ADR and Civil Justice Interim Report October 2017
Irwin Mitchell LLP Response Document

Foreword

This paper is a response to the CJC ADR Working Group paper: ADR and Civil Justice Interim Report October 2017

Irwin Mitchell is a full service, top twenty law firm incorporating the leading personal injury practice in the UK and providing a wide range of legal services for business and commercial clients and in the fields of contentious probate, public law, judicial review, family law and other litigation teams. We have significant expertise in litigation – handling more cases than any other law firm, and our specialist lawyers are independently recognised as leaders in their field by the profession.

Should the CJC require any clarification of the issues raised in this paper they should not hesitate to return to us using the contact information shown at the end of the document.

Summary

We welcome the opportunity to respond to this consultation exercise addressing the means by which greater use may be made of ADR in civil litigation. As a general proposition, we recognise the benefits that well managed ADR can bring to disputes in achieving the resolution of litigation with a saving of further legal costs and the time required for a fully contested court process. We are disappointed that the CJC recommendations chose to restrict the scope of ADR to a narrower subset of engagements which has the tendency, in our view, to underplay the contribution to dispute resolution made by common practices in the sector especially the use of written offers mandated by the Civil Procedure Rules and joint settlement meetings between parties. With experienced and specialist lawyers on each side, mediation will often not add much to what can be achieved at a joint settlement meeting without a mediator.

Given the wide range of options currently available to litigants and the need for tailored solutions and flexibility to meet a whole range of factors in each case, we are firmly opposed to the mandatory imposition of a particular form of ADR or ADR generally across a spectrum of litigated cases. We do however agree that more should be done to engrain ADR in a wider sense to become a common practice for a least some part of the journey of a civil dispute ("making ADR culturally normal"), and we will refer below to clarifying the cost rules, giving greater emphasis to ADR in pre-action protocols and more recognition of best practice guidelines such as, in personal injury, the Serious Injury Guide which encourages collaboration between the parties to a dispute in a more general sense. If ADR is to become much more effective at an earlier stage in disputes, a major cultural change in case preparation and the readiness of parties to deal with all the issues will be required (for example in medical negligence cases).

Where ADR is introduced into procedures that either do now or will in the future lead to the imposition of fixed costs, or be would a mandatory element of online claim processing ("ODR"), then it is essential in our view that the costs recoverability of ADR is catered for within any fixed cost model and that proper resources are made available to support ADR for vulnerable or unrepresented litigants.

QUESTIONS FOR CONSULTATION AND RESPONSES

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?

Response: We do not formally record the incidence of ADR across our litigated disputes so cannot assist with a measure of this but would tend to agree with the general observation that the particular means of ADR identified in scope in the CJC report are applied in the minority of litigated disputes. The use of ADR is most effective where both/all parties to a dispute are motivated to engage, expecting an outcome that justifies the effort and in comparison to a litigated outcome will recover or justify the cost committed to the process. If at least one party does not share that motivation, ADR is unlikely to be effective. In our experience uptake is vulnerable to numerous factors that could impact the enthusiasm of a party to engage. This can include lack of preparation, lack of trust in the methods proposed, cost recoverability issues, tactical considerations and so forth. It is very difficult to provide a simple explanation for why. Be that as it may, our experience is that a vast majority of disputes end in a settlement rather than a full court hearing, and that many forms of positive mutual engagement between litigants that lead to this take place without the formal label of "ADR", for example, the practice of joint settlement meetings involving direct discussions between parties' legal representatives but no third party dispute management. The report refers to ADR as a means to achieve settlement where negotiation has failed to achieve this. However in our experience negotiation is a multi-staged process which eventually achieves the outcome desired in the overwhelming majority of disputed claims; the issue is the time and cost required to reach that point. Thus to measure only more strictly defined routes of ADR as the report is restricted to inevitably underplays the practical value of negotiation as dispute resolution in civil litigation. It was interesting to note from the report that mediators themselves reported that personal injury and medical negligence for example accounts for only 1% of their workload yet in our experience easily more than 95% of such matters handled by Irwin Mitchell settle without a trial. We accept that these methods may however fail to prevent the cost of litigation arising prior to that point.

