



The Civil Mediation Council's Response to the Ministry of Justice's Call for Evidence on Dispute Resolution – October 2021

Introduction

This is the response of The Civil Mediation Council (CMC) to the MoJ's Call for Evidence on Dispute Resolution in England and Wales (August – October 2021).

What is the CMC?

The CMC is a UK registered charity, with a mission to promote and encourage the use of mediation in the resolution of conflicts and disputes. Established in 2003, the CMC liaises with government, the Civil Justice Council, different mediation organisations, employers, and other stakeholders to promote mediation as an effective means of conflict resolution and address issues of concern within the mediation process.

In addition, with over 700 registered individual members, 40 registered service providers and 21 registered mediation training providers, the CMC is the largest registering and regulatory organisation for mediators in England and Wales. It provides the public with a trusted directory of mediators across various areas including civil and commercial, workplace, community, SEND and education. It keeps members and the public abreast of developments in mediation, the mediation process, and its place in the settling of arguments in a constructive, non-confrontational manner.

The CMC also hosts a Fixed Fee Mediation scheme¹ which, following the removal of a similar scheme from the Ministry of Justice's webpages, assists members of the public in finding a mediator for disputes under £50,000 at a fixed price.

Since 2016, the CMC has operated a voluntary system of regulation for mediators; the vast majority of its members have opted to become a regulated mediator. In early 2021, the CMC changed its membership policy so that from January 2022, every individual CMC member who practices civil/commercial or workplace mediation in England and Wales will have to be CMC regulated.

The purpose of regulation is to protect the public, and the regulatory scheme covers both civil/commercial mediation and workplace mediation. It offers mediators a professional pathway from training through to CMC Fellowship, which is available to the most experienced mediators. The CMC does this by setting criteria for mediator skills training courses and operating an approval system for these courses. As such, all CMC regulated mediators are trained to agreed industry standards, follow an appropriate Code of Practice, carry out necessary professional development activities, and have both suitable insurance and a suitable complaints process in place. The CMC also offers a similar regulatory scheme for providers, and jointly with the College of Mediators, operates a slightly different scheme for members specialising in SEND mediation.

¹ <https://civilmediation.org/fixed-fee-scheme/>

In addition to requiring mediators to demonstrate they meet the CMC's criteria for recognition, the CMC also offers a complaints process that can be used if a client is not satisfied with the outcome of the mediator's own complaints process.

The CMC carries out activities to promote best practice, for example through offering affordable CPD at its conferences and issuing guidance on relevant topics. It is also continuing to strengthen its regulatory approach, for example through developing a framework for external assessment of training courses.

The CMC's expertise

Through its members and Board, the CMC is uniquely placed to answer this Call for Evidence about dispute resolution and specifically about mediation. Before answering, the CMC asked for the input and evidence of its members and had detailed responses from 65 individual members and 7 registered service providers representing groups of mediators. Where appropriate, this response quotes directly from these detailed responses. The CMC has also used its knowledge as a working charity and the collective experiences of those serving on its Board, Committees and Working Groups. These serving members are all volunteers, who stand to make no personal gain from their work.

Where evidence is currently unavailable, the CMC would welcome a discussion as to how it might be obtained and how the research might be funded.

Questions

1. DRIVERS OF ENGAGEMENT AND SETTLEMENT

An understanding of the drivers of engagement and settlement will enable the development of policies and procedures that ensure access to justice in a way that best meets people's needs. Existing evidence points to reasonable settlement rates for pre-hearing dispute resolution schemes.

1. 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?

1.1. Parties are motivated to mediate their disputes when they understand the benefits. Rather than the characteristics of parties, or type of dispute, education is the key to encouraging participation in dispute resolution processes. Because of this, the CMC has a focus on education as a way of furthering its charitable mission to promote and encourage the use of mediation in the resolution of conflicts and disputes. The CMC liaises with government, the Civil Justice Council, different mediation organisations, employers and other stakeholders to promote mediation as an effective means of conflict resolution. Motivation and engagement are linked to education and the availability of information and data. For that reason, the CMC is in complete support of this Call for Evidence.

1.2. Where parties are represented, the decision to mediate can be dependent on the advice and experiences of their lawyers (whether solicitors, barristers, legal executives, or in-house counsel). This is particularly the case where the parties are inexperienced litigants, relying heavily on their lawyers for procedural and tactical advice. Where advisers or parties have mediated before, feel comfortable in a mediation, or have had one or more positive experiences, then mediation is presented as a constructive and positive way forward. Additionally, where the lawyers' education has included training on mediation, they are much more likely to see it as an integrated part of any case and include it as part of the usual dispute resolution process. Conversely, where advisers or parties do not like the idea of mediation, have never mediated before or have had a negative experience, as one member states they are:

“loathe to step out of their comfort zone and mediate their disputes”.

1.3. Where certain sectors collectively endorse mediation then mediation takes place with greater regularity. This is evident in disputes involving banks, insurance companies (particularly professional indemnity cases) and construction disputes. It is increasingly in evidence in disputes concerning clinical negligence and those involving insolvency practitioners. These are areas where there are often “serial litigants” resulting in a greater understanding of the advantages of mediation over court-led proceedings, particularly as a way to manage risk across a wide portfolio of cases.

1.4. Parties are more motivated and engaged in the process where they have previously agreed to mediation at the contractual stage. One member states:

“Unsurprisingly, if the parties have already accepted that disputes will be mediated before they are litigated/arbitrated then they accept the need to mediate. I have mediated a number of disputes where such decisions have been made at the contracting stage and all of them have settled at mediation.”

- 1.5. Parties are incentivised to mediate where they want to avoid business disruption, complaints, or limit reputational damage. Additionally, where parties wish to continue commercial relationships, or are working together on an on-going basis, mediation offers a mechanism to resolve disputes as cheaply, fairly and as quickly as possible.
- 1.6. There are circumstances where, mistakenly, parties believe that suggesting mediation will be perceived as a sign of weakness or an attempt at a fishing expedition to obtain useful information to assist in the case. As mediation becomes the norm and part of the usual management of a dispute, these views are less prevalent.
- 1.7 Members of the CMC have provided the following evidence in relation to specific areas:
 - (a) In construction disputes, adjudication has reduced reliance on mediation to some extent. However, many construction disputes are still mediated, supported by the role of the court and the threat of cost sanctions.
 - (b) In the workplace and employment context, barriers to mediation are lack of knowledge, the traditional use of formal processes and the approach of HR who frequently reach for the grievance procedures when, as one mediator puts it:

“they should be reaching for the resolution procedures”.
 - (c) Inheritance disputes are often mediated because the parties realise that the estate in dispute is of a fixed value which is only going to be reduced further in size by legal costs. This focusses minds on mediation rather than the risk of incurring further costs.
 - (d) SEND cases are an example of where there has been a dramatic increase in the uptake of mediation. The possibility of going to mediation without losing the right to make a tribunal appeal is attractive. Where mediation is requested, the Local Authority and/or The Local Clinical Commissioning Group have to attend. It is quicker and allows for wider and more imaginative, tailor-made solutions than a tribunal outcome, especially where the relationship between the parties might span a 25 year period. Local Authorities are motivated to mediate to avoid tribunal appeals which are very time consuming and costly.
 - (e) In clinical negligence cases, the need for an apology/explanation is also an important factor. As a confidential and without prejudice process, mediation offers a safe forum for exploring explanations, or offering apologies without the risk of prejudicing future legal proceedings should the mediation be unsuccessful.

2. 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?

2.1. Parties are incentivised to mediate their disputes when they understand the benefits, which include:

- (a) costs savings compared to litigation.
- (b) the ability to manage reputational issues as a result of the confidentiality of the process.
- (c) the ability to maintain (and even improve) business relationships.
- (d) the ability to manage the risk of an unfavourable outcome from an unpredictable court process (for example discovery of new documentation, witnesses not saying what is expected, or a judge preferring a different legal or factual interpretation).
- (e) outcomes which have been created by and are therefore owned by the parties, rather than one imposed on them by a judge.
- (f) convenience of the process and its flexibility. Mediations can be set up at any point in the life of a dispute, often at short notice. They allow parties to move forward at their own pace, rather than being led by the availability of court dates.

2.2 Other incentivising factors include:

- (a) knowledgeable lawyers (whether solicitors, counsel, or those working in-house or in the public sector) encouraging parties to mediate and advocating the benefits of the process. For example, one CMC member has experience of clients using bonus payments to incentivise external counsel to reach early settlement.
- (b) the court exercising its case management powers, for example by staying proceedings to allow for mediation, or making “Ungley” orders (whereby a party who considers a dispute to be unsuitable for resolution outside of court to justify that view at the conclusion to the trial).;
- (c) without obligation discussions with a mediator to understand the process.
- (d) an appreciation of the “*hidden costs*” of litigation such as the diversion of management time from core business, and the emotional toll and stress of litigation. Where parties have been involved in litigation before, they often have a real appreciation of the real impact of these costs. In contrast, where parties have not been involved in litigation before, there can be lack of understanding of these hidden costs and a focus on a desire for “*justice to be done*”.

