

# Recent Developments in Alternative Dispute Resolution

Update No. 15

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# ADR Update No. 15

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*This **ADR Update** is intended to inform the advice sector of developments and initiatives in alternative dispute resolution. ASA wants to encourage dialogue between advisers and ADR providers so that the growing field of ADR develops in a way that ensures access to justice and informed choice. If you know of others who might like to receive a copy of **ADR Update** by email, or if you would like more information about any of these topics, please contact Val Reid, ASA's policy and development officer for ADR. The **ADR Update** can also be downloaded from the ASA website.*

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# Research

## **Civil Justice since the Woolf reforms – how useful is ADR?**

Hazel Genn has produced some interesting statistics on civil justice and alternative dispute resolution in England.

These observations were made during a seminar given by Hazel Genn for the Scottish Consumer Council (SCC) on January 19<sup>th</sup> 2005. The SCC is leading a project, funded by the Nuffield Foundation, to consider the reform of civil justice in Scotland. It has arranged a series of seminars to explore different aspects of how civil justice operates. Hazel Genn's seminar reviewed the effect of Lord Woolf's Access to Justice report on the civil justice system in England, and considered the implications for reform in Scotland. She is conducting various research projects for the Department for Constitutional Affairs (DCA) which have not yet been published, and used figures from these projects to illustrate her observations.

I have summarised her main points here, but the website link for the full paper is given at the end of the article.

### **The pre-Woolf civil landscape**

Hazel Genn makes it clear that it is difficult to compare the pre-Woolf and post-Woolf civil landscape without baseline statistics. As yet unpublished research for the DCA on the pre-Woolf litigation landscape (before 1999) demonstrates that:

- 50% – 83% of defended cases in the county courts were personal injury (PI) claims
- overall at least 75% of cases were within the small claims or fast track financial limit; in most courts this figure was 85% or more
- the higher the value of the claim, the more likely both sides were to have legal representation
- PI cases had high settlement rates and a small number of trials
- non-PI cases had a higher proportion of trials, and a much higher proportion of cases withdrawn
- debt cases were most likely to end in trial (38%) and in all of those the claimant succeeded
- in 96% of all cases going to trial the claimant was successful
- in all types of cases 50% of awards or settlements were for £1,000 - £5,000, and a further 25% – 33% were for £5,000 - £10,000
- costs in non-PI cases were relatively modest, and in PI cases around 50% had costs of £2,000 or less, 24% had over £4,000

### **The impact of the Woolf reforms**

Lord Woolf's approach to reform was to encourage the early settlement of disputes through a combination of pre-action protocols, active case management by the courts, and cost penalties for parties who unreasonably refused to attempt negotiation or consider ADR.

Hazel Genn outlines such evidence as there is on page 5 of her paper (see link at the end of this article). This indicates that the Woolf reforms are working, at least to the extent that pre-action protocols are promoting settlement before application is made to the court; most cases are settling earlier, and fewer cases are settling at the door of the court. In fact, most cases are now settled without a hearing.

However, costs have increased, or have at least been front-loaded. In particular, in cases where mediation has been attempted and agreement has not been reached, costs are clearly higher for the parties.

## **The role of ADR**

Despite the encouragement of pre-action protocols, civil procedure rules and the Funding Code, Hazel Genn has not found evidence that the use of ADR has increased in the way that was anticipated. The voluntary pilot mediation scheme at the Central London County Court (CLCC) only had a take-up rate of 4% before 1999. Between 1999 and 2003, when the effect of the Woolf reforms was beginning to be felt, there was an increase in the take-up of this scheme, but a decrease in settlement rates from 62% to 40%. She hypothesises that the Woolf reforms have led parties to mediate in order to avoid cost penalties, and in order to appear to cooperate with judicial direction, but they may be only “half-hearted” in their attempt to negotiate a settlement. Reasons given by both lawyers and parties involved supports this theory; this emerges from research which she has conducted for the DCA on the CLCC scheme, which is so far unpublished.

