

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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✉ val.reid@asauk.org.uk

🌐 www.asauk.org.uk

🌐 www.ADRnow.org.uk

✉ ASA, 12th Floor, New London Bridge House, 25 London Bridge Street, London SE1 9SG

☎ 020 7378 6428

Ombudsman news

The Financial Ombudsman – accessible and transparent?

Lord Hunt published his [review of the Financial Ombudsman Service](#) on April 9th. His overall view is that although much of the work done by the FOS is ‘highly impressive’, it still looks too much like a ‘middle-class service for middle-class people’. Last year, the FOS took on responsibility for dealing with complaints about loans, credit brokers and claims management companies, which widened its previous potential client base. Lord Hunt suggests that the FOS should look at how it can reach out to less affluent citizens with debt management problems, as it can still seem ‘intimidating and unwelcoming to the less educated, more vulnerable complainant’.

The report makes a total of 73 recommendations. They include:

- Extending the FOS opening hours, and using a freephone number
- Developing new systems for fast-tracking debt and credit-related cases; Lord Hunt points out that although these are often of lower value, they are frequently of vital importance to the people complaining
- Appointing case advisers to guide and support vulnerable complainants through its system – printed and web-based information is just not enough
- Moving towards greater openness in publishing performance information about the firms it investigates

Publish and be damned?

This last point relates to an ongoing debate about just how much information about FOS decisions should be made public. In principle, openness and transparency can only be an advantage to consumers and to the industry as a whole. In practice, the issue is not straightforward. Given the volume of complaints the FOS deals with each year, what is the best way to make meaningful information available, without swamping the public with so many facts and figures that it is impossible to make sense of the data? And how to get the balance right between the cost and the benefit? Lord Hunt suggests that as a first step the FOS could publish more anonymised data. This should be independently edited, and organised so that consumers and businesses can easily search for benchmarks in areas of interest. He also suggests public awards for businesses that deal with complaints well, and a wooden spoon for the worst performers. Lord Hunt’s report is clear that in this area ‘the status quo is not an option’. The FOS should also work more closely with the Financial Services Authority to ensure that ‘more robust, company-specific data is made available for complaints handling within all parts of the system’.

What’s in a name?

Interestingly, the report also suggests that the Financial Ombudsman Service ‘should commission a more user-friendly, readily understood and enticing trading or brand name.’ The term ‘ombudsman’ is considered to be off-putting and incomprehensible. Can it be that ombudsmen are not enticing to the general public? A wholly unscientific straw poll of one (the very helpful guy fitting a new gas meter as I wrote this article) demonstrates that this is true: when I asked him if he had heard of the Financial Ombudsman Service, the answer was an unequivocal no; he added that ‘in fact I don’t even know what that middle word is’. Lord Hunt suggests ‘Financial Complaints Service’.

In the April edition of the FOS newsletter, Walter Merricks, the Chief Ombudsman, states in response that ‘we will make a start on the ‘openness agenda’ in our annual

review – to be published next month – by providing more detailed comparative data about complaint-uphold rates across the different financial sectors and products we cover. And clearly that will be a first step on the road to greater transparency.'

Note: Last September the Board of the Financial Ombudsman Service commissioned Lord Hunt to conduct a review of the FOS. In particular, he was asked to look at how accessible the service is to people of all backgrounds, and whether the FOS could be more open about the performance of the financial services providers it investigates.

'I want to complain about how you handled my complaint'

Often, when people complain to a public services ombudsman, the original problem has been aggravated because the council, hospital or government department handled the first complaint so badly.

Ann Abraham, the Parliamentary and Health Services Ombudsman, has just drafted some [guidelines on good complaints handling](#) for public bodies. The aim is both to improve the way that complaints are dealt with at an early stage, and to make it clear to the people complaining and to the services involved how she will judge their performance when she is conducting an investigation.

The guidelines follow the same six principles as last year's principles of good administration:

- Getting it right
- Being customer focused
- Being open and accountable
- Acting fairly and proportionately
- Putting things right
- Seeking continuous improvement

She states that everyone has the right to receive a good service from public bodies, and to have things put right if they go wrong. Good complaint handling matters because it is an important way of ensuring that customers receive the service to which they are entitled.

In particular, she believes that complaints handling should focus on the outcome for the complainant, not on complex procedures and processes which can lead to delay and unfairness (principle 1). She also expects public bodies to make their complaints handling arrangements accessible, and to make sure that their customers know about any available help and advice when making a complaint (principle 2). It is important for all public bodies to be open and truthful when things have gone wrong, and to say clearly what they will do to put things right (principle 3). Crucially, good complaint handling is not just about remedies for individuals, but about learning lessons from complaints, and improving the service to others in the future (principle 6).

