Trust Mediation
specialist personal injury and clinical negligence mediation

Response by Trust Mediation Limited

CIVIL JUSTICE COUNCIL

ADR and Civil Justice

CJC ADR Working Group

Interim Report October 2017

Trust Mediation Limited

Trust Mediation is a provider of specialist personal injury and clinical negligence specialists. It is not-for-profit company limited by guarantee.

Board of Directors

The volunteer Directors of the company are :

- Tim Wallis (Chair)
- Frances McCarthy
- Philip Hesketh
- Brian Dawson
- Paul Balen
- Andrea Barnes
- Lea Brocklebank

Legal information

Registered office: 218 Strand, London WC2R 1AT
Company registration: 06375267 England

Response

This response is from Trust Mediation Limited to the CJC'S ADR Working Group's Interim Report of October 2017.

Tim Wallis
Chair
15 December 2017

SECTION 10: QUESTIONS FOR CONSULTATION

The questions of the Report have been copied and Trust Mediation's responses are denoted by the initials TM.

Trust Mediation welcomes the Interim Report and is broadly supportive of the Working Group's recommendations.

Trust Mediation's responses relate to the current experience of its mediators. It is developing an ODR capability but does not have any public statement to make about that at the current time. Trust Mediation believes that ODR has a significant role to play in the immediate future and would also add that arbitration, as well as mediation, also has an important role.

General

10.1. The Working Group believes that the use of ADR in the Civil Justice system is still patchy and inadequate. Do consultees agree?
TM: We agree.

10.2. The Working Group has suggested various avenues that may be explored by Judges, by lawyers and by ADR professionals in order to improve the position. We will ask questions in relation to these proposals below. But do consultees think that the Working Group has ignored important questions or precedents from other systems or that there are other areas of inquiry with which we need to engage?
TM: No, save for the above comment

Making ADR culturally normal

10.3. Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?
TM: (1) ADR community has failed to communicate effectively. (2) Passive cultural resistance against change by many lawyers and some institutional users of litigation such as insurers, reinforced by ambivalent approach of policy makers and judiciary.

10.4. How can greater progress be achieved in the future?
TM: Pilot programmes. CJC can use its unique position to foster these.

Encouraging ADR at source

Is there a case for reviewing the operation of the consumer ADR Regulations? Why has their impact been so limited? TM: yes. Failure to go far enough as outlined in the paper.

10.5. Should the Courts treat a failure to use an appropriate conciliation scheme as

capable of meriting a cost sanction? TM: yes.

10.6. Are there other steps that should be taken to promote the use of ADR when disputes (of all kinds) break out?

TM: public legal education, starting in schools.

Encouraging ADR when proceedings are in contemplation

10.7. Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings?
TM: Not yet.
How in practical terms could such a system be made to work? How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?

10.8. Can the prompts towards ADR in the pre-action protocols and the HMCTS Guidance documents be strengthened or improved?
TM: yes.
Clarity and consistency should reduce judicial ambivalence towards mediation.
It should be made clear, by HMCTS Guidance documents and the judiciary when exercising case management powers, that adherence to PAPs should be expected, not treated as optional extra with no penalties for parties that ignore them). Further, the issue of compliance with the PAPs should be reviewed the first time the court considers case management after the commencement of proceedings. Orders at that stage could include a) costs sanction b) A Jordan Order (the type of Order used by District Judge Jordan:

The Jordan ADR order

1. The parties shall by [14 days from the date of this order] consider whether the claim is capable of being resolved by alternative dispute resolution and
a. if either party considers that the claim is unsuitable for alternative dispute resolution, that party shall, not less than 28 days from today, serve on the other party a witness statement giving the reasons upon which that party relies in saying the claim is unsuitable;
b. a party served with such a statement may within 14 days after receiving it serve on the other party a witness statement in response;
c. all witness statements so served shall be disclosed to the trial judge at, but not until, the conclusion of the trial;
d. at the conclusion of the trial, when deciding on the appropriate costs order to make, the trial judge shall take all such witness statements into account in considering whether such means of resolution were appropriate; and
e. a party who objected to alternative dispute resolution but has not served such a witness statement may be presumed to have objected for no good reason.

The Jordan order is consistent with the case law, in that it calls for contemporaneous written reasons for refusal.

