Written evidence submitted by DisputesEfiling.com Limited (NLR0049)

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1 Foreword

1.1 The Call for Evidence is concerned with the of clinical negligence claims in England and Wales (E&W). For reasons explained in the Introduction to this Response we are well-placed to provide evidence about the state of dispute resolution and its future development.

1.2 The introduction to the Call makes its scope clear:

"The Committee has launched a new inquiry to examine the case for the reform of NHS litigation against a background of a significant increase in costs, and concerns that the clinical negligence process fails to do enough to encourage lessons being learnt which promote future patient safety."

1.3 We have long sought (see below) to reduce the cost of clinical negligence claims by working with amongst others: the Department of Health and Social Care, the Ministry of Justice and NHS Resolution, the agency tasked with managing notifications of potential claims against the NHS Hospital Trusts, amongst others and then managing claims that may arise from such notifications.

1.4 We draw attention to another Call for Evidence which is current - by the Ministry of Justice entitled ***"Dispute resolution in England and Wales: Call for Evidence"***[1] which opened on 3 August 2021 and closes on 31 October 2021. To an extent the issues raised by the Call for Evidence made by the Health and Social Care Committee (the Committee) are also raised in the MoJ's Call. On page 6 of the MoJ Call this sentence appears:

"Our ambition is to mainstream non-adversarial dispute resolution mechanisms, so that resolving disagreements, proactively and constructively, becomes the norm."

The focus of our evidence to the MoJ Call is that alternative dispute resolution (ADR) processes such as mediation and early neutral evaluation should be made mandatory and managed online so as to reduce cost and accelerate the receipt of compensation by Claimants. That is also the thrust of our Response to the Committee's Call for Evidence.

2 Glossary

Word, phrase, acronym or abbreviation	Meaning

[1] https://consult.justice.gov.uk/digital-communications/dispute-resolution-england-wales-call-for-evidence/

ACAS	Advisory, Conciliation and Arbitration Service
ADR	The collective description for methods of resolving disputes otherwise than through the normal trial process, per the Glossary to the CPR. The principal forms of ADR are: arbitration, mediation, neutral evaluation and adjudication.
AOI	ADR-ODR International Limited
CCOP	County Court Online Pilot
CEDR	Centre for Effective Dispute Resolution
Civil justice system/civil justice	The courts of civil and family jurisdiction and the tribunals of England and Wales
CJC	Civil Justice Council
CPR	Civil Procedure Rules 1999, as amended
CCMCC	County Court Money Claims Centre (Salford)
CMC	Claims Management Company
CE-File	Courts Electronic File (Thomson Reuters' C-Track product)
COVID-19 or the Pandemic	Coronavirus disease
CPRC	Civil Procedure Rules Committee
DCA	Department of Constitutional Affairs, former name of the Ministry of Justice
DEF	DisputesEfiling.com Limited
DfE	Department for Education
DCP	Damages Claims Portal
DRAM	Dispute Resolution Assessment Meeting
E&W	England and Wales
EHC	Education, Health and Care Plan
EL	Employers Liability claims
ENE	Early Neutral Evaluation – a form of ADR
EP	European Parliament
HMCTS	Her Majesty's Courts and Tribunals Service
HMT	Her Majesty's Treasury
IAM	Information Assessment Meeting
JENE	Judicial Early Neutral Evaluation, a form of ADR
LCD	Lord Chancellor's Department, former name of the Ministry of Justice
LiPs	Litigants in Person – those pursuing/defending claims in the civil justice system without representation by lawyers. Sometimes called Self-Represented Litigants (SRLs) or, in the USA, Self-Drivers.
LSEW	The Law Society of E&W

MCOL	Money Claims Online
MIAM	Mediation Information Assessment Meeting
MoJ	Ministry of Justice
NHSR	NHS Resolution
OCMC	Online Civil Money Claims
OIC	Official Injury Claim Service
ONS	Office for National Statistics
PAP	Pre-action Protocol
PD	Practice Direction made under the CPR
SCMS	Small Claims Mediation Service
SCT	Small Claims Track
SEND/SENDIST	Special Education Needs and Disability/First Tier SEND Tribunal

3 Introduction and summary

3.1 DisputesEfiling.com Limited (DEF) is an English registered company which was incorporated in 2015 and owns the Intellectual Property and operating systems in a Cloud-based Platform for the management of ADR cases (the Platform or the DEF Platform).

3.2 The DEF Platform was developed in 2015 for the Personal Injury Claim Arbitration Service (PIcArbs) founded by Andrew Ritchie, QC, as he then was.

3.3 Since that first iteration and in response to the growing demand for a range of ADR options the Platform has developed and today offers five modules:

- Pre-Action: which facilitates compliance with the Pre-Action Protocols and, as part of that process, settlement via ad hoc negotiation
- Arbitration
- Adjudication
- Mediation
- Neutral Evaluation

Data in any one module can be transferred from one module to another and back again. Thereby facilitating hybrid forms of Dispute Resolution such as Arb-Evaluation-Arb.

