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Charity Law Unit

*Disputes in the
Charitable Sector*

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THE CHARITY LAW UNIT

The Charity Law Unit was established in October 1994 to provide a focus for the already well established reputation of the Faculty of Law, University of Liverpool for research and teaching in Charity Law. The Charity Law Unit has grown from strength to strength since its establishment and it is the only such unit in England and Wales.

The Charity Law Unit's mission is to be recognised as the centre of excellence for legal research of the charity sector. It aims to do this both by responding fully to the demands for legal research raised by the charity sector and by being pro-active in highlighting and pursuing legal research in areas where the law and its application requires clarification, guidance or possible reform.

The report, *Disputes in the Charitable Sector*, was written by Debra Morris. She is author of *Schools: An Education in Charity Law*, published by Dartmouth Press in 1996, and she is assistant editor of the leading text on Charity Law, *Tudor on Charities*, published by Sweet & Maxwell. She is also case note editor of *Charity Law & Practice Review* and has written many articles in the area of Charity Law. She is currently working at Cayman Islands Law School.

The empirical work for *Disputes in the Charitable Sector* was undertaken by Helen Rice, who was employed as Research Assistant on the project. Other members of the research team were Warren Barr and Jean Warburton.

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To respect their confidentiality, participants' names and potentially identifying circumstances have been altered.

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Debra Morris

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OVERVIEW

Disputes can be very costly to charities. They may lose staff, income and their reputation. Further, any cases that end up in court can undermine the legitimacy of the sector as a whole, especially in the light of public concerns over charities' administration costs. The research investigates disputes in the charitable sector in England and Wales. In particular, it seeks to identify the commonest types of dispute and the different ways with which they are dealt. The aim is to gain a better perception of the scale and character of disputes in the charitable sector in England and Wales.

One element in the recent reforms to civil justice is the rise of what is called alternative dispute resolution (ADR). Included under this heading are professional mediators who broker and negotiate between disputing parties in order to come to a mutually acceptable resolution as well as those who provide adjudication services, whether on points of law or questions of fact. These may or may not be legally qualified personnel. The aim of ADR techniques is to avoid what are seen as the disadvantages of litigation. For example: mediators are free to take a flexible approach to rules of procedure; disputing parties will be expected to play a major role in the resolution of the dispute; and, settlements may be aimed at addressing the root of the conflict. Disputes settled by means of ADR are often much less costly to resolve than those that result in litigation.

Not only does the work seek to shed light upon the frequency of disputes occurring in the charitable sector, it also contains information concerning the nature of involvement of third parties. In addition, it helps to identify which specific forms of ADR are used.

The research also seeks to raise the profile of the importance of ADR services for charities, thereby reducing the costs of disputes for charities.

INTRODUCTION

Charities encounter the same range of disputes and conflicts as other organisations. In addition, they are often very strongly value-based, and may experience intense internal conflicts about directions and policies (e.g. Laurance and Radford, 1997). Yet the cost of such conflict is high. For the disputing charity, it can divert energy, time and resources away from its primary task and can damage its public image. It can also have a very real financial cost in litigation and lost revenue. As Walker J pointed out in a High Court case between two disputing charities:

Charities solicit donations from the public ... in the expectation that donations will be well spent on furtherance of the charity's purposes. Even for a lawyer it is a difficult mental feat to recognise this very expensive litigation as helping the diabetics whose subscriptions and gifts will be the ultimate source for payment of the lawyers' bills (*British Diabetic Association v Diabetic Society Ltd* [1995]).

He continued:

I very much hope that both sides will do their utmost to see that this sort of squabbling and sniping now ceases, because it lowers the parties, and indeed charity generally, in the eyes of the general public on which charity depends for support.

In addition to the problems with using charitable resources to fund litigation, disputes can have negative effects on the day to day functioning of charities and their ability to fulfil contracts and service agreements (Singh, 1996). Further, as implied by Walker J, any cases that end up in court can undermine the legitimacy of the sector as a whole, especially in the light of public concerns over charities' administration costs.

The bigger picture

Concern with charity disputes can be located within a wider context of reform to the civil justice system in England and Wales. Major reforms (often referred to as the Woolf reforms) have been introduced under the headings of modernisation and increasing 'access to justice' (Woolf, 1996). The rules of civil procedure have been almost completely re-written in order to support the new emphasis on proportionality and just settlement. Judges now have greater powers to intervene in legal proceedings so as to better 'manage' cases. One significant element in this reform of civil justice is a growing interest in the role that Alternative Dispute Resolution (ADR) can play as a means of keeping disputes out of the courts. The new Civil Procedure Rules (CPR) reflect this increased significance. They require the court to further the overriding objective of the rules by active case management. This includes encouraging the parties to use an ADR procedure if the court considers that appropriate and then staying a case while the parties (either of their own volition or at the instigation of the judge) attempt to settle their case via ADR (CPR 1999, rules 1.4 and 26.4). The Government White Paper 'Modernising Justice' contained statements from the Lord Chancellor, Lord Irvine, to the effect that resorting to ADR techniques allows certain disputes to be resolved more quickly and cheaply than resorting to the courts (LCD, 1998).

A Discussion Paper on ADR, published by the Lord Chancellor's Department in 1999, begins by noting:

For most people, most of the time, litigation in the civil courts, and often in tribunals too, should be the method of dispute resolution of last resort (LCD, 1999).

Taking this a step further in March 2001, the Lord Chancellor, whilst extolling the virtues of ADR as an attractive alternative to formal judicial proceedings, announced a major new initiative by Government to promote ADR in place of litigation (LCD, March 2001). In future, with the aim of leading by example, Government departments will only go to court as a last resort. Instead, Government legal disputes will be settled by mediation or arbitration whenever possible. Standard Government procurement contracts now include clauses on using ADR to resolve disputes instead of litigation and, whenever possible, claims for financial compensation will be settled by independent assessment instead of going to court. Early evaluation of the progress made by Government departments in implementing the ADR pledge demonstrate that it is being taken very seriously (LCD, 2002).

ADR is now being promoted in many traditional areas of litigation. For example, in an attempt to tackle the soaring cost of medical negligence actions, the Government is keen to encourage the use of mediation to resolve claims against the National Health Service. The Legal Services Commission has issued guidelines asking lawyers on the Law Society medical negligence panel to consider mediation and to draw clients' attention to it (LSC, 2001) and a medical negligence mediation scheme has been piloted by the National Health Service (Mulcahy et al, 1999).

Another example is in the area of company law. The final report of the Company Law Review, which contains wide-ranging proposals for modernising company legislation, also includes provision for an arbitration scheme to deal with shareholder disputes, as an alternative to litigation (The Company Law Review Steering Group, 2001). In response, the Government has recently announced in a White Paper its intention to consult with ADR providers to identify the best way forward, and in particular to undertake a cost-benefit analysis for any new arbitration scheme (DTI, 2002).

There is some evidence to suggest that, since the introduction of the CPR in April 1999, there has been a rise in the number of cases in which ADR is used (LCD, 2001). In general, however, civil litigators seem yet to have taken the bait. Two recent Court of Appeal cases prove the point. In the first, concerning the closure of a residential care home, Lord Woolf LCJ, restating his commitment to the paramount importance of avoiding litigation wherever possible, said that the courts should use their powers under the CPR to ensure that disputes between public authorities and members of the public were resolved with the minimum involvement of the courts. In an indirect criticism of the lawyers involved, he said:

Today sufficient should be known about alternative dispute resolution to make the failure to adopt it, in particular when public money is involved, indefensible (*R (Cowl and others) v Plymouth City Council* [2001]).

In the second case, the Court of Appeal refused a winning party any award of costs in its favour, on the basis that it had ignored a strong suggestion to resolve matters by arbitration or mediation. Brooke LJ warned:

If [lawyers] turn down out of hand the chance of alternative dispute resolution when suggested by the court ... they may have to face uncomfortable costs consequences (*Dunnett v Railtrack plc (in railway administration)* [2002]).

It is clear, however, that whilst judges *will* accept valid reasons for not wanting to proceed with ADR (see, e.g. *Hurst v Leeming* [2002]) these reasons must be fully justifiable if the party wishes to avoid a potential cost penalty.

In another recent case, Colman J confirmed the trend towards mediation as 'a firmly established significant and growing facet' of civil procedure, and enforced a contractual clause which required the parties to refer their dispute to ADR (*Cable & Wireless plc v IBM UK Ltd* [2002]).

While ADR undoubtedly has many advocates, when it is actually offered as an option to disputing parties, it is often rejected. In Genn's study of the mediation scheme piloted in Central London County Court, only around 5% of those who were offered the option chose to take it up (Genn, 1998). Her later work also confirms that voluntary take-up of invitations to enter ADR schemes remains at a modest level, even when the mediator's services are provided free or at a nominal cost (Genn, 2002). Various explanations have been offered stressing some reluctance and misperceptions of ADR amongst legal advisers, a general lack of awareness amongst potential users or simply the desire of the parties to have their day in court.

