



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

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Paper 113/11

30 September 2011

NIAR 050-11

# Access to Justice – Alternative Dispute Resolution

## 1 Introduction

This paper will examine developing alternatives to court proceedings for resolving disputes. It is the fourth in a series of papers on developments in legal aid. The first three papers dealt with issues relating to eligibility and scope of legal aid. This paper draws on issues arising from the Access to Justice Review, the Ministry for Justice's Green paper on proposals for legal aid reform and the Law Reform Commission's report on Alternative Dispute Resolution in the Republic of Ireland and the Strategic Framework for Access to Justice in the Federal Justice system in Australia.

## 2 Access to Justice Review Northern Ireland

The Access to Justice Review was established in the wake of the Hillsborough Agreement. The Review published an Agenda Setting Paper and a Discussion Paper in November 2010 and a Progress Report in March 2011. The final report of the review was published in September 2011

As part of its work, the Review has identified several mechanisms for dealing with disputes without going to court. These include issues concerning the criminal justice system, alternative approaches to personal injuries cases, administrative law issues

and Alternative Dispute Resolution. This paper will focus on Alternative Dispute Resolution.

### **Alternative Dispute Resolution**

One of the major themes in the Access to Justice Review is the promotion in Alternative Dispute Resolution (ADR) mechanisms including mediation, collaborative interventions in the context of the family, arbitration and conciliation. Mediation is defined as a mechanism where two parties are facilitated in reaching an agreement themselves in the office of the third party. Conciliation is defined as a mechanism in which a third party takes a proactive role in advising the parties on possible solutions but the decision to accept a solution is left to the parties. Collaborative law is defined as a mechanism which operates in the family context, where there is an agreement not to go to court and there is a 4 way co-operative dialogue involving the couple and their advisors.<sup>1</sup>

The Review notes that ADR is not a new concept in Northern Ireland as it is strongly endorsed by the judiciary and a number of organisations; however its development has been piecemeal.<sup>2</sup>

The Review Team highlighted that that neighbourhood disputes and anti- social behaviour are area that would be suited to community based ADR and suggest that this could be developed on a partnership basis with the voluntary and community sector as part of the community safety strategy.<sup>3</sup>

The Review Team highlighted a number of benefits to the use of ADR:<sup>4</sup>

- Genuine consent;
- voluntary nature which gives parties a sense of ownership and autonomy in decision making;
- more flexibility over outcome than is the case in court proceedings ;
- sustainable working relationships;
- less stressful; timescales which suit parties;
- cheaper
- reduces pressure on an overcrowded system.

The final report of the Review Team made a number of observations and recommendations in relation to ADR in Northern Ireland. These include:<sup>5</sup>

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<sup>1</sup> Definitions set out in the Access to Justice Review Northern Ireland "The Report", August 2011, 60

<sup>2</sup> Access to Justice Review Northern Ireland "The Report", August 2011, 9

<sup>3</sup> Access to Justice Review Northern Ireland "The Report", August 2011, 10

<sup>4</sup> Access to Justice Review Northern Ireland "The Report", August 2011, 61

<sup>5</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 143

- The availability of a menu of ADR mechanisms for different types of cases enhances access to justice and should be promoted by DoJ and stakeholders in the justice system;
- Confidentiality-Discussions in the ADR process are treated as privileged by the parties and the mediator and are not disclosed except by agreement of the parties; if necessary the legislation should be enacted to confirm the legal position of privilege;
- While there is no reason for the mediator to be legally qualified, it is desirable that parties to have legal advice at appropriate points in the ADR process;
- The Legal Services Commission should develop a funding scheme and financial model before committing to funding under Family Help or a bespoke funding scheme in order to assess potential costs;
- There should be a coordinating body with membership drawn from a range of bodies including suppliers of mediation services, public bodies with a funding role and training providers to promote ADR and ensure the appropriate infrastructure is in place.

The Review Team make recommendations in respect of ADR in family cases. The final report recommends establishing a pilot family ADR scheme associated with a particular court. It is also recommended that one of the conditions for legal aid is to ensure ADR should have been considered. As well as ADR in family cases, it is suggested that all government departments should take an active role in adopting and promoting ADR in resolving disputes with the public and suppliers.<sup>6</sup> In recommendations on ADR in community disputes, it is recommended that there should be mapping of the coverage of community dispute resolutions schemes and funding arrangements. It is also recommended that referral mechanisms are developed to route suitable neighbourhood disputes, antisocial behaviour or harassment through such schemes for resolution.<sup>7</sup>

