



# ADR and Civil Justice

CJC ADR Working Group

Final Report

November 2018

## **Table of Contents**

Section 1: Introduction

Section 2: Executive Summary

Section 3: The types of ADR available

Section 4: The Response to our Interim report

Section 5: The Changing Landscape

Section 6: Awareness of ADR

Section 7: Availability of ADR

Section 8: Government/ Court Encouragement of ADR.

Section 9: Conclusions and Recommendations.

Appendix: Glossary

**1. SECTION 1: INTRODUCTION**

1.1. The Civil Justice Council resolved at its meeting on 28<sup>th</sup> January 2016 to form a Working Group to review the ways in which ADR is at present encouraged and positioned within the civil justice system in England and Wales. We published our Interim Report in October 2017. This is the Working Group's Final Report.

1.2. The terms of reference of the Working Group were:

1.2.1 *To review existing forms of encouragement for mediation (and other suitable forms of ADR) in civil cases in the Civil Procedure Rules, case law and the powers of the court.*

1.2.2 *To consider alternative approaches to encourage the use of mediation (and other suitable forms of ADR) in civil disputes, including practices in other jurisdictions.*

1.2.3 *To assess proposals for reforms to the rules or for initiatives that might be taken outside the formal rules.*

1.2.4 *To monitor and contribute to the forthcoming review of the EU Mediation Directive.*

1.3. The members of the Working Group were :

**William Wood QC** (Chair) the ADR representative on the CJC, a commercial mediator in practice at Brick Court Chambers

**Tony Allen**, a mediator specialising in medical and personal injury matters, a writer and commentator on mediation matters and a consultant to CEDR

**Professor Neil Andrews** Professor of Civil Justice and Private Law at Cambridge University

**Graham Ross**, a mediator and specialist in ODR, a member of the CJC Advisory Group on ODR

**District Judge Richard Lumb**, based in Birmingham, specialising in the management of major medical and personal injury litigation, Regional Costs Judge.

**Stephen Lawson**, a litigation solicitor, partner in the firm of FDR Law based in Warrington, specialising in contentious probate.

The Working Group has had the invaluable assistance of **Peter Farr** (as secretary) and also **Andrea Dowsett** and **Alexandra Morton**. Our very sincere thanks to them.

- 1.4. The Working Group published its interim report in October 2017. Since then the group has received 36 sets of written submissions and a selection of articles in response from stakeholders and commentators. On 6th March 2018 the Group held a one-day workshop in central London attended by 90 stakeholder representatives including representatives of the MoJ and HMCTS, judges, barristers and solicitors, arbitrators, mediators and the voluntary sector. Following the workshop, a limited number of additional papers were received. This Final Report was submitted to the Civil Justice Council at its meeting on 26<sup>th</sup> October 2018.

Step	Date	Link
Interim report	17/10/17	<a href="https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf">https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf</a>
Written responses	Deadline: 15/12/17	<a href="https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/cjc-consultation-on-adr/">https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/cjc-consultation-on-adr/</a>
Workshop	6/3/18	
Final Report	November 2018	

- 1.5. We have reviewed all of the responses, written and spoken, and we are enormously grateful for the time and care that those responding have obviously taken. But for this Final Report to be workable we will not be able to refer to and respond to each and every point which has been made to us. Where the authors have given the requisite permission, the

written submissions made to us are available on the CJC website at the link indicated in the table above.

- 1.6. So far as the Interim Report is concerned, unless we refer below to specific points of correction or improvement the descriptive sections of our interim report continue to represent our views. Subject to that proviso, Sections 4, 5, 6 and 7 can, essentially, stand as the findings of the Working Group as to the current ADR landscape. So far as the Working Group's views about the future and recommendations for change are concerned, this Final Report is a free-standing account of those and should be taken to replace the discussion and interim recommendations contained in Sections 8 and 9 of the Interim Report although certain passages are adopted below.

## 2. SECTION 2: EXECUTIVE SUMMARY

- 2.1. First a disclaimer: although this is effectively the conclusion of the work of this Working Group it does not purport to describe a perfect end-state for ADR or its role in the Civil Justice system. We seek here to identify options and next steps. There will be a continuing need for review and experimentation. One of our most important conclusions is that there should be a forum for continuing liaison between Judges, ADR professionals and other stakeholders to progress ADR's contribution and its place within a rapidly changing civil justice world.
- 2.2. People have spoken of our work as if it were only or mainly about the issue of compulsion to mediate. We disagree. The compulsion question is a central one but we have increasingly come to see the issues in relation to ADR as forming three distinct but related challenges:
- The awareness of ADR, both in the general public and in the professions and on the Bench;
  - The availability of ADR, both in terms of funding and logistics and in terms of quality and regulation of the professionals involved;
  - The encouragement of ADR by the Government and Courts.
- 2.3. We think that progress can only be achieved if an ADR strategy is devised to cope with all three challenges. To put it in extreme terms no amount of encouragement or coercion would be acceptable if ADR remained wholly unfamiliar to the public and was only available from unregulated providers at disproportionate expense. We can put that more positively. The system we seek to work towards is one in which:
- (1) Citizens are aware that when civil disputes arise there are alternatives to the present choice of capitulation or litigation.
  - (2) Citizens are aware that those alternatives include approaches involving neutral third parties to assist settlement.
  - (3) Those neutrals/the facilities are available in a practical and affordable form and operate in accordance with transparent standards of practice such that there is confidence in their training, their competence and their integrity.

- (4) Far from being a sign of weakness the use of and the offer of the use of such techniques is wise, culturally normal and indeed would be expected by the Court.
- (5) The Court would promote the use of ADR techniques to the extent that they would sanction those who did not agree to take reasonable steps toward settlement and reasonable steps towards the use of ADR. The Parties would always be free to settle or not and the Court would never sanction a failure to do so.

2.4. Awareness of ADR:

This is probably the most important, and also the most difficult challenge. Our conclusions include the following:

- The promotion of ADR must be seen as part of the wider challenge of public legal education;
- We applaud initiatives such as peer mediation in schools and colleges and the annual Mediation Awareness Week;
- There must be a further and more complete embrace of ADR in law faculties and professional training and disciplinary codes;
- We would support greater coordination between the different ADR areas, including restorative, family, civil, workplace and community, to provide a single “voice of mediation”;
- We propose a new website (perhaps to be called “Alternatives”) as a central online depot for information about ADR to include videos of the different types of ADR techniques being demonstrated;
- The ADR community must continue to push, as we know it has tried to do for many years, for references to ADR into the broadcast media and into social media.

2.5. Availability of ADR:

Our conclusions include the following:

- There is a need to ensure the availability of judges for JENE particularly at the fast track level. We encourage the FDR approach in low value cases;
- The small claims mediation scheme should be fully resourced so that it can fulfil its potential.
- The CMC should consider the accreditation of cheaper more proportionate forms of mediation such as 3 hour telephone mediations?
- The CMC should look carefully at emulating the regulatory approach of the FMC;
- We emphasise the crucial role of the case officer under the online court system and the importance of appropriate recruitment and training;
- Steps should be taken to promote standards for Online Dispute Resolution as a necessary step towards its further promotion and acceptance.

2.6. Court/Government encouragement of ADR:

Our conclusions include the following:

- There should be a review of the operation of the Consumer ADR and ODR Regulations to ensure that the existing rules are complied with and careful thought should be given to their further reinforcement;
- The Rules and the case law have to date been too generous to those who ignore ADR and in our unanimous view under-estimate the potential benefits of ADR. The present ethos is most clearly embodied in the Halsey guidelines but its approach is embedded in the rules and the court machinery as a whole. These require review.
- Court documents, protocols, guidance material for litigants and case management should all express a presumption that ADR should be attempted at an appropriate stage on the route through to trial.



- The terms of the claim document (potentially also the Defence document) should include a requirement to certify attempts to contact the other party and achieve settlement;
- We propose earlier and more stringent encouragement of ADR in case management: there should be a perception that formal ADR must be attempted before a trial can be made available; we should explore the possibility of applying sanctions for unreasonable conduct that make sense at the interim stage;
- We should work on the challenge of dealing with QOCS parties where costs sanctions in the ordinary sense do not work against Defendants.
- We do not support the introduction of civil MIAMs;
- We do not support the introduction of blanket compulsion in the sense of an administrative requirement that proof of ADR activity has to be provided as a precondition of any particular step;
- We have been keen to identify an acceptable mechanism under which a mediation could be triggered without the intervention of the Court. We think the British Columbia Notice to Mediate procedure is the most promising option for a first step in this direction. We identify a number of policy decisions that arise if this option is to be pursued.

## 2.7 The Judicial/ADR Liaison Committee

We think that ADR Professionals and Judges need to talk on a regular basis. Stakeholders need a forum in which the role of ADR in a rapidly changing Civil Justice landscape can be monitored and supported on an informed basis. The need for this kind of forum is demonstrated by the way this Working Group is being consulted on a continuing basis by stakeholders over a number of current initiatives, including the new personal injury jurisdiction in the small claims court.