3.4 The development of the Platform has arisen from our Director's close involvement with the issue of IT in the civil courts of E&W which began in 1994 with his appointment as Chairman of the London Solicitors Litigation Association's (LSLA's) Woolf Sub-Committee. That sub-committee (for the LSLA) provided evidence to the Access to Justice Inquiry. Relevant aspects from this background are summarised below with the object of providing lessons from previous efforts to introduce effective IT into the civil justice system with the aim of ensuring success on this occasion.

3.5 **1997**

Following publication of Lord Woolf's Final Report our Director campaigned for the establishment of the Civil Justice Council (the CJC) (via the first cross-Profession single issue lobby: The Selborne Group) and was successful despite trenchant opposition by the then Lord Chancellor's Department who infamously declared "we do not need another talking shop".

3.6 **2002-2004**

As President of the LSLA our Director's programme was two-fold:

a) To secure a new home for the Commercial Court. The Association was successful in that the building was provided and now known as the Rolls Building; and,
b) To introduce effective IT into the civil justice system of E&W. This work continues.

3.7 **2006**

Our Director was involved in the abortive Electronic Filing and Document Management initiative (EFDM) which failed when HM Treasury withdrew the agreed £60m funding despite this having been "ring-fenced".

3.8 **2007**

Our Director co-founded and chaired the Commercial Litigation Association (CLAN) which campaigned for the introduction of effective IT in the civil justice system of E&W.

3.9 **2008**

In August, at Lord Justice Jackson's (as he then was) invitation, our Director drafted what became chapter 43 of his Final Report (published in December 2009) concerned with IT in the civil courts. Chapter 43 was published as drafted by our Director save for the addition of Lord Justice Jackson's recommendations.

3.10 **2012**

Our Director founded what became the IT in the Civil Courts Working Party (chaired by Dame Elizabeth Gloster) which recommended proposals for the introduction of effective IT to the civil courts. In addition to our Director, members of the Working Party included: Paul Shipley, then Director of IT at Her Majesty's Courts and Tribunals Service (HMCTS), Richard Susskind, Patrick Allen and Matthew Lavy.

3.11 **2014**

The tender to provide the platform for what became known as the Courts Electronic File or CE-File led to two competing bids from the Court efiling company founded by our Director in 2012 (iCourt) and Thomson Reuters' C-Track system.

3.12 **2015**

In 2015 our Director, working with Andrew Ritchie, QC (as he then was), designed and built a Cloud-based Platform which developed into what is now the DEF Platform (the Platform) for the management of Dispute Resolution cases.

3.13 **2016**

Thirty years after being admitted a solicitor in 1986 our Director ceased to practice in order to work full-time on the further development of the Platform.

3.14 **2018**

Sir Terence Etherton (as he was then) as Master of the Rolls invited our Director to speak at the CJC Workshop which formed part of the consultation exercise leading to the CJC's ADR Final Report. Opening the panel discussion our Director's speech included this passage:

"We are asked to survey the many types of alternative dispute resolution. But to what are they alternative? Is not the citizen entitled to resolve his, her or its disputes in whatever way best suits them without fear of being marginalised?

The time has come to ditch the pejorative adjective Alternative….Dispute Resolution is not alt-Anything. We fail the citizens of this country if we marginalise their options with an unnecessary adjective."

3.15 **2019**

During this year DEF was the sole provider of platform to NHS Resolution to enable the management of their programme to mediate clinical negligence claims. The outcomes and lessons learned from this pilot are explained later in this Response.

3.16 **2020**

Three important initiatives were undertaken by DEF:

a) June: DEF submitted a tender for Phase 1 of the LawTech study into the feasibility of developing a platform to manage disputes involving SMEs. Although our bid was unsuccessful we notice the published Feasibility Study incorporates a number of points made in our tender.
b) July: we published the first empirical research which identified the existence and growth of a Backlog of cases in the civil jurisdictions of Civil, Family and Tribunals. The central conclusion of that research is that the Backlog presented an urgent need for more ADR in civil justice and for ADR cases to be managed online to meet users' expectations of a modern service.
c) December: DEF together with ADR-ODR International (a provider of mediation services) jointly bid for the contract to deliver a Pilot of mediation services for residential tenancy possession claims for the Ministry of Justice and the Ministry of Housing, Communities and Local Government (as that Department was then known). This was offered to the Ministries as a process that would be managed online culminating in mediation delivered by telephone or video. The system was designed to enable Court staff and the Judiciary to be able to access the resulting mediation agreement via the DEF Platform.

3.17 **2021**

Our active engagement with civil justice reform in E&W continues with the preparation of this Response and a Response to the MoJ's Call for evidence about ADR in E&W. Our Director participated, for DEF, at the Round Table convened by the Ministry of Justice on 7 October 2021 as part of the process of gathering evidence for the MoJ Call.