The approach outlined above, consistently implemented, would in my view make a significant difference, it would be entirely consistent with Woolfian mantra of litigation being a last resort and, as it is merely the proper application of existing requirements, less likely than mandatory mediation to stimulate principled objection. Further, this approach enables parties with good reasons not to mediate to provide a written statement of those reasons. If such reasons are genuine, and consistent with the case law there should be little risk of a costs sanction. In this respect it is pertinent that most judges are now sufficiently mediation-savvy to recognize the difference between genuine reasons consistent with the case law and "I don't want to mediate and this is the best excuse I can think of not to." Moreover, if a Jordan Order is used, written reasons for refusal can be challenged straight away, rather than raised after trial.

Should a declaration be included in the claim document in the terms of **R9** (see paragraph 9.19 above)
TM: yes. Additionally or alternatively, there should, following the Irish lead, be a Mediation Act and solicitors and counsel should have statutory responsibilities along the lines of ss 14 and 15 of Ireland's Mediation Act 2017.

10.9. Are MIAMs on the family model a practical solution at the pre-action stage?
TM: I suggest pilots in particular areas eg Neighbour disputes, and that.
Have the Working Group over-stated the practical difficulties of introducing civil MIAMs? Have they under-stated the potential advantages of doing so?

Encouraging ADR during the course of the proceedings

10.10. Do consultees agree with the Working Group that the stage between allocation and the CCMC is both the best opportunity for the Court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?
TM: emphatically yes.

10.11. Do consultees agree with those members who favour **Type 2** compulsion (see paragraph 8.3 above) in the sense that all claims (or all claims of a particular type) are required to engage in ADR at this stage as a condition of matters proceeding further?

TM: Possibly yes, after consultation, for some sectors. This idea is not new:

'The aim is that, in general, no case should come to trial without the parties having undertaken some form of alternative dispute resolution to settle the case.'

(Lord Justice Jackson: Cumulative First Supplement to the 2013 edition of the White Book.) (*Civil Procedure*, Sweet & Maxwell), p ix.

I do, however, wonder whether it is necessary to go that far. See our response to 10.8 above (strict compliance with PAPs and use of Jordan Orders. See also our response to 10.12

10.12. If compulsion in particular sectors is the way forward, what should those sectors be? Should they include clinical negligence? Should they include boundary/neighbour disputes?
TM: We are in favour of strong encouragement, delivered by consistent case management which, per Briggs LJ, is as much designed for settlement as trial, and enforced by Jordan Orders and costs sanctions.

We advocate such an approach being rolled out by pilot schemes which should be properly assessed and reviewed by academics.

We think that clinical negligence claims and boundary/neighbour disputes would be a good place to start. Contested probate claims and personal injury stress claims and personal injury claims generally are also candidates. We return to these suggestion below.

First, however, we make a general point about timing. Such pilots should give careful consideration to the most appropriate time for any particular case to be mediated. A problem (for the receiving and paying parties) with joint settlement/round table meetings is that they take place late in the proceedings, when most of the costs have been incurred. Mediation can be used much earlier in the proceedings, to the satisfaction of the receiving party and the benefit of the court and the paying party. It would be a shame if mediation were routinely to take place late in the proceedings.

<u>Clinical Negligence Claims.</u> Trust Mediation's experience of its first year of mediating clinical negligence claims made against NHS Resolution provides evidence to suggest that, contrary to the expectations of some lawyers, mediation is suitable for claims of this nature. So, again, we would favour strong encouragement of mediation for these claims.

<u>Boundary/Neighbour disputes.</u>

In support of our view that mediation for these claims should be strongly encouraged, see the following extract from the White Book(14-9.1):

"Norris J continued the debate [about ordering mediation], at least in relation to right of way and boundary disputes, in *Bradley v Heslin* [2014] EWHC 3267 (Ch). He said:

> "23. Perhaps in times of scarce resources and limited (and in any event expensive) representation it is time to give those who know the worth of mediation in this context (both to the parties and to all Court users) some help. If in any boundary dispute or dispute over a right of way, where the dispute could not be disposed of by some more obvious form of ADR (such as negotiation or expert determination) and where the costs of the exercise would not be disproportionate having regard to the budgeted costs of the litigation, any District Judge (a) imposed a 2 month stay for mediation and directed that the parties must take all reasonable steps to conduct that mediation (whatever the parties might say about their willingness to engage in the process) (b) directed that the fees and costs of any successful mediation should be borne equally (c) directed that the fees and costs of any unsuccessful mediation should form part of the costs of the action (and gave that content by making an "Ungley Order") and (d) gave directions for the speedy further conduct of the case only from the expiration of that period, for my own part (recognising that certainly others may differ) I think that such a case management decision would be difficult to challenge on appeal.
>
> "24. I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice."

