

Recent Developments in Alternative Dispute Resolution

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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, if you would like to be removed from the ADR Update email circulation list, or if you would like more information about any of these topics, please contact Val Reid, ASA's ADR policy officer.*

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ADR in family disputes

Two years on – parenting after separation or divorce

In-court conciliation is good at brokering agreements and sorting out a schedule for contact: but it does nothing to improve the relationship between separated parents, and this means that children are still struggling.

In November 2007 the Ministry of Justice published research by Liz Trinder and Joanne Kellett which followed separating families for two years. All the families in the research used in-court conciliation to try to resolve disputes over their children's residence and contact. Parents were interviewed after six months and two years; the researchers looked at whether they had made an agreement, and whether it was working. However, they also looked at whether they were happy with the arrangements, their ability to communicate with each other, and whether they were able to co-operate as parents.

In-court conciliation is usually provided by CAFCASS officers (from the Children and Family Court Advisory and Support Service). A common model is a one-off meeting at the court between a CAFCASS officer and both parents. These meetings usually last about thirty minutes. The researchers found that although three-quarters of the parents initially made an agreement through their in-court conciliation meeting, during the two year period of the research 60% of the agreements had been dropped or had broken down, and 40% of the families had been involved in further litigation.

After two years, more children were having overnight contact, and the overall amount of contact per child had increased. But despite this, most parents still reported a very negative relationship with each other: communication and co-operation had not improved, and had often worsened. The researchers also found that 35-43% of children were showing significant levels of psychological distress. This far exceeds the national average in the UK, where at any given time around 20% of children have similar scores on a standard measure.

The ability of parents to co-operate and to shield their children from conflict is one of the key factors likely to enhance their children's wellbeing after separation. Previous research has established that what matters is not how much contact they have, but whether or not they have 'good' contact. This research shows, not surprisingly, that parents who were able to collaborate on making arrangements before conciliation, were likely to continue to do this. Parents who had had high levels of conflict, or had been in violent relationships, were far less likely to be able to make contact work. Neither court intervention nor in-court conciliation had much effect on this.

Usually, where parents had 'moved on' and put together a workable contact arrangement, or had accepted an arrangement that was far from perfect, this was simply down to the passage of time. Often things had settled down because the children had grown older, one or both parents had a new partner, or because the cost and stress of the court process meant that they had just given up.

Trinder and Kellett conclude that resources would be better directed to more therapeutic mediation, which specifically aims to improve parenting skills after family breakdown. This approach has been relatively successful in Australia. They suggest

that this could either be incorporated into the work of CAFCASS, or referred to external specialists. Another option would be to reframe this whole area as a public health issue rather than a legal problem, and develop comprehensive services for families in the community.

Read the full report on: www.justice.gov.uk/publications/research211107.htm

Read about the Australian model on: www.familyrelationships.gov.au

ADR reviews

Should the FOS name and shame the bad guys?

The Financial Ombudsman Service (FOS) has committed itself to an external review every three years. Lord Hunt of Wirral is leading the current review, and has invited all stakeholders to comment on two themes: how accessible is the FOS? and should the FOS make information about complaints and decisions public?

ASA has submitted a brief response, supporting in principle the publication of information about FOS decisions. There are two key arguments in favour of making this information public:

- It would enable some external scrutiny of the quality and consistency of FOS decision-making
- It would give consumers greater information about performance of financial services providers, and enable more informed decision-making

There are, of course, concerns which need to be addressed if information which is currently confidential is going to be published. For example, publishing adjudications and ombudsman decisions and identifying the businesses involved may encourage more businesses to resolve disputes through the 'guided mediation' stage of the FOS process. Would this be an advantage or a disadvantage for consumers? On the one hand it could give consumers added bargaining power in negotiating appropriate redress. On the other hand, more settlement negotiations would take place away from any public scrutiny.

You can read the published submissions on the Hunt Review website:

www.thehuntreview.org.uk

Review of civil justice in Scotland

In February 2007, the Scottish Executive announced a wide-ranging review of civil courts in Scotland. Among other topics, it is looking at:

- The cost of litigation to the parties and to the public purse
- The role of mediation and other ADR options

The Review Board has established some principles which they believe should underlie any civil justice system, including 'proportionality'. However, they say that '*proportionality does not mean justice on the cheap*'. In November 2007 the Review Board published a consultation paper, asking specific questions about some of the key issues. Chapter 5 summarises the commonly understood pros and cons of mediation and its potential role in the court process. It also provides a useful outline of the current position in Scotland and in other jurisdictions.