3.18 The DEF Platform is one of the few platforms (outside the USA and Turkey) to have Dispute Resolution cases under management on its platform. For the past 6 years we have actively explored how a Cloud-based service may enable Dispute Resolution to play a greater role in the English and Welsh civil justice system. This has been undertaken by deploying the DEF Platform with Dispute Resolution Service Providers and working with, amongst others, NHS Resolution supporting their programme for managing online the mediation of clinical negligence claims.

3.19 We are also working with claims management companies to provide the DEF Platform within distributed ledger technology integrating with the existing HMCTS portals to enable an efficient and effective system for resolving large volumes of claims. Consequently much of our time is spent identifying the bottlenecks to a more friction-less dispute resolution service. Having identified those bottlenecks we develop technology to alleviate or remove the bottleneck.

3.20 In addition to this activity stream we are also at work in countries with large backlogs of cases, a current focus being Greece where a compulsory process has been introduced to bring parties together to explore whether mediation might assist in resolving their dispute. This has been introduced for Family cases and civil and commercial cases not exceeding €30,000 in value. The purpose is to increase the number of mediations taking place and thereby reduce their considerable Backlog of over 250,000 cases. We are also at work in Nigeria where a much larger Backlog (ca 500,000 cases) is the subject of

elimination processes based on the use of ADR via the Nigerian Multi-Door Courthouse which is a process of Court-connected ADR.

3.21 The past 27 years' experience provide insights as to the state of the market for Dispute Resolution services in E&W and other jurisdictions too, for example: Greece, Nigeria, Northern Ireland and Scotland.

3.22 The evidence we provide in response to the Committee's Call comes from the background summarised above together with our current and past work in the Dispute Resolution and technology fields.

3.23 **Summary of evidence**

- Implementation of the CJC's ***"Report on Fixed Recoverable Costs in Lower Value Clinical Negligence Claims"*** published in October 2019 requiring the early neutral evaluation (a form of ADR) of clinical negligence claims will immediately reduce costs and accelerate the receipt of compensation for Claimants.

- Introducing mandatory mediation in the pre-action stage for claims valued at more than £25,000 will have the same effect.

- To manage the resolution of up to 15,000 cases every year requires a Cloud-based platform designed to manage ADR processes. DEF would be pleased to share further insights about its Platform should the Committee desire.

4 DEF's engagement with clinical negligence dispute resolution

NHS Resolution (NHSR) is the agency of the NHS charged with managing claims for damages arising from allegations of clinical negligence in NHS Trust Hospitals, amongst other claim types.

There are about 15,000 clinical negligence claims notified every year of which between 11,000 and 12,000 notifications lead to proceedings being issued.

Despite there being a large number of cases that may be suitable for mediation (and some say every case is suitable for dispute resolution) only a small percentage of those claims are mediated each year. Other than 2019, when DEF provided a platform for the management of these cases, the cases referred to mediation are managed by a mixture of solicitors' document collaboration platforms or on paper.

This great benefits of mediation are therefore not fully realised by reason of inefficiencies of process and very low case numbers. Nevertheless, the results that are available show mediation is successful in resolving cases and this data will be considered below.

NHSR Claims Mediation Service

The service seeks to resolve clinical negligence claims notified to NHS Hospital Trusts the management of which notifications is the responsibility of NHSR.

Unfortunately, despite the programme running for a number of years, very few of the 13,000-15,000 claims notified every year are mediated. The most recent published data on the progress of the NHSR programme is to be found in the Report: ***"Mediation in healthcare claims – an evaluation"***[2] which was published in February 2020.

The Report says in para 12, that ***"since the inception of NHS Resolution's Claims Mediation service, from December 2016 to 31 March 2019, 606 completed mediations have taken place."*** This is a period when ca 35,000 claims were notified and ca 24,000 claims issued. The opportunity to save the NHS money by using mediation and, at the same time, achieve better outcomes for Trusts and Claimants alike is perhaps at its most tangible in this context as the amount spent on legal costs by the NHS every year is audited and the number of cases resolved via dispute resolution equally easily audited.

As to the quality of outcomes for Claimants, para 26 of the NHSR Report on p. 14 has this:

> ***"The analysis of the claims mediated has established what can be described as "non-tangible benefits of mediation", e.g. giving the opportunity to injured claimants, patients or relatives of deceased patients to speak to trusts/healthcare professionals to explain what changes, if any, have been made, and to offer direct apologies. These non-tangible benefits and the impact of the mediator are frequently described by the participants of mediation as the positive benefits of the process that cannot be replicated with other forms of ADR, such as a round table meeting with lawyers."***
>
> Pp 14 and 15 have quotations from users which show that the process is valued for achieving outcomes that a Court with its binary approach (win/lose) could not provide.
>
> In the period 2018-2019 some 390 cases were the subject of mediation in the programme. Of those only 6 proceeded to trial, see page 9 of the Report. That is a remarkable achievement. However, given the huge sums being spent on legal costs by the NHS it is surprising that the Public Accounts Committee's recommendation in 2017 that mediation be mandated has not been taken up[3].
>
> On p.17 of the Report the results are summarised and address whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts:
>
> ***"31. Mediation puts the patient/claimant at the heart of the claim, focusing on concerns, which are very often not "all about the money", and it would not be possible to address those concerns in any other ADR setting, such as a meeting with just the lawyers.***

