

# **The Use of ADR in Ombudsman Processes**

## **Results of a survey of members of the British and Irish Ombudsman Association**

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### **1. INTRODUCTION**

The following is a compilation of the results of a survey conducted by the author of BIOA members in autumn 2002.

The aim of the survey was to determine what alternative dispute resolution (ADR) processes are being used by ombudsmen in their complaints-handling procedures.

The aims of the paper are:

- to describe the survey results; and
- to elicit responses to discussion questions.

Responses to the discussion questions in section 8 are welcome from BIOA members and other interested individuals and organisations. The author will assume that responses can be made publicly available unless the respondent indicates otherwise. Please send responses to the author either by email at [margaret@domar.co.uk](mailto:margaret@domar.co.uk) <<mailto:margaret@domar.co.uk>> or by post to 113 Dawes Road, London SW6 7DU by **12 September 2003**.

This paper will be posted on the BIOA website during the response period.

## **2. SUMMARY OF KEY FINDINGS**

Among the key findings of the survey are:

- A majority of responding services (12 out of 17) use an ADR process.
- In some ombudsman services 100% of complaints are resolved through the use of an ADR process.
- Definitions of ADR processes are needed - respondents use the terms in different ways.
- There is a wide range of ADR use across the board - in other words a spread of ADR processes was identified, except for arbitration, which is used by only one ombudsman service.
- Prevention is identified by two services and appears to be an 'unsung tool' in the ombudsman armoury.
- Nearly every ombudsman service offers - and is placing increased emphasis on - some form of informal resolution.

This last finding is important for several reasons: an increasing number of complaints are now being resolved through some form of informal resolution; this process remains undefined and for the most part unexplained to service users; complainants' perceptions of fairness are affected as much by the process as by the outcome achieved, so it is important there is clarity about the process being used.

### **3. THE QUESTIONNAIRE**

The questionnaire was distributed by the author, with the help of BIOA's Secretary, in September 2002 to all BIOA members via the email distribution list for the BIOA Managers' Training Group. The results were briefly presented, in anonymous form, at the BIOA Managers' Group Training Seminar on 8 November 2002.

The questionnaire appears as **Appendix 1** to this paper.

Definitions of ADR processes are provided at the end of this paper in **Appendix 2**. These are the result of consultation with BIOA and the Legal Services Commission, among others, and have appeared in a number of publications written by the author.

*Note:* Definitions of processes were deliberately not included in the questionnaire. Although this means that some explanation is required to clarify the responses, the intention was to avoid influencing the responses - e.g. to avoid preventing a respondent from discussing early resolution because it did not 'match' a defined ADR process.

Also note that the survey sample is small: out of a total of 44 possible responses 17 were received (a response rate of 44%). Nevertheless the responses received provide a great deal of specific information from which useful general conclusions can be drawn.

### **4. THE RESPONDENTS**

A questionnaire was sent out by the author to all 39 contacts on the British and Irish Ombudsman Association (BIOA) Managers' Group email mailing list. The BIOA Managers' Group email mailing list has manager-level representatives from all ombudsmen and complaints-handling schemes in membership of BIOA. The questionnaire was sent with a cover note from Gordon Adams, BIOA secretary, with an explanation of the purpose. All schemes were invited to send delegates to the Managers' Group training seminar in November 2002, and it was explained that the questionnaire responses would be presented, in general and anonymously, at that seminar. Responses were invited to be sent directly to the author by email.

Of the 39 questionnaires sent out, 17 responses were received. This represents a 44% response rate.

The responses are from 17 different complaints-handling bodies.

No distinction has been made between full members of BIOA - i.e. those meeting the BIOA criteria for voting membership - and other complaints-handling bodies that are associate BIOA members.

Respondents were promised that their responses would be treated in confidence, and any reports would remain anonymous, unless they specified that their response could be identified with their ombudsman service. (Responses quoted in this paper are identified by a number which is linked to the service's identity in a key to which only the author has access.)

Because of the small numbers involved, the responses are given as actual numbers rather than percentages.

## **5. BACKGROUND**

The issue of ADR use among ombudsmen services is important for several reasons. Some of these reasons are internal to the ombudsman world, and some relate to external influences.

### ***An essential new tool***

Among ombudsmen, the number of complaints that are resolved through informal, early resolution is increasing. Most ombudsmen services suffer from some delay and backlog in dealing with cases, and most are experiencing an increase in complaint volumes. It is to be expected that as a result, they would seek ways to move complaints more quickly through their procedures, where appropriate. The effect of greater efficiency pressures cannot be discounted, although it would be short-sighted to view saving time and resources as the only benefit of using informal resolution. Ombudsmen in the UK are increasingly looking to expand their toolkit, their range of methods and techniques for dealing with complaints. As many of the survey responses indicate, for some complainants a quick resolution and an early settlement can be preferable to the 'Rolls Royce' ombudsman investigation. When what is desired is the quick payment of an unpaid benefit, for example, a drawn-out investigation resulting in an explanation of what went wrong is unlikely to serve the complainant's interests.