As always – fine principles, but why is it so hard for public bodies to put them into practice? What sanctions or incentives would it take to ensure that government departments and health service trusts always behaved in such a reasonable and user-friendly manner?

Service failure – the new maladministration

From April 2008, the LGO has a wider remit. As well as investigating maladministration, it can now also investigate service failure. This has been part of the function of the public services ombudsmen in Scotland and Wales for the last few years, and has now spread to the LGO in England. This means that the ombudsman can investigate a complaint if a local authority has failed to provide a service which it had a duty to provide, whether or not it provided the service directly or through a contract with a partner agency. The LGO has described it like this:

‘For example, if the council has arranged for contractors to make repairs in a council property, and the contractors just never turn up, the tenants will not get the service they are due. This would be a failure in a service which it was the council’s function to provide, and a complaint could be made to the ombudsman if the council do not deal with the problem appropriately.’

As well as a greater flexibility in investigating service failure, the LGO also has new powers to make a ‘public statement of reasons’ when it discontinues an investigation. In the vast majority of cases, the LGO will settle a case at an early stage, usually because the local authority, prompted by the LGO approach, offers to put right the problem for the person complaining. In other cases, the LGO can decide not to continue with a full investigation and a public report, because the injustice caused to the complainant is not significant enough to justify the time and expense involved. Concerns have often been raised about this practice. This is partly because the decision rests with the ombudsman, not with the complainant, and so the complainant may feel that access to justice has been frustrated. Another concern is that poor councils are not named and shamed in public as a result, so there is less incentive to improve performance in the future. From April this year, if the LGO decides not to continue with a full investigation and report, it can still publish a ‘public statement of reasons’ explaining what the problem was, and how it has been dealt with. These powers are very new, and the three local government ombudsmen are unsure at this stage quite how they will be used in practice. However, it is worth bearing this in mind when considering whether or not to take a complaint to the LGO.

As part of its ongoing aim to be more accessible to members of the public, the LGO has also set up a new advice team. Anyone who is wondering whether or not their complaint is suitable for the LGO can telephone an advisor, who acts as the first point of contact. He or she will discuss the problem, and say whether or not the LGO can take it on. The LGO advice team can be contacted on 0845 602 1983 or 024 7682 1960 from 8.30am to 5pm Monday to Friday.

More about the [LGO](#) and [maladministration](#) on the ADRnow website.

Details of the changes can be found in part 9 of the [Local Government and Public Involvement in Health Act 2007](#).

Joint ombudsman investigations

Frank’s learning disabilities as an adult were so severe that he needed one-to-one care for 95% of his waking time. For about two years Frank lived in a residential care home run jointly by Buckinghamshire County Council and Oxfordshire & Buckinghamshire Mental Health Partnership Trust. But the home made no attempt to properly assess his care needs, and eventually, in despair, his parents took him home and attempted to care for him themselves.

Neither the Health Trust nor the Council responded helpfully to concerns and complaints. Because the Trust and the Council were equally responsible for providing – and failing to provide – care, it was difficult for Frank’s parents to know where to complain. However the Local Government Ombudsman and the Parliamentary Ombudsman can now undertake joint investigations into complaints that involve organisations under their different jurisdictions. This is the first joint investigation they have carried out, and the two ombudsmen found that both the County Council and the Health Trust were at fault. They recommended that between them they should pay a total of £32,000 compensation to Frank and his family.

It is worth remembering these new powers, granted under last years’ regulatory reform order, when deciding how best to make a complaint about matters that span more than one organisation. You can start the complaint off with either ombudsman service – they will decide to work together if they can see that collaborating will offer a better, joined-up service for the complainant.

Read the [full report](#) ‘Injustice in residential care: A joint report by the Local Government Ombudsman and the Health Service Ombudsman for England’.

ADR in Tribunals

Tribunals and ADR

The Council on Tribunals recently published the results of a [survey](#) of the ways in which tribunals are using proportionate dispute resolution. However, the survey found that very few tribunals believe that ADR options are appropriate.

A few tribunals, such as the UK Intellectual Property Office, and the Valuation Tribunal Service for Wales, are offering a mediation option, but they rely on the parties themselves to decide whether they think this would be helpful. Most respondents thought that ADR was just not suitable for the kinds of matters that came to their tribunal, as there is usually little room for negotiating outcomes. For example, tribunals as different as the Social Security and Child Support Appeals Tribunal, and the National Parking Adjudication Service, made it clear that ‘settlement’ is out of bounds – either there is an entitlement, or there isn’t; either a penalty is payable, or it isn’t. The Mental Health Review Tribunals of England and Wales believe that their hearings involve “fundamental questions of liberty, health, safety and public protection”, which are not amenable to compromise.

