

MEDIATION AND CHARITIES: FRUSTRATED DESIRES

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INTRODUCTION

It has long been recognised that litigation is bad for you. It is particularly bad for charities. As Robert Walker J pointed out in *British Diabetic Association v Diabetic Society*:³ 'Even for a lawyer it is a difficult mental feat to recognise this very expensive litigation as helping the diabetics whose subscriptions will be the ultimate source of payment of the lawyers' bills.'

In recent years, however, there have been considerable efforts to encourage those in dispute to use alternative methods of dispute resolution.⁴ Alternative Dispute Resolution (ADR) covers a very wide spectrum of procedures but the most common are probably arbitration and mediation; mediation being a consensual process by which parties are encouraged to reach a settlement as opposed to arbitration where a third party makes a binding decision. There is general consensus that ADR is good and should be encouraged.⁵ Unfortunately, there is

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³ [1995] 4 All ER 812, 816.

⁴ See, eg., Lord Chancellor's Department, *Alternative Dispute Resolution – a discussion paper* (London: Lord Chancellor's Department, 1999), the text at n 11 below and M.Partington, 'Alternative Dispute Resolution: Recent Developments, Future Challenges' [2004] *CLQ* 99.

⁵ See text at n 27 below.

also general consensus that methods of ADR, although increasingly available, are not being used.⁶

The Charity Law Unit in the Liverpool Law School in 2001-2002 carried out a major research project⁷ into disputes in the charitable sector to try to ascertain not only what types of disputes charities became involved in and why but also what types of ADR were used by charities to seek to resolve those disputes.⁸ Charities were found to be far from unique in recognising the value of ADR but making little use of the facilities available. The research did, however, provide some very useful lessons⁹ both as to means of avoiding disputes in the first place and ways of encouraging the use of ADR to seek to settle disputes; lessons that could well be of benefit to all charities.

ADR WITHIN THE CIVIL JUSTICE SYSTEM

Concern with charity disputes can be located within a wider context of the Woolf reforms to the civil justice system in England and Wales. One significant element of the reforms is a growing interest in the role that ADR can play as a means of keeping disputes out of the courts. The introduction of the Civil Procedure Rules (CPR) has raised the profile of ADR by putting a duty on the courts to encourage the use of ADR in appropriate cases and to facilitate such use as one element of case management.¹⁰

A Discussion Paper on ADR, published by the Lord Chancellor's Department (now the Department for Constitutional Affairs) in 1999, began by noting:¹¹

'For most people, most of the time, litigation in the civil courts, and often in tribunals too, should be the method of dispute resolution of last resort.'

⁶ See, eg, H. Genn, *Court-based ADR Initiatives for Non-family Civil Disputes: The Commercial Court and the Court of Appeal*, Research Series 1/02, (London: Lord Chancellor's Department, 2002).

⁷ The research was funded by the Economic and Social Research Council (Reference no R000223526).

⁸ See D. Morris, *Disputes in the Charitable Sector* (Liverpool: Charity Law Unit, 2003).

⁹ See text at n 83 *et seq* below.

¹⁰ CPR, rules 1.4 and 26.4.

¹¹ Lord Chancellor's Department, *Alternative Dispute Resolution – a discussion paper* (London: Lord Chancellor's Department, 1999).

Taking this a step further in March 2001, the Lord Chancellor pledged¹² that, in future, with the aim of leading by example, all government departments and agencies will use ADR in all suitable cases, whenever the other party accepts it.¹³ The most recently published annual monitoring report on the effects of the pledge reveals that in the financial year 2003-04, ADR was used¹⁴ in 229 of the government's cases, estimating savings of over £14.6 million.¹⁵

For some types of dispute, specific pre-action Protocols exist to set out the steps parties are expected to take before issuing court proceeding. For all other types of disputes parties are expected to follow the Practice Direction on Protocols, which requires parties to a potential dispute to follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation.¹⁶ Although ADR is independent of the court system, a judge can recommend that parties involved in litigation enter into it. The court may also impose cost sanctions if it decides that one or more of the parties has been unreasonable in refusing to attempt ADR.

In *Cowl v Plymouth City Council*,¹⁷ concerning the closure of a residential care home, Woolf LCJ, restating his commitment to the paramount importance of avoiding litigation wherever possible, said that the courts should use their powers under the CPR to ensure that disputes between public authorities and members of the public were resolved with the minimum involvement of the courts. In an indirect criticism of the lawyers involved, he said:¹⁸

'Today sufficient should be known about alternative dispute resolution to make the failure to adopt it, in particular when public money is involved,

¹² Lord Chancellor's Department, *Government Pledges to Settle Legal Disputes Out of Court*, Press Release 117/01, 23 March 2001.

¹³ However, whilst in *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (Ch) a government body was held to its pledge and its failure to mediate was regarded as a serious matter by Lewison J, in *Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday* [2004] EWCA (Civ) 576, the Court of Appeal considered that Lewison J had been wrong to attach such weight to the ADR pledge.

¹⁴ Of these, 79 per cent concluded with settlement without recourse to a hearing.

