# ALTERNATIVE DISPUTE RESOLUTION IN RIGHTS-BASED DISPUTES: MEDIATION IN BRITAIN TODAY

## Introduction

This article takes a selective and focused approach to the use of alternative dispute resolution (ADR) in the context of rights-based disputes within Britain. It draws on examples outside of Great Britain only where they illustrate the workings of the British system or provide an interesting comparator. It does not seek to offer a comparative perspective of all ADR competences of EU Member States as this is the subject matter of another expert paper published in this online volume, please refer to the article "Mediation as a tool for specialized equality bodies?" which provides a cross-comparative analysis of mediation competences.

## 1. Background and context

Interest in mediation has developed significantly within Britain over the past 20 years, brought about primarily by a significant review of the legal system in 1986 by Lord Woolf. Similarly, a number of significant changes in the law since then, notably the Civil Procedure Rules and the Access to Justice Act 1999 have all focused on the need to settle disputes prior to going to court. This has been further translated into practical necessity through a number of Court of Appeal cases which have demonstrated the willingness of the court to impose cost penalties on parties who have previously rejected mediation.[1]

Alternative Dispute Resolution or **ADR** is often the catchall term used to refer to methods in which parties can settle disputes without recourse to the law (where recourse to the law refers to formal court hearings). This type of dispute resolution is often termed in the 'shadow of the law' meaning that in most types of ADR if a complaint is not resolved by alternative means it can then be referred on to a tribunal or a court.[2]

Whilst the term ADR refers to a broad range of resolution options the three main 'methods' are **arbitration**, **conciliation** and **mediation**. Other types of ADR include ombudsman schemes similar to those found in some EU Member States and combined methods such as ***med-arb*** - a mix of both arbitration and mediation. This paper will concentrate solely on the three main areas used in Britain today. These are more defined than those definitions used by other EU member bodies as can be witnessed in other papers in this series. Furthermore, ADR in Britain is used almost solely in civil law disputes, although there are elements of ADR such as restorative justice within British criminal law and practice.[3]

ADR has been used in a broad range of sectors including the construction industry, urban planning decisions (including neighbourhood disputes), civil and commercial disputes, social welfare and family issues, as well as within the realm of restorative justice procedures.

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[1] See Dunnett vs Railtrack PLC 2002 and Frank Cowl & Others vs Plymouth City Council 2001 in DRC Brief 'Disability rights, casework and alternative dispute resolution' www.drc-gb.org/the_law/legal_commentary

[2] See Raymond and Ball (2004)

[3] An element of restorative justice can be mediation although this is not a remedy in itself nor can it be ordered compulsorily, it instead relies on the willingness of both parties, victim and perpetrator, to agree.

As mediation is arguably the more well known of the three ADR processes it is often used interchangeably (and somewhat confusingly) to describe the whole process. In fact there are a number of significant differences in the way that the various methods operate and are conceptualised in Britain and it is worth noting these from the outset so that these can be viewed on a comparative basis with the competences and ADR processes in other EU member states. An annex at the end of this document outlines the three methodologies comparatively, for ease of reference.

## 2. Development in practice: the three areas of ADR

The following is a brief outline of the three main areas of ADR. **Arbitration** refers to the process of resolving a dispute by the intervention of an independent third party. The arbitrator is neutral but reaches decisions on the dispute and these are binding in law meaning that neither party has recourse to the courts should they not agree with the outcome. It is a private process in which both parties pre-commit to having their dispute resolved by the impartial arbitrator, the result being final and legally binding.

This type of ADR is used mainly in international, corporate or commercial disputes as well as in employment and consumer rights areas. Decisions are made on the basis of the law, good practice and the application of reasonableness.[4]

**Conciliation** refers to a process of enabling two parties to resolve a dispute via the assistance of an independent third party**.** Like arbitration, the third-party or conciliator is impartial. It is a private but voluntary process, decided upon by both parties in which the outcome is non-binding. The exception here is in employment disputes where the outcome is binding. Likewise, whilst parties can agree for the outcome to be made into a binding document it is not obligatory to do so. The important point of note here is that the right to seek further redress cannot be compromised in the early stages through pressure to sign a binding document (this is designed to protect both parties' interests but particularly to protect the rights of vulnerable parties who may need extra time/assistance with the process). This occurs only later on in the process after an outcome has been agreed upon.