**3. SECTION 3: THE TYPES OF ADR AVAILABLE**

- 3.1. It is an inescapable feature of the present landscape that there is no single ADR product available. We all agree with the assumption made in our terms of reference that mediation should be seen as the dominant technique for these purposes. But as our Interim Report demonstrates it is impossible to ignore the work being done and the cases being settled using other techniques as well. In some ways this multiplicity of options is a disadvantage. In terms of public legal education it might be easier to “sell” a simple, no-choice alternative to litigation. The task of explanation would be that much easier. Equally we have to accept that cases of different values and with different subject matters will inevitably demand different techniques and we think it is a strength of the present position that all of the methods considered below are available.
- 3.2. The types of ADR technique we are considering lie along a spectrum between fully evaluative techniques like arbitration and wholly facilitative techniques like negotiation and mediation. That spectrum would run roughly as follows:
- Negotiation and round table meetings (least evaluative)
  - Mediation
  - Conciliations and ombudsmen
  - Judicial Early Neutral Evaluation/Private Early Neutral Evaluation (JENE/PENE) (we propose dropping the first “E” for the rest of this report, as this process can be used at any stage of a dispute)
  - Arbitration (most evaluative)

Online Dispute Resolution is potentially very important but given its many different forms is hard to categorise on this spectrum.

Mediation

- 3.3. This is the principal process for us to consider, operating in the direct shadow of the civil courts. Almost all of the Court decisions about ADR have been about mediation. Mediation is flexible, massively successful and consistently surprises professionals and parties alike in its ability to achieve settlements where the parties appear implacably opposed. We wish to stress that support for mediation has been fully shared if not led by the non-mediator members of the Working Group

3.4. We are content to adopt one of the standard mediation definitions in evaluating its role in civil justice. CEDR's definition is that it is:

*A flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.*

3.5. Its primary characteristics are:

- Without prejudice status plus contractual confidentiality created by a formal signed agreement for each mediation, which also requires signed written settlement terms for a binding outcome.
- Flexibility to suit the dispute and the parties.
- Usually convened at the offices or chambers or one of the party lawyers, but sometimes in a purpose-designed mediation suite at a neutral venue.
- Managed by a trained and experienced neutral to whom a fee is normally paid, but who has no directive authority by virtue of their office, operating entirely by party consent. Parties are normally advised by lawyers so that legal fees are an additional cost in most cases.
- In practice, parties have a genuine opportunity to participate as fully as they wish in inter-party exchanges
- Its format is of a series of plenary and separate private meetings and the mediator does not have an adjudicative role.
- Parties always retain freedom of choice as to settlement or not, (and as to continued participation), without adverse consequence.
- The Small Claims Mediators apply the same fundamental principles but typically use one hour of sequential telephone calls to try to achieve a settlement between the parties. The mediators are employed by the Court and the service is free to the parties.

Nothing we have heard in our consultations or discussions has led us to alter our view of the position of mediation as what our Interim Report called

*“The pre-eminent non-adjudicative dispute resolution process conducted in parallel with litigation”*

It is a user-friendly, adaptable and highly effective dispute resolution process, so long as its scale and extra cost is proportionate.

There are a large number of qualified mediators available and keen to mediate. That of itself cannot be a driver of policy in this area. But it is inescapable that there is in the mediation community a large untapped resource that is available to help and well able to deal with an increase in demand.

Mediation can be convened both before and after issue of proceedings, and we are aware of a trend towards earlier mediation in for instance the clinical negligence sector, where experienced lawyers on both sides can give robust early advice which often leads to earlier resolution of claims despite limited exchange of evidence.

#### Round table meetings (RTMs)

3.6. These developed alongside the growth in mediation following the Woolf reforms, and again operate in the direct shadow of the civil courts. We have used RTM as the acronym rather than JSM (joint settlement meetings) in case it is thought that settlement **must** be achieved. Sometimes described as “mediation without the mediator” they usually take the following form;

- They naturally attract without prejudice status (no formal agreement is signed to generate confidentiality or to require signed written terms for settlement terms to be binding )
- Usually convened at the offices or chambers of one of the party lawyers.
- Each party’s legal team meets to explore the possibility of agreed settlement
- There is no process manager: process is worked out by the lead lawyers for each party, who also are the main protagonists in the discussions
- In practice the lay parties themselves take a minor part, if any, in the discussions, apart from responding to advice on what is discussed and giving instructions for settlement or not

- The cost involved is for each party's lawyers
- Again there is freedom of choice as to whether to settle or not, with no adverse consequences if settlement does not emerge

Our consultations told us that this is a frequently deployed process, particularly in clinical negligence and personal injury cases, albeit that where it does not lead to settlement it is sometimes followed by a formal mediation which may yet lead to settlement. RTMs do not involve the cost of the neutral's fee. There is no evidence of less effectiveness over producing financial settlements than mediations, but (anecdotally) lay parties are less fully involved in the process when there is no neutral to make this possible and comfortable, and they are usually convened late in the life of litigated claims.

### Negotiation

- 3.7. RTMs sit at the formal end of a wide spectrum of negotiation techniques broadly covered by the label negotiation. We do not wish to get hung up on the arid question of whether the simplest forms of negotiation, (perhaps a brief telephone call to sound out the opposition about a settlement) do or do not constitute ADR. Leaving the labels to one side it seems to us that:
- (i) Negotiation in its simplest form plays a vital and statistically very substantial part in settling large parts of the Civil Justice caseload. The King's College London/TCC Survey suggested that in that well-funded and sophisticated sector, roughly twice as many cases settle through simple negotiation than settle through mediation. Most cases should settle without formal ADR. Dialogue between the parties should be encouraged at every stage, both before and during any legal process.
  - (ii) But if negotiation has not worked we do not think that a Court should accept, (or that the rules should accept) a simple informal discussion of possible settlement as an adequate attempt at ADR so as to satisfy the "last resort" requirements in the rules.

### Judicial neutral evaluation

- 3.8. The Briggs report identified this process as being deployed in several County Court locations developed from FDRs in family court process. This process is a direct component of the civil justice system, and has been a

judge-led initiative purportedly within the case management authority conferred on judges by the CPR. This takes the following form:

- An appointment with a District Judge (or Deputy DJ)
- Convened on court premises.
- If the parties seek it then it comes at the cost of the application fee but otherwise this is free. Parties will incur legal fees if their lawyers attend.
- The DJ discusses the merits and demerits of each party's position in a joint meeting, indicating a view of strengths and weaknesses and encourages reconsideration of settlement across the table or by offering private consideration time.
- The DJ normally does not see either party privately.
- If the JNE does not settle the case, the DJ involved is effectively recused from further involvement, and any trial will be before a different DJ or a CCJ
- The Rules provide for judicial ENE in for example the Commercial Court but the Working Group is not conscious that the process is much used.

A possible disadvantage of JNE is that the Judge tends to be limited to the potential outcomes of the litigation and does not explore wider options for the wider interests of the parties.

### Private neutral evaluation

- 3.9. This is a process whereby disputants instruct a neutral third party to examine the dispute and produce a non-binding view on the merits, which all parties are free to ignore if they so choose. This has never taken off in the Commercial Court and the TCC.

The CPR and the various Court Guides have since the time of the Woolf reforms made provision for Early Neutral Evaluation. ENE seems to have been very rarely used indeed. The number of private ENE's of which the Working Group are aware is vanishingly small.

- 3.10. We have seen nothing during our consultation to alter our view that Private Neutral Evaluation has so far proved unattractive. However, it is clear that in the newly expanded small claims personal injury jurisdiction

(see paragraph 5.11 below) a PNE of an evaluative kind both relating to quantum and liability on paper or on line, is being considered and this may be one-way binding on participating insurer defendants.

### Conciliation and ombuds processes

3.11. These are legion especially in the consumer sector, and may be delivered by an over-arching statutory ombuds services such as FoS, or an industry-specific scheme. There are variations but in the standard format the process takes the following form:

- Referral by a consumer
- With statutory schemes participation is often obligatory on the part of the complainee. In industry schemes participation may be a requirement of industry Trust-Mark schemes.
- Free of charge to the consumer
- Some financial limits on redress apply
- Consideration on paper, with no meetings of party representatives
- Possibly a further personal conciliation, usually by telephone or perhaps e-mail
- A determination by the ombuds which is binding on the business but the consumer may opt not to accept it and take proceedings.

### Arbitration

3.12. This differs in principle from mediation and all the other processes discussed above, in that parties choose it in order to obtain a private binding adjudication of their dispute entirely outside the civil court process. We were urged during the consultation process to take arbitration into our deliberations.

3.13. In our Interim Report, we said:

*As an adjudicative process we do not see arbitration as within our remit, even though in the strict sense it is "alternative" simply because cases decided in arbitration do not for the most part subsequently trouble the Courts.*

3.14. Another reason for regarding arbitration as outside our remit was that while arbitration is well-established in the civil justice world for high value engineering, construction, shipping and oil and gas disputes it has

not to date proved adaptable in the resolution of lower value cases, the cases upon which we are concentrating. However, things are changing. PICArbs is offering an efficient, online, arbitration service at a fixed fee for the parties to personal injury and clinical negligence cases. We can certainly imagine that such a service would be part of the set of ADR options offered on the Alternatives website, in the guidance literature for litigants and generally as part of any general public legal education initiative designed to spread the word that there are alternatives to litigation pure and simple.

- 3.15. We think there are still real issues, however, about the use of Court encouragement to push parties towards evaluative ADR technique such as arbitration. It seems to us that to penalise a party in costs for not going to arbitration (a dispute resolution route with no possibility of return to the Court) is almost bound to be a breach of Article 6 of the European Convention on Human Rights.

