

Mediation and Judicial Review: An empirical research study

Varda Bondy

Linda Mulcahy

with

Margaret Doyle and Val Reid



About the Public Law Project

The public law project (PLP) is a national legal charity, founded in 1990 which aims to improve access to public law remedies for people whose access to justice is restricted by poverty, discrimination or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- Increasing the accountability of public decision-makers;
- Enhancing the quality of public decision-making;
- Improving access to justice.

Public law remedies are those mechanisms by which citizens can challenge the fairness and/or legality of the decisions of public bodies and so hold central and local government and other public bodies to account. They include non-court based remedies such as complaints procedures and ombudsman schemes and also litigation remedies, in particular judicial review.

To fulfil its objectives PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

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While many have helped this work, all errors and omissions as well as conclusions and opinions are the responsibility of the authors alone.

About the research team

Varda Bondy, solicitor, is Research Director at the Public Law Project. She is also a Visiting Fellow in the School of Law of the University of Essex and a Visiting Senior Research Fellow in the Department of Law, Queen Mary University of London.

Linda Mulcahy is the Anniversary Professor of Law and Society at Birkbeck College, University of London. She has conducted a wide range of empirical research projects on dispute resolution and has published extensively in the field.

Margaret Doyle is a consultant, researcher and independent mediator. She is experienced in disputes involving special educational needs and disability discrimination. She has published widely in the field of ADR.

Val Reid is currently the policy officer for ADR for the Advice Services Alliance. She has worked as a regional development manager for National Family Mediation and as manager of the Middlesex Family Mediation Service.

Maurice Sunkin is Professor of Public Law and Socio-Legal Studies, School of Law, University of Essex, and member of the Human Rights Centre, University of Essex; he is also an associate member of Landmark Chambers; and a Trustee of the Public Law Project.

The Nuffield Foundation is a charitable trust established by Lord Nuffield. Its widest charitable object is 'the advancement of social well-being'. The Foundation has long had an interest in social welfare and has supported this project to stimulate public discussion and policy development. The views expressed are, however, those of the authors and not necessarily those of the Foundation.

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Section One

Introduction and background

Introduction

The aim of this research is to establish an independent evidence base for identifying the value and the limits of mediation as an alternative to, or used alongside, judicial review. It has been devised in response to claims made by government and mediation providers that mediation can lead to savings in costs as well as in court time, and provide remedies and solutions to disputes that cannot be offered by the court. These claims will be considered in the specific context of judicial review, which not only has an important constitutional function, but, compared to other forms of civil litigation, offers flexibility, low costs and speed. Moreover, claims as to the value of mediation need to be examined in light of the realities of judicial review litigation. For example, a large proportion of judicial review claims end in settlements negotiated between the parties, with little input from the court. Therefore, any aspects of added value that mediation may offer need be considered in relation to bilaterally negotiated settlements as well as in relation to judicial determinations.

The claims for mediation stand in stark contrast to the low take-up of mediation by lawyers generally. In particular, it is indisputable that the take-up of mediation as an alternative to judicial review is low. The research team was interested in analysing the reasons for this, for instance, whether it comes about as a result of lack of understanding of the process, an assessment of it as adding no value to bilateral negotiations, or more principled concerns such as the importance of a transparent supervisory role for the court, the need to create precedents, and the retreating role of adjudication in public law.

Mediation in public law: the ambivalence of policymakers and the concerns of practitioners

Since Lord Woolf's *Access to Justice* report in 1996, there has been considerable enthusiasm amongst policy makers and some members of the judiciary for increased use of, and experimentation with, alternative dispute resolution (ADR),

including mediation.¹ Shifts in policy have occurred as a result. These include the new attention paid to ADR in the civil pre-action protocols, the government pledge on ADR, the introduction of case management powers for judges, and changes to the funding code for civil legal aid. In addition we have seen the setting up of a number of court-based mediation schemes,² the development of case law regarding mediation and public pronouncements on the value of the process by senior members of the judiciary. However, it is important to stress from the outset that all of these developments apply to mediation in civil litigation generally. There has been little or no mention of public law and the few specific references which have been made to it have been ambivalent or contradictory.

An important question which has fuelled the research reported here is whether judicial review actions should be treated in the same way as other forms of civil litigation. Judicial review has an important constitutional function in providing 'the means by which judicial control of administrative action is exercised'³ and in 'ensuring that the rights of citizens are not abused by the unlawful exercise of executive power'.⁴ As the government has pointed out:

'The government believes that the ability to challenge the acts or omissions of public authorities is a necessary check on the use of the power of the state, and a positive encouragement to maintain high standards in public administration or by public bodies.'⁵

The special status and function of public law was recognised in the 2001 government pledge to use ADR to resolve disputes involving government departments wherever possible. The pledge specifically excluded public law and human rights disputes. The exclusion reflected Lord Irvine's view that, while ADR has an expanding role within the civil justice system, 'there are serious and searching questions' to be answered about its use and that it was 'naïve' to assert that all disputes are suitable for ADR and mediation. Examples cited by Lord Irvine included cases concerning the establishment of legal precedent, administrative law problems, and cases which 'set the rights of the individual against those of the state'. These, he said, must be approached with great care.⁶

On the other hand, also in 2001, in his judgment in the case of *Cowl*,⁷ Lord Woolf commented:

'Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and

¹ ADR includes alternatives to litigation such as ombudsmen and mediation. The current project focuses on mediation.

² See, for instance, H Genn (1998) *Central London County Court Mediation Pilot: Evaluation report*, LCD Research Series, No. 5/98; H Genn (2002) *Court-based ADR Initiatives: The commercial court and the court of appeal*, LCD Research Series, No. 1/02; H Genn (2007) *Twisting Arms: Court-referred and court-linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07; L Mulcahy, with M Selwood and A Netten (2000) *Mediating Medical Negligence Claims – An option for the future*, Stationery Office, Norwich.

³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408E.

⁴ *R v Ministry of Defence ex p Smith* [1996] QB 517, 556D–E.

⁵ Government consultation paper, *Access to Justice with Conditional Fees* (March 1998).

⁶ Inaugural Lecture to the Faculty of Mediation and ADR (1999) at www.dca.gov.uk/speeches/1999/27-1-99.htm (last accessed 05.05.09).

⁷ *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935.

the public, and saved time, expense and stress . . . Today, sufficient should be known about ADR to make the failure to adopt it, in particular when public money was involved, indefensible.’

Despite Lord Woolf’s enthusiasm, mediation in public law disputes remains rare. *Cowl* remains the only authority on mediation which is directly related to public law disputes and other judges have not followed Lord Woolf’s lead in promoting mediation in this area.

Lord Irvine’s reservations, on the other hand, have been echoed and articulated in discussions among academics who have expressed concern about the dangers of the ‘vanishing trial’ and the privatisation of justice.⁸ Commentators have questioned how well the principle of public accountability is served by mediation and how its increased use might impact upon the supervisory jurisdiction of the court over the activities and decision-making of public bodies. It is argued that, in the field of public law, the radiating effect of court judgments on decision-making by public bodies is a particularly important check on the authority of the state.⁹

Public law practitioners are also amongst those who have raised concerns,¹⁰ many of which were expressed at workshops organised by the PLP in April 2004 and in October 2005. A number present raised practical concerns about the impact of mediation. These included reservations that the process could be vulnerable to tactical use by either side to cause delay or avoid the establishment of unfavourable precedents. Concern was also expressed that failed mediations would result in unnecessary delays and increased costs. Even practitioners who can be described as being ‘pro-mediation’ grappled with the potential conflicts that could be created between the constitutional and supervisory role of judicial review on the one hand and the private and confidential nature of mediation on the other.¹¹

However, the views of public law practitioners do not always appear to be reflected in policy initiatives designed to promote mediation. Responses to the Legal Services Commission’s (LSC) consultation paper *A New Focus for Civil Legal Aid in 2004*,¹² reflected the chasm between the views expressed by public law practitioners and those of policymakers in their approach to ADR and mediation. So, for example, in their response to the proposal to restrict public funding to mediation in certain cases, the Housing Law Practitioners’ Association (HLPAs) asserted:

⁸ M Galanter, ‘A World without Trials’ (2005) Annual Distinguished Alternative Dispute Resolution Lecture, University of Wisconsin.

⁹ For a summary of some of these arguments see V Bondy, M Doyle and V Reid, ‘Mediation and judicial review – mind the research gap’ (September 2005) *Judicial Review* 220.

¹⁰ V Reid, ‘All aboard the band wagon’ (September 2004) *Legal Action*; S Wilken (2002) ‘ADR in public law: a new hope?’ http://www.39essex.com/index.php?art_id=147 (last accessed 06.05.09); V Bondy, ‘Who needs ADR?’ (2004) *Judicial Review* 306, flagging concerns surrounding the use of mediation in cases involving public law challenges.

¹¹ Wilken, ‘ADR in public law’, n. 10 above; M Supperstone QC, D Stiltz and C Sheldon, ‘ADR and public law’ [Summer 2006] *Public Law* 299.

¹² ‘A new focus for civil legal aid’, www.legalservices.gov.uk (0.5.05.09).

'We think further research is needed on mediation and other forms of ADR. We do not consider that public funding should be denied or restricted merely due to the existence of the options of mediation and other ADR.'¹³

A joint response on behalf of a group of public law specialists comprising solicitors and barristers was submitted by the PLP, expressing strong opposition to any proposals that might lead, directly or indirectly, to compulsory mediation.¹⁴

The Department for Constitutional Affairs (DCA) (now the Ministry of Justice (MoJ)) and the LSC have largely disregarded these concerns. Rather, they have made clear that the use of ADR is to be promoted whenever possible. The LSC now has, as a result, the power to limit post-permission legal-aid certificates to mediation, so denying funding to pursue a case to trial and effectively compelling mediation. However, it is worth noting that the LSC does not appear to be exercising this power at present.

The post-Bowman reforms of judicial review procedure introduced in October 2000 do not entirely reflect Lord Woolf's enthusiasm for ADR, as expressed both in *Cowl* and in his *Access to Justice* report. Indeed the Bowman Committee Report asserted that there is ordinarily little scope for alternative dispute resolution in judicial review.¹⁵ However, the reforms do encourage early settlement. So, for instance, the objectives of the Bowman Committee report included:

'ensuring that the system:

- (a) disposes of unmeritorious cases fairly at the earliest possible stage, and
- (b) encourages both parties to examine the strength of their case and to settle where necessary, at the earliest possible stage.'

Lord Irvine's initial hesitation about encouraging parties in public law disputes to use ADR, and mediation in particular, was also reflected in the judicial review pre-action protocol (PAP), drafted by a working party following a consultation exercise by the DCA in 2001. The responses to the consultation led the group to conclude that there were significant risks associated with a claimant inappropriately using ADR, and as a result a reference to ADR was not included within the body of the protocol.¹⁶ However, a cautious reference to ADR was included in paragraph 3 of the introduction which stated:

'Where alternative procedures have not been used, the judge may refuse to hear the judicial review case. However, his or her decision will depend upon the circumstances of the case and the nature of the alternative remedy. Where an alternative remedy does exist a claimant should give careful consideration as to whether it is appropriate to his or her problem before making a claim for judicial review.'

This provision remained in force until October 2005 when a standard paragraph on ADR was inserted into all PAPs, including that for judicial review, without any

¹³ HLPAs response to the New Focus consultation in October 2004 <http://www.hlpa.org.uk/uploads/LSCresponse.doc> (last accessed 05.05.09).

¹⁴ See Public Law Project response to consultation in 'A new focus for civil legal aid' <http://www.publiclawproject.org.uk/downloads/Response-NewFocus.pdf> (last accessed 13.05.09).

¹⁵ *A Report to the Lord Chancellor* (2000) (hereafter the Bowman Committee Report), LCD, London, p. 67, para. 17.

¹⁶ See <http://www.dca.gov.uk/consult/preaction/judrevpa.htm> (last accessed 06.05.09).

further consideration of the value of ADR in the field of judicial review.¹⁷ The new protocols required that:

‘The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review “must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose”.’

Elsewhere in the protocols it is noted that the forms of ADR that the parties are expected to consider include discussions, negotiations, the ombudsman, early neutral evaluation and mediation.¹⁸

Towards compulsory mediation?

The parties in judicial review actions cannot be compelled to mediate. The protocol expressly stipulates that ‘no party can or should be forced to mediate or enter into any form of ADR’.¹⁹ However, an element of ‘persuasion’ was added to the process. A failure to follow the requirements of the pre-action protocol may result in costs orders being made against the offending party. In addition, Lord Woolf’s suggestion in *Cowl* that ‘insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible’ even in disputes between public authorities and members of the public, appeared to provide another steer in this direction. Thus far, there are no known judicial review cases in which a party has been penalised in costs for failure to mediate, and data collected in the Dynamics of Judicial Review study revealed that it is extremely rare for judges in the Administrative Court to suggest that parties engage in mediation.²⁰

There have, however, been increasing signs of an appetite to make mediation compulsory in civil litigation generally since this study was initiated, and other senior judges have now added their voices to Woolf. In 2008, within a few months of each other, two lectures were delivered that strongly promoted mediation. On

¹⁷ See http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm (last accessed 06.05.09). In an interview carried out for this study in January 2008 with MoJ officials responsible for the drafting of the protocols, the officials recognised the constitutional role of the Administrative Court and explained that the inclusion of the paragraph on ADR in the judicial review protocol was not intended to suggest any degree of compulsion to mediate.

¹⁸ PAP, see n. 16 above, paras 3.1 and 3.2.

¹⁹ Civil Procedure Rules Protocols Practice Direction 4.7 http://www.justice.gov.uk/civil/procrules_fin/pdf/practice_directions/pd_protocol.pdf (last accessed 05.05.09).

²⁰ V Bondy and M Sunkin (2009) *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Public Law Project, London. Out of 115 solicitors interviewed in the course of this study (60 acting for claimants, and 55 for defendants), only four (3%) said that they had experienced a judge suggesting that the parties attempt mediation in a judicial review.

29 March 2008, Lord Phillips delivered a speech on alternative dispute resolution²¹ in which he described himself a mediation enthusiast. He suggested that

‘Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the court.’

Whilst he stopped short of arguing for compulsory mediation, he is clearly favourable to the suggestion:

‘What are the pros and cons of compulsory mediation? Strong views are expressed about this on both sides. Those opposed argue that compulsion is the very antithesis of mediation. The whole point of mediation is that it is voluntary. How can you compel parties to indulge in a voluntary activity? ‘You can take a horse to water, but you cannot make it drink’. To which those in favour of compulsory mediation reply, ‘yes, but if you take a horse to water it usually does drink’. Statistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition.’

The Master of the Rolls, Sir Anthony Clarke, gave a speech at the Civil Mediation Council’s national conference on the future of civil mediation in May 2008, which also demonstrated a stance in favour of compulsory mediation.²² In it he criticised the *Halsey* judgment²³ as being ‘overly cautious’ in its conclusion that compelling parties to mediate could constitute a violation of Article 6 European Convention on Human Rights, and suggested that this point may be open to review ‘either by judicial decision or in any event by rule change’. He said that he wanted to see directions to mediate made routinely by judges.

The need for further research

This study was designed neither to promote the use of mediation nor to undermine it, although the authors of this report wish to state from the outset that they oppose any compulsion on parties to mediate and hold that the decision to mediate should always be a decision made by the parties together with their legal representatives.

Rather, this study seeks to examine critically the claims that are made for and against mediation in relation to public law disputes; attempts to understand its lack of take-up by practitioners; and considers whether it is possible or desirable to encourage greater take-up and in what circumstances.

A key goal of this project is, accordingly, to determine the extent to which mediation could be said to provide either a more effective way of resolving some disputes or a valuable complement to the adjudication process. The approach adopted by the research team was based on the assumption that any in-depth policy debate about the place of mediation in public law should be informed by the views and experiences of public law practitioners.

²¹ http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf (last accessed 05.05.09).

²² Sir Anthony Clarke (2008) ‘Alternative dispute resolution: an English viewpoint’, paper presented at the Civil Mediation Council’s national conference on the future of civil mediation.

²³ *Halsey v Milton Keynes General NHS Trust; Steel v Joy and Halliday* [2004] EWCA (Civ) 576.

The study aimed, in particular, to explore public law practitioners' reluctance to mediate. Does this come about as a result of their lack of understanding of the process? Do they regard mediation as adding any value to bilateral negotiations and adjudication? Do practitioners have more principled concerns which relate to the special role of judicial review in the civil litigation landscape, or concerns about the retreating role of adjudication in public law? The research also sought to explore attitudes towards the use of mediation as an alternative to litigation.

The structure of this report

In Section 1 of this report we explore the issues raised in this section in depth. Section 2 explains the research methods used. Section 3 looks at the progress of claims through the judicial review process and at the stages at which settlements tend to occur. This provides the context for subsequent considerations as to where in the process mediation might feature alongside other regularly utilised forms of negotiated settlements, notably bilateral negotiations, and what factors might motivate parties to choose mediation over other modes of negotiated settlement. Section 4 provides a snapshot of the attitudes of public law practitioners and their experiences of mediation. It sets out the main 'objections' to mediation amongst practitioners both with and without mediation experience. Section 5 examines critically the main claims that are made for the benefits of mediation over litigation, and we focus in particular on the aspects of process and substantive outcome that mark mediation out from adjudication. Section 6 explores the role of lawyers in mediation and what they expect from mediators. In Section 7 of the report, we look briefly at the issue of the speed and cost of mediation, and Section 8 presents 15 case studies of mediated judicial reviews and brief details of other mediated disputes involving public bodies drawn from interviews with lawyers and mediators. This represents the first attempt to collate and present a significant number of mediation case studies in the public law field and thus provide information not hitherto available about real life examples of judicial review mediations. The final section brings together some of the key findings of the study and reflects on their significance.

Section Two

Research methods

Introduction

With very few exceptions, there is a dearth of data on the use of mediation in judicial review cases and it was this gap in knowledge that the current project hoped to fill. The research methods utilised in this study were designed by a research team able to draw on a wide range of research skills, practice-based knowledge of judicial review litigation and mediation, policy expertise and academic critique. Throughout the project the varied expertise of the team members informed and influenced the design of the interview schedule and the nature of the access to and interaction between the research team and participants. In the view of the research team, their 'insider status' as recognised experts in the field gave considerable credibility to the project and facilitated the involvement of more research subjects in the study than would otherwise have been the case. In addition, it is argued that it prompted the production of more detailed accounts of case handling than would have been so with a less experienced team.

Baseline data on the judicial review landscape: the Dynamics of Judicial Review study¹

The fact that there is a lack of authoritative data in relation to the conduct and fate of most judicial review actions meant that there was little data with which to compare mediated cases. Very little has been published on the journeys that public law disputes make through the litigation system and the points at which mediation might be used to nudge a case towards settlement. However, the project team were fortunate in being able to draw on recently collected data from a study entitled 'The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before Final Hearing' (the Dynamics of Judicial Review study). This Nuffield Foundation-funded project was conducted by the Public Law Project in partnership with the University of Essex and provided essential baseline data on the circumstances in which and stage when there was potential for resolution by mediated settlement. These data and the analysis of them are reported fully in *The Dynamics of Judicial Review Report*, published in June 2009.

¹ V Bondy and M Sunkin (2009) *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Public Law Project, London.

The above-mentioned study produced two datasets which provided the research team with a unique 'map' of the life cycle and dynamics of judicial review litigation. More specifically this involved:

- 1 An analysis of 1449 civil judicial review claims (excluding immigration/asylum cases) that were issued during a nine-month period in 2005. These data were obtained from the Administrative Court's computerised information system, known as 'COINS'. This made available invaluable quantitative data on what happened to judicial review cases at various stages in the process and included information about success rates at permission stage, the incidence of withdrawal and settlement of claims and the stages at which they occurred.
- 2 Interviews with 123 solicitors about 172 judicial review cases.

The current study utilised two particular types of data from the Dynamics of Judicial Review study interviews. The first of these involved information about the nature, timing and quality of settlements in judicial review cases and the factors which contributed to or inhibited settlements. Practitioner-interviewees were asked to describe their behaviour in particular judicial review cases and to elucidate their general approach to case handling, including the reasons why cases did or did not settle, and the substance of settlements.² The second set of data focused on approaches to alternative forms of dispute resolution. In particular:

- the likelihood of any alternatives to court-based adjudication (complaints procedures, referral to an ombudsman or mediation) being considered or used at any stage of the judicial review processes;
- the reasons for rejection of such avenues where considered;
- attitudes towards ADR and the extent to which these had shifted in response to policy initiatives and judicial endorsement of these mechanisms;
- the extent to which such alternatives are prompted or otherwise supported by judges as a case-management strategy and the stages at which this is most likely to occur; and
- interviewees' experience of mediation.

These data provided the research team with a preliminary snapshot of the extent to which public law practitioners are familiar with mediation and helped us to frame a set of more probing questions about mediation in the current project. The dataset also helped to identify the perceived barriers to the use of mediation that warranted further investigation.

Understanding motivation and perceptions – data collection in the current project

The Dynamics of Judicial Review study provided the research team with a valuable set of baseline data, but detailed information about knowledge, experience and

² See V Bondy and M Sunkin 'Settlement in judicial review proceedings' [2009] *Public Law*, April 237–259; and Bondy and Sunkin, *The Dynamics*, n. 1 above.

attitudes towards mediation was still lacking. By utilising qualitative research methods, the project team aimed to gather more insightful accounts of the actual and potential use of mediation in the judicial review arena. In this context, face-to-face interviews were considered to be the most effective way to investigate attitudes to mediation amongst practitioners.

Semi-structured interviews were used to explore the extent to which the perceived barriers (flagged up in the Dynamics of Judicial Review project interviews and outlined above) are insurmountable. They also allowed the research team to consider a range of possible solutions to the objections raised in the earlier project with interviewees. Those who identified problems with mediation were asked to reflect on the viability and practical implications of 'solutions' suggested by the research team and working party. In this way, we developed a reiterative process in which dialogue between the various experts involved in our research was facilitated.

The expert working group

One of the priorities for the research team was to set up a working party made up of mediators, solicitors and barristers, administrative court judges and academics who were experts in the field of public law or mediation. The purpose of this group was to provide a forum in which representatives from a number of stakeholder groups could take part in shaping and challenging the issues explored.³ The working party provided invaluable input to the project at two main stages over the course of two meetings and one seminar. At an early stage they helped in the formulation of questions to be put to interviewees. As the data were being collected, and analysis undertaken, these experts were also asked to comment on emerging themes. Because of the diverse backgrounds and interests of the participants, the presented themes generated lively discussions as well as disagreements, thereby helping the team indemnify the angles that need further exploration and the dividing lines in the debate.

Internet search

Before embarking on data collection, the research team undertook an internet search in order to ascertain what information was already available about mediated public law cases. Obtaining information on mediations is difficult because of the shroud of confidentiality that surrounds the process.⁴

The main sources of public law mediations were the Ministry of Justice ADR Pledge annual reports and the database of the Nationwide Academy for Dispute Resolution (NADR), a limited company offering dispute resolution services and

³ The group discussions took place under 'Chatham House' rule.

⁴ The search did not include medical negligence or personal injury cases involving public bodies, or family public law cases, and it focused on challenges made against public bodies by individuals rather than organisations.

accreditation of mediators and arbitrators.⁵ Its online mediation database and mediation case summaries (covering approximately the past 20 years) identify fewer than 10 cases as public law cases in which mediation was used or was mentioned in the court record. Many of these are well known – such as *Cowl*⁶ and *Anufrijeva*⁷ – and all are in the public domain.

The Centre for Effective Dispute Resolution (CEDR), another dispute resolution provider and producer of the booklet *ADR for Public Authorities: A guide for managers*, provides anonymised case digests on its website.⁸ Only one of these appeared to be a public law case, involving a dispute between a local authority and a care home over fee levels within a contract. Although the residents of the care home were affected by this dispute and the outcome, they were not parties to the case and are not described as having attended the one-day mediation. This case involved similar issues to those of a case described by one of the interviewees, although in that case the individual care-home residents attended one of the two mediation sessions.