<u>Probate disputes.</u>

In the experience of Trust Mediation mediators who mediate this type of dispute (as well as personal injury and clinical negligence disputes) these disputes are mostly eminently suitable and we would suggest that this is another area where mediation should be strongly encouraged,

<u>Personal injury stress claims</u>

These claims are another possible area for a pilot. See the highlighted passage in the copy PIBULJ article below.

30 April 2010 - The Michael Caine aspect of stress claims and mediation - John Usher & Tim Wallis

The Michael Caine aspect of stress claims and mediation

There is now much settled law regarding claims for stress, bullying and harassment. This article highlights the use of mediation in stress claims, with case studies, as well as asking a question about a catchphrase of a popular British actor.

It is self evident to most people that stress claims are costly in human terms. HSE statistics demonstrate that stress is also costly in economic terms: 12.8 million working days were estimated to be lost through stress, depression and anxiety in 2004/5, each new stress case is said to lead to an average of 31 days off work and in 1995/6 work-related stress was said to cost society about £3.7 billion per annum.

Most pi lawyers know that *Walker v Northumberland County Council*[1] was the first judgment against an employer for stress at work. It is perhaps not so well known that the solicitor for the claimant in that case, John Usher, subsequently wrote about the case and concluded: "The answer to the problem is not to go to law." He is convinced that most if not all of the cost to the employer (said to be some £500,000) was avoidable.[2] How?

One answer to that question is given by a less well known case on stress, *Suzanne Kay Vahidi v. Fairstead House School Trust Ltd.* [3] Here, the claimant, a reception teacher who had held the post of assistant head, had difficulty when faced with a number of changes to the way she conducted her professional duties and suffered a depressive illness. The claimant was absent from work for 8 months, returned on a part time basis, got back to full time but after a couple of months fell sick again. A month later she was dismissed on the grounds of ill health whereupon damages were claimed for stress. The claim was dismissed (no breach of duty), as was the claimant's subsequent appeal. Scott-Baker L.J. said:

"One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, **litigants really should mediate cases such as the present.** Of course, mediation before trial is infinitely preferable to mediation before appeal. But it is a great pity that neither form of mediation has taken place in this case, or, if it has, that it has not produced a result."

The collective experience of the writers and other mediators regularly carrying out personal injury mediations suggests that there are a number of very good reasons why the Court of Appeal is right to say that stress cases are eminently suitable for mediation. The following reasons and the case studies below explain why mediation is a very useful tool in this area.

1 The very nature of these claims and the injuries suffered is such that the claimants concerned almost always prefer the idea of an informal voluntary meeting to the prospect of a court hearing (and indeed may prefer mediation to a protracted grievance or disciplinary process).

2 The nature of the claims can also make it attractive, to one or both sides, that a mediation is a private meeting.

3 It can be very important to the claimant to hear, direct from the employer, an apology or other expression of regret or, at least, an acknowledgement that the medical problems encountered have in fact arisen from the workplace in circumstances that could have been better managed. (Lawyers are often scornful about this aspect, but it can be very a significant feature of mediations in this area.)

4 Agreements reached at mediation can go beyond what a court can do. Case study 2 below, for example, demonstrates how a settlement can encompass the issues arising from associated employment and personal injury claims as well as appending a reference in agreed terms.

5 Mediation is a good tool to use where, as can often be the case with such claims, there are significant disputes on liability, causation and quantum.

6 The fact that many or most of the issues in a claim are in dispute is one of the reasons why this type of claim can become quite emotive. This can spill over and impact the negotiating relationship between the parties and their lawyers, making routine negotiations or joint settlement meetings more difficult. Case study 2 below would probably not have settled at a JSM. (It is ironic, at least to mediators, how this factor, as in clinical negligence claims, tends to make the lawyers less inclined to consider mediation or to agree to use it.)

