



Civil Mediation Council (CMC) Response to the

Ministry of Justice (MoJ) Consultation:

Increasing the use of mediation in the civil justice system

October 2022

Introduction

This is the response of the CMC to the MoJ's consultation on increasing the use of mediation in the civil justice system issued on 26 July 2022.

The CMC is a registered charity, with a mission to promote and encourage the use of mediation in the resolution of conflicts and disputes. Established in 2003 at the suggestion of the MoJ in order to see self-regulation in the field, for many years the MoJ had observer status on the Board. The CMC liaises with government, the Civil Justice Council (CJC), 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 practising non-family mediators in England and Wales. The largest mediation providers, trainers and mediation organisations are members of the CMC, including CEDR, Chartered Institute of Arbitrators (CIArb), Royal Institution of Chartered Surveyors (RICS); the CMC also has a number of regional members, including the Association of Northern Mediators and the Association of South West Mediators.

The CMC provides the public with a trusted directory of mediators across various areas including civil and commercial, workplace, community and education. It keeps members and the public abreast of developments in mediation, the mediation process and its place in the settling of disputes in a constructive, non-confrontational manner.

In preparing this response, the CMC has sought consensus and consulted with its individual and organisational members and with other parties operating within the mediation market, including CEDR, RICS, CIArb, the Association of British Insurers (ABI), Independent Mediators, IPOS Mediation, Clerksroom and Scottish Mediation. It has also consulted with various thought-leaders and respected practitioners.

Executive Summary

The CMC supports the introduction of automatic referral to mediation for all small claims, provided that participants are provided with appropriate information. The CMC believes that the proposed one-hour should be capable of extension and/or there should be a voucher system to enable parties to access further mediation.

The CMC already regulates mediators, mediation providers and mediation trainers on a voluntary basis. Self-regulation remains appropriate. The CMC proposes a system similar to that currently in place for MIAMs in family cases whereby anyone conducting a mandated mediation must be registered with the CMC, or a CMC member organisation. The CMC will work with member organisations such as CEDR, RICS and CIArb to benchmark and agree minimum registration standards. That way, the public can be assured that mediators registered with member organisations, rather than individually with the CMC, have at least the same standards and level of regulation as CMC individually registered mediators. The CMC will hold a central list of all accredited and registered mediators so that the public has a “one-stop shop” to check a mediator’s credentials. The CMC will continue to work with the Family Mediation Council (FMC) to obtain a Royal Charter for mediation as a profession.

Answers to the specific questions raised

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

1.1 No. The Civil Procedure Rules include a number of rules relating to allocation of cases to the small, fast and multi-tracks. Cases of any complexity or with any special features will not be dealt with as small claims track cases. Housing Disrepair and low value Road Traffic Accident claims are either excluded from the small claims track or have their own dispute resolution processes. The present exemptions and rules should continue. Any cases unsuitable for mediation are likely to be covered by those rules and exemptions and it is the CMC’s view that those cases that remain allocated to the Small Claims Track should be required to participate in mediation.

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

2.1 Yes. There may be very rare cases where a party cannot attend because they do not have the necessary technology or have some disability that prevents them from participating in a mediation. In such circumstances a judge should direct that a party may have representation perhaps using a “McKenzie friend”.

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

3.1 It is an essential element of mediation that it is confidential. If there is any interrogation of a mediation testing whether a party negotiated “in good faith”, it will create a range of secondary hearings. The majority of commercial mediation agreements have a clause that prevents a party from procuring evidence from or calling a mediator as a witness to any subsequent court process. The CMC regards this as best practice. Any assessment of failure to engage should only consider whether a party failed to attend a mediation appointment without a reasonable excuse. The same tests and sanctions should apply as they do for other breaches of court orders or rules.

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

4.1 Yes. Mediation should be treated in the same way as other steps in the litigation process and a failure to act in accordance with a court order should be suitably penalised.

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

5.1 The Small Claims Mediation Service (SCMS) will introduce “mediation” to more than a quarter of a million parties. The CMC supports this and will work with MoJ and other stakeholders to ensure the successful implementation of the policy.

5.2 Under the current system, parties have gone through a number of small but significant steps before they get to their small claims mediation session. Most significantly, they have both ticked a box on their Directions questionnaire (Small Claims Track) form stating that they agree to their case being referred to the SCMS and answered "yes" to a question sent by email stating that they are willing to negotiate on the amount of the claim and are willing to compromise. This works well for voluntary mediation.

5.3 In order for a mandatory mediation scheme to be as effective as possible, the CMC believes that it will be important to:

- a) Shift the emphasis in the information provided to the parties away from compromise towards a more risk-based approach;
- b) Provide the opportunity for longer mediation sessions; and
- c) Consider giving parties a choice of process.

The following provides more detail on each of those suggestions.

Shifting the emphasis in the information away from compromise towards a more risk-based approach

5.4 In a situation where mediation is mandatory, the CMC believes that it will not be helpful to ask parties if they are willing to compromise before they enter into mediation. If a party answers "no" but is then forced to mediate anyway they are likely to take a negative view of the process. Instead, the CMC believes that other elements of the process should be emphasised to help the parties get into a frame of mind which is more likely to result in a settlement at mediation.

