Recent Developments in Alternative Dispute Resolution

Update No. 11

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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****, either by post or by email, or if you would like more information about any of these topics, please contact Val Reid, ASA's policy and development officer for ADR. The* ***ADR Update*** *can also be downloaded from the ASA website:*

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www.asauk.org.uk

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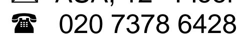
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News and information

Can courts order mediation even when one party objects?

In a commercial case held on December 5th 2003, a judge on the chancery division ordered mediation to take place over disputed terms in a lease, even though the claimant was strongly opposed to mediation. Although a full judgement has not yet been published, the judge's reasoning was that the ongoing relationship between two parties to a lease meant that mediation ought to be a more appropriate and effective way to resolve the dispute and to improve communication between the parties than a court judgement.

Specific references to ADR in the Civil Procedure Rules encourage courts and parties to consider mediation or other ADR options, but don't directly confer powers to the court to force the parties to attend mediation where one party is unwilling. However in this case, the judge claimed to derive the power to make such an order from part 1.4 of the Civil Procedure Rules, which gives courts the power to actively manage cases.

The case is Shirayama Shokusan Company Ltd v Danovo Ltd [2003] EWHC Ch and more details can be found on the following websites:

www.cedr.co.uk/index.php?location=/news/archive/20040108.htm

www.9oldsquare.co.uk/Case/CaseDetail.asp?CaseID=240

Judicial review can only be considered after ADR has been tried

Three decisions by the Appeal Court in October 2003 have confirmed principles for the use of judicial review which were established in Cowl v. Plymouth (see Update 4 for details of this case – it can be found on the ASA website www.asauk.org.uk). Each of the three cases involved a claimant who came to the UK seeking asylum, and each claimed that they failed to receive benefits and entitlements which they should have received under article 8 of the Human Rights Act (HRA), which grants individuals a right to respect for their family life and privacy. They each claimed that the failure was due to maladministration, and sought judicial review of the decisions made; a key issue before the Court of Appeal was whether a public body is under a positive duty to secure those rights.

A summary of the judgement, and details of the issues considered can be found on the court service website (given below). However, from an ADR perspective it is worth noting that in the course of the judgements given, principles about the need to consider ADR before applying for judicial review were re-stated. They included:

- Proceedings should be proportionate to the issues involved
- Permission to apply for judicial review should only be granted after it has been explained why an ADR procedure, such as that of the Parliamentary Commissioner for Administration (Parliamentary Ombudsman) or Local Government Ombudsman is not more appropriate

More details on:

www.courtservice.gov.uk/judgmentsfiles/j1977/anufrijeva-v-southwark-summary.htm

DCA launches new website

Last summer the Lord Chancellor's Department became the Department for Constitutional Affairs (DCA). In November 2003 the DCA website was re-launched to reflect the areas which the department is now responsible for:

- The legal system
- Getting legal help
- People's rights
- Legal policy
- Constitution
- Appointments
- Judges
- Magistrates

You can get an overview of the site on its home page:

www.dca.gov.uk/index.htm

You can find information about ADR in the legal policy section of the site under civil matters:

www.dca.gov.uk/civil/adr/index.htm

Law Society launches family mediation panel

On November 18th last year the Law Society launched its Family Mediation Panel. This provides an accreditation scheme linked to a code of practice for solicitors who also act as family mediators.

More details on:

www.lawsociety.org.uk/

Time-limited access to Acas conciliation

Acas is proposing to respond to the new Employment Act 2002 by refusing last-minute requests for conciliation made just before an employment tribunal is due to hear a case. The Act provides for regulations which will introduce fixed periods for conciliation in employment tribunal claims; the Government's aim is to influence parties so that they prioritise conciliation at the beginning of the process, with the hope that claims will be resolved earlier, and unnecessary tribunal applications will not be made.