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[2] https://resolution.nhs.uk/wp-content/uploads/2020/02/NHS-Resolution-Mediation-in-healthcare-claims-an-evaluation.pdf

[3] A report by the House of Commons' Public Accounts Committee considered the issue of the rising cost of clinical negligence claims. Their report was published on 23 November 2017. One of its recommendations was that mediation should be mandated. See Recommendation 2, third bullet point on p.6: https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/397/397.pdf

32. The feedback obtained from the participants is very positive. The quality review of cases proceeding to mediation has consistently documented the impact of a face-to-face apology or explanation from a member in facilitating resolution of the claim. Mediation outcomes have included agreements for claimants to attend trusts to share their stories with frontline staff to learn from mistakes and prevent future harm, or to be involved in the drafting of proposed changes in procedure. Accordingly, the power of mediation as a resolution tool cannot be overestimated."

The NHSR programme needs to be seen in the light of the Recommendations in the CJC's ***"Report on Fixed Recoverable Costs in Lower Value Clinical Negligence Claims"*** published in October 2019 which we consider later in this Response.

5 Drivers of engagement and settlement

The hesitation of lawyers when considering the use of ADR arising from the (perhaps understandable fear) of lost fee income and a natural resistance to change are such that ADR will never grow much beyond the 400 or so cases currently being undertaken by the NHSR Claims Mediation Service if all that is done is repeat the same exhortations and costs sanctions that have been the tried, tested and failed policy of the past 30 years.

In contrast non-lawyer users of the Courts appear, from the empirical evidence we address below, to have no such hesitation once they have become aware of a process that offers a win-win situation and, furthermore, does so far sooner than the Courts are able to do given the shortage of both resources and Judges.

The failure of costs sanctions and exhortations are evidenced by the chronically low take-up of ADR in mainstream jurisdictions within E&W when considered in the context of the number of cases commenced each year.

The experience of pre-action ADR assessments is good and has been found to work successfully in cases in Commercial Construction, Family, Employment and Special Education Needs and Disability (SEND) cases. In short wherever pre-action engagement has been tried it has worked to the benefit of all. It should be noted that far from depriving lawyers of income the introduction of adjudication to resolve disputes in commercial construction cases created a new income stream for lawyers as they assist their clients with the adjudication process.

The success of pre-action dispute resolution occurs when there is a measure of compulsion in connection with the preliminary review process. This is evidenced in different jurisdictions in E&W and the evidence of SEND and Family cases is summarised below.

<u>SEND</u>

In SEND cases a stage similar to a MIAM has to be held within 2 months of the Local Education Authority's (LEA's) decision and the neutral has to provide a certificate to enable an application to be lodged to the First Tier Tribunal. The empirical evidence of the success of mediation for SEND cases is summarised in this table:

Year:	2014[4]	2015	2016	2017	2018	2019
Total number of appeals to the SENDIST[5]	4,063	3,147	3,712	4,725	5,679	7,002
Number of mediation cases that have been held[6]	77	1,399	1,886	2,497	3,202	4,125
Number of mediation cases held followed by appeals to SENDIST	17	343	477	630	845	1,035
Mediation success rate (rounded %)	78	75	75	75	74	75
Rounded % of appeals where parties chose to mediate as a measure of the effectiveness of the opt-in engagement method	2	44	51	53	56	59

This evidence was obtained via a DfE FOI request which DEF submitted in February 2021, from the MoJ and partly from an evaluation commissioned by the DfE which was published in July 2021[7]. The Report contains the most recent data we can find about the efficacy of pre-action ADR.

This Evaluation is, in our view, powerful empirical evidence supporting the introduction of a triage stage into the preliminary or pre-action phase of the dispute process. This is already in place in some jurisdictions in E&W, see above, in others there is no triage stage and parties proceed directly to a form of ADR.

Family

MIAMs have been considered a success though not as much of a success as they might be were both parties to Financial or private law Children applications required to engage in MIAMs. Instead only the Applicant is required to engage and if the Respondent refuses the process is stymied.

In the June 2020 evaluation of ***Mediation in Mind*** for Family cases the report notes that the process of meeting with parents and children to discuss ADR, provide counselling and otherwise support families helped significantly to prepare those families for mediation and contributed toward the significant success of mediation.

A triage or pre-action phase should include a requirement upon parties to engage in a MIAM-like event, at which parties are compelled not to settle but just to sit down and explore the issue with the assistance of a neutral. If the parties wish this may lead to ADR taking place of a kind suitable for their dispute. For example, early neutral evaluation (ENE) or mediation. The evidence from the recent SEND evaluation suggests that such a process will resolve at least 75% of those cases. Given the wider application of this proposal we do

[4] 2014 was the first year that SEND mediation scheme in force under the Families and Children Act, 2014

[5] Figures from MoJ: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2020. Not clear whether calendar year or academic/other year used as the basis of the count.