## **Automatic Referral to Mediation**

An Automatic Referral to Mediation Scheme (ARMS) is now being piloted at CLCC; the pilot scheme began in March 2004. Details were given in the ADR Update number 12 (June 2004) which can be found on the ASA website [www.asauk.org.uk/adr](http://www.asauk.org.uk/adr). In this scheme 100 cases a month are randomly assigned to mediation rather than a hearing, and parties who do not want to participate in mediation must justify their decision to a judge. Evidence from Hazel Genn’s research on this pilot for the DCA (as yet unpublished) indicates that 80% of cases have sought to opt out from mediation, although the proportion of cases in which both parties opt out is higher among personal injury cases than among other cases. Of 689 cases automatically referred to mediation between May and October 2004, only 53 mediations have taken place. However, of those that agreed to mediate, the success rate is 66%. In the majority of cases legal advisers are advising clients against using mediation.

## **Any conclusions?**

Hazel Genn concludes that in England pre-action protocols have influenced pre-issue dispute resolution behaviour, in that more cases are being resolved before an application is made to court. Cases that are not settled at an early stage are moving more rapidly through court procedures.

ADR, and mediation in particular, is being promoted by the government as an alternative to court in England. However, despite this promotion, mediation is not a particularly popular option, nor is it necessarily a cheaper option. When court-based mediation schemes are no longer offered at low cost by mediation providers, they are even less likely to attract more users.

She suggests that mediation and other ADR options can only be a supplement to traditional settlement processes, not a substitute for them. If ADR is to be encouraged, it should be as part of a “flexible and proportionate dispute resolution landscape”.

Details of the SCC civil justice project can be found on:

[www.scotconsumer.org.uk/civil/index.htm](http://www.scotconsumer.org.uk/civil/index.htm)

Hazel Genn’s seminar paper for the SCC can be found on:

[www.scotconsumer.org.uk/civil/seminars/speakers/Genn%20paper.doc](http://www.scotconsumer.org.uk/civil/seminars/speakers/Genn%20paper.doc)

## **How many people have heard of mediation?**

43% of people have never heard of mediation.

- In fact 16-24 year olds are less likely to have heard of it (65% have never heard of it) and 55-64 year olds are much more mediation-aware (69% have heard of it).
- Those in the higher socio-economic groups were nearly twice as likely to have heard of mediation.

When mediation was explained to them, 59% of people said they would consider using it to resolve a dispute, but 38% said they would not consider it.

- 47% said they would consider mediation for an employment dispute.
- 43% said they would consider mediation for a neighbour dispute.
- 39% said they would consider mediation for a housing dispute with the local authority or another landlord.
- Only 32% said they would consider mediation for a dispute about family matters.

The averages hide some gender differences which are rather interesting – far more women than men would consider using mediation for family disputes, and more men than women would consider using mediation for employment disputes.

The Scottish Consumer Council (SCC) commissioned this research to find out whether people in Scotland were aware of mediation as a method to resolve disputes, and what they thought of it. The research team interviewed a representative sample of just over 1000 adults throughout Scotland in January and February 2005. It was published in March 2005 to coincide with the second conference of the Scottish Mediation Network. The co-ordinator of the network commented on the difficulty of setting up mediation appointments when 43% of people haven't heard of it, and 38% wouldn't consider using it!

The full report is on the Scottish Consumer Council website on:

[www.scotconsumer.org.uk/documents/Omnibus.pdf](http://www.scotconsumer.org.uk/documents/Omnibus.pdf)

## **Employment Appeal Tribunal conciliation**

The Employment Appeal Tribunal (EAT) has always had the power to encourage parties to try conciliation if it believes that there is a possibility of agreement. A significant minority of appeals to the EAT include claims that the Employment Tribunal proceedings were unfair, in that there was bias, or an appearance of bias, on the part of the Tribunal, the Chairman or lay members. The EAT considers that some of these appeals may be amenable to conciliation, and has agreed with Acas a protocol for the possible referral of such cases to conciliation.

