

# Recent Developments in Alternative Dispute Resolution

Update No. 26

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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](mailto:val.reid@asauk.org.uk)

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

🌐 [www.ADRnow.org.uk](http://www.ADRnow.org.uk)

✉ ASA, 6<sup>th</sup> Floor, 63 St Mary Axe, London, EC3A 8AA

☎ 020 7398 1470

# Opinions

## **The sound of one hand clapping**

Without the civil justice system, society could not operate as it does. Civil Justice provides the legal architecture for the economy to operate effectively, for agreements to be honoured, and for the power of government to be scrutinised and limited. But all of this is meaningless without civil courts to resolve the disputes that arise, and enforce legal and personal rights.

### *Civil justice – rhetoric and reality*

In her three [Hamlyn Lectures](#) at the end of 2008, Professor Dame Hazel Genn traced the story of the civil justice system in England since the Woolf reforms. Her main argument was that the escalating costs of criminal justice have increasingly reduced the money available for civil justice since the cost of civil and criminal legal aid were yoked together within a capped budget. She observed that her research over recent years has involved spending time in squalid court buildings, where too few staff struggle with too much work. She argues that this running down of the infrastructure of civil justice has been masked by the rhetoric of government policy, as the Ministry of Justice and the Legal Services Commission claim that reductions in legal aid are not about removing a welfare benefit to the poor, but about preventing fat cat lawyers stuffing their pockets with taxpayers' money.

### *ADR – benefit or diversion tactic?*

At the same time, the government has been enthusiastically promoting ADR, on the grounds that adjudication is expensive, time-consuming and disempowering for individuals, and that ADR is a cheaper, quicker and more satisfying way to resolve disputes. Hazel suggests that the aggressive marketing of mediation by expensively trained but underemployed mediators has been co-opted by the government as a convenient way to divert attention from the need to fix the civil justice system and to resource it adequately.

### *Justice and mediation – rights or interests?*

Mediation can be a valuable dispute resolution option. But it can be dangerous when the language of mediation reconfigures the need to enforce individual legal rights as a mutual problem to be solved. As an example, Hazel tells the story of the expensive stair lift bought by her mother-in-law, which repeatedly breaks down. Is this a clash of morally equivalent interests – the installer's interest in not having to come out to fix it, and the mother-in-law's interest in not getting stuck half way up her stairs on the way to bed as she lives alone and is immobile? Or is it an enforceable right under contract law to have a working stair lift that is fit for purpose? And will the problem ever be sorted out without the coercive power of the courts to direct the company to comply with their obligations?

### *Mediation and civil justice – some observations*

Hazel Genn's research into ADR, and mediation in particular, has led her to a number of conclusions:

- The background threat of litigation is essential to bring people to the mediation table – if there were no courts, why would any defendant agree to mediate? 'Mediation without the credible threat of judicial determination is the sound of one hand clapping.'

- Mediation works best when the parties enter the process voluntarily – the more the courts pressurise people into mediation, the less likely they are to reach an agreement.
- People should be informed about the full range of dispute resolution options, but not forced into one particular route.
- It is impossible to generalise across contexts about the relevance of any particular ADR process, so there needs to be more principled and detailed thinking about ADR policy.

There will be a seminar to discuss the lectures this summer, and the full text will also be published by Cambridge University Press.

## **Youth homelessness in the UK**

The Joseph Rowntree Foundation has recently published a report into [youth homelessness in the UK](#). This is the first UK-wide review of youth homelessness for a decade, and the study shows that although more young people were accepted as homeless following the extension of priority needs groups in the early 2000s, the number of young people accepted as homeless has fallen in England and Wales in the last three years.. At least 75,000 young people were in contact with homelessness services during 2006-07, and the main trigger for the risk of homelessness is relationship breakdown (usually with a parent or step-parent). For many, this is a consequence of long-term conflict within the home and often involves violence.

### *Homelessness mediation – what does ‘success’ look like?*

Many local authorities have developed a range of new initiatives to try to prevent homelessness at an early stage. Mediation is one of those strategies, and chapter 4 of the report looks at a number of homelessness mediation services and their impact. The research found significant variations in the aims, the practice and the intended outcomes of different schemes. Since mediation schemes were funded by local authorities, there was often pressure on the mediators to define a ‘successful outcome’ as preventing homelessness by negotiating a return to the family home. This may well not be in the best interests of a young person, especially where violence is an intrinsic part of the family dynamic. The researchers quote a young person from Lambeth as saying ‘Talking to my Mum would be the worst possible thing anyone could do to me! ... [She] will be all nice until that person leaves, ‘Yeah, thanks very much for your help’, then the second they leave I’ll get a black eye for it.’

