



Bar Council response to the Civil Justice Council Consultation on the future of ADR in Civil Justice

December 2017

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB)'s Consultation on the Civil Justice Council's (CJC) interim report on the future of Alternative Dispute Resolution (ADR) dated October 2017¹.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of Criminal and Civil Courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. References in this Response to "the Paper" should be taken as a reference to the CJC Consultation Paper.

Overview

5. The Bar Council welcomes the opportunity to respond to the questions below, at the invitation of the CJC. This submission has been prepared by the ADR Panel of the

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>

Bar Council, with the assistance of the Remuneration Committee. The ADR Panel comprises members who have a wide range of experience in ADR, most of whom are dual qualified as barristers and mediators, and are therefore able to draw informed comparisons between the litigation process and alternative forms of dispute resolution. Unless expressly stated, the term “ADR” in this paper refers to mediation which, as Briggs LJ has recently confirmed in his Civil Courts Structure Review (at para 4.16) is “the pre-eminent non-adjudicative dispute resolution process conducted in parallel with litigation. Almost all decided cases about ADR have actually been about mediation.”

Question 10.1. *The Working Group believes that the use of ADR in the Civil Justice system is still patchy and inadequate. Do consultees agree?*

6. We agree that there is an inconsistent use of ADR in the Civil Justice System since the introduction of the Civil Procedure Rules. One of the reasons often cited is a lack of public knowledge of ADR as an alternative process for resolving disputes and, surprisingly, a lack of knowledge on the part of members of the judiciary and practitioners of both the mechanics and benefits of ADR. The public, as a result of this lack of awareness, rely on the advice of the professionals they consult, to inform them of what route to take when accessing the civil justice system. In some cases, it is the professionals themselves that lack sufficient knowledge and experience of ADR to inform the lay client of when and how to deploy the processes. As a result, there will be a lower take-up, or a take-up at a late stage, when the costs incurred make attempts at settlement more difficult. An example of the harm potentially caused to the parties by insufficient appreciation of the availability of ADR arose in the case of *Briggs v First Choice Holidays* [2017] EWHC 2012 (QB).

7. Whilst the use of ADR is strongly advocated by some members of the judiciary and legal professions, the primary difficulties arise where there is no legal involvement. Litigants are not necessarily aware of the ADR provision available or the possibility of using mediation. As a general proposition, it is difficult for litigants in person to access mediation facilities without legal assistance; save for small claims mediation and family mediation where engagement is strongly encouraged. To that extent, while the provision of ADR is high, the use of mediation and other facilities can be low.

Question 10.2. *The Working Group has suggested various avenues that may be explored by Judges, by lawyers and by ADR professionals in order to improve the position. We will ask questions in relation to these proposals below. But do consultees think that the Working Group*

has ignored important questions or precedents from other systems or that there are other areas of inquiry with which we need to engage?

8. Having considered precedents from other systems, the Bar Council would argue that the focus needs to be on changing the culture in the UK. This would involve continuing education and better communication of the message to judges, lawyers and members of the public that many parties to a dispute may be better served by settling it without litigation.

Making ADR culturally normal

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

9. A wider understanding of ADR has proved particularly difficult because, as stated in response to Question 10.1 above, there remains a lack of public awareness. Most litigants still regard justice as “having their day in court”; that is, having their position approved by a judge – for all to see. Even where the outcome is not the one that they wish for, they respect the court system as an institution. In contrast, ADR is a confidential process that does not always satisfy a litigant’s desire for a public “victory”.

10. Further, the introduction of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) has resulted in a significant drop in the take-up of ADR. The Ministry of Justice’s statistics state that there was a 44% reduction in mediations, from 14,000 mediations started in 2012 to 7,700 in 2017². It is difficult to avoid the suspicion that a significant reason for the plunge was the fact that fewer disputing parties had mutual access to legal representation in the form of solicitors or barristers. Parties at loggerheads will fight, irrespective of funding. However, legal aid ensures parties are advised by legal representatives who are professionally obliged to advise clients about ADR, and indeed to encourage it where appropriate.

11. Litigants in person are suspicious of ADR, even when it is recommended by a judge. Without access to independent legal advice, they are less likely to be adequately

² Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum. Submitted to the Justice Select Committee on 30 October 2017 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf

informed about the advantages of ADR or the disadvantages of proceeding with litigation. There is a lamentable lack of “official” signposting or explanation to parties. With the best will in the world, court-produced fact sheets cannot convey the message with the same transparency as a solicitor or barrister explaining it slowly and patiently. Reducing Legal Aid has certainly rendered use of ADR less likely.

12. The Bar Council is of the view that ADR is very well understood and promoted by practising barristers. All students on the Bar Professional Training Course (BPTC) have to undertake a mandatory module on ADR. This has been the practice of barrister education for at least a decade. Those working in property litigation, family law, employment law, and contentious probate in particular are acutely aware of the cost and benefits of mediation.

13. The difficulty with promoting an understanding of ADR is tied up with its merits; it produces nuanced outcomes in each case that are not readily understandable without the context. ADR conducted without legal advice may not be as successful. As such, it is difficult for third parties to understand. Further, the fact that mediations are confidential in nature, again an important benefit, means parties may not be able to communicate outcomes or information about the mediation process to third parties, in particular, where a settlement agreement itself often contains a confidentiality clause.

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

14. Judges are already highly proactive in recommending mediation in any dispute where they consider it could be of assistance, but there needs to be a reinvigorated approach from government and at all levels of the courts, to provide documents to potential litigants in language that is clear, about what to consider when instituting proceedings.

15. Greater progress could be achieved by increasing public awareness. This needs sufficient investment from government and the judiciary to communicate through paper-based or digital public awareness campaigns.

16. At pre-issue stage, we agree there needs to be a “consistency of language, tone and intent” across the board, not only in Pre-Action Protocols, but also in documents made available at courts. These documents need to make clear the advantages of ADR, and the potential sanctions if an ADR process is not adopted. The presumption should be that it is unreasonable for parties to institute proceedings without first having

considered and implemented an ADR procedure. See the powers of the court on costs in CPR 44, and the Report at paragraph 5.9. Sir Rupert Jackson's suggestion in his preliminary report needs to be reconsidered.

Encouraging ADR at source

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

17. The approach to "Consumer ADR and Ombudsmen" in the consultation underplays the importance of other schemes. It is described in the summary, somewhat dismissively as "a plethora of other industry-specific complaints and dispute resolution mechanisms". Not all schemes offered by ADR providers are "industry-specific", and many can compete with organisations that brand themselves as "Ombudsmen". The reality is that there are many ADR providers which supply dispute resolution or ombudsman services, and which are members of the Ombudsman Association, but are not called "Ombudsmen". The word "Ombudsman" is a sensitive term under the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014³, requiring the consent of the Secretary of State if a company or business wishes to use the name in its title. The focus on the desirability of an ombudsman with that specific title may encourage consumers (and others) to form the inaccurate view that the absence of one means no recourse to dispute resolution.

18. There are cases where other ADR schemes, aside from that of an ombudsman, could perhaps be of greater assistance to litigants than is suggested in the consultation. The use of the word "Ombudsman" is one which may itself cause focus to shift from "dispute resolution", which is what is required in cases which might otherwise come before a court. For example, the Centre for Effective Dispute Resolution ([CEDR](#)) or [Retail ADR](#) provide Communications and Internet Services Adjudication Scheme (CISAS), Water Redress Scheme (WATRS), the Postal Redress Service (POSTRS) and various other forms of ADR, in competition to those run by Ombudsman Services: Communications/Property/Consumer.

19. It is important to highlight that the general experience of consumers in relation

³ http://www.legislation.gov.uk/uksi/2014/3140/pdfs/ukxi_20143140_en.pdf

to “Ombudsman” services is not particularly positive. In the Money Saving Expert report for the All Party Parliamentary Group on Consumer Protection, 53% of complainants said that their experiences with ombudsmen made them less likely to use one again⁴.

20. This is a matter of concern given the current thinking that only one business may use the term “Ombudsman” in a given area, even though there may be a number of ADR suppliers. This had the consequence recently that the “Retail Ombudsman” as named on inception in 2014 was recently required to change its trading name to “[Retail ADR](#)”. Although the organisation provides the same service, it was required to redact any reference to “Ombudsman” in its title.

21. It is suggested in the consultation paper that, anecdotally, the ADR Directive has not led to an increase in consumer dispute resolution. It is not clear to what extent this anecdote is accurate. There have been a number of new entrants to the ADR market (of which Retail ADR is an example), and CEDR and Ombudsman Services have noticeably increased the number of schemes which it operates. In the case of CEDR, there has also been a notable increase in the number of trained adjudicators and arbitrators. Furthermore, there appears to be a greater uptake of online dispute resolution including greater use of “[Resolver](#)”, “[Modria](#)” and other online platforms.

22. Any of the accredited bodies registered with the [Chartered Trading Standards Institute](#) (CTSI) in accordance with the Consumer ADR Directive (as implemented in the Consumer ADR Regulations) are accredited and audited bodies that can offer services in the areas of their accreditation. There is no reason why parties to litigation should not be encouraged to look for arbitration and adjudication under such schemes. Although the consultation has focused particularly on the areas of mediation and judicial Early Neutral Evaluation (ENE), there is considerable scope for diversification into independent adjudication schemes (which usually are not binding on the consumer but are binding on the trader) or arbitration schemes (which are binding on both parties), which offer a low-cost simple resolution. This may require alteration to the scheme rules, but we envisage that consultation with ADR suppliers would enable suitable changes to be agreed. Moreover, the dispute does not need to be industry specific before advantage could be taken of such schemes. CEDR offers

⁴ A Money Saving Expert report for the All Party Parliamentary Group on Consumer Protection dated November 2017 https://images6.moneysavingexpert.com/images/documents/MSE-Sharper_teeth_interactive.pdf?_ga=2.23314426.1931835025.1512299326-1943587962.1512299326

independent arbitration which can be made available on a case by case basis, and their panel of independent arbitrators have considerable experience in dealing with these matters and are accredited, mentored, peer-reviewed as appropriate in accordance with the ADR Directive.

23. There is no evidence that traders, faced with the alternative of litigation, would be unwilling to use such bodies, and it is suggested that greater uptake could be achieved by better “signposting”. At the time of the implementation of the ADR Directive, it was envisaged that signposting to appropriate ADR providers might be better achieved by a central body, but this is not in place. Court services could give greater information about the provision of ADR by such bodies including consumer arbitration and adjudication.

24. It should also be noted that the view of Lord Briggs in paragraph 4.7 of the report that “because of the diversity of the court case-load Lord Briggs was reluctant to permit evaluative work to be conducted by anybody other than a Judge” is relevant to the principles underlying the provision of a system of justice but antithetical to the provision of ADR, in which parties are encouraged to make an informed decision without judicial input. There is no reason why a barrister, arbitrator or solicitor should not be able to give advice by way of ENE. Indeed, it is questionable whether judicial advice could fairly be described as the provision of “neutral” services. An evaluation given by a Judge is likely to be more influential on the parties but is nonetheless capable of being different from the decision that would ultimately be arrived at. This could both restrict the choices of the parties and damage the appearance of impartiality of the judiciary as a body: as a generalization, it is preferable to restrict the provision of ADR to the professional ADR providers. It is notable also that there is a precedent for the use of ENE in respect of the use of consumer enforcement powers arising under regulation 15(4) of the General Product Safety Regulations 2005⁵. By agreement between the Chartered Institute of Arbitrators and Government, this process (which is described legislatively as the taking of advice) is conducted by ENE. Although there are only two known cases under these regulations, it is understood that one has been carried out by a retired Judge of the High Court and the other by an engineer arbitrator.

⁵ The General Product Safety Regulations 2005 - http://www.legislation.gov.uk/ukxi/2005/1803/pdfs/ukxi_20051803_en.pdf

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

25. The costs sanction should be maintained. It is useful to remind disputing parties that the fact that their case had a strong chance of success is not in itself a sufficient reason for proceeding to a trial. That may not be the best use of court resources.

26. Furthermore, the irrecoverable cost of a successful trial might still outweigh the financial advantage to both parties of early settlement. Although these can never be known, because it has not taken place, the righteousness of the cause alone should not be a reason for refusing to spare the courts' burden.

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

27. Consideration could also be given to requiring as part of the over-riding objective, that parties should try, where possible to settle disputes and issues between themselves. At the moment, the court has a duty to encourage the use of ADR, but there is no expressed obligation on the parties themselves to try to take responsible decisions as to negotiation and settlement.

Encouraging ADR when proceedings are in contemplation

Question 10.8. *Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings? How in practical terms could such a system be made to work? How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?*

28. Although Halsey suggested that forced mediation is a breach of Article 6 rights⁶, this view has been challenged and punctured on a number of occasions. Instead, our view is that engaging in an ADR process furthers the parties' fair trial rights because:

28.1 If the matter settles, the parties have reached a resolution without needing the court;

⁶ *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576

28.2 If it does not settle, the parties' rights of access to the courts are unimpaired;

28.3 Although parties may not previously have considered this, mediation may offer the parties a more elegant or satisfying solution than the rather limited repertoire of the courts. It therefore expands rather than circumscribes access to justice; and

28.4 Even if the success rate of forced mediation is lower than that of voluntary mediation, it would still result in a much higher rate of settlement than currently exists. 30% of 100% is more than 70% of 30%.

29. The primary difficulty with making mediation or ADR engagement a condition for issuing proceedings is the fact that before proceedings are issued, the court has no involvement in the case. There are already requirements to comply with pre-action protocols. A 'tick box' on the claim form to indicate that the parties had attempted mediation would be ticked as a matter of course with minimal ADR engagement having been attempted.

30. Another argument against making engagement mandatory is the view that mediation works on the basis that the parties come to it voluntarily and choosing for mediation to be their preferred method of resolving the situation. If parties are forced into a mediation it may restrict their engagement with the process. However, the experience of other jurisdictions where there is a greater degree of compulsion to mediate than in England and Wales is that even reluctant parties can and do settle at mediation on terms they can live with. What most people in dispute want is an end to the dispute, not resolution by a particular method.

31. Given the large number of undefended debt cases (as set out in the interim report and commented on in Briggs' Civil Courts Structure Review⁷), it is clear that the vast majority of cases issued may not need ADR intervention. The court is only realistically in a position to assess such cases as not requiring ADR once the case has been issued and an admission has been filed or the defendant has failed to defend. It is not realistic or practicable to be able to assess such cases as not requiring ADR before this stage.

⁷ Civil Courts Structure Review: Final Report by Lord Justice Briggs - <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>

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

32. There is room for improvement through the provision of a (non-approved) list of ADR providers willing to participate in a court based scheme, with a description of the type of service offered, and a brief explanation of the advantages and disadvantages of taking part in any particular type of scheme is commended.

33. In addition, the courts should also explore the possibility of developing a mechanism for informing parties about the different ADR options, and the various ADR providers which supply these services. This will ensure that the parties do not have to communicate directly in order to select the ADR service or provider, which may in itself be a deterrent for parties.

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

34. There are mixed views as to whether the introduction of MIAMs have encouraged parties to a family dispute to turn to mediation rather than litigation. Since its introduction, MIAMs have not produced the huge diversion of cases away from the Family Courts into mediation as some had hoped. One of the reasons for this is the sheer number and breadth of exceptions that apply to either party having to attend a MIAM and the low threshold for subsequently issuing proceedings. There are also exceptional cases where parties are permitted to bring cases even where they have not satisfied the criteria in the application forms for issuing proceedings.

35. If the CJC were minded to recommend the introduction of a similar pre-issue requirement for attendance at an information and assessment meeting before civil proceedings could be issued, the Bar Council would certainly suggest a thorough look at and narrowing of the relevant exceptions (see the answer to question 10.19 below as to when refusal to mediate is and is not reasonable) and also consideration of raising the threshold from mere attendance at a MIAM by one of the prospective parties to the dispute before they can issue proceedings.

Encouraging ADR during the course of the proceedings

Question 10.11. *Do consultees agree with the Working Group that the stage between allocation and the CCMC is both the best opportunity for the Court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?*

36. The best opportunity for the courts to encourage ADR is the stage between allocation and the CCMC. Thus, the process should first be encouraged at allocation stage, if attempts have not been made earlier. This should ensure that before the case moves on to more intrusive case management at CCMC, parties are required to demonstrate that they either have engaged or will engage in ADR before the case can move forward. Litigants will be encouraged to assess the strengths and weakness of their cases before costs escalate. It is agreed that the advantage at this stage of having the issues in a case clearly pleaded can benefit the mediation process; albeit that there may be other 'non-legal remedies' that the parties wish to seek, and which will not be set out in pleadings. There will, of course, be cases of certain types that do not lend themselves to such an early attempt. These, instead, can be identified by well-directed questions in the Questionnaire.

37. It should also not be assumed that ADR, once attempted, should not be tried again. Parties' views change over time and become better informed. Parties should be encouraged to consider the use of ADR – perhaps, but not necessarily, in a different form – at every stage in proceedings. The possibility that parties may change their minds about the usefulness of non-judicial solutions should never be ruled out.

Question 10.12. *Do consultees agree with those members who favour **Type 2** compulsion (see paragraph 8.3 above) in the sense that all claims (or all claims of a particular type) are required to engage in ADR at this stage as a condition of matters proceeding further?*

38. See above at 10.11. It is accepted that the stage at which mediation takes place can be very case sensitive, and many lawyers wish to have as much information as possible before resorting to it. This course means the best costs savings are not made. Earlier engagement would be more effective. However, it is important to remember that in mediation, the defendant generally holds most cards until close of evidence. Thus, any sort of early forced mediation would have to be balanced by earlier exchange of evidence (perhaps on a partial and focused basis) so as to confer equality

of arms while balancing the cost of front loading. As stated above, the objection on the grounds of a threat to the right to a fair trial is misplaced, in our view. Parties are not under an obligation to settle. More important is the cost of engaging in an ADR in low value claims where the cost and “hassle” may be disproportionate. There is no easy answer to this. Mediators are likely to want or need some payment for their assistance. It may be that the large pool of accredited mediators would be available at a lower cost.

Question 10.13. *If compulsion in particular sectors is the way forward, what should those sectors be? Should they include clinical negligence? Should they include boundary/neighbour disputes?*

39. It is difficult to ring-fence particular sectors for compulsion when all disputes, save in rare circumstances, are susceptible to a mediated settlement. An example of this is where reputational issues are at stake/point of law requires to be decided. Boundary or neighbour disputes are regularly mediated, as are clinical negligence disputes now. The Bar Council would firmly advise against going down the route of identifying particular sectors.

Question 10.14. *Alternatively, should the emphasis at this stage be on an effective (but rebuttable) presumption that if a case has not otherwise settled the parties will be required to use ADR?*

40. Emphasis should remain on a rebuttable presumption that ADR should be used in all cases.

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

41. The British Columbia system is most attractive as a means of growing mediation in our legal system. It represents a form of compulsion or automatic referral, albeit initiated by the parties. Inappropriate cases would be identified at an early stage. If such a system was to be enshrined in the Civil Procedure Rules (CPR), and explained through the courts’ documentation when proceedings are in contemplation or to be initiated, this would grow public awareness including at pre-issue.

Question 10.16. *Do consultees agree that the emphasis needs to be on a critical assessment of the parties' ADR efforts by the Courts in "mid-stream" rather than a process which simply applies the Halsey guidelines at the end of the day after the judgment? Is it practical to expect the CCMC to be used in this way? If directions were otherwise agreed between the parties can the court reasonably be expected to require the parties to attend purely to address ADR?*

42. The Bar Council recognizes that there is a divergence of views here, given the difficulties in terms of court time and added cost in addressing reasonableness at an interim stage in the proceedings, as opposed to after judgment, and the contrasting view that there is adequate time at the CCMC stage to address the justification or otherwise of the parties' failure or refusal to engage in ADR.

The argument against:

43. Lack of consideration given to how practical costs, or other sanction could be applied mid-case. Further, many cases will not be sufficiently developed at CCMC to encourage parties to adopt ADR at that stage. Where they are, the arguments could add a significant amount of time to the length of the hearing.

44. In any event, the budgeting process is an uncertain tool to encourage ADR. Judges vary in their willingness to curtail budgets for the phases of Settlement and/or the Joint Settlement Meeting (JSM), irrespective of whether combined in the same phase or with JSM as a contingency.

45. Sadly, generous provision for ADR is too often sacrificed by judges on the altar of costs management and, worse, by parties on budgeting tactics. It is noteworthy that defendants' budgets for ADR JSM are often substantially smaller than those advanced by the Claimants. Defendants submitting deliberately depressed budgets is part of an acknowledged and judicially criticized policy, practised by many. It would be better to acknowledge that money allocated towards settlement, or at least narrowing issues, is likely to be well spent.

46. One solution would be to take all costs relating to negotiation or Part 36 or settlement or ADR or JSM out of the costs budgeting process. This would remove the discouragement a tight budget often presents.

47. There would be no objection in principle to a standard direction for ADR, if suitably phrased. Many agreed directions already pay lip service to ADR. An ADR direction could be made standard, whether included by the parties or not, but, suitably phrased, might have more effect.

48. Some flexibility could be left to parties if the order directed that the stay for ADR will take place, in default of earlier ADR, after close of evidence and before the Pre-Trial Conference (PTC). For example, this could occur at the same time as PTC. Such a direction could read: *“There shall be a 2 months stay following close of evidence, for Alternative Dispute Resolution (including round table conferences, early neutral evaluation, mediation and arbitration) unless a mediation/ADR has taken place earlier. Any party not engaging in any such means proposed by another is to serve a witness statement giving reasons within 21 days of receipt of that proposal. That witness statement must not be shown to the trial judge until questions of costs arise. If the ADR is unsuccessful, parties shall file Pre-Trial Checklists [2 weeks after the 2 months].”*

49. The above provision would lengthen the time to trial unless ADR takes place unsuccessfully before the trial date is fixed. Those courts that are applying an informal timetable of 18 months to trial would have to modify their approach to accommodate the extra time.

The argument in favour:

50. The proposals in the Interim Recommendations R11-16 are accepted. Specifically, the amount of time which might be required to consider the attitude and conduct of parties to ADR would not be prohibitive if they were required to address the issues in a separate questionnaire prior to, and for consideration at the CCMC in written submissions. They should be required to address whether ADR has been considered, and if not taken up, should set out why not. By this stage, the court would be in a position to assess the reasonableness or otherwise of the parties' stated positions. The options open to the court would be to order parties who have not yet engaged in ADR to do so within a limited time frame. Alternatively, comments could be made that might be taken into account by the trial judge when considering the parties' reasonableness and engagement in ADR by the CCMC, or other pre-trial stage. This could be done in suitable cases where a party is, as is his/her right, refusing

to mediate.

51. It is accepted that for the court, then, to order costs sanctions might be a step too far, save in the most obvious circumstances. Where it is plain that a party is acting unreasonably, then it is difficult to see why costs sanctions should not be applied. It must be better, as the recommendations state, that a decision should be open to be reviewed at the time it is made, rather than in hindsight. The obligations of the parties and the powers of the court would have to be enshrined in law, or at least in the CPR.

Question 10.17. *Are costs sanctions at this interim stage practicable? Or is there no alternative to the court having the power to order ADR ad hoc in appropriate cases (Type 3 compulsion)?*

52. Costs sanctions at the interim stage, while a positive idea in theory, would be very difficult to implement in practice. It is common (particularly in the County Court) for judges at the interim stage to leave costs so that they can be determined once the entire dispute has been heard. There is also a judicial reluctance to take time deciding on costs issues at the interim stage, as there is a great deal of time pressure on District Judges (in particular) to deal with a large number of procedural hearings within the same list.

53. As with 10.16, there are arguments for and against this proposal.

54. The argument against costs sanctions:

54.1. It is hard to see how any practical costs, or other, sanction could be applied mid-case. Further, many cases will not be sufficiently developed at CCMC to encourage parties to adopt ADR at that stage. Where they are, the arguments could add a significant amount of time to the length of the hearing.

54.2. Further, it is hard to see how interim costs sanction could be imposed without impugning the confidentiality of a mediation, if one has taken place.

54.3. Setting terms in bad faith as a condition of entering into mediation might be something that could be divulged to the court. For example, a party who says they will only agree to attend if they are allowed to ask questions of the other party or witness. This in effect, is a demand for a practice cross-

examination in confidential proceedings. Such terms are an abuse of the process and ought to be reported as a reason for the other party's refusal to proceed. Nevertheless, however tempting it may be to sanction such conduct early, the sanction would have to be kept from any subsequent trial judge.

55. The argument for costs sanctions:

55.1 In addition to the response to Question 10.16 above, in appropriate circumstances, costs sanctions would be practicable. If a mediation has already taken place, save in the most extraordinary circumstances, sanctions should not arise. Otherwise it is right that a case should be sufficiently developed so that a fair and proper view of the reasonableness of the parties can be assessed. Certainly, this should be the case for the CCMC.

Costs sanctions

Question 10.18. *Do consultees agree that whatever approach is taken at an earlier stage in the proceedings it should remain the case that the Court reserves the right to sanction in costs those who unreasonably fail or refuse to use ADR issues?*

56. The Bar Council agrees that the court should certainly retain the discretion to sanction those who unreasonably refuse to engage in ADR, or impose bad faith conditions for participating.

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

57. The Halsey Guidelines are very vague and were, by and large, specific to the appeals in that case.

57.1. Parties reluctant to mediate have shifted ground to prevent mediation while purporting to consent but setting conditions, such as the demand to be allowed to cross-examine the other party during the mediation. The latter example will always be abusive.

57.2. Other conditions may be dependent on the facts of the case. For example, the insistence of one party to travel to the other's location for the mediation. If

the party refusing to travel is disabled, it may be a reasonable refusal, even if they must make the same journey for court should the mediation fail.

57.3. A party wanting to send staff without full authority to settle, or even undermining an agreed mediation by sending a representative whose authority is limited, is acting in bad faith.

58. A party who refuses to mediate when faced with an unreasonable or abusive condition would have reasonably refused to enter into the mediation. In the third example, such a party would be justified in refusing to continue with the mediation. Something which ought not to be within the scope of mediation confidentiality.

59. The setting of unreasonable or bad faith conditions for mediation by a paying party, or attending a mediation in bad faith in the manner described, should be added to the Halsey criteria.

60. The Bar Council agrees that the Halsey guidelines should be revisited. In particular, the contention that a party might be able to invoke Article 6. In addition, there are a number of cases decided since *Halsey* which have led to confusion. The difference in emphasis in the judicial comments made in *PGF v OMFS*⁸ and *Gore v Naheed*⁹, leads to uncertainty for litigants and those advising them. Comments such as "I have difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated", serve only to act as a dissuasion for advisers to encourage their clients to engage in ADR. This runs entirely counter to the principle that parties should be encouraged to settle their disputes both before and after litigation is commenced.

61. The factors determined by the court to be relevant in assessing whether a refusal to mediate is reasonable are set out below with comments as to their applicability:

61.1. **The nature of the dispute**, as to which the court advised that "*most cases are not, by their very nature, unsuitable for mediation.*" The real question, therefore,

⁸ PGF II SA V OMFS Company 1 Limited [2013] EWCA Civ 1288

⁹ Gore v Naheed and Another [2017] EWCA Civ 369

becomes: what cases are *not* suitable for mediation? The only cases where mediation should not be attempted are those where there is a risk that significant harm would be done. So, if physical safety cannot be guaranteed or there is a history of emotional abuse between the parties, then putting them in the same room may result in damage to one other. Even then, safeguards could be put in place (like shuttle mediation) just as special measures would be applied in court. A plenary session may be inappropriate in such circumstance.

61.2. **The merits of the case**, by which the court meant that a party who reasonably believes he/she has a strong case may reasonably refuse to mediate. It is suggested that this is an irrelevant and circular criterion. All parties believe they have a strong case, otherwise they would not be contemplating litigation. Inserting the word "reasonable" merely allows the court to make its own assessment on the merits and, because it is doing so at the conclusion of the case, with the benefit of hindsight. Once one party has won the case, it is difficult to see how the other party can reasonably have believed they had a strong case. Bearing in mind that the appeal process has sometimes resulted in a "yo-yo" for the parties, where different views have been firmly expressed at different tiers of appeal, there could never be a "reasonable" refusal to discuss the dispute (the essence of mediation) and this should be viewed with some caution. Furthermore, this criterion is interpreted to mean that mediation is only suitable for cases which are finely balanced; where the prospects of success are 50/50. This implies that mediation is always about meeting in the middle. In reality, an imbalance in the strength of a case is not an obstacle to mediation. It just means that one party has a stronger hand in the mediation, just as they would have done in court. A settlement in which one party gets 90% of what they wanted, and the other party only gets 10% is still a successful mediation. Had the matter gone to trial the result might have been the same, just with additional costs, stress and delay.

61.3. **Other settlement methods have been attempted.** The court itself noted that "*mediation often succeeds where other settlement attempts have failed.*" If this criteria is relevant at all, it must require an examination of what specific process was employed, and the reasons why it failed. Ordinary negotiation between the parties should carry little weight, because it is often only after the parties have exhausted attempts to settle through negotiation that the assistance of a third party becomes necessary. Moreover, it is often carried out by skilled litigators, who are not necessarily skilled negotiators. Negotiation between the parties and mediation with an expert mediator are entirely different things.

61.4. **Costs of mediation would be disproportionately high.** It is hard to imagine circumstances in which the costs of a mediation would be higher than litigation. The costs of mediation should never be seen as an *additional* cost to litigation because mediation costs are incurred in the high expectation that they will be the final costs of resolving the dispute: they are intended to be an *alternative* to the remaining costs of the action. Proportionality must therefore be judged against what costs the parties would go on to incur if the mediation does not result in a settlement.

61.5. **Delay to a trial date.** It is difficult to imagine circumstances in which a mediation could not be arranged in time to avoid having to vacate a hearing date. But were that to be the case, that is no different to the parties attending court, informing the judge that discussions are under way between the parties, and asking for the case to be put back to see if a settlement can be reached. Generally, this is welcomed by the judge. Court time is regularly wasted by late vacation of trial dates, or settlement part way through a hearing. Why should attempts to mediate a settlement, even if it does cause delay to a trial, be treated any differently to the same delay being caused by attempts to settle without a mediator?

61.6. **Whether mediation had a reasonable prospect of success.** This criterion is ambiguous and impossible to apply without a high degree of speculation. The point of departure is likely to be that in which each party is minded to show no weakness to the other: this is not uncommon in contested proceedings. Moreover, what constitutes “success” in mediation is unclear. The parties may not settle on the day, but sufficient progress may have been made to break the deadlock so that a settlement is reached in the days or weeks following mediation. How could the court have predicted that? Attempting to predict which cases will settle in mediation and on what basis is an uninformed “wild guess” and mediators as well as parties to mediation will say, anecdotally, that cases which seem at first so intractable that the parties cannot settle even in mediation, nonetheless are resolved with the assistance of a skilled and trusted mediator. The mediation process is not susceptible to analysis in the absence of a real, live mediation. Events occur in mediation that could not possibly have been foreseen because it is as much a psychological process where parties are processing emotion and a myriad of factors some of which relate to the dispute and some which appear not to. Many mediators can give illustrations of situations where, parties which are “miles apart” at the start of the day can reach agreement quickly when there is a sudden shift in the power dynamic because of the revelation of hitherto unknown information (it may remain

unknown to the other party if disclosed only to the mediator). Conversely, parties can be very close to a settlement but can become entrenched in an impasse because neither is willing to make the final concession to let go of the conflict (so called “salami-slicing”). Hence, assuming that the success of mediation is related to the gap between the parties or the legal merits of the case is a fallacy. It may often have more to do with the attitudes of the parties than an assessment of the legal merits.

62. There are other factors which are not included in the Halsey guidelines which, it is suggested, are more relevant than some of those that are listed:

62.1. **The skill of the mediator.** This is usually one of the most determinative factors in whether a mediation is successful. The ability of the mediator to switch deftly from one role to another, deploying a range of communication and relationship-building skills, is not comparable to the role of an advocate in litigation. Whereas in litigation it is often said that 90% of cases are decided on the law or the facts, and that the advocate will only affect the outcome of the remaining 10%, the opposite is true in mediation. Just bringing the parties together is unlikely to result in a settlement: the mediator is key to achieving that. Thus, knowing who would have mediated the dispute is relevant to an assessment of whether it was reasonable to refuse mediation. It may be invidious for the court to have to determine whether the prospects of success would have been more or less under this or that mediator, but at the very least some regard must be had to whether an experienced and expert mediator was available (and is a CMC Registered Mediator for example). Assuming such a mediator was available, there really are very few cases that could not settle.

62.2. **The timing of the mediation.** It is suggested that there is an optimum time to mediate which will vary from case to case. Refusal to mediate at a stage such as pre-disclosure may be reasonable while refusal at a later stage may not be. Thus, there should be a continuing obligation to consider whether mediation is appropriate.

ADR and the middle bracket

Question 10.20 *Do consultees agree with the Working Group and with Lord Briggs that there is an ADR gap in the middle-value disputes where ADR is not being used sufficiently?*

63. Those responding to this consultation have not noted any particular reluctance on the part of informed parties to engage in ADR due to the value of the claim. That being said, there may be a gap which needs to be filled: in particular, significantly more use could be made of ENE.

64. It is agreed that there is a potential ADR gap in 'middle-value' disputes. Litigants in those type of disputes are less likely to have legal assistance, and therefore less likely to be encouraged to use mediation or other ADR processes. Given the cuts and near abolition of legal aid in relation to civil claims, it is unsurprising that litigants in this sort of bracket are unable to access legal support and therefore are not signposted to ADR. This is yet another example of the catastrophic knock-on consequences of the legal aid cuts.

Question 10.21. *Is part of the problem finding an ADR procedure which is proportional to cases at or below £100,000 or even £150,000 in value?*

65. Mediation, as the most often used ADR procedure other than in relation to consumer claims, is regularly used in comparatively low value claims. It is not considered that mediation fees in these cases are regarded as disproportionate. Mediators practice in a highly competitive market and charge fees which parties, both lay and professional, regard as reasonable when compared with the costs of proceeding to trial. It is always going to be the case that if a settlement is not achieved then costs incurred may be regarded as wasted. It does not follow, however, that this is proving a block to the take-up of mediation in low value cases of the type here being considered.

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

66. More can and should be done to meet the demands in this challenging legal climate, however, this onus should not be placed on the ADR community. This suggestion looks like an attempt to impose Fixed Costs or Pro Bono duties on the ADR community. The Ministry of Justice should remember that ADR providers are not necessarily always lawyers, and thus, are not subject to their control.

67. The failure to take up ADR has more to do with Para 10.3 above. More

particularly, if the premise is accepted that there is too low a take-up of ADR in cases of the value specified, then this is more likely to be because of the lack of awareness of the value of ADR, and mediation in particular, in all cases as the best and most cost-effective method of resolving disputes. This is especially the case when the costs of mediation are set against the costs of going to trial. The ADR community is large and varied enough to take up any demand that is placed upon it.

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

68. ADR should be recognized under the fixed costs scheme. The current fixed costs schemes make no separate provision for ADR. That means that if ADR is to take place, it must be paid for out of the maximum fee for solicitors profit costs, which ranges from £500 (pre-issue) to £2,655 (at trial). For obvious reasons, no solicitors can now recommend ADR to their clients in such cases. They would have to advise that the client will have to pay the costs of the mediation out of their own pocket (if mediation fails) and (possibly) out of such sum (if any) receivable as a result of a successful mediation.

69. Even if a lower proportion of mediations (if mandatory) are successful, earlier resolution will reduce pressure on the court resources. Fixed costs for a mediation can only assist.

70. In terms of proportionality, it is hard to see how more than half a day's mediation could be justified for most cases below £25,000. There should only be one fee for low value claims, and this should not be set sufficiently high so as not to discourage mediation of the higher value cases. That should provide a keen incentive to mediate the lower value cases, and not litigate. It should be assumed that a party will be attended by only one lawyer each side and no more than one lawyer each side should be allowed to attend.

71. Complications which could prevent mediation if fixed fees are introduced are those case where there is involvement of Interested 3rd parties such as Credit Hire or Claims Management Companies. On the one hand, such companies are prone to consider that because they are funding the litigation, they have some ownership of the process. That militates for their exclusion to prevent interference. On the other hand,

if they are excluded, there is a risk that a Claimant may be exposed to contractual liabilities beyond any agreed sum. No lawyer could recommend agreement to a client in such circumstances without a written waiver from the other contracting party. Only primary legislation could override private contract in those circumstances.

72. The fixed fee should not include any provision for the legal representative to travel to the mediation. Local representation is the only proportionate way.

73. Some provision would be needed to ensure that the representatives attending are of sufficient seniority or qualification to assist in the mediation. Fixed costs work is rarely if at all carried out by legally qualified staff, let alone those with the experience and judgment to assist in a mediation.

74. This should not be the case, however, where consumer ADR is engaged, because under schemes falling within the Consumer ADR Directive, such schemes must always be free of charge or only of nominal cost to the consumer. Awarding costs of ADR where the consumer does not succeed risks undermining the impact of the ADR Directive.

Question 10.24. *Anecdotal evidence suggests that the various fixed fee schemes are not receiving any very great take up. Is this the experience of providers? What kind of volumes are being mediated under these schemes? Why, if they are unsuccessful, are they not being used?*

75. In terms of mediation only schemes, it is likely that take-up would also increase if information and access were provided and encouraged *at the time that the parties might be willing to consider this.*

Question 10.25. *What pricing issues have arisen as between consumer mediation, the civil mediation website fixed price scheme and schemes such as those operated by CEDR and Clerksroom? Are there inconsistencies and confusions?*

76. It is the Bar Council's view that consumer ADR should be at no cost or only nominal cost to the consumer. Many areas of trading activity now regard use of ADR as the norm, notwithstanding that the trader bears most of the cost. It is thought that most of the fixed price documents-only adjudication or arbitration schemes are less than £500 cost to the trader. Information about costs should also be readily made

available by ADR suppliers to those considering, in the context of a court scheme, whether to participate or not. The existence of a list of ADR suppliers, as suggested above, could provide this information.

Low value cases/litigants without means

Question 10.26. *Assuming an increase in manpower and the increase in flexibility over dates that have been indicated to Lord Briggs, do consultees think that a further reform or development of the Small Claims Mediation Scheme is required?*

77. Not as presently indicated.

Question 10.27. *Is further effort needed outside and additionally to the SCM scheme to make sure ADR is available for lower value disputes? What do Consultees see as being the challenges in dealing with this area?*

78. Please see the suggestion above of a single available list of ADR providers, including the provision of information about the type, cost, and duration of services offered.

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

79. Provided the resource of accredited mediators is available, which is likely, there should be no particular problem. However, the suggestion of a large scale pro bono resource is less convincing. Like anyone else, mediators should be paid for their efforts, especially when there is an obvious saving to public funds.

Question 10.29. *What are the other funding options available?*

80. Para 10.3 above is repeated. Legal aid could, and should, be extended to provide representation specifically at mediations of all kinds, subject to means. It would be an inducement to litigants in person to attend a mediation if they know that their costs are covered. The cost of providing the representation should be more than paid for by the number of cases which settle earlier.

Question 10.30. *Do consultees agree that special ethical challenges arise when in particular*

mediators are dealing with unrepresented parties?

81. It is not considered that there are any special ethical challenges for mediators which arise from unrepresented parties. In every case, whether the parties are represented or not, the mediator has an ethical duty to ensure that there is 'a level playing field' for all parties. This can be particularly awkward to manage where one party is represented and one is not or where neither party is represented, but there is a clear power imbalance either arising from their relationship or their personalities. However, the ability to create a safe, secure and fair environment in which the mediation can take place is part of the core skills of the mediator.

82. One particular ethical difficulty which can arise with unrepresented parties is a situation where the parties wish to create a legally binding agreement, but one or both of the parties plainly does not have the skills or knowledge to be able to appreciate the legal intricacies of doing so. Sometimes a mediator may suggest that if the parties want the agreement to be binding they should either seek legal advice on the precise terms either before signing or agree terms, but with some form of 'cooling off' provision which allows the parties to seek advice for a short period after signing. Sometimes the parties will look to the mediator for assistance in drafting a settlement agreement. Individual mediators take different views about the extent to which they are prepared to assist parties with drafting agreements. Some mediators are happy to produce a skeleton draft agreement, some are prepared to get involved in the fine detail of the final agreement, but others choose not to get involved at all.

83. In employment or workplace mediations, where the parties sometimes wish to create legally binding outcomes, there are statutory requirements for independent legal advice to be obtained by the employee in order to make the agreement binding. There is no ethical difficulty in pointing that fact out to the parties. It is especially important for employers to be aware of that fact as a failure to comply with the statutory requirements can leave an employee or free to continue an existing claim or even to bring a fresh claim.

84. Any mediator who becomes involved in any activity which could be construed as providing legal advice to the parties, should ensure that their professional indemnity insurance covers any such activity.

The on-line opportunity

Question 10.31. *In the digital sector how is the Tier 1 prompting for mediation going to work? Can the same prompts be used outside the Online Solutions Court when digital access becomes possible across other jurisdictions?*

85. In our view prompts for mediation can be the same in the OSC and outside the OSC. The same messages (as are set out in the report) that currently appear in leaflets and questionnaires can be incorporated in the OSC, either in square boxes on webpages to indicate information about mediation, or by requiring a 'tick box' at the relevant stage to acknowledge that the parties have been informed of the use of mediation.

Question 10.32. *What issues arise with the use of Tier 1 of the OSC and the other forms of digital access which are now intended? Is the use of ODR techniques going to lead to unfair advantages for litigants with digital access?*

86. In paragraphs 4-19 and 28-36 of the Bar Council response to the Briggs' Interim CCSR¹⁰, we clearly set out concerns regarding issues that may arise in relation to digital access, which can be summarised as:

86.1. Confidentiality of the system;

86.2. Security of the system, to ensure identity and security of data and information;

86.3. Vulnerable litigants (the elderly and disabled) being influence by third parties, in a way that cannot be picked up by the mediator;

86.4. The requirement of digital assistance for those who cannot access such technology readily or do not have the relevant skills and learning to use such systems;

86.5. Lack of hardware to use such systems (for example, not all individuals have smart phones with camera facilities for conducting face-to-face web

¹⁰ Bar Council response to the Civil Courts Structure Review: Interim Report - https://www.barcouncil.org.uk/media/423295/2016.03.08_civil_court_structure_review_-_bar_council_response_to_interim_report_-_final.pdf

meetings).

87. The same concerns and issues arise with the use of Tier 1 of the OSC for ODR. We consider that the OSC and ODR techniques would lead to an advantage to those litigants who are more familiar with the use of technology. The Bar Council is concerned that members of the public who already struggle with digital access (namely, the elderly or disabled) and those who have no digital access (those without broadband, or those who rely on visiting their local libraries for access) will increasingly find themselves struggling to engage. Further, while the proposed system may be intended to work on smart phones, in our view this will unfairly disadvantage those who are not comfortable or familiar with using such technology.

Question 10.33. How should ODR techniques be introduced? Which techniques are going to be appropriate? Could a system of online blind bidding be beneficial? How are they being introduced within the wider digital provision?

88. The Bar Council is aware that there is current testing taking place in order to design Tier 1 of the OSC. Without a clear understanding of the design of that system, we are unable at this stage, to comment on the suitability of the OSC for mediation or ODR purposes. We consider that ODR techniques should be introduced carefully and with appropriate pilot schemes to ensure viability. In some areas (e.g. the often-referenced eBay and similar consumer sites), forms of online dispute resolution can achieve results, but these tend to be in circumscribed areas with a limited number of potential complaints made and resolutions sought. We anticipate it would be more challenging to bring these techniques to other areas. Perhaps different forms of ODR are appropriate to different types of cases, and that is a matter that has to be investigated further. We refer to comments made in the report regarding how appropriate MIAMs are for family disputes, but its inappropriateness for other settings.

89. We are concerned that a system of blind binding would divorce parties from the outcome sought. Often an apology or another resolution can be achieved through mediation, we are concerned about any system which primarily focuses on monetary sums in issue.

90. We are unable to comment on wider digital provision as our members have limited direct experience with such areas. We would strongly encourage the CJC ADR

Working Group to conduct further researches into this area so that any recommendations as to use of such systems can be made from a firm evidential basis, rather than based on anecdote.

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

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

91. The Bar Council cannot speak to the use, or lack thereof, of conciliation but seeks instead to shed light on the use of Ombudsmen. As one of our number says: "Having been a fan of Ombudsman Schemes for many years, I am now regretfully concluding that they have deteriorated sadly since their introduction in 1978."

92. There are several reasons for this:

92.1. **Quality of staff:** staff are now often not legally educated – let alone legally qualified.

92.2. **Amorphous discretion:** the decisions under the FSMA are now driven solely by what is deemed in the absolute discretion of the Ombudsman's file handler to be "fair". That would be a sweeping discretion if conferred upon a judge used to balancing competing interests and familiar with the principles of equity. In the FSMA it means that decisions vary with the notions of fairness of a legally uneducated decision maker.

92.3. **Exceeding the bounds of their competence:** To illustrate the Bar Council's view on this, one of our members recounted a recent case where a young man had taken his mother's car, believing that it was insured under his name, and in turn, believing that he had her permission to drive it. In fact, she had not managed to insure it. The Ombudsman's file handler, in a draft opinion, stated that he had committed theft for which he should have been reported to the police, and based the case's determination on that opinion. This example is a concatenation of errors which should not have been reached, had the Ombudsmen read the Theft Act. A telephone call to the individual in question revealed that she was not a lawyer, not a law graduate, indeed had not even studied Law at A-level. She had not looked up the law before opining on it, and appeared to have no understanding of how serious her mistake was.

She rewrote her opinion to remove the offending opinion but did not go as far as altering the conclusion. The opinion was legally flawed in a number of other respects, but this was the most egregious.

93. This has resulted in clients being advised to view the Ombudsman's process as a matter of form, which is necessary to discharge their duty to engage in ADR. This is likely to lead to a poor quality response, which is simply an additional hurdle in the process of getting in front of a judge who knows what he is doing.

94. This is not necessarily the case for all Ombudsman/ADR schemes, and the comments above, which concern the Financial Ombudsman Scheme (a statutory and not commercial scheme which confers unusually high responsibility on the file handler because there is a provisional decision made which means that the Ombudsmen themselves may never see the decision), cannot be said to apply to all such schemes. CEDR, for example, are understood to require legal, professional or arbitration qualifications for adjudicators and arbitration qualifications for all their arbitration schemes. Decision-makers are trained and initially mentored. Matters which cannot be readily resolved are not put before a file handler for a provisional decision, unlike FOS. Moreover, the Directive on Consumer ADR contains quality control provisions which are audited by CTSI and commercial competition assists in keeping standards high. FOS is disadvantaged by being a statutory scheme using a wide range of qualified staff at relatively low rates of pay and a reputation acquired perhaps before the Directive came into being has perhaps proved hard to lose. Competition in the ADR market is an important aspect of providing high standards and this should be supported.

Challenges for Judicial ENE

Question 10.35 *Do consultees agree that JENE has certain distinct advantages (if the judicial resources are available to provide it) in terms of providing a free ADR service with no regulatory/quality risk?*

95. The case for JENE is flawed for the following reasons:

95.1. Para 10.3 and 10.5(viii) above are repeated.

95.2. JENE will increase the administrative burden on the judiciary and create a need for more judges – at a time where there are visible recruitment difficulties.

95.3. Judges will have less time for trials.

95.4. The judiciary will assume a part of the burden formerly shouldered by solicitors and barristers under Legal Aid. A cost formerly borne by Legal Aid will be transferred to the Court Service. There is no evidence that this will be more economical or proportionate in the long run. Forced ADR or specifically mediation, paid for by Legal Aid, would be cheaper in the long run.

95.5. This will also infringe the principle of judicial neutrality, and create an undesirable move towards an inquisitorial system.

95.6. There is a risk that JENE will turn into a system of mini-trials without the opportunity for full evaluation of the evidence.

95.7. The provision of JENE will be a service. Given the recent Supreme Court opinion to the effect that the Ministry of Justice is already providing a service (see Lady Hale para 123 *Unison v Lord Chancellor* [2017] EWSC 51), this is an ineluctable conclusion. However, the provision of services is subject to minimum duties which are implied by common law if not by statute. Contesting the decision of a judge exercising a judicial function is done by appeal. Contesting the opinion of a judge exercising a non-judicial function may open up some interesting new grounds.

Question 10.36. *Do consultees feel that a loss of party autonomy and the narrowness of the legal enquiry are disadvantages of the system and if so how can this be mitigated?*

96. The response to Question 35 is repeated. ADR in many forms, and particularly mediation, does not lead to a loss of party autonomy but to a celebration of it. Parties to mediation are given the power and responsibility to take practical and commercial decisions about their own circumstances, while nonetheless releasing the important influence of emotional responses. They are free to choose tailor-made solutions that can be agreed with the other side. This does not happen in court which can only apply

pre-formulated rules to the dispute which restrict the range of judicial awards (e.g. damages, specific performance, etc.).

97. It is likely that different judges will approach their task in different ways, and engage in an assessment of merits with a varied degree of attention to detail whether of law or fact. As mentioned in the Report at 9.58, there are limitations to the conclusions which a judge could reach. Subject to a party's knowledge of the advantages and options available in a mediation, there may or may not be awareness of the limitations of JENE. The fact is that there are such limitations. It is difficult to see how they could be mitigated without the judge acting, in effect, as a mediator conducting the JENE accordingly. Without a judge being trained as a mediator, the approach to the role adopted will inevitably be limited.

Challenges for online dispute resolution

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

98. ODR does indeed have enormous potential to deliver ADR efficiently and at a low cost. However, much thought must be given to the potential of designing a system that is not only cost-effective but also secure, robust and does not disenfranchise the very users whose needs it is seeking to meet.

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

99. The Bar Council sees no issue with specified standards for ODR, and would like to point out that this is already in use in consumer cases and documents only decision-making using the EU platform.

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

100. We refer to our comments in the preceding paragraphs. ODR can only really develop if confidence is built up gradually. It is important to start with low-value cases and then progress to higher value cases. Encouraging online adjudication and

arbitration is a good start.

101. In addition, ODR will need to be appropriately signposted. It will take time for such systems to become the norm, and there are no 'quick fixes' in this area.

Challenges for Mediation

Question 10.40. *Do consultees agree that Judges and professionals still do not feel entirely comfortable with mediation in terms of standards and consistency of product? Is there a danger that the flexibility and diversity which many regard as the strength of mediation is seen as inconsistency and unreliability by other stakeholders?*

102. The expectation is that judges and professionals are obliged to turn their minds to whether or not they are comfortable with mediation by reference to standards and consistency, however, the Bar Council accepts that this may not always be the case. Experienced ADR Professionals are well informed about who to choose as an acceptable competent mediator. Generally, judges and professionals who understand and are aware of the methods employed by mediators are usually supportive and likely to make the assumption that a trained and accredited mediator will be up to the job. The continued problem of a lack of knowledge, awareness, or informed awareness of the benefits of mediation on the part of the judiciary, the professions and parties to litigation is the cause of a lower than expected take-up of mediation.

103. The answer, then, is to facilitate greater and better education of all concerned.

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

104. As above.

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

105. The Civil Mediation Council has done as much as might be expected in terms of regulation (by registration upon fulfilling certain criteria) bearing in mind the lack of funds to impose, monitor and enforce standards. It is unlikely that government funds would be made available for the purpose of any more meaningful regulation. Private providers already police their own members' conduct, or should do so.

Question 10.43. *What other challenges are faced by mediation?*

106. The Bar Council has set out a number of challenges in its responses above, and would encourage the CJC to focus on remedying these before seeking out others.

For further information please contact

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