

# All mediation conference

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Since 2006 the Civil Mediation Council (CMC) has held an annual conference for its members which focuses primarily on civil and commercial mediation. The marketing material for the event this year explained that this conference was going to be 'something different'. For this conference, which took place on 23 May 2018, the CMC worked with groups from varied sectors of mediation. This year, the call for a unified mediation profession appears all the louder. Aspirations were evident in this well-organised and smoothly managed event, moderated throughout by the experienced hand of Joshua Rosenberg.

The highlights of the discussions concerned new developments in mediation in medical negligence cases, an attempt to draw lessons from family mediation, calls for change in civil and commercial mediation, grass roots movements in community mediation and restorative justice, and an exclusive announcement about the developments in SEND mediation. This was a conference to champion new developments and successes and to call for a unified and regulated mediation profession.

## Medical negligence cases

The opening session covered fascinating developments in mediation in cases of medical negligence. Juliette Vernon explained that the NHS Resolution Claims Mediation Service had been working with three providers and that, since inception March 2018, 75% of cases have settled in agreement. She emphasised that the mediation allows for other remedies for patients, such as reassurance from the clinical team about future treatment and also for important apologies. Melanie Rowles, of the Medical Protection Society described an instance of a doctor wanting to speak to family to explain how he had changed his practice and how she had to

argue with lawyers to enable this to be done. Julie Charlton reminded the conference of NHS guidance that saying sorry should be encouraged, it is an acknowledgement that things have gone wrong, it is not an admission of liability, and is often one of the most important part of the process of mediation.

Michelle Grace spoke powerfully about her experience of mediation following the tragic death of her son. She described how mediation offered the best way to affect change – and that was her main aim. She described how taking photos of her son to her mediation with medical professionals had mellowed the mood and helped facilitate the mediation. Barrister Richard Furniss emphasised that there was an increasing awareness of mediation in clinical negligence. There is currently a tiny proportion of mediated cases – around 200 mediations out of 17,000 claims last year – but he was confident that numbers would increase, as the NHS pilots are successful.

There was some discussion about how mediation could be made to become more mainstream. Tony Allen, a solicitor and former director of the CEDR, described how the process of mediation is as important as the outcome. It is a process which allows people to say what they feel. He suggested that it might be fairer than we think, to compel mediation. There appeared to be a consensus amongst most speakers that compulsory mediation was not a breach of Art 6 Convention Rights. This view was to be repeated throughout the day.

## Civil and commercial mediation

Bill Wood QC spoke of the work of the Civil Justice Council (CJC), of which he is chairman. The CJC ADR Working Group published its interim report in October

2017. It suggested three important areas of development for mediation:

- public education;
- availability and cost;
- courts to take a more aggressive approach to mediation.

An ambition in the interim report was to develop a presumption that parties should bring forward proposals for ADR. Ian Christie is Secretary of the Civil Mediation Council and observed that litigation is embedded in our culture and a cultural shift was required if mediation were to become normalised and litigation the last resort. He suggested that a cultural change could not come with a soft approach that there is a need for a greater proposal. He considered a change to a system where the court would charge a nominal fee to issue followed by an automatic referral by the court to mediation. He considered the family law experience, involving MIAMs, but felt that more was required. The time had come for serious consideration of compulsory mediation.

Michael Ord spoke of the employment tribunals where there is compulsory conciliation and a success rate 74%. He also spoke of judicial mediation which has been running since 2008/9 and which was seen as hugely successful, last year saving 1200 judge days – the equivalent of six full-time judges. Here there was an argument for judicial assessment at a preliminary hearing – on the papers – to encourage parties to understand the realities of their cases. Mediation should be the culture in every case, but significant change would require a change in culture to be imbedded in the court rules and as part of a properly financed scheme.

Kerry Greenidge, from Her Majesty's Court and Tribunal Service spoke about online court reform. The online civil money claims service came to public Beta status on 26 March 2018. Since then, 6,500 claims have been issued. Of these, 11 cases case settled by parties. There was signposting to mediation. There was acceptance of Rozenberg's suggestion that the system here was not as sophisticated as elsewhere, for

example, British Colombia, which gives information about ADR, helps with a letter before action and then 'squeezes' the parties towards mediation. The current online system in the UK has a mediation service after issue for small claims up to £10,000 and judges can also refer to mediation. Currently 10% opt in to the mediation service and 88% of those that do, settle in mediation. Ms Greenidge was unable to give much detail for the future, except to say that HMCTS are having active discussions with judiciary about mediation.

