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Litigation is no picnic. There is common agreement that it is expensive, time-consuming and often fraught with worry and uncertainty for litigants. In 2002, Lady Justice Hale, at LAG's inaugural lecture event, expressed concern about worthwhile civil claims being abandoned because of fears about disproportionate legal costs (see December 2002 *Legal Action* 9). She also identified problems with adversarial approaches to justice that rely heavily on the evidence and arguments that lawyers choose to place before the courts.

LAG recognises many of these concerns, and shares Lady Justice Hale's view that litigation is not always the most appropriate way of resolving disputes. In many areas of law, alternative dispute resolution (ADR) has proved its worth. It can offer a more flexible range of solutions than the courts, and is particularly useful to preserve an ongoing relationship between the parties. Mediation can be highly effective in family breakdown and neighbour disputes, and conciliation is well-established for employment cases. Many people who have been on the receiving end of injustice have greatly benefited from the work of ombudsmen schemes.

But ADR is not free of problems. At present, service provision is patchy and, within some ADR approaches, quality assurance is poorly developed and regulation non-existent. There is also much to be done in promoting a proper understanding of appropriate ADR options, both in the legal and advice sectors and for the public at large.

Despite these unresolved difficulties, the government is enthusiastic about promoting the use of ADR. LAG detects an emerging tendency to view it as a cheap, lawyer-free option that parties should be persuaded to use whether they like it or not. Making legal aid less easily available for litigation is one device: for example, the Legal Services Commission now expects to see details of the alternative approaches that a claimant has tried before it will grant a funding certificate for judicial review.

But more is to come. The report of the Chief Medical Officer, Sir Liam Donaldson into clinical negligence, *Making amends*, proposes a compulsory, ombudsman-style redress scheme for NHS patients covering claims up to the value of £30,000. A 'small amount of money' would be available for independent legal advice on the compensation package offered by the scheme. Although patients could reject the scheme's compensation package in

favour of pursuing a court claim, the consultation document suggests that this course of action could trigger a refusal of, or reduction in, legal aid.

The government seems equally keen to divert workplace disputes away from the Employment Tribunal (ET). A recent development is the work being undertaken by the Department for Trade and Industry to promote ADR options for employment cases, thereby – presumably – saving on ET running costs. But there are worries that people will be diverted into an ADR process without first having the opportunity to get independent legal advice. Given the tight ET deadlines, the ADR option may also prove to be a one-way ticket.

The push towards ADR has also been reinforced by the courts, themselves troubled by the expense and unwieldiness of litigation. In a recent Court of Appeal decision,^{*} the Lord Chief Justice, Lord Woolf, described the litigation costs of three test cases as 'truly horrendous'. He went on to suggest that, before giving permission to apply for judicial review, a judge should expect a claimant to explain why an internal complaints procedure or ombudsman scheme was not more appropriate to resolve the dispute.

But this comment raises some important issues. The cases in question provided the court with its first proper opportunity to consider its power to award damages under the Human Rights Act 1998. It was surely in the public interest for the court to use these test cases to develop and clarify the law. Lord Justice Sedley, in LAG's 2003 lecture (see centre pages of this issue), comments extensively on the important role of the courts in developing an understanding of human rights obligations – especially in relation to vulnerable groups such as patients with mental health problems, children and asylum-seekers.

LAG fully supports the appropriate use of ADR, just as it endorses the proper use of litigation. From a user's perspective, informed decision-making is the key – which means having access to skilled advice about the best course of action. What is more, advice should be available throughout the ADR process, with public funding available to support this. It must also be recognised that ADR approaches, if properly supported and regulated, are not a cheap option.

* *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406.

For detailed discussion of ADR issues, see: www.asauk.org.uk/pdfs/adrcns.pdf.

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editorial

Horses for courses