¹⁵ Department for Constitutional Affairs, *Report for the period 2003/04. Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution (ADR)* (London: DCA, August 2005).

¹⁶ CPR Practice Direction – Protocols, para 4.2.

¹⁷ [2001] EWCA Civ 1935.

¹⁸ *ibid* at [25].

indefensible. This message was reinforced more recently by Ward LJ in *Burchell v Bullard*¹⁹ when he said: 'The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.'

Following closely on the heels of *Cowl*, the Court of Appeal refused a winning party any award of costs in its favour, on the basis that it had ignored a strong suggestion to resolve matters by the use of ADR. Brooke LJ warned:²⁰

'If [lawyers] turn down out of hand the chance of alternative dispute resolution when suggested by the court ... they may have to face uncomfortable costs consequences.'

Whilst judges will accept valid reasons for not wanting to proceed with ADR²¹ these reasons must be fully justifiable if the party wishes to avoid a potential cost penalty. In the conjoined appeals of *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday*²² the Court of Appeal focussed on this issue of what are justifiable reasons for refusing to agree to ADR. The Court of Appeal held that the courts will not refuse costs to a successful party unless the unsuccessful party proves that the successful party acted *unreasonably* in refusing to agree to ADR.²³ The Court of Appeal set out a non-exhaustive list of factors which may be relevant to the question of whether the refusal to mediate was reasonable:²⁴

- the nature of the dispute;
- the merits of the case;
- the extent to which other settlement methods have been attempted;

¹⁹ [2005] EWCA Civ 358 at [43]

²⁰ *Dunnett v Railtrack plc (in railway administration)* [2002] EWCA Civ 303 at [15].

²¹ See, eg, *Hurst v Leeming* [2002] EWHC 1051 Ch.

²² [2004] EWCA (Civ) 576, approved in *Burchell v Bullard* [2005] EWCA (Civ) 358.

²³ Reflecting the importance of this decision, the Court of Appeal received submissions from the Law Society, the Civil Mediation Council, the ADR Group and the Centre for Effective Dispute Resolution.

²⁴ Where a party seeks to show unreasonable refusal to participate in ADR through 'without prejudice' letters, the court is unlikely to look at them unless they were expressly marked, 'without prejudice, save as to costs' (a Calderbank offer). See now *Reed Executive plc and Others v Reed Business Information Ltd and Others* [2004] EWCA (Civ) 887.

- whether the costs of the ADR would be disproportionately high;
- whether any delay in setting up and attending the ADR would have been prejudicial; and,
- whether the ADR had a reasonable prospect of success.

The Court of Appeal also made it clear that, while courts should encourage parties to consider settlement of their dispute through ADR, they could not oblige the parties to mediate. This would be a breach of the parties' right of access to justice, contrary to article 6 of the European Convention of Human Rights.²⁵ The Court of Appeal also recognised the consensual nature of ADR, which is fundamental to its success.

This case, however, should not be seen as reducing the need on the part of litigators to embrace ADR. For example, Dyson LJ noted:²⁶

Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.

Judges are also taking the opportunity to extol the virtues of ADR extra-judicially. Lightman J recently listed nine reasons (including fallibility of judges!) why litigation should be the course of last resort if any reasonable alternative is available.²⁷

Judiciary, court staff and representatives of mediation providers have established ADR schemes at a number of county courts and the Court of Appeal, tailored to their courts for civil, non-matrimonial cases.²⁸ In November 2003, government minister David Lammy announced the development of 40 monitored court mediation schemes around the country - testing different models of interaction

²⁵ See, however the text at n 31 below.

²⁶ [2004] EWCA (Civ) 576 at [11].

²⁷ Lightman 'Litigation: the last resort' [2004] NLJ 185.

²⁸ See, eg, S. Prince, *Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court – A Report Prepared for the Civil Justice Council*, March 2004.

between mediation and the courts.²⁹ These pilots, with a budget of £1.5 million, have taken three forms: awareness raising through publicity; court based advice service;³⁰ and, running at least one 'opt-out' mediation scheme, with parties required to attend mediation or provide the court with reasons why they do not wish to proceed with mediation – the Automatic Referral to Mediation scheme (ARMS).³¹ In March 2005, a National Mediation Helpline, run by the Civil Mediation Council and supported by the Department for Constitutional Affairs, was officially launched.³² It provides a single telephone point of contact for anybody who wants to arrange a mediation appointment. It is designed to provide a service for those courts where a court-based scheme is neither practical nor cost effective.

The government White Paper on reform of tribunals³³ has, as one of its key elements in the reform of administrative justice, 'proportionate dispute resolution'.

ADR is now being promoted in many traditional areas of litigation and there is some evidence to suggest that, since the introduction of the CPR in April 1999, there has been a rise in the number of cases in which ADR is used. After a substantial rise in the first year following the introduction of the CPR, there has been a levelling off in the number of cases in which ADR is used.³⁴

²⁹ David Lammy MP, Parliamentary Under-Secretary at the Department for Constitutional Affairs, Speech on key issues for Government. Centre for Dispute Resolution Conference: The First Mediators' Congress, QEII Conference Centre, Westminster, London, 20 November 2003.