The success of ADR is dependent upon when it occurs. In medical negligence cases, ADR is unlikely to ever have any benefit at source. The earliest that ADR can provide benefit is after the pre action protocol ("PAP") stage. At that point, it is incumbent that both sides have obtained independent expert evidence and undertaken adequate work to quantify the claim. From our experience, the reason that the majority of cases proceed into litigation is because the NHSR have not commissioned independent expert evidence and are not yet in a position to concede liability in full or, at the very least, engage in meaningful settlement discussions. To address the patchy uptake in ADR, both parties – but most importantly NHSR – must prepare their case earlier. The counter argument to this, is that it shunts more costs into the pre-proceedings stage which is objected to at para 5.9 (page 25) of the report. However, the success of pre action ADR requires a cultural shift on both sides – NHSR need to prepare more thoroughly whilst claimants may need to be better prepared on quantum in disputed claims before breach and causation are resolved yet retain a commitment to proportionality.

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?

Response: We do not consider that the working party has limited unnecessarily the scope of its considerations other than to repeat above that the recognised forms of ADR are not the totality of methods at the disposal of litigants to resolve a dispute and so the absence of use of ADR should be automatically considered as a failure to seek to resolve disputes and reduce costs by the parties.

For example we would observe that arbitration has been set aside as a means of ADR for this analysis yet there is currently a move at a pilot phase within personal injury at least to increase use of contractual arbitration as an alternative to court. This has been led by an initiative going by the title "PiCarbs" involving a small group of commercial insurers and claimant and defendant law firms. Whilst we have chosen to remain outside the pilot phase, we consider this to be an innovative development worthy of monitoring and of course providing an alternative method of dispute resolution to court proceedings (whereby the parties have agreed contractually that PiCarbs will be the means by which the dispute is resolved in lieu of proceedings). We would therefore question whether it is wise to completely disregard arbitration as a means of ADR which has the potential to reduce the volume of disputes reaching the court (or a final hearing) and suggest that this needs to be brought into consideration.

Making ADR culturally normal

10.3. Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?

Response: The best means to achieve dispute resolution is unlikely to be uniform across different subject matters/ areas of practice. An attempt to introduce ADR into a process which is not tailored to that practice can lead to confusion, cynicism or indifference and may add to costs. For example, whilst mediation could be appropriate in some forms of medical negligence dispute (where an apology or face to face engagement between the parties has a remedial benefit) in the vast majority of personal injury and clinical negligence disputes, settlement is often achieved through the mechanism of Part 36 offers or lawyer-to-lawyer settlement meetings and there is no reason to expect that mediation would be a more effective device to achieve the outcome of an agreed damages settlement. It is essential to use the right format of dispute resolution that suits the dispute; a particular form cannot be a sensible option for all dispute types.

It should also be understood that many parties to a dispute come to that dispute without an expectation that they should seek compromise but rather by a sense that their legal rights have been infringed and redress is sought / expected and so the idea of ADR is not necessarily present in the litigant's mind from the outset. When presented late (later) in the process with an alternative means of resolving the dispute, the litigant may lack understanding as to why this would be considered more appropriate than a decision by a court of law which culturally many in the UK come to expect even before receiving legal advice. Thus legal advisors have an educational journey to take the client along. This may be less so in certain areas than others.

Further, ADR can only be effective when both parties are prepared and in a position to negotiate. There are several areas of litigation risk in medical negligence: establishing breach of duty; what does the factual causation picture look like?; what does medical causation look like?; only once this framework is established can accurate quantification be undertaken. All of these issues mean that both sides are only likely to engage in ADR once they are comfortable to do so. Claimants prepare their case early – but can face criticism for running up costs early. Defendants hold off preparing their case until they know what case they must meet – but can face criticism for not admitting early or being prepared for ADR. Therefore, all in all, it is suggested that it is not that ADR is not understood, moreover, that the pace of case preparation is different on both sides and only when this is more synchronised can ADR become truly effective in medical negligence in particular.

10.4. How can greater progress be achieved in the future?

We have chosen not to separately reply to this question as the replies to the following questions cover this debate. It will be seen that we are in favour of setting out more clearly where cost penalties may be invoked, allowing a more pronounced role for ADR in pre action protocols and court directions, and recognising valuable initiatives such as the APIL/FOIL Serious Injury Guide which encourages continuous collaboration between the parties to a dispute.