The consultation asks four questions about mediation:

1. Should the court (a) encourage, (b) require or (c) facilitate mediation?
2. If so, how? And at what stage of the process?
3. In which types of dispute is mediation inappropriate?
4. What form of ADR is most helpful, and how should it be funded?

For more information, and to read the whole consultation paper, go to:

www.scotcourts.gov.uk/civilcourtsreview

The government ADR pledge

In March 2001 Lord Irvine, then the Lord Chancellor, made a government commitment to use ADR to resolve disputes wherever possible, aiming to avoid the need for expensive legal proceedings. The intention was that ADR options would be used in government contractual disputes, but not in public law cases. Each year the Ministry of Justice (MOJ) publishes a report on the effect of this pledge on government dispute resolution procedures. Each government department and agency, including the NHS Litigation Authority, is asked to monitor their use of ADR throughout the year, and to provide information to be collated by the MOJ's Better Dispute Resolution team.

The sixth report was published by the MOJ in January 2008, and indicates that over the period 2006-7, ADR has been used in 331 cases with 68% leading to settlement, saving costs estimated at £73.08m.

The following table compares the results with the previous years:

Year	Number of cases	Number of settlements	Success rate	Estimated costs savings
2006-7	331 cases	225	68%	£73.08m
2005-6	336 cases	241	72%	£120.7m
2004-5	167 cases	125	75%	£28.8m
2003-4	229 cases	181	79%	£14.6m
2002-3	163 cases	Not given	83%	£6.4m
2001-2	49 offers of ADR	Not given	Not given	£2.5m

It is clear, looking at the anonymised case studies in the report, that the 'savings' figures are very much rough estimates. For example, Her Majesty's Revenue and Customs reports a damages claim for over £1m, which was settled during mediation for a payment of £25,000 to the claimant. It is impossible to know with certainty whether this is a valid 'saving', and whether or not it is the mediation which was responsible, since a very high proportion of cases settle before a hearing anyway, and of course the outcome of the hearing is also unpredictable. Given the very approximate nature of these figures, the disproportionately high 'saving' of £120.7 million reported last year is probably just an anomaly.

Even though this report just seems to be paying lip service to the achievements of the ADR pledge, it is worth noting the falling success rates reported over the last five years. This parallels Hazel Genn's research into the Central London County Court mediation scheme over the last ten years. She found that as a higher proportion of parties took part in mediation, usually under pressure from the court, the settlement rate was reduced. Is a similar effect being demonstrated here?

Read the full report on:

www.justice.gov.uk/news/announcement-150108a.htm

ADR and consumers

Ombudsmania?

Since the first ombudsman arrived in this country forty years ago, a wide range of schemes has sprung up to deal with complaints about furniture, estate agents, funerals, telecommunications, banks and many more consumer issues. On the one hand it is a huge advantage to consumers to have access to free dispute resolution without all the cost, stress and delay of going to court. On the other hand, there are problems with such a proliferation of organisations. In some markets there are competing schemes, and providers may be tempted to choose the cheaper option; this may not necessarily provide the best service to the consumer. The Funeral ombudsman scheme has closed because the industry withdrew funding. And just how independent are these ombudsmen? Some (but not all) are members of the British and Irish Ombudsman Association (BIOA). However, it is worth noting that there are two types of BIOA membership – full voting members and associate members. Associate members do not have to meet the standards for independence and accessibility that are required of full members. Do most consumers understand and appreciate the difference?

The National Consumer Council (NCC) is about to publish a pamphlet about the spread of private sector ombudsman schemes. The intention is to highlight the problems caused by their ad-hoc development, and to kick-start a debate about ombudsmen in consumer markets.

The NCC has five main areas of concern:

1. Markets that cause the most problems for consumers, such as electrical appliances or second hand cars, have no ombudsman scheme to resolve disputes.
2. Increasingly, services are provided in bundles. When buying a home, for example, you may well use the linked services of estate agents, providers of Home Information Packs, mortgage providers, financial advisers, surveyors and lawyers. If you have a complaint, there is a maze of different redress options to negotiate. Ombudsman schemes are not grouped in the same way, resulting in overlaps as well as gaps in provision.
3. Allowing two or more dispute resolution schemes to set up in competition in the same market risks a race to the bottom in standards.
4. Ombudsmen could use their unique market knowledge more pro-actively to raise industry standards.
5. There is no single organisation to take responsibility for ombudsman planning and strategy.

