Alternative Dispute Resolution: A Discussion Paper

The Advice Services Alliance’s response to the Lord Chancellor’s Department’s consultation Paper
1. **INTRODUCTION**

ASA welcomes the opportunity to respond to the Discussion Paper on Alternative Dispute Resolution issued by the Lord Chancellor’s Department. We are pleased that the LCD is developing its policy on ADR and would like to contribute our views and experience to that development.

Given the changes taking place in the area of civil justice, there is a need for the government’s ADR policy to develop in a holistic way. The new Legal Services Commission’s policies on ADR need to be developed in tandem with the LCD’s. Otherwise there is a danger of mixed messages being given and of policy being developed that is unworkable in practice. For instance, the Legal Aid Board in its Funding Code refers to directing clients to ADR schemes such as that in the Central London County Court. This would require a national network of such court-annexed schemes, and the LCD has not decided whether to support such a network.

We have organised our response by theme, following the sections 1-8 of the discussion paper and referring to specific questions where applicable.

2. **ABOUT ASA**

ASA is the umbrella organisation for independent advice services in the UK. Its aims are to:

- champion the development of high quality information, advice and legal services;
- ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage;
- encourage co-operation between organisations providing such services;
- provide a forum for the discussion of issues of common interest or concern to advice organisations.

Our current main areas of policy and development work cover legal aid, civil justice, quality of advice, and alternative dispute resolution. Our ADR work, funded since September 1998 by the Nuffield Foundation, focuses on developing ADR policy in the advice sector and helping advisers identify appropriate methods of dispute resolution for their clients. One aim of the project is to produce a guidance manual for advice agencies covering current ADR service provision and what to consider when advising clients of their options for resolving disputes.

**SECTION 1: INTRODUCTION**

In paragraph 1.8, the discussion paper suggests that ADR techniques have evolved to meet perceived defects in more formal procedures. Although this is partly true, it would be unfortunate to present - or to perpetuate a misperception of - ADR as the ‘cure’ for the ‘problem’ of litigation. Many ADR methods have evolved because they provide a different quality of dispute resolution - both in process and in outcome - that corresponds to the needs of the parties in those particular circumstances. Some of these originated for non-legal problems. A danger of presenting ADR in opposition to litigation is that the benefits most likely to be promoted are those that compare favourably to going to court - such as savings in time and cost, less hassle, and less formal
procedures. Because most disputes are not resolved in court, but rather through settlement negotiations, this sets up a false dichotomy.

Many disputes - including specific categories like neighbour disputes but also a whole range of those deemed too trivial or without money value - might not warrant pursuing in court, but there well might be reasons to use a form of ADR. As Hazel Genn writes in her study *Paths to Justice*: ‘...court and other legal proceedings play a very minor role in the resolution of justiciable problems afflicting ordinary members of the public as private individuals (p.149).’ What she found instead was a ‘dark figure’ of hidden potential demand, some of which could be met by ADR.

Another problem with setting up ADR in opposition to litigation arises when, as is suggested elsewhere in the paper, parties might be penalised for not attempting ADR before litigating. The factors most likely to be taken into account to measure proportionality and appropriateness are objective ones, like cost, and not subjective ones, like what the parties actually want to achieve and how. Nevertheless, we are pleased to see that cost alone is not the sole criterion by which the effectiveness of ADR is to be judged.

**Terminology**

We are very much in favour of a shift in terminology from ‘alternative’ to ‘appropriate’ dispute resolution. It is disappointing to hear the LCD take what appears to be a defeatist approach to encouraging this change. We agree that ‘alternative’ can be misleading, in that choosing to use ADR is not always a matter of choosing second best, and furthermore that many ADR methods can be used in conjunction with litigation and tribunals. There is no evidence to suggest that the term ‘alternative dispute resolution’ is ‘now so well established that there is little prospect of changing it’. Indeed, we are currently experiencing very significant changes in terminology in the civil justice arena - many of them as part of the new Civil Procedure Rules, and others to come into effect with the launch of the Community Legal Service, and many of them imposed rather than merely encouraged. We would like to see the LCD take a leading role in what is surely an uncontroversial change in terminology relating to ADR.