#### Online Dispute Resolution

- 3.16. Apart from the online dispute resolution systems which are being established within the Court system as part of Court modernisation and the online solutions court there are a number of online dispute resolution systems available privately. Some of these effectively serve as adjuncts or frameworks for established ADR techniques like mediation. But some modern systems embody more artificial intelligence (“AI”) and their programmes may contribute creative solutions to the resolution of the problem or use systems such as blind bidding. An example is the iCan Smartsettle system. This is a comparatively new but rapidly developing area. We discuss elsewhere the need for standards to be set before stakeholders begin to trust online dispute resolution provided by private providers as an acceptable form of ADR to be encouraged in the context of court proceedings. It seems inescapable that given the wide acceptance of online processes and services in our social and business lives dispute resolution is bound to develop in this direction.



**4. SECTION 4: THE RESPONSE TO OUR INTERIM REPORT (BRIEF SUMMARY OF WORKSHOP AND WRITTEN RESPONSES)**

Is there an ADR deficit?

- 4.1. The widespread view of the written responses and responses given at the workshop was that ADR was under-used and too little known.
- 4.2. There was broad agreement that ADR is working relatively well in high value cases where its usefulness is recognised and its cost is proportionate. It is also seen to be working well in those cases that are able to take advantage of the small claims mediation service. But between those two extremes there remains a considerable gulf.
- 4.3. Almost the only qualification to these views was a suggestion, notably from experienced claimants' personal injury and clinical negligence lawyers, that structured negotiation was already playing a full and appropriate part in dispute resolution in the area of clinical negligence and serious personal injury. Further that by implication mediation and other forms of ADR involving third party neutrals would never have a major role to play. But other commentators in the clinical negligence area clearly felt that there was more use to be made of classical third-party ADR. Indeed, we gather that APIL, FOIL and MASS are in the process of setting up a register of mediators qualified by experience to mediate claims in the personal and clinical injury sectors, which may indicate a shift of view about the place of mediation there.

Issues arising in relation to the awareness of ADR

- 4.4. There was a recognition that public awareness of ADR was acutely limited. The strong submission made to us was that further public legal education in relation to ADR should be part of a general drive to improve public awareness of the law and the way in which law could vindicate the rights of the citizen.
- 4.5. The effect of a reduction in the availability of legal representation and Legal Aid was to expose even more starkly the public's own lack of awareness of ADR. The role of the solicitor as a guide in these matters was recognised as crucial.

- 4.6. A number of correspondents suggested that some form of central website provision to provide information about ADR was vital. It should include clear explanatory information and possibly video demonstrations of different ADR techniques. Others referred to a “single help desk”.
- 4.7. There was more than one call for more statistical analysis of what is happening in ADR. In particular it was thought that better statistical analysis would enable the success story to be related convincingly in order to promote ADR generally.

Issues arising in relation to the availability of ADR

- 4.8. The availability of mediation was discussed by a number of Respondents in the context of the local mediation pilots which were currently being conducted and which it is hoped will provide a source of proportionate and inexpensive local mediation services.
- 4.9. Respondents regretted the demise of the National Mediation Helpline.
- 4.10. There was relatively little negative or positive comment on the Interim Report’s suggestion of greater regulation in the civil mediation world. It was noted that there have been no major quality problems or expressions of dissatisfaction with mediation services. Further the reality is that the CMC will find it extremely difficult as a matter of resources to do more than it presently does. But there was some recognition that the price of any increase in the degree of encouragement or any step in the direction of compulsion would necessarily be that the Courts will want to see a process better defined and regulated.
- 4.11. *Pro Bono* mediation was discussed. The view of a number was that it seemed wrong in principle that where judges and lawyers required payment to participate in middle and low priced litigation or disputes, mediators should somehow be expected to do it free. *Pro Bono* was also said not to be the sustainable answer unless funding could be provided for logistics and administration even if there was an extent to which the mediation community might be willing to work free of charge.
- 4.12. A number of responses described the availability of various schemes to provide mediation services at fixed fees in the middle and low bands of cases. The point was made that while the mediation fees can be

reasonable it is the fees of the lawyers that frequently make a mediation meeting disproportionately expensive and unavailable.

- 4.13. Fears were expressed as to the extent to which the Small Claims Mediation Service was currently sufficiently resourced. In particular there was a concern that by the time the personal injury limit has been increased as is currently proposed, the resulting massive increase in the workload of the small claims mediation service (and indeed the Courts themselves) would be crippling.
- 4.14. Judicial mediation and judicial neutral evaluations were the subject of a number of responses. Doubts were expressed as to whether this was a proper use of Judge time and a fear was expressed that the Judge power simply would not be available for those hearings. Presumably one difficulty is that a Judge was conducting one of those hearings is disbarred from conducting the trial. That of itself requires a degree of resource and flexibility that may not be available in some courts.
- 4.15. The employment judges have described the usefulness and efficiency of their own mediation activity in cases in which they obtain the party's consent at interim hearings to conduct mediations. These seem somewhat different to the robust, quick-fire early neutral evaluations in the County Court which were described by Lord Briggs in his final CCSR Report.
- 4.16. Online dispute resolution may well enjoy greater popularity even if provided privately once people get used to the ODR techniques being used in the on-line court. There is at present, it is thought, a great deal of unfamiliarity and it is an area which needs standards to be set and in particular reassurance to be given to potential litigants about the security and confidentiality of their communications.

#### MIAMs

- 4.17. MIAMs were not widely supported as a solution to the civil systems problems. It was accepted that ACAS early evaluation was extremely effective in the employment tribunal world and there was some discussion as to why that might be. There were greater doubts as to the efficacy of MIAMs in the family context and the point was also made that

it is frequently much too early in a civil case to take a firm decision or even take a provisional view about the usefulness of mediation when proceedings have not yet been issued or are at a very early stage.

- 4.18. The Italian experience was pressed upon us as now being in effect a MIAMs system where both sides attend and have a very low cost initial meeting with a Mediator. It was suggested that statistics showed that the Italian system was making a considerable dent in the number of court filings and was proving extremely efficient. Other commentators observe that the system had not been successful in Poland where it was tried.

#### Consumer Conciliation

- 4.19. It was suggested that the Ministry of Justice and the Department of Business should cooperate on growing the use of conciliation and ombuds activity generally. But many thought it would be unfair for a consumer to be at risk of a costs sanction if he didn't use a conciliation scheme; so much depends on the individual circumstances. It was thought there could be a question on the allocation questionnaire in the court process as to whether a conciliation scheme had been or was available.

#### Encouragement by the Court and case management

- 4.20. There was no or very little support for anything approximating to blanket, compulsory or automatic referral to mediation. There was support in many quarters not confined to the mediation community for a stronger level of encouragement and for something close to a presumption (rebuttable in, for example, genuine test cases) that ADR would need to be tried in every case.
- 4.21. One of the issues that repeatedly came up in responses was the question of timing. The point being made was that the optimum timing for a mediation may vary and may in some cases be pre-proceedings, in others be post-pleadings and in others be after the conclusion of all exchanges of evidence and disclosure. This meant that a compulsory pre-set mediation deadline was bound to be insensitive and inefficient.
- 4.22. A number of commentators observed that even if some form of compulsion was desirable the judicial conservatism and the conservatism

of other rule-makers would be likely to prevent any such reform over being introduced. The proposal to entertain some form of notice to mediate procedure on the British Columbia model received widespread support.

- 4.23. We single out for mention the Civil Mediation Council's proposal of an "automatic" referral system. The key to this was a need for any party not prepared to mediate to demonstrate that they fitted one of a very narrow group of permitted opt-outs. The sanction for non-compliance was still a costs sanction at the end of the day. There was a system of financial inducements to mediate which involved discounts on fees that would otherwise be payable. In order to give an inducement to a defendant the system involved introducing (for the first time to our knowledge) a Defendant's court fee which would be higher or lower depending upon his/her preparedness to mediate.
- 4.24. There was support for a strong and consistent approach to be taken across all pre-action protocols and Practice Directions and other Court documents. There was broad support for a declaration in the claim form of the kind envisaged in our interim report to the effect that some attempt had been made to contact and discuss the claim with the defendant. There was not unanimity that the period immediately prior to the CCMC was the ideal point at which to press for mediation.
- 4.25. All felt that costs sanctions were still the right way to encourage the uptake of mediation and ADR generally. There was regret that the precise guidance from the Court of Appeal had become somewhat confused and in particular that between the *PGF v OFMS* and *Gore v Naheed* decisions it was difficult to determine a common thread. The Council of Circuit Judges referred to the need for clarity over costs sanctions and guidance.
- 4.26. Many respondents felt that the Halsey approach, particularly with its focus on the merits or perceived merits of a case was now out of date and did not fit with the experience of ADR professionals.
- 4.27. There were serious doubts about the Interim Report's proposals that there should be some form of interim costs order to express disapproval of a refusal or failure to mediate at the interim stage. What costs would

SECTION 4: THE RESPONSE TO OUR INTERIM REPORT  
(BRIEF SUMMARY OF WORKSHOP AND WRITTEN RESPONSES)

be dealt with? How could this be properly assessed? How could the case be investigated unless without prejudice material would be investigated?