2.3. The CMC is not aware of any statistical evidence of the threat of costs sanctions as a driver of parties to mediation. The majority of CMC members do believe that the threat of costs sanctions pushes people to mediate, although this view was not universal. Of course, where legal costs begin to outweigh the sums in dispute then there is a greater incentive to mediate (although perversely such a situation frequently makes finding agreement much harder as the costs burdens can outweigh the damages sought and/or agreed).

2.4. Experience and responses were mixed as to whether parties were incentivised to mediate by it being imposed on them (and see the answer to question 11 below). However, if mediation was imposed on them the parties were more willing to engage when they understood it to be a

“genuinely supportive process, facilitated by competent, experienced neutrals who understand the complexities of the territory to be mediated”.

2.5. In relation to specific areas of practice, members provided the following evidence:

(a) In the SEND context the evidence of what works includes:

(i) Providing parties with good information and the option of going to mediation early in a disagreement (the Mediation Information Advice Session)

(ii) In the SEND context the local authority has to attend if the family request mediation, and they have to have relevant decision-making power on the day

(iii) Local authority officers who understand the spirit of mediation, i.e., attend with an open mind and willingness to listen and understand

(iv) That in the SEND context mediation often avoids a tribunal

(v) That SEND mediators have now an official accreditation and have to undergo accredited training. This instils trust in the knowledge / expertise of the mediator.

(b) Evidence of what does not work in the SEND context:

(i) Mediation not fully understood by the local authority, i.e. seen as a "mini tribunal"

(ii) LA officer not having full decision-making power on the day

(iii) Mediation delivery model is not based on very thorough preparation of all participants

(c) In the family mediation context, the voucher scheme has been very successful. MIAMs also make a difference as they educate parties to what is on offer.

(d) The experience of CMC members is mixed as to the success of the NHSR mediation scheme. It is noted that CEDR has recently published a review of clinical negligence mediation to which you are referred.²

(e) And, finally, where mediation is written into the dispute resolution clauses of contracts parties will be expecting to mediate.

² <https://www.cedr.com/the-future-of-clinical-negligence-mediation-the-mediators-view/>

3. 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.

3.1 Evidence from one member conducting 20 plus family and finance cases per month is that the

“MIAM gives the mediator an opportunity to explain how important it is for clients to come to their own arrangements not only by giving the clients control of their own destiny but for reasons above, time money and stress. I find not many, really, want to go to court. It’s out of sheer frustration. When the process is explained to them and the benefits of mediation, I find most cases proceed. Real shame though we are only halfway there as the second client has a choice then whether to move forward with mediation. I personally believe the MIAM should also be mandatory for C2/P2. I don’t believe it should be purely down to the skill of the mediator to entice the second party in.”

3.2 Another member states:

“the compulsory framework helps to focus parties to earlier dispute resolution, helps to ease them into having an earlier difficult conversation and at least reduce[s] areas of conflict and or [raises] possibilities for solutions prior to any hearing in an adversarial environment”.

3.3. The experience of the CMC, and that of its members, suggests that even reluctant parties to mediation come to an agreement when they were not expecting to do so. The education of parties on the process of mediation results in increased engagement. Parties who would not have otherwise thought about mediation can be engaged in the process, even where they are approaching the MIAM as tick box exercise. Parties have to talk to each other which, up until the mediation, has often not happened.

3.3 As the MoJ is aware employment tribunals are using judicial mediation in employment claims.

3.4 Clear evidence of the success of gateways can be seen in the significant uptake of SEND mediation following 2014 introduction of MIAS.

3.5 Compulsory gateways also prevent any fears that suggesting mediation will be interpreted as a sign of weakness.

3.6 CMC members have reported positive experiences of judge mandated hearings to discuss mediation and the positive use of Ungley Orders (whereby a party who considers a dispute to be unsuitable for resolution outside of court to justify that view at the conclusion to the trial).

3.7 The Central London County court scheme pushes parties to mediation. The evidence of settlement rates in this scheme are not known to the CMC but are presumably available from those who run the scheme.

4 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.

4.1 It is unclear whether the suggestion of mediators being able to refer is reference to a formal process of referral or whether this is simply freedom to signpost to other services. It is not clear from the question whether this is in addition to mediation or instead of mediation.

4.2 In any event, the experience of the CMC, and the evidence of its members is that this is not an issue that many are familiar with. Many members who responded replied “Why not?” and the CMC has sympathy with this view. The CMC is of the view that as long as a mediator is careful to ensure that there is no bias or conflict from referring on, then it should not be discouraged. There is no evidence that referring people to support services impacts on a mediator's impartiality.

4.3 Where parties are represented, it is felt that the lawyers should be the ones suggesting other forms of support or intervention.

4.4 Where parties are unrepresented, the majority of CMC members supported signposting as long as it is meaningful, fully explained and consented to. One mediator said:

“It may be helpful to suggest that parties enlist the aid of jointly instructed expert to determine or advice on a technical issue that needs to be resolved before agreement can be reached.”

Another suggested that there may be a need for:

“clearly defined guidance of when it is safe to [refer]... This should be part of regulatory guidance for mediators with decision check lists to provide a uniform approach and reduce risks of harmful or risky referrals that would not be in the lawful interests of the parties tested against the mediator's duty of confidentiality. Getting this wrong could adversely affect the image and reputation of mediators and impact on the important issue of trust.”

4.5 In SEND mediations, Local Information and Advice Service (LIASE) advocates are often not present, but it would be useful for mediators to have a list of named advocates they can refer parties to. One member comments:

“SENDIASS holds local knowledge and communicates regularly with the local authority. There is also a statutory "local offer" which provides information about other support groups etc. The SEND Mediation provider works with many local authorities and needs to stay strictly impartial. They cannot fulfil the role of SENDIASS.”

4.6 In workplace mediation a:

“referral for individual work such as counselling or coaching may be appropriate”.

4.7 Community mediators often refer disputants onto social, health and environmental services. One member stated that occasionally they advise disputants to consider obtaining legal advice or union

support. Mediators frequently suggest that the parties might need surveyor reports and other expert inputs.

5 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?

5.1 It is difficult (and perhaps wrong) to generalise because, of course, each dispute turns on its facts, circumstances and the nature of the parties involved. It is clearly impossible to compare progression of an identical case to mediation to a case which proceeds to trial; once cannot clone a case and make a direct comparison. Furthermore, to some extent, as mediation providers we are unaware of the cases that do not come to mediation. However, there are some areas where the evidence from members suggests that the uptake of dispute resolution is low:

(a) Some members suggest that there is a low uptake in cases involving fraud and dishonesty, or where there are direct conflicts between the oral evidence of the parties or their witnesses. However, others disagree on the basis that such cases are inherently risky both in terms of outcome and reputation and often parties can see a real benefit in managing those risks by a mediated settlement. One member states;

“As a client and now as a mediator, I have been at many mediations where there have been allegations of dishonesty, or fraud. They are perfectly suited for mediation. There does not need to be any acceptance of the dishonesty, but rather a focus on the range of possible outcomes at trial (either in terms of facts, or outcomes) and whether a party wants to manage that risk. A good mediator can manage and provide a forum for discussion of the emotions involved in such cases, whilst focussing parties on settlement”

(b) One member stated:

“In our specialist field of medical mediation, uptake remains relatively low. Awareness of this form of mediation is not widespread and in our experience, referrals are made through word of mouth or from previous cases. More research is needed into the outcomes of medical mediation cases to understand whether there are particular types of case which are more or less likely to be resolved through mediation. For example, there is some evidence that cases involving strongly held religious beliefs may be less likely to result in a successful resolution and that in such cases, it may be more expedient to make an application to court.”

(c) In low value disputes, the small claims court can be more cost-effective.

“The motivation to pre-pay for mediation is understandably low.”

Members said:

“I participate in the CMC Fixed Fee Scheme and not infrequently receive queries about disputes where the "other" party is not responding to communications. Without the "stick" of proceedings there seems little likelihood that an unwilling party will engage in dispute resolution. Thereafter the cost of mediation is going to be a deterrent where a determination by the court is likely to be "free" for the self-represented party. Pro-active management by the courts to resolution seems to be the

only option. I do contrast this with a number of "Consumer" claims where I conciliate for CEDR. These are low value claims that would fall in Small Claims Track. Dispute Resolution process is funded by the business (or indirectly through a Members Organisation). These cases are formally conciliations but in fact are mediations where parties resolve the dispute through mechanism of a neutral intermediary. Settlement rates are high, cost is low."