The Review Team highlights that England and Wales identified ADR as a source of savings of around £10 million per annum in the family budget. The Review Team argues that their motivation in encouraging the development of ADR is driven by the belief in the value of the concept to the justice system and securing access to justice for clients. However the Review Team warns of the need for further financial modelling in the family arena to assess financial implications.<sup>8</sup> The Review Team also concludes that they are in little doubt that early dispute resolution across government departments and public bodies has the potential to ease pressures on the legal aid fund.<sup>9</sup>

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<sup>6</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 144

<sup>7</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 144

<sup>8</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 132

<sup>9</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 132

### 3 Ministry of Justice Proposals for the Reform of Legal Aid- Mediation in family cases

The Secretary of State for Justice in England and Wales published a Green Paper on proposals for reform of legal aid in November 2010. The policy driver behind reforms is the financial pressure on the legal aid fund and the aim of proposals is to “provide a substantial contribution to the Ministry of Justice’s target of a real reduction of 23% in its budget worth nearly £2bn by 2014-15.”<sup>10</sup> One of the proposals in the Green Paper is the continued legal aid for family mediation in private family law cases.<sup>11</sup> It is also proposed that mediation will be funded in ancillary relief cases to support individuals to reach an agreement without recourse to the courts.<sup>12</sup> Since the requirement to consider mediation was made mandatory for the legally aided sector was introduced in 1997, publicly funded mediations have risen year on year from 400 in 1997 to almost 14,500 in 2009. The full and partial success rate for publicly funded mediation cases stands at 70% with full resolution cases accounting for 66% of this figure.<sup>13</sup> It is proposed that where a client enters mediation a fixed amount of legal help (equated to £150 of work) will be made available to facilitate the input of a solicitor in providing advice during mediation and formalising any agreement made. The fee would be payable whether mediation succeeds or not.<sup>14</sup> It has been reported that the Legal Services Commission spent £14.4 million on family mediation services in 2009/10. It has been estimated that there is a saving of £10million to the legal aid fund as 70% of these mediations reach full or partial settlement.<sup>15</sup>

It is worth noting that a research and evaluation report of an in-court mediation pilot notes that the average cost of assessment and initial for those cases that reached agreement was £1757. It has been highlighted that this model was 4.1 times more expensive as a way of delivering mediation compared to £424 under normal circumstances. It was also reported that in 2008/09, the average cost of obtaining a Private Law Children certificate was £3000.<sup>16</sup>

The House of Commons Justice Select Committee has recently published its response to the Government’s proposed legal aid reforms.<sup>17</sup> The Committee, whilst welcoming the concept of mediation in family cases, comments that this is not a ‘panacea’ and recommends consideration is given to how difficult and unresolved family law cases will

<sup>10</sup> Ministry for Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 5. Available at <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>

<sup>11</sup> Ministry for Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 43

<sup>12</sup> Ancillary relief is financial support to a party to a marriage on divorce, nullity or judicial separation. Ministry for Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 59, 149

<sup>13</sup> Ministry for Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 43

<sup>14</sup> Ministry for Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 43

<sup>15</sup> Access to Justice Review Northern Ireland Discussion paper, November 2010,

<sup>16</sup> Legal Services Commission “In –Court Mediation and Family Disputes: Research and evaluation report of an in-court mediation trial”, August 2010, 6

<sup>17</sup> House of Commons Justice Select Committee “Government’s Proposed Reform of Legal Aid” Third Report of Session 2010-2011

be dealt with if legal aid is not available.<sup>18</sup> The Committee also heard evidence from witnesses that mediation may not be appropriate in many cases; for example where a parent has a mental illness or where there is alleged harm to a child.<sup>19</sup>

The Committee heard evidence that mediation has disadvantages; for example, a mediator cannot offer legal advice to indicate when an agreement between parties is wrong and not all mediators are trained in family finance law and may not produce the right result.<sup>20</sup>

In parallel to the Government's proposals, a Family Justice Review is being conducted and an Interim report has been published to date. The report notes that the state cannot fix fractured relationships and that court is generally not the best place to resolve these disputes.<sup>21</sup> The Review promotes the use of mediation or collaborative law if further help is needed to resolve outstanding issues.<sup>22</sup> It has been suggested that attendance at dispute resolution should not be compulsory but should aim to become the normality.<sup>23</sup>

#### 4 Alternative Dispute Resolution in the Republic of Ireland

The Law Reform Commission in the Republic of Ireland published a report and draft legislation on Alternative Dispute Resolution (ADR) in November 2010. The Commission notes that there are some disputes that are better resolved by agreement rather than recourse to the courts. It has also been identified that the advantages of ADR methods such as mediation and conciliation include "the speedy access to a process that may produce a satisfactory outcome for the parties in a short space of time."<sup>24</sup> The Commission also noted there was a strong economic case for use of ADR in cases where the state is a party to the dispute, highlighting that the Government spends €300 million in litigation and associated legal expenses annually.<sup>25</sup> The Commission noted experience from the Oregon Justice Department in the United States, which reported savings of up to 85%; in a typical case the cost of mediation was \$9,537 compared to \$60,557 in a case proceeding to a full hearing.<sup>26</sup>