Acas proposals on how its conciliation procedures will be affected by this measure were published on its web site in December 2003. Acas has requested responses to this consultation paper by March 5th 2004. More details on:

www.acas.org.uk/fixedperiod.html

Making Amends – the views of the LSC

The LSC has published its response to the Chief Medial Officer's consultation paper on dealing with clinical negligence disputes, "Making Amends" (see ADR Update 10 for details of this consultation and the ASA response – it is on the ASA website on www.asauk.org.uk). The Commission is broadly in support of the report's plans to make litigation a last resort in such dispute, which is in line with the Department of

Constitutional Affairs' public service agreement target 3, to reduce the proportion of disputes which have to be resolved by recourse to the courts. However the LSC response stresses that recourse to the courts in cases which cannot be resolved any other way must be maintained, in order to maintain the patient's right to a fair hearing under article 6 of the Human Rights Act.

The LSC response points out that there have been dramatic changes to the mechanism for funding clinical negligence cases recently, the most crucial being restricting negligence cases to specialist firms, with tougher guidance on the merit of cases. This means that the figures given in "Making Amends" demonstrating the cost of clinical negligence claims are only really of historical interest, as the full impact of the 1999 reforms is not yet shown in the figures. The number of new claims started would be a better indicator, and a graph on page 4 of the response shows that since 1999 new claims numbers have fallen from 8,000 to 6,000 per year, whereas before that date they fluctuated between 8,000 and 19,000. The LSC therefore suggests that there is no case for reform based on the premise that NHS negligence claims and costs are spiralling out of control – that is not the case.

The LSC response makes a number of points about the proposals, including the suggestion that there should be a minimum level of damages which the new scheme would consider, to avoid swamping the Redress Scheme with a large number of claims under £5000, which would not currently be eligible for legal aid, and therefore would probably not be pursued. Like ASA, the LSC believes it is essential that clients have access to legal advice before accepting a Redress package. Legal advice for the more serious claims would also be needed during the Redress process, and the Legal Help scheme would be the best way to fund legal advice at each of these stages. However, the LSC is also clear that Legal Aid funding to pursue a case where compensation had been refused by the Redress scheme, or where the client was dissatisfied with the offer of compensation, would be problematic. The real impact of the scheme would therefore depend on how effective Redress proved to be in delivering remedies comparable to those which could be obtained through litigation. The LSC response also stresses the importance of establishing and demonstrating the independence of the proposed "Redress" scheme in order for patients to have confidence in its procedures.

The LSC goes on to strongly support the use of mediation as an alternative to litigation in clinical negligence cases; although encouragement to consider mediation has been included in LSC decision-making guidance since April 2001, over 96% of cases were concluded without either side even proposing mediation, though of those few cases where mediation was used, it was beneficial in 83%. The LSC's conclusion is that encouragement has not been enough, and "we therefore need to consult about introducing further degrees of compulsion to at least explore the possibility of mediation or set benchmarks for the proportion of cases we would expect our suppliers to mediate". Watch this space!

The full LSC response to "Making Amends" can be read on the LSC website:
www.legalservices.gov.uk/devel/cmo_report_lsc_response_oct03.pdf

Mediation in church disputes

A book on church disputes mediation has recently been published, which provides a fascinating insight into the types of disputes which arise in small organisations staffed by committed people with strong views! The book, by James Behrens, explores a wide range of issues which emerge as common problems, including personality conflicts,

governance disputes, discrimination and employment disputes. There is also an absorbing account of the high profile dispute between the Dean and Chapter of Westminster Abbey and the organist Dr Martin Neary four years ago. This dispute created a lot of adverse publicity for the Church of England at the time, and the book charts the many ways in which all the parties involved failed to resolve the initial conflict, and the huge cost of the various legal proceedings (over £600,000) regarding a dispute over £13,900.

The author explores a number of different models of mediation, and their relevance for resolving conflict, even complex multi-party disputes; he also finds surprising precedents for mediation and similar interventions both in the history of the church and in other countries.

Although the book is not of immediate relevance to most of the problems addressed by agencies and advisers in the advice sector, the principles of how to approach disagreement, and how best to resolve disputes without exacerbating conflict, do have a bearing clients' disputes, and on disputes within voluntary organisations themselves.

Copies of the book "Church Disputes Mediation" can be ordered from Gracewing publishing on gracewingx@aol.com

New Independent Police Complaints Commission

From April 2004 there will be a new Independent Police Complaints Commission to replace the Police Complaints Authority. Its aim is to ensure that complaints against the police are properly investigated, using new legal powers to intervene and investigate. It will do this by overseeing the operation of the police complaints system, and independently investigating or supervising police investigations of complaints or allegations of misconduct. It will also aim to improve systems for dealing with complaints by feeding back the results of its own investigations, and recommending good practice.