"It is the low value claims which causes the biggest problem with the second party not wanting to mediate. Most enquiries are under the 20k settlement figure and the disputes are wide ranging covering unpaid loans, rent disputes, vehicle disputes, property condition, landlord, trade partnerships, boundary, building etc. The first party's only option is for small claims action. Where it is a higher value settlement, generally with solicitors involved-the price of the mediation is often the deciding factor of the instruction proceeding."

"Very small claims, where the fee for mediation exceeds the Small Claims court filing fee."

- (d) Evidence from members suggests that in personal injury cases, there is sometimes a preference for more informal round table meetings, rather than mediation. However, this is a form of dispute resolution in itself.
- (e) Where there are free alternatives, uptake can be low, for example in employment cases where there are free judge-led mediations available.
- (f) One member comments in relation to construction cases:

"Construction, particularly with small firms. Often the end client is willing to undertake mediation but the contractor feels that they will be an effective litigant in person which they almost always will not be. There is often an overt disdain for perceived "white collar desk workers" from the people doing manual work. The perceptions are incorrect but it is very difficult to communicate that mediation can be far lower cost and far quicker and less stressful."

- (g) And in relation to SEND, one member comments:

"In the SEND context disputes can relate to the school placement: the LA decide on a placement that the family is dissatisfied with. For example, family wants a special school and LA names a mainstream school with a support unit. Some of these disagreements can be resolved through mediation, but they cannot when the special school parents want is full or says they cannot meet the needs of the child or young person. In those cases, the tribunal can rule."

6 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?

6.1 The CMC's experience is that "the earlier the better", which is a view shared by members. As one member states:

"In all cases, as early as possible, which is not to say that mediation is appropriate at that stage but disputants need to be informed about mediation if they are to be able to judge when best to engage in it."

6.2 The experiences of CMC members cover a wide range of disputes represented by the member respondents to the survey. Regardless of this, it is clear that early mediation helps to prevent relationships deteriorating further, parties becoming entrenched and this increases the possibility of constructive dialogue being maintained. Where mediation is sought at a very early state, it prevents

"a positional approach and blame again which sets in once proceedings are issued."

6.3 The specific experiences of CMC members are as follows:

- (a) *In construction disputes it depends on the issues. In simple cases, early mediation can prevent relationships deteriorating, parties becoming entrenched, and lead to the maximum saving in costs. Even if the issues are or appear complex, early mediation could help the parties understand each others needs and which issue or issues can be resolved and how best to achieve this. So an early exploratory mediation leading to an agreed agenda may help the parties avoid legal action or at least decide the most effective form of action. I call this a stepping stones mediation/agreement.*
- (b) *In commercial disputes, where parties are legally represented, it is highly likely that the lawyers will undertake an early case review with their client before legal proceedings are contemplated. Mediation ought to be something that is discussed at that early stage as part of the overall review and option building. In my experience, both as mediator and previously as a solicitor in private practice, mediation is rarely discussed (or at least not discussed meaningfully) in those early stages of the process. Greater awareness of the tangible benefits of mediation would assist. This is more than simply education about what is mediation. Intuitive and tailored training around mediation is needed.*
- (c) *In our experience, the earlier a dispute is recognised and acknowledged, the better chance there may be of de-escalating and/or resolving it through mediation. An important element of our work is the provision of conflict management training to health professionals at all levels and we are currently involved in research to evaluate the impact of this on the number of cases which result in an application to court. We believe that requests for mediation are often made very late in the day and often at a point where relationships between professionals and families have become entrenched. Supporting health professionals to manage conflicts proactively has often resulted in improved relationships and a willingness to find a mutually acceptable way forward.*
- (d) *In virtually all the civil and commercial mediations I am involved in... parties could benefit from a clear explanation of what mediation is and also a realistic appraisal of how expensive, risky and*

stressful it will be to take their dispute all the way to court using the legal process. Most parties I see at mediation have a moment of realisation during the mediation where they realise just how deep they are into the litigation and how far they still have to go and therefore what the true cost is going to be. The earlier parties can have this reality check, the more focussed they are likely to be on settlement and the more attractive mediation will appear.

- (e) At the stage lawyers are instructed. My experience relates in particular to international commercial disputes – including shipping and international trade.*
- (f) As early as possible. If mediation is explained / encouraged without people losing the right to court / tribunal access, and if it is done well and mediation happens quickly it should be clear that it provides a fast effective way to resolve disagreements. This is especially important when there are ongoing long-term relationships and where continuing adversity can cause damage to the people involved in the dispute.*
- (g) In low value commercial disputes, if there was more information that the parties had to read prior to issuing a claim, or they had to apply to opt out of the expectation to mediate, possibly with a written application, then I think it would increase the number of disputes that were resolved by mediation. I think that this would also work for higher value disputes*

6.4 In the workplace context, one member suggested that resolution procedures should be issued rather than grievance procedures. Many members were clear that as early as possible was key:

“It often helps stop the dispute escalating and becoming a much bigger problem”.

6.5 One member specialising in workplace mediation said:

“There are a number of points, these include:- when a working relationship starts to breakdown/conflict become obvious and prior to formal processes - prior to a formal process commencing/when discussing outcomes and terms of reference etc -following a formal process (dependant on situation and context) - prior to any appeal/legal process - at commencement of legal proceedings and at any stages throughout prior to hearing.”

6.6 However, a failure to mediate at an early stage does not mean that further attempts to incentivise mediation should not be made at every stage of the dispute, even right up to trial mediation can be effective at any point within the lifecycle of a case. The Court of Appeal mediation scheme is a very good example of this. The scheme applies to eligible cases for which permission to appeal is sought and obtained via the Court of Appeal and unless a judge exceptionally directs otherwise, the parties in such cases are notified by the court that case papers have been automatically referred to CEDR for the appointment of a mediator. Parties are then asked to confirm if they wish to proceed to mediation. Mediation under the pilot scheme is voluntary but parties may be required to justify to the Court of Appeal their decision not to attempt mediation at subsequent court hearings. The CMC is not aware of the success of this scheme, but presumably the results are available.

6.7 It should be noted that even if mediation is not initially successful at an early stage it will clarify issues between the parties, identify risk for the parties and open a conversation at a time where an adversarial process sends parties into their trenches. Furthermore, a failure to resolve a case at an early mediation is not a bar to a successful mediation further down the line.

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

7.1 Parties to mediation can often misunderstand the role of the mediator. The most frequent misunderstanding is that the mediator will make a decision and will tell the parties what to do. In addition, parties (and sometimes advisers) commonly believe that:

“The mediator needs to be persuaded of the strength of my case. The mediator is my agent. It helps to get the mediator on your side.”

7.2 Some believe that the mediator is biased to the person that instructed them, which is absolutely not the case. The European Code of Conduct for Mediators, which is the applicable Code of Conduct for CMC states:

“Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation”

7.3 Others have a lack of understanding about their own role and their:

“degree of control in the matter - their accountability and responsibility to take decisions, not the mediator or their legal advisor”.

“That the parties will have to accept that they are wrong/apologise and/or alternatively not be able to prove that they are right. That it will never work. That they will never believe whatever the other will say”.

7.4 Another common misconception according to members is that:

“If mediation is not successful, we should just go straight to court”.

In the experience of the CMC, this does not follow - often mediations which do not settle on the day settle in the days/weeks after (as evidenced by the CEDR Audit³ - see further the answer to question 8 below). In addition, information learnt at mediation can assist in formulating a sensible Part 36 offer.

7.5 Mitigation of these misconceptions goes back to the need to better educate disputants about the process and the role of the mediator. Some of this is done in pre-mediation calls but if the information is only being imparted at that stage it suggests that the parties are not fully informed about the process that they have already entered into. Education needs to come at the point that parties realise they have a dispute and are looking at their options as to how to resolve the dispute. Currently the common belief is that the only way to resolve a dispute is going to court. This view needs to be changed if mediation or other dispute resolution methods are to be encouraged.

7.6 The role of advisers in encouraging and educating parties about mediation cannot be underestimated. One mediator states that:

“Lawyers often underestimate the degree of influence they can have on an opponent through

³ <https://www.cedr.com/ninth-mediation-audit-2021/>

emotional intelligence and behaviours, rather than the vigour, as opposed to the clarity, of their advocacy. The mediator can help with this both during appointments and through training”.

7.7 Another area where education would be of benefit is within the business community. As one member states:

“there is a poor understanding in the general business community of mediation process and benefits, and differences with arbitration and conciliation this is compounded when lawyers have a financial incentive towards court action. Courts should obtain evidence and judge if/ how lawyers have made an appropriate positive case for mediation. There should be a legal obligation on lawyers to give a consistent professional verbal and written briefing to clients on mediation as an option which is signed and dated by the client and their lawyers”.

