

# Mediation in Judicial Review: A practical handbook for lawyers

Varda Bondy

Margaret Doyle

## **About the Public Law Project**

The public law project (PLP) is a national legal charity, founded in 1990 which aims to improve access to public law remedies for people whose access to justice is restricted by poverty, discrimination or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- Increasing the accountability of public decision-makers;
- Enhancing the quality of public decision-making;
- Improving access to justice.

Public law remedies are those mechanisms by which citizens can challenge the fairness and/or legality of the decisions of public bodies and so hold central and local government and other public bodies to account. They include non-court based remedies such as complaints procedures and ombudsman schemes and also litigation remedies, in particular judicial review.

To fulfil its objectives PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

**Mediation in Judicial Review:  
A practical handbook for lawyers**

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# Foreword

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Mediation is now a familiar part of the litigation – and pre-litigation – landscape. In private law disputes experienced solicitors and counsel now know how to spot the cases that are suitable for mediation, and the cohort of satisfied customers is growing all the time. The same cannot be said of public law litigation. There is very little experience of mediation and there are a number of factors at work which make mediation inappropriate or unnecessary in many – perhaps, most – cases. Two excellent research studies which the Public Law Project has conducted (one together with the University of Essex) have provided valuable insights into the reasons for this.

And yet, as the present authors make clear, there remain a lot of cases in which mediation is not only appropriate but also a much better way of reaching a satisfactory outcome. There is now a growing recognition of this fact, but recent studies have shown that in the public law field there is still a lack of confidence among practitioners and officials that they know how to identify those cases: and even if they know, they then have to persuade the other side to agree. Research in the fields of special educational needs and planning have also identified these weaknesses – and in the private law field many more personal injury disputes would be satisfactorily resolved through mediation if only more practitioners could identify the tell-tale signs.

This admirable guide therefore meets a contemporary need. It combines a light-touch explanation of the process with sound practical advice on the nuts and bolts of setting up a mediation. The case studies provide excellent illustrations of the way in which, in certain cases, mediation can provide solutions of a kind the courts cannot deliver. It would be nice to think that in future years a party's representatives will have consulted this guide before they say 'No' to a request for mediation in the judicial review field. They will be missing a lot if they don't.

*Henry Brooke*

*January 2011*

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While many have helped in this work, all errors and omissions as well as conclusions and opinions are the responsibility of the authors alone.

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*The Nuffield Foundation is a charitable trust established by Lord Nuffield. Its widest charitable object is 'the advancement of social well-being'. The Foundation has long had an interest in social welfare and has supported this project to stimulate public discussion and policy development. The views expressed are, however, those of the authors and not necessarily those of the Foundation.*

# Contents

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<b>Introduction: Why this handbook?</b>	<b>1</b>
<b>Section One: Why mediation? Policy and judicial imperatives</b>	<b>3</b>
<b>1.1 Background</b>	<b>3</b>
<b>1.2 What judges say outside the courtroom</b>	<b>7</b>
<b>Conclusion</b>	<b>9</b>
<b>Section Two: What is mediation?</b>	<b>11</b>
<b>2.1 Introduction</b>	<b>11</b>
<b>2.2 Models of mediation</b>	<b>12</b>
<b>2.3 Key principles of mediation</b>	<b>13</b>
<b>2.4 How is mediation different from roundtable?</b>	<b>14</b>
<b>2.5 Assessing the suitability of mediation</b>	<b>17</b>
<b>Conclusion</b>	<b>24</b>
<b>Section Three: Practicalities</b>	<b>25</b>
<b>3.1 Introduction</b>	<b>25</b>
<b>3.2 Proposing mediation</b>	<b>25</b>
<b>3.3 Responding to an offer to mediate</b>	<b>26</b>
<b>3.4 Timing of offers to mediate</b>	<b>27</b>
<b>3.5 Setting up: the steps</b>	<b>29</b>
<b>3.6 The components of mediation costs</b>	<b>30</b>
<b>3.7 Choosing and engaging a mediator</b>	<b>31</b>
<b>3.8 Agreeing the date and venue</b>	<b>35</b>
<b>3.9 Establishing who needs to attend</b>	<b>35</b>
<b>3.10 Preparation</b>	<b>37</b>
<b>3.11 Lawyers' and advisers' roles</b>	<b>39</b>