Where ADR is used, it tends to be used in disputes involving individual parties, rather than disputes between citizen and the state. There was a strong feeling that even if mediation was tried, it should never prevent access to a tribunal hearing, and that it was essential to ensure the independence of the tribunal and the transparency of the ADR process.

ADR in housing disputes

If it ain't broke...

Earlier this month the Law Commission published its [latest paper](#) on housing law reform. Its 2006 issues paper proposed three reforms:

- A system of 'triage plus' to diagnose problems and refer people to the most appropriate place for advice and help
- Greater use of alternative dispute resolution
- A transfer of most housing cases from the courts to the tribunal system

Responses to the issues paper made it clear that implementing these suggestions would not be straightforward.

Triage plus

The Law Commission's issues paper suggested that those giving advice need to get their act together, and to create better knowledge, information and referral systems to avoid clients falling through gaps in the system. This provoked howls of outrage from legal practitioners and advisers, who argued forcefully that gaps in the system were caused by lack of resources, not by lack of knowledge or expertise. This new paper asserts that more public education and information is important, but is unable to suggest where funding for this might come from. It also suggests that CLACS and CLANS will meet the need for a holistic advice and referral service in the future: we await the LSRC's evaluation of these developments with interest.

Greater use of ADR

Those who responded to the issues paper had a wide range of views, but no new arguments were put forward. It's clear that in some types of dispute, and with some disputants, ombudsmen or mediators might be able to help. But in others – where an urgent solution, due process, or the power of the courts to enforce rights is essential – they are unlikely to be effective. The paper makes it clear that mediation should never be compulsory, but that courts, tribunals and advisers should make sure that people know about their ADR options.

Courts or tribunals?

Proposals to transfer claims for possession and disrepair from county court to the Residential Property Tribunal Service were based on the argument that a specialist body would be better at dealing with housing law disputes. Predictably, judges were hostile to this loss of jurisdiction; ASA, Shelter, and other advice networks also pointed out that such a change would risk the loss of legal aid for representation. The Law Commission has therefore proposed that developing a specialist housing tribunal might remain a long term goal; in the short term any reforms should concentrate on improving the existing system.

Making a difference?

Many of the responses to the 2006 issues paper pointed out that most of the problems with the system for dealing with housing disputes are caused by lack of resources. Shelter stated baldly that housing advice gets 'an inadequate slice of an inadequate cake'. Greater financial investment would improve things significantly. The other key problem is the complexity of the law in this area. In the paper 'Renting Homes', also published in 2006, the Law Commission argued that a thorough reform and simplification of housing law is essential, as the current law is an 'irrational, massively over-complicated mess'.

The ADRnow website

Not just for ADR anoraks

When you run a national website, you really want to know who is using the site, and what they find useful or interesting. Last August we installed Google Analytics on the ADRnow site, which means we can find out information about our users in a lot of detail. Here are some of the interesting figures from the first six months of using Google Analytics (September 2007 – February 2008).

How many people use the ADRnow website?

During this six month period, a total of 79,937 pages were viewed on this site. That represented a total of 35,017 visitors: 29,882 of those were unique visitors. On average, visitors stayed on each page for just over 1½ minutes, and looked at 2 pages.

How did people find the website?

- 8% of users knew the site address and came to it directly.
- 15% came by following a link from another website: 3.34% came via Adviceguide (the Citizens Advice public information website), and 1.92% via Direct.gov (the government information website). Other referring sites included Justice.gov.uk (The Ministry of Justice website), Advicenow (ASA's legal information website), ASA, CLS Direct, the BBC, and Trading Standards.
- 76% found the site by typing a search term into Google or another internet search engine. The five most common search terms used were 'arbitration', 'furniture ombudsman', 'maladministration', 'ADR' and 'Parliamentary Ombudsman'.

Which pages were the most popular?

The most viewed page, with nearly 10,000 viewers was the home page. The other six most popular pages (each viewed between 2,000 and 4,000 times) were:

- The profile of the furniture ombudsman scheme
- The generic page on arbitration
- The ADR directory
- The FAQ page
- The profile of the Central London County Court mediation scheme
- The generic page on mediation

Why was there a sudden interest in arbitrators on April 15th?

Around 300 people visit the ADRnow website each day. On April 15th this year, there was a sudden peak – over 700 people logged onto the site. In fact, 428 of these visitors went straight to the page about how arbitration works. What was going on? Fascinated, I used the Google Analytics programme to trace where they had come from. It turns out that every single one of these extra visitors followed a link from the BBC website. The source was the BBC Radio 5 Live on-line sports discussion page, 606, where Leeds United FC fans were hotly debating the decision to appoint an arbitrator to decide on the legitimacy of the decision to deduct penalty league points from their club. One helpful fan had added a link to ADRnow, to explain the role of an arbitrator to his puzzled mates. Glad to have been of use!

Have a look at [ADRnow](#) and tell us what you think.