7 Both case studies below demonstrate how claims of this nature are very heavy in terms of legal, management and HR resource. This is partly, but not solely, because the factual and medical matrix involves investigation of events over a period of time rather than a finite moment as in an accident claim.

8 Mediation has quite high prospects of success, particularly on personal injury claims.

9 As with any mediation, there is no reason why legal costs cannot be agreed, as well as damages, at the mediation. (It is more efficient, quite apart from the impact on cash flow, if the costs cheque can be put in the same envelope as the damages cheque.)

10 There is a considerable prospect of both reaching settlement for the claimant and reducing the costs of both sides. It follows that there is the same prospect of reducing the risk carried by the claimant's lawyers under a CFA agreement and additional liabilities.

Case studies

Case study 1: Stephen Jones

This case study is not a stress case as such but concerned the type of problems that often lead to a stress claim. Stephen Jones[4] was a member of the management team. Another manager in an open plan office rang him, and on finding he was not at his desk, left a message to call and put the receiver down. He did not, in fact, put it down properly and turned to colleagues mimicking Stephen's welsh accent and referring to him as "a muppet". The message recorded laughter from others present.

Stephen complained. He lodged a grievance, including a reference to race discrimination. He received an apology, but remained dissatisfied with the grievance procedure throughout. There were delays and appeals. Meanwhile, lawyers were instructed and ET proceedings taken close to a hearing.

Stephen told his lawyers he wanted the event never to have happened and was concerned that the respect for him had been undermined to such an extent he was tempted to leave. The lawyers told him that they could only achieve a financial settlement, but that he had a good case before a tribunal. The employers' lawyers advised that an offer of less than £2,000 was all that was required. Stephen's lawyers told him that if he did not accept they would advise the union to withdraw support as the tribunal would not award more. But they offered to try for an increase.

An offer of £2,000 was made and reluctantly accepted. The grievance had to be abandoned as part of the final settlement. Stephen did not have faith in the grievance procedure and doubted the independence of the appeal.

The union's and the employer's lawyers incurred costs at least three times the final settlement. The employer used up valuable resources. The outcome was unsatisfactory to all involved. The employee remains disgruntled.

The writers are convinced that if there had been an early mediation it is likely that the matter would have been resolved to the satisfaction of all for a fraction of the cost with Stephen still in post. Whether or not such speculation is right it is quite clear that the scope for using mediation to achieve earlier settlement is considerable.

Case study 2: John Doe[5]

In 2005 John Doe was appointed to a middle management post with a public sector organisation. As the employer knew, John had a constitutional medical condition that could be aggravated by stress. No one knew, however, that the next few years would be dominated by allegations of stress caused by work overload and lack of support, lengthy absences, and suspension following an allegation that, some months later, turned out to be unfounded. Disciplinary proceedings were followed by a claim for damages for personal injury/stress and a prospective claim for unfair dismissal.

By 2006 difficulties had surfaced with John's performance of his duties and these gave rise to absences and a series of meetings concerning personnel and occupational health issues. In January 2007 John was suspended, only to be cleared by an investigation some months later. He was then absent from work on account of sickness, returning after a break of 6 months overall. Discussions about a termination of his employment at that stage did not reach a conclusion. The unsatisfactory relationship continued, with further absences, during 2008 until an incident (which most would describe as minor) in December 2008. The disciplinary proceedings that followed created further stress and John started a period of absence that was to last until the mediation, over 12 months later.

Proceedings were started, with the support of John's union, in 2009 and these were stayed, in 2010, for a mediation.

At the one day mediation, John and his employer settled the personal injury claim and also agreed other matters which the court could not order, namely a consensual termination of the contract of employment and the terms of a reference.

The mediator felt the fact that John was able to participate in the mediation process was clearly important to him. It also appeared to be a factor that significantly contributed to the parties' ability to reach agreement about this complex set of facts and legal issues surrounding the personal injury and employment claims.