Alternative dispute resolution

Various methods of dispute settlement are usually included under the heading of ADR. It covers a broad spectrum of procedures, from ombudsmen and regulators to complaints procedures, all providing a forum outside the courts and tribunals in which to resolve disputes. Some techniques, such as arbitration, are not dissimilar from bringing a case to court - there is a leading official who has the power to make judgements over matters of fact and law that will bind all the parties. The difference here is largely procedural, with greater informality or less strict rules of evidence being adopted, for instance. Other ADR methods are less regimented, involving the disputing parties being brought together in the presence of a mediator in order to try to achieve some mutually satisfactory settlement.

Most commentators seem to agree that mediation is the primary consensual ADR process that is being used (e.g. Brown and Marriott, 1999). Put simply, mediation is a process by which the parties to a dispute agree to appoint an independent person who meets them and their advisers with a view to helping the parties to reach a negotiated settlement. The mediator is neither a judge, nor an arbitrator. Remaining neutral, the mediator does not decide anything, but challenges each party to consider in particular the benefits of a settlement as against the risk of simply ploughing on with litigation. Mediators may or may not be legally qualified personnel, and some consider that the best mediators come from outside the legal profession. Mediation is a voluntary process, although sometimes the courts will direct mediation or tell the parties to try to resolve the dispute by mediation.

Mediation can occur through a number of modes. One paradigm is that the mediator will hold an initial joint session with all parties and their advisers at which the parties

are encouraged to re-state a willingness to resolve the dispute. There then follow individual sessions between mediator and each party, and negotiations begin. The mediator can receive information or comments from each party either on a confidential basis or for the purposes of communication to the other party. Assuming a settlement is finally agreed it is important for the legal advisers to document the terms of the agreement and to ensure that the parties sign the agreement. If proceedings are already underway, a formal consent order can be drawn up there and then.

Mediation is a powerful yet flexible tool that can be used to achieve consensus or move from positions of deadlock. Although a neutral third party becomes involved in the dispute, the power and responsibility for reaching a solution is retained with the parties themselves. Therefore the chance of the resolution succeeding in the long term is increased and generally 85% of mediations are settled in one day (NCVO website).

ADR can involve a combination of methods. For example, an expert may provide a binding decision on a question of fact, which will then play its part in negotiations that are organised by a mediator. Alternatively, early neutral evaluation (ENE) - where a neutral person looks at each parties' claims and gives his or her non-binding opinion, either on what the result should be, or on a particular point of law - may lead on to mediation.

One aim of all ADR techniques is to avoid what are seen as the disadvantages of litigation. Disputes settled by means of ADR are often much less costly to resolve than those that result in litigation. According to its proponents, ADR is less combative than litigation and, because disputing parties will be expected to play a major role in the resolution of the dispute, it is better able to reach a settlement aimed at addressing the root of the conflict rather than simply its legal dimension (e.g. Brown and Marriott, 1999). Other advantages include the privacy and confidentiality of the process, greater flexibility in the types of solutions which can be achieved, the preservation of the parties' relationships and the costs savings.

Charities and ADR

In a recent charity dispute that went to the Court of Appeal, Mummery LJ, having complained about the substantial sums of money that had been spent on litigation, went so far as to lead the parties to mediation, with a direction that no more money should be spent from the assets of the charity until all efforts had been made to secure a mediation of the dispute in question (*Muman v Nagasena* [1999]). Yet, despite such strong direction from a Court of Appeal judge, in general, the charitable sector has been cautious in its uptake of mediation. This may be because charities see 'cost' in paying for a mediation, as opposed to 'no cost' to struggling on with internal attempts at resolution.

On the rare occasions where there has been publicity about a charity using ADR, the experience reported seems to have been a positive one. For example, the Joseph Rowntree Foundation, in its report of its experience of using arbitration to resolve a libel dispute with The Sunday Times newspaper, stated that the advantages of using the arbitration procedure included the much reduced financial risks involved and the

speed with which the process was conducted as compared to using the courts (JRF, undated). Resolving disputes in private may also mean that funders do not get involved and are not even aware of the problems.

Regulatory bodies may become involved in dispute resolution. Where charities are in dispute, the matter will come before the Charity Commission (Charity Commission, January 2001). Under section 1 of the Charities Act 1993, the Charity Commission has the general statutory function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving trustees information or advice on any matter affecting a charity and by investigating and checking abuses. If a dispute raised with the Charity Commission concerns minor cases of abuse or poor management, it may offer information and guidance to a charity and encourage better methods of administration (see, e.g. Charity Commission, July 2002, where the Commission describes this sort of work as 'charity support'). But, where the issues are of serious concern, the Charity Commission has a number of powers that can be used to intervene in a charity and to put things right or prevent them happening again. For example, it can suspend or remove trustees or employees, appoint new trustees, freeze bank accounts or, if the concerns are criminal, refer the matter to the police or other appropriate authorities. Its overall aim with all cases is to protect the charity, improve upon the past and encourage good practice in the future.

The Charity Commission itself is supportive of ADR for charities. It considers that one of the hallmarks of a well-run charity is that it conducts its external relations in a way that enhances its own reputation and that of charities generally (Charity Commission, January 2002). Recognising that a charity's reputation is a valuable asset, a well-run charity should be sensitive to external opinion and should seek to enhance its standing in its dealings with commercial and public sector bodies, its methods of raising funds, and its advertising and publicity. When recommending that all contracts between public bodies and charities should include a provision for resolving contractual disputes, the Charity Commission recommends adopting a form of ADR, adding that a charity would be justified in paying the reasonable fees of a dispute resolution service if there is a fair chance that it will mean avoiding the greater expense and disruptive effect of litigation later on (Charity Commission, March 2001). The Charity Commission also readily accepts that the promotion of the efficiency and effectiveness of charities and the effective use of resources to achieve charitable purposes are charitable purposes themselves and of benefit to society (Charity Commission, November 2001).

The National Council for Voluntary Organisations (NCVO) has offered a mediation service since 1995 and has had a panel of experienced and skilled mediators who have worked since then on resolving conflict in the voluntary sector. In 1999, with the help of a grant from the Home Office, the NCVO embarked on partnership with the Centre for Effective Dispute Resolution (CEDR), who jointly established a mediation service specifically for charities. CEDR, itself a charity, has an international reputation in the field of dispute resolution. This subsidised service is available to all charities and allows CEDR to charge a reduced mediation fee, depending upon the size of the charity's annual income. The scheme offers a five-hour mediation session and is based on a three-tier fee system. Having a sliding scale of cost, with half of the expense subsidised by the service itself, means that a small organisation can pay as

little as £250, which may be the difference between deadlock and progress (NCVO website). A panel of CEDR mediators was identified for the scheme, drawn from a range of backgrounds including the voluntary sector, law, management consultancy, counselling and training and the scheme is managed by a CEDR Solve dispute resolution adviser. All the mediators are CEDR accredited, have access to their continued professional development programme and carry professional indemnity insurance.

The Charity Commission is keen that this avenue is explored by charities. As John Stoker, Chief Charity Commissioner has said:

Disputes within and between charities can prove costly and damaging. We would urge charities to acknowledge the existence of the dispute when they have got one and look for the best way of resolving it. Mediation can be effective in resolving many types of dispute and we would encourage charities to explore its possibilities (CEDR website).

A further indication of the support for ADR for charities is that a Compact Mediation Scheme, designed by a joint Government and Voluntary Sector group with consultancy advice from CEDR (The Compact Mediation Working Group), is to be piloted in 2002. The scheme, which was proposed to the third Annual Compact Review meeting in April 2002 (CMWG, 2002), aims to create a mechanism to resolve disagreements between Government departments and voluntary or community organisations, where action contrary to the 'letter' or 'spirit' of the Compact on Relations between Government and the Voluntary and Community Sector (or its Codes of Good Practice) is thought to have occurred by either party (CEDR, 2002). This is in line with the Compact itself, which states that 'mediation may be a useful way to reach agreement, including seeking the views of a mediator' (Home Office, 1998). The scheme has been designed to provide a mechanism for future learning; anonymised case studies will be brought to the Compact Annual Review Process to indicate where and how the relations have experienced difficulties and to avoid similar pitfalls in the future. The pilot scheme has been developed with the local situation in mind, and it is hoped that the scheme may be adapted for use at local level, as the national Compact has been.

Another view is that mediation is less likely to resolve a dispute for charities than for commercial organisations. This is due to the fact that those involved with charities tend to be so for reasons other than personal gain. Often they invest a considerable amount of personal energy and time for no financial reward and are consequently more emotionally involved than those in commercial organisations. It is said that such emotional involvement often makes rational discussions difficult. These reasons might help to explain why one experienced mediator interviewed for the research claimed that mediation for a charity takes three times longer to set up than for other organisations in dispute. Obviously, in the case of some highly charged disputes mediation is not appropriate. Nevertheless, even a failed attempt at mediation may have some use in that it may assist in shortening the ensuing litigation by narrowing the issues. Also, some forms of mediation, for example, community mediation which is used to resolve conflict between people within the same communities, including disagreements with neighbours about noise or harassment, or problems with local children, parking, shared land etc., specifically concentrate on the 'people' side of the issue as opposed to the 'problem' side of the issue (see, e.g. Behrens, 2001 who

advocates the use of mediation to resolve trust and probate disputes. Compare, however, Wood, 2001, who claims that the use of ADR processes for such disputes may give rise to as many problems as it may be attempting to solve).