[6] Source: FOI reply from DfE on 03.03.21, data only provided up to 2019. The FOI response from the DfE is available on request. It is unclear whether calendar year or academic/other year was used as the basis of the count.

[7] The evaluation is available via this link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004123/SEND_tribunal_national_trial_independent_evaluation_July_2021.pdf

not refer to it as a MIAM but a Dispute Resolution Assessment Meeting or DRAM and will use that acronym in the rest of this Response. It should be noted the Family Mediation project uses the abbreviation IAM which means Information Assessment Meeting as that meeting brings together many other disciplines as well as ADR professionals.

A DRAM would, in our view and in light of the empirical evidence, make a significant contribution to enabling access to earlier resolution of clinical negligence claims because a DRAM:

a) Enables parties to resolve their cases before entering a badly under-resourced court system; and,
b) Lowering volumes of cases coming before the Courts. The SEND evaluation indicates that there will be cases which do not resolve in pre-action or triage and require proceedings. Those cases will however be a minority according to the SEND evaluation thereby enabling swifter progress to trial by reason of fewer cases vying for scarce judicial time.

Those commencing proceedings should be required to file a certificate signed by a neutral stating whether genuine attempts to engage in a DRAM were made or if there was a failure to engage meaningfully by one or other party in the DRAM.

Failure to engage meaningfully in the DRAM should carry sanctions. In such a situation other jurisdictions have developed a sanctions based approach. In Nigeria we understand inappropriate or perfunctory conduct attracts the stay or strike out of proceedings.

The CJC Compulsory ADR Report of June 2021[8] also saw the need for sanctions that could lead to the stay or strike out of proceedings and referred to the success of the so-called DRH in some County Courts as a way of ensuring active participation and discouraging perfunctory performance. See paras 112, A33 and A34 of the Compulsory ADR Report.

Contrast the above examples with situations where no such compulsion exists: consumer claims. Empirical evidence from Peter Causton (given during the MoJ's Round Table event on 7 October 2021) of his experience of the EU's Alternative Dispute Resolution Directive[9] is that Traders will not engage. Further, Mr Causton manages the Manchester County Court Mediation Pilot and finds that parties will only engage with dispute resolution in that context once a Court has ordered them to do so. A very time-consuming process as this only takes place many months after proceedings are commenced and having taken up the time of valuable Court staff and Judges which could be better spent on cases suitable for adjudication having explored settlement options before the Court process begins.

Will cases benefit from ADR?

All cases will, in our view, benefit from ADR in the pre-action stage.

What follows is based on our Director's 30 years of experience as a commercial litigator from 1986 until 2016.

[8] https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf
[9] Directive 2013/11/EU of the European Parliament and of the Council, 21 May 2013, in force in the UK in July 2015 concerning alternative dispute resolution for consumer disputes.

Most citizens come to the courts not to fight but to solve a difference. Not to seek victory in the court room but to achieve a compromise with which they can live.

What appears to work is something which requires parties to contemplate the prospect of the end of their dispute.

The opportunity to be heard sooner is attractive to disputants who find that civil justice in E&W has too few judges and is a long way down the Government's list of priorities for additional resources. It is a system with buildings suffering from decades of neglect. A system where the ranks of the Judiciary are not full causing trials to be delayed. The existing court management infrastructure lends itself to lost files, lost hearings and lost cases.

All of the above incentivise most disputants to warmly embrace the prospect of an earlier end to their dispute.

Drawing attention to these concerns, in appropriate terms, enables disputants to make informed choices and to understand that dispute resolution is a proportionate, less costly and more effective way to air their grievances.

Potential litigants, in our Director's experience, are most interested in three things at the outset of their instructions:

- How much would a claim cost;
- How long would it take; and,
- How likely was the client to win?

By focusing on those three issues at the start of a retainer our Director found that most clients would embrace settlement through ad hoc negotiation in pre-action or ADR at strategic points along the way to trial.

In our view it is that approach which should be replicated, so far as it can, in any information that is made available to parties at the start of their journey through the justice system.

The corollary is that the solution must be readily available with the capacity to deliver a resolution within a relatively short period of time. That is to say, within a month or two rather than the several years that the courts offer.

<u>The Mediation Information & Assessment Meeting (MIAM)</u>

The MIAM is a process that has been found to work well and there is empirical evidence that supports this in different jurisdictions within E&W, we have drawn attention to Tribunals (the SEND cases) and Family.

We believe the MIAM should be used for those clinical negligence claims where the value is greater than £25,000. We have suggested this be called the Dispute Resolution Assessment Meeting or DRAM as the form of ADR process in question may be other than mediation.