The LCD notes the low take-up of ADR among litigants and their advisers. These low levels of take up have also been confirmed in Hazel Genn’s study *Paths to Justice*, which found that very few people took their justiciable problems to any form of ADR, including ombudsmen. (Very few, in fact, took their problems to any form of dispute resolution.) The causes of this resistance to ADR are complex, as the LCD recognises. One primary cause, again supported by Genn’s findings, is the low level of awareness of ADR among solicitors and advisers. Building awareness among those who frequently are in a position to influence a client’s choice of dispute resolution method - as the Law Society and ASA, among others, are currently doing - is one significant way to tackle low take-up.

**Scope of the discussion paper**

We agree with the decision not to include tribunals in the scope of the discussion paper. Although there are many links with ADR, and certainly tribunals began as a form of alternative to the courts, tribunals now are so formalised and legalised that they are more closely allied with litigation.
We would like to see ombudsmen included in the LCD’s policy development discussions, however. The links between mediation and ombudsmen are increasing, with many ombudsmen adopting a conciliation or mediation stage in their dispute resolution procedures. The role of the public-sector ombudsmen in relation to the courts needs to be clarified; they too often get presented as alternatives to litigation when the remedies they provide are too different for them to be presented in this way. On the other hand, the private-sector ombudsmen - who can provide binding decisions and adequate levels of compensation - are often viable alternatives to court action.

4. SECTION 2: WHAT IS ADR?

It can be very confusing to group all ADR processes under one heading, given their very different characteristics. The distinction the paper makes between ‘assisted settlement’ and ‘alternative adjudication’ is a useful one. Like this paper, ASA’s Guide to ADR for Advisers considers the role of ADR in dispute resolution generally and gives definitions of various ADR processes. ASA’s guide suggests a continuum of processes in which the most directive are at one end and the least directive on the other. But we have also referred to the LCD’s distinction, which more starkly distinguishes between two types of process. This distinction goes to what parties want from a dispute resolution process, not just what they want from the outcome, and is important to hold on to. It will sometimes be necessary to separate the two forms - assisted settlement and alternative adjudication - when developing policy relating to ADR.

5. SECTION 4: CHOOSING ADR

The Benefits of ADR
As well as evidence that mediation can promote and speed up settlement, there is evidence from Genn’s study of the Central London County Court project that settlement figures tended to be lower than what a court might have been expected to award. This in itself is not indicative of an unsound settlement, since parties are free to agree to lower settlements in exchange for, say, a speedier resolution. It is important for parties to be aware of this, however, because for some the size of the settlement will be a key factor in deciding whether or not mediation is the appropriate dispute resolution route. And it is perhaps even more important in forms of alternative adjudication such as arbitration, where parties are agreeing to be bound by an imposed decision. There is some evidence, for example, that awards in the arbitration scheme run by the Chartered Institute of Arbitrators for the Association of British Travel Agents result in lower compensation than would be awarded in a county court.

Much of the discussion on ADR tends to focus on the claimant’s perspective and to neglect a defendant’s perspective. Claimants will often have a choice of forum in which to pursue a claim, but in most cases defendants have no choice where litigation against them has already started. There needs to be some exploration of whether ADR is a possible or appropriate choice for a defendant, and if so when. If a party is taken to court for possession proceedings, for example, they will need to defend themselves in court - and protect their right to stay in their home - before an alternative remedy could be considered to address the overall situation.
**ADR and the civil justice reforms**

Although it may be too early to see how the civil justice reforms are working, the LCD should be monitoring their effect on the take-up of ADR. This evaluation should include how judges’ ADR orders are working and whether sanctions have been imposed on any party for unreasonably refusing to consider mediation. It does not appear to be adequate to suggest that ‘earliest signs indicate that the changes have made ADR processes a more attractive course for some parties’. For one thing, an ‘attractive choice’ suggests that parties are actively choosing mediation. How many ADR orders are being used to direct unwilling parties to try mediation? There needs to be much more clarity around how cases are being identified by judges as appropriate for ADR.

In addition, we are concerned by anecdotal evidence that some judges are ordering parties to attend a specified number of hours with a mediator before a decision is made that mediation is not appropriate. Also, although we recognise that the Centre for Dispute Resolution (CEDR) is one of the key mediation providers in court-referred cases, we are concerned that some orders are specifying that parties attend ‘a CEDR mediation’.

In addition to information on the impact on ADR of the CPR, it would also be useful to have an investigation of the real costs of ADR. We know, and the paper points out, that many schemes such as the Central London County Court one operate at below commercial rates. Because up to now there has generally been greater supply of mediators than there has been demand for mediation, many trained mediators have been willing to provide their services free or for nominal fees in order to gain valuable experience. But how long is this sustainable, especially if the demand for mediation is increasing at the rates suggested by providers like CEDR?