The government's ADR Pledge (March 2001) specifically identifies public law as an area in which ADR may not be suitable. Therefore, it is to be expected that not many of the cases summarised in the annual reports monitoring the use of the pledge commitment are judicial review claims. In published reports since 2002,⁹ the Ministry of Justice reports on only two cases involving public law issues. One was a negligence and discrimination claim relating to immigration detention; the other a judicial review involving three public bodies. Neither summary provides much detail, although in the latter case mediation is said to have resulted in £30,000-worth of cost savings.

The sample

The focus of this project went beyond an interest in experiences of mediation. Rather, it sought to evaluate whether, in the view of subject specialists, mediation could ever provide a valuable addition to the dispute resolution 'toolkit' of practitioners in the highly specialised arena of the Administrative Court. However, it became clear during re-examination of the Dynamics of Judicial Review study data that distinctions needed to be made between those practitioners with an understanding of what constituted mediation and those who were ill-informed about the process. Given the focus of the project on the views of experts it was decided to concentrate further explorations mainly on the former category, that is practitioners who were known to have an interest in and experience of mediation. As a result, interviewees were selected from among practitioners who had participated in the Dynamics of

⁵ See www.justice.gov.uk and www.nadr.co.uk (last accessed 06.05.09). Note that seven cases are listed as public law mediations in the database, although these include cases where no mediation was used but was mentioned by the judge and an additional four are described in the mediation case summaries list. Also note that it is often difficult to identify from the information provided whether or not a case is in fact a judicial review.

⁶ *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935.

⁷ *Anufrijeva v London Borough Southwark* [2003] EWCA Civ 1406.

⁸ www.cedr.com/CEDR_Solve/casestudies/results.php?param=adm (last accessed 06.05.09).

⁹ The 2006–07 report is available at www.justice.gov.uk/news/announcement-150108a.htm. There is a link for archived reports from previous years.

Judicial Review study who had relevant mediation experience and who were re-interviewed with a new focus on mediation. Other experts in the field of public law were identified for interview through expert networks.

Interviews were not undertaken with litigants who had experience of mediation. Whilst their views would undoubtedly be of value, problems of identification,¹⁰ limited resources and, most importantly, a desire to focus on the ‘gatekeepers’ to mediation prompted the research team to focus all their efforts on expert practitioners instead. We recognise, however, that litigants’ views and experiences are an integral part of the picture when assessing the value of mediation, and so we suggest that this is an important area for future research.

Policymakers

Policymakers have provided much of the impetus for an increasing use of mediation in the post-Woolf-reforms environment. As a result, it was considered important to involve representatives of such stakeholders in the interview sample. The views of four senior policy advisers from the Ministry of Justice and LSC and two senior representatives of the Administrative Justice and Tribunals Council were sought because of their expertise in public law, litigation and funding issues.

Members of the judiciary

The project team was keen to include nominated judges¹¹ in the Administrative Court who deal with a large volume of judicial reviews in the sample. An early interview was conducted with Mr Justice Collins, the then Lead Judge with judicial oversight and control of the Administrative Court. An interview was undertaken in the early stages of the project with Lord Woolf (now an experienced mediator) because of his prominent role in civil justice reforms and his well-documented enthusiasm for mediation. Two other judges, Mr Justice Ouseley and Mr Justice Sullivan, participated in focused discussion in the expert working group set up by the project team. In addition, the research team drew on interviews (undertaken as part of the Dynamics of Judicial Review project) with two experienced barristers acting as deputy administrative court judges, one of whom had a particular interest in ADR. Both were well known for their lecturing and published work in the field of public law and it was anticipated that they would have a broader perspective than merely their own case work portfolio. Two other members of the judiciary who were approached declined to take part in the research.

Expert barristers and solicitors

Most of the interviewees in the sample of expert barristers and solicitors were approached because they were known to have had experience of, or interest in, mediation. Those few who were not in that category were approached because they fell into one of the following categories:

¹⁰ Many of the mediations to which the research team were alerted in the field of judicial review had happened some time ago and difficulties in lawyers tracking down their former clients and negotiating their participation in the project were anticipated.

¹¹ Judges are nominated by the Lord Chief Justice to sit on cases in the Administrative Court. See www.hmcourts-service.gov.uk.

- were experts in the field of judicial review;
- were experts in an area of law in which mediation is rare, such as planning, housing and prisons law;
- had handled a large volume of public law cases;
- were involved in the not-for-profit sector; or
- had represented a large number of different defendant public bodies.

Unfortunately, there are no accessible official records of the cases in which mediation took place. Moreover, it was clear from the outset that very few mediations had occurred in the context of issued judicial review cases. As a result, a snowballing technique was used to identify practitioners for interview. A total of 45 practitioners were asked to participate in the research project. The sample included a number of lawyers who had been involved in the Dynamics of Judicial Review project and had additional insights to offer on mediation and others identified through professional networks who had experience of mediation in the field of public law. Of the claimant solicitors in the sample, eight were in private practice and two worked for national legal charities. Solicitors with expertise in defence work included: an in-house solicitor with a London Local Authority; a solicitor in a London private practice acting for both London and out-of-London authorities; a former solicitor, chief executive of a local authority and a trained mediator; a solicitor at the Department for Work and Pensions; a senior solicitor acting for central government; and a junior and a senior practitioner from the Treasury Solicitor' Office (TSol) who had a particular interest in mediation. Of the nine barristers interviewed, six were also trained – though not necessarily practising – mediators, and all but one barrister who specialised in local authority work had at least some mediation experience.

On the whole, the response to interview invitations was positive, and, on occasion, enthusiastic. But not all who were invited agreed to an interview, or even responded. The perspectives of defendant lawyers were noticeably harder to obtain, as were interviews with commercial lawyers.

Mediators

The sample also included 11 interviewees who were practising mediators. Of these six mainly practised as barristers or solicitors, and have also been included in the sample of practitioners above. A further four interviewees who were practitioners had trained as mediators but did not practice. The sample of mediators drew on those who had experience of public law mediations. Within this group only one invitation to take part in the study was turned down.

Questionnaire design

The exploratory nature of this qualitative project led to the choice of semi-structured interviews as the most appropriate research method. Several different versions of the questionnaires for use in interviews were designed and amended by the research team before the final version was adopted. In addition, four pilot interviews were conducted which led to further amendments being made. The interviewees were asked about their experience in public law litigation, their area

of expertise and the rates and modes of settlements of judicial review cases in which they had been involved. The interviews proceeded to focus on;

- factors which contributed to, or inhibited settlements;
- the potential for mediation to add value to the judicial review process as compared with bilateral negotiations, roundtable discussions and adjudication;
- views about the most appropriate stages at which mediation might be of value;
- aspects of mediation which might prove problematic in the area of judicial review;
- interviewees' views of the role that the Administrative Court should play, if any, in facilitating mediation.¹²

In addition, a series of more practical questions were asked which focused on such issues as how they would go about arranging mediation, how they would select a mediator and why, and what their role might be in a mediated public law dispute.

Interviewees were asked to describe in detail any experience they had of mediated public law cases and to evaluate the success of the process when compared to other forms of dispute resolution. Those with little or no mediation experience were asked to consider why it did not feature in their work and to examine the obstacles they recounted.

The interview process

A conversational style was adopted in interviews in which prompts and probes were adapted to the discussion that arose in the course of the interview. It was considered important to provide opportunities to test and tease out interviewees' perceptions against various 'what if' scenarios. In this way, interviewees engaged in the re-examination of perceived obstacles to mediation as well as wholly uncritical endorsements of mediation as they arose. It follows that in some interviews the questionnaire was not always rigidly adhered to but used instead as an aide-memoire of key areas for exploration.

All but three interviews were conducted face to face. Three were conducted by telephone. Interviews lasted one-and-a-half hours on average, with the shortest interview lasting 41 minutes and the longest 2.5 hours. It was felt that the emphasis on getting interviewees to re-think their previously unchallenged assumptions led to them becoming more engaged with the topic than if they had been asked to supply unchallenged opinions. Interestingly, several interviewees remarked in the course of the project that they were re-thinking referral to mediation in their current caseload as a result of the questions that were put to them.

¹² This question yielded few meaningful insights and was not pursued in the analysis.

Data analysis

All interviews undertaken by the research team were recorded and transcribed with the consent of the participants. Because of the discursive and exploratory style adopted in interviews it was not always easy to code responses into neat categories. Instead, a number of key themes were identified on close reading of the transcripts and used to organise the qualitative data. Anything said about a particular theme was clustered together in a Word document. An Access database was then created which allowed the research team to enter a separate record for the data for each interviewee on a spreadsheet with summaries of their key arguments. Once responses to questions have been clustered in this way the research team undertook a close reading of the responses and identified sub-themes.

In addition, the details of all mediated public law cases reported to the research team were entered into a separate database. Data were stored electronically and password-protected. Access to the data was limited to the members of the research team and care has been taken in reporting the data to ensure that none of the interviewees are identifiable as the authors of particular quotations.

Section Three

A brief anatomy of settlement in judicial review¹

Introduction

This section looks at the progress of claims through the judicial review process and the stages at which settlements tend to occur. This provides us with an overview of current settlement activity which will allow us to consider how and when mediation could usefully be mapped onto existing processes. Until recently, little has been known about settlement rates in judicial review, especially where this occurs prior to the onset of litigation. This section is based on the analysis undertaken by the Dynamics of Judicial Review study which provides a unique overview of settlement activity in the field. This allows us to present both quantitative data, on rates of settlement and withdrawal at each stage of the judicial review procedure, and qualitative data, gleaned from experienced practitioners about litigation strategies at each of the stages.

Before visiting the data, it is important to draw attention to certain features of judicial review litigation. Firstly, judicial review is a remedy of last resort, to be used only if there is no other alternative which could solve the problem. This means that for public law specialists, the consideration of alternatives prior to commencing a judicial review is an intrinsic part of the process. Secondly, the process is considered to be simple and relatively quick as compared with other forms of civil litigation. Thirdly, the permission filter enables the court to engage in a form of early neutral evaluation by refusing permission to proceed in claims that are not arguable. Finally, as will be seen in this section, significant settlement rates are the norm in judicial review actions.

The post-Bowman reforms of the judicial review process in 2000 have provided new incentives to settle disputes at an early stage and to reduce the number of

¹ The data and findings in this section are drawn from V Bondy and M Sunkin (2009) *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Public Law Project, London. See also V Bondy and M Sunkin, 'Settlements in judicial review proceedings' [2009] *Public Law*, April:237–259.

last minute 'door of the court' settlements which gave rise to avoidable costs in terms of legal fees and court time. The pre-action protocol, introduced in March 2002, required the parties whenever possible to identify and communicate the issues in dispute prior to proceedings being issued, further promoting a culture of early resolution.

The judicial review procedure and the stages at which cases conclude

The judicial review process consists of six key stages.²

- The potential claimant sends a letter before claim in accordance with the pre-action protocol except where exemptions apply. Examples of such exemptions include cases which are urgent or where the defendant is *functus officio*.³
- The defendant replies, usually within 14 days, either agreeing to provide the remedy sought or aiming to persuade the potential claimant that the claim has no merit.
- If matters are not resolved and a claim is issued, the claimant must serve the defendant with the claim within 7 days of the date of issue.
- The defendant files an acknowledgment of service within 21 days of service of the claim.
- Permission stage when a judge considers whether a case is arguable and should be allowed to proceed to substantive hearing.
- Substantive hearing.

Urgent matters can be dealt with by way of interim relief or at an expedited hearing.

The Dynamics of Judicial Review study shows that there are three stages in the judicial review process at which settlements occur. These are:

- following the letter before claim (LBC) and prior to issue;
- immediately after a claim has been issued;⁴
- after permission to proceed has been granted.

Using data from the Dynamics of Judicial Review study, obtained from interviews with practitioners, it was established that, as a result of communications between the parties following the letter before claim, an average of 60 per cent of initial threats of judicial review did not proceed. Some disputes disappeared when defendants were able to demonstrate to the claimant solicitor that the case lacked merit, but the majority concluded in favour of claimants when defendants

² On procedure, see <http://www.hmcourts-service.gov.uk/cms/1220.htm#five> (last accessed 06.05.09).

³ *Functus officio* 'is a judicial or official person prevented from taking a matter further because of limitation by certain regulations', HM Court Service Glossary of Latin Terms, <http://www.hmcourts-service.gov.uk/infoabout/glossary/latin.htm> (last accessed 06.05.09).

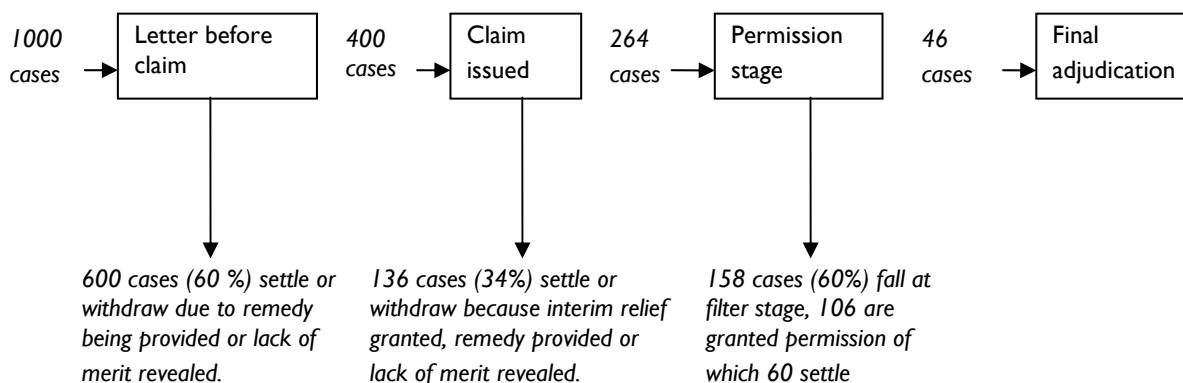
⁴ Sometimes following an injunction, but not always.

responded positively, and either provided the claimant with what they were asking for or offered sufficient concessions to avert proceedings.

Thus, of each 1000 threats of judicial review made in a letter before claim, 600 (60 per cent) do not result in the issue of any proceedings. Figure 1 below shows that, of the original 1000 threats of judicial review, 400 cases are issued. Data from the Administrative Court in the same study enable us to calculate that, of these, 136 cases (34 per cent) are settled or withdrawn shortly after issue. This is either because interim relief is granted, which effectively resolves the dispute, or a remedy is provided by the defendants or, more rarely, because lack of merit is revealed. Of the remaining 264 claims that are considered at the permission stage by a judge, a total of 158 cases (60 per cent) are refused permission to proceed. Of the 106 cases that are granted permission, 60 (56 per cent) are settled before they reach final hearing.

Accordingly, out of every 1000 threats of judicial review, only 46 disputes, a mere five per cent, reach a substantive contested hearing. It is important to bear these figures in mind when we come to consider the actual or potential role of mediation in this arena.

Figure 1: The progress of 1000 claims through the judicial review process



The potential for mediation

It could be argued that mediation is only necessary where direct negotiations between the parties have failed to achieve resolution. Moreover, if mediation is to be attractive to litigants, both sides in a dispute must have either something to gain from engaging in it or something to lose from not attempting it. The parties are otherwise unlikely to seek the involvement of a third party, with the consequential investment of time and costs. A barrister/trained mediator with extensive mediation experience explained:

‘There are lots of cases that will settle without the need for the formal and potentially costly process of mediation . . . For lots of local authorities, if interim relief . . . and permission [are] granted, they don’t have the will, energy or enthusiasm to defend a case to a substantive judicial review and carry all those costs, they would just say OK, we’ll provide this support . . . something that is quite limited and straightforward, most asylum support cases [for example] . . . wouldn’t end up being mediated because [it’s] a low level kind of support and it is a yes or no [issue] . . . There isn’t much

to negotiate about, either they'll do it or not. It's likely to be in the more complicated care packages where mediation would have a role to play.'

Having described the standard trajectories of judicial review cases, we move on to consider how and why settlements happen and where in the process mediation might feature.

Cases that are resolved without being issued

The pre-action protocol has undoubtedly contributed to an increase in the rate of early settlement by encouraging an early exchange of views.⁵ Practitioners reported that the defendants' response to a letter before claim was sometimes sufficient to demonstrate that there was no merit in a claim and no further action would then be taken. More often, however, defendants take appropriate action in response to the threatened challenge. A claimant solicitor specialising in education and disability law explained:

'I would say that about 40 per cent [of our claims are resolved] after we've sent the pre-action protocol letter and before us having to issue proceedings. Resolving means either they give us what we want or they give us more than we want. Or they give us enough such that . . . proceedings are no longer merited . . . I think they settle because the problem . . . has arisen, not through any deliberate intent, but because of, well, incompetence is probably putting it too strongly, but organisational difficulties on the part of the public authority. They settle because the pre-action protocol letter will invariably be passed to the authority's legal department who may then advise them . . . that they're unlikely to succeed if the judicial review is brought against them, or . . . that actually to effect the remedy sought is much more straightforward and cheaper and less problematic than fighting a case . . . And particularly in education cases where what you might be asking is just for somebody to take a decision correctly . . . A lot of decisions are taken on an administrative level and by people who aren't at all skilled in public law, and therefore may not be aware of the issues of propriety or illegality or perversity or now proportionality.'

Another example of cases that can easily resolve was given by an experienced public law practitioner interviewed for this project:

'Cases that are about delay in doing something are the most common cases to settle at the letter before claim stage because all the public bodies need to do is just get on and do it.'

Interviewees also drew attention to the fact that defendants will avert challenges by conceding just enough to avoid proceedings, but without necessarily addressing underlying issues. In the words of one claimant solicitor:

'Approximately one-third of potential claims end as a result of sending the letter before claim. This happens either as a result of the defendants bringing up materials that we were not aware of, or more often they resolve it in a way which means that there is no need to proceed. It may be a combination. Their concession is not always all that we want, but it is sufficient to mean that we are not in a position to go ahead. As always in judicial review, the clients are not interested in procedural stuff, they are interested in the substantive stuff, and they rarely get it in judicial review. The question is

whether they get it subsequently. And if the defendants are clever, they find a way of remedying the error, but it doesn't mean that the reconsideration will allow us to achieve what the client wants.'

This was confirmed by a barrister acting for local authorities who said:

'In reality there's no error that can't be cured by being thought about again . . . Some [clients] may say they've managed to cut down litigation by so doing. If you have made a bad decision, it is best to acknowledge it straight away or if not acknowledge then at least to address it by saying . . . we're going to make another decision in three weeks and we're hard at it. And if it is a case of failure to carry out an assessment, it is essential that the assessment should be carried out.'

Although there are variations in the degree of trust and co-operation between claimants' and defendants' representatives, it is clear that parties engage, wherever possible, in pre-issue dialogue. Defendants presented themselves as seeking to address matters wherever they could by taking a fresh decision or providing the required service. Where the challenge is not to a decision, but to a failure to carry out a duty, there is clearly no room for negotiation, as the matter can only be resolved if the authority complies with its duties.

Practitioners pointed out that many cases that cannot be resolved in direct negotiations would also be unsuitable for mediation. Included in this category were urgent cases, claims requiring legal determination on a point of policy or law where there was no perceived room for compromise, or cases where the defendant is *functus officio* and has therefore no legal power to change the decision being challenged.

Several further factors appeared to militate against mediations of cases at the pre-issue stage. On the claimant's side there is the requirement to issue proceedings promptly, and in any event no later than three months from the date of the decision being challenged. In addition, publicly funded claimants may encounter funding difficulties that would make it more viable for them to consider mediation after a claim has been issued. Often the issues in dispute may not be crystallised until later on in the process. The last point was mentioned by a claimant solicitor with extensive mediation experience in the area of community care law:

'[Mediation] is not [likely] pre-issue or pre-letter before claim, because the parties are almost not in a position to mediate. The issues haven't been crystallised sufficiently for them to realise that it's something that they need to give serious consideration to. Public bodies are really reluctant to commit the time and the cost to a formal mediation, unless they're in the context of ongoing litigation.'

And finally, where defendants refuse to settle a case because in their view it has no merit, they are also unlikely to agree to engage in mediation. They would expect such a claim to be refused permission and disappear. This leaves a very small margin of cases in which both parties are likely to be able or willing to engage in mediation at this early stage.⁶ This was summarised by a barrister and trained mediator:

⁶ Only one such pre-permission mediation was reported on in interviews and there is insufficient detail as to this early mediation as it was reported by a person who had not dealt with it directly. See the case studies in Section 8 below.

'because of the time limits, as a claimant, I would want to issue some form of a claim before I mediate – partly because I wouldn't want to lose the chance to bring a timely claim, and partly because I would have thought that I would at least want to have all those participating in the mediation to have the ability to say, "We think the outcome should be that this is quashed, and so we ask you to sign a consent order." And so I think [mediation is more suitable] after issue and post-permission, basically. The problem with the process is that after issue, pre-permission there's a very short window there – you have to set up summary grounds, so I think, realistically, it's [post-permission], in terms of mediation.'

Clearly, the potential for mediation at this stage is limited, but this does not mean that it should not, or does not, happen. In the sample of 15 mediated disputes presented in Section 8, four mediations appear to have taken place after the letter before claim but prior to the claim being issued.⁷

Cases that are resolved after being issued, but before permission is considered by a judge

It could be argued that it is only after a claim has been issued that the claimant is in good position to consider mediation. Having issued proceedings, their position is now protected, and they will normally have had a substantive response from the defendants which indicates their understanding of the issues. Defendants who might have delayed responding to a threat of proceedings in order to see whether it materialises will now take a closer look at the complaint. If they consider that a claim has some merit, but have been unable to reach an agreement with the claimant, they may be more amenable to considering alternatives to bilateral negotiations such as mediation after the issue of a claim.

There are clearly circumstances in which mediation holds no attraction at this stage. Where defendants are confident that the claim lacks merit they tend to prefer to take no action until it has been considered by a judge at permission stage. In other instances it can be more cost-effective to concede rather than resist a claim, regardless of the merits. In the words of a barrister acting for central government:

'It is a question of who wants to get rid of the dispute, or what you're interested in. Usually for defendants, they want to get rid of a case as quickly and as cheaply as possible, both in terms of legal expenses and resources.'

Moreover, interviewees felt that, where defendants indicate willingness to concede, the likelihood is that a negotiated settlement will be reached directly between the parties' representatives. Even where the concession is limited and does not provide a substantive resolution, such as when the defendants offer to reconsider the decision, the claimant often has no choice but to accept it as usually it would undermine the grounds for the challenge and pre-empt the judicial review. On the rare occasions when this is not the case, or where the defendants prefer a long-term solution rather than merely dealing with the specific challenge,

mediation would only become relevant where both parties wish to reach a solution but are unable to do so by themselves.

Where merit is accepted by the defendants, a settlement ought to follow. Where defendants believe that a claim has no merit or where the outcome of permission is uncertain, they are likely to want to wait and see what happens at permission. As the only cost for the defendant at this point is that of preparing the acknowledgement of service, it is difficult to see what would convince defendants to agree to mediation.

In our sample of mediated cases, only one mediation occurred at this stage in the process, and it was initiated by the defendant government department. In this case, the department appears to have been motivated by recognition that the claim had merit, although other motives, whilst not explicitly reported, may have played a part, such as a desire to avoid publicity. In any event, the mediation failed to achieve a settlement and the case went on to a full hearing.

Cases that resolve after permission has been granted

Once permission to proceed to adjudication has been granted, defendants will look at the case afresh. Confirmation that a case is considered by the court to be reasonably arguable provides a new incentive for defendants to reconsider their position and to try to avoid adjudication. We have seen earlier that more than half of the claims in which permission was granted were settled at this point, and we know that nearly all were settled in favour of the claimant.⁸ As a barrister who is also a trained mediator explained:

‘You get a permission order and suddenly, if you’re for a defendant and permission’s been granted, it’s a completely different proposition to simply facing a judicial review claim, because the judge has said there’s an arguable case and you then have to kind of get ready to produce your case and your evidence, and do quite a lot of work, and so the . . . opportunity to face up to the case exists.’

