ADR AND CIVIL JUSTICE - INTERIM REPORT OF CIVIL JUSTICE COUNCIL

WORKING GROUP OCTOBER 2017

This is the response of NHS Resolution (formerly NHS Litigation Authority) to the consultation questions in the above report. We shall deal with each in turn:

1. **The Working Group believes that the use of ADR in the Civil Justice System is still patchy and inadequate. Do consultees agree?**

   This depends upon the definition of ADR chosen. In our view, ADR encompasses both negotiation and arbitration, but we note from paragraph 3.16 that the Working Group has excluded these from its consideration.

   We believe that negotiation is usually the optimum way to resolve claims. It is cost-effective and results in thousands of our claims being concluded per year. Indeed, fewer than 1% of NHS Resolution cases go to trial on liability or quantum.

   We would however agree that the use of mediation is patchy. As referenced in the consultation, we have our own mediation scheme and are very keen to spread the message that mediation is an excellent way of resolving problematical cases, especially those which entail issues over and above money. Take-up from claimant lawyers is indeed patchy. For example, in our recent mediation pilot, of the 91 offers of mediation made, over 1/3rd (32) were either declined or the claimant's lawyer did not respond.

2. **Do consultees think that the Working Group has ignored important questions or precedents from other systems or that there are other areas of enquiry with which we need to engage?**

   No.

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

   This may be because of the different forms taken by ADR in its widest sense. However, as we have noted above, negotiated settlements are commonplace in clinical negligence, including cases of the highest value.

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

In order to make ADR (of whatever kind) culturally normal, we suggest that there be a requirement to engage in the process prior to issuing proceedings. By this we do not mean that there should be a mediation in every case, but rather attempts at ADR in whatever form is most appropriate for the case, including negotiation, to narrow the issues. Policing of such attempts would probably have to be undertaken by the procedural judge in the first hearing after commencement of proceedings, and the remedy could be by way of costs sanctions.

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

We pass on this question as it is not within our remit.

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

Please see our answer to question 5.

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

The Pre-action Protocols with which we deal all contain recommendations regarding ADR in the pre-litigation stage. Taking further the point we made in response to question 4, we believe that the protocols should be strengthened in terms of applicable sanctions in the event that a party does not engage in ADR. Additionally, there should be encouragement of as many relevant groups and bodies as possible to promote ADR. Such bodies could include consumer and patient groups, the Law Society, the Bar Council, the BMA and the Medical Defence Organisations.

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?

We very strongly advocate the disclosure of liability and quantum reports prior to the issue of proceedings. That would represent a true “cards on the table” approach and accord with the spirit of the Woolf reforms in 1999.

Some practicalities need to be ironed out. For example, there might perhaps be a compulsory suspension of limitation for a defined period pending the use of ADR. By ADR in this context we include settlement negotiations. Alternatively, rather than compulsorily extending limitation, it could be that the period between issue and service of proceedings is extended pending the undertaking of ADR (again, to include

settlement negotiations).

9. **Can the prompt 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?**

   Yes. We endorse the recommendation referred to, save that we would substitute the word "should" in the first line with "must". The introduction of such wording ought to stop some litigation being commenced.

10. **Are MIAMs on the family model a practical solution at the Pre-Action stage? Have the working group overstated the practical difficulties of introducing civil MIAMS? Have they understated the potential advantages of doing so?**

    We do not answer this question as it is outside our specialist areas.

11. **Do consultees agree with the Working Group that the stage between allocation and the CCMC is the best opportunity for the court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?**

    This period is a good opportunity for ADR, but in our view ADR should often take place earlier as stated in our response to question 7.

12. **Do consultees agree that those members who favour Type 2 compulsion in the sense that all claims are required to engage in ADR at this stage as a condition of matters proceeding further?**

    We repeat the view that ADR, if it is defined broadly, including settlement negotiations, should be compulsory at this particular stage.

13. **If compulsion in particular sectors in the way forward, what should those sectors be?**

    We agree that clinical negligence should be included, together perhaps with Employers' Liability and Public Liability. However, in the latter categories, there are many low-value cases and those up to £25,000 already have their own portal. Perhaps therefore EL and PL cases above £25,000 should have the proposed requirement.

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?**

    No.

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

Yes - we believe that this might be a beneficial introduction. However, there would need to be a cooling-off process for unrepresented claimants. Under the NHS Resolution scheme, each party normally bears 50% of the cost of the mediation, save that where a claimant is without legal representation, we will meet 100% of the cost. There is a potential danger, if the British Columbia system were to be introduced, that some claimants in person would take advantage of it by effectively forcing a mediation to be held, the costs of which they know they will not have to contribute to whatever the outcome.