5.5 In a mandatory scenario, the CMC believes that more emphasis should instead be placed on the risks and costs (both time and money), stress and opportunity costs of pursuing a litigated outcome. It would be important to explain to parties that often claims go to court because **both** parties believe that they are right. Once a matter is before a judge, the parties no longer have control over the outcome. The decision is in the judge's hands and the judge will impose a decision on the parties. Parties tend to overestimate their chances of success in court. The CMC believes that it would be helpful for parties to be reminded that there is a significant risk that the judge will decide against them. In mediation, the parties retain control over the outcome. They get to decide.

- 5.6 Mediation can help parties resolve matters more quickly than going to court and also avoid having to appear before a judge and answer questions which some people may find a stressful experience. If the parties reach a settlement at mediation, they have certainty over what the decision is.
- 5.7 The CMC will work with the MoJ to develop the language and guidance that will help parties come to mandatory small claims mediation in the frame of mind which is likely to be most conducive to reaching a settlement.

Providing the opportunity for mediation sessions longer than an hour

- 5.8 Under the current voluntary mediation scheme, a one-hour mediation is sufficient to settle 55.6% of cases attended by the parties¹ and 29.4% of cases referred to small claims mediation overall². This is a situation where parties have stated that they are willing to compromise.
- 5.9 Under a mandatory mediation scheme, parties will not have been pre-selected on the basis of their willingness to compromise. It is reasonable, therefore, to assume that those cases may require more time to get into the frame of mind where they are willing to compromise and settle the claim.
- 5.10 The CMC is of the view that where mandatory mediations need more time than one-hour, small claims mediation sessions should be extended. Where the mediator believes that there is a reasonable chance for the parties to settle their case at mediation, the mediation could last two or three hours. It may also be helpful for the parties to be able to return to mediation after they have completed an initial short mediation and potentially made further progress outside of the mediation if they feel the mediator may be able to help them reach settlement.
- 5.11 Alternatively, or in addition, the parties could be offered a voucher providing them with a contribution towards additional mediation with the same or a third-party mediator. This could be designed in a similar way to the current Family Mediation Voucher scheme and may be particularly helpful for higher value small claims.

¹ HMCTS: Small Claims Mediation Service Presentation, Reforming Court and Tribunal Services Together, November 2021:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033969/HMCTS_small_claim_mediation_service.pdf

² *Ibid* slide 6: 38,976 cases referred, 11,464 cases settled

5.12 The option to extend mediations beyond an hour would also address some of the concerns from CMC members that referring to the SCMS as “mediation” risks damaging the understanding and support for the mediation process that many of the CMC’s mediators practise. The CMC is of the view that whilst a small claims mediation is a very different process to, for example, a one-day commercial mediation, a workplace mediation or a judicial mediation, they all involve the use of a third party neutral to facilitate the resolution of a dispute and therefore can be called mediation. However, there needs to be a clear distinction between the types of service provided by a mediator in different mediation contexts.

Choice of process

5.13 The CMC would welcome consideration of whether parties could be given a choice as to the process that they enter into at the point that mediation is first suggested. Could they have the choice of using a court appointed mediator or to privately engage a mediator? Clearly the SCMS is free and no doubt that will influence the choice of parties. However, the CMC runs a fixed fee mediation scheme³ which for those claims above say, £2000, is economically viable for parties that want a process that allows for more time and more intervention by the mediator. The voucher scheme suggested above could be used by parties who felt that their claim would benefit from a longer process with the potential for more direct communication if the mediator thinks it would be helpful.

5.14 A drawback of the SCMS process is that it does not allow for the parties to exchange views directly with each other or enough time for the mediator to properly interrogate the parties’ positions. This can sometimes result in frustration that the other side has not “heard” their arguments. It is vitally important that parties are fully informed about the options available to them. It is also important that, if a small claims mediation is not successful, parties are informed about their next steps and that the door to mediation or other dispute resolution processes is not closed. The parties should, for example, be offered the opportunity to engage a mediator privately to enable a longer mediation session or to revert to the SCMS mediator that has already been involved in their case.

5.15 It is essential that parties taking part in a small claims mediation have a good experience and therefore that SCMS mediators are appropriately qualified. The CMC provides an integrated pathway for mediators through their mediation careers. It requires providers of

³ <https://civilmediation.org/fixed-fee-scheme/>

Registered Training Courses to provide and assess the core skills that will be needed to be an effective mediator (see 11.6 below). Thereafter the CMC provides a recognised career path with new mediators commencing as Associate progressing to Registered and to Fellowship status.

- 5.16 The CMC will work with the SCMS to agree the significant skills necessary for a SCM mediation, to recognise and accredit those who have been trained and to provide a pathway to Associate, Registered and ultimately Fellowship. The CMC will integrate its work on mediation standards with the Judicial College.

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

- 6.1 A number of CMC members are familiar with the SCMS and some do fixed fee mediations for claims under £50,000 outside of the SCMS. Given the time constraint of one hour, there is a perception that the process is different to mediation as many mediators recognise it - the mediator trades the parties' offers and there is no opportunity for contact between the parties. It can be a bartering exercise and some mediators are also concerned that the inability to talk directly to the other party reduces its efficiency as well as the chance of success.
- 6.2 It can, nonetheless, be successful because parties may take the view that discounting the sum claimed is worth avoiding the risks associated with going to court, the court experience and time waiting in the County Court for a hearing. As stated above, given the limit of matters that can be covered by a mediator in a one-hour mediation, it is critical that the pre-mediation information provided to participants explains those risks clearly and allows time pre-mediation for the parties to have considered and perhaps adjusted their attitude to risk before entering into the process.

