

Annual Report

2005/06

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

In general terms, the Government's objective under the pledge initiative is to formally commit all Departments and agencies to use mediation to settle legal disputes in all suitable cases wherever the other party accepts it.

Since the publication of the formal pledge by the then Lord Chancellor, Lord Irvine in March 2001, government departments and agencies have taken proactive steps, using alternative dispute resolution procedures to settle disputes where appropriate.

It is envisaged that by committing Government departments and agencies to the use of ADR procedures for the resolution of disputes that may arise out of contractual engagements, relationship with suppliers would be maintained. In particular, the pledge initiative also envisaged that Government departments and agencies would use ADR procedures in the most effective and proportionate manner, where appropriate, in order to avoid the need for expensive legal and court services.

The pledge report, for the first time, provides information on the development of in-house mediation schemes by government departments for resolving employment and staff disputes.

This is the fifth Annual Report published by the DCA, which gives an overview of the main activities undertaken by government departments and agencies, in line with the government's Pledge commitments.

This 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.

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.

During this reporting period 2005/06, ADR has been used in 336 cases with 241 leading to settlement, saving costs estimated at £120.7m.

Compared to the previous year's returns ADR was attempted in more cases (167 cases in 2004/05), with a higher number of settlements (125 in 2004/05) - a slightly lower settlement rate of 72% (75% in 2004/05). While the estimated savings are vastly in excess of the £28.8m recorded in the 2004/05 report, it should be noted that this year's figure has been inflated by a couple of exceptionally large cases - one being a £50m claim that was settled for £1.8m.

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.

Illustrative Cases

During 2005/06, Departments and agencies used ADR procedures to settle a wide range of disputes. The case studies listed below show some of the actual experiences of the use of ADR. Agreements reached through an ADR process are generally subject to confidentiality agreements, thus restricting the information that can be released.

Her Majesty's Revenue and Customs

- Mediation was used in respect of a claim arising out of the wrongful seizure of a lorry by Customs Officers which led to a dispute over economic losses. The claim was originally for £100,000 but settled for £37,500 plus payment of £14,500 costs. Although the claim was inflated and settled at a realistic level, the real saving was in costs which if it had proceeded could have amounted to £25,000 per side.
- Mediation was used in respect of a complex commercial claim arising out of customs enforcement action. The claim was not successfully mediated but settled within three months. The mediation was seen as an important catalyst in the settlement process. The claim settled for £1.8m. Although the claimants sought to recover a much higher sum - and the settlement represented good commercial sense taking into account risk, the real saving was in costs.

Department for Environment, Food and Rural Affairs

Dispute concerned the valuation of the services provided and works undertaken to assist with the eradication of the Foot & Mouth Disease, where the parties were £5-6m apart in terms of expert evidence relating to valuation. Proceedings were instigated. Defra proposed a structured negotiation involving the experts and principal decision-makers (a form of ADR), and in the process settlement was achieved. The terms of the agreement are set out in a Tomlin Order and approved by the court.

Defra were defending a substantial claim for compensation following the use of a landfill site during the foot and mouth crisis. Heads of claim included: commercial losses for diverting waste to other sites while the landfill was closed; legal costs; interest; and the costs of ongoing environmental monitoring. An indemnity was sought for future environmental liabilities. Mediation assisted in significantly reducing the issues in dispute and prompted a settlement.

Ministry of Defence

- All MoD commercial contracts contain DEFCON 530, which states that MoD and its contractors will consider using ADR in all suitable cases.
- A claim for noise nuisance by an owner of an estate in close proximity to a RAF station operating Jaguar aircraft was successfully mediated before trial. The claim was for about £1.6 million, but settled for £550,000.
- A claim made by the Ministry of Defence against a company for causing collision damage to a Type 23 Frigate was settled at mediation for £4 million.

Department for Work and Pensions

The DWP used the services provided by ACAS to help settle a number of cases. One involved a settlement payment to a member of staff who had been dismissed unfairly, and another to a woman about to go on maternity leave, who had unlawfully been refused a post that she had previously been offered as a redeployment opportunity.

Settlements were also made in respect of several claims made under the Disability Discrimination Act:

- for failure to make reasonable adjustments as part of recruitment;
- for inadequate IT equipment to a disabled member of staff several months after a major IT rollout; and,
- for failing to adjust a trigger point for attendance management purposes.

ADR was also used to settle a long running dispute involving various NHS bodies as well as the Secretary of State.

Office for Government Commerce

OGC used the Uniform Domain-Name Dispute Resolution Policy (UDRP) to obtain a domain name from a company who had registered it and attempted to sell it on.