While remaining impartial the conciliator can take an active role in negotiating between parties, either via a shuttle approach over the telephone or in adjacent rooms, face to face or via written submissions somewhat like arbitration. This type of ADR can be used across a number of sectors including social welfare, employment and health care. The conciliation method used (such as shuttle or face to face) depends on the situation in which it is being applied. In Britain employment conciliation most commonly takes the shuttle approach whereas discrimination disputes (in non-employment matters) are more likely to be face to face, consumer matters on the other hand are more likely to be dealt with via submissions.

Finally, the term **Mediation** is often used interchangeably with conciliation (particularly in areas such as healthcare where for example the British National Health Service - The NHS - guidance uses both interchangeably), and there is still some difference of opinion about how they differ both theoretically and in practice. Perhaps the main difference is the level of involvement of the third-party, which in conciliation is more interventionist, and in mediation more facilitative. Mediation like conciliation involves an impartial third-party, however it is the parties not the mediator who decide the terms of the agreement. The mediator has a role rather in evaluating the feasibility of such terms and making suggestions or offering guidance.

[4] In Scotland the arbitrator is referred to as an arbiter

The process is voluntary and private with both parties agreeing the final decision. Like conciliation, the outcome is non-binding although parties can agree for this to be made into a court order called a consent order where proceedings have already been issued. A consent order allows for either party to apply to the court for enforcement should there be a breech of the terms of the agreement. Where proceedings have not been issued, the agreement can be enforced as a contract. However, whilst this happens occasionally it should be noted it is more rare as the process of mediation itself and the focus on parties brokering their own agreements generally means there is a low breach rate as parties have ownership in the process. Anything said within mediation is confidential and cannot be used later in court against either party, a conditionality referred to as 'without prejudice'.

Mediation generally has the broadest application out of the three ADR processes discussed; it can also be used across a broad number of sectors. It is used in family matters (including divorce proceedings), planning and community disputes, and consumer matters as well as in social welfare cases. Mediation generally occurs on 'neutral' ground and follows a staged approach, identifying the issues of dispute, discussing possible options for remedy and agreeing an outcome. This can take from one day to several weeks or months depending on the sector and issues involved.

There are three general types of mediation approaches used within Britain: *facilitative or 'interest-based' mediation* (the mediator does not direct the parties towards any particular settlement); *evaluative mediation* (the mediator makes suggestions as to the likely outcome of the dispute); and finally, *rights-based mediation* (the mediator ensures that any mediated agreement reflects statutory rights and legal entitlements).

As the two terms mediation and conciliation are used interchangeably within some sectors it is perhaps useful to examine how ADR processes are managed within a particular sector or organisation. For example, by examining the experience of Britain's employment dispute resolution service, the Arbitration, Conciliation and Advice Service (ACAS). ACAS assists in the resolution of all types of employment disputes using mediation, conciliation and arbitration methods. This independent organisation is funded by government with the given mandate to 'promote good employment relations'. It has a legal duty to offer conciliation in most cases when someone has a complaint about their employment rights – they can do this even if no formal complaint has been made to an employment tribunal.

Individuals or groups may ask ACAS to become involved in an employment dispute from the point at which other in-house resolution channels have failed (such as the company or organisation's own human resource or dispute resolution procedures where these exist). As indicated above, a claim does not have to be lodged with an employment tribunal in order to enlist ACAS' services, likewise an employee, employer, or their representative may ring ACAS for information during initial stages for once-off advice pertaining to their dispute. ACAS provides conciliation both for individual disputes and for group ones. Noting in their annual report 2004/2005:

> *Effective mediation has been shown to reduce the amount of management time spent dealing with grievances and conflict. It has helped to reduce staff absences and retain valuable employees, as well as avoiding potentially costly employment tribunal claims. Demand has risen slightly and we dealt with 85 cases this year. We were successful in helping the parties to either resolve the matter fully or make progress towards resolution in the overwhelming majority (93%) of cases. Cases came from all parts of the public, voluntary and private*

*sectors – 18 were from small firms with fewer than 50 employees (22%). In the public sector, investigating individual grievances and disciplinary issues can result in lengthy suspensions of valuable employees on full pay.*

ACAS generally recommends mediation either through one of their trained panel of mediators or through the organisation's own in-house mediation scheme. Where proceedings have been issued, a copy of the complaint is automatically sent to ACAS, who will write to parties to indicate that they are available to conciliate the dispute if parties desire. This conciliation is available for a fixed period after the issuing of a claim in certain employment claims. In 2005/6, 36% of all cases were settled through ACAS without going to a tribunal hearing.[5]

ACAS also offer arbitration in certain cases. This scheme has been in operation since May 2001 as an alternative to an employment tribunal hearing, resolving claims alleging unfair dismissal or those about requests to work flexibly. To date, ACAS has accepted 55 cases for resolution under the scheme across England, Scotland and Wales. In cases where dismissals have been found to be unfair, remedies have ranged from £256 to £18,000. This is roughly consistent with the range awarded at employment tribunals.

