

Annual Report

2004/05

Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution

The Pledge Commitments



Settlement of Government Disputes through Alternative Dispute Resolution

"Government Departments and agencies make these commitments on the resolution of disputes involving them:

- Alternative Dispute Resolution (ADR) will be considered and used in all suitable cases wherever the other party accepts it.
- In future, Departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement would be tailored to the details of individual cases.
- Central Government will produce procurement guidance on the different options available for ADR in Government disputes and how they might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government.
- Departments will improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure.

There may be cases that are not suitable for settlement through ADR, for example, cases involving intentional wrongdoing, abuse of power, public law, Human Rights and vexatious litigants. There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle.

Government Departments will put in place performance measures to monitor the effectiveness of these undertakings."

23 March 2001

Introduction

Promotion of Alternative Dispute Resolution (ADR) within government became a commitment for all disputes involving Government Departments and agencies in March 2001, when the then Lord Chancellor, Lord Irvine, published the formal pledge (see previous page).

The overarching aim of the Pledge is that Government Departments and agencies should consider and use ADR to settle legal disputes in all suitable cases where the other party agrees to it.

The Pledge envisages that ADR procedures should be used in the most effective and proportionate manner where possible, avoiding the need for expensive legal and court services.

This is the fourth Annual Report published by the DCA, in line with the Pledge commitments. The report contains:

- a review of ADR use in Government over the last 12 months and a brief summary of the Activities under the Pledge, which includes case illustrations
- information on the development of awareness of ADR use by Government Departments and agencies.
- other ADR activities within Government and the EU.

Reviewing Progress

Government Departments and agencies, including the National Health Service Litigation Authority¹ have continued to monitor their use of ADR throughout the year, providing statistical information to the Department for Constitutional Affairs to collate for this report.

This shows that over the period 2004/05, ADR has been used in 167 cases with 125 leading to settlement, saving costs estimated at £28.8m.

Compared to 2003-04, ADR was attempted in fewer cases (229 cases in 2003/04), with fewer settling (181 in 2003/04) - a lower success rate of 75% (79% in 2003/04). However, the estimated savings have almost doubled when compared to the £14.6m recorded in the 2003/04 report.

Although, it is disappointing that ADR has not been used in more cases, this may in part be due to the fact that there have been an increasing number of disputes resolved outside formal ADR processes and without recourse to litigation, which are not captured by the headline figures for reporting ADR use. For example, the Treasury Solicitor's Department report an increasing number of cases where disputes are resolved through proactively encouraging parties to settle without the use of a formal ADR process such as mediation (i.e. by a process of negotiated settlement, either directly between the client and the other side, or between solicitors and/or counsel).

¹ The NHSLA reporting period runs from July to June, and although this is a different reporting year from the other departments, the figures are included in this report for completeness.

Procurement Contracts

The Pledge also required Departments to provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. In March 2002, the Office of Government Commerce published Dispute Resolution Guidance, making ADR clauses a permanent feature in all departmental standard procurement contracts.

This has encouraged greater use of ADR across government. The following comments, reproduced from the Foreign and Commonwealth Office 2004/05 annual return, illustrate how seriously departments have committed themselves to subscribing to the terms of the pledge in their contracts:

" ADR was successfully used to resolve a construction contract dispute where the contractor claimed additional monies for changes... the process was quick, well defined by contract clauses and eliminated the need for protracted dispute."

The ADR Pledge and *Halsey v Milton Keynes General NHS Trust*²

Under the Civil Procedure Rules, courts have jurisdiction to impose a costs sanction on successful parties who unreasonably refuse to mediate.

In the 2004 case of *Halsey v Milton Keynes General NHS Trust*, despite the Trust rejecting repeated offers of mediation from the claimant's solicitor, the judge declined to deprive the Trust of its costs on winning, finding the repeated offers to mediate by the claimant's solicitor "somewhat tactical". In the course of handing down the Appeal Court's judgement in the appeal of *Halsey*, Dyson LJ proceeded to set out clearly those reasons why a party might reasonably refuse to consider ADR.

The *Halsey* judgement also made reference to the ADR Pledge. The ADR pledge had previously been referred to in the 2003 case of the *Royal Bank of Canada v Secretary of State for Defence*³, where Lewison J had said that the ADR pledge given by the Government was something to which he ought to attach "great weight".

By contrast, in *Halsey*, Dyson LJ said it was wrong for the judge in the *Royal Bank of Scotland* case to attach "great weight" to the ADR pledge. The ADR pledge was no more than an undertaking that ADR would be considered and used in all suitable cases. If a case was suitable for ADR, then it was likely that a party refusing to agree to it would be acting unreasonably, whether or not it was a public body to which the ADR pledge applied.

² *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 291

³ *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC (Ch)

Illustrative Cases

During the period of the Report, Departments and agencies have used and continue to use ADR methods to settle a wide range of cases.

The following examples of the use of ADR give only a flavour of the actual experience, because agreements reached through an ADR process are generally subject to confidentiality agreements restricting the information which can be released.