³⁰ For example, a Desk Officer funded by the DCA (who has been trained specifically for her role by Centre for Effective Dispute Resolution) is now available in Manchester County Court to advise parties and lawyers about how to refer cases to mediation through the Manchester Law Society Scheme. See CEDR news, 25 February 2004 at www.cedr.co.uk/index.php?location=/news/archive/20040224.htm (last visited 7 September 2005).

³¹ See CPR Practice Direction – Pilot Scheme for Mediation in the Central London County Court which provided for such a scheme to operate from 1 April 2004 to 31 March 2005. This was similar to the pilot scheme in Ontario, Canada, conducted in the courts in Toronto and Ottawa, which has received favourable evaluation; RG. Hann and C. Baar with L. Axon, S. Binnie and F. Zemans, *Evaluation of the Ontario Mandatory Mediation Program* (Rule 24.1): Final Report - The First 23 Months, March 12, 2001.

³² See www.nationalmediationhelpline.com (last visited 7 September 2005).

³³ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243 (London: Department for Constitutional Affairs, 2004) ch 2.

³⁴ Lord Chancellor's Department, *Further Findings. A continuing evaluation of the Civil Justice Reforms* (London: Lord Chancellor's Department, August 2002) para 4.5.

When offered as an option to disputing parties, ADR is often rejected.³⁵ In Genn's study of a mediation scheme piloted in Central London County Court in 1996, only around five per cent of those who were offered the option chose to take it up.³⁶ Her later review of the ADR scheme in the Commercial Court and the Court of Appeal, Civil Division, commissioned by the Lord Chancellor's Department, also confirms that voluntary take-up of invitations to enter ADR schemes remains at a modest level, even when the mediator's services are provided free or at a nominal cost.³⁷ Emerging evidence from evaluation of the pilot Automatic Referral to Mediation scheme (ARMS) in the Central London County Court³⁸ shows that the majority of cases (80% between May to October 2004) have sought to opt-out of mediation.³⁹ Various explanations have been offered for the rejection of ADR stressing some reluctance and misperceptions of ADR amongst legal advisers, a general lack of awareness amongst potential users or simply the desire of the parties to have their day in court.

CHARITIES AND ADR

Charities are encouraged to use ADR by both the judiciary and the Charity Commission. Encouragement takes the form not only of exhortation to have due regard to the reputation of charities and the expense of litigation but also specific direction to use ADR. This encouragement is backed by a number of facilities for ADR specifically designed for and available to charities. These facilities are in addition to those available generally to anyone involved in a dispute.

The National Trust became involved in litigation when huntsmen and tenant farmers sought judicial review of a decision of the council of the Trust to end deer-hunting with hounds on National Trust land. In the course of his judgment, Robert Walker J said:⁴⁰ 'It is most regrettable that this very expensive and time-consuming

³⁵ See text at n 14 above.

³⁶ H. Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98 (London: Lord Chancellor's Department, 1998).

³⁷ H. Genn, *Court-based ADR Initiatives for Non-family Civil Disputes: The Commercial Court and the Court of Appeal*, Research Series 1/02, (London: Lord Chancellor's Department, 2002).

³⁸ See text at n 31 above.

³⁹ H. Genn, *Solving Civil Justice Problems. What might be best?* Scottish Consumer Council Seminar on Civil Justice, 19 January 2005.

⁴⁰ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 719.

litigation should have occurred between the two groups both of which (whatever has been said in the heat of controversy this week) share many admirable aims'.⁴¹

A wider view of the cost of disputes⁴² and litigation was taken by Lightman J in an application to the court following decisions by the council of the Royal Society for the Prevention of Cruelty to Animals to seek to adopt a policy of barring certain people from membership. Considering the proposed policy, Lightman J said:⁴³ 'That public image and reputation must be of crucial importance to the success of the Society, in particular, in respect of its activities and its attraction of support (financial and otherwise).'

The case of *Muman v Nagasena*⁴⁴ concerned a dispute about occupation of a Buddhist temple used by the Ambedkar International Mission, a charity, which went to the Court of Appeal. Mummery LJ showed his concern about the use of charity funds for litigation when he said:⁴⁵ 'In this case very substantial funds have been spent on litigation without achieving a result. The spending of money on this kind of litigation does not promote the religious purposes of the charity.'

This condemnation of the use of charity assets for litigation was followed by a direction that the proceedings be stayed and that the stay should not be lifted until after an attempt had been made by both parties to resolve the dispute by mediation. To encourage mediation, the parties were given details of the mediation scheme run jointly by the Centre for Dispute Resolution and the National Council for Voluntary Organisations.⁴⁶

The Charity Commission similarly exhorts charities to consider carefully their impact on potential beneficiaries, stakeholders and the public. In the view of the Commission, one of the hallmarks of an effective charity is that it uses its resources so as to optimise its potential.⁴⁷ The Commission takes a pro-active approach to avoiding the expense of litigation by recommending that all contracts

⁴¹ See the comments of the same judge at text at n 3 above.