OGC was successful in showing that this was a bad faith registration and the domain name was transferred to OGC. Details of this case are available at:

<http://arbiter.wipo.int/domains/decisions/html/2005/d2005-0230.html>

Home Office

The Immigration and Nationality Directorate (IND) concluded a successful mediation with a service provider. While it involved four meetings with the mediator, both parties were determined throughout to work towards a satisfactory conclusion. The outcome was a financial settlement, agreement on the future interpretation of the contract, and the avoidance of a time consuming and relationship-damaging dispute.

IND also used mediation to successfully settle a dispute with a public sector housing provider.

Treasury Solicitor's Department

Personal Injury

A former prisoner brought an action for personal injury arising from alleged clinical negligence. The claim raised complex issues of causation. TSol offered mediation, which was agreed to by the claimant's representatives. The claim would have resulted in a lengthy trial and the successful mediation resulted in considerable savings in legal costs.

A former Prison Officer sought damages as a result of his medical retirement after injuring his back in a workplace accident. Mediation was offered and accepted; although agreement was not reached - the parties' expectations could not be reconciled - a useful insight into the background of the claim was gained, which culminated in a successful application for specific disclosure against the Claimant.

Company/Commercial

Charity Proceedings brought by the trustees of a charity against the partners of two firms of accountants who were responsible for producing the charity's annual accounts at a time when significant sums were lost. Proceedings were issued for damages for negligence. The matter was successfully resolved at mediation, including recovery of costs.

A multi-million pound claim for breach of the procurement regulations, which included a significant claim for loss of profits, was successfully mediated, as was a significant claim for professional negligence arising in the field of construction.

A significant Intellectual Property dispute was successfully mediated. Lengthy and expensive proceedings were threatened, with attendant delays having consequences for implementation of policy. Mediation brought the dispute to an early conclusion and allowed the policy to proceed.

A claim for noise nuisance and damage to property caused by RAF low flying aircraft was resolved at mediation.

Public Law

The Claimants brought an action for damages for unlawful detention, sex and race discrimination and negligence arising from their immigration detention. Significant and sensitive issues concerning policy and procedure in immigration were raised. The matter was successfully mediated.

Employment Law

An employee had been on long term sick leave, then had a brief return followed by maternity leave. She said she could not return to her original workplace due to issues with management. At mediation the case was settled by the employee agreeing to return to a workplace other than her preferred choice, and compensation. The principle achievements of the mediation were:

1. Costs saving on what would have been a 10 day hearing;
2. A compensation payment which was less than the maximum she might have achieved;
3. A return to work, and no recurrence of previous absence problems;
4. The avoidance of acrimonious litigation which would have exacerbated the rift with the employee;
5. Persuading the employee to be more realistic in her redeployment options;
6. The mediation exercise also highlighted the fact the employee had a particular mistrust of certain individuals within the department, nowhere evident in her pleadings, which could be countered through relatively easy steps, such as getting other people to handle her case.

A senior manager had been off on long term sick leave and returned to work on the basis of working substantially reduced hours. Her manager's attempts to encourage her to do any substantive work led to her taking out various grievances against her manager. At mediation the case was settled on the basis that the employee was retired early on ill health grounds with a lump sum. The principle achievements of the mediation were:

1. Costs saving on what would have been a 8 day hearing;
2. A compensation payment which was less than she might have achieved if successful in her claim for disability discrimination;
3. The avoidance of acrimonious litigation
4. A resolution of an ongoing problem which had tied up management resources for a considerable period of time.

Developing Awareness of ADR

There have been some notable initiatives in promoting ADR awareness among legal staff and claim managers. These include claim managers receiving mediation awareness training, as well as some claim managers qualifying as accredited mediators.

Foreign and commonwealth office

All key procurement staff, studying for MCIPS (Member of the Chartered Institute of Purchasing and Supply), cover the topic of ADR.

Ministry of Defence

The MOD's Chief Claims Officer and the Senior Claims Officer are both qualified accredited mediators. The former is also a member the Government Legal Service Sub Group on ADR.

All MOD claims managers handling compensation claims made against the Department attend a structured series of legal training during the reporting year, which included a session on mediation.

Department for Work and Pensions

2 day Mediation training by Grade 7 Lawyer.

Department for Food and Rural Development

ADR training was provided to seven staff within the Procurement and Contracts Division, just prior to the start of the 05/06 financial period.

Treasury Solicitor's Department

TSol run a regular "ADR Awareness" session. This is run bi-annually for new case-officers. It is a half day seminar which explains the basics of ADR and mediation. It also takes attendees through a mock mediation. 36 attended the event in November 2005, and a further 22 in April 2006.

TSol have also revised a full day training in mediation skills which is designed to assist lawyers in preparing for and representing a client at mediation. Its focus is on practical tips and includes a mixture of lectures, group discussions and role-play. 17 attended the course in March 2006.

