

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.*

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Opinions

Should mediation be a compulsory part of the court process?

Over the last year, a number of high profile judges have spoken out in favour of compulsory mediation. Mediation is good for you, the argument goes, but most people don't choose mediation, therefore they don't know what's good for them, therefore judges, or the courts themselves, should lead them to water and compel them to drink.

At last year's Civil Mediation Council (CMC) conference, The Master of the Rolls, Sir Anthony Clarke, came out strongly in favour of compulsion, and criticised the [Halsey](#) judgment for being 'overly cautious'. However, a different view was being expressed at this year's CMC conference in May 2009. The Lord Chief Justice, Lord Judge, opened with a [speech](#) in which he made it clear that in his view mediation should never be a compulsory part of the civil justice system. He put forward a number of arguments to back up his views:

- Where one party is intransigent, compelling the parties to try mediation would simply protract the process and delay justice.
- Lord Justice Jackson's recent review of the costs of civil litigation indicates that mediation has not proved particularly popular or useful, except with higher-value commercial disputes¹
- Every few years society introduces a new procedure to try to avoid expensive and formal court procedures (think of tribunals, or arbitration). Over time, these cheap, informal processes tend to become expensive and formalised. Making mediation a compulsory part of the civil justice procedure could risk turning it into just one more part of the costly and off-putting procedure that people want to bypass.

The conference also heard an interesting parallel view from Judge Machteld Pel talking about the civil justice process in the Netherlands. Following a compulsory mediation pilot in the early years of the 21st century, courts now have a system whereby judges assess a case at an early stage. In her view most cases are either focused on a *dispute* – which needs a legal decision – or on a *conflict* between the parties – which needs a more personal form of resolution. Judges are trained to diagnose the nature of the problem, and have three options:

- A judicial decision (to resolve the content of the dispute)
- A referral to mediation (to address the conflict between the parties)
- A settlement process (which involves an opinion given by the judge on the content of the dispute, plus a round table meeting with the lawyers to deal with the conflict)

Machteld Pel is an enthusiastic advocate of this client-centred system, which relies on education of judges and lawyers, and good, clear information for litigants.

¹ Lord Justice Jackson's [review](#) of the costs of civil litigation was published in May 2009. His conclusions relating to ADR are as follows:

43.6.33 My own tentative opinion ...is that in the context of business disputes the parties and their advisors are nowadays well aware what ADR has to offer ... and ... can usually make sensible decisions about ADR without extensive input from the judge. If they want to mediate they will do so. If, on the other hand, they desire the decision of the court, then that is what they are entitled to receive, without being forced to incur fruitless mediation costs.

43.6.34 Away from business litigation, however, parties are less well informed about the benefits of ADR and there is a need for better information and education about ADR and its benefits. Even there, however, if reluctant parties are forced to mediate, the outcome may be wastage of costs rather than settlement.

What is a good mediation?

Hazel Genn has researched mediation over ten years at Central London Civil Justice Centre. At the Civil Mediation Conference in May 2009, she summarised the factors that in her experience make for a 'good' mediation.

What makes a good mediation for the parties in dispute?

- Mediation must be voluntary – there is very clear evidence that when parties are compelled to mediate, they are much less likely to reach an agreement
- All parties should prepare for mediation – they need information on what to expect, and advice about their case and what might realistically be achieved
- Mediators should make sure that both sides get the chance to have their voices heard, and manage the power imbalances rather than ignore them
- Both sides need to feel that the process and the final agreement is fair - the mediator must be clearly independent and neutral
- Mediation works best when both parties respect the mediator for mediation skills, legal knowledge, and experience in the subject of the dispute
- If all of these factors are present, people will probably value the process of mediation even if they don't get to an agreement
- Finally, mediation is most likely to succeed when the other side is prepared to be reasonable (this works for both parties, of course)

What makes a good mediation for the legal advisors involved?

- Having a good understanding of how mediation works and making sure your client is well informed about it
- It helps to choose a mediator that you respect for mediation skills, legal knowledge, and experience in the subject of the dispute
- Lawyers or advisors who are going to the mediation session with their clients should be prepared, but not over-prepared – they need to be able to negotiate flexibly
- Lawyers, like the parties themselves, need to perceive that the mediator is fair and unbiased
- Even when no settlement is reached, many legal advisors value mediation as a good opportunity to review the case, and hear the other side's perspective
- Not surprisingly, lawyers are happy when their clients are happy – especially if a settlement is agreed

What makes a bad mediation?

