

Recent Developments in Alternative Dispute Resolution

Update No. 28

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Last ADR Update

This is the last edition of ASA's ADR Update. We have been publishing this three times a year since September 2000 to keep advisers, policy-makers, academics and others in touch with ADR news and developments in the UK. I will be leaving ASA at the end of August, and as the current funding for our ADR policy work (from the Big Lottery Fund) has also come to an end, ASA will no longer cover ADR policy.

Val Reid

August 2009

ASA still has a small amount of ongoing funding from the Legal Service Commission to keep the [ADRnow](#) website up to date. If you would like to comment on the website content, please contact adr@asauk.org.uk

All previous editions of the **ADR Update** can be downloaded from the policy section of ASA's website www.asauk.org.uk

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ADR – an alternative to justice?

ASA began work on Alternative Dispute Resolution (ADR) policy in 1998, and I joined as ADR policy officer in September 2001. I will be leaving ASA at the end of August, and, as the current funding for our ADR policy work has also come to an end, ASA will no longer cover ADR policy. But there are still some ADR issues which should be monitored, discussed and debated.

Mediation

Mediation will save the world

In 1996 Lord Woolf's [Access to Justice](#) report was published. In it, he argued strongly that litigation should be a last resort. The nascent mediation lobby had an evangelical enthusiasm for the benefits of mediation, claiming that it transformed relationships, enhanced communication and offered win/win solutions. This faith came to be shared by courts, judges and government, though it was based on little empirical evidence. It seemed self-evident that it was better for people to be empowered to resolve their own problems – it was a bonus if it meant savings in the courts and legal aid budget as well.

Litigants being like horses...

But this enthusiasm did not seem to be shared by the public. Judges at [Central London County Court](#) (CLCC) had set up a pilot mediation scheme in 1996, but in the early years fewer than 5% of litigants chose to use mediation, despite heavy promotion by the court. Initially it was thought that what was needed was information: if only people knew about mediation they would inevitably use it to resolve their disputes, avoiding the lengthy, expensive, stressful litigation process. So information was provided. The LSC leaflet number 23, 'Alternatives to Court', was published, the National Mediation Helpline was established, and ASA was funded to train advisers in understanding ADR issues, and to set up the national [ADRnow](#) website. But still very few people chose to use mediation¹.

At the same time, a number of initiatives were begun to persuade litigants that mediation was good for them. The [civil procedure rules](#) were changed in 2000 to give courts more of a say in how cases were conducted, and to penalise parties on costs if they 'unreasonably' refused mediation. A series of court cases nudged disputants further towards compulsory mediation. Either you [couldn't go to court](#) or you had to pay the [loser's costs](#) if you wouldn't mediate. Fewer and fewer excuses were accepted by the courts – they were not convinced by pleas of a [watertight case](#), or the need to establish a [legal precedent](#). It was presumed that refusing mediation was automatically unreasonable. Then in 2004, the [Halsey](#) case called a halt, and established that refusing access to the courts was contrary to justice, and a possible violation of article 6 of the European Convention on Human Rights. It was up to the loser to demonstrate that the winner had been unreasonable in turning down mediation. And it was re-affirmed that the choice about how best to resolve a dispute belonged with litigants: the civil justice process should be there for them if that was what they wanted or needed.

¹ As an example, the National Mediation Helpline was set up in November 2004, funded by the government. It was [evaluated](#) after 6 months by the Telephone Helpline Association. During that time, around 1600 callers had contacted the service for information about mediation, around 500 were referred to one of the six listed mediation providers, but the THA researcher was only able to identify and contact 5 who had actually gone ahead with a mediation.

Halsey has not been overturned in the courts. However, some judges clearly still think that they know what's best for the court user, and wish they could force them to mediate. For example, in May last year the Master of the Rolls, [Sir Anthony Clarke](#), criticised the Halsey judgment at the Civil Mediation Council conference, and proposed that litigants (being like horses) should be forcibly led to water, where they are then more likely to drink.

Quicker, cheaper, better?

During my eight years at ASA there has been a steady drip of published [research](#) about mediation, and the results have not backed up the assumptions about its benefits. For example, research over ten years at [CLCC](#) found that the more users felt pressurised into mediation, the less likely they were to reach agreement that way. And although successful mediations were quicker and cheaper than a court hearing, where mediation was unsuccessful litigants found that costs were higher and the whole process took longer. In 2004, fewer than half of mediations were successful.

An idea that failed?

As I write this in August 2009, government enthusiasm for civil mediation seems to have waned. While the 2004 LSC consultation paper was titled '[A new focus for civil legal aid – encouraging early resolution; discouraging unnecessary litigation](#)', the recently published [LSC strategic plan for 2009-12](#) makes no mention at all of ADR, mediation, or proportionate dispute resolution. But another initiative to promote family mediation is being piloted this summer, outlined on page 18 of the [August Focus newsletter](#). Attending mediation information desks to learn about the 'benefits' of family mediation will be compulsory for separating couples going to court. This is the third time I have encountered such a scheme since I began working in family mediation in 1991 – none has been successful in persuading more than around 20% of couples to try this method of dispute resolution. Family mediation has remained a minority choice².