## 3. Use of Alternative Dispute Resolution in discrimination law

As discussed in section 1, ADR is used across a broad range of sectors to provide alternate recourse to the law and as we have seen it is used effectively in employment disputes. However as members of *Equinet* are all equality bodies and deal in the main with rights-based issues, this section will look in more detail at the use of ADR in relation to discrimination and equality law as well as examining in a subsequent section the issue of ADR and fundamental rights such as those contained within the UK's Human Rights Act (HRA).

The use of ADR, in particular mediation and conciliation as in other areas, is a growing area in the field of equality law in Britain. Arbitration however, whilst used in some employment discrimination cases, is used less readily as it imposes a binding decision on the parties. Moreover, mediation is generally seen to offer a more efficient, cost-effective and satisfactory outcome to all parties involved than traditional remedies. Indeed, this view is now embedded within Britain's civil justice system via the Civil Procedure Rules, which require mediation as the first port of call in many cases.

Mediation is also often favoured in rights-based disputes as it can allow an element of 'seeing-right' a problem. This has been evidenced in the DRC's own experience, where matters of discrimination and disability are so interlinked it is only through the methods used in the process of conciliation that allows a more flexible and finally accepted resolution for *both* parties. This more hands-on approach to resolution of justiciable problems was highlighted in Genn's wide scale study 'Paths to Justice' which explored complainants' primary motivations in settling disputes or going to the law – this included a distinct wish to sort out a problem and then move on.[6] The privacy of mediation as well as the speed with which a dispute can be resolved is also favoured by those who have been discriminated against. It is argued that mediation is especially suited to discrimination cases as the process encourages parties to exchange

[5] See ACAS annual report at www.acas.org.uk
[6] In O'Brien p.251 and Genn, Hazel (1999)

information and experiences, with the outcome that they can walk away from a mediation session with a greater understanding of the issues. One argument in favour of this approach holds that this greater understanding can help erode the attitudes and prejudices that lead to the discriminatory practice in the first place and hence prevent this behaviour or action from happening again. [7]

Another considerable draw specifically related to discrimination cases is that mediation can assist in matters where there is to be an ongoing relationship, for example a disabled person who wishes to access a shop or bar. In these cases, it is usually in no-ones interest to allow relations to become permanently soured. Furthermore, the situation often derives from a service provider's lack of awareness and knowledge of the act they have committed or behaviour they have exhibited. Conciliation in these cases can assist with dealing with the subtleties which may be lost in a court or tribunal and can assist in the producing a 'fair' outcome for the person discriminated against.

Of course it is fair to say that there is still some caution in applying a mediation-only approach as noted in DRC's commentary on said issues:

> *Alternative dispute resolution, especially in the context of discrimination, has not received universal support. Beneath the expressions of scepticism lies a legitimate fear that justice will be made subordinate to administrative efficiency, that the radical force of reforming legislation will be tamed by the subterranean resolution of disputes at the convenience of one party and at the expense of the other*.[8]

This of course refers to conciliation and mediation becoming overly process and cost-driven at the expense of establishing principles and legal precedent. Other arguments against the over-reliance on this method of ADR is that by allowing agreements to be reached in privacy there is no ability to 'name and shame' persistent offenders. Likewise, the inability to openly publicise case outcomes without both parties' express consent means that potential wider dissemination as part of a public education programme is not always possible.

A further consideration is that within some ADR processes there is room for inherent power imbalances to develop. For example, current procedure at the DRC Conciliation Service requires complainants to be well versed in ADR processes/negotiation skills prior to conciliation due to the inability to have legal representation or advocacy without the express permission of both parties.[9] The lack of legal representation may assist in keeping the process informal however it does not always address the inherent power imbalance between complainant and service provider.[10] This differs from standard practice in other countries such as the conciliation process undertaken by the Australian Federal Commission where parties may attend either alone or with advocacy and/or representation.