External influences also play a part in the increased use of ADR. Reforms to the civil justice system, arising from the Access to Justice Act 1999, have endeavoured to place ADR on an equal footing with 'traditional' methods of dispute resolution such as courts and tribunals. In its widest sense ADR includes

complaints procedures, ombudsmen, conciliation, trade association codes of practice, arbitration, and mediation. Ombudsmen are not always identified as ADR, probably because their wider function - in educating the public and influencing good practice among public bodies and within industries, for instance - seems to place them outside the realm of dispute resolvers and legal services. As ADR is increasingly understood to mean 'appropriate' dispute resolution, however, it becomes more important for ombudsmen to be placed within this arena. They are in many cases the most appropriate route to remedy for individual complainants.

In principle, informal or early resolution fits well with the *appropriate* dispute resolution agenda. This is because informal resolution starts with the premise of what the particular complainant wants to achieve, not what a generic or hypothetical complainant is entitled to or might reasonably expect from a judicial ruling.

It is clear that ADR processes - including this previously undefined process known as informal resolution - are essential tools in the ombudsman's toolkit. Their use is an initiative that is to be welcomed, especially if - as appears to be the case - it serves the interests of both ombudsman service and its users, both complainants and complained-about.

### ***Reservations about its use***

The use of ADR processes in practice raises some concerns, however, especially in relation to how and when it is used and to whether it is a process that parties enter into voluntarily and in an informed way. What is needed is clarity about the resolution process - as well as reassurances that it does not simply amount to a 'recommendation without investigation' but is a means to achieving consensual agreement, mutually accepted by both parties.

Another concern about informal resolutions is that they are often private - in fact a key component of most ADR is that it is confidential. Because of the unique role that ombudsmen play in influencing good practice, it is right to worry that the wider ramifications of a finding of maladministration will be lost if the settlement is not made public. Agreements made as a result of informal resolution are usually not published as case digests in the way determinations are. One way to address this concern might be to ensure that outcomes of informal resolution can be published in anonymised form. Few ombudsmen have to resort to the 'naming and shaming' that is in their power, so confidentiality of the parties can be preserved.

For the reasons given above, it makes sense to have a closer look at the 'how's and 'when's and 'whether's of ombudsman ADR use and to put forward some good practice advice that, it is hoped, will help ombudsmen make the most of the

opportunities of ADR and at the same time address the concerns that such use raises.

## 6. THE RESPONSES

*Note:* As explained earlier, responses quoted in this paper are identified by a number that appears after the quote and which is linked to the service's identity in a key to which only the author has access.

**Part 1** of the questionnaire asked for contact details of the ombudsman service and the person completing the questionnaire.

Respondents were also asked if they wanted their responses to remain confidential. For those who indicated 'yes', this has been honoured. For those who indicated 'no', the author has generally identified the responding service; individual respondents are not identified.

In **Part 2** of the questionnaire, respondents were asked about their use of and familiarity with ADR processes. They were asked to identify whether their service offers any of the following ADR processes.

Table 1 shows the numbers of positive responses for each process. Many ombudsman services use more than one process, and as a result the numbers do not total 17.

| <b>TABLE 1: Does your service offer any of the following?</b> |                                     |
|---|-------------------------------------|
| <b>Process</b>  | <b>Number of positive responses</b> |
| Negotiation   | 6                                   |
| Mediation   | 6                                   |
| Conciliation  | 4                                   |
| Early neutral evaluation                                      | 4                                   |
| Arbitration   | 1                                   |
| Adjudication  | 7                                   |
| Other:  |                                     |
| Prevention  | 2                                   |
| Informal resolution/settlement                                | 4                                   |
| No ADR used   | 5                                   |
| ADR being considered  | 1                                   |

As shown above, 5 respondents stated that their service uses no ADR processes. Among the comments made by this group were:

*“We are somewhat restricted in the available process by statutory procedures. ADR does not fit well with the statutory requirements and has not been actively considered for that reason.” [14]*

*“...ADR does not apply to this organisation in any significant way. I am a regulator...and our resolutions are focused on [a disciplinary/enforcement role]...and not on securing a remedy for the complainant.” [3]*

The fact that ADR processes were not defined in the questionnaire led to some interesting differences in response, which must be taken into account when considering the responses overall. Respondents appear to use the terms describing ADR processes in different ways. For example, among respondents who consider ombudsmen to be part of ADR, ombudsmen determinations are referred to as ‘adjudications’, as in the following response:

*“Our service itself is of course a form of ADR... . We would normally describe ourselves as providing adjudication.” [9]*

Among respondents who do not identify ombudsmen as part of ADR, the term ‘adjudication’ was not used. As a result, the numbers identified as using adjudication do not reflect the numbers actually carrying out that process but merely the numbers who use that term to describe the process.

Also, the fact that the terms ‘mediation’ and ‘conciliation’ were often used interchangeably (mentioned above) suggests some confusion about the processes those terms describe.

