

# alternative dispute resolution

# update

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## Recent Developments in Alternative Dispute Resolution

### Update no. 4

## appeal court case on use of ADR

### The need to consider ADR before entering the judicial process

A recent **Court of Appeal** judgement emphasises the need for claimants and their advisers to consider alternative dispute resolution where appropriate, and is in line with the Government's policy of increasingly encouraging potential litigants to avoid court action where possible.

The Times Law report on Tuesday 8<sup>th</sup> January 2002 covered the case of Cowl and Others v. Plymouth City Council. The Appeal Court was considering an appeal against the High Court's decision to reject an application for Judicial Review to quash a decision by the City Council to close a residential care home. A significant factor in the appeal being dismissed was the applicants' failure to take up an offer of use of a statutory complaints procedure, or to consider other methods of Alternative Dispute Resolution.

The Appeal Court made the point that insufficient attention was paid to the paramount importance of avoiding litigation wherever possible. Lord Woolf suggested that in similar cases, courts might need to hold inter-partes hearings "at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the court".

"Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress... Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible."

Although these comments were made in the context of judicial review cases, it will be interesting to see whether they are taken up by the courts in cases generally.

- **Court of Appeal**
- **Cowl and Others v. Plymouth City Council**
- **Before Lord Woolf, Lord Chief Justice, Lord Justice Mummery, and Lord Justice Buxton**
- **Judgement December 14<sup>th</sup> 2001**
- **Times Law Reports January 8<sup>th</sup> 2002**

# information update

## **Disability Conciliation Service**

This is a free alternative to the court process for all DDA Part II cases (details of the scheme were given in the ASA Factsheet issued in October 2001). A fast track referral mechanism has recently been introduced, where advisers to disabled people who wish to make use of the service can refer the case directly to the DRC legal team. The adviser should first establish that both parties are willing to attempt to resolve their dispute through the conciliation service, and then contact Jackie Smith, Legal Team Secretary, on:

Tel: 0161 261 1775  
Fax: 0161 261 1703  
Email: [Jackie.Smith@drc-gb.org](mailto:Jackie.Smith@drc-gb.org)

If the case is not resolved by the conciliation service, it will be returned to the adviser who made the referral.

## **CEDR – new contact details**

CEDR has moved to new premises at:  
Exchange Tower, 1 Harbour Exchange Square, London E14 9GB

CEDR itself aims to work in partnership with business, the professions and government to encourage and develop mediation and other dispute resolution techniques.

Tel: 020 7536 6000  
Fax: 020 7536 6001  
Email: [info@cedr.co.uk](mailto:info@cedr.co.uk)  
Website: [www.cedr.co.uk](http://www.cedr.co.uk)

CEDR Solve is an independent commercial mediation provider and offers a range of ADR, training and consultancy services.

Tel: 020 7536 6060  
Fax: 020 7536 6061  
Email: [info@cedr-solve.com](mailto:info@cedr-solve.com)  
Website: [www.cedr-solve.com](http://www.cedr-solve.com)

## **Survey on Advice Agencies offering ADR**

In October 1999 ASA published a survey of advice agencies offering mediation as part of their range of services to the public, and later that year produced a paper on the issues facing them. ASA is now planning to update this information so that there is a national database of advice agencies providing mediation; ASA will also research the current practice and operational issues which advice agencies offering mediation have identified, and their need for targeted support and guidelines.

If your local CAB, law centre or advice centre offers a mediation service of some kind, or you are aware of other agencies involved in this work, please contact Val Reid at Advice Services Alliance:

Address: ASA, 4 Deans Court, St Paul's Churchyard, London, EC4V 5AA  
Tel: 020 7236 6026  
Email: [val.reid@asauk.org.uk](mailto:val.reid@asauk.org.uk)

# new leaflets

## Local Government Ombudsman leaflet

The Local Government Ombudsman published a new leaflet entitled “**complaint about the council?**” in November 2001, which explains what the LGO can do, and how to go about making a complaint. It has a crystal mark from the Plain English Campaign, and is also available in nine other languages, as well as in large print, Braille and on tape. The leaflet sets out clearly which authorities can be complained about, and what complaints can be investigated. It also has a helpful checklist to help clients (and their advisers) decide whether to complain to the LGO.