<b>3.12 At mediation</b>	<b>41</b>
<b>3.13 Settlement agreements, confidentiality and publicity</b>	<b>44</b>
<b>3.14 Where costs cannot be agreed</b>	<b>47</b>
<b>3.15 Public funding: LSC rules on funding for mediation costs</b>	<b>48</b>
<b>Appendix I: Case studies</b>	<b>51</b>
<b>Appendix II: Mediation schemes</b>	<b>61</b>
<b>Appendix III: Using a mediation-providing organisation</b>	<b>71</b>

# Introduction

## Why this handbook?

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What place does mediation have in judicial review cases? Research by the Public Law Project (PLP) and the University of Essex on the permission stage in judicial review<sup>1</sup> concluded that most judicial review claims are settled and that most settlements satisfy the claims made in the judicial review. While some cases that settle as a result of bilateral negotiations could arguably result in a better outcome for one or both parties were they mediated instead, mediation is an unlikely option where more familiar and straightforward routes to disposal are available to lawyers.

Mediation in judicial review would, therefore, be likely to be considered in cases in which both parties have an interest in reaching a settlement but are unable to do so because negotiations have become 'stuck'. Indeed, PLP's parallel empirical research on mediation and judicial review<sup>2</sup> established that mediation can be a useful process where negotiations are impossible, difficult or have broken down. As an independent neutral third party, a mediator is in a good position to assist where parties are in general agreement about the course of action required to resolve a dispute but need help to hammer out the detail, as well as to reduce or obviate oppositional dynamics in more conflictual situations. In several of the case studies (see Appendix I), mediation enabled underlying issues in a dispute to be teased out, and all the successful mediations resulted in outcomes that gave claimants more than they could have achieved had they been successful at court.

The empirical research on mediation also showed that many public law practitioners have no detailed understanding of the mediation process and confuse it with other forms of settlement negotiations such as roundtable meetings. The latter are, of course, a useful means of resolving disputes, but they are different from mediation in many respects and, therefore, appropriate in different circumstances.

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1 V Bondy and M Sunkin (June 2009) *The Dynamics of Judicial Review Litigation*, Public Law Project, London, available at <http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>.

2 V Bondy and L Mulcahy with M Doyle and V Reid (June 2009) *Mediation and Judicial Review*, Public Law Project, London, available at <http://www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf>.

This lack of experience and understanding of mediation within the judicial review context presents a practical difficulty for many lawyers and is likely to prevent them from engaging in a comprehensive discussion about mediation with their clients. We know from our research that solicitors play a key role as gatekeepers in influencing the choice of redress mechanism through advising their clients on the available processes. Lawyers naturally focus on the redress routes that they consider relevant, as informed by their own experience and expertise. However, in accordance with the duty to advise clients on all dispute resolution options and with an ever-increasing emphasis on mediation on the part of policy makers, they need to remind themselves that mediation must at least be weighed up along with more well-known routes.

This handbook is intended to address the gaps in legal practitioners' understanding of how mediation can be used as an alternative to, or alongside, judicial review and to provide practical assistance to those practitioners who are, or who may be, considering mediation as a route for resolving public law disputes, particularly judicial review claims.

Many practitioners interviewed in the research stated that they could not envisage how mediation might be of benefit in their cases, as they were already adept at negotiating early settlements directly with the other side. Yet lawyers who were familiar with mediation were quite clear about the potential of reaching good outcomes that could not be reached through bilateral negotiations or through litigation. It was also apparent that many lawyers did not know how to go about finding a mediator or arranging for mediation, while some who had attempted it had found it time-consuming and frustrating. Therefore, we have aimed with this handbook to present a number of practical ideas and suggestions from practitioners, lawyers and mediators about how mediation could best be incorporated into the judicial review sphere.

PLP's research also suggested that mediators have limited awareness of the need to understand public law principles and the framework of duties and powers within which public bodies operate. Therefore, while not aimed at mediators specifically, it is hoped that this publication will assist those mediators who are unfamiliar with judicial review to understand the public law context, the ways in which it may differ from other types of dispute, and what attributes parties and lawyers dealing with such disputes are seeking in a potential mediator.

Finally, many of the recent developments encouraging greater use of mediation apply to mediation in civil litigation generally. There has been little or no mention of public law by the mediation lobby and policy makers, and the few specific references which have been made to it in government policy initiatives on alternative dispute resolution (ADR) have been ambivalent or contradictory. Most of the publications on mediation, e.g. practice manuals, textbooks, and articles, focus on civil litigation. It is hoped that this guide will not only provide answers to practical questions but also address other concerns that practitioners may have with regard to mediation in this particular context.