### **Informal resolution**

Note that many respondents who identified their services as using mediation or conciliation - and who gave a positive response to this question - may not be using those processes as defined in Appendix 2. More often than not this process is a form of informal resolution - variably called ‘informal resolution’, ‘early settlement’, ‘local settlement’, and ‘negotiated settlement’. It involves some elements of many of the ADR processes listed in the questionnaire, but it is different enough in itself to be treated as a separate process. In some cases this process is confused with mediation and conciliation, which are in themselves often used interchangeably for what is essentially the same process. The term ‘conciliation’ is sometimes used to describe a process in which an impartial third party gives an opinion on some aspect of the case or on a possible outcome,

whereas mediation usually does not involve this element of involvement by the neutral third party. 'Conciliation' has also been used to describe a process in which the parties are not brought together (as they are in mediation) but a third party works with both separately to determine the issues and then gives a recommendation for settlement.

The primary distinction between these two methods and the informal resolution methods described by many of the respondents is that mediation or conciliation allows the parties to reach their own, mutually agreed settlement. In informal resolution the settlement is usually generated by the ombudsman service. In many cases, it is the ombudsman who determines whether a settlement is appropriate, and what kind of settlement.

The same respondent quoted above, whose service uses an informal resolution process they call local settlement, explains:

*"It is important to understand that these are outcomes where the [organisation] agrees to provide a remedy which the Ombudsman considers is satisfactory. The person complaining may not necessarily take that view, so in that sense it is not always an outcome which is agreed by all the parties." [9]*

Another respondent had a similar explanation of the process of settlement:

*"Settlement is not an option which the complainant can choose or reject. By law it is a matter for the Ombudsman's discretion." [10]*

In this service, just as a complainant might have to accept a 'settlement' or nothing in such cases, he or she might also have to accept not getting the settlement if the ombudsman decided to investigate instead:

*"When the Ombudsman judged a matter of principle or a systemic problem was involved he might decide to conduct a full investigation even though the complainant might be content to have settlement." [10]*

This is different from mediation in several respects:

- The parties do not determine the outcome. The outcome can be recommended/advised by a third party.
- The parties do not determine the process. Their participation might not be voluntary or conscious; the decision to use the process is in the hands of the third party.
- The parties do not determine when a dispute is resolved. If the parties reach a mutually acceptable agreement, but the third party believes an

investigation is appropriate, the settlement might not be finalised until the third party is satisfied with the outcome.

Although the processes differ in many respects, the skills used by the case handler within an ombudsman service are similar to those used by mediators. In an issue of *The Ombudsman*, Stephen Shaw, the Prisons and Probation Ombudsman, writes of the need for new skills to be acquired by ombudsman staff, including mediating skills. His service has seen a large increase in the number of cases closed by what they call 'local resolution':

*"We have established an expectation that cases will be resolved informally (or restoratively, if you prefer), thus emphasising that these methods are not an alternative to a formal report but that the formal report should be the exception, justified by the circumstances. The test we apply is that the outcome must be 'fit for purpose'. In other words, an informal settlement when that is best, a full report when that is best, and something in between when that is best."* [The Ombudsman 18 (July 2002)]

Unlike with mediation, the choice of process remains with the ombudsman or deputy ombudsman and is not for the complainant to decide. This can have a positive effect, however. One interesting aspect of the Prisons and Probation Ombudsman's approach - which addresses the concern about missing wider ramifications when a resolution is achieved informally - is that the ombudsman can choose to investigate a complaint even if the complainant is satisfied with the settlement that has been achieved. It would be important, however, for the settlement to be complied with regardless of the outcome of the investigation, if the settlement had been agreed by both parties and it offered redress that the complainant felt was adequate.

### ***Negotiation, mediation, conciliation***

The questionnaire asked respondents to describe various ADR processes in relation to each other. In particular, it asked if there are differences between negotiation, mediation and conciliation, and if so, what the respondent's understanding of those differences is.

The responses reveal a variety of interpretations of mediation and conciliation, including:

*"Mediation is a voluntary process in which an independent non-judicial mediator will assist the parties to identify a resolution which may be made contractually binding. Conciliation is less likely to involve any evaluation by the mediator."* [14]

This appears to reflect the range of interpretations of 'mediation' and 'conciliation' that exists more widely, and the varied use of terminology.

For example, the leaflet published for complainants by the Office of Estate Agents' Ombudsman contains the following description:

***"Mediation and Conciliation***

*The Ombudsman will always consider - and actively promote and support - any opportunities for a mediated settlement with the Estate Agent you have complained about. If the Agent has made you a goodwill offer by way of settlement - which you have rejected - we will consider whether or not that offer does or does not represent appropriate compensation for your complaint."*

One respondent stated that there is no difference between negotiation, conciliation and mediation [4].

In its newsletter, the Financial Ombudsman Service (FOS) describes the role of mediation within its procedures as follows:

***"mediation***

*This means exactly what it says. Typically, a caseworker will receive a complaint where the two parties are still quite a way apart and will then try to bring them together, using the knowledge and experience of how similar cases have been settled in the past.*

*Often, the underlying issues are not in dispute - the parties are just unable to agree on how the firm can best put matters right. But if the assessment team caseworker can't bring the parties together by acting as a 'go-between', we won't force a settlement. The caseworker may, however, negotiate quite firmly or add a fairly clear recommendation."*

For the year ended 31 March 2002, the FOS resolved 85% of complaints by mediating and recommending settlements - without needing to use formal ombudsman powers to make binding decisions [source: FOS newsletter].