Encouraging ADR at source

10.5. Is there a case for reviewing the operation of the consumer ADR Regulations? Why has their impact been so limited?

Response: Whilst we are not engaged in the process of routinely giving direct advice in this area we do offer the following commentary. We consider that it is vital that an individual, who will most likely be unrepresented and without legal advice initially, is free to engage in an independent complaints process for example or to seek legal advice on how they may ensure that they secure proper redress for any breach of contract or other legal harm. We would be opposed to any reform that would compel a consumer to resolve a potential claim through a third party process without them having an opportunity to understand their legal rights and take other action if so desired, simply to achieve cost savings for the courts or defendants. The right to legal redress and access to justice is a fundamental cornerstone of our society and legal system.

ADR at source may be appropriate where there is a liquidated sum. For unliquidated damages, such as PI claims, ADR at source will very rarely be appropriate.

10.6. Should the Courts treat a failure to use an appropriate conciliation scheme as capable of meriting a cost sanction?

Response: Not where an individual claimant has not had access to independent legal advice at the time. For the reasons cited above at 10.5 we would be generally opposed to this. There may be certain types of dispute, where both parties are corporate entities for example, where this may be more appropriate, but this would take the discussion outside the ambit of "consumer ADR regulations" presupposed in question 10.5

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

Response: We do not propose any specific changes but would make the general observation that consumer focussed information (where a dispute or complaint arises) always emphasises both the right of the individual to seek independent legal advice and the potential value of consumer ombudsmen services which could offer an early resolution of the dispute particularly for non-complex and low value (<£1,000) disputes.

Encouraging ADR when proceedings are in contemplation

10.8. Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings? 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?

Response: The use of ADR on a mandatory basis prior to issue of proceedings is superficially attractive but can be fraught with problems. A party may be unprepared to resolve a dispute at that stage due to timing, outstanding disclosure (which may only be available after the commencement of formal legal proceedings) or a prior history of difficulties in the pre-litigation process. Compelling ADR against such a background may simply result in unnecessary cost if unwilling parties (on the "it takes two to tango" principle) are compelled to engage in a process that they are unprepared to make concessions in. There must be recognition of the fact that with many disputes, there is inequality of means and access to evidence between parties until the court has mandated an exchange process and that the complainant has the burden of proof. Unsuccessful premature ADR may have to then be repeated at a later stage in proceedings when both/all parties are ready to engage. This would lead to duplication of cost, and the negativity of the first failure may impair the chance of a positive and successful negotiated outcome for the second. Further, there are instances where a claimant is compelled to litigate due to limitation periods and the law currently does not provide any protection that extends limitation solely for the purpose of ADR (we have little or no practical experience of the exception to this cited in the report). For those reasons, whilst we consider that the Court should retain the power to reflect an unreasonable refusal to engage in ADR in terms of costs recovery, mandatory ADR would in our view be a step too far in all areas in which we practice.

Noting our opposition as above, if there is to be a strengthening of the tools to focus the minds of litigants on ADR prior to proceedings, the CPR should set out more clearly what cost penalties the Court will impose if it considers that a party has unreasonably frustrated attempts to engage in ADR which may have a greater bearing on parties than the current wide discretion as to costs.

We consider that the report has not identified with any degree of confidence why compulsory ADR would necessarily be successful. Whilst the report concludes the opposite, i.e. that there is no evidence that mandating ADR is ineffective, this ignores the cited experience of the Central London County Court pilot of 2004-05 which it is accepted in the report was broadly unsuccessful and so indicating the opposite conclusion to that reached. We would therefore suggest that if policy was to head down this route, a pilot of compulsory ADR would have to be conducted so that more robust results than the 2004-05 outcomes can be demonstrated to give greater confidence to the process before this is widened out to all litigants (or all litigants in a class).

If there is compulsion to pilot ADR pre litigation in medical negligence case our main point on this would be that the NHSR must undertake adequate liability investigations to put themselves in the position of making concessions and offers. This requires a cultural change. If compulsory ADR was introduced now, it would be a waste of costs because the NHSR are woefully unprepared to address issues in depth pre issue of proceedings.

10.9. Can the prompts towards ADR in the pre-action protocols and the HMCTS Guidance documents be strengthened or improved? Should a declaration be included in the claim document in the terms of **R9** (see paragraph 9.19 above)

Response: The parties should be allowed to state what steps have been taken to narrow the issues or engage in resolving the dispute without being limited to simply citing formal ADR which may not always be appropriate for every dispute. For example, with high value personal injury claims the parties may have complied with the APIL/FOIL Serious Injury Guide and so achieved a good level of agreement and narrowing of issues/saving of costs without any formal ADR at all, yet this is not currently recognised.