# Section One

## Why mediation?

### Policy and judicial imperatives

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Since Lord Woolf's *Access to Justice* report in 1996, there has been considerable enthusiasm among policy makers and some members of the judiciary for the increased use of alternative dispute resolution (ADR), including mediation. Yet there has also been a marked lack of clarity about the use of mediation in public law cases specifically. This section provides an overview of the policy initiatives on, and judicial attitudes to, mediation over the past decade. It discusses, in particular:

- changes to the Civil Procedure Rules (CPR) from 2000
- new pre-action protocols from 2002 and
- key court judgments indicating judicial attitudes towards mediation
- what judges say outside the courtroom

#### 1.1 Background

##### *Civil Procedure Rules*

The CPR<sup>3</sup> were introduced with a focus on litigation as a last resort, stating that mediation and other routes to resolution should be attempted before going to court. CPR 1.4(1) obliges the court to further the overriding objective of enabling it to deal with cases justly by actively managing cases. This includes, according to rule 1.4(2)(e):

‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure’.

Rule 26.4(1) provides that the court can also stay the case if considered appropriate:

‘a party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means’.

Although the term ‘alternative dispute resolution’ is defined in the glossary to the CPR as a ‘collective description of methods of resolving disputes otherwise

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<sup>3</sup> CPR 1998 (SI 1998/3132) <http://www.legislation.gov.uk/uksi/1998/3132/contents/made>.

than through the normal trial process', it is usually understood to mean mediation involving a third party.

Refusal of an offer of mediation can have costs consequences. The general rule in CPR 44.3(2)(a) is that the unsuccessful party is ordered to pay the costs of the successful party. This needs to be read together with CPR 44.5(3)(a)(ii), which requires the court, in deciding the amount of costs to be awarded, to have regard to the conduct of the parties, including in particular:

'the efforts made, if any, before and during the proceedings in order to try to resolve the dispute'.

The cases in which the question of displacing the general rule has arisen are discussed below.

### *Pre-action protocols*

In order to help parties and courts understand what is expected, pre-action protocols have been developed to set out the steps which should be taken. The judicial review pre-action protocol, introduced in March 2002, required some form of ADR to be considered. By 2007 the wording was brought into line with that of the other pre-action protocols, to read:

'The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the claimant and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review "must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose".'(3.1)<sup>4</sup>

The protocol goes on to suggest that the appropriate ADR options to consider in judicial review cases are discussion and negotiation, ombudsmen, early neutral evaluation and mediation. At the time of writing, the authors are not aware of any judicial review cases in which parties have been penalised for failure to consider or engage in mediation or other forms of ADR. However, such costs penalties have been applied in other types of case (see below), and this situation could therefore be subject to change.

### *Case law*

Since the CPR were introduced in 2000, a number of significant judgments have illustrated the approach taken by the judiciary towards the courts' duties on case management and encouragement of ADR. Cases have focused on two key questions: can courts adjourn cases, or even refuse to hear a case, because one of

the parties refuses to try mediation or some form of ADR, and what is meant by an ‘unreasonable’ refusal to mediate’?

To date, the only judicial review case in which a judge has pronounced on the value of using mediation is the Court of Appeal case of *Cowl*,<sup>5</sup> in which Lord Woolf stated that:

‘. . . insufficient attention is paid to the paramount importance of avoiding litigation whenever possible . . . Particularly in the case of these disputes [between public authorities and members of the public], both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.’<sup>6</sup>

Lord Woolf’s judgment in *Cowl* has been cited in every subsequent policy paper on mediation, and by mediation providers, to argue that mediation and judicial review can, and should, co-exist. (Note that this is in contrast to the government’s ADR Pledge, announced by Lord Chancellor Lord Irvine in 2001, the same year as *Cowl*, and discussed further below.) However, what is striking is not that a prominent and influential judge such as Lord Woolf favours the use of mediation, but rather the fact that, nearly 10 years after Lord Woolf’s pronouncement in *Cowl*, no other judgment in a judicial review case has supported this view. The occurrence of mediations as an alternative to judicial review remains rare.

While *Cowl* remains the only authority on mediation in the context of judicial review, there is now a body of case law giving support for the use of ADR in general, and mediation in particular. The courts have so far stopped short of *requiring* parties to mediate, but there has been a great deal of interest in how far the courts should go in directing parties to mediate and penalising those who do not.

In 2002, Railtrack successfully defended a case against a claimant who wanted compensation for her horses, which had been killed by a train.<sup>7</sup> However, the court refused to allow Railtrack to recover its costs on the grounds that the company had refused the court’s suggestion that mediation was the best way to resolve this dispute.