The areas covered by each of the three Ombudsmen have also changed, and a new ombudsman has been appointed to the London office – Tony Redmond. Details of the areas, and contact addresses, phone and fax numbers can be found on the website at [www.lgo.org.uk](http://www.lgo.org.uk) More information is available on the Adviceline on 0845 602 1983, and copies of the free leaflet can be ordered from the website on [www.lgo.org.uk/pubsorder.htm](http://www.lgo.org.uk/pubsorder.htm)

One of the concerns that some advice agency workers have about advising clients on whether to pursue a complaint with the Local Government Ombudsman is the difficulty of finding published information about how previous cases have been resolved. Although investigations are confidential, the website does contain a comprehensive digest of anonymised cases for the years 1996 to 2000, covering the following areas:

- Commercial
- Education
- Environmental health
- Highways
- Housing
- Housing benefit
- Land
- Leisure + recreation
- Local taxation
- Planning
- Social services

Advisers wishing to outline advantages and disadvantages of the scheme to clients can find examples here to help illustrate possible outcomes.

## Health Service Ombudsman leaflet

The Health Service Ombudsman has produced a new leaflet for people considering making a complaint about the service they have received from the NHS. The leaflet is dated October 2001, and contains a clear flowchart helping clients and their advisers to decide whether or not a complaint to the Ombudsman is appropriate. The leaflet is available in 11 other languages, as well as in large print, Braille and on tape.



Copies of the leaflet are available free from the office of the Health Service Ombudsman at:

Address: 13<sup>th</sup> Floor, Millbank Tower, Millbank, London SW1P 4QP  
Tel: 020 7217 4942  
Fax: 020 7217 4940

Email: [OHSC.Enquiries@ombudsman.gsi.gov.uk](mailto:OHSC.Enquiries@ombudsman.gsi.gov.uk)  
Website: [www.ombudsman.org.uk](http://www.ombudsman.org.uk)

# ADR reports

## Disputes in Cyberspace 2001

Consumers International has published a very helpful report on online dispute resolution for consumers in cross-border disputes (ie disputes involving parties from different countries). The report includes a summary of 29 online dispute resolution (ODR) providers with websites and contact details, along with an assessment of the quality and range of the services provided by each one.



**Consumers International**

The report also considers issues such as availability, geographical base, types of dispute covered, languages offered, cost to the consumer and the follow-up enforcement procedures offered by these ODR services. Some of the report's key concerns about ODR providers are:

- Most ODR services are available only to speakers of English
- Businesses enjoy a wide range of business to business (B2B) dispute resolution services, but most ODR services are not designed for disputes between consumers and businesses (B2C)
- Most of the ODR services available to consumers are disproportionately costly for typical retail transactions
- Most ODR providers fail to provide enough evidence of the impartiality of their scheme, or of the results of their cases
- Most ODR services fail to provide adequate incentives for compliance with ODR results

However, despite the many concerns raised by the report, most ODR providers can be easily found by a simple web search, and most give clear information about what they can provide. Some providers have expanded their work in the area of consumer disputes, and at least one, ECODIR, a pilot scheme funded by the European Commission to settle international on-line consumer disputes, is free to consumers, and seems to have considerable potential.

Details of ECODIR are at: [www.ecodir.org](http://www.ecodir.org)

The full text of the Consumers International report, with the digest of providers, is at: [www.consumersinternational.org/campaigns/electronic/adr\\_report\\_2001.pdf](http://www.consumersinternational.org/campaigns/electronic/adr_report_2001.pdf)

## Consensus without Court

### ***Encouraging Mediation in Non-Family Civil Disputes in Scotland***

The Scottish Consumer Council published this policy report in December 2001.

It looks at:

- the role of mediation in resolving consumer disputes
- the present situation in Scotland, England and Wales
- the barriers to the development of mediation in Scotland
- how the use of mediation can be encouraged in Scotland

In considering how to encourage the use of mediation, the report recommends a "full-scale review of the entire civil justice system" in Scotland, along the lines of the Woolf review in England and Wales, and recommends complete integration of mediation schemes as part of the network of community services. The report also considers how to promote a culture of early settlement through education of the public, the legal profession, legal advisors, court staff and the judiciary, and finally looks at the need for appropriate funding for mediation, and regulation and training of mediators. Although the report refers to a number of changes in England and Wales as helpful

models for development in Scotland, it also highlights a number of issues that are relevant to both policy and practice in England and Wales.

A copy of the report can be downloaded free from the Scottish Consumer Council website on: [www.scotconsumer.org.uk](http://www.scotconsumer.org.uk)

## **Mediation trends in the North of England**

Anthony Glaister, a CEDR mediator and chair of the Association of Northern Mediators, has recently published a summary of a survey of mediation trends during the year 2000. This includes a number of interesting findings, including:

- Mediations in the area increased by 35% from the first to the second half of the year (from 90 to 124) which was broadly in line with national trends towards increased use of mediation in commercial disputes
- Most mediators were appointed by request by both parties to a commercial mediation scheme such as CEDR or the ADR Group
- 80% of the mediators appointed as a result of these agreements between the parties were lawyers
- Out of the 214 mediations monitored, 142 stemmed from existing litigation

The survey also looks at preliminary results from two pilot schemes for mediation at Leeds Combined Court Centre and at Manchester Courts.

