

ADR Committee Response

Introduction

1. The Civil Justice Council was established as a statutory advisory body in 1998. Its principal objectives are to keep the civil justice system under review and to ensure that the changes to the civil justice system introduced by the reform of Civil Procedure increase access to justice.
2. The ADR Committee was established in the same year, and has seen its primary responsibility as encouraging, wherever appropriate, the use of ADR in the civil justice system.
3. The ADR Committee therefore welcomes the opportunity to comment on the Consultation Paper “A New Focus for Civil Legal Aid”, published by the Legal Services Commission (LSC) in July 2004.
4. The Committee does not seek to comment on all the questions raised in this paper. It limits its observations to the issues raised in Chapter 4 of the paper “Discouraging Unnecessary Publicly Funded Litigation”.

General approach

5. The general approach of the LSC can be seen in para 4.1. “The Community Legal Service has to operate within a fixed budget. Given the growing constraints on the budget, we must ensure that legally aided litigation is a last resort.”
6. The notion of use of the courts being a last resort is, of course, central to Lord Woolf’s philosophy for the reform of the civil justice system. The ADR Committee supports this principle.
7. It is however concerned by statements which may suggest that the sole reason for the use of ADR is to save costs – whether those incurred by the State through the Community Legal Service, or those incurred by private clients, either themselves or through their insurers. The ADR Committee is firmly of the view that the primary justification for the use of ADR must arise from the outcomes which can result from use of ADR, i.e. outcomes that are at least as satisfactory as – often better than – the resolution of a dispute in court.
8. The advantages of the use of ADR are well known. They include:
 - The informality of process;
 - The speed of process;
 - The anonymity of process;
 - The ability to achieve results/remedies that a court could not offer;
 - The ability of parties who may have to continue a relationship to agree a solution to a problem and move on with their lives;
 - The fact that the parties themselves help to shape the outcome
9. There are of course disadvantages, many of which are the converse of the advantages:

- Hearings are not in public;
- Outcomes are not made public;
- Solutions may not reflect the precise state of the law;
- There are cases where a ruling from a court is particularly required.

10. The ADR Committee thinks that it very important that the case for the use of ADR should focus on the advantages to the parties, as much as – even more than – any potential savings to the legal aid budget that may result from the use of ADR.

11. The Committee notes, from articles in Legal Action for example, that some of those who currently represent clients who typically fall within the scope of the legal aid scheme appear to be somewhat resistant to the use of ADR. (Indeed, we suspect that there is still widespread ignorance of and scepticism about the value of ADR in the legal profession at large.) We do not have the empirical evidence to know the extent of this resistance. But insofar as it exists, we think it likely to reflect at least in part a feeling that use of ADR is being promoted solely to save money. An approach based on the argument set out in the preceding paragraph may do something to counter any such views.

Use of complaints procedures

12. The ADR Committee accepts that complaints procedures, including those provided by Ombudsmen, fall within the scope of the concept of ADR. The Committee sees nothing wrong in principle with the Legal Services Commission encouraging the use of such complaints processes. They will often provide an outcome that satisfies a complainant.

13. Many of these procedures will require that complainants put their complaint in writing. The ADR Committee thinks that assistance in putting a case clearly will often be required. The Committee notes that Legal Help can be available to assist with this. It will be important to ensure that such help is available through agencies to which members of the public actually go; these may not always be firms of solicitors.

14. At the same time there may be scope for the LSC to work more closely with Ombudsman services or other complaints procedures to explore the extent to which those services may themselves be able to assist the complainant. There is no point in public money being spent twice on the same issue. It understands that much may be learned from the practices of the Financial Services Ombudsman's approach to those that call its telephone service.

Non-family mediation

15. The Committee agrees with the point made in para 4.19 about the important role that may be played by mediation. It also agrees that the decision of the Court of Appeal in Halsey is supportive of the use of mediation in civil litigation. Indeed, the Committee is of the view that this decision is much more supportive of ADR than many practitioners think.

16. The Committee notes the observation set out in the Consultation Paper that over 98% of legal aid certificates closed with neither side proposing ADR. It agrees that,

while there may be good reasons in many cases for mediation not being contemplated, this appears to be a disappointingly low figure.

