



ADR APPG – MINUTES

Discussion on MoJ's mandatory mediation consultation

Attendees: John Howell MP, Catherine Dixon, John Pugh-Smith, Lord Balfe (Richard Andrew Balfe, 'RAB'), Lord Strathcarron (Ian David Patrick Macpherson, 'IDPM'), Tony Guise, Gill Mansfield, John Spellar MP, Karl Thompson, James South, Marcus Cato, Andrew Miller, Paul Adams, Lewis Johnston, Alexander Dunlop, Winsom Gordon.

Apologies: Dr Isabel Phillips

Please note, there were several other unnamed attendees in the room. If you were in attendance to this meeting and wish to be named in the attendees, please email and we will update the minutes accordingly.

Session

JH: Introduced the ADR APPG and thanked everyone for attending.

CD: Gave a brief introduction of CI Arb as the impartial Secretariat of the ADR APPG. She noted that whilst CI Arb is the Secretariat, she will be speaking in her role as Director General at CI Arb. She noted that 25% of members active mediators. She mentioned CI Arb's work with other regulators (SRA) in relation to how our professional standards are upheld. She noted the different types of membership available.

JPS: Thanked John Howell as Chair, and said it was unfortunate he wasn't able to attend the previous May APPG meeting. In response to JH's request to explain the outworkings of the APPG he said he wanted to mention several points. Firstly, the desire to achieve more awareness amongst parliamentarians, and, mentioned sessions on the Brexit referendum, work with the APPG on Fair Business Banking, land use and planning. Secondly, he noted that the APPG was set up originally was to achieve a voice on behalf of the wider ADR community. He also mentioned the APPG's work with CI Arb to produce its Singapore report and the Singapore Convention. Thirdly, he welcomed this APPG's topic, noted the reasons why it was very timely because of the MoJ consultation and their involvement in the central questions around mediation. He commented that the mediation community needs to have a better and more coherent voice to help achieve better conversations post-COVID. Lastly, he stressed that mediation would help UK business in the market and the need for constructive, realistic ADR solutions.

JH: Spoke of his Council of Europe role and said that he wanted to get mediation and ADR in different countries. He noted it was Chatham House rules. He welcomed two members of the House of Lords – Lord Balfe and Lord Strathcarron.

IDPM: introduced himself and mentioned that he is Vice Chair of Society of Mediators.

RAB: came into this via end-of-life care for very young children, and where they cannot make their own decisions. He mentioned the Department of Health and Social Care review, and the involvement of Baroness Finlay. He noted there were discussions over the word 'binding'. He said he was



interested to attend to see what he can learn to feed into the DHSC review on children's end of life care (during discussions he observed that doctors were willing to discuss mediation however, they still wanted to retain the power to make final decisions in end-of-life cases).

Consultation questions

Question 2: "Do you think that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge? If so, why? And what factors do you think should be taken into consideration?"

TG: He noted that there are exemptions already to the pilot scheme on small claims. Noted the Online Civil Money Claims Pilot, Practice Direction 51R. He also commented that we should not enter a free for all, there is no reason to increase the number of exemptions.

JH welcomed and briefly introduced John Spellar MP.

GM: Said most areas where people get into disputes are amenable to some form of mediation, even if it doesn't come through to full resolution. She said in this context, the question is talking about a time-limited process and that 1hr is very little time. For purely transactional and money cases, she said it can and does work – but noted that it isn't strictly mediation. She mentioned subject matter exemptions and procedural exemptions, for example strike out, summary judgement, where there is a larger public policy interested and HMRC exemptions.

KT: supported Gill's point on the 1hr issue. He said it takes on average 2hrs to bring something to close, and that impinges on the principal of consensus. He referred to Tomlin orders. He said the time issue is "unrealistic". He said a properly qualified mediator would likely be able to resolve the exemptions question.

JH: asked what is a properly qualified mediator? He also asked whether mediators should be drawn from a wider pool of individuals outside law.