Some respondents expressed strong views about the unsuitability of mediation and conciliation for complaints that go to an ombudsman. For example:

*"In our context, resolution by mediation or conciliation carries the connotation of admission of guilt by the public body. This is precisely the outcome which public bodies resist particularly where [they have] already rejected the complaint through the internal complaints procedure. They are unsuitable processes where any concession would have to read across to a wider audience." [10]*

### **Early neutral evaluation**

Respondents were asked about their understanding of early neutral evaluation, a process about which relatively little is known, as indicated by the following response: *“No idea - yet another piece of meaningless jargon”* [1]. In spite of its low profile, 4 respondents indicated that they use it as part in their ombudsman service. The response given in one case indicated a sound familiarity with this process (although the service does not use it):

*“A process by which an independent third party gives an initial view of the likely outcome should the matter go to final decision (usually that of a court). The hope is that the parties will review their positions in light of the view expressed and reach settlement.”* [14]

The Financial Ombudsman Service (who expressed willingness to be identified in their response) uses a form of early assessment that is similar to early neutral evaluation. One difference is that the assessor is part of the body with the authority to make a determination:

*“The objective of one of the casehandling units, known as the assessment unit, is to resolve cases quickly and informally. This involves a quick assessment of a case to establish whether a resolution can be found with minimal communication with either party. ... If it is clear that early settlement cannot be achieved or the case involves a number of complex issues, the case is referred to one of the other three units for investigation, adjudication and, if necessary, a formal decision from the ombudsman.”*

The Independent Housing Ombudsman (IHO) (also willing to be identified) uses early neutral evaluation in two ways:

*“First, the advice we give landlords and complainants when they approach us informally or at a very early stage in a complaint; we often let them know whether in our view their claims or counterclaims are likely to result in something substantially different as a result of our formal involvement. (That is, we often suggest answers to questions they pose to us, such as: ‘My landlord has offered me £100, should I accept it?’ or ‘We accept we made an error and want to settle the dispute, how much should we offer in compensation given the Ombudsman’s own decisions?’) But we also give ‘neutral evaluations’ as part of our investigation (sometimes in addition to a determination) if we want one of our experts ... to let the sides have an opinion on a technical point without the Ombudsman himself adopting that opinion as part of a decision.”*

### **Arbitration and adjudication**

Respondents were also asked the same question about differences between arbitration and adjudication.

One respondent replied:

*“Arbitration always carries the connotation of ‘splitting the difference’ irrespective of the (finer) merits of the case. ... Adjudication would imply a more measured analysis and ‘fair’ judgement.” [10]*

Another stated:

*“I see arbitration as a hearing by an independent authority acceptable to both sides. Adjudication can be imposed on one of the parties by an authority they may not have chosen.” [4]*

Only one responding service, the Independent Housing Ombudsman, uses arbitration as one of several methods of resolving complaints.

### **Other**

One respondent, who explained that his service did not see itself as offering ADR, recognised elements of ADR within its processes:

*“...it may often be the case that our involvement leads to a resolution of a problem which is agreeable [to both parties]. For us that is a very important aspect and we always have an eye to that as a possibility. But we do not formally describe it as either mediation or conciliation, even though the end result may look much the same.” [9]*

This view was echoed in the reply by the Office of the Ombudsman in Ireland:

*“On some rare occasions, when we have already established that there is maladministration we do find ourselves mediating between the public body and the complainant in relation to, for example, the amount of financial redress. However, this approach, when it is used, is a by-product of the examination/investigation process and is usually done in the interests of expediency - i.e. to ensure a settlement which all parties can agree upon.”*

The same view was expressed by the Parliamentary and Health Service Commissioner:

*“As an alternative to a full statutory investigation the Ombudsman may endeavour to resolve a complaint by more informal means. Under that arrangement one of the Ombudsman’s officers would contact the department, or complainant, or both. They will ask the department to resolve the complaint, or say why that is not possible, and/or provide information on the case within a specified deadline. ... When those enquiries have not resulted in a successful resolution, but we consider that the complaint has merit and that we should press the department further, we may decide to proceed to a statutory investigation. ...*

*“This alternative method of resolving a complaint is usually the quickest way of resolving a justified complaint to the complainant’s satisfaction. In a wide sense, it might possibly be construed as an alternative dispute resolution method.”*

Two respondents identified that they use prevention as well as resolution techniques. Among the methods used for **preventing disputes** are:

- Holding regular training events and workshops for firms and the advice sector [2]
- Helping consumer advisers to help clients resolve complaints without the need to involve the ombudsman [2]
- Raising awareness of the types of complaint the ombudsman can and cannot handle [2]
- Visiting “firms to sort out misunderstandings and provide feedback where systemic complaints handling issues have been identified” [2]
- Publishing a “monthly newsletter containing details of the ombudsman’s latest policy on a range of issues and case studies” [2]
- Providing a technical advice desk to give guidance to firms about how the ombudsman might view a particular type of complaint [2]
- Working with organisations and groups of complainants, “trying to get them to deal with conflict more constructively” [5]
- Supporting ADR used as an option locally before complaints need to be referred to the Ombudsman [5].

