

Increasing the Scope and Powers of the Small Business Commissioner Consultation

Response by the Creators' Rights Alliance:

- 1. At the moment the Commissioner can accept complaints from small businesses about larger businesses. To what extent do you agree that the Commissioner's complaints handling function should be extended to allow for small business to small business disputes?**

Agree.

Sole traders and freelancers operating through limited companies are often unable to resolve business-to-business disputes without recourse to time and cost-intensive litigation. Small Claims Court, Money Claims Online Procedures and Intellectual Property & Enterprise Court do not always work well for creative professionals and we would welcome any process that could be instituted under the Small Business Commissioner that could provide a simple, business-to-business dispute resolution tailored to small businesses, whether sole traders or limited companies.

In particular, self-employed freelancers in the creative industries have far fewer resources and often less legal and technical knowledge than other small businesses and this difference in resource and knowledge should be taken into account when designing any dispute resolution process. To ensure that any system is fair and equitable for different types of complainant, we would suggest a largely or exclusively online procedure benefitting from clear, pro forma fields with flexibility for complainants to add matters that may be pertinent to their cases without costs and other penalties associated with more formal litigation processes and with more complex disputes reserved for the Courts.

- 2. It is proposed that the Commissioner should have the power to carry out a review on the impact and effect of relevant legislation, policies and practices on small businesses, following an instruction by the Secretary of State. The review need not be limited to payment matters and may consider other issues which affect small businesses. To what extent do you agree that this power should be made available to the Commissioner?**

Strongly agree.

The crisis caused by the COVID-19 pandemic has shone a light on the unfair practices that impact small businesses and freelancers in the creative industries. Many have seen a freeze in commissions and/or attempts to unilaterally renegotiate contract terms. Some have been unable to access any form of government support such as Universal Credit, the Self Employment Income Support Scheme or the Job Support Scheme, forcing them to survive off savings and/or loans, or even leave the professions for which they have trained in altogether. The disruption to the sector will have a long-term impact on creators unless the government works with the sector to ensure creative businesses and workers properly supported. Therefore, some businesses – both large and small – have been unable to fulfil invoices leaving creators waiting months to be paid.

Therefore, there is a knock-on effect with creators unable to meet costs for vital equipment, studio space and/or make payment to other creators. The Commissioner should not only regularly review relevant legislation but strengthen existing legislation and introduce new legislation to better protect small businesses and freelancers in the creative sector. Given the expert knowledge of the Commissioner, they should also be able to make recommendations to the Secretary of State. For example, we would suggest that the Commissioner extend the prompt payment system used in the public sector, where the Government pays all undisputed and valid invoices within 30 days, to the private sector. The Commission should also have the power to change the prompt payment code from a voluntary to a compulsory system that all businesses must sign up and adhere to or otherwise face penalties.

3. In addition to pre-existing complaints function, it is proposed to expand the Commissioner's powers so that he or she could investigate specific instances of suspected poor or unfair payment practices: (i) at his or her own initiative; (ii) following receipt of a complaint from a third party. To what extent do you agree that this power should be made available to the Commissioner?

Strongly agree.

The Commissioner should have the power to investigate suspected poor or unfair payment practices at their own initiative and following receipt of a complaint from a third party. Trade Unions and professional bodies representing creators should be able to submit complainants on behalf of members as they possess greater resources and capabilities that freelancers to highlight frequent offenders. Trade Unions and professional bodies have a unique understanding of the situation facing freelancers, particularly in regard to unfair payment and contract practices that persist within the creative sector. Therefore, we recommend that the Commissioner undergoes regular engagement with trade unions and membership bodies to keep up to date with the issues impacting freelancers.

Unfair payment practices exist across many sectors and is an issue the Creators Rights Alliance (CRA) and its members are trying to tackle within the creative industries. The pandemic has exposed the fragilities that exist within the creative sector, which employs many on short term, freelance and self-employed contracts. Many businesses within the creative sector are either micro businesses (less than 10 employees) or are self-employed workers who work on a freelance basis. As a result, the sector relies on these types of creative businesses, over 20% of all the self-employed people in the UK work in the cultural and creative industries (33% of the 2.1 million in the creative industries and almost 50% of the 676,000 in culture). These workers are often exposed to unfair payment practices due to a pervasive culture within the creative sector of producing work for free or a small payment (often below market value) in order to gain 'exposure' or build up a portfolio. The UK's creative industries are being undermined by late payments. Findings from business finance company MarketInvoice have revealed that 48% of businesses in the creative industries were paid late in 2018. Similar research by IPSE (the Association of Independent Professionals and the Self-Employed) found that freelancers spend an average of 20 days a year chasing late payments, with the issue

being more acute for younger freelancers. We have heard from members who report that regularly chasing late payments has an adverse impact upon their overall emotional wellbeing as it adds to financial stress that they are already experiencing because of the COVID-19 crisis.

