



Ministry of  
**JUSTICE**

*The Annual Pledge Report*

*2006/07*

*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

The aim of the pledge commitments 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.

The overriding objective for the launch of the ADR pledge is that by committing itself to the use of Alternative Dispute Resolution methods to resolving disputes, where appropriate, government could be seen to lead by example. The pledge initiative encourages government departments and agencies to use ADR procedures to resolve disputes that may arise out of contractual engagements so that relationship with suppliers of good and services could be maintained throughout central government. The pledge initiative conceptualise government departments and agencies using ADR procedures in the most effective and proportionate manner, where appropriate, in order to avoid the need for expensive legal costs and court actions that may arise out of contractual disagreements.

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.

This is the sixth Annual Report published by the Ministry of Justice, 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 Authority have continued to monitor their use of ADR throughout the year, providing statistical information to the Ministry of Justice to collate for this report.

During this reporting period 2006/07, ADR has been used in 331 cases with 225 leading to settlement, saving costs estimated at £73.08m

Compared to last year's returns ADR was attempted in marginally fewer cases, (336 cases in 2006/07), with fewer settlements (241 in 2005/06) - a slightly lower settlement rate of 68% (72% in 2005/06).

## Illustrative Cases

During 2006/07, central government 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 a claim for damages arising from a failed Tribunal appeal in relation to an assessment for excise duty on goods removed from warehouse without payment of duty. The original claim was for £4.5m, but as a result of mediation a settlement was agreed at £1m together with payment of the Claimant's costs.
- 16 employment cases were settled with the assistance of ACAS (Advisory, Conciliation and Arbitration Service).
- A mediator was used in one personal injury case, however this case ultimately settled by negotiation.
- In a dispute about disclosure of documents and a (wide) claim to legal professional privilege by a taxpayer and agents, rather than make a contested court application HMRC Solicitors suggested jointly instructing Counsel with a view to him being provided with all the disputed documents and making a decision. After a good deal of logistical preparation and discussion as to the choice of Counsel, a decision was made in favour of the taxpayer and HMRC withdrew the claim for disclosure. The substantive appeal proceeded.
- A High Court civil claim for damages against the Department, where the claim was pleaded in excess of £1m, was successfully mediated using the services of CEDR. The mediation culminated in the case being settled at a figure of £25,000 to the Claimant. The final settlement document included agreement in regard to other matters not litigated upon but which required to be concluded between the parties.

### Department for Environment, Food and Rural Affairs

- Mediation was successfully used in a case that had begun as far back as 1992, concerning the recovery of sheepmeat clawback, which had culminated in a judgment of the Court of Appeal in 2001 in favour of Defra. However in 2005, the defendant succeeded in having that Judgment called into question, on the basis that Defra had unwittingly relied upon misleading evidence in support of its claim. In 2006 the parties agreed on mediation as the method for settling the claims for consequential loss. The mediation resulted in a full and final settlement, on conditional terms, in November 2006.
- Had the claims for consequential loss been litigated, it is highly likely that Defra would have faced additional legal costs of £50,000 or more. In the event the fees paid on behalf of Defra to the mediator did not exceed £5,000 and no hard legal costs were incurred.
- In retrospect, it would have been even better had some form of ADR been considered at a much earlier stage, for example immediately after the proceedings in the Court of Appeal in 2001.

- Mediation was used in another high profile case, and although there was no settlement at the time, it did assist in eliminating the issues in dispute and setting the parameters for a settlement range. The matter settled a year later.