Respondents whose services use ADR processes were asked to identify how the processes are described for service users in published information and on the website.

A total of 8 respondents replied to this question (see Table 2 below).

|   |   |
|---|---|
| <i>In published information on case handling?</i> | 2, 1, 10, 5, 17, 4, 16  |
| <i>In leaflets for complainants?</i>              | 2, 1, 5, 17, 7, 4, 16   |
| <i>On the website?</i>                            | 2, 1, 5, 17, 7, 4, 16   |
| <i>In other material?</i>                         | 2, 10, 5, 17, 4   |
| <i>If not described, why not?</i>                 | Comments:   |
|   | “Not all of the ADR processes described above are mentioned” “We would refer to the settlement provisions in articles about the Office or in talks.” “More detail is intended to be given to the parties involved in the process. However the rules of the Ombudsman Scheme have not yet been finally agreed and published.” “on audiotape” |

Examples of leaflets were sent by two services, both of which are targeted at potential complainants and give basic information about procedures.

**Part 3** focused on who in the organisation carries out ADR processes and what training they have received.

The first question posed in this section was whether ADR is delivered by internal staff or external providers. The vast majority of respondents indicated that ADR is carried out by internal staff. These covered a range of job titles including:

- Consumer consultants
- Consumer advisers
- Complaints officers
- Case officers
- Caseworkers
- Resolution officers
- Adjudicators
- Investigators
- Director of Investigation
- Assistant Ombudsman
- Deputy Ombudsman
- Ombudsmen

In one service, the Independent Housing Ombudsman (IHO), ADR is provided by

a mix of internal staff and external providers. Mediations are provided by the Centre for Effective Dispute Resolution (CEDR) on a case-by-case basis. Conciliation is carried out by senior investigators. Early neutral evaluation is carried out by the Deputy Ombudsman or Senior Investigators. Arbitration is carried out by arbitrators on a panel of members of the Chartered Institute of Arbitrators. Adjudication - in the case of IHO this refers to determinations with a hearing - are carried out by the Ombudsman.

Among all respondents, training provided to staff includes:

- Case-handling/caseworker skills training [2]
- ADR processes
- Counselling courses [7]
- Mediation and arbitration training - although these are carried out externally “the training is good for conciliation and generally for dealing with people and disputes.” [5]

Other responses to this question included:

*“A person who had no experience of negotiation within the public sector would be most unlikely to be appointed to a senior position.” [10]*

*“It is intended that ADR training will be offered to all staff with any involvement in the Ombudsman Scheme.” [7]*

Respondents were asked, “Who explains these dispute resolution options to the parties?”

- Caseworker [2]
- Initial paperwork [1]
- Evaluation team [5]

Respondents were also asked whether complainants and organisations complained about are given the same information about the dispute resolution options available. Seven respondents indicated positively that both parties receive the same information [1, 2, 4, 5, 7, 16, 17]. No respondent answered this question in the negative, although one respondent did say they had changed the information they provide in the leaflet for complainants so as to not to “raise undue expectations of the result.” [10]

In **Part 4**, respondents who use ADR were asked to describe how and when they use ADR and how frequently. In particular, respondents were asked to identify what factors are taken into account when deciding to pursue a resolution through ADR.

*Do you have established criteria for deciding which dispute resolution method to use? If so, what are these?*

One respondent explained that “informal resolution suitable only for complaints of a less serious nature”. [16] Another factor taken into consideration is the age and perceived vulnerability of the complainant - for example, if the complainant were from an ethnic minority. [16]

This respondent explained that in this process, complainants can halt the process of informal resolution at any time and insist on a formal investigation.

The Financial Ombudsman Service (FOS) explained:

*“Each case is assessed on its merits to decide which method to use. Where many complaints are made about the same issue, e.g. mortgage endowments or dual variable mortgage rates, procedures are streamlined to save time and ensure consistency.”*

The parties in FOS complaints do not have any influence over the decision of which process to use; the process used is at the casehandler’s discretion.

The Ombudsman for Estate Agents (also willing to be identified in its response) described its criteria as:

- “1. Simple complaint.*
- 2. Agreement/conciliation resolvable in short period of time.*
- 3. Likelihood of success in short term.”*

No other factors are taken into account, and parties do not have any influence over the decision of which process to use.

