

# Recent Developments in Alternative Dispute Resolution

Update No. 25

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# ADR Update No. 25

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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.*

**ADR Updates** can be downloaded from the policy section of ASA’s website [www.asauk.org.uk](http://www.asauk.org.uk)

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# Ombudsman news

## Parliamentary Ombudsman v Government – the sequel

*The Equitable Life report yet again raises questions about the role of the ombudsman*

On July 27<sup>th</sup> the long-awaited [report into Equitable Life](#) was published by Ann Abraham, the Parliamentary Ombudsman. Titled 'A decade of regulatory failure', there is little room for confusion about the report's conclusions. The Department for Trade and Industry (now BERR), the Government Actuary's Department and the Financial Services Authority all came in for various degrees of criticism for their failure to provide oversight and regulation to a standard that might have been expected. The ombudsman found that this constituted [maladministration](#) causing injustice, and recommended that the government should apologise for its regulatory failures, and set up and fund an independent scheme to assess claims and determine compensation within six months of the publication of the report, with the aim of completing payments within two years.

The Equitable Members Action Group estimates that the cost of such a compensation scheme would be around £4.7 billion, and there have been predictable debates in the media about whether or not such a use of taxpayers' money is justified. But so far there have been no public statements from any of the government departments or statutory bodies concerned. The only comment, from an un-named Treasury spokesperson quoted on the BBC website, was that *'the length and complexity of the report mean it would be inappropriate to comment before giving it our full and careful consideration. We expect to provide a full response to the House [of Commons] in the autumn.'* Although this is indeed a long and complex report (running to 2,800 pages), the Treasury has had plenty of time to give it full and careful consideration. The original draft report was sent to the Treasury and the other public bodies concerned in January 2007, and they in turn submitted a substantial joint response – over 500 pages, as Ann Abraham wrote in her somewhat irritated letter to MPs in May last year. Her revised draft report was sent out again to all the interested parties in February this year, and in May she notified them of the final publication date.

So would it be appropriate to assume that 'full and careful consideration' is a euphemism for 'no'? Not necessarily. There have been two recent issues over which the government has initially refused to accept the recommendations of the ombudsman. Not surprisingly, they both involved the suggestion that significant sums of money should be paid out in compensation for maladministration by public bodies. But in both cases, after initial refusal, the government has in fact complied.

### *MOD compensation for British internees*

At first the Ministry of Defence refused to accept the ombudsman's findings concerning a compensation scheme for British internees in the Far East during World War II, and only agreed to implement her recommendations when the House of Commons Public Administration Select Committee took evidence on the issue.

### *Occupational pensions*

The ombudsman report into the role of government bodies in advising on occupational pension schemes, 'Trusting in the pensions promise', was published in March 2006, but the Department for Work and Pensions (DWP) contested the findings of the report, and rejected its recommendation that some form of compensation should be

considered on the grounds that it would be too expensive for the public purse, and was therefore unjustified.

The Parliamentary Select Committee for Public Administration considered this refusal, and published a damning report. It concluded that:

*“It would be extremely unfortunate if government became accustomed simply to reject findings of maladministration, especially if an investigation on this committee proved there was indeed a case to answer. It would raise fundamental constitutional issues about the position of the ombudsman and the relationship between parliament and the executive. At the heart of every case of maladministration is someone who has suffered injustice. By concentrating its energy on denying findings of maladministration, rather than on considering what remedies might be practical and proportionate, the government has caused further distress to complainants. It has delayed any resolution of their problems.”*

An application for judicial review was made, but in December last year the DWP conceded, and announced an extension to the Financial Assistance Scheme so that those who had lost out on their pension as a result of their employer going bust would have 90% of the value of their pension restored. At the time, Ann Abraham commented, *‘I warmly welcome this announcement, which constitutes full compliance with my key recommendation and which also remedies the deficiencies in the Financial Assistance Scheme identified in my report.’*

#### *Equitable Life*

In the case of the Equitable Life report there have been no immediate denials of maladministration, and no high-profile refusals to consider compensation. This may mean that the government has learned from past experience, and is considering complying with the ombudsman’s recommendations. On the other hand, it may mean that it has learned the value of exploiting the short attention span of the media, and is hoping that some other story will be monopolising their attention when that promised statement is made to Parliament in the autumn. We should not lose sight of this issue - questions about the relationship between ombudsman, parliament and government have significant constitutional implications.