TSol is also committed to providing ADR training through its in house lecture programme. To this end a place is reserved on the Training Committee for a delegate dedicated to arranging lectures on ADR. Lectures arranged through the in-house training committee are open to all departments via the Government Legal Service. Lectures are aimed at dealing with a wide variety of issues and topics.

- 43 attended *Mediation for Lawyers* in April 2005
- 28 attended *a Practical Guide to Mediation* in July 2005
- 28 attended *ADR & Personal Injury* in November 2005
- 39 attended *ADR & Costs: Can one be forced to negotiate?* in February 2006

Where permission is granted, the text of the lectures has been placed on the TSol Intranet.

Other ADR Activities

Government Departments and external stakeholders have teamed up to explore potential avenues to improve the delivery of ADR. The initiatives listed below are a summary of other activities that have taken place under the Pledge during the reporting year.

Ministry of Defence

MOD is establishing an in-house mediation process for resolving employment disputes for both civilian and members of HM Forces.

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.

Office for Government Commerce

OGC has devised model contract terms and conditions for goods and services, developed for local authorities to use in an attempt to reduce costs in procurement. The contracts include clauses that provide for an escalating alternative dispute resolution procedure, cumulating in an agreed referral to mediation. Only in the event that mediation fails to bring about a settlement of the dispute, can court proceedings commence, although the right to obtain interim orders is maintained.

DFES

Section 13 of the Higher Education Act 2004 provided for the appointment of a designated operator of a student complaint scheme in England and Wales. The Office of the Independent Adjudicator (OIA) became the designated operator of the Scheme with effect from 1 January 2005. The OIA received 322 complaints in 2005 and closed 213 complaints. The OIA may suggest an HEI and a student should enter into mediation to try to resolve a case, although the OIA itself does not facilitate the process. However, the OIA does handle a significant number of enquiries which could have been potential complaints but have been withdrawn as a result of the OIA's advice. The OIA has also set up workshops and visited HEIs (Higher Education Institutions) to give advice to complaint handlers - moving towards the ultimate goal of informal dispute resolution in HEIs.

DCA

DCA has established a successful Workplace Mediation scheme. The idea evolved from within DCA's HR community - welfare officers were often called upon at the tail end of disputes where positions had become entrenched and the possibility of achieving a solution slim.

The Director of HR supported the running of a six-month pilot scheme. This was discussed with the TUS who also supported it. Initially, eight employees were chosen to attend mediation training - largely drawn from the HR/Welfare community so that the project manager within Welfare could manage the pilot closely. The employees were trained by Conflict Management Plus in 'interactive mediation' designed specifically for disputes arising in the workplace.

The pilot began in July 2004 and was extremely successful with many disputes being resolved relatively quickly. Consequently, support was given for a permanent scheme and a trawl was carried out to recruit a further 16 mediators from across the Department. Grade and post were irrelevant to the selection criteria.

As at August 2006, 133 referrals had been made to the Mediation Service. The disputes have centred on a range of issues, including: relationship breakdown, personality clash, equality and diversity issues, bullying and harassment, and the fall out from formal grievance procedures.

Some 55% of mediations have resulted in a 'win-win' resolution. A further 35% have been withdrawn and not pursued further, with just 10% proceeding to a formal complaint through the grievance procedure.

Treasury Solicitor's Department

The headline figures from TSol's Litigation and Employment Group do not reflect the very substantial number of disputes that are resolved outside a formal ADR process (i.e. by a process of negotiated settlement, either directly between the client and the other side, or between solicitors and/or counsel). The majority of cases opened, which do not reach a hearing, will have been resolved by such proactive negotiation.

This accounts for a significant proportion of business, and the results reflected in this report's headline figures 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 modest) of even mediation itself.

TSol staff have actively contributed to the Government Legal Service Sub-Group on ADR, the purpose of which is to promote awareness of and use of mediation across Whitehall. David Pearson, the Head of Litigation at TSol, chairs the group.

The TSol ADR Group formed last year, has continued its work to bring together lawyers from across TSol, raise awareness of ADR and its application and provide advice, support and training to those involved in mediations. The group is chaired by Philip Kent, a Litigation Divisional Director. During 2005/6 the group has reviewed the ADR website on the TSol intranet to add a series of notes from lectures arranged via the In-House Training Committee, and guides to ADR for the benefit of lawyers and lay clients. It has also reviewed its links with ADR service providers and is in the process of preparing updates on ADR caselaw.

Following the move of TSol from Queen Anne's Chambers to One Kemble Street, comprehensive accommodation and refreshment facilities have been made available for mediations on site. This has proved extremely popular and One Kemble Street is now a regular venue for mediations.

TSol has run a pilot requiring ADR to be considered at the prognosis stage of a case, with initial advice on the suitability of a case for mediation being given to the client. Additional pilots have run requiring ADR to be considered as part of internal monthly case reviews carried out by case officers and in supervisory reviews carried out by line managers as part of TSol quality policies.