



Bar Council response to the Ministry of Justice Consultation on Increasing the use of mediation in the civil justice system

About us

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the open consultation by the Ministry of Justice (MOJ) on [“Increasing the use of mediation in the civil justice system”](https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system) published on 26 July 2022.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad. A high proportion of barristers are trained mediators, arbitrators and/or adjudicators involved in alternate dispute resolution as well as litigation.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist trained, independent advocates and dispute resolvers, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The General Council of the Bar of England and Wales is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Introduction

¹ <https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system>

4. The Bar Council welcomes the Government's proposal to make mediation an integral part of the court process. We also strongly support the Government's intention to ratify the [UN Convention on International Settlement Agreements \(the "Singapore Convention on Mediation"\)](#).²

5. We agree that, if mediation is to succeed as an integral step in the court process, it is essential to ensure that high-quality, affordable, and accountable mediation services be available to the public.

6. We note the Government proposes two initiatives:

- i. the proposal of compulsory mediation for all proceedings allocated to the small claims track of the County Court; and
- ii. whether a requirement to compulsory mediation should be expanded beyond small claims, coupled with measures for strengthening the external civil mediation sector.

7. In relation to the second proposal, the Bar Council considers it important that the requirement to engage in compulsory mediation is not extended beyond small claims until it has been sufficiently trialled, evaluated (including with the assistance of stakeholders such as the Bar Council), further consulted upon and only if widely considered a success. There are a number of other considerations to take into account before extending compulsory mediation beyond the small claims track.

8. We appreciate that the two principal drivers behind these initiatives are to reduce the court backlog and to improve access to justice by resolving cases more quickly, and that at present only 21% of small claims opt into the present Small Claims Mediation Scheme (SCMS). We note that there has been inadequate time to evaluate the success or otherwise of 'opt out' mediation. In order to resolve cases fairly there are matters which need to be addressed, including to maintain confidence in the processes within which compulsory mediation will sit.

9. The Bar Council are, overall, unsure about the desirability and merit of compulsory mediation within the small claims court process. The implementation of the Government's proposals should be subject to a number of provisos:

² https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

- i. firstly, the use of sanctions should be limited, applied only in circumstances of wholesale failure to attend, and the mediation itself needs to be confidential;
- ii. secondly, the SCMS should be properly funded, and the mediators should be given proper training;
- iii. thirdly, there must be a proper complaints and (where relevant) appeals procedures implemented;
- iv. fourthly, the system should run efficiently, thus, to not increase any delays to final determination following trial at court. The scheme should be assessed as a success only if it does, indeed, reduce the backlog and the time taken between issue and final determination; and
- v. finally, this should be trialled and reviewed after a period of two or three years, and should not be considered for extending beyond the small claims track until this point.

Government's New Process

10. First, we would like to address some issues regarding the process proposed. We note the proposal is for a mandatory one-hour telephone appointment with a court mediator and the parties. This really does not amount to a proper mediation and would probably be inadequate even for small claims (which can often be the most difficult to resolve). It is trite but necessary to observe that although the dispute may have a low financial value that is often far outweighed by the importance to the individuals concerned. The case may be as complex as a much higher value case. We would propose that the one-hour appointment be an initial exploratory call, which if the case is more complicated or requires further time and with the agreement of the parties, should be transferred for proper mediation, by a trained accredited mediator.

11. We would like clarification as to the accreditation and training of the SCMS mediators. As noted below, we question the practicability and doubt the fairness of imposing sanctions for alleged non-compliance, particularly if the matter is before a mediator for only a one-hour telephone call. We are strongly opposed to any reporting back to the court by the mediator other than whether the parties attended or not. For the SCMS mediator, a member of HMCTS staff, to give an opinion as to whether a particular party is acting in 'good faith' would be a gross violation of party autonomy, would lead to a loss of confidence in the mediation as a 'safe space' within which parties may say things they would not wish too openly and wholly undermines any

suggestion of the mediator being independent of the court. It would also lead to ancillary disputes on the question of whether the mediator fairly or properly assessed the 'good faith' question, and appeals on the issue of application of sanctions. None of this can give confidence in the mediation process or speed up justice.

Stay

12. We question whether there is any need for the claims to be stayed for 28 days to allow for mediation to take place, rather than adding the mediation stage within the existing process of civil claims. Any stay can only add to the delay towards determination of the case at a final hearing. Since the small claims track is generally, save in the case of unreasonable behaviour, a non-costs shifting regime, there is almost no benefit in suspending case preparation activities. It will also add unnecessary conceptual complexity for litigants unfamiliar with court processes and the impact of such a stay.

Consultation Questions

In relation to the questions posed in the Consultation, our responses are as follows:

Question 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?

13. Rather than imposing compulsory mediation, we would recommend the Government continue to expand the option to allow the parties to opt out of mediation, perhaps by stating their reasons for opting out if they do so, as opposed to implementing mandatory compulsory mediation (i.e. where the parties will not be able to choose to opt out of the process). This will be in line with HMCTS' recent pilot which has been extended within the Online Civil Money Claims (OCMC). It will also allow time, not yet permitted, to assess the success or otherwise of the voluntary process. We consider for practical reasons there is a real risk that the proposal to impose mandatory mediation may delay the ultimate resolution of the case through the court process, particularly where a party has already attempted but failed to resolve the case prior to issuing proceedings.