Nick Hardwick, the Chief Executive of the Refugee Council, has been appointed as the Chair of the Commission, and John Wadham, the Director of Liberty, as the Deputy Chair. More details about the scheme will be available later, but preliminary information is available on the Commission's new website on:

www.ipcc.gov.uk

Housing disrepair pre-action protocol

The Department for Constitutional Affairs (DCA) has launched two new pre-action protocols. One covers disputes about housing disrepair, and the other illness and disease (i.e. personal injury claims where the injury takes the form of an illness or disease, and is not the result of an accident). Both were first published in September 2003, and came into force on December 8th 2003.

The housing disrepair protocol, which covers claims in England and Wales, is intended to:

- Encourage parties to exchange of information at an early stage
- Provide a clear framework for attempting an "early and appropriate resolution of the issues"

The DCA claims that an attempt has been made to draft the protocol in plain English, and to ensure that it is accessible and easy to use, even for those representing themselves.

The introduction to the protocol states that "it is generally common ground that in principle court action should be treated as a last resort, and it is hoped that the protocol will lead to the avoidance of unnecessary litigation." This is why the protocol stresses the importance of:

- sharing information at an early stage
- attempting to negotiate a solution before beginning litigation
- considering ADR (in particular ombudsman schemes) as a means of resolving disputes

In cases which go to court, parties will need to be able to demonstrate that they have complied with the protocol, and judges will have the power to impose costs penalties on those that have not done so.

The guidance notes to the protocol identify the ADR options which should be considered, and paragraph 4.1 lists the appropriate schemes for council tenants, tenants of social landlords and private tenants. In particular, use of the Local Government Ombudsman (LGO) for council tenants, and the Independent Housing Ombudsman (IHOS) for tenants of social landlords, is recommended. The problem is, of course, that other than the Right to Repair scheme (which covers small, urgent claims of less than £250) and the LGO and IHOS schemes, there are few other ADR options in this area. Certainly, few mediation schemes offer mediation on housing disrepair, and the experience of advice sector agencies working in this area is that many large organisations acting as landlords are reluctant to negotiate or mediate without the pressure of court proceedings.

The disadvantage of ombudsman schemes is that the process of investigation and report can take a long time, and will not solve the problem of urgently needed repairs. However, both the LGO and IHOS schemes offer an early dispute resolution process, which means that staff will attempt to resolve a dispute informally by speaking to both parties, before beginning a lengthy investigation. One of the advantages of ombudsman investigations is that a systemic problem with a particular landlord can be exposed; although LGO findings are not binding on local authority landlords, they can and do prompt change and reform in repeat offenders. IHOS findings are binding on social landlords, who are required to be registered with the scheme.

More details, and the full text of the protocol, can be found on the DCA website:
www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_hou.htm

Details of Ombudsman schemes dealing with housing disrepair:
www.lgo.org.uk
www.ihos.org.uk

Interestingly, in the new protocol for dealing with illness and disease, there is no mention at all of the use of ADR options as part of the process of disclosure and negotiation prior to proceedings. More details on:
www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot-1

Would you buy a used car from…

Problems with home maintenance, repairs, electrical appliances and used cars are the most common consumer disputes, but there is little or no provision for alternative dispute resolution in these areas. The Department for Trade and Industry (DTI) has just published some research, commissioned from the National Consumer Council (NCC), into ADR options in consumer disputes. The research was conducted and the report written by Margaret Doyle, who is the author of ASA's book "Advising on ADR", Katrina Ritters and Steve Brooker of the National Consumer Council.

The report was made available on the DTI website on January 27th this year, and suggests that ADR is a potentially valuable option in consumer disputes. ADR, it concludes, could save the consumer time and money, offer a range of remedies, and help drive up business standards. However, although there is fairly good ADR provision in sectors such as holidays, travel and telecommunications, overall provision is a lottery, and information about ADR options is hard to find. The number of cases using ADR is very low compared to the number of consumer complaints, and consumers have no way of evaluating or comparing the effectiveness of the ADR options that are available.