Another respondent explained:

*“Settlement is not an option which complainant can choose or reject. By law it is a matter for the Ombudsman’s discretion. Where the Ombudsman judged a matter of principle or a systemic problem was involved he might decide to conduct a full investigation even though the complainant might be content to have settlement.” [10]*

The Independent Housing Ombudsman (IHO) (willing to be identified in its response) explained:

*“The only criteria are the willingness of the sides to take part and the desirability and potential effectiveness of a given option compared with investigation/determination (which is always our point of reference: the ‘classic ombudsman’ job). But in some arbitration instances even when a*

*complainant was willing to take part we did not think it fair to get someone to go through the process if we thought s/he was vulnerable or [not] sufficiently articulate.”*

In addition, IHO considers the following:

*“Cost in case of arbitration is taken into account if a dispute is primarily about money and the sum involved out of proportion. ... Also, if we believe someone is simply trying to get his/her ‘day in court’ there is no point sending the dispute to mediation because it is unlikely to provide a final outcome (the process being conciliatory and private).”*

The parties in IHO complaints have a say in what process is used:

*“We only refer cases to mediation or arbitration with the expressed agreement of both sides and after we are satisfied they understand the implications. However, we also tell them that if they do not accept our offer to use mediation or arbitration the Ombudsman may well decide not to investigate the matter (for this they do not have any influence whatsoever; the decision to accept a case within jurisdiction is entirely, under our rules, for the Ombudsman to make.)”*

One respondent stated that the factors that are taken into account are time and practicality. The parties do have an influence over the decision of which process to use (although this was not explained). [17]

The Independent Case Examiner (also willing to be identified) explained that although they do not have any established criteria for deciding which method to use, they do take into account “the attitude of the client during the first contact”. They also consider “the source of referral. Some cases are taken on with the express purpose of conducting a detailed investigation and report as opposed to resolving a complaint.” [4]

Parties to complaints to the Independent Case Examiner do have an influence over the decision of which process to use, although this was not explained.

### ***Motives for using ADR***

Respondents who identified their service as one using ADR were asked what their reasons were for using ADR.

A total of 7 respondents replied, as shown below in Table 3. Because respondents identified more than one answer the total is more than 7.

| Reason                                | Number of services   |
|---------------------------------------|--|
| <i>To save money?</i>                 | 5  |
| <i>To save time?</i>                  | 6  |
| <i>To offer a range of services?</i>  | 5  |
| <i>Other reasons (please specify)</i> | 4:<br><ul style="list-style-type: none"> <li>• <i>To help resolve at the earliest stage</i></li> <li>• <i>To release resources</i></li> <li>• <i>Appropriateness</i></li> <li>• <i>Legislative requirements</i></li> </ul> |

As stated earlier, most ombudsmen services have limited resources and have more complaints coming in than they can reasonably expect to put through the investigation procedure. As a result, the pressure to work more efficiently, and to process complaints more quickly, cannot be discounted. A prevalent response from services is a view that was reflected in the newsletter produced by the Banking section of the Financial Ombudsman Service (FOS):

*“Our role is to resolve as many cases as we can, just as soon as we can, only passing on for an ombudsman’s decision those cases that cannot be resolved in any other way.”*

One public-sector ombudsman stated that he believed mediation or conciliation would be unsuitable when the complaint has already been rejected by the internal complaints procedure and when any resulting ‘concession’ would have to read across to a wider audience [10]. This reveals a not uncommon perception that mediation exposes an admission of guilt and is worth trying only when the organisation is aware it has made a mistake.

### ***Number of cases dealt with through ADR***

A total of 9 respondents provided figures for the number of cases dealt with by an ADR method annually. Because of the great range in size of services, they were asked to provide a percentage of total complaints. The responses are shown in Table 4.

| Percentage of cases annually | Number of services |
|------------------------------|--------------------|
| 1-10%                        | 3                  |
| 20-25%                       | 3                  |
| 67%                          | 1                  |
| 100%                         | 2                  |

More detail was provided in some responses. Based on its latest figures, the Independent Housing Ombudsman (IHO) resolved 30 cases through mediation (compared with 250 investigations). It used arbitration in 2 cases.

IHO also further explained the percentages it provided in its response:

*“Including conciliation, mediation and arbitration (excluding neutral evaluation), up to 20% of cases within jurisdiction (the remaining 80% being investigations). However, conciliation may well have a bigger impact if we take into account cases which are not within our jurisdiction fully but for which we still offer assistance when we can. We do quite a lot of work with all the complaints made to us, even with premature ones (2000 in total); the ones in which we intervene formally (investigation or ADR) are a small percentage.”*

Respondents were asked about the number of cases that are dropped after ADR has been initiated, and the number that proceed to investigation. IHO explained its procedure:

*“When a mediation is not successful, we always investigate (even when we say we may not at the time we offer mediation to the parties, or otherwise we feel they may not try their best knowing that there is a fallback position by coming back to us). After arbitration, of course, we never touch the case again regardless of the outcome.”*

In **Part 5**, respondents were asked if their service has any plans to introduce ADR processes, and if there is anything else they would like to add.

