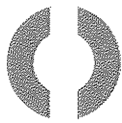

Complaints Commissioner

Office of the Complaints Commissioner
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14th September 2011

Dear Complainant,

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01289

I write with reference to your emails of 19th May, 19th July and 8th August 2011 in relation to your complaint against the Financial Services Authority (FSA). I am writing to advise you that I have now completed my investigation into your complaint.

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint that falls within the complaints scheme. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. It rarely declines to do so however. Full details of Complaint Scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

Your Complaint

1. You are unhappy with the information given to you by an operative in the FSA when you called on 15th October 2010. You say that you called the FSA to establish whether redress you were being offered by Firm A (in respect of a with-profits bond which you had encashed three years earlier) was being offered by Firm A on its own or as the result of pressure being applied by the FSA.

2. You are unhappy as you say that the operative told you that he believed the redress was not being offered as the result of pressure being applied by the FSA. Subsequently you learned that this was not the case and the redress was being offered as a result of FSA pressure and that Firm A was fined £2.8M for its failings.

3. You feel that you were misled as a result of the information provided to by the CCC operative and have lost the opportunity to negotiate with Firm A and have its redress calculation 'checked' by an actuary of your choice.

4. You are also unhappy with the manner in which the FSA has considered your complaint. You feel that some if its arguments are illogical and that its position is, in your opinion, an infringement of your legal rights enhanced by the Human Rights Act 1998 (HRA 1998).

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5. You are looking for the FSA to make a compensatory award to you, by way of an *ex gratia* payment, as an alternative to the matter being brought before the courts under a judicial review process.

Coverage and Scope of the Scheme

COAF provides as follows:

(1) The complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions. The complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:

- (a) mistakes and lack of care;
- (b) unreasonable delay;
- (c) unprofessional behaviour;
- (d) bias; and
- (e) lack of integrity.

(2) [deleted]

(3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

I should also make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that the FSA is exempt from "liability in damages". It states:

"(1) Neither the Authority nor any person who is, or is acting as, a member , officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) (Irrelevant to this issue under investigation)

(3) Neither subparagraph (1) nor subparagraph (2) applies

(a) if the act or omission is shown to have been in bad faith; or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."

At this point I have seen no evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play. You have not been able to demonstrate any bad faith on the part of the FSA in any event. Mere assertion, along the lines of (and I quote from you response to my preliminary Decision):

> *"The FSA's action was wholly unjustified as legislation did not authorise them (sic) to delude the public they (sic) were set-up to protect by exercising their delegated powers unreasonably*".

does not amount to evidence of bad faith as you will understand.

COAF nevertheless then goes on to provide in paragraph 1.5.5 that:

> *"Remedying a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex-gratia basis. If the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."*

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "compensatory payment on an *ex-gratia* basis".

If you were to take the view that Schedule One referred to above was relevant in the context of HRA 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

> *"It is unlawful for a public authority to act in a way which is incompatible with a Convention right".*

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the HRA 1998.

Article 1 of the First Protocol provides:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".*

It is my decision, given my views in this matter that I now set out, that Article 1 of the First Protocol has no application in your case.

My Position

I have now had the opportunity to consider the issues you have raised and to review the FSA's investigation file and the representations you have made to my office.

From these papers it clear that the FSA accepts that you contacted it on 15th October 2010. However, although the FSA accepts that the you called it to establish whether the offer of redress Firm A was making to you was a business decision by the firm or was a result of FSA pressure (i.e. as a result of a FSA investigation into the firm), there is a disagreement over what exactly was said by the CCC operative.

Although the FSA does retain recordings of the calls it receives for a period of time, at the time you made your complaint, the FSA only retained these for a period of around one month (although I understand that from the first quarter of this year the retention period has subsequently been increased to around six months). Unfortunately, as your complaint was made over two months after the call took place it was not possible for the FSA to obtain a recording of that call. As such it is not possible to comment, with any degree of certainty on what exactly the operative told you when you called the FSA on 15th October 2010.

You hold the view that the FSA decided to "*dismiss the matter due to the lack of a telephone recording*" and that ultimately you believe that to state "*that the content of conversation could only be left to speculation is decidedly offhand and cavalier*". While you are free to hold this view, I respectfully disagree with it.