Although in this situation much emphasis is placed on keeping the balance, therefore whilst representation is allowed it is only allowed if this does not tip the balance too much either way. For example if one party attends with representation it will be suggested by the officer that the other party also seek (or has the opportunity to ask for) representation. In this

[7] http://www.adrnow.org.uk/go/SubSection_35.html;jsessionid=ahgJG0tgrDN-#hum
[8] http://www.drc-gb.org/the_law/legal_commentary/disability_rights__casework_an.aspx
[9] Parties attending the DCS for conciliation may have access during the process to legal advice via phone and it has been accepted in principle that if both parties agree then legal representatives could attend with either party (see Doyle and Reid, 2006 p.5)
[10] An exception here is the ACAS service which allows for representatives to negotiate or attend on behalf of either party.

circumstance if one party is unable to, or refuses, to have legal representation then the investigation/conciliation officer will in most situations demand that the respondent participates in the conciliation conference without a lawyer. This is in following with the Commission's legislative base which states that 'The person presiding at the conference must ensure that the conduct of the conference does not disadvantage either the complainant or the respondent'.[11] Furthermore, in the Australian context complaints are listed on a public register following conciliation to inform policy work and highlight key issues in discrimination law.[12]

The balance of power issue is also addressed differently in each context this of course pertains to the degree of intervention of the conciliator. In Canada for instance the conciliator[13] plays a more interventionist role on the basis of 'public interest' whereas within the Australian context this is less so, in view of the desire to ensure 'an appropriate level of party self-determination in relation to outcome'.[14] The differences in these two approaches in terms of breadth of cases conciliated and scope of intervention of the conciliator demonstrate the danger of relying too heavily on terminology alone in cross-comparative analysis.

These points raise legitimate concerns as to the over-reliance on ADR as the sole means of dispute resolution in discrimination cases. Nonetheless it is widely acknowledged that there are many positive aspects to using ADR as a tool in resolving discrimination based disputes. Furthermore the move to greater promotion of ADR in this sector reflects the wider move within the current civil justice system away from traditional remedies such as litigation.

It has been acknowledged that to date discrimination disputes in Britain have not been as well served by ADR as they could, largely due to this area being relatively new to the justice system in the UK. ADR has a much longer and more developed history in many of the former Commonwealth countries such as Canada, Australia and New Zealand where conciliation is often offered as a first port of call in resolving disputes. Likewise the Equal Employment Opportunity Commission (EEOC) in the United States also has a more developed history with regard to conciliation in employment discrimination and rights matters. The move towards the development of ADR looks to continue particularly in light of the establishment of Britain's first single equality and human rights body, the Commission for Equality and Human Rights (CEHR). This body will take over the responsibilities of the current equality bodies with respect to race, gender and disability and make new provision for the areas of age, religion and belief and sexual orientation.

At present neither the Commission for Racial Equality (CRE) or the Equal Opportunity Commission (EOC) (those bodies responsible for race and gender equality) are able to conciliate cases. Although interestingly the CRE's predecessor the Race Relations Board *did* have a conciliation remit however this was not carried over in the

[11] Section 46PK (3) www.hreoc.gov.au

[12] A thorough cross-comparative analysis has been undertaken in Raymond and Bell's Article for the Australian Human Rights and Equal Opportunities Commission. This examines in detail different approaches to ADR between the U.S, Canada and Australia it can be found at www.hreoc.gov.au

[13] Interestingly, the approach to conciliation is quite defined as opposed to other remits, whilst mediation is viewed as an early resolution method and is voluntary - conciliation is a mandatory process undertaken usually (but not always) after an investigation has occurred but prior to be referred to a tribunal. This more focused approach to phases in the ADR process is specific to the Canadian context (see CHRC 2004 and 2005).

[14] Ibid Raymond and Bell

establishment of the CRE in 1975.[15] The lack of conciliation powers was seen to be a considerable weakness to the suite of powers of the existing commissions. This has been remedied in the *Equality Act 2006*[16] which allows for the new Commission for Equality and Human Rights (CEHR) to provide conciliation for cases (other than employment ones) across its full legislative remit this includes in relation to race, sex, disability, sexual orientation, religion and belief. Age-related employment disputes will continue like all employment matters to be dealt with by the ACAS.

The powers contained within this new body have been largely framed on the Disability Rights Commission's (DRC) existing provision of a conciliation service. This service has been an emerging area for the DRC in its first 6 years of operation and no doubt it will be an area of continuing development and focus within the CEHR when it takes over responsibility for the DRC in late 2007.

## 4. The Disability Conciliation Service (DCS)

The DRC-run conciliation service, the Disability Conciliation Service (or DCS) is a contracted service run by a specialist ADR provider, Mediation UK.[17] Potential cases can only be referred for conciliation via the DRC helpline, referral pilot schemes (some specialist providers such as law centres or citizens advice bureaus) or directly via the county court. The service underwent a review and part overhaul in 2005 and the contract is now managed in-house at the DRC by the Conciliation Management Unit (CMU). The CMU manage the contract for the service as well as prepare cases referred from the DRC helpline (or other providers as stated) for conciliation. More recently the CMU has received in-house referrals from the DRC legal team who after revision of a case feel that conciliation would be the best first option for remedy. If of course the case does not settle then it can be sent back for litigation.