It follows that it is at this point, after permission had been granted, that mediation is most likely to be considered and to occur. But only where bilateral negotiations cannot produce a settlement. This is not because mediation cannot potentially add value to settlements at any stage, but because parties are unlikely to be prepared to expend time and money setting up mediation if they can reach an agreement between themselves. It is worthy of note that of the 15 mediated judicial review cases identified in the course of this project, 10 are known to have occurred after permission had been granted.

Conclusion

The Dynamics of Judicial Review study has shown that most judicial review claims are settled and that most settlements result in a positive outcome for the claimant. It was estimated that over 60 per cent of judicial review threats are resolved without the need to issue proceedings as a result of communication between the parties. Settlements also occur immediately after proceedings are issued, when

⁸ For a full discussion on post-permission settlements, see Bondy and Sunkin, *The Dynamics*, n. 1 above.

over a third of claims settle, Of claims that are granted permission, more than half settle at that stage.

Settlements occur mainly as a result of defendants accepting that claims have merit, although other pragmatic considerations can also play a role. While cases that settle as a result of direct communication between the parties could, in principle, also be mediated, possibly with a better outcome for one or both parties, mediation remains an unlikely option where more familiar and straightforward routes to settlement are available to lawyers.

Further, the nature of the remedies in judicial review enables defendants to avert many challenges simply by agreeing to reconsider and come to fresh decisions. In such circumstances, claimants often have no choice but to accept the defendant's concession and withdraw proceedings. Such 'pragmatic' concessions on the part of defendants offer the short-term advantage of disposing of troublesome challenges quickly and cheaply, but often produce the same outcomes for claimants without addressing underlying issues or providing substantive remedies for them.

Thus, in the light of current practices, any realistic exploration of the potential role of mediation in judicial review would need to focus on the small percentage of unresolved cases that proceed beyond the permission stage in which both parties have an interest in reaching a settlement but are unable to do so because bilateral negotiations have broken down or stalled.

The question remains as to whether there could be an expanded role for mediation in some cases if defendants could be motivated to engage more fully with the substantive underlying issues rather than seeking to dispose of claims by making minimal concessions. This question will be explored more fully in the following section.

Section Four

Mediation experience and attitudes among public law practitioners

Introduction

Lawyers have a critical role in determining the incidence of recourse to mediation and evaluations of mediation schemes have typically identified them as ‘gatekeepers’. In light of the low take-up of mediation as a method of negotiated settlement in public law cases, it is therefore essential to understand the attitudes of legal practitioners to mediation and the influence such attitudes may have on their advice to their clients regarding the choice of legal redress mechanisms. In this section, we discuss practitioners’ attitudes towards the use of mediation, drawing on data from interviews with public law practitioners conducted during the Dynamics of Judicial Review study, as well as from subsequent interviews with lawyers who have an express interest in, and experience of, mediation.

What do practitioners understand by the term ‘mediation’?

Despite the extensive literature on mediation generally, it became clear in the course of the Dynamics of Judicial Review study that public law practitioners were often unclear about the precise meaning of the term ‘mediation’. They expressed a variety of assumptions about the mediation process, some of which revealed misunderstandings about the differences between mediation and other forms of negotiated settlement, for example, bilateral negotiations and roundtable meetings. In addition, mediation was sometimes treated as being synonymous with compromise. Such confusion about the process is not unusual and has previously been commented on in the UK and other jurisdictions. Buck has raised the point that:

‘The definitional problem is not merely an academic debate as the confusion about terms can prevent public agencies imparting clear information and can therefore act as an obstacle to growing public confidence. It is also likely that as more courts and tribunals make use of ADR procedures there will be a greater need to develop consistent understandings of relevant terms.’¹

It became evident that, when ‘misapplying’ the term, interviewees were sometimes using it to connote collaborative or co-operative styles of negotiation

¹ See, for instance, T Buck (2005) *Administrative Justice and ADR: The Australian experience*, DCA Research Series 8/05, London, section 5.3, pp 55–57. at p. 56.

between lawyers, leading to creative and satisfactory resolutions of complex disputes. An account given by a solicitor specialising in community care law illustrates this point:

'I would describe another situation as a form of mediation. This is a case where we had a public funding certificate. We weren't going to issue though, because the client had such particularly severe learning disabilities . . . which meant that she needed an absolutely concrete predicable path in her life, otherwise her behaviour became uncontrollable. She was being moved from one day care centre to another and needed a very clear plan to ensure that it happened [which] meant that the old day care centre needed to delay its closure in order to allow that to happen. They sort of agreed in principle that that would take place, thereby preventing us from issuing, but we did have a very detailed sitting around the table with both solicitors present, chaired by the head of the learning disabilities services, in which the detail of the process was negotiated and fashioned out, and if that hadn't been agreed, then we would have to revert to issuing proceedings.'

Although the absence of a neutral third party means that such interactions should not, technically, be referred to as mediations, they nonetheless demonstrate versatility in negotiating style within the existing adversarial system. Some commentators would describe this behaviour as marking a shift in litigation culture away from the battleground to the negotiating table. In the US, where mediation has long been integral to the civil justice system, alongside litigation in various forms, a number of 'collaborative lawyering' programmes have evolved. These are said to reflect a desire on the part of lawyers who are trained in the adversarial system to develop new skills and approaches to dispute resolution.²

ADR and the settlement orientation as an intrinsic part of judicial review

The pre-action protocol stipulates an obligation to consider alternatives to adjudication from the outset. It lists 'discussions and negotiations' as the first of four options for resolving disputes, followed by ombudsman, early neutral evaluation and mediation. The public law practitioner will also be aware of the need to consider the availability of a statutory appeal, internal appeal or use of a complaints procedure. Where public funding is applied for, the solicitor will have to satisfy the LSC that there is no viable alternative to legal proceedings. Such evaluations are subjected to further scrutiny when counsel is instructed, often to advise on the merits at an early stage, or at the point of issuing. This means that, in publicly funded judicial reviews, by the time a claim is issued, the question of alternative processes and remedies will have been considered several times. The permission stage can be said to provide a form of early neutral evaluation, indicating to the parties the strengths or weaknesses of their respective cases. This happens not only as a result of the decision to grant or to refuse permission to proceed to judicial review, but also through observations made by judges when making the permission decision. In addition, judges can engage in case management at this

² For a review of the literature on these issues, see C Menkel-Meadow (2003) *Dispute Processing and Conflict Resolution: Theory, practice and policy*, Ashgate, Aldershot and Burlington, Dartmouth; and L Mulcahy, (2005) 'Feminist fever? Cultures of adversarialism in the aftermath of the Woolf reforms' in *Current Legal Problems*, J Holder and C O'Conneide (eds), Oxford University Press, Oxford, vol. 58, pp. 215–234.

point and, when deemed appropriate, direct that the parties attend court for an oral permission hearing. This provides an opportunity for the judge to encourage communication between the parties with a view to promoting a settlement.³

It was shown in the Dynamics of Judicial Review study that the opportunities and incentives to negotiate arise at various stages. Significant proportions of disputes settle, firstly, as a result of the letter before claim being sent, secondly, following the issue of a claim, and then again after permission has been granted, suggesting the existence of a 'settlement culture'.

Claimant solicitors involved in the Dynamics of Judicial Review study commonly provided a long list of attempts at settlement made prior to issuing proceedings.⁴ In a case that was settled after permission was granted, one interviewee, a solicitor at a London law centre who specialised in housing law, described repeated efforts to communicate with the defendants, a London local authority, before finally issuing proceedings:

'I sent many letters arguing that [the council] should treat this as a new application. It led to another interview, but the same decision [was made], namely that there has been no material change of circumstances. I applied for legal aid, briefed counsel to draft the claim form, and wrote again explaining why the decision was wrong. I got no reply to this letter nor to a subsequent letter and only then did I send the pre-action protocol letter to HPU with a copy to legal services. I tried again to settle just before issuing.'

It was argued that even in urgent cases, efforts can be made to avoid court. One claimant solicitor expressed this view in the context of a case concerning failure on the part of a local authority to make adequate community care provisions:

'Our first contact with the council was by way of letter before action, as time was ticking on at the stage when the family approached us. There were time pressures for a variety of reasons: there was the risk of the placement going to someone else, the claimant was beginning to self-harm more frequently, the family unit was about to break down and it was turning into a desperate situation. It was August and the placement was due to commence in September. We constantly tried to avoid issuing . . . but in the end there was nothing left to get out of the negotiations. We encouraged the family to continue its relationship with the social workers, and there were frequent meetings between these parties.'

It was not only claimant solicitors who made vigorous attempts to resolve cases prior to trial. Interviewees in the Dynamics of Judicial Review study demonstrated that both parties in potential judicial reviews made efforts to keep cases out of court,⁵ including suggesting the use of meetings and other alternatives to trial.

Lawyers were strongly of the view that settlements negotiated between two competent legally qualified professionals could be just as successful as those involving mediators. One out-of-London solicitor with eight years' litigation experience had

³ V Bondy and M Sunkin (2009) *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Public Law Project, London.

⁴ For a full discussion on pre-permission communication between the parties and rates of early settlements, see *ibid.*

⁵ *Ibid.*; and V Bondy and M Sunkin, 'Settlements in judicial review proceedings' (2009) *Public Law* April 237–259.

an indirect experience of mediation which, in their view, compared unfavourably to a directly negotiated post-permission settlement:

'I was involved in a case recently, concerning closure of a residential facility for disabled adults. I was litigating in parallel with another law firm on the same issues for a different group of clients. They chose the mediation route, and we went for a judicial review. At great expense, they obtained a reassessment of their clients' needs, but no commitment to keep the facility open. We negotiated a settlement after obtaining permission, and we got them to enter a new contract to keep the facility open. I think that we got a better result for less of an expense. We were both funded by the same LSC area office who tried to pressurise us to join in on the mediation.'

Interviews conducted with expert practitioners in the current project confirmed this approach. In the words of one barrister:

'I don't see the need for a mediator. I think that as lawyers we ought to be able to have proper discussions and we ought to be able to listen to each other and put our concerns on the table openly and then sort things out, hopefully come to a consensus. And if we can't, then we carry on with litigation.'

Clearly, where lawyers are able to conduct fruitful discussions with each other and reach a satisfactory solution, they are unlikely to seek the assistance of a mediator. This begs the question, however, of whether lawyers are right to think that cases that cannot be negotiated, even by competent and willing lawyers, are also intrinsically unsuitable for mediation. Lawyers without mediation experience may not appreciate either how mediation could enable parties' entrenched positions to change or how it could facilitate different outcomes from those reached through direct negotiations.

Practitioners' perceptions of the circumstances in which mediation is suitable or unsuitable

Practitioners in both the Dynamics of Judicial Review study and the current study identified a wide range of circumstances in which they thought mediation was irrelevant or unsuitable in their work. In this section, we explore the main reasons they provided as to why mediation was not appropriate in particular types of case. Table 4.1 below sets out the reasons given by interviewees in the Dynamics of Judicial Review study.

It is important to stress that most of the lawyers in that study had no mediation experience and their views about the suitability or unsuitability of mediation were therefore untested.⁶ We move on subsequently to explore the views of lawyers and mediators with public law mediation experience and will make some comments regarding the differences and similarities between the views of the two groups.

It can be seen from the table that the three factors most frequently mentioned as rendering mediation unsuitable in judicial review cases were considered to

⁶ Of the 123 interviewees in the Dynamics of Judicial Review study, only 19 lawyers (eight acting for claimants and 11 for defendants), comprising 17 % of the sample of interviewees, had had some experience of mediation. The experience of the majority of these lawyers was in areas other than public law. Only seven interviewees had experience of mediation in the context of public law disputes.

be urgency, the need for a judicial determination on a point of law or policy, and lack of room for compromise. Urgency was mentioned by nearly twice as many claimants as defendants. This is unsurprising given that it is inevitably the claimant who is in need of an urgent remedy, for example, in cases of imminent homelessness or a school placement. The need for judicial determination on a question of law or policy was mentioned by both sides in almost equal numbers.

Table 4.1 showing the main reasons given by Dynamics of Judicial Review study interviewees for considering mediation unsuitable.⁷

Reason	Claimant	Defendant	Both
Urgency/time limits	35	18	53
Question of law/policy/liberty	19	21	40
No room for compromise/strong case	5	21	26
Costs implications/expense	9	7	16
Defendant is <i>functus officio</i> ⁸	5	2	7
Power imbalance ⁹	3	-	3
Total number of responses	76	69	145

What is interesting is that four times as many defendant solicitors as claimant solicitors cited ‘no room for compromise’ as a reason for the unsuitability of mediation or other forms of ADR. Because of the relatively small sample, it is impossible to draw any firm conclusions from this, but it might possibly reflect the fact that in public law disputes, the key to resolution or to compromise lies with the defendants rather than the claimants. As expressed by one public law specialist:

‘What claimants want is fairly obvious and it is up to defendants to offer it; they are always in a position to make an offer and start negotiations, without the need for a formal ADR structure.’

The subsequent in-depth interviews with lawyers who had experience of mediation, allowed further exploration of these issues. Their responses revealed some overlap with the earlier study, but the more experienced practitioners interviewed in this study placed more emphasis on the question of whether the use of mediation raises issues of principle that are problematic in the context of public law disputes and how these can be overcome. These included the need for judicial precedents, the need for transparency and publicity in public law cases and issues of power imbalance between unequal parties.

Here we focus on three key issues: the perception of lack of room for compromise; the need to set a judicial precedent; and the importance of transparency in public law disputes. The question of power imbalance is discussed later in Section 6.

⁷ This table is reproduced from Bondy and Sunkin, ‘Settlements’, n. 5 above.

⁸ <http://www.hmcourts-service.gov.uk/infoabout/glossary/latin.htm>: ‘Having discharged duty – A judicial or official person prevented from taking a matter further because of limitation by certain regulations’.

⁹ I.e. disparity in starting points, parties not on equal footing, need to ensure that parties are adequately represented.

No room for compromise

The contention that cases in which there was a need for an authoritative statement on 'yes or no' questions of law or policy are unsuitable for mediation emerged as a strong theme in interviews with lawyers both with and without mediation experience. Many held the view that, where the parties disagree on the correct legal position or on whether a statutory duty is owed, a legal determination is needed. If the defendants hold that no duty is owed, they would be acting unlawfully in conceding a claim in such circumstances and, hence, would not participate in any negotiated compromise, including by way of mediation. This may explain why four times as many defendant as claimant solicitors in the Dynamics of Judicial Review study cited the lack of room for compromise as a factor rendering mediation unsuitable.

A claimant perspective on this was articulated by a solicitor specialising in complex public law cases who explained:

'There are cases where for one reason or another you would not be able to achieve anything, where you are dealing with an issue of statutory construction or something. It's a pure black and white question of law and there is no room for compromise – either one interpretation of the law is right or the other is right and there is no other practical means by which the problem can be resolved. In that situation I wouldn't offer [mediation] because it would be an empty offer.'

He went on to give an example:

'I am doing a case at the moment which is about whether the Parliamentary Ombudsman's reports, as far as their findings are concerned, are binding on the Secretary of State. Now the answer is either yes or no. A mediator is not going to be able to assist anyone in reaching that answer.'

Other examples which fell into this category involved cases in which the scope or function of statutory provisions were being called into question. This might be the case, for example, in an action in which it was claimed that regulations contravened, or were incorrectly applied so as to contravene, the provisions of the Human Rights Act. In these situations, the only way forward is for the court to decide between two opposing arguments. Eligibility for housing under homelessness legislation was another example of such a category. These are cases that were suitable for either/or determination rather than compromise. In the words of one defendant solicitor:

'Because of the nature of the cases I deal with, I have probably formed a blanket view that cases are not suitable for ADR, unless something really different arises in the facts. I'd like to think that in those circumstances I would think of ADR, but in homelessness cases it is not my first, second, or even third thought.'

And in the words of another defendant solicitor:

'Although ADR may sometimes be suitable when the claim is about the way in which a particular policy has been applied to a claimant, it is difficult to see how it could work when the claim is that the policy is wrong or that it has been wrongly interpreted. In such cases it is often desirable for reasons of legal certainty that a court give judgment on the issues.'

While interviewees pointed out that not every dispute fell into this category, public law disputes were often rights-based. One interviewee gave the example of prison cases that revolved on whether a decision on remission was correct, or whether the treatment of a prisoner was proper. She characterised these as being ‘very polarised, very structured, very rigid, and frankly best resolved by a judicial review’. Another example was given by a barrister who is also a mediator:

‘Where there’s a hard-edged dispute of law you require a binding determination, don’t you? Often, when you’ve got central or local government discharging public decision-making duties and from the public purse, in terms of what follows, that’s perhaps, they would say, with some force, the only proper way of determining it. They have to have a legally enforceable determination by court of jurisdiction.’

Mediators might take the view that the perception that mediation inevitably involves compromise is mistaken, and that the fact that many of these issues are rights-based does not preclude mediation. Where a dispute revolves around a question of legal entitlement, one way to address concerns about how to enshrine claimants’ rights into a mediated settlement is for those rights to be identified at the start and for statutory entitlement to serve as the framework for settlement discussions. A rights-based model of mediation was identified by the Law Society of England and Wales in 1991 as an alternative mediation approach to that of ‘facilitative mediation’. While still expanding the range of possible solutions by exploring parties’ interests, the model requires a more directive role of the mediator.

The need for judicial precedent

Some critics see the promotion of mediation as signifying the ‘privatisation’ of dispute resolution and the retreat of law from the public sphere.¹⁰ Although trials can be expensive, individual rulings and the creation of precedents lead to improved standards of performance on the part of public bodies and help resolve important questions that affect many others who benefit from such rulings indirectly. This is not possible where mediation is conducted in private and the settlement recorded in a confidential document.¹¹

In a similar vein, it has been argued that the emphasis mediators place on interests as opposed to rights undermines the importance of rights discourse in our society. Test case strategies used to protect the interests of the disadvantaged against the state have resulted in notable successes which have had considerable symbolic value. Disadvantaged groups have struggled hard for substantive rights to be embodied in legal rules and for their grievances to be heard within the public arena of the courts. The particular danger to which critics of mediation have drawn attention is that the secrecy and confidentiality of mediation will consign

¹⁰ M Galanter, ‘A world without trials’ (2005) Annual Distinguished Alternative Dispute Resolution Lecture, University of Wisconsin.

¹¹ For a much fuller overview of this issue, see H Genn (2008) ‘Judging Civil Justice – What is civil justice for (and how much is enough)?’, Hamlyn Lecture, University College London, 27 November.

issues of wider interest to the private sphere and cause them to disappear from the public agenda.¹²

It is worth bearing in mind that many of the principled objections to mediation raised by commentators and practitioners can apply similarly to other types of negotiated settlement, as will be discussed later. It is hardly surprising that such principled objections featured more strongly in the present research than in other empirical studies.¹³ A review of the findings of other studies suggests that such a viewpoint is less frequently cited in the context of civil litigation more generally. A solicitor and trained mediator explained:

‘it’s really important that some of these points of principle go before the court and are determined . . . otherwise we’re faced with a complete stagnation of development of the law, and particularly for vulnerable people the law has to be clarified . . . For example, most [home closure] cases have settled. It would be very helpful to everybody, the residents, the relatives and also local authorities, to know 100 per cent whether there was a legal obligation to assess the impact of closing the home on the residents before the decision to close the home is made. . . . we say plainly there is an obligation; human rights, natural justice, bleatingly obvious, that good old legal ground. But local authorities will say ‘no’. And cases will still be brought . . . also, it is very important . . . to ensure that the law moves with the times and develops according to society developing.’

The above example, however, is as relevant in relation to settlements generally as it is to settlements negotiated through mediation, and this same solicitor acknowledged that the first and foremost consideration in choosing the forum for dispute resolution is that of the client’s best interest. This was exemplified by the ‘Human factor case’ described in Section 8. That case concerned a severely disabled woman, paralysed from the neck down and living in an NHS facility, who was told that, due to a shortage of women carers on the night shift, her intimate care would be carried out by male nurses instead. This woman raised personal and religious objections to this, yet the trust were unwilling to accept her objections until the matter went to mediation, when it was satisfactorily resolved. As a result of the mediated agreement, more female staff were trained. This meant that other care users would also benefit from this settlement.

This case could be seen as an example of a rights-based mediated settlement that achieved both an outcome desired by the claimant and a wider-reaching policy change that could affect other service users. But as the claimant’s solicitor pointed out, had there been a ruling to that effect, other solicitors as well as care users would have been aware of the judgment and could have relied upon it to request the same provisions from their local authorities:

‘the client obtained the relief that she needed, but there is still an important point as to does a person have any right to have their views taken into account regarding provision of intimate care by male or female staff? And actually, it’s all about dignity . . . All of the cases that we deal with have important points of principle which will affect other people. But in all the

¹² R Abel (1982) ‘The contradictions of informal justice’ in *The Politics of Informal Justice*, R Abel (ed.), Academic Press, London, pp. 267–320.

¹³ See e.g. H Genn et al. (2007) *Twisting Arms: Court-referred and court-linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07, London.

cases that are settled, those points of principle are not placed before the court and the law is not developed because a settlement is reached for that particular client.

This is not a concern limited to mediation, however. The vast majority of judicial reviews do not involve matters of public interest, nor do they set a precedent. Settlements agreed directly between the parties have exactly the same effect as do mediated settlements with regard to the non-creation of precedents and lack of publicity. A barrister/mediator pointed out that defendants can, in any event, easily avoid unhelpful precedents:

‘defendants can and do cherry-pick cases, and take strategic decisions as to what to settle, and they do so with their own considerations in mind rather than the claimant’s considerations in mind. The embargo on running – apart from in truly exceptional cases – kind of academic points, is a trump card for defendants, because they can render particular challenges academic by agreeing to reconsider. . . . it’s quite easy, if you look at this all from an academic perspective rather than an empirical perspective as well, to say, gosh, this is all terribly suspect, and constitutional issues and all the rest of it. But that is the real world . . .’

In the ‘Human factor case’, described above, the claimant solicitor was asked whether it would have been possible to continue the litigation to obtain a determination of the point of principle, once mediation had concluded. This very experienced practitioner had not experienced any case where a defendant agreed both to a mediated resolution for an individual and to the case going forward for a determination of principle. This, in her view, would not be in the defendants’ interests, ‘unless they were forward-thinking defendants’. Such a situation would also raise funding difficulties, as the LSC would rarely fund action once the specific dispute had been resolved.

One barrister/mediator was sceptical of rhetorical claims about rights and interests in this context and pointed out that mediated agreements can address claimants’ primary concern, namely their service needs:

‘The mediation will create rights – an agreement will set up rights for the claimant which are substantive, that are a practical solution to the problem. I’m not sure recognition of legal rights is what people want. For example, in a community care case, does the client want a promise to provide them with a shower stool in three months or the right to a proper decision?’

Transparency and publicity

One of the key concerns to emerge from the in-depth interviews with practitioners with mediation experience was that mediation of public law disputes needed to be distinguished from mediation of other private civil disputes because of the special need for transparency in the performance of their duties by public bodies. This call for transparency was echoed in a number of accounts of which the following, made by a barrister, is typical:

‘Confidentiality might be a problem – public law disputes are disputes about public administration, and for various reasons we feel that’s something that ought to be in the open – for reasons of consistency etc. Why do we feel that? I suppose reasons to do with the upholding and vindication of rights, and the need for public bodies to be seen to be acting at all times in accordance

with the law. So all of those things tend against confidentiality; and also there are often specific factors to do with obligations that the defendant is under a duty to make public . . . – it's not like a private individual that can choose what it does in the open, or what it doesn't. So there may be legal duties – so, you have freedom of information, and you have all that kind of stuff, which impinges and the Human Rights Act – and all of that makes confidentiality more controversial in the public law sphere than in the private.'