Mediation will only be an option for charities if they have the power to enter into the compromise arrangements that will hopefully emerge. Charity trustees are under a duty to apply their assets as far as is possible for the purposes of the charity, so trustees may be concerned that only a court order or a legally binding decision of an arbitrator will enable them to part with some of their resources in favour of the other disputing party. However, in most cases, trustees will either have the power in their governing documents or be able to seek the power to enter into a compromise arrangement. This may be via section 15 of the Trustee Act 1925. Alternatively, section 26 of the Charities Act 1993 gives the Charity Commission the power to authorise entry into a compromise arrangement.

THE PROJECT

The aim of this research was to gain a better perception of the frequency and subject of disputes in the charitable sector in England and Wales. In particular, it sought to identify the commonest types of dispute and the different ways with which they are dealt. In dealing with their disputes, what forms of advice, support and third party intervention are currently utilised?

Charities appear to be ideal candidates for ADR. Advantages include: disputes can be settled quickly and cheaply; the methods adopted can aim to solve the basis of the problem; and, it may all be carried out in private. However, the few initiatives aimed at providing ADR services to the charitable sector seem to have had limited take-up. Therefore this research also seeks to raise the profile of the importance of ADR services for charities, thereby reducing the costs of disputes for charities.

In addition, this research will help to identify which specific forms of ADR are used. Is there any relationship between the type of dispute, the type of intervention and the resolution of the dispute?

Finally, it is hoped that lessons can be drawn for the charitable sector as a whole, as to the most appropriate ways in which to deal with disputes. This information will help to reduce the 'costs' of disputes to charities both at the level of the individual charity and the sector as a whole. Costs are to be understood here in the broad sense, including not only the direct costs of employing legal advisers, paying court ordered damages etc, but other, more indirect costs, such as the amount of staff or volunteer time taken up with disputes. Disputes that become public can also damage a charity's reputation, with knock on effects upon fund-raising (see, e.g. Lightman J's comments in the RSPCA case discussed in chapter 3).

Methodology

The method used was empirical and involved discussing issues of conflict resolution within the charitable sector with those who had specialist knowledge of this area.

Preliminary stage

The first step was to identify as far as possible current issues and research in the field of charities and dispute resolution by way of a review of existing literature in the area (e.g. Laurance and Radford, 1997) and an analysis of the relevant legal principles. On the basis of this background research, it was possible to design the empirical part of the study and the research questions were proposed.

It was decided that semi-structured interviews should be used. This was to ensure both continuity of questioning content with all interviewees, whilst at the same time allowing flexibility for the interviewees to develop ideas and speak more freely. It was important to use this style of questioning as research in relation to dispute resolution, specifically for charities, is limited and therefore it was expected that new issues would emerge from the questions posed. On the one hand, structured

questioning would not have allowed for the development of themes and on the other, unstructured questions would not have ensured that the research questions were fully answered.

The next step was to identify the first stage interviewees. It was decided in the early stages of the design *not* to approach charities that had actually been in dispute. Initially a postal questionnaire to individual charities asking about their own disputes was considered. However, with over 160,000 registered charities (Charity Commission, July 2002) the sample size and the poor response rate anticipated would have added to the cost and not added to the value of the research. More fundamentally, it was also considered that the information gained as a result of the exercise would have been of doubtful validity, since individual charities, concerned about the public perception of the charitable sector as inefficient and the knock-on effect upon fund-raising, would generally be reluctant to talk about their disputes. After careful consideration, it was decided that umbrella and resource bodies would be best placed to provide the information required as, although not part of the dispute, they come into contact with organisations in conflict, often in an advisory capacity. The aim was to gain a greater understanding of how charities get involved in potentially court bound disputes. At present, apart from the many newspaper reports of minor disputes (mainly in local press involving local charities) and the limited in number, but much publicised, cases that get to court, much of this information is undisclosed. By talking to the umbrella and resource bodies that get involved, or at least consulted, when charities are in dispute, it was hoped that a better sense of the problem could be gained.

Stage 1

The first stage interviews were conducted in order to gain a general idea of the issues to be explored.

For the first stage interviews, approaches were made through existing Charity Law Unit contacts. Organisations and individuals were identified with a breadth of experience in the field of charitable disputes. So as to give a clear account of the issues that are facing charities in dispute, the interviewees included organisations who had a regulatory and/or advisory role or who actually provided ADR for charities. The most appropriate person/s from each organisation were identified to be interviewed, which included chief executives and leading professionals in the field.

Nine semi-structured interviews were conducted in September and October 2001. Interviewees were asked a broad range of semi-structured questions designed to address the different issues that had been identified. These included:

- the causes of conflict in the charitable sector;
- factors which make the disputes worse;
- how frequently problems arise;
- how problematic conflict is in the charitable sector;
- how formal the process is and whether disputes are dealt with differently if they are internal or external;
- what forms of dispute resolution are presently being used in the sector;
- the utilisation of third parties in the conflict resolution process; and,

- the identification of certain types of ADR as being more effective for particular types of disputes.

In terms of issues of validity, there were a number of potential problems. Primarily, due to the sensitivity of the area being researched, there could have been problems concerning the extent of the information that would be shared. In particular, whilst confidentiality was stressed, there could nevertheless still be concern as to whether interviewees would divulge full details of the dispute. Personal interests could also play a part, as interviewees may have reason to promote or play down certain issues. It is hoped that the use of umbrella and resource bodies as interviewees, rather than the charity in dispute, has kept these potential problems to a minimum. The interviews all lasted between 45 minutes and an hour and were held at the offices of the interviewee, or, if that was not possible, in a quiet space nearby. Unless the interviewee objected, all interviews were recorded and later transcribed. The same researcher undertook all the interviews. This high level of consistency between each interview, be it first or second stage, helped to ensure that the information obtained was of a uniform and reliable nature.

Stage 2

The first stage interview data was then analysed with a view to identifying key issues and trends. The analysis was written up and then disseminated to the interviewees. This then formed the basis of the discussion at the meeting that followed. All the first stage interviewees were invited to the meeting, which was used as an opportunity to endorse the findings to date and to ensure that the empirical data had been interpreted correctly. The meeting also provided an occasion for interviewees to provide further information that may have come to light since the interview, or that was stimulated through the discussion held at the meeting. The meeting was research participant led, in order to limit the researchers' influence on the shape of the discussion. Whilst the main conclusions of the first stage analysis were found to be sound, the meeting also succeeded in drawing out and developing the initial findings. In particular, volunteering was identified as a theme within the category of dispute types, and, in regards to the resolution of disputes, self-help was identified as a popular first step. Subsequent to the meeting, the additional information identified was incorporated into the analysis of the first stage interview data.

Stage 3

Having gained a good general idea of the issues facing the sector, the aim was then to build upon the information already obtained from both the first stage interviewees and the discussions at the meeting. To this end, approaches were then made to the second stage interviewees who were able to provide a more focussed and detailed level of information.

Two different methods were used to identify umbrella and resource bodies who provide an ADR service as appropriate interviewees for the second stage.

The initial plan was to use the Directory of Resource and Umbrella Bodies (Charity Commission, 1998) to identify the second stage sample. This publication, which was withdrawn in June 1999, was intended as a resource for the charitable sector, and was

aimed at Government departments and other agencies that work with the sector. The majority of bodies listed in the Directory are membership organisations, and detailed information was given about the size and range of each organisation's membership and the services provided for its membership. The Directory also provided details of each organisation's willingness to engage in consultation and their policy interests. An initial search of the Directory was made in order to identify umbrella and resource bodies that provide a dispute resolution service. Due to the publication's age and its subsequent withdrawal, research was then carried out to ensure that the advertised ADR service was still running. As a result, it soon became clear that several organisations claiming to provide an ADR service either had ceased to do so or had never done so. A letter was then sent to those organisations that claimed to still run the service, asking for their participation (via interview) in the research. The response rate was very low with only one organisation agreeing to be interviewed out of the ten charities identified. Several reasons can be suggested to explain the low response rate including: the sensitive nature of the work being researched; lack of previous contact with the organisations concerned; and, the under resourcing and consequent lack of time available for many charities.

It then became crucial to devise a more successful method of sample identification within the time constraints of the project.

After careful consideration, it was decided that the most successful method to identify second stage interviewees would be by snowball sampling. This involves identifying respondents using a network of contacts, and is generally used when the population to be sampled is unknown or difficult to access. In this case, snowballing was considered a viable alternative for interviewee identification, and it originated by utilising the knowledge of the first stage interviewees. The second stage sample then emerged through a process of reference from one interviewee to another. This method of identification had several advantages. First, it ensured that the correct people were identified as contacts; the individuals who were suggested for interview were well known practitioners in the field of ADR with the necessary breadth of experience to be able to provide valuable information. Secondly, it enhanced the credibility of the project, which helped to allay interviewees' fears. This is especially relevant due to the sensitive nature of the research. There was less chance of refusal when approaches to new interviewees had been recommended by others. Also, this approach allowed for more appropriate targeting of individuals within organisations. Out of the 14 individuals suggested via this technique, 8 agreed to be interviewed. Interestingly, several of the latter were members of organisations that had originally declined to participate when they had been contacted through the Directory of Resource and Umbrella Bodies approach. This success may well be partly due to a more targeted approach to the most appropriate individuals.