The efficacy of the MIAM both in Family and elsewhere (e.g. in the SEND cases, see empirical evidence discussed above) has been documented most recently in an evaluation of the SEND jurisdiction and this evaluation has been considered at length earlier in this Response.

The use of DRAMs in clinical negligence claims should only take place once shortcomings have been addressed. In our view there are issues to address before the DRAM is used with higher volumes of cases:

a) The MIAM in Family is only compulsory for the Applicant. Thereby enabling the Respondent to stymie the entire process. In a reformed version participation should be compulsory for both parties in both MIAMs and DRAMs;
b) The DRAM should, as with MIAMs, be used to explore whether parties are willing to undertake dispute resolution. To that end prior to the DRAM (which should be offered either virtually or in person) the parties or their representatives will be invited to upload relevant documents to a platform to enable the DRAM to take place;
c) If they are not willing to engage in ADR then the case may proceed to one of the established portals either OCMC, CCOP or the DCP with the uploaded documents transferring via an API and populating the case in the relevant HMCTS portal. The ADR neutral would file a certificate in the event one or more parties refused to engage in dispute resolution; or,
d) Given the volume of DRAMs most will take place via telephone or video. The same may be the case for ENEs and mediations taking place post the DRAM.

We note that the CJC Compulsory ADR Report of June 2021[10] in para 108 and the CJC Report about Low Value Claims in Clinical Negligence both considered there was a role for ENE and mediation at different stages of proceedings.

It is important to bear in mind that there exists a misconception that ADR is not justice. This arises because of a common conception that the Courts provide justice. Lord Woolf's Inquiry in the mid-'90s was entitled "Access to Justice". But what is justice? Justice is the ability to secure a swift resolution of a dispute in a fair way meaning each party has a chance to make their voice heard, the neutral listens to each party and a decision is arrived at following thorough consideration of all of the issues.

Yet the common misconception persists that ADR is not justice.

We believe that is the reason (or one of the reasons) so many people opted out of the recent Small Claims Track Opt-Out Pilot. The results of the evaluation of that Pilot are crucial to understanding this issue. More may be learned at the 2021 Public User Engagement event which MoJ/HMCTS is running and which we will attend to raise this and other issues.

Behaviours need to change through education from an early stage, making more information available, changing behaviours by compulsion or perceived (so-called "quasi") compulsion – an introductory process may be the answer and we have proposed the DRAM.

Education about dispute resolution in our Universities is growing but education about ADR needs to start as early as Primary and Secondary schools.

6 Financial and economic costs/benefits of dispute resolution systems

There is little research on this issue that we are aware of because dispute resolution processes are almost always confidential and there is very little dispute resolution taking place in the UK economy today.

[10] https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf

Having said that, we are aware of research by the European Parliament addressing this issue but that Report deals only with mediation and the savings of cost and time resulting from that type of dispute resolution.

In 2011 the European Parliament's Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs published the results of a study into the efficacy of mediation in the light of the 2008 "European Union Directive on Certain Aspects of Mediation in Civil and Commercial Matters".
The report was entitled: ***"Quantifying the cost of not using mediation – a data analysis"***[11]**.**

The object of the research is explained in paragraph 2.1 at the top of p. 11 of the Report:

> ***"The main goal of the research, directed at legal experts in the 26 EU Member States, was to answer the following question: "What is the cost of not using a Two-step 'mediation then court' procedure in Europe?""***

The study is, as one would expect, detailed and careful. We have prepared a table distilling the detail into a summary form to illustrate the value of this report in establishing the costs-effectiveness and cost savings of two-step dispute resolution approach:

Costs of using mediation to resolve a dispute compared with litigation, and showing total costs if mediation failed:

ITALY	
Litigation	€15,370.50
Mediation	€4,369.50
Total Two Step	***€19,740***
BELGIUM	
Litigation	€16,000
Mediation	€7,000
Total Two Step	***€23,000***

In evaluating the effect of mediation on the duration of the dispute resolution, it is important to note the correlation between the estimated mediation success rate and the time saved: the higher the success rate of mediation, the shorter the duration of the dispute resolution proceedings and the greater amount of time and costs saved. As a general frame of reference, various statistics prove that the success rate of voluntary mediation administered by professional mediators is over 85%.

Time to resolve a dispute

Time (days)	**Belgium**	**Italy**
Litigation	505	1210
Mediation	45	47
Litigation and	550	1257

11 https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf

mediation		

Detailed analysis of this data is available on p. 13 of the Report.

Thus in most cases the second step of Court proceedings will not happen and the saving of costs and time is significant.

It should be noted that when parties use the DEF Platform the time from commencement to the end of the dispute resolution event/meeting (we call this the cycle time) are far quicker than the 45-47 days found in the report. The quickest we have achieved is three days on one occasion but typically 14-21 days.

We commend this Report to the Committee and a reading of the full report is both relevant and worthwhile in the context of this issue.