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

- 7.1 The CMC believes that the information provided by the court is useful for the current voluntary small claims mediation process. As described in question 5, it believes that some of the information may no longer be suited to mandatory mediation and a different approach should be taken.

- 7.2 In addition, as described in question 6, some users' experience of SCMS does not match the information provided. It is vitally important that the process that is offered is properly described and that users' expectations are properly managed.
- 7.3 The information provided by the court would ideally be changed in light of the CMC's answers to question 5, along with information provided in the Directions questionnaire (Small Claims Track) and the information provided by email. Further suggestions are provided in response to question 8.
- 7.4 The CMC will work with the MoJ to develop the language and guidance that will ensure that parties understand the process that they are entering into and are in a position to be more likely to achieve settlement at mediation.

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

- 8.1 As described in questions 5 and 7, the CMC believes that the information provided by the court is useful for the current voluntary small claims mediation process but that a different approach should be taken for mandated mediation.
- 8.2 In addition, as described above, the available time for a SCM is very short. The parties attending should be told:
- a) that the mediator will have read the case papers;
 - b) that the mediator is neutral;
 - c) that there will be no adjudication of the issues in dispute;
 - d) that the parties should be aware that it is unlikely that they will be offered everything they are claiming;
 - e) that they may be unable to speak directly to the other side; and
 - f) the parties should consider before the mediation the outcomes that they would regard as satisfactory and the time and effort and risk of going to court
- 8.3 Short animated videos can be created to cover each of the above points. Case studies such as those outlined in the consultation paper are also useful examples of the outcomes that can be achieved. Finally, a link to the MoJ's excellent "A guide to civil mediation" should be included.

- 8.4 The current MoJ Small Claims Mediation Service video⁴ is also helpful and should be maintained or adapted in line with the new process. Videos should be sent to parties along with written information.
- 8.5 The above information should be integrated with the online court process.
- 8.6 As mentioned in the answer to question 5 it is vitally important that the different versions of mediation are properly and fully understood by users. There needs to be a list of different types of mediation with links to fuller explanations. “A guide to civil mediation” is a good example of the type of information that could be offered although, as mentioned above at Q7, the CMC understands that the information on the SCMS is not always a true reflection of what actually takes place.
- 8.7 The CMC will work with the MoJ to develop the language and guidance that will ensure that parties understand the process that they are entering into and are in a position to be more likely to achieve settlement at mediation. It will also offer assistance in the preparation of materials, videos and online content.

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

- 9.1 See above regarding using a McKenzie friend as representative. The option of additional time at the mediation or to have a pre-mediation meeting should be available where a party does have particular needs.

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

- 10.1 Often parties need some time to reflect on their position and whether to settle. This is not really possible in the context of a one-hour mediation. The CMC would support the ability for parties, if not able to agree settlement within the hour, to be able to ask for further time, for the mediator to be able to offer say, an extra 30 minutes, or for the parties to be able to request mediation again at a later stage of their case.

⁴ <https://www.youtube.com/watch?v=cvNNX6Jj6y8>

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

11.1 The answer to this question and to question 12 below is complex and there are many interrelated points. For ease, the answer to question 11 has been split into the following sections:

- a) The current system;
- b) The purpose of accreditation and regulation;
- c) Options for increasing the strength of accreditation and/or providing new regulation; and
- d) The costs of implementing and maintaining accreditation/regulation

The current system

11.2 The civil mediation sector currently operates under a voluntary system of regulation. Since 2016, this has been managed and run by the CMC although the standards have been in place for over a decade. Since January 2022, every individual CMC member who practises civil/commercial or workplace mediation in England and Wales must be CMC Regulated. However, there is currently no requirement for those calling themselves mediators to become a CMC member. There is therefore a gap in the system.

11.3 The voluntary regulatory scheme under the CMC covers both civil/commercial mediation and workplace mediation. It covers individual mediators, mediation service providers and mediation training providers. The registration criteria were drafted by experts from across the field and with consideration of standards outside of this jurisdiction. Although voluntary, the CMC's rules of membership and professional standards are robust and comprehensive and are regularly reviewed by the CMC's Regulation and Standards Committee, which reports to the Board on a monthly basis.

11.4 In summary, a CMC regulated mediator must:

- a) Comply with the CMC rules of membership;
- b) Meet Professional Standards, including following a Code of Conduct; and
- c) Abide by CMC rules on complaints and discipline

These are considered further below.

- 11.5 The CMC rules of membership⁵ are summarised below for ease. Those members practising as mediators must:
- a) Support the aims and objectives of the CMC and not act in a way which brings the mediation process, the mediation profession, or the CMC into disrepute.
 - b) Comply with the CMC's Professional Standards (see 11.6).
 - c) Abide by the CMC's Rules relating to complaints and discipline (see 11.7).
 - d) Obtain the requisite number of Observation and Experience Points and conduct at least a minimum number of mediations in the year preceding the application for membership or renewal.
- 11.6 All CMC Associate Mediators, CMC Registered Mediators and CMC Fellows must meet the following Professional Standards:
- a) Training
 - i. Mediators who started their mediation training in England or Wales after September 2018 must have passed a CMC Registered training course (see (vii) below for further details).
 - ii. Mediators who started their mediation training in England or Wales before September 2018 must have successfully completed an assessed training course which included training in ethics, mediation theory, mediation practise, negotiation, and role play exercise.
 - iii. If that training course was completed on or before 31st March 2011 for civil and commercial mediation, or 31st March 2015 for workplace mediation, it must have included not less than 24 hours of tuition and role-play followed by a formal assessment.
 - iv. If that training course was completed after 31st March 2011 for civil and commercial mediation, or 31st March 2015 for workplace mediation, the course must have included not less than 40 hours of tuition and role-play followed by a formal assessment.
 - v. Mediators must demonstrate a grasp of basic contract law to undertake civil or commercial mediations or an understanding of anger and conflict in today's workplace for workplace mediations if they are not also a qualified lawyer.