- Being put under pressure to mediate
- A mismatch between what is expected and what happens on the day of the mediation
- A 'bad' mediator – who seems to be taking sides, panics, mismanages the time, or puts people under pressure to settle
- A mediator who does not address any imbalance in power, knowledge or negotiating skills between the parties – being neutral doesn't mean allowing one party to bully the other

What makes a good mediation for society?

- Settlements should reflect the merits of the case
- Settlements should resolve the personal conflict between the parties
- Both sides should be satisfied with the result

Hazel Genn argues that 'justice' is important for society as a whole. A good mediation doesn't only resolve a particular dispute; there should be a perception that both the process and the outcome are fair.

Quicker, cheaper, better – mediation facts or myths?

New [Public Law Project](#) (PLP) research into mediation and Judicial Review (JR) indicates that there are plenty of assumptions about the value of mediation, but little evidence to justify most of them. Interviews with experienced public law practitioners established that despite the enthusiasm of mediators and some judges, mediation rarely takes place in JR cases. So why this gap between rhetoric and reality?

Some mediators and policy makers suggested that lawyers were acting as gatekeepers and blocking access to mediation. Two reasons were given – maximising profit from the litigation process, and ignorance of mediation. The research found no evidence to support either of these claims. Since the vast majority of JR cases settle at some stage, lawyers are clearly not prolonging litigation for their own advantage. And although many lawyers were unclear about exactly how mediation works, and confused it with other forms of settlement negotiations such as round table meetings, even practitioners who are trained mediators and who are fully aware of the potential benefits of mediation rarely engage in mediations in public law disputes. So if lawyers are not the problem, why is mediation not being used in public law cases?

Many lawyers claimed that mediation was simply not appropriate for public law cases in principle – the reasons given included the need to establish judicial precedents, the need for transparency and publicity in public law cases, and issues of power imbalance between unequal parties. However, this cannot be the only reason. Only 5% of potential JR cases actually reach a final hearing, and the rest are settled at some stage: as one public law solicitor argued: ‘If directly negotiated settlements are not considered constitutionally suspect, than surely neither are mediations?’

So if mediation is not being excluded from JR because of principled objections, then why is it so rare? One possible explanation is the way in which the JR process works to encourage settlement. For the first time, figures from this project and from another PLP research project published simultaneously, ‘The Dynamics of Judicial Review’, give a very clear picture of what is actually happening.

- As soon as a letter before claim is sent² 62% of potential cases are settled or abandoned
- Of the cases where a claim is actually issued, 34% are withdrawn before the permission stage³ - the vast majority are settled in favour of the claimant, either by an agreement to review an earlier decision, or by offering a substantive benefit to the claimant⁴
- Of the cases where permission is granted 56% are withdrawn before further action – again most of these settlements favoured the claimant

According to the evidence gathered by PLP, it seems clear that litigation, or the threat of litigation, brings public bodies to the negotiating table. An offer of mediation is unlikely to be accepted by the defendant until JR is a potential course of action. And once a JR has been threatened or issued, then cases that can settle do so, usually as a result of discussions between the parties’ lawyers. Mediation seems to offer little added value.

The PLP report concludes that mediation providers and policy makers have promoted the use of mediation without distinguishing between different legal contexts. In

² This figure is based on estimates given by claimant solicitors interviewed for the ‘Dynamics of Judicial Review’ research. See page 15 for the subject matter of the cases.

³ Note that the settlement rate varies considerably between 62% for homelessness cases and 5% for cases involving the police.

⁴ Only 8 out of 54 cases were withdrawn pre-permission without benefit.

commercial disputes, mediation may well offer a dispute resolution process that is cheaper and quicker than litigation. But the research found no evidence that mediation is ever quicker or cheaper than the Judicial Review (JR) process. However, it did find that in a small number of cases involving protracted personal hostility⁵, a successful mediation enabled the warring parties to untangle their conflict, and work out a detailed solution that benefited vulnerable individuals. In some cases this, took place after a judicial determination of the key legal issues in dispute.

The study concludes that the simplistic idealisation of mediation is not at all helpful.

‘Mediation enthusiasts and lawyers alike must be able to incorporate into their respective perspectives each others’ insights and experiences rather than set up litigation and mediation as mutually exclusive alternatives one of which is good and the other bad. Ultimately ...the choice of mediation must be made by practitioners together with their clients, and no one else’.