Among the comments received were clarifications of the limitations on the service, such as this comment:

*“We plan to introduce an earlier look at a complaint - as soon as it becomes a case - in order to deal with the ‘quick and easy’ complaints first.” [1]*

*“At the present time we operate a very unstructured form of conciliation as a means of trying to resolve disputes where possible without the need of embarking on a long and detailed investigation of the issues.” [6]*

*“[We hope] to have mediation introduced as an ADR option in the resolution of complaints...”. [16]*

## **7. THE SEMINAR**

On 8 November 2002, BIOA's Managers' Group held a training seminar in central London. Chaired by John Flood, Professor of Law and Sociology at the University of Westminster, the seminar focused on two topics: Dealing with the Media, and Alternative (Appropriate) Dispute Resolution, or ADR.

The ADR session was led by a team of three presenters comprising the author, Margaret Doyle, ADR consultant; Val Reid, Policy and Development Officer (ADR) at Advice Services Alliance; and Mike Biles, Ombudsman, Independent Housing Ombudsman Service. After the presentations on ADR, the audience was divided into two groups and given questions for discussion. Each group was allowed time to discuss the questions, and the small group's responses were each fed back to the whole audience and captured on flipcharts. These were later distributed to all participants.

Among the discussion questions asked at the seminar were:

*Should ombudsmen be offering other forms of ADR?*

*Is the primary role of ombudsmen:  
resolution of individual disputes?  
good practice in complaints handling within a particular sector?*

*Should there be a standard approach to ADR among ombudsmen?*

*Is the answer different for public-sector ombudsmen than for those in the private sector?*

*What factors about a complaint or a complainant might argue in favour or against use of other ADR processes?*

*How can we ensure that good practice issues are not hidden by using mediation - or that systemic problems are not overlooked?*

### **The way forward**

The responses produced at the seminar - along with the responses to the discussion questions posed in this paper - will contribute to the development of advice and, if appropriate, good practice guidelines.

## 8. DISCUSSION QUESTIONS

Responses are sought from ombudsmen services and other interested organisations and individuals to the following discussion questions:

1. *What are the key factors that define the following dispute resolution options?*

- *negotiation*
- *informal resolution*
- *conciliation*
- *mediation*
- *full investigation*

2. *What criteria should be used by ombudsmen (including caseworkers) when deciding which dispute resolution option is appropriate?*

3. *Who contributes to that decision? Do parties? Who has the final say?*

4. *How can ombudsmen ensure that using ADR will not hide systemic problems?*

5. *How should ombudsmen monitor and evaluate parties' views about the dispute resolution method used (both complainants and representatives of organisations complained about)? How can they use this information to review the procedures they use?*

6. *Would good practice guidelines on ombudsmen's use of ADR be welcomed? If so, what should they cover?*

All responses should be sent to Margaret Doyle either by email at [margaret@domar.co.uk](mailto:margaret@domar.co.uk) <<mailto:margaret@domar.co.uk>> or by post to 113 Dawes Road, London SW6 7DU by **12 September 2003**.

Thank you for your willingness to respond. Responses will contribute to the development of advice on good practice in the use of ADR by ombudsmen.

## **APPENDIX 1: The questionnaire**

### **PART 1: WHO ARE YOU?**

*NOTE: It would be helpful to have the name of the ombudsman service you work with and your contact details. We understand the need to treat the information you give us confidentially. If you would like for your entire reply (other than name of service) to be kept anonymous, please provide the details and indicate that you do not want this information revealed. That way we can contact you confidentially if we have any questions about your responses.*

NAME AND POSITION OF PERSON COMPLETING THE QUESTIONNAIRE:

CONTACT DETAILS:

Tel:

Email:

NAME OF OMBUDSMAN SERVICE:

DO YOU WANT YOUR REPLY TO REMAIN ANONYMOUS?

YES NO

### **PART 2: DOES YOUR SCHEME USE ADR?**

DOES YOUR SERVICE OFFER ANY OF THE FOLLOWING (please put YES next to all that apply):

*NEGOTIATION:*

*MEDIATION:*

*CONCILIATION:*

*EARLY NEUTRAL EVALUATION:*

*ARBITRATION:*

*ADJUDICATION:*

*OTHER ADR PROCESS (please specify):*

ARE THERE DIFFERENCES BETWEEN NEGOTIATION, MEDIATION AND CONCILIATION, AND IF SO, WHAT IS YOUR UNDERSTANDING OF THOSE DIFFERENCES?

ARE THERE DIFFERENCES BETWEEN ARBITRATION AND ADJUDICATION, AND IF SO, WHAT IS YOUR UNDERSTANDING OF THOSE DIFFERENCES?

**NOTE: IF YOU DON'T USE ANY OF THE PROCESSES ABOVE OR ANY FORM OF ADR, PLEASE INDICATE HERE AND GO TO PART 5 BELOW.**

ARE THE ADR PROCESSES YOU USE DESCRIBED (please put YES next to all that apply):

*IN PUBLISHED INFORMATION ON CASE-HANDLING?*

*IN LEAFLETS FOR COMPLAINANTS?*

*ON THE WEBSITE?*

*IN OTHER MATERIAL?*

*IF NOT DESCRIBED, WHY NOT?*

### **PART 3: WHO DOES WHAT?**

DOES YOUR SERVICE USE INTERNAL STAFF OR EXTERNAL PROVIDERS TO DELIVER ADR?

