Supplement to the Response of GEMME – UK to the Report

1. The ADR deficit: where is it and how do we measure it?
    a. The main deficit is in multi-track County Court cases. At present there is no precise means of measuring it. A rough approach is (for a given year) to take the MoJ figures for (a) contested multi-track cases (b) trials and (c) the CEDR figures for mediations of civil and commercial cases. Although the results are very crude one can use the figures in at least two ways. The first is simply to show the percentage of cases that went through to trial with the obvious consequence that they did not settle through mediation. The other is to use the CEDR figures as a reference to show the cases that settled without CEDR mediation and the cases that fought despite the availability of mediation.
    b. As to the future, although there can be no practical means of measuring the deficit outside the court system, there is no reason why there should not be an obligation on those settling cases that are in the system to notify the court whether the settlement arose pursuant to mediation and (where there was mediation but no settlement) that a mediation had taken place.
2. Hearts and minds: public legal education and making ADR culturally normal.
    a. As set out in our main report, we consider that part of the problem arises from a failure of perspective. Those involved with ADR largely engage with a relatively limited group either professionally involved with ADR or forced to come into contact with it. ADR is a form of brand and those involved with ADR would benefit from seeking the advice of those involved with promoting public awareness of brands. An example of this is may be found in the promotion of awareness of educational institutions.
    b. We are unaware of any attempt to engage with and learn from institutions that have extensive contact with the public. Citizens Advice has a sophisticated and extensive database freely available to the public as well as constantly accessed by its assessors and advisers. It has large programmes of research and actively campaigns. Nevertheless the available information on ADR is limited and tightly focussed
    c. We note that CEDR has produced a DVD called “A Way into Mediation”. We further note that the DVD was produced jointly with HMCTS and that it is for sale at a price of £65.00 plus £13.00 VAT for non CEDR members. Even for

those aware of the DVD, its price will not encourage use at a level that will achieve general access. We see no reason why HMCTS should not produce a short video of the sort described in our main report and make it freely available to popular access on media such as YouTube.

3. ADR in a changing context: court modernisation, the Jackson reforms and the consumer ADR regulations. We have nothing to add to our report.
4. ADR and the rules 1: pre-action. Could more be done and how practically would it work? We have nothing to add to our report.
5. ADR and the rules 2: concurrently with proceedings. Could more be done and how practically would it work?

   We further consider that, in the event that parties are willing to mediate but cannot agree on a mediator, there should be provision for each party to put forward three names with short supporting reasons and then for the other party, if need be, to state its objections with a right of reply in the opposing party and, if there is then no agreement, the judge to have the power to nominate the mediator from the names put forward.
6. The different forms of ADR: the challenges faced by each of the different forms of ADR.
   a. We consider that at least where litigants in person are concerned there is something fundamentally unfair in requiring such people to have the carriage of an unknown process where the onus is on them to be central in achieving a solution. We note that the Court of Appeal has a successful scheme involving the *pro bono* provision of mediators. We consider that there is scope for the State funding of a form of McKenzie Friend in court related mediation.
   b. However, we note anecdotal evidence that there is widespread dissatisfaction with the facilitative as opposed to the evaluative approach to mediation in that parties do not regard it as adding value to the resolution of disputes. We further note that, in mediations, this evaluative approach is usually confidential to the respective parties. Thus it is different from the approach in FDR appointments. Nevertheless we think that the way forward is for the third party to occupy a central role in helping the parties to achieve what must always be their own resolution to the dispute.