JS: On exemptions, he said that exemptions should be kept to a minimum. Secondly, where is the nexus of decision making of whether an exemption should be allowed. He said that a mediator is qualified to decide whether there is a power-imbalance. He suggested that mediators should be able to make that decision.

JH: agreed entirely with this, he noted that exemptions are counterproductive – we could find another way to deal with these issues.

CD: spoke about the issue of timing, she said it was twofold – the length, and secondly, when it would take place. For example, she said that allegations surrounding abuse may raise the question of when it should take place. She questioned what pre-action or mediation has taken place.

On the issue of timing, she used to run NHS Resolution, one of the challenges there was getting to a point of understanding the quantum on the case – expert evidence was necessary. She said mediating before the expert evidence was gathered could be very problematic. She noted the power-imbalance issue, either under-or-over compensating. She stressed the importance of keeping



exemptions to a minimum and ensuring that the time of the mediation is suitable; do it too soon and it would potentially be problematic.

JH: noted his understanding that in the situation where there is child abuse, there should be an exemption. Although, he questioned why mediators can't decide whether a case is exempt. Also, observed that the Government wants to ensure mediation is used whenever possible to reduce cases and CD's point conflicts with this.

GM: if you put the mediator in the position of making judgements, this would conflict with one of the core tenants of a mediator.

JH: noted that we would not be asking the mediator to become carry out the function of a judge, rather the mediator is deciding whether the case is suitable for mediation.

GM: responded that this would be a judgment.

JPS: said that the whole purpose of mediation is to build relationship and trust. He said in family courts they have the MIAM processes, which he is an advocate of. He stressed it is not a one size fits all. He would prefer to seek a triaging process like we have for the judicial review process.

GM: Disagrees with this. She noted she is not a family mediator. She said that from her experience that family mediators do not love the MIAM process and suggested that triage should not sit with mediator.

MC: noted that triage is important as there is a golden hour to makes things more simplistic in a case, he noted that adding a subsidiary role for mediators is something that would make the mediation process more like arbitration.

AM: stated that he does not use the law in his mediations. He also, noted that he does not disagree with anything, but we need to go back to the purpose and what it means to make mediation mandatory. Referred to Lord Bellamy and mandated mediation for small claims. For him it was hard to think of a claim that is not suitable for mediation, so there would be a limited number of exemptions.

IDPM: "I don't think you can get anything done in an hour". He said the hour begins when you have the case papers and start reading them. He could see how all small claims cases could go to mediations. He doesn't believe it could be done within one hour, he gave this perspective as a retired commercial mediator.

JH: spoke about how a case was the only that a defendant could have their day in court.

WG: noted that in her experience as a mediator that the voluntary nature of mediation has been "weaponised". Where one party does not want to engage, that's where the problem is.

JH: noted that mandatory mediation is good but questioned if she supported exemptions.

WG: responded that exemptions should be kept to a minimum.

TG: Spoke about how subject matter exemptions may become silent in their approach, and he noted that personal injuries and road traffic injury claims have separate and online systems, which are a form of ADR.



RAB: noted there is a massive backlog of cases need to be taken through. He said cases take over 1 year, which isn't acceptable. He argued that one shouldn't throw out the good to be perfect, but instead 'just crack on'. He argued that 2hrs would be better.

CD: Added that there should be a very limited number of exemptions. She questioned when the appropriate and optimal time was that the 1 hr mediation should take place. Further said that one needs discretion for it to be effective and she suggested that discretion should be discussed.

AM: The mantra of mediation is "sooner rather than later", they don't want to wait for expert reports but want to discuss straight away.

Question 10: "What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?"

TG: said that support for end-users needs to be managed online. Pre-action protocols will be digitised, he questioned the issue about calculation of value, he noted that it could be managed by telephone and email. Lastly, he suggested that it must be client based to allow the volume of cases to be dealt with more quickly and in a secure environment.