Where cases which appear totally without merit to the defendant are the subject of a Notice to Mediate, one way around the potential for abuse might be to ask the mediator to move to "evaluative" mode.

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 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?**

As indicated in response to earlier questions, we agree that the court should assess critically the parties' ADR efforts at the points referred to in those questions.

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?**

We do not agree that these alternatives are necessarily incompatible. For example, the court might order a costs sanction against a party wholly unwilling to engage in ADR, and then order ADR to take place.

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?**

Yes.

19. Do consultees agree with the working group that the *Halsey* guidelines should be reviewed?

We do not fully understand this question because *Halsey* is a decision of the Court of Appeal and can therefore only be overturned by the Supreme Court or by statute.

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?

Perhaps - but not in respect of NHS Resolution cases.

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?

No - we do not think this is the case because NHS Resolution already has in place a mediation scheme which covers (inter alia) cases within this bracket. Furthermore, if the definition of ADR is extended to include settlement negotiations, we settle numerous cases within this tranche by such means.

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

Perhaps yes; but as noted above our own scheme for mediation already meets this demand.

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

We do not fully understand this question because it is not clear to which fixed costs scheme the question relates. Fixed costs do not apply to clinical negligence at present. However, following a Department of Health consultation and Sir Rupert Jackson's subsequent recommendations on the issue, the introduction of fixed recoverable costs for clinical negligence is likely. Under that procedure, we would expect that the costs of ADR would be recognised.

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?

Our own mediation scheme is being increasingly used and as at the end of November 2017 we had mediated 99 cases in slightly less than a year. We regard that progress as encouraging.

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?**

    We pass on this question.

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?**

    Yes.

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?**

    Our own mediation scheme includes low value cases and litigants without means. Indeed, as mentioned above, where claimants without legal representation are involved our scheme provides for NHS Resolution to meet 100% of the costs of the mediation, irrespective of the outcome.

28. **How can we provide a sustainable, good quality mediation service for this bracket? Is Pro Bono mediation viable?**

    Our own scheme provides such a service.

29. **What are the other funding options available?**

    Insurers might introduce a scheme similar to ours.

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

    Yes. Mediators are not permitted to give legal advice and that can produce ethical challenges, because unrepresented parties may well benefit from legal advice during the course of a mediation.

Questions 31-34

We pass on these questions.

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 regulation/quality risk?**

    We believe that in theory this is a good idea if resourced appropriately.

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?**

    The biggest potential difficulty with JENE is that at the stage at which it is envisaged, the judge will not have all the evidence which would be available at a trial, and furthermore the parties will not have the opportunity to make representations.

    Consequently, this form of ADR has limitations which mediation does not.

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

    Possibly. Everything depends upon the functionality and resourcing of any proposed system.

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

    Yes. Definitely.

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

    We believe that there are significant challenges because any system of ODR assumes that people will want to use it and that they have the ability to do so. As we commented in our response to the Briggs proposals, we have reservations over the development of an on-line court which may disadvantage those who lack IT literacy. This group includes many older people and those who have problems with literacy. Put another way, an ODR system, if made compulsory for certain disputes, would render some disadvantaged sections of society unable to participate in it and thus cause them even greater disadvantage. It will therefore be essential for some alternative to ODR to be available in order to prevent such people being denied justice.

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 stake holders?**

    We find this question impossible to answer because we cannot speak for judges or

other professionals. For our own part, as professionals within the dispute resolution system, we are fully supportive of mediation and do not agree at all that it entails "inconsistency and unreliability" as alleged in the question.

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

We pass on this question for the reasons explained above.

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

If this is a reference to regulation of mediation providers, we would not disagree with the proposition although there is a danger that excessive regulation would cause some providers to leave the market, and thus produce a shortage. Funding for additional regulation might be by way of a levy upon mediation providers, but that cost would necessarily be passed back to users of the service and would therefore be counter-productive in the sense of discouraging parties from proceeding to mediation.

43. What other challenges are faced by mediation?

We think one of the biggest challenges is that the parties or their lawyers may consider that mediation will expose weaknesses in their case, and thus oppose proceeding down that route. Normally, practical experience of the way in which a mediation actually runs causes parties and their lawyers to be more favourable towards the process; the challenge is to encourage those who have not yet participated to take the first plunge. With that in mind, we have set up a mediation panel and are actively promoting and incentivising mediation both with our own lawyers and those who act for claimants.

NHS Resolution
15th December 2017