**Questions 1-8**

In addition to the potential savings in cost and time offered by ADR, other factors in its favour include convenience, informality, and flexibility. Parties have a greater degree of control over the process and the remedy in many forms of ADR, such as mediation. Genn’s study of the Central London County Court scheme found that parties liked the informality, ability to participate, and focus on the issues that mediation provided.

Another benefit is the opportunity to avoid turning a problem or complaint into an adversarial battleground. The sooner a problem or complaint can be resolved, the less likely it is that positions will be entrenched and that things will be said that can damage future relations between the parties. It is possible - and certainly many community mediation schemes aim for this - that parties will gain conflict resolution skills that can help prevent subsequent problems turning into adversarial disputes. Furthermore, processes that allow parties to consider other perspectives might make for more realistic expectations in future ‘justiciable’ situations.

Flexibility means that remedies are available in ADR that cannot be achieved in litigation. One example is a change in behaviour. For many disputes - not just in family or neighbour situations but anywhere there is an ongoing business or personal relationship - an agreement to change behaviour or policy might not only resolve the current dispute but might prevent further ones, and also is likely to have an impact on others affected as well. It is also likely to mean that agreements are more long lasting than court orders that do not call for a change in future behaviour or practice.
These other qualitative benefits are most likely in forms of ‘assisted settlement’ such as conciliation, mediation, and early neutral evaluation. They are admittedly difficult to quantify, however.

**Among the drawbacks of ADR are:**

- Because ADR results in private settlements, it does not set legal precedent and so ADR outcomes are unlikely to have wider ramifications.
- The lack of scrutiny of decision-making in alternative adjudication forms such as arbitration makes it difficult to assess the quality and soundness of those judgments.
- The skills of the neutral are paramount to rectify power imbalances between the parties. Both of Genn’s studies have shown that although mediation emphasises consensual agreements, sometimes people feel pressured into agreeing to a settlement they are not happy with. Pressure might come from a perceived disadvantage or lack of power, from worries over costs and from a desire to be rid of the problem. To be fair, this is also true of traditional settlement negotiations. But one of the dangers in mediation is that the non-interventionist philosophy of a mediator means that some are not willing or able to intervene to rectify a power imbalance. This was demonstrated in some of the cases observed by Genn in the Central London County Court pilot. Although some mediators will deal effectively with power imbalances and consequent pressures on a party, others might not. Regardless of how skilled the mediator is, however, the perception of the parties in terms of equity of the process is also important. This concern could be addressed by ensuring access to legal advice for all parties.
- A practical drawback is that a suitable (ie affordable, accessible and of high quality) ADR scheme might not be available for a particular type of dispute, for the client’s circumstances, or in a certain geographical area. Provision is still relatively patchy.
- Advice and support to use ADR must be resourced. For some clients, being able to attend a mediation hearing with an advocate, for example, will ensure that they can participate in the process and are not disadvantaged. ADR providers have tended to discourage representation and advocacy at hearings, but this has implications in terms of who can access these services. In the study of the Central London County Court pilot it was found that mediation works well when there is some equality of representation.

To have confidence in the system parties need to feel that it is fair and that they have some degree of control and involvement. They also need to feel they are receiving a service that is as good as another - that the ‘privatised’ justice, as ADR is sometimes perceived to be, works as well and as fairly as that delivered by the state.

Taking account of what the party wants and how they want to achieve it is crucial. ADR processes must be simple to use, transparent, and able to provide a remedy that the parties want. One thing we would like to see ADR providers actively encouraged to do is provide anonymised case studies that will give advisers, solicitors, and their clients a flavour of the types of cases that can be resolved and the way they are resolved. Although it is important to make clear that these are not precedents and advisers should be careful that they don’t unknowingly mislead clients, providing such case studies would go a long way towards encouraging the use of these processes. We believe it is possible to do this within the constraints of the confidentiality policies operated by providers.
It is also important not to be so taken with the wide-ranging applicability of assisted settlement that we neglect to identify cases where it will never be suitable. Where an individual is at odds with a public body or other large organisation and where the issues at stake are non-negotiable - such as whether or not to grant political asylum or the level of or right to receive social security benefits - there is no point in attempting mediation.