- 4.28. There was a suggestion that something short of an actual costs award could be used, perhaps a note on file in relation to costs which the Judge trying that hearing of the interim application could leave for the attention of the trial judge.
- 4.29. There was support and approval expressed for bespoke and sector-specific schemes which are beginning to develop in relation to the use of ADR. The use of ADR could grow on a voluntary basis without any need for compulsion. Mediation and ADR could become “culturally normal”.
- 4.30. Equally some thought that boundary disputes and clinical negligence were candidates for additional pressure or actual compulsion. (This would be because these are expensive and emotional cases often with disastrous outcomes and heavy costs incurred.)
- 4.31. There was support for an ability to recover the costs of ADR processes and being properly viewed as “costs in the case”, whether incurred before or after the beginning of the proceedings.
- 4.32. It was noted that at this stage there were questions as to whether the ADR prompts at Tier 1 of the money claims online system were having any significant effect on referrals to ADR

**5. SECTION 5: THE CHANGING LANDSCAPE**

- 5.1. This is a dynamic scene with extensive change occurring even since the interim report was published a year ago. We have to bear these on-going changes in mind when suggesting any further overlay of reform.
- 5.2. The most significant changes for our purposes are :
- (1) The Online Court and commencement of the public Beta testing of the Online Civil Money Claims service, the first manifestation of the OSC;
  - (2) The NHS Resolution and Medical Protection Society mediation initiatives;
  - (3) A report and recommendations on Boundary Disputes which is being developed under the auspices of the CJC;
  - (4) The increase in the small claims personal injury limit which will have serious implications for the EL/PL protocol;
  - (5) The three County Court Pilot Mediation Schemes;
  - (6) Brexit;

The Online Court

- 5.3. The development of the online Court for money claims under the limit of £40,000 was prompted by the Susskind Working Party Report (to which two of us were signatories) and the interim and final CCSR Reports by Lord Briggs. Online Civil Money Claims, the first stage of implementation, now allows claims to be made and responded to on-line. It includes already a nudge towards the use of ADR at Tier 1 of the kind which was referred to in the CCSR Reports. (At the moment the system only replicates Tier 1). There is not yet a clear picture as to how far that link to ADR provision is successfully diverting parties into ADR.
- 5.4. It appears that the one concrete consequence of the money claims on line system being introduced is that more defences are being lodged. This was not, we think, an intended consequence. Plainly it is intuitively possible that the increased ease of being able to serve a Defence under

these systems is going to increase the number of Defences served. Clearly if the number of disputed cases is going to increase then the importance of ensuring a successful and effective system of ADR is available becomes all the more acute if the Court system is not to be burdened even more excessively than it is at the moment.

- 5.5. But, Tier 2, yet to be built, is more significant for us because as envisaged by Lord Briggs a case officer will there review the E-file and one of his functions will be either to guide the parties towards an appropriate form of ADR/ODR or to conduct some form of ADR himself. (Failing that at Tier 3 there will be an adjudicative solution provided by a judge, or possibly on paper).
- 5.6. It seems to us enormously difficult to make any recommendations for the encouragement of the use of ADR in this value band/type of case when the system is still being worked out. It is beyond doubt a huge opportunity. As we said in our Interim Report, *“We can see that if ODR techniques become woven into the design of the Court system then the debate whether or not to compel ADR may simply become obsolete”* (IR 2.7) In general the existence of the Online Court project presents the opportunity for expansion of its use of ODR techniques especially those that go beyond simply enabling communications to take place online and embrace those systems that exploit Artificial Intelligence to empower litigants to reach settlement more easily. This should enable it to handle large increases in case load.

#### The NHS Resolution mediation scheme and MPS pilot mediation scheme for clinical claims

- 5.7. The NHS handles roughly 15,000 new claims each year, over 10,000 of them alleging clinical negligence. NHS Resolution, following a successful two year pilot, has established a permanent mediation scheme under which mediation is proposed or accepted through its panel firms. It has now appointed two mediation providers, Trust Mediation and CEDR, to provide rosters of specialist mediators to work under a specialist clinical negligence mediation protocol. In a given case there will be a discussion with the Claimants’ solicitors as to whether and how a case can most appropriately be settled. Clinical claims can also be settled by conventional negotiation or are sometimes referred to Arbitration where



the parties agreed to it. Where mediation is chosen NHS Resolution will pay the mediation fee if either the claimant is unrepresented or NHS has admitted liability. The scheme therefore goes some way to resolving the funding issue and ensures that a trusted, quality-assured cohort of mediators is available. The services are already proving successful. The NHS Resolution Annual Report of 2017-2018 revealed that 189 scheme mediations were held in its first year, greatly exceeding its target of 50 mediations. The report expresses satisfaction with what mediation delivers to patients and their families, making face-to-face apologies possible, and providing a platform for patient concerns to be expressed, as well as making earlier settlement possible. The Chief Executive Helen Vernon said the organisation wished to increase the use of mediation and commented “Our experience so far is that providing the time and the space for patients and healthcare staff to discuss what happened can mean a better outcome all round.”

The Medical Protection Society has also initiated a pilot scheme for claims involving members indemnified by them. They will pay for the mediator’s fee and the venue.

### Boundary Disputes Protocol

- 5.8. The Civil Justice Council has been considering recommendations for boundary disputes and in particular how greater use might be made of ADR in this disproportionately expensive and frequently very emotional area of dispute.
- 5.9. At the same time RICS and the Property Law Association (PLA) will soon offer a joint Boundary Disputes Mediation Service involving a panel of third party legal and surveyor experts. (RICS and PLA are necessarily involved because it is acknowledged that boundary disputes may either be heavily legal or heavily surveying matters in emphasis). The RICS, through its dispute resolution service will arrange referrals and monitor training and standards. The challenge is to make sure that every boundary dispute is at least given the opportunity of using the new service. The PLA have also assisted in the production of a straightforward pre-action protocol which it was content to be made available for the Council’s purposes. It can be found here: <http://www.propertyprotocols.co.uk/the-boundary-disputes-protocol>.

Increase in the small claims personal injury limit

- 5.10. As we have already noted there are changes of enormous significance planned in the handling of small personal injury claims. The working group has already held discussions with the Ministry of Justice about the provision of an ADR element in the new system. Those discussions are likely to continue well after the publication of this Report and this is a good example of the work that could be carried on by a new Judicial/ADR liaison body. These changes imply on the face of it a massive increase in the workload of the small claims court and, if all other things remained equal, a similarly major increase in the case load of the already stretched Small Claims Mediators.
- 5.11. However, as already noted it seems probable that a more evaluative model, perhaps based on a consumer conciliation model, involving a robust initial view on paper/online of liability and quantum. The views expressed by the third party neutral, presumably a practising personal injury lawyer, could be binding one-way on a participating insurer on a consumer conciliation model. If this can be funded then we think it will be a significant new development. We hope that the Judicial-ADR body that we have proposed will be able to assist in developing this option with stakeholders.

Brexit

- 5.12. The EU Mediation Directive 2008/52/EC, promulgated in March 2011, was not a significant advance for ADR in this country. It involved changes in the law of a minor kind dealing with cross-border mediations only. None of the Working Group's members have had any experience of those changes (in rules of our evidence, limitation and confidentiality) having materially affected the outcome of any case they have been involved in or even arisen for consideration. It is likely those changes will remain in force after Brexit. More important are the Consumer ADR Regulations and the Online ADR Regulations, the which will be preserved as part of UK law. Anything involving EU Institutions is more difficult. Agreement is likely to need to be reached with the EU to permit the EU's ODR Portal to continue to operate by referring to UK consumers to UK approved ADR providers as at present. Failing this an independent UK Portal will need to be created.

County Court Pilots

- 5.13. At present no meaningful conclusions have been reported from these pilots. Their lessons will have to be absorbed by the CJC or perhaps by the Judicial/ADR liaison body that is discussed elsewhere in this Report.

**6. SECTION 6: AWARENESS OF ADR**

- 6.1. When we talk of making ADR culturally normal we mean that the public should be fully aware of the option of ADR in advance of any involvement with the dispute or the Courts or the legal system. In other words the public should be aware that there are alternatives to litigating a case to trial and that there is an advantage to taking special steps and possibly seeking specialist assistance in order to achieve settlements early and cheaply.
- 6.2. Where are we now? The HMCTS Court users' survey suggests that there is still ignorance of the existence and opportunities offered by ADR but that 68% of all litigants contacted said that they would have preferred to avoid Court proceedings if at all possible.
- 6.3. We are of course far from being the first to call for a greater effort in this area. As long ago as January 2010 Lord Justice Jackson spoke of a need for a major campaign in this area. None of us would disagree. But this is a huge challenge with no quick fixes and specific steps are hard to identify.
- 6.4. A strength of the NHS Resolution initiative is clearly that a single entity, the NHS, the monopoly provider of public health services in England, is involved in each dispute and is committed to and understands ADR. The decision by NHS Resolution means that it will sponsor and offer specialist mediation services in clinical negligence cases seems to us to be bound to increase the use of mediation. We have noted that many companies, including banks and insurance companies, who are repeat users of litigation also act as promoters of ADR in their sectors and lead the use of ADR in litigation.
- 6.5. The challenge of public legal education around ADR of course forms part of a wider challenge; as was pointed out at the workshop there is a chronic lack of public awareness and understanding of the operation of the legal system as a whole. We are pleased to see the increasing prominence of ADR in initiatives such as the CJC's Annual Forum on access to justice for those without means. ADR professionals need to build links with CAB and other non-profit organisations in this area and understand their challenges.