The NCC pamphlet proposes some solutions to improve this consumer lottery – it will be published on the NCC website later in February:

www.ncc.org.uk

More information about BIOA membership on:

www.bioa.org.uk

Coal Health Compensation – conciliated complaints get a raw deal

The biggest personal injury scheme in British legal history was established to compensate miners and their families for serious health problems. British Coal was found guilty of negligence in two group actions in the late 1990s, and the Department of Trade and Industry (DTI – now DBERR) took on responsibility for paying subsequent compensation claims. It was agreed that solicitors acting for the miners would be paid costs by the DTI where the claim was successful. However, some solicitors failed to tell miners about this arrangement, and deducted additional fees from compensation awards to offset the unsuccessful cases in which they were not paid.

Many miners and their families began to complain about their solicitor's behaviour. Complaints about solicitors are now handled by the Legal Complaints Service (LCS), the consumer complaints arm of the Law Society, which set up a small team of caseworkers and adjudicators to deal with these complaints. In 2006, the Legal Services Complaints Commissioner investigated the way the LCS was handling the complaints, and made several recommendations. A further investigation was completed at the end of 2007, and a report published on January 15th this year.

In 2007, six miners refused to accept a conciliated settlement and insisted on adjudication. Between them, they were awarded over £10,000 of additional compensation as a result. The Commissioner found that this was a systemic problem in the LCS. Caseworkers were encouraging miners to settle their complaints through conciliation at an early stage in the process, on the grounds that it would be resolved much more quickly. Often they received far less than they would have done if the complaint had been formally adjudicated. Awards as low as £19 were wrongly described by LCS caseworkers as 'significant'. Caseworkers were inconsistent in the amounts they recommended in conciliation, they failed to use findings from adjudicated decisions as templates for conciliated award levels, and often they did not tell miners about the adjudication option. Far from improving after the 2006 report, the gap between conciliation and adjudication has got wider in the most recent cases.

This is not just an issue for coal health compensation. A proliferation of ombudsman and dispute resolution schemes are springing up to deal with consumer complaints (see, for example, 'Ombudsmania?' on page 6 of this ADR Update) and many of them incorporate an early dispute resolution option. Organisations have many different names for this – conciliation, guided mediation – but often this stage of the process is much more casual and less open to scrutiny than the more formal adjudication stages. Consumers are heavily dependent on the advice of the caseworkers as to whether the proposed agreement is appropriate. An advantage of such schemes is that disputes can be resolved quickly, cheaply and informally; but if this is at the expense of fairness, then complainants are getting a raw deal. The Legal Services Complaints Commissioner reports that none of these problems are insurmountable, and could be resolved relatively quickly by better and more consistent quality control. This is a lesson with a wide application.

Read the report on:

www.olsc.gov.uk

Complaints about energy suppliers

The Energy Supply Ombudsman has been up and running for just over a year. It is an independent ombudsman scheme that will investigate complaints about companies that supply gas and electricity. Like most ombudsman schemes, it will only take on a case if the complainant has not been able to resolve the problem directly with the company involved. The vast majority of complaints are about bills, but the ombudsman will also investigate complaints about transfers between suppliers, or about rude and unhelpful staff. Since 1st September 2007, the scheme also deals with complaints about sales activity, such as pressure to sign up with another supplier. Financial awards are not intended to be punitive, but the ombudsman has the power to order suppliers to pay compensation of up to £5,000. However, it's worth noting that the average amount during the first year of operation was under £90.

The ombudsman scheme is separate from Energywatch, the energy consumer watchdog, which offers consumer advice and helps with making initial complaints to suppliers. It is also separate from Ofgem, the energy regulator. It was set up to meet Ofgem's recommendation (in 2005) that energy suppliers should be members of an independent redress scheme.

Not all suppliers are members of the scheme, as it is currently voluntary. However, the Consumers, Estate Agents and Redress Act received Royal Assent on 19 July 2007. This Act requires all energy suppliers to be members of an independent redress scheme. There are as yet no details about how this will work in practice. For example, in the field of telecommunications there are two rival redress schemes – Otelo, the telecommunications ombudsman (which is run by the same not-for-profit company that runs the energy ombudsman scheme), and CISAS, an adjudication scheme run by the Chartered Institute of Arbitrators. It is possible that this model of competing schemes may also be introduced in the energy supply industry.

More information on:

www.adrnow.org.uk/energyombudsman

www.energy-ombudsman.org.uk

www.energywatch.org.uk

www.ofgem.gov.uk

Mediation news

County Court mediation

There has recently been a change in the way court-based mediation schemes are organised.