This protocol is being used during a four month trial, which started in January 2005, and involves a judge requiring the parties in suitable cases to consider conciliation by Acas, and staying the appeal for around 28 days for discussion with an Acas officer to take place. The appellant will also need to report back to the EAT on the outcome.

The pilot will be reviewed in May/June this year, and the results will be made public.

More details and the full protocol can be found on the EAT website on:

[www.employmentappeals.gov.uk/info\\_frame.htm](http://www.employmentappeals.gov.uk/info_frame.htm)

# ADR schemes

## Tenancy deposit disputes

A new scheme has been established to adjudicate on disputes about tenancy deposits at the end of a tenancy. The Tenancy Deposit Scheme (TDS) is intended to replace the government-sponsored pilot which was run by the Housing Ombudsman Service, but which is no longer in operation.

The Housing Act 2004 s.212-215 deals with tenancy deposits; provisions which will come into effect later this year mean that landlords who are not using an authorised tenancy deposit scheme will not be able to issue a s.21 notice requiring the tenant to leave. Against the background of this legislation, it is not surprising that the Association of Residential Letting Agents has supported the establishment of the TDS.

Under the TDS scheme, any dispute about the return of a tenancy deposit is eligible, providing the landlord uses a regulated agent operating in Great Britain or Northern Ireland, and the agent belongs to a professional body approved by the scheme. The three main residential letting agents networks in the UK have all been approved:

- the Association of Residential Letting Agents
- the Royal Institution of Chartered Surveyors
- the National Association of Estate Agents.

So far, about 700 letting agents have joined the scheme – around a fifth of the total.

Any dispute over the deposit at the end of a tenancy is referred to the TDS by the letting agent. The tenancy deposit is held by the agent, and if a dispute arises the agent sends the disputed sum to the TDS to hold while an independent adjudicator is appointed. A decision should be made within 29 working days of the referral. The scheme is free to tenants, and the TDS guarantees to return the deposit if the decision is made in the tenant's favour.

More details on the TDS website:

[www.tds.gb.com](http://www.tds.gb.com)

Section 212-215 of the Housing Act 2004 can be found on:

[www.legislation.hmso.gov.uk/acts/acts2004/40034--q.htm#212](http://www.legislation.hmso.gov.uk/acts/acts2004/40034--q.htm#212)

# Consultations and reports

## **Citizen redress: what citizens can do if things go wrong with public services**

Every year 1.4 million complaints about public services are made through the various redress systems dealing with central government departments. They are processed by over 9,300 staff at an annual cost of £510 million. Processing these cases generates at least another £198 million in legal aid costs, primarily in immigration and asylum appeals. Complaints and redress are big business.

### **National Audit Office report**

In March 2005 the National Audit Office (NAO) published a report on citizens' redress. Its aim was to map existing redress systems; however, the report makes it clear that researchers, let alone citizens, have difficulty finding out about the systems that are supposed to serve them, there is little consistency in the different processes, and around half of government departments cannot even say how many complaints they have received in the last two years. The picture is one of complexity, duplication, long procedural trails, and no reliable means of assessing efficiency and effectiveness.

Traditionally government departments have made a strong distinction between complaints and appeals.

- Complaints about processes, and about how issues have been handled, are dealt with by an internal complaints system, and can usually be taken to an ombudsman or an independent complaints handler if the internal complaints system is not satisfactory.
- Challenges to the substance or the accuracy of a decision go through an appeals system, or to a tribunal. Some appeals systems are independent from the original decision-makers, some are not.

The NAO report points out that rigidly separating complaints from appeals is unhelpful and confusing for citizens, who would benefit from a more integrated concept of "getting things put right". It identifies the Financial Ombudsman Service as providing a helpful model, with no boundary between complaints about the process or the content of a decision.

