Civil Mediation Council Response to the Civil Justice Council Consultation

Automatic Referral to Mediation for Civil Cases

A. Preamble

[References to paragraph numbers are references to the CJC Interim Report].

1. The Civil Mediation Council ("CMC") resolved to put forward a concrete model for compulsory mediation, to present to government, in answer to the consultation invited by the Civil Justice Council's Interim Report ("CJCIR"). The CMC has not sought to provide definitive answers to the 43 questions posed in the consultation. The model thus proposed by the CMC is a practical scheme for 'automatic referral' of civil cases to mediation post-issue. This proposal follows the CMC's own Academic Conference on Mandatory Mediation held on 13 October 2017 in conjunction with the FMC. The conference was attended by over 70 members, and some 10 papers on the subject of mandatory mediation were delivered by distinguished academics, many of whom identified similar issues to those contained in the CJCIR.

2. A draft of the proposed scheme was prepared for consideration by the CMC Board.[1] It was approved in principle at a Board meeting on 15th November 2017, and presented at the AGM on 29th November 2017. The proposal was distributed to the entire CMC membership (over 550 individual members and 84 provider organisations). 9 individual responses were received, all in favour of the proposed scheme and none against. Some helpful suggestions for improving the proposal were received, which have been incorporated in the final draft.

[1] Paul Randolph, a CMC Board member and Chair of the Academic Committee, was invited to prepare the draft. For this purpose, he invited a working group to assist, consisting of Mary Banham-Hall (a campaigner for the extension of MIAM's to civil cases), Jean McDougall, and Iain Christie.

B. Rationale

3.

a) The CJCIR identified the fundamental problem of making ADR familiar to the public and culturally normal (2.12). The essential rationale behind the CMC's proposal is that one effective way of realizing this aim is to expose a greater number and wider section of the public to mediation; and that in order to achieve this, an element of compulsion may be necessary. We agree with the CJCIR's conclusion (2.5) that the measures adopted over the past 20 years to encourage the use of ADR have not worked. It is not the place of this response to analyse the reasons for this, although the CMC notes that the need for greater 'awareness-raising' and more education feature prominently in the CJCIR. Yet, we also note that similar observations and comparable recommendations were made in the 2007 National Audit Office Report on Legal Aid and Mediation in Family cases.[2] The NAO report recommended, amongst other measures, that

> *"the Legal Services Commission should actively promote mediation and reflect this in the guidance and information the Commission provides online and in leaflets and information packs for solicitors and their clients" (page 5, para 2a)*.

b) The CJCIR helpfully identifies (5.21-5.34) the numerous HMCTS guidance documents produced for litigants. Yet despite this, the MOJ Court Users Survey 2015[3] still found, eight years on, "relatively low levels of awareness of ADR".

c) We are driven to the conclusion that simply to do more of the same over the next 20 years will not be productive.

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[2] Legal Services Commission, Legal aid and mediation for people involved in family breakdown. Report By The Comptroller And Auditor General, HC 256 Session 2006-2007, 2 March 2007: https://www.nao.org.uk/wp-content/uploads/2007/03/0607256.pdf

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472483/civil-court-user-survey.pdf

C. Automatic Referral

4. The CMC takes the view that references to 'compulsion' should be avoided as far as possible and replaced by 'automatic referral'. Compulsion is a toxic concept, widely reviled, and tends to generate unduly emotional reactions. The objections to compulsory mediation are comparable to those raised in Parliamentary debates in the 1980's on the compulsory wearing of seat belts and the ban on indoor smoking.

5. We acknowledge the observations in the CJCIR (8.9) concerning the Automatic Referral to Mediation scheme in the Central London County Court in 2004 – 2005, and recognise that Professor Hazel Genn was sceptical as to its success. However, we are encouraged by her comment, noted in 8.9, that

> "*had insurance companies showed a greater willingness to attempt mediation, the results of the pilot scheme might have looked somewhat different*".

We also endorse the view of the CJC Working Group (8.9) that

> *"It may be that 12 years later in the post-Halsey era the success rate would be higher*".