The ability to provide a conciliation service is set out in Section.28 of the Disability Discrimination Act 1995 (as amended by the Disability Rights Commission Act 1999 and subsequent legislation). This gives the DRC power to make arrangements with any other person for the provision of conciliation services in relation to Parts 3 and 4 of the Act. This means, at present, the service only conciliates disability discrimination cases in the areas of goods and services and education. Matters that relate to employment discrimination are referred to ACAS, Britain's Arbitration and Conciliation Service.[18] The DCS can also choose to refer cases to other providers if it feels it cannot be dealt with in-house or that it is outside the legislative remit of the DDA. Such providers include the Free Representation Unit (FRU)[19] as well as independent advisory and advocacy bodies such as trade unions.

The DCS takes up to 300 referred conciliation cases a year. This has expanded following the creation of the management unit and will continue to do so during the final 12 months of the DRC's operations. In 2005/2006[20] the service took 125 cases with the re-structuring of the service witnessing a positive increase in the number of cases taken in the first quarter of 2006/2007 with 39 new cases underway and a total of 78

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[15] Ibid O'Brien p.249
[16] Section 27 of the Act allows for conciliation services under equality statute http://www.opsi.gov.uk/ACTS/en2006/06en03-a.htm
[17] http://www.dcs-gb.net/
[18] ACAS provide conciliation services for all employment matters whether discrimination based or not (such as unfair dismissal)
[19] Although FRU does not provide conciliation services, only referral at the point of litigation.
[20] CMU STATISTICS 1 September 2005 – 31 March 2006 http://drcnet/intranet/news/CMU_YearlyStatistics0506_0604.doc

new referrals from the DRC helpline over the same period.[21] Referrals to the DCS continued to increase significantly beyond the first quarter of the CMU's existence.

Many of these cases (over 60%) go on to be settled in full and a smaller amount (10%) are withdrawn prior to conciliation. If the case cannot be resolved through conciliation it can be referred on to the DRC's in-house legal service for consideration for litigation. In order for the case to be supported it needs to meet the DRC's case support criteria which is laid out in the yearly legal strategy and published on the DRC website.[22]

The DCS has tackled some of the 'negative' issues associated with ADR creatively. For example in relation to privacy and the inability to publicise outcomes, the DCS has recently been successful in being granted full permission to publish some of the more challenging cases. This has helped demonstrate the breadth of applicability of conciliation in discrimination matters. Where parties have not agreed to waive privacy rights the DCS has anonymised case examples in order that the main issues are still brought to light. This of course needs to be dealt with sensitively as some cases with particular facts can stand out and could easily be recognized by either party. The DCS and CMU use their discretion in these instances. The DRC would not want any agreement reached to be compromised in these circumstances.

The type of conciliation provided by the DCS is called 'rights-informed'[23] which means, as outlined in section 2, that conciliators are required to outline the parties' legal rights and entitlements and ensure these are taken into consideration during the process. Likewise, any settlement needs to be framed around these rights. It has been interesting to note that for many conciliators or those previously used to only facilitative mediation this has been an area of both personal and professional development.[24]

The mandate of the DRC prohibits it from providing conciliation services in-house, primarily due to concerns of impartiality and potential conflict of interest. The Act specifies that "no member or employee of the Commission may provide conciliation services in relation to disputes arising…". In addition, the DRC must ensure that any arrangements include "appropriate safeguards to prevent the disclosure to members or employees of the Commission of information obtained by a person in connection with the provision of conciliation services "[25]

This delineation of powers has been replicated within the mandate for the new CEHR. This approach diverges significantly from that taken by other equality bodies such as in Canada and Australia, both of which operate in-house conciliation services. In Australia in particular the Federal Commission does not place such emphasis on separation of powers and instead views (with the inclusion of specific safeguards) the continued involvement of the case officer as beneficial to the conciliative process. The reasoning is that this person imparts knowledge of the case and can assist with generating insights that may be missed by an external provider.