⁴² The cost of an average employment discrimination case to a charity, including the impact of negative PR, has been estimated to be £75,000, L. Laurance and A. Radford, *You're not listening to me!* (London: NCVO Publications, 2003) 16.

⁴³ *Royal Society for the Prevention of Cruelty to Animals v Att Gen* [2001] 3 All ER 530, 551.

⁴⁴ [1999] 4 All ER 178.

⁴⁵ *ibid*, 184.

⁴⁶ See text at n 53 below.

⁴⁷ See CC 60, *The Hallmarks of an Effective Charity* (London: Charity Commission, 2004).

between public bodies and charities should include a provision for resolving contractual disputes and that a form of ADR is used. This approach is supported by a statement that the payment of the reasonable fees of a dispute resolution service is justifiable if it is likely to avoid litigation with its attendant cost and disruption.⁴⁸ The Commission also takes a pro-active approach in relation to internal charity disputes. It recommends that trustees of charities with a membership structure consider whether a clause stating that disputes should go to mediation is appropriate for their charity.⁴⁹

In its advice to those who have complaints against charities,⁵⁰ the Charity Commission specifically draws attention to alternative means of dispute resolution. The benefits of mediation are set out as are sources of further information, including the Charity Law Unit's report on 'Disputes in the Charity Sector' and details of providers of mediation services. This encouragement for charities to use ADR is supported by the major umbrella body for the voluntary sector, the National Council for Voluntary Organisations (NCVO). Stuart Etherington, NCVO Chief Executive, has said:⁵¹

Mediation is an excellent way of dealing with disputes before they threaten to affect the day-to-day work of an organisation. With the cost of an ongoing dispute often running into thousands of pounds and the subsequent negative publicity that it can generate, mediation offers a flexible, cost effective and successful outcome in the majority of cases.

The proposal for a Charity Appeal Tribunal in clause 8 of the Charities Bill to deal with appeals from decisions of the Charity Commission might appear at first sight to be an encouragement to litigation by charities. There is, however, no general right of appeal; appeals are restricted to the particular decisions specified in the

⁴⁸ See CC 37, *Charities and Contracts* (London: Charity Commission, 2003) para 40.

⁴⁹ See RS 7, *Membership Charities* (London: Charity Commission, 2004). See also the proposal in the Consultation Paper on the Queensland Association Incorporation Act 1981 that the Act should require associations to have a dispute resolution procedure in their rules - [www.fairtrading.qld.gov.au/OFT/OFTWeb.nsf/AllDocs/C5F65928C5396FF24A256FB00005C9D4/\\$File/AI_consult_paper_V2.pdf](http://www.fairtrading.qld.gov.au/OFT/OFTWeb.nsf/AllDocs/C5F65928C5396FF24A256FB00005C9D4/$File/AI_consult_paper_V2.pdf)

⁵⁰ See CC 47, *Complaints and Charities* (London: Charity Commission, 2003) para 18 *et seq.* See also RS 7, *Membership Charities* (London: Charity Commission, 2004) 8, 24.

⁵¹ NCVO Press Release, *Commission endorse NCVO publication on mediation* (30 September 2003).

legislation. In the course of evidence to the Joint Committee on the Draft Bill⁵² the Minister, Fiona Mactaggart, emphasised that any disputes relating to maladministration should continue to be dealt with by the Commission's Independent Complaints Reviewer and that that was the preferred method of resolving disputes with the Commission.

There are ADR facilities available which are specifically designed for charities. The NCVO together with the Centre for Effective Dispute Resolution (CEDR) have offered a mediation service for charities since 1999. The service is supported by the Active Community Directorate of the Home Office and offers a five-hour mediation session with fees graded to the size of the charity.⁵³ For disputes between charities and government departments, for example in relation to funding,⁵⁴ there is the Compact Mediation Scheme.⁵⁵ This Scheme gives effect to the statement in the Compact on Relations Between Government and the Voluntary Sector and Community Sector in England itself that 'mediation may be a useful way to reach agreement, including seeking the views of a mediator'.⁵⁶ In addition to ADR schemes open to all charities, ADR facilities are available, usually provided by umbrella bodies, for specific types of charity. For example, ACCORD is a dispute prevention and resolution service available to Age Concern, which will provide advice and ADR services to Age Concern organisation, groups and Age Concern England.

Charities can, of course, like anyone else involved in a dispute, avail themselves of general ADR facilities. The services of the Association of Northern Mediators,⁵⁷ for example, are available just as much to a charity involved in a dispute with one of its suppliers as to a profit making business. If a dispute does progress to legal

⁵² Report of the Joint Committee on the Draft Charities Bill (2004) HI paper 167-1, HC 660-1, para 226.

⁵³ For details see www.cedrsolve.com (last visited 7 September 2005). The CEDR has published several model documents concerning dispute resolution provisions and procedures, which can be downloaded from its website.

⁵⁴ The move from grants to contracts for funding charities has increased the possibility for disputes and the need for settlement mechanisms, see D. Morris 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities?' in A. Dunn (ed) *The Voluntary Sector, the State and the Law* (Oxford: Hart Publishing, 2000) 123 *et seq.* and the sources cited therein.