This method thus proved to be an effective and speedy technique for building up the sample numbers. It also ensured objectivity, with the researchers having no input in the choice of interviewees.

Similarly, the final 5 interviewees were identified using the same snowballing technique, with the original reference point being other Charity Law Unit contacts (who were meeting at a series of governance seminars) and also delegates at the annual NCVO conference (What Price Independence? 6 February 2002, London).

Stage 4

Once the individuals had been identified for interview, semi-structured interview questions were devised. These were of a similar nature to the first stage interview questions, but this time, the issues to be discussed were more focussed.

The analysis of the first stage interviews and the meeting highlighted the areas which needed further investigation. It became evident that the process of conflict resolution and the scale of disputes in the charitable sector needed to be focused upon. A correlation between types of dispute and type of ADR also needed further enquiry. Fourteen second stage interviews were conducted between February and April 2002. Both the first and second stage interviews were all conducted under very similar conditions to ensure a consistent and professional standard.

The research ensured confidentiality of the data at all times, with each interview coded to ensure that the identities and interests of the interviewees were protected. The interview transcripts were then anonymised to ensure that any individuals or organisations that could be identified within the dialogue were removed.

In total, 23 organisations and individuals were interviewed. These consisted of umbrella and resource bodies, dispute professionals and charity sector consultants across a wide geographical spread. They had experience of a range of disputes and conflict within the charitable sector. Although the original sample selection technique had not proved very successful at the second stage, the snowballing technique which was implemented in its place ensured that the most appropriate individuals were approached, with the necessary experience and expertise.

Stage 5

Once the second stage interviews were completed, analysis ensued. Issues were categorised and trends identified from the empirical data.

The Report

The remaining parts of this report detail the findings of the research. These are categorised as follows:

- The subject matter of charity disputes
 - Employment disputes
 - Other contractual disputes
 - Intellectual property disputes
 - Property disputes
 - Estate or legacy disputes
 - Funding
 - Charity law
 - Membership disputes
- Dispute triggers and exacerbators
 - Change management

- Employment practices
 - Lack of clarity
 - Outsiders intervention
 - Dominant personalities/ personal agendas
 - Skills deficit
 - The way a grievance is handled
 - Particular types of charities
- Third party intervention – who and what
 - Who
 - Networking and peer support
 - Umbrella and resource bodies
 - Third party professionals
 - Dispute professionals
 - Individuals who are not dispute professionals
 - What
 - Informal ADR processes
 - Formal ADR processes

The final chapter contains conclusions and a series of recommendations.

The report is based on the original research described in this chapter. However, earlier findings from other projects are referred to throughout the report, where relevant. The bibliography contains full references to these earlier publications. It is hoped that research in this area will continue and therefore the bibliography also contains additional references which may provide supplementary background reading.

In line with the commitment to the research participants that their confidentiality would be respected, all information gathered from the research sample is presented throughout this report on an anonymous basis.

THE SUBJECT MATTER OF CHARITY DISPUTES

The first research question was to find out what kind of conflicts charities become involved in. On the basis of research undertaken previously, it was considered that disputes could be provisionally categorised into **general** and **charity-related** disputes. The former category includes matters which any individual or organisation might become involved in and would usually, but not necessarily, involve external parties (i.e. other than the trustees, staff and beneficiaries). Then there are those disputes that are specific to charities. Charity trustees are the people responsible under a charity's governing documents for controlling the management and administration of the charity, regardless of whether they are actually called 'trustees' (Charities Act 1993, s.97). Under section 1(4) of the Charities Act 1993, the Charity Commission is not permitted to 'act in the administration of a charity' and so may not direct trustees how to run their charity. Trustees therefore have broad discretion to manage the charity as they see fit. However, it is not uncommon for there to be internal disputes over matters of charity policy or administration where trustees are acting within their powers, and for the benefit of the charity, and where the charity is operating prudently and effectively.

A) The research suggests that **general** disputes may well include:

Employment Disputes

Employment related conflict was a constant theme raised by the research.

The research found evidence of a wide range of employment disputes, including: allegations of sex, race, disability and part-timer discrimination; work-related stress; victimisation, bullying and harassment; unfair dismissal; breach of contract; and, equal pay claims. Disputes covered both paid workers (employees) and unpaid workers (volunteers).

Contractual problems have also extended to charities' use of consultants and fund-raisers (often as independent contractors) where charities are sometimes disappointed with the level of service provided. Lawyers interviewed as part of the research had acted for charities pursuing claims of professional negligence against advisers including lawyers and auditors.

These findings match the results of earlier work, which suggests that charities are twice as likely as other employers to become involved in disputes with their employees. It was found that employment tribunal cases involving charity employers were at almost double the levels reported in private and public sector organisations (Cunningham, 2001). Cunningham found that conflict and workforce discontent were particularly prevalent in smaller charities with non-existent or poor personnel policies and larger, non-unionised charities which had recently experienced rapid growth in employee numbers. It is perhaps also revealing that a recent survey of voluntary organisations in a Human Resources Benchmarking Club found that staff turnover at 20% per annum and rising is higher than for all sectors in the UK (Dullahide *et al*, 2000). The National Centre for Volunteering also report that a surprising number of

volunteers complain that they have been unfairly forced out of a charity or poorly treated (Restall, 2002).

Other Contractual Disputes

Disputes can arise with third parties that have entered into contracts with a charity. Lawyers interviewed as part of the research reported that these concern usual matters such as disputes with photocopier suppliers, for example.

Intellectual Property Disputes

The research revealed that it is not uncommon for charities to become involved in Intellectual Property disputes. Several disputes discussed during the course of the research related to the use of a charity's name. These emphasised that a charity's name is a valuable asset which needs to be protected. A number of umbrella bodies spoke of disputes arising amongst their members over the use of a charity's name; there was often concern that the good name of a charity might be brought into disrepute through the misuse of its name.

Lawyers interviewed as part of the research had also acted for charities who:

- had been the subject of complaints as a result of advertising campaigns;
- had sought advice on their possible legal exposure for hosting internet chatrooms on their websites; and,
- were seeking to protect copyright in relation to publications authored by charity employees.

A number of recent high profile disputes concerning charity names back up the research findings, which suggest that this is a problematic area for charities. Such disputes often concern a charity and a commercial organisation. For example, in the past, the British Legion (*British Legion v British Legion Club (Street) Ltd* (1931)) and Dr Barnardo's Homes (*Dr Barnardo's Homes National Inc Association v Barnardo Amalgamated Industries and Benardout* (1949)) have succeeded in passing off actions against commercial organisations. In the former case, the plaintiffs, a charity, succeeded in obtaining an injunction against an unconnected commercial social club with the name British Legion Club, on the grounds that the plaintiffs would be damaged if any misfortune befell the defendants. In the latter case, the plaintiffs, a charity, brought a successful action against the defendants, commercial publishers of romantic pulp fiction, who used the slogan, 'This is a Barnardo Publication' on their books. Evidence was brought before the court that a boy in one of Dr Barnardo's homes was found in possession of one of these books, and, when challenged, he justified the propriety of his possessing it by reference to the words on the back.

More unusually, in the case of *British Diabetic Association v Diabetic Society Ltd* [1995] a registered charity had to resort to an expensive action in passing off against another (unregistered) charity in a bitter legal battle which necessarily led to a substantial financial drain on the cause that they both represented (see, Morris, 1996). In this case, the first of its kind in England, the British Diabetic Association (BDA) accused the Diabetic Society, of passing itself off as being the same as, or connected, with the BDA. At issue was an annual income of £10 million in collections, gifts and bequests.

The judge said that a passing off action by one charity against another is, on the face of it, a deplorable, even scandalous thing to occur. He expressed his ‘profound regret’ at the failure of all attempts to settle the dispute. The fact that the case ran its full course is both deplorable for charitable parties and highly unusual in passing off cases generally. On interim remedies for passing off, one authority says:

From the plaintiff’s point of view, an interlocutory injunction is quick, relatively cheap and all but conclusive ... If the plaintiff can obtain an interlocutory injunction that is, in practice, almost always the end of the matter. There are very few recent cases in which defendants subject to interlocutory injunctions have fought on to trial ... (Wadlow, 1995).

The BDA case did go to full trial, despite the fact that counsel assured the judge that repeated efforts had been made to settle the proceedings. It was reported in the press that the costs were around the sum of £500,000 (see, Morris, 1996). After the case, the defendants, who had personally funded their own defence, said that they were facing bankruptcy and that their charity could not continue since bankrupts could not be directors (Charities Act 1993, s.72) and there was no one else to run it. Clearly, any shortfall in recovery of legal costs against the defendants would have to be paid out of charitable funds. This case presents an appalling example to the charity world of excessive funds being spent on one charity fighting another, rather than being expended upon the admirable charitable cause which they both sought to further. The dispute did arouse the attention of the media, giving rise to bad publicity for the BDA and charities in general. Whilst all efforts should be made to resolve future similar disputes at a much earlier stage, lawyers interviewed as part of the research had acted in a number of similar disputes between rival charities.