The report identifies a number key areas which need to be addressed:

- improved consumer and adviser awareness and understanding of ADR
- clearer definition of the status of ADR outcomes
- easier enforceability of ADR agreements
- consistent and accessible quality assurance
- better funding provision

The full report is on the DTI website on:
www.dti.gov.uk/ccp/topics1/adr

For more information, contact Steve Brooker at the National Consumer Council on s.brooker@ncc.org.uk

You're not listening to me!

The National Council for Voluntary Organisations (NCVO) has just published a guide for voluntary organisations on dealing with disputes, and the potential value of mediation in resolving them. The guide outlines the kind of disputes which can occur in voluntary organisations, including:

- Internal disputes between staff
- Disagreements between managers and trustees
- Disputes with suppliers of, for example, furniture and equipment
- Difficult relationships with local authorities around deliverables in a contract
- Disputes over work with other partner organisations
- Disagreements with funders about performance outputs

The guide provides a formula for looking at the potential cost of a dispute, both in terms of the direct costs of legal advice, and also the value of staff time lost and ongoing stress and poor relationships. The guide also looks at the principles involved in the mediation process, and how mediation can be used to resolve disputes. It provides case studies to illustrate how it might work in practice, and suggestions for including mediation clauses in contracts with partner organisations, suppliers and staff.

NCVO works with the Centre for Effective Dispute Resolution (CEDR) to provide a subsidised mediation service for the voluntary and community sector, funded by the Active Community Unit. For more information or advice on mediation as a dispute resolution tool, contact CEDR Solve on 020 7536 6060 or email
mediate@cedr-solve.com

The guide "You're not listening to me" by Linda Laurance and Anne Radford (£10 plus p+p) can be ordered from NCVO on 020 7713 6161 or email
ncvo@ncvo-vol.org.uk

More details on:
www.ncvo-vol.org.uk
www.cedr.com

ADR schemes

Courts mediation pilot

Although the Civil Procedure Rules encourage consideration of ADR, and courts have powers to recommend it to litigants, the Department for Constitutional Affairs (DCA) has never come to any firm conclusions about how, or even whether, mediation should be incorporated into normal court procedures. Instead, there are a range of different court-based mediation projects throughout England. There are schemes at county courts in Birmingham, Central London, Guildford, Exeter and South Wales where information about mediation is provided to clients with cases above small claims level, and mediation at a subsidised rate offered on court premises. Similar schemes operate at Leeds and Manchester, where mediation takes place off the court premises. There are also schemes dealing with small claims at Exeter, Barnstable and Torquay where the district judge writes in advance to parties involved in cases which have been identified as suitable for mediation, and offers a short mediation at court on the day of the hearing. Most of the mediation schemes are offered by mediators who are linked to local law societies, or local networks of mediators, at a subsidised rate.

The DCA has decided to do some research to try to identify the "best" model for court-based mediation, by gathering information about existing schemes, and piloting some new projects. The new projects will include an "opt-out" scheme, where parties are referred to mediation by the court, and will need to justify a decision not to participate to the judge. They are also planning to pilot a scheme in Manchester where a help desk will be sited in the court where parties can get help and advice on mediation, in order to make a better informed decision about whether to try the process as a way of resolving their dispute.

Speaking at the CEDR congress in November 2003, Heather Bradbury of the DCA regretted that the UK is not able to run an integrated major pilot project, as has recently been concluded in the Netherlands. Another speaker at the congress, Machteld Pel, reported on this research project, which involved providing mediation training mediation to 500 judges, and offering mediation in a slightly different format in 5 courts. Judges, court staff, users of the scheme and their legal advisers were interviewed over a period of three years, and the results have been evaluated. The report is not yet available in English, but the findings seem to be that:

- 61% of those undertaking mediation reached an agreement
- most parties were satisfied with mediation, even if no agreement was reached
- parties liked mediation in cases where they wanted to:
    - take responsibility for their own solutions
    - save costs
    - save time

In Holland, all cases have a "settlement conference" at some stage during the litigation process, and many of the cases referred to mediation during the project were referred after the settlement conference, where agreement was not reached at this stage. However, the researchers found that the less coercion applied to the parties, the higher the success rate of mediation; only 15% of those who were offered mediation by letter at an early stage of the case chose to use mediation, but these cases had a very high success rate. Where judges referred the case to mediation there was obviously a higher take-up of the mediation process, but a lower success rate. As a result of the Netherlands pilot, and integrated system of litigation, arbitration and mediation will be rolled out across the country, with the aim of helping people choose the process that will be most appropriate to their case.