- 6.6. The promotion of understanding of ADR has to be a part of initiatives that must be pursued in schools (where peer mediation is achieving great things), factories, clubs, pubs and offices everywhere. In the mass media family mediation seems to occur more frequently than civil mediation.
- 6.7. Public awareness is critically important in the broadly lower value cases where parties may not be represented. We know from bitter experience in family mediation that the uptake of ADR suffers in the lawyer-free zone.
- 6.8. There is no doubt that direct experience of the techniques of mediation and ADR is always going to be a more persuasive and better teacher than any number of well-meaning pamphlets, or lectures. On the positive side reports from mediators begin to suggest that it is no longer safe to assume that the parties attending a mediation will never have had any experience of mediation or anything like it in the past.
- 6.9. Nor will their experience necessarily have been in a civil or commercial context. ADR now has many faces. There are a number of different areas in which the techniques of mediation, in particular, are being used and may be encountered by the citizen. These include
- consumer conciliation,
  - online dispute resolution occurring in the context of online sales and a variety of other disputes relating to internet use.
  - workplace mediation in relation to issues such as stress and bullying,
  - employment disputes,
  - community mediations involving neighbours or anti-social behaviour,
  - restorative justice in the criminal system,
  - and of course civil and commercial mediation of the kind with which this report deals.

Mediation may not be described as such in each of these contexts but it is at heart the same process in each area (of course some of these mediations experiences may have been hard or traumatic).

- 6.10. We are prompted to think that there may be a case for greater liaison between the various areas and the councils and organisations who lead the ADR communities. That view was encouraged by the excellent 2018 Allmediation Conference held recently in London. The different disciplines that were represented included Family, Community, Civil and Commercial, Workplace and Restorative Justice, with a keynote session profiling the successes of clinical negligence mediation. We do not suggest that the specialist activities of each council, for example in relation to regulation, should be amalgamated. But we do think that there is a great deal that these different areas can learn from each other and that in relation to promoting the central idea of mediation and it could help if there was a single “voice for mediation”.
- 6.11. We propose a new mediation/ADR website, potentially to be called “Alternatives”. An attractive and user-friendly central website should be established describing the different forms of ADR available, illustrating each by video and indicating how high quality ADR professional services could be accessed. With sufficient regulation/quality assurance there might be links to providers searchable by area and expertise, a development of the existing [civilmediation.justice.gov.uk](http://civilmediation.justice.gov.uk) links.
- 6.12. We think that the Government should renew its commitment to the ADR pledge about which little is now heard. We think Government has an important leading role to take in setting an example to private litigants and businesses.
- 6.13. So far as the professions and the judiciary are concerned it is again the case that the actual involvement of lawyers or judges in ADR processes is far more persuasive and informative than any lecture or seminar.
- 6.14. The Jackson Handbook is now in its second edition and is one of a number of current text books about ADR. It is increasingly likely that the Judges who are in charge of case management will, in their lives as litigators have attended mediations and been involved in ADR processes.
- 6.15. There was a strong suggestion at the workshop that although there has been some progress there is still too little available by way of education in ADR matters in law faculties and in the professional training bodies. We also think that the profession should be doing more through their

regulatory arms to ensure first that there is a strong ADR component in training and that the duty to advise on the availability of ADR should be made a disciplinary requirement by the profession. We understand that the 2007 Solicitors Code of Conduct said specifically "... you should discuss whether mediation or some other ADR may be more appropriate than litigation, arbitration, or some other formal process". We think that SRA, CILEX and BSB should be asked to consider whether their codes of conduct are sufficiently specific in this area.

- 6.16. In this connection we think that there is a case for a continuing liaison body involving Judges, other professions, and ADR professionals which could meet perhaps six monthly. We have found the combination of disciplines in our own working group extremely productive. This would be a useful forum in which Judges, lawyers and ADR professionals could share some of their concerns and explore how best to realise ADR's potential. This could be chaired by one of the (now several) Judges who have had experience of working as mediators prior to their appointment. It could be a further useful step towards dealing with the currently "semi-detached" relationship between ADR and the Civil Justice system which was diagnosed by Lord Briggs in his CCSR Reports. Of course the Civil Justice Council has an ADR representative and is a forum in which this kind of liaison can and does occur. But this Working Group has demonstrated, we think, that establishing a permanent specialist liaison group it is more than justified by the nature of the task we face. We hope it could be involved in any further steps towards the greater regulation of the civil mediation world of the kind which are advocated in the next section. This body could also look to monitor the promotion of ADR ideas in law schools and law faculties and in the Bar Council and the Law Society's professional conduct requirements.

**7. SECTION 7: AVAILABILITY OF ADR**

7.1. It seems to us that there are two aspects to the challenge of making ADR available. They are:

- (1) Funding and logistics;
- (2) Quality assurance and regulation.

Funding and Logistics

7.2. As we have already noted, there is no shortage of trained neutrals, at least in the mediation world, to assist litigants if called upon. But that is only the beginning of the challenge of organising and funding an available and useful ADR offering at a proportionate cost.

7.3. It is instructive to look at the two areas in which, by common consent, ADR is playing a proper role in the Civil Justice System. In the small claims mediation service the public receive the services of the small claims mediator and the accompanying administrative effort free of charge. In higher value cases a private mediation can readily be justified and funded as proportioned and appropriate.

7.4. So what of the middle ground? It is significant it seems to us that although there are mid-priced and low-priced mediation schemes available to provide a proportionate service they are relatively little used. The challenge of middle and low priced disputes may be that however moderate the expenses of the mediator the cost of the venue and the legal fees will consistently make mediation an unattractive option in cases worth, let us say, £50,000. The oddity is, as we noted in our interim report, that in the small claims case worth £5,000 the parties receive free of charge the services of a mediator for a 1-hour telephone mediation, but the parties to the case worth £50,000 receive nothing at all.

7.5. There are two important developments to which we have referred already.

7.6. In the NHS Resolution initiative NHS is going to pay for the mediations in those cases where either liability is admitted or there is no legal representation on the Claimants' side. The fee is in any event set on a



fixed scale. The MPS pilot scheme is also paying for the mediator and venue.

- 7.7. Another potential source of change is the Online Solutions Court. This is because the proposals envisage the provision of a case officer who will familiarise him or herself with the file at tier 2 and assist the parties either with some form of ADR triage and advise them on their options or he will on his or her own account conduct a small claims mediation. He too will be available free of charge (or at least at no additional charge) to the parties.
- 7.8. We note the views of mediators that *pro bono* mediation is not a substantial part of the answer to providing a proportionate ADR service in mediations of middle or low value cases. Lawyers and judges do perform services *pro bono* but they do not do so across the board in bread-and-butter litigation. Why, it may be asked, should ADR professionals? But of course with small claims mediators (and Judges performing JNEs) performing their services free of charge, charging a fee for private ADR services at the same levels of value is always going to be difficult.
- 7.9. It is important that we deal with the ability to recover the costs of mediation. ADR, both the costs of a neutral, the cost of a venue and of the parties own lawyers, if they are involved, need to be recognised under any fixed costs regime. These steps are now a legitimate part of the pursuit of a claim. We understand that £1,000 may have been proposed as a fixed cost of ADR in the intermediate track. We will have to see how far that proves sufficient.
- 7.10. In terms of improving the logistical availability of mediation services at a proportionate cost we make the following recommendations:
  - (1) We think the CMC could promote and accredit a three-hour telephone mediation process to fill the gap in provision where physical attendance at a day of meetings with lawyers is always likely to be disproportionate.
  - (2) We have referred above to the availability of an evaluative conciliation procedure in the new small claims personal injury jurisdiction

- (3) It is important that judicial resources are made available for JNE/FDR to take place in low and mid-value cases.
- (4) Private initiatives in relation to ODR should be applauded and promoted and, we hope, accepted by the Courts once appropriate standards are in place;
- (5) Arbitration looks to be being made available in the lower value range at least in PI and ClinNeg.
- (6) The pilot mediation schemes at Exeter, Manchester and London may potentially offer information about how flexible mid-price mediation services can be structured.

### Quality Assurance and Regulation

- 7.11. We do not raise the thorny issue of regulation as an abstract concern. We have throughout our work both at home and abroad seen that Judges and civil justice systems are not prepared to encourage, still less coerce, their users into a particular ADR process unless they have confidence that the ADR will be provided to a consistent standard. Compulsion and anything coming close to compulsion will only ever be accompanied by a regulated (or sometimes court-rostered) group of neutrals. Thus where compulsory ADR is required by the Court rules, as in MIAM meetings in family litigation, the regulation of the providers of that service is noticeably strong. (Revealingly there is stricter regulation of those conducting family MIAMs (compulsory) than of those conducting family mediations themselves (voluntary).) For example we would not expect a government-sponsored "Alternatives" website to include links to ADR providers unless they are the subject of some form of accreditation.
- 7.12. Now clearly there are no problems for JNE in relation to questions of quality assurance and regulation. The judges who conduct these FDR-style hearings are unimpeachable as to their quality and as to their impartiality. In the same way the court service can control the quality of its small claims mediators directly by selecting them and training them. The challenge lies in the private sector provision of ADR services, most obviously in mediation and conciliation.