We believe that the current increased levels of frustration within the dispute resolution landscape may be provide more fertile ground into which the seed of automatic referral may be sown.

6. In advocating a scheme for Automatic Referral, the CMC adopts the sentiments expressed by the 'significant minority' of the CJC Working Group at 9.18 (a)-(d) as to potential advantages of pre-action compulsion, but in particular, that:

> "a) It has to be worthwhile to impose a simple, universal requirement on the parties to do something which will be of benefit in all but a small minority of cases" .

D. The Proposed Scheme

7. With some reluctance, the CMC concluded that compulsion to attend a Mediation or a MIAM, as a pre-condition to the issue of proceedings, was fraught with difficulties and unlikely to be viable. To make this a pre-condition would provide any prospective defendant with undue power to prevent or delay the issue of proceedings. Furthermore, and in addition to the difficulties identified at 6.16, 8.6.4, 8.10, 9.18, and 9.24, together with the experiences in other jurisdictions, it was felt that the amount of unpaid work that would be required of the mediator to secure the engagement of *both* parties would be counter-productive. However, we believe that with the increase in mediations that will result from automatic referral, the public may gradually come to a greater acceptance of, and familiarity with, the process. Like the Working Party, we were encouraged by the experience in British Columbia, where the establishment of post issue mediation has led to the growth of informally agreed mediation as a norm (7.18); and in Italy, where it resulted in greater public awareness (7.11).

8. The CMC nevertheless recommends there should be a strong ***expectation*** that mediation has been offered, or considered pre issue, and that any failure to do so should be scrutinised and, if appropriate, penalised. The CJCIR identifies (5.9)

> "*the already established specific authority in CPR 44 to exercise retrospective costs control over pre-issue litigation conduct*".

It is hoped that Judges will enforce this with greater vigour, and also at the first opportunity, rather than simply adjourning costs issues to the trial judge.

9. The proposed scheme bears some similarities to the British Columbian scheme, which was favorably viewed by the attendees at the CMC Academic conference in October 2017, as well as by the CJC Working Party. We believe that the proposed scheme for automatic referral can also dovetail well with any ODR platform that may be introduced.

E. The Proposed Scheme: Notes to Flow Chart

Claimant issues claim - automatically referred to mediation

1. Pre Issue attempts at ADR The Claimant should be obliged to state on the claim form whether or not mediation has been offered, and to give reasons for any failure to offer, or if offered, the failure to enter into mediation. The Claimant should be informed that the case will be automatically referred to mediation, subject to the 'opt-out' provision (see Note 3, below), and subject to possible penal sanctions.

C 'agrees to mediation Pays *nominal* issue fee

2. The Claimant accepts automatic referral and pays a ***nominal*** issue fee. This is to incentivise parties to attempt mediation so that if successful no further costs are incurred.

C 'opts out' - pays full issue fee - files reasons

3. The Claimant be given the choice 'opt out' and declare the case unsuitable for mediation. This addresses the concern in 8.12:

….'*The answer for many is that, in addition to the general arguments of principle, a blanket requirement would be insensitive to the cases in which ADR is either inappropriate or unhelpful*' .

However, we believe the permissible grounds for opting out should be clearly and narrowly defined, so as to minimise satellite litigation on the issue, and so as to ensure that opt-out occurs only in the most exceptional circumstances. These exemptions may or may not necessarily follow decided cases, but we recommend that the guidelines laid down by the CA in Halsey be revisited in the light of this scheme. The Claimant should be required to file full supporting reasons, with a warning that the reasons will be scrutinised at the next interlocutory hearing, and severe cost penalties may follow if the reasons are found to be inadequate. If the Claimant opts out at this stage he or she should be obliged to pay the full issue fee.

D served with claim - informed of automatic referral - cf. Notice to Mediate

4. When served with the claim, the Defendant is informed that the case will be automatically referred to mediation. This will be similar to the Notice to Mediate under the British Columbian scheme.

D admits claim - offers payment or payment terms

5. The Defendant is given the option of admitting the claim, with payment routes made available, and where deferred payment terms may be negotiated, enabling the Claimant to conclude the case in the normal way, and proceed to enforcement.