No details are yet available about the DCA pilot schemes in England, but the aim is that the new schemes should be operating from April 2004, and more information will be available nearer that time.

New Telecomm ADR scheme

Oftel has approved in principle a new dispute resolution scheme, covering Orange, Telewest, T-Mobile and some members of the Internet Service Providers Association including AOL and Freeserve.

The scheme, called the Communications and Internet Services Adjudication Scheme (CISAS), was launched on 9 December, and will be administered by the Chartered Institute of Arbitrators. It will offer an adjudication service to resolve disputes between consumers and their service provider. The scheme covers complaints about service provision, but not the content of phone messages or websites, or "business" decisions about whether or how to provide a service.

Providers which are members of the scheme agree to be bound by decisions made by the adjudicator, who can order them to:
- Offer an apology or explanation
- Provide a product or service
- Give compensation of up to £5000 (including VAT)
- Change their policies or procedures

Consumers must have attempted to resolve the dispute directly with the provider before approaching the Chartered Institute of Arbitrators, and need a reference number from the provider in order to access the scheme.

Under section 54 of the Communications Act, public communications providers are required to offer an alternative dispute resolution procedure to their customers, other than their own internal complaints system. These procedures must be approved by Oftel/Ofcom, in consultation with the Department of Trade and Industry. Oftel has already approved an telecomm Ombudsman scheme, Otelo, which was launched in

January 2003, and which covers BT and a number of other providers (see ADR Update 7 for more details – this is on the ASA website on www.asauk.org.uk).

More details of the CISAS scheme on the Chartered Institute of Arbitrators website: www.arbitrators.org/cisas/

More details of the Otelo scheme and the Ombudsman's first report on: www.otelo.org.uk

Ombudsman news

"I want to complain…"

The Financial Ombudsman Service has just published its latest updated guide to dealing with complaints. It is mainly aimed at organisations offering financial services (banks, insurers, mortgage providers and so on) and their staff, but it also provides a useful checklist for advisers and their clients. It covers:

- Best in-house practice in dealing with complaints
- The sort of problems the Financial Ombudsman will deal with
- When and how to complain to the Financial Ombudsman
- How the ombudsman will deal with a complaint

The whole guide can be downloaded from:
www.financial-ombudsman.org.uk/publications/guide-firms.htm

Handling of complaints against solicitors still not up to scratch

The new Legal Services Ombudsman, Zahida Manzoor, has published an interim report reviewing the progress of the Law Society towards the targets set by the Lord Chancellor in improving the handling of complaints against solicitors. However, the report concludes that in spite of substantial new initiatives, the complaints-handling performance of the Office for the Supervisions of Solicitors (OSS) has continued to deteriorate:

- the OSS' backlog has increased from 4,434 in January 2002, to 8,545 in September 2003
- the OSS currently has a total of 281 complaints within its caseload that are more than two years old, of which 28 are more than three years old
- the OSS is substantially underperforming in all but one of the performance targets set by the DCA for turnaround times, and has missed its satisfaction rating target by 18%

More details of concerns, and a copy of the full report are available on:
www.olso.org/AR2003_interim/default.asp

Local Government Ombudsman complaints 2002-3

The LGO annual report always gives a useful overview of the kind of issues which are dealt with by the Local Government Ombudsman, and also a review of the performance of individual local authorities. Over the last year, for example, out of a total of over 18,000 complaints:

- 12% were about housing benefit
- 26% about other housing issues
- 20% were about planning
- 9% were about education
- 7% were about social services

Around 30% of these complaints were resolved through some form of local settlement, brokered by the LGO caseworker. The Ombudsman defines the criteria for accepting a local settlement and deciding not to pursue an investigation: "If a council is willing to accept fault, to provide a fair remedy for it and make any administrative improvements that are necessary, the investigation may be discontinued". By far the highest number of local settlements are achieved in disputes about housing benefit and council housing repairs (see details of the new housing disrepair protocol in this Update for a discussion of this).