7.8 In relation to SEND mediations, one mediator responded:

“On SEND Mediations (One of my specialisms) Many Parents and/or Guardians believe Local Authority Officers come to Mediation with Brick-wall agenda based purely on avoiding costs. Best way to mitigate this is to ensure no such Agendas exist. It is well known through ISPEA and others that Local Authorities procure for the Mediation Contractors and then have the last word on which Mediators are to be used. For example, as happened to me, you see the parties through to a settlement the LA Representative does not like it and instructs the Contracted Supplier not to use that Mediator again. The Contractor wanting to do the bidding of the LA does as they are told.”

2. QUALITY AND OUTCOMES

We want to ensure that parties are supported to use the best processes. As well as measures such as engagement/settlement rates and the perceptions of parties, it is important that parties achieve quality outcomes i.e. problems can be resolved effectively, fairly, and with minimal cost and delay for parties.

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

8.1 A useful source of evidence is the ninth Biannual Mediation Audit conducted by the Centre for Effective Dispute Resolution (CEDR) in 2021⁴. To quote:

The survey was undertaken using an internet-based questionnaire, which was open to all mediators in the United Kingdom, regardless of organisational affiliation. It was publicised by way of CEDR’s website and direct e-mail to the mediator contacts both of CEDR and of other leading service providers and members of the Civil Mediation Council. This particular report is based upon the 361 responses that were received from mediators based in the United Kingdom. This is a statistically significant

⁴ <https://www.cedr.com/ninth-mediation-audit-2021/>.

sample that represents about 50% of the individual membership of the Civil Mediation Council. As in any survey, not all participants answered every question. Alongside our survey of mediator attitudes, we conducted a parallel survey of lawyer attitudes in order to provide a user-oriented perspective to some of the questions raised. It is important to emphasise that this is a survey of the civil and commercial mediation landscape, a field we have very loosely defined as encompassing any and all mediation activity that might reasonably fall within the ambit of the Civil Mediation Council. This reflects the background of the surveying organisation, CEDR, and the channels through which survey responses were canvassed. We do not, therefore, claim to cover either community or family mediation (although some of our respondents do report also being active in those fields).

8.2 You are referred to the full body of evidence in that report, but the CMC would draw attention to the following findings which demonstrate the very real financial value of civil and commercial mediation in England and Wales:

- (a) The overall success rate of mediation is very high with an aggregate settlement rate of 93% (72% on the day of mediation and 21% shortly thereafter).
- (b) The value of cases mediated in the commercial mediation field is approximately £17.5 billion each year.
- (c) On the basis of mediators' reported caseloads, it is estimated that for the year to 31 March 2020, the size of the civil and commercial mediation market in England & Wales was approximately 16,500 cases per annum. This is an increase of 38% since 2018.
- (d) The approximated total value of mediated cases since 1990 in England and Wales is £155 billion.
- (e) £4.6 billion will be saved this year by commercial mediation.
- (f) £40 billion has been saved by the commercial mediation profession since 1990.

8.3 Mediation is by definition a voluntary process. A mediator is not permitted to impose a solution on a mediating party and any decision whether to settle, and if so on what terms, is entirely the choice of the parties. It can be assumed that parties will only settle at mediation because in their view and taking into account multiple factors, the settlement reached at mediation represents a better outcome than that which would be achieved at court. To put it simply, the success rate at mediation would not be so high if this were not the case.

8.4 Similarly, the growth in mediation across England and Wales (and globally) is in itself evidence of mediation providing better outcomes.

8.5 Why does mediation provide better outcomes? There are several reasons:

- (a) Mediation is flexible. A court has jurisdiction to consider only those issues identified by the parties in pleadings. Mediation is holistic and can consider and address all issues, including those not formally in front of the court. One member refers to the ability of mediation to consider what a court might consider to be "peripheral" issues, but which are real drivers in a dispute, for example a disagreement as to where ashes should be scattered in a probate case.
- (b) Mediation can encompass remedies not available to a court. As one member states:

I regard virtually every mutually agreed settlement as providing a better outcome than can be achieved in court. The whole point of mediation is to avoid the risk of failure, financial ruin, a large costs bill, an irretrievable break down in a relationship. I have seen mediations settle on an apology or acknowledgement of wrong, a kind word, a kiss (between a mother and her son), extended / future business deals, the sale of purchase of property, and so on. None of these remedies could have been ordered by a court.

(c) Another states:

There are many settlements that are better than court imposed results. One I did a few years ago included part of the settlement going to a charity. The payer was happy to pay more so long as he knew the payee wasn't getting it and the payee didn't care he was getting less so long as the payer was paying out more.

(d) Control of the outcome passes to the parties. Solutions are discussed and agreed, rather than imposed. One member states:

I have completed over 50 mediations over that last 2 years with a settlement rate of over 90%. In most cases, the parties have given post mediation feedback which has highlighted the positive perception the parties had around the process and the result achieved. This can be contrasted with the often binary nature of court proceedings - where invariably the losing party is deeply unhappy with the outcome.

This can impact on enforceability (see answer to question 14 below).

(e) Financial cost savings are significant. The best evidence of this is in the CEDR audit quoted above: £4.6bn will be saved in this year alone. One of the major drivers for parties in seeking to settle is a desire to limit future costs (either to their own lawyers, or in terms of the risk of becoming liable for their counterparties' costs). As far as the CMC is aware, there is no detailed evidence of the costs saved by mediating versus court proceedings across a wide sample of cases. In any event, this is not evidence available to the CMC although a snapshot is available at Appendix 1. However, it would be very interesting for this work to be carried out across a sample. It would also be very interesting to quantify the cost-savings in terms of the impact of litigation versus mediation in the diversion of management time from core-business.

(f) There are also significant non-financial costs savings, for example in terms of stress and parties' mental health. One member states:

Anecdotally many participants express regret that mediation did not occur earlier. There is a significant saving of cost, time, anxiety for the parties and all those who are brought into processes as witnesses.

Another comments:

The obvious evidence is that the process is considerably shorter, less painful, probably get the agreement about right and far less stressful for the participants. That's my experience as a mediator and also acting as expert witness in construction disputes in court.

8.6 It is also useful to look at what is meant by "better outcomes" in certain types of cases, for example:

- (a) In medical mediations, feedback from both parents and clinicians suggests that mediation results in working relationships between parties being maintained rather than fractured and that shared decision-making can be restored. This is a valuable outcome in and of itself. In clinical negligence and personal injury disputes, apologies, explanations, and lessons learned to prevent recurrence are often integral to the settlement.
- (b) In the SEND context, parties can include discussions to find solutions for school transport issues, transition concerns (primary to secondary school etc), actions to be taken by the school to better support a pupil with SEND, for example. Parties can look at flexible solutions (for example part home tuition or part school attendance). Some SEND mediations include health and social care services, which helps with finding and agreeing workable and achievable solutions.
- (c) Employment Tribunals are stressful and often do not meet the unrealistic expectations of parties. In workplace and employment mediations, the terms of an employee reference are frequently agreed. Workplace mediations can help parties to review options, share confidences and decide what they need rather than having a judgement imposed upon them. In allegations of bullying and harassment, the mediator can create a safe space for a dialogue between the alleged victim and perpetrator, allowing for acknowledgement and recognition of feelings and actions.
- (d) In property and boundary disputes, mediation often allows a creative outcome that is not possible in court where the outcome is binary. One member referred to a property dispute about a commercial tenancy, where a tenant offered to agree a new short term lease as quid pro quo to resolve the matters that were in dispute. The outcome was a substantial cost saving, additional rent and a continuing presence at a retail park by the tenant, that would otherwise have led to redundancies and closure of the retail outlet. Often in boundary disputes, a court cannot really address the "dispute"; a court can only issue a judgement on what is litigated, which is often only the tip of the iceberg in the relationship.
- (e) Particularly in family business, continuing business and emotive disputes, parties feel that they have been heard and are able to restore or maintain relationships (both personal and business).

9 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?

9.1 As noted in the answer to question 8 above, settlements reached at mediation are reached on a voluntary basis. This means they are agreed between the parties on the basis they provide a better outcome than the alternative (usually a court-led process). Parties impose a solution that they have agreed themselves. As this is the case, mediated settlements are by definition more likely to resolve the problem, and indeed, more likely to resolve wider issues surrounding the problem than a narrow court judgment. One mediator comments:

Settlements that the parties in mediations that I have conducted have reached regularly include agreements relating to future behaviour including how they will behave and how they will communicate with one another. Parties often also conduct lessons learned processes as part of the mediation process which they use to improve and enhance their process and procedures to ensure that mistakes are not repeated. Disputes often develop from initial misunderstandings or a failure to understand why someone or another organisation is acting in a particular way, particularly across different cultures

and countries. Settlements often seek to remove the 'grey zone' and ensure that everyone agrees how they want the relationship, which underpins the contractual agreement, to work.

9.2 Similarly, as mediation usually involves consideration of more than strict legal rights and liabilities, it is more likely to result in a settlement where the personal, or emotional, or (to use a word from above) “peripheral” issues have been aired and dealt with. Again, this means mediated settlements are both more likely to fully resolve the problem and help avoid further problems in the future. CMC members comment:

There are no ongoing disputes related to my mediated cases

This is true in the overwhelming majority of inheritance mediations

I've never had a dispute open back up post mediation so the problems must be resolved.

