



## **Bar Council response to the consultation on a draft Code of Professional Practice for Mediators**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Mediation Council's (CMC) consultation on a draft Code of Professional Practice for Mediators.<sup>1</sup> The response has been prepared by members of the Bar Council's Alternative Dispute Resolution Panel.

### **About the Bar Council**

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:
  - Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
  - Inspiring and supporting the next generation of barristers from all backgrounds
  - Working to enhance diversity and inclusion at the Bar
  - Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
  - Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
  - Sharing barristers' vital contributions to society with the public, media and policymakers
  - Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales

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<sup>1</sup> [CMC Consultation on a Draft Code of Professional Practice](#)

- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas
3. To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.
  4. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.
  5. We welcome the opportunity to comment on any scheme designed to raise professional standards and support it where appropriate. It is recognised that a considerable number of barristers are qualified, practising mediators who are members of the Civil Mediation Council. Even more appear as party representatives in mediations where members of the Civil Mediation Council are mediating.

## **Overview**

6. It is now generally regarded as inevitable that mediation should be regulated, and there are a number of drivers to this end now in place. Barrister mediators would prefer a regulatory regime which works rather than have one imposed on mediation and mediators for political reasons which won't work.
7. Having said that, in the wider context, the following points are worth mentioning:
  - Civil commercial mediation is presently unregulated in England and Wales and has been since its inception here in April 1989. As an industry, growth has been entirely organic
  - Mediation is not the provision of a legal service
  - Unlike certain jurisdictions, notably Turkey, Greece, Italy and the UAE one does not have to be a lawyer to be a mediator
  - It follows that in this jurisdiction being a mediator does not require any professional qualification, or indeed, any training. There is no barrier to entry

- Appearing as an advocate or party representative in mediation is not a reserved legal occupation
- Since party autonomy is at the heart of the mediation decision-making process, the flexibility of outcome and procedural freedom does not easily lend itself to regulation: that is why the new CMC Code is concerned with ‘professional expectations’

8. The drivers for regulation include the following:

- The need to strengthen the industry standard 40-hour training course in this jurisdiction
- Effective and enforceable sanctions to underpin consumer/user complaints
- Recent developments in the Civil Procedure Rules<sup>2</sup> permitting courts to direct mediation without the consent of the parties, as an increase in non-court-based dispute resolution; there is a concern that judges making such case management may be unaware of the bullet points set out above or, for example, the fact that there is no present rule for disclosure in mediation, no duty on the mediator to ensure equality of arms, and the law in respect of mediation confidentiality<sup>3</sup> is not settled

9. Notwithstanding Brexit, most professional training organisations and major service providers within the industry, and by extension individual mediators, subscribe on a voluntary basis to the European Code of Conduct for Mediators 2004, compiled in large part by Michel Kallipetis KC, past Chairman and current member of the Bar ADR Panel, and leading counsel in the two seminal Court of Appeal authorities<sup>4</sup> on mediation.

10. The preamble to the European Code states:

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<sup>2</sup> CPR 1.1 - The overriding objective of dealing with cases justly and at proportionate cost, so far as practicable, will now include "promoting or using" ADR.

CPR 1.4(2) and 3.1(2) - The courts' general case management duties and powers have been clarified to not only encourage but also require parties to engage in ADR when appropriate.

Part 44 - When the court is exercising its general costs discretion, its consideration of the parties' conduct may now include "whether a party failed to comply with an order for ADR, or unreasonably failed to engage in ADR."

<sup>3</sup> *Farm Assist Ltd (In Liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC) per Ramsey J

<sup>4</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416

- a) This code of conduct sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.
- b) Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect the code.
- c) Organisations have the opportunity to make available information on the measures they are taking to support the respect of the code by individual mediators through, for example, training, evaluation and monitoring.
- d) For the purposes of the code mediation is defined as any process where two or more parties agree to the appointment of a third-party – hereinafter “the mediator” – to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State.
- e) Adherence to the code is without prejudice to national legislation or rules regulating individual professions.
- f) Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as with regard to specific areas such as family mediation or consumer mediation.

11. It is anticipated that any new regulatory code would take the principles set out in the European Code as a model in the absence of a good reason for not doing so. It is questionable whether any wide departure would be otiose.

12. Post-Brexit, a simple step might be to adopt the European Code as a code for England and Wales, without more.

13. Where a court or tribunal is directing mediation, we respectfully suggest any control (regulation) of mediators is probably best left to the respective Rules Committees dealing with the Civil Procedure and Family Procedure Rules.

14. The Civil Mediation Council is a small member organisation, established in about 2005 and registered as a charity in about 2015. It has no present regulatory function and is regarded as a registration body. It presently represents a small proportion of practising civil commercial mediators, certainly less than 20%, and possibly less

than 10%. It is however, regarded as an important industry voice and a vehicle for the mediation world to speak to the Ministry of Justice, the Judiciary and to Government. If it had ambitions to act as a regulator, the CMC would probably be the first to say it is inadequately resourced at present to undertake such a role.

### **The draft Code of Professional Practice for Mediators**

15. We understand the need to improve and standardise professional standards and welcome this Code as a discussion document for the whole of the civil commercial mediation profession which presently lacks anything dedicated to this jurisdiction.
16. The Code makes reference throughout to 'regulated mediation professional' and other 'regulatory processes' neither of which terms are defined. In fact on analysis this is a voluntary code of practice and the CMC has no power to create a regulatory regime. It is a series of 'professional expectations' consistent with mediators who are engaged in dealing with the consumers of such services, but the entire code is parochial in the sense that it is written for the benefit of mediators who are registered with the CMC as members 'and sits alongside the CMC's Membership Rules, Standards and Guidance .... and the CMC's Equality and Diversity Policy'.
17. There is a strong sense of well-meaning and the protection of the public which is to be welcomed in an environment of movement away from *alternative* dispute resolution to non-court-based dispute resolution. It is strong on considering fairness and integrity of the process, which are presently out with the law: notwithstanding reference the Code makes to the Nolan Principles, mediation is primarily a private process governed by the contractual relationship between the parties and the mediator. Being appointed as mediator is not in the nature of a public office, and reference to Nolan is, with respect, misconceived.
18. However it falls down on effective and enforceable sanctions for breach of the Code, or ensuring compliance with a member's complaints process. There is no express disciplinary provision. Since it is a voluntary Code presumably the ultimate sanction would be to expel a mediator/mediation service provider from membership. That does not provide an adequate remedy for a consumer of mediation services who is dissatisfied with professional conduct and where a

member's complaints policy does not provide sufficient redress and suggests that this is no more a regulatory regime than a voluntary code.

19. Should the Code of Professional Practice introduce effective sanctions for breach, it is presently silent on dealing with double jeopardy for matters of complaint concerning the inadequacy of professional standards by barrister mediators. That needs to be addressed in conjunction with the Bar Standards Board on the advice of the Bar Council's ADR Panel. In addition how in such circumstances the Code would deal with issues of confidentiality should be specified.
20. We are broadly supportive of any initiative which raises professional standards and protects the public. This CMC Code of Professional Practice is a useful discussion document for its members and will promote wider considerations as the industry moves forward into the mainstream.

**Bar Council**

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