WHO CARRIES OUT (please put the JOB TITLE OF INTERNAL STAFF or NAME OF ADR PROVIDER next to all that apply):

*MEDIATION?*

*CONCILIATION?*

*EARLY NEUTRAL EVALUATION?*

*ARBITRATION?*

*ADJUDICATION?*

IF INTERNAL STAFF DELIVER ADR, WHAT TRAINING HAVE THEY UNDERGONE FOR THIS PURPOSE?

WHO EXPLAINS THESE DISPUTE RESOLUTION OPTIONS TO COMPLAINANTS AND THE ORGANISATIONS COMPLAINED ABOUT?

ARE COMPLAINANTS AND THE ORGANISATIONS COMPLAINED ABOUT GIVEN THE SAME INFORMATION ABOUT DISPUTE RESOLUTION OPTIONS? (If not, please explain.)

WHAT TRAINING HAVE OTHER MEMBERS OF STAFF (e.g. reception/enquiry staff, case handlers) HAD IN ADR PROCESSES?

IF YOU USE AN EXTERNAL ADR PROVIDER, WHO IS IT AND WHAT ARE THE COSTS?

**PART 4: WHEN DO YOU USE ADR AND WITH WHAT RESULTS?**

DO YOU USE ADR FOR ANY OF THE FOLLOWING REASONS (please put YES next to all that apply):

*TO SAVE MONEY?*

*TO SAVE TIME?*

*TO OFFER A RANGE OF SERVICES?*

*OTHER REASON/S? (please specify)*

DO YOU HAVE ESTABLISHED CRITERIA FOR DECIDING WHICH DISPUTE RESOLUTION METHOD TO USE? IF SO, WHAT ARE THESE?

WHAT OTHER FACTORS ARE TAKEN INTO ACCOUNT?

DO THE PARTIES HAVE ANY INFLUENCE OVER THE DECISION OF WHICH PROCESS TO USE?

HOW MANY COMPLAINTS ANNUALLY ARE DEALT WITH USING AN ADR PROCESS? (IF DIFFERENT PROCESSES ARE USED, PLEASE SPECIFY.)

WHAT PERCENTAGE OF TOTAL COMPLAINTS DOES THIS REPRESENT?

IF POSSIBLE, PLEASE DESCRIBE HOW MANY COMPLAINTS ANNUALLY:

*ARE RESOLVED USING AN ADR PROCESS?*

*ARE DROPPED AFTER ADR HAS BEEN INITIATED?*

*PROCEED TO INVESTIGATION?*

(IF DIFFERENT PROCESSES ARE USED, PLEASE SPECIFY.)

## **PART 5: CONCLUSION**

DOES YOUR SERVICE HAVE ANY PLANS TO INTRODUCE ADR PROCESSES? IF SO, PLEASE DESCRIBE.

IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD IN RELATION TO YOUR OMBUDSMAN SERVICE'S USE OF ADR?

IF POSSIBLE, PLEASE ATTACH A COPY OF THE CASEWORK PROCEDURES FOR YOUR SERVICE.

*Thank you for completing and returning this questionnaire!*

## APPENDIX 2: Definitions of ADR processes

**Adjudication** involves an impartial, independent third party hearing the claims of both sides and issuing a decision to resolve the dispute. The outcome is determined by the adjudicator, not by the parties. Determinations are usually made in the basis of fairness, and the process used and means of decision-making are not bound by law. It can involve a hearing or be based on documents only.

**Arbitration** involves an impartial, independent third party hearing the claims of both sides and issuing a binding decision to resolve the dispute. The outcome is determined by the arbitrator and is final and legally binding, with limited grounds for appeal. It requires both parties' willing and informed consent to participate. It can involve a hearing or be based on documents only,

**Conciliation** involves an impartial third party helping the parties to resolve their dispute by hearing both sides and offering an opinion on settlement. It requires both parties' willing and informed consent to participate. The parties determine the outcome, usually with advice from the conciliator. An example is ACAS conciliation.

**Early neutral evaluation** involves an independent person assessing the claims made by each side and giving an opinion on a) the likely outcome in court or tribunal, b) a fair outcome, and/or c) a technical or legal point. It is non-binding, and the parties decide how to use the opinion in their negotiations. It requires both parties' willing and informed consent to participate. It can be useful to help moderate a party's unrealistic claims.

**Mediation** involves an impartial, independent third party helping disputing parties to reach a voluntary, mutually agreed resolution. A key principle is that the parties, not the mediator, decide the outcome. It requires both parties' willing and informed consent to participate. It requires mediating skills, and it has a structured format.

**Negotiation** involves dealing directly with the person or the organisation in dispute. It is non-binding and can be done by the person in dispute or by a representative ('assisted negotiation'). The negotiator is not impartial but instead represents a party's interests. An example of negotiation is settlement discussions between solicitors.

**Ombudsmen** are impartial, independent 'referees' who consider, investigate and resolve complaints about public and private organisations. Their decisions are made on the basis of what is fair and reasonable. They also have a role in influencing good practice in complaints handling.