Wonky tattoos and secret nerve gas trials – when is it right to use mediation?

Each year the government publishes figures showing how it has used ADR to settle disputes. The annual ‘Pledge Report’ claims that doing so saves the taxpayer money. This report arises from a pledge made by Lord Irvine in 2001, when he was Lord Chancellor, that Government Departments would, wherever possible, resolve disputes through some form of ADR, rather than legal action.

The [figures from 2007-8](#) are shown on the table below, which compares the most recent results with previous years.

Year	Number of cases	Number of settlements	Success rate	Estimated costs savings
2007-8	374 cases	271	72%	£26.3 m
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

The ‘estimated costs savings’ figures seem to show significant changes in the average costs saved per case - £500K in 2005-6, compared with £97K in 2007-8. But obviously the ‘estimated costs savings’ are just that – estimates. It is impossible to put a precise figure on what a case would have cost if it had gone to a final hearing, and what compensation might have been ordered by a judge. It’s also impossible to second guess which cases would have settled anyway through bilateral negotiations between the parties’ lawyers, as the vast majority of cases are resolved before a court hearing without the use of ADR. It’s also difficult to factor in the increased cost to the taxpayer of the 28% of cases which went to mediation but failed to settle, thus adding to the costs of the case as Hazel Genn points out in her [‘Twisting Arms’](#) research report.

⁵ Many of these cases involved community care disputes.

As well as publishing these statistics, the annual Pledge report gives a number of anonymised case studies to illustrate the kinds of issues which have been resolved in this way. ASA has concerns about some of these cases, because they seem to run counter to the principles stated in the original Pledge. In 2001 Lord Irvine recognised that ADR would not always be suitable for all disputes with Government Departments, and he gave some examples of cases where such settlement could be inappropriate:

'There may be cases that are not suitable for settlement through ADR, for example cases involving intentional wrongdoing, abuse of power, public law, human rights and vexatious litigants. There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to public interest to settle.'

The 2007-8 report includes the first year's figures from the popular [small claims mediation scheme](#) which now covers England and Wales. It gives an example of a successful mediation in a case where the claimant was unhappy with a 'wonky' tattoo, and was claiming £2,500 through the small claims court to have it removed. The mediator successfully negotiated a deal whereby the tattoo shop owner agreed to create a new tattoo which incorporated the crooked one into a new design.

But there is a wide gulf between wonky tattoos and public law cases. For example, one of the case studies reported setting up a mediation to resolve a group action brought by 360 former members of HM forces who claimed their health had suffered as a result of taking part in tests at Porton Down in the 1950s and 1960s. The Pledge report claims that the mediated settlement 'saved the veterans the stress of obtaining compensation via a lengthy high court trial.' But there are other issues involved in such a case, including the public interest in understanding how these tests of toxic chemicals such as nerve gas, mustard gas and riot control agents were performed without informed consent on young servicemen. Resolving such questions in private through mediation or settlement, but without the accountability and transparency of a public hearing, may save stress; but perhaps it is time for a public debate about whether it serves the wider interests of justice.

ADR and consumers

Complaints about phone and internet providers

Problems with mobile phone providers are one of the top consumer gripes. In fact Consumer Focus, the consumer watchdog, is currently asking consumers to let them know about their [biggest problems with mobiles](#).

[Ofcom](#), the telecommunications regulator, has made it a requirement that all mobile phone providers – in fact, all internet, broadband and landline providers as well – must be members of an approved dispute resolution scheme for resolving complaints. There are currently two schemes – [CISAS](#), an adjudication scheme, and [Otelio](#), an ombudsman scheme – both of which are free for consumers.

One of the problems with these schemes is that they won't take on consumer complaints until the phone company has had 12 weeks to try to resolve things. Not surprisingly, this can cause delay and frustration for the consumer. Following a [consultation](#) last year, Ofcom has ruled that from September 1st 2009 you can take your complaint to CISAS or Otelio after 8 weeks if the company hasn't sorted it out to your satisfaction. However, Ofcom seems to have backed away from other proposals it made in the consultation, such as setting minimum standards for complaint handling, and requiring better signposting by the providers. Ofcom is 'seeking more information' about provider complaints that this would cost too much!