Her Majesty's Customs and Excise (C & E)

- Customs had five Tribunal discrimination cases, which were settled following use of the mediation process, resulting in significant savings compared to the costs of a contested case.
- Mediation was also used to settle a disputed damages claim involving allegations of wrongful actions by Customs.

Department for Environment, Food and Rural Affairs (Defra)

(1) Cumbria Waste Management ("CWM") and Lakeland Waste Management ("LWM")

- The claims by CWM and LWM related to the landfilling and management of various types of waste (predominantly carcasses) at 3 landfill sites.
- The dispute revolved around the interpretation of the contracts with CWM and LWM and in particular the definition of "landfilling" and "additional costs" and also the sums due for the treatment of leachate.
- 2 mediations were held. The first took place in July 2004, shortly after which the dispute with LWM was settled at a saving of approximately £650,000 against the sums claimed, including VAT. The second mediation occurred in February 2005, at which the dispute with CWM was settled. The CWM settlement also resolved future liability for leachate charges. The approximate saving in relation to the sum claimed and future liability for leachate (including VAT and interest) is £3.395M.
- The savings in relation to costs relate to the disputes with both LWM and CWM – since they would have been consolidated, and is in the approximate sum of £2M.

(2) Note: the mediations where substantial savings have resulted have been in connection with claims made by contractors following work done during the Foot and Mouth outbreak in 2001. The sums involved have been extremely large, and "estimated savings" are by reference to the total sums claimed.

Department for Constitutional Affairs

- Mediation did not directly produce settlement, but helped to lower claimant's expectations to a reasonable level. Settlement followed shortly afterwards, for the amount we thought claimant would receive at trial. Consequently, trial costs were also saved.

Foreign and Commonwealth Office

- ADR successfully used to resolve construction contract dispute where contractor claimed additional monies (£23K) for changes. FCO argued that contract was design and build and changes were not 'client changes', therefore contractor was obliged under terms of the contract to ensure the end product satisfied the requirements spelt out in the project specification.
- Contract included the provision for disputes to be referred to independent adjudicator who ruled in favour of FCO.
- Process was quick, well defined by contract clauses and eliminated need for protracted dispute. Adjudicator's costs amounted to £1,073, which was shared 90% on contractor and 10% on FCO.

Treasury Solicitor's Department

- The Companies and Regulation Team at TSol rarely has cases that are suitable for ADR, but there was a notable exception this year. This was an action brought by a government department against a nationwide retailer of men's clothing about "70% off" advertisements, and other matters. Agreement was reached to mediate "the other matters", and at the mediation (the department's first) agreement was reached in relation to those matters, and that part of the claim was therefore stayed.
- There were several section 6 Company Directors Disqualification Act 1986 cases where the matter was concluded after negotiation, with little or no Court proceedings, using the Statutory Undertaking Scheme under the 2001 amendment to the Act.
- Several claimants brought actions against a government department for damages in relation to the publication of information in a report. The department offered mediation and this resulted in an overall saving in damages and costs of the order of £100,000.
- A claim for disability discrimination and unfair dismissal was successfully mediated before trial. The agreed compensation was £15,000. The Claimant was assessed as having a 70% chance of succeeding in her claims and could have received £20,000 in damages. The legal costs saved in relation to the hearing were estimated at £10,000.
- In a claim for damages for personal injuries and consequential losses arising out of a road traffic accident it was alleged that potholes in the area of the accident had not been properly repaired. The department responsible for the maintenance of the road had in place a system of inspection and maintenance, which involved two contracts, one for the management of the roads and the other for maintenance and repairs. Its agents were

responsible for undertaking safety and detailed inspections, as well as daily safety patrols - none of which revealed any defect. The department's two agents were joined in the action. The claim was originally valued at £200,000. Although settlement was not achieved at mediation, the claim settled shortly after with the client department bearing roughly 23% of the settlement.

- A mediation took place in a personal injury claim valued at £2 million. TSol appeared to make no progress at the meeting. None of the parties had applied their minds to settlement prior to the mediation taking place, and all were entrenched in their respective positions. Whilst no progress appeared to have been made at the mediation itself, negotiations started a few days later and the case settled within the week. The client paid £250,000 towards the settlement of the claim, which avoided the substantial risk of the client being found liable for 100% of the claim. This was a particularly favourable outcome for the client.
- In a brain injury case valued at £1.3 million, which appeared to have no prospect of settlement, the claim settled the day after ADR for £550,000, with the client paying approximately 50%. The mediation provided a forum for the parties to adjust their expectations, and to evaluate the strengths and weaknesses of their respective positions. As a result, an expensive 5-day trial was avoided, including the cost of preparing for trial.
- In a claim for an indemnity against a government department, it appeared unlikely that the Claimants would settle and the claim was valued in excess of £50,000. Mediation was agreed to and settlement achieved at £30,000 plus statutory interest. This was an outcome, which would probably not have been possible without mediation.
- Following a road traffic accident, the Claimant aquaplaned across a pool of standing water, causing her to lose control of her car, the vehicle to leave the carriageway and end up in a ditch. The Claimant sustained severe personal injury. Primary liability was admitted. In determining damages, the parties jointly instructed an employment consultant to prepare a report having (separately) instructed medical experts, the Defence initiated the holding of a discussion between the 2 experts and the subsequent preparation of their joint report. The claim, which had been valued at a figure approaching £650k, was settled between the parties for £250k shortly before the trial of the action. Legal cost savings were also achieved. Due to the intensive ADR training provided to lawyers within the Treasury Solicitors Department in the year 2003/04, during which the vast majority of existing lawyers attended awareness courses, the ongoing need for training was mostly to cater for those who were recent joiners or who may have missed previous courses.
- This accounts for a significant proportion of business and the results displayed in Section 1 are consequently not representative of TSol's considerable effort in achieving quality advice balanced with an appreciation of the claimant's needs. In achieving settlement in a high proportion of cases the client is spared the costs (albeit limited) of even mediation itself.