### **Mystery shoppers**

A mystery shopper exercise was undertaken by the researchers to try to get information from government departments about how to complain. This showed a very patchy pattern of responses. Many government departments were difficult to reach by phone, or slow to respond, and others were not set up to deal with such requests. In one major agency it was impossible to get through to a real person by phone, despite repeated attempts. Trying to get information by phone without web access seems to be particularly difficult.

### **Focus group findings**

Focus groups indicated that citizens regard many redress arrangements as time-consuming, formal, impersonal and intimidating; one in six people didn't really expect a reply when they complained about a public service.

Older people are familiar with the concept of an ombudsman, but people under 40 were much less aware of what ombudsmen do. Overall, though, only one person in fourteen mentioned any kind of ombudsman unprompted when asked how they might go about resolving a problem with a public service. There was also a common idea that

ombudsmen would take a long time to produce results. Mediators and other ADR redress processes seem to have a very low public profile.

### **Statistics snapshot**

Some interesting statistics give a snapshot of how public service complaints are dealt with. For example, in the year 2003-4 the highest number of complaints received by government departments were about health issues, including complaints about the NHS. Of 147,500 complaints, 280 were dealt with by a mediator, and 4,750 were handled by the Parliamentary and Health Service Ombudsman. A further 19,230 letters of enquiry or complaint from MPs were also received on this issue. Immigration triggers a much higher proportion of letters from MPs – there were 6,870 complaints in the same year, but 36,520 MP letters.

### **Recommendations**

The report makes a number of recommendations as to how government departments could improve their complaints handling. It suggests that the DCA should look at developing more pro-active mediation and other ADR routes to redress, and proposes that the government should consider whether there could be a single access point for citizens to get information on how to make a complaint or seek redress from a public service.

The full report can be downloaded as a pdf document from the NAO website:

[www.nao.org.uk/publications/nao\\_reports/04-05/040521.pdf](http://www.nao.org.uk/publications/nao_reports/04-05/040521.pdf)

### **Court-based mediation schemes – a toolkit for courts and providers**

The Courts Service and the Civil Justice Council have just published a “toolkit” for organizing and running court-based mediation schemes. It was launched by the Master of the Rolls on May 6<sup>th</sup>. The toolkit is based on the experience of courts which have already established mediation schemes over the last few years. It comes in two parts:

- Part 1 covers the basic questions that must be answered by courts before deciding to establish a mediation scheme.
- Part 2 covers practical guidance on the nuts and bolts of bringing a new scheme into operation.

The toolkit outlines three types of scheme:

- Court-based schemes, such as that at Central London County Court, where the court makes premises available for mediation, and deals with the administration and collection of fees. Mediators are provided by local mediation organisations or through the local Law Society.
- Court-associated schemes, where the court sends out leaflets to applicants with details of local mediation providers.
- The National Mediation Helpline, operated by the Civil Mediation Council and supported by the DCA, which provides a single national phone number for help and information about mediation, and an agreed price scale for approved mediation providers.

The full toolkit can be found under the “what’s new” section of the Civil Justice Council’s ADR website on:

[www.adr.civiljusticecouncil.gov.uk](http://www.adr.civiljusticecouncil.gov.uk)

## How much will I get?

The Local Government Ombudsman (LGO) has just published new guidance notes on remedies for complainants. In principle the ombudsman's aim is to "put the complainant back into the position he or she would have been in but for the fault". In order to provide some sort of consistency, the LGO has produced these guidelines, which are applied in both formal reports and local settlements.