In another case, *Hurst v Leeming*,<sup>8</sup> Mr Justice Lightman considered the validity of a number of reasons put forward by a successful defendant to justify his refusal to mediate. Some reasons were dismissed, including the fact that he believed that he had a watertight case and would therefore certainly win in court. The only acceptable reason among those advanced by the defendant, the judge decided, was whether, viewed objectively, mediation had any realistic prospect of success. He said:

‘Mediation is not in law compulsory, but alternative dispute resolution is at the heart of today’s civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute,

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<sup>5</sup> *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Dunnett v Railtrack plc* [2002] EWCA Civ 303.

<sup>8</sup> *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 *Lloyds Rep* 379.

there must be anticipated as a real possibility that adverse consequences may be attracted.’

The case of *Halsey*,<sup>9</sup> reported in May 2004, concerned a negligence claim against Milton Keynes NHS Trust. As the hospital did not accept that staff had been negligent, and had expert evidence to back up this stance, it refused an offer of mediation from the claimant’s solicitor. The trust claimed that the offer was tactical, in that it attempted to pressure it into negotiating unjustified compensation by threatening cost penalties for a refusal to mediate.

The case had been talked about and discussed in mediation circles for some months before the judgment was issued. One of the reasons for this unusual degree of anticipation about a forthcoming judicial decision was the fact that the Appeal Court judges had requested opinions from the Civil Mediation Council (CMC), the ADR Group and the Centre for Effective Dispute Resolution (CEDR)<sup>10</sup> about the value of mediation. Hearing about these requests, the Law Society also submitted its own opinion. *Halsey* makes it clear that the Appeal Court judges did not accept the CMC’s argument that there should be a general presumption in favour of mediation. Instead, they accepted the submission of the Law Society that the question of whether mediation was unreasonably refused should depend on a number of factors, which should be evaluated by the court in each case.

The court set out six (non-exhaustive) factors to be borne in mind when considering whether a party has acted unreasonably in refusing ADR.<sup>11</sup> The case makes it clear that mediation ought not be made compulsory. However, after stressing that the court’s role is to encourage, not to compel, the use of mediation, Dyson LJ stated that:

‘All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.’

The judgment clarifies two points: courts cannot compel parties to use mediation or another form of ADR, as this would be contrary to Article 6 (the right to fair trial) of the European Convention on Human Rights (ECHR); however, courts can deprive a successful party of their costs if the court considers they have unreasonably refused to consider mediation. The *Halsey* case has shifted the burden of argument from the party that refuses to mediate to the party that loses the case. It is up to the losing party to show that mediation had a reasonable chance of success and that the winning party was unreasonable to refuse mediation.

*Halsey* is the current authority in case law regarding the requirement to consider ADR, and was reiterated in the Court of Appeal case of *Burchell v Bullard*.<sup>12</sup> In that case, concerning a building dispute which resulted in a judgment to the value of £5000 while incurring costs of over £160,000, Ward LJ stated:

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<sup>9</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576.

<sup>10</sup> The CMC, an umbrella organisation for providers of civil and commercial mediation, was newly formed at the time. ADR Group and CEDR are mediation providers.

<sup>11</sup> Paras 17–28.

<sup>12</sup> *Burchell v Bullard* [2005] EWCA Civ 358.

'*Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so . . . These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.'

A subsequent judgment in *Earl of Malmesbury*<sup>13</sup> took the costs sanctions risk into new realms by taking into account, when making an order for costs, the parties' behaviour in the mediation itself. This was possible because in that case both parties chose to waive privilege, thereby putting the judge in the unusual position of being privy to the discussions that had taken place within the mediation. In that case, Mr Justice Jack wrote:

'I consider that the claimant's position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded . . . As far as I am aware the courts have not had to consider the position where a party has agreed to mediate but then has taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party to agree to mediation but who then causes it to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take account of in the costs order in accordance with the principles considered in *Halsey*.'

Although the courts so far have stopped short of requiring parties to mediate, they have articulated a clear duty on practitioners to consider mediation and to explain a refusal to mediate so as not to incur costs sanctions. To what extent practitioners should be concerned that behaviour within mediation might lead to sanctions is not clear, as for the most part the confidentiality of mediation discussions leaves these outside judicial scrutiny.

