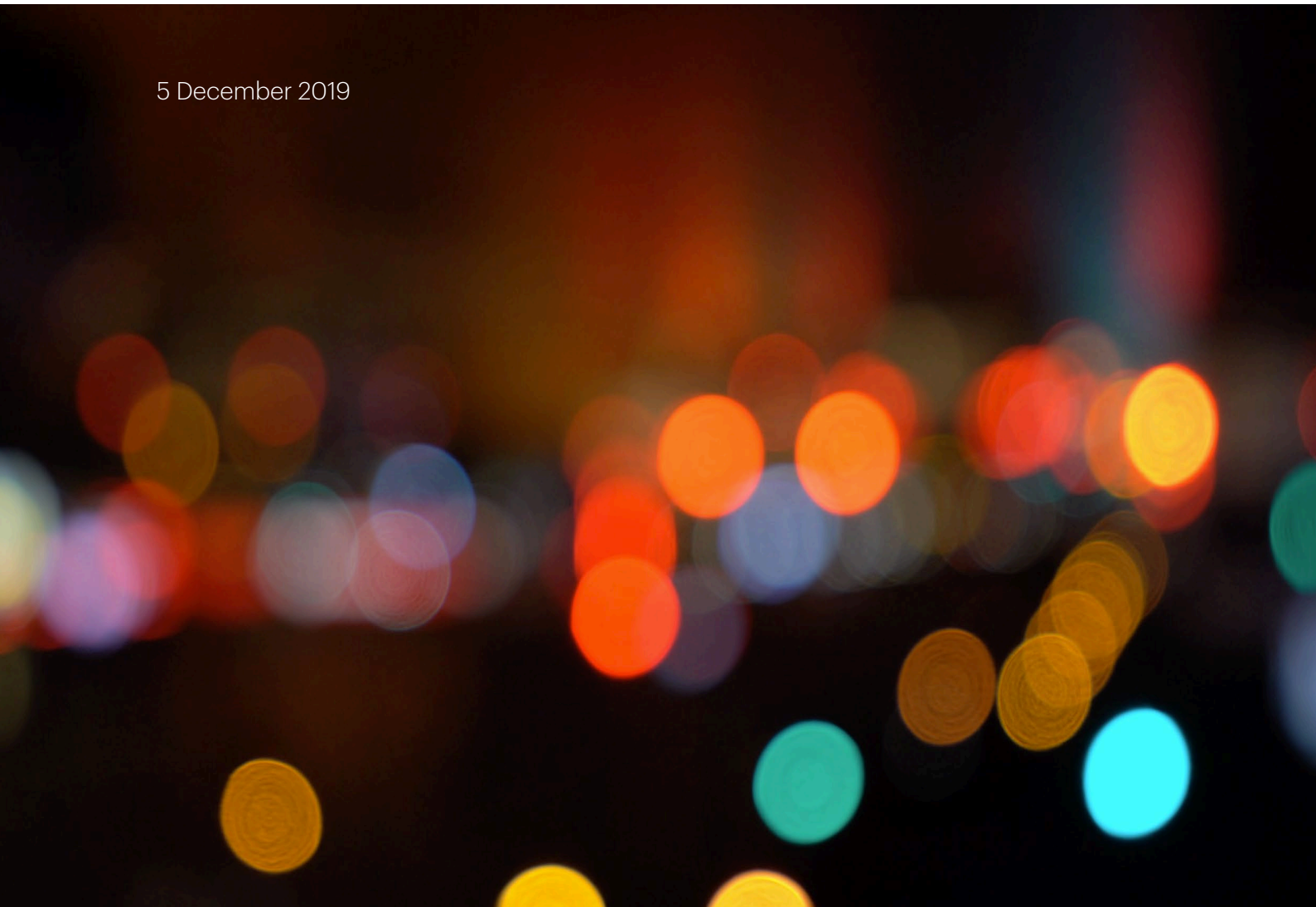


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BANKING OMBUDSMAN SCHEME INDEPENDENT REVIEW

5 December 2019



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1. INTRODUCTION

The ombudsman concept is a proven and highly-regarded dispute resolution method, with a history founded in Sweden's parliamentary ombudsman in the early 1800s. The ombudsman model has been widely adopted. Its hallmarks are accessibility, independence, fairness, accountability, efficiency and effectiveness. The ombudsman service is free to consumers and external to the providers being complained of, in this case, banks. Many provide a reporting function so that improvements can be made.

Increasingly ombudsmen have both a preventative and resolution role.

In New Zealand we have 3 ombudsman schemes: the Parliamentary Ombudsman, the Banking Ombudsman and the Insurance and Financial Services Ombudsman. In April 2019 a Bill, the Ombudsmen (Protection of Name) Amendment Bill, was introduced into Parliament to ensure that only certain schemes could be named as an ombudsman scheme.

The Banking Ombudsman Scheme, (BOS) was established 27 years ago as an independent service to help consumers to resolve problems with their banks.

In that time, it has helped over 80,000 consumers and facilitated the compensation of nearly \$40 million.¹ It is also an approved dispute resolution scheme under [the Financial Service Providers \(Registration and Dispute Resolution\) Act 2008](#) (the Act).

BOS is one of 4 financial dispute resolution schemes and covers all retail banks in New Zealand which collectively provide banking services to most New Zealanders.

As an approved scheme under the Act, BOS is required to commission an independent review and provide a report to the Minister of Commerce and Consumer Affairs every 5 years. The BOS participation agreement also requires such a review.

Deborah Hart of Deborah Hart Consulting was engaged to conduct the review in July 2019.

Deborah Hart is the former executive director of the Arbitrators' and Mediators' Institute of New Zealand and is an Associate of that organisation. She is a panel member of the Human Rights Review Tribunal and a member of the Institute of Directors. She is also the board chair of the Holocaust Centre of New Zealand.

2. EXECUTIVE SUMMARY

It is the finding of this review that BOS meets the legislative requirements for an approved scheme. It complies with its terms of reference and is meeting its own strategic objectives.

BOS is a highly effective dispute resolution scheme. It operates with integrity and professionalism. It is outward-looking and proactive in finding ways to both prevent disputes and resolve them. It has also

been nimble in responding to changing conditions. Particularly notable is a significantly increased workload, whilst also markedly improving its prevention function.

This report makes recommendations for improvements, but this does not diminish what is an excellent service that is a credit to the BOS Board, Ombudsman and her staff.

3. RECOMMENDATIONS

Accessibility

1. BOS should develop strategies to increase its visibility to consumers through banks.
2. BOS should consider formalising its current process and procedure as regards vulnerability with an assessment tool to check for vulnerability, policies and procedures.
3. BOS should consider creating and marketing more videos about its service, more advocacy tools such as instructional videos and more in-person clinics around the country that can be attended by mentoring groups and individuals.
4. BOS should consider providing, or supporting, additional advocacy services, which would require extra funding, if not provided directly by the banks to their clients.
5. BOS should investigate more ways to work with the 3 other financial dispute resolution schemes. This may include sharing resources and rationalising tools and procedures. It may also include a single point of entry for all financial complaints with referrals to each scheme and / or a single complaint mechanism, either as a replacement or in addition to existing systems.

Independence

6. BOS should consider ways in which it can diminish any perception of bias including an amendment to clause 13 of the Participation Agreement to provide a right to invite consumer representatives, such as Grey Power, Salvation Army, Citizens Advice and FINCAP to attend the BOS AGM.

Fairness

7. BOS should advise complainants that all the information they share is held by BOS and is made available to investigators and the Ombudsman should the case need a determination.

Accountability

8. BOS should consult with stakeholders with a view to amending its Terms of Reference to formalise current practice and give it explicit powers to investigate systemic issues and work with banks to ensure that these are appropriately addressed and if not appropriately addressed, reported to the regulator.
9. BOS should explore an MOU with RBNZ, the Commerce Commission or an arrangement with RBNZ, FMA, the Commerce Commission and BOS.

Effectiveness

10. BOS should amend its scheme documents to include the complaints dashboard.
11. Complaints dashboard information should be available publicly and not in the form of aggregated data.
12. In the next budget rounds, BOS should consider, at a minimum, modest rises in fees to ensure nil balance budget and the retention of reserves.
13. BOS should consider how it can better embrace diversity, particularly as regards recruitment policies and procedures.
14. BOS should revisit the 2014 independent review recommendation to amend its terms of reference to give BOS the power to make non-monetary awards.

4. REVIEW APPROACH

4.1 Terms of reference

BOS has been reviewed against its [strategic plan 2017 - 2020](#) and the principles listed in section 52(2) of the Act, namely accessibility, independence, fairness, accountability, efficiency and effectiveness.

The review's main objective is to examine and make recommendations about, how effectively and efficiently the scheme operates to achieve its strategic objectives, particularly to resolve and prevent complaints as set out in the strategic plan.

The review identifies improvements to help BOS to achieve its aim of being a modern ombudsman scheme that makes a valued contribution to a fair banking sector. In so doing, it revisits the last review and comments on implementation of recommendations then made.