⁵⁵ See www.thecomcompact.org.uk (last visited 7 September 2005).

⁵⁶ Home Office, *Getting it Right Together. Compact on Relations between Government and the Voluntary and Community Sector in England* Cm 4100 (1998) para 14.

⁵⁷ For details see www.northernmediators.co.uk (last visited 7 September 2005).

proceedings, charities can use one of the mediation schemes now established at some county courts.⁵⁸

THE RESEARCH

Given the sensitive nature of the subject matter, information relating to charitable disputes often remains undisclosed. The aim of the Charity Law Unit research, therefore, was to gain a better perception of the frequency and subject of disputes in the charitable sector in England and Wales. In particular, it sought to identify the commonest types of dispute and the different ways (including specific forms of ADR) with which they are dealt. It was also hoped that the research would raise the profile of the importance of ADR services for charities, thereby reducing the costs of disputes for charities.⁵⁹

The year-long empirical study involved discussing, through both semi-structured interviews and group discussion, issues of conflict resolution within the charitable sector with those who had specialist knowledge of this area. It was decided in the early stages of the design *not* to approach charities that had actually been in dispute, because of worries that sample size⁶⁰ and poor response rate would have added cost rather than value to the research, and that charities, concerned about the public perception of the charitable sector, might have proved reluctant to talk about disputes, raising questions of validity over any information obtained. The sample consisted of 23 organisations and individuals. These were made up of: umbrella and resource bodies that come into contact with organisations in conflict, often in an advisory capacity; dispute professionals; and, charity sector consultants. These bodies had a breadth of experience of a range of disputes and conflict within the charitable sector across a wide geographical spread. Part of the study involved interviewing, at some length, key personnel within these organisations, at both an early and later stage in the study. Interviewees were asked a broad range of semi-structured questions designed to address the different issues that had been identified. These included:

- the causes of conflict in the charitable sector;

⁵⁸ See <http://www.dca.gov.uk/civil/adr/index.htm> (last visited 7 September 2005) and text at n 29 above.

⁵⁹ This has been partially achieved by the Charity Commission drawing attention to the research in its publication on charity disputes. See text at n 50 above.

⁶⁰ At the end of June 2005, there were 167,022 'main' charities on the Charity Commission register. www.charity-commission.gov.uk/registeredcharities/factfigures.asp (last visited 7 September 2005).

- factors which make the disputes worse;
- how frequently problems arise;
- how problematic conflict is in the charitable sector;
- how formal the process is and whether disputes are dealt with differently if they are internal or external;
- what forms of dispute resolution are presently being used in the sector;
- the utilisation of third parties in the conflict resolution process; and,
- the identification of certain types of ADR as being more effective for particular types of disputes.

Another element of the research was a joint discussion of several interviewees, with a view to clarifying and building upon data already gathered in order to provide a more focussed and detailed level of information.

The initial interviewees were identified through the researchers' existing contacts. Information gleaned at an early stage in the research was then used to identify 'second stage' interviewees through the process of snowball sampling.⁶¹ Unless the interviewee objected, all interviews were recorded and later transcribed. The same researcher undertook all the interviews. This high level of consistency between each interview helped to ensure that the information obtained was of a uniform and reliable nature.

Analysis of the empirical data allowed a typology of charity disputes to be developed. As for the identification of triggers and exacerbators, it proved impossible to separate out factors which suggest why disputes happen (triggers) from those which help to explain why disputes escalate (exacerbators). This was because of a high degree of overlap between the two; many triggers were also found to be exacerbators and vice versa. Factors were therefore broadly categorized and even within these broad headings, there were many overlaps; individual triggers and exacerbators are often intertwined in one dispute and impossible to separate. The type and forms of third party involvement in charitable disputes were also identified and categorised.

⁶¹ This is often used as research tool to access hidden and hard to reach populations. See, eg., K. Browne, 'Snowball Sampling: Using Social Networks to Research Non-heterosexual Women' (2005) vol 8, no 1, *International Journal of Social Research Methodology* 47.

THE RESEARCH FINDINGS

Dispute typology

Careful analysis of the data derived from interviews and further checking with the group of interviewees allowed for the determination of a general typology of disputes to assist in the consideration of ADR within the research project and future research. The research provisionally categorised disputes into general disputes and those which are specific to charities. The research found disputes of a general nature falling within the following categories: employment disputes; other contractual disputes; intellectual and real property disputes; and, estate or legacy disputes. Charity-related disputes were found to concern: funding; charity law; and membership.

General employment law disputes, such as unfair dismissal claims, were a constant theme raised at every stage of the research. A typical comment from an interviewee was:⁶² 'Perhaps most common is the dispute between the individual and the charity employer in terms of employment issues'. This matched earlier research findings which suggest that charities were twice as likely as other employers to become involved in employment disputes.⁶³

A number of high profile intellectual property disputes concerning charity names back up the research findings which suggest that intellectual property disputes are a common area of concern for charities. Such disputes often concern a charity and a commercial organisation. For example, in the past, the British Legion⁶⁴ and Dr Barnardo's Homes⁶⁵ have succeeded in passing off actions against commercial organisations. In 2001, the World Wide Fund for Nature, a charity, successfully sued the World Wrestling Federation for breaking an agreement that the two parties had reached in 1994 over the use of the initials WWF.⁶⁶ Other charities that have been too slow to register their domain name, have failed to renew their registration, or have otherwise had their rights to a domain name disputed, include

⁶² Interview ID M.