14. Further, if compulsory mediation is incorporated within the court process, the parties are less likely to take seriously the guidance set out in the [Practice Direction on the Pre-Action Conduct and Protocol](#).³ This guidance emphasises that litigation should be viewed as a last resort, and requires parties to consider whether undertaking a form of dispute resolution might enable them to settle the matter without the need to issue court proceedings. Why will they bother, in circumstances where such a process is to be imposed upon them, in any event?

15. In order to build a stronger credible justice system which serves society and promotes consumer confidence, it would require not just swift access to resolution but proper and fair processes, including for small claims. Justice is meant for all; small claims are capable of having a more significant impact on the parties than some larger claims where both parties are more likely to be large businesses, and to have the resources to instruct lawyers. Moreover, small claims can involve complex issues, e.g. claims of misrepresentation. Possible “inequality of arms” needs to be taken into account as well as the financial value of the claim.

16. To avoid the system becoming a ‘tick box exercise’ it is critical that those mediators reviewing such cases are experienced mediators. We anticipate that the funds available are unlikely to be sufficient to pay a fee to attract experienced and busy mediators to provide the necessary pool of such mediators in all court centres. Inevitably those mediators reviewing cases and speaking to the parties will be asked to give advice about mediation and the benefits to the disputants. For the compulsory scheme to achieve the desired result, those giving such advice must be experienced and receive proper training. We suggest that a cadre of volunteer senior and experienced mediators could volunteer to review and/or assist with such training.

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

17. We have concerns that a system of individual exemption may create further expense, bureaucracy and delay. However, the Bar Council does feel that there must

³ https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct

be exemptions in cases where a party lacks capacity, is under 18 or has some other vulnerability.

18. We also note that where the Government itself is a party to a civil small claim dispute concerning an issue of public or Government policy, then the case will be exempted from the requirement to mediate. We do not see why Government ought to be exempt and this is presently unexplained. Indeed, on the face of it, it does not set a good example.

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

19. Confidentiality is central to the mediation process. The Bar Council opposes any move that would require a mediator to disclose their opinion as to whether a party has adequately engaged in the process as this would inevitably compromise confidentiality. The Bar Council suggests that the duty of litigants to engage adequately must be limited to, at the most, requiring them to answer the mediator's telephone call at a pre-arranged time and to stay on the line for an hour or until the mediator ends the call if earlier. Such actions can be independently verified. Any other approach would compromise mediator confidentiality and undermine the process by placing the mediator in a judicial role. It inevitably would lead to complaints of unfairness, breach of Article 6 the European Convention on Human Rights (ECHR) rights and therefore require an extra regulatory body to determine such complaints. We further address this point in our opening comments above.

Question 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?

20. Questions of proportionality will be specific to each particular case. Such sanctions would have to be decided by a judge on an individual basis. However, we cannot see that striking-out would ever be appropriate. There is already a perception in relation to certain other small claims track reforms, for example the introduction of dispute resolution hearings in pilot areas such as Birmingham, that striking-out following non-attendance is used far too liberally and as the main tool for reducing

the case-load. Effectively, procedure is used to grind down litigants. This brings the court service and justice system into disrepute. In any event, the Bar Council is concerned that any penalty for perceived non-compliance might raise questions about breach of Article 6 of the ECHR.

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

21. The Bar Council has concerns as to how a party aggrieved by a mediator's conduct under this scheme can obtain redress. A robust complaints and grievance framework for SCMS Mediators will need to be established/ advertised.

22. We would welcome the introduction of an Advisory Board, Panel or a Committee of senior experienced volunteer mediators, who would be willing to assist in the development, design and monitoring of the small claims' mandatory mediation service. Therefore, it would ensure that the process is set up under the foundation of experienced mediators, who can ensure the process is efficient, well run and the mediators appointed to mediate Small Claims are properly trained for the role. We would welcome the opportunity to be involved in any further discussions on this point.

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

23. The Bar Council does not have a response to this question.

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

24. The Bar Council does not have a response to this question.

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

25. The Bar Council does not have a response to this question.

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

26. At a minimum, users with particular vulnerabilities ought to be identified via a form of triage at the earliest possible stage so that they can be provided with additional information concerning what the service entails and what it means for their claim.

27. A further option would be a direct line of referral available from the court/SCMS to organisations such as the Citizens' Advice Bureau (CAB) to provide independent advice and guidance to vulnerable individuals identified via triage. Given the emaciation of the third sector since LASPO this will, however, inevitably require financial assistance to providers of such advice and guidance. Stakeholders in the court service that provide free legal advice and representation (such as the CAB) could also be engaged at the earliest opportunity and, at a minimum, prior to the commencement of any roll-out of the service so that they are forewarned of possible increased demand for their services from vulnerable individuals engaged in mediation. This ought to enable them to ensure that the advice and guidance they give is accurate, consistent and promptly available. Again, financial assistance will need to be made available.

