



Civil Mediation Council (CMC) Response to Call for Evidence: Opt-out Collective Actions Regime Review

Introduction

1. This is the response of the CMC to the call for evidence in respect of the Opt-out Collective Actions Regime Review.
2. 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, 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. With 1000 registered individual members and over 80 organisational members including registered service providers and 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 Centre for Effective Dispute Resolution (CEDR), Chartered Institute of Arbitrators (Ciarb), and The Royal Institution of Chartered Surveyors (RICS).
3. The CMC provides the public with a trusted directory of mediators across various practice areas including civil and commercial, workplace, community and education. It also supports the administration of the SEND mediator panel and 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.
4. The CMC sets standards for civil and commercial mediation, including its current work on standards for mediation in the county court. It also sets standards in its other areas of work.

Executive Summary:

5. Mediation is known to be a cost-effective and efficient method of dispute resolution. Mediation can prevent disputes from escalating into the justice system, and where disputes have entered the civil justice system, mediation can resolve disputes quickly and remove cases from court backlogs, giving a solution which is usually quicker, cheaper and leaves the outcome in the parties' control.
6. The CMC advocated for automatic referral to mediation for small claims and for the power of a court to order unwilling parties to mediate to be recognised. Both of those have now happened in the civil justice system. The CMC now advocates for mediation schemes to be further embedded in other areas in which it can add value, particularly to those areas where lay people, including consumers.

7. Mediation and similar forms of ADR may be familiar to some consumers already, since a number of businesses choose to incorporate an ADR scheme to resolve disputes where a large number of customers/consumers may be claiming a small amount of money. Methods of dispute resolution include time limited mediations, or determinative processes.
8. The range of possible solutions which can be agreed upon by the parties in a mediation go beyond those which a court can order. One example of this is that the parties may negotiate an apology (private or public) and the appropriate form of words that might take. Parties may also agree that one of them offers the other party some additional service or something else of value. For this reason, mediation can produce a result which satisfies not only the legal points in contention, but also the commercial and personal interests of the parties.
9. Civil and commercial mediators mediate multi-party, complex and high value disputes, designing processes that are appropriate for the parties they are working with. This includes disputes where there is a representative for a group with similar or the same issues.

Please see CMC's response to five relevant questions from the Call for Evidence below:

Q7. Recommendation 15 of the CIC report on litigation funding proposes a binding dispute resolution process for funders and funded parties. However, we would like to explore further how conflict between litigation funders and class representatives could be approached.

To what extent should extra-curial dispute resolution be used or required to be used to resolve conflict between the funder and class representative or class?

10. In the landmark case of *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416, which the CMC intervened in jointly with CEDR and Ciarb, the Court of Appeal in a special constitution of the Lady Chief Justice, the Master of the Rolls and the Deputy Head of Civil Justice held that a court could lawfully order even unwilling parties to use alternative dispute resolution, provided the order did not impair the very essence of a claimant's right to proceed to a judicial hearing and that the process was proportionate to the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. It was the CMC's submission in that case that mediation would meet those criteria in nearly every situation.
11. Following that case, the power for the court to order parties to engage in a dispute resolution process has been inserted into the Overriding Objective in the Civil Procedure Rules ("CPR"), with additional rules relating to the court's case management powers, and a related costs sanction. In addition, the power has also been added to some specialist rules within the CPR, including those for the Commercial Court.
12. There is also a pilot scheme under Practice Direction 51ZE for automatic referral to mediation in Online Money Civil Claims for small claims. The pilot has operated with a good settlement rate which has had the effect of removing cases from the list of those awaiting a trial date.
13. As such, binding dispute resolution processes are already enshrined in the Civil Justice System and have been successfully used for some time now.

14. These powers have not yet been incorporated by the Tribunal Procedure Rules Committee into the Tribunal rules for the various Tribunals, although there are some specialist tribunals (such as the Tax Tribunal) where ADR schemes already exist in their specialist areas.

15. Recommendation 15 of the CJC Report states:

“Recommendation 15: An independent, binding dispute resolution process to resolve disputes between funders and funded parties should be established. The process should make provision for the promotion of the consensual resolution of such disputes. The cost of the dispute resolution process should be borne by the funder.”

16. Mediation which is required by the relevant rules to take place would meet the criteria of a binding dispute resolution process, which enables the parties to come to a consensual resolution of the dispute.

17. The wording of the power already contained in the CPR (and the Standard Order for mediation which has been produced) could be incorporated in an appropriate way in the CAT rules in a way which is tested, neat and fulfils the criteria of the CJC Recommendation.

Q16. Do you have any experience of involvement in ADR to resolve a loss suffered by consumers as a result of anti-competitive behaviour?

If so, what kind of ADR have you engaged in and how common is this in your experience?

If not, why not? What would make it more likely for you to consider this option in the future?

To what extent does the prospect of engaging in ADR deter businesses from wrongdoing?

How far do you believe that appropriate redress for class members can be achieved by ADR?