7 Technology infrastructure

Technology has significant potential to play a serious role in enabling access to dispute resolution. The CJC Compulsory ADR Report of June 2021[12] saw potential benefits from dispute resolution being managed online, see paras 110 and 116.

Between October and December 2020 the CJC conducted a survey to seek views about the Terms of Reference for a review about how the Pre-action Protocols (PAPs) should be reformed and whether the PAP process should be moved online. Issue 10 raised in the survey was this:

"Should there be any changes to PAPs as a result of the HMCTS reform programme and the digitisation of the civil justice system generally? To what extent are PAPs already online? Should there be further digitalisation of PAP steps and guidance?"

Our response urged the development of PAPs that were managed online. We were not alone. When the results of that survey were published in June 2021 they showed that ca 80% of Respondents agreed the PAPs should be managed online.

No technology will work well unless the conditions affecting its use take into account the following evidence drawn from the work DEF has undertaken.

Our experience is that without State intervention parties will be left to their own devices and their own reticence to engage in dispute resolution and, when they do, they will introduce document sharing platforms of varying quality and security.

Our evidence of running a pilot of online management of mediations for NHSR (see below) shows that time is wasted by parties arguing over whose platform will be used. This leads to mediations being undertaken using paper processes.

After that pilot ended in December 2019 we concluded that compulsion of one kind or another would be required to drive up the number and frequency of dispute resolution and that to achieve mainstreaming the use of an online platform on which to manage the process was required. Those points were made to NHSR in both our Interim and Final Reports but we heard no more. The pilot mediation provider with which we worked was too

[12] https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf

concerned about mediations being sent to another provider to mandate the use of the platform.

DEF has developed bespoke modules to cater for the differences between dispute resolution processes. Some of the features that makes the DEF Platform work well are:

- Removal of bottlenecks from the dispute resolution process;
- The creation of a bespoke bundle tailored to the different needs of neutrals in different dispute resolution settings;
- Based on a smart contract providing appropriate templates for each claim type;
- The use of on-board messaging to avoid engaging with multiple programs; and,
- The ability to transfer data seamlessly from one module to another to facilitate, say, pre-action negotiations, then into neutral evaluation and perhaps finishing with that data being moved into our mediation module.

ADR Service Providers typically receive a low number of cases every month and conduct their business using 20th century technology such as the telephone and email.

The moment dispute resolution moves into the mainstream those 20th century methods will serve to create bottlenecks impeding the efficient processing of claims.

Consequently we are at work identifying and developing the means to remove that and other bottlenecks.

Our goal is the creation of an end-to-end dispute resolution system in which, as a last resort, cases can transfer into the DCP/CCOP or other HMCTS portal via API. This system is being built within distributed ledger technology using AI to select and book neutrals.

To enable the end-to-end system to be put into place we wish to be able to build or connect with HMCTS built API to connect to the DCP/CCOP. With that cases that do not settle via dispute resolution on our Platform may continue to Court proceedings far quicker than they currently do.

DEF was asked by NHSR to support the management of these mediations via its Platform. This online pilot was undertaken for 12 months from December 2018 until December 2019 and was not a success for various reasons which are set out in our Final Report to NHSR, please see Appendix 2 to this Response. In brief the reasons may be summarised thus:

- There appeared to be little awareness raising undertaken by NHSR internally. This is an issue that was identified as problematic and holds important lessons for any further development of the Pilot.
- DEF's efforts to raise awareness amongst Claimant solicitor firms and those Defendant firms on the NHSR Panel were met with enthusiasm and a desire to use the DEF Platform. Unfortunately when DEF was proposed by either Defendant or Claimant firms their opponents typically insisted on using their firm's document collaboration system. There then arose discussion whether to use DEF or another platform. This led to failure to agree to use any platform and the parties then dealt with the mediation on paper.
- The ADR Service Provider engaged with the Pilot would not require use of the DEF Platform for fear their customers would use the other ADR Service Provider

on the NHSR panel which, at that time, did not use a platform to manage its cases.

These outcomes, although disappointing, nevertheless provide valuable lessons for the Project. We have not received a formal, or any, response from NHS Resolution to our Final Report.

8 Public Sector Equality Duty

8.1 We have considered how protected characteristics and socio-demographic differences affect interactions with dispute resolution processes?

These considerations afford a real opportunity to make a positive change for the better in terms of enabling those with protected characteristics to make the most of dispute resolution processes.

The Equality Act, 2010 (EQA) and guidance produced thereunder requires us to develop the Platform so that it takes into account protected characteristics.

The standards prepared by the World Wide Web Consortium (W3C)[13] support this approach with their Web Content Accessibility Guidelines 2.1 (WCAG 2.1, June 2018). These standards provide a good indicator of what standard the courts would reasonably expect businesses to follow to ensure that their websites are accessible in accordance with the EQA.

Question and answer formats should be developed to enable parties to commence and complete claims despite being, for example, unfamiliar with legal and other issues concerning their claims having visual and/or hearing impairment or a poor command of English language.

