protect the Ombudsman's independence and are clearly delineated to restricted areas relating to OFSO's finances and the provision of general information about OFSO's services. The power to give directions/guidance is also specifically constrained by sub-paragraph (6), which provides for the Minister to consult OFSO first and requires the Minister to be satisfied that the direction/guidance is necessary in the public interest and will not compromise the independence of OFSO.

5.5.2 Consideration should be given to strengthening the independence of the OFSO by requiring that the Board Member appointed as Chairman is not a financial services provider or person whose business involves representing financial services providers.

Realistically this would not happen in practice as it would create the perception of conflict and therefore potentially undermine confidence in the impartiality of OFSO. It was not considered a realistic enough scenario to be captured within the Primary Law. However, Para 1(6)(b) of Schedule 1 could be amended if necessary.

5.5.3 Consideration should be given to the merit of having a mechanism for the annual report of the OFSO to also be scrutinised by a relevant oversight Panel or Committee.

This is more than adequately covered by both the Comptroller & Auditor-General and the States Assembly (covered in Schedule 2).

5.5.4 Consideration should be given to whether the possibility of charging complainants, even in exceptional circumstances, creates a potential barrier to access for some, including those with the least access to independent resources. Our view, as supported by the work of Thomas and Frizon (2012), is that any fee could be a barrier to more vulnerable consumers. Also, the accessibility principle set out in the OA Principles of Good Complaints Handling refers to "A service that is free, open and available to all who need it".

The only possibility for complainants to be charged is for the Ombudsman to award costs payable to OFSO if the complainant caused OFSO additional costs through 'improper conduct or unreasonable delay'. This is a high-level test (e.g. forging material) and could not be invoked in normal circumstances. Furthermore, this is a common provision within similar ombudsman schemes. If it is found that a complainant has fraudulently deceived the Ombudsman through the manufacture of documentation, who is to cover the cost?

5.5.5 Consideration should be given to whether there is sufficient obligation on the part of the financial services industry to publicise to service users the possibility of referral of complaints to the OFSO.

We remain in discussion with the Jersey Financial Services Commission (JFSC) to achieve this through the Memoranda of Understanding (MOU) between OFSO and the JFSC.

5.5.6 Consideration should be given to whether the OFSO should have more explicit power directly to shape the design of internal complaints procedures adopted by the financial services industry. Multiple steps or stages in a complaint handling procedure can potentially serve as a 'channel barrier' with the potential for detrimental effects on consumers. An example of more explicit legislative power can be found in Section 119 of The Public Services Reform (Scotland) Act 20101 which has given the Scottish Public Services Ombudsman the power to require listed authorities to adopt a model complaint handling procedure.

This is an important area and a useful observation. A key objective throughout our work developing the Financial Services Ombudsman has been to keep the roles of the Jersey Financial Services Commission as regulator and OFSO clearly distinct. We consider the setting of requirements on financial services providers as regards internal complaints procedures to be the role of the regulator. As such, we are working with the Commission (and other relevant bodies such as Trading Standards) to develop or improve requirements in this area to support the effective functioning and accessibility of OFSO. Note the requirement in the draft Financial Services Ombudsman (Jersey) Law 201- for the Commission and OFSO to co-operate (Article 23). Note also that under Article 11 (7)(b) of the draft Financial Services Ombudsman (Jersey) Law 201- the OFSO can publish a model internal complaints procedure.

5.5.7 Consideration should be given to whether the form of referral of a complaint should be described explicitly, and in particular, whether electronic means and other alternatives to complaints in writing are to be permissible.

This level of detail would not be expected to be outlined in the Primary Law. Consequently, it will be covered in guidance material produced by OFSO.

5.5.8 Consideration should be given to whether suitable arrangements exist to provide systemic, as well as individual, remedy. The EASP may want to have regard to recent amendments (through the UK Financial Services Act 20102) to Section 404 of the UK Financial Services and Markets Act 2000, relating to large-scale consumer redress schemes.

The proposal on which we consulted, and which was previously laid before the States, was to create OFSO as an alternative to the courts for the resolution of individual complaints against providers of financial services. If OFSO perceives any systemic issues from the individual cases that it handles, it will (of course) report these to the JFSC. Action on systemic issues is a matter for the conduct regulator (JFSC) and not for the ombudsman (OSFO). The section 404 power in the UK to which the QMU report refers is a power given to the conduct regulator (the Financial Conduct Authority) and not to the ombudsman (the Financial Ombudsman Service). The regulatory powers of JFSC are outside the scope of this piece of legislation.

