

Synopsis of Judicial/ADR Liaison Committee meeting held on 13 July 2020

The matters arising discussed were:

- The Judges' Council approval for the paper on the ADR landscape to be shared more widely, including to the Ombudsman Association.
- The committee's webpage is now live: <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/alternative-dispute-resolution/>

Updates from sub-committees:

The Rule Changes subcommittee:

- A paper was circulated in advance of the meeting on mandatory mediation schemes in Ontario and British Columbia.
- The main issue raised was cost and funding in respect of access to justice.
- A number of points were raised including: the importance of reliable data on cost saving comparison between court costs vs. mediation costs; giving thought to a pre-action protocol to encourage people to mediate before issuing proceedings and quality assurance, leading to queries about how greater regulation for civil mediators would be funded.
- The committee also discussed backlog and concerns about the likely flood of litigation leading to people to urge restraint and adopt ADR. It was noted that this is a good time to raise with the Government the possibility of introducing an automatic referral scheme.
- Individual schemes set up by CEDR and others and the JUSTICE working group report on a compulsory mediation scheme in the housing sector published in February were referenced.
- The committee also discussion pilots in Exeter, Manchester and London however it was unclear if the pilot scheme is still going on.

The Education of Judges subcommittee:

- There does not appear to be an unmet training need although there may need to be an exercise to increase awareness of the pilot amongst some sections of the judiciary.
- It was clarified that personal injury claims are not included in the pilot.
- Difficulties in getting parties to agree to mediation was discussed. It was agreed that the type of case makes a difference as some work may be unsuitable. Although more could be done to promote its further use.
- There was a discussion about normalising mediation and the need for a cultural shift about the psychology of dispute.
- Small claims are now handled by the mediation service. There is informal mediation that goes on for other cases where the judge will offer an opinion at directions hearings. For more expensive cases however there are no schemes available.
- Training judges as mediators and having a judicial mediation list was suggested although it was raised that pressure on district bench made this unattractive.

The Encouragement and Awareness subcommittee:

- The subcommittee decided to concentrate on SMEs.
- SMEs are significantly affected by Covid-19 and many will need to re-negotiate their current contractual obligations.
- The committee were keen to connect with the Law Tech Deliver Panel and to get information from MoJ about mediation awareness and the website. This committee had discussed previously that a central website is best way to raise awareness.

- The subcommittee had analysed a small amount of data on mediation. Factors influencing uptake were found to be: size of the company, previous experience with it, knowledge about the mediation process, misconceptions regarding the process, and presumed costs. The quality of mediators did not appear in data the sub-committee had reviewed.
- There is not that much information about how much SMEs know. The sub-committee should work on how to get that information.
- There was a private scheme set up by CEDR and CIArb aimed at SMEs, a scheme set up with the Manchester Chamber of Commerce and a scheme in London too.

Education of professions generally:

- The subcommittee had investigated the idea of mandatory CPD for the professions. The subcommittee plan to do a gap analysis and will explore opportunities to do with universities and business schools, and to look at other jurisdictions.
- A central recommendation of the Working Group in December 2018 was that ADR should be encouraged.
- The Committee supports the idea of Bar Council amending its Code of Conduct to include ADR.
- CILEx is opposed to changes to current codes of conduct and mandating. It was suspected that the Law Society's view would be the same. The Law Society have been contacted to confirm.
- A potential shift from outcome focused to competency based was considered.

ADR outside the civil courts subcommittee:

- The subcommittee's focus was producing a working draft of the paper.
- The subcommittee intended to do some work on awareness.

COVID-19 Recovery:

- A representative from MoJ attended the meeting.
- There was a discussion about the Committee's views about how to approach ADR in context of Covid-19 and how to increase the capacity of the courts immediately and in the long-term.
- MOJ had not dedicated policy thought to availability of ADR. Covid-19 gives chance for review, as does spending review with HM Treasury.
- Ministers' commitment to mediation and understanding of its benefits were queried.
- Public awareness of mediation was raised.
- It was noted that all the changes described will take time and need funding. The webpage described earlier may be a 'quick win' in the shorter term.
- Real change in the sector, including any mandatory elements, will require analysis and may require legislation which will take several years to achieve.
- MoJ were not able to put ADR in the whiplash scheme before it was due to start, in April 2021. The two main reasons for this were: there were legal risks in only offering it to unrepresented claimants and it was not an essential part of the system.
- The representative from MoJ was interested in any ideas to promote ADR so they could be promoted to colleagues in MoJ. It was made clear this was a personal approach and nothing could be guaranteed. Members were asked to share any thoughts by the end of July. Those raised at the meeting included: a change in the CPR; expanding the mediation pilot referred to earlier to every Court in England and Wales and giving resources to the court to continue FDR type mediations and requiring all businesses to signpost ADR or to ADR regulations, without them being mandated to use it.

The Annual Report:

- Members to send suggestions and consider ahead of the next meeting.

Any Other Business:

- The BEIS white paper mentioned in previous meeting had been delayed and had not yet been published.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf

Date of the next meeting:

- The next meeting is to be arranged off-line for mid-October.