4.2 Process

In late July 2019, Deborah Hart Consulting was engaged to undertake this review. An [issues paper](#) was developed which was released publicly and included on the BOS website, on 19 August 2019.

The issues paper invited both written and oral submissions. 6 written submissions were received, as well as a number of emails.

Those contacted and interviewed included banks, consumer groups, government institutions and individuals, and the Australian Financial Complaints Authority, (AFCA).

A desktop review of key documents was also conducted.

A random sample of 60 closed files were provided by BOS. They represented 30 cases each of complaints and disputes. The list was chosen by assigning a random number (the function in excel is '=RAND()') to each case and then sorting the list highest to lowest based on the random number – for each complaints and disputes. The top 60 were provided in a list. From this list a representative sample of both the complaint and disputes files were selected. The complainants in these files were contacted and those who agreed, were interviewed.

A random sample of files were reviewed regarding complaints against BOS.

A list of those interviewed and documents reviewed is included in this report.

A draft report was issued to the Banking Ombudsman for comment on 13 November 2019, prior to the release of the final review.

4.3 Glossary

Levels of dispute

Below are terms used by BOS in dealing with consumers. For consistency they are used throughout this report as defined by BOS.

Dispute: Any case that has been considered by the bank, but there has been no resolution and the customer has requested BOS investigates.

Complaint: Any expression of dissatisfaction about a bank which requires a response.

Enquiry: Any other contact, such as a general query about banking.

Australian Financial Complaints Authority is referred to as AFCA

Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is referred to as the Australian Royal Commission

Banking Ombudsman Scheme is referred to as BOS

Customer is referred to as anyone who obtains a service from a bank. They may have made an enquiry of BOS or lodged a complaint.

Complainant is referred to as the person making the complaint

Facilitation is a dispute resolution technique in which BOS seeks to find an agreed resolution between a complainant and a bank

Financial Markets Authority is referred to as FMA

Memorandum of Understanding is referred to as MOU

Reserve Bank of New Zealand is referred to as RBNZ

Terms of reference are referred to as TOR

[Financial Service Providers \(Registration and Dispute Resolution\) Act 2008](#) is referred to as the Act.

5. BACKGROUND

5.1 The New Zealand context

The last year has seen heightened interest in the banking sector. Banking conduct and culture was highlighted in the wake of the Australian Royal Commission.

What followed were questions of whether the undesirable conduct discovered in Australia had also developed in New Zealand and inevitably there was an impact on levels of trust in the banking sector here.

A higher degree of scrutiny ensued. In 2018 the Finance and Expenditure Select Committee investigated conduct and culture in the banking sector and BOS provided its views to the Select Committee. In late 2018 and early 2019 the FMA and the RBNZ published two joint reviews into the conduct and culture of banks and life insurers.

In September 2019 a new financial conducts regime was announced by the Government, to be followed by legislation which will require banks, as well as insurers and other financial services providers, to put systems in place to ensure they treat customers fairly.

The banking sector has now turned its attention to culture and conduct. Fairness in approach is important, not just legalistic adherence to procedures.

It comes at a time when there is complexity in financial products and an abundance of financial products and services, but at the same time there is an increase in the use of technology and an associated decrease in face-to-face interactions with banks.

Unsurprisingly, there has been an increasing caseload for BOS – a 21% rise in a year, with online complaints alone rising by 43%. The Banking Ombudsman, Nicola Sladden, reports that the cases are more complex as well. This is consistent with what banks report. The issue of scamming has also dramatically risen with an 118% rise in these cases.

The last independent review in 2014 noted an increase in complaint volumes driven primarily at that time by regulatory amendments, the global financial crisis and the Canterbury earthquakes.

“The goalposts have shifted in the last 12 months.”

Banker

“Complaints data can be the canary in the coalmine.”

Rob Everett, Chief Executive, FMA

It seems then that volatility and increasing workloads might have become the norm.

It is with this background that this review of BOS has carried out.

5.2 How BOS works

The BOS aim is to both facilitate a resolution of consumer complaints and prevent these complaints in the banking industry.

Complainants contact BOS and someone from the Early Resolution Service will deal with them. This person, in the main, stays with the complainant as the point of contact with BOS. The case may be classified as an enquiry or a complaint. An enquiry can often be dealt with quite quickly – sometimes immediately. Complaints are typically facilitated using an evaluative model, with suggestions being made as to how the case could be settled with both the bank involved and the complainant.

Cases that are unable to be resolved are escalated to the dispute stage. An investigator, usually new to the case, is appointed. More information is often sought and the investigator may continue to try and facilitate a resolution. If it cannot be resolved, BOS provides the parties with notice of the likely decision and an opportunity to provide comments or further information. The Ombudsman or the Deputy Ombudsman (Resolution), under a delegated authority, then considers comments or further information provided in response, and makes a final decision.

Most of the BOS caseload comprises enquiries and complaints, rather than disputes.

In addition to handling enquiries, complaints and disputes, prevention has become a significant work-stream for BOS – it is half of its strategic purpose. This is consistent with what it means to be a modern ombudsman scheme.

6. ACCESSIBILITY

6.1 Principle

BOS makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.

6.2 Findings

BOS is widely promoted and its service is free to consumers. It is easy to use for most, but not all consumers. However, not all banks promote BOS adequately.

Whilst BOS has made good advances to make its service widely available, more can be done to make BOS accessible to vulnerable consumers.

6.3 Awareness of BOS

BOS is the best known of the financial dispute resolution schemes, by a considerable margin.²

Some of the notable initiatives to ensure the visibility of BOS include:

- A media strategy that has resulted in significant publicity about BOS, and the services it has to offer.
- BOS worked on the 2018 Fraud Awareness Week and produced [television commercials](#) regarding email scam awareness.
- Regional hui were held in 2018, in concert with consumer groups to enable a connection with vulnerable and disadvantaged consumers.
- Refreshing the BOS website including the use of plain English.

6.4 Information about BOS

BOS has put emphasis on a website upgrade and relaunched its website in April 2018. It is simple and easy to navigate with case notes and “quick- guides” that are user-friendly and that can assist those with banking complaints and disputes. Whilst requiring a level of literacy and comprehension, the language throughout is easy to understand. By far the most likely way customers will discover BOS is through its website.³

“We felt listened to and supported.”

Complainant

In the [participation agreement](#) that each bank signs, banks undertake to “inform customers of the details of... BOS”.⁴ BOS provides information on its service in hard and soft copies to banks so it can be provided directly to their customers. Many bank representatives advised that they readily offered and promoted BOS. Some commented that they preferred customers went to BOS early rather than get entrenched in the dispute.

However, it is disappointing that at the primary point of contact where customers should gain access to information about BOS, at their bank, complainants report that they found BOS via banks in just 10% of cases.⁵ The 2006 independent review by Sir Anand Satyand found that too little information about BOS was available via banks and he recommended that banks better publicise BOS.

It is now recommended that BOS develops strategies to increase BOS visibility in banks.

Recommendation

1. BOS should develop strategies to increase its visibility to consumers through banks.

6.5 Cases

In the 2018-2019 year, BOS dealt with 4,797 cases.⁶

The predominant way that BOS is contacted is through its 0800 number, although online / website contact is increasing.

How people contact BOS		
How received	% age of total	
	2017 - 2018	2018 - 2019
Phone call	58.01%	55.93%
Email	21.63%	17.22%
Online / website	17.55%	25.27%
Other	2.82%	1.58%

² [The New Zealand Consumer Survey 2018](#), released by MBIE, found that 51% of people knew about BOS.

³ 2018 -2019 Customer survey (complaints service)

⁴ Clause 6.1

⁵ 2018 -2019 Customer survey (complaints service)

⁶ 2018-2019 BOS Annual Report

6.6 Ease of complaints process

BOS is free to consumers and funded entirely by the banks.

It is very easy to make a complaint in writing or simply by telling the story by phone. The Early Resolution Service team members at BOS are expert at helping people to tell their stories. This is reflected in the responses of complainants when surveyed, 85% of whom said the service was easy or very easy to use.⁷

6.7 Reach of the scheme

6.7.1 Financial cap

The last independent review recommended increasing the financial cap to ensure better reach for the scheme. Last year BOS increased its financial limit from \$200K to \$350K, giving the service a greater ability to be engaged over banking disputes and thus making the service more accessible.

6.7.2 Vulnerability

Vulnerability could be defined as someone, who due to their personal circumstances, is especially susceptible to detriment. All manner of circumstances could make someone vulnerable at a time that they interact with a bank and either need an issue clarified or have a complaint to pursue.

The scope of vulnerability is a lot wider than those sectors of the community living with a disability, people from a socially disadvantaged background or the like. The thinking today is pivoting towards a belief that anyone can be vulnerable at a time in their life. It could be someone who finds themselves financially exposed because of a sudden illness, loss of a job or significant investment, or a marriage break-up for examples.

This in turn has significant repercussions for what BOS has to provide for those who are vulnerable, and how those services are provided to ensure the service is accessible to all.