Ombudsman news

Complaints to Local Authorities

Local Authorities are getting better at dealing with complaints. This is the conclusion of the Local Government Ombudsman (LGO) after seven years of guidance and training provided to councils and their staff by the LGO. So the LGO team has decided that from April 2009 they will only investigate complaints after the council's own complaints procedures have been completed. Obviously there will be some exceptions, where the LGO believes that their intervention would be justified at an earlier stage. There is a helpful [guide for advisers](#) on the LGO website on when and how to make a complaint on behalf of a client.

The LGO has also published revised [guidance on running a complaints system](#) for local authorities. This covers the principles that the LGO expects from a well-run council complaints system. When the LGO investigates complaints from members of the public, councils that do not reflect these standards will be criticised. The guidance starts with the basic question 'what is a complaint?' (an expression of dissatisfaction about a council service that requires a response), and looks at key features that a complainant should expect – an accessible, well-publicised system, knowledgeable and helpful staff, good communication at all stages of the process, and a reasonable timescale (all complaints should be dealt with within 12 weeks).

The guidance also makes it clear that councils are expected to review the complaints they receive, and improve their service provision in line with what they have learned from the nature of these complaints.

There is more information on the [LGO website](#), and you can contact the LGO Advice Team to discuss individual complaints or questions about the process on 0300 061 0614.

The Financial Ombudsman Service annual review

In the last week of May the Financial Ombudsman Service (FOS) published its [annual review](#) for 2008-09. If you deal with complaints about financial services on a regular basis it's well worth having a closer look at the review; it gives details of the most common issues the FOS tackles, and the ways in which they are dealt with.

Initial enquiries to the FOS

Over the year the FOS has dealt with 789,877 enquiries by phone and letter from people with complaints about banks, insurers, credit companies and other financial services providers. This is slightly lower than last year. Around a sixth of these – 127,471 – were taken on as cases by the FOS. Of the rest, FOS research indicates that after getting advice from the FOS customer contact team, just over half of them were able to resolve their complaint directly with the company. Of the other half – those who couldn't sort things out immediately – 56% continued to try to resolve the problem (and intended to come back to the ombudsman later on) but 44% said they had let the matter drop, mainly because of the unhelpful attitude of the business concerned.

Credit card charges

During the last year the most common disputes were about payment protection insurance (24% of cases), credit cards (14.5%) and current accounts (11%). The complaints about credit cards are interesting, and reflect both the pros and the cons of the FOS method of dispute resolution. Most are about 'default charges' – automatic charges imposed by credit card providers when a customer misses a payment, makes a payment late, or exceeds their credit limit. So far, all the cases which have been taken on by the FOS have been settled by the credit card companies meeting the customers' claims, which avoids the ombudsman making a formal, public decision on the merits of these charges. A parallel debate is going on with regard to [bank charges](#) for unauthorised overdrafts – in this case, the FOS has suspended nearly all pending complaints while the principles are decided by the courts.

Consumer credit

From April 2007 the FOS has been able to look at complaints about consumer credit, including hire purchase firms, debt collectors and catalogue shopping companies. There were few complaints about these issues in the first year (2007-08) but the number has increased significantly over the last year. Taking on responsibility for these services has also changed the demographic of people using the FOS. There has been an increase in women complaining about consumer credit problems, more younger people are bringing complaints, and also more 'blue collar' workers from C1/C2 backgrounds.

Resolving disputes

There are three 'levels' of dispute resolution by the FOS team. Of the 127,471 cases taken on by the FOS last year, around half were resolved through an informal settlement brokered by one of the FOS staff. The rest required an adjudication of some kind. Most of those (41% of the total) were settled after a written recommendation, but 8% went on to a formal review and decision issued by one of the ombudsmen.

In 57% of cases the outcome of the dispute was changed in favour of the consumer following FOS intervention. This means either that the business had refused to accept that it did something wrong, but subsequently accepted that it had done something wrong after all and offered appropriate compensation. Or that the business had accepted its mistake but offered inadequate compensation in the first place, and after the FOS got involved increased its offer.

Timescale

Over the past year 30% of cases were resolved within 3 months, 56% within 6 months, and 88% within a year. The FOS has taken on more staff to try to improve those times over the coming year.

Naming and shaming

Over half of the complaints received were about six of the UK's largest financial groups, and 38 businesses had more than 500 complaints made about them. The FOS is planning to implement the recommendations of the [Hunt report](#) and name these businesses. In March 2009 the FOS published details of how it plans to make this [complaint data](#) public from September this year.