CD: Said that three things needed to be considered. Firstly, the right information for the right people. Secondly, good accessibility. Thirdly, the form in which support takes. She stressed that much more needed to be done around the information piece.

JS: Agreed with Catherine that organisations needed to work together to get the information piece correct and in one place. He noted that there was 'no need to reinvent the wheel' but instead to signpost better. Noted that the Small Claims Service, was set up pre-pandemic and therefore there needs to be something that is more appropriate now.

JH: he questioned whether there is enough harmony in the mediation sector to come together.

JS: He believed there is enough agreement on the fundamental principles.

PA: Noted that he came into the mediation world as a 'fresher', and that when he joined there was a surprising amount of discord. He said that this is rapidly changing and gave the example of family mediation council and others working together. He said that the difference now is that everyone *must* work together, especially as the mediation sector growing. CMC and FMC are working together as a regulator rather than a service provider.

JPS: Raised two points. Firstly, on online mediation. He suggested that people are sufficiently aware of online mediation. He mentioned the 'Vos context' of trying to get the backlog of cases down by using technology to aid mediation. He noted that AI won't solve all of the mediation sector's issues but it would help.

Secondly, he mentioned the elephant in the room. He questioned how mediation goes from a 'cottage industry' into a profession. He stressed the need for it to be treated as a profession, run as a profession and therefore the core question is how best to regulate. He said there has to be quality in the sector to build confidence, and that this is what the CMC has been trying.



Question 11: “Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government?”

PA: He noted that accreditation is not fixed. He noted that there have been huge strides in recent years and gave the example of online training. Online mediation training, he said, was questioned before the pandemic and now people are very fond of them, thus signifying change in the sector. He argued that one regulator would be best. He continued that the Government has an opportunity to mandate accreditation which will raise the standard of the sector.

JH: questioned who the one regulator would be.

PA: He suggested that CMC should be the regulator to do this. He noted that the CMC are working with the FMC and wished to unite under one regulatory body. He suggested that doing so would allow the member organisations to focus on service provision, where they can provide the best service to their clients.

AM: Noted that there were several elephants in the room. He stressed that accreditation is currently not fine. He said that there are problems with the many schools who have been accredited to accredit and across the board there is a huge quality problem.

He said he has several hats and “one wig”. He is a trustee of CI Arb, and is a member of the CMC, he is a barrister, he is on the CEDR panel and he teaches mediation for RICS. He said the room itself is an echo-chamber. He said that the elephant in the room has convinced itself that accreditation is fine – but he doesn’t believe this. He said that there is something seriously wrong with people becoming a “mediator in 5 days”.

He stressed the key to this is quality. He said no one has ever asked him for his accreditations, but people talk about the quality. On regulation, he said it is such a multi-layered area. He stressed that there is an issue with getting this information to the public.

JH: Not all mediators to be lawyers, questioned how the pool of mediators is sufficiently broad to ensure that many people are included. Secondly, he noted that he was astonished that the conversations that took place between the organisations in the field and how dispersed it is. He noted that there is no “mediation profession” but a cohort of disparate people.

AM: Spoke of his trip to Montreal, and he was talking about accreditation over there which is degrees and pupillages. He noted that they were shocked with the UK way of doing things. He said that there is very different training being given by different schools out there.

KM: said that this was a hot topic, there is one school advising graduates to have a post grad that led into a doctorate, properly qualified is someone accredited using the same benchmark, there is already a very good academic benchmark, he gave the example of principal negotiation course from Harvard.

TG: On accreditation, he said that there should be transparent national standards. On regulation, he gave the example of claims management companies.



PA: He agreed that they are trying hard to raise the standards across the board, he said there are variable standards out there in the UK. He said that so long as there no compulsion to accredit, he said it would be impossible for CMC to stamp out poor ethics in the sector. He said access to work is key, this enables the sector to raise standards. He said that until the Government compels this there are always issues and the sector will try to undercut each other financially and potentially lowering.

