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Dear Civil Justice Council,

Re: Submission in response to CJC ADR Working Group Interim Report, "ADR and Civil Justice"

I am a senior lecturer in dispute resolution at the School of Law, Queen Mary University of London. I am writing in response to the request for submissions arising from the CJC ADR Working Group Interim Report, "ADR and Civil Justice" dated October 2017.

In its Report, the Working Group states that ADR is underutilised within civil justice and sees a need to find ways to encourage its use further, particularly in view of the minimal 'cultural' familiarity with ADR processes within society. The status quo, it suggests, needs to change with courts promoting the use of ADR more actively.

In a research paper I published in 2016 in the Civil Justice Quarterly, I explore the status quo with respect to government and judicial responses to ADR encouragement as it currently exists, and I too conclude that change is necessary for an improved justice system.

In this submission, I pay particular attention to the issue of compulsion and the comments of the Working Group regarding the need to continue the dialogue about compulsion. On the basis of my research, I see a need for some action to be taken with respect to the current relationship between ADR and its use in the civil justice system in England and Wales. The system of encouragement of ADR processes under the CPR and Pre-Action Protocols lacks consistency and transparency, which results in litigants and prospective litigants becoming vulnerable when it comes to obligations to participate in such processes.

My research paper examines this point in depth. Its abstract, set out below, describes the exploration:

The nature of support for mediation in England and Wales vacillates among government insistence that mediation is the preferred method for resolving disputes, judicial encouragement of mediation, and an emphatic denial of

compulsory mediation in this jurisdiction. Insisting on a façade of voluntariness to the process while subjecting litigants to cost sanctions for unreasonably refusing to participate in the process creates a burden on the litigant and the civil justice system. Government and judicial reluctance to align rhetoric supporting mediation with a clearly mandated programme ultimately impedes the effectiveness of achieving the government's policy goal for civil justice—that is, to deal with cases justly and at proportionate cost as noted by the overriding objective of the CPR. The article seeks to illuminate the schism between rhetoric and action, and the resulting lack of transparency in civil justice. It will lead to a conclusion that calls for government action to settle this debate once and for all: to put its policies into action by recognising that the power to order mediation already exists in England and Wales and to make this clear through express legislative provisions rather than through the current reliance on the application of judicial discretion.

I set out its conclusion, in full, below:

Beginning with *Halsey*, which threw the cat among the pigeons with Lord Dyson's obiter dictum about compulsory mediation, the issue of compulsion has not been easily determined. The factors of *Halsey* in the determination of whether a refusal to mediate is unreasonable require a litigant to assess the risks of refusing mediation, with subsequent case law providing too general a guide for such an assessment. The issue of whether the courts have power to order mediation is also problematic: there appears to be power and often it is invoked, but the official party-line is that there is no power in the CPR to mandate mediation. Further, there are the judicial and extra-judicial views, which are not of like mind as to the level of encouragement to be given to parties regarding mediation. And finally, there is the government speaking to a streamlined justice system in which mediation is to play a central role (going so far as requiring automatic referral to mediation in certain situations), but leaving it for the parties to decide whether to participate in mediation in the face of onerous costs sanctions should the incorrect decision be made. Lord Faulks succinctly states the current government policy:

"HMCTS continues to promote mediation on the directions questionnaire, a key stage in civil litigation, and will consider with the judiciary the introduction of a standard paragraph on all orders to encourage parties to mediate and to advise them that the court may penalise them on costs if they unreasonably refuse to attempt mediation."

As suggested earlier, the difficulty with this approach is that it is the litigant who suffers and ultimately, the efficacy of the civil justice system. Litigants are entitled to know what their obligations are when it comes to civil justice; in particular, what needs to be done to ensure that they get equal treatment in access to justice. For example, to start a claim, certain steps are to be taken and costs to be paid: it is time to be clear about these steps and costs to ensure litigants are fully informed about the risks they will face if they embark on litigation. Currently, public policy through the

CPR says they must consider whether mediation is appropriate for their dispute, failing which they will be subject to costs sanctions. Whether those costs sanctions will be applied in light of their decision not to pursue mediation, remains uncertain and difficult to assess in view of the current state of the law and views about the place of mediation in civil justice. Litigants find themselves in a system that advocates mediation, which may or may not be compulsory.

Government needs to redress the current schism between talk and action. This article is not seeking converts to a mandatory system of mediation. Rather, it seeks to expose the inconsistency of the rhetoric as presented to litigants and potential litigants alike. There seems to be a desire by the English courts and government to continue under a façade which holds to the view that compulsory mediation is not appropriate for England and Wales. However, the rules and pre-action protocols of their civil justice system, the statements made by the judiciary in cases and speeches, and the actions of government all point to a regime that seeks to do indirectly what it feels it should not do directly. Furthermore, it supports a system which is ad hoc, opaque and burdensome on litigants. There is a need for clear articulation about the expectations of the civil justice system.

Sir Alan Ward suggested in *Wright v Michael Wright (Supplies) Ltd*, a decision of the Court of Appeal in 2013, that there is a need to revisit the issue of compulsion. Although the appeal was allowed on a substantive point, Sir Alan took the opportunity to support mediation, stating that parties should mediate because costs are too high and there are benefits to mediation. He went further to say that it is time to rethink the compulsion issue and the decision of *Halsey.* Sir Alan points to mediation as the reason why the government has reduced the ability of people to fund litigation through legal aid—as mediation "offers a proper alternative which should be tried and exhausted before finally resorting to a trial of the issues"—a sentiment with which he agrees. This was not the first time that Sir Alan indicated firm support for mediation. In *Faidhi* above, he indicates his support for mediation for neighbourhood disputes, stating "give and take is often better than all or nothing."