### Remedies

Remedies may include:

- an apology
- a review of the local authority's practices
- a practical action (such as issuing a statement of special education needs, or making repairs to a tenant's house)
- financial compensation. This might include:
  - costs incurred in pursuing the complaint
  - financial recompense for the loss of a non-monetary benefit (such as education, or the use of a room affected by disrepair)
  - distress
  - time and trouble
  - interest

The guidance considers specific remedies, including appropriate ranges for financial compensation, in specific areas such as:

- council housing repairs
- neighbour nuisance
- housing benefit
- school admissions
- special educational needs
- environmental health
- social services

### Note for advisers

This guidance may be useful for advisers who need to help clients decide whether to make a complaint to the LGO or to take the matter to court. Generally speaking, courts require applicants to consider ADR before making a court application, and there is a risk of financial penalties for those who unreasonably refuse ADR. One of the factors for making (and justifying) an informed decision about how best to pursue the issue will be a comparison of potential remedies.

More details on:

[www.lgo.org.uk/pdf/remedies.pdf](http://www.lgo.org.uk/pdf/remedies.pdf)

## **Neighbour nuisance – local authority responsibilities**

Noise, household rubbish piling up, garden ornaments stolen, children running wild, fighting, screaming, all-night parties, constant dog barking, abusive language, aggressive behaviour. Low-level anti-social behaviour upsets and distresses neighbours, and is generating an increasing number of complaints to the Local Government Ombudsman (LGO) because local authorities are not dealing with complaints about nuisance neighbours or anti-social behaviour. Complaints come not just from densely populated inner cities, but also from market towns and rural locations.

### **The role of the LGO**

As well as dealing with individual complaints about local authorities, from time to time the LGO issues guidance on particular topics that are causing concern. In February 2005 the LGO published guidelines for local authorities on how to deal with complaints about neighbour nuisance. The guidelines contain a helpful list of legal and other remedies available to councils in tackling neighbour nuisance and anti-social behaviour complaints.

### **The responsibilities of the local authority**

Local authorities now have a wide range of options in dealing with neighbour nuisance and anti-social behaviour, and one of the concerns of the LGO is that simple administrative failures undermine councils' effectiveness when responding to complaints.

It is worth noting that these guidelines do not just apply to complaints by or about council tenants; the LGO expects councils to be "as robust in dealing with complaints by or against non-tenants as with complaints by or against council tenants".

### **Common problems with local authorities**

The guidelines highlight some of the common problems identified when the LGO investigates complaints from the public.

- Often council staff are not aware of their own guidelines, or have not been properly trained to deal with these issues.
- There are often lengthy delays in councils investigating neighbour nuisance complaints.
- In some cases complainants feel they have been pressured into agreeing to mediation to resolve a dispute, and that the mediation itself was simply an excuse for the council to avoid dealing with their complaint.
- Councils sometimes refuse to respond to a complaint on the grounds that the person complaining, or the person complained about, are not council tenants. However, the LGO expects councils to respond adequately to all complaints, regardless of whether or not the people involved are living in local authority housing.
- The LGO gets many complaints that councils don't return telephone calls, don't reply to letters, and don't keep people informed about what action they are taking.

### **LGO guidelines**

- Councils should define neighbour nuisance and anti-social behaviour so that staff know what they are dealing with, and when specific actions should be triggered.
- Councils should have written policies and procedures for dealing with neighbour nuisance, so that they have a consistent response when people complain.
- Targets for reasonable response times should be set, and should be kept.
- Mediation can be a very effective way to resolve neighbour disputes, but it is not always suitable; councils need to consider the circumstances of each case.

- Complainants need to be kept informed of key events, and of any progress by the council.

The guidelines also include a number of case studies, giving examples of problems, complaints, and the remedies suggested by the LGO.

The full guidance is available on the LGO website on:

[www.lgo.org.uk/pdf/neighbour-nuisance-asb.pdf](http://www.lgo.org.uk/pdf/neighbour-nuisance-asb.pdf)

### **New Focus for Civil Legal Aid: Consultation Outcomes**

The LSC has announced the reforms of civil funding that will take place following last year's New Focus consultation. Changes will be introduced in April and July this year. The LSC claims that the package of reforms has changed significantly in light of the "persuasive consultation responses" received. However, they maintain that the " thrust of the proposals – to encourage the early settlement of disputes and to treat litigation as the last resort – remains unchanged".