17. Much of the research on the use of ADR, plus anecdotal evidence from practitioners, suggest that timing is an important factor in any decision to use ADR. Suggestions of ADR that come too early may result in understandable resistance, on the basis that not enough is known about the dispute to enable a realistic mediation to occur. Conversely, an indication that ADR might be appropriate which arises too late may mean that the parties' positions may have become so entrenched that the chances of a successful mediated outcome are reduced.
18. Recent litigation protocols – notably that relating to housing disrepair cases – have placed emphasis on the importance of parties considering use of ADR. And the General Practice Direction on Protocols, introduced in April 2003, requires defendants to state “whether [they are] prepared to enter into mediation or another alternative method of dispute resolution” (para 4.6(e)).
19. The ADR Committee therefore sees no reason in principle why the Funding Code should not also do more to encourage the use of mediation at an early stage in the litigation process. Such an approach is consistent both with the Woolf reforms and subsequent developments. It is important, however, that any encouragement to use mediation should not be used as an excuse by parties which might lead to unnecessary delay in reaching a final outcome. There is no good reason why a case that is properly case-managed should be subject to any delay by the use of ADR; indeed, in many cases, it will contribute to the early resolution of the dispute.
20. While supportive of the general suggestions made in the Consultation Paper, that the Funding Code should be strengthened to ensure that more attention is given to the possibility of the use of ADR, the ADR Committee thinks it very important that any such policy development is not seen in isolation.
21. There are a number of key issues which do not appear to be addressed in the Consultation Paper.
22. First, the ADR Committee thinks it is important that any use of mediation is appropriate and proportionate. It notes that most of the courts that now offer 'in-court' mediation schemes, offer this on a time-limited basis – typically 3 hours. It may be important for the LSC to consider the extent to which this form of mediation should be used, as opposed to any longer (and thus more expensive) period. It may need to work with the Court Service and the judiciary to ensure that sufficient in-court schemes are put in place.
23. Second, and related to the previous point, the cost of mediation – which is typically split between the parties – will be more acceptable to both sides if the mediation is provided on such a time limited basis. The LSC will need to ensure that it is able to pay the legally aided client's contribution to the cost of mediation. It will need to recognise that it will not normally be able to recover such a payment from the other side, particularly where the mediation is successful. (Cf the point made in para 4.20 of the Consultation Paper.)

24. Third, there is always a risk in a mediation that any inequality of bargaining power between the parties may not be redressed in a mediation. Whatever the theory about assisting parties to an agreed outcome, there is a fear that weaker parties may be browbeaten by a stronger party. It will be important, therefore, that Legal Help should also be available to pay for assistance in the preparation of a case for a mediation. The ADR Committee thinks that there may also be circumstances where it would be cost effective for the LSC to fund legal assistance in the course of a mediation.
25. Fourth, it is sometimes suggested that there are classes of case which are particularly unsuited for mediation. The example of public law cases is sometimes given. The ADR Committee is of the view that spending a great deal of time trying to provide in advance lists of types of case that are and are not suitable for ADR may be rather a waste of effort. We are of the view that there will be few disputed cases where ADR does not have some potential, even if it limited – say – to getting agreement on the facts, or identifying issues to be determined by a court. ADR does not have to be 'all or nothing'.
26. Fifth, as the LSC comes to determine its new policies as the result of this Consultation Exercise, the ADR Committee thinks that it will be of great importance that the outcome of any change in policy is presented not just to those agencies that work within the Community Legal Service. The ADR Committee is particularly aware of the fact that the county court judiciary are a key element in the successful development of ADR. Opportunities will need to be created for the LSC to explain its approach to the judiciary and to listen to comments that may come from the judiciary. The ADR Committee has already developed some experience in arranging seminars for the judiciary on the use of ADR and may therefore be able to assist the LSC in this.
27. Sixth, the ADR Committee accepts that there are perhaps a number of lessons that have been gained in the context of resolving disputes in the family courts that could, with advantage, be considered more broadly in the context of non-family civil litigation. There may therefore need to be more consideration given to the possible use of the judiciary themselves engaging in forms of ADR (e.g. Early Neutral Evaluation), as well as referring cases to forms of ADR not run by the judges.

Conclusion

28. The ADR Committee looks forward to hearing the outcome of the consultation process and exploring any further ways in which it may assist the LSC.