“Many people tell us what makes them vulnerable once they feel comfortable that we are non-judgemental.”

Banking Ombudsman

There has been a significant amount of staff training in the area of vulnerability. It has included:

- Lifeline training designed to help staff successfully manage interactions with distressed customers. The training had a focus on recognising the signs of suicide risk, knowledge and skills regarding how to have difficult conversations and where to get support.
- St John training on mental health first aid. This training covered how to recognise signs of mental distress, how to respond and which agencies to refer to for help.
- A course on assisting consumers in vulnerable circumstances.

Staff currently look for signs someone is vulnerable - such as a hesitation to follow advice, heightened emotions or concerns about a ‘small’ amount of money. It offers a range of extra assistance if the customer can’t write, can’t articulate their complaint, are not comfortable speaking English, are worried that they have no power against a large bank because of their circumstances. Staff are aware of these issues and respectfully ask people if they suspect they may be vulnerable.

BOS is also part of an Older and Disabled Person Forum run by the NZ Bankers Association, (NZBA), that includes a number of disabled persons organisations. This helps BOS staff to better understand the challenges older and disabled people experience.

Whilst these are highly useful initiatives, there is more that could be done.

This report recommends formalising the current process and procedures with an assessment tool to check for vulnerability, as well as more guidance for staff with written policies and procedures. These could include risk factors that indicate vulnerability, welfare checks and referrals to social service agencies.

Those identified as vulnerable often need urgent assistance. Budgeting advisers told me that they were dealing with people who were typically in a crisis situation. Sometimes the pressures were as dire as being unable to provide the necessities of life. It was put to me by a number of consumer advocates that vulnerable people not only have an issue with their bank, but often a range of other, often complex issues, including financial stress.

BOS has set good timelines to deal with cases generally. The cases of those identified as vulnerable are escalated and prioritised so that their cases get expedited attention. This process needs to be formalised in written policies and procedures.

⁷ 2018 -2019 Customer survey (complaints service)

Recommendations

2. BOS should consider formalising its current process and procedure as regards vulnerability with an assessment tool to check for vulnerability, policies and procedures.

"BOS is doing a great job. It just needs to do a great job for more people."

Budget adviser

6.7.3 Accessible to whom?

Some submitters commented that BOS is used and is a practical option for only a part of the community.

The following table gives insights into the demographics of who uses BOS. It shows that men use BOS more than women. Younger people are less likely to use BOS than their numbers would suggest. Some ethnicities were more likely use BOS as well, with

Europeans being 66% of the users of BOS. Although 15% of the population identify as Maori⁸, only 9.6% of the BOS caseload is from those who identify as such. Although 7% of the population identify as from Pacific descent⁹, only 4% of the BOS caseload is from those who identify as Pacifica.

Who uses BOS – demographics

Gender	2016-17	2017-18	2018-19
Female	44%	43%	44.5%
Male	56%	57%	53.8%
Ethnicity	2016-17	2017-18	2018-19
Chinese	2.8%	3.9%	3.1%
Cook Island Māori	0.4%	0.8%	1.1%
Indian	5.2%	7.8%	3.3%
Māori	9.1%	8.1%	9.6%
NZ European	66.1%	63.3%	66.0%
Other	14.6%	14.6%	14.1%
Samoan	0.9%	0.9%	1.8%
Tongan	0.7%	0.7%	1.1%
Age	2016-17	2017-18	2018-19
0-29	9%	8%	3.11%
30-34	13%	9%	4.35%
35-39	8%	9%	7.04%
40-44	13%	11%	7.45%
45-49	9%	10%	10.14%
50-54	12%	9%	13.04%
55-59	11%	10%	12.84%
60-64	6%	8%	13.04%
65-69	8%	10%	11.18%
70-79	7%	13%	15.11%
80+	3%	4%	2.69%

⁸ Statistics NZ

⁹ Statistics NZ

I comment in this review on broadening the use of BOS particularly to those who are less likely to be able to use the service themselves and who are vulnerable. Unsurprisingly, consumer advocates and budget advisers would often talk about Maori and Pacifica as having higher levels of vulnerability and less ability to engage with BOS, than other groups. Changes to how BOS deals with vulnerability is therefore likely to have a significant impact on these ethnic groups.

Many of those who I interviewed, whether from banks or consumer groups noted that BOS is not as accessible for a range of people including those with a lower level of education, less ability to manoeuvre through the system or are simply swamped by life challenges. The recurring themes were lack of knowledge and lack of confidence, even just to pick up the phone to BOS. This raises two issues:

- Ensuring the service is available to those with limited ability to deal with it themselves.
- Advocacy services.

6.7.3.1 BOS availability to those with limited ability to deal with it themselves

BOS intends that anyone should be able to lodge a complaint and advance their case, themselves. For the majority of people, this is exactly how BOS works for them.

BOS offers special assistance for those who have limited English, deaf, hearing impaired, deaf-blind or speech impaired. Information about the complaints process is available online in 10 languages, including Maori, Samoan and Tongan, making the service more accessible to a range of New Zealanders. There are also interpreter services including a sign language option.

BOS has done much to ensure the scheme is accessible, but visual aids such as videos could be used more in a variety of ways, but especially about the way in which a complaint can be progressed. These would be of particular use to those with limited literacy and comprehension. Videos, with captioning and image tagging, much like those BOS has produced on BOS itself, could ensure that many people, of varying abilities, could access and understand the content. Videos would augment what is now available. The videos should be prominently displayed on as many channels as possible, including the BOS website, of course.

There could be separate short videos about how to advocate at the enquiry, complaint and dispute stage. Videos could be used to give people assurance about the contact BOS will make with banks – something budget advisers said caused their clients stress in thinking they could be disadvantaged just by complaining.

6.7.3.2 Advocacy services

Consumer groups routinely advised that it is difficult for some individuals to make a complaint and assistance in advocacy was necessary for both consumers and social service providers, who assist them.

There has been useful work in assisting advocacy services including:

- The BOS website has links to agencies that can help advocate.
- BOS works with organisations and government agencies. It is working with and, in some cases, leading initiatives with MBIE, MSD and Te Puni Kokiri on a Safer Credit Strategy to improve financial inclusion.
- BOS is working with FinCap to create an educational module for mentors so they can assist their clients in accessing dispute resolution schemes.

More could be done to ensure that all customers can advocate for themselves or have someone do it for them. To do this BOS needs to consider additional advocacy tools including instructional videos on advocacy, online and regular in-person clinics nation-wide that can be attended by mentoring groups and individuals.

The Early Resolution Service team at BOS are skilled at helping complainants to articulate their concerns and to guide them. I heard that often in conversations with complainants, in customer surveys and in calls recorded on the database.

“An advocacy service would be a good step forward.”

David Verry, North Harbour Budget Services

However, quite properly BOS investigators do not advocate for complainants. Their work is to provide advice, information and to facilitate discussions with banks, often via shuttle diplomacy.

An advocacy service is needed. It would make BOS more accessible generally and ensure that BOS investigators are not tempted to become advocates for a complainant, which would confuse their role and affect their independence.

The options are:

- (a) provision of an inhouse BOS advocacy service separated from the resolution and prevention teams to prevent possible conflicts of interest; or
- (b) supporting advocacy services available through an external agency, like FinCap; or
- (c) the banks providing advocacy services directly to their clients. These services would need to be established in a manner to prevent conflicts of interest, although I note no matter how well established, perceptions of bias may deter bank clients from using this type of service or fully trusting it.

The first 2 options are to be preferred because they would be trusted as independent by most consumers in a complaint situation. They would require additional funding to BOS or directly to the external agency.

Recommendations

3. BOS should consider creating and marketing more videos about its service, more advocacy tools such as instructional videos and more in-person clinics around the country that can be attended by mentoring groups and individuals.
4. BOS should consider providing, or supporting, additional advocacy services, which would require extra funding, if not provided directly by the banks to their clients.

6.7.4 Working with other dispute resolution schemes

In New Zealand there are 4 separate schemes for financial dispute resolution.¹⁰

The difficulty of separate schemes was put to me, by consumer advocates as an accessibility issue and, by banks as an efficiency issue, in particular as a cost-efficiency measure.

In Australia, AFCA launched in November 2018. It replaced three schemes.¹¹ The United Kingdom also merged its schemes into one.

To enable a customer to access BOS, social service providers advised that they needed a competent advocate. Advocates have to learn about and deal with the 4 distinct schemes - a difficult ask for often cash strapped and over-burdened social services.

There are stories of those who had to manoeuvre their way around several dispute resolution services, often at a time of stress. The Salvation Army provided the example of a family that had taken on too much debt with loans from a bank, and three other lenders, each of which had a separate dispute resolution service, making resolution of the claims problematic.

There are benefits to both a single scheme and separate schemes. However, the issue of amalgamation is outside the scope of this report and to enable a single scheme, government intervention would be required. Nonetheless it is clear that there are significant benefits to customers that single schemes offer that could presently be available to complainants – ease of entry and sharing of resources. These benefits could be implemented, whilst retaining the 4 schemes.