Key proposals related to ADR include:

- in clinical negligence, a greater range of cases will be expected to pursue complaints procedures before funding for potential litigation is granted, and guidance will continue to strongly support the use of mediation and other ADR techniques
- in actions against the police, Legal Aid may be refused if the police complaints system has not been pursued without good reason, and cost benefit guidance will emphasise the importance of proportionality of costs and remedies
- in other non-family areas, guidance to continue to encourage mediation and other forms of ADR will be introduced, limiting certificates where necessary to achieve this

The full response is on the LSC website on:

[www.legalservices.gov.uk/docs/civil\\_consultations/New\\_Focus\\_civillegalaid\\_Outcomes\\_march05.pdf](http://www.legalservices.gov.uk/docs/civil_consultations/New_Focus_civillegalaid_Outcomes_march05.pdf)

### **ASA Conference**

The ASA conference will be held on Friday 24<sup>th</sup> June in London. It will look at the Community Legal Service 5 years on, and will review the past, examine the present and consider the future. There are a total of 21 workshops, including two on ADR. In one, John Sergeant will talk about his recent evaluation of an Acas mediation pilot project. Does mediation have a role in employment disputes? What did employers and employees think of it? In another workshop, a speaker from the parliamentary ombudsman will talk about recent MORI research into users' experience of the ombudsman (see ADR Update no.14 February 2005), and a speaker from the local government ombudsman will talk about their adviser support project.

More information about the conference, with booking details, on:

[www.asauk.org.uk/conference](http://www.asauk.org.uk/conference)

# Cases

## Courts continue to promote the value of mediation

*“A judgment of £5000 will have been procured at a cost to the parties of about £185,000. Is that not horrific?”*

*“The costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation”.*

## Outline of the original dispute

The recent case of **Burchell v Bullard** in the court of appeal ([2005] EWCA Civ 358) focussed on the costs of an earlier case. This original dispute was between a builder, Mr Burchell, and his clients Mr and Mrs Bullard. Mr Burchell had a contract to build an extension to the Bullards' house. He claimed a payment of around £18,000 from the Bullards, which they refused to pay on the grounds that they were unhappy with the quality of his work. They counter-claimed for over £100,000 for repairs due to shoddy workmanship. The judge found the counter-claim to be greatly exaggerated, and the Bullards' claim was eventually judged to be worth only about £14,000. This meant that less than £5,000 changed hands at the end of the five day hearing. The costs of the case at that stage were over £160,000.

## Costs – should the winners pay because they refused mediation?

The appeal, which was heard in April 2005, focussed on who should be responsible for paying the costs of the case. When the dispute first arose, in 2001, the builder had suggested mediation as a way to resolve the dispute. The Bullards refused, on the grounds that the case was far too complex for mediation. The appeal court judge, Lord Justice Ward, was reluctant to penalise the Bullards on costs, as their refusal to mediate pre-dated major cases such as *Dunnett v Railtrack*, and Last year's *Halsey* judgement. However, he stated that “a small building dispute is *par excellence* the kind of dispute which ... lends itself to ADR.” He gave a number of reasons why mediation should have been attempted.

- The defendants' belief that their case was so watertight that they need not attempt ADR was unreasonable.
- Their claim that the case was too complex for mediation was “plain nonsense”.
- “The costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation”.
- “The defendants cannot rely on their own obstinacy to assert that mediation had no reasonable prospect of success”.

Despite his unwillingness to use the provisions of the civil procedure rules to fully penalise the Bullards for their refusal to consider mediation, Lord Justice Ward made it clear that in future defendants “can expect little sympathy if they blithely battle on regardless of the alternatives”. He said:

*“Mediation has established its importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.”*

The full transcript of the case can be found on:

[www.bailii.org/ew/cases/EWCA/Civ/2005/358.html](http://www.bailii.org/ew/cases/EWCA/Civ/2005/358.html)