[21] CMU QUARTERLY STATISTICS 1 April – 30 June 2006 Ibid
[22] www.drc-gb.org/ the_law/drc_legal_strategy.aspx
[23] www.asauk.org.uk/fileLibrary/pdf/doing.pdf#search=%22rights%20based%20mediation%22
[24] Doyle and Reid (2006) p.2

[25] (s.28(4) DDA 1995)

New EU jurisdictions considering the pro's and con's of each approach would do well to view the difference in approach taken within these three countries to see if lessons can be learnt taking into account context and philosophical approach. For example, if an equality body wanted to implement an externally–run system based on a belief of neutrality they may have to weigh this against issues such as efficiency and staff expertise. Likewise, arms-length management of a contracted service could raise issues of quality in service provision (although the experience of the DRC shows that contracts can be designed to take account of this by including key performance indicators specific to conciliation for disability complaints).

Pragmatic considerations such as staff expertise and resources can also impact on an equality body's ability to conduct ADR although no comparison to date has examined the cost effectiveness of running an in-house service as compared to a contracted service. For example, the volume of disability-related complaints handled in Britain may be less in terms of quantity (300 as compared to the Australian Commission's 503 under the DDA in 2004), however the statistics may not be directly comparable as the type and method of complaint processing are different. In addition, the DCS deals only with disability matters whereas as conciliation services in both Canada and Australia deal with cases across the range of competences as well as sectors. One area (or competence) which is not subject to conciliation in the UK is the issue of fundamental human rights. This is an area of emerging interest and will be discussed further below.

## 5. ADR and human rights: friend or foe?

Over recent years and particularly with the advent of the UK's first Human Rights Act there has been an emerging debate concerning the ability to mediate or conciliate human rights cases. This was first raised in early discussions around the need for a human rights commission being then transposed to the CEHR debates later on. Whilst it is now known that the single body, the CEHR, will *not* have the ability to mediate HRA cases it is nevertheless interesting to examine where and when this may be suitable and what place there may be for these powers in the future.[26]

There have been a number of arguments made in favour of having the ability to mediate fundamental human rights cases in addition to discrimination cases. One of the most persuasive is borne of pragmatism concerning the ability of complainants to have their cases heard in the first instance. Indeed, not all potential cases under the HRA are of 'public-interest' and will therefore fall outside of strategic litigation priorities nor will they be eligible for publicly funded support. In this way it is argued that mediation could provide a useful alternative in ensuring that as many people who have suffered a violation of their rights as possible have recourse to a suitable remedy.[27]

Another argument states that it is often difficult to meet the high-threshold of the HRA in order for a case to be considered in the first place. Moreover, while the legislation does provide protection it does not offer workable outcomes in the same way that a party-negotiated agreement can. This may include very practical and tangible outcomes that require some innovative thinking rather than the legal verbose that is often the unwitting outcome of cases. Translation into real, concrete impact on the

[26] Of course, due to the nature of British discrimination legislation, there is not universal coverage across all equality areas or sectors (for e.g. it is not unlawful to discriminate in the area of goods and services on account of age presently). However, if the Government's intention to merge equality legislation under a Single Equality Act comes to fruition, some of these current anomalies are likely to be removed. Regardless, human rights legislation sits separately from that of anti-discrimination.

[27] Butler, France (2001)

ground is often very difficult in these types of cases with the result that the individual who originally lodged the complaint feels that the matter has not been adequately resolved.

Of course, there are particular issues to consider in relation to the mediation or conciliation of fundamental rights namely the delicate issue of 'negotiating away' rights. On closer inspection however of the HRA (or indeed the ECHR from which it is taken), there are very few rights that are absolute and those that are (e.g. right to be free from torture) are not going to be suitable for mediation. The fact remains however that there is no ability to practice this approach in the UK at present and it is therefore difficult to make clear observations as to how it would actually work in practice, despite being an interesting area for development.

Clearly, looking to share experiences from outside the UK may go some way to remedying this. Mediation in human rights cases has been undertaken in other countries. Canada, for example, has run a successful human rights mediation pilot scheme for two years which was recently adopted as a permanent form of redress due to its success and support for the scheme from complainants and service providers alike. However once again, caution must be applied in comparing these examples like for like due to different legislative structures and remits.

One reason for this could be that human rights outside of the UK is often used in the broadest sense, thus encompassing what is commonly referred to in Britain as discrimination. This too is reflective of the Australian Commission's experience that makes less formal delineations between human rights, discrimination and social justice issues in their work. The lack of a formal human rights statute no doubt also impacts on the ability to undertake conciliation in this area as, unlike Britain, there is no legislative remit by which to do so. An issue therefore when seeking to undertake a cross-comparative analysis is how many cases considered to be equality or discrimination matters are actually categorized under the broad banner of human rights cases. This area would clearly benefit from some further research and in-depth analysis.