We agree that Pre Action Protocols should achieve a reasonable measure of consistency (but recognising that different subject areas may warrant a slightly different response, so need not be identical) and we see the PAPs as an opportunity to set out in clearer terms than there is now the conduct expected of parties not just in the operation of formal ADR but in the engagement and co-operation of parties to a dispute in narrowing the issues, disclosing pertinent documents and seeking agreement on the management of the dispute (such as engagement of experts). The aforementioned Serious Injury Guide, not presently endorsed or recognised in the CPR, is a good industry example of a best practice requirement that manages the full engagement between litigants and not simply mandating forms of ADR. There is no reason in principle why the costs standards in CPR Part 44 cannot be made clearer that pre-action compliance with such requirements of PAPs will be an express factor for consideration in the award of any post-issue legal costs order (in the exercise of the Court's discretion).

In medical negligence cases, ADR would be most likely be ineffective at least until following exchange of medical evidence between the parties. In appropriate cases, there are costs savings to be made at that point because once the case enters the expert meeting phase the majority of costs will have been incurred pre-trial. With a view to bringing about swifter and less costly resolution of cases, ADR post-exchange of medical evidence but before completion of joint statements would achieve real savings if that were possible, which it will not be for every case.

If the Defendant refuses to engage in ADR in a medical negligence case they should be required to certify:

a) That they have obtained independent expert evidence and they have reasonable prospects of defending all issues in the case.
b) Why ADR is not appropriate at this stage.
c) When they would propose to undertake ADR.

If the Claimant refuses to engage in ADR in a medical negligence case they should be required to certify:

a) Why ADR is not appropriate at this stage.

b) When they would propose to undertake ADR.

10.10. Are MIAMs on the family model a practical solution at the pre-action stage? Have the Working Group over-stated the practical difficulties of introducing civil MIAMs? Have they under-stated the potential advantages of doing so?

Response: MIAMs were introduced for a very particular reason which suits the process of disputes involving family proceedings. Whilst they offer a model, requiring such an engagement for all civil proceedings will present significant challenges given the wide range of expertise that would be required and resourcing. We consider that each type of dispute requires its own solution and so would caution against this type of approach. We agree with the concerns expressed in the report around the practicalities of this.

Encouraging ADR during the course of the proceedings

10.11. 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?

Response: We agree that this is the *earliest* opportunity in proceedings when the timing of ADR can be usefully considered. However we do not agree that this will routinely be the best time for ADR to occur, since every case is different and there could be factors such as non-disclosure that may doom ADR compelled or encouraged at that stage to fail. We refer to our reply at 10.12 below and 10.9 above in respect of medical negligence cases where exchange of medical evidence is important for each party to understand the issues in the case.

In practice, we find it useful for the Court to include a timetabled meeting of the parties scheduled into directions when those are considered. This may not be ADR as defined in the report, or the Court may order that ADR as defined be used in the alternative to a meeting of the parties, but at least then the timing can be planned at a point sensible, and sensitive, to the needs of the *particular case* depending on what steps will have been completed by that point, and what may potentially be saved in terms of further legal costs thereafter. Our recommendation is that the parties and the court be required, at the first directions hearing to address how a narrowing of the issues or settlement might be achieved and to make suitable directions accordingly, by amending the CPR case management provisions e.g. Part 26.

10.12. 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?

Response: No. We find it hard to envisage how this will work in practice in cases that are not suited to be resolved at the point in time where Type 2 compulsion is ordered. For example, if the Court were to make that order for ADR following filing of direction questionnaires but before ordering exchange of evidence (and other directions), one or more of the parties may be unwilling to make compromises that they otherwise would if they had full production of disclosed documents and evidence at a later stage, thus rendering the ADR more likely to fail. In a sense, the later in the process ADR is staged, the better informed the parties will be but the less the potential saving in cost and time which is why it would be hard to engineer a point that would be most effective in every case (willing parties may otherwise engage in

negotiation or ADR at an earlier stage but could withhold, knowing that they may be obliged to repeat it at a later stage if unsuccessful). It is difficult to envisage how litigants conduct would respond in the light of mandated ADR at any particular point and what impact this may have on the further conduct of the case. We would recommend a more flexible approach subject to the overriding requirement that in every case the court must make provision in directions.