In the context of mediation and the costs of stress three things are clear. First, the savings arising from settlement at this stage compared to proceeding to trial were immense – many tens of thousands of pounds. (And the trial would only have dealt with the personal injury claim.) Secondly, it seems very probable that the nature of the case and the state of the evidence was such that a technical legal assessment and a joint settlement meeting would not have resulted in settlement at this stage. Thirdly, the total cost of stress in this case not be measured in legal costs alone. John's career has suffered a major setback and his and his family's life was dominated by the problem for years. The management time involved in dealing with these issues amounted to several hundred senior man hours – and that is before the considerable task of liaising with and providing instructions, evidence and documents to legal advisers. The union also incurred significant expenditure of resource. Taking all this into account it is not hard to make a case for a modest investment in attempting early intervention.

Conclusion

Finally, the Michael Caine question. It concerns the Court of Appeal's recommendation in Vahidi that "litigants really should mediate cases such as the present". Would it be fair to say that "not a lot of people know that"?

John Usher, solicitor and mediator, is a member of the Civil Justice Council, the Advisory Committee on Civil Costs and the Advisory Council of Trust Mediation.

Tim Wallis, mediator and solicitor, mediates with Trust Mediation, Expedite Resolution and other organisations. He also chairs the Dispute Resolution Committee of the Civil Justice Council.

1 [1995] 1 All ER 737, [1995] IRLR 35

2 John Usher wrote in "Stress and Teachers" (1998) (ISBN 1-86156-082-6)

3[2005] EWCA Civ 765 2005 WL 1333233 (CA (Civ Div)), [2005] E.L.R. 607, 6-24-2005 Times 1333,233,

4 Name changed for reasons of confidentiality

5 Name changed for reasons of confidentiality.

Personal Injury claims

It is not uncommon for it to be suggested to be made that mediation is not appropriate for personal injury claims. This view was not supported by Jackson LJ in his Costs Report:

"There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation."
('Jackson Report' ('Review of Civil Litigation Costs: Final Report' by Jackson LJ, published by HMSO in 2010, Executive Summary, para 3.1(iii), p 361).

Trust Mediation, a provider of specialist personal injury and clinical negligence mediators, has mediated several hundred claims of this nature since 2008. The settlement rate for 2008-2016 was 86%.

10.13. Alternatively, should the emphasis at this stage be on an effective (but rebuttable) presumption that if a case has not otherwise settled the parties will be required to use ADR?
TM: This approach would not be inconsistent with the "strong encouragement" approach which we advocate above. It would avoid stimulating principled objections that would follow from the introduction of

compulsory mediation.

10.14. Would it be beneficial to introduce a Notice of Mediate procedure modelled on the British Columbia system?
TM: Yes in conjunction with the "strong encouragement" approach which we advocate above. Again, it would avoid stimulating principled objections that would follow from the introduction of compulsory mediation.

10.15. Do consultees agree that the emphasis needs to be on a critical assessment of the parties' ADR efforts by the Courts in "mid-stream" rather than a process which simply applies the Halsey guidelines at the end of the day after the judgment? Is it practical to expect the CCMC to be used in this way? If directions were otherwise agreed between the parties can the court reasonably be expected to require the parties to attend purely to address ADR?

TM: emphatically yes – and yes to all. The justification is that in our experience of mediating personal injury and clinical negligence cases, as well as commercial disputes, for 20+ years, mediation often results in settlement when the parties and their lawyers genuinely believe at the outset of the mediation meeting that the case is very unlikely to be settled. As to the last question, this could be dealt with, in low to mid value cases, by a written joint ADR summary from the parties and a telephone hearing. Generally, the likelihood of avoiding the cost of a trial justifies the cost of a hearing about ADR.

10.16. Are costs sanctions at this interim stage practicable? Or is there no alternative to the court having the power to order ADR ad hoc in appropriate cases (**Type 3** compulsion)?

TM: Both can be used, but in the absence of cogent reasons (provided they are consistent with the case law) there should be no reason why ADR should not be ordered.

Costs sanctions

10.17. Do consultees agree that whatever approach is taken at an earlier stage in the proceedings it should remain the case that the Court reserves the right to sanction in costs those who unreasonably fail or refuse to use ADR issues?

TM: Yes.

10.18. Do consultees agree with the Working Group that the Halsey guidelines should be reviewed?

TM: Yes. (The post Halsey case law is generally pretty clear, but a review

could highlight the few cases where there is a judicial difference of view.)