A final consideration in relation to human rights and ADR is whether the way complaints are handled complies with the HRA. Whilst this is a procedural issue it is an important one. For example, Article 6 of the HRA gives complainants a right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in determining their civil rights and obligations. A recent judgment in a case called Halsey in 2004 demonstrates that courts do not have the power to compel unwilling parties to take part in mediation if it is going to mitigate or infringe on a person's rights. This is only one example of the inherent tensions in this area and whilst the application of ADR in human rights cases has been put on hold at present, there is no question that it is an interesting and important area which will no doubt be revisited as ADR practice matures within the British justice system.

## 6. Conclusion

It is clear that ADR within rights-based disputes is a developing area in Britain, encouraged by the national (and international) trend towards ADR in general, across a broad range of sectors. There are however specific considerations when using ADR within a rights-based discourse especially in the area of discrimination and human rights claims, this includes the aforementioned balance of power issue and of course the lack of legal precedence in this emerging area of law. There is clearly much to learn from other countries both within the EU and more broadly, from countries with longer histories in conciliation and ADR in rights-based disputes. The DRC's conciliation service and the ACAS employment advice service have been front-runners in this area

and are soon to be followed by a more comprehensive service covering all strands of discrimination within the new Commission for Equality and Human Rights. It is hoped and intended that the new body will draw on the experience so far as well as looking further afield to learn from innovative methods of ADR practice and adapting this to the British context in order to inform the further development of rights-based dispute resolution.

One key advantage however in discrimination and rights based disputes which differs from other areas of the law is the personal element and level of satisfaction that ADR, mediation in particular can bring to individual claimants. Mediation can provide what a court is unable to do, the ability to listen fully to the claimant's (and respondent's stories), to air grievances, to make-right. The question is whether this can be delivered without being at expense of the development of the law. There is indeed a place for both, it is finding the correct balance which is the challenge that lies ahead.

**Annex 1: ADR methods in Britain**[28]

| | Arbitration | Conciliation | Mediation |
|---|---|---|---|
| ***What*** | The process of resolving a dispute by the intervention of an independent third party. The arbitrator is neutral however their decisions are binding in law meaning that neither party has recourse to the courts should they not agree with the outcome. It is a private process in which both parties pre-commit to have their dispute resolved by the impartial arbitrator. The result it final and legally binding. | The process of enabling two parties to resolve a dispute via the assistance of an independent third party**.** Like arbitration, the third-party or conciliator is impartial. It is a private but voluntary process, decided upon by both parties in which the outcome is non-binding (although a binding agreement can be signed by both parties). The exception here is in employment disputes where the outcome is binding. Likewise, whilst parties can agree for the outcome to be made into a binding document it is not obligatory to do so. | Often used interchangeably with conciliation and therefore easily confused. Arguably the main difference applies to the level of involvement of the third-party which in conciliation is more interventionist and in mediation more facilitative. Mediation like conciliation involves an impartial third-party, however it is the parties not the mediator who decide the terms of the agreement. The mediator therefore may have a role in 'road-testing' the feasibility of such terms and making suggestions or offering guidance. The process is voluntary and private with both parties involved agreeing the final decision. Like conciliation the outcome is non-binding although parties can agree to sign a binding agreement which has effect as a contract or, where proceedings have already been issued, to have the outcome made into a court order called a consent order. |
| ***When*** | For employment disputes, the ACAS provides arbitration for collective disputes involving groups of employees and now offers an arbitration scheme to handle | This type of ADR can be used across a number of sectors including social welfare, employment and health care. | Like conciliation, mediation can be used across a wide range of sectors although it can go wider to include areas such as divorce and separation, small claims, |

[28] The content of this table has been taken largely from one site http://www.adrnow.org.uk/go/SubSection_35.html;jsessionid=ahgJG0tgrDN-#hum