The most important change would be a one-stop shop at the front-end of the service – a single phone number and a single website, whilst retaining the separate BOS interface or replacing it. I note that replacing it would

need careful consideration. This could be done with an efficient referral service to each of the schemes and a single complaint mechanism to initiate the process. This alone has the capacity to simplify entering the scheme for at least some complainants, particularly those who are vulnerable, thus making BOS more accessible.

It would be an ambitious move, but it is recommended that work be done to advance this measure.

www.complaintline.org.nz provides a single website point of entry for consumers to find an appropriate dispute resolution scheme, but no triaging. BOS and other financial dispute resolution schemes are part of the website information provided. However, the service is not well-known and is limited in providing the right dispute resolver and contact details. It also incorrectly refers banking issues to both BOS and another provider – Financial Disputes Resolution. In my view, this service as currently framed is insufficient to provide a single and effective single point of entry.

Alternatively, FinCap's www.moneytalks.co.nz provides budgeting advice to consumers. Among other things, it already refers complaints to financial dispute resolution schemes. It could be strengthened to be a point of entry for financial dispute resolution schemes.

The valuable work that is being undertaken by BOS to ensure that consumer support organisations, like FinCap and the Salvation Army, know about what BOS offers, will help to ensure that consumers get to know about BOS and can access it.

Resource sharing is already happening to some extent, between the 4 financial dispute resolution schemes including:

- Quarterly meetings of the 4 schemes and informal meetings as well.
- Joint educational initiatives.
- Joint training.

There could be increased cost-benefits and consumer benefits in doing more to rationalise resources and harmonise websites, tools and procedures. BOS has begun down the track of working with other financial dispute resolution schemes and should consider what more could be achieved.

Recommendations

5. BOS should investigate more ways to work with the 3 other financial dispute resolution schemes. This may include sharing resources and rationalising tools and procedures. It may also include a single point of entry for all financial complaints with referrals to each scheme and / or a single complaint mechanism, either as a replacement or in addition to existing systems.

¹⁰ FSCL, FDRS, IFSO and BOS

¹¹ The Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT)

7. INDEPENDENCE

7.1 Principle

The decision making process and administration of BOS are independent from the banks.

7.2 Findings

Organisationally, BOS has good mechanisms to protect its independence.

BOS has been adept at steering a prudent course to work collaboratively but retain independence, both at board and operational levels.

I recommend a relatively minor, but perception-related change to open up BOS to inclusion of consumer groups.

7.3 Organisational structure

BOS was established by the banking industry. However, the structure is one of an independent corporate entity, with the shareholder being the chair of the board. The board is comprised of two bank representatives, two consumer representatives and an independent chair. It is evident that the board is skilled and ably led by its chair – Miriam Dean QC, who is engaged and skilled. The board does not involve itself in complaints decision-making. As well it is evident that operations are independent of the banks.

“Miriam Dean is involved, interested and she cares.”

Banker

However, the Constitution makes it clear that it is the banks’ scheme. There is a right to attend the Annual General Meeting by the scheme participants – the banks, together with the Chairperson of the New Zealand Bankers’ Association, the Banking Ombudsman, the Secretary and every director as well as an auditor. The only complainant representatives are those 2 board members who represent consumers, currently Sue Chetwin as Chief Executive of Consumer New Zealand and Kenina Court who was appointed by the Minister of Commerce and Consumer Affairs. However, BOS has invited consumer representatives in the past.

There was one submitter who said it was inappropriate to have bank representatives on the governing board of BOS and that this was a conflict of interest. In complainant feedback there was not infrequently an allegation of bias, based on BOS being the banks’ scheme.

This report does not find that there are any grounds to believe there is a lack of independence, but it is recommended that consideration be given to ways to diminish the perception. One way to achieve this could be to provide a right to invite consumer representatives, such as Grey Power, Salvation Army, Citizens Advice and FinCap to attend the AGM. This would require an amendment to clause 13 of the Participation Agreement.

A word of caution is required in relation to the BOS prevention role which benefits consumers but is bank-centric for good reason – they are the entities complaints are about, they are the ones to primarily learn from information provided. In working collaboratively to get better banking outcomes it could result in BOS being perceived as too close to the banks. The issue then is how to be a trusted independent service able to assist banks to perform better internally whilst ensuring independence for complainants and giving confidence externally.

BOS has used its resolution role to inform its prevention role. This is wholly appropriate. However as regards specific cases, the resolution role is separated from the prevention role. This too is appropriate. This is done to a large extent by the two deputies – one for prevention and one for resolution and their separate teams. The Ombudsman and the board span both roles. It is necessary for this to occur, to ensure the helicopter view of the whole scheme.

Most importantly, great care needs to be taken to ensure independence whilst working with the banks on prevention. BOS, at both the operational and governance levels, seems well aware of the balancing act. I believe BOS actively safeguards its independence, whilst ensuring constructive relationships with banks that enables the prevention work to occur.

Recommendation

6. BOS should consider ways in which it can diminish any perception of bias including an amendment to clause 13 of the Participation Agreement to provide a right to invite consumer representatives, such as Grey Power, Salvation Army, Citizens Advice and FinCap to attend the BOS AGM.

7.4 Funding

BOS is free to consumers and funded entirely by levies from banks. It was put to this review that this affects the independence of BOS.

BOS has to be funded somehow. It could be funded by consumers and banks jointly, but this would be a significant deterrent to those wishing to make complaints, so is an undesirable solution. The only other possible funder is the government and there seems no appetite for that fix.

Whilst it is understandable to think that funding from one source inevitably means a bias towards that source, there is no evidence of that bias at BOS.

A final note - BOS could be funded much like the majority of funding to the FMA. That is, banks would still provide the funding, but to government, which in turn would fund BOS. This could provide more arms-length independence from funders. I make no recommendation as to this but leave it to the board to assess whether there is sufficient concern for BOS long-term to warrant discussions with government.

8. FAIRNESS

8.1 Principle

The procedures and decision making of the BOS are fair and seen to be fair.

8.2 Findings

In the files I reviewed there was a consistent, thorough and principled approach, in keeping with BOS case handling procedures that are fit for purpose.

I make a recommendation regarding information collection and advice to complainants about that.

8.3 Procedures

Procedures are broadly set out in 4.2 of this review and paragraph 23 of the TOR provide the complaints-handling process.

The cases reviewed showed an adherence to the procedures. In addition, BOS advises that it has never been the subject of judicial review.

Some complainants I talked with, who had taken cases to BOS, felt that the service was unfair because the Ombudsman did not find in their favour and wanted to relitigate their case via the review. That is not the purpose for this review, of course.

Nothing I found indicated procedures were wanting or lack of adherence to those procedures. Decisions I reviewed had good reasoning and sound judgement was applied.

Whilst it is open to the Early Resolution Service and investigators to hold in person meetings to facilitate a resolution, this is rarely done. More often facilitation is by shuttle diplomacy. This has proven to be effective, but it does deny complainants and banks from hearing the other's point of view directly, which can often provide for transformational outcomes. I make no formal recommendation regarding this, but suggest that BOS could actively consider more face-to-face facilitation in appropriate cases.

BOS often gathers a lot of information about a case. Most often it is used to help with an enquiry or facilitate a settlement. But in the few cases that go on to the dispute stage and need a decision, all the information is at the disposal of the determiner.

BOS at the outset advises complainants generally about data collection and uses. But in fairness to complainants, notice at the start of the process should be given to complainants that specifically states that if their case is not able to be settled by facilitation, all the information they provide will be given to the investigator and the Ombudsman, and could be used to determine their case.

Recommendation

7. BOS should advise complainants that all the information they share is held by BOS and is made available to investigators and the Ombudsman should the case need a determination.

8.4 Natural justice

The terms of reference for BOS require:

10. In making any decision, including whether to consider, or continue considering, a complaint, the scheme must follow the rules of natural justice, which include giving both sides:
 - 10.1 Adequate notice of important steps and decisions
 - 10.2 The opportunity to provide information, express their views, and to have those views considered, before a decision
 - 10.3 The reasons for the decision in writing and within a reasonable time.
11. The scheme is not bound by legal rules of evidence when arriving at decisions.

Banks are consistently contacted after an enquiry or complaint is received. There is a constant fact-finding process that goes on with cases. The gathering of evidence is generally more intense as the case progresses through the enquiry, complaint and dispute stages. The complainant and bank are given opportunities to comment and give their side of events throughout.

Before a case is finally decided, a preliminary view is put to each party for comment or to provide further information.¹²

"Letters and cosy chats ought to be subjected to "Fair go" treatment ..."

Complainant

8.5 Decision-making

Decisions are binding on the bank if the complainant accepts those decisions within the stated deadline as being in full and final settlement of the complaint. There is a clear understanding of the seriousness of the task when it comes to making a decision.

Decisions I have reviewed are clear, impartial, respectful and well-reasoned. There are quality assurance processes which, among other things, ensure that an Ombudsman signs out any decision.

