ANNEX 5

Alternative dispute resolution

Introduction

In social welfare law matters it is important that alternative dispute resolution (ADR) systems, adopting the guiding principles of appropriateness and proportionality, are designed to be used by often large volumes of unrepresented and unassisted people. In many of the models we have looked at, the model of resolution assumes responsibility for knowledge of the law and ascertaining key facts and reaching a decision within that compass. In addition, there is an emphasis on direct engagement with complainants and a growing move away from lengthy paper-based investigations to a more proactive engagement with the complainant and the service provider by telephone or email – to elicit and check facts and to establish the remedy desired before reaching a decision. These approaches seem to us to be worth rolling out more widely.

We have also considered mediation, which, in contrast, seeks to find a solution that is acceptable to both parties and which may require each to make concessions. While this is useful in some contexts without any help or support, there are many areas – such as employment, personal injury and family cases – where there is inherently often a stronger party, and where advice and support, often legal, may be necessary to ensure that the weaker party is not disadvantaged by the imbalance of power. So we consider that there may be a role for mediation, but perhaps as part of a broader process.

It seems to us that the ideal model of ADR for unassisted individuals is:

- an assessor or forum which has all the legal expertise required (to overcome the individual's lack of knowledge of the law);
- an inquisitorial function to ensure that all the necessary facts and evidence are discovered;
- flexible and personal engagement using telephone or email in preference to writing or oral hearings so that the assessor does all the paperwork and is responsible for its being comprehensive and accurate;
- built-in mediation where appropriate for issues where there may be no 'right' answer or where an agreed solution is desirable;
- a final binding decision on both parties;
- no cost or low cost, and, where ADR is paid for, predictable pricing with the possibility of costs-shifting and/or means-weighting.

We have recommended in para 4.15 of our report that courts and tribunals should adopt some of these approaches where this is sensible.

Approaches to ADR

Within the court system, the county court telephone mediation service has had success in offering an alternative to small claims hearings. It will be interesting to see how this track record develops with a higher small claims limit. We encourage the Ministry of Justice (MoJ) to monitor and research its continued operation.

The Financial Services Ombudsman provides a model for resolving complex problems affecting very large numbers of people. From the start, the first Ombudsman, Walter Merricks, recognised that a new approach was required which extracted all the relevant information from people as early as possible in the process so that the Ombudsman could assess whether they had an eligible and a valid complaint. The strategy of building interactive online systems which could be used directly by complainants or with the assistance of trained call centre staff has become a model approach. On top of this, the Ombudsman service proactively gets in touch with complainants, by phone or email as well as by post, to find out more information when required. This approach requires investment in building sophisticated decision-tree systems and training staff and investigators.

The Social Fund Commissioner submitted evidence to us about the operation of his scheme which was abolished at the end of March 2013. For more than two decades, Social Fund Inspectors have provided an independent tier of review for disputed decisions by Jobcentre Plus on applications to the discretionary Social Fund. Uniquely in administrative law, the process has the following advantages:

- it combined a review and appeal function in one process which is inquisitorial and streamlined;
- the process is designed to be used by people who are unrepresented and unadvised;
- inspectors bring knowledge of the relevant law – appellants do not need this; all decisions are explained so that customers can see how the law was applied to their case;
- inspectors review the evidence and decide whether there are crucial gaps and then contact the customer to explain the issues and to fill any crucial gaps in evidence and keep customers informed of progress;
- typically this is done by telephone which is quicker, enables follow-up questions and avoids double-handling;
- for those customers for whom this is not appropriate, succinct letters were used;
- this approach avoids the time, expense and risk of cancellation of oral hearings;
- the process is timely and cost-effective: during 2011/12, with a workload of 52,107 decisions, 93.7 per cent of urgent cases were dealt with within 24

hours of receipt of Jobcentre Plus decision papers, and other cases 99.2 per cent within 21 days of receiving the papers. The unit cost was £74;

- responses to the customer survey indicate a high level of satisfaction; since 1988 only 30 cases proceeded to judicial review, 27 of them within the first ten years. No cases have ever required investigation by the Parliamentary and Health Ombudsman.

Two interesting developments in relation to traffic issues are worthy of note because of the innovations they offer. The Traffic Penalty Tribunal (which deals with parking offences)[1] offers the facility to have a telephone hearing in place of an oral hearing. It reports that '93% of Appellants that took part in a telephone hearing felt they had sufficient opportunity to put their case across to the Adjudicator with 85% of appellants saying they would opt for a telephone hearing again or recommend it to a friend'.

In relation to traffic offenses, which are dealt with in magistrates' courts, and are not social welfare law at all, there is a road traffic app which asks a series of questions and then provides the equivalent of an early neutral evaluation of the likely outcome of your road traffic offense, with paid access to legal advice as the next step. This is an interesting example of expert support and standardised decision-tree advice, which might also result in people accepting the penalty – a proportionate way of resolving the dispute.[2]

We have referred, in the section in our report on courts and tribunals (paras 4.5ff of our report), to the many approaches that tribunals are taking to dispute resolution. Tribunals have been encouraged and supported in this by the, now defunct, Administrative Justice and Tribunals Council. It explored this theme of dispute resolution outside tribunals at a seminar in February 2012, drawing on the expertise of all current adjudicators and ombudsmen.[3]

ADR in the private sector

So far we have looked at ADR provided by the state. In the private sector, the most important new development occurred very recently. On 18 June 2013 the EU published new legislation[4] on ADR and online dispute resolution (ODR). This will allow consumers and traders to solve their disputes without going to court, in a quick, low-cost and simple way:

- The ADR Directive[5] will ensure that consumers can turn to quality

1 See: www.trafficpenaltytribunal.gov.uk/site/.
2 See: http://roadtrafficrepresentation.com/RTR/PublicForms/Home.aspx.
3 See: http://ajtc.justice.gov.uk/adjust/adjust_latest.htm#sem.
4 See: http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm.
5 Directive 2013/11/EU on alternative dispute resolution for consumer disputes, 21 May 2013, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF.

alternative dispute resolution entities for all kinds of contractual disputes that they have with traders; no matter what they purchased (excluding disputes regarding health and higher education)and whether they purchased it online or offline, domestically or across borders.