GM: She said that there is a good balance of trainings at CEDR, and she said that there is a broad selection of people from different backgrounds. She noted that CMC charges £300 and then she 'ticks a box' to ensure she has read what she is expected to do as a good mediator but that was it. She knows she is doing the good things to have high standards and but suggested that this isn't good enough to ensure all mediators have high standards and she has a concern people will be mediators without constant CPD throughout their careers. On mandatory, she said that if this is at the cheaper end of the market, people will try to maximise profits and will not care about quality or ongoing discussion.

LJ: Echoed what AM said on regulation and that it is multi-layered. Questioned what the purpose of a system of standards and regulation. Wanted to ensure that mediators are adequately trained, they have access to recourse and redress if they haven't been acting competently or if malpractice takes place. Noted there is a strong eco-system of bodies – doesn't want to reinvent the wheel.

Have benchmarks across the eco-system which different orgs need to meet. He said that a single regulation would not work, and it would stop people from coming from all directions.

AD: On accreditation, he noted this issue had been kicking around for a long term. He noted there were only three university's that did mediation at the time. He noted that he spent 5 years mediating before he accredited. He noted that Peaceful Solutions was a course for community mediation, whereby you had to do 100hrs supervised, which 'just disappeared'. His thesis was *Mediation – a profession that isn't*. He mentioned gas engineers and what potential lessons learned there are from that sector. He said that there needs to be transparency on the end user.

JH: What role Government can play or is it something the sector can do themselves.

JS: Said he feels like he is in Groundhog Day – he said the CMC have raised the standards. He stressed he 'doesn't want to throw the baby out with the bathwater'. He said that there is a system that works reasonably well, but that it can be better. He doesn't think there should be a national standard, but that the organisations should work together.

JPS: He said that there are a lot of people that do brilliant community mediation, but they wouldn't go near full accreditation. He said that if the MoJ should consider this, it should be in this limited way.

PA: On training, what qualification do you need to call yourself a mediator – it has got better, and it will get better. He said there are standards around client conduct, CPD, insurance cover, submitting yourself to a disciplinary process. All of these things only come from when a mediator accredits. Government should look for a compulsion to accredit. He said that the standards develop over time.

KT: There are already some common standards through the CMC. Mentioned the legal services act. He stressed it does not have to be a monolithic regulator, because a good mediator should have



trust in the process from the consumer. He stressed that it is the consumer who needs to be put front and central in this discussion.

MC: He argued that if the UK Government or a single organisation overregulates, there will be a bottle neck. There needs to be a common standard consensus that everyone understands. He gave the example of the Institute of Civil Engineers, a body of engineers who are publicly responsible for everything that they do. He said that there are several levels to this.

CD: She questioned what is 'the mischief we are trying to protect'? Minimum standards. She said the sector is not a million miles away from that. Organisations in the room have those standards, and there needs to be collaborative work. She wouldn't support one-size-fits-all or one body that everyone has to go through. Providing there are bodies that individuals have completed steps to protect themselves and protect the public, with the consumer at the centre, then that should provide sufficient safeguarding.

On the multiplicity of CI Arb membership, they come from a multiplicity of backgrounds. Need to look at the interplay of individuals who are already regulated in different fields, for example lawyers, engineers, and others.

AM: Reiterated, "there are more that brings us together than divides us". He said that there is an echo chamber, and sadly the message isn't going out there. Said that there are several solicitors who do not know what CMC is, or CEDR or arbitration. Said lawyers are either mediation friendly, or they are not. He stressed that it is the mediation sector's fault.

MC: Said that the one body is not a good idea, but that one voice must be done for the final recipient. Stressed that all the primary organisations are not currently coherent with one another.

AD: Went back to the mention of protection from mischief. He said that on employment mediations over lockdown, he saw a significant increase. If someone has a bad experience with mediation, it puts them on the back foot for next time and they are unlikely to have a positive view of mediation.