These judgments, taken together with the pre-action protocols, CPR, and the mediation-specific prompts that have been introduced within case management, such as the Allocation Questionnaire, set out guidance that practitioners would be wise to follow, even in judicial review proceedings, in spite of there being no evidence of 'refusal to mediate' costs sanctions being applied so far in judicial review. The guidance is useful to consider not only in responding to an invitation to mediate, but also to bear in mind in seeking to recover costs when a genuine and early offer to mediate is refused.

## **1.2 What judges say outside the courtroom**

Mediation providers have long campaigned for the promotion of mediation through case management, including compulsory mediation, and have found ardent

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<sup>13</sup> *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB).

supporters among some senior judges. For example, in 2008 Lord Phillips, the then Lord Chief Justice, suggested in a speech on ADR<sup>14</sup> that ‘parties should be given strong encouragement to attempt mediation before resorting to litigation’. Whilst he stopped short of arguing for compulsory mediation, he was clearly favourable to the suggestion:

‘What are the pros and cons of compulsory mediation? Strong views are expressed about this on both sides. Those opposed argue that compulsion is the very antithesis of mediation. The whole point of mediation is that it is voluntary. How can you compel parties to indulge in a voluntary activity? “You can take a horse to water, but you cannot make it drink.” To which those in favour of compulsory mediation reply, “yes, but if you take a horse to water it usually does drink.” Statistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition.’

The then Master of the Rolls, Sir Anthony Clarke, gave a speech at the CMC’s national conference on the future of civil mediation in May 2008, in which he also demonstrated a stance in favour of compulsory mediation.<sup>15</sup> In it he criticised the *Halsey* judgment as being ‘overly cautious’ in its conclusion that compelling parties to mediate could constitute a violation of Article 6 ECHR, and suggested that this point may be open to review ‘either by judicial decision or in any event by rule change’. He said that he wanted to see directions to mediate made routinely by judges.

These assertions were made about mediation generally, without any specific consideration of public law disputes. However, an important question is whether judicial review actions should be treated in the same way as other forms of civil litigation. The special status and function of public law was recognised in the 2001 government pledge to use ADR to resolve disputes involving government departments wherever possible. The pledge specifically excluded public law and human rights disputes. The exclusion reflected the then Lord Chancellor Lord Irvine’s view that, while ADR has an expanding role within the civil justice system, ‘there are serious and searching questions’ to be answered about its use and that it was ‘naïve’ to assert that all disputes are suitable for ADR and mediation. Examples cited by Lord Irvine included cases concerning the establishment of legal precedent, administrative law problems, and cases which ‘set the rights of the individual against those of the state’. These, he said, must be approached ‘with great care’.<sup>16</sup>

Other members of the judiciary, while not referring specifically to public law, have expressed measured approaches to calls to keep cases out of court and for the increased use of mediation. Lord Justice Jackson, for example, in his 2009 review of costs in civil litigation,<sup>17</sup> refers to submissions made by CEDR to the inquiry on costs to the effect that:

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<sup>14</sup> [http://www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf).

<sup>15</sup> <http://www.judiciary.gov.uk/media/speeches/2008/speech-clarke-lj-mor-08052008>.

<sup>16</sup> Inaugural Lecture to the Faculty of Mediation and ADR (1999), available at [webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/speeches/1999/27-1-99.htm](http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/speeches/1999/27-1-99.htm) (last accessed 11 January 2011). The latest pledge report (2008–09) is available at [www.justice.gov.uk/publications/alternative-dispute-resolution-2008-09.htm](http://www.justice.gov.uk/publications/alternative-dispute-resolution-2008-09.htm).

<sup>17</sup> ‘Review of civil litigation costs: final report’ (December 2009), [www.judiciary.gov.uk/NR/rdonlyres/.../0/jacksonfinalreport140110.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/.../0/jacksonfinalreport140110.pdf), at chapter 36.

‘CEDR is concerned that too few cases settle during the pre-action protocol period. Procedural judges need to raise questions of their own motion about whether mediation has been tried before issue and where dissatisfied with the replies “impose a sanction on either or both parties”. Even if there is a good reason why mediation cannot take place pre issue, judges are entitled to ensure that a provision for mediation is inserted into the case management timetable at the appropriate stage. In CEDR’s view, “A degree of oversight and if need be compulsion may even be needed to be exercised over procedural judges in terms of implementing such a policy.”<sup>18</sup>

Jackson does not fully adopt CEDR’s view, and acknowledges that ‘Mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure.’ However, he agrees with CEDR that ‘mediation has a significantly greater role to play in the civil justice system than is currently recognised’<sup>19</sup> and, therefore, ‘there should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring’.<sup>20</sup>

Similarly, the Master of the Rolls, Lord Neuberger, in a speech on mediation in November 2010,<sup>21</sup> stated that mediation ‘cannot be a substitute for justice’, placing himself at odds with government proposals to promote mediation so as to prevent many legal aid funded cases from reaching the courts. In a plea for a balanced approach to mediation, he said:

‘Education [about mediation] should . . . put mediation in its context – a new means of resolving disputes, but not one that replaces well-established means – settlement, litigation, capitulation. Education should include when not to mediate, and when to cease mediation, as well as how not to mediate.’