- 7.13. One method of getting quality assurance is to contract with one or more providers to provide neutrals from a closed and highly-controlled “expert” list to litigants in a particular area or sector. Thus NHS Resolution and MPS have dealt with the issue in their schemes by appointing private, specialist panels through selected neutral provider organisations. The Court of Appeal mediation scheme is run in conjunction with CEDR on the same basis.
- 7.14. The alternative is to run an open-application regulatory scheme with published minimum standards that accredits qualifying neutrals.
- 7.15. The Family Mediation Council has a separate Family Mediation Standards Board which requires fairly lengthy training, coupled with mentoring and supervision, before a mediator can receive the accreditation that entitles him or her to conduct a MIAM. That regulatory system includes, for example, a disciplinary function whereby a complaint, if upheld can lead to the withdrawal of the accreditation.
- 7.16. These provisions and arrangements have no equivalent or virtually no equivalent in the Civil Mediation Council’s Registration system. There is no separate standards board. There is in all honesty no meaningful disciplinary sanction. It is not possible to withdraw accreditation even where a serious complaint is plainly justified. Indeed the complaints process is effectively only a mediation service between complaining party and the mediator.
- 7.17. It appears Family mediators are prepared to pay the subscriptions which will fund the Family Mediation Council and its Standards Board because there is a throughput of regulated work in the form of MIAM meetings. (It is fair to note that the FMC has also received significant government assistance in relation to the cost of the relevant software.) The vicious circle on the civil side is that people are not receiving sufficient instructions as mediators, they are not prepared in large numbers to subscribe and pay subscriptions to the CMC and consequently the CMC is severely constrained in the disciplinary and regulatory functions that it can provide.
- 7.18. There are signs of a similar syndrome in consumer ADR. Mediators and providers spent considerable sums meeting the extremely thorough-

going regulatory standards imposed by the Consumer ADR Regulations but have been left with a disappointingly small flow of work having qualified.

- 7.19. All organisations like FMC and CMC face the threat, in the disciplinary area in particular, of legal challenge and judicial review. The costs of fighting or, still more losing, litigation brought by an aggrieved professional could be existential for any of these bodies.
- 7.20. Nevertheless we feel that every effort must be made to end the vicious circle on the civil side. The leads set by the Family Mediation Council must be followed as far as possible. The Family Mediation Council leverages its regulatory arrangements as a way of persuading the public and selling the mediation message to the community at large. These are opportunities which are currently being missed on the civil side of things.

In Section 8 of this report we suggest ways in which the Civil Justice system could include enhanced encouragements to litigants to use ADR. Bluntly the price of those reforms, or at least the more aggressive of them, is bound to be a greater degree of regulation within the ADR community.

### The Standard Setting for ODR

- 7.21. We referred in our interim report to the need for some standards to be set for the seemingly huge variety of techniques available within ODR if it is to gain wider recognition as a privately available ADR service rather than just an aspect of the digital court. We think the respects in which standards may be required are most obviously confidentiality and security. Where there is an evaluative or advisory component in the online inter-action then clearly issues of accuracy and quality could arise. We wonder whether it will be advisable to offer the public a link to a private ODR provider (on the Alternatives website) until standards are established and the provider commits to follow them. It is recognised that the newly formed International Council for Online Dispute Resolution ([www.icodr.org](http://www.icodr.org)) is developing global standards for ODR and already has a set of principles on its website. As the ICODR comprises the body of universally acknowledged leading experts in the field, it would be unwelcome for those less knowledgeable and less experienced to seek to develop standards of their own.

**8. SECTION 8: GOVERNMENT/COURT ENCOURAGEMENT OF ADR**

8.1. We turn now to the question of how parties should be encouraged/incentivised by the Courts to use mediation and the other various alternative routes to resolution in,

- (a) disputes with different subject areas;
- (b) disputes of different value;
- (c) at different stages in the litigation process.

Once the question has been stated in that way it becomes clear that there can be no single answer to the question.

8.2. It is also clear that as we turn to this topic we cannot expect the other two major issues we have identified, lack of public awareness of ADR, the availability of appropriate ADR “products”, to have been magically solved. If they had been this part of the report could be left blank.

Encouragement at the outset of the dispute

8.3. The Dispute Resolution techniques most likely to be deployed at the outset of the dispute are consumer conciliations and ombudsman services provided under the schemes that were reviewed in our interim report. We remain of the view that careful consideration needs to be given to the scope of the consumer ADR Directive and to the position that, outside statutory schemes, suppliers of services in England and Wales are at present able to do no more than to cite the theoretical possibility of conciliation conducted by a particular body and are under no obligation in any given case actually to use those ADR systems even where the consumer wishes to do so.

8.4. In fact as matters stand there is evidence that even the existing requirements of the Consumer ADR and ODR Regulations are being ignored and flouted to an extraordinary extent. Steps clearly need to be taken by way of enforcement to ensure that at least that step is being taken.

Encouraging ADR at the point of issue of proceedings

- 8.5 We think that more nudges and encouragements towards ADR can be built into the system at the stage at which proceedings are being or are about to be issued. We should require certification in the claim document that steps have been taken to contact the Defendant and discuss the question of the dispute. Those assurances could include assurances that the claimant has not only contacted the defendant to discuss the claim but acknowledges that litigation should only be last resort and has acquainted him or herself with the availability of other forms of ADR, perhaps by visiting the “Alternatives” website to which reference was made in section 6 of this Report. This would apply to all claims of all values in all tracks.
- 8.6. We have very little to add to the comments made in Chapter 5 of our Interim Report about the need to review the Court guidance materials and protocols. These should all be reviewed to ensure that they all are consistent with a spring-loading of the system in favour of the use of ADR at an appropriate stage. We refer back to and repeat the analysis and recommendations made IR 5.10 – 5.34. One contributor to our workshop suggested that the RTA/EL/PL Portal Protocol had worked despite being firmly “voluntary” in tone. However, this is not the way it reads. The typical verb it uses is “must”, whereas the typical verb in the other Protocols is “should”. We think that firmer language throughout the protocols and greater expectations at CCMCs over compliance with the ADR duties which they create is needed.
- 8.7. To take a critical example, N181 is the Directions Questionnaire for all the cases in the fast-track and the multi-track. It currently asks a party not seeking a stay for ADR to explain his/her decision. We believe that this section could be strengthened so as to make it clear that there are only certain reasons which are going to be acceptable. It would explain that it is not acceptable to reject ADR simply because the case is too complex, that the parties have bad relations, or that there may be issues of law involved etc.
- 8.8. N181 also asks about the extent to which the litigant has been advised by his lawyer about the option of ADR. This could be changed to a specific assurance that the litigant has either been acquainted or has acquainted

him or herself with the Alternatives website (or its content in hard copy form). This would enable the Court to satisfy itself that the relevant materials have been looked at even where a client was not represented. The Changes equivalent in spirit could be made to the other Court Guidance documents which were reviewed at length in the interim report.

### MIAMs

- 8.9. We have given anxious consideration to the possibility of the civil procedure system embodying pre-action mediation, information and assessment meetings (MIAMs).
- 8.10. We think it is striking that the two current embodiments of this approach in England and Wales have a number of elements in common. Those are the requirement for contact with the early conciliation service at ACAS for anybody seeking to issue employment tribunal proceedings and the requirement for a MIAM to have been undergone for any party seeking to issue family proceedings.
- 8.11. In both cases the requirement is an administrative one and no judge or judicial discretion is involved. The court will simply not issue the proceedings (unless in family there is for example a certified complaint of domestic abuse) without a certificate from the relevant neutral that the required contact has occurred. The huge advantage of this is speed, simplicity and an absence of expensive procedural sparring.
- 8.12. Both of these are specialist jurisdictions where a number of specific issues are likely to recur in almost all cases. These can be contrasted with the diversity of the issues that can arise in civil litigation.
- 8.13. Also there is of necessity a pre-existing relationship between the parties. The dispute, whether between spouses or between employer and employee, will almost certainly have been articulated between them and discussed. Again we contrast the vast majority of civil claims which are money claims and may well be undefended, for example claims for rent or utility bills.
- 8.14. In both the family and employment situations it is relatively obvious who needs to be contacted and involved. The employee and the employer need to be involved in the conciliation. The spouses need to be involved

in the MIAM. In civil claims where companies may well be involved it is far from obvious who should be required to attend the MIAM. For some companies who are repeat users of litigation, perhaps NHS Resolution is an example, a requirement for that organisation to attend an MIAM would be pointless and annoying.

- 8.15. We have referred already to the fact that in the form of the Case Officer working at Tier 2 in the Online Court (see below) a MIAM-type of experience is going to be available to litigants in that court. There may well be strong similarities between his or her interaction with the parties and a MIAM. It would be unhelpful to try to introduce compulsory MIAMs at the same time as the case officers are beginning their work in the Online Solutions Court.
- 8.16. Finally, we note that the Civil Mediation Council would, we think, need to be organised so as to be able to provide convincing MIAM accreditation, just as the Family Mediation Council and the Family Mediation Standards Board are. No doubt it could organise itself if the challenge of providing civil MIAMs was thrown down with a sufficiently long time lag before introduction.
- 8.17. We have taken very seriously evidence given in response to our Interim Report to the effect that the Italian system was a successful example of a MIAM system (because what is compulsory is an initial meeting which can be followed, if all parties agreed, by a mediation proper). The process has to be conducted by a lawyer as mediator and seems strongly evaluative. It was submitted that this approach which was applied to certain categories of case within the civil case load (amounting to about 10% of the whole) was proving successful in settling a significant number of cases. At present the Italian experience does not affect our overall view as to the desirability of introducing civil MIAMs. There is a suggestion that the Italian approach is going to be emulated in other European Countries and these developments should clearly be monitored. But we still take the view that civil MIAMs should not be, at least for the foreseeable future, imposed as a pre-condition or beginning or continuing civil proceedings in England and Wales.