8.6 For the future

BOS is considering having one person take a file through the complaints process and if necessary, the disputes process to a determination. There are good reasons for this "cradle to grave approach", primarily consistency and enabling a complainant to tell their story only once.

However, great care needs to be taken with this approach if one person is to try to facilitate a settlement as a facilitator and then turns into the decision-maker. These kinds of "med-arb" processes have often been criticised because the determiner can hear information in the mediation / facilitation phase that could taint a final decision and this in turn lessens the likelihood that parties will be free and frank in the mediation / facilitation phase, making settlement less likely.

"Listened carefully, understood completely, acted promptly. Brilliant"

Complainant

¹² How we investigate information sheet

9. ACCOUNTABILITY

9.1 Principle

BOS publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.

9.2 Findings

There is ample public accounting of BOS both as regards cases and operations.

Complaints about BOS are dealt with appropriately.

I make recommendations to improve investigating and reporting systemic issues.

9.3 Information

BOS does not publish its final determinations, but it has case notes which contain a lot of excellent information about cases BOS has dealt with.

Although BOS is not totally adhering to the principle of accountability as regards publishing final determinations, because of the robust reporting it does, I do not find that the absence of final determination publishing diminishes the accountability of BOS. I also note that it is not a widespread industry practice to publish all final determinations.

Annual reports are published and released in hard copy and online.

9.4 External reporting

BOS has a [Systemic Issues Protocol](#)¹³. It defines systemic issues as, “concerns about banking services which have the potential to affect more than one complaint.” The protocol covers the identification and reporting of these issues. However, the BOS terms of reference do not provide a mandate for the investigation and reporting of systemic issues.

There is mandatory reporting to the regulator of a series of material complaints about a bank, pursuant to [s.67 of the Act](#).

A MOU with the FMA¹⁴ states: “BOS must disclose information to FMA if there is a series of material complaints about a financial service provider...”¹⁵ However the agreement goes on to say that BOS will only disclose information allowed by its TOR.¹⁶

It is a reasonably high bar to reach to find a series of material breaches about a single service provider. BOS has not considered it has received a series of material breaches that obliged it to report to the FMA.

BOS does provide quarterly reports to the FMA on cases received over the period so the Authority can maintain an industry-wide view of complaint trends.

The systemic issues protocol has a wide purview, wider than the disclosure required by the Act and the FMA MOU. BOS could ensure under the protocol that issues it becomes aware of, that affect more than one bank, are reported to the regulator.

The 2014 independent review recommended¹⁷ that BOS should consult with stakeholders with a view to amending its TOR to give it explicit powers to investigate systemic issues and work with Participants to ensure that these are appropriately addressed.

BOS considered that it has a voluntary code with respect to systemic issue investigations. It agreed to consult stakeholders about formalising its power to investigate systemic issues. The board concluded the current arrangement, based on co-operation and the voluntary protocol, had worked well to date, and that there was no need to formalise the scheme’s role in this regard.

“The test we ask ourselves is, “what would the Ombudsman say?””

Banker

¹³ June 2011

¹⁴ Memorandum of understanding signed 6 December 2014

¹⁵ Clause 2.5

¹⁶ Clause 2.7

¹⁷ Recommendation 16

Whilst there is no explicit power for BOS to investigate, it has a senior investigator charged with investigating systemic issues. A register is maintained of possible issues that could affect a number of people, whether in a single bank or a number of banks. Banks are contacted to explain what they are doing and BOS works through each issue with the bank/s involved to try and ensure a satisfactory outcome.

BOS has certainly been adept at using persuasion and its considerable mana when it sees emerging issues or concerns. Particularly at a time when banking culture and conduct has been in the spotlight, this has been an effective tool. It may not always be so.

Explicit powers to reflect the work that is being undertaken, and to ensure the power to investigate should, in my view, be reflected in the terms of reference. There should be no argument that BOS is stepping outside its remit when it investigates and /or reports systemic issues.

Conduct can impact on prudential risk management and governance. So RBNZ is interested in complaints and what they can tell it about bank conduct. RBNZ holds regular workshops with banks and this year it invited the Banking Ombudsman to be part of the workshop. It has no formal agreement with BOS.

Like the FMA, RBNZ, as well as the Commerce Commission, need to better understand culture and conduct of banks and the impact on risk management and governance. There is no reason a similar MOU to that forged with the FMA could not be explored with RBNZ, and/or the Commerce Commission.

Recommendations

8. BOS should consult with stakeholders with a view to amending its Terms of Reference to formalise current practice and give it explicit powers to investigate systemic issues and work with banks to ensure that these are appropriately addressed and if not appropriately addressed, reported to the regulator.
9. BOS should explore an MOU with RBNZ, the Commerce Commission or an arrangement with RBNZ, FMA, Commerce Commission and BOS.

9.5 Complaints about BOS

BOS maintains a formal register of complaints. 17 complaints were made against BOS in the period 23 March 2018 to 31 May 2019.¹⁸

A review of the complaints process and register has been undertaken. It is found that there is a low number of complaints against BOS in comparison with its caseload and that BOS adequately monitors and deals with the complaints. There are no themes to the complaints which give rise to concern.

¹⁸ Complaints register

10. EFFICIENCY

10.1 Principle

BOS operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum, and by regularly reviewing its performance.

10.2 Findings

BOS has maintained an efficient service with an increased workload.

10.3 Organisational design

The board convenes 5 times yearly. There is comprehensive and excellent reporting to the board and it deals with all areas that could be reasonably required of a governance entity. Board decisions are well recorded. In addition, board members seem highly engaged. BOS reports annually through its annual report and AGM.

A resource and restructure review was undertaken in late 2015 in response to the 2014 independent review. The organisational structure review was implemented in 2016 and better aligned with the scheme's strategic framework for both resolution and prevention. Importantly this resulted in the appointment of two Deputy Ombudsmen – one for prevention and one for resolution.¹⁹

Nicola Sladden is a highly competent and talented Banking Ombudsman who manages the BOS workload and her team exceedingly well.

10.4 Timing

There is a regular review process and a tracking system for all cases.

As outlined below, since the last independent review, there has been an over 50% increase in the caseload and the escalation of cases to disputes now occurs in under 4% of cases.

"Nicola is outstanding."

Board member

Resolution Method	Number of cases 2013 / 2014	Number of cases ²⁰ 2018/ 2019
Enquiries*	2095	1506
Complaints*	710	3106
Disputes	237	183
TOTAL	3042	4797

Between 2014 and 2018, the definition of complaint changed, which means less interactions are now categorised as enquiries and more as complaints.

The vast majority of the cases are dealt with at the enquiry and complaint stage. Pleasingly disputes have decreased, since the last independent review in 2014, whilst enquiries and complaints have increased.

¹⁹ The Deputy Ombudsman, prevention has recently resigned. An interim deputy has been appointed.

²⁰ Cases received

Dispute resolution method	Number of disputes 2013 / 2014	Number of disputes ²¹ 2018/ 2019
Jurisdiction declined	42	14
Jurisdiction declined - Complex	2	
Abandoned	22	3
Withdrawn	60	47
Settlements / facilitation	24	42
Initial Assessment	33	16
Recommendation / decision	54	52
TOTAL	237	174

Dispute timeliness			
	Expectation ²²	Delivery to date	Delivery 2018-2019
Simple cases	90% of simple disputes resolved within 30 working days	100%	81%
Standard cases	90% of standard disputes resolved within 60 working days	80%	94%
Complex cases	80% of complex disputes resolved within 120 working days	68%	81%

In addition, in the last year, BOS reported:

- 94% of complaints were resolved through an early resolution service.
- 98% of complaints were completed in two working days.
- 94% of complaints classed as “simple” were completed in 30 working days.

These results were achieved with an 80% customer satisfaction and a 90% stakeholder satisfaction, whilst also achieving robust staff satisfaction rates.

These outcomes are impressive given the pressures of an increased workload.

Whilst efficiency is commended, it does not always ideally necessitate all cases being dealt with quickly. Banks and / or complainants need time to put their cases to BOS, some longer than others. It is true to say that the right solution, at the wrong time, will be the wrong solution. There's a balance to allow parties to provide information, consider options, seek counsel of advisers, whānau and / or family and determine the best way forward for themselves. BOS seems to well-understand this balance.

It was put to me by several banks that the mechanism to dispose of vexatious and frivolous cases, which take up a significant resource for both BOS and the bank involved, should be used more. It was also put to me that if the matter could not be solved at the complaint stage and it was escalated to a dispute that the costs involved incentivised the bank to simply pay out the customer, unfairly.

Complainants have the right to have their matter considered as a dispute. If the matter cannot be solved at the enquiry or complaint stage, it gets escalated to the dispute stage. This in turn means that banks will pay more for that case because of the BOS levy structure. Banks therefore must accept some cases will unfortunately consume significant resource.

BOS levies are based on:

- Each bank's relative size - 40% of the levy; and
- Each bank's relative use of BOS – 60% of the levy.

“Prompt attention and functional efficient follow-up.”