Discussions about transparency also focused on the need for public authorities to be seen to treat like cases equally. The remedies provided to one individual in a public law dispute can have implications for others. For example, an authority with limited resources cannot be seen to offer a particularly generous and costly provision to one individual or family and not to others in similar circumstances. Compromise in mediation can cause problems when standards need to be set. In the words of a barrister/mediator:

'What is difficult for public authorities is that effectively the claimant is no different from an awful lot of other people and so they have to ask themselves, well, just because they brought proceedings against us and pursue this in mediation, is it right to be giving them something that we wouldn't be giving to another with materially the same position. I think claimants think sometimes it is an excuse, but I think it is a bona fide concern for local authorities . . . it can be an issue for local authorities to enter mediation if it means not treating complainants alike.'

These arguments against the use of mediation in these cases are challenged by the findings in the Dynamics of Judicial Review study that a significant number of judicial reviews are resolved through agreed settlements which, like mediated agreements, are not, on the whole, in the public domain. Despite the stress placed on transparency and publicity, a handful of interviewees argued that mediation did not have to be treated as synonymous with secrecy. In theory, almost anything can be agreed between the parties to a mediation including a change in policy and the making of an agreed public statement. It was argued by some interviewees that both sides could agree that information about the mediation process and settlement reached could be released to the public and press. One interviewee described how a dispute between two local authorities was settled in mediation and a memorandum for public release drawn up as a result, demonstrating that there was no reason why mediated outcomes should be treated as undermining transparency. In another case, although the parties signed a confidentiality agreement at the start of mediation, by the end of it, they agreed to waive confidentiality because they needed to explain to the court how and why the particular agreement was reached. The claimant's solicitor explained that this was needed to ensure enforceability of the agreement should problems arise in future:

'it was important that we had that mediation agreement attached to the consent order in order to go back to court if there was any problem.'

In addition, mediators pointed out that mediated agreements in public law cases can include both the issuing of public statements after the mediation, and the attaching of mediated agreements to a consent order. But, despite the fact that a court order is considered to be in the public domain, it is nonetheless unlikely that

such an agreement would come to the attention of other lawyers so as to allow them to learn from that experience and be able to apply it in other, similar cases.

The question of the power imbalance between parties in public law disputes was also raised by a significant number of interviewees with mediation experience. This aspect will be discussed in the chapter dealing with lawyers and mediation.

Conclusion

Many public law practitioners have no direct experience of mediation and there is widespread misunderstanding of the process, with many lawyers conflating mediation with other forms of negotiated settlement and regarding it as synonymous with compromise. These misperceptions could be partly responsible for lawyers' assumption that mediation has nothing to offer in public law disputes that cannot be achieved through other, more familiar forms of negotiated settlement. Thus, the situation is self-perpetuating, as lawyers fail to consider mediation and, consequently, do not gain the knowledge and experience that could challenge their assumptions about its possible relevance to their work. Many public law practitioners are nonetheless evidently versatile negotiators capable of reaching creative solutions that are beneficial to both sides in a dispute, a skill that ought to make lawyers more open, rather than resistant, to attempting mediation in situations that become 'stuck'.

The study shows that practitioners considered mediation to be unsuitable in judicial review cases for a variety of reasons, both practical and principled. Those lawyers without mediation experience raised largely practical objections to the use of mediation, such as urgency of cases, inability on the part of the public body to change its decision without a court order, and there being no room for compromise on an issue of law or policy. The practitioners with mediation experience placed more emphasis on what could be termed principled objections, such as the need for judicial precedents, the need for transparency and publicity in public law cases, and issues of power imbalance between unequal parties.

The creation of precedents was expressed as having various functions. Claimant solicitors saw precedents as being necessary in order to develop certain areas of law, serving the needs of the wider community, as well as providing an important indicator for public bodies as to how to perform their duties lawfully. Defendants also saw precedents as having an important role in some cases, providing guidance to authorities on how to act in future similar situations, although in other circumstances avoiding the creation of a precedent was seen as a positive advantage to the defendants.

However, many of these concerns do not, in themselves, explain the lack of recourse to mediation, since they could be said to be as applicable to directly negotiated settlements as they are to mediated settlements. Nevertheless, settlements are negotiated directly between the parties' lawyers as a matter of routine. Moreover, interviews with claimant lawyers and the examples of mediation they have been engaged in show clearly that principled objections do not appear, in fact, to inform their decisions about whether or not to mediate. Rather, it is the circumstances and interests of the individual clients that determine that choice.

With regard to the need for scrutiny of public bodies' behaviour and the need for precedents, it was pointed out by expert participants that these apply in only a small percentage of cases, and it is, in any event, open to defendants to avoid scrutiny and the risk of unhelpful precedents if they wish to do so by agreeing to settle a case. Hence, it is not an issue that is uniquely created by mediation, which is merely another form of negotiated settlement. This important issue must therefore be addressed in some other way, such as developing procedures for enabling the court to deal with legal issues after proceedings had ended, or use other mechanisms, for example, the ombudsman, to investigate such aspects wherever possible even after a case had ended. In addition, it is worth remembering that mediated agreements can include public statements as well as commitments to make policy changes that would benefit others. This could be a matter of good practice on the part of defendant public bodies.

The matter of power imbalance in negotiations between a public body and an individual, another major issue of concern, is discussed in Section 6, where it is suggested that this is considered by lawyers and mediators to be largely redressed by ensuring the presence of competent and expert solicitors for claimants.

Given lawyers' critical role in advising their clients regarding the choice of legal redress mechanism, it is essential to understand their attitudes to mediation and how their reservations about the use of the process might be influencing the take-up of mediation in the public law sphere. It is also important that lawyers understand more precisely when the various concerns over the use of mediation in public law disputes apply and where they need not apply, so as not to reject mediation out of hand for the wrong reasons. There is, therefore, a need for specially designed training that is informed by the understanding of lawyers' concerns and practices which aims to increase their understanding of the process so as to enable informed choices, rather than to encourage the take-up of mediation per se.

Finally, it is worth remembering that claimants and defendants are likely to be motivated by different considerations in making decisions about whether to mediate. For example, four times as many defendants as claimants cited 'no room for compromise' as a reason for considering mediation to be unsuitable. We have already seen in Section 3 that the main factor leading to settlement is the defendants' recognition of the merits of the challenge. Where defendants think a claim lacks merit, and are therefore unwilling to make any concessions, they are unlikely to engage in any settlement process, including a process of mediation. This would seem to leave only a small minority of cases in which mediation could seem attractive to defendants, namely those cases in which a duty has been acknowledged, but the precise terms of its performance are the subject of dispute. It is difficult to envisage defendant public bodies agreeing to engage in mediations where a dispute can be resolved cheaply and swiftly by offering to do the bare minimum in order to 'make the case go away', even where mediation could lead to a creative and long-term solution that could ultimately prove advantageous to both parties. This would require a change of culture coupled with adequate financial as well as staff resources.

Section Five

Is value added by mediation?

Introduction

In this chapter we consider some specific positive claims for the mediation process, how these claims are borne out in the specific context of judicial review, and what practical outcomes mediation can generate that other processes cannot.

Drawing on interviews with practitioners, we look at what factors distinguish mediation from other forms of dispute resolution and how mediation compares in practice with other forms of negotiated settlement.

Does mediation empower parties?

Judicial review requires, on the whole, little participation from the parties compared with other forms of litigation. The claimant's involvement is usually confined to giving instructions and signing statements. They need not attend court at all, let alone give evidence. The arguments are often legal and technical. The outcome, even if successful, can be frustrating in that it does not necessarily resolve the substantive issue that was the subject of challenge due to the limited nature of the remedies available. This can be frustrating for those individuals who want to have their 'day in court' and be heard by a figure of authority, a judge.

A barrister, who is also a trained mediator, described the contrast between mediation and adjudication in the following way:

'if you look at who participates in a court case, it's the judge and barristers, and it's not the client . . . at a mediation, the interests take centre-stage, and you have the ability for the decision-maker and the party to . . . have a direct dialogue that takes place in a structured way, where there [are] checks and balances to secure equality – and that could be very powerful, and that could also lead to a breakthrough in terms of understanding.'

For claimants, therefore, mediation could seem particularly attractive in judicial review disputes if they wish to take an active part in the unfolding of their case. It could also be argued that, because in judicial review the arguments focus on strictly legal issues that are not always easy to explain, lay claimants can feel that they are being marginalised and that the issues that are important to them are being overlooked. Mediation could therefore afford individuals an opportunity to

take part in negotiations and present their own narrative. As long as their lawyers are present, they do not risk their rights and entitlements being overlooked.

The sense of empowerment arising from involvement in shaping and agreeing the outcome may be a positive experience, in contrast with the alienation that parties may experience when divorced from the process. This sense of empowerment can, in itself, be regarded as a form of positive outcome. Research in this area suggests that procedural justice (process) is often perceived as being as important as substantive justice (outcome) and that satisfaction with both process and outcome can be interrelated.¹ So, for instance, a disappointing result can be more acceptable to a party if it is reached in a way that is perceived as fair,² or when a disputant feels heard and understood.³

Yet, despite acknowledgment by some lawyers of this positive aspect of mediation, and awareness of its potential, empowerment did not feature prominently in accounts of actual mediations.

In part, this may be explained by the fact that the study focused on the views and perspectives of lawyers rather than litigants, and that lawyers are more concerned with obtaining what, in their view, is the best achievable outcome for their clients rather than with their clients' experience of the process itself. This is not to say, though, that lawyers are necessarily insensitive or impervious to this aspect of clients' experience, however, and, in fact, those interviewees who mentioned their clients' experience of the mediation process recounted a number of examples of circumstances in which participation in mediation was not a positive experience for their client. It is interesting that several of the examples given of clients' negative experiences in mediation came from lawyers who were also mediators.

Lawyers described mediations as long-winded, gruelling and even humiliating for their clients (see Section 8). Some lawyers emphasised that, like adjudication, the mediation process can also be very stressful. This was especially the case where mediations stretched late into the night in order not to lose momentum, as happened in at least one of the mediated cases in our sample.

Some lawyers questioned the universal applicability of the empowerment claim. For example, a lawyer with extensive mediation experience suggested that, in situations concerning a determination of the legality of a decision, participation is not a priority for claimants

'I don't know that actually parties always want their own outcome. A lot of parties want the judge to decide their case, they think that's what judges are there for, that's what justice is about, and I'm a citizen and I'm entitled to go to court and to get a decision yes or no. And they will accept the judge's decision most of the time.'

¹ H Genn et al (2006) 'Tribunals for diverse users', DCA Research Series 1/06, January, p. 194, exploring the views of tribunal users, and also citing research by T Tyler, J Baldwin, and previous Genn studies.

² T Tyler (1991) 'Procedure or result: what do disputants want from legal authorities?', *A Handbook of Dispute Resolution: ADR in action*, K Mackie (ed.), Routledge, p. 19.

³ R L Wissler, 'Mediation and adjudication in the Small Claims Court: the effects of process and case characteristics' (1995) *Law and Society Review* 29(2):352.

The same lawyer gave an example of an actual mediation that had an unfortunate effect on a client:

‘I have been to a mediation which was just appalling . . . we started at 5 o’clock and finished at 11 and the mediator didn’t actually speak to my client at all. It was just awful.’

Another lawyer/mediator compared and contrasted experiences of mediation and adjudication, observing that it is not possible to generalise about the appropriateness of either as this may depend on the parties and the case:

‘There is a sense of ownership potentially of the deal – you’ve chosen it rather than having a court impose it on you, although that can be overstated. I am not sure that people do typically get away from mediation skipping down the road holding hands and feeling they love each other after all, though I did do one educational negligence case where the insurers were deeply impressed with the way the parents and the boy had tried to claw back the lost education and they were very reasonable about what they wanted and they reached a nice easy settlement and I think they genuinely liked each other in the end of the process, but I am not sure this is necessarily typical. And equally there are some cases where the parties need a detached authority telling them the answer, so I don’t think that it’s a God-given rule that choosing [mediation] is always better than having a judgment handed down to you, but it can be.’

In some circumstances, mediation can have a negative effect on a claimant’s interests and, thus, the opposite effect from empowerment:

‘something to be aware of is that sometimes mediators who are very very keen to settle a case at all costs, may well put pressure on a client to agree to something which their legal advisor might be saying hang on . . .’

In addition, lawyers pointed out that mediation is not alone in its capacity to strengthen the voice of litigants. Claimants may indeed feel empowered by obtaining a High Court judgment against the public body with whom they are in dispute. For example, Southall Black Sisters describe on their website their victory in a judicial review as follows:

‘On 18 July [2008] at the High Court, in a dramatic turn of events, Ealing Council withdrew their case after one and a half days of a hearing which saw their defence rapidly unravelling. From the outset, it became apparent to the presiding judge, Lord Justice Moses and to all those present in the courtroom including the packed public gallery, that Ealing Council was skating on really thin ice in attempting to justify its decision to cut funding to SBS and to commission instead one generic borough wide service on domestic violence on the grounds of “equality” and “cohesion”.’⁴

The solicitor who represented the organisation described the women packing the public gallery, some of whom spoke little or no English and could not understand the exchanges in the courtroom, cheering and waving. Success in the High Court in this case was clearly felt as greatly empowering of the claimant organisation’s constituency user group.

⁴ <http://www.southallblacksisters.org.uk/>.

Roundtable meetings can also have a similar effect. Mediation is often said to be particularly enabling of the involvement of vulnerable individuals who would find the court setting confusing and intimidating. However, one solicitor specialising in community care law thought that careful consideration would be needed in order to assess the effect of a mediation setting on vulnerable clients. She recounted an example of a client with severe learning disabilities which made it difficult for him to communicate comfortably, as a case in point. She explained how she had opted for a roundtable negotiation over mediation because she wanted her client to attend and believed that he would feel intimidated by a more formal process. In her view, a mediator would introduce the presence of an unfamiliar third party and would not be conducive to her client's participation:

'it required a sympathetic approach because he had in fact limited capacity and they indicated to us that they wouldn't expect it to be a very formal, chaired independent mediation process, because they [too] realised that it wouldn't be suitable for him to have a formal process which would be too intimidating to him.'

Mediation and direct negotiations between lawyers

As we have said previously, a significant number of public law disputes resolve as a result of direct communication between lawyers, in that the case does not proceed to adjudication and ends as a result of that communication. The Dynamics of Judicial Review study has shown that the majority of these cases conclude with some positive outcome for the claimant. It is hardly surprising, therefore, that many interviewees insisted that negotiations can, and do, provide an adequate forum in which to resolve disputes with no need for a neutral third party. In common with other studies of mediation, a number of participants expressed the view that 'good lawyers' do not need an additional framework in order to reach good, and at times even creative, outcomes.

For example, scepticism about the added value of mediation was expressed by a lawyer specialising in environmental and planning law who had no mediation experience. He doubted that in the kind of disputes he was dealing with there was anything that could be gained from mediation that could not be otherwise obtained via negotiation. To illustrate that view, he described a negotiated settlement in a judicial review claim in which it was agreed to impose certain conditions on a planning decision about a new development rather than to quash the decision altogether. The settlement differed from the sort of decision that could have been made by the court because it offered a practical solution to the real issues at stake rather than focusing solely on the matter of *ultra vires*. Whilst he agreed that this case could have been resolved by mediation, he argued that the same result was achieved through negotiation between experts and that mediation would have added unnecessarily to the costs of the case without any corresponding benefit.

Mediation can be a useful forum not only where negotiations are impossible or have broken down. It can assist even in situations where the lawyers all agree on what needs to happen. In one very long-running community care dispute, in which the solicitors and barristers knew each other well, all the lawyers agreed that an

independent user trust needed to be set up. The purpose of the mediation was to agree the terms of the trust. One of the solicitors involved described the scene:

‘There were about 20 of us in the room . . . Feelings between some of the lawyers ran high at times in the course of the proceedings. In a way, having somebody there who could take over if necessary, made everyone feel more comfortable about embarking on it. He [the mediator] was the independent person to break up fights and say let’s move on, if necessary.’

Mediation compared with roundtable bilateral negotiations

We remarked earlier that roundtable negotiations can share similarities with mediation in empowering vulnerable parties and generating satisfactory outcomes. Here, we present views of mediators on the differences between the two processes.

One mediator considered that roundtable meetings often excluded the clients themselves, and that mediation alone offers the opportunity of full participation by clients:

‘Roundtable conferences . . . are lawyer-centric; they are dominated usually by the senior lawyer present on that team. I do not believe that the parties . . . are involved other than peripherally in the large majority of them. Very frequently they’re in a side room, and the effective debate goes on unmoderated, on a bilateral, probably positional basis, as between lawyers on either side.’

For this interviewee, the mediator’s prescribed role is to ensure that clients have a chance to have their say and this means that the clients have to be present. He gave an example of one mediation in which he went to the trouble of visiting the claimant at home as she was unable to attend the meeting. Moreover, he also arranged for the defendants to visit the claimant at home. In another case, in which the claimant was unable to attend or be visited, he encouraged her parents to bring a photograph of her to the mediation. In other interviews, it was argued that mediator–litigant interactions, especially those undertaken in caucuses, allowed for issues and preferences to be teased out in a way which was not encouraged in bilateral negotiations where the lawyers tend to take centre stage. Another mediator emphasised the importance of being able to interrogate the underlying issues in a mediation: ‘We call it the exploring phase, to understand what it is that is driving the parties.’ He suggested that this approach is relevant in public law disputes ‘where often politics and what’s going on behind the scenes is the main drive for whether [a case] is going to settle or not’.

A number of interviewees identified the formal structure of the mediation process as an asset when compared with roundtable meetings, which some felt could dissolve into a free-for-all. Mediation was considered to offer a guided structure overseen by someone with no personal interest in the dispute or its outcome. A barrister/mediator put it as follows:

‘The more straightforward disputes, you would hope could be settled more by roundtable meeting and without the need for a mediator. Another factor is how well the parties know one another or trust one another that can make a difference. If you’ve got solicitors or counsel who know one another and have a good relationship, they may feel reasonably confident in their ability to have

a structured dialogue without the need for external structure. If you have a really messy case or just don't have that trust, and you need lots of bodies there to consult and give instructions or you have more than two parties, then really mediation would greatly improve the prospect of success.'

The practice of exchanging information in advance of mediations was also considered to help to frame issues for discussion on the day. In a similar vein, interviewees were also impressed by the greater clarity about what has been agreed which is likely in mediated settlement. One practitioner/mediator identified this as a key role for the mediator:

'in roundtable discussions there [are] always arguments about what's agreed, is it binding, is it in full and final settlement . . . there is always a danger that in fact each person will think they've agreed different things from what the other person is agreeing . . .'

Another interviewee suggested that the use of breakout rooms for private caucuses, a technique that has no purpose in bilateral negotiations, could provide a useful opportunity for reflection in the course of mediation. Its particular use in providing a safe environment which allowed the mediator to push each side harder in evaluating their respective positions was stressed by several interviewees. One mediator described the value of such separate meetings:

'the mediator is able to have private conversations with each team, out of the hearing of the other people, to try to expand the options that are available and the courses that might be attempted to move things on; and, with permission, can bring the fruits of that exploration team-to-team, and help them see if they want to make progress.'

Despite their many advantages, caucuses were viewed as unhelpful in certain situations. Some claimant solicitors found this aspect of the process unhelpful. One claimant solicitor with mediation experience argued that, if the legal representatives know each other, 'then all of that to'ing and fro'ing [in] mediation is completely hopeless'. In one case, this interviewee insisted that the mediation be held with all parties seated around the table because, in his words: 'I prefer to see the whites of people's eyes that I'm negotiating with.' Another practitioner described her experience in mediation consisting of sitting in a room doing nothing for an hour:

'talking to your client, saying "right, we'll say that when [the mediator] comes in" and then you're waiting, and then he comes in and says "the other side is saying this, now what do you say?"'

She perceived this shuttle model as time-wasting and 'ridiculous' for the lawyer as well as the client.

Better outcomes?

Participants in this study felt that mediation offered considerable scope to add value to the judicial review process in terms of achievable outcomes, because of the focus on providing outcomes that are tailored to the parties and their particular needs. These can include agreements on actions to be taken, apologies, explanations and compensation to affected individuals, and even commitments to effect changes in policy and procedure. The range of options is in direct contrast

to the limited nature of the remedies available in judicial review, which can often leave a claimant frustrated. A barrister and trained mediator explained:

‘Although the administrative court is very fond of saying it’s the court of practical remedy, of course its remedy powers are couched in language which is anything but practical. So the main thing is that, as a claimant, you can obtain things [in mediation] which can be concrete and detailed, and of course can go outside the powers that the court has, because you’re not restricted.’

A barrister and trained mediator said:

‘there may be two reasons [for opting for mediation over a reconsideration]. The first may be that the claimants won’t withdraw the proceedings just because they say we’ll take a fresh decision because if the underlying dispute is still there, there may not be much point to just withdrawing and then having to issue all over again and second the defendant may know that even if this set of proceedings gets withdrawn, if they take the same decision again, they’re just going to end up in the same place.’

Interestingly, even some of those interviewees with no mediation experience described the benefits they would expect from mediation in respect of outcomes, in particular the opportunity to achieve results that could not be obtained in court proceedings, as did these two lawyers.

‘Judicial review is a blunt instrument. If mediation could get a client e.g. a change of a social worker they’re not getting on with or an apology, that would be added value.’

‘For me, the point of mediation . . . is that it allows the substantive issues in contention to be discussed as opposed to the fairly bold ‘you can or you can’t’ type decisions that will come out of court.’

Another barrister with mediation experience also noted the limitations of a court ruling in judicial review, in terms of what can be achieved for the client. He highlighted that mediation has considerable potential to inject some common sense into settlements:

‘there may be different ways, perhaps more practical ways of meeting the shared concerns of the different parties that the courts can’t propose. The court in judicial review is in such a limited function and mediation can look much more widely and much further and see whether there is a practical resolution, a different way of delivering services that doesn’t cost as much so that the local authority or the NHS trust is happy but which is sufficient to safeguard the individual’s position, so that’s why those are so appropriate for mediation.’

A claimant solicitor, also a practising mediator, described why he chose mediation in a particular judicial review case which was about setting up a user independent trust for the parents of a severely disabled child. He stressed the various ways in which the detail of the outcome could be fleshed out in a much more meaningful and efficient way in the course of mediation:

‘we agreed a mediation, because we thought that . . . the most we could have got from the court proceedings is a declaration that the [local authority] hadn’t properly considered whether to do a user independent trust, and asking them to do it, consider it, whereas the mediation may have been a

way of not only asking them to consider it but if they agreed that one was possible, figuring out the practicalities of it. And in effect moving the process on much more significantly than going to get a high court hearing, getting a declaration or a mandatory order and then the authority going away, making a decision. And then you'd still have to have all of the negotiations about the actual trust itself.'

Although the mediation did not result in a settlement, the solicitor viewed it as a success as he considered that his clients had achieved a lot more than if they had just gone to the High Court.

The opportunity to include issues that the court could not address was welcomed by a number of interviewees. For one, who has used mediation successfully in several licensing cases, mediation was not only quicker:

'but the outcome included issues that couldn't have been resolved in court. In other words, the mediation not only settled the issues that were the subject of the court proceedings, but also disposed of other issues. The outcome of proceedings in those cases would have been uncertain and possibly leading to defeat for my clients.'

Among the examples of actual mediated cases given in the interviews, there were several instances in which mediation appeared to offer a unique opportunity to achieve a tailored outcome that may not otherwise have been reached in adjudication or bilateral negotiations. Mediation can free up the parties in a way that roundtable meetings do not if, as some interviewees suggested, they focus on purely legal remedies. A claimant solicitor who uses mediation frequently in her work explained:

'a roundtable meeting post-permission will still look at the grounds for judicial review and the prospects of success. And so therefore the parties would be very very limited by that sort of setting, because by definition you are effectively putting the parties in the same room in the context of the litigation. And you don't have any outside influences for the mediator to open up creative thinking of what other issues should we be looking at here. What really do you want that you can't achieve through judicial review that we might be able to achieve through mediation? . . . So in my view that's too restrictive. So a round table meeting, if it's suggested, I'm not going to refuse it, but it won't be as good an opportunity for both sides to settle as a mediation.'