| | Arbitration | Conciliation | Mediation |
|---|---|---|---|
| | individual unfair dismissal claims and claims related to flexible working requests.<br>Arbitration clauses are now common in contracts, particularly in consumer contracts. Generally such clauses require the parties to the contract to use arbitration for any dispute that arises. In consumer disputes below the small claims limit, however, such clauses are not binding on the consumer.<br>The DRS-CIArb[29], an independent body, provides arbitration for consumer and large-scale business disputes. It offers a number of tailor-made arbitration schemes for particular consumer sectors and also a generic arbitration scheme that can be used for any consumer dispute. It also has an arbitration scheme to deal with cross-border consumer disputes referred by the UK's European Extra-Judicial Network (EEJ-Net) clearing house, which is run by Citizens Advice. | While remaining impartial the conciliator can take a more active role in negotiating between parties, either via a shuttle approach over the telephone, in adjacent rooms or face to face or via submissions somewhat like arbitration.<br><br>The conciliation method used (such as shuttle or face to face) depends on the situation in which it is being applied, for e.g. in Britain employment conciliation most commonly takes the shuttle approach whereas discrimination disputes (in non-employment matters) are more likely to be face to face and consumer issues via submissions. | business disputes, medical negligence and personal injury, workplace, consumer, community care, education, youth crime, housing, as well as international and cross-border disputes.<br><br>Mediation applies to both individual and group disputes. |
| ***How*** | Submissions for arbitration are generally made by documents and generally a hearing is not required.<br>Arbitration takes place under strict rules but is less formal than a court allowing discretion to both parties in the way the | On application or referral by a third-party. As conciliation is a voluntary process it must be entered into willingly by both parties. The procedural differences depend entirely on the context in which conciliation is used. Examples include: | Mediation usually takes place in a neutral venue of the parties' choosing.<br>Most typically, mediation is a process of between 5-6 stages, beginning with identifying the issue, then exploring possible options and finally deciding upon |

[29] Dispute Resolution Scheme (DRS) provided by the Chartered Institute of Arbitrators (CIArb)

| | Arbitration | Conciliation | Mediation |
|---|---|---|---|
| | process may be conducted. Most do not involve a hearing relying on the basis of written submissions.<br>In private arbitration, parties may choose the arbitrator (an expert in the field) although in some schemes the arbitrator is appointed by the administering body. Some providers offer an internet-based service (usually in consumer matters) with submissions made electronically.<br>Decisions are made on the basis of good practice, previous cases under the same statute and whether the submission is reasonable. Reasons for the decision will be listed in the award somewhat like a case judgment. | • Resolution of a dispute by bringing parties together (such as the DCS).<br>• Resolution of a dispute where conciliator conducts discussions with the parties separately, such as by telephone (as does ACAS in employment disputes).<br>• Resolution via the conciliator listening to both parties (or consideration of written submissions) and delivery of an opinion as to the best or most likely outcome of the dispute. This opinion then forms the basis of an agreement between the parties. (the method is used by trade associations and some consumer complaints bodies). | an outcome which of course, due to the broad remit of mediation, can differ depending on the sector.<br>Mediation can involve both the face-to-face and shuttle methods depending on the sector. Whatever the method, participants are always encouraged to lead the process throughout and be active.<br>There are number of different approaches to mediation which depend on the degree of involvement of the mediator: *facilitative mediation*, *evaluative mediation*, and *rights-based mediation. (see main document for more detail)* |
| ***Cost*** | Variable. ACAS offers a free service in employment matters. Other schemes are either free or require a subscription fee. Some services such as online arbitration require a percentage of the claim as a fee (the percentage tends to be higher in private arbitration cases). | Conciliation is free. The cost of the service is usually borne by the body complained about or by a relevant trade or professional body. | The cost of mediation varies. Some mediation is free especially if it concerns community disputes. Family mediation is most commonly offered on a fee-paying basis to reflect the specialist skills involved and the generally heavy time-commitment. In commercial disputes the cost may well be a percentage of the final value of the settlement, much like arbitration in commercial matters. In most parts of Britain some assistance is provided for those undergoing family mediation via legal aid (this of course |

| | Arbitration | Conciliation | Mediation |
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| | | | excludes Northern Ireland). |
| ***Outcomes*** | The decision is binding in almost all cases except for cross-border EU consumer disputes where the decision is binding on the trader only. The award can be enforced by the courts if necessary. | Settlements (as opposed to 'awards' in arbitration) are private and can only be made public with the prior consent of the parties involved. Outcomes can vary from an apology and/or explanation, compensation, or an agreement to change policies and practices. | Outcomes of mediation are similar to conciliation and can be made as broad or as narrow as the parties wish them to be. |
| ***Time limits*** | Rights of appeal are limited and where they do exist a large non-refundable deposit is required in order to deter facetious claims. | This depends on the sector, although in discrimination claims taken to the DRC or subsequently to the CEHR conciliation service, agreeing to conciliate allows the parties a two month extension on the time-limit to lodge a court claim if they choose to do so following an unsuccessful conciliation outcome. | This depends on the sector. Where there are strict time limits it is advisable to get advice before proceeding with mediation. |

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## Glossary

ADR Alternative Dispute Resolution

HRA Human Rights Act 2000 (UK)

ACAS Arbitration, Conciliation and Advice Service

DRC Disability Rights Commission

DCS Disability Conciliation Service

CMU Conciliation Management Unit