Complainant

²¹ Disputes completed

²² Set for the 2019-2020 year

The usage levy is weighted so that the more work that goes into a case, the higher the levy. A decision that a dispute is outside jurisdiction is cheapest, then a dispute that is resolved by facilitation, and finally the most expensive is a case that requires a preliminary view or a final decision. To give a feel for the fees, a preliminary view or final decision is approximately 10 times more expensive than a decision regarding lack of jurisdiction.

In the last review, it was recommended that BOS should amend its terms of reference to give it a discretion to refuse to consider (or continue to consider) a complaint where it is satisfied that it was frivolous, vexatious, had little prospect of success or there had been a fair offer made.

As a consequence, the terms of reference were expanded²³ to provide wide-reaching powers to enable BOS to dispose of appropriate cases.

The new terms came into force on 1 January 2016 and have been used 19 times, most often when a case has no reasonable prospect of success.

Applying the revised terms of reference will always be a judgment call. Whilst some cases have been dealt with according to the new terms, BOS is clearly erring on the side of caution. This can be frustrating for banks, who have to pay a higher levy and put their own resources into defending a claim, but it is a prudent course to ensure that cases are properly dealt with and that BOS cannot be accused of disposing of cases it should be seized of.

BOS has good case handling procedures. The timelines are appropriate and ensure a balance between timeliness of progressing a complaint and giving parties the ability to respond. BOS for its part adheres to the timelines in the majority of cases. There are checks on decisions made at key times. For instance, if there is a preliminary view made by an investigator of a “standard” or “complex” case, this view is reviewed by the Deputy Banking Ombudsman or a senior investigator for quality assurance before the view is given to the parties.

11. EFFECTIVENESS

11.1 Principle

BOS is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

11.2 Findings

There has been excellent work done to meet both resolution and prevention strategic objectives.

A number of people interviewed were at pains to point out that the prevention strategies must not come at the cost of resolving disputes. There is no doubt that BOS has increased its prevention role recently, but taking into account the resolution rates, excellent feedback and consumer opinions, I find it is not at the detriment to the resolution role.

I make recommendations as regards the complaints dashboard to ensure the effectiveness of this tool.

Human resourcing is a difficult issue, but well-managed. However, the lack of diversity within BOS needs attention.

Setting of fees occurs periodically and fairly. There is value for money in the considerable amount of work that is undertaken both in the prevention and resolution spaces. I make a recommendation for modest and regular fees increases.

11.3 Resolution and prevention

The strategic plan makes it clear BOS has a dual role to both prevent and resolve disputes. This is in keeping with what a modern ombudsman looks like – outward facing, nimble, proactive at finding new and better solutions, not just to the case at hand. This means considering prevention as well as resolution.

The prevention role has been supported by a deputy ombudsman focussing on this role, whilst a deputy ombudsman for resolution focusses on resolution.

“There has been a pivot to prevention”

Board member

²³ 5. The scheme can decline to consider, or stop considering, a complaint if satisfied any of the following applies:

- 5.1 The complaint has no reasonable prospect of success
- 5.2 The complaint is frivolous or vexatious, or the complainant is not pursuing it in a reasonable way
- 5.3 The complainant has not suffered, and is unlikely to suffer, direct loss or any significant inconvenience
- 5.4 The bank has made a reasonable offer to settle the complaint. (This decision is based on the facts as presented by the complainant.)

11.3.1 Resolution

Early resolution is important to ensure that a complaint does not get entrenched. This has been a strength of BOS. As already reported, most cases are resolved at the enquiry or complaint stage, which is plainly in consumer interests. Very few need to be dealt with as a dispute.

I have reported on resolution and its effectiveness in part 10 of this review.

11.3.2 Prevention

The preventative role, as identified in BOS' strategic plan, is to identify root causes of disputes, share insights to encourage best practice and informed decisions by customers and to collaborate with banks and consumer groups to build financial capability and promote high standards of conduct.

The idea is that if BOS, with its unique insights, can help individuals, consumer groups and banks to prevent disputes and resolve them early, there will not be so many disputes or so many entrenched disputes.

The Ombudsman has been boosting the preventative function of its service whilst maintaining the core business of resolution. This has included increasing both bank and consumer group engagement.

This work has seen a number of highly effective initiatives including:

- Media campaigns
- The revamp of the website in 2018
- Fraud awareness week scam commercials
- Monthly insights to improve bank practices
- Alerting stakeholders to trends and developments

BOS in undertaking its resolution role, collects a lot of information about complaints. There is ample evidence that it works with banks and consumer groups when it sees emerging issues and concerns, to try to prevent recurrences. That evidence includes:

- It sends monthly updates to banks so they can improve their systems and services.
- It shares updates through presentations to consumer and community groups, at industry and consumer forums, via the news and social media, and through submissions on policy matters.

"We bounce ideas and suggestions and ask for help from BOS when we are not in a disputes situation."

Banker

- It actively monitors cases to identify issues that could have a wider impact for other bank customers.
- A systemic issues protocol outlines the approach to identifying, resolving and reporting systemic issues.²⁴
- When BOS identifies a potential systemic issue, it may ask a bank to tell it the number of customers affected, the potential impact, the proposed redress and what steps it will take to avoid a recurrence. If it is satisfied with the corrective action, it resolves the case in the normal way. If not satisfied with the response, it may name the bank in its annual report and notify the regulators.
- Outcomes from the systemic issues investigations include, among others, monetary refunds for other customers, amendment of standard letters, improvements to processes and procedures, better communications to customers, improved staff training, and improved complaints management.

BOS is about to embark on an ambitious project of a sector-wide "complaints dashboard". The dashboard will gather together data from banks on their complaints to enable a single place where the data is recorded, can be analysed and shared to provide deeper insights from complaints. "A key objective of the scheme's strategy is to identify and share insights on the cause of complaints to improve bank practices and policies, and to promote high standards of conduct."²⁵

This project has been agreed to by the banks and funding allocated, but there has been no agreement to operate the dashboard in the BOS terms of reference.

It is my view that the dashboard should not be an optional bolt-on to the existing service. To be effective, it needs buy-in of all the banks that belong to BOS so that it can provide comprehensive data. It therefore requires an amendment to the terms of reference.

BOS advises that the data shown on the dashboard will be publicly available. It is noted some banks, although generally in favour of the dashboard, were more reticent in conversations with me about data being made public and some wanted data aggregated.

²⁴ June 2011 Protocol

²⁵ Letter from BOS to each bank dated 20 March 2019

The optics of BOS collecting complaints data and simply providing it to banks and / or only providing aggregated data publicly, could damage the perception of BOS independence. For this reason alone, BOS must make the data publicly available. But the possibility of social impact of the data being readily available to all – banks, as well as regulators, the media and the public, showing what each bank has done, is another excellent reason for transparency.

I note that making data publicly available in a non-aggregated form is aligned with overseas experience²⁶.

It was identified during the 2018 RBNZ and FMA joint review that bank processes, that have been put in place to encourage the raising of workplace conduct concerns and issues, more commonly known as “whistleblowing”, were “seldom used and were not particularly effective.”

Presently each bank contracts a whistleblowing service individually, which means that issues across banks are difficult to identify.

A scoping exercise by BOS has been funded by the banks to investigate and better understand what BOS could provide. If BOS takes on this role, it will enable a large picture of issues across and within banks. It could augment the work BOS is doing with the dashboard and will aid its prevention role. There certainly is considerable allure in an organisation that is already well-known and well-respected, taking on the role. There are fish-hooks as well, of course, not least the extra workload to enable an excellent whistleblowing service.

The whistleblowing service is outside the scope of this review, but if it is to proceed, it will need significant additional funding and a further amendment to the scheme documents.

Recommendations

10. BOS should amend its scheme documents to include the complaints dashboard.
11. Complaints dashboard information should be available publicly and not in the form of aggregated data.

“We are the little scheme that could.”

BOS staff member

11.4 Limitations

The scope of the BOS has been extended to a \$350K financial cap. This was done to make the service available to a wider range of people and is the highest financial limit of all the financial dispute solution schemes.²⁷ It provides sufficient scope for the scheme in my view.

11.5 Resourcing

It is evident that the staff is engaged and ably led. This is supported by a 2019 staff survey in which 100% of staff agreed or strongly agreed that they were inspired to meet their goals at work. In the same survey, 92% of staff agreed or strongly agreed that they felt completely involved in their work and 83% agreed or strongly agreed that they were excited to go to work. And other indicators evidenced a strong work ethic, high levels of trust in the team and a very positive work environment.