Others commented on how mediation could disrupt oppositional dynamics of discussions by allowing greater flexibility in the way that settlement negotiations were structured and outcomes arrived at. In a case in which the parties could not agree on the issue of costs to begin with, one barrister described how, to his surprise, the mediator suggested dealing with costs at the end of the mediation rather than at the beginning. The parties were then able to reach agreement on a number of other substantive issues, as a result of which they were then more inclined to compromise on costs. The barrister remarked that it would not have occurred to him to approach the problem in this way; it was the mediator's insistence that forced the parties to try something different.

'the way in which the mediator handled the really difficult issue between us challenged my ideas about how you settle proceedings and the way you go about it; that you don't immediately lock horns on the really difficult

issue that you're in complete loggerheads on; that you see where all the agreements are and how far you can get with that. That's not the way I would have dealt with it.'

In addition, the mediation generated proposals that had not been on the table before:

'What was new was that they were actually putting in counter proposals and that's why we felt encouraged, because we hadn't thought we would even get that far. Secondly, the counter proposals were proposals that we didn't automatically think we couldn't live with. Obviously that changed the perspective for both parties.'

Another perceived benefit of mediation in regard to outcome was that the resolution of an ongoing dispute in mediation that successfully addresses underlying issues can pre-empt years of litigation and unhappiness. A barrister gave an example of the circumstances in which mediation ought to be attractive to defendants:

'I think there may be two reasons. The first may be that the claimants won't withdraw the judicial review proceedings just because they say we'll take a fresh decision because if the underlying dispute is still there, there may not be much point to just withdrawing and then having to issue all over again and second the defendant may know that even if this set of proceedings gets withdrawn, if they take the same decision again, they're just going to end up in the same place.'

Mediated outcomes also create certainty of outcome as expressed by a claimant solicitor: 'If you go to court you never know what you're going to end up with. At least here you know what you agree.'

Conclusions

The sense of empowerment arising from involvement in shaping and agreeing the outcome may be a positive experience, in contrast with the alienation that parties may feel when divorced from the process. This sense of empowerment can, in itself, be regarded as a form of positive outcome. Yet, despite acknowledgment by some lawyers of this positive aspect of mediation, an awareness of its potential, empowerment did not feature prominently in accounts of actual mediations. Lawyers also questioned the universal applicability of the empowerment claim and pointed out that, for example, in situations concerning a determination of the legality of a decision, participation may not be a priority for claimants. Some lawyers, including lawyer-mediators, also recounted a number of examples of circumstances in which participation in mediation was not a positive experience because the process was long-winded and gruelling for their clients.

It was also pointed out that it is not possible to generalise about the potential for empowerment of parties by either mediation or adjudication as this may depend on the parties and the case. In some cases, an adjudication by a High Court judge is evidently experienced as very empowering for successful claimants. Roundtable meetings may be more facilitative of participation by vulnerable or disabled claimants in some circumstances. Lawyers who are experienced in working with vulnerable clients are best placed to advise on the forum most suitable to meeting their clients' needs both in terms of process and outcome. However, in order to provide informed advice, lawyers need to understand the

structure and practicalities of the various dispute resolution methods available, including mediation.

As an independent neutral third party, a mediator is in a good position to assist where parties are in general agreement about the course of action required to resolve a dispute but need help to hammer out the detail, as well as to reduce or obviate oppositional dynamics in more conflictual situations. In terms of outcomes, mediation allows underlying issues in a dispute to be teased out and addressed in a way not possible in the court process or in bilateral negotiations. This can lead to effective resolution of longstanding disputes and avoid ongoing litigation.

The 'shuttle diplomacy' method of caucusing in mediation is perceived as unwieldy and time-wasting by some lawyers, who prefer more direct face-to-face contact with the other party. In order to maximise the benefits of the process, it ought to be tailored to the nature of the dispute, the characteristics of the parties and the experience of the lawyers involved.

While the potential attraction of the participatory aspect and the range of solutions of mediation are not in doubt, such benefits are not unique to mediation, as mediation enthusiasts sometimes claim, but may also be offered by other redress mechanisms. Overstating the claims for the benefits of mediation as a process may therefore fail to persuade lawyers who have experience of other processes that work successfully to empower clients and facilitate their participation as well as reach creative outcomes. Claiming a monopoly for mediation could tend to increase some lawyers' resistance to exploring it as a useful option.

Section Six

Lawyers and mediators in public law mediations

Introduction

As we have seen in previous chapters, the high level of settlements, lack of familiarity with the process of mediation and principled concerns over the use of mediation in judicial review cases combine to leave a narrow margin in which mediations are likely to occur. Yet the real-life mediations described to us in the course of the study, and which are presented in Section 8, show that mediation can make a significant difference and have an important role to play in some cases, especially, for example, where details of complex arrangements for provision of services need to be negotiated. Courts may not be the best forum for such detailed negotiations. In the majority of mediations seen in the study, the claimants were vulnerable, for example, children with special educational needs and adults with complex community care needs. The practitioners who specialise in this kind of work, both with and without mediation experience, have presented as being protective of their clients and anxious to minimise any distress that could be caused to them en route to resolving their disputes with public authorities. They described giving careful consideration to the question of what would be the best and most appropriate process for their clients. Where mediation was felt to be the appropriate option, legal advisers chose their mediator with care so as to achieve the best possible match between the needs of their clients, the nature of the dispute, and the skills, expertise and personality of the mediator. The few lawyers who had significant mediation experience would have a pool of mediators to choose from. Others who lacked experience told us that they would ask colleagues, where possible, for personal recommendations should they require a mediator.

A review of the literature on mediations generally suggests that commentators tend to characterise lawyers as resistant to referring cases to mediation. When they are involved in mediation together with their clients, their presence is regarded as unhelpful. There is no available literature on how these aspects manifest themselves in the specific context of public law disputes. In this section, we consider, therefore, the part that lawyers play in bringing about mediations, the role that they do, and could, play in the mediation itself, and how lawyers and mediators regard each other.

Solicitors as gatekeepers?

Some academic commentators as well as mediators have drawn attention to the critical importance of lawyers as gatekeepers in state-sanctioned mediation schemes. It is lawyers who are best placed to advise their clients about mediation and to encourage them to try it. Despite their initial reservations, lawyers are increasingly happy to accept mediation,¹ a finding which has led some commentators to predict that a mediatory style is becoming co-opted as an everyday part of legal practice. But ‘intransigence’ by lawyers has been cited as a primary reason for the slow take-up of mediation in the United Kingdom.² In the Central London County Court Mediation Pilot, the demand for mediation was lowest when both parties were legally represented.³

The use of terminology such as ‘gatekeepers’ and ‘intransigence’ is indicative of a view that lawyers are failing to recognise and utilise a good thing when they see it.

It has been implied as well as explicitly stated by mediation providers and policy makers that the reasons behind lawyers’ lack of recourse to mediation include ignorance of the process, being wedded to an adversarial culture, and profit motives. For example, a senior figure at the LSC⁴ thought that:

‘there is natural lawyer resistance – sometimes it is client resistance, but I mean lawyer resistance is the most likely explanation [for not using mediation]. It could be a mixture of the financial attractiveness of pushing cases on to litigation, where they’ll obviously earn the most money, plus this more emotional desire to be in control of the process . . .’

The theme of profit motives was also expressed by a non-lawyer mediator-interviewee:

‘Lawyers . . . tend to resist [mediation]; the measure of success of a law firm is the profit per partner. It is a financial measure, and mediation is not a way of earring a lot of money, so there is a real dilemma here. I did a mediation several years ago when a lawyer helped a party get a deal and avoid court. He was quite pale when his party signed the mediation agreement and he said: “I just kissed goodbye to £120,000 worth of fees.” . . . He had the grace or the ethics to encourage his party to do a deal that deprived him of £120,000. Now any lawyer that is measured by earnings, it must be quite a challenge, when mediation is proposed, to wholeheartedly support and advocate it. It is going to be easier to say it’s too early or inappropriate because you’ve got to keep your billing up. Now I can’t prove that. But psychologically there’s got to be something there; even if it is not in the front of the mind, it’s going to be in the back of the mind. That doesn’t apply to government departments of course.’

While we are not in a position to state categorically that profit motives never feature in lawyers’ considerations as to the conduct of cases, we have not come

¹ S Roberts ‘Mediation in the lawyers’ embrace’ (1992) *Modern Law Review* 55(2):258–264

² M Nestic, ‘Mediation on the rise in the UK?’, <http://www.adr.civiljusticecouncil.gov.uk/updocs/client0/Nestic.doc> (last accessed 12.05.09),.

³ H Genn (1998) *The Central County Court Pilot Mediation Scheme Evaluation Report*, Research Papers No 5/98, LCD.

⁴ Interviewed in the course of this project.

across any direct evidence to support this view. Indeed, settlements reached through direct negotiations that are, as we know, prevalent in judicial review litigation, give rise to even fewer profit opportunities than mediation. Moreover, in-house defendant solicitors cannot be suspected of putting profit above common sense and they appear no keener to engage in mediation than are claimant solicitors.

Solicitors can be said to be ‘gatekeepers’ in the sense of influencing the choice of redress mechanism through advising their clients on the processes available to them in seeking to resolve a dispute. It was clear from interviews that lawyers do not necessarily engage in a comprehensive discussion with clients in every case about all the potential remedies in existence, but limit the advice to the remedies that they consider relevant in the circumstances. Expertise and experience mean being able to eliminate the irrelevant and concentrate on the best route to achieving what the client wants or needs, as explained by a solicitor/mediator:

‘To be honest, now I don’t really go through a process in my mind as to whether a judicial review is appropriate, I will know pretty much instantly, as will my colleagues, what’s the route.’

In reply to the question: ‘What factors influence your decision to start the judicial review process as opposed to following another course of action?’ one expert public law solicitor said:

‘Essentially it is outcome determined . . . It’s what is most likely to produce what the client wants . . . I suppose [the decision] has to do with three things, First of all that there is a legal issue to be resolved which the judicial review process is better suited to sort out as opposed to, say, an evidential dispute. Second, that one of the available judicial review remedies is likely to change something in terms of the decision making of the public authority involved, as opposed to just being an empty remedy. The third thing is if there is nothing better that is likely to be more effective. If, for example, there is a difficult set of messy facts, the better way forward may be some sort of complaint procedure or something where there can be some definitive view reached on precisely what this person’s needs are, something that an administrative court judge would instinctively shy away from – that is a strong signpost in another direction.

However, although the practitioners who were interviewed for the Dynamics of Judicial Review study were routinely considering a range of mechanisms for resolving public law disputes and were experienced in negotiating with the opposing side, the majority of interviewees, 83 per cent, had no mediation experience. It must follow that ignorance of mediation on the part of lawyers means that mediation is not an option that readily springs to mind whenever a lawyer is dealing with a new case. Yet there was little indication of active resistance to mediation. For example, we have come across only one case of a mediation offer being rejected. In that case the defendants rejected a suggestion of mediation made by the claimants. The barrister representing the defendants, himself a trained mediator, explained that the rejection of mediation was made on the basis of his conviction that the claim had little merit, and he believed that the mediation proposal by the claimants was made for invalid tactical reasons.

Although only a small proportion of public law practitioners interviewed in the course of the Dynamics of Judicial Review study had a clear understanding

or experience of mediation, only a few suggested, without being prompted, that a better understanding might lead them to consider the use of mediation in appropriate cases. The majority provided other articulated reasons as to why mediation would be impossible, inappropriate or unnecessary. This suggests that other factors, apart from lack of experience, are at play in lawyers' lack of recourse to mediation in the public law field, as articulated in Section 4. In any event, ignorance alone does not explain the rarity of mediations in this context. This is evident from the small number of public law mediations among even the best-informed and most positive of our interviewees.

The role of solicitors in mediation as they see it

Lawyers and mediators held a variety of opinions about different aspects of mediation, for example, what type of case is suitable for mediating; whether legal questions and issues of legal rights should inform mediations; whether mediators need to understand the legal issues involved; and even what constitutes a successful mediation. But, with the exception of two interviewees acting for defendant local authorities, all our interviewees were of the view that lawyers need to be present at mediations involving public law disputes

This is not a self-evident position in mediation generally. Some commentators argue that lawyers are a hindrance because they cannot help introducing an adversarial element into an otherwise collaborative process⁵ and tend to insist on a legal solution at the expense of the client's 'real' needs.⁶ Research on mandatory mediation schemes in North America suggested that it is unrealistic to expect lawyers trained in the art of the adversarial encounter to embrace an ADR philosophy.⁷ Although not the focus of our research, this view has not been expressed by our interviewees except in passing by one mediator who then went on to qualify it by saying that 'as lawyers are getting more experienced in mediation they understand that it's a different role and lots of them will take the back seat, be a supporter, give advice when needed and let the client take the lead'.

Solicitors are also seen by mediators as capable of assisting in reality testing, helping clients explore and negotiate their problems and supporting the clients

⁵ L Mulcahy, 'Can leopards change their spots? An evaluation of the role of lawyers in medical negligence mediation' (2001) *International Journal of the Legal Profession* 8(3):203–224.

⁶ C Cunningham, 'The lawyer as translator, representation as text: towards an ethnography of legal discourse' (1992) *Cornell Law Review* 77(6):1298–1387.

⁷ The perception that 'good' lawyers are adversarial, apolitical and competitive tends to be perpetuated during the academic stages of training in which the Socratic method is still widely used and even the most impressive of clinical programmes tend to encourage students to concentrate on specific events and moments in time and to rely on linear modes of reasoning. Numerous critics have argued that the traditional law school curriculum inappropriately privileges an adversarial approach to disputes and pays undue attention to the case-based method and masculine ideals at the expense of more holistic or contextualised understandings of grievances favoured by mediators and feminists: D Bok, 'A flawed system of law practice and training' (1983) *Journal of Legal Education* 3:70; S Carr-Gregg, 'Alternative dispute resolution in practical legal training – too little too late?' (1997) *Journal of Legal Education* 10(1):23–41; A Hunt (1992) 'Critique and law: legal education and practice', in *The Critical Lawyers' Handbook*, I Grigg-Spall and P Ireland (eds), Pluto Press. In this way, legal training imbues graduates with an inappropriate fidelity to individualism, formal legality and abstract reasoning: D Kennedy, 'Legal education as training for hierarchy', in Grigg-Spall and Ireland (eds); R Abel and P Lewis (1995) 'Introduction' in *Lawyers in Society: An overview*, R Abel and P Lewis (eds), University of California Press.

in the process.⁸ They are also instrumental in contributing to the discovery of mutually preferential outcomes while ensuring that any agreed resolution reflects the applicable legal norm.⁹ The prevalence of out-of-court settlements in judicial review could indicate that lawyers enjoy some success in achieving these goals.

Solicitors and barristers acting for claimants in publicly funded cases in our study considered that their presence at mediations was clearly necessary because of the innate power imbalance between the parties. They saw their role at mediation as ensuring that their clients' legal rights were protected, as well as supporting and reassuring their clients in the process of reaching the best resolution for them.

'I think most people, when they have got to the stage of instructing a lawyer, feel the need for assistance and advice on reaching any kind of settlement . . . And there remains the issue of power imbalance. If they feel they are being pressurised by a mediator . . . [they are] more likely to say 'No' than perhaps accept something that is being proposed for the right reasons. I think that a client needs to be confident that what they are agreeing to . . . is the best that they can achieve, and also that it is actually enforceable if it is not going to be adhered to. And if a client was in a mediation process just by themselves, it would be really difficult . . . the client can't be expected to reach a decision on matters resolving a legal dispute, or explain their position, without the assistance of a lawyer, when the reason you are in mediation in the first place is because there is a legal dispute.'

These concerns are heightened when solicitors represent vulnerable clients, for example, in community care, mental health and education law cases, as expressed by a solicitor specialising in community care law:

'To expect my clients to engage in any sort of process, whether it's the complaints process or ombudsman, mediation or litigation, without proper skilled representation, we'd be placing them in a completely unacceptable position.'

But, while being protective, claimant solicitors also recognised that assisting their clients to obtain the best resolution did not necessarily mean that they would get everything they wanted. Given that successful judicial review adjudications often conclude with no more than a fresh decision being taken, and given that defendants are unlikely to offer more than they have to in order to resolve a dispute, claimant solicitors can make an important contribution to the success of the mediation process by providing a reality check for their clients. An education law solicitor who is also a trained mediator described his legal role as follows:

'I'd be absolutely clear at the outset . . . not only [about] what we're trying to achieve but what's possible, what we're entitled to, what we're not entitled to strictly speaking . . . So, for example, invariably in public law proceedings, in education matters, what you will get is something quashed and then a remittance back for reconsideration. But that doesn't mean the reconsideration will give you the ultimate outcome that you want, all you'll get is another bite of the cherry, maybe. So if we know that, if we're going to get more than another bite of the cherry, that's a significant win for the

⁸ W F Felstiner, R L Abel and A Sarat, 'The emergence and transformation of disputes: naming, blaming, claiming' (1980–81) *Law & Society Review* 15(3/4):646.

⁹ R H Mnookin and L Kornhauser, 'Bargaining in the shadow of the law: the case of divorce' (1979) *Yale Law Journal* 88:986.

client. So they need to know that, even though it might not be everything that they would want . . . it's my job to put [everything] into the balance for the client . . . It's reality testing, reminding them what they want, pointing out to them what they're not going to get, what it would be unhelpful for them to do as well as the wins that they're getting.'

A barrister specialising in prison cases summarised her role similarly:

'My role would be in protecting my client's interest. I would also make sure that we don't get in the way of coming to a settlement, in the sense that we don't set goals so high that we'll not attain them so our mediation failed.'

The exception to the view that lawyers are indispensable at mediations was expressed by two lawyers representing defendant local authorities, one a solicitor in private practice and the other an in-house lawyer. Their clients are themselves experts in their field, understand the issues involved and would be expected to be able to negotiate settlements by themselves. The solicitor in private practice, who had no mediation experience, and who thought that mediation had little to offer in his field, said:

'Because I have informed clients, I would set it up for them and not go. It depends on what they want. I would see what they want to discuss. I would see them afterwards.'

The in-house lawyer, who had a more positive attitude towards, but little experience of, public law mediation said:

'It would depend on the type of case . . . [In the 'A troubled teenager' case]¹⁰ I didn't think that there was going to be anything added by my presence, because actually it was a trained facilitator – and [the parties] needed to sort things out themselves . . .'

All the other interviewees who represented defendants, however, were of the view that they had an important role to play in mediation, though it is not surprising that they saw their role differently from their counterparts who represent claimants. The claimant representatives, for example, were concerned with the issue of power imbalance and vulnerability of their clients, which was not an issue for defendant representatives. A barrister, who is also a trained mediator, with experience of representing mostly public bodies in complex cases, explained her role as counsel for defendants in mediation as follows:

'You have to be very careful that you don't say things that go beyond your client's instructions because it's quite easy to get carried away in a mediation in discussions of this, that and the other. I think your role can vary; you can end up taking the lead in discussions or you can take a very backseat role. Often . . . letting the respective clients talk can work quite well. Where I'm acting for a local authority or a health trust, if you've got a very good client who explains in a way that in court you never get from a client what their perspective is and why, you can sometimes see a shift . . . in the perception of the lawyers on the other side, where they realise, "Well, they have actually got a point." So sometimes you'll say very little in a mediation as counsel other than when you're in your own private session. Sometimes you'll say a lot, it varies enormously.'

Another barrister, also a trained mediator, agreed that different types of dispute, as well as different parties, call for different input from lawyers, and distinguished between everyday type disputes, involving individuals on both sides, and those involving complex legal issues:

'I think it's a big mistake not to have lawyers there . . . There are some [cases], neighbour disputes, family disputes, maybe. But anything that's more commercial, rights-based, people just won't have the confidence to do without their lawyers there – they need their lawyers to hold their hands and advise them, and particularly so in judicial review, where often one will have to be very careful to ensure that the parties are not doing anything unlawful or inappropriate. So I think they definitely need lawyers there. I think it will depend on the nature of the dispute whether it's useful to have barristers and/or solicitors there.'

Yet lawyers can be a hindrance if they are unable to leave behind their adversarial style, as pointed out by the same barrister/mediator:

'There's a perception [by solicitors] that barristers are less helpful to mediations than solicitors, sometimes justified, because some barristers are too used to being confrontational, and adopting a rights-based approach, to be able to contribute helpfully to the mediation; some are just sort of steeped in a highly adversarial style of negotiation . . . [though] I've come across other barristers who've been immensely helpful and sensible.'

A barrister who had been involved in several complex public law mediations found that undertaking mediation training with one of the major providers had made a big difference to her approach and to her effectiveness as counsel in that setting:

'I wouldn't be pro-mediation in the same way as I am if I hadn't done that [training] and seen the way it works. I think it enormously helps me when I'm at mediation and knowing what's going on and deciding in my client's interests, what to do next in order to broker an agreement, so I found it valuable.'

The response of a barrister who represented largely, but not exclusively, defendants to the issue of lawyers' participation captures the difference between the two sides' perspectives. He started out by describing a limited role in mediation for lawyers:

'I tend to think that the lawyers are actually less important than the clients, until you get to drafting the settlement. That's because . . . they probably look at it more through the legal prism, whereas actually the mediator wants to get rid of that mindset, and focus on the interests – and the interests are best reflected through the clients . . . I'm not convinced there's that much of a meaningful role, other than to be there to give advice to your clients, and to look at issues such as vices, and to provide . . . I suppose, a validity to the exercise.'

But recognising that his view sprang from a defendant's perspective that did not reflect the experience of a claimant participating in mediation, this interviewee went on to add:

'probably, [in order] to create a situation where the mediation is fair and balanced, you need lawyers there, and I suppose that's more important if you are in a situation where otherwise there is a power imbalance, because

you've got a sophisticated client for the defendant, and a kind of one-case client for the claimant.'

There would seem to be strong support for the involvement of lawyers in mediation, but it could be argued that this is a predictable result given that our sample drew largely on lawyers, albeit many of whom were also trained mediators. We will now consider mediators' views about the role of the lawyer.

The role of solicitors as mediators see it

In *Twisting Arms*, Genn reported that in nearly three-quarters of settled cases in the County Court pilot scheme¹¹ the mediators attributed part of the success to contributions made by the legal representatives and commented favourably on their approach to settlement. Significantly, mediators in this study who had been involved in public law mediations also considered solicitors to be an integral part of the process. One non-lawyer mediator stressed the role of lawyers in helping to frame realistic expectations and their involvement in drawing up the settlement agreements, as being of considerable benefit. In their view:

'Lawyers' presence at mediation is important, not because I am not a lawyer but because I think it is important that the parties have their legal advisors there and I think it's important that the legal advisors be the ones to draw up the settlement agreement. I do think it's tough for lawyers to take a back seat in mediation because they are used to being the problem solvers and the advisors. But I think now lawyers are getting more and more experienced in mediation, they understand that it's a different role and lots of them will take the back seat, be a supporter, give advice when needed and let the client take the lead.'

Interestingly, the issue of power imbalance was not identified by the above mediator as being problematic, but a mediator who is also a QC explained the difficulty for the mediator in the absence of a claimant's lawyer:

'It is difficult if you have an unrepresented individual against . . . an authority that is represented or has the expertise to represent themselves. It is then difficult for the mediator to maintain the same even-handed approach. A judge would do that overtly, he would say quite openly: 'I am going to try and think of the best way Mr Snook could put his case,' and that's perfectly acceptable . . . It is more of a difficulty for the mediator . . . if the individual isn't advised and doesn't know what a sensible settlement is. It is difficult for the mediator not to get drawn into giving advice in that situation . . . The lawyers need to be present, but [even] being in the wings might be better than nothing.'¹²

One solicitor who was also an experienced mediator, but with no judicial review mediation experience, distinguished between mediations that involve questions of law, and those that do not, commenting generally that lawyers are only needed in the former type of case, which would effectively include any judicial review:

'Sometimes lawyers get in the way; sometimes lawyers assist. And that depends on the nature of the dispute, and also on the rules. In terms of the

¹¹ H Genn, *Twisting Arms: Court-referred and court-linked mediation under judicial pressure* (2007) Ministry of Justice Research Series 1/07, May.