4. To what extent do you agree that the Commissioner should have a power to compel the disclosure of information in connection with the investigation of a complaint?

Strongly agree.

4.1. To what extent do you agree that the Commissioner should be able to issue an information notice?

Strongly agree.

4.2. To what extent do you agree that the Commissioner should be able to apply to the Court for an order enforcing an information notice?

Agree.

4.3. To what extent do you agree that the Commissioner should be able to issue a civil penalty if a notice recipient does not comply with an information notice and to recover the amount of the penalty as a debt (through court proceedings if necessary)?

Agree, a fair and reasonable civil penalty should be issued if there is a failure in compliance and a repayment plan should be issued to ensure payment is made with due regard for the both the relative size of the complainants, the conduct of the parties and the proportionate loss to the claimant in the case of small-to-big business disputes.

5. It is proposed that the Commissioner should be able to issue a binding monetary award or payment plan in connection with a complaint where there are adverse findings in relation to the respondent, or else risk facing financial penalties. To what extent do you agree that this power should be made available to the Commissioner?

Strongly agree.

This is long overdue; many freelancers and small businesses have been left without appropriate support to tackle unfair and poor payment practices. For example, according to IPSE (the Association of Independent Professionals and the Self-Employed) this is a pertinent issue within the creative sector, where freelancers have been found to lose £5,400 a year on average. The Commissioner should facilitate the process of payments being recouped on behalf of complainants and should follow up with the respondent to ensure that payments are being made according to schedule. As more particularly set out in our answer to question 1 above, Small Claims Court and Money Claims Online procedures do not necessarily work well, which contributes to potential claims being written off, rather than pursued.

6. To what extent do you agree that the Commissioner should have the power to issue a monetary award where there is a finding that payment(s) are due to a small business

complainant and have been unfairly or unreasonably delayed or withheld by the respondent?

Strongly agree.

Any delays in payment will have a considerable impact on freelancers and small businesses who, particularly in the midst of the COVID-19 crisis, operate within tighter margins and typically have fewer savings to fall back on. Late payments have a significant impact on a business's ability to plan for future investments and mitigate against unforeseen events. Similarly, it prevents small businesses and freelancers from meeting costs or paying their own suppliers. It is only fair that complainants are compensated for delay in receiving payment.

7. To what extent do you agree that if the Commissioner considers that the respondent cannot pay the monetary award in the time specified, he or she may issue a binding payment plan?

Agree.

The Commissioner must ensure that payment is sought through means that are fair to both parties, particularly if both parties are small businesses who may not have the capacity to set up a payment plan individually.

8. To what extent do you agree that where the respondent fails to pay the monetary award, or fails to pay an instalment of a binding payment plan, the amount of the award or instalment should be recoverable as a debt (through court proceedings if necessary) by (i) the complainant themselves; (ii) the Commissioner, who would subsequently pass the amount recovered to the complainant; (iii) both the complainant and the Commissioner?

Agree.

Funds should be recovered by the Commissioner who should act as a facilitator on behalf of complainants as they may not have the resources to individually pursue claims, particularly through the courts.

9. To what extent do you agree that the Commissioner should have the power to impose a financial penalty when a business does not comply with a monetary award and / or payment plan?

Strongly agree.

The Commissioner should facilitate the process of payments being recouped on behalf of complainants. The Commissioner should follow up with the respondent to ensure that payments are being made and level financial penalties if necessary. There is an inherent inequality within the payment process particularly between large (over 250 employees, with higher turnover and profit) and small businesses (fewer than 250 employees with less turnover). It is only reasonable and fair that any business that owes payment and fails to

comply with the commission should face a financial penalty. In fact, all businesses that repeatedly fail to promptly pay suppliers or freelancers should face financial penalties.

10. To what extent do you agree that in circumstances where there is a failure by a business to pay a financial penalty, the amount of the penalty should be recoverable by the Commissioner as a debt (through court proceedings if necessary)?

Agree.

11. It is proposed that the Commissioner should have the power to claim investigation costs incurred in connection with a complaint where there are adverse findings in relation to the respondent. To what extent do you agree that this power should be made available to the Commissioner?

Agree.

12. To what extent do you agree that, where the respondent fails to pay investigation costs incurred by the Commissioner, those costs could be recovered by the Commissioner as a debt (through court proceedings if necessary)?

Agree.

Additionally, the Creators' Rights Alliance suggests to the Commissioner that it will be worth re-examining the provisions of the Late Payment of Commercial Debts (Interest) Act 1998 that theoretically allow challenges to contract terms that are "grossly unfair". We say "theoretically" because the looseness of the wording of the Act means that any freelance wanting to challenge a contract under it faces a requirement to front up tens of thousands to take a case to a Court high enough to determine what Parliament meant in their case.

The CRA would be happy to meet with the Commissioner to discuss specific proposals to remedy this, and indeed many other matters concerning unfair contracts.