### Family mediation

John Taylor, Chair of the Family Mediation Council (FMC), introduced the session on family mediation. He described the significance of the Family Justice Report in 2011 and how the subsequent report of Professor John McEldowney in 2012 had made recommendations which had provided a blue print for the development of the FMC and its professional standards. Taylor described a standard framework not written in stone, but open to review. These standards were recognised by the Government, which required potential parties to family litigation to attend mediation information and assessment meetings (MIAMs), which were conducted only by accredited members of FMC. He described the regulatory interaction of the Family Mediation Standards Board as a balance of cooperation and independence, suggesting that the FMSB focusses on practice and the FMC on policy.

The Government has adopted MIAMs, which are provided only by FMC accredited members. Such collaboration means that the Ministry of Justice (MoJ) attend to observe FMC board meetings and the FMC also meets regularly with other organisations, such as Cafcass, a public body to promote the welfare of children and families involved in the family court.

Taylor outlined the FMC strategic plan for 2018/2019. There would be a focus on the continued development of professional standards and an emphasis on raising awareness of mediation. There was also

mention of the how to take successful mediations from outcome to final settlement. For family mediators, this involves consideration of whether mediators in a successful mediation should then draft a consent order to be placed before the court so that an order might be made in the agreed terms. Taylor explained that the FMC was looking to make a mediation agreement more easily ratified by a court.

This is a controversial proposal. In 2015, the Solicitors Regulation Authority (SRA) issued guidance which stated that in limited circumstances, where a solicitor is not advising the parties as to their legal position, but simply reflecting an agreement that they have reached, it may be possible to enter in to a separate retainer for the preparation of a draft consent order on the parties' joint instruction. The perceived advantage is the provision of a more efficient and less expensive service. For many solicitor-mediators, this is an inevitable evolutionary step, especially for those who already tune their minutes of agreement towards the language of the court.

But there are concerns about the blurring of the solicitor and mediator roles and of indemnity insurance. The SRA guidance warns of potential breaches of Principles 1, administration of justice, and 6, public confidence, and instructs solicitors not to so act where there is concern about potential unfairness to either party. And in providing a more efficient service, the proposal is likely to discourage parties from taking independent legal advice before committing to the agreement.

Robert Creighton, Chair of the Family Mediation Standards Board, explained that the board provided regulation and governance over the FMC. For Creighton there was an overlap between policy and practice. Regulation was necessary to protect the public and also to give the profession a status and validity and also to maintain support of stakeholders, such as the MoJ and Legal Aid Agency. Regulation meant training and continuous professional development. Accreditation was a gold standard. But all of this brought challenges.

Creating and maintaining a register of accredited members had proved to be a difficult and costly process, and had necessitated financial assistance from the MoJ. The process of accreditation had created a tension between the need for rigour and the need to encourage accreditation. It remained uncertain whether there was enough work for all of the accredited members. There remained a question as to the right number of people to be awarded accreditation.

A contribution from the floor was critical of the FMC description of members as either accredited, or 'working to accreditation'. The latter description was said to deter the public and so an alternative suggested solution was to have bronze, silver, and gold ratings of mediators, each category describing the work that the mediator is competent to undertake.

### **Restorative justice**

Linda Millington led a discussion on restorative justice which is based on an understanding that everyone affected by a crime is enabled to repair the harm and find a positive way forward. It comes after the court process, bringing offenders to account, to take responsibility for their crime and to say sorry. The principles of restorative justice are that it has to be voluntary, it has to be a safe process (there is a need for preparation and risk assessment), and that restorative (reflective) questions are used to guide the process.

Darren Carson explained the process in one particular case involving a 16-year-old boy to illustrate how the process is designed to work and how offenders come to appreciate the outcome of their actions and develop empathy with others. Lucy Jaffe explained the victim's perspective and gave an example of a burglary case where the victim had been enabled to speak about impact of the crime upon her and others. As with many other cases, the restorative justice process was intended to help the perpetrator avoid reoffending.

### **Workplace meditation**

David Whincup opened a discussion about mediation and mental health in the work

place. Mediation success rates were said to be 80/90% against a backdrop where the Employment Tribunal system was seen to be breaking down. Rachel Suff, of the Chartered Institute of Personnel and Development, explained that mental health was a significant issue in the workplace. CIPD had found that long term absences are often caused by mental health or stress issues. 55% organisations report an increase in reporting of common mental health issues. 60% stress issues are work related. Employees need strategies to deal such problems and mediation has an important role to play in that.