⁶³ I. Cunningham, 'Sweet Charity! Managing employee commitment in the UK voluntary sector' (2001) 23(3) *Employee Relations* 226.

⁶⁴ *British Legion v British Legion Club (Street) Ltd* (1931) 48 RPC 555.

⁶⁵ *Dr Barnardo's Homes: National Incorporated Association v Barnardo Amalgamated Industries Ltd & Jack Bernadout* (1949) 66 RPC 103.

⁶⁶ *World Wide Fund for Nature (formerly World Wildlife Fund) (WWF) v World Wrestling Federation Entertainment Inc* [2002] EWCA Civ 196.

the National Deaf Children's Society (NDCS) and British Heart Foundation.⁶⁷ More unusually, in the case of *British Diabetic Association v Diabetic Society Limited*⁶⁸ a registered charity had to resort to an expensive action in passing off against another (unregistered) charity in a bitter legal battle which necessarily led to a substantial financial drain on the cause that they both represented.⁶⁹

Analysis of the interviews and other data showed that charity funding was a frequent source of dispute. Disputes may arise with funders when charities do receive funding⁷⁰ and also when they do not.⁷¹ The research found that inappropriate use of funds may well be raised as an internal matter (by members for example) where funds are being applied outside a charity's objects.

Under the broad heading of charity law, interviewees raised many sources of conflict relating to the alleged (mis)use of a charity's powers or the engaging in activities which were outside a charity's objects. For example, interviewees reported that some religious charities were spending money on support abroad when their objects were to support adherents in this country.

The research also discovered that membership disputes were quite common. These often focus on a charity's governing documents and an interpretation thereof. Interviewees raised issues such as: who can and cannot be members of a charity; how broad should membership be; and, how can a charity find ways of excluding certain individuals.⁷² It was noted that wide membership policies can cause conflict later when memberships split into factions:⁷³ 'People start challenging membership criteria, who is a member, who has a right to vote, etc. Democracy can be a double-edged sword.' The research also found that conflict can occur between the members and the trustees where democratic processes are not followed. A common theme was concern over Annual General Meetings not

⁶⁷ 'Charities fight porn owner for web name' *The Times* 18 July 2002.

⁶⁸ [1995] 4 All ER 812.

⁶⁹ See D. Morris, 'What's in a name? – The cost to a charity of protecting its name' [1996] *Charity Law & Practice Review* 1.

⁷⁰ See text at n 54 above.

⁷¹ A charity even attempted (unsuccessfully) to seek judicial review of the decision by a funder not to award it a capital grant; *R (on the application of Asha Foundation) v Millennium Commission* [2002] EWHC 916.

⁷² See, eg, text at n 43 above and RS 7, *Membership Charities* (London: Charity Commission, 2004).

⁷³ Interview ID Q.

being held or appropriately advertised. Similarly, a recurring issue was that of poor conduct surrounding elections for officers.⁷⁴

Another finding of the research was that internal disputes between trustees of religious charities and members of the congregation relating to religious or spiritual matters have, unfortunately, become familiar in recent times.⁷⁵

Triggers and exacerbators

The research showed a wide variety of factors which caused disputes (triggers) and which caused disputes to escalate (exacerbators). Contrary to the initial hypothesis, these factors did not fit neatly into one category or the other. The research found evidence of the following triggers and exacerbators: (poor) change management; (poor) employment practices; lack of clarity; outsiders' intervention; dominant personalities/ personal agendas; skills deficit; the way a grievance is handled; and, particular types of charities.

Lack of clarity was raised as a constant backdrop to dispute. The main uncertainty which the research revealed relates to roles and responsibilities, in particular, what is the dividing line between the role of the trustees and that of the paid staff? One interviewee summed up the problems in this area:⁷⁶

I don't think it's as simple as saying that trustees don't know how to be trustees – which is often true – but it is often equally true that paid staff as a whole don't know how to provide trustees with appropriate levels of information with which to involve them in a strategic sense, in the way that they ought to be involved.

Inability to define roles also extends to lack of individual job descriptions for paid staff, volunteers and even independent contractors, such as fund-raisers. The research found that badly drafted governing documents can cause much confusion, and can allow people to interpret them to suit their own ends, causing further conflict. Failure to include appropriate clauses to deal with disputes when they arise, for example, clauses relating to the removal of trustees or members, also causes problems later.

⁷⁴ A public example is the use by the chairman of the National Trust of his proxy votes to ensure the election of pre-selected candidates, regardless of the votes of the membership, which sparked debate in the House of Lords in November 2001. HL Deb vol 628, part no 43, col 424-448 12 November 2001.

⁷⁵ See, eg, text at n 44 above.

⁷⁶ Interview ID M.