My personal belief is that voluntary mediation has something to offer in conflicts which involve strong feelings, and where the ongoing relationship between the disputing parties could benefit from better communication. This includes disputes between [separating couples](#), [warring neighbours](#), [parents and schools](#), [disabled people and pubs, shops and banks](#). Some of these areas are already funded by the government through the LSC, Local Education Authorities, or the Equalities and Human Rights Commission. It would be good to see government support and resources for community mediation, where there are few affordable or effective legal options.

But mediation brings with it a significant disadvantage – it may not be able to redress the power imbalance between two parties. When it comes to enforcing the performance of statutory duties by reluctant local authorities, or restraining violent partners, or preventing racial harassment, the stronger party may simply refuse to mediate, or use the process to perpetuate intimidation. In such cases, access to the court process is essential.

² There has been some evidence to indicate why this is the case. For instance, research into mediation in [family disputes](#) published in 2004 demonstrated that only 25% of couples using mediation managed to resolve all the issues in dispute, and fewer than half of users were satisfied with the mediation process itself. And a small [research project](#) by Shelley Day Sclater published in 1999 showed that the face-to-face mediation process felt more psychologically stressful for couples than a court hearing where they were represented by a solicitor.

Thanks to Halsey, we have come full circle: the decision about which dispute resolution option is most appropriate is now back with litigants and their advisers. Will this continue, or will some judges and mediators succeed in their desire to persuade disputants that they know what's best for them? Will policy-makers re-discover their enthusiasm for 'proportionate dispute resolution' when more money needs to be shaved from the civil legal aid budget? Who will take responsibility for remaining vigilant on these issues?

Mediation, though the most well-known ADR process, is not the only one. There have been other ADR developments in the last eight years that should not be ignored. I've given an overview of two issues which I think need public debate.

Arbitration

The risks of privatising justice

In 2001 [arbitration](#) referred to a process little used outside the world of commercial disputes and trade union negotiations. But in 2008 there was public [controversy](#) about arbitration in a different context. In 2007, the [Muslim Arbitration Tribunal](#) (MAT) was set up, and will hold its first conference in October 2009. The MAT presents itself as a tribunal which can settle disputes within the Muslim community according to Sharia law – arbitration panels are made up of an Islamic scholar and a lawyer³. In particular, they deal with neighbour disputes, inheritance disputes, domestic violence and forced marriages. If both parties agree, according to the Arbitration Act 1996 the decision of the MAT can be legally binding.

Although the MAT website makes it clear that they do not have the jurisdiction to deal with criminal offences in the UK (such as domestic violence), what it proposes is an opportunity for couples where violence has been alleged to 'reach reconciliation', and that the terms of this reconciliation can be passed to the Crown Prosecution Service 'with a view to reconsidering the criminal charges'. There is a worrying potential here for victims of domestic violence, usually women, to be put under pressure by a private ADR process which is not open to public scrutiny.

Ombudsmen

Over the last eight years there has been a proliferation of ombudsman schemes in a range of different contexts. For example, it is now compulsory for all energy suppliers to be members of the [Energy Ombudsman](#), and for all [estate agents](#) to be members of one of two approved ombudsman schemes. Any affordable and accessible method for dealing with consumer disputes is to be welcomed, but ASA has a number of concerns.

Mind the gaps

Four out of the top five consumer complaints⁴ – second hand cars, TVs, mobile phone handsets and car repairs – have no ombudsman or other redress schemes. Wouldn't it be good to have an accessible consumer ombudsman, as the National Consumer Council proposed last year⁵?

How independent is an ombudsman?

There is considerable confusion about what the name 'ombudsman' means, and in particular how independent an ombudsman scheme is from the providers it might be

³ MAT procedure rules 10(1) 'The Tribunal shall consist of as a minimum a: (1) Scholar of Islamic Sacred Law (2) Solicitor or Barrister of England and Wales.

⁴ Based on the number of complaints made to Consumer Direct in the first six months of 2009.

⁵ 'Lessons from Ombudsmania' published by the [National Consumer Council](#) in February 2008.

called on to investigate. For example, FIRA, the trade association for furniture retailers, runs a dispute resolution scheme which used to be called 'Qualitas'. In 2006 it changed its name to the [Furniture Ombudsman](#). In fact it offers conciliation and adjudication, not an ombudsman-style investigation. It is not a full voting member of the British and Irish Ombudsman Association (BIOA) because it does not meet its [criteria for independence](#), but it is an associate member. BIOA is currently reviewing its roles and functions, and I believe it should look at a clear definition of what an ombudsman is and does, and at a robust accreditation process that helps the consumer understand clearly just how independent an 'ombudsman' scheme is.

ADR confusion

During the last eight years most ombudsmen have developed early resolution techniques. Guided mediation and telephone conciliation by ombudsman caseworkers are now the mechanisms by which the vast majority of disputes are resolved, in both public and private schemes. This is cheaper and quicker than lengthy in-depth investigations and published reports, and for that reason could benefit complainants. But last year, the Local Government Ombudsman only published a report in 1.37% of cases. Once again, ADR processes are doubly removed from public scrutiny.

First principles

The key issue, in the view of ASA, is informed decision-making. Where there are options, people need to have enough information to decide which route will be best for them, and they need independent advice to help them understand and weigh up the choices they face and their possible outcomes. The bottom line is that we all need to have access to independent courts in order to protect our rights, and to enforce public duties and private behaviour. This is not necessarily the cheapest policy, but it is one that best serves the interests of justice.

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ASA

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