Only 1% of complaints resulted in a report finding maladministration causing injustice, and in 45% of cases there was no evidence of maladministration, or insufficient evidence of maladministration to pursue the complaint.

The full report can be found on the LGO website on:
www.lgo.org.uk

Ombudsmen – a user's guide

Many advisers working in Law Centres, CABx and advice agencies have a general idea that ombudsmen can be a good thing, but sometimes are unsure what they can investigate, which ombudsman scheme covers which problem, and how to go about making a complaint. In order to respond to the common confusion about ombudsmen and what they do, Sir Edward Osmotherly, former chairman of the Commission for Local Administration in England, has written an article in the November/December edition of the Adviser. The article outlines the nine key ombudsman schemes in England, Wales and Scotland, explains how they work and responds to frequently asked questions.

You can download a copy of the article from the website of the British and Irish Ombudsman Association (BIOA) on:
www.bioa.org.uk/BIOA-New/Adviser_Article_Ombudsmen_Osmotherly.pdf

Should I refer my client to the Local Government Ombudsman?

The LGO website has just added a new "Guide for Advisers" section, which provides information for advisers on whether or not their client's problem could be dealt with by the Ombudsman. It covers issues such as :

- Has the council done something wrong? (maladministration?)
- Has the fault affected your client in some way?(injustice)
- What happens during an investigation
- Outcomes and remedies

There is a step-by-step flowchart for advisers to follow in helping clients decide whether or not this might be an appropriate way forward, and a direct link to the LGO complaint form online. The LGO is also providing a telephone consultancy service especially for advisers through their advice line on lo-call number **0845 602 1983.** Members of the public can call this number to get information and advice, but advisers can also be put through to an investigator to discuss more complex issues. The LGO team would value feedback on this section from advisers, so do try it out and let them know what you think.

You can find the guide to advisers on the LGO website on www.lgo.org.uk or directly on www.lgo.org.uk/advisers-guide/advisers-guide.php

ADR feature

Each edition of the ADR Update will feature information about an ADR scheme that has not received a great deal of publicity, but might well be useful for advisers and their clients to know about.

The ICE-BERG

At the British and Irish Ombudsman's Association conference in May 2003, Jodi Berg, the Independent Case Examiner, joked that she had only applied for this job so that she could become an ice-berg. The Independent Case Examiner (ICE) is an ombudsman-like scheme which will investigate complaints about the work of the Child Support Agency in England, Wales and Scotland. It also covers the Child Support Agency in Northern Ireland, and the Northern Ireland Social Security Agency.

The ICE office is funded by the Department of Work and Pensions, and acts as an independent referee when people are unhappy with the actions of the Child Support Agency (CSA). If someone feels that they have been treated unfairly and are not happy with the way that the Agency has responded to their complaints, the Independent Case Examiner hears both sides of the complaint and makes recommendations about putting things right. The CSA is committed to accepting recommendations by the Examiner, unless there is legislation preventing compliance. Clients who are unhappy with the decision of the ICE can refer their complaint to the Parliamentary Ombudsman.

Where possible, the ICE will try to negotiate a settlement between the complainant and the CSA at an early stage. If this is not possible, she will conduct an investigation and issue a report, though this will of course take longer. She also has the power to require redress of some kind if a complaint is fully or partly upheld, which can include:

- An apology
- Compensation
- A review of CSA procedures

As usual with ombudsman schemes, people need to make their complaint to the local CSA office first, and then take the problem to the ICE if the local response is unsatisfactory. A leaflet about the CSA complaints procedure is available on:
www.csa.gov.uk/pdf/leaflets/csa2022.pdf

The ICE will look at complaints about maladministration; i.e. the way a case has been handled. This will include:

- Long delays
- Mistakes
- Staff being impolite

Complaints need to be made within 6 months of the incident, and can be made in writing, or via the E-form on the website.

More details on the ICE website:
www.ind-case-exam.org.uk/index.htm

The ICE cannot deal with complaints about how child maintenance is calculated – disputes about this should go first to the CSA, and from there can go on to an independent appeals service. The CSA website has a useful section for advisors on:
www.csa.gov.uk/newcsaweb/advisors.asp