One interviewee, commenting on a current dispute, noted positively for the future:⁷⁷

“when we eventually get [this charity dispute resolved], we are going to re-jig the governing document. The first thing that I am going to suggest going in is some sort of dispute resolution clause, which will pull in local independent bodies, like the Commission for Racial Equality, or somebody that will be there to deal with a dispute or a disagreement in the future.”

Another theme to arise from the research was the existence of dominant personalities and personal agendas. Individuals may found or join a charity to protect their own interests, to exert power, or to promote their own political points of view. This was raised as a particular problem in black and minority ethnic (BME) charities, where homeland politics can divide the membership into camps, creating power struggles between leaders of different factions. However, it was found that this is not a problem exclusive to BME charities.

Many problems seemed to arise as a result of lack of knowledge. In the experience of the interviewees skills deficit on the part of trustees leads to poor governance. The research found that paid staff often work without professional advice and this is particularly evident when it comes to advice on personnel matters - ‘that’s probably the biggest area that I think the sector needs some help with’.⁷⁸ It was also found that, even where professional advice is sought, for example, from consultants, problems often arise as a result of *their* lack of understanding of the charitable sector.

Particular types of charities were found to be more susceptible to being involved in disputes or would be less well able to handle disputes, than others. These include: emotive charities, for example, animal charities and self-help groups where the values and principles of a charity can be central to the conflict – ‘the old problem of the emotion that goes with the cause’;⁷⁹ charities with memberships; charities that are members of an umbrella body; charities that are run by and then employ family members and friends; small charities; newly established charities; and, those where trustees or members of charities cannot meet very often due to geographical restraints.

⁷⁷ Interview ID A.

⁷⁸ Interview ID R.

⁷⁹ Interview ID E.

Methods of dispute resolution

The research sought to find out who gets involved in helping charities to resolve disputes and what they do. The interviews highlighted the common involvement of third parties in disputes. This shows that a broad spectrum of third parties are being called upon to help in solving charity disputes, from umbrella and resource bodies to third party professionals such as local councillors or trade union members.

The nature of third party involvement ranged from informal ADR processes such as proximity talks or team building days, to formal ADR processes such as mediation. It seems that the larger (and sometimes more commercial-style) charities tend to go for more formalised procedures for dispute solving. Charities that are opting for a more formal ADR process tend to favour mediation over arbitration. Charities generally regard the latter as very similar to court proceedings. Advocates of mediation see it as fitting better with their charity's vision and values.

An interesting finding from the research was that one way of informally resolving disputes was simply implementing policies and procedures. Using this method, third parties who are brought in to assist with dispute resolution may well simply ask the parties in dispute to ascertain what their policies and procedures are. They may be asked to look at: staffing policies; financial control policies; policies for appointments; policies for board membership; or, job descriptions for board members. Sending the parties back to their own policies and procedures helps them to understand their own roles and responsibilities and the frameworks within which they operate. If charities have not got such policies and procedures in place, then they may well need to develop them. If they have got them in place and they are not working, they may need to review and revise them and try to find ways around their problems. There are obvious advantages to this approach and these were illustrated by one interviewee:⁸⁰

Typically the cases that get settled as a result of litigation tend to be just 'money to go away'. There is no real guarantee of any long lasting change. Mediation or conciliation should offer the prospect of building in more stuff about changing policies or providing training and actually meaning it. It seems more likely that that's going to have an affect.

Apart from employment disputes, which often went to dispute professionals such as the Advisory, Conciliation and Arbitration Service (ACAS), the findings show no link between the type of dispute and the type of ADR which is or should be

used to resolve it. However, the research suggests that there is a link between the type of dispute and the type of third party who is approached to resolve it. Professional dispute specialists (who may well work within and without the charitable sector) are more likely to get involved in mediation for external-type disputes, for example, where there are conflicts between two charities. Conversely, organisations working solely within the charitable sector seem to deal with issues of internal controls and best practice, although it also appears that they are often working without any guidance.

It was found that many charities do not use ADR because they do not know what help is available. This was neatly encapsulated in one comment by an interviewee:⁸¹

'My suspicion is that an awful lot of people in the voluntary sector don't know that [ADR] exists and, therefore, don't think it's an option and I think there is a lot here [to be done] about marketing in its broadest sense.'

The research also revealed, encouragingly, that many individuals do not take their disputes with charities any further because they do not want charities to incur costs on disputes as they care too much about the cause and would not want to deplete charitable funds in that way. As one interviewee put it,⁸² *'bringing the charity into disrepute is a major sin in our membership scheme.'*

LESSONS LEARNT FROM THE RESEARCH

Consideration of the research overall produced a number of lessons which are of potential use to charities. Some of the lessons are directed at the prevention of disputes whilst others provide guidance for the more effective resolution of disputes. Many of the lessons confirm and support work that is already being undertaken by umbrella bodies and advisers in the charity sector.

A number of lessons to be drawn from the research can be gathered under the general heading of 'prevention is better than cure'. Good governance systems and practice can prevent disputes arising or provide mechanisms to prevent disputes escalating. This approach is actively encouraged by, amongst others, the Charity

⁸¹ Interview ID H.

