Who Needs ADR?*

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As long ago as January 1999 Lord Irvine's inaugural lecture to the Faculty of Mediation and ADR [1] recognised that, whilst ADR has an expanding role within the civil justice system, 'there are serious and searching questions' to be answered about its use. It was 'naïve' to assert that all disputes are suitable for ADR and mediation. Cases concerning the establishment of legal precedent, administrative law cases and cases which 'set the rights of the individual against those of the State' must be approached with great care. 'We must undertake a comprehensive process of research and consideration, to answer with certainty the question: what kinds of case are suitable for ADR?'

Sir Jeffrey Bowman took a similar stance in his Review of the Crown Office List [2]. Although he recommended the introduction of measures leading to early settlement of claims, he did not consider ADR to be suitable in the context of judicial review. He said: 'There is…generally little room for compromise in the public law field. This said, we would not wish to discourage any genuine attempts to use ADR where it appears to offer a realistic prospect of settlement'.

In March 2001 came the government's pledge to resolve disputes by ADR whenever possible. The pledge specifically excluded public law and human rights disputes as cases that are not suitable for settlement through ADR, thereby adopting Lord Irvine's reservations on the subject.

In contrast, Lord Woolf has been a consistent advocate of ADR, including in the public law arena. His views found expression in the 1996 Access to Justice report, in CPR rules, and famously in the Court of Appeal judgment of Cowl [3], which came nine months after the government pledge. According to Lord Woolf, 'lawyers acting on both sides of a dispute are under a heavy obligation to resort to litigation only if it is really unavoidable'. And because Cowl was a judicial review appeal, it has strongly influenced attitudes in favour of the use of mediation as an alternative in public law cases, leaving behind the doubts expressed by Lord Irvine.

It is not surprising that ADR providers place more emphasis on Lord Woolf's approach rather than that of Lord Irvine or Sir Jeffrey Bowman. In giving guidance to local authority managers about when ADR should and should not be used, the Centre for Effective Dispute Resolution (CEDR) lists public law cases among those that are unsuitable for ADR, consistent with the government pledge. But the guidance then immediately refers the reader to a two-page commentary on "Extending the government pledge into local government" which quotes extensively

the passages from the Cowl judgment that direct parties to public law disputes towards
mediation [4]. There is no mention of the acknowledged reservations surrounding mediation in that field.

A much quoted passage from Cowl '…insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible" also features prominently on the opening page of the Legal Services Commission's July 2004 consultation paper 'A New Focus on Civil Legal Aid'. The paper seeks to promote mediation and other forms of ADR in publicly funded litigation, and whilst it contains no explicit mention of mediation as an alternative to judicial review, the Cowl reference could be seen as suggestive at the very least.

In Halsey v Milton Keynes General NHS Trust [5] Lord Justice Dyson can be said to combine the Irvine/Bowman and the Woolf/LSC schools. Whilst he states in paragraph 6 of the judgment that 'we should proceed on the basis that there are many disputes which are suitable for mediation', he rejects the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation, and states that ADR processes are not appropriate in every case. Examples of disputes unsuitable for ADR, he says, are 'cases where a party wanted the court to resolve a point of law which arises from time to time, and it is considered that a binding precedent would be useful; or cases where injunctive or other relief is essential to protect the position of a party. But in our view most cases are not by their very nature unsuitable for ADR'.

But questions about the suitability of cases for ADR cannot be seen in isolation from questions about which interests are served by directing cases down that route. Ultimately, we need to be able to answer the question: who needs ADR? Do the LSC and the Treasury need it to save money? Do judges need it to save court time and reduce caseloads? Or do parties need it to resolve conflicts more satisfactorily? Can all these needs be met without sacrificing quality of decision-making and access to justice to other expediencies?

To mediate or not to mediate?

Obvious concerns surrounding the use of mediation in cases involving public law challenges, i.e. cases concerning the legality of acts, omissions or decisions of public bodies, have been raised by practitioners following Cowl [6]. In April 2004 PLP held a conference on 'ADR in Public Law', with a view to generating a discussion on the implications for public law in the current rush to ADR.[7] It was attended by practitioners, academics, mediators, commissioners and judges and a representative from the Legal Services Commission.

The conference highlighted the difficulties inherent in identifying when mediation in the judicial review context might be the appropriate route. A fundamental issue that emerged from the discussion was the need to develop clear guidelines to enable practitioners and the court to identify those cases most likely to benefit from the

mediation process. Without these, mediation processes could be vulnerable to tactical use by either side, to cause delay, complainant fatigue or to avoid the establishment of unfavourable precedents. It is also crucial that ADR is not simply seen as a means to reduce the costs of litigation. It must be about obtaining better outcomes for claimants.

Experienced mediators at the conference pointed out the advantages that could accrue from the successful employment of mediation processes. Mediation can increase the parties' sense of ownership of the process and the solution, in contrast to the limited remedies available in judicial review. In judicial review a decision might be quashed and sent back to the decision-maker with an ultimate outcome which does not address the real grievance. In mediation, the claimant can be centre stage and the underlying issues and grievances can be addressed directly. This reduces acrimony and promotes a continuing working relationship. It also gets away from the idea of winners and losers, and focuses on practical solutions. Even if the mediation process does not succeed in resolving the case, it can narrow the issues to be considered by the court.