⁵ Full individual CMC membership rules: <https://civilmediation.org/wp-content/uploads/2021/10/CMC-Individual-Membership-Rules-23.2.2021-3.pdf>

- vi. Mediators who have been trained outside England and Wales, who are applying to the CMC and intend to practise in England and Wales, are required to demonstrate that the training course they successfully passed complies with the requirements for course content and structure, and assessment of participants as competent mediators, as set out in the CMC Mediation Skills Training Registration Scheme criteria at the time of application. Since September 2022, the International Mediation Institute Certification is regarded as being eligible for Registered status if a mediator moves to the UK.
- vii. CMC Mediation Skills Training Registration Scheme:
- The CMC does not register Training Providers but rather their courses. The application for registration is accompanied by guidance from the CMC for the Training Providers (which is available on request). A Training Provider is obliged to tell the CMC if their registered course changes in a way that impacts the criteria for registration. Once a Training Provider's course is registered, they might expect to be spot-checked biennially that it is continuing to meet these requirements.
 - The CMC system for registering Commercial and Workplace Mediator Training Courses considers a number of key elements, for example:
 - Duration - the course must be at least 40 hours
 - Content - the course must cover ethics, mediation theory, mediation practise, negotiation, and learning through role play
 - Assessment - candidates must pass an assessment that includes role play(s) of at least two hours total and the training provider must confirm sufficient independence in the assessment process.
 - Over the course of the pandemic, and through discussion with training providers, the CMC reviewed sample videoed role play assessments from each course, to consider standards as some elements of training moved online by necessity at the time. The CMC has now, with the agreement of training providers, begun a permanent system of reviewing these sample assessment videos to a set of common criteria in order to moderate and improve standards across all CMC Registered Training Courses.

b) Code of Conduct

- i. Mediators must follow an appropriate and published Code of Conduct, which must be no less rigorous than the EU Model Code of Conduct for Mediators⁶ published in 2004.
- ii. In summary, the EU Model Code provides standards as to:
 - Competence: Mediators must continually update their education and practise in mediation skills and be competent to conduct the mediation before accepting the appointment.
 - Independence: Mediators have a continuing duty to disclose any circumstances that may affect their independence or conflict of interests, including any personal or business relationship with one of the parties, any financial or other interest in the outcome of the mediation, or having acted in any capacity other than mediator for one of the parties.
 - Impartiality: Mediators commit to serve all parties equally.
 - Procedure: Mediators must make sure the parties understand the process, and the role of the mediator and the parties in it. The proceedings must be conducted in an appropriate manner taking into account the circumstances of the case, including possible power imbalances and the rule of law.
 - Fairness: Mediators must ensure that all parties have adequate opportunities to be involved in the process and have the power to terminate the mediation if a settlement is being reached that appears unenforceable or illegal
 - Settlement: Mediators must take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement. The parties may withdraw from the mediation at any time without giving any justification.
 - Confidentiality: Mediators must keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

⁶ <https://civilmediation.org/wp-content/uploads/2020/05/European-Code-of-Conduct-for-Mediators.pdf>

c) Good standing

Mediators must confirm they are of good standing. This requires applicants to make an annual declaration to the CMC if they have been convicted of any offence, been disqualified as a director, been made bankrupt, been a director of a company which entered into administration or became insolvent or committed serious misconduct or mismanagement in the course of carrying on a professional activity or been refused Professional Indemnity Insurance. Any such disclosures are considered by two members of the Regulation and Standards Committee, who have complete discretion to accept or not accept the application.

d) Complaints handling

Mediators must have a published complaint handling procedure which meets the CMC's minimum standards.

e) Feedback

Mediators must have a feedback system under which parties are invited to give feedback which is then assessed and reviewed.

f) CPD

Mediators must undertake at least six hours of mediation specific CPD per annum in addition to minimum observation or practise requirements. Information is provided as to the type of CPD which is accepted. Mediators should have the opportunity to consult experienced mediators before, during or after each mediation to discuss any issues on which they would benefit from advice.

g) Insurance

Mediators must have professional indemnity insurance cover in place of not less than £1,000,000. Where mediators are doing work involving sums exceeding this amount, they must have appropriate additional insurance cover in place and be able to provide evidence of the same.

h) Efficient administration

- Mediators must have access to suitable and sufficient administrative arrangements that are proportionate to and for the work and workload they undertake (e.g., the handling of enquiries, the recording of calls, the accurate

accounting for fees, and the proper rendering of bills to the mediation participants).

- Mediators must, where appropriate, be registered as a data controller with the Information Commissioner's Office (ICO).

i) Mediation Work

Mediators must be able to demonstrate that they are appropriately trained, experienced and skilled in the disputes they mediate.