⁸² Interview ID C.

Commission⁸³ and the NCVO.⁸⁴ Good governance is, however, only fully effective to prevent disputes if it is kept up to date and in accordance with best practice; the maintenance of good governance is an on-going process. In particular, the research highlighted the need for charities to carry out a 'legal health-check' every five years, say, of their governing documents. The research also showed that if hard decisions had to be made they should be made quickly, for example, dealing with a member of staff at the root of a conflict.

The potential for disputes is greatly reduced if there is a clear distinction between the strategic issues, which are matters for the trustees, and management and operational decisions which are the responsibility of paid staff, in particular, the Chief Executive. Whilst this is a clear lesson from the research, its practical application is far from easy, as the work of the Association of Chief Executives of Voluntary Organisations⁸⁵ (ACEVO) has shown.

Employment related disputes are a particular problem for charities.⁸⁶ In addition to paying attention to clarifying the status of employees and volunteers, the research raised the suggestion of umbrella bodies retaining the services of a human resources consultant who could then provide advice to charities as necessary on a fixed fee basis.

A strong theme that came through the research was the need for support, both internally and externally, if disputes were to be avoided or dealt with effectively. Many charities, particularly smaller ones, felt that there was little support in times of conflict and this suggests a greater role for umbrella and resource bodies. An important lesson for charities potentially involved in a dispute was the need to keep open channels of communication at all times.

The research showed that many disputes would not have arisen if charities had had greater knowledge of legal matters relating to their activities. Support in the form of legal and practical information is available, for example, from the Charity Commission or the NCVO but this is clearly not reaching charities on the ground. Support is also available from third parties, for example, professional advisers although the research showed a need for such third parties to have a better understanding of the charity sector. Whilst the research revealed a perception that

⁸³ See CC 60, *The Hallmarks of an Effective Charity* (London: Charity Commission, 2004); RS7, *Membership Charities* (London: Charity Commission, 2004)

⁸⁴ See, eg, *A Governance Code for the Voluntary and Community Sector?* (London: NCVO Publications, 2004) and other work of the NCVO Trustee and Governance Team.

⁸⁵ See, eg, *Rethinking Governance* (London: ACEVO, 2003).

⁸⁶ See text at n 63 above.

much greater support was needed, on objective analysis the major lesson to be learnt is that there must be much more effort placed on education and communication of the support that is already available.

The need for education is also the main lesson when the means to resolve disputes is considered. The research revealed a wide variety of sources of ADR⁸⁷ but limited use of those resources. The lesson from the research is that there is a need for greater awareness of the benefits of ADR not only by charities but also by lawyers and other advisers. There is an obvious tension between the inherent confidential nature of mediation and publicity of the benefits of its use but it is possible to raise the profile of mediation as the publicity surrounding the publication *You're not listening to me!*, a guide to mediation for voluntary organisations, showed.⁸⁸

CONCLUSION

The research has shown that charities are far from unique when it comes to disputes. They too easily become involved in disputes that lead to litigation and they fail to use facilities for ADR which are available. The position for charities, however, is improving as steps identified in the report are being taken to prevent disputes arising and moves are being made to highlight alternative means of resolving disputes.

The need for good governance systems and support for charities has now been recognised by Government which has funded the National Hub of Expertise in Governance (the Governance Hub).⁸⁹ Together with ACEVO, Charity Trustee Networks, Institute of Chartered Secretaries and Administrators (ICSA), NCVO and the Charity Commission, a Code of Good Governance⁹⁰ has been drawn up which, with its emphasis on the role of the Board, should help to prevent disputes. Within that Code, the Board is specifically charged with the task of dealing with and managing any conflicts that may arise within a charity.

⁸⁷ D. Morris, *Disputes in the Charitable Sector* (Liverpool: Charity Law Unit, 2003) 27 *et seq.*

⁸⁸ L. Laurant and A. Radford, *You're not listening to me!* (London: NCVO Publications, 2003).

⁸⁹ Part of the Home Office ChangeUp Initiative, see www.governancehub.org.uk (last visited 7 September 2005).

⁹⁰ www.governancehub.org.uk/?Getting_help_with_governance:A_Code_of_Governance_for_the_Voluntary_and_Community_Sector

Whilst there is some evidence that employment disputes in the charity sector may be on the increase,⁹¹ the problem has been recognised and a number of steps are being taken to make human resource expertise more easily available to charities. For example, an HR Leaders Club has been set up which will help to share best practice in the sector.⁹²

The adoption by the Charity Commission as part of its new strategy⁹³ of a commitment to sharing knowledge and working together across the sector goes some way to addressing the need for education and greater awareness of the benefits of ADR.

Conflicts involving charities will always be with us but the future for the prevention of disputes and the mediation of those moving towards litigation is brighter.

⁹¹ See, eg. 'Charities Fear Cost of Volunteers' Claims' *The Times* 31 January 2005.

⁹² See *Third Sector*, 20 July 2005, p 30.

⁹³ See *Charity Working at the Heart of Society. The Way Forward 2005-2008*, (London: Charity Commission, 2005).