9.3 Another strength of mediation is its focus on the future. Court proceedings are generally very backward looking: what went wrong, what are the legal consequences, how can people be put back into the position they would have been in had the hurt not occurred? In contrast, mediation is forward looking: there is acknowledgement of what has happened, but a focus on how it will be put right going forward, how things will change, how people will behave differently. Again, by definition, this means that mediation is more likely to help avoid further problems in the future. One mediator states:

In cases where there is an ongoing relationship (neighbour, workplace, family business, customer and supplier and contractual relationships) my experience is that the mediator does work to test the implementation of any deal and to probe what happens if there is a recurrence of events that led to the dispute. The mediator often acts as coach to support the parties in dealing with things differently if there is a recurrence.

9.4 The CMC has no evidence that mediation is less likely to resolve the problem. Similarly, it has been provided with no evidence to suggest that mediation is less likely to avoid further problems in the future. Of course, it may be the case that mediators are simply not aware of (because they are not contacted about) settlements which have resulted in further problems in the future. The involvement of a mediator often ends upon settlement. Although many mediators seek feedback about the process and the outcome at the end of a mediation, gathering evidence about longer term outcomes would require contact (and engagement from parties) sometime after a mediation. It is a question best directed to the end users of mediation.

9.5 Where mediators have an ongoing involvement in a case (for example in a workplace scenario), there is evidence that mediations help avoid further problems. For example, the CMC received the following evidence from workplace mediators:

I've not had clients come back to say the problem was still there. I have done reviews in the workplace and seen agreements working

Underlying causes identified helps solve root cause not just symptoms, follow up support assists in building back relationships and creating a working environment that is effective even where parties are driven by different values and needs.

In Workplace mediation it is relatively easy to encourage new ways of working capable of leaving a dispute behind.

In workplace mediation particularly, part of the process is to discuss what should happen in future if a similar dispute situation were to occur.

Workplace agreed new ways of working that create better communication and deliver fairness and productivity improvements.

9.6 Other mediators refer to the impact of settlement in neighbour disputes:

In rural property disputes where parties continue to live as neighbours the effect of a resolution rather than a judgement can be profound. I encourage parties to acknowledge the end of the dispute and look to the future. Where possible they'll shake hands.

Neighbour dispute: resolved the dispute through collaboration which repaired the relationship and created platform for further cooperation

9.7 Another mediator referred to SEND mediations, where changes are agreed to and fully accepted by all parties, as an example of a case more likely to remain resolved.

9.8 Several mediators referred to commercial settlements where the problem was fully resolved and the settlement likely to be sufficient to prevent future problems, for example:

In a landlord-tenant commercial lease contract case where the tenant was sued multiple times for lack of paying rent, the parties were able to renegotiate their entire contract agreeing upon a redetermination of the overdue rent and a new termination date for the entire contract with all related technical obligations in a way no judgement could ever provide.

Contract dispute: settlement allowed for contract to continue and opened up new opportunities to benefit of both parties.

When projects are ongoing, such as a term contract or a PFI contract, I have experience of real changes being agreed which will reduce the possibility of future disputes. This has included agreeing mission statements, replacing problematic staff, agreeing protocols for responding to particular situations and agreeing an informal note of how the parties construe the contract and intend to apply it.

10 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?

10.1 It is not easy to objectively assess the quality of mediated case outcomes. Mediation is a confidential process, and it is conducted without prejudice. The majority of settlements reached are also confidential. Confidentiality is absolutely integral to the process and the CMC would not be in favour of any process of assessment which undermined this. As a result of confidentiality, the data is not available in the public domain.

10.2 Even if the data were available, what is "quality" in terms of outcome? Is it costs saved, is it stress reduced, is it reduction of pressure on the courts, is it reflected in levels of compliance? Quality is subjective in both its definition and peoples' ratings. Given the mediation process is voluntary, one way to look at quality is to look at settlement levels, but this can be misleading. A quality outcome might be a reduction in the number of issues, or a partial settlement. It might be an agreement to

exchange more information and talk again. Mediation is a flexible process with flexible outcomes.

10.3 It is not hard to think of cases where even participants in the same mediation might have different views as to quality, depending upon their expectations and how the process developed for them personally. Might the experience of a large claimant lender be very different from that of an individual defendant borrower? Would responses be weighted? The response to mediation of an individual sued for negligence might be very different to the insurer representing them, and different again to the claimant.

10.4 Similarly, how does one compare outcomes? Once a case is settled it comes to an end. Parties will consider what potential outcomes might be when weighing up options at mediation, but these are conjecture (even if based on experience). There is no way to know for sure whether you would have got a more favourable outcome if you had gone to trial.

10.5 As a result of the above, it is difficult to conceive of a process whereby there could be an objective measure of quality. A standardised questionnaire sent to participants might be an option. However, even that has difficulties: parties are not obliged to respond. Would the results be sufficiently balanced: might there be a "TripAdvisor effect" where parties only respond at extremes. i.e. those who are very happy, or very dissatisfied with the process? The evidential value of those responses might be misleading.

11 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.

11.1 In December 2017, Sir Alan Ward, the then Chair of the CMC published the "*Civil Mediation Council Response to the Civil Justice Council Consultation: Automatic Referral to Mediation for Civil Cases*" (ARM Response). The ARM Response was in answer to the fundamental problem of how to make ADR familiar to the public and culturally normal, as identified by the CJC ADR Working Group Interim Report of October 2017. This problem has not gone away. In June 2021, the CJC published its report on Compulsory ADR, considering whether parties could be compelled to participate in ADR and if so, whether they should be. That report comments:

But there are still major challenges ahead in ensuring that sufficient information about and understanding of the relevant form(s) of ADR is available to litigants. Outside the court system there is plainly a need for significant public legal education about ADR, however elusive that goal can sometimes seem.

11.2 In the ARM Response, the CMC sets out a proposal for Automatic Referral to Mediation (ARM), together with details of the proposed scheme and a flow chart. The full text of that ARM Response and the accompanying flowchart are attached as Appendix 2 and it is not intended to repeat the terms of that proposal in this document. It remains a workable proposal and ARM continues to be one of the CMC's strategic goals. It is important to note that the recommendation is for an opt-out system (as opposed to the current opt-in approach to [A]DR). The recommendation is that there should be a "strong expectation" that mediation has been offered or considered pre-issue and that "any failure to do so should be scrutinised and, if appropriate, penalised".

11.3 A study of human behaviour and the debate around organ donation demonstrates that it is harder

to opt out rather than opt in and that this approach could be applied to dispute resolution processes.

11.4 The CMC's position is that an increase in mediations resulting from automatic referral would result in the public coming to a greater understanding of and acceptance of mediation (much as has happened in the Family Law context with MIAMS). It is worth noting that the ARM Response was prepared following circulation to the entire CMC membership (over 550 individual members at that time) and there were no responses received arguing against the proposal.

11.5 The CMC also notes with interest the system in Ontario where the Mandatory Mediation Program has been in place since 1999⁵.

11.6 In preparing this response, the vast majority of the members who replied to the CMC's request for information mentioned the need for some form of ARM, with a significant number being in favour of compulsion. Members commented:

"MIAM or similar process for all Civil and Commercial claims would ensure that there is increased engagement with the process and more important an opportunity to educate about the process. I think this would immediately increase the take up of mediation."

"At present it is too easy for one party to say "mediation won't work" especially where there is inequality of arms"

"There is strong evidence that mandatory mediation works from my experience of construction contracts where mediation is a contractual obligation before the parties are allowed to start legal proceedings - so called dispute escalation clauses. The concern that such mandatory mediations are not likely to result in settlement is unfounded. In my experience, parties who have the foresight to include mediation clauses in contracts are relieved that mediation is the "option of first resort" in the event of a dispute. It means, even in the context of a dispute, the parties are still working in a collaborative state of mind rather than behaving in an adversarial manner."

11.7 Where people were not in favour, the concerns centred around maintaining the integrity of the mediation process, for example:

"I'm worried that making mediation mandatory would result in a huge rise of mediations, some/many of which may be conducted by inadequately qualified/experienced mediators; resulting in mediation becoming a tick box exercise and therefore lowering its reputation in the eyes of the public."

"Mediation must not be denigrated by becoming part of a box ticking exercise, nor as a tool to be used by large organisations in beating unrepresented parties into submission".