Further details of the Manchester Courts mediation scheme can be obtained from Fran Eccles, Manchester Law Society, Rational House, Bridge Street, Manchester M3 3BN.

Tel: 0161 819 1927.

Information on the Association of Northern Mediators can be found on:

Website: [www.northernmediators.co.uk](http://www.northernmediators.co.uk)

Anthony Glaister's summary of the survey finds can be found on:

Website: [www.mediate.com/articles/glaister.cfm](http://www.mediate.com/articles/glaister.cfm)

## **new ADR schemes**

### **Financial Ombudsman Service**

The Financial Services and Markets Act 2000 made provision for a new Financial Ombudsman Service, which replaces eight existing dispute resolution schemes in the financial sector, including the banking, building societies, investment, insurance and personal investment authority ombudsmen. The new scheme is now the largest in the world, and is intended to provide a free, simple, informal and accessible alternative to the courts. It will cover disputes about mis-selling, unsuitable advice, unfair treatment, maladministration, misleading advertising, delay and poor service in a whole range of financial services, including:



- Banking services
- Building Society services
- Insurance services
- Personal pensions
- Investment services

Clients will need to make a complaint to the organisation first, but if they are unsatisfied with the final response, or if the dispute is not settled within 8 weeks, then the Financial Ombudsman Service can be contacted. FOS awards will be based on what is "fair and reasonable in all the

circumstances” rather than on strict legal liability, and the maximum enforceable limit for compensation will be £100,000. The FOS decision is binding on the firm, but not on the client. If the FOS decision is not accepted by the complainant within the time limit, s/he will be free to pursue the matter in court if necessary.

Legal help will be available where appropriate to clients pursuing complaints under this new scheme, but the service believes that in most cases this should not be necessary. Where an oral hearing is held to investigate a complaint, the Ombudsman proposes to conduct the hearing in such a way that a party who is represented will not have any advantage over a party who is not represented. Complaints can be made directly by a client, or by a legal adviser or CAB worker on their behalf, though the client’s written authorisation is needed for the complaint to be taken up.

The Funding Code Guidance makes it clear that the Legal Services Commission will operate a presumption that applications for Investigative Help or Full Representation will generally be refused under Funding Code Criterion 5.4.3 where the proposed litigation relates to disputes about financial services which could be covered by this scheme (see Funding Code Guidance 7.4 for details).

More information about the scheme, and how to complain, can be found at:

Website: <http://www.financial-ombudsman.org.uk>

### **Enquire pilot SEN mediation project in Scotland**

Throughout the UK new mediation schemes are being set up to deal with disputes between parents and Local Education Authorities about provision for children with special educational needs (SEN). One such scheme has been set up by Enquire, the national advice service for special educational needs in Scotland. The service has been taking referrals since May 2001. Five local authorities are taking part in the pilot: Argyll and Bute, Stirling, Glasgow, East Dunbartonshire and South Lanarkshire.

In SEN mediation a neutral mediator aims to resolve disputes about issues such as school placement, provision for children with special educational needs, exclusion from school, provision of transport or provision of respite care. As with any mediation, taking part is voluntary, and information disclosed during mediation is confidential. The service is free to users, and allows for the possibility of more creative solutions than the more formal court process. It also enables better working relationships between parents, schools and LEAs to be maintained during and after the dispute. If the project is successful it could be extended nationally in Scotland.

For more information about the Scottish SEN mediation service provided by Enquire, contact:

Address: Enquire, Princes House, 5 Shandwick Place, Edinburgh, EH2 4RG

Tel: 0131 228 8484

Email: [Enquire.SENinfo@childreninscotland.org.uk](mailto:Enquire.SENinfo@childreninscotland.org.uk)

Website: [www.childreninscotland.org.uk/enquire/mediation.htm](http://www.childreninscotland.org.uk/enquire/mediation.htm)

Information about the London Region SEN project can be found on:

Website: [www.londonregionsenproject.org.uk/index.htm](http://www.londonregionsenproject.org.uk/index.htm)

## LawWorks Mediation Pilot

LawWorks Mediation Scheme is currently a pilot mediation scheme by the Law Centres Federation, the Solicitors Pro Bono Group and the Bar Pro Bono Unit. It aims to provide mediation on a pro bono basis to resolve certain civil and commercial disputes where one or both parties could not otherwise afford mediation, and would not be eligible for public funding to cover the cost of ADR. The types of disputes they have in mind are housing, consumer, employment, accident and financial problems. The mediators who would deal with disputes of this type will have been trained either by CEDR or the ADR Group. Where community or neighbourhood type cases are referred, it is hoped that they can be referred to mediators from Mediation UK. During the pilot scheme, which will be starting in early 2002, referrals will be accepted from a small number of advice agencies and law centres in London and the West Midlands. The scheme will also provide legal representation where the parties cannot afford their own lawyers and no other funding is available.