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

28. To support parties using the SCMS, there should be an online video tutorial or written material that comprehensively explains how the service works and that includes the benefit of mediation to aid users understanding of the process as compared to litigation. It would be helpful for parties to be informed in such material that both parties need to compromise and make concessions and that there is a possibility for creative settlements. In making such information available, it would enable parties to engage properly in the mediation, whilst being fully aware of the realities of proceeding to trial.

29. A further possible measure is that of a short confidential briefing sheet that users complete before the mediation. This should set out each party's position and would provide an opportunity to indicate whether there is common ground between the parties to enable settlement. Parties should be given the opportunity to consider and set out what sum or terms they would accept to settle the matter.

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

30. While it is commendable for the Government to implement a policy of compulsory mediation for certain types or level of disputes, the question arises as to whom the Government recommends to the public at large as competent mediators to conduct such disputes. There has to be a recognisable and acceptable standard for such recommended mediators in order to justify depriving disputants of their right to seek resolution through the courts. A failure to ensure that those recommended mediators have requisite training (and possibly experience) will have two undesirable and unintended consequences. First, the compulsory reference to mediation may well become merely a 'tick box exercise' with additional and unnecessary expense to the disputants (which has occurred in some jurisdictions). Secondly, a mediator who does not have the requisite training or experience will bring mediation itself into disrepute and defeat the whole purpose of recommending mediation as a first resort for resolving disputes to save the legal system and the disputants the costs and delay of contesting all disputes in court.

31. The Government has to decide whether it wishes to fund an independent accreditation body and take on board the concomitant financial consequences which any such body will incur, because there would need to be a Professional Conduct Procedure for the inevitable complaints about the competence, conduct and breach of duty by a mediator holding a Government accreditation.

32. We are strongly opposed to Legal Services Act 2007 style regulation for mediation, which (in our experience) has led to increased costs, no improvement in the handling of core regulatory functions or consumer experience, and has led to the creation of a cadre of professional regulators seeking to find roles and assert themselves at the cost of practitioners and, ultimately, consumers. One of the real benefits of commercial mediation, and why sophisticated 'well-off' parties increasingly choose to use it, is because of its flexibility and responsiveness to the particular needs of the dispute and the parties.

33. Plainly generally unrepresented litigants-in-person participating in the SCMS are in a different position and require some protection, but we suggest this is best addressed through accreditation, setting of some basic standards and principles and an effective complaints/ grievance process.

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

34. This is the most difficult area for consideration, there are several organisations now engaged in providing training for mediation accreditation and the current requirement for registration by the Civil Mediation Council (CMC). However, inevitably they will each have conflicts in granting 'official accreditation' and generate complaints from the other training organisations of unfair commercial advantage. It may be that the CMC is independent enough to be accepted as the accreditation body, however, we would reiterate our caution with this suggestion.

35. The inherent problem is that any such accreditation body has to have in place a properly funded complaints procedure to determine the inevitable complaints about the alleged failure by one of its accredited mediators to comply with the standards set by the accreditation body.

Question 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?

36. As above: highly desirable, provided it is fully funded to provide not only a recognised and acceptable level of competence but a proper complaints procedure to determine allegations of alleged breaches by mediators. These may be rare so far in this jurisdiction, but are commonplace in countries where mediation is well established.

Question 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?

37. Yes, as described above.

Question 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?

38. Yes, especially if the Government does not wish to fund its own accreditation body to deal with regulatory issues.

Question 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?

39. Yes. Making sure that the recommended mediators have received proper and up to date training and guidance to deal with such groups. Apart from language skills, many practising mediators are qualified to deal with specialist cases (custody, ancillary relief, and matrimonial property dispute), and cases involving parties with medical conditions.

40. Many of the concerns Bar Council has raised above have the potential to arise most acutely in relation to such groups, in particular: the risk of inequality of arms at any compulsory mediation (paragraph 15); the importance of adequate information about the mediation process and significance of pre-mediation briefing (paragraphs 28 and 29), which may assist in identifying vulnerabilities or particular needs that may affect the efficiency and effectiveness of the process; the risk that sanctions for non-participation – if applied – could operate disproportionately against such groups, through language barriers, disabilities, or caring commitments, for example (see paragraph 20). As also noted above, we consider there to be a strong case for the applicability of exemptions to certain vulnerable litigants (paragraph 17).

Conclusion

41. In conclusion, the Bar Council welcomes the Government's expansion of the use of dispute resolution services, but we are cautious about the proposals of this consultation. If it is to be implemented, it must be given every assistance to make it work. Our approach is designed to be constructive and our recommendations, especially those in paragraph 9, are made with a genuine desire to assist the MoJ in implementing a mediation process which will be effective and fair. We would

welcome further engagement and discussion with the Government on the outcome of this consultation, and reiterate our offers of assistance made at paragraphs 16 and 22.

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