### **Administrative Redress: Public Bodies and the Citizen**

This Law Commission consultation paper looks at when and how citizens should be able to obtain redress from a public body that has acted wrongfully.

The Commission believes that the current law is uncertain and over-complicated. In some places it is too restrictive for complainants – for example, you cannot usually claim compensation as part of an action for judicial review. But on the other hand, in negligence actions, courts’ haphazard interpretation of the duty of care has meant that public bodies are faced with unpredictable liabilities, and an ‘ever-increasing burden on public resources’.

The Law Commission identifies four existing routes for challenging public bodies:

- Internal complaints procedures
- External non-court procedures including tribunals and public enquiries
- Public sector ombudsmen
- Court actions in public and private law

### *Internal complaints procedures*

The Commission's assumption is that internal complaints procedures should be the starting point for almost all citizens seeking redress, as it is cheaper and quicker than other routes. However, this may not resolve the problem. The paper suggests two reasons for this – either that the aggrieved citizen wants a public vindication, or because there is a 'fundamental disagreement over the nature of the complaint'.

### *External non-court procedures including tribunals and public enquiries*

Where this happens, the Commission believes that the next option should be the tribunals system, which was created for this purpose.

### *Public sector ombudsmen*

Where this is inappropriate, the next route should be a complaint to the relevant public sector ombudsman. In order to make this easier, the paper proposes two reforms:

- removing the statutory bar – complaints to the ombudsman would not be barred because the applicant has attempted to obtain, or could obtain, a legal remedy through the courts
- removing the MP filter – complaints could go directly to the Parliamentary Ombudsman, without having to go through an MP first

### *Court actions in public and private law*

Where court action is needed, the Commission proposes a number of reforms:

In private law...

- changes to the tort of *negligence* in order to make liability and remedies more predictable
- abolishing the actions of *malfeasance in public office* and *breach of statutory duty*
- replacing these with a new concept of *modified corrective justice*, influenced by current EU law

*Modified corrective justice* is based on the principle that the remedy should put the citizen in the position s/he would have been in if the public body had not acted wrongly. Compensation should only be considered where there is *serious fault*, and where the body is undertaking *truly public* activity. Courts should also have discretion to abandon the rule of *joint and several liability* in such cases, and to decide what proportion of compensation a public body should pay according to its share of liability.

In public law...

- Damages should be available in judicial review alongside existing remedies, where *serious fault* can be shown.

The paper proposes greater flexibility between the different systems:

- Courts could have the power to stay proceedings for an ombudsman investigation to take place. The claimant could then revive the court proceedings if a point of law still required adjudication
- A public sector ombudsman could refer questions of law to a court for determination during the course of an investigation

The paper also recognises the possible effects of these reforms: public bodies may back away from certain policy goals, or limit service delivery, in order to reduce their exposure to liability. Those responding to the consultation are asked to give their views on the potential consequences of these changes.

### [Administrative Redress: Public Bodies and the Citizen](#)

Published 2<sup>nd</sup> July 2008 – responses by 7<sup>th</sup> November 2008.

## **Improving the Financial Ombudsman Service**

Earlier this year the Hunt review published its report into the Financial Ombudsman service (FOS). You can read a summary in [ADR Update 24](#). The FOS has now started thinking about how to implement the report's recommendations about [transparency](#) and [accessibility](#).

### *Transparency*

The Hunt review strongly recommended a greater openness about the data which the FOS holds. About 100,000 disputes are resolved each year, most through guided mediation, and an ombudsman makes a formal decision in around 8,000 of these cases. The FOS strategy will not be to publish every single decision: there was a consensus that this would result in confusion rather than transparency. However, leading decisions which illustrate key principles will be published in an anonymised form. The FOS also agrees in principle with Lord Hunt that there is no reason why they should not publish the number of complaints made about each business, and the proportion upheld. It plans to start making this information public in 2009, and to consult on how best to do this before then.

### *Accessibility*

Lord Hunt suggested that the FOS might change its name, as many people have little or no idea what an ombudsman does. However, the FOS has decided that a name change might cause confusion, and would rather do more 'targeted awareness-raising'. They are also proposing a number of changes to make the service more user-friendly, including extending the opening hours of the helpline, and piloting a process where a named member of staff will support consumers with specific needs through the complaints process.

