



The Law Society

**Response of the Law Society of England and
Wales to the Civil Justice Council ADR Working
Group Interim Report**

December 2017



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ADR and Civil Justice – Interim Report

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The Law Society of England and Wales is the independent professional body that works globally to support and represent over 170,000 Solicitors, promoting the highest professional standards and the rule of law.

We are supportive of the work being done by the Working Group. We do not propose to answer each of the questions posed by the Group but do wish to add comments on the provision of ADR in the Civil Justice system.

We would be happy to engage with the Working Group on the next iteration of it's report.

Summary

1. The Society agrees with the working group that the use of ADR in the Civil Justice System remains patchy and inadequate.
2. We remain supportive of the idea of a single complaints helpdesk that could signpost consumers to the correct ADR provider. We accept that the current regulatory landscape is complex for consumers and that a single point of contact would be helpful.
3. We consider that signposting consumers with small claims to ADR pre-issue should be done in a clearer and more comprehensive manner. For example, webpages such as <https://www.gov.uk/make-court-claim-for-money> should remind litigants in person of their options for ADR.
4. We agree with the Working Group that mandatory ADR as a condition of issuing proceedings is not appropriate.
5. We believe that ADR is not used sufficiently across the board. However, we disagree with the view that there are not ADR procedures available to cases below £150,000. We are aware of mediation procedures that are proportionate for cases of modest value.
6. Any amendment to the use of ADR should be made with a view of linking to ongoing reforms such as Court modernisation and Jackson's fixed costs proposals to ensure that it remains relevant in a changing practitioner environment.
7. In ensuring ADR's fit with ongoing reforms, we have also considered how existing procedures will be impacted and whether they remain fit-for-purpose. With this in mind, we consider that the Small Claims Mediation Service will not cope with the volume of complexity of claims if the Small Claims limit for Road Traffic Accident personal injury claims is increased to £5,000.00.
8. We recently issued guidance to firms on how to comply with the ADR directive¹. We are fully supportive of Online Dispute Resolution (ODR) being used regularly to try to settle

¹ <http://www.lawsociety.org.uk/support-services/advice/articles/changes-to-client-care-information-and-leo-time-limit/>

disputes. Consumers and legal professionals alike should both be aware that the Court system is a last resort.

Cultural normality and signposting

9. Both the legal profession and consumers will need to buy into the use of ADR as a method to resolve disputes rather than proceeding the whole way through the Court system.
10. Consumers are largely aware of schemes such as the Legal Ombudsman and Financial Ombudsman Service. However, in other niche areas there is not widespread knowledge of what ADR service may be available. Greater signposting to ADR schemes would assist.
11. Greater signposting can be achieved through a single online complaints helpdesk that would feed consumers into the appropriate ADR scheme.
12. It can also be achieved by appropriate and highlighted wording on relevant forms, websites and documents both prior to the issue of proceedings and within the conduct of proceedings.
13. We consider that consumer guides and documentation should point to ADR and repeat that Court action is a last resort wherever possible. We also consider that at the point of issue the consumer should once again be notified of the option to pursue ADR.
14. Public Legal Education of ADR and its benefits could also be of assistance when looking to make ADR culturally normal.

Encouragement of ADR when proceedings are in contemplation

15. We do not consider that ADR should be made mandatory prior to the issue of proceedings. We believe that if ADR was mandatory in all circumstances it would frustrate the principle that litigants should have unimpeded access to the courts.

Encouraging ADR during the course of proceedings

16. We consider there is a good argument for active case management and for the judiciary to encourage ADR once a claim has been allocated.
17. We are not in agreement with compulsory ADR as a condition of matters progressing further. Parties with a good reason to decline ADR should be able to do so.
18. Bespoke post issue ADR schemes for certain areas such as Clinical Negligence may well assist in encouraging take up of ADR within proceedings. It is noted that NHS Resolution have a bespoke mediation service, although it doesn't appear to be widely used at this time.
19. We are aware that the Civil Justice Council are forming a working group to take forward Lord Justice Jackson's proposals for a bespoke procedure for Clinical Negligence claims of up to £25,000.00. We expect the group will give consideration to how ADR might operate within their procedure.

20. Behavioural drivers must be considered when thinking about how and when ADR can be encouraged. This will be especially relevant should Lord Justice Jackson's proposed fixed costs reforms proceed.
21. Within Lord Justice Jackson's proposals for the intermediate track there are ring-fenced fees for ADR at mediation or joint settlement meetings. The ring-fenced costs may assist in normalising ADR within proceedings for cases up to £100,000. Some analysis needs to be done on the amounts set aside for ADR and the service that can be provided for the sums suggested.

ADR and the middle bracket

22. We expect the Working Group will receive direct submissions from mediation groups on this question but note that the Centre for Effective Dispute Resolution (CEDR) and others offer fixed priced mediation services that cover cases within the identified middle bracket.
23. The issue at hand may not be an unmet demand but again will relate to sign-posting to services which already exist.

Low value cases/litigants without means

24. If current government proposals to increase the small claims track to £5,000.00 for Road Traffic Accident (RTA) personal injury claims and to £2,000.00 for Employers and Public Liability (EL/PL) personal injury claims proceed then there will be a significant increase in the number of small claims progressing through the courts.
25. The original government impact assessment looking at increasing the small claims limit noted that 96% of RTA claims would be captured by an amended small claims limit². This equates to 525,000 additional small claims before any EL/PL claims are considered.
26. We do not consider that the existing Small Claims Mediation Scheme could cope with the increase in claims that would wish to use its service and nor is it set up to deal with the complexity of disputes which arise in RTA claims.
27. It may be appropriate to consider a bespoke Small Claims Mediation Service specifically for use in personal injury matters on the small claims track. We recognise that the cost of such a scheme may be a difficult hurdle to overcome in a similar fashion to the Working Groups consideration of Civil MIAMs.
28. We do not consider that Pro-Bono mediation is appropriate to fill any gap in this area.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/581388/whiplash-impact-assessment.pdf at Page 39 - Item 1

Pre-Action Protocols/Portals

29. Pre-Action Protocols appropriately encourage ADR. We consider that attempts to make a stronger recommendation short of compulsion in the wording would be helpful.
30. The portals for RTAs and EL/PL claims in personal injury are stand-alone pre-action routes to settlement. They are currently designed for use by practitioners. Their development into consumer facing portals may well provide good insight into how ODR will be used by consumers in the future.

Online Dispute Resolution

31. We have issued guidance to our members setting out how they are able to comply with the EU ADR Directive. We are supportive of the increased use of ODR in the future.
32. The use of ODR ties in with the Online Solutions Court but will also provide an alternative avenue for claims which do not fit into the bracket of less than £25,000.00.

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