If the pilot is successful, LawWorks Mediation hopes to expand the scheme as soon as funding can be found. If you would like to know more email: [mediate@probonogroup.org.uk](mailto:mediate@probonogroup.org.uk)

# consultations

## Mediation Quality Mark Consultation

Responses to the Mediation Quality Mark Consultation were received at the end of last year, and the Mediation Quality Mark working group will be meeting on a number of occasions during February to produce the final version. The most recent draft of the MQM standard can still be read on the LSC website at:

Website: [www.legalservices.gov.uk/devel/other.htm](http://www.legalservices.gov.uk/devel/other.htm)

## General Pre-action Protocol

Responses to the General Pre-action Protocol were due in by the end of January 2002. ASA has responded with support in principle for the provisions of the protocol, but with serious concerns about information and support for Litigants in Person, and about how the protocol will apply to cases likely to be allocated to the small claims track. ASA has also suggested that the Government's support for the principles of ADR, which is apparent in this protocol, means that some strategic thinking will need to be done about issues such as:

- Developing easily available guidelines to help advisers identify cases where ADR is appropriate
- Encouraging Courts and CLSPs to undertake local mapping exercises to provide information about the availability and location of ADR services

The General Protocol consultation documents are available on the LCD Website on:

Website: [www.lcd.gov.uk/consult/preaction/preaction.htm](http://www.lcd.gov.uk/consult/preaction/preaction.htm)

If you would like a copy of the ASA response, please contact Val Reid on:

Tel: 020 7236 6026

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

# ombudsman news

## Asylum seekers, advisers, and the role of the Parliamentary Ombudsman

Hazel Genn's research published in her book "Paths to Justice – what people do and think about going to law", indicated that only 2% of people faced with a group of problems including immigration and nationality took their problem to an ombudsman. Around a third of those facing such problems did nothing to try to resolve them, often because they believed that nothing could be done.



The service offered by the Parliamentary Commissioner for Administration (PCA - commonly known as the Parliamentary Ombudsman) may seem remote to some of the most excluded clients, but in fact it could be relevant to their needs. Michael Buckley, the current Parliamentary Ombudsman, held a consultation meeting for voluntary sector organisations on October 29<sup>th</sup> 2001, and one of the issues highlighted by NACAB, the Immigration Advisory Service and the Refugee Legal Centre was how to improve the service offered by the National Asylum Support System (NASS). Not surprisingly, many refugees are reluctant to make a complaint about poor performance or delay, either because of language difficulties, or because of apprehension about authority.

The Parliamentary Ombudsman cannot act without a complaint from a member of the public who has been disadvantaged by the action (or non-action) of a government department, but he stressed that he welcomes applications facilitated by advice workers who are supporting the individual concerned. A caseworker from the Parliamentary Ombudsman's office can attempt an informal resolution of the problem, or institute an official enquiry if necessary. Informal resolution can mean a speedy settlement of the dispute, and appropriate compensation for the complainant. An official enquiry can highlight systemic problems within any department, and recommend or order changes to practice which will improve things for future clients, such as the resolution to the misleading SERPs advice issued by the DSS (see ADR update number 3, October 2001).

However, none of this can happen unless individuals who have a problem contact the Parliamentary Ombudsman. It is therefore essential that advice workers, who advise and represent some of the most disadvantaged and marginalized people in society, know how to access this and other ombudsman schemes, so that clients are not deprived of a possible remedy because of lack of knowledge or understanding of the options. The Parliamentary Ombudsman website is full of information, easy to follow, and contains a template form for referring any complaint to your client's local MP, the essential first step in the process.

Find out more on: [www.ombudsman.org.uk](http://www.ombudsman.org.uk)

*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, please contact ASA with details at: **ASA, 4 Deans Court, St Paul's Churchyard, London EC4V 5AA***

*If you would like more information about any of these topics, please contact Val Reid, ASA's policy and development officer for ADR, on 020 7236 6026, [val.reid@asauk.org.uk](mailto:val.reid@asauk.org.uk)*

*ASA also publishes **Advising on ADR: The essential guide to appropriate dispute resolution** (June 2000), £20. The guide can be ordered from York Publishing Services, 64 Hallfield Road, Layerthorpe, York YO31 7ZQ, Fax: 01904 430868.*