This case, did however, provide a precedent – charities can sue in passing off against other charities. Mediation does *not* create a precedent, which may be disadvantageous where the law needs to be clarified. There are, however, other ways in which the results of mediation can be made public. For example, Charity Commission guidance may be produced or the parties themselves may agree to publicise the outcome of mediation (see, e.g. JRF, undated, discussed in chapter 1). Lack of precedent is not, therefore, a reason not to consider mediation; it simply raises a problem which can be dealt with in other ways.

In 2001, the World Wide Fund for Nature, a charity, successfully sued the World Wrestling Federation for breaking an agreement that the two parties had reached in 1994 over the use of the initials WWF (*World Wide Fund for Nature (formerly World Wildlife Fund) (WWF) v World Wrestling Federation Entertainment Inc* [2002]). The Fund predates the Federation, and it registered its black and white panda logo with the letters WWF when it was founded in 1961. The Fund changed its name 14 years ago. In the USA, it is still known by its original name, the World Wildlife Fund, which has the rights to the domain name, wwf.org. Elsewhere, it goes by the name, the World Wide Fund for Nature. The Court of Appeal upheld the first instance judgement of Jacob J, who, in giving judgement for the Fund, said that the Fund was entitled to be concerned at association with the wrestlers’ ‘very insalubrious image’. In May 2002, the wrestling group changed its name to World Wrestling Entertainment and its new domain name is now wwe.com rather than the previous wwf.com. The wildlife fund will continue to use wwf.org (*The Times*, 8 May 2002).

Other charities that have been too slow to register their domain name, have failed to renew their registration, or have otherwise had their rights to a domain name disputed, include The Leonard Cheshire Foundation and Marie Curie Cancer Care (UK Fundraising website).

Property Disputes

The research findings provide evidence of both internal and external disputes relating to property.

Internally, these may concern beneficiaries, with disputes relating to who can use charity property or for what purposes. There may be disagreements or complaints about charities providing accommodation (almshouses) or land (allotments) concerning the terms and conditions of occupancy or use. Alternatively, there may be disagreements about the use of village halls.

Externally, there may be conflict over property rights with third parties who may be other charities. This is not uncommon due to the prevalence of the sharing of the occupation of buildings amongst charities. Alternatively, charities may find themselves in dispute with their non-charitable neighbours over such matters as boundaries etc.

Estate or Legacy Disputes

Lawyers interviewed as part of the research had acted for numerous charities in connection with their entitlement under disputed wills (see, e.g. Borkowski, 2002, who notes that claims under the Inheritance (Provision for Family and Dependents) Act 1975 often involve charities as defendants; the typical scenario is where a substantial legacy is left to a charity to the exclusion of next of kin or dependents). They had also acted for charities that have been bequeathed shares in a company which has been badly managed. This led to the charity taking proceedings against directors of company.

B) The research found evidence of **charity-related** disputes over matters such as:

Funding

Disputes concerning funding were raised many times during the research. These may relate to either being the recipient of funds or not. If charities do *not* receive funding, there may be disputes between two or more charities fighting over the same pot of money. This problem was raised by many interviewees. Recently, a charity even attempted (unsuccessfully) to seek judicial review of the decision by a funder not to award it a capital grant (*R (on the application of Asha Foundation) v Millennium Commission* [2002] and [2003]).

Where charities *do* receive funding, there may well be subsequent conflict with funders over the terms upon which funds were given or the way in which funds are being applied. Again, this was raised by many interviewees. With local authority funders that are purchasing services from charities, there appears to be an increase in the number of grievances over the level of service being provided. Interestingly, the

point was made that service users rarely complain in this situation, being grateful for the help being provided by charities. This fits in with earlier research on the contract culture, which found that service users themselves are still largely absent from the equation (Morris, 1999).

Where the funder is a statutory body, the following dispute scenarios have been highlighted as potential situations where the Compact Mediation Scheme (see chapter 1) might be applicable:

- Inappropriate interference by the funder in the operational management, such as staff recruitment, management and work programme, of an independent charity;
- Inappropriate interference by a funder in judgements being made by the umbrella or resource bodies (choice of pilot locations for initiatives, biasing the destination of delegated grant funds);
- The cutting of grants or funding under service level agreements at notice that is far too short to cope effectively with the results;
- The cutting of grants or funding, leading to umbrella bodies having to make the difficult choice as to whether to keep the money to support their own services or to provide grant funding to their member charities;
- Lack of consultation or information, which has severely handicapped the effectiveness of umbrella or resource bodies (ACRE, 2002).

The research found that inappropriate use of funds may well be raised as an internal matter (by members, for example) where funds are being applied outside a charity's objects. Funders who are not satisfied with the way that funds are being applied may withdraw funding, leading to further conflict.

Even the submission of an application for funding may be a source of internal conflict, where the application is lacking support from some internal quarters.

Finally where funding applications are successful and there is an injection of capital to a charity, the findings suggest that this can cause argument over how to spend it!

Charity Law

Under the broad heading of Charity Law, interviewees raised many sources of conflict relating to the alleged (mis)use of a charity's powers or the engaging in activities which were outside a charity's objects.

In general terms, trustees are obliged to use charity funds for the specific purposes set out in a charity's governing documents and for no other purpose (*Att.-Gen. v Brandreth* (1842)). With unincorporated charities, trustees are also under an obligation to use any trust powers that they may have in accordance with the terms of the trust (*Re Hay's Settlement Trusts* [1981]). Any powers of a charitable company can generally only be exercised in furtherance of the objects of the company (*Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd* [1987]). Powers given to committee members are fiduciary and therefore members must exercise the powers for the purposes for which they are conferred in what they consider to be the best interests of the charity (*RSPCA v HM Attorney General & Others* [2001]).

In relation to powers, inappropriate delegation was found to be a common cause of concern. Trustees are responsible for the overall management and administration of the charity, and must, without specific authority, act personally. Under sections 11-15 of the Trustee Act 2000, the statutory powers of delegation do not include as delegable functions decisions relating to the application of a charity's funds. In relation to charitable trusts, delegable functions are limited to carrying out decisions already taken by the trustees, the investment of assets and the raising of funds. Yet, examples were found of disputes where the background was that trustees had allowed paid staff to carry out trustee functions without the appropriate power to delegate such tasks. One interviewee talked of lots of examples where paid staff control charities and control governance as well as management and make decisions, sometimes very bad decisions, loaded with conflict of interest. Trustees here were described as powerless.

Evidence of other areas of dispute raised by the research included conflict surrounding the details of a charity's investment policy (a case which went to the High Court over such a dispute is *Harries v Church Commissioners for England* [1993]) and the selection of beneficiaries.

In relation to objects, examples were given of religious charities that spend charitable money on providing support abroad, where their objects may well be to advance the religion and support its adherents in this country. Ultimately, this will often lead to dispute amongst the members.

With objects, the research revealed that the vision and values of a charity may well be a cause for conflict, when objects are re-interpreted. This may often occur so as to tailor a charity to fit the available funding. Due to broad or unclear drafting, it often questionable whether or not a charity *is* acting within its objects. Interpretation of the objects clause itself in a charity's governing documents may well be the cause of dispute. Disagreement may arise between trustees or between trustees and members about the future direction or policy of a charity.

Lawyers interviewed as part of the research raised problems of breach of trust and liability of trustees. There are serious charity related disputes where the Charity Commission may well get involved (Charity Commission, January 2001). These may occur if:

- the way in which a charity is being run is putting significant assets or funds at risk (for example, through financial imprudence or dishonesty);
- there is real danger of the name of a charity being brought into disrepute, including the threat of public disorder; and,
- the administration of a charity has broken down such that it is not working effectively.

The Charity Commission may well become involved where a charity's income is not being used for its charitable purposes, or where the trustees are not acting in accordance with the provisions of a charity's governing documents or of charity or trust law (Charity Commission, January 2001).

Membership Disputes

The research found evidence to suggest that disagreements amongst members or between trustees and members, have become quite common. These often focus on a charity's governing documents and an interpretation thereof. Interviewees raised problems around who can and cannot be members of a charity, how broad should membership be, how can a charity find ways of excluding certain individuals etc.

Examples were raised of religious charities where people are beginning to challenge membership criteria and question who is a member, who has a right to vote, etc. It was noted that wide membership policies can cause conflict later when memberships split into factions; democracy can be a double-edged sword.

The research also found that conflict can occur between the members and the trustees where democratic processes are not followed. A common theme was concern over Annual General Meetings not being held or appropriately advertised. Similarly, a recurring issue was that of poor conduct surrounding elections for officers. A public example is the use by the chairman of the National Trust of his proxy votes to ensure the election of pre-selected candidates, regardless of the votes of the membership, which sparked debate in the House of Lords in November 2001. According to Lord Mancroft, the manner in which the chairman has used proxy votes at AGMs to bolster his own policy decisions and prevent dissent, is a tactic that:

while it may be acceptable in a commercial setting, is totally out of place in a charity. The first rule of management in a publicly accountable charity is transparency. That has been lost, and with it a good deal of support (Hansard, 2001).