### **Ministry of Defence**

- High profile cases of British soldiers being injured or killed in non combat situations were settled by way of ADR without the injured party or families undergoing the trauma of a court case to secure a ruling on compensation.
- This Ministry of Defence case involved complex issues of causation and dealt with the question of combat immunity. Given the high profile nature of the case, mediation was offered. The terms of settlement are subject to a confidentiality agreement. The Claimant's solicitors agreed to mediation and the case was successfully resolved. The case was a claim for dependency and was resolved shortly after a pre-action letter of claim was received. Given the case was resolved at this early stage, all costs of litigation were avoided.
- The Claimant had issued two claims against the MoD. The first claim was a clinical negligence claim arising from the birth of her child in a German military hospital in 1995. The second claim was a stress at work claim, which arose from the Claimant's employment at a German teaching school between November 1995 and August 2001. The Claimant was claiming a total of £1 million in damages but the case settled at mediation for £255,000. The costs have yet to be resolved but savings of £50 - £70k are anticipated.

### **Department for Work and Pensions**

Mediation was used to successfully resolve:

- a dispute of recovery of factory support grant from a company in liquidation;
- an alleged breach of the Data Protection Act 1998; and
- a dispute between an NHS trust and its PFI partner.

### **Treasury Solicitor's Department**

- A property dispute which, although it did not settle at the mediation itself, settled soon afterwards as a result of the defendant increasing an initial offer of £300,000 to £850,000.
- The claimant, a prisoner, alleged racial discrimination on the part of prison officers. Because of the low value of the claim, it would not have been cost effective to engage a conventional mediator. Instead, we asked an advisor from the Prison Advisory Service to act as an informal mediator by telephone. This resulted in considerable savings in terms of costs, and also savings in staff and management time, since a number of staff would have had to attend trial had the dispute continued.

- The claimant, a prison officer, alleged that he had suffered psychiatric injury due to threats from prisoners during the course of his employment. He also claimed that the defendant's response to his problems exacerbated the injury. Mediation was offered. In addition to saving the defendant substantial sums in costs, the mediation was also successful as it allowed a more co-operative approach and preserved relations with the claimant, who continues to work for the defendant.
- The claimant, a prisoner, was seriously assaulted by another prisoner. He alleged that the prison had failed to take any steps to protect him from foreseeable attacks by other prisoners. A number of similar assaults had also been carried out shortly before the claimant was assaulted. An internal report was commissioned which indicated possible failings on the part of the defendant. Mediation was offered after proceedings were issued, which resulted in the resolution of the dispute. As mediation was offered very early in the litigation process, substantial costs were saved.
- The claimant, a prisoner, had property stolen from his cell when he was transferred to a different part of the prison. He alleged that the prison had failed to lock his cell and had therefore failed to take sufficient steps to safeguard his property. The court suggested that the parties should take part in the free small claims mediation service that was offered by Manchester County Court. In the event, the mediation was settled by telephone. This is a useful example of how mediation can be used to resolve low value and less complex claims.
- The mediation service offered by the Central London County Court was used to settle a personal injury quantum only case. A settlement was achieved in respect of general damages and the claimant's future earnings.
- This case involved complex issues relating to alleged financial losses as a result of an individual entering a witness protection scheme. The total amount claimed was £324,866.28. Mediation was offered by the defendant and the case settled one month prior to trial, with the defendant agreeing to pay £85,000 in damages plus reasonable costs. There was a considerable saving in costs for the defendant. The costs of proceeding to a full trial were estimated at £85,000, whereas the actual costs incurred were £51,218.73.

## **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.

### **Ministry of Defence**

The MOD's Chief Claims Officer and Senior Claims Officer are accredited mediators and members of the Chartered Institute of Arbitrators. They undergo continuous professional development training.

The Director General Legal Services and the Director General Human Resources are also accredited mediators.

Others in MOD have been trained as in-house work place dispute mediators.

### **Department for Work and Pensions**

One Grade 7 lawyer has now been accredited as a mediator by the ADR Chambers. She has observed two mediations and can now offer mediation.

### **HMRC**

HMRC Solicitors office has merged in the last two years. It has been developing its learning strategy, and ADR is part of that development plan.

### **OGC**

The OGC is currently revising its model contracts for goods and services, which are available for use throughout central government. There is an ADR clause included, which provides that parties should attempt initially to settle disputes through high-level discussions, failing which the parties will appoint a mediator. Should mediation fail the parties can then bring court proceedings, or as an alternative in suitable cases institute arbitration proceedings.