¹² The same interviewee went on to say that the fact that a litigant is unrepresented should not, in itself, be a bar to mediation, as a similar power imbalance would be manifest in court too.

nature of the dispute, if there's no real issue of law, and it's just a case of resolving this dispute . . . you don't need lawyers on that. If there are enough hard-edged issues, you're going to need lawyers, unless you've got a mediator who's got the specialist knowledge to be able to resolve those informally.'

A mediator who had worked with a number of experienced lawyers in public law mediations and who was clearly comfortable with the presence of lawyers, said this of his interaction with them:

'I think it's essential to have good legal advice, and experienced mediation advisers, legal advisers at mediations. I will look a team in the eye and say, 'How many times out of ten is that going to work in front of a judge? What are the risks that that's not going to work? Will that fail – that argument?' But what I will not do is to say, 'I think that argument will fail, I think that's a bum argument, and . . . although that might lie under my words . . . that's the line for me.'

What are lawyers looking for in a mediator?

Lawyers in our sample were asked in the course of interviews to name characteristics such as particular skills or legal knowledge that they would look for or do look for when selecting a mediator, and why. A key theme to emerge is that the majority of lawyers would prefer to work with a mediator who is an expert in the field. The majority of specialist public law lawyers argued that in a number of public law disputes they would seek to engage a mediator who was either a lawyer, or who had a clear understanding of the legal issues in the area of dispute. Although public law expertise was not the only skill sought in a mediator, an understanding of the legal and practical framework of the dispute was considered necessary for a variety of reasons. They also mentioned that the primary characteristics they looked for were excellent mediation skills and authority.

A solicitor who said that a mediator in judicial review disputes need not be a lawyer, did so on the basis that, by definition, mediation is not about legal issues:

'I don't think that they need to be lawyers. Almost by definition, if they are heavily legalistic and there's a dispute about the meaning of the law, I don't think that's a case for mediation. In a lot of cases, nobody really cares about the law. In a lot of cases it's about whether or not you get for your clients what they're concerned about. In those cases you say, can we start from the other end and agree how to do things without the other side losing face etc. If there is an argument about the meaning of the provision, there is just no point in trying to mediate it.'

This view was echoed in that expressed by a mediator, who felt that understanding of the legal issues was important, but that mediation itself is not focused on what might or might not be achieved in court. He said:

'It's useful for me to get a hang of . . . both the legal and personal parameters . . . I do need to have a sense of where the issues lie, so that I can see where the risks lie, and help people to acknowledge to themselves, and occasionally to each other, where the risks actually are . . . [W]hat we do is to spend no time . . . at all about whether someone is going to get an order or not . . . we spend all our time [in mediation on], [w]hat is going to happen to this person, and this authority, tomorrow? And we are often completely freed from the merits of the litigation when we're having this discussion.'

Why did the majority of public law practitioners prefer a mediator with public law knowledge? Although an understanding of public law was not the only skill sought in a mediator, an understanding of the legal and practical framework of the dispute was considered necessary for a variety of reasons.

One solicitor without direct mediation experience stated that specialist legal knowledge, whilst not a pre-condition in a mediator, would be desirable in order to ensure realistically practical outcomes:

'I think that it would be difficult for [mediators] to identify what they are providing as an alternative to the legal process if they don't understand what the legal process itself is capable of achieving or what the argument was about that put people into the mediation room in the first place. Sometimes you get situations where the local authority says we can't do what you ask for these reasons, and if the mediator does not know anything about the legal framework that is in place, so how do they get to the bottom of that? It's just going to be totally artificial, I think. Put it another way – it is difficult to broker a practical solution if you don't have any understanding of what, practically, the authority in question can do.'

A similar view was expressed by a barrister/mediator. While stating that it was not intrinsically imperative for a mediator to be an expert in the field in which they were mediating, he went on to say:

'But you do need to understand what the parties are talking about both factually and potentially legally . . . particularly if it is complicated. For example, if you were trying to mediate a community care case and you didn't have a working understanding of what kind of duties local authorities, local social services had towards people with disabilities, you would be in the dark about it.'

Another barrister/mediator, who mostly represented defendants, thought that detailed understanding of a specific area of dispute is necessary, even if the mediator is not a lawyer or public law specialist per se. For many interviewees, like this one, the emphasis was on the mediator having a deep understanding of the subject area of the dispute – for example, education or community care – and the culture and roles within that area. Such an understanding is a powerful tool enabling the mediator to challenge parties with authority and encourage them to think creatively about solutions:

'It depends on the nature of the dispute obviously. I would be particularly interested in someone who knew the subject matter rather than being familiar with public law. They come together in a sense. If I was doing a dispute in education, I would want someone who knows about education, because what I would want from a mediator is someone who can come up with a creative solution as we are not talking about money here. Therefore, someone who is familiar with the general field. It doesn't have to be a lawyer, it could be maybe an ex-chief education officer who could say "Why don't you think about this or that?", so someone who has authority and knowledge, who understands the culture of the dispute.'

Just as important is an understanding of the limits on the exercise of power on the part of public bodies. Although defendants themselves, as well as their lawyers, would be expected to be aware of the extent of their powers, practitioners see it as an advantage to have a mediator who is also aware of *vires* issues. This was seen

as essential for engaging in reality testing, as explained by a barrister/mediator who is a housing law specialist:

‘Personally, I do not subscribe to the CEDR view that any mediator could mediate any type of dispute . . . a lot of legal disputes, as opposed to commercial disputes, require a mediator who has a solid grounding in that area of law . . . it’s not a normal commercial decision-making situation, where I weigh up the pros and cons on a commercial basis and come to a deal, making an offer, and I know my bottom line . . . In . . . public law, quite often we’re dealing [not only] with . . . issues of fact, but also [with issues of] discharge of legal obligations by local and central government, who are . . . managing a social safety net . . . or managing the public purse, or managing the public assets, and there’s a statutory scheme which tells them what they can and cannot do, and a grey area in between as to how they might do it, depending on the individual factual circumstances. Now, obviously, they can’t really go beyond what their powers are, and they can’t do something which is probably outside of their powers. So, again, you need a mediator who is going to be able to say, would that be *ultra vires*? . . . Can we do this? Because, at the end of the day . . . it’s pointless doing a deal that’s not going to go through to fruition.’

The *vires* point was echoed by another barrister/mediator:

‘I suppose I would probably look for [a mediator with] some grounding in public law . . . because you would need to appreciate the constraints in terms of what could be achieved in judicial review, and also the constraints in terms of needing to make a decision that’s appropriate to the legal basis of the defendant, and also that it is then accounted for in a realistic way by the defendant.’

Asking the right questions does not necessarily presuppose legal experience, but a mediator’s familiarity with the area of law relevant to the dispute and its related terminology inspired more confidence in some practitioners and was seen by them as helpful in shortening the mediation process.

A barrister and mediator, who often represents defendants in judicial review actions and who has extensive experience of public law mediations, explained how legal expertise can make a difference, despite holding that generally, the skills and experience of the mediator are the most important factors:

‘There are some cases where a degree of knowledge and experience in the area of law would be helpful, so I think that is a factor. Some of the cases which I have had that have involved quite complicated issues about health care provision and funding disputes, it seems to me that it would be helpful to have a mediator who’s got some knowledge of that, not that you’re expecting them to tell you what the answer is because that’s not their role, that’s your role and ultimately the judge’s role. But . . . familiarity with the terminology and the jargon, acronyms and concepts involved and why the different parties might have their respective positions . . . would just shorten the process. It means the mediator doesn’t have to ask for explanations of things to the same extent. So that’s sometimes helpful but less significant than experience as a mediator . . . Most of the mediators I have had are lawyers, although some don’t practice as lawyers. They are full-time mediators.’

Mediators’ specialist legal knowledge was also seen as helpful in moving along complex legal issues. Despite being told during mediation training that a skilled

mediator could mediate anything, a solicitor specialising in education law carefully chose a QC/mediator to mediate in a complex education law dispute because he thought that engaging a mediator who was familiar with the relevant area of law 'gave a significant advantage to both parties' in a case that involved a novel point of law. Such an expert, he explained:

'would be in a position . . . not to advise on the law, but to give [his] views as to what the law is, [which] would move things on. And it did do that . . . After day one, the [defendants] agreed that they could do a user independent trust and they began to think about the terms of it. So in my view it worked, even though in the end nothing came of it . . .'

Some practitioners also took the view that understanding public law is not purely about legal expertise; it also involves awareness of the social context of disputes. They thought that that mediators needed to have a wider grasp of the social realities of disputes involving vulnerable and disadvantaged claimants.

'I would want to have a mediator who has public law experience from [the] claimants' side . . . I wouldn't trust a mediator who hadn't dealt with disadvantaged people. Although I do assume that mediators' skills are transferable skills, I would prefer to have someone who understands how crap public bodies can be . . . I would hope that a good mediator wouldn't need to have a particular expertise, but these cases are about peoples' lives and human rights, and I would prefer someone who understands public law, who knows what the defendants should be doing. I know that it isn't their role to decide on this, but this knowledge would make them aware of the context.'

A public law practitioner specialising in community care law, with extensive experience of setting up mediations in publicly funded disputes, said the following about how she chooses a mediator:

'It depends completely on the case and the clients. In some cases I have used solicitor or barrister mediators. In some cases I have decided that actually it's more appropriate to have a mediator who's got no legal training. For example, one case [about nursing care] was dealt with by a non-lawyer mediator. He had a background in church, faith mediation, so where there was a dispute between particular faith groups, he's skilled at dealing with that . . . So I think it really depends because personalities are so important; there are some mediators who I could see would be completely unsuitable for matching with particular personalities, with the parties in a particular case . . .'

In some cases I think [legal knowledge is important], particularly when you need some reality testing. So there you have a sort of element of neutral evaluation. It's not a formal early neutral evaluation . . . those skills should be part of the mediator's skills in any event. Because the whole point is about looking at what is the real dispute between the parties, however it's described in the legal documents. What do the parties want to get out of this?'

It could also be argued that a mediator who is not a lawyer has the advantage of not being tempted into giving legal advice, which goes beyond the remit of a mediator. Furthermore, mediators are trained to engage all participants; at a mediation where lay parties are attending, a mediator's ability to stand back from the practitioners and ask for explanations, for terminology and concepts to be clarified, can encourage the participation of parties. As discussed in Section 5 on the added

value of mediation, this aspect of participation is one feature that distinguishes mediation processes (and roundtables) from adjudication in judicial review.

Conclusion

The fact that mediations of judicial review disputes are rare is well established. However, the assertion by some mediators and policy makers that lawyers resist mediation because of profit considerations, implying that they would choose to litigate unnecessarily rather than mediate, so as to maximise profits, has not been borne out by the evidence in this study. Although it could be argued that lawyers would be unlikely to disclose such motives to interviewers, we found that all the practitioners who participated in this study regularly engaged in settlement activity, which would undoubtedly generate less profit than would mediation of the same cases. Further, in public law litigation, such an attribution about profit motives would have to be levelled mainly at claimant solicitors, as defendant solicitors are often salaried, working for local authorities or central government. Yet we did not find that defendant solicitors had more mediation experience than did claimant solicitors, nor were they more active in suggesting mediations. Accordingly, any gatekeeping that takes place would appear to do so for other reasons.

It is clearly the case, however, that lawyers have a determining role in advising clients on the choice of redress mechanism and also in choosing a mediator. Once mediation is embarked upon, claimant solicitors in particular were near-unanimous in holding that they needed to be present and involved in the process.

Lawyers who act for vulnerable claimants were in no doubt that their presence at the mediation, together with their clients, was necessary, indeed essential. They saw their role as providing support in terms of ensuring that their clients' rights and interests were protected, as well as providing reassurance when needed. Yet, while stressing their role in protecting their clients, they also understood that the process was not about 'fighting' for everything the client wanted. They were aware of the limitations of what clients could achieve through court proceedings and were anxious not to jeopardise the possibility of settlement by resisting any compromise.

Likewise, they expected their mediators to understand the legal framework of the relevant disputes. Public law practitioners who had mediation experience expressed a strong preference for mediators who were either legally qualified, or who had a working understanding of public law principles and the framework of duties and powers within which public bodies operate. This was not because lawyers expected mediators to provide legal advice. Lawyers, naturally, considered this to be their job. The reasons given for the clear preference for legally informed mediators were: that the mediator's grasp of relevant terminology and concepts saved time and unnecessary frustration; that legal knowledge helped the mediator to understand the parties' respective positions and enabled the mediator to move along complex issues and to challenge the parties where necessary; that it ensured realistically practical outcomes; and that legal knowledge was essential where novel points were being considered. Lawyers did also stress, however, that legal understanding was not the only required skill, and that excellent mediation skills and authority were essential.

Section Seven

‘Cheaper, quicker, better’ – the claimed benefits of mediation explained

Introduction

The claims that are made about the benefits of mediation as compared with the court process are typically expressed in the following terms.¹

- It is low cost and speedy in comparison with litigation.
- It is flexible and allows the parties to have, or regain, control over the dispute and its outcome.
- It offers remedies and relationship outcomes not available from adversarial processes.

In Section 5 we examined the claims made for the added value that mediation offers in terms of better, more flexible processes (i.e. processes that empower the clients and engage them directly in the resolution of the dispute) and better outcomes (i.e. those that are holistic and provide practical remedies for the client). We queried whether these positive elements claimed for mediation are demonstrable in the specific context of judicial review disputes, as well as whether they are exclusive to the mediation process. Do they offer added value over and above what can be achieved by way of other forms of settlement such as skilful negotiation between solicitors, including roundtable meetings?

In this section we also examine the claims regarding cost and speed in light of the available evidence.

How quick is mediation?

We obtained little concrete data from our interviews on the speed of mediation. In none of the 15 judicial review mediations identified by the study was speed mentioned as even one of the motivating factors, nor was it evident that mediation saved any time compared with litigation. Mediation meetings appeared to last no more than a day, although some took longer. Factors that influenced the speed of mediation, however, included the need to identify and agree on a mediator, to

¹ See CEDR (2003) *ADR for Public Authorities: A guide for managers*. <https://www.nationalmediationhelpline.com/what-is-mediation.php>; <http://www.ladr.co.uk/advant.html>; http://www.mediate.co.uk/benefits_risks/index.html (all last accessed 07.05.09) etc.

obtain prior authority from the LSC where the client was publicly funded, and to secure a date and venue convenient to all parties.

One of the obstacles to speedy mediation in judicial review, which could undermine its potential for time saving, is that there is no system in place to assist public law practitioners who may be interested in setting up mediation, but who are unfamiliar with the resources available. This was the experience of one claimant solicitor who attempted to set up a mediation following a suggestion to that effect made by a judge:

'I had this idea that mediation would be quick and wonderful, but it has taken so long. First we had to agree a mediator. I contacted CEDR as they were the only people I knew about and asked for CVs of suitable mediators. I looked for a profile of someone compassionate with knowledge of special educational needs. I dismissed CVs of those with pure commercial background. This took time. Then we had to coordinate dates. I sent [the council] possible dates. They took so long to respond that new dates had to be considered. I needed to find out about location and cost of premises for the mediation to take place. I also wrote to the LSC, who said that there was no need to amend the certificate. After all that, [the council] said that there is already a mediation scheme in place for Special Educational Needs which the council are paying into, so it would be free for us and help keep down costs. Finally, as I was trying to sort out dates yet again, [the council] sent a letter saying that the situation has now moved on and should be resolved through the council's complaints procedure . . . it has all taken too long.'

How does the speed of mediation compare to the speed of judicial review?

It is very difficult to compare the speed of resolution of cases that are mediated with cases that are settled somewhere along the line in a judicial review claim, or even with cases that reach final hearing. The small number of mediated judicial review cases and the multitude and complexity of case-specific factors make it nearly impossible to make a like-for-like comparison.

The Administrative Court office can produce calculations showing the average periods taken from the time a claim is issued until the consideration of permission and from time of issue until substantive decision date. So, for example, in the period August 2005 until July 2006, it took on average 9 weeks for a claim to reach a permission decision on paper, 10.8 weeks to reach oral hearing of permission, and 31.9 weeks till substantive decision date. In the period August 2007 until July 2008, the average waiting periods had increased to 13.4 weeks, 18.5 weeks and 57.6 weeks respectively.²

Without knowing more about the timescales involved in the mediated cases, however, it is difficult to draw a comparison. Despite periodic concerns over delays in the Administrative Court, judicial review is generally regarded as a simple and speedy remedy, and it may be difficult to identify the circumstances in which mediation could offer speedier resolution than litigation.

Certainly, in disputes that require urgent interim relief, mediation is unlikely to be relevant. One of the most frequently cited reasons for the unsuitability of mediation was in relation to urgent cases needing immediate resolution.

A claimant solicitor specialising in education law, who was a trained mediator, considered that mediation took too long to be of any help in urgent cases:

'We're about to issue proceedings in a case we got in yesterday, which is about where a child goes to school in September, next week, because the school is acting unlawfully. Now if they said let's mediate, he still wouldn't be in school in three months' time by the time we'd got everything together, found the mediator, applied for funding from the LSC, found a date that's convenient. And so the disadvantage to him . . . the disabled child, would be significant.'

In addition, even in cases not requiring urgent relief, the question of what advantage mediation might have to offer in terms of speed compared with litigation cannot be considered in isolation from the issue of its timing within the judicial review process. The windows of opportunity for mediation early on in a judicial review are limited. A barrister and trained mediator described the problem as follows:

'The problem with the process is that after issue, pre-permission, there's a very short window there – you have to set up summary grounds . . . there'll be negotiations and there'll be internal reality testing by the defendant, which could lead to settlement, but I can't see it's realistic to actually undertake a structured mediation in that process, so I think it's once you've got the claim up . . .'

Although in theory the earlier the mediation takes place, the greater the potential for time saving, the 'realpolitik' of public law disputes appears to dictate a more likely role for mediation later on in the process, rather than at the very start of it. Mediation may, for example, offer a potential for time saving between permission grant and substantive hearing, especially when the pressures on the court list mean that cases are waiting many months to reach final hearing. In these circumstances mediation could enable parties to have more control over the speed with which the matter is concluded.

Even post-hearing, mediation could arguably save time. If it deals successfully with complex matters that cannot be adequately resolved via the limited remedies available in judicial review, mediation may thereby enable the parties to avoid the need for future litigation. Publicly funded claimants, however, are unlikely to retain funding after a case has been successfully resolved. Moreover, the defendants would have to be convinced of the benefit of spending time and money at that stage in the hope of savings in the future – not an insignificant challenge.

Who knows how much mediation costs?

It is difficult to say how much mediations cost, let alone compare that with the cost of judicial review litigation in particular cases. We considered the publicly available information on mediation providers' websites on the basis that this is a likely starting point for solicitors wishing to inform themselves of the costs involved prior to embarking upon the process. But the information is varied and potentially

confusing, as can be seen from a sample obtained in an internet trawl. Some providers say nothing at all about fees, while others say that fees are negotiable. Where fees are set out, there is no consistency amongst providers regarding how their fees are itemised, or in the amounts they charge. There are also variations in the fee structures, for example, whether the rates are calculated on an hourly or daily basis, whether they are set out according to the mediator's seniority and whether they include preparation and travelling. Most disconcertingly for lawyers involved in public law disputes is the fact that more often than not, the fees are calculated according to the value of the claim, which is irrelevant in public law matters.

Where daily rates that are not based on claim values are offered, they can be too wide-ranging to provide any real indication of what to expect:

'Mediator fees will vary depending on a combination of the experience of the mediator; time preparing for and spent at the mediation; complexity and the value in the underlying dispute. For a full day of mediation with, say, four hours of preparation expect to pay somewhere between £1,000 and £5,000 (split between the parties). 'Overtime' is usually charged after an eight or ten hour mediation day. Expect also to pay travelling and other out-of-pocket expenses. Some mediators charge for travelling time. The majority of commercial mediations are resolved within one day of mediation.'³

Perhaps a better indication of the cost of one-day mediation can be found in the following example:

'In terms of time, parties may take purely as a guideline the sum of £1,750 plus vat (that is, £875 plus vat payable by each party) for an average mediation taking one full day, consisting of 8 hours of mediation and not more than 4 hours of reading/preparation.'⁴

Many of the quoted rates would appear prohibitive to the legal aid practitioner who must follow the LSC guidance on reasonable fees for mediators based on basic remuneration rates for lawyers providing county court advocacy, £66 per hour in 2009.

While the National Mediation Helpline quotes modest hourly rates ranging from £50 to £93.75 per hour, depending on the nature and value of the dispute,⁵ it does not provide a venue and, in common with other providers, seems to be geared towards private law disputes where claims have a potential monetary value. Indeed, when approached, staff were unable to assist with any information on how to find a mediator who is a public law specialist.⁶

Evidently, these issues only feature as difficulties for the uninitiated. Practitioners with mediation experience choose their mediators on the basis of their specific expertise and know what to expect in respect of fees or how to negotiate them. Several interviewees who lacked practical experience said that they would consult colleagues for information about whom to approach, and this might include some initial information with regard to cost. But based on the above publicly available information, it can be seen that difficulties might arise for public law practitioners

³ <http://www.solentmediation.com/mediation-costs.html> (last accessed 07.05.09).

⁴ <http://www.ladr.co.uk/cost.html> (last accessed 07.05.09).

⁵ <https://www.nationalmediationhelpline.com/costs-of-mediation.php> (last accessed 07.05.09).

⁶ 'Mystery shopper' exercise on 21.11.07.

wishing to compare the costs of mediation with those of litigation, in order to identify whether savings could be made by going down the mediation route.

So is mediation cheaper than litigation?

Solicitors can estimate the cost of a judicial review action at various stages of the process on the basis of past experience in similar cases. Indeed, they are obliged to provide costs estimates to clients throughout. The LSC has data on the average cost to the fund of judicial reviews in various case categories, at every stage of the process. For example, the LSC is able to say that the average cost of a community care case that ends prior to being considered for permission is £2607,⁷ and it rises to £8647 for cases that are concluded after permission has been granted.⁸ The average cost of a housing case at the same stages is £1634 and £4353 respectively.⁹ However, the LSC is unable to produce equivalent data as to the actual or average cost of mediated judicial reviews. Too few such cases have been submitted for payment and, moreover, it would be difficult to make relevant comparisons due to the multitude of factors involved. So we asked practitioners how much they paid for mediations and how this compared with the cost of litigated judicial reviews.

Lawyers and mediators with experience of mediated public law cases were unable to provide confirmed figures for the total cost of mediations they had been involved in, and expressed a variety of views regarding the comparative costs of mediation and litigation. An experienced public law solicitor, with a mixed private and legally aided caseload, who was also a trained mediator, was asked whether he knew how much a particular mediation had cost:

'A lot I would imagine . . . we got LSC funding for it . . . Counsel's fees would have been about £4,000 or thereabouts I would imagine, plus whatever – I mean we can't charge very much, about £89 an hour or something, maybe even less, I don't know whether the [LSC] knocked us down because we were attending. It's a bit like going to court; you don't get the hourly rate . . . and we had to pay the mediator's fees obviously. Actually I think there the authority agreed to meet the costs of the mediator's fees. But anyway it would have been a few thousand, five or six or seven thousand.'

The mediator in the same case, who was also a barrister, pointed out the non-monetary costs involved in this difficult and ultimately unsuccessful mediation:

'I'm not even entirely sure if the local authority came to the mediation with counsel; I think they had their own solicitor there. If I remember right, we had a half a dozen people sat there for what in the end must have amounted to two working days. So you can see the expenditure on resources would have been considerable . . . I think it was at the pre-permission stage but the dispute had been going on for a long time, including an ombudsman complaint and a previous judicial review.'