11.8 Without detracting from the strategic importance of ARM in terms of increasing the take up of mediation, there is also work to be done to educate people, businesses, government organisations and schools (for example) about what mediation is and what its benefits are. It is the CMC's position that there needs to be an integration of mediation into everyday life. Educating our young people about the power of positive dispute resolution from a young age, for example through peer mediation at school, can be transformational. Similarly, ensuring that there is proper education about mediation

⁵ https://www.attorneygeneral.ius.gov.on.ca/english/courts/civil/fact_sheet_mandatory_mediation.html

given to HR managers, TU representatives and managers would be a major step forward; management and leadership courses and qualifications could include proper education about mediation. Pledges by businesses and government to use mediation would encourage greater awareness and take up of mediation. It is noted that the 2011 Mediation Pledge, although apparently still in existence, does not appear to form a central part of policy.⁶ In terms of targeting members of the public, an advertising campaign, or integration of mediation into TV dramas or soaps, are all possibilities.

11.9 In terms of government involvement, one member suggests

“A very positive step would be for the UK Government to recognise the value of the UK ADR business to UK plc. We are world leaders in many areas and this is largely ignored.”

11.10 It is probably trite to say, but the more information and evidence that is gathered as to the benefits of mediation, whether that is costs savings, speed, risk management, mental health or other, the more uptake there should be. To that extent the CMC fully endorses and supports this Call for Evidence.

11.11 Finally, the CMC notes the continued use of the word “*alternative*” when describing dispute resolution options. Party-led dispute resolution may be an alternative to court proceedings, but it is not alternative in the sense of “*not mainstream*”. Party-led dispute resolution (or as the CMC would advocate, mediation) is mainstream and the use of language must be carefully considered. Mediation is not alternative in a way that is comparable with alternative medicine, for example.

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

12.1 The CMC has no statistical evidence of how unrepresented parties are affected in mediation. Indeed, given the huge disparity in the kinds of claims that members mediate and the even wider disparity in the characteristics of an unrepresented party, it is hard to imagine how any statistical evidence could be reliably obtained.

12.2 In proceedings before the court, there is usually a costs burden upon the represented party dealing with an unrepresented counterparty. This burden arises primarily because of a lack of familiarity with court processes and/or the law. In mediation, there may also be additional preparation costs for the represented party versus the unrepresented in preparing for mediation. However, given mediation usually results in a costs savings, the cost savings of mediating such cases may also be higher.

12.3 Mediation can be a more accessible and understandable process for one who is legally unrepresented. The mediator, whilst under an absolute duty of impartiality, can take a more active role in assisting an unrepresented party to prepare practically and emotionally for mediation. A mediator can offer a useful “buffer”, where an unrepresented party may feel out-gunned by lawyers, or at a tactical disadvantage. To the extent this assists the unrepresented party to feel more comfortable, that party is more likely to be in a position to make decisions. Mediation is also a forum where people have the opportunity to be and feel heard, which is anecdotally often a driver for those litigants.

⁶ <https://www.gov.uk/government/news/government-supports-more-efficient-dispute-resolution>

12.4 For the mediator, the mediation is often more difficult. Unrepresented parties must be assured that they can trust both the mediator and the process. Unrepresented parties may also be convinced of the strength of their case, requiring sensitive reality testing without the giving of legal advice. The mediator will want to ensure that the unrepresented party understands the implications of their decisions whilst not actively advising the unrepresented party. This can represent a challenge to the mediator but is possible to navigate. It is also possible for any mediation process to allow the unrepresented party to bring a trusted friend, or partner to assist with decision making.

13 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?

13.1 No. The CMC does not have any such evidence.

14 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?

14.1 It is first worth noting that agreements reached at civil and commercial mediations are not binding until they are in writing and signed by all participants. At that point, there is a binding contract, or a draft order, which can be enforced as a matter of law. Therefore, there is every incentive for all parties to comply with the terms of a settlement agreement in a civil and commercial case.

14.2 Secondly, in many cases, a mediator's involvement with a civil or commercial case will end once settlement has been reached. Mediators do not routinely discover whether the settlement has been complied with. One might speculate that mediators would be contacted for advice if the settlement fell through and this very rarely happens. However, this is conjecture rather than hard evidence. In the vast number of responses received by the CMC, members were either unaware of whether settlements had been complied with or were able to say that they had.

14.3 The position is different in workplace mediations, where the outcome is not usually legally binding. In those mediations, an agreement is made in good faith and usually followed up by the mediator some weeks later. The CMC has been provided with no evidence about compliance with these agreements, save for those comments already made in answer to question 9.

15 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.

15.1 The CMC has no such evidence.

3. DISPUTE RESOLUTION SERVICE PROVIDERS

We are keen to gain a greater understanding of the Dispute Resolution workforce and how they are currently trained, how standards of work are monitored and how quality is assured to users of their services.

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

16.1 The CMC was formed at the request of Ministry of Justice in 2003. It now has over 700 individual registered members, 40 registered service providers and 21 registered mediation training providers and is now the largest registering and regulatory organisation for mediators in England and Wales.

16.2 The CMC and its members have a good understanding of the standards needed to provide effective mediation services. Since 2016, the CMC has operated a voluntary system of regulation for mediators and the vast majority of its members have opted to become a regulated mediator. In early 2021, the CMC changed its membership policy so that from January 2022, every individual CMC member who practices civil/commercial or workplace mediation in England and Wales will have to be CMC regulated.

16.3 The purpose of regulation is to protect the public, and the regulatory scheme covers both civil/commercial mediation and workplace mediation. It offers mediators a professional pathway from training through to CMC Fellowship, which is available to the most experienced mediators. The CMC does this by setting criteria for mediator skills training courses and operating an approval system for these courses. As such, all CMC regulated mediators are trained to agreed industry standard. In addition, all CMC regulated members follow an appropriate Code of Practice, carry out necessary professional development activities, and have both suitable insurance and a suitable complaints process in place. The CMC also offers a similar regulatory scheme for providers, and jointly with the College of Mediators, operates a slightly different scheme for members specialising in SEND mediation. The registration criteria were drafted by experts from across the field and with consideration of standards outside of this jurisdiction. The CMC has a Regulations and Standards Committee which constantly reviews the required standards, considers improvements and refinements, ultimately reporting to the Board. Accordingly, the CMC considers the standards set are correct and logical.

16.4 In addition to requiring mediators to demonstrate they meet the CMC's criteria for recognition, the CMC also offers a complaints process that can be used if a client is not satisfied with the outcome of the mediator's own complaints process.

16.5 The CMC carries out activities to supports to promote best practice, for example through offering affordable CPD at its conferences and issuing guidance on relevant topics. It is also continuing to strengthen its regulatory approach, for example through developing a new framework for external assessment of training courses.

16.6 As evidence of acknowledgement of the need to provide effective mediation services, one could refer to the adaptation over the last 18 months to be able to provide online mediation services, with no prior warning and no prior settled online practice. Mediators have led this change, usually managing the technical side of the mediations with mediators setting up their own Zoom accounts / Teams and teaching themselves and parties / lawyers how to use it. A further example is mentioned by a registered service provider where specific processes have been developed for providing mediation for disputes within the NHS, where up to 25 participants have been involved in one mediation from multi-disciplinary teams. Much like mediation itself, the mediation market is adaptive to ensure that effective services are provided.

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

17.1 The CMC is unaware of any evidence in this field. However, the quality of training is undoubtedly important to growing and maintaining confidence in the field of commercial mediation. This is why mediators who start mediation training after September 2018, must have passed a registered CMC training course in order to become a CMC registered mediator. Those who started before September 2018 must have completed an assessed training course including mediation theory, mediation practice, negotiation, and role play exercises.

17.2 It is difficult to build a successful mediation practice. Within the civil / commercial field there is considerable reliance on word of mouth between users of mediators (primarily solicitors as the gatekeepers to litigation). As such, there is an element of natural selection. Those mediators who operate at a high standard are most likely to get re-instructed. This is also reflected in publications such as The Legal 500 and Chambers & Partners.

18 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?

18.1 Yes, the CMC does have evidence of how complaints procedures are applied in relation to registered mediators, service providers and training courses. As a pre-condition of registration with the CMC, each mediator, service provider and training course must have a written complaints procedure. If the complaint is not resolved at that level, the CMC acts as a second or final tier for complaints about mediators and service providers registered with it. More information about this can be found on the CMC Website: <https://civilmediation.org/complaints/>. In summary:

- (a) A complaint may be made against a Regulated Mediator on the grounds that: (i) they no longer meet the requirements for Regulated status; and/or (ii) they are not a fit and proper person to hold Regulated status. This may include a complaint that the Regulated Mediator has breached the applicable Code of Conduct, which is deemed to be the EU Model Code of Conduct for Mediators (adopted in 2004) unless otherwise approved by the CMC.
- (b) A complaint may be made against a Registered Provider on the grounds that: (i) it no longer meets the requirements for Registration; or (ii) the service provided by the Provider does not meet generally acceptable standards.
- (c) A complaint may be made against an organisation which offers a Registered Training Course on the ground that it no longer meets the requirements for Registration.

(d) A complaint may be made against any Member of the CMC on the grounds that they have brought the CMC or the mediation profession or the mediation process into disrepute.