### **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. 21 attended the event in April 2006 and 48 the event in December 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 GLS. Lectures are aimed at dealing with a wide variety of issues and topics.

<b>Date</b>	<b>Topic</b>	<b>Attendees</b>
21/02/06	ADR & Costs	38
23/02/06	Beyond Mediation	31
02/03/07	ADR & Employment	31

## **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**

The MOD now routinely offers an in-house work place mediation service. The MOD's Chief Claims Officers sits on the Government Legal service's ADR Management Group. The MOD has in the past concentrated on attempting to settle large value cases by way of ADR ( mediation) but will in future encourage settlement of lower value claims by way of ADR

### **DWP/DOH**

Five consultant members of the DOH Private Finance Unit have undertaken a CEDR mediation training course to become accredited mediators. They are now offering mediation service to the parties to PFI projects where there can be a number of disputes that need to be resolved. They have recently carried out a mediation of a dispute between a NHS Trust and its PFI partner over a substantial claim for compensation following delay of a Phase of the PFI Works which has now been settled to the satisfaction of both parties.

### **Ministry of Justice**

During the year April 2006 to March 2007 there were a total of 49 cases referred to the in-house Mediation Service. Of those cases 19 mediations were set up with 15 cases having a positive outcome.

The cases most likely to be resolved appear to be those where line managers have been involved at a relatively early stage and where both parties come to the mediation with a willingness to try to resolve matters. The cases less likely to be successful are those where there has been difficulty for some time and the issues have become entrenched. Other cases less likely to be successful include those where it becomes apparent that one party doesn't really want the issue resolved, but just want the other party punished in some way.

There is also evidence of successful outcomes when cases are withdrawn. Often, just talking the issues through with the Mediation Co-ordinator enables managers and/or parties to decide that they really would like to try to resolve matters at a local level first and then if that avenue is unsuccessful or further help is needed to come back to the Mediation Service at later stage.

### **Department of Innovation University & Skills.**

The United Kingdom Intellectual Property Office, the trading name of the Patent Office, launched its mediation service on the 3 April 2006, and won the 2006 CEDR (Centre for Effective Dispute Resolution) Excellence in Alternative Dispute Resolution Award for the Public Sector for introducing the service.

The Office has changed its procedures to encourage greater use of Alternative Dispute Resolution and provides various guidance notes on its web site, with the objective of encouraging parties to see it as an alternative to litigation.

A number of staff have received mediation training (including training at the World Intellectual Property Office) and accreditation at CEDR. They are available to mediate at either the London or Newport Offices, with disputes referred to then internally by the Office or Courts and also from parties who have independently decided on mediation.

### **Home Office**

The Home Office had also established an in-house mediation service to deal with employee workplace disputes. During the year there were 19 mediations, of which 12 were resolved in whole or in part.

### **Treasury Solicitor's Department**

The headline figures do not reflect the very substantial number of disputes, which 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 negotiation.

This accounts for a significant proportion of business, and the overall results reflected in this Report 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.

Staff of TSol have been active in continuing to contribute 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 Director-General of Litigation at TSol is the Chair of the Group.

Working closely with the above-mentioned GLS ADR Group, the TSol ADR Group has continued 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 is chaired by Philip Kent.

Following the success of the TSol Intranet ADR page, TSol has been responsible for reviewing and overhauling the WebPages on ADR on LION. This now allows access to all GLS lawyers to practical guidance on mediation, caselaw as well as other information (e.g. information on departmental internal mediation schemes).

One Kemble Street continues to be available to host mediations. This is extremely popular and One Kemble Street is now a regular venue for mediations.

TSol is committed to expanding the role of mediation, especially in high volume, low value claims. To that end it has also set up a pilot scheme with CI Arb to mediate a number of personal injury small claims. If successful the pilot may be expanded across PI and further consideration will be given to its use in other areas of TSol's work.