Lawyers interviewed as part of the research noted the recent increase in the number of human rights issues raised in relation to membership disputes, which may relate to removal of members, power to control or refuse membership.

Disagreements between trustees of religious charities and members of the congregation relating to religious or spiritual matters have, unfortunately, become quite common in recent times. These internal disputes are often more debilitating and divisive than external conflict, and a number of cases have come to court. The case of *Muman v Nagasena* [1999] is a classic example. Mummery LJ in that case noted that there had been a long history of internal dispute and at one time there were at least three sets of legal proceedings arising solely out of the issue of the occupation of a vihara (Buddhist temple). The points in issue concerned who were the trustees of the charity and who was the patron (who was entitled to occupation) of the charity. The documents indicate that the costs incurred in those proceedings were in excess of £90,000. The judge, pointing the parties in the direction of the NCVO/CEDR charity mediation service (see chapter 1), complained:

In this case very substantial sums of money have been spent on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purposes of this charity. It is time for mediation. No more money should be spent from the assets of this charity until ... all efforts have been made to secure a mediation of this dispute in the manner suggested.

Another typical example is the case of *Varsani v Jesani* [1999] where the Court of Appeal was asked to make a scheme for the administration of the property of a religious charity (under Charities Act 1993, s.13), when the adherents of a Hindu religious sect, for the promotion of which the charity was established, had been divided by a schism. Often such disputes originate abroad and a good example was the long-running battle between rival factions within the Gaudiya Mission who were struggling for control of it (*Gaudiya Mission v Brahmachary* [1998] Ch 341) where parallel litigation was also being conducted in India.

The Royal Society for the Prevention of Cruelty to Animals (RSPCA) recently took the unusual step of seeking guidance from the High Court to clarify its membership rules after it was suspected that the charity had fallen victim to ‘entryism’ by the pro-hunting Countryside Animal Welfare Group (*RSPCA v HM Attorney General & Others* [2001]). The charity had held in abeyance 600 applications for membership, which it believed were part of a campaign to overturn its opposition to hunting with dogs, a keystone policy of the RSPCA since 1976. The RSPCA won the right to exclude pro-hunting infiltrators from joining the charity. However, Lightman J stopped the charity from arbitrarily excluding anyone that it believed had suspicious motives for joining. Instead the charity will have to give all applicants a chance to explain their primary motives for becoming members. It was held that the charity did have the right to exclude or remove members under its rules but to do so meant every case would have to go before the full 25-strong council, which cannot delegate its powers. The RSPCA had asked the judge to approve a scheme to exclude anyone who fell within categories that it thought indicated that they were joining to promote hunting with dogs - without giving them a chance to deny this. Lightman J would not sanction this:

... after long and anxious consideration I have concluded that it is not in the interests of the Society or conducive to its good name to adopt such an arbitrary and unattractive method of implementing the membership policy.

He spoke of the critical importance of the public image and reputation of the charity for fairness and justice:

That public image and reputation must be of critical importance to the success of the Society, in particular, in respect of its activities and its attraction of support (financial and otherwise).

This last quote sums up the issues here; charities exist for the benefit of their objects and all its activities must support those objects. Clearly, failing to maintain a good public image and reputation is *not* conducive to upholding a charity’s objects. Disputes about membership do *not* assist in the maintenance of a good public image and reputation.

C) Interviewees did not discuss the following additional kinds of disagreements, which the **Charity Commission** identify in their documentation (Charity Commission, January 2001):

- criminal matters unconnected with the running of a charity or the furtherance of its purposes; and,
- disagreements between parents and school governors about the running of a school.

DISPUTE TRIGGERS AND EXACERBATORS

The initial intention was to separate out factors which suggest why disputes arise (triggers) and those which help to explain why disputes escalate (exacerbators). However, it soon became apparent once the research was underway that many triggers may well be exacerbators (and vice versa). Whilst the following broad triggers and exacerbators were identified from the research, it is important to note at the onset that many issues could well be discussed under a number of headings and are often intertwined and impossible to separate. For example, poor employment practices may well be due to skills deficit and lack of clarity.

Change Management

The poor handling of change within a charity was a recurring theme which would often lead to a dispute arising. Change can come in many forms, from changes in a charity's structure (it may merge, become part of an umbrella body, remove itself from an umbrella body, wind up) to changes in size (both expansion and contraction can raise issues) to changes in personnel (there may be changes in leadership or perhaps changes to working practices for both paid staff and volunteers) or changes in policy (especially when instigated by outsiders, such as consultants or auditors). Even a large increase in funding can be the background to a dispute forming. In every instance, it was the handling of the change, rather than the change itself which was the cause of conflict.

Employment Practices

Poor employment practices seemed to be the background to many employment related and personnel type disputes. These relate to both paid staff and volunteers.

Charities were often accused of ignoring employment law and good human resources practice. Nepotism towards family and friends seemed to be the reason why some individuals found employment with charities, which can obviously lead to problems around conflict of interest later. Where staff work without job descriptions, appropriate appraisal mechanisms, or grievance procedures, this can also lead to conflict. So, for example, where appraisal *is* introduced and criticism made of performance, staff rightly complain when they were unclear of their roles and responsibilities in the first place.

It was found that some charities seem unwilling to deal with poor performance issues during the currency of contracts of employment, preferring simply to allow fixed term contracts to come to an end. Conversely, lack of praise for good performance was seen as a source of resentment. Lack of hierarchy, for example, where a co-operative structure is in place, can also be a trigger to a dispute, especially where some disciplinary action is necessary.

The research also found that volunteer management brings its own problems, especially where volunteers are unclear as to their roles, or are left out of the decision making (or consultation) process (e.g. Plummer, 2002).

Diverse working practices within the sector, together with uncertain funding regimes, may have contributed to the problems in this area.

The number of disputes may well have increased as a result of the recent improved awareness of (and enhanced statutory) employment rights.

Lack of clarity

This was raised as a constant backdrop to dispute. The main uncertainty which the research revealed relates to roles and responsibilities, in particular, what is the dividing line between the role of the trustees and that of the paid staff? Inability to define roles also extends to lack of individual job descriptions for paid staff, volunteers and even independent contractors, such as fund-raisers.

It was found that dual roles, for example, where trustees were also active charity volunteers can give rise to conflict of interest.

Mismatching of expectancies was another trigger to dispute (Nunan terms this 'confused board role' O'Hagan, 2001). The research found that this may occur where trustees do not conform to type. For example, they may have been appointed as 'token trustees' simply so that their name is associated with a charity. When they become active, others may well be disgruntled. Holding or custodian trustees are often unclear as to their role and can be concerned when they learn that they are expected to stay out of decision making. Treasurers can also have the wrong idea as to their role, thinking that they are solely entitled to make all financial decisions (e.g. Laurance, 2001). Individuals may join committees to help themselves address personal issues, resulting in conflicting expectations and a lack of collective vision. This can be a particular problem when trustees are wearing more than one hat, and issues from other organisations come into play.

It was also found that sub-committees that then attempt to operate outside their remit, either purposefully trying to gain power or due to lack of clarity in relation to their role, may spark dispute.

The research suggests that lack of transparency in relation to the administration of a charity is often a trigger for some form of dispute between trustees or members or both. The recent public dispute at the charity, St John Ambulance, is a good example of this. The dispute, which has led to two trustees resigning and another two threatening to do so, is reported to be due to, amongst other things, failure to behave in an open and accountable manner (Benjamin, 2002).

These findings are in line with recent research published by the Association of Chief Executives of Voluntary Organisations (ACEVO). ACEVO is of the view that many of the problems that commonly arise between the trustee chair and the chief executive could have been avoided if they had clarified their roles at an early stage (ACEVO,

2002). The recent public dispute at the Notting Hill Carnival Trust, which culminated in complete breakdown of relationships between the chief executive and some of the trustees, is a good example (Gray, 2002).

Moving away from personnel, the research also found that lack of clarity which can be the root cause of much conflict, can relate to a charity's governing documents themselves. Badly drafted governing documents can cause much confusion, and can allow people to interpret them to suit their own ends, causing further conflict. It was also noted that governing documents should contain clauses which will allow charities to deal with disputes when they arise. Failure to include appropriate clauses to deal with the removal of trustees or members, for example, will only cause problems later (see, for example, the Notting Hill Carnival Trust dispute, discussed by Gray, 2002).

Similarly, property disputes can arise as a result of badly drafted documentation (see, e.g. Morris, 2001).

Outsiders' Intervention

The research found that a trigger for dispute may be the intervention of third parties. This may be invited from within - where consultants suggest changes in practice - or may come from regulatory bodies - for example, the Charity Commission - or funders. Within rural communities, simply the arrival of 'outsiders' with different cultural backgrounds can be a spark for dispute.

Where particular individuals within a charity involve third parties (for example, the Charity Commission) in disputes, this in itself can be an exacerbator.