10.13. 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?

Response: We do not agree that any litigation sector in which we presently specialise is suitable for compulsion. In some areas, particular types of case may be more attractive for ADR but that does not render all cases in that sector suited to compulsory ADR at a particular stage of the case. For example in medical negligence matters, a mediation may be successful in some cases but in others where there is an outright denial of liability and/or causation, and the Defendant has no intention of admitting anything, ADR is very unlikely to achieve an outcome that a judicial hearing of the evidence will determine (one way or another).

As stated above, two factors must be borne in mind if there were to be compulsion of ADR pre proceedings (or at any early stage in the proceedings):

1) Front loading of claimant costs will occur – it will only be possible to enter meaningful negotiations and conclude a case if appropriate evidence has been commissioned and the client advised accordingly. There will undoubtedly be longer term cost savings through litigation being avoided but pre ADR costs will be higher.
2) Both parties, but particularly the NHSR in medical negligence claims, must be adequately prepared at the time of the ADR. At present in the latter group, pre litigation ADR would be ineffective because the NHSR prepare so many Letters of Response without full and independent expert evidence. A change in culture and strategy is necessary for this to be effective.

10.14. 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?

Response: There may be little practical difference and we do not consider what would be achieved. If a case has not otherwise settled, then the parties will not still be engaged in the process. For some, this amounts to compulsion to resort to ADR. However we concede that "rebuttable" implies that the court has discretion and so this does not amount to compulsion where the court departs.

10.15. Would it be beneficial to introduce a Notice of Mediate procedure modelled on the British Columbia system?

Response: The British Columbia practice of issuing a Notice to Mediate is interesting and we imagine that it may well be used tactically for example by a litigant faced with dogged resistance from the other party to enter into negotiations. It is important that any such process is designed to achieve a genuine outcome and not simply used by one party to out manoeuvre another. For example, a party who has not yet been compelled to disclose documents by court order may seek to pre-empt matters by serving such a notice before any order from the Court compelling disclosure or other steps and so forcing the opponent to

the table when it is known that they are weaker than they will be at a later point (or at least setting up a cost argument for a later stage if opponent declines the Notice at that point). We would want to understand from British Columbia practitioners in more detail than the report provides *how* such notices have been used in reality and what pitfalls have been experienced if any, however in principle we could foresee that the availability of this process with costs sanctions could have its uses (subject to any procedural changes that would initiate greater court intervention). It would also be important to understand what effect service of such a notice could have pre-proceedings as in general it would not unless the Court some mandates it through a pre-action procedure that would trigger sanctions post proceedings.

10.16. 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?

Response: We agree that if progress is to be made in encouraging greater use of dispute resolution (ADR or negotiation) then some form of interlocutory appraisal of the efforts of litigants in this direction should be "beefed up" in preference to just looking at the court's powers in making final cost orders. This could be achieved by the Court recording a note as to the provisional findings as to the parties conduct towards ADR/settlement in the directions order, which the Court is obliged to consider when making a final order as to costs. A similar process happens now with costs case management under CPR Part 3 where a Judge may find (for example) that a party's incurred costs are disproportionate and makes an adverse comment for consideration by the costs judge in the CCMC order.

10.17. 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)?

Response: We consider that this is possible but there are serious risks of injustice if a cost sanction is fully applied on interim findings which may later be viewed differently by a costs judge in a more in depth context or analysis and for that reason we prefer the concept of a Judicial "notice" or comment that is intended to guide the final order as to costs as outlined in 10.16 above.

Costs sanctions

10.18. 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?

Response: Yes, we consider that this is the most effective policy tool that the Court has at its disposal short of mandatory ADR and we support the availability of this for a number of reasons. Firstly, because it offers flexibility and the Court can apply a penalty (or not) according to the specific circumstances of, and conduct in, each dispute. Secondly because cost consequences are a motivator for litigants and their legal representatives are professionally obliged to give advice as to cost consequences. Thirdly because we oppose the mandatory imposition of ADR and the availability of the costs sanction enables the court to avoid this more drastic (and potentially ineffective) solution.

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

Response: The Halsey guidelines appear to permit a high degree of subjectivity of the declining litigant based on their perception of the issues in the case at the time. Whilst they comprise a set of useful indicators for the Court to consider, we would agree that a Court should not be constrained to disregard other factors which may in fact drive a conclusion that a decision not to engage in ADR was unreasonable. We are not certain that simply having a longer list is the better approach; we simply suggest that too much emphasis should not be given so that these factors displace any other consideration which may in fact warrant a different finding by the Court.