Over the last ten years, many county courts in England and Wales developed mediation schemes. Some, like Central London, had their own in-house scheme offering mediation in rooms on the court premises. Others, like Exeter, had a rota of mediators approved by the local Law Society who provided mediation away from the court in their own offices. Each court had a different process for referring interested parties to the mediation process. Most of them offered subsidised rates, but the cost varied throughout the country. Small claims mediation schemes also varied from court to court.

During 2007 the Courts Service decided to rationalise court-based mediation.

- From Autumn 2007, in *fast and multi-track cases*, all courts will use the National Mediation Helpline (NMH) as a one-stop shop to provide information about civil and commercial mediation, and put people in touch with local mediators. The helpline is funded by the Ministry of Justice, and providers are listed by the NMH if they are accredited by the Civil Mediation Council. The helpline has a table of fixed fees which apply to all mediations, including those referred by the court, and those where the parties have contacted the NMH before making a court application.
- In *small claims cases*, each court area is appointing a mediation officer who will be based in one of the local courts – they should all be in place by April this year. The mediation officer will answer questions about mediation, and offer telephone or face-to-face mediation for any case where both parties agree. There will be no charge for this over and above the small claims court fee, which will already have been paid.

The Edinburgh Sheriff Court mediation scheme, and other pilot mediation schemes in Scotland, are not affected.

Read more about court mediation schemes on the ADRnow website:

www.adrnow.org.uk/courtmediation

Find more details about the National Mediation Helpline:

www.nationalmediationhelpline.com

Read the Central London County Court leaflet about mediation:

www.adrnow.org.uk/fileLibrary/pdf/Central_London_Mediation_Leaflet_Oct_2006.pdf

Find out more about the Edinburgh Sheriff Court mediation scheme:

www.adrnow.co.uk/edinburgh

ADR case law

Can you take ombudsmen to court?

In 2000 Gaston Siborurema came to the UK from Rwanda. Three years later he enrolled on a student nursing course at London South Bank University, but over the next eighteen months he failed two of the course units four times. At this point, the university withdrew him from the course for failing to make academic progress. After various internal appeals, Mr Siborurema made a complaint to the Office of the Independent Adjudicator for Higher Education (OIA), an ombudsman-like service for dealing with disputes between students and universities which, like most ombudsmen, can look at whether the process of making a decision was fair, but not at matters of academic judgement.

The OIA investigated, and told Mr Siborurema that his complaint was not justified. Mr Siborurema then applied for permission to judicially review (JR) the OIA's decision. The independent adjudicator at the time was Baroness Ruth Deech, who argued strongly that the OIA was not subject to JR. She claimed that students used the OIA because *'we offer a speedy, user-friendly and free service and because our decisions are based on fairness and a consideration of higher education practices rather than legal rights'*. She felt strongly that just the threat of JR caused delay and expense, and prevented the OIA from getting on with its real work.

Initially, permission to move for JR was refused, but Mr Siborurema and his lawyers appealed against that decision. The appeal was heard at the end of December 2007. The three judges were in general agreement that Mr Siborurema's case was 'hopeless'. However, they went on to consider it in some detail because they felt that the principle of whether or not the OIA and other non-public ombudsman schemes are subject to JR was an important one.

Lord Justice Pill stated that he had no difficulty in concluding that the OIA is open to judicial review, partly because it was set up by statute. Although he accepted that the wish of the OIA to be free from court supervision was 'genuine and well-intentioned', he felt strongly that it should not be upheld:

'Its aspiration to be an informal substitute for court proceedings is not inconsistent with the presence of supervision by way of judicial review. OIA's decisions, will, it is to be hoped and expected, be based on fairness and a consideration of higher education practices, as Baroness Deech puts it, but I do not see that impeded by the existence of a limited remedy in the courts if OIA has exceeded its powers or acted in a manner inconsistent with the Statute under which it operates. However well-intentioned, an important scheme available to resolve a wide range of disputes ... should not be free from that supervision. For it to become a law unto itself would not achieve the statutory intention.'

Although it is already established that public sector ombudsman schemes such as the Local Government Ombudsman and the Parliamentary Ombudsman are subject to JR, this judgment makes it clear that all such schemes which have a basis in statute can be challenged in the courts.

Read the details of the case and the full judgment on:

www.bailii.org/ew/cases/EWCA/Civ/2007/1365.html