Dominant Personalities/Personal Agendas

A constant theme in discussions was that of dominant personalities and personal agendas. Charities seem to attract emotive personalities who obviously care about the causes for which they are working. This can sometimes cause problems. Emotions can run high and motives are not always altruistic. Individuals may join a charity to protect their own interests, to exert power, or to promote their own political points of view. This was raised as a particular problem in black and minority ethnic (BME) charities, where homeland politics can divide the membership into camps, creating power struggles between leaders of different factions. However, it was found that this is not a problem exclusive to BME charities. Powerful individuals who are central to a community and notorious for their differing opinions may choose to become involved in a charity, which simply forms the backdrop to existing problems. In rural communities very few people hold the power and others tend to keep quiet for fear that they will be ostracised. This means that disputes generally revolve around the same personalities. Alternatively, charities often seek out powerful individuals to act as trustees, but this strategy can backfire.

It was found that strong personalities can particularly adversely affect the relationship between the chief executive (and his or her staff) and the trustees. Such power struggles can be made worse by lack of clarity over roles, discussed above (see also ACEVO, 2002). One trustee chair has gone so far as to say that 'disagreements

between chief executives and trustees are the main reason organisations fail' (Stanford, 2002).

Dominant individuals associated with charities can cause particular problems when change is introduced. Advocates of change will find themselves in conflict with the traditionalists who do not want to let go of the past. The latter may well have been involved in the charity since its inception (Nunan terms this 'founder syndrome' O'Hagan, 2001).

Dominant individuals may hold meetings outside meetings and may be guilty of favouritism. They may seek to use their expertise to exert power over non-experts (for example, in a medical charity, where both doctors and lay persons are involved) or they may seek to bully volunteers. Sometimes paid staff are able to manipulate trustees where the latter used to be (or still are) service users who may lack both power and skills.

Skills Deficit

The research revealed that many problems seem to arise as a result of lack of knowledge. Again this is linked to lack of clarity and the problems may be compounded by the exertion of power by dominant individuals.

Skills deficit on the part of trustees leads to poor governance. It was found that trustees are often chosen for their power in the community and their willingness to become involved, rather than because they have the necessary skills. The BME charity sector has particular difficulty attracting black professionals to act as trustees. Skills deficit can be a concern with service users on boards too. Problems are compounded when trustees are not given the training that they need in order to be effective. So, for example, with a lack of business acumen, they may falter when it comes to exerting good financial controls, or dealing with the chief executive, or negotiating with third parties, etc. Trustees are often not willing or able to make tough decisions (for example, dismissing the chief executive) when necessary. There is often more concern for employees' welfare than the best interests of the charity. Meetings are often held without being recorded in writing, which can cause problems later. There also appears to be much ignorance in relation to the law on the part of trustees, for example, concerning the potential for trustee liability and concerning employment law. Some trustees fail to appreciate that they are handling public money and therefore ought to be accountable externally.

The research found that paid staff often work without professional advice and this is particularly evident when it comes to advice on personnel matters. Again, the fuzzy divide between governance and management is partly as a result of paid staff not knowing what information to pass on to trustees so as to keep them appropriately informed.

It was also found that, even where professional advice is sought, for example, from consultants, problems often arise as a result of *their* lack of understanding of the charitable sector.

The Way a Grievance is Handled

The research discovered that the way a grievance is handled can itself be either the trigger for a dispute or certainly an exacerbator of an otherwise minor dispute.

Triggers and exacerbators here include: delay in dealing with problems – both once the problem has been aired and even by failing to air it in the first place; formalising a grievance (rather than talking it through); failure (or delay) in seeking third party assistance; and, poor communication.

The point was also made that conflict is not seen culturally as in any way positive – parties are looking for somebody to blame whereas it would be more helpful to approach conflict resolution as a creative process.

Disturbingly, it was noted that, quite often, charities end up fighting over the procedure to be adopted, and fail to solve the initial dispute.

Particular Types of Charities

The research attempted to ascertain whether particular types of charities were more susceptible to being involved in disputes or would be less well able to handle disputes than others. The following themes emerged:

- Emotive charities seem to be more likely to be in conflict, for example, animal charities and self-help groups. The values and principles of a charity can be central to the conflict. Also, emotionally involved employees find it hard to take criticism, as criticism about their performance can be seen as criticising their commitment to the cause;
- Charities with memberships seem to be more likely to dispute;
- Charities that are members of an umbrella body may find that a cause of dispute. The dispute may well be with another charity member of the same umbrella body, with one accusing another of ‘letting the side down’ which may have a knock-on affect upon the reputation of the former;
- Charities that are run by and then employ family members and friends seem to be particularly vulnerable to dispute;
- Where trustees or members of charities cannot meet very often due to geographical restraints (for example, in rural communities) communication may be more difficult and therefore dispute more likely;
- Small charities without support often suffer quite considerably at times of conflict; and,
- Similarly, whilst a mature organisation can absorb a conflict and still survive, this may be much more difficult for a newly established charity.

THIRD PARTIES INTERVENTION

The research sought to find out who gets involved in helping charities to resolve disputes and what do they do.

WHO

It is not surprising to learn that self-help is often the first step to dispute resolution. This will often involve looking at internal charity procedures and documents and external literature (such as Charity Commission leaflets) to try to find a solution.

The types of third parties who were brought in to help to resolve disputes varied immensely. Many bodies (especially organisations within the charitable sector) who get involved in this sort of work are not pro-active. They do not have the resources available to carry out this work on a large scale and so dare not advertise for fear that the demand will be too great. They also seem to operate on a 'hit or miss' basis, without much direction or guidance.

The types of third parties that get involved can be categorised under the following broad headings.

Networking and peer support

Informal networking in the charitable sector for assistance is a popular first response to dispute resolution. For example, community based organisations operate very informally when it comes to seeking third party support and they rely on historical networking whereby, they might not know how to resolve a dispute, but they may well know somebody who will be able to do so.

Peer support also appears to be critical, with bodies such as Charity Trustee Networks, which encourages and supports networking groups for trustees, being resorted to by trustees when faced with conflict.

Umbrella and resource bodies

Umbrella and resource bodies are often contacted when disputes arise. These range from general bodies, such as the NCVO, that provide help and services across a wide range of activities such as fund-raising, governance or constitutional advice, to those that concentrate on specific areas of interest such as volunteering, children, mental health etc. (for example, umbrella bodies of rural charities - ACRE or citizens advice bureaux - NACAB). Umbrella bodies may well have procedures in place to deal with disputes concerning their members. For example, ACCORD is a dispute prevention and resolution service available to Age Concern, which will provide advice and ADR services to Age Concern Organisations, Groups and Age Concern England. This is a good example of an attempt to settle conflicts that may arise in the normal course of work as part of Age Concern. Sometimes, however, rather than examining the rights and wrongs of the conflict, umbrella bodies may settle disputes on a hierarchical

basis, with pressure being exerted, especially with religious organisations. Occasionally, the threat of disaffiliation is used to insist that disputes are solved!

General charity resource bodies may also be contacted. Charities may telephone help-lines such as those operated by the NCVO or the Charity Commission. Charities may approach their local Council for Voluntary Services, Rural Community Council or a national bodies such as the National Centre for Volunteering. If such bodies cannot provide help themselves, they often offer a sign posting service.

Some confusion was expressed concerning the role of the Charity Commission in dispute resolution.

Third Party Professionals

Under this broad heading, the research found evidence of the following being approached for advice when disputes arise:

- Members of Parliament
- Local councillors
- Local authorities
- Trade unions
- Police
- Specialist charity law firms
- Local law or accountancy firms
- Electoral Reform Society

Dispute professionals

When it comes to employment related disputes, charities are often directed to the Advisory, Conciliation and Arbitration Service (ACAS) by umbrella and resource bodies.

The use of professional dispute specialists by charities seems to vary across the country, with little take-up in the North West and more frequent use in the South East, for example. This may well fit with the general regional use of ADR for commercial organisations; in a survey of the top companies in the Midlands, North West and North East, 61% of respondents had not received advice from their lawyers on the possibility of resolving a dispute through mediation (Carroll, 1999). It is encouraging to note the findings of a later survey of mediation trends in the North of England which showed, albeit from a very low threshold, an increase in mediations by 30% from the first to the second half of the year 2000 (Glaister, 2001).

It is unclear whether the low take-up is due to lack of awareness or because charities do not want to utilise a 'formalised' ADR process. It was noted that some lawyers had only recently received mediation training. Carr, in noting civil litigators' current reluctance to use ADR, suggests that the education and training of lawyers is crucial if ADR is to achieve popularity with social welfare lawyers (Carr, 2002). In fact, lawyers who were interviewed said that their way of getting clients to consider ADR was the client's consideration of their response to a tick box on the Allocation Questionnaire. This is a form (N150) sent to both parties to a court-bound dispute, to

help the judge to decide the best way of dealing with the case. It contains the question:

Do you wish there to be a one month stay to attempt to settle the claim, either by informal discussion or by ADR?

Dispute professionals themselves often seek assistance from various bodies, such as community specialists in the police force and individuals with knowledge of certain religions, for example. Interpreters are also utilised at time of conflict to ensure that all issues are fully understood by all parties.

Individuals who are not dispute professionals

It is often the case that individuals who are well known within the sector are asked for their opinion and asked to assist in difficult situations. They are not necessarily lawyers or dispute professionals, but, more importantly, they are known and highly regarded within the charitable sector or the local community. Examples include a clerk from the local church or an elder of the community.