11.7 As stated above the CMC requires all its Regulated Mediators, Registered Mediation Providers and organisations which run Registered Training Courses to abide by the CMC's rules as to complaints and discipline. This means they must have a published complaints handling procedure in place. The CMC acts as a second tier for complaints and considers any complaints about a mediator or mediation provider referred to it if that complaint has not been resolved by the mediator or the provider. More information about this can be found on the CMC Website⁷. A complaint will be considered on one of several grounds as follows:

- a) A complaint may be made against a CMC Regulated Mediator on the grounds that: (i) they no longer meet the requirements for CMC Regulated status; and/or (ii) they are not a fit and proper person to hold CMC Regulated status. This may include a complaint that the CMC 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 CMC Registered Provider on the grounds that: (i) it no longer meets the requirements for CMC 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 CMC Registered Training Course on the ground that it no longer meets the requirements for CMC Registration.

⁷ <https://civilmediation.org/complaints/>

- 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.

11.8 The CMC's current complaints process was introduced in 2018 and is currently being reviewed. This review is an example of the necessary reconsideration and updating of rules/standards that should be undertaken by any regulator.

11.9 In addition to regulations for individual members, 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 purpose of regulation or accreditation

11.10 The purpose of regulation or a system of accreditation is primarily to protect mediation users from harm or detriment. Regulation also protects the mediator to the extent there are a clear set of rules which can be followed and a process for resolving complaints or issues.

11.11 The view of the CMC is that any tightening of the requirement to be accredited and/or regulation must be targeted towards risk to users, whilst being proportionate in cost and burden. Mediation is a young profession and is constantly developing. Any regulation must not stifle innovation. A significant benefit of mediation is its ability to be adaptive (for example to move immediately on-line during the pandemic) and again, this should not be unreasonably curtailed through regulation.

11.12 Mediation differs from other services provided within the civil justice system. In particular, the outcome of mediation is party-controlled. Even where there may be an automatic referral to mediation, or where mediation is an embedded step in the litigation process, the decision whether to settle a case and upon what terms rests wholly with the parties themselves. There is not and cannot be any compulsion to settle. A compulsion to mediate is very different to a compulsion to settle.

11.13 A mediator does not give any judgment on the merits of a case and does not make any orders. The mediator cannot compel anyone to do anything. This is significantly different from other legal professionals. Solicitors and barristers are in the business of giving advice; judges and arbitrators give decisions. Mediators manage the process of enabling the parties to decide whether to settle, or not.

- 11.14 The CMC is confident that its system of voluntary regulation is robust provided mediators accept to be bound by it. 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.
- 11.15 The CMC considers mediation to be a highly skilled but low-risk activity, and this is born out in practise. The number of complaints the CMC receives about mediators is very low, with 15 complaints in the last three years. Of those complaints; five are live, one was upheld, seven were rejected following investigation, and two did not meet the criteria for consideration (one was out of time, one was not about mediation). This is a very low number when measured against the estimated 16,500 commercial mediations that took place in 2020 (CEDR Mediation Audit 2021). The CMC attributes this primarily to mediators' ability to handle complaints well in the first instance, as opposed to low awareness: CMC Regulated Mediators are required to ensure that their complaints procedure, including the possibility of an appeal to the CMC, is readily accessible to members of the public and clearly visible to potential mediation participants from the outset of the mediator's appointment, including being available on the mediator or provider's website. The CMC checks that this is the case before adding mediators to the list of those it regulates.
- 11.16 The CMC has the ability to suspend or permanently remove a regulated person or registered organisation after an investigation and the right to publicise this. Since the inception of the CMC complaints procedure, two members have had their registered status revoked. Where a complaint is upheld and disciplinary action is taken, the CMC Board takes a view about whether it would be in the public interest to publish the decision, and if it concludes it is, then this is published on the CMC website. The CMC also publishes summary information about the number of complaints considered and upheld each year and uses anonymous case information to help mediators avoid mistakes that are identified as part of a complaint process from happening in other cases.

- 11.17 As James South states in his article ‘Mandatory Mediation - Everything you Need to Know’⁸, CEDR is only aware of one case in 24 years of a mediator being sued. The case⁹ was heard in the Victorian Supreme Court, Australia. It highlighted the potential risks for mediators though in the absence of any reported judgement, it appears the claim for contribution against the mediator did not proceed to trial and the issues remain to be judicially decided.
- 11.18 The CMC is aware that there are civil and commercial mediators practising in England and Wales who are not CMC members. The CMC had already identified this as a potential risk to the reputation of mediation as a whole and wants to work with the MoJ and government to manage this.

Options for increasing the strength of accreditation and/or providing new regulation

- 11.19 After consideration of many options and consultation with its members and the wider mediation market, the CMC is confident that a system of self-regulation remains the most appropriate option.
- 11.20 As stated above, the current system of self-regulation in existence and managed under the CMC is comprehensive, robust and appropriate. The issue is simply the gap in the system whereby you don’t have to be registered with the CMC to work as a civil or commercial mediator. The CMC has considered the way in which family mediators are accredited and regulated by the FMC and in particular how the Family Procedure Rules specify that MIAMs must be conducted by a family mediator authorised by the FMC. A similar system should be put in place for any mandated, compelled, or automatically referred civil justice mediations, whereby anyone conducting such a mediation (whether small claim or otherwise) must be authorised or registered by the CMC. This effectively produces a “compulsion to accredit,” whereby mediators are incentivised by the ability to access work streams.
- 11.21 The CMC will work with its member organisations such as CEDR, RICS and CI Arb to benchmark and agree minimum registration standards. That way, the public can be assured that mediators registered with CMC member organisations have at least the same level of self-regulation as CMC individually regulated mediators. This mirrors the position with FMC in relation to the Law Society’s compliance with its standards. It is further anticipated that the list will note the relevant professional body so that complaints could be appropriately directed (see further below).