D denies claim and agrees to - or asks for - mediation

6. The Defendant is given the option of asking for mediation (or issuing a Notice to Mediate) even where the Claimant has asserted the case is unsuitable.

D denies claim but 'opts out'

7. The Defendant is given similar options to assert that the case is not suitable for mediation. The exemptions should again be few and narrowly defined. All supporting reasons should be fully set out, with a similar warning as to cost penalties.

Court informs parties re mediation process; how to find mediator; and sets time limits

8. Where both parties have agreed to mediation, the court will issue a stay, and provide instructions on how to find a CMC Registered mediator. This can be similar to the British Columbian procedure (Appendix 3). There will be provision to deal with cases where the parties are unable to agree upon the mediator.

D pays fee to defend and/or counterclaim

9. The Defendant is required to pay a fee if after refusing mediation, he or she wishes to continue to defend and/or to counterclaim. The Claimant also pays the balance of the issue fee.

Mediator appointed – arranges and conducts mediation

10. Once a mediator is selected, the mediator takes over the conduct of the process, and secures agreement with the parties as to the date, venue, and fee. The fee should be clearly specified so as to avoid grounds for argument, or delays caused by 'mediator shopping'. There may a standard pre-mediation agreement setting out the terms and conditions under which the mediator will act.

Mediation successful

11. Where the mediation succeeds the mediator ensures that terms are written up and agreed, and that the court is notified of the settlement, and any necessary draft order is drawn up.

Mediation not successful

12. Where the mediation does not result in a settlement, each party will have the option to decide whether or not they wish to proceed further.

C pays balance of issue fee to proceed

13. If the Claimant wishes to proceed, he or she must pay the balance of the issue fee.

D pays fee to defend and/or counterclaim

14. if the Defendant wishes to continue to defend the claim, he or she also pays a fee. All payments of fees can be considered by the Court as part of the Costs investigation at the conclusion of the case.

Case proceeds to next stage: Allocation or CMC

15. Where both parties have indicated a wish to proceed further and have paid their respective portions of the fees, the case proceeds in accordance with the usual timetable and procedural rules.

Automatic Referral as above should be repeated at each stage of the litigation: e.g. at Allocation, or at any CCMC; or when proportionality rule is triggered

16. a) The Automatic Referral process (cf. Notice to Mediate) can be repeated at a number of junctures and at any stage of the life of the case. For example, at any CCMC, the judge will be expected to assess the case for suitability for mediation as a standard item; and if appropriate make directions to facilitate 'automatic referral' e.g. disclosure, exchange of position statements, selection of mediator, attendance at mediation. **This addresses issues raised in 9.30, R11: and R15,** namely that there should be :

*"more active promotion of ADR in midstream. with the parties and the court asking whether enough is being done **now** to explore settlement. Just as the parties and their solicitors are able to make objectively reasonable decisions about ADR during the proceedings so a court should be able to decide whether they have in fact done so".*

b) The parties would again have options to opt out at each of these stages, but only under stringent conditions, possibly similar to the exemptions in section 23(c) of the British Columbian regulations, namely: "*where it is materially impracticable or unfair to require the party to attend*". At every stage the reasons for refusal to mediate must be filed, with warnings re cost consequences. **This addresses the question posed in 5.53:**

"What is striking about the regime as a whole is that any real criticism of either or both parties' use of ADR (or lack of it) is left until after judgment. Why cannot and should not that conduct be capable of critical review by the court at the time the decision is taken? The subsequent decision is, first, only taken in the rare cases which get as far as final costs order and, second, is then inevitably overshadowed by the judgment".

c) Proportionality Rule Where the joint costs reach 20% of the total case value, there should be an automatic referral to mediation. We suggest that this rule be made specific: 'Proportionality Rule' i.e. that costs must be proportionate to case value. The CJCIR Group expressed the fear that this may be enormously difficult to police (9.38). Some doubts were also expressed by members of the CMC.

Sir Alan Ward
Chair, CMC
December 2017