Complex questions need to be reduced to simple language. WCAG 2.1 recommends the use of language no more complex than lower secondary level. The need for simple language rather than language understood only by lawyers, expert witnesses (e.g. medics) is also echoed by the SEND Mediation Evaluation.

The use of such tools as:

- Page readers;
- Videos with subtitles;
- Adjustable font size;
- Responsive websites that enable sites to be fully accessible from mobile phones; and,
- Content presented in different languages; such as Welsh, Panjabi, Polish, Urdu, Bengali (with Sylheti and Chatgaya) and Gujarati.

Adopting these approaches enables those with protected characteristics to have a more equal chance to consider information about dispute resolution and to make informed choices about how to pursue a claim.

[13] W3C is the international organisation concerned with providing standards for the web.

8.2 We are aware of evidence on issues associated with population-level differences, experiences and inequalities that should be taken into consideration.

Research published in 2019 by Lloyds Bank[14] found that ethnic minority groups aged over 40 years old are 10% less likely to be Digital First and more likely to be Competent or Disengaged than white people in the same age group. This data suggests that this group of older ethnic minority people may be left behind and would benefit from targeted support. The issue is complex and deserves closer study.

The most recent report to look at the Small Claims Track is the CJC Report on that Track published in April 2021[15]. Inevitably there is no consideration of the demographic as those statistics do not exist.

This is another instance where data produced by the dispute resolution platforms, for example DEF's Platform, and by MoJ/DHSC would help to inform policy making.

9 Additional evidence

9.1 Cross-Department working

Another aspect of our engagement with reforming the management of litigation for the NHS is one of detail but nonetheless relevant (and important) for future success.

We began an engagement with the DHSC and the MoJ following the publication of the recommendations of a report by the House of Commons' Public Accounts Committee which considered the issue of the rising cost of clinical negligence claims. That Committee's report was published on 23 November 2017. One of its recommendations was that the Department of Health (as it then was), the MoJ and NHS Resolution take urgent and coordinated action to address the rising costs of clinical negligence including if necessary mandating ADR (pp.3 & 6).

This led DEF, together with Andrew Ritchie, QC (as he then was), to approach both the DHSC and MoJ to present our Platform and explain how the Platform accelerates case cycle times and reduces costs. A copy of that letter appears in Appendix 1 to this Response, the appended letter is an example; the same letter was sent to each Secretary of State.

This approach led to a meeting with senior civil servants of the Department for Health and Social Care (DHSC) in August 2018 to discuss what we could offer. Unfortunately the promised liaison with MoJ never materialised, so far as we are aware as we did not hear further from the DHSC and the MoJ did not reply.

We imagine Brexit and the Pandemic distracted those concerned from this issue.

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[14] See, page 24: https://www.lloydsbank.com/assets/media/pdfs/banking_with_us/whats-happening/lb-consumer-digital-index-2019-report.pdf

[15] https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf

DEF hopes there would be the capacity to engage in such cross-Departmental working with the MoJ as its current work programme (see their own Call) appears well aligned with the Committee's priorities as evidenced by this Call.

9.2 ***Report on Fixed Recoverable Costs in Lower Value Clinical Negligence Claims"***

This Report was published by the CJC in October 2019 and is relevant to the Committee's Call[16].

The focus of the Report is (p.6):

"The background to the CJC's work on clinical negligence claims demonstrates that the task set was a complex one. The Department of Health had already consulted on proposals for fixed recoverable costs. Sir Rupert Jackson had considered making recommendations in his 2017 report, but ultimately his only recommendation was that the CJC be engaged to consider process improvements and costs together."

Adding, toward the foot of p.6:

"The process improvements outlined in this report, whilst not agreed by all, represent a broad consensus between many of the working group members on a better way of handling clinical negligence claims with a value of up to £25,000."

The Working Group responsible for the report developed the scheme devised by the Law Society of England and Wales producing a carefully worked out process focused on pre-action negotiations with a fall-back of ENE if negotiations did not succeed in settling the case.

There was disagreement about the level of recoverable costs that would be payable and the Report lay untouched until, we believe, recently when the issue of recoverable costs began to be revisited the auspices of the CJC. The aim being to reach a consensus between Defendant and Claimant camps on the amount of recoverable costs which would be acceptable to both sides.

This type of low value claim is also within the scope of the MoJ's own Call. Cross-department working on this very important issue would seem even more pressing than it was in 2018.

10 Conclusions and contact details

10.1 Implementation of the CJC's Report of October 2019 will immediately reduce costs and accelerate the receipt of compensation for Claimants.

10.2 Introducing mandatory mediation in the pre-action stage for claims valued at more than £25,000 will have the same effect.

10.3 To manage the resolution of up to 15,000 cases every year requires a Cloud-based platform designed to manage ADR processes. DEF would be pleased to share further insights about its Platform should the Committee desire.

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[16] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/archive/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims/

10.4 If the Committee wishes to contact DEF

Oct 2021