5.5.9 Consideration should be given to the possibility of including a mechanism for dissatisfied consumers to complain about the service provided by the OFSO (as opposed to complaining about judgement relating to the decision). Some UK and Irish Ombudsmen have procedures for dealing with service complaints, including the appointment of an external person to review complaints of this nature. For example, the UK Financial Ombudsman Service has an Independent Assessor, with explicit terms of reference³, who takes an independent view on whether a reasonable service has been provided in the investigation into a complaint about a financial business and publishes an annual report on the service complaints received.

Specific provision has not been made within the Primary Law mainly due to the relative size of the scheme. These issues can be raised with the chair of the OFSO board. In the unlikely event that the workload necessitates it, the OFSO board can delegate the function to an Independent Assessor – as the board of the Financial Ombudsman Service has done in the UK, where the workload is much, much greater. It was not thought necessary to include this requirement in the UK legislation.

States of Jersey
States Assembly



États de Jersey
Assemblée des États

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Our Ref: 515.24(5)

6th March 2014

Economic Affairs Scrutiny Panel

Financial Services Ombudsman Review

Dear Senator Maclean,

As you'll be aware, the Economic Affairs Scrutiny Panel is conducting a two phase review into the introduction of a Financial Ombudsman Scheme in Jersey. Phase 1 relates to the draft Financial Services Ombudsman (Jersey) Law to which this letter refers. Phase 2 will relate to the Regulations of the Financial Services Ombudsman (Jersey) Law which the Panel is yet to receive, and the exemption Order received in draft this week.

The Panel received the final version of the aforementioned Law on Monday 21 January 2014 and subsequently began Phase 1 of the Review. Due to the technical nature of the draft Law expert opinion was sought, which was received on Friday 14 February, and highlighted 8 areas for recommended improvements to the legislation. Having sought your response to these 8 recommendations, the Panel is satisfied with the draft legislation save for three areas. These are outlined below and we would request a response from you to the points raised and in particular to the recommendations that are made ahead of determining our final Comments and approach to the forthcoming debate:

• **Chairperson**

Consideration should be given to strengthening the independence of the OFSO by requiring that the Board Member appointed as Chairman is not a financial services provider or person whose business involves representing financial services providers.

The Panel believes it is fundamentally important to ensure the impartiality of the service. Although there is not a suggestion that the person appointed as Chairman could be influenced by the entities who fall under the remit of the Law it is important that the independence of the OFSO could not be called into question.

The Panel is keen to avoid any perception concerns, or issues of 'Agency Capture' which is the notion that it can be difficult for persons to divorce themselves from previous involvements or if you have been in position for a while, becoming influenced and taking on the views of the industry. The Panel is also mindful of the implications of small jurisdictions whereby decisions which appear 'normal' are in reality unfair but culturally have been accepted.

A Chairman outside of the Financial Industry could safeguard against such issues.

You stated in your response to this recommendation that paragraph 1(6)(b) of Schedule 1 could be amended to reflect the above. **The Panel is concerned that no such amendment to the draft Law has been lodged and recommends that you bring forward the appropriate amendment.**

• **Charging complainants**

Consideration should be given to whether the possibility of charging complainants, even in exceptional circumstances, creates a potential barrier to access for some, including those with the least access to independent resources.

At the very core of an Ombudsman Service in accordance with the OA Principles of Good Complaints Handling is 'A service that is free, open and available to all that need it'. Currently the draft Legislation provides a vehicle for the Ombudsman to charge complainants. Your Department has referred to the UK Financial Services and Markets Act 2000 which makes a similar provision, however, the UK Financial Ombudsman Service in practice makes no charge to a complainant regardless of circumstances. The proposed law effectively deviates from this best practice and keeps the door open for the ability to charge complainants.

In short the 'award' clause is contrary to the spirit (if not the letter) of the free access principle since it creates the risk of a complainant (perhaps quite innocently, through what is deemed to be delay or inappropriate conduct) incurring a financial penalty as a result of engaging with the complaint process and **will** create a barrier.