It is not for the courts, however, to consider the issue; it is for government as the purveyor of public policy. The courts work with what they have: a procedural system of rules and protocols which we see are not consistently interpreted and the existence of precedent against compulsion in the form of *Halsey*. *Gilks v Hodgson* provides a good example of this, illustrating that courts are stymied in their frustration with cases that refuse to mediate: "If parties, or one of them, insist on litigating in this way, it is difficult for the court to cut short their wasteful endeavours, however much it may try to do so." Ahmed in his recent exploration about the relationship of mediation and civil justice argues that the courts have the power to be more robust in their application of the cost sanction to the point of making payment orders against the successful party. As courts are reluctant to invoke such a vigorous sanction, he proposes a rule change to reflect the power expressly.

Ahmed's suggestion to clarify the extent of the court's power to impose costs sanctions is one way to deal with judicial reluctance with respect to mediation. It is submitted however that this suggestion will not address the weaknesses of the current mediation framework in civil justice. The judiciary itself is at odds with its views about the power of the court to impose mediation, and the desire to do so. Such unease has no place in civil justice. Lord Neuberger says that civil justice belongs to the third branch of government—the judiciary. As stated earlier, Lord Neuberger sees mediation as part of the complement of case management tools for judges' use in insuring access to substantive justice for litigants. It is up to the judiciary to interpret and apply the CPR as to when a litigant should participate in mediation as it is the judiciary's responsibility to manage cases and thereby ensure substantive justice is protected. Lord Jackson is of a similar view. Views such as these confirm the need for government clarity regarding the administration of civil justice as it relates to mediation. This is further strengthened by Lord Neuberger's recent acknowledgment that the current system of penalising litigants for failing to mediate is not ideal and some form of compulsion in relation to mediation may be agreeable, although the forms suggested continue to be somewhat equivocal.

Government supports and encourages mediation as the viable alternative to litigation. Public policy must be expressly reflected in the administration of the civil justice system. It is the government's responsibility to ensure this is done appropriately, yet the government appears reticent to do so. Currently, power resides in a vacillating judiciary to determine the role that mediation will play in any particular case. Whether the government acts through statutory instrument or introduces primary legislation, action must be taken. Arguably, the move to compulsory mediation requires the implementation of primary or secondary legislation at the behest of the executive branch of government rather than leaving its fate to the delegated powers of the Civil Procedure Rules Committee. This Committee is primarily made up of members of the judiciary and lawyers: given the reticence of the judiciary to consider compulsion in light of *Halsey*, the involvement of the legislative or executive branch of government is needed to ensure that government public policy aims are met. Secondary legislation such as the type introduced by the Secretary of State recently to deal with on-line dispute resolution for consumer disputes is but one example. The legislation has been introduced in fulfillment of an EU Directive dealing with consumer disputes and the introduction of an ADR process to deal with such disputes across Europe. A call is made for similar legislation to redress the problems discussed in this paper surrounding the relationship between mediation and civil justice in England and Wales.

In conclusion, it is proposed that a better way forward is for government to bite the bullet and develop legislation which better reflects its public policy position regarding ADR and civil justice rather than vacillating through procedures that are not expressly definitive one way or another. An open, transparent system is needed. It is time to be definitive about policy and

the manner in which to treat mediation in civil justice. Disputants should know where they stand: they should know what their obligations are when they commence litigation and the penalty for failing to fulfill them. Lord Clarke has opined that the courts already have power to direct parties to mediation. The government needs to channel that power into express legislative provisions to ensure clarity of process.

If such a call is too drastic, the government should introduce a pilot scheme where mediation is truly mandatory. In other words, it would not provide the opportunity for litigants to easily withdraw from attending a mediation session. The ARM Pilot was vulnerable to its opt-out provision and the *Halsey* decision, and as a result, does not provide a good indicator of the value to government policy of such a scheme. It is important, too, that an evaluation be conducted during the pilot to assess the areas of weakness requiring modification prior to finalisation and to enable full consultation by stakeholders in the pilot. Such a pilot scheme could lay the groundwork for a movement to an express recognition of mandatory mediation in civil justice and a movement away from a system of flux, one that is dependent on judicial discretion regarding the place of mediation in civil justice. The overriding objective of dealing with cases justly and proportionately demands it.

I refer you to the full research paper for the arguments that support these conclusions: "Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales" (2016) 35(2) 162-185.

With regard to the call for a pilot scheme for mandatory mediation referenced in the last paragraph of the above conclusion, much debate exists among stakeholders in England and Wales regarding the issue of mandating ADR processes, and in this debate, attention is often turned to the ARM Project of the County Court as illustrating the ineffectiveness of such compulsion in England and Wales. For the reasons described in the concluding paragraphs of my research paper, the ARM Project may not be the best indicator of the efficacy of a mandatory scheme. The experience of the Ontario Canada civil justice system with its mandatory mediation rule (rule 24.1 of the Rules of Civil Procedure) whereby mediation is mandated in a majority of civil cases provides an excellent framework through which to develop and establish an effective pilot project in this regard.

I would be happy to discuss this further with the Civil Justice Council.

Best,

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