# New ADR processes

## **Gas and electricity complaints – the new ‘customer journey’**

Current arrangements for complaints about gas and electricity suppliers are about to change. At present consumers with complaints can contact [Energywatch](#), a consumer organisation that will give advice, and may get in touch with the provider directly to try to sort out the problem. Consumers who are not happy with the solution offered by the supplier can take their complaint to the [Energy Ombudsman](#). At present this is a voluntary scheme, but most energy suppliers are already members. From 1<sup>st</sup> October 2008 all this will change., and there will be a new ‘customer journey’.

### *Consumer Direct*

The first stage is to complain to the supplier. Consumers needing information about how to go about this, or advice on their rights, can contact [Consumer Direct](#). Consumer Direct will have a dedicated call centre to deal with consumer complaints about energy suppliers in England, Wales and Scotland. Unlike Energywatch, they will not take responsibility for sorting out complaints directly with the company, though they may forward details of a complaint to the supplier by email. They will advise individual consumers, and small businesses (those with under 10 staff).

### *The Energy Ombudsman*

If the supplier does not resolve the complaint within 8 – 12 weeks, complaints can be taken to the Energy Ombudsman. From 1<sup>st</sup> October 2008 all gas and electricity suppliers and networks are required to be members of this ombudsman scheme, which has been approved by the regulator Ofgem. The ombudsman will take complaints from individual consumers, and from small businesses.

### *Consumer Focus*

There is extra help in dealing with complaints for vulnerable consumers, or for particularly urgent or complex problems. From October 1<sup>st</sup> 2008, Consumer Direct can refer consumers to the Extra Help Unit at the re-vamped [National Consumer Council](#), which will change its name to ‘Consumer Focus’. It will provide additional support if someone’s energy supply has been cut off, if they are being threatened with disconnection, or if their personal circumstances make it hard for them to make a complaint themselves.

These changes are based on the provisions in the [Consumers, Estate Agents and Redress Act](#) which was passed in July 2007.

## **Complaints about Estate Agents**

As well as changes to complaints about energy suppliers, the [Consumers, Estate Agents and Redress Act](#) also requires all estate agents to be members of an approved redress scheme from October 1st 2008.

The Office of Fair Trading has approved two schemes:

- The [Ombudsman for Estate Agents \(OEA\)](#)
- The [Surveyors Ombudsman Service](#)

The OEA has been in operation for ten years, but until now membership has been voluntary.

As usual with ombudsman schemes, consumers who are trying to sell or to buy a house in the UK must first complain to the estate agent. If the problem can't be resolved, then they can complain to whichever scheme their estate agent is a member of.

Complaints are likely to be about:

- a breach of the estate agent's legal obligations
- unfair treatment
- avoidable delays
- a failure to follow proper procedures
- rudeness or discourtesy
- not explaining matters
- poor service or incompetence

Consumers must have suffered some kind of financial loss, stress or inconvenience. Both schemes are free to consumers, and can make awards of up to £25,000 – though in the past, most awards made by the Ombudsman for Estate Agents have been for less than £500.

There is more information about [how the two schemes work](#) on the ADRnow website.

## **Workplace disputes**

Last year, the Gibbons review of procedures for dealing with workplace disputes raised a number of key questions. The [government response](#) to the consultation, published in May 2008, provides a digest of the public opinions expressed, and a guide to the thinking behind the provisions of [the Employment Bill](#), currently going through parliament. There is a summary of the issues in [ADR Update no 21](#).

### *Repeal of the current statutory dispute procedures*

75% of those responding to the review thought that the current statutory dispute procedures should be repealed, as they tend to formalise disputes at an early stage, get lawyers involved too soon, and encourage escalation rather than resolution. Some trades unions and certain bodies representing vulnerable employees disagreed, arguing that the procedures had a value in protecting all employees equally. The government has decided to repeal the procedures, and legislation for this is included in the Employment Bill.