ADR and the middle bracket

10.19. Do consultees agree with the Working Group and with Lord Briggs that there is an ADR gap in the middle-value disputes where ADR is not being used sufficiently?
TM: yes.

10.20. Is part of the problem finding an ADR procedure which is proportional to cases at or below £100,000 or even £150,000 in value?

TM: Trust Mediation has developed an effective 4 hour fixed fee mediation model. Of the 300+ mediations that Trust Mediation has conducted since 2008 over 50% of them have been 4 hour mediations. As to the proportionality of the fee for this model the reader can be the judge: the fee structure is set out below. When considering this point it should be mentioned that although a claim may have a value of, say, £50,000, its ultimate value to the parties, taking into account the costs of both parties, might be twice that sum, or more.

Trust Mediation has also developed the use of telephone mediation for low value claims. It is not often used, but, when it is, it is usually successful.

Trust Mediation believes that these mediation models work where particular conditions are fulfilled. These include using specialist mediators and both the mediators and the parties following the Trust Mediation guidance on preparation.

pto

Mediation Fees

Note: The fees assume there are two parties

Service	Fee	VAT	Total Fee	Total Per Party (50%)
2 Hour Telephone Mediation	£495	£99	£594	£297.50
4 Hour Face to	£1,815	£363	£2,178	£1,089

Face Mediation				
8 Hour Face to Face Mediation	£3,330	£660	£3,960	£1,980

Multiple Defendants

The Mediator's fees apply where there is a claimant and one defendant. The fees increase by 10% for each additional defendant after the first when they are parties to the mediation.

For example, the Mediator's fee for a 4 hour mediation with three defendants would be £1,815 x 120% = £2,178 plus VAT.

What is included?

Preparation, reading, the mediator's travel, and the mediation of up to two, four or eight hours are included in the fee. The venue for the mediation, and any cost for the venue and refreshments, is the responsibility of the parties (see below). There are no hidden extras.
The fees cover both Trust Mediation's administration and running costs and the mediator's fee, in proportions which are agreed from time to time between Trust Mediation and its mediation panel. Trust Mediation can provide further details of this apportionment in individual cases if requested.

When are fees paid?

Fees are usually paid in advance by the Defendant where liability is not disputed but in many cases the parties agree that they will each pay half of the fee in advance and then deal with the costs of the mediation as part of the claim.
The parties are free to agree such terms on costs, as between themselves, as they think appropriate. The Mediation Agreement, however, provides for a presumption that, unless otherwise agreed or ordered, mediation fees and the parties' legal costs and expenses shall be costs in the case. Parties and their lawyers should consider what costs arrangements are suitable (whether the case settles, or whether it does not) prior to the mediation.

Additional Hours

The fees for face to face mediations are for a 4 or 8 hour mediation.
If a 4 hour mediation does not exceed 5 hours or an 8 hour mediation does not exceed 9 hours the fixed fee will apply. Otherwise all time over 4 or 8 hours respectively will be charged and payable at £330 per hour plus VAT.

Venue, and costs of venue

The venue for the mediation is the responsibility of the parties. It is often possible for the mediation to take place at your offices or those of your opponent. The mediator will travel to you. Where it is desirable to use a neutral venue, we can help with information about venues but you (or your opponents) will need to book and pay for the venue. We will not be involved in that except to ensure that your mediator has appropriate directions. Sometimes we may be able to offer mediation at the home offices or chambers of our mediators for no cost. Do contact our Registrar if you would like any help on this or have any query about venue

https://www.trustmediation.org.uk/mediation-fees/

10.21. Could the ADR community do more to meet this unmet demand?
TM: Yes

10.22. Should the costs of engaging in ADR be recognised under the fixed costs scheme?

TM: yes. Mediation should be a permissible disbursement, fixed at a proportionate level.

10.23. Anecdotal evidence suggests that the various fixed fee schemes are not receiving any very great take up. Is this the experience of providers? What kind of volumes are being mediated under these schemes? Why, if they are unsuccessful, are they not being used?
TM: As to take up of Trust Mediation's fixed fee offering, see the response to 10.20 above. Trust Mediation agrees the take up is low. Lawyers and insurers tend to be very cautious about new working methods. Fixed fee time limited mediation has considerable potential, particularly given that it can and often does achieve settlement at a much earlier stage in the proceedings than the point when a joint settlement meeting takes place. The fact that this is a cost effective approach is demonstrated by Trust Mediation's settlement rate (overall combined settlement rate of all cases 2008-2016: 86%).