The Panel understands your intention to avoid vexatious, fraudulent and other irrelevant claims however the Panel believes that rather than deterring persons likely to make such claims it will in fact both undermine the spirit of the service and act as barrier to innocent claimants.

The Panel is also concerned that financial institutions may seek to complain to the ombudsman that although such clause exists the ombudsman is 'failing' to act upon it. This has the potential of increasing the ombudsman's workload, not just in addressing those concerns but by requiring additional work to investigate claims which could fall under this area of the legislation, making a determination and award of costs in its own favour and consequently pursuing the same.

The Panel has concluded that concerns about vexatious and other inappropriate use of the Ombudsman could be better dealt with in the dispute resolution rules under which the Ombudsman service operates. In this regard we would refer to the DISP 3 Rules in the FCA Handbook which gives direction under which the ombudsman may dismiss a complaint:

- 3.4: (2) the complaint is frivolous or vexatious
- 3.4: (17) other compelling reasons why it is inappropriate for the complaint to be dealt with under the Financial Ombudsman Service
- 3.5.9 (4) dismiss a complaint if a complainant fails to supply requested information
- 3.5.14 if a complainant fails to comply with a time limit the Ombudsman may: (2) dismiss the complaint.

The Panel recommends that the ability of the Ombudsman to charge a complainant is removed from the draft Law.

• **Systemic Remedy**

Consideration should be given to whether suitable arrangements exist to provide systemic, as well as individual, remedy.

You'll be aware that systemic breaches relate to a collection of incidents, this could be within an individual organisation, a sector of the industry or the industry as a whole, as in the case of PPI mis-selling. Under UK law the Financial Conduct Authority (previously the FSA) has the authority to decide if a ruling in relation to large scale issues is required and subsequently prescribes the remedy, with powers delegated to the Financial Ombudsman Service to enforce, as necessary

Presently **there is no organisation within Jersey with the authority to make any provision with regard to such systemic issues**, including the JFSC. Consequently a gap exists within Jersey legislation.

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You indicated that 'discussions' are continuing with the JFSC, however, no indication of the stage, content or timescale for these discussions has been provided.

The Panel would recommend that you move to close this gap through the appropriate legislation.

The Panel is mindful that consideration of costs is an important factor, particularly for the financial industry who will be funding the Ombudsman service. It would therefore seem prudent to provide such authority to an appropriate body, thereby assisting the financial sector to avoid a case levy each time a complaint was made via the Ombudsman which would have fallen into the systemic category. Such authority would provide the Financial Sector with a specific remedy to follow which is not open to challenge by either the financial organisation or the complainant. This approach may also reduce the workload of the ombudsman who would otherwise be required to deal with each complainant in relation to one specific issue, many times over.

In relation to individual organisations the UK Financial Ombudsman has the authority to make recommendations on best practice to organisations, and bring to their attention recurring issues. The Panel believes there is further benefit with such authority, this being that the Ombudsman is fully independent and able to draw upon the direct interaction and experience of financial entities and complainants, to bring about positive change, by making recommendations to assist the financial institution (or sector) adjust such practices which ultimately assists the financial organisation and guards against future complaints and also reduces cases going to the OFSO.

The Panel requests your assurance that the equivalent authority regarding recurring issues is afforded to the Financial Ombudsman Service through the draft Law.

As an aside, it should be noted that residents of Jersey are NOT routinely able to seek assistance via the UK in relation to systemic breaches, such as PPI. This will only be possible in cases where the product was sold to the resident in the UK or their contract is with a UK provider. PPI sold locally and/or where the contract is with a Jersey financial provider does not fall into this criterion. The Panel would draw your attention to the amendment to the Financial Market and Services Act, which brought into effect the rules in relation to PPI mis-selling, which was enacted in July 2010 and suggests that Jersey residents may find themselves unable to progress PPI claims through the Ombudsman as these will pre-date the 1 January 2010 cut off in the draft Legislation.

We look forward to receiving your response in due course.