Matching cases to dispute resolution processes
It is encouraging to see that the LCD’s paper identifies one factor indicating suitability for ADR as being that both (or all) parties must be willing (para. 4.9). We welcome this straightforward reinforcement of the voluntary nature of ADR and note that it is not present in the Funding Code guidance, another reason for developing policy in tandem.

Questions 9-14
In general we agree with the comments on suitability. In terms of factors mitigating against ADR, however, it is not necessarily the case that litigation is the only option in cases where one party is refusing to acknowledge the problem or engage in negotiations. In the case of ombudsman schemes and the trade association arbitration schemes operated by the Chartered Institute of Arbitrators, the company or organisation agrees beforehand to submit any disputes that remain unresolved after any internal complaints procedures have been tried. A company might refuse to acknowledge an individual complaint or be unwilling to offer a reasonable settlement but will have agreed in principle to abide by the decision of the ombudsman or arbitrator. In some cases this provides an effective remedy for a complainant where the company or organisation has refused to negotiate, and it certainly helps to minimise the effect of the power imbalance inherent in such cases.

Another characteristic that is useful for some types of disputes is the possibility of resolving disputes at a local level. Many disputes involve local providers - councils, small businesses, schools - and would benefit from an ADR service that would take account of local needs and reflect the population of the area. Community mediation services provide this local approach to dispute resolution. There is a great pool of experienced mediators within community mediation schemes; because of the caseloads they handle, many of their mediators practise regularly and frequently, and also are committed to their practice development. We would like to see the government encouraging and supporting community mediation services expanding into areas other than neighbour disputes to fill this need for low-cost, local dispute resolution. Some consumer disputes, workplace disputes, and disputes over children’s schooling and special educational needs might be appropriate areas in which to expand.

Checklist
Although a checklist might be useful, it is a difficult venture, and there are many risks associated with trying to create one. ASA has explored the possibility for its ADR Guide for Advisers but was unable to create such a checklist that was not overly complex.

For one thing, there is no substitute for an adviser’s professional judgement. An adviser takes into account the resources - financial but also emotional - of his or her client, the client’s ability to present a case, and many other factors when helping the client determine what they want to do. They also rely on their own experience of previous cases and forums. Crucially, advisers assess the legal merits of a claim or defence and advise their client accordingly. Clients need to be
aware of the merits of their claim before embarking on ADR just as they do before proceeding with litigation. This professional judgement cannot be factored into a simple, easy-to-use checklist. Nor can the legal merits of a claim, which will vary from case to case.

Also, what clients and their advisers need to consider cannot be reduced to nuggets of single questions in a flowchart. For example, asking whether the client prefers an in-person hearing or not is more complex: not only would the client’s own circumstances and abilities need to be taken into account, but also the access issues, travel time, expenses, length of hearing, etc. Some of this will need expert input, and some will be a matter of the client’s personal judgement, in terms of how much weight to attach to particular factors.

Another risk of producing a checklist or flowchart for identifying suitable ADR options is that it could be misused for the purposes of determining for a client which route is most appropriate. When such a determination is made by a judge, when deciding whether to impose costs sanctions on a party, or by the Legal Aid Board, in deciding whether or not to fund litigation, it would be based on objective factors like cost savings that do not take into account the client’s needs and circumstances. It might even be used by an adviser or solicitor without a client’s input, and even at the request of a party who wants as little involvement as possible in the case, with the risk that it would not accurately reflect the client’s needs and circumstances.

Nevertheless, it might be possible to produce a useful checklist as a prompter. Such a checklist could identify the key questions to ask (such as ‘Do you want to attend a hearing?’), and the primary factors to consider (such as what the costs rules are of a particular process), but it would be misleading and possibly dangerous to then draw a conclusion as to appropriate route on the basis of it. Instead, it could give indicators - such as by helping the user identify that they prefer a process with as little involvement as possible - and then recommend seeing an adviser or solicitor for further guidance. The position of defendants would also have to be considered in such a prompter. For instance, being taken to court for possession by a mortgage lender is one situation in which it would be inappropriate to pursue ADR before taking necessary steps in dealing with the proceedings. It might be that ADR is suitable for other related issues and can be an additional process, but it cannot be a substitute unless the proceedings are stayed. Similarly with a small employer being taken to tribunal - there can be many reasons for wanting to stay within the tribunal system, including not wanting to be seen to settle dubious claims and encourage future ones.