### The Case Officer

8.18. We have just referred the important figure of the Case Officer who was first proposed in the CCSR Reports and now forms part of the planning for the Online Court. Whether he will have directive powers in relation to ADR at Tier 2 of the Court is as yet unclear. He will obviously at least be a very influential figure in this area. We very much hope that Case Officers will receive effective training in ADR matters rather as the Small Claims Mediators currently do. Potentially he or she will have a crucial role to play and we hope that the Judicial-ADR Liaison Committee can be involved in monitoring the development of this role.

### The limitations of case management

8.19. Before turning to consider wider case management powers and what may broadly be called the Halsey Regime, we need to acknowledge that case management and costs sanctions are simply irrelevant to a very large section of low value cases within the current system. But for these cases this is already a period of dynamic change with regard to ADR. The Small Claims Mediation Scheme has been successful. The Online Court and its Case Officer are about to arrive. The ADR elements of the new Small Claims Personal Injury Jurisdiction are under development as we speak.

8.20. Further, particularly with cost budgeting taking up so much court time at the interim stages there is a real and severe shortage of Judge time for procedural issues like ADR to be case managed. If we are promoting real intervention in this area then these problems create a serious potential hurdle in that there is simply going to be too little Judge time available for any sensible discussion or argument. Even where parties give wholly inadequate reasons in the box on N181 for not using ADR and not seeking a stay, the members of the working group could not readily recall examples of that being examined or criticised at the case management stage. In circumstances where we are contemplating the imposition of meaningful sanctions at an interim stage this is clearly a very serious concern indeed. The ideal would be a world where, at least in the multi-track, parties would expect to attend CCMC's with three areas of concern: directions, costs and ADR. Costs budgeting will normally involve a discussion of the costs of ADR both incurred and estimated.

Encouragement through case management

8.21. We make no apology for repeating the statement made by the Master of the Rolls, Sir Anthony Clarke in 2008 that:

“ADR must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required and whether a Part 36 offer ought to be made and at what level.” (In his speech to the Civil Mediation Council conference: 8 May 2008)

8.22. The present system of case management in relation to ADR has, at least in the multi-track, the following features:

- (1) ADR orders and accompanying stays of proceedings are included routinely by agreement in Directions.
- (2) There may be words of encouragement from the Judge at a Directions hearing that may amount in some cases even to pressure. Experience is not uniform.
- (3) No compulsory mediation ADR orders are made and no immediate sanction is applied in cases where a Court disagrees with the decision over ADR being taken by one or both parties.
- (4) The Court’s order may require a refusing party to record his/her reasons for not attempting any ADR process so that those can be re-visited and reviewed later post judgment in the context of costs. But the members of the working group are unaware of any instance of such a post-judgment examination being conducted or of any guidance as to how such a process of consideration should proceed.
- (5) Applications can be made post judgment (see Halsey, PGF etc) for a victorious party to be deprived of some or all of his/her costs on the grounds of an unreasonable refusal to mediate.
- (6) Halsey’s guidance as to what the parties can rely upon to justify a refusal to mediate effectively forms a list of permissible opt-outs.

8.23. As we approach any recalibration of the level or timing of the encouragements to be given by the Court or by the Rules we think that the governing principles should be the following:

- (1) There was no or virtually no support for blanket compulsion in any of the written or spoken contributions given to us in response to the Interim Report and we do not recommend any such measures.
- (2) But the Halsey List of acceptable reasons for not entering into ADR (which stands as an encapsulation of the current judicial approach) needs to be urgently reviewed and is too generous to the refusing party.
- (3) Court documents, protocols, guidance material for litigants and case management should all be co-ordinated to express a presumption that ADR should be attempted at an appropriate stage on the route through to trial.
- (4) Mediation is only one, albeit plainly the most important, of the ADR techniques which are available which could be further encouraged by the Court.
- (5) At all costs the parties should be discouraged from becoming bogged down in satellite disputes about opting in or opting out of the ADR process.
- (6) The approach of reserving the question of cost penalties to the position post judgment should, if at all possible, be replaced by something stronger happening earlier. We think there is a need to develop a form of stronger court intervention for use mid-stream at the time that the decisions to use or not use ADR are being taken. We discuss below the kinds of sanction that could be applied at the case management stage.
- (7) At the very least Fontaine Orders should become part of standard Directions.
- (8) We think that when conditions are felt too permit it careful further consideration should be given to introducing a Notice to Mediate system on the basis of the British Columbia model.

- 8.24. As noted above blanket compulsion (perhaps to our surprise) received very little support in the responses to our Interim Report. Thus the Civil Mediation Council's report was for the court to administer a (narrow) set of opt-outs with a costs sanction for disobedience where a party stubbornly refuses to mediate
- 8.25. In our Interim Report we singled out boundary disputes and clinical negligence claims as candidates for a possible pilot use of mediation. Ironically in both of these areas important and constructive steps are now being taken to promote ADR. We would be extremely reluctant to propose mandatory mediation at this juncture, for example in clinical negligence NHS Resolution is now engaging Claimants' lawyers in an informed discussion of a range of ADR options on a case-by-case basis it is hard to see it being other than harmful for a blanket requirement, of one particular form of ADR, to be super-imposed.
- 8.26. So what if any changes do we propose?

The test of reasonableness

- 8.27. It is with greatest deference that we offer any criticism of the carefully-considered guidance given by the Court of Appeal on a case management issue. But that is where we find ourselves and it is significant that some of the feedback we received seeking clarification of the inconsistencies in recent Court of Appeal decisions came from the judiciary.
- 8.28. Although we do not agree with all aspects of the CMCs "automatic" referral scheme we do agree with them that the opt-outs under Halsey needs to be significantly narrowed. We think that the acceptable opt-outs could be broadly as follows:
- (1) The parties have already attempted mediation (or possibly JNE or some other form of ADR) without success.
  - (2) The parties are already committed to an ADR process in the near-term.
  - (3) The parties (or a party) satisfy the Court of a need to wait (often until after disclosure) for any meaningful negotiations to take place, but they will commit to using ADR at that stage if the case has not otherwise settled.

- (4) There has been unreasonable or obsessive conduct by one or other party (of the *Hurst v Leeming Variety*).
- (5) There is a genuine test case in which the court's judgment on an issue of principle is required.

Most of us think that realistically if both parties are opposed to any or any further use of ADR there is unlikely to be any sanction. The alternative view is that the court may wish to reserve the right to condemn both parties. There is some precedent for this.<sup>1</sup> Of course under the current operation of the *Dunnett* principle the losing party has to apply for relief from the full award of costs anyway; it would be hard to make that application if the applicant had not themselves suggested and supported the use of ADR at the relevant time.

8.29. In our combined experience of the way ADR and in particular mediation has worked in complex and entrenched disputes, we do not think that any of the following are acceptable opt-outs:

- (1) That the case appears complex (this seemed to be accepted as in part justifying a refusal to mediate in *Gore v. Naheed*).
- (2) That the case involves serious issues such as fraud.
- (3) That the ADR process appears to be unlikely to succeed.
- (4) (Given the increasing flexibility of the ADR offering) that the cost of ADR is too great.
- (5) That one or other party believes he or she has a strong case.

8.30. At this point we confront a series of difficult policy issues. We express our views about each of these below but on some of them we have not achieved unanimity. We see each of these as areas for further work, for detailed development in the future.

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<sup>1</sup> See *McMillen Williams v Range* [2004] EWCA Civ294, and also the interesting South African case of *Brownlee v Brownlee* 25 Aug 2009 S. Gauteng (Johannesburg) High Court, where the court limited what each lawyer could recover from their respective client

- 8.31. We have identified three key policy issues that will determine the design of the rules in this regard.
- 8.32. Policy Issue 1: how far should the court intervene in the choice of ADR process and should it insist that a mediation, as it distinct from for example simple negotiation, be undertaken? Opinion in our Working Group is evenly divided. Option A is that, provided the court is satisfied that something more than simple, informal, negotiation or a Part 36 offer has been attempted then in most cases that will satisfy the ADR requirement. Certainly if the parties have engaged in judicial evaluation or a formal roundtable meeting then (unless there are very particular circumstances), parties should be taken to have done enough. Option B is that ultimately the parties must attempt to mediate and, subject to the other limited opt-outs acknowledged in 8.29, above will not be able to proceed to a trial without having done so, unless positively excused from this by a judge at CCMC or PTR. Mediation has proved itself a highly flexible and effective solution to cases which had been thought impossible to settle. Until it has been tried the “last resort” of trial should not normally be available.
- 8.33. Policy Issue 2: Is it possible to interfere in the parties’ decision-making “midstream”. Judges already make suggestions at the directions stage about ADR and ignoring such a suggestion is already one route to incurring a holding cost penalties. But could not there be some more direct and immediate intervention and will the opportunity arise, even in multi-track cases, for such a discretion to be discussed?
- 8.34. We think this should be explored but we accept that such a proposal needs to be developed in a way which avoids a proliferation of hearings which only discuss ADR issues. The question perhaps is whether if all of the directions were settled in a given case, stakeholders would accept hearing taking place only about ADR.
- 8.35. Policy Issue 3: is there a sanction that would work in one of these midstream hearings. We think there is but again we think that detailed development of the proposal and detailed further discussion with stakeholders is required. One possibility would be a recommendation of a costs penalty made by the Judge at the interim stage, a “note on the file”. Another would be a provisional fee reduction of any recovery of fees

that may be made at the end of the day, perhaps 40% or more. This would be provisional in the sense that at the end of the day if a party wished to deploy material that was too sensitive to deploy *inter partes* at an interim hearing, then it could do so in support of an application for relief. This issue would necessarily be handled at the interim stage by a Judge who would not ultimately be the trial judge.