Another solicitor with considerable judicial review and mediation experience, who was also a trained mediator, said about the cost of a successful mediation lasting 'a long day':

⁷ Based on 408 cases. Data provided by the LSC in September 2007 at the request of the project team.

⁸ Based on 64 cases.

⁹ Based on 1143 and 215 cases.

‘A good mediator costs between £2,000 and £3,500 a day. [In that particular case] it was about £2,500 I think for the mediator’s fees and the venue, which wasn’t good at all.’

An experienced mediator who was involved in three community care mediations in our sample could not provide any figures for costs:

‘I haven’t looked up how much [the costs were] . . . We would normally set an hourly rate comparable to the seniority of the mediator . . .’

Costs in relation to the characteristics of judicial review litigation

While unable to provide figures for the actual cost of mediated cases, practitioners expressed views about the cost of mediation generally. It is, of course, impossible to generalise, but as can be seen from the conflicting responses below, some characteristics of judicial review litigation make it likely that, unless mediation occurs at a very early stage, most judicial reviews would in fact be cheaper to litigate than to mediate. Those characteristics are:

- a. *It is inexpensive to issue judicial review proceedings* – It costs £50 to issue an application for permission, and a further £180 to apply for judicial review following grant of permission.¹⁰
- b. *Costs are incurred early on* – A relatively substantial part of the preparation costs, at least for claimants, is incurred early in the process. A QC/mediator explained why it is that for mediation to be cost-effective, it would need to occur at an early stage, preferably before the claim had even been issued:

‘As you . . . know, one of the characteristics of judicial review is that, particularly from the claimant’s point of view, the costs are very front ended; you’ve virtually done all the work you need to do apart from doing the skeleton and turning up. So if you only think about mediating by the time the claim form has gone in, you’ve lost what seems to me to be the best opportunity to get in early when you first see the dispute looming.’

Yet, it is difficult to set up mediations prior to issuing proceedings because of the need to protect the claimant’s interest with regard to time limits, because defendants are often unwilling to engage in settlement considerations in complex cases until after a claim had been issued or permission granted. The extent of availability of public funding can also be a consideration.

- c. *The simple procedure of judicial review is costs-effective* – Therefore, a short hearing is unlikely to cost more than mediation. A barrister/mediator acting for central government explained:

‘I think that the cost of mediation is not dissimilar to the cost of litigation. Most judicial reviews are not document heavy. You don’t do lengthy witness statements; it is about a one day or two days’ hearing, the barristers have to prepare for mediation also, so you are looking at very similar costs.’

- d. *The majority of claims settle anyway* – Where defendants accept that a claim has merit, they are likely to offer a settlement, or agree to participate in a roundtable meeting to resolve complex arrangements. Defendants next consider settlements after permission has been granted which may already be too late to make mediation a less expensive option.
- e. *Final hearings are relatively short* – Most judicial reviews that reach substantive hearing do not last more than a day or two, as pointed out in the two following examples from barristers/mediators:

'In terms of being cheaper, when you go to court, you don't have to pay the cost of the judge or the premises, and you do have to pay a mediator. In fact, most public law disputes are not that expensive, especially the minor education disputes; you have a one day hearing, [and] a limited amount of costs on each side.'

'One of the reasons judicial reviews don't mediate is that, whereas you have a commercial dispute taken to the high court for a fortnight's trial, it's eminently sensible for the parties to spend some money on a day's mediation to see if they can settle it, as you know, most judicial reviews don't last more than a day or two at most, and if you fail after a day of mediation to settle it, you have pretty dramatically escalated your wasted costs and the costs benefit ratio is starting to look not nearly as healthy.'

- f. *Lawyers need to be present in mediations of judicial review disputes* – One of the presumptions underlying assertions that mediation is less costly than litigation is that the involvement of lawyers can be limited,¹¹ if not dispensed with, thereby removing one of the expensive factors in the overall cost of the case. But this did not sit well with the views expressed by most practitioners, as well as mediators, that mediation of judicial review cases usually requires the involvement of solicitors and sometimes also barristers.¹² Nor is it appropriate to consider low-cost mediation (e.g. time limited, or with an inexperienced mediator) in public law disputes. In these circumstances, according to a barrister/mediator specialising in housing law:

'If you've got a fully represented mediation, there's no difference between that and litigation.'

A legal aid practitioner and a trained, though non-practising, mediator who was involved in many judicial review mediations explained why this is necessary:

'You've got to have proper funding . . . one of the concerns about mediation in judicial review cases in community care and mental health and so forth is about the equality of arms. Now I know you're not supposed to bring arms (weapons) to mediation, but – you're talking about the individual versus the state. So you're talking about bodies that are immediately in a position of power and lack of power. And therefore any mediation has to be on a formal footing and it can't be a sort of on the cheap, volunteer ad hoc this is a cheap solution. It isn't a cheap solution – if you compare the cost of the average

¹¹ LSC interview on 18.02.08.

¹² See Section 6.

judicial review with a decent mediation, it's about the same. It's about the same for a day's mediation as it is for a day's litigation.'

The exception to this view came from a city lawyer whose experience in mediated judicial reviews was in the area of licensing:

'A day at a mediation is cheaper than a day at court, because you've got to prepare for court – there's not all *that* much preparation to be done for a mediation. Mediation will always be cheaper – particularly if it happens some months before what would otherwise be the date of the court hearing. I had one spread over two days. But at my level, the costs of a firm like mine are such that mediation will always be cheaper.'

This perspective reinforces once again the notion that mediation tends to offer better value financially in commercial disputes involving two privately paying parties engaging expensive lawyers as opposed to publicly funded claimants and, for example, in-house local government solicitors.

A different perspective on the components that cause the cost of mediations to escalate came from a non-lawyer mediator. While lawyers on the whole doubted that mediation would often be cheaper than a court hearing, given that mediators and premises have to be paid for whereas judges and courtrooms do not, he thought that the most expensive part of mediation is created by lawyers themselves:

'The cost of the mediator is the most incidental; it's the cost of everyone else who attends . . . The extra layer is that the lawyer, barrister, and expert may be there, getting up to £10,000 a day easily. It is up to the lawyers as to which one goes to mediation, which means the cost is within their power.'

However, this level of legal fees would certainly not apply where the claimants are publicly funded, as are most individual claimants in judicial review disputes, and this aspect did not feature in any of the case studies in this project.

But costs benefits are not necessarily quantifiable

The costs of a process need not be seen merely in terms of how much each party pays out in mediation and legal fees. There are other aspects that can be regarded as being costs savings, as described by a senior solicitor at TSol:

'In commercial cases you can do this by comparing claim and settlement amounts. You can't do this in public law because claims aren't money based. We can't do it empirically. We might measure it by the shortened length of the case. We just have to believe that if a conversation narrows the issues, it saves time and costs. The benefits of mediation are not all quantifiable in financial terms . . .'

Despite articulating the benefits of mediation though, this interviewee confirmed that he was not aware of any instances of TSol attempting to resolve a judicial review claim by mediation. In practice, claims either settle directly, or are defended.

A barrister and mediator who often acts for local and central government, agreed that the cost is not only measurable in financial terms, but also pointed out the consequent cost to defendants in terms of human resources:

'It's not just the financial cost. If you settle the case . . . you haven't got all your in-house solicitor, your social worker, their care manager and their line managers' time being taken up in constantly dealing with litigation, and that's why it tends to be in the more complicated cases that mediation is used and favoured because in the more simple and straightforward cases there might not be so much of a cost saving or a human resource saving.'

Conclusion

The comparative speed and cost of mediation and litigation can depend on the stage at which mediation happens, on the anticipated duration of a substantive hearing compared with the duration of the mediation and on whether the mediation is successful. Mediation is unlikely to be feasible in cases requiring urgent interim relief, for which the judicial review process is quick and effective. Even in non-urgent cases, the stage at which the mediation is held will influence the time savings achieved.

As for cost, it needs to be borne in mind that normally the parties each pay only half the costs of mediation, costs can also be negotiated as part of the final settlement agreement, and paying for a mediator and a venue is an added expense which is unlikely to be offset by any savings in reduced preparation time. In the case of a judicial review that proceeds all the way to a final hearing that typically lasts no longer than a day or two, it is unlikely that mediation would lead to costs savings. On the contrary, it is likely to be more expensive, although there can be other costs aspects that are not quantifiable and other benefits with regard to outcome that might lead parties to wish to mediate. In such cases, however, rather than being the 'cheap justice' that some practitioners have objected to,¹³ mediation might in fact be the Rolls Royce option.

On the whole, interviews with lawyers and mediators did not support the claim that mediation is cheaper than litigation and have actually highlighted how difficult it is to generalise in this respect. It is clear that in some situations a successful mediation will be cheaper than a lengthy and complex court hearing, but more expensive in other situations. Our interviewees indicated that in judicial review cases involving a commercial dispute between two privately paying, litigation-savvy bodies, mediation might well provide financial benefits. But, as put by one experienced solicitor/mediator dealing with many community care cases:

'[Mediation is] really not a cost saving exercise at all in judicial review, if you're going to do it properly.'

In the absence of empirical data to support the assertion that mediation is cheaper than litigation in the context of judicial review, how does this claim arise and why is it repeatedly rehearsed? One possibility is that the claim arises from experiences in commercial law disputes. However, if this is so, the very different processes and issues involved in public law disputes preclude the simple transfer of the claim from one arena to the other.

¹³ See e.g. responses to the LSC's 'New Focus' legal aid consultation: <http://www.publiclawproject.org.uk/downloads/Response-NewFocus.pdf>.

Mediation providers have a financial and ideological interest in promoting mediation and they have formed a powerful and persuasive lobby. What better way to recruit support from the establishment than the promise of savings on costs, both in terms of public funding and of judges' time? It is not suggested that claims about costs savings are made in bad faith, but it is suggested that, certainly in the context of judicial review, where there is no evidence to support them, uncritical adherence to them could have significant implications for both policy and practice. For example, the assumption that mediation is cheaper is at the core of the rationale for costs sanctions against a party who 'unreasonably' refuses to mediate.

At present, in the absence of any provisions for compulsory mediation, the promotion of the notion that mediation is cheaper than litigation does not necessarily impact on the choices made by practitioners and judges as to how to proceed with a case. These choices are based on a multitude of factors. But should mediation be made compulsory, not an unlikely proposition in light of numerous pronouncements by senior members of the judiciary,¹⁴ the belief that mediation can save costs could lead to misconceived pressure on parties to mediate for the wrong reasons.

¹⁴ See Section I, 'Introduction and background' for recent pronouncements by Lord Chief Justice and Master of the Rolls.

Section Eight

Case studies

Introduction

This section presents the narratives of 15 mediations of judicial review cases, which have been anonymised to preserve the parties' confidentiality. These cases were reported to the research team by interviewees. This account represents the first attempt to collate and present a significant number of mediation case studies in the public law field and to provide information not hitherto available about real life examples of judicial review mediations. As we have noted in Section 2 on methods, it is difficult to obtain information about mediated cases generally due to the confidentiality of the process, but examples of mediations concerning public law disputes are nearly impossible to come by. Yet, in the absence of concrete examples of cases that involve issues that are relevant to their work, it is difficult to illustrate to public law practitioners who are not familiar with mediation how the process could be applied in their practices.

The 15 examples below were recounted by 10 interviewees: four claimant solicitors, of whom two were also trained mediators; two mediators who were qualified, but not practising, as solicitors; two defendant solicitors, one of whom was a trained mediator; and two barristers who were both trained mediators.

One barrister and trained mediator said that she had been involved in 12 mediations of public law disputes over a five-year period, and one solicitor and trained mediator had been involved in eight such mediations. These were exceptions. One city lawyer and one mediator each had experience of three public law mediations and the rest of those who took part in these mediations had, at the time, been involved in only one mediation each.

What types of case were mediated?

Of the 15 cases, four were commercial-type disputes, three of which concerned challenges to threats to withdraw licences, all conducted by the same solicitor, and the fourth case was a dispute between a government department and a local business enterprise. Another case was a dispute between two public bodies. The 11 remaining cases, although they were classified variously as concerning community care and education disputes, had several important common features: in all the cases the claimants were vulnerable individuals and the defendants were

local authorities, and in none of the cases was it disputed that a duty was owed by the defendants to the claimants, so that the mediations revolved around questions as to how those duties were to be performed.

Many of the cases discussed below share the characteristic of having reached a stalemate in efforts to resolve them before attempting mediation. Although the sample of mediated cases is small, this supports the common assertion that the skills of an independent third party can be particularly beneficial in cases that involve complex emotional dynamics.

At what stages in the judicial review procedure did the mediations occur?

The stage in the judicial review process at which mediation occurred was known in 14 out of the 15 cases. In 10 cases, the mediations took place after permission had been granted. This reflects what interviewees had told us about the stage at which they considered mediation to be most likely to take place. The following comment from a barrister may partly explain why this is so:

‘Where you quite often make headway with a public body that has refused mediation or just ignored the suggestion, is you issue proceedings. And either before the permission stage or particularly if you get permission, the local authority will then become much more enthusiastic to try and engage, because often they’ll think, well we think we’ve got a really good case or we’re really p—d off with this person, they will want to get the case knocked out at the permission stage if they can and if that fails then they will be much more receptive to mediation at that stage.’

It was interesting that, of this relatively small sample of 15 cases, three mediations had taken place before proceedings were issued. In two of these cases it is known that a settlement was reached, although in one of them the mediator said that it ‘wasn’t a kind of nice, tidy, ribbon-tied settlement . . .’ and that ‘very frequently, it’s not possible for a mediation to button everything up. But arguably it’s a very important stage . . . on the road [to resolution]’. One mediation took place after the case had been issued but before it was considered for permission.

What were the outcomes of the mediations?

A review of the cases discussed below also raises the issue of what constitutes a successful mediation. In four of the cases that were mediated post-permission, mediation did not conclude with a settlement. Yet in three of those cases, the parties involved have suggested that the mediation helped to break a deadlock and resolve some issues or enabled the parties to move closer towards full agreement later on. In one case, it was reported that the mediation provided no benefit, but was instead a hindrance to constructive dialogue. The remaining six mediations resulted in settlement.

Empowerment

A number of the case studies raise doubts about the extent to which the stated benefit of empowerment is manifested in practice. In one case, the experience of the lay participants was described by the mediator himself as being gruelling and, in another, the claimant’s solicitor thought the experience had, in fact, been humiliating.

Court, mediation or both?

Three mediations in this section raised issues regarding the interplay between the forum of the Administrative Court and mediation. In the first case (case study 2: 'The best of both worlds?'), mediation took place after the court had determined that the local authority had the power to set up an independent user trust, a legal question that could not have been resolved in mediation. The complex details of the trust were then negotiated at the mediation between the legal representatives of the various parties involved. This is an example of a case in which a combination of the two processes, litigation and mediation, was needed to provide the necessary range of solutions to a complex situation. Neither forum alone could have provided a satisfactory outcome. Similarly, in another case (case study 3: 'It's good to talk') important legal principles were established with regards to the claimants' rights under Article 8 of the European Convention on Human Right and, at the judge's suggestion, the complex details of care provisions were then agreed in a mediation, mainly between lawyers and representatives of the relevant public bodies.

The third case (case study 7: 'The human factor') highlights how opportunities to set legal precedents in cases raising issues of public interest may be lost when the duty to obtain the best outcome for individual clients dictates that cases be dealt in the private forum of mediation. In this case, although other service users in similar circumstances in the same borough would have benefited indirectly from the mediated agreement to train more female care staff, the terms of the agreement would not have been publicised and the case would have had no wider radiating effect. This touches upon concerns raised by commentators and practitioners as discussed in Section 4 about the extent to which mediation privatises justice and removes potentially important issues from being considered in a public hearing. It could also be regarded as an example of a case in which defendant public bodies could regard mediation as offering them the advantage of confidentiality, thereby avoiding publicity and public scrutiny. At present, there is no mechanism to seek a legal ruling on points of law once a particular dispute has been settled in negotiations.

Mediations of judicial review cases*Case study 1: A question of trust*

Long-term failures and mistrust between the parents of a disabled child and their local authority led to a bitter stalemate. Mediation was an attempt to get them talking, and to establish trust (and a Trust).

Jack and Rita, the parents of a severely disabled child had lost all trust in the local authority's attempts to provide suitable educational provision. Jack and Rita asked the local authority to set up and fund a user independent trust, so that they could take over responsibility for arranging the support their child needed. This had never been done before and the judicial review proceedings were partly about the local authority's refusal to consider this request. Jack and Rita also wanted compensation for the local authority's many past failures. An earlier complaint to the ombudsman had been upheld and permission to go ahead with judicial review

**Case study I:
the claimant's solicitor**

'... the most we could have got from the proceedings was the judge saying to the authority you have a power to enter into a user independent trust, and you therefore have to make a decision as to whether to do so or not, properly, rather than just not make a decision or wrongly assume you have no powers to do so. And we realised that even if we'd got, they could make a decision not to do it and we could only then challenge them if it was based on unlawful grounds. Or if they agreed to do it, we'd still have ongoing significant discussions about the nature of the user independent trust and what would it look like; what would be its terms; who would sit on it; who would be the trustees? So for all of those reasons we thought mediation ...'

had been granted. At this stage the court proceedings were stayed for mediation to be attempted.

The mediation was initiated by the parents' solicitor with all the parties and their legal representatives attending. The mediator was also a barrister and was specifically selected for his expertise in education law. Despite the entrenched positions of both sides, the parents' solicitor felt that mediation could achieve more than a hearing. They reasoned that a judge could only determine whether the local authority had the power to set up a trust. Even if that proved to be the case, the local authority would still have

to decide whether or not to establish one, and there would be lengthy ongoing discussions about what the trust would look like. Based on what had happened in the past, the claimants felt that this would inevitably lead to protracted debate. It is likely that the local authority, with an ombudsman finding against them and knowing that permission for judicial review had been granted, felt that they had little to lose by entering into negotiations. The mediator thought that this was an optimal case for mediation, because of the detail and complexity of the issues, and the need to salvage what was left of the relationship between the parents and the local authority.

The mediation, which the claimant's solicitor described as gruelling for the parents, took place over two days in the mediator's chambers. On the first day the negotiations went on until three in the morning. No final settlement was reached, as Jack and Rita's distrust of the local authority made it very hard for them to see eye to eye over even the most trivial things. According to the mediator, although this appeared to be an optimal case, the mediation failed partly because there were some issues that one of the parties did not want to be mediated and because the parents had reached the point where they assumed there was a hidden agenda behind everything the local authority said. In the words of the mediator, 'They have gone beyond the stage at which they were capable of agreeing anything, even to the most trivial drafting suggestions.'

However, the principle of the trust was agreed and most of the terms were drafted. The final details were to be agreed later, but in the end no agreement was reached. Both the mediator and the parents' solicitor felt that mediation would have been more effective at an earlier stage, before so much mistrust had built

up between the parties. Soon after, the child turned 19, and the local authority's educational responsibilities came to an end.

Case study 2: The best of both worlds?

Sometimes the adjudicatory process is not enough to sort out the detail involved in resolving a case. In this instance, mediation and the judicial review process provided complementary solutions.

The Leander family had been in dispute with their local Primary Care Trust (PCT) for six years about their daughter Susan's care. It seemed impossible to agree either a home-based care package or a care plan which centred on a residential facility. What the family wanted was enough money to be set aside by the authority in an independent user trust so that they could arrange care in the way they thought best. However, the PCT did not believe it had the power to allow this.

Mediation took place just a week before the final hearing was due to take place. The mediator visited the Leander family at home and met with Susan. Afterwards, at the mediator's suggestion, the representatives from the PCT did so too. Both separate and joint meetings were held with the family and the PCT to work through complex financial details and to explore the role the family could or should play in managing the care package. No settlement was reached because the PCT was still reluctant to commit to a trust fund unless it knew whether or not it was within its powers to do so. Despite the lack of agreement, the mediator believed that the process had been beneficial because communication had been restored between the parties and 'things actually looked different at the end of the day than they had looked at the beginning of the day'.

At a final hearing, the judge ruled that the PCT did have the power to set up a trust fund for the Leanders with the result that the detailed arrangements worked out at mediation could be implemented. The judge commented that 'Judicial Review is an unsatisfactory means of dealing with cases such as this', but the mediator recognised that in this case the parties needed both the formality of a judicial determination and the flexibility of the mediation process.

Case study 3: Multi-party disputes

Getting 20 people around a table to talk is never going to be easy, but in this case it overcame deep-seated hostility and restored a sense of dignity to the disabled sisters at the heart of the dispute.

Grace and Alice East were adult sisters who were severely disabled. The local authority provided home carers and for many years things went smoothly; but when a new manual-handling protocol was introduced, the carers were told that they should use hoists to lift Grace and Alice. The sisters reacted badly to this and their parents were furious. The carers stopped working as a result and trust between the East family and the local authority had completely broken down.

Lengthy litigation followed. In a five-day hearing, the judge tried to balance the health and safety of the carers, with the Article 8 rights of disabled people and the process resulted in a 'ground breaking' ruling about the principles which should govern manual-lifting protocols. The claimant then requested that an independent

Case study 3: the defendant's barrister

'I think without mediation, it probably wouldn't have reached a resolution because the dispute between the parents were so deep-rooted and intractable and hostile really, they could never have sat down and had a sensible discussion and just sorted it out as you would expect most disputes could be sorted out . . . Where you've got that level of hostility or distrust, as you had from the parents towards the local authority in terms of distrust and then from the local authority's perspective, they were utterly fed up with the parents and feeling that nothing they ever did would ever be good enough, you're never going to get them round a table to sort things out in the absence of some formalised structure.'

trust be set up because of the bad feeling between the parties. It was argued that this would allow the local authority to provide the public funding and the family to arrange their own care. The judge agreed to this but referred the matter to mediation so that the details of the proposed trust and the care plan could be agreed.

The claimants' solicitor proposed the mediator, who was accepted by the large number of parties with an interest in this case. The mediation took place over a long day in which a detailed agenda was worked through during a series of joint and separate meetings. Grace and Alice attended the first part of this post-adjudication hearing

in their wheelchairs and their parents were there for part of the mediation as well. In fact, the agenda was too extensive and it was impossible to decide everything in the course of a single day. However, the big picture was agreed, and the finer points were negotiated later between the lawyers, who had maintained a good working relationship. This resulted in a complicated memorandum and detailed articles of trust being negotiated after the mediation.

There were a number of different perspectives on whether the mediation had added value to this process. Both sides' lawyers felt that the arguments and ill feeling had become so deep-rooted that they could never have resolved things without the help of a mediator, though one observed that since the judge had 'decided all the difficult stuff the mediator had an easy time'. The mediator felt strongly that involving Alice and Grace in deciding how they were cared for was the focus of the whole procedure.

Case study 4: A journey of a thousand miles . . .

It's not always possible to tie everything up neatly in a single settlement. Sometimes mediation is a tool within the context of wider litigation and ongoing negotiations, not a straightforward alternative to a judgment.

Pamela had severe learning difficulties and lived in a residential care home. When she plucked up courage to tell her parents that she had been sexually abused at the home and at a day centre she attended, they took her straight back to live with them at the family home. They could not forgive the local authority for what had happened and were unable to agree with them about the nature of a new

care plan for Pamela. They also planned to claim for damages because of what had happened to her.

Before the application for judicial review was submitted, mediation was suggested. Although Pamela was too vulnerable to attend, her parents brought a photo of her along to the mediation sessions, so that local authority representatives, lawyers and everyone there remained focused on her needs. With the help of a very experienced mediator, they talked for two days and met again three months later for a review. A temporary care plan was agreed and Pamela's parents promised not to issue the damages claim immediately while they waited to see how things would work out.

It was impossible for the family and the local authority to make definite long-term plans, so this was not a 'nice, tidy, ribbon-tied settlement'. But, it was argued that the mediation did offer a place where Pamela's parents could vent their anger and gave them an opportunity to agree interim measures so that Pamela could start to get on with her life after her trauma.