We agree with the statements in the paper relating to public policy issues and ADR (para. 4.14). For advisers, the fact that most - although not all - ADR outcomes are kept out of the public domain means that it is very difficult to identify which option might be best for a particular client’s case. A balance needs to be struck between some basic tenets of ADR - that it is confidential and that it does not set legal precedent - and the need for information on the processes and outcomes to be available to the public.

We have a concern with the statement that ADR processes need to ‘treat all alike’. It is important to note that treating all alike is not the same as ensuring equal access. Where resources are unequal, for example where a client is inexperienced and or has a special need relating to language or disability, then special provision will be necessary to ensure equality of access. In
court proceedings, for instance, judges may assist litigants in person by asking questions to ensure their case is presented adequately.

**Questions 15 and 16:**
Other reasons of public policy that might make ADR unsuitable include where other groups will be affected - such as other tenants or employees - by a decision or agreement. This is mentioned in 4.14 in relation to wider impact of legislation being lost, and also is reflected in the decision of the Lord Chancellor to identify cases with a wider public interest as one of the priorities of the Community Legal Service Fund. Some forms of ADR do offer remedies with wider application. Ombudsman decisions and even mediated agreements, for example, can include changes in future behaviour or practice that would have wider impact, and in fact this is one of the advantages of ADR’s flexibility.

It is important to identify the range of the effect any mediated agreement or alternative adjudication will have, and to assess how best to allow that effect without compromising the principles of confidentiality. Another way to counter the public policy disadvantages is to disseminate case studies a) so that decision-making in adjudicatory processes is more transparent and b) to inform advisers and parties of ADR’s potential, within the constraints of not setting a legal precedent.

### 6. SECTION 5: FINDING OUT ABOUT ADR

Much of this section supports our points made above that building awareness among advisers and solicitors is key to increasing the potential of ADR. We would also like to call for greater awareness of courts and tribunals so parties and their advisers can make meaningful judgements as to the appropriate route. Surveys, including Genn’s *Paths to Justice*, show a low awareness among the public of the small claims procedure and fear of lawyers’ costs even when legal aid or free or low-cost services might be available.

**Questions 17 and 18:**
We would add that judges should be included in the list of those groups of people who need to understand ADR techniques and their suitability for different kinds of dispute. It is disappointing that judges have been given only minimal training on mediation and its appropriateness in relation to the new Civil Procedure Rules and in light of their new power to make ADR orders and issue costs sanctions for not using ADR.

Other ways to increase this understanding are:
- encourage the publication of anonymised case studies
- encourage more openness in ADR processes, such as by encouraging observers at mediations and arbitrations (by agreement of the parties) and by exposing the processes and decision-making to greater scrutiny
- support training of all the groups mentioned (including judges)
- support publicity and development efforts such as those of the British and Irish Ombudsman Association and the Joint Mediation Forum
Although increased information about ADR services on the internet is in principle a good thing, we are not convinced that information alone will increase public knowledge and understanding of ADR. People need access to early advice on their legal position and on the options open to them. The government will have to look at how to resource awareness-raising work on ADR.

Questions 19-24
The LCD’s *Resolving Disputes Without Going to Court* is a very useful quick-reference booklet and should be kept up-to-date. It is easy to use and understand.

A clear distinction has to be maintained, however, between this booklet and detailed guidance. The LCD makes clear that the booklet is not giving recommendations, but it could also make reference to guidance on ADR use that is available. Hopefully such guidance will increasingly be incorporated into the online rights information provided by lawyers and by groups like NACAB and others, and it is certainly part of ASA’s ADR guide for advisers, briefings and training.

Thought also has to be given as to how the booklet links with the Community Legal Service directory - in many ways it can be a complement to that because it will list details of providers who are not in the CLS directory because they have not obtained a Quality Mark (and have no interest in doing so).

Questions 25-30
An electronic directory is a good idea, as is the promotion of information on ADR generally, but it would have to be considered how it links in with the *Resolving Your Disputes* booklet and the CLS directory, both of which will have contact details for ADR providers. In principle, why should the government pay for a directory that will contain details of many commercial providers? And how would a decision be made as to who goes in and who doesn't? One way to approach it would be to provide separate directories for different processes. Ombudsman schemes, for instance, are fairly straightforward to list in directory form, and most meet certain quality standards even without a CLS Quality Mark. But mediation provision is a more complex area. In addition to the well-known organisations like Mediation UK and CEDR, there are many smaller mediation organisations and individual providers who could potentially be included. Some of these are the only providers of a particular type of ADR in an area, such as mediation for school exclusions.