- 8.36. There are two reasons for the current approach taken in, for example, the Fontaine Order. One is presumably to conceal sensitive material from the Court. We have some difficulty in identifying what that material might be. The other would presumably be that some material was too sensitive to deploy in the face of the other party. Again we are unsure quite what kind of material this could be. In any event we think that our approach solves both of these problems.
- 8.37. It has been recognised for some time that QOCS cases are a problem for the Halsey regime. A Defendant who in any event cannot recover costs if successful faces no sanction as there is nothing for them to be deprived of. It may not be realistic to imagine costs orders being made *in favour* of a *losing* Claimant in such cases but it is hard to see how else an unreasonable Defendant in these cases could be sanctioned. For the QOCS Claimant there already exists the standard Dunnett-style sanction of being deprived of some or all of their costs if they win. If they declined to mediate and then lost they could be exposed to an application to strip them of QOCS status but that would seem severe.
- 8.38. We are aware that there is potential here for satellite disputes to break out expensively as to whether ADR should be required or not. Once the court's attitude has become clear and costs awarded summarily against those who apply unsuccessfully for relief in a given case parties will simply get on and use ADR more and argue less. We think the provisional reduction in costs will be an effective incentive.

A way forward: Notice to Mediate:

- 8.39. The advantage of automatic, self-policing ADR systems like family MIAMs is that they do not require judicial intervention or court time. We think that the most promising first step in this direction could be the

introduction of the Notice of Mediate scheme as already operating in British Columbia.

- 8.40. We anticipate that the comment that the above proposals are all adjustments to the existing systems and are insufficiently radical (for others of course they will no doubt go too far). But we think that with the current state of civil justice and current levels of awareness and availability of ADR services they strike the right kind of balance. In the near future we think that some form of more automatic referral could be achievable. We have stressed above the desirability of referring the dispute automatically to a default system of ADR without the need to trouble the court or the risk of satellite argument. Is there room for a step towards an automatic system yet? Have considered various options the working group believes that the British Columbia Notice to Mediate system offers the most promising way forward in this regard.
- 8.41. Essentially if one party issues a Notice to Mediate, being a formal invitation by one party to the other to mediate, then a mediation will kick into action and a mediator will automatically be appointed from a Court-approved roster (if the parties do not agree on a mediator themselves) without any consideration or intervention by the Court. The Court has a residual supervisory role but the indications we have from practitioners who use the system is that it has had the effect of making the court-based mediation system culturally normal, that there is very little or no satellite dispute about the fitness or appropriateness of a given case to mediate and that these have proved in British Columbia to be successful steps towards increasing public awareness and acceptance of mediation as a technique.
- 8.42. If we introduce a Notice of Mediate system a number of critical policy decisions arise.
- (a) Should there be an ability to refer to court if the Notice to Mediate is issued by an unreasonable opponent who you believe will never settle. A striking feature of the British Columbia scheme is that the only basis for relief from the obligation to mediate is attendance at a previous, failed, mediation.



- (b) Are the stakeholders sufficiently confident there is an ADR product of guaranteed quality available as a default system, just as there is a system of court rostered mediators available in British Columbia?
  
- (c) Under the British Columbia scheme sanctions for ignoring a Notice to mediate include striking out the defaulting party as well as costs orders. Rule-makers would have to decide whether that was too severe a sanction under a Notice to Mediate procedure in England and Wales.

## **9. SECTION 9: RECOMMENDATIONS**

### **The Judicial-ADR Liaison Committee**

#### **Recommendation 1:**

- 9.1. A liaison committee should meet on a regular basis at which ADR professionals and Judges can monitor and give advice on the role of ADR in the rapidly changing Civil Justice landscape.

### **The public awareness of ADR**

#### **Recommendation 2:**

- 9.2. The public awareness of ADR needs to be seen as part of the wider challenge of public legal education in England and Wales.

#### **Recommendation 3:**

- 9.3. The ADR community should liaise with the Citizens Advice Bureau and voluntary sector and participate fully in initiatives such as the CJC's access to justice for those without means conference.

#### **Recommendation 4:**

- 9.4. Peer mediation in schools and colleges should be promoted.

#### **Recommendation 5:**

- 9.5. Law faculties throughout England and Wales should be encouraged to regard ADR as an essential part of any professional training.

#### **Recommendation 6:**

- 9.6. The professional training of all parts of the profession should embrace and emphasise the role of ADR.

#### **Recommendation 7:**

- 9.7. The disciplinary codes of all parts of the profession should emphasise a professional duty to ensure that clients understand all the alternatives to litigation that are available.

Recommendation 8:

9.8. The mediation Councils and leading bodies in the various mediation sectors should consider collaborating over public legal education so as to provide a single “voice of mediation” in England and Wales.

Recommendation 9:

9.9. A new Website, perhaps to be called “Alternatives” should be established to act as a single online depot offering information about all the different techniques of ADR that are available. Illustrations of the successful use of ADR in settling entrenched disputes could be included.

Recommendation 10:

9.10. The ADR community should continue its efforts to ensure that mediation and ADR are mentioned in the broadcast media and social media.

Recommendation 11:

9.11. ODR needs to establish itself in the public consciousness in order to realise its vast potential. It offers efficient and proportionate dispute resolution to a world that increasingly embraces online services and interactions in all aspects of life. Part of the solution will undoubtedly be standard setting. (See further below.)

**Availability of ADR**

Recommendation 12:

9.12. Small claims mediators and the small claims mediation scheme need to be fully resourced.

Recommendation 13:

9.13. The case officers in the online court will have a crucial role to play and care must be taken to ensure that their training and recruitment is appropriate.

Recommendation 14:

9.14. We support the proposed introduction of a neutral evaluation system in the newly-expanded personal injury jurisdiction of the small claims court.

Recommendation 15:

9.15. Judicial resources should be made available for judicial neutral evaluations to be conducted in the small claims and County Court.

Recommendation 16:

9.16. The Civil Mediation Council should consider promoting and accrediting cheaper, less expensive mediation models such as 3 hour telephone mediations.

Recommendation 17:

9.17. The Civil Mediation Council should seek as far as possible to emulate the Family Mediation Council in its regulation of mediators and mediation providers.

Recommendation 18:

9.18. Online dispute resolution in all its many forms must establish a set of standards in order to gain further acceptance.

**Court/Government encouragement of ADR**

Recommendation 19:

9.19. There should be a review of the operation of the Consumer ADR Regulations to ensure that the existing rules are complied with and careful thought should be given to their further reinforcement, so as to increase the use of consumer conciliation in this area.

Recommendation 20:

9.20. The terms of claim documents, Court forms, pre-action protocols and guidance documents already contain significant prompts towards ADR but should be reviewed to ensure that:

- (a) there is effectively a presumption that ADR will be attempted in any case which is not otherwise settled;

- (b) that litigants are fully aware of or have been fully informed about the alternatives to litigation.

Recommendation 21:

- 9.21. The Halsey Guidelines for the imposition of costs sanctions should be reviewed and should narrow the circumstances in which a refusal to mediate is regarded as reasonable.

Recommendation 22:

- 9.22. However difficult it may be we should try to achieve a greater degree of Court intervention during the case management process as opposed to waiting until after judgment.

Recommendation 23:

- 9.23. The post-mortem sanction under the Halsey system should be retained and applied more vigorously. The jurisprudence is ripe for review in light of apparent inconsistencies between recent Court of Appeal decisions.

Recommendation 24:

- 9.24. In the medium term the best option for a mechanism which defaults the parties into ADR without the need (or possibility) of expensive and wasteful court applications is the Notice to Mediate system operated in British Columbia. If and when stakeholders are satisfied that there is a sound mediation scheme (to perform the function of the Court roster of mediators in British Columbia) then proposals for a notice to mediate system in England and Wales should be brought forward.

## Appendix 1:

### GLOSSARY

ACAS:	The Advisory Conciliation and Arbitration Service, a public body offering advice and conciliation services in employment matters.
ADR:	Alternative Dispute Resolution
APIL:	Association of Personal Injury Lawyers
CAB:	Citizens Advice Bureau
CEDR:	Centre for Effective Dispute Resolution
CJC:	Civil Justice Council
CLIN NEG:	Clinical Negligence
CMC:	The Civil Mediation Council
CPR:	Civil Procedure Rules
DJ:	District Judge
CCJ:	County Court Judge
CCMC/CMC:	Costs and Case Management Conference, Case Management Conference
FDR:	Financial dispute resolution, Family Court hearing to seek to promote settlement of money disputes in divorce
FMC:	Family Mediation Council
FOIL:	Forum of Injury Lawyers
HMCTS:	Her Majesty's Courts and Tribunal Service
JSM:	Joint Settlement Meeting
J(E)NE:	Judicial (Early) Neutral Evaluation
MASS:	Motor Accident Solicitors' Society
MIAM:	Mediation Information and Assessment Meeting
MOJ:	Ministry of Justice
NTM:	Notice to Mediate
ODR:	Online Dispute Resolution
P(E)NE:	Private (Early) Neutral Evaluation
PI:	Personal Injury
PTR:	Pre-Trial Review
QOCS:	Qualified One-way Costs Shifting
RTA/EL/PL Protocol:	This is the protocol for processing and seeking to resolve quantum only disputes in the road traffic, employers' liability and public liability area
TCC:	Technology and Construction Court