The report considers the use of ADR in the context of the civil justice system, resolution of workplace disputes, family law disputes such as divorces, probate and succession

<sup>18</sup> House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, 3

<sup>19</sup> House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, 41

<sup>20</sup> House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, 40

<sup>21</sup> Family Justice Review Interim Report, Executive Summary, March 2011,20

<http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-exec-summ.pdf>

<sup>22</sup> Family Justice Review Interim Report, Executive Summary, March 2011,22

<sup>23</sup> Family Justice Review Interim Report, Executive Summary, March 2011,23

<sup>24</sup> Law Reform Commission "Alternative Dispute Resolution: Mediation and Conciliation", November 2010, 1. Report available at [http://www.courtsni.gov.uk/NR/rdonlyres/0B397204-46D6-453B-A3A9-19830A11341C/0/p\\_A2J\\_adr\\_mediationAndConciliation.pdf](http://www.courtsni.gov.uk/NR/rdonlyres/0B397204-46D6-453B-A3A9-19830A11341C/0/p_A2J_adr_mediationAndConciliation.pdf)

<sup>25</sup> Law Reform Commission "Alternative Dispute Resolution: Mediation and Conciliation", November 2010

<sup>26</sup> Law Reform Commission "Alternative Dispute Resolution: Mediation and Conciliation", November 2010, 55

disputes, personal injury disputes including those arising from medical treatment, commercial, consumer and property disputes. The Commission has commented that ADR is a broad spectrum of structured binding and non-binding processes including mediation and conciliation and arbitration but not litigation, although it may be linked to litigation.<sup>27</sup> The Commission has made a number of key recommendations in respect of ADR process including:<sup>28</sup>

- There should be a statutory framework for specific forms of ADR, rather than ADR in general terms and the statutory framework should not have a prescriptive definition of ADR. The Law Reform Commission recommends that the proposed statutory framework should focus on mediation and conciliation which are the most significant forms of ADR. The Law Reform Commission notes that where consistency and compliance are essential, only a limited number of terms should be defined in statute.<sup>29</sup>
- The Statutory framework should make it clear that it applies to individuals, partnerships, corporate bodies and state bodies;
- There should be clear definitions of conciliation and mediation set out in legislation;
- Key principles underlying mediation and conciliation should be set out in statutory form, including principles of neutrality and impartiality;
- Participation in mediation conciliation is voluntary and any party involved can withdraw at any time without explanation;
- Confidentiality in mediation and conciliation should be subject to a distinct form of privilege facilitating full and frank disclosure between parties to resolve dispute;
- Parties may be encouraged by a mediator or conciliator to seek independent legal advice before signing an agreement entered into during mediation or conciliation;
- Financial cost of mediation should be reasonable and proportionate to the importance of issue or issues and to the amount of work carried out by the mediator and conciliator;
- Consideration should be given to extending panels at the Legal Services Board to include a panel of accredited mediators or conciliators;
- Solicitors acting for any person should advise clients to consider mediation and conciliation in appropriate cases prior to initiating civil or commercial proceedings;
- A pilot court annexed mediation scheme should be established in the Circuit Court, based on voluntary participation of litigants;
- A mediated or conciliated agreement is enforceable as a contract at law where in writing and signed by all parties;

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<sup>27</sup> Law Reform Commission "Alternative Dispute Resolution: Mediation and Conciliation", November 2010, 16

<sup>28</sup> Note that this is not an exhaustive list of recommendations but highlights some of the key points made. For a full list of recommendations, see Law Reform Commission "Alternative Dispute Resolution: Mediation and Conciliation", November 2010, 187-196

<sup>29</sup> Law Reform Commission "Alternative Dispute Resolution: Mediation and Conciliation", November 2010, 16

- Where Court has invited parties to consider mediation and conciliation, it may make an order that both parties bear costs equally in the absence of an agreement on financial costs;
- Where an apology is made in personal injuries cases, including health care cases, the apology should not constitute an admission of liability;
- The Minister for Justice and Law Reform should publish a statutory code of conduct for mediators and conciliators after the Mediation and Conciliation Bill comes into force.