On the other hand, concerns were expressed that any mediation scheme in the public law context should be high quality, speedy, and effective. To this end, it was seen as essential that the right mediator be appointed, with expertise in the relevant area of dispute. There is a tension between the demand of the courts and the Treasury for a cost-effective alternative to expensive court proceedings, and the acknowledgment that competent and experienced mediators are not cheap. In addition, access to legal advice throughout the mediation process was seen as necessary to ensure that parties are adequately advised on settlement. Also, lawyers are often helpful in reality testing and moderating clients' expectations.

There are also concerns about the transparency and accountability of the mediation process. Mediation providers insist that confidentiality is an intrinsic aspect of successful mediation. But lack of publicity regarding case outcomes creates a perception of lack of transparency, and risks loss of confidence in the mediation process.

When to mediate?

The conference participants expressed different views as to the timing of the 'mediation window'. At what stage in proceedings should mediation be introduced? Before issuing proceedings, after issuing or after a grant of permission? There may, in fact, not be a 'one size fits all' mediation window, and different cases may benefit from mediation at different stages.

One suggestion was that if the judge considered a case suitable for ADR, proceedings could be stayed for a short period after the grant of permission to allow mediation to be attempted. What is clear is that the court would need to keep a tight control over the mediation timetable to prevent drift and delay.

At present, practitioners cannot hold off from issuing for fear of missing the three month time limit, despite the sentiment expressed by Maurice Kay LJ that judges faced with action that is less than prompt would be generous in their application of the rules if they could see that the time had been put to good use.

Who Pays?

Differing views were also expressed on the issue of costs. Examples were given of cases where mediation saved time, costs and stress to all concerned, and cases where the opposite was true.

The LSC are keen to promote ADR and to provide funding for it. At present, though, a full certificate will only be issued for the purposes of litigation. Lawyers can only be paid at legal help rates for any advice and representation they provide to clients in the context of pre-action ADR. The LSC recognise that this may act as a disincentive. It was suggested at the conference that a full certificate could be issued limited to pursuit of ADR options, and this suggestion has subsequently appeared at paragraph 18 of the LSC consultation paper 'A New Focus on Civil Legal Aid'. In accordance with good 'win/win' mediation principles, this suggestion could be seen as offering both lawyers and the Treasury something of what they want. On the other hand, there is a danger that this could introduce an element of compulsion to a process that the conference participants felt should remain consensual.

The neutrality of the funding source was flagged as an important consideration in ensuring the public's perception of mediation as independent and impartial.

Where Do We Go From Here?

Have we really moved on since Lord Irvine's remarks in 1999 in our understanding of the role of ADR as an alternative to litigation generally and the place of ADR in public law in particular? What do we still need to know? These questions are now more urgent than ever. (See 'ADR – Jumping Off the Bandwagon?' Val Reid, in this LAG issue.)

A clear view emerged from the conference regarding the need for dedicated research. Research has been carried out on the use of mediation in the Commercial Court, the Court of Appeal and in the Central London County Court [8] and court-based mediation schemes are currently being piloted in several county courts. But to date there has been no such pilot in the Administrative Court [9].

PLP are now designing an action research project to follow up the issues raised at the conference. Meanwhile, PLP are keen to hear from practitioners [10] with any experiences of the use of ADR in a public law context, and their views on the advantages and disadvantages of those procedures in terms of costs, duration and outcome. This could include mediation, ombudsman complaints, the use of complaints procedures or any other form of ADR as an alternative to judicial review.

We need more debate and research to ensure that ADR/mediation as an alternative to judicial review proceedings is not adopted wholesale from private law into public law without establishing clear and principled guidance for identifying the circumstances in which it is likely to be genuinely suitable.

Notes

1 www.dca.gov.uk/speeches/1999/27-1-99.htm

2 Review of the Crown Office List (Lord Chancellor's Department, London 2000 (The Bowman Report) pp 66-67.

3 R (Cowl) v Plymouth City Council [2001] EWCA Civ 1935.

4 'ADR for public authorities – A guide for managers': CEDR June 2003, pp 14-17.

5 [2004] EWCA (Civ) 576

6 'ADR and Judicial Review – a cultural revolution': K Ashton and J Halford (LAG June 2002); 'ADR and Judicial Review - pros and cons explored': K Ashton, C Collier and J Halford (LAG July 2002); 'After Cowl: inquiry advises on homes closure policy': N. Mackintosh (LAG December 2002); 'ADR and Judicial Review after Cowl': Martin Smith (JR [2002] 148).

7 The conference was hosted by Herbert Smith and sponsored by Landmark Chambers. It was chaired by Kate Markus. The panellists were Brian Thompson, Nick Wikeley, Patrick Birkshaw , Anthony Bradley, Margaret Doyle, Daniel Kolinski, Richard Stein and Colin Stutt. The keynote address was made by Maurice Kay LJ.

8 See 'Court-based initiatives for non-family civil disputes: the Commercial Court and the Court of Appeal': Professor Hazel Genn, Faculty of Laws at University College London, LCD research series no 1/02 (March 2002).

9 Maurice Kay LJ informed the conference that there has been discussion of an ADR pilot in the Administrative Court at the Administrative Court Working Party on ADR.

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