WHAT

What third parties do once they get involved to assist charities in their dispute resolution ranges from the informal to the formal.

Informal ADR processes

Many informal processes are used, although it was noted that occasionally charities take advantage of the informality by seeking assistance from several sources until they find the solution that they are seeking – this is possibly due to the non-binding nature of decisions reached through informal ADR processes.

Informal processes to resolve disputes ranged from discussion, conciliation and facilitation, through to proximity talks, team building days and the use of email support groups. Expert assistance, especially from human resources professionals, is often sought from other charities on an informal basis.

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

Policies and procedures were emphasised throughout the research as a way of both avoiding disputes and then handling disputes if they do arise.

When disputes are with funders, the latter will occasionally decide simply to withdraw funding.

Finally, training might be sought to help resolve disputes, so best practice training for governors might be used. This may well be provided by an umbrella or resource body.

Formal ADR processes

It seems that the larger (and sometimes more commercial-style) charities tend to go for more formalised procedures for dispute solving.

Charities that are opting for a more formal ADR process tend to favour mediation over arbitration. Charities generally regard the latter as very similar to court proceedings. Advocates of mediation see it as fitting better with their charity's vision and values. Differing opinions were expressed concerning whether or not a decision reached through mediation should be binding on the parties. It was accepted that such decisions are difficult to enforce upon an unwilling party, but others suggested ways of enforcement, including the removal of funding.

Mediation specialists consider carefully who the best person for a particular mediation case is. They try to marry up specialist skills, such as an understanding of the charitable sector with a legal or accounting specialist, for example, depending on the demands of the case.

For the charitable sector, mediators need to have community intelligence, they need to understand motivational factors and would normally be powerful persuaders. Obviously they need to have the respect of both parties.

Umbrella bodies will often get involved at this stage, either providing support generally or occasionally acting as expert witnesses. If providing support, some will only do so if their member claims that they are not at fault.

CONCLUSIONS AND BEST PRACTICE

The research did not find any link between the type of dispute (see chapter 3) and the type of ADR that is or should be used (see chapter 4). At present, this seems to be entirely dependent on the individual charities in dispute.

It does appear, however, that there is a link between type of dispute and the type of third party approached to help to resolve it. Professional dispute specialists (who may well work in both the non-charitable and the charitable sector) are more likely to get involved in mediation for external-type disputes (for example, where there are conflicts between two charities or a charity and a third party). Conversely, organisations working solely within the charitable sector (such as Councils for Voluntary Service) seem to deal more with issues of internal controls and best practice. It does appear, however, that they are often working in these areas without guidance themselves.

The NCVO message, which heavily advocates ADR for charities, does not seem to be getting across to the charitable sector. The point was made many times that there is a lack of knowledge and that the charitable sector needs to be educated about the virtues of ADR. In fact, many research participants suggested that the public dissemination of this research would assist in this area. A contact list of organisations that can provide assistance with disputes and in particular ADR services is at the end of this report.

There appears to be some support within the charitable sector for a pre-action protocol for charity disputes. Pre-action protocols outline the steps that parties should take to seek information from and to provide information to each other about a prospective legal claim. The objectives of pre-action protocols are:

- to encourage the exchange of early and full information about the prospective legal claim;
- to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and,
- to support the efficient management of proceedings where litigation cannot be avoided

The CPR enable the court to take into account compliance or non-compliance with an applicable protocol when giving directions for the management of proceedings (see CPR 1999, rules 3.1(4) and (5) and 3.9(e)) and when making orders for costs (see CPR 1999, rule 44.3(a)). Pre-action protocols currently exist for: construction and engineering disputes; defamation; personal injury claims; the resolution of clinical disputes; professional negligence; and, judicial review cases. A draft Pre-Action Protocol for the Resolution of Probate and Trust Disputes (available on the ACTAPS website) is currently under consideration by the Lord Chancellor's Department (Frydenson, 2002).

Lessons to be learned

Several general lessons have been learned from the research, which may well make the passage through a dispute towards resolution more comfortable. The evidence suggests that charity disputes are more likely to get out of hand because they are

handled badly. It does not seem to be the case that the charitable sector has more than its fair share of disputes.

- Prevention is better than cure. Good governance of a charity can help both to prevent disputes arising and to resolve them more smoothly when they do arise. Both the Charity Commission (see Charity Commission, July 2002) and the NCVO (see the work of its Trustee and Governance Team outlined on the NCVO website) are promoting this approach.
- If hard decisions need to be taken in order to resolve a dispute (for example, dealing with staff who are at the root of conflict, withdrawing funding, or ultimately winding up a charity) then these decisions need to be made without delay.
- Trustees must distinguish between the strategic issues, for which they are responsible, and the operational decisions that they delegate to paid staff (in particular, the chief executive). In this respect, many trustees would benefit from access to increased training and best practice. Many would gain from the work of the NCVO Trustee and Governance Team, which is dedicated to improving the effectiveness of voluntary sector organisations by strengthening their governing boards and enhancing the skills of trustees who sit on them. Its services include good practice information, sign posting, publications and events (see NCVO website).
- A charity with good governing documents will find it easier both to avoid and to handle charity disputes, whose existence may be as a result of, or may well expose, any structural or constitutional weaknesses that a charity may have. With this in mind, it is recommended that, every five years, all charities undertake a 'legal health-check' of their governing documents, making any necessary amendments. Similarly all property holding should be clarified and the employment status of all charity workers should be clearly spelt out. Umbrella bodies of charities should pass on this message and encourage their members to undertake a 'legal health-check'. This may be a particularly appropriate task for umbrella bodies of specific types of charities (for example, umbrella bodies of rural charities - ACRE or citizens advice bureaux - NACAB).
- All organisations interviewed seem to agree that, although an extremely stressful time, there is little support available for charities in times of conflict. This is especially a problem for small charities. It was even noted by some that support services are contracting rather than growing. This finding would suggest the need for an increased role for umbrella and resource bodies, as, understandably, many charities in dispute may be reluctant to approach the Charity Commission for support.
- There appears to be a particular need for assistance in relation to employment related disputes. One suggestion is that either individual charities, or possibly umbrella or resource bodies, should retain the services of a human resources consultant on a fixed fee basis who can then provide advice and support as and when it becomes necessary.

- Many charities would benefit from increased knowledge of legal matters relating to their activities. This raises questions of education, but perhaps more importantly, communication and dissemination. Much information *is* available (for example, from the Charity Commission, in the form of leaflets or the NCVO), but the research indicates that this does not seem to be filtering down to the grassroots organisations.
- A healthier approach to dispute resolution, which demands a move away from crisis management and an acknowledgement that dispute resolution can be used as an opportunity, is required.
- Third parties who become involved in charity dispute resolution need a good understanding of the charity sector.
- Keeping channels of communication open throughout the duration of a dispute is crucial.
- Charity disputes are of interest to the public so their external handling and consequent PR implications are crucial.
- Clarity in relation to job specifications for all those involved in a charity would help to prevent disputes arising.
- Many mediators are accredited by Mediation UK. Progress is being made towards establishing a National Vocational Qualification Level 4 in mediation. These initiatives should be encouraged.
- Whilst recognising the benefits of the confidentiality of many ADR processes, the appropriate dissemination of the results that are achieved would be beneficial.
- There is a need for greater awareness by lawyers and other advisers of ADR and they need to be trained appropriately in the art of dispute resolution that does not end in litigation.

Concluding Comments

Three clear messages that have come from the empirical research are:

- Whilst a well drafted governing document will not necessarily prevent conflict, it may clarify what should be done, for example in relation to the removal of trustees or members, or perhaps suggest a process through which an attempt at resolving conflict may be achieved;
- Similarly, simple attention to clarity of governance procedures would prevent and/or control many charity disputes; and,
- Many charities do not use ADR because they do not know what help is available. Efforts to promote ADR services for charities do not seem to have trickled down to the grassroots organisations that are in great need of such services.

It is hoped that this work will inform debate about dispute prevention and about the need for ADR services for charities, thus reducing the costs of disputes when they do arise. There will, of course, be circumstances in which charities will find litigation unavoidable and maybe even appropriate. However, the undoubted potential benefits of ADR should be explored as a real possibility, wherever the opportunity arises.

By gaining a better perception of the scale and character of disputing in the charitable sector, this work may contribute to wider debates on the current reforms of civil justice generally. For example, the urgent need for dissemination and education concerning the availability and benefits of ADR has broader application. In general terms, under the reforms, litigants are encouraged to pursue options that will increase the chance of their case being settled. Likewise judges are encouraged to intervene to aid in the early resolution of a case. Judges have already recognised that charity disputes are a prime example of cases where every attempt should be made to ensure such early resolution.

One final positive point to note is that the research revealed that many individuals do not take their disputes with charities any further because they do not want charities to incur costs on disputes; they care too much about the cause and would not want charitable funds to be spent in this way.

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Advice Service Alliance
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Tel - 020 7236 6022

Centre for Effective Dispute Resolution (CEDR)
Exchange Tower
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Disability Rights Commission
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Tel - 08457 622 633

Mediation UK
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