As the FSA does not hold a copy of the recording it cannot comment, with any clear degree of certainty on what was said. As such, when considering the matter the FSA has to rely upon the information available to it. In this case, it has the benefit of a contemporaneous note of the recording which states:

> "*[The caller] wanted to know if there is any rules relating to refund of charges and if we are investigating firms in relation to charges Firm A contacted him to refund charges. Checked and no current news on this and sounds as if it is a business decision (sic)*".

I am not aware of any other contemporaneous note of this conversation. You have, of course, stated what you recollection of it was but a recollection after the event , in my view, has less probative value than a contemporaneous note made at the time by one of the parties involved in the conversation. I should add that while you state that your enquiry had "*nothing to do with charges*" any review of values does involve the issue of charges and in the mind of the CCC operative that may well have been how the operative interpreted your enquiry.

When investigating your complaint, the FSA stated in its decision letter, which was dated 16th May 2011, that it had not had the benefit of a recording of the telephone conversation but did have the benefit of the contemporaneous note I have set above. It confirmed this by saying:

> "*As explained below, this investigation has not had the benefit of the telephone recording of your first call to the CCC and so it is only possible to speculate on what information may have been provided to you based on an electronic note from the call and the CCC's normal procedures*".

Given that a note of the call will only highlight the salient and significant parts of any discussion which takes place, the note will not recall every comment which is made by either a caller or the operative. Similarly, although you indicate that the FSA holds the view that as a recording the call is not available the discussion did not take place, I note that the FSA stated in its decision letter that:

> "*...the evidence available suggests you were told that the firm's offer 'sounds as if it was a business decision'. It was a mistake to say that the offer you received from the firm was likely a business decision as this was an assumption, based only on the adviser finding no information on the FSA's website. Please accept our apologies on behalf of the FSA for this error*".

Clearly, in light of this comment, the FSA accepts that you <u>were led to believe</u> (my emphasis) from the way that the information was presented to you that the offer of redress that Firm A was making to you was likely to be a business decision. I also note that the FSA made an apology for providing you with what can be described as misleading information. In my view, if the FSA had disputed that the call had taken place or that as a result of the conversation you had with its CCC operative you were left with the impression that Firm A was acting on its own <u>it would not have made</u> (my emphasis) the apology that it did.

I also note that you are concerned that the FSA's operative (and therefore the FSA) by indicating that Firm A acted on its own deliberately misled you. You have however provided no evidence that there had been any intention to mislead you deliberately (my emphasis). Mere assertion to the contrary is not evidence as I have already explained. You also feel that given the specific question that you say you asked, you should have been informed that there was an ongoing investigation even if you could not be told to what that investigation related.

I appreciate that you feel the FSA was acting unreasonably by not confirming to you when you called that Firm A were under investigation for "systems and control failings". Unfortunately, whilst the FSA was conducting an investigation, disclosure restrictions, included in the Act, prohibited the FSA from making such disclosures to you as a (previous) policyholder. Whilst you may, one could say even understandably, feel that as an affected policyholder you were an 'interested party' and as such had a right to know that the redress being offered was as the result of an ongoing FSA investigation, this is not the case. Under the Act, until a decision notice is issued, no public disclosure can be made except to an 'interested party' which Section 69(9) of the Act describes as:

(9) "Other interested parties", in relation to an approved person ("A"), are—

(a) the person on whose application the approval was given ("B"); and

(b) the person by whom A's services are retained, if not B.

Clearly, as a (previous) policyholder, although affected by the firm's actions, you would not immediately fall into the definitions of an "interested party" as set out within the Act. As such, by not releasing information to you the FSA acted in accordance with the legislation which was put in place by Parliament and therefore, in my opinion, it was not acting as you say in a manner which you describe as comparable with the concept of 'Wednesbury unreasonableness'.

I also think here, by way of background, it may be useful if I provide some background about the manner in which the FSA conducts investigations into a firm. As part of its general supervisory function, the FSA may have concerns about one or more aspects of how a firm is operating. As such it may instigate an investigation to enable it to establish in some detail, whether a firm is complying fully with its rules or simply treating customers fairly.

The fact that a firm may be, what you describe as, "*under investigation*" does not mean that the firm has acted inappropriately, has breached the FSA's rules or that the FSA has significant concerns about the firm. Likewise, it does not mean that the Firm will be subject to disciplinary action by the FSA. As such, in my opinion, it would potentially be harmful as well as unreasonable for the FSA to make any disclosure about a firm until such time as it has completed its investigation and, where disciplinary action is being pursued, until that process has been completed (particularly in light of the disciplinary and appeals/challenge process which is in place).