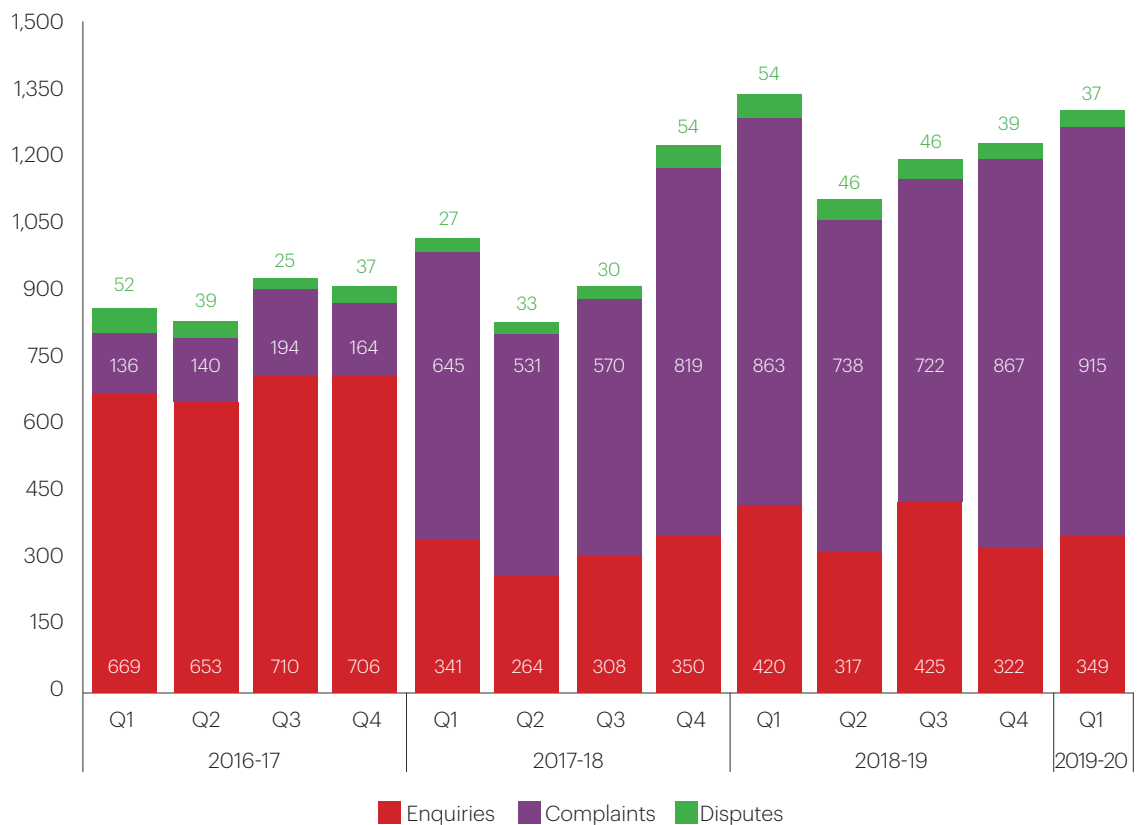
That staff are so well engaged is testament to the leadership within BOS and particularly impressive when the office has come under caseload pressure. As well, both consumer representatives and banks, uniformly spoke in glowing terms of the Ombudsman.

²⁶ UK: Financial Conduct Authority publishes firm-specific data.

²⁷ FSCL, FDRS and IFSO have \$200K limits

The last 12 months has seen a growing demand and some volatility in demand. The chart below shows this clearly.

Cases received per quarter



The aftermath of the release of the Australian Royal Commission report caused a spotlight on bank conduct and culture here. Public hearings began and stories of misconduct came to light. This meant an increase in cases, which is evident in the statistics.

There is little reason to believe the recent trend of an increase in cases will not continue or occur again. BOS estimates there will be a 10% increase in its caseload in the 2019-2020 year, enquiries and complaints are trending upwards and some bank participants advised that they wanted a higher number of cases to be able to come to BOS. Together with the work in prevention, this will in turn cause a resourcing issue.

BOS over the last 3 years employed approximately 12 full-time equivalent (FTE) staff, with a number of contractors and law students to assist with workload fluctuations. Two additional FTE's have recently been added to the staff, both in the resolution team, to meet on-going demand.

It is my impression that the office is operating to maximum or near maximum capacity.

The work that is done by BOS staff is sometimes challenging and stressful. Support is provided to staff through an Employee Assistance Programme – confidential and free counselling for staff. There is also a significant range of other support provided including meditation and stress management, as well as training.

11.6 Fees

It is understood that there will be a review of future resourcing needs in early 2020– especially as regards the prevention team. This is part of a regular review of fees and budget-setting.

BOS is largely a demand-led service, particularly in relation to its resolution function. The board foresaw that there could be a time in which there would be increased demand and since 2013 has been prudently building significant reserves.

Since the 2015 – 2016 year, levies have been falling, but in June 2019, the board considered and approved a 15% increase in levies, so that they are set at \$2.76M for the year ended 30 June 2020. Even with this significant increase, a deficit of \$171K is forecast for year-end and reserves will meet the shortfall. With this use of reserves, BOS will still comfortably stay within its own board-approved reserves target.

The use of reserves short-term is a sensible course of action. However it is clear that BOS has increasing demands on its services and is growing its services as well. Modest, but regular increases to levies may be able to meet future needs, whilst retaining reserves.

It is therefore recommended that in the next budgeting rounds the board considers, at a minimum, modest annual increases in fees, to at least the level required for nil balance budgets and the retention of reserves.

Recommendation

12. In the next budget round, BOS considers at a minimum, modest rises in fees to ensure nil balance budget and the retention of reserves.

11.7 Diversity

All BOS staff underwent unconscious bias training in 2018.

There is some diversity within the BOS staff in terms of gender, ethnic background and sexual orientation, but most staff members are Pakeha women. It would be advisable for there to be more diversity to ensure that BOS is better able to serve a diverse community, employs the creative thinking that diversity brings and

is more representative of the community it seeks to serve. A diverse workplace can also be more welcoming to all and attract a wider talent pool in of itself.

BOS needs to consider how it can embrace diversity in its organisation and so needs to turn its attention to its recruitment policies and procedures, which are silent on diversity.

The board of BOS notably comprises 5 women. This is unusual, but in this report’s findings does not provide for any criticism of a lack of diversity.

The board’s make-up develops because of appointments made through various mechanisms – 1 board member from Consumer NZ, 2 board members appointed by the NZ Bankers’ Association, 1 appointed by the Minister of Commerce and Consumer Affairs and the independent chair appointed by the board. This has, for the first time, per chance, meant an all-women board. But the board personnel changes regularly and in all likelihood the make-up in terms of gender diversity will alter once again, as it has in the past. It should also be noted that the board has a woman of Pacifica background and there is some diversity in age on the board as well.

Recommendation

13. BOS considers how it can better embrace diversity, particularly as regards recruitment policies and procedures.

“A white middle-class workforce is pretty tough if they’re meant to be dealing with all clients.”

Consumer advocate

12. PROGRESS SINCE THE LAST REVIEW

The 2014 independent report made 21 recommendations, the majority of which were implemented. I provide feedback on the recommendations that were not implemented, or only partially implemented and not covered elsewhere in this report.

12.1 Recommendation 1

The review recommended that BOS should form a Community Representatives Liaison Group to help BOS develop a comprehensive community engagement strategy that includes both consultation and development of educative resources for community representatives.

BOS agreed to research the use of liaison groups in other schemes to understand their purpose and mandate. It also decided to continue to work with the other dispute resolution schemes in the financial services sector to progress current initiatives to lift customer awareness of dispute resolution schemes.

BOS decided to implement a strategic communications and engagement plan to reach consumers and others. It helped to lead the cross-sector Financial Inclusion Industry Forum in July 2018. It has worked with various agencies to develop initiatives, including establishing a cross sector liaison group which includes community representatives.

I find that BOS has worked to engage the community in the intervening period. It has continued to develop a range of resources, including extending its translation of resources that are available online. Its engagement with community groups is a pragmatic way to engage with the community. I have made recommendations in this report for more engagement.

12.2 Recommendation 4

The review recommended that BOS should amend its TOR to give BOS the power to make non-monetary awards.

BOS consulted banks and consumer groups about the power to make non-monetary awards, but it was decided not to implement the recommendation. BOS believes that the majority of complaints are resolved by facilitation, and this is the best means of reaching a non-monetary outcome.

Other financial dispute resolution schemes do have broader powers to make non-monetary awards.²⁸

Non-monetary awards, such as the use of apologies, are best left to facilitated processes where a party agrees to apologise. However, the power to order remedial action, such as forgiveness or variation of a debt, release of security, reinstatement, rectification, variation or termination of a contract, or the meeting of an insurance claim, are all significant powers that the Ombudsman should have in appropriate cases.

Recommendation

14. BOS should revisit the 2014 independent review recommendation to amend its terms of reference to give BOS the power to make non-monetary awards.

12.3 Recommendation 8

The review recommended that BOS should consult with stakeholders with a view to including in its TOR some restrictions on the ability of participants to institute legal and enforcement proceedings while a complaint is under consideration by BOS.

BOS consulted stakeholders about restricting the ability of participants to institute proceedings while a complaint is under consideration. The recommendation was partially implemented with a pragmatic fix to the TOR as follows:

- BOS's consent required for a bank to commence legal proceedings and BOS cannot unreasonably withhold consent
- A bank must notify BOS if it is taking, or intends to take, debt recovery action.