10.24. What pricing issues have arisen as between consumer mediation, the civil mediation website fixed price scheme and schemes such as those operated by CEDR and Clerksroom? Are there inconsistencies and confusions?

TM: We have no useful information.

Low value cases/litigants without means

10.25. Assuming an increase in manpower and the increase in flexibility over dates that have been indicated to Lord Briggs, do consultees think that a further reform or development of the Small Claims Mediation scheme is required?
TM: Further development. The work to date suggests that this is a successful and cost effective approach

10.26. Is further effort needed outside and additionally to the SCM scheme to make sure ADR is available for lower value disputes? What do Consultees see as being the challenges in dealing with this area?
TM: We suggest ODR options be developed in the context of the online court.

10.27. How can we provide a sustainable, good quality, mediation service for this bracket? Is pro bono mediation viable?
TM: Some pro bono mediation is possible, but many mediators do not have a stream of work to enable them to do any significant amount of pro bono work

10.28. What are the other funding options available?
TM: None come to mind.

10.29. Do consultees agree that special ethical challenges arise when in particular mediators are dealing with unrepresented parties?
TM: Yes, but mediators can deal with the challenges.

The on-line opportunity

10.30. In the digital sector how is the Tier 1 prompting for mediation going to work? Can the same prompts be used outside the Online Solutions Court when digital access becomes possible across other jurisdictions?
TM: We have no information or ideas to offer at this stage, save that we believe ODR has significant potential.

10.31. What issues arise with the use of Tier 1 of the OSC and the other forms of digital access which are now intended? Is the use of ODR techniques going to lead to unfair advantages for litigants with digital access?
TM: We have no information or ideas to offer at this stage, save that we believe ODR has significant potential.

10.32. How should ODR techniques be introduced? Which techniques are going to be appropriate? Could a system of online blind bidding be beneficial? How are

they being introduced within the wider digital provision?
TM: We believe that blind bidding and predictive analytics should be explored

A greater role for conciliation/ombudsmen during the currency of proceedings

10.33. Is consumer conciliation still underused? How could its use be expanded? Should it be used alongside civil proceedings to a greater extent?

TM: we make no response on this.

Challenges for Judicial ENE

10.34. Do consultees agree that JENE has certain distinct advantages (if the judicial resources are available to provide it) in terms of providing a free ADR service with no regulatory/quality risk?
TM: Yes. ENE has great potential. We do not understand why the uptake has always been extremely low.

10.35. Do consultees feel that a loss of party autonomy and the narrowness of the legal enquiry are disadvantages of the system and if so how can this be mitigated?
TM: we make no response on this.

Challenges for online dispute resolution

10.36. Do consultees agree that ODR has enormous potential in terms of delivering ADR efficiently and at low cost?
TM: Yes.

10.37. Do consultees agree that specified standards for ODR would assist its development and help deal with any stakeholder reservations?
TM: Yes. We think this is very important.

10.38. What are the other challenges that the development of ODR faces? How else can ODR be rendered culturally normal?
TM: Public legal education.

Challenges for Mediation

10.39. Do consultees agree that Judges and professionals still do not feel entirely comfortable with mediation in terms of standards and consistency of product? Is there a danger that the flexibility and diversity which many regard as the strength of mediation is seen as inconsistency and unreliability by other stakeholders?
TM: We have not received any indicators that standards and consistency of

product are an issue. We consistently get positive feedback from clients and virtually no negative feedback. Reluctance to use mediation is perceived by us to be cultural resistance.

10.40. How do consultees think that these concerns can be reassured and addressed?
TM: Greater education. More active marketing by ADR providers – in a manner that is consistent with reluctant clients. (No evangelism and "hard sell", more evidence based persuasion.

10.41. Is there a case for more thorough regulation? How could such regulation be funded and managed?
TM: Yes. Mediators meed to fund and manage,

10.42. What other challenges are faced by mediation?
11 TM: No response.