Following an initial investigation, once the FSA feels that a firm may have 'questions to answer' it issues what is described as a 'Warning Notice'. Whilst this notice clearly indicates (and indeed sets out) the FSA's concerns, the provisions of the Act continue to prevent the FSA (or indeed anybody else) from making a public disclosure of the concerns at that stage. Specifically, I would draw your attention to Section 391(1) of the Act which states:

(1) Neither the Authority nor a person to whom a Warning Notice is given or copied may publish the notice or any details concerning it.

Clearly this shows that Parliament, when drafting the Act, explicitly wanted the FSA not to make any disclosures which could incorrectly impact the firm's legitimate business interests until such time as both the investigation and disciplinary action had been completed. However, once both the investigation and disciplinary action had been completed it appears that Parliament's intention was that the FSA should make a public disclosure on the nature of the offence and the action it had taken. This is clear from Section 391(4) which sets out that the FSA can only publish information about a matter once a decision notice (which is described in Section 390 of the Act as a 'Final Notice') has been issued. Specifically, Section 391(4) of the Act states:

> (4) The Authority must publish such information about the matter to which a decision notice or Final Notice relates as it considers appropriate.

As such, until the 'Final Notice' has been issued the FSA cannot (my emphasis) make any comment on what action it has taken as this would be in breach of Section 348 of the Act. For ease of reference, I set out this section 348 of the Act in full:

348 Restrictions on disclosure of confidential information by Authority etc.

(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates.

(2) In this Part "confidential information" means information which—

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and

(c) is not prevented from being confidential information by subsection (4).

(3) It is immaterial for the purposes of subsection (2) whether or not the information was received—

(a) by virtue of a requirement to provide it imposed by or under this Act;

(b) for other purposes as well as purposes mentioned in that subsection.

(4) Information is not confidential information if—

(a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or

(b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.

(5) Each of the following is a primary recipient for the purposes of this Part—

(a) the Authority;

(b) any person exercising functions conferred by Part VI on the competent authority;

(c) the Secretary of State;

(d) a person appointed to collect or update information under section 139E or] to make a report under section 166;

(e) any person who is or has been employed by a person mentioned in paragraphs (a) to (c);

(f) any auditor or expert instructed by a person mentioned in those paragraphs.

(6) In subsection (5)(f) "expert" includes—

(a) a competent person appointed by the competent authority under section 97;

(b) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under Part XI;

(c) any body or person appointed under paragraph 6 of Schedule 1 to perform a function on behalf of the Authority.

As such, when considering the disclosure of information, I would specifically draw your attention to subsection 4 of section 348 of the Act. Here it states that until information is in the public domain it is an offence to release any information. As the FSA does not, correctly in my opinion, make any public statement until disciplinary action has been completed as it is possible for an investigation to commence with a 'Warning Notice' (which sets out the FSA's concerns to the firm/individual concerned) being issued, only for the investigation to be abandoned with a 'Notice of Discontinuance' being issued. A premature (and possibly incorrect) disclosure may well have an adverse effect upon a firm and this is clearly not a position the FSA (as the UK financial services regulator) could place itself in.

I appreciate you feel that, by not confirming that the firm was under investigation, the FSA has breached your Human Rights which I have also referred to earlier. However, in view of the comments I have made above, I do not share this view. I would however add that it appears to me from subsection 2(a) and (b) of section 348 of the Act that it was Parliament's intention that the FSA should not release information until the FSA had fully discharged its functions under the Act (which I believe completed the appropriate level of disciplinary action and issued a 'Final Notice'). Given that this is what I believe was Parliament's intention, in my opinion, the FSA could not make any comment whatsoever about whether Firm A (or any firm) was under investigation <u>until such time</u> (my emphasis) as the Final Notice was issued.

When you called on 15th October 2010, the FSA's investigation into Firm A appears to have been ongoing (with the 'Final Notice' not being issued until 15th December 2010) regardless of your views, the FSA could not confirm to you that the offer of redress you had received from Firm A was as a result of action by the FSA. Similarly, the FSA could not make any comment about whether the FSA had concerns about or was conducting a investigation into other providers of with profits based contracts. Although I have made this point, I must bear in mind the comments which the FSA made in its decision letter whereby it accepts that the CCC operative should not have indicated to you that the offer of redress appeared to be as the result of a business decision.