⁸ <https://www.cedr.com/mandatory-mediation-everything-you-need-to-know/>

⁹ Tapoohi v Lewenberg & Ors (No 2) [2003] VSC 410

- 11.22 The CMC will work with the MoJ to register those mediators currently working as HMCTS small claims mediators.
- 11.23 The CMC will maintain a central list of regulated mediators (whether registered individually with CMC or through a member organisation) so that the public has a “one stop shop” to find a properly accredited mediator and to prevent any confusion.
- 11.24 Although the proposal is that it would be mandatory to be CMC regulated to conduct a mandated, compelled, or automatically referred mediation, the Courts/MoJ should encourage all practising mediators to become CMC accredited by directing all users of mediation (whether voluntary, mandated, automatic or otherwise) to the list maintained by the CMC. In that way, self-regulation is reinforced.
- 11.25 In addition to the proposals above, the CMC is pursuing an application for a Royal Charter, which it began to explore in 2021. The purpose of seeking the Royal Charter is several-fold:
- a) To assist the public in understanding the mediation market and improving confidence in it;
 - b) To assist the public in finding properly qualified, accredited and regulated mediators;
 - c) To try to limit the ability of mediators to practise in the market without regulation. Although a chartered organisation would not have the power to force mediators to come under its ambit, in practical terms, most mediators would see the benefit of coming under a Royal Chartered Organisation;
 - d) To provide formal recognition for mediation as its own profession. Mediation is no longer an alternative to litigation, but a process and profession in its own right, distinct from other forms of dispute resolution including arbitration and adjudication; and
 - e) By introducing the concept of a “Chartered Mediator” to provide a formal career path and signposting to members of the public of the level of expertise of a particular mediator.
- 11.26 Obtaining a Royal Charter would greatly strengthen self-regulation – mediators would see the benefit of becoming under the auspices of a chartered organisation. The CMC understands that the Charter itself would not prevent unqualified mediators holding themselves out as mediators, but those who were not registered with the Chartered Organisation would be much less likely to be selected by the public.

11.27 In 2021, the CMC approached the FMC to discuss applying for a joint Royal Charter for mediation and the organisations are in discussions about this. The CMC and FMC represent:

	Number of Mediators
CMC Regulated Civil/Commercial Mediators	591
CMC Regulated Workplace Mediators	171
Joint CMC/College of Mediators SEND Register	129
FMC Registered Family Mediators	998

By joining forces with the FMC, the CMC believes that together they will represent in the region of 1,600 practising mediators in England and Wales. It is not possible to calculate the exact number until it is known how many mediators are registered in more than one mediation category; for example, there are 131 mediators registered under both Civil/Commercial mediation and Workplace mediation.

11.28 For the avoidance of doubt, the CMC believes that a separate, formal regulator is neither appropriate nor necessary. This is for a number of reasons:

- a) As explained above, mediation is a low-risk activity. Setting up and then running a formal regulator would be expensive and time consuming. The risk does not justify the outlay;
- b) The number of complaints is small (see above);
- c) It would make no sense for there to be a formal regulator for commercial mediation, but not for family mediation. It is understood that the current family mediation regime works well and the CMC would query the benefit of disrupting that system; and
- d) As mentioned earlier, the only issue is the potential gap whereby mediators do not need to be registered. This could be dealt with by linking registration to the ability to conduct the mandated or automatically referred mediations and/or directing users to the central list to be maintained by the CMC and/or the Royal Charter.

The costs of implementing and maintaining accreditation/regulation

11.29 The CMC is a UK registered charity complying with Charity Commission guidelines and regulations. Its charitable objectives are, for the benefit of the public, to: promote the

resolution of conflicts and disputes by encouraging the use of mediation and other dispute resolution techniques and methods; and advance the education of the public in matters of mediation and other dispute resolution techniques and methods.

11.30 The CMC revenue derives largely from:

- a) registered mediators (80%);
- b) registered providers and providers of registered training courses (15%);
- c) a small number of “friends of” and corporate supporters (2.5%); and
- d) an annual Conference (2.5%) that usually makes a small surplus.

11.31 The key financial figures relevant to this consultation are set out below. The CMC is mindful that the cost of regulation to the mediator is ultimately passed on to the consumer. The CMC has maintained a freeze on memberships fees across all categories for five years. The increase in revenue has arisen almost entirely from additional individual memberships with a small increase arising from some members achieving Fellowship. In 2022 the CMC, recognising an increase demand for its services and greater activity in the sector, increased its strategic and operational resources and plans to (and expects to) run a deficit – in effect returning some net assets to members in lieu of an increase in fees.