Developing Awareness of ADR

Government Departments and agencies continue to take steps to promote ADR awareness among legal practitioner staff. Departments have begun to implement training programmes,

encouraging Government Lawyers to undertake awareness training as mediators to ensure that ADR is seen as a fundamental part of their dispute handling process.

The ADR awareness training process forms part of the overall approach to resolving legal disputes in the most effective and proportionate manner.

The examples below, detail training and development activities in ADR procedures undertaken by reporting Departments over the last twelve months.

Customs and Excise (C & E)

- In February 2005 eight lawyers and a Legal Support Officer from the Law Enforcement Legal Services Group attended a mediation training course provided by a specialist mediator training firm. The course covered all aspects of ADR.

Department for Transport

- In February 2005, a number of lawyers from the Department attended a talk by a well-known commercial mediator.

Ministry Of Defence

- MOD's Chief Claims Officer and Senior Claims Officer have undertaken training to become accredited mediators, in order to obtain a better insight into the mediation process.
- MOD also uses mediation to settle staff disputes where appropriate.

Treasury Solicitor's Department

There were a number of courses designed to provide practical skills to be used in mediation.

- October 2004: Mediation Awareness Training – 43 attendees
- February 2005: Mediation Awareness Training – 26 attendees
- February 2005: Lecture: A Mediator's View of Mediation – 49 attendees
- March 2005: Lecture: ADR In Public Law – 12 attendees.
- April 2005: Lecture: The Litigator's Role in Mediation – 25 attendees.

Foreign and Commonwealth Office

- No ADR specific training, but key procurement staff studying for MCIPS etc do cover the topic.

Other ADR Activities

In addition to developmental programmes, Government Departments and external stakeholders have teamed up to explore potential avenues to improve upon the delivery of ADR objectives. The initiatives listed below are a summary of other activities that have taken place under the pledge during the current reporting year.

Her Majesty's Customs and Excise (C & E)

- Officials have been exploring the possibility of setting up a scheme to use mediation in small value claims and for litigants in person: a 3-hour mediation costing in the region of £450 + VAT.

Department for Trade and Industry

- The Department operates two Schemes set up under the direction and approval of the High Court for the settlement of Coal Health Claims. These Schemes have diverted the vast bulk of these cases away from a full court process.

Treasury Solicitor's Department

- Staff of TSol have been active in continuing to contribute to the Government Legal Service Sub-Group on ADR. David Pearson, the Director-General of Litigation at TSol took over the chair of this Sub-Group earlier this year. Its purpose is to promote awareness of and use of mediation across Whitehall.
- TSol also formed the TSol ADR Group during the course of the 2004/5 year, its purpose being to bring together lawyers from across the range of TSol work to assist in the greater awareness of ADR and its application and to assist in providing support and training to those involved in mediations. The group has a website on TSol's intranet with information about mediation and is chaired by Philip Kent, Director of the Private law Litigation Division.

The Draft EU Directive on Mediation

Negotiations continue on a proposed EU Directive on certain aspects of mediation in civil and commercial matters⁴. The scope of this proposal includes family mediation.

The aim of this proposal is to ensure better access to justice by the promotion and encouragement of the use of mediation as a form of alternative dispute resolution without nevertheless making mediation compulsory. It sets out to establish "a sound relationship between mediation and judicial proceedings" by providing minimum common rules in the Community on a number of key aspects of civil procedure.

In terms of procedure rules, the proposed Directive is likely to: require a mediated agreement to be capable of confirmation as a court judgment or order, if requested by the parties; ensure that mediators cannot be compelled to give evidence on matters regarding or raised during the mediation, subject to overriding considerations of public policy such as child protection matters; and, require that Member States have a procedure to ensure that parties who choose mediation to try to solve a dispute are not prevented from subsequently initiating judicial proceedings by the expiry of limitation periods regarding a claim which is the subject of mediation.

⁴ Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters [13852/04; COM(2004) 718 FINAL]