7. SECTION 6: PROVISION OF ADR SERVICES

Questions 31-42
It is perhaps premature to consider a national scheme along the lines of the Central London County Court mediation project. Most forms of ADR are still developing, and to some extent an evolutionary approach is right at this time. Drawbacks of allowing ADR to continue to develop in line with market forces include patchy provision, both geographically and quality-wise. The Legal Aid Board’s consultation on the CLS pointed out that the problem with a demand-led system where provision is being driven by market forces and legal aid in the past has been that providers decide what sort of services they’re interested in providing and where. These decisions don’t necessarily fit the needs of the public.
We would argue for the government to take a role somewhere in the middle, between letting market forces lead and establishing a centrally controlled scheme. The government perhaps need not take such an active role in the commercial sphere - where market forces combined with the civil justice reforms seem to be working - but in areas of social welfare law - those areas named as priorities in the CLS - the government should take appropriate steps to match provision with need. (It is possible that the DTI or DfEE should have a role in the development of ADR in the commercial sphere.) The LCD could, for instance, usefully support a pilot scheme funded by the CLS Fund.

Any projections of ADR need in social welfare areas should dovetail with the CLS planning - the same approach to provision should be taken in relation to, for example, directing resources towards ADR provision. Need is also dependent on public policy. If, as is claimed, we are already seeing - not yet one year after their implementation - increases in mediation use since the new Civil Procedure Rules (CPR) were introduced in April 1999, what is the likely effect two years on from CPR, and with reforms in legal aid requiring more parties to be considering ADR? Monitoring of the effects of these changes is needed in order to plan for adequate provision. Also needed, as mentioned above, is an investigation of the real costs of ADR provision. For example, community mediation services, although free to the user, are not ‘free’ at all but rely heavily on local authority and charitable funding.

The small claims procedure is meant to be a kind of ADR scheme offering a set service and fixed fees. Nevertheless, we agree that generally there would be an advantage to having a set-fee assisted settlement scheme available to all litigants. There would be not much point in offering an alternative adjudication scheme, however. The qualitative benefits of mediation described in the paper in chapter 4, and above, indicate that mediation can provide a meaningful alternative. But there are concerns about redirecting litigants to a fixed-fee, set mediation service where:
- there is an element of compulsion, including costs sanctions (see below)
- the value of the claim means that the extra time and cost of mediation is disproportionate to the claim (this is particularly true in the small claims track; more on this below)
- mediation cannot be arranged quickly
- the quality of the mediation is unknown

At the moment, there is a gap in availability of low-cost mediation for small-value claims, and as mentioned above the situation where mediators provide their services pro bono or at below market forces is likely to end as demand for commercial mediation increases. The government could usefully provide resources to fill this gap.

**Question 43**

The growth of online dispute resolution is interesting but also has the potential to change the way we define ADR. Med-arb seems to be the dispute resolution method of choice for e-commerce disputes, and the med-arb process used by many online services challenges the perceptions of ‘traditional’ mediators. Although it might be early to develop policy on this emerging process, it is already in use by consumers across the globe. There is little research available on its effectiveness and fairness, however. It will be important to watch how this new area develops and consider how advisers, ADR professionals and solicitors in the UK can inform its development.
8. SECTION 7: ADR IN THE PROCESS OF LITIGATION

We strongly support the statement that court users should know what approach to ADR the courts will take, and that it will be consistent throughout the system. This is more than desirable; it is essential. It is very unclear how judges are currently identifying cases as appropriate for ADR, what form ADR orders are taking, and what if any cost sanctions are being imposed for not using ADR.

Questions 44 and 45
Pre-action protocols are in themselves a form of ADR as they are designed to encourage early settlement. We would not object to the protocols referring to other forms of ADR such as mediation and even requiring parties to consider them, but we think it is important to be careful how any sanctions are applied for not doing so. Only parties themselves can decide what would be a sound settlement for them. For this reason we think it would be inappropriate to try to develop a checklist, as described earlier in the paper, that would match cases to forms of ADR.

Also, it’s important to note that ADR might not be appropriate - or indeed available - for some protocols. For example in some undefended debt cases where the only issue is ability to pay, the most appropriate method is simple negotiations coupled with debt advice. Even if mediation could be identified as adding value to such cases by, for example, allowing a more human element to enter into negotiations, there is lack of affordable mediation for low-value cases, so it would be impossible to require parties to try ADR.