	2018	2019	2020	2021	2022 (budget)
Revenue	£119,763	£131,148	£108,914	£125,759	£130,576
Surplus	£14,068	£24,758	£13,352	£21,210	(£13,710)
Net Assets	£68,917	£93,765	£107,027	£121,128	£107,418
Membership fees					
Registered	£160	£160	£160	£160	£160
Fellow			£250	£250	£250
Associate			£80	£80	£80

11.32 It is noted that membership fees are comparable to, though slightly higher than for members of the FMC and in general are significantly less than for members of other professional organisations that have a formal regulatory function.

- 11.33 The CMC benefits hugely from the voluntary contribution of its members and independent directors to its board, committees and working groups. Collectively it is estimated that the contribution in financial terms would equate to a significant proportion of, if not equal, to its revenue. There is no doubt that CMC members will continue to make that contribution but it is recognised that an accreditation/regulation function will add to the demands on the CMC and that additional support and resource will be appropriate to serve the sector and the consumer of mediation.
- 11.34 Additionally, there will be a greater obligation on the CMC that will arise from a higher profile with the public and as a consequence of its accreditation/regulation role. Systems and processes should be and will be resilient and robust. The CMC will take on and deliver the self-regulation role and will ensure that it is funded by its members. There are some short term “investment costs” that, depending on MoJ policy objectives, may be difficult to deliver from CMC net assets and goodwill of volunteer members if time constraints are short.
- 11.35 The CMC, as a charity, will continue to fund its activities from membership fees, using funds generated to support its charitable purpose. It is anticipated that there will be an increase in revenue that will derive from an increase in membership with the scope to increase membership fees that have remained static for five years.
- 11.36 CMC membership has increased by 250 since 2017 from 450 to the present 700. The CMC knows that there are some practising mediators who comply with all CMC current registration requirements who are not CMC registered. Changes to the membership structure introduced in 2022 mean that a number of those mediators will join the CMC.
- 11.37 Additionally, there is a pool of mediators that are trained by providers of CMC Registered Training Courses to the standards detailed at paragraph 11.5 above. It is estimated that approximately 500 mediators are trained each year. It is recognised that not all of those trained are actively seeking a career as a commercial mediator but the new CMC membership structure offers a career path for mediators as an Associate, Registered Mediator and Fellow. A combination of accreditation/regulation and the increased role of mediation generally, with support from MoJ, CJC and the Judiciary, will cause the membership of CMC to continue to grow, particularly if a Royal Charter is obtained. Historic growth, if continued, would lead to a membership of 1250 in approximately five years. It is likely that membership numbers will probably increase by more than that figure and considers that 1500 members in five years is realistic.

11.38 Additional members, accreditation, greater engagement with the public commensurate with the enhanced role of CMC will, as mentioned, place extra demands on CMC resources. The CMC will need to expand its operational support. The CMC considers that funding for this additional resource is sustainable on an annual basis from additional members and modest increases in memberships fees. The “base case” of 1250 members paying an extra 10% in membership fees would increase CMC revenue by 50% in five years. The CMC believes that it could deliver the likely service to mediators and the public, consistent with its charitable purpose, from that revenue. It is more likely that membership numbers will be greater and less likely that membership fees would increase by only 2% per annum.

11.39 The CMC is more concerned about funding the initial costs of implementing an accreditation/regulation process consistent with MoJ policy decisions. There will be a need for some additional paid expertise to complement the CMC voluntary resources in some of the following areas:

- a) Extending registration accreditation to MoJ SCMS mediators;
- b) Obtaining Chartered Status from the Privy Council;
- c) Mutual recognition of accreditation by other professional bodies such as CIArb, RICS, Solicitors Regulation Authority, Bar Council and such others as seek recognition;
- d) Review of the provision of a central list of accredited mediators;
- e) Review and explanation of the accreditation regime to the public via the CMC website and other social media; and
- f) Paid support for complaints handling

The CMC will welcome a discussion with the MoJ about these issues and any support that can be provided to ensure a successful and prompt implementation of and policy decisions.

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

12.1 The CMC is a charity, formed at the request of the Ministry of Justice in 2003. It now has over 700 individual registered members, 40 registered service providers and 21 registered mediation training providers. It is already the largest registering and regulatory organisation for non-family mediators in England and Wales. Formal recognition would simply formalise the existing position.

12.2 If the purpose of regulation is to protect the public, then the question of which body (or bodies) could be formalised as the primary public-facing, regulatory/accrediting body has to be considered from that standpoint.

12.3 As stated above, the CMC has consulted with its members and member organisations, including CEDR, RICS and CI Arb. The CMC will work with those member organisations to benchmark minimum professional standards. The CMC will maintain a central list of mediators who meet those standards so that the public has a “one stop shop” to find a regulated mediator and to prevent any confusion. It is further anticipated that the list will note the relevant professional body enforcing those standards (for example, CMC, RICS or CI Arb) so that complaints can be appropriately directed.

12.4 It is the CMC’s view that it would be unhelpful for there to be more than one formalised regulating body. It would be confusing for users, particularly lay consumers. If mandatory mediation is to be extended to small claims and then further, the vast majority of users of mediation services will be individuals facing claims in the small claims court, or multi-track claims. Indeed, the data published by government shows the following for 2021:

Number of claims issued in the County Court:	1,582,363
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Number of claims issued in the Business and Property Court:	8,626
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Of those claims issued in the County Court, 275,904 were defended from which 97,956 comprised small claims, 50,063 fast track and 10,607 multi-track claims.