Case study 5: Lack of powers

Although this highly unusual case was issued as a judicial review, it had much in common with a commercial dispute. However, the government department involved felt that they had no power to negotiate a business compromise because the issue was ultra vires.

Widgets plc complained to a government department that a change in regulations had affected the market for its product despite an undertaking to the contrary that the company claimed the department had given. The company argued that its legitimate expectation had been undermined by the department's decision. The department, on the other hand, felt that it had no power to change the regulations once made.

A judicial review was issued and, although the department believed its interpretation of the law was correct, it offered to go to mediation. The mediation took place over the course of a single day, but no agreement was reached. The company was unwilling to accept the department's offer and the department felt it had no power to offer further concessions.

The department ultimately 'lost' the case at the court hearing. The judge decided that it did have a responsibility to try to mitigate the effect of the changes in the regulations. The judge was not aware that mediation had been attempted, or what had been offered at that stage but his proposed solution was similar to that proposed by the department at the mediation.

Case study 6: The devil is in the detail

Despite the paucity of data on this case, it illustrates a common claim for the added value of mediation.

The Madden family were exasperated by their ongoing battles to secure special educational provision for their son. Their solicitor sent a letter before action to the Local Education Authority (LEA) threatening a judicial review if the LEA could not reach an agreement. The LEA suggested mediation and the solicitor held off from issuing proceedings while the mediation took place.

A detailed agreement was worked out between the LEA and the Maddens at the mediation. The family's solicitor confirmed that the most they could have got from taking the case to court was an order that the LEA should make some form of special educational provision for their son. The judge could not have specified all the practical details agreed in mediation of how their child's needs would be best met.

Case study 7: The human factor

Strong feelings about personal treatment clashed with a Health Trust's worries about the wider implications of permitting a patient to have a say in the choice of carers. Mediation provided a place for a severely disabled woman to tell her story in her own words.

Marion, a severely disabled woman in a long-term NHS facility, required regular intimate care. This had been provided by female nursing staff for 32 years. Changes in shift procedures meant that the PCT could no longer guarantee female carers; Marion was horrified that her intimate care might be provided by a man, as this went against her Christian principles and said that she would stop eating and drinking whenever male staff were on duty so that she wouldn't need that care. Her solicitor made several attempts to resolve the issue with the PCT through letters and by requesting a meeting or a mediation. The PCT felt unable to promise female carers because of the resource implications for other service users. They were concerned that it could lead to patients being able to insist on other specific characteristics with regard to carers. Proceedings were issued, an injunction obtained and permission for judicial review was granted. The last circumstance provided the trigger for the PCT to agree to mediate, as proposed by Marion's solicitor.

The mediation took place over a single day and involved Marion, her solicitor, and representatives of the PCT and their legal team. The mediator, who was not a lawyer, was experienced in dealing with disputes involving religious principles. By the end of the day, a settlement was reached. The PCT agreed to train female auxiliary staff to provide home care and to use female agency staff where necessary. This would apply not just to Marion herself, but to other service users as well. Marion's solicitor believed strongly that by meeting her client and hearing her tell her own story the PCT was made aware of the day-to-day reality of her disability and the depth of her concern about who should provide her intimate care. It was suggested that being faced with a human being made all the difference to the PCT's attitude.

The agreement reached in the mediation was attached to a consent order. However, Marion's solicitors had to go back to court to get a decision on who should pay the costs of the case and ended up being awarded only 50 per cent of the costs. If they had won the case in court, they would have been able to claim all the costs at a higher rate.

Case study 8: The costs trap

Although mediation produced the outcome which the claimants wanted, there were disadvantages in this case. The confidentiality of the agreement kept other residents who might benefit in the dark and there were costs implications for the claimants' solicitor as well as the LSC.

Jimmy and Martin were adults with severe mental health problems. They had a history of being hard to place, but had lived for nearly 10 years in a residential home where they were very happy. However, when the care home increased its fees, the local authority refused to pay and the care home gave Jimmy and Martin notice to leave. The care staff believed that a move would have had a disastrous effect on the men and their solicitor suggested mediation in order to discuss the situation. The local authority refused. As a result the claimants' solicitor applied for judicial review and permission, as well as an injunction, was granted at an oral hearing. At this point, Jimmy and Martin's solicitor repeated the mediation proposal to the judge. After pressure from the court, the local authority agreed to mediate. Possibly, this was because they were nervous of the knock-on effect of a court order requiring them to pay the higher fees. It was also suggested that a mediated agreement would enable them to keep the outcome confidential from other service users and insulate them from further claims.

It was anticipated that both the local authority and the care provider would participate in the mediation, but when the local authority failed to confirm to the care providers that they would meet their costs of attending the mediation, the care home refused to attend. The clients were too ill to attend. Despite the absence of the main players, the mediation, which lasted a whole day, was successful in that the local authority agreed to pay the cost of a further mediation with the care-providers, albeit on condition that the claimants' solicitor did not attend. The claimants' solicitor felt that both sides gained a better understanding of their respective positions and that this led to an improvement in their relationship.

The second mediation took place between the two parties with a financial interest in the outcome and a settlement was reached. Although the details were kept confidential from everyone else involved, it meant that Jimmy and Martin could stay in the home. Further negotiation produced an agreement to use arbitration to resolve any future disputes about fees.

The claimants' solicitor who initiated the mediation thought, in hindsight, that it would have been quicker and cheaper to have obtained a ruling in a judicial review if they had won at that point. It was accepted that a court-based precedent could also have been of benefit to other care-home residents faced with an uncertain future. The costs implications of the case were also significant. If the court had decided the case in Jimmy and Martin's favour, they could have recovered the full costs of the case, at a realistic rate, from the local authority. But in mediation, parties usually bear their own costs. Although the claimants' solicitor could claim the basic legal-aid rate for the work, the LSC on that occasion refused to fund an application to try to recover the full costs from the local authority.

Case study 9: A wasted opportunity

Although it seemed as though mediation was the ideal forum for getting down to the details, a combination of high conflict between the parties and poor mediator tactics sabotaged any possibility of agreement on the day.

Beatrice had difficulty with the care provided for her father, Frank, after his stroke. Although the local authority was responsible for Frank's care needs, the care plan was constantly being changed, carers often did not turn up, and the care agency was far from helpful. The repeated arguments, accusations and conflict between Beatrice, the agency and the authority escalated into a messy personal dispute.

Frank's solicitor began a judicial review action and a judge granted permission for the case to go ahead. The claim was repeatedly amended as circumstances changed and several hearings were adjourned, but nothing was resolved. Frank's solicitor suggested mediation, as things seemed to be going round in circles. There were no legal principles at stake, as the local authority accepted that Frank was entitled to care. What they were all arguing about was who should provide his care, how it should be provided, and how it should be paid for.

The mediation took place over a long day in the local authority offices and seemed to the parties to drag on forever. Although there was a good working relationship between Frank's solicitor and the defendant's lawyers, the bad feeling between Beatrice and the local authority made face-to-face discussion difficult. For this reason, the mediator decided the parties should remain in separate rooms, while he 'shuttled' between them passing on comments, suggestions and offers. However, this proved to be unsuccessful. In addition, the representative from the local authority did not have the authority to settle on the day and everyone became frustrated that they couldn't talk face to face. The mediator suggested a second day of mediation, but everyone agreed that it would be a waste of time.

The two solicitors met later and it did not take them long to draft an agreement. It was suggested by the claimant solicitor that the fact that a mediation had been agreed by both sides meant that the lawyers were predisposed to negotiate reasonably and were able to do so once they were away from the heated atmosphere of the mediation day.

Case study 9: the defendant's solicitor

'If we'd found a way to have a 15-minute chat with all of us there... then we'd have been much better off. I suggested that we sack the mediator and try to reach an agreement between us. [However, the mediation] helped bring us together and focused our minds on the details. The fact of saying let's mediate means that you're already thinking is this the kind of case in which we can get the answers we want?'

Case study 10: No one wants to be the first to blink

An 'invitation' from a judge and the efforts of a proactive mediator brought two recalcitrant organisations together.

A local authority was pursuing a judicial review against a regulatory body over the process which had led to a report which had been critical of the authority. Two attempts at a roundtable meeting had been unsuccessful and both sides were waiting for a date of hearing to be listed. More than 250 pages of written pleadings had been exchanged, with inevitable cost consequences. The judge 'invited' the parties to try to settle, or at least to narrow the grounds of their dispute. Both agreed to try mediation in principle, but neither would actually commit to a date.

A breakthrough was achieved by a proactive mediator who proposed back-to-back preliminary meetings with both sides and even suggested the dates. This meant that neither side risked showing weakness by being the first to consider compromise. An interviewee suggested that mediation went ahead without any loss of face and a provisional settlement was reached for the court to endorse. The mediator believed that the opportunity to explore issues between the in-house decision-makers and their external advisers in private was an important element in reaching agreement. Given the failure of two previous roundtable discussions, the mediator argued that it was unlikely that this dispute would have been settled without the aid of a mediator.

Case studies 11–13: Strategic offers of mediation

In three similar cases where the claimants' case was weak, a canny solicitor gambled that the defendant could not refuse to mediate and achieved a good deal for his clients.

In three separate cases, licence-holders applied for permission for a judicial review of the regulator who had threatened to withdraw their licences because conditions had been breached. In each case permission was granted. All three licensees were represented by the same solicitor, who had a realistic view of his clients' positions. On his advice, his clients agreed to propose mediation, on the ground that if the cases went to court they might well lose, whereas a deal might be possible in mediation. He rightly assumed that the regulator would not want to be seen to refuse to mediate.

And so it proved. All three cases settled, and more quickly than they would have done if the court process had continued to the end. The outcome was especially good for the licensees because the agreements reached at mediation included a number of issues which could not have been resolved in court. The solicitor also felt that the cost to his clients was significantly less, as mediation did not involve as much detailed legal preparation as a court hearing would have done.

Case study 14: A troubled teenager

In this dispute between a family and a local authority, there were no clear grounds for judicial review but some kind of agreement needed to be brokered for the sake of a troubled teenager.

Kevin was out of control and his mother Martha simply couldn't cope. Social services wanted to carry out a needs assessment, but Martha refused to let them,

as she was so fed up with what she saw as their unhelpful attitude. It seemed impossible to agree about what would help Kevin but Martha and her husband thought he needed plenty of sporting opportunities, especially cricket. The local authority felt this was extravagant and inappropriate.

Although the family's solicitor was threatening judicial review, the local authority lawyer knew that it was unlikely to succeed. It wasn't that the authority was refusing to carry out its duty to assess Kevin's needs. Rather, the solicitor argued, it was Kevin's parents who were refusing to let the local authority do so. But she could see that something needed to be done to end the stalemate. So she suggested mediation, as she thought that an independent person who was not part of the council or the family might help to calm things down. The outcome of this attempt is not known as the lawyer who recounted it had no further involvement in the case.

Case 15: Home closure

In this case the local authority decided to close down a residential care home and to move its residents elsewhere. The residents did not want to move to another home and their lawyer was able to demonstrate that an enforced move could be detrimental to their health.

This pre-permission mediation lasted for a full working day and was attended by solicitors and counsel for both sides and some additional 20 people supporting the defendants. The claimants' solicitor had suggested mediation. She expected that in the course of the mediation there would be some discussion about the financial implications of closure as well as about the effect of the proposed move on the residents. In fact, she found that the only point that the local authority's representatives were prepared to talk about was that the residents simply had to move elsewhere. This is an example of a situation in which one party, having entered mediation in which there was the expectation of engaging with the other side and exploring options together, did not, in fact, do so in good faith. Indeed, the claimants' solicitor could not, on reflection, understand why the local authority had agreed to take part in the first place.

Other mediations involving public bodies

- A failed asylum seeker who resisted deportation was injured by the control and restraint techniques used by immigration officers. Her claim for £35,000 damages was settled through mediation and the Home Office agreed to suspend her removal order for two months while she recovered.
- A dispute over fee increases between a local authority and a care home was resolved through mediation shortly before the court judgment was due.
- A student with mental health problems began a disability discrimination claim against his university in the county court. The university proposed mediation as a way of dealing with the issue out of the public eye. The case was settled through mediation with a payment of £5000 to the

student, which the mediator felt was a higher award than he would have received in court.

- A defendant government agency proposed mediation in a long-standing acrimonious dispute with a district council, following years of litigation and a failed roundtable meeting. The proposal to mediate, the agency hoped, would place it in an advantageous position with regards to court costs in the forthcoming High Court hearing should the other side refuse. The claimant accepted the suggestion. At the start of the mediation, the mediator insisted that the parties concentrate on various substantive and practical aspects of the dispute and leave to the end the most contentious issue, that of the costs that had accrued over time in the course of the dispute. This proved to be a wise tactical decision as by the time this matter came up, the parties had already reached agreement on many important matters. A memorandum of agreement was drawn up and, although it was not turned into a court consent order, it was offered as a template to other councils who had similar problems. Both sides felt that an agreement had been reached which could never have been achieved in court.

Section Nine

Conclusion

It was a premise of this study from the outset that there is little recourse to mediation among public law practitioners. This was confirmed by the Dynamics of Judicial Review study which found that less than six per cent of public law practitioners had either considered the possibility of using mediation in any of their cases or had actually participated in a mediation of a public law dispute.

However, while lacking experience of mediation, public law practitioners had extensive experience of the negotiation and successful resolution of judicial review claims. *The Dynamics of Judicial Review Report* has shown that most judicial review claims are settled and most settlements satisfy the claims made in the challenge.

Settlements occur at various stages of the process, starting with the estimated 60 per cent of claims that resolve through dialogue between the parties following the letter before claim but prior to issue of any proceedings. Cases thereafter tend to settle either shortly after claims have been issued or following the grant of permission. Some 60 per cent of cases that are considered for permission are refused and conclude at that stage. The combined effect of the many settlements that occur throughout the process, together with the filter provided by the permission stage in judicial review, leaves only five per cent of cases that proceed to substantive hearing, according to official statistics.¹ The permission stage filter can thus be viewed as a form of early neutral evaluation which successfully disposes of unmeritorious cases.²

While some cases that settle as a result of bilateral negotiations could arguably result in a better outcome for one or both parties were they mediated instead, mediation is an unlikely option where more familiar and straightforward routes to disposal are available to lawyers. Any exploration of the role of mediation in judicial review would therefore be likely to focus on the small percentage of unresolved cases that proceed beyond the permission stage and in which both parties have an interest in reaching a settlement but are unable to do so because negotiations have become 'stuck'.

¹ <http://www.justice.gov.uk/docs/judicial-court-stats>.

² It is not suggested here that all the cases disposed of in this manner are necessarily unmeritorious, merely that cases that are pronounced unarguable by a judge at permission often conclude at that stage.

Policy makers' and mediators' perspectives: facts or myths?

In the past decade or so, policy makers have reiterated the case for mediation made out by mediation providers and have sought to promote the use of mediation in all areas of civil litigation, including public law. The claims that are made in support of mediation are essentially that it is quicker, cheaper and offers better outcomes than could be achieved through the court process. Given all these benefits, the apparently irrational failure on the part of practitioners to incorporate mediation into their practices was attributed, *inter alia*, to self-serving profit motives and ignorance of the benefits of the process. Of all the above claims and charges, only two were borne out by the evidence, namely that many public law practitioners displayed a lack of knowledge about the precise nature of the mediation process, and that mediation can lead to outcomes that cannot be reached through direct negotiations or through adjudication.

Many lawyers have no detailed understanding of the mediation process and confuse it with other forms of settlement negotiations, such as roundtable meetings. There is no doubt, therefore, that there is room, and also a need, for training to increase awareness and understanding on the part of public law practitioners of the mediation process. Such training, however, needs to be geared to the realities of public law practices. It must address lawyers' reservations and assumptions rather than promote idealised models of mediation that lawyers cannot relate to their own experience and to the needs of their clients. In addressing these realities, training must also take into account financial and resource considerations for both claimants and defendants and the differences in their respective perspectives.

The assertion by some mediators and policy makers that lawyers resist mediation due to financial considerations, implying that they would choose to maximise profits by litigating rather than mediating, has not been borne out by the evidence in this study. Firstly, interviewees appeared to be primarily concerned with their clients' interests, although it could of course be argued that lawyers would be unlikely to admit to profit motives as a driving factor. Secondly, practitioners regularly engaged in direct negotiations with a view to reaching settlements, an approach which undoubtedly generates less profit than would mediation of the same cases. Further, in public law litigation, such an attribution about profit motives could only be levelled at claimant solicitors, as defendant solicitors are often salaried, working for local authorities or central government. Yet, we did not find that defendant solicitors had more mediation experience or were more likely to suggest mediation than claimant solicitors.

There was little, if any, evidence to support the claims that mediation is quicker or cheaper than judicial review. On the whole, interviews with lawyers and mediators did not support these claims and highlighted how difficult it is to generalise. Mediation certainly cannot be as quick (or as cheap) as an injunction or an expedited hearing, yet it may well be both quicker and cheaper than a five-day substantive court hearing involving multiple parties. However, in the case of a judicial review that proceeds to a final hearing typically lasting no longer than a day or two, it is unlikely that mediation would lead to costs savings. On the contrary, it is likely to be more expensive.

We suggest that a possible explanation for these repeatedly made but unsubstantiated claims for the speed and cost benefits of mediation is that policy makers may have adopted uncritically claims made by mediation providers whose experience is more often derived from commercial law disputes, which present very different issues from, and cannot therefore be simply mapped onto, public law disputes. It is suggested that certainly in the context of judicial review, where there is no evidence to support these claims, uncritical adherence to them could have significant implications for both policy and practice. For example, the assumption that mediation is cheaper is at the core of the rationale for costs sanctions against a party who ‘unreasonably’ refuses to mediate.

At present, in the absence of any provisions for compulsory mediation, the promotion of the notion that mediation is cheaper than litigation does not necessarily impact on the choices made by practitioners and judges as to how to proceed with a case. But should mediation be made compulsory, the belief that mediation can save costs could lead to misconceived pressure on parties to mediate for the wrong reasons.

While the stated benefits of speed and cost are questionable, it is clear from our case studies and interviews that mediation can be a useful process where negotiations are impossible, difficult or have broken down. As an independent neutral third party, a mediator is in a good position to assist where parties are in general agreement about the course of action required to resolve a dispute but need help to hammer out the detail, as well as to reduce or obviate oppositional dynamics in more conflictual situations. In several of our case studies, mediation enabled underlying issues in a dispute to be teased out and all the successful mediations resulted in outcomes that gave claimants more than they would have achieved had they been successful at court.

Our findings confirm that, apart from a small number of commercial-type mediations, mediated judicial review disputes tend to be neither quick nor cheap, yet mediations can, and often do, provide innovative and long-lasting benefits. It could therefore be said that, rather than being the ‘cheap justice’ that mediation providers promote and that practitioners have objected to, mediation might in fact be a Rolls Royce option. In that case, would policy makers and the LSC still wish to promote mediation over adjudication, or would they respect lawyers’ judgments as to the appropriate choice of mechanism and fund accordingly?

Practitioners’ perspectives: theory and reality

The study has shown that practitioners considered mediation to be unsuitable in judicial review cases for a variety of reasons, both practical and principled. Practical reasons included cases that needed an injunction, cases in which the decision-making body was *functus officio* or cases requiring a legal determination on a disputed question of law or policy. The practitioners who had significant mediation experience, many of whom had also trained as mediators, placed emphasis on ‘principled objections’, such as the need to establish judicial precedents, the need for transparency and publicity in public law cases, and issues of power imbalance between unequal parties.

Such principled objections, however, could be said to be as relevant to the many settlements that are negotiated daily between solicitors as they are to mediation. This study shows that lawyers engage in direct and roundtable negotiations, as well as mediations, even where important issues of public interest are involved, wherever they believe that such mechanisms can achieve the best outcome for their clients. As one participant argued: 'If directly negotiated settlements are not considered constitutionally suspect, than surely neither are mediations?' Principled objections, important as they are, do not, therefore, appear to inform practitioners' choices of redress mechanism in public law disputes. It needs to be stressed, however, that lawyers and mediators interviewed for this study were almost unanimous in their view that the presence of lawyers at mediations is essential in order to redress the power imbalance between the parties. The view that negotiation and mediation do not raise substantially different concerns about issues of principle must be seen in that context.

It appears that when mediation does occur, there are a multitude of factors that combine to bring it about. These factors can be quite complex given that both parties must want to mediate and that in most situations claimants and defendants are likely to have different motives for wishing to participate.

Lawyers and mediators: towards a better understanding

Lawyers and mediators in this study appeared to agree that the presence of lawyers was necessary at mediations of public law disputes in order to redress the power imbalance between the individual claimant and defendant public bodies. In addition, lawyers saw their role as providing support in terms of ensuring that their clients' rights and interests were protected, as well as providing reassurance when needed; and mediators considered lawyers' presence as being useful in helping to frame realistic expectations. Lawyers were also needed in order to draw up complex settlement agreements. This necessity for expert lawyers to be involved in mediations of public law disputes is also a factor that affects the cost of the process as compared with mediations that do not necessitate the involvement of lawyers.

Lawyers expected their mediators to understand the legal framework of the relevant disputes, and expressed a strong preference for mediators who were either legally qualified, or who had a working understanding of public law principles and the framework of duties and powers within which public bodies operate. The reasons given for the clear preference for legally informed mediators were that the mediator's grasp of relevant terminology and concepts saved time and unnecessary frustration; that legal knowledge helped the mediator to understand the parties' respective positions and enabled the mediator to move along complex issues and to challenge the parties where necessary; that it ensured realistically practical outcomes; and that legal knowledge was essential where novel points were being considered.

Finally

This study has shown that there is no single explanation for why there are so few mediations of public law disputes, nor is it possible to create a checklist of factors that would identify public law cases that are suitable for mediation. While many practitioners are unfamiliar with mediation and are therefore unlikely to consider it even in appropriate cases, the study has shown that even practitioners who are trained mediators and who are fully aware of the potential benefits of mediation rarely engage in mediations of judicial review cases or other public law disputes. Explanations provided by these practitioners were that there are few opportunities to use mediation in public law because the majority of disputes settle anyway and many of those that do not settle are considered unsuitable for mediation.

The study has exposed a number of gaps between theory and practice.

It has shown that the arguments that are made in favour of using mediation over adjudication cannot be justified and that the promotion of mediation by policy makers is based on little, if any, evidence.

It has shown that lawyers on both sides who consider mediation a useful process rarely find opportunities to use mediation in their judicial review cases.

It has also shown that principled objections raised by practitioners to the use of mediation in public law do not, in fact, prevent them from utilising mediation in their practices where possible. Practitioners are trying to adapt the mediation process itself in order to take account of these principled concerns, for example by incorporating into mediated agreements commitments on the part of public bodies to changes in policy or practice that would benefit other service users or members of the public, and by negotiating agreements to publicise the terms of mediated settlements. Such innovative developments have the potential to make mediation a much more useful tool in the toolkit of public law practitioners.

Ultimately, the idealisation of mediation by mediation providers and its promotion by policy makers and some judges in the face of the reservations and concerns of experienced and well-informed practitioners is short-sighted and unhelpful. It obscures the complexities of practice and does not address the realities of what mediation can and cannot achieve in the public law arena, thus undermining the real potential that mediation might have in the context of public law disputes. Enthusiastic and sweeping assertions, such as those made by a mediator interviewed for this project who stated that 'there is a fundamental flaw in our judicial system [in] that it says there is a winner and a loser, and life is not like that' and that 'mediation is the best way and therefore it should be appropriate to any form of dispute' are not conducive to gaining the confidence of sceptical and hard-pressed public law practitioners. Mediation enthusiasts and lawyers alike must each be able to incorporate into their own perspectives the insights gained from the others' experience rather than set up litigation and mediation as mutually exclusive alternatives one of which is good and the other bad. Ultimately, however, the choice of redress mechanism must be made by practitioners together with their clients, and no one else.

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