### *Acas guidelines on dispute resolution*

To replace the statutory dispute procedures, the government proposes that a short Acas code of practice on workplace disputes should be introduced on a statutory basis. Employment tribunals will be able to take this into account when making decisions on individual cases. As an incentive to follow the code, the Employment Bill will give tribunals discretionary powers to increase or reduce an award by up to 25% if either party unreasonably fails to comply. Acas will also issue longer, more comprehensive guidelines for employers on how best to put the code into practice, which will be flexible but not prescriptive.

### *Early resolution*

The government has increased funding for Acas so that it can expand its telephone conciliation service to be available even before a claim is put in to an employment tribunal. Acas is currently piloting this 'pre-claim conciliation' in three areas of the country, and it will be rolled out across England, Scotland and Wales from April 2009. The time restrictions on when Acas can get involved in conciliation will be removed.

A large number of respondents, especially ADR providers, were keen on promoting non-statutory mediation as a way of resolving workplace disputes at an even earlier stage. The government is happy to encourage this, but is not planning to make it a requirement. However, if workplace mediation is going to be useful for both employers and employees there will need to be common professional standards, and a credible, accessible register of providers. From October 2007, the [Scottish Mediation Network](#) has hosted a register for mediation providers in Scotland (see [ADR Update 22](#)) and discussions are taking place about setting up a similar scheme in England and Wales.

### *A new advice service*

The consultation asked whether it would be a good idea to set up a new telephone and internet advice system. It was suggested that this 'impartial' advice would alert both sides to the 'realities of tribunal claims' and the 'potential benefits of ADR to achieve more satisfactory and speedier outcomes'. It was also suggested that this advice service could be the sole gateway into the tribunal service.

Not surprisingly, there was wide support for good, independent advice for both parties involved in employment disputes. Although a majority of the respondents supported a new service, a significant minority felt that there was no point in duplicating work which Acas, independent lawyers and advisers already do, and that it would be better to invest more resources in the existing provision. A majority thought that such an advice service should be the main access route into the tribunal system, but a significant minority strongly believed that it might prove to be a barrier to justice rather than a gateway, and opposed the idea.

The government proposal is to fund Acas to develop its helpline service. In total, Acas will receive £37 million over three years for its expanded role, including the extended helpline and early resolution services. The Acas helpline will not replace the role of union officials or lawyers, and it won't filter applications to an employment tribunal, but it will give information about what is involved in the tribunal process, and about ADR options.

### *Other provisions*

The government has also decided to simplify tribunal claim forms, and to allow tribunals to use paper-based hearings in straightforward claims where all the parties consent.

## ADR and the courts

The Courts Service (HMCS) is continuing to explore ways to encourage people to consider – and ideally to use – mediation or other forms of ADR as an alternative to a court hearing.

### *Fast and multi-track claims*

From April 2008 all [allocation questionnaires](#) for fast and multi-track cases include a new section (A) on 'settlement'. The form states:

*'Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.'*

The form has questions for legal representatives and for the parties themselves.

- Legal representatives are asked to confirm that they have explained to their clients about their responsibility to try to settle, the options available, and the possibility of costs sanctions if they refuse.
- Parties are asked whether they want to try to settle the claim at this stage, whether they would like the hearing to be postponed for a month while this is attempted, and whether they would like the court to arrange a mediation appointment through the National Mediation Helpline. If the person completing the allocation questionnaire answers 'no' to the question about wishing to settle at this stage, they are required to give reasons justifying this. Under the civil procedure rules, cost penalties may be applied where a party *unreasonably* refuses to attempt to settle.

### *Small claims*

The new [allocation questionnaire for small claims](#) asks parties whether they would like to use the free small claims mediation service, funded by HMCS. If both parties reply saying they would like to try mediation, the court mediator will contact them and the hearing is usually stayed for mediation to take place. If the judge thinks the case may be suitable for mediation but the parties have not ticked this box on the questionnaire, the case will usually be listed for a hearing, but the mediator will contact the parties to encourage them to consider this option while waiting for their hearing date.

Since April 2007 HMCS has been rolling out the small claims mediation scheme throughout England and Wales, and, as from June this year, there is a mediator in post in every court area. Small claims mediation can be provided either face to face or by phone: the phone is proving very popular, and over the last year 87% of mediated cases used that option. During that time, a total of 3,745 phone and face to face mediations took place, and around two thirds of them resulted in settlement. The mediated cases settled on average after around 5 weeks: small claims hearings usually take place around 14 weeks after allocation. The small claims mediation service is very popular with its users, with 98% saying they were satisfied or very satisfied, and even 85% of those who did not succeed in settling their case at mediation saying they would use the service again. For an analysis of the pros and cons of the original small claims mediation pilots on which the new national scheme is based, see [ADR Update 20](#).