### *The risks of gatekeeping*

This fear that mediation services might be used as a gatekeeping tool by local authorities to reduce statutory homelessness claims for housing has already been raised by Citizens Advice (2004) and ASA (see [ADR Update 19](#)). The researchers found a number of mediation services that had turned down tender opportunities because the local authorities concerned were setting unrealistic ‘return/remain home’ targets and imposing overly severe restrictions on the intensity and longevity of support to be provided to young people. But in other places they found local authorities that gave a planned move from the family home and improved family relations equal weighting in their definitions of a successful outcome.

### *The importance of independence*

Providers were positive about the provision of independent mediation, but argued strongly that effective risk assessments should be carried out to ensure that a young

person is not put at risk. However, there is no discussion of who should conduct these risk assessments – local authority workers or mediation services? Providers also felt that an important distinction needed to be made between independently delivered mediation services and more general support or ‘negotiation’ between parties undertaken by housing officers during home visits. Because of the differing approaches between local authorities to targets and outcomes, ‘success’ rates seem to vary significantly – the Association of Local Government cites ‘success’ rates ranging from 38% to 96% in London Boroughs in 2005.

*The views and experience of young people*

Very few young people in the focus groups which the researchers talked to had actually had any experience of mediation themselves. A few thought ‘it might have helped’ but a far greater proportion were very cautious about the idea. They felt that it would be awkward to involve third parties in family disputes, and, like the young person quoted above, were afraid that their parents would resent the intervention and react negatively, if not violently. They were also afraid that getting involved in mediation might restrict their entitlement to other services, particularly housing itself.

# New dispute procedures

## Workplace disputes – new procedures

From April 6<sup>th</sup> this year, there will be a new way of dealing with disputes at work. The three-stage statutory procedures for discipline and grievance have been simplified, and [new, less formal processes](#) will be supported by a statutory Acas [code of practice](#). This gives an outline of 'fair' and 'reasonable' standards in dealing with workplace disputes. Employment tribunals will be able to take the code into account when hearing cases, and to revise awards upwards or downwards between 0% and 25% if employers or employees have not followed it. Acas have also produced a longer, non-statutory [guide](#) which contains more detailed advice and guidance.

### *Acas helpline*

The new procedures emphasise the importance of trying to resolve disputes at an early stage. In order to support this, Acas has expanded the opening hours of its [helpline](#) (08457 47 47 47) – from April it will be open from 8am to 8pm Monday to Friday, and from 9am to 1pm on Saturdays.

### *Acas pre-claim conciliation*

Acas will also offer an early dispute resolution service on the same basis as their existing telephone [conciliation](#) service. Currently, Acas telephone conciliation is offered automatically when a claim is put in to an employment tribunal. From April, conciliation will be available for any workplace dispute or potential dispute, even before an employment tribunal application has been made. This has been piloted already in a number of areas, and according to the most recent edition of [Acas news](#) has proved popular – settlements were reached in more than two thirds of cases where both employers and employees agreed to conciliate, and the majority of cases were resolved within two weeks. Access to this new pre-claim conciliation service will be via the Acas helpline.

### *Workplace mediation survey*

Acas also encourages people to think about mediation as an option for dispute resolution. In July 2008 the Chartered Institute of Personnel and Development (CIPD) published '[Workplace mediation – how employers do it](#)', an on-line survey of member organisations. They had responses from 327 people who said that their company had experience of using mediation to try to resolve workplace disputes.

The two benefits of mediation most frequently mentioned in the survey were that it can improve relationships between employees (83%) and reduce the stress of more formal grievance or disciplinary procedures. Although half of respondents thought mediation would help avoid the cost of defending employment tribunal claims, in fact mediation was not related to a tribunal claim in 83% of cases in the survey. In the 16% of cases where there was a potential or actual tribunal claim, half of the claims were withdrawn as a result of the mediation. Business respondents thought that the most suitable issues for workplace mediation involved relationship breakdown, or claims of bullying, harassment, and discrimination.

### *Acas and CIPD factsheet on workplace mediation*

Following the survey, CIPD and Acas have jointly published a [factsheet on mediation](#) for employers. Interestingly this includes a warning that mediation may not always be

suitable in claims of bullying, harassment or discrimination. The factsheet suggests that 'each situation needs to be judged on a case-by-case basis, as serious cases of bullying and harassment, and clear cases of discrimination, may need to be dealt with by more formal procedures.'