18. Mediators design processes to ensure they are appropriate for the dispute. Civil and commercial mediators are experienced at dealing with multi-party disputes, and those where there may be groups, including representative disputes. Advantages to mediating such a dispute include:

- A range of possible options that could be agreed to resolve the dispute which goes beyond what a court or tribunal court order.
- Mediation can represent an opportunity to limit costs exposure or to agree a different position on costs than a court might order.

19. Mixed processes are also possible, such as an early neutral evaluation which may be followed by mediation to resolve the matters between the parties.

20. As regards deterrence, in our view when a method of ADR is incorporated into the dispute resolution system, such as with incorporating the power of a court to order parties to use ADR within the overriding objective, the parties must consider it seriously as an option, and it has no less power than a court remedy.

21. One important factor in a mediation is that the process is confidential and the agreed outcome may also be confidential (subject of course to tribunal orders disposing of the proceedings). This may be thought to potentially have less of a deterrent effect than the public nature of proceedings, but in our view being required by the relevant rules to engage in a process means that the ADR process would have similar deterrent effect to engaging with proceedings. Conversely, the opportunity to use a confidential method of ADR like mediation may have the effect of motivating parties to engage in the process in a more constructive way, leading to better quality outcomes.
22. The CMC, as previously stated, has the majority of mediation service providers in the UK registered with it. A number of these providers run mediation schemes (or defined pathways to resolution that include mediation), working with or for regulatory bodies, trade associations and government agencies. Such schemes use mediation as well as other ADR techniques like adjudication or similar ombudsman-type processes). However, whilst other ADR processes can be efficient for individual small claims, when dealing with matters that resemble class actions such processes may reduce the ability for complainants to feel heard within the process making them less likely to engage in it or accept an outcome. This is why mediation has been successfully used in some class action-type matters, occasionally supported by Funders or other CFAs. By its nature mediation is confidential so there are not lots of case studies but we can point to CEDR's running of the Alder Hey Retained Organs Litigation where over 1,000 parents discovered that organs of their children had been retained without proper consent at Alder Hey Children's Hospital. This is often held up as a model where mediation process design enabled many voices to "blend" to negotiate financial and non-legal remedies. There are also other public examples such as CEDR's Mediation of the Kenyan Tribes People versus the UK Ministry of Defence and the US Mediator Ken Feinberg's mediation of multiple aspects of the BP Deepwater Horizon / Gulf Spill claims.

Q19. What barriers do you consider there are to pursuing alternative routes to redress, such as ADR, voluntary redress schemes, or similar potential options outside of, or prior to, litigation?

How could greater use of these alternative routes be facilitated?

23. Without a power in the Tribunal rules and an associated sanction, having an available method of ADR such as mediation, may not lead to as great a reduction in ongoing litigation as might be possible to achieve.
24. Rules where considering appropriate use of ADR is an obligation on the parties and on the court is important to removing a practical barrier for parties engaging in ADR. Parties do not need to be concerned as to being seen to be weak in litigation if they suggest ADR when it is clear that the rules require them to do so.
25. Further, a sanction for failure to engage with the relevant rule is an important factor in motivating parties to engage; without a sanction, the rule would be less effective in practice.
26. Finally, we note that the change made in the CPR is made to the Overriding Objective, which means that the power is relevant at every stage of proceedings. This is important to facilitate the most active use of methods of ADR. Mediation can be very effective at every stage,

whether it is pre-action, at any stage during the first instance trial, on appeal and dealing with costs. The Court of Appeal, for example, has had a mediation scheme running for many years.

Q25. To what extent do you think it would be beneficial for the CAT to have increased oversight of settlement/a stronger role in approving settlement agreements between parties?

27. We do not express a view on the amount of oversight the CAT should have in approving settlement agreements between the parties, but we do observe that it is an essential part of a mediation that the confidentiality of the process is respected. Without the process being fully confidential, the parties cannot meaningfully engage with the process in the way that is so successful in resolving their disputes in mediation.
28. Any oversight the CAT has on approving the terms agreed between the parties where that agreement arises from a mediation should not permit the CAT to interrogate the mediation process.

Q26. What should happen to unclaimed funds from a settlement agreement?

29. Unclaimed funds from settlement agreements could and should be used to support the processes which give rise to settlements.
30. At present there is no government funding at all for civil and commercial mediation processes (beyond the provision of the small claims mediation pilot), although the government does currently fund in family mediation cases the initial meeting a mediator might have with the parties in such a dispute (MIAMS).
31. Civil and commercial mediation processes are usually funded by the parties, with the exception of the small claims pilot referred to above, which is free at the point of use and is staffed by HM Court Service mediators.
32. The CMC considers that unclaimed funds from a settlement agreement could be used to support the development of the mediation sector, whether that is funding mediation services directly in the CAT and other parts of the Civil Justice system, or whether that is taking into account the wider social uses of mediation, which can be used to prevent disputes from entering into the justice system at all. Our members include community mediators, which are usually volunteer run mediation services, peer mediators where mediation is run in schools and has a direct positive effect on outcomes for children. Those schemes could benefit from the support of additional funding.

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Submitted by: Civil Mediation Council

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