Questions 46-48
Some ADR providers will not accept cases once litigation has commenced. Although this is not necessarily an indication that ADR is inappropriate, it clearly limits the options. These include some community mediation schemes, some ombudsmen, and conciliation under the NHS complaints procedure. Generally, however, we would support having specific references to ADR and making recourse to ADR an option - but a voluntary one - at any stage of litigation. It should take the form of checking whether parties have considered it and whether they would be willing to consider it now. We agree that forms of assisted settlement are most likely to be valuable at this stage, rather than alternative adjudication.

The aim, however, should be to ensure that litigants are aware of all the options before issuing proceedings. And in many cases there would be no point in trying to persuade parties to consider ADR once litigation has commenced. In small claims, there would be little incentive to pursue ADR once proceedings have been issued. Although there might be benefit to using mediation rather than small claims, particularly for cases where there is an ongoing relationship between the parties or because the party wants primarily non-monetary remedies, for low-value cases the costs and time of redirecting a case would often be disproportionate to the value of the claim. For one thing, the litigant will already have paid a court fee of at least £20 (set to rise to £27) - it would be unreasonable to expect them to pay for mediation fees on top of this, especially as mediation gives no guarantee of a resolution (and given the points made above about lack of low-cost mediation for low-value claims). If the case did resolve at mediation, would the litigant be reimbursed a portion of the court fee to reflect the fact that no hearing was needed? Other factors, like travel time and cost, taking time off work, and childcare also need to be figured in.
Many litigants prefer the certainty of the small claims procedure. Introducing a redirection to ADR adds complexity and removes this certainty.

Note that offers to settle and payments into court don’t apply to small claims (para. 7.32). This is due to the desire to keep the procedure simple and accessible to litigants in person.

**Questions 49-52**

Early neutral evaluation has a useful role in case management, but its role also differs according to which track a case is allocated to. If judges are to be performing ENE, would court fees need to be increased for this additional ‘service’? In small claims cases courts are unlikely to have the resources to provide ENE. Some have only one district judge, and if - as this paper clearly states and as we strongly believe - the same judge who offers ENE should not also hear the case, in order to preserve neutrality, who would be available to hear the case? There seems no point in offering a preliminary hearing for the purposes of ENE in the small claims track. One aim of the CPR is to avoid pre-trial hearings in small claims. Parties should instead have access to advice before filing a claim to determine the strengths of their case. Advice desks should be set up in busy courts where the level of business would justify it, so that litigants are given advice on their options well before incurring court fees. For all potential litigants, early access to advice is crucial.

**Compulsion**

**Questions 53-66**

We agree that it is paradoxical to compel the use of a process which depends on willingness to participate for its success. In general we oppose any form of compulsion to use ADR. There are better ways to improve take-up and awareness among parties and their advisers other than compelling them to use ADR. Among these better ways are training, promotion of ADR provision, encouraging greater transparency about the processes and outcomes and more openness about settlements and decision-making. Compulsion is simply not the right tool; it not only contravenes the fundamental nature of ADR processes but will end up being counterproductive if people find themselves unwilling participants in a process that can’t deliver what they want to achieve.

Another way to encourage take-up is through an opt-out clause, which we would support. But it must be voluntary and it must be without question. In other words, a party’s reasons for opting out must be accepted, without the ‘reasonableness’ of those reasons being questioned and without costs sanctions being imposed. Determining the appropriate way to resolve a particular dispute is complex and requires subjective judgements to be made by the party and his or her legal adviser. Among reasons for opting to litigate are that the party wants the certainty of a legal judgment or wants to set a legal precedent, but there are many other reasons that might be considered ‘good’ or ‘bad’ depending on who is assessing them. We would therefore support an opt-out clause with the following requirements:

- That parties are given information before faced with this decision. This includes knowing what form of ADR they are being directed to if they choose not to opt out, how it works, and what possible outcomes there might be.
- That parties will have access to quality, affordable ADR that can offer comparable remedies. At the moment there simply isn’t enough information about outcomes to be able to compel people to use ADR processes.
- That there are no cost sanctions for opting out.
• That there is no need to defend the reasonableness of one’s decisions or to have one’s decision accepted or rejected.