I would however add here, for sake of completeness, that whilst disciplinary action may well have been ongoing against Firm A by the FSA's Enforcement division, this would not generally have been communicated to the whole of the FSA. As such, the information which was provided to you by the CCC operative was, I believe, provided in good faith and certainly with no intent to mislead you, deliberately or otherwise. That is further rationale in this context for my earlier finding that there is no evidence of bad faith.

I hold this view as the notes recorded on the FSA's call logging system show that he "*[c]hecked and no current news on this and sounds as if it is a business decision*". I understand by this that he checked whether Firm A had received a 'Final Notice' (which at the time of the call it had not) and as it had not, he indicated that, he believed, it was a business decision. Although this may be an incorrect assumption to make, given the disclosure restrictions contained within section 348 of the Act, in my opinion, it was not, as you indicate, "*premeditated concealment*" of the facts. I accept however that it might (my emphasis) been preferable to have offered no comment at all but I doubt that that would be a realistic course of action or one that would have satisfied you at the time.

I also note that in your response to my Preliminary Decision you have commented that the "*measures taken by the FSA were in breach of EEC law as the principle of proportionality was a general principle of community law which individuals may rely on before the national courts. Article 5 of the EEC Treaty obliges member states not to take measures in the community sphere which breaches the principle of proportionality. Proportionality denotes that the means used to attain a given objective should be no more than is appropriate and necessary; an appropriate balance must be maintained between the adverse effects which an administrative authority's decision may have on the rights liberties or interests of the person concerned and the purpose which the authority is seeking to pursue. Administrative measures must be proportionate to the aim in view and which are the least restrictive of the basic Treaty freedoms*". You also add that in your opinion, "*the FSA's action could not be sustained on proportionality. First, [your] rights must be protected and the consequence of the FSA 'anonymity policy' was not the only consideration. Secondly, it is not sufficient to argue there were reasonable legislative grounds for the adopted course of action*".

Although I have considered your comments, it is not wholly clear why you feel that the FSA has not acted proportionately. As I have explained above, the fact that a firm is 'under investigation' does not in itself mean that the firm concerned has actually committed any breach of the FSA's rules. It simply means that the FSA has concerns which may need further investigation. Whilst you say that the FSA by not disclosing that the firm was under investigation, has not acted proportionately to you, making a premature disclosure to you would, by the same standards, not be viewed as acting proportionately to the firm or indeed to consumers generally.

I would also reiterate the comments I made above in that the FSA has to comply with the legislation set out by Parliament. Clearly, it was Parliament's intention when drafting the Act (shown by the inclusion of Section 391) that no disclosure should be made until a Final or decision Notice had been issued. I appreciate that you believe that this is placing the industry's needs before those of consumers, but given that this is something which is set out within the Act itself, it is not something which either I or the FSA can gain say.

In the context of your reply to my Preliminary Decision you further postulate that both the FSA and indeed the jurisdiction that I exercise places an undue emphasis upon the relevant and surrounding legislation. In support of that you quote from the former Professor of Jurisprudence at the University of Oxford, H L A Hart. While I am always interested in jurisprudential argument, I am driven back to the fact that the FSA, and indeed my jurisdiction, is derived from statute and that therefore the issue of *ultra vires* is always a key factor in coming to my final determination. What stage the FSA investigation had reached could not determine nor involve the FSA breaching its statutory constraints since no matter how advanced that stage of the investigation may or may not have reached finality had not been arrived at and until it had been my view remains that the legislation created an imperative in the context of confidentiality which no amount of jurisprudential argument can outweigh nor gain say.

I note that you are looking for an *ex gratia* award as a way of bringing this matter to a conclusion. Although I appreciate that the FSA could (and possibly should) have handled the call you made to the CCC on 15th October 2010 better than it did, when considering a complaint, I have to be mindful of the actions of the FSA and the complainant both before and after the complaint, the manner in which the FSA has considered a complaint, the impact the FSA's actions (or inactions) had on the complainant and the possible remedies available to a successful complainant (as set out in paragraph 1.5.4 and 1.5.5 of COAF). Paragraphs 1.5.4 and 1.5.5 of COAF (under the sub-heading of "[w]hat are the possible outcomes for the complainant?) state:

COAF 1.5.4	If the *FSA* concludes that a complaint is well founded, it will tell the complainant what it proposes to do to remedy the matters complained of.
COAF 1.5.5	Remedying a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an *ex-gratia* basis. If the *FSA* decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the *Complaints Commissioner* to review the *FSA's* decision.