Yours sincerely



Deputy S G Luce
Chairman
Economic Affairs Scrutiny Panel

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10th March 2014

Your Ref: 515.24(5)

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 Chairman
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Dear Chairman

Economic Affairs Scrutiny Panel Financial Services Ombudsman Review

Thank you for providing a copy of the 'Report from Queen Margaret University on the Draft Law'. I am pleased to read that your adviser's find that the '*draft Law is fit for purpose, judged against the criteria for an eligible complaint; the complaint process, awards, appeals and powers; independence from industry and government; territorial scope; and funding mechanism*'. I note that your advisors comments are limited to a number of areas where it '*might be possible to strengthen or clarify the provisions in the draft Law in order to ensure exemplary practice*'. I further note the Panel only have three remaining areas requiring comment:

Chairperson

The purpose of the Board of the Office of the Financial Services Ombudsman (OFSO) is to protect the independence of OFSO, in particular the independence of the Ombudsman, from, amongst others, financial service providers. I am satisfied there are substantial provisions within the Law to protect the Ombudsman from the Board and, as the Board has no role or influence over the determination of cases, I feel that making an explicit reference to the Chairman not being a '*financial services provider or person whose business involves representing financial services providers*' within the Primary Law is unnecessary as I consider there are sufficient safeguards in place within the legislation as drafted. In addition to seeking the views of the Appointments Commission, I must notify the States Assembly, prior to appointing a Chairman.

Charging complainants

The OFSO is very much intended to be 'a service that is free, open and available to all that need it'. Nothing in the legislation contradicts this important over-riding principle. I am satisfied that the OFSO needs to retain the capacity *in extremis* to recoup its costs

from a complainant where the actions of the complainant are due to *'improper conduct or unreasonable delay'*. I do not consider this to be unreasonable as the 'test' for its usage is extremely high to the extent that, as is the case in the UK, I would not expect to see it used. As your letter notes, in the UK the Financial Services and Markets Act (2000) gives the capacity for the Financial Ombudsman Scheme (FOS) to recoup costs but in practice the FSA makes no use of this. I would see the interaction of law and the actual practice of OFSO working in exactly the same way.

I agree with the Panel's observation that inappropriate use of the Ombudsman Scheme by complainants should be dealt with by the Ombudsman. This is covered in Article 22 of the *Financial Services Ombudsman (Jersey) Law 201-* whereby the Ombudsman can reject complaints for reasons such as they have no prospect of success due to being frivolous or vexatious. The ability for the Ombudsman to recover its costs in the event that a complainant wilfully misled or unduly delayed an investigation instigated by them will not form part of this policy as the circumstances in which they would be invoked are so unlikely and the measure is a last resort.

For the avoidance of doubt, the capacity for OFSO to recover its costs from a complainant only applies upon determination of a complaint. Therefore the measures outlined in Article 12 under which the Ombudsman can reject complaints have already been satisfied.

Systemic remedy

The regulatory powers of the Jersey Financial Services Commission are outside the scope of the Ombudsman legislation and it is impossible to examine the issue of systemic remedy in isolation. However, I am happy to continue dialogue with the Jersey Financial Services Commission as any action on systemic issues is a matter for the conduct regulator and not for the Ombudsman.

I am content that the Ombudsman has a variety of mechanisms at his / her disposal for addressing recurrent issues within both individual financial service providers and across sectors of the industry ranging from case fees through recommendations to the issuing of best practice guidance.

Once again I would like to thank the Panel for its important work to date on the Financial Services Ombudsman (Jersey) Law 201-. I will ensure you are provided with a copy of the proposed subordinate legislation prior to the initial consultation exercise this month.

Yours sincerely



Senator Alan Maclean
Minister for Economic Development

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18th March 2014

Economic Affairs Scrutiny Panel

Jersey Financial Ombudsman Review

Dear Senator Maclean,

Thank you for meeting with the Panel on Thursday afternoon.

We are reassured by your assertions during this meeting where we have agreed:

Chairperson

The Minister and the Jersey Appointments Commission will ensure that no Chairperson can be appointed which will call into question the independence of the Financial Ombudsman Scheme. Further reassurance was provided with the confirmation that, as per P205/2009, States Members do have the appropriate opportunity to make objections to the proposed Chairperson, should they so wish.

Charging

Complainants will not be charged under any circumstances and this section of the draft Legislation will be removed.

Systemic Issues

Economic Development will continue the ongoing discussions with the JFSC to ensure the appropriate authorities are put in place.

Yours sincerely

Deputy S G Luce
Chairman
Economic Affairs Scrutiny Panel