18.2 Complaints in relation to commercial mediation are very low. The CEDR Mediation Audit 2021 estimated 16,500 commercial mediations took place last year (up from 12,000 in 2018). In contrast, in 2019, 5 complaints were made to the CMC across individuals, Registered Service Providers and providers of training course (not limited to commercial mediations alone). One complaint was upheld, resulting in the provider having its status as a registered provider revoked. Only 2 formal complaints were submitted to the CMC in 2020 and these are still under investigation. Since the inception of the CMC complaints procedure, 2 individual members have had their registered status revoked.

19 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

19.1 The CMC has the ability to suspend or permanently remove a registered person or organisation after an investigation and the right to publicise this. As stated above, in 2020, 5 complaints were made to the CMC across individuals, Registered Service Providers and providers of training course (so not limited to just commercial mediations). One complaint was upheld, resulting in the provider having its status as a registered provider revoked. Since the inception of the CMC complaints procedure, 2 individual members have had their registered status revoked.

19.2 The CMC does not have evidence of mediators behaving inappropriately in a mediation or in relation to a mediation. The CMC does not think that this has been or is currently a problem.

19.3 Law firms or in-house lawyers appointing a mediator for a case would be expected to perform due diligence before an appointment. Litigants in person, where not using a registered service provider to find their mediator, looking more widely in the marketplace may benefit from guidance to avoid a potential problem.

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

20.1 The CMC requires mediators to perform continuing professional development as part of their annual registration (and registered service providers must confirm that their mediators have met their requirement). Guidance on CPD can be found here: <https://civilmediation.org/wp-content/uploads/2021/10/CMC-CPD-Guidance-1.2.2021.pdf>

20.2 There is also collaboration within the wider mediation sector in this area. In 2020, significant discussions took place via the All Mediation Forum, with a range of stakeholders including the College of Mediators and the Family Mediation Council. These discussions focused on the need for mutual recognition, the development of a common code of practice and common complaints procedures. The aim of this work is to ensure consistency and professionalism across all areas of mediation and thus ensure that the public benefit from professional high quality mediation services. In addition, the CMC, together with the College of Mediators promote the National Mediation Awards, with the aim of celebrating and rewarding best practice across all forms of mediation. In 2020, there were 100 nominations of such a high standard that the judges decided on 14 winners for the 12 awards.

21 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?

21.1 The current system for the CMC can be related to that of RICS or the Law Society, in that (as you would with a surveyor or solicitor) there is a place you can go to check if your mediator is registered but most individuals or businesses will want to do their own research and where possible will make their decision based on a personal recommendation. The exception to this would be in certain disputes where there are directions to go to a bespoke panel of mediators or to use a mediation scheme.

21.2 The CMC is confident that its system of regulation is robust, the number of mediators seeing the benefits of signing up to this self-regulatory system is continuing to grow and the CMC has an active marketing team which does all it can to encourage people to use CMC regulated mediators. However, anybody can call themselves a mediator. They do not need to be trained, to follow a code of conduct, meet requirements for continuing professional development, or have insurance and a complaints policy. There is therefore a gap in the regulatory system which means that some mediators may not meet any agreed industry standards. In his 2020 report *“Reforming legal services: Regulation beyond the echo chambers”*⁷ Professor Stephen Mayson of University College London recommended that mediation should be regarded as a legal service and regulated as such, on the basis that consumers are just as likely to be ill-informed and vulnerable as they are in relation to other legal services. He went on to say that

‘Interestingly, where voluntary regulation of mediators exists, it applies the sort of regulatory tools that are envisaged in this report. There are requirements for registration, accreditation, professional indemnity insurance, continuing professional development, adherence to a code of conduct, and complaints handling. In one sense, therefore, the issue is not so much the absence of regulatory standards or unwillingness to submit to them. It is that they are only voluntary and can be avoided by those mediators who wish to practise beyond regulatory scope. It is likely, therefore, that those mediators who are members of an appropriate scheme, such as those operated by the [Civil and Family] Mediation Councils, will present only low risk to consumers. The aspects of their existing voluntary regulation could easily form the basis of compliance with future requirements under legal services regulation.

The recommendations in this report would mean that registration for all mediation and alternative dispute resolution services would become compulsory. This would bring within scope those mediators who are currently operating without registering voluntarily. For those mediators who have already elected to comply with the requirements of the Mediation Councils, there should in fact be little change in their regulatory obligations or costs. However, their regulation would in future be mandatory and within the statutory framework of legal services regulation.’

⁷ https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_final_report_final_0.pdf

4. FINANCIAL AND ECONOMIC COSTS/BENEFITS OF DISPUTE RESOLUTION SYSTEMS

We are keen to get more evidence around the possible savings of dispute resolution processes. We seek evidence to help us understand the economic differences between dispute resolution processes.

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

22.1 Please see Appendix 1

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

23.1 No, the CMC has no such evidence

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

24.1 Please see Appendix 1.

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

25.1 Please see Appendix 1

5. TECHNOLOGY INFRASTRUCTURE

We are interested to learn what evidence informs the potential for technology to play a larger role in accessing dispute resolution.

Although we are aware of many domestic and international platforms, we must continue learning from new and novel approaches to digital technology that can remove barriers to uptake, improve the user experience, reduce bureaucracy and costs, and ultimately improve outcomes for parties.

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

26.1 The onset of the pandemic necessitated a complete change in the way in which mediation services were provided. Mediation suddenly had to be provided via the use of video technology an approach which many, particularly lawyers, were cynical about. However, it is now accepted that virtual mediation:

“is seen as effective in its own right and not just as a costs savings measure or a convenience”.

26.2 Virtual or remote mediation reduces travel and time costs, maximises availability and has improved access to mediation overall – particularly for litigants in person where the logistics and cost of finding an appropriate venue for mediation could often be a barrier to participation. It also allows international parties to participate – all beneficial from an environmental perspective:

“During the period from mid March 2020 to date, I have only handled 2 cases in person and more than 50 cases remotely using Zoom or Teams. This has also allowed me to resolve disputes across oceans - California, New York, BVI, to name a few. Settlement rates have remained similar to face to face mediations. This has avoided significant costs of travel and accommodation. In line with the Mediators' Green Pledge, documents are all submitted electronically. Technology has played an important role in mediation recently and will continue in the future.”

26.3 Remote mediation allows participants to take part from the comfort of their own homes. Where individuals might feel intimidated in an unknown environment such as an office block this ability to participate from familiar surroundings has:

“made them feel safer and more in control. It has also created a less formal space - for example, where all parties may be joining the mediation from their homes rather than having to attend the offices of lawyers - this has created a sense of a shared space. However, it does depend on the mediator being adept at using technology, creating appropriate breakout rooms and managing parties in the virtual space. This has produced its own challenges as well as benefits.”

26.4 One member stated:

“Judicial mediation in the employment tribunal is currently being conducted by video with success.

I believe it to be less stressful than the parties having to travel to court to take part.”

- 26.5 The use of video meetings for pre-mediation and post-mediation calls has also added value to the process. Previously a mediator was not always in a position to talk to the clients before the mediation day (they might only have spoken to the solicitor) but now, because it is necessary to check that the technology is working, the mediator gets an opportunity to start building trust before the mediation day and can then “*hit the ground running*” on the day itself. It allows momentum to be built up and maintained over several sessions if necessary.
- 26.6 The majority of members who responded stated that the effectiveness of mediation online has not affected settlement rates. A minority believe that the quality of the process is damaged where the mediator cannot as easily pick up body language or chance remarks.
- 26.7 Dr Deborah Hann at Cardiff University is carrying out research in to the effect of the pandemic on mediation in the workplace. Her findings are yet to be published, but suggest that remote mediation has not impacted settlement and has, in fact, increased take up.
- 26.8 However, the technology is only as good as its operator and so the success of the process depends on the mediator being adept at using technology and managing parties in the virtual space.
- 26.9 Electronic bundles are now almost universally accepted which helps to make the process more cost effective.
- 26.10 In a broader sense, technology has made the remote signing of documents, document sharing, taking payments online and using accounting apps for invoicing more widespread, which has all assisted in making the mediation process easier and smoother.

“The use of online mediation has overall had a positive effect on the take up workplace mediation. Business people appear to be more willing to engage via a computer than face to face. I think it is a time issue for them to a certain extent. They don't actually have to go anywhere to engage. Other parties find online mediation much less threatening as they don't have to sit in the same room as someone they are in dispute with.”

Additionally, the online nature of the process means that the traditional “whole day” can be broken up.