In this instance it was accepted by the FSA that it was likely that the CCC provided you with information that was at the time could be considered misleading when you called it on 15th October 2010. (However that was in one sense inevitable given the restrictions imposed by Parliament upon the FSA as to when certain relevant information can be disclosed to the public). In addressing this, the FSA has apologised to you. I appreciate that you are now looking for an *ex gratia* payment as a way of resolving this issue but, as indicated in paragraphs 1.5.4 and 1.5.5, the FSA's complaints scheme does not provide an automatic right to compensation and other remedies are available to the FSA. I would add here for the sake of completeness, that although you feel that you are due redress by way of an *ex gratia* payment you have, in my opinion, failed to provide sufficient, if any, evidence to show that you have indeed suffered any financial loss or that any loss which has been suffered was as a direct result of the information you were given by the FSA particularly given the statutory disclosure or reporting restrictions placed upon it by the Act.

The FSA has previously consulted on the issue of compensatory payments on a number of occasions before, during and after the drafting of the Act. Ultimately, when assessing this issue, the FSA must be mindful of its statutory obligations of using its resources economically and efficiently. With this in mind, the FSA's Board's view is that the FSA should retain a wide discretion on whether it will make a compensatory payment on an *ex-gratia* basis following a complaint investigation. This is a view that I concur with, particularly in view of the way that the FSA is funded and the impact such payments will ultimately have on the regulated community and, therefore, indirectly, on the consumers who purchase financial services products or use services provided by regulated firms.

In relation to this complaint, I note that you say you are looking for an *ex gratia* award to avoid a judicial review of the FSA's decision and actions. In assessing your claim for this, I accept that the FSA's CCC failed to provide you with the level of service which it would have expected and provided you with information which it is accepted left you with an incorrect impression of the position. However, when this was brought to the Complaints Team's attention it immediately accepted this and issued you with an apology before the matter was referred to my office. In my opinion, although I appreciate that you lost the opportunity to have the 'redress calculation' checked by an actuary; this does not mean that you have suffered a financial loss as a result.

Clearly, as I am sure you are aware, had you acted, as you say you would have acted and employed the services of an actuary to check or challenge the redress Firm A had offered you, this would have been (as I am sure you will be aware) at your own expense and the costs incurred thereby could not (my emphasis) have been recovered from Firm A. As such, although you may have lost the opportunity to have had the calculation checked, the expenditure you may have incurred with the Actuary could possibly have exceeded the redress you actually received.

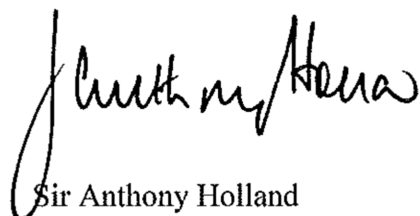
Similarly, in my opinion, I believe that an error discovered and addressed purely by the firm, is more likely to have generated concern by you about the method and overall redress calculation than one which was being 'monitored' by the FSA. I would mention here that the fact that the FSA was involved in this matter should, in my opinion, have offered you further reassurance that the redress calculation was conducted appropriately (and ultimately negated the need for you to seek independent reassurance that the calculation had been correctly completed).

I would add that the fact that you appear to have accepted the offer Firm A made without further enquiry or investigation (by way of an actuary employed at your expense) does not suggest to me that you would have acted differently had you been aware of the FSA's involvement in this matter. It does not appear to me that you have been significantly disadvantaged or inconvenienced in any way by this particular issue particularly in view of the comments I have set out above, I believe that the apology the FSA has made to you is a sufficient and an appropriate remedy in all the circumstances of your complaint; nor do I consider the time it took to address your complaint creates an obligation on the part of the FSA to take any further action beyond what it has done.

I am sorry, but having considered the points both you and the FSA have made, I do not believe that the position adopted by the FSA was unreasonable. Given that the FSA has apologised for its error and as it does not appear to me that you have been adversely affected I am unable to uphold your complaint.

Finally, you may already know that the Government recently published a white paper and a draft bill to repeal the Act. One of the suggestions in the previous consultation papers and indeed in the draft bill is that the new regulator may be able to make announcements when it issues a 'Warning Notices'. Although this is still, at this stage, a proposal you may wish to approach your Member of Parliament about your case and the way in which the current legislation has impacted upon you.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner