Bar Council response to Call for Evidence on Dispute Resolution in England and Wales

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's Call for Evidence on Dispute Resolution in England and Wales.[1]

2. The Bar Council represents approximately 17,000 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.

Introduction

4. This response has been co-ordinated by the Alternative Dispute Resolution Panel ("ADRP") of the Bar Council[2].

[1] https://www.gov.uk/government/consultations/dispute-resolution-in-england-and-wales-call-for-evidence

[2] The Terms of Reference of the ADRP are:

1) To consider developments in ADR/mediation/arbitration and the implications for the practising Bar;
2) To act as the focus for matters relating to ADR/mediation/arbitration;
3) To promote awareness of ADR/mediation/arbitration among the Bar and more widely;

5. The members of the ADRP have a wide experience of dispute resolution processes in civil and family disputes, including arbitration, adjudication and mediation. Some members also have experience of "ombudsmen schemes"[3].

6. The ADRP and the Bar Council do not collect statistical evidence. Other organisations, in particular the Civil Justice Council 's Judicial ADR Committee, are better placed to provide such data.

7. The responses below are based on ADRP members' extensive experience, which cumulatively amounts to hundreds of years' of experience.

8. Several Specialist Bar Associations (SBAs) have given individual responses[4]. We are broadly aligned with the spirit of these submissions and recognise the expertise and experience that the Specialist Bar Associations bring with them. As such, these submissions should be treated with considerable weight when making any decisions about the role of ADR in dispute resolution going forward.

General responses

9. Generally, the Bar Council welcomes the MOJ's initiative to encourage greater use of different methods of dispute resolution, and the desire of the new Master of the Rolls, Sir Geoffrey Vos, to encourage greater use of technology in such processes, as well as in the court processes.

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4) To provide advice on ADR/mediation/arbitration:
    a. to the Bar generally; and
    b. to specific committees;
5) To assist the Ethics Committee in the formulation of ethical and other guidance covering practice as a mediator and/or arbitrator.

The ADR Panel reports primarily to the Legal Services Committee.

[3] By "ombudsman schemes" we refer to those schemes where a right of application to a dispute resolution provider is offered as a consequence of a statutory or contractual requirement or by virtue of a trader's involvement in a trade ADR scheme. Such schemes may offer conciliation or mediation as part of their processes but usually involve final resolution by some form of decision-making process or adjudication. In these schemes, the outcome is not usually binding on the consumer but is binding on the trader. These schemes are of particular value where the dispute is of low financial value. They may also offer remedies that would not at the moment be granted by a court, such as a direction to a trader to make an apology. These schemes often also offer a wider focus on aspects of customer service and fair decision-making/maladministration/actions that do not meet the reasonable expectation of consumers. These matters cannot always be comfortably accommodated by notions of breach of contract or breach of a duty of care.

[4] Copies of responses by the Planning and Environment Bar Association (PEBA) and the Personal Injuries Bar Association (PIBA) accompany this response.

10. The time has come to re-name "Alternative" Dispute Resolution as "Primary Dispute Resolution" (PDR)[5]. This will send the clear message that dispute resolution processes such as arbitration, adjudication, early neutral evaluation, expert determination and mediation should all be considered before litigation and should be ordinary mainstream ways of managing and resolving differences between citizens without resorting to "law".

11. Although it is clearly a good idea for judges to encourage litigants to consider ADR, the Bar Council does not support judicial compulsion. ADR processes are inherently consensual. Compelling a party to consider ADR is one thing. Compelling them to participate is quite another. In terms of general policy, the Bar Council suggests a "nudge" from a judge can be firm, but it should stop short of a "shove."

12. Taking an overview, DR ideally needs to be considered by parties to a dispute long before it escalates to litigation.

13. There is a dire need for a government advisory body independent from the court system to be set up to provide advice about the different forms of ADR available. A suggested name for such a new body is the "Dispute Resolution Advice Service".

14. Finally, regarding use of technology, any use of technology in ADR processes or in court processes must always take account of those in society who are digitally excluded. If it does not, a significant number of people may be denied access to justice.

Responses to specific questions

1. Drivers of engagement and settlement

Q1. Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?

15. Material considerations are cost, timesaving, the desirability or otherwise of maintaining cordial relations and, more importantly than anything, where the dispute resolution route is not clearly signposted, the information that parties have about the

[5] PDR is a term already used in some jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. For example, section 14 of the Australian Family Law Act 1975 "*encourages people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made*."

dispute resolution options (hence the Bar Council suggests setting up a new Dispute Resolution Advice Service).

16. As identified in the Call for Evidence, there are a wide range of options available.

17. Experience suggests that where a claim is of high value or importance to the parties, it is more likely they will seek professional advice as to the best process for the resolution of their dispute. That advice will, or certainly should, always involve discussion of a dispute resolution process outside litigation. This is underpinned by professional obligations by both solicitors and barristers. Nevertheless:

- It is a complication that parties have little direct access to information about ADR outside the court process and ADR is not yet part of our national vocabulary: litigants' first challenge is more likely to be "see you in court" than "shall we go to mediation?".

- Moreover, legal professionals are not united in their view of "alternative" dispute resolution. Although we do not suggest the obligation to explain different types of ADR is ignored by professionals, it is an obligation often placed in the hands of those who may have a conflict of interest with their client. Dispute resolution outside court may be advantageous to parties financially and in in other ways, (such as timesaving), but not financially advantageous to their advisors. This is an unfortunate reality which could be ameliorated by better understanding by prospective and actual litigants about the options that are available. Transparency of this sort would also be a better protection for those advising on dispute resolution processes.

- Knowledge about dispute resolution schemes on the part of legal professionals can also be patchy. While the process of mediation is increasingly well understood, few litigants are advised that they may consider early neutral evaluation, adjudication or arbitration either under an existing scheme or a tailor-made set of dispute resolution rules designed by agreement between the parties and their advisors to meet the specific needs of the dispute and the parties. An example of such tailor-made schemes is offered by the provider CEDR. At least one ADRP member has had direct experience of reaching adjudication and arbitration decisions in business to business (B2B) disputes on that basis. The characteristics of the parties in such a case were that the solicitors advising each party were well informed about dispute resolution processes and wished to bring the dispute to an end speedily. A strict timetable also involving the decision-maker was also important.

18. Better information about the availability of non-court-based dispute resolution (i.e., ADR) is highly desirable. It should involve all types of dispute resolution and apply to stages before, during and after court action.

19. The cost of setting up and running the suggested new Dispute Resolution Advice Service might be questioned. In the long-term however such cost is likely to be more than off-set by the savings to the court system, as well as being of wider social benefit. (A society with less disputes and litigation is a happier and healthier society).

20. Where a claim is of low or comparatively low value, the absence of no guarantee of a settlement in mediation, is likely to be a disincentive. This may not apply to other dispute resolution techniques such as adjudication where a decision may be reached, in some cases, very inexpensively and often on a 'documents only' basis and without the need for legal representation. As indicated above, where parties are directed towards an adjudication scheme by a trade body or because the process is provided for by statute, parties tend to use these gratefully. The dispute resolution providers would be able to give statistical evidence about the number of cases that are dealt with each year.

Q2. Do you have any experience or evidence of the types of incentives that help motivate parties to participate in dispute resolution processes? Do you have evidence of what does not work?

21. As indicated above, knowledge about the options is critical. Other incentives are the likelihood of reduced cost, the speed of obtaining an outcome and the increased likelihood of maintaining collaborative relationships after the dispute has been resolved.

22. Another important consideration is that ADR prior to litigation may not require the parties to be legally represented.

Q3. Some evidence suggests that mandatory dispute resolution gateways, such as the Mediation Information & Assessment Meeting (MIAM), work well when they are part of the court process. Do you agree? Please provide evidence to support your response.

23. The Bar Council has no response.

Q4. Anecdotal evidence suggests that some mediators or those providing related services feel unable to refer parties to sources of support/information – such as the separated parents' information programme in the family jurisdiction – and this is a barrier to effective dispute resolution process. Do you agree? If so, should

mediators be able to refer parties onto other sources of support or interventions? Please provide evidence to support your response.

24. The Bar Council has no response.

Q5. Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?

25. The Bar Council is aware that disputes involving important principles of law, or where a punitive remedy is requested, may need to be resolved in court. Such cases may however be resolved on an individual basis by mediation of the individual dispute. The uptake of resolution techniques such as adjudication, etc is low.

26. It is notable, however, that at least one dispute resolution provider (CEDR) offers a service by which aggrieved persons can complain about the decision-making processes of certain statutory bodies such as Ofsted, Homes England, etc. As above, parties to a dispute can tailor-make the rules that would apply to a decision.

Q6. In your experience, at what points in the development of a dispute could extra support and information be targeted to incentivise a resolution outside of court? What type of dispute does your experience relate to?

27. As indicated above, the most valuable input would be additional distribution of information about ADR and the options at all stages of a dispute: before, during or afterwards. A way to achieve this would be to create the suggested Dispute Resolution Advice Service.

28. At present, signposting to ADR only happens in consumer cases. This may not be working as well as originally hoped on the implementation of the ADR Directive.

Q7. Do you have any evidence about common misconceptions by parties involved in dispute resolution processes? Are there examples of how these can be mitigated?

29. Education/information is key to avoiding misconceptions by parties. Often parties do not understand the difference between mediation and arbitration and the roles of the mediator and arbitrator. The costs of the possible ADR processes need to be transparent. It may be that videos demonstrating how the various processes work could resolve continuing misconceptions.

2. Quality and outcomes

Q8. Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?

30. Much depends on the nature of the dispute and its background. The importance of an apology is not to be underestimated, for example in clinical negligence cases, but also in other disputes. In business disputes, a continuing relationship may be of vital importance. Mediator members of the ADRP have considerable experience of successful outcomes outside the main dispute which could not have been addressed by a court. Also, as noted above, adjudication schemes may offer opportunities to look more widely at issues such as customer service, whether the applicant is a consumer or business. An example of the last of these is the new Business Banking adjudication scheme.

Q9. Do you have evidence of where settlements reached in dispute resolution processes were more or less likely to fully resolve the problem and help avoid further problems in future?

31. It is rare to get post-mediation feedback. Certainly, the sooner a dispute resolution process is commenced and concluded, the greater the likelihood of avoiding further disputes between parties.

32. As dispute resolution processes are also generally directed to individual issues, this process is not designed to compel parties to take steps that will prevent future disputes with other parties. This is the role of public activities such as court decisions or regulation.

Q10. How can we assess the quality of case outcomes across different jurisdictions using dispute resolution mechanisms, by case types for example, and for the individuals and organisations involved?

33. A way of assessing the quality of decision-making would be to consider the complaints made against dispute resolution providers. Statistical information may be available from these bodies or from professional bodies such as the Chartered Institute of Arbitrators.

Q11. What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view.

34. Again, information and education is key. Unless parties have had experience of ADR procedures, they are unlikely to be aware of alternatives to litigation and the potentially beneficial costs implications. While, for various reasons, there has been a reluctance to accept a greater degree of compulsion than, for example, potential costs

sanctions, this is not the case in all jurisdictions. Data can be accessed from those jurisdictions, not available to us.

Q12. Do you have evidence of how unrepresented parties are affected in dispute resolution processes such as mediation and conciliation?

35. The role of the mediator where a party is unrepresented is to ensure that that party is not disadvantaged. In that respect, the quality and experience of the mediator are most important. Early advice to an unrepresented party, as in family cases, would be of assistance. In other words, a form of MIAMs in civil cases.

Q13. Do you have evidence of negative impacts or unintended consequences associated with dispute resolution schemes? Do you have evidence of how they were mitigated and how?

36. No.

37. The Bar Council does not believe that this is an issue. Of course, it may be the case that a party does not like, or changes his mind about, an outcome that has been arrived at in a dispute resolution process. It may be that such a party has by engagement in the process agreed not to pursue litigation. We do not however think this is a "negative" impact or "unintended consequence".

38. There are also unlikely to be unintended consequences for others because the nature of dispute resolution is that it is confidential and limited only to that one dispute.

Q14. Do you have evidence of how frequently dispute resolution settlements are complied with, or not? In situations where the agreement was not complied with, how was that resolved?

39. We imagine that non-compliance is rare. A settlement agreement signed by the parties is an enforceable contract. Some of us have experience of a mediated settlement coming back for clarification.

40. In adjudications, the scheme may have the effect that one party is free to reject the outcome (e.g., a consumer although the trader is bound) or the scheme may be binding only for a time (e.g., in building disputes). In relation to adjudications under trade schemes or those involving regulated entities, trade bodies, the regulator and the dispute resolution provider will usually oversee compliance.

Q15. Do you have any summary of management information or other (anonymised) data you would be willing to share about your dispute resolution processes and

outcomes? This could cover volumes of appointments and settlements, client groups, types of dispute, and outcomes. If yes, please provide details of what you have available and we may follow up with you.

41. No.

3. Dispute resolution service providers

Q16. Do you have evidence which demonstrates whether the standards needed to provide effective dispute resolution services are well understood?

42. No.

Q17. Do you have evidence of the impact of the standard of qualifications and training of dispute resolution service providers on settlement rates/outcomes?

43. The Civil Mediation Council (CMC) lists registered mediators and mediation providers. CMC mediators must meet minimum training and CPD requirements, have insurance, comply with a code of conduct and operate complaints procedures. CMC mediators must mediate to a certain level each year. The CMC operate a disciplinary process in respect of complaints made against mediators. While the training of mediators is reasonably rigorous, it is practice which develops a mediator's skills, and this in turn reflects in settlement rates and outcomes.

44. In relation to accredited providers of services that fall within the scope of the ADR Directive (i.e., Consumer disputes), providers are required to ensure that officials subscribe to certain criteria as set out in the Directive.

Q18. Do you have evidence of how complaints procedure frameworks for mediators and other dispute resolution service providers are applied? Do you have evidence of the effectiveness of the complaints' procedure frameworks?

45. This sort of information is likely to be available from the providers. The Bar Council does not keep information on complaints about individual barristers. The Bar Standards Board might be able to provide statistical information.

Q19. Do you think there are the necessary safeguards in place for parties (e.g. where there has been professional misconduct) in their engagement with dispute resolution services?

46. The CMC and the Bar Standards Board have disciplinary procedures. Individual mediators and mediation providers must operate grievance/complaints procedures. The Chartered Institute of Arbitrators also has disciplinary procedures.

The Law Society also operates complaints procedures. It appears, absent any evidence to the contrary, that necessary safeguards are in place for parties.

Q20. What role is there for continuing professional development for mediators or those providing related services and should this be standardised?

47. CPD is a requirement for continuing practice as a CMC registered mediator. Sharing of experience among mediators is a valuable asset. This is particularly so where mediators mediate alone and have little opportunity to learn new skills. This is standardised by reference to categories of activity which qualify as CPD.

Q21. Do you have evidence to demonstrate whether the current system is transparent enough to enable parties to make informed choices about the type of service and provider that is right for them?

48. The Bar Council has no such evidence. As explained above, there is a need for information to be made available to parties to enable them to make informed choices of the process(es) suitable to them and their dispute. To be effective, such information should be held and accessible centrally.

4. Financial and economic costs/benefits of dispute resolution systems

Q22. What are the usual charges for parties seeking private dispute resolution approaches? How does this differ by case types?

49. There is no usual charge that applies across all types of process. Mediation charges are agreed by individual mediators in a range that varies from a few hundred pounds to many thousands. Adjudications and arbitrations that take place under established schemes are often subject to fixed fees set by the dispute resolution providers. Individually negotiated fees are likely to be set at an hourly rate in a range from approximately £100 per hour to £1,000 per hour or a daily rate. Parties can negotiate capped fees for the dispute resolution. The fees are thus dependant on the type of dispute, the negotiated rate and the complexity of the case.

Q23. Do you have evidence on the type of fee exemptions that different dispute resolution professionals apply?

Q24. Do you have evidence on the impact of the level of fees charged for the resolution process?

Q25. Do you have any data on evaluation of the cost-effectiveness or otherwise of dispute resolution processes demonstrating savings for parties versus litigation?

50. The Bar Council does not gather such evidence or data and can only respond generally to Q23, 24 and 25 as follows.

51. The cost of provision of private resolution processes is very much market led. The market in mediation is highly competitive. Providers tend to charge fees at levels dictated by the claim value, providing there is a value to the claim. As practising mediators, ADRP members have not seen any drop in mediations due to the level of fees.

52. However, there is a real issue with low value claims where fees will easily become disproportionate. Mediators will expect, and be entitled to, a reasonable fee. In the event of compulsory mediation, who will pay? The Small Claims Mediation Service is of relevance here, as is Judicial Mediation.

5. Technology infrastructure

Q26. Do you have evidence of how and to what extent technology has played an effective role in dispute resolution processes for citizens or businesses?

53. Technology at various levels has played a significant role in many areas of dispute resolution, particularly during the COVID-19 pandemic crisis, from using video conferencing technology (VCT) to conduct hearings and mediation processes online, to various online dispute resolution (ODR) platforms, and the use of artificial intelligence algorithms.

54. We refer to VCT to mean any online technology or software that allows users in different locations to hold face-to-face remote meetings (being present simultaneously to present their position) without having to move to a single location together (e.g., Zoom, Microsoft Teams). VCT is particularly convenient for users in different cities or even different countries because it saves time, expenses, and hassles associated with travel and also caters for the safety concerns in relation to the COVID-19 pandemic. Uses of VCT include: i) holding routine meetings and client conference calls; ii) conducting negotiations and online mediations; iii) holding court/tribunal remote hearings; iv) providing online pro-bono advice for citizens; and v) training professionals. There is also anecdotal evidence that those with disabilities have actually preferred to have remote online mediations and hearings using VCT.

55. Online dispute resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties completely online, usually in an asynchronous manner using emails or online text. It primarily involves negotiation, mediation, adjudication or arbitration conducted completely online. ODR technology is used to streamline bulk, low-value claims/transactions, or for disputes where the law is relatively simple and has limited outcomes (e.g., debt recovery).

56. Although traditionally ODR technology was used for customised systems or sectors, (like eBay Resolution Centre, Facebook's dispute system or parking penalty disputes at the Traffic Penalty Tribunal), there appears to be a widening in the use of ODR to deal with more areas for citizen based on decision tree algorithms (e.g. "Rechtvijzer : First Aid Lawyer"). However, the effectiveness of the use of such platforms using basic decision tree algorithms and/or narrow artificial intelligence-led technologies is questionable.

57. There are also specific technologies which support different aspects of dispute resolution, which are provided by a variety of technology providers, some relatively niche, including (but not limited to):

(i) Smartsettle for blind bidding, these systems accept confidential settlement offers from the parties and determine what is acceptable to both parties.
(ii) SettlementIQ/MicroPact for drafting collaborations to enable parties to review draft document and forms to resolve disputes.
(iii) Modria/Smartsettle for automated negotiation, where algorithms are used to calculate outcomes that allegedly lead to the maximum satisfaction of the parties.
(iv) Luminance e-Discovery and Corporate Diligence platform.
(v) Virtual Courthouse.com, which enables remote mediation through VCT.
(vi) CaseXplorer online arbitration case evaluation tool.

58. The Bar Council has limited evidence as to the actual effectiveness of these technologies as some have been of limited use, particularly in serious cases.

Q27. Do you have evidence on the relative effectiveness of different technologies to facilitate dispute resolution? What works well for different types of disputes?

59. Further to the response given to Q26 above, it appears online private mediations and arbitrations using VCT are effective subject to addressing concerns on accessibility and fairness.

60. With regard to VCT concerns as to following need to be addressed:

(i) Accessibility issues to make sure users are treated as fairly as possible, such as: a) whether the parties have sufficient hardware (or has one party only has access to a mobile phone?) for participation and sharing content; b) any disability issues that may have to be catered for; c) whether the broadband speed for all users sufficient for a stable connection; d) whether the participants have a private area when on camera. Such concerns link to the

sixth general point made in paragraph 14, above. Any technology infrastructure adopted should be inclusive.

(ii) Data Protection and Cybersecurity issues need to be addressed by all users particularly where sensitive data is being shared.

(iii) Addressing legal professional privileged communications with the parties and their lawyers. Are there private avenues for the parties to communicate maintaining confidentiality of the process?

(iv) Privacy issues and dealing with any recordings which may be taken (whether or not with permission).

61. The Bar Council does not have any empirical evidence of the effectiveness of ODR technologies, or other technologies using automated algorithms. However, concerns as to the use of such algorithms and its accuracy in correct decision making, as well as addressing the challenges (bias/discrimination) need to be dealt with by the providers on development and implementation, so that the algorithms used and/or co-factor-data relied upon are transparent (to address any concerns of bias/discrimination, and/or be available for challenge to enforce legitimate fundamental rights of citizens).

62. Mediation and arbitration have been used effectively to resolve disputes arising as to the explicability of complicated machine learning algorithms between providers and users, sometimes in a review of the challenged decision.

63. Recordings used by drones have been used to avoid site visits, which has made the dispute resolution process safer and more efficient for the participants.

Q28. Do you have evidence of how technology has caused barriers in resolving disputes?

64. As mentioned above in response to Q27, there are the general issues which need to be addressed when dealing with VCT software for hearings and mediations such as accessibility, fairness, data protection and security etc. However, VCT has been very effective in private and judicial mediations as well as arbitral hearings.

65. Sometimes there are difficulties experienced when users do not have a private quiet space to: (i) protect the confidentiality of the process; (ii) be fully present to the process taking place; and/or (iii) avoid unnecessary interruptions and distractions. The common barrier is when a party intentionally uses technology as an excuse to delay matters, (saying that they cannot connect or use the technology), and/or abuses the trust factor or rules agreed for conducting the dispute resolution (e.g. where a witness in arbitral proceedings is being coached while giving evidence online).

However, most of these barriers can usually be addressed, depending on the circumstances.

Q29. Do you have evidence of how an online dispute resolution platform has been developed to continue to keep pace with technological advancement?

66. The Bar Council has very limited evidence as to how ODR platforms have been developed to continue to keep pace with technological advancements and/or proposed regulations on the use of artificial intelligence-led technologies.

Q30. Do you have evidence of how automated dispute resolution interventions such as artificial intelligence-led have been successfully implemented? How have these been reviewed and evaluated?

67. Again, we have very limited evidence as to how the artificial intelligence-led interventions have been implemented, reviewed or evaluated.

68. The Bar Council assumes that these are rather basic decision-tree based algorithms which will require the assistance of professional lawyers in order to provide an effective resolution of the dispute.

6. Public Sector Equality Duty

Q31. Do you have any evidence on how protected characteristics and socio-demographic differences impact upon interactions with dispute resolution processes?

69. No.

Q32. Do you have any evidence on issues associated with population-level differences, experiences and inequalities that should be taken into consideration?

70. No.

7. Additional evidence

Please share additional evidence in relation to dispute resolution, not covered by the questions above, that you would like to be considered as part of this Call for Evidence.

The Bar Council has no additional evidence to share.

Bar Council
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