#### *Background note*

A couple of years ago the government consulted on how best to streamline the workplace disputes process, following the Gibbons review. You can read about the consultation in [ADR Update 21](#) and the responses in [ADR Update 25](#).

## **New procedures for health and social care complaints**

From April 1<sup>st</sup> this year there will be a [new system](#) for complaints about health and social care.

#### *The current NHS complaints system*

The current system for [NHS complaints](#) is slow and rather cumbersome. It has three stages:

- Local Resolution by the provider organisation
- An independent review by the Healthcare Commission
- Referral to the Health Service Ombudsman

People complaining can receive support, advice and advocacy from the Independent Complaints and Advocacy Service (ICAS).

#### *The new NHS and social care complaints system*

The new system is intended to be more streamlined, and to place more emphasis on local resolution. It will have only two stages – local resolution, and an appeal to the relevant ombudsman.

- NHS and Social Care organisations dealing with complaints will be encouraged to agree an individual timescale and approach with each complainant, and to consider the use of mediation to resolve complex cases locally.
- Where complainants are reluctant to approach the provider of the service they are unhappy with, they can complain directly to the PCT or to the local authority Adult Social Services commissioner.
- Complaints which are not resolved locally will no longer have to go through the Healthcare commission, but can be taken straight to the Health Service Ombudsman or the Local Government Ombudsman.
- NHS and social care organisations are being encouraged to get feedback from users about their experience of care, and to use this information to improve standards.

#### *Early adopters*

For the last year, since April 2008, 94 NHS and social care organisations have been piloting this new system, known as 'making experiences count'. These '[early adopters](#)' are sharing their experience of good – and bad – practice in order to build up a picture of what will work best.

#### *Find out more*

The Department of Health is holding four [regional events](#) in February and March for health workers, staff involved in Patient Advice and Liaison Services (PALS) and advisers, where you can find out more.

## **Supporting vulnerable consumers**

### *Complaints about gas and electricity suppliers*

Since October 1<sup>st</sup> 2008, there has been a new process for dealing with consumer complaints about gas and electricity suppliers (see [ADR Update 25](#) for more information about the changes). The first port of call is [Consumer Direct](#), which will offer information and advice. However, vulnerable consumers can be referred by Consumer Direct, regulators, redress schemes or MPs to the [extra help unit](#) at Consumer Focus. In order to support advice agents with vulnerable clients, Consumer Focus has set up a telephone service for advice agency staff, and an on-line searchable [knowledge base](#) with answers to some of the most common questions.

# Mediation news

## Register for mediators

The [Civil Mediation Council](#) (CMC) is consulting on a new 'registered mediator' scheme, which will apply to individual mediators and to mediation organisations. The consultation documents make it clear that the intention is to avoid a statutory accreditation scheme being imposed on the mediation sector.

### *The pilot accreditation scheme*

The CMC piloted an accreditation scheme, which ran from 2006 to December 2008, and was adopted by the Ministry of Justice as a requirement for mediation providers listed on the [National Mediation Helpline](#). ASA had two issues of concern with this pilot:

- It was based on self-certification, and there was no provision for auditing the applications, or for ongoing compliance monitoring
- It had no minimum standards for professional practice supervision

### *The new mediators' register*

These concerns are not addressed in the proposed new scheme. There will be a full-time registrar who will be responsible for administering the scheme, but not for inspecting or auditing the mediators or the organisations involved. In order to be members, individual mediators will need to state that they have:

- Completed a training scheme with a minimum of 24 hours training and some form of assessment
- Observed two mediations
- Completed three mediations a year as lead mediator
- Completed at least 6 hours mediation-specific CPD each year
- Arranged professional indemnity insurance for at least £1 million

They also need to commit themselves to co-operating with the CMC Independent Complaints Review body if a complaint is made about them.

Registered mediators will also need to sign up to a code of practice, but neither this nor the registration requirements include any minimum supervision standards, other than a reference to 'effective arrangements for ensuring monitoring and/or peer review'.

### *Dealing with complaints*

The CMC will have a process for considering complaints about mediators' fitness to practice, and for de-registering mediators and mediation organisations that are considered unfit.