Suzy McCormick is the lead consultant on mental health and attendance management for civil service human resources, based at the Cabinet Office. She leads the health and wellbeing strategy for the civil service and implementation of the recommendations of the Farmer / Stevenson 'Thriving at Work' review. Mediation in the civil service comprises 160 civil service trained mediators, where a mediation dashboard collates and measures mediation across the civil service. A new approach to mental health culture has seen 2,000 staff becoming trained as 'mental health first aiders'.

Simon Long is a senior advisor at the Advisory, Conciliation and Arbitration Service (ACAS). He set out the workplace mediation practice standards where mediation has to be confidential, impartial, and in a safe environment. There has to be a clear and voluntary process, based on informed consent. Long explained how mediation is not stress free, but can help and can be used in a return to work process. Poor mental health and stress does not prohibit mediation and mediators may be guided by medical opinion as to the appropriateness of the process. Adjustments should always be considered by mediators, who can take steps to meet a participants needs, considering, for example, if extra support is required, or if sessions should be shorter, or if there needs to be a higher level of mediator intervention, or whether a participant should be accompanied by a friend or colleague.

Jessica Sullivan, of Care First, explained how mediation is used within an employee assistance programme. It is not used in the middle of a disciplinary process, but only after that has been completed. The process is designed to have a forward looking focus and provides a feedback to the manager and so is not confidential

### Community mediation

David Walker MBE emphasised that community mediators have a passion for their local communities and often look to recruit and train local people. Bacons College was offered as a pioneering example where sixth form students had been trained to become mediators over 10 years ago and ever since. A sixth form student at Bacons College was able to explain how he had benefited from a mediation when he was in year 7. His two mediators were 6th formers and their intervention had allowed him to be more comfortable at school. This student explained succinctly how a peer mediation service embeds mediation in people and offers important life skills for the future.

Corrine Rechais outlined a mediation service for neighbours, sometimes supported by a housing association to provide services free for the user where neighbours were encouraged to talk to one another and explore the individuals' needs, to work out how to resolve their problems. Dr John Allison, of the London Community Mediation Council, described a challenging landscape where there was a marked decline in the funding of mediation, with local authorities cutting funding. The financial picture for community mediation is a difficult one. There is a need for more research measuring the social benefit of community mediation.

If there was anyone from Whitehall with responsibility for local communities, they did not make themselves known to the conference.

### SEND mediation

Here, Whitehall was present. The conference was treated to an announcement by the Department of Education that it was about

to publish new standards on the use of mediation in cases concerning children and young people who have special educational needs or a disability (SEND). There will be two training courses and a system of accreditation. This is about professionalising the practice and applications to join a panel are now open. A register would help local authorities to identify accredited mediators. The new scheme is not compulsory. The course is designed for existing mediators already with accreditation. There is no compulsion for the mediator to be a lawyer. A question from the floor invited the department to reflect upon its provision for mediators with disabilities.

### On reflection

This was a conference with ambition. It was proud to praise successful pioneering developments in mediation and did not shy away from controversial issues such as compulsory mediation. There are bold ambitions for a unified and regulated mediation profession and for recognition and funding from Government. But the conference also raised some difficult issues. The experience of family mediation suggests that Government support comes at a price of Government oversight of policy and practice. Accreditation and professional membership comes at a price for mediators and there remains a scarcity of work to share around.

Government support comes not without risk. The Government is keen to establish

alliances with those who may be able to help reduce the cost of providing a judicial system, but the creation of a unified and well organised profession will not guarantee its ongoing support. Family solicitors will point to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 as evidence of that.

Some family lawyer mediators may understandably be confused. The CMC has ambitions for a unified profession, supported by Government, at a time when calls for the de-regulation of legal services are louder than ever. The solicitors' regulator, the SRA, recently decided to proceed with controversial proposals to allow solicitors to deliver services to the public from unregulated entities and to allow individual self-employed solicitors to provide services without sole practice authorisation. The SRA also proposes significant changes to the way that solicitors qualify with a route to qualification, including the new Solicitors Qualifying Examination, in which there will be no place for supervision during work experience or assessment of competence by a supervisor.

Some mediators attending might reflect upon the strength of the conference, which was to be found in the diversity of mediators and the diversity of their ideas and motivation.