²⁸ IFSO and FSCL for examples

12.4 Recommendation 12

The review recommended that BOS should amend paragraph 9 of its TOR to limit the information access rights of a party to the written information provided by the other party. The effect of this would be that BOS would not have to provide its own internally generated documents. Nor would it have to transcribe recorded telephone calls where that is not necessary.

BOS agreed to consult with stakeholders on this recommendation. As a consequence, the recommendation partially implemented and the TOR changed as follows:

“17. The scheme must respond to any request by either side for information about a complaint in accordance with the Privacy Act 1993, any obligation of confidentiality and any other legal obligations.”

Given the obligations of the Privacy Act extend to written and unwritten communications, the way in which this recommendation was implemented is sensible.

13. WHO WAS CONSULTED

Written submissions

- Anonymous individual submitter
- Martyn Ayling
- Paul Bradley
- Allan Hunter
- Jamie Jackson
- ASB
- ANZ
- Salvation Army

Consumer Groups

- Tim Barnett, Chief Executive, FinCap
- Sue Chetwin, Chief Executive, Consumer New Zealand and BOS Board
- Andrew Mitchell, financial mentor, Royal Oak Community Ministries, Salvation Army

Banks

- Roy Ball, Head of Customer Insights, ASB
- Samir Castello, General Manager, Customer Resolution, BNZ
- Donna Cooper, Chief Executive TSB and BOS Board
- David Cunningham, Chief Executive, Cooperative Bank
- Shaun Drylie, Chief Executive, SBS Bank
- Nina Hassell, Senior Manager Operational Excellence, Westpac
- John Mayers, Customer Relations, ANZ
- Angela Mentis, Managing Director and CEO, BNZ and Board BOS
- James Woodward, General Manager Enterprise Operations, Kiwibank

New Zealand Institutions

- Banking Ombudsman, staff and board members
- Peter Boshier, Parliamentary Ombudsman
- Peter Cordtz and Tom Hartmann, Commission for Financial Capability
- Roger Beaumont and Philip van Dyk, New Zealand Bankers' Association
- Rob Everett, Chief Executive Officer, Financial Markets Authority
- James Hartley, General Manager, Commerce, Consumers and Communications, Ministry of Business, Innovation and Employment
- Andy Wood, Head of Supervision, Reserve Bank of New Zealand

Overseas Institutions

- Dr June Smith, Australian Financial Complaints Authority

Individuals

- Kenina Court, Board BOS
- Miriam Dean QC, Chair BOS
- Heather Donachie
- Kerry Francis, consumer advocate
- David Houghton, Pakuranga and Howick Budgeting Service
- Prakash Patel
- James Smith
- Gary Towers, West Auckland Budget Service
- Radha Turner
- David Verry, North Harbour Budgeting Services

14. DOCUMENTS

Documents reviewed included:

- Financial Service Providers (Registration and Dispute Resolution) Act 2008
- Constitution
- Participation Agreement
- Operational Guidelines
- Terms of Reference
- Annual Reports 2018 and 2019
- EY Audit reports 2018 and 2019
- Case Handling Procedures
- Systemic Issues Protocol June 2011
- Levy calculations: a guide
- Strategic plan 2017 – 2020
- BOS website
- Policy: Complaints about our service
- Complexity ratings of disputes
- Complaints Register
- Board papers and minutes 2018 and 2019
- Update on 2014 Recommendations
- Independent reviews of BOS: 2006, 2008, 2011 (x2) and 2014
- Independent review of the Utilities Disputes – 2017
- Independent review of the Insurance & Services Ombudsman Scheme - 2018
- Information sheets
- Customer survey (disputes service) 2018/2019
- Customer survey (complaints service) 2018/2019
- MOU with the Financial Markets Authority 6 December 2014
- Gill, Chris & Williams, Jane & Brennan, Carol & Brien, Nick. (2013). The future of ombudsman schemes: drivers for change and strategic responses. Queen Margaret University, Edinburgh, 5 July 2013
- Ombudsmen (Protection of Name) Amendment Bill 2019
- Ombudsman schemes and effective access to justice: A study of international practices and trends, October 2018, IBA
- New Zealand Consumer Survey 2018
- Media
- Lifeline training materials
- DR actions in the Safer Credit work
- Vulnerability toolkit
- IFSO terms of reference
- FSCL terms of reference
- BOS Privacy Statement

15. INDEPENDENT REVIEW OF SCHEME TERMS OF REFERENCE

Background

The Banking Ombudsman Scheme is an approved external dispute resolution provider, and as such is required to commission an independent review of its operations every five years and report back to the Minister in accordance with section 63(1)(q) of the Financial Service Provider (Registration and Dispute Resolution) Act 2008. The scheme's participation agreement also requires such a review.

The scheme will be reviewed against the strategic plan 2017-2020 and the principles listed in section 52(2) of that Act, namely, accessibility, independence, fairness, accountability, efficiency and effectiveness.

The strategic plan 2017-20 sets out the scheme's vision and purpose. The strategy has two overarching – and interdependent – objectives: resolution and prevention. Consistent with our vision of better banking, we aim to deliver a preventive model of dispute resolution. This includes:

- identifying the root causes of complaints
- sharing insights to encourage best practice by banks and informed decisions by customers
- collaborating with stakeholders and other agencies to build financial capability and promote high standards of conduct.

The strategy also sets out the scheme's values. We provide a service that is accessible, independent, fair and efficient.

General objectives

The review's main objective is to examine, and make recommendations about, how effectively and efficiently the scheme operates to achieve its strategic objectives, particularly to resolve and prevent complaints as set out in the strategic plan 2017- 2020. The review will also identify any improvements to help it achieve its aim of being a modern ombudsman scheme that makes a valued contribution to a fair banking sector.

Specific objectives

The review will examine the principles listed in section 52(2) of the Act:

Accessibility: whether the scheme makes itself readily available to customers by promoting awareness of its services and by ensuring its services are easy to use.

Is the scheme sufficiently accessible to those who may need its services? In particular:

- Are its promotional activities adequate and appropriate?
- Are its services easy for vulnerable consumers to use?
- Do banks adequately promote its services?

Independence: whether the scheme's decision-making and systems are independent of banks.

Is the scheme's structure and systems sufficient to ensure both its independence and the public's perception of its independence? If not, what changes should be made?

Fairness: whether the scheme makes decisions that are fair and seen to be fair by observing the principles of natural justice and by adopting a rigorous, credible approach to reaching decisions.

Accountability: whether the scheme gives a public account of itself by publishing adequate information about its operations. In particular:

- Does the scheme provide adequate statistical and general reporting to the board, banks and public adequate?
- Are there appropriate processes for managing complaints about the scheme?
- Does the scheme have a fair, transparent and appropriate process for setting fees and allocating costs.

Efficiency: whether the scheme provides an efficient service? In particular:

- Is its case management process and decision-making efficient, especially given its fluctuating caseload and other commitments?
- Are quality assurance processes adequate?
- Is the organisational design, including the composition of the leadership team, appropriate?

Effectiveness: whether the scheme is effective? In particular:

- Is the scope of the scheme appropriate?
- Is the scheme delivering on its strategic objectives to resolve and prevent complaints?
- Is the scheme adequately identifying root causes of complaints, sharing insights and collaborating with stakeholders?
- Do the roles of the scheme reflect modern ombudsman practice?
- Is the scheme adequately resourced to fulfill its dual functions - to resolve and prevent complaints?
- Are the scheme rules, including the commercial judgement limitation, appropriate?

Review resources

The scheme will provide the following information to assist the reviewer(s):

- website material, including publications and other resources
- procedural guidance for its staff, banks and complainants
- stakeholder surveys and reports (including customer, bank and staff surveys)
- previous external reviews
- complaint and dispute files
- strategic and business plans
- board papers and operational reports

Review process

The review will include:

- a desk based review of hard-copy and web-published scheme documents, including previous reports, board meeting minutes, governance documents, annual reports and statistical reports
- publication of an issues paper, and an invitation to the public to make a submission or speak to the reviewer
- review of a random and representative sample of cases files
- participation in co-design workshops developed by an external facilitator
- interviews with the Banking Ombudsman and other staff
- interviews with the Chair and other board members
- interviews with representatives of participants
- interviews with government representatives/regulators, and an invitation to the Minister to provide views on the review
- interviews with non-government consumer organisations
- interviews with Ombudsman of other disputes resolution schemes
- interviews with complainants whose matters had been closed

In reporting against the above criteria, the reviewer(s) will:

- provide a balanced analysis of the key issues identified during the review process
- make recommendations in keeping with the fundamental nature of a modern financial ombudsman scheme
- provide a record of issues raised that were not covered by the criteria set out in the terms of reference.

Timing

The reviewer(s) should begin work in August and present a draft report to the scheme by 8 November, and a final report by no later than 13 December.

16. ACKNOWLEDGEMENTS

I sincerely thank all those who submitted both in written and oral submissions.

I acknowledge and thank the Banking Ombudsman, her staff and the board for the open and helpful way in which they supported the review.

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