The CMC also intends to establish a complaints review scheme for mediation clients who are dissatisfied with the way their mediation provider has dealt with their complaint. However, this will not be easily accessible, as the person complaining will have to pay a fee of £1,000 for a complaint to be considered. The panel will have the power to recommend that all or part of the fee should be refunded if a complaint is upheld, but no power to enforce this.

Final decisions about whether to adopt these proposals will be taken at an EGM in March 2009. The [draft documents](#) are available on the CMC website.

## **Where does family mediation belong?**

In April last year Relate Scotland and Family Mediation Scotland joined together to form [Relationships Scotland](#). Their aim is to provide a single door to an easily accessible network of services for families experiencing conflict and relationship breakdown. In the real world, many people who are unhappy in their relationship won't immediately know whether they need relationship counseling, sex therapy, family mediation or a child contact centre. In fact, they may need a combination of these at different stages.

For many years family mediation services have debated whether they 'belong' with other mediation providers working with civil, neighbour and workplace disputes, or whether they are most at home with other services which support families. Interestingly, in Scotland family mediation has a foot in both camps, as Family Mediation Scotland is also part of the [Scottish Mediation Network](#), which runs a single register for all mediators in Scotland.

# Ombudsman news

## **Equitable Life and the authority of the Ombudsman**

In December 2008 the Public Administration Select Committee of the House of Commons published its [response](#) to the Parliamentary Ombudsman's report into Equitable Life (there is a summary of this on page 2 of [ADR Update 25](#)).

The Select Committee's report not only endorses the Ombudsman's findings of maladministration and her calls for an apology and compensation, but also highlights the significance of the government's response in terms of the role of the Ombudsman's office. The Committee states: *'we would be deeply concerned if the Government chose to act as judge on its own behalf by refusing to accept that maladministration took place. This would seriously undermine the Ombudsman's office and the ability to learn lessons from the Equitable Life affair. If it were to happen, there should be a debate on the floor of the House to allow Members to discuss these constitutional issues and re-establish the Parliamentary Commissioner's role.'*

Their support for the Ombudsman's recommendation for the creation of a compensation scheme is based on the principle that *'where regulators have been shown to fail so thoroughly, compensation should be a duty, not a matter of choice.'*

In her report published in July last year, the Ombudsman found the Government guilty of maladministration on 10 occasions, but the Government has only accepted five findings of maladministration in full, four in part and rejected one. It has agreed to follow her recommendation that it pays compensation to policyholders, but has suggested that this compensation may be means tested.

## **Financial businesses – the practicalities of naming and shaming**

The Financial Ombudsman Service has been consulting financial businesses, consumers and advisers on [how best to publish data](#) about the complaints it receives.

The FOS has always published anonymised case studies, data on the types of complaint received, and the proportion of cases resolved in favour of the consumer. However, it has never publicly identified the banks, mortgage lenders and insurance companies which get the most complaints. The Hunt review came out strongly in favour of making this information public, in the interests of transparency and consumer choice. This consultation is about how best to make the mass of detail available in a way that helps consumers rather than confuses them.

### *Initial enquiries*

During the year 2007-08, the FOS received 794,648 new enquiries, giving rise to 123,089 new cases. It would be virtually impossible to publish details of every single enquiry in a comprehensible format. The enquiries reflect a wide range of consumer concerns:

- Some relate to issues that are outside the FOS remit
- Some are complaints which have not yet been referred to the financial business concerned

- Some are seeking impartial advice about something a financial business has said or an offer that has already been made
- Some are full-blown complaints which are ready to become new cases

The FOS is considering how to publish some information about these initial enquiries, in order to highlight trends in consumer concerns, and also to identify businesses which are not handling consumer complaints well at this early stage.

#### *Complaint details*

How to record and publish data about the complaints that go on to become FOS cases is actually quite a complex issue. For example:

- How could the FOS distinguish between cases where the business has been really unfair to the consumer, and cases where its decision is reasonably fair but has not been clearly explained?
- Does it make a difference if the business has not offered enough compensation at the start, or if it has offered none at all?
- What about cases where there is simply a conflict of evidence that needs an independent third party to make a judgement call?
- Is it possible to identify cases where a business or a consumer has been unreasonable in refusing to resolve the complaint, or is that too subjective a decision?
- Should consumers be able to tell the difference between cases where the business has done nothing wrong, and cases where it has done something wrong, but has offered adequate compensation? Both are currently recorded as a decision in favour of the business.

And what effect might publishing this data have on the willingness of businesses and consumers to compromise at an early stage of the complaints process?