## 5 Family Dispute Resolution in Australia

Given that the Access to Justice Review Team recommended the establishment of a pilot family ADR scheme associated with a particular court and that one of the conditions for legal aid is to ensure ADR should have been considered, it may be useful to consider the Family Dispute Resolution model in Australia. Family Dispute Resolution (FDR) was introduced in Australia in 2006 and is used when couples are separating. The process is compulsory in Australia and services are provided by Family Relationship Centres (FRCs) and Legal Aid Centres (LACs). Therefore when a person is applying for a parenting order, they must first attend FDR and obtain a certificate to confirm an attempt at FDR was made. There are exceptions to the compulsory requirement to attend FDR, in instances of family violence, child abuse or urgency.<sup>30</sup> To support the introduction of compulsory FDR 65 Family Relationship Centres (FRCs) were established to offer a range of advice and information for families. Other additional support systems were also introduced including an advice line and a website called Family Relationships Online (FRO) to provide information and advice on family issues. From 2009, accredited FDR practitioners are required to meet new accreditation standards that include knowledge on how to deal with family and domestic violence, creating a supportive environment for vulnerable parties and operating in a family law environment.<sup>31</sup>

A report by the Access to Justice Taskforce of the Attorney General's department has reported that the introduction of compulsory FDR into the family law system may serve as a best practice model to guide the use of ADR in other areas of the justice system.<sup>32</sup> A cost benefit analysis of FDR concluded that legal aid FDR delivers a benefit costs ratio of 1:1.48, meaning that for every \$1 of Commonwealth funding spent on these services, there is a return of \$1.48 to the Commonwealth.<sup>33</sup> According to the

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<sup>30</sup> Australian Government Attorney -General's Department "Strategic Framework for Access to Justice in the Federal Civil Justice System, September 2009, pg 94-95

<sup>31</sup> Australian Government Attorney -General's Department "Strategic Framework for Access to Justice in the Federal Civil Justice System, September 2009, 95

<sup>32</sup> Australian Government Attorney -General's Department "Strategic Framework for Access to Justice in the Federal Civil Justice System September 2009, pg 94-95

<sup>33</sup> Australian Government Attorney -General's Department "Strategic Framework for Access to Justice in the Federal Civil Justice System September 2009, pg144

Access to Justice Taskforce, the total applications made for family law final orders in the Family Court and Federal Magistrates Court (FMC) declined by nearly 20% from 2006-2007 to 2007-2008. The costs to the Government in 2007-08 in providing FDR averaged \$1000-\$1500 per service. This compared with the cost of finalising a dispute in the family court was \$9000 and the average cost of a legal grant for litigation being \$3,837.<sup>34</sup>

## 6 Conclusions

This paper provides information on the recommendations of the Access to Justice Review on Alternative Dispute Resolution (ADR) and on developments in England and Wales, Australia and the Republic of Ireland. The Access to Justice Review Team in concludes that ADR enhances access to justice and in particular recommends the development of a family ADR pilot. It is also recommended that consideration should be given to making it for a condition of legal aid in particular categories of case that the option of ADR should have been considered. The Review Team highlights the importance of confidentiality in ADR and outlines some instances where there may be exceptions, for example in ensuring enforcement of an agreement, where child abuse or domestic violence issues are at stake or where disclosure is needed to facilitate the investigation or prevention of a crime. The Review Team recommends legal position on privilege is confirmed in these circumstances and if necessary legislation enacted.

In England and Wales, the number of publicly funded mediation cases has risen year on year from 400 in 1997 to 14,500 in 2009. In England and Wales, it has been proposed that legal aid will be retained for family mediation in private family law including private law children and family proceedings and ancillary proceedings. It is also proposed that that where a client enters mediation a fixed amount of legal help (equated to £150 of work) will be made available to facilitate the input of a solicitor in providing advice during mediation and formalising any agreement made. In England and Wales, it has been suggested that ADR provides savings of around £10m to the family budget. The use of ADR including mediation and collaborative law has also been endorsed by the Family Justice Review Team in England and Wales in its interim report. This Review suggests that attendance at dispute resolution should not be compulsory but should aim to become the normality.

In the Republic of Ireland, a comprehensive report and draft legislation covering Alternative Dispute Resolution has been published by the Law Commission. It is suggested that there is a strong economic case for the use of ADR as the Government spends €300m on litigation costs and associated legal expenses. The Law Commission recommends a statutory framework for specific forms of ADR and recommends that participation in the mediation process is voluntary.

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<sup>34</sup> Australian Government Attorney -General's Department "Strategic Framework for Access to Justice in the Federal Civil Justice System September 2009, pg 40

In Australia, Family Dispute Resolution has been well established and this was supported by the establishment of Family Dispute Resource Centres, a telephone helpline and website. In Australia, the FDR process is compulsory. When a person is applying for a parenting order, they must first attend FDR and obtain a certificate to confirm an attempt at FDR was made. However there are exceptions to the compulsory requirement to attend FDR, in instances of family violence, child abuse or urgency.