JH: He questioned whether the room thinks that the professions that are regulated by a different body, for example solicitors or accountants, should be exempt from additional regulatory requirements from mediators, or should they all be accredited.

GM: Noted that those individuals have very different skillsets and conventions. You cannot equate a solicitor, judge, chartered surveyors etc... But she stressed that these highly qualified individuals are not the same qualifications needed to be a successful mediator. She said that there may be a way of passporting this.

AM: Said he believed he would have been a better barrister if he was a mediator before.

CD: Said as a solicitor you are regulated by everything you do. In mediation it could go wrong if the mediator starts giving legal advice. She said it is complex picture when looking at legal services sector.

JH: Agreed with the above comments. He thanked everyone for their engaging points and discussion, thanked the MoJ for their attendance and welcomed the ongoing consultation.

End of session.



ADR APPG – BRIEFING

Discussion on MoJ's mandatory mediation consultation

Date: Wednesday 7th September

Time: 12:00 – 14:00

Venue*: Room C, in 1 Parliament Street, Westminster, London SW1A 2JR. **No virtual attendance.*

General overview

Session: to discuss the currently open Ministry of Justice Consultation on the Government's new mandatory mediation proposals. The deadline of the Consultation is Tuesday 4th October 2022.

Running order

The session will be conducted as a round table, with John Howell MP asking questions from the consultation.

12:10 Introduction from John Howell MP, Chair of ADR APPG

12:15 Introduction from Catherine Dixon, DG of CI Arb, Secretariat of the ADR APPG

12:20 Questions from the MoJ from the consultation
1h20 discussion

13:40 Summary and close from the chair

13:45 Look ahead from September 2022 and the ADR APPG plans

Overview: Themes from the questions that John Howell MP, Chair, will ask:

- Exemptions
- Support for end-users to participate effectively
- Stronger accreditation/new regulation
- What existing organisations could be formally recognised as the accreditation body
- National standard of mediation
- Dual regulation (specifically if a mediator is also a solicitor)

Questions from the consultation that the Chair will start by asking

2. Do you think that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge? If so, why? And what factors do you think should be taken into consideration?

10. What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?

11. Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government?

12. Which existing organisation(s) could be formally recognised as the accreditation body for the civil mediation profession and why?



13. What is your view on the value of a national Standard for mediation? Which groups or individuals should be involved in the development of such a Standard?

15. Some mediators will also be working as legal practitioners, or other professionals and therefore subject to regulation by the relevant approved regulator e.g. solicitors offering mediation will already be regulated by the Solicitors Regulatory Authority. Should mediators who are already working as legal practitioners or other regulated professionals be exempt from some or any additional regulatory or accreditation requirements for their mediation activities?

Other questions from the consultation

1. We propose to introduce automatic referral to mediation for all small claims (generally those valued under £10,000). Do you think any case types should be exempt from the requirement to attend a mediation appointment? If so, which case types and why?

3. How do you think we should assess whether a party who is required to mediate has adequately engaged with the mediation process?

4. The proposed consequences where parties are non-compliant with the requirement to mediate without a valid exemption are an adverse costs order (being required to pay part or all of the other party's litigation costs) or the striking out of a claim or defence. Do you consider these proposed sanctions proportionate and why?

5. Please tell us if you have any further comments on the proposal for automatic referral to mediation for small claims.

6. Do you have experience of the Small Claims Mediation Service?

7. Did you receive information about the Small Claims Mediation Service? If you received information, how useful was it?

8. How can we improve the information provided to users about this service?

9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?

14. In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?

16. Are there any measures that the Small Claims Mediation Service could take to ensure equal access for all to their services, considering any specific needs of groups with protected characteristics and vulnerable users?



Contact:

Alexandra Braby

Policy and External Affairs Manager, CI Arb

E: abraby@ciarb.org | T: +44 (0)207 421 7491 | M: +44 (0)79449 50706