#### *Which financial businesses?*

In the six months from January to June 2008, the FOS received complaints about 2,361 different businesses. This does not give the whole picture, though. In fact, 93% of cases were about just 296 businesses, all of which had over 10 complaints each, and 31% of new cases related to just 4 businesses, each of which had over 2,000 complaints. Looking at these numbers, the FOS suggests that publishing complaints about 2,000 or more businesses with just one complaint would not be proportionate. It proposes publishing complaints about businesses that have more than 30 new complaints and 30 closed cases in a six month period. This is likely to involve around 150 businesses, with 85 – 90% of all complaints between them.

#### *Other issues*

There are some other questions such as how to link businesses which have different names but are part of the same financial group, or how to classify complaints against a business which has been taken over by another organisation.

#### *When?*

The FOS is proposing to start publishing this data at some point this year.

#### *Background Note*

*This consultation follows the Hunt review of the FOS published in April 2008. You can read more about the original Hunt review in [ADR Update 23](#), details of its recommendations in [ADR Update 24](#), and a summary of the FOS response in [ADR Update 25](#).*

## **Parliamentary and Health Service Ombudsman**

In October 2008 the Office of the Parliamentary and Health Service Ombudsman (OPHSO) published its [annual report](#).

### *The Parliamentary Ombudsman*

During the year 2007-08, the Parliamentary Ombudsman received 7,341 complaints against government departments, agencies and public bodies. As in most years, the highest number of complaints (2,574) were about the Department for Work and Pensions (DWP), especially Jobcentre Plus (1,063) and the Child Support Agency (868). HM Revenue and Customs (HMRC) came in a close second with 2,342 complaints. The vast majority of complaints are not the subject of a formal investigation – around three quarters are not taken on at all, as they are not properly made, are premature, or are out of remit. Many of those that are accepted are resolved at an early stage, as the OPHSO caseworker attempts to mediate between the complainant and the public body.

- A total of 248 cases were accepted for investigation last year, 160 from HMRC, and 78 from the DWP. Of the published reports on these two departments, around a third of complaints were upheld in full, a third upheld in part, and a third not upheld.
- Overall, just over half of the cases accepted for investigation were resolved within 6 months, and 92% within a year.

### *The Health Service Ombudsman*

During this same year, OPHSO received 4,257 complaints against the National Health Service (NHS). Under the current NHS complaints system, complaints which are not resolved directly with hospitals, GPs or dentists go to the Healthcare Commission. If the person complaining is still unhappy, they can complain to the Ombudsman. So OPHSO comments that it is not surprising that over 40% of complaints were about the Healthcare Commission itself.

- A large proportion of complaints are outside the ombudsman's jurisdiction, or are resolved at an early stage through OPHSO intervention. A total of 703 cases were accepted for investigation, and around half of these complaints were upheld in full or in part. 29% of cases were resolved within 6 months, and 75% within a year.

### *The new NHS complaints procedure*

From April 2009 there will be a new NHS complaints procedure, with only two levels. Complaints will initially be dealt with locally by the GP, dental practice, or hospital concerned. If the problem is not resolved at that stage, the complaint can go straight to the ombudsman. There are more details about this on page 6 of this ADR Update. The new system is intended to reduce delays both for the person complaining and for the NHS service provider, and also to make it possible for the Health Service Ombudsman to work more closely with the Local Government Ombudsman on complaints that cross boundaries between health and social care.

## Why won't you listen to me?

The Parliamentary Ombudsman has published her latest report into [improving public service](#). Through a series of case studies, she gives example of the kinds of problems members of the public too often face when trying to complain about poor service from local authorities, government departments and healthcare practitioners. In most of these cases, the problems are made worse by the way in which the public body deals with – or fails to deal with – the original complaint.

Case studies include a complaint about a mistaken DLA assessment by the [Disability and Carers Service](#), a poor quality filling by a [dentist](#), and a complaint by a charity about misleading copyright information on the [Department of Health website](#) which meant they ended up paying thousands of pounds in fees to a photographer. Many people will identify with the man whose operation was [cancelled on several occasions](#) because the tests requested by the consultant had not been completed. On the final occasion he discovered that his paperwork had been lost; when he tried to explain to hospital staff what he knew the consultant wanted, they refused to listen to him.

In each case the Ombudsman explores the link between the way the complaint is handled, and her published [principles of good administration](#) and [principles of good complaint handling](#). These reports are useful guidelines for advisers on when and how to involve the Ombudsman in getting service failure acknowledged and compensation paid.