- 26.11 SEND and community mediation providers have mixed views of the utility of technology in their context:

“During the pandemic technology allowed the continuation of mediation via zoom and Teams and other platforms. It is double-edged sword whereby from a business perspective it increased the capacity of Contractor Managers to reduce time in mediation and time in travel thereby getting more productivity and paying less for it with no expenses for travel payable to Mediators. From people perspective virtual mediation means no travelling being in a familiar environment (at home) less domestic issues (childcare) travel costs lunch arrangements etc. Downside: In the most complex of cases seeing and being with people works best. Technology across all the families and organisations involved is hugely different, technology drops out at a crucial moments document sharing is possible for some but by no-means everyone. When challenges are necessary it is easier to control the process when you are physically in the room. The quality of mediation can suffer a lot in the virtual mediation

meeting.”

“Providing SEND Mediation via Teams or Zoom has not affected service user satisfaction at all, as shown in comparison of our quarterly reports pre- and post pandemic.”

“In SEND mediation and Community Mediation (since the pandemic this is the only work I have done) For SEND it has been both good and challenging some people have found it a beneficial method as they do not have to travel they are in a familiar environment and the child or YP is with them (although not often in the same room some get involved as we progress). The alternative is no mediation or mediation by phone. The challenges are tough too for example documents are not always available, (sharable) people have issues with their own WIFI setup, some people do not find it at all comfortable dealing with people on-screen, the technology can drop out, controlling people in emotional episodes is sometimes very difficult. Separate confidential adjournments are tricky, stopping people interrupting is equally tricky. On balance face to face is in my view best.”

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

27.1 Mediating via video rather than telephone is far more effective; possibly, per the answer to 26 above, as effective as mediating face to face. The consensus among members is that Zoom offers the best functionality for mediation because of the ability to easily set up breakout rooms.

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

28.1 The majority of members who provided a response answered no to this question (71.19% v 28.21%). Managing the process online can be more difficult if there are connectivity issues, or a lack of computer equipment and it can be difficult to manage multiple participants and speakers at once.

28.2 One member referred to the need to ensure that all participants are equally comfortable with the technology before the mediation:

“where there is a disparity in familiarity with computers, or technology, or online platforms, the mediator must take the time to ensure that those less familiar are comfortable using their computer and comfortable with how the mediation will work online. In particular, parties have expressed concern where there is a considerable age gap between participants and one side may have a tactical technology advantage. However, provided this is addressed before the mediation, it is not a barrier. Indeed, handled well, it can increase a party’s engagement in the process and trust in the mediator.

28.3 There is some anecdotal evidence from members of it taking longer to build rapport online and some signals can be misread. However, the majority of members do not see this as an issue (and certainly preferable to mediating in masks, where nuances of facial expressions can be lost). Bad or unprofessional behaviour can be more difficult to control on an online platform.

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

29.1 The CMC does not have this evidence. As stated above, Zoom and Teams are currently most commonly used for online mediation and SettleIndex is available for working out the settlement value of a dispute

30 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?

30.1 The CMC does not have this evidence. One member stated that they had used smart settle in simulation but would not in a real-life mediation. Another stated:

“But am aware that this is happening. As a past academic researcher in the field of AI and law I am not entirely satisfied that AI is best as a standalone approach, possibly as an assistant to the mediation process. The introduction of AI technologies is likely to disarm mediation and mediators of USP and this will not help the disputants in a variety of their interests”.

6. PUBLIC SECTOR EQUALITY DUTY

We are required by the Public Sector Equality Duty to consider the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people in shaping policy, delivering services and in relation to our own employees.

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

31.1 The CMC does not hold any evidence. The responses gathered from CMC members drew on their personal experiences:

“BAME disputants served by a lack of diverse mediators. CEDR year on year stats makes this undisputable”

“Foreign language persons and vulnerable persons with physical or mental disabilities require more time and sensitivity”

“In my view those with protected characteristics must be fully supported by a fully qualified and appropriately experienced Advocate capable of actually working alongside them or if necessary stepping in and fully representing and helping with any document sharing communication and/or technology issues they may face. Without this they will clearly be at a distinct disadvantage throughout the process.”

“Affordability is an issue - The family Voucher scheme is assisting many who would not of had the opportunity.”

“I used to be involved in the Equalities Mediation Service which was facilitated by the EHRC. It worked extremely well and lead to excellent outcomes for people with protected characteristics. However, government funding for this was withdrawn some years ago and a "helpline" put in its place.”

“Some people with protected characteristics do not find the mediation process easy to understand or participate in. Where they have a limited capacity in literacy, education, understanding, reasoning, speech, hearing, following processes etc; they struggle and may become very agitated and upset. The degree to which they are capable of attending needs to be carefully examined. Skilled Advocates must be allocated to people in these circumstances.”

“The confidence of the parties, their self-reliance, language skills and demographic backgrounds and education inform a paradigm within which they are comfortable. I have found the more educated intelligent clients are most likely to settle.”

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

32.1 Again there is very little evidence available in relation to this question. Those who did respond said the following:

“I do have a concern that technological inequality could lead to unfairness on a party who for instance does not have the full access or confidence in "online". There needs to be a technical parity of access. Having said that most platforms (I have used Zoom exclusively) are very user friendly with the access managed by the mediator. It has rarely been a problem.”

“In some cultures it is seen as a sign of disrespect if the Claimant attends with its CEO/President and the defendant simply sends along a junior claims handler.”

“There are harder to reach groups, or groups that are not comfortable with "outside interference" in their disagreements. This has been resolved to a certain extent in the SEND context (statutory MIAS), which means that anybody with a disagreement will at least learn how going to mediation may be able to help resolve issues. However, the percentage of local authority decisions which are disputed is low - around 5%, and I do not know whether some groups are more "accepting" of decisions that they are not satisfied with.”

Prepared on behalf of the CMC by:

Rebecca Clark Deputy Chair

Henrietta Jackson-Stops Chair, CMC Government Liaison Group

With thanks to Andy Rogers Chair, CMC Registration and Standards Committee

Dispute Resolution in England and Wales
Call for Evidence

About you

Please use this section to tell us about yourself. including your experience of dispute resolution.

Full name	Rebecca Clark & Henrietta Jackson-Stops
Job title or capacity in which you are responding to this call for evidence exercise	Deputy Chair, CMC & Chair of Government Liaison Working Group, CMC
Date	29/10/2021
Company name/organisation (if applicable):	Civil Mediation Council
Address	100 St Paul's Churchyard, 3rd Floor, London
Postcode	EC4M 8BU
Experience of dispute resolution, if any:	
<p>Through its members and Board, the CMC is uniquely placed to answer this Call for Evidence about dispute resolution and specifically about mediation. Before answering, the CMC asked for the input and evidence of its members and had detailed responses from 65 individual members and 7 registered service providers representing groups of mediators. Where appropriate, this response quotes directly from these detailed responses. The CMC has also used its knowledge as a working charity and the collective experiences of those serving on its Board, Committees and Working Groups. These serving members are all volunteers, who stand to make no personal gain from their work.</p> <p>Where evidence is currently unavailable, the CMC would welcome a discussion as to how it might be obtained and how the research might be funded.</p>	

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond. **If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

The CMC is a UK registered charity, with a mission to promote and encourage the use of mediation in the resolution of conflicts and disputes. Established in 2003, the CMC liaises with government, the Civil Justice Council, different mediation organisations, employers, and other stakeholders to promote mediation as an effective means of conflict resolution and address issues of concern within the mediation process.

In addition, with over 700 registered individual members, 40 registered service providers and 21 registered mediation training providers, the CMC is the largest registering and regulatory organisation for mediators in England and Wales. It provides the public with a trusted directory of mediators across various areas including civil and commercial, workplace, community, SEND and education. It keeps members and the public abreast of developments in mediation, the mediation process, and its place in the settling of arguments in a constructive, non-confrontational manner.

The CMC also hosts a Fixed Fee Mediation scheme⁸ which, following the removal of a similar scheme from the Ministry of Justice's webpages, assists members of the public in finding a mediator for disputes under £50,000 at a fixed price.

Since 2016, the CMC has operated a voluntary system of regulation for mediators; the vast majority of its members have opted to become a regulated mediator. In early 2021, the CMC changed its membership policy so that from January 2022, every individual CMC member who practices civil/commercial or workplace mediation in England and Wales will have to be CMC regulated.

The purpose of regulation is to protect the public, and the regulatory scheme covers both civil/commercial mediation and workplace mediation. It offers mediators a professional pathway from training through to CMC Fellowship, which is available to the most experienced mediators. The CMC does this by setting criteria for mediator skills training courses and operating an approval system for these courses. As such, all CMC regulated mediators are trained to agreed industry standards, follow an appropriate Code of Practice, carry out necessary professional development activities, and have both suitable insurance and a suitable complaints process in place. The CMC also offers a similar regulatory scheme for providers, and jointly with the College of Mediators, operates a slightly different scheme for members specialising in SEND mediation.

Please tick to confirm if you are happy to be contacted for follow-up discussion:

YES

NO

We will provide an automatic generated response to acknowledge receipt of your response to the Call for Evidence.

⁸ <https://civilmediation.org/fixed-fee-scheme/>