From this, it is clear to see that the vast majority of claims issued in 2021 comprise small claims.

12.5 There needs to be a “one-stop shop”, where all civil court users can obtain information about mediation and access a properly accredited or regulated mediator. Uncertainty over levels of regulation and/or which body or bodies are legitimate will be unhelpful. In particular, it would be extremely divisive for there to be different regulators, or lists depending on the value of claims being mediated, the subject matter of the dispute or whether the underlying claim is in litigation, arbitration or pre-issue. This sends a very difficult message to members of the public and also risks creating a two-tiered system where some mediation is seen as prestigious and some not.

- 12.6 Furthermore, anything different would be contrary to how regulation works within adjacent sectors, for example for solicitors or barristers. There is a very considerable difference between the type of work done by a solicitor at a city law firm to that done by a smaller high street practice. However, both are regulated by the SRA and the level of regulation is identical.
- 12.7 It is the CMC's view that there must be a separation between regulation/accreditation and commercial enterprise. The CMC is a charity existing to promote mediation. It is not a commercial organisation: it does not train mediators and it does not manage mediation work. There is no commercial advantage to the CMC, or disadvantage to any other body, in the CMC becoming the formalised body. Having a separation between commercial profit and regulation will increase the public's trust in the regulating organisation. That split is conceptually important.
- 12.8 Finally, the CMC believes it is important that any regulation should be conducted by people with experience in the field. The CMC fulfils that requirement.

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

- 13.1 The CMC is of the view that (a) there is no need for a national Standard for mediation; and (b) that such a Standard would be a duplication of effort, unhelpful and confusing.
- 13.2 As stated above, there are already strict regulations and standards for civil mediators in existence. As mentioned earlier, the only missing piece is that there is no current requirement for mediators to become members of the CMC.
- 13.3 The CMC anticipates that any national Standard for civil mediators would simply replicate the CMC's current regulatory regime which is already robust and effective. It would be a duplication of effort and unnecessary.
- 13.4 Mediation Standards evolve in line with the progression and development of the mediation profession. Under the auspices of the CMC, the regulations and standards are an evolving and adaptive set of rules, able for example to adapt quickly to unexpected events such as the pandemic and the need to train as a mediator and work online. For the Standards to sit with a National Standards body, there would need to be a proactive group monitoring those

standards to ensure they remain current and enforcing them when need arises. The Standards should not exist in isolation. Furthermore, it would be irrational for there to be a disconnect between the body setting the Standards and those enforcing them – the development of standards and regulations is dependent on those writing them understanding how they are working and how and when they are being breached in order to adapt them to developing circumstances. Similarly, it would be difficult for a professional body to enforce Standards written by someone else.

13.5 Additionally, it is critical that a regulator makes sure that a mediator doesn't just have particular skill or experience at one point in time (for example at accreditation), but also that these are appropriately maintained through CPD.

13.6 It would be illogical for there to be national a Standard for only civil mediators and not for workplace, family, education etc. This is a bigger piece of work than simply civil mediation.

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

14.1 As stated above, the risk is that consumers access rogue mediators who are not adequately trained or insured.

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

15.1 It is coincidental that many mediators are also lawyers - it should not follow that the SRA or other bodies should take on the responsibility for regulation or accreditation of mediators. Those bodies are not familiar with the mediation market, procedures or professional skills and, the CMC doubts, would welcome additional responsibilities in relation to a profession which they have, up to now, neither sought nor had had no oversight of. Furthermore, mediators don't have clients, don't give advice and don't hold client monies as solicitors do,

so mediation is a low-risk profession which does not require the degree of regulation as solicitors do.

15.2 As detailed at paragraphs 11.20 to 11.22 above CMC will work with member organisations to benchmark standards for accredited mediators and maintain a centralised list of accredited mediators at the CMC. It is anticipated that a note of the relevant professional body would be maintained on that list so that complaints could be appropriately directed. The CMC would need to work with those bodies to ensure that progress of any disciplinary process is monitored; to volunteer appropriate mediation expertise where the complaint was related to a breach of mediation standards and to remove any mediator who was found to have fallen short of professional standards from the list of accredited mediators as appropriate.

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

16.1 It is likely that either one or both parties to a mandated small claims mediation will be a litigant in person. Litigants in person are not part of a protected group and are not necessarily vulnerable. However, they may have specific needs in that they may have less understanding of the legal process and their legal rights and responsibilities. Although a mediation does not involve a decision about who is legally right or wrong, the chances of success at any ultimate hearing is clearly relevant to an assessment of the potential risks of proceeding versus the benefits of settlement. The sort of risk analysis involved in a mediation often requires a basic understanding of one's legal rights and responsibilities. Of course, this is part of a wider issue about the availability and cost of legal advice in legal proceedings for disputants, particularly at the lower-case value levels. Accordingly, this should not be seen as a bar to the introduction of mandatory mediation, but is something which may impact on its success. It does also reinforce the importance of the information provided to participants prior to a mediation.

16.2 More generally, mediation is ideally placed to deal with vulnerable users and a mediator can design a process which allows for fair and equal access and participation. A time limited one-hour telephone mediation is not necessarily consistent with this and where vulnerable users are participants, the CMC repeats its suggestion that small claims mediation sessions

should be extended in time. Other reasonable adjustments could include participants being allowed to attend with a friend, or for the mediation to take place at a particular time of day.

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Civil Mediation Council

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