# ADR – new directions

## **Family mediation – the LSC strategy**

The Legal Services Commission (LSC) published its [strategy for family mediation](#) in August this year. Over the last year 17,250 people reached agreement through family mediation; 1 in 5 legal aid clients attempted mediation to resolve their family dispute, and around 70% of these successfully negotiated an agreement. The LSC wants to increase the use of family mediation on the grounds that ‘family disputes that are resolved through mediation can be cheaper, quicker and according to academic research, less acrimonious than those, which are settled through the courts.’

The three key areas covered by the strategy are:

### *Value*

This part of the strategy is based on the National Audit Office report (see [ADR Update 21](#)) published last year, which suggested that money could be saved if more people used family mediation, and that the biggest barrier to people choosing mediation was that their solicitor failed to tell them about it. The LSC strategy for family mediation has therefore been built around motivating solicitors to refer appropriate clients to mediation through a revised fee structure; fixed fees under Family Help, for example, are intended to incentivise solicitors to refer clients to mediation at an early stage, as they get the same fee regardless of how much work they do on the case.

### *Access*

As in other areas of legal aid contracting reform, the LSC is looking to contract with fewer, larger providers. Currently, 50% of providers do 88% of all family mediations, and the LSC is looking for ways to encourage these larger providers to increase their work. They are also planning to expand the LSC training contract grant scheme to cover family mediators.

### *Quality*

The LSC has developed an assessment tool known as the Contract Management Review Criteria Report which will provide information from mediation services on ‘conversion rates’ – what proportion of mediations result in agreement – and outcomes. The LSC may introduce Key Performance Indicators based on success rates into future contract bid rounds.

The strategy also includes a change in the fee structure so that mediation services will be funded for direct consultation with children, and for co-mediation where appropriate in child abduction cases.

## Legal Complaints in Scotland

From 1<sup>st</sup> October 2008 all complaints about solicitors or advocates in Scotland will go to the new [Scottish Legal Complaints Commission](#) (SLCC). The Commission is an independent body, set up in 2007 as a one-stop shop to deal with all consumer complaints about legal service providers. The Commissioner is Jane Irvine, who has been the Scottish Legal Services Ombudsman since 2006.

As with most complaints bodies, consumers should first try to resolve their dispute directly with the service provider. Where this is not successful, complaints can be taken to the SLCC. The SLCC will decide whether it can take on the complaint – it has the power to reject frivolous or vexatious complaints – and how it would be best to resolve it. It will be piloting a mediation service later this year. Where complaints are fully investigated, the SLCC will have an ombudsman-like role, conducting an inquisitorial process. If the SLCC finds in favour of the complainant, it can require the practitioner to re-do work or reduce fees, and can also award up to £20,000 in compensation.

The Law Society of Scotland and the Faculty of Advocates will still deal with matters of professional misconduct or unsatisfactory conduct, though the SLCC can oversee how such complaints are investigated.

Information about how to [contact the SLCC](#), which will be based in Edinburgh, will be published on its website by 1<sup>st</sup> October.

## Mediation and the European Union

In April 2008, the EU approved a new [mediation directive](#) for mediation in civil and commercial disputes. This follows a consultation process in 2004 - you can remind yourself about this by reading the summary in [ADR Update 14](#). The directive applies to cross border disputes, though each member state can choose whether to apply its provisions to civil and commercial disputes within their own jurisdiction.

There are five key provisions:

- Member states should encourage the development of some form of quality assurance for mediators
- Every judge in the EU has the right to suggest mediation at any stage in the proceedings if s/he thinks it is appropriate
- Member states must each set up some mechanism for agreements reached through mediation to be enforceable through the courts where both parties agree
- The EU directive assumes that mediation should be confidential, so it provides that mediators cannot be compelled to give evidence in court about what took place in mediation
- The directive includes a rule on limitation periods – any time limits for court applications will be suspended while mediation takes place

The directive came into force in May this year, and each member state now has three years to decide how to incorporate the provisions into its own national law.