- According to the ODR Regulation,[6] an EU-wide online platform will be set up for disputes that arise from online transactions. The platform will link all the national alternative dispute resolution entities and will operate in all official EU languages.
- Member states will implement the ADR/ODR rules by July 2015. The ODR platform will be operational in January 2016.

Many consumer disputes arise outside the arena of social welfare law but there are some issues, such as social care packages, and indeed housing disputes, which straddle the public/private divide, and we presume that these will be affected by this directive, which we hope will start to have an influence on the provision of dispute resolution services and encourage innovation such as the eBay online dispute resolution service[7] and the technology enabled ODR services, such as SquareTrade, formerly used by eBay.[8]

The Centre for Justice

In the sphere of social welfare law, the Centre for Justice[9] (CfJ), a non-profit-making body, adopts an approach which combines an expert and inquisitorial approach with the best features of arbitration and mediation. The main features of their approach are:

- the parties can be given a decision through arbitration if required, but they can also be helped to agree a solution through integrated mediation, where possible;
- all the CfJ's arbitrators are also accredited mediators and the choice of panel member is based on ensuring expertise in the relevant area of law so that legal representation is not necessary;
- importantly, where mediation is used but is unsuccessful, or it is not used, the CfJ carries out a thorough investigation of the issues and delivers a binding award within the statutory framework of the Arbitration Act 1996;
- the costs of the process are shared and for those who cannot afford to pay the limited costs, means-weighting is available. Means-weighting ensures that the weaker party does not feel that their opponent is in the CfJ's pocket;

6 Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, 21 May 2013, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF.
7 See: http://pages.ebay.co.uk/help/tp/problems-dispute-resolution.html.
8 See: http://pages.ebay.com/services/buyandsell/disputeres.html.
9 See: www.centreforjustice.org.

- in an increasing number of cases, local authorities and major corporations are willing to pay both parties' contribution because of the advantage to them in saving costs and staff time and timely resolution;
- a cost envelope is assessed at the very outset and then formally confirmed by the expert assessor/arbitrator before the matter is taken forward;
- issues are resolved within a rapid time frame – two to four months.

The process is particularly relevant for housing, employment, education and all areas of social care. While it is relevant for care packages, the irreducible minimum costs makes it less useful for smaller-value issues and ongoing benefit entitlement.

The CfJ is keen to persuade government to give the right to any party to use the scheme (or other binding ADR) rather than being forced to take or defend a case they cannot afford through the courts. They are seeking an amendment to the Civil Procedure Rules (CPR) to this effect. Such changes are not a matter for our Commission, but we were impressed by the combination of approaches in one forum.

We also acknowledge the difficulty of achieving this at a stage when parties are already heavily involved in litigation. Sir Alan Ward in the opening paragraphs of his recent judgment in *Wright v Michael Wright Supplies Ltd and another* [2013] EWCA Civ 234, 27 March 2013 set out the problem starkly (at paras 2–3):

> Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences … My second concern is that the case shows it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation. Both tracks are intended to meet the modern day demands of civil justice. The *raison d'être* (or do I simply mean excuse?) of the Ministry of Justice for withdrawing legal aid from swathes of litigation is that mediation is a proper alternative which should be tried and exhausted before finally resorting to a trial of the issues.

However, this approach can only be achieved if the possibility of alternative means of dispute resolution are either:

- mandated by the courts and tribunals system – not as an alternative but as the only way for this type of dispute; or
- flagged up in all the preparatory information and advice as the best means of resolving the issue.

The desirability of courts and tribunals mandating ADR are debated elsewhere but we consider it essential to add a note of caution. If individuals are to be strongly encouraged or indeed forced by the state to resolve their disputes outside the courts and tribunals system, it is incumbent on the state to invest in

these systems and to ensure that procedural guarantees, fairness and quality of these alternative services are equal to those offered by the formal justice system.

Overseas models

One of our witnesses, Roger Smith, has drawn attention to two overseas models of dispute resolution – in Holland and in New South Wales – where the government, in each case as part of overall budget cuts, has assumed responsibility for holistic information and advice aimed at resolving disputes. He comments on his online blog,[10] in an entry on legal aid:

> The Dutch, for example, want to save money as much as us but they have established a world leading website designed to meet the government's responsibility for advice – and indeed resolution – albeit at low cost. They have not just sought to wash their hands of the problem. People with legal problems – like women with custody battles but not facing violence – will not go away. We will acknowledge ultimately a need to do something for them. The most attractive model anywhere in the world would seem to me to be that in New South Wales where a comprehensive website is backed up by a telephone hotline service and by dispersed face to face provision where required. It is not what we had until now but it does provide a model for what might be done if these cuts are to be rescinded at reasonable cost.

His comments illustrate the usefulness of integrated provision which is aiming at alternative and appropriate dispute resolution from the very start. They also illustrate the important role that the state should fulfil in this process. We hope that the MoJ will recognise the potential of our recommendations on ADR, combined with those on public legal education, to achieve its strategic goal of settling disputes outside court, and will make the necessary investment to achieve them.

10 *Legal aid: the cuts, the context and the challenge*, 24 April 2013, available at: www.rogersmith.info/legal-aid-the-cuts-the-context-and-the-challenge/.