ADR and the middle bracket

10.20. 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?

Response: We agree that this bracket may benefit from greater use of ADR. We do not tend to agree with the inclusion of online portal processes as ADR in same manner as mediation and early neutral evaluation, rather we see this as a method of negotiation within the claim processing (without the portal, an offline exchange of a similar sequence will still lead to case settlement for many lower value claims). It seems illogical to include online portals within the scope of consideration but not offline negotiations and settlement meetings. Mid value disputes are not often managed in an online process and we suspect that the absence of a portal process may confuse this analysis (is there evidence that cases in this value bracket are less likely to settle by a particular stage than lower value claims?). However there is clearly a challenge with proportionality in some of these claims and so greater recourse to settlement would help to reduce some costs. A video or telephone settlement meeting might be a means of achieving a lower cost result in these cases although we suspect that they are unlikely to be as effective as a "whites of the eyes" meeting.

10.21. 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?

Response: We have answered this within our reply to 10.20 above.

10.22. Could the ADR community do more to meet this unmet demand?

Response: We are not able to reply in detail on this point but the ADR community would perhaps need to concentrate on ensuring that the costs of their intervention were proportionate to the value of the dispute and so their charging models should build in sufficient flexibility to weight charges to more complex or higher value disputes to reduce the cost burden in lower value cases.

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

Response: Yes, as we have already remarked in our reply to the Fixed Recoverable Costs report issued by Lord Justice Jackson, there is no mention made of formal ADR in the report recommendations as to costs and so no encouragement for it, although there is provision for the cost of counsel attending a settlement meeting to be recovered by the successful party which of course is welcomed.

10.24. 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?

Response: Due to the prevalence of other means of resolving disputes we are not frequent users of formal ADR (mediation) services although use them on appropriate cases in the minority of claims. A useful example of successful mediation for mid value cases is clinical negligence cases where the claimant seeks a remedy or outcome other than damages alone such as a chance to talk to the clinical team or Trust management and a formal apology or explanation and where the damages are relatively modest. We do not measure the numbers but would suggest that fewer than 5% of our clinical negligence cases involve formal ADR and less than 1% of our multi track personal injury cases. Nonetheless we would reflect that fixed fees for an ADR engagement would be an important element where the fees paid by the successful party are to be fixed by future Government reforms and so it would be essential for the fees of ADR providers to provide certainty to litigants.

10.25. 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?

Response: We do not have sufficient experience of all of these measures to make a useful comparison.

Low value cases/litigants without means

10.26. 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?

Response: We have commented in separate consultations on the proposed extension of the small claims limit in the personal injury sector and our significant concerns around any such proposed increase. We some involvement in the small claims meditation service on behalf of clients and in that limited experience the quality and outcomes are mixed with success dependent upon the willingness of both parties to engage. In some instances, appointments have been cancelled at short notice. Any extension of this service would have to be accompanied by a significant increase in the funding available to ensure that the scheme could meet the increased demand and that those delivering the service were adequately trained for the task.

10.27. 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?

Response: Resourcing in this area is very challenged and at present, particularly for claims managed through the online claims portal for example the process is focussed on an exchange of offers rather than a formal mediation or other ADR, the former is effective in over 50% of the claims to forestall the claim from reaching Stage 3 (court) and so clearly there is some scope for improvement but a great deal of lower claim personal injury claims are resolved as it is under the current method pre-issue of the Stage 3 claim.

10.28. How can we provide a sustainable, good quality, mediation service for this bracket? Is pro bono mediation viable?

Response: We consider that pro bono mediation may be a challenge given that this concerns the large volume of claims disputed and a pro bono service may be difficult to maintain in a sustainable manner if demand were to increase. If the Government is committed to increasing quality ADR in this sector then there is no alternative but to ensuring that it is properly funded and professionally provided by an established ADR provider but to a model that reduces cost. Mediation without reliable well trained mediators may be pointless, and we are unsure of the extent to which relying only upon pro bono support will be necessarily deliver what is required.