Even aside from whether the reasons for rejecting ADR are reasonable, who decides which process is the most appropriate one? If one party wants to arbitrate, and the other wants to mediate, how would a judge decide which party was being unreasonable? One suggestion is that a stepped approach would work, in that parties should be encouraged to try mediation as a first stage and move on to increasingly adjudicative processes if mediation fails. (This is what med-arb and other ‘hybrid’ processes offer.) But the quality of the process and the kind of remedies available may be so different as to make this unfeasible.

Another problem is that the questions suggested as a way for a judge to determine whether a party was reasonable or not will not necessarily give enough information to be able to draw a safe conclusion one way or the other. It assumes, for one thing, that both sides have some ‘right’ to them. What if, in attempting mediation, one party feels that it is clear that the other side simply doesn’t have a strong case and so it makes sense to continue with litigation? It comes back to what people want; it’s not just about cost, but forcing people will defeat even the purpose of saving money.

It is reasonable to impose a sanction if there is evidence that one party asked for stay to try ADR in bad faith, without the willingness to settle but with an interest in drawing out the matter.

Finally, there is a need to consider the provision of Article 6 of the European Convention on Human Rights – that individuals have a right to a fair and public hearing by an independent tribunal. How will a requirement that parties use ADR rather than litigate, effectively limiting access to the courts, conflict with this provision? The discussion paper recognises this as an issue that needs to be addressed.

9. CHAPTER 8 - QUALITY CONTROL

We agree that confidence in the quality of ADR services is needed and that this needs be balanced with a degree of innovation that allows ADR to evolve. But quality is different in the different ADR processes. The focus on mediation suggests that other areas of ADR do not need the same quality assurance, or that they already have them. But in fact there is more movement towards common standards for mediators than there are for other ADR professions.

Ombudsmen schemes should meet the requirements of membership of the British and Irish Ombudsman Association, which relate to independence and efficiency, but there is no required qualification to be an ombudsman.

The paper is far too complacent about quality control of arbitrators. Yes, the Chartered Institute of Arbitrators has a rigorous series of exams and other hurdles for potential arbitrators to pass before being recognised as qualified, but rigorous training is not in itself an adequate safeguard. Unlike solicitors and judges, much of whose work is subject to scrutiny by legal colleagues, arbitrators’ decision-making is not subject to scrutiny. More useful as a safeguard for parties would be to make arbitration awards available to the public, with the parties’ identities concealed.
unless they have agreed otherwise. This is what the Southwark Arbitration Unit does, and it means that their awards can be scrutinised.

Regarding ENE, simply because someone is trained as a lawyer or is qualified in some other profession does not mean they are qualified to act as a neutral to offer either ENE or expert determination. What the qualification or quality standard should be needs to be explored with providers.

That said, mediation is a bit of a quality minefield, for the reasons described in para. 8.6 in the paper. A danger in mediation is that, as it is promoted as a consensual process in which parties reach their own agreements, the extent of the mediator’s power is too often underestimated. This can lead to a cavalier attitude towards quality assurance.

It is probably premature to try to regulate mediators. The UK College of Family Mediators is an interesting model. Family mediators work under a common set of standards, governed by the UK College. Those operating a legal aid franchise also operate under the franchise specifications, which are adequate quality standards. The government could be supporting the efforts of the Joint Mediation Forum to develop common standards and a model code of conduct for mediators.

Part of any mediation practice standard should be the requirement to explain what approach the mediator uses. This is a controversial area among mediation providers, but from the parties’ perspective it is reasonable to want to know what to expect from the mediator. Hazel Genn’s study of the Central London County Court pilot found that this was a problem for many parties and their solicitors. Some felt the mediator was too directive or too bullying; others felt the mediator was too passive and not directive enough. By explaining their approach - for example, whether they will give their own opinions and/or offer their views of the legal positions - mediators would allow parties to be better informed and prepared, and to make a choice as to what type of mediation they prefer.

There should be a system of approval and to some extent it should be left to the providers to do this, in the way the ombudsmen and family mediators have done. The government should be looking at encouraging flexibility, creativity and innovation within quality constraints.

The government’s role in assuring quality of ADR provision must tie in with the CLS Quality Mark. The government should be involved where public funding is involved. This is most appropriate in areas of social welfare law (as in the CLS), in cases in which clients might be vulnerable and almost certainly don’t have the expertise or previous experience by which to judge the quality of the service provided - nor, in fact, do their advisers. The Legal Services Commission will need to develop a Quality Mark for ADR providers and to consider how to include in the CLS directory those providers who are not interested in obtaining a Quality Mark - as will be the case for most of the ombudsmen schemes and commercial providers.
References