10.29. What are the other funding options available?

Response: There is no magic bullet to alternative funding and any model must recognise that the cost of providing effective ADR must be built into the costs that are payable by the losing party within the process where it is used. Seeking to achieve anything is likely to fudge the issue and if ADR is not properly funded then it will most likely become ineffective or unused. Why would a litigant spend money on ADR if a fixed or restricted cost model will not cover the cost and an outcome to the dispute could be achieved in a later stage to the process which does recover (fixed) costs?

10.30. Do consultees agree that special ethical challenges arise when in particular mediators are dealing with unrepresented parties?

Response: Yes and in those cases, a mediator's role will change. We would go so far as to suggest that a mediator should decline to continue with a mediation if they recognise that a party would be better served by having some representation and that party agrees to at least investigate that option. If that party is unable to fund legal representation then a mediator should ensure that if the ADR continues they will be able to assist the unrepresented party in achieving a fair result whilst staying true to their professional responsibilities as an independent actor. Appropriate industry guidance should properly address such scenarios and some means of auditing performance on a confidential basis would ensure that good practice is implemented in this regards.

The on-line opportunity

10.31. 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?

10.32. 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?

10.33. 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?

Response to 10.31, 10.32 and 10.33: we do not generally directly engage in representing clients outside of the personal injury sector in online dispute resolution, and in the latter this is through the well-established practice of portal claims for low value road traffic accident, employers' liability and public liability claims. We monitor developments in this area with interest but share many of the concerns which have been well ventilated online with this area and especially around the reliability of IT portals, the accessibility of this type of interaction for vulnerable individuals who may be unfamiliar with web based systems, or where the language provided is not their first language or where they do not have secure access to personal broadband connectivity. ADR otherwise relies upon a personal element of wanting to settle a case and ORD depersonalises this to a certain extent. In general, providing that there is an "opt out" provision for those unable to engage in online communication we would generally support a pilot of the extension of ODR but this would be better restricted to lower value non-complex disputes and the right of the complainant to seek representation/ advice must not be entirely displaced by the process.

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

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

Response: We do not offer a separate response to this issue as this is not a significant area of our practice experience. As a common sense observation would suggest that once legal representation has been arranged and the issues are being defined in the course of a managed dispute, consumer conciliation not geared up to ADR in the context of litigation may be ill-equipped to deal with the issues and complexity that has evolved by that point and that litigation modelled ADR would be far more appropriate in most such cases.

Challenges for Judicial ENE

10.35. 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?

10.36. 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?

Response to 10.35 and 10.36: Our practical experience of JENE is very limited and so we are unable to reflect in great detail on this. We would suggest that this is an area that would benefit from a more developed pilot given the limited experiences of this in the industry although a clear framework would need to be drawn around the pilot to determine the status of the evaluation in pilot cases. We would imagine that JENE has potential benefits but to be most effective, should be undertaken when certain minimal information can be provided to the Judge by all parties to aid the quality of the outcome, and that the earlier the JENE is undertaken the more advisory or indicative the process is, rather than determinative.

Challenges for online dispute resolution

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

10.38. Do consultees agree that specified standards for ODR would assist its development and help deal with any stakeholder reservations?

10.39. What are the other challenges that the development of ODR faces? How else can ODR be rendered culturally normal?

Response to 10.37, 10.38 and 10.39. We would refer in part to the comments made at para 10.33 above. We have reservations about any rapid or wide extension of ODR unless these issues can be adequately addressed, and in the vast majority of cases in which we advise (personal injury, clinical negligence, commercial litigation, probate dispute, judicial review etc.) we consider that it is likely that the issues are too complex and the need for evidence to great to render ODR of much practical application at this stage although we are interested in developments in software platforms and third party host sites and will continue to monitor for positive opportunities.

Challenges for Mediation

10.40. 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?

Response: This a difficult area for sweeping conclusions as the quality of mediation varies and inevitably legal advisors have had both good and bad experiences. We suspect that with increased uptake of mediation services, the sector will develop and confidence generally would thus increase, but subject to the comments which appear at 10.42 below.

10.41. How do consultees think that these concerns can be reassured and addressed?

10.42. Is there a case for more thorough regulation? How could such regulation be funded and managed?

Response to 10.41 and 10.42: It is essential that mediation is conducted by trained and experienced mediators and that there should be a common accreditation and regulation framework governing mediators.

10.43. What other challenges are faced by mediation?

Response: We would observe that there should be a clear route for the recovery of mediation costs where the parties are unsuccessful and recourse to litigation (in respect of the same matter) becomes necessary.

Contact details

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