## Conclusion

There is increasing pressure from government to keep cases out of court.<sup>22</sup> The Ministry of Justice’s plan is to ‘develop proposals to promote wider use of alternative dispute resolution, including mediation, in the civil courts and make it easier for people to get advice and guidance’.<sup>23</sup> This echoes the policy initiatives made by its predecessors (the Lord Chancellor’s Department and the Department for Constitutional Affairs) over the past decade. But the renewed policy emphasis on avoiding litigation, combined with the threat of costs sanctions and the continual reduction in the availability of legal aid, mean that solicitors must be aware of when mediation might be the right process for a dispute and be able to explain why it is not if challenged.

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<sup>18</sup> ‘Review of civil litigation costs’, see n. 17 above, at ch. 36 para. 2.1.

<sup>19</sup> Ibid. at ch. 36 para. 3.2.

<sup>20</sup> Ibid. at ch. 36 para. 6.3.

<sup>21</sup> <http://www.judiciary.gov.uk/NR/rdonlyres/1437BE8B-BC0D-410F-9585-847666B973DF/0/mojspeechmediationlectureA.pdf>. Also available at <http://www.judiciary.gov.uk/media/speeches/2010/speech-mor-gordon-slynn-memorial+lecture>.

<sup>22</sup> See, e.g. [www.jonathandjanogly.com/content/mediation-form-dispute-resolution](http://www.jonathandjanogly.com/content/mediation-form-dispute-resolution).

<sup>23</sup> Business Plan for 2011–15 <http://www.justice.gov.uk/moj-business-plan2011-15-nov10.pdf> at 3.6.



# Section Two

## What is mediation?

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This section:

- defines and describes mediation
- discusses key principles of mediation
- examines how mediation is different from other types of negotiated settlements, especially roundtable meetings
- describes the stages of judicial review and
- discusses the issue of determining whether or not mediation is suitable

### 2.1 Introduction

Mediation is a process of assisted negotiation guided by a trained, independent professional – the mediator. It gives the parties in dispute and their representatives an opportunity to agree jointly the details of any settlement after an examination of their respective needs and of the options and possibilities for resolution. The mediator does not make a determination of the issues in dispute or impose a settlement on the parties, but aims to assist the parties to identify and agree a settlement that is responsive to their needs and with which they commit to comply.

Normally mediation meetings involve an initial face-to-face meeting, with all parties together with the mediator.<sup>24</sup> Some mediators use ‘caucusing’ or ‘shuttle mediation’, in which, after an initial face-to-face meeting, they then separate the parties into different rooms and go back and forth (shuttle) between them conveying information and settlement proposals. They then bring the parties together to draft the final settlement agreement, if one is reached. Other mediators conduct the mediation entirely as a face-to-face session. In PLP’s research, several public law practitioners expressed a preference for face-to-face sessions throughout mediation. As mentioned in Section 3, this is an issue for lawyers to talk through with their clients and the mediator in advance of mediation, as part of the preparation.

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<sup>24</sup> It is also possible to conduct mediation on the telephone; this is the model used for the majority of mediations held for small claims in county courts.

## 2.2 Models of mediation

There are a number of models of mediation, or approaches, and the mediator's role varies slightly with each. The model most often used in the UK is known as **facilitative mediation**, in which the mediator does not give opinions or advice. Rooted in the arena of community-based disputes, facilitative mediation is also practised by mediators trained in commercial and family mediation fields. Another model or approach, **evaluative mediation**, requires the mediator to give the parties an informed view or opinion of, for example, the merits of the case or the strength of the parties' respective legal positions.

Both facilitative and evaluative mediation are interest-based approaches in that they prioritise the parties' interests over legal rights. In private law disputes, parties are free to reach settlements that are based on their interests rather than legal entitlements. However, in public law disputes there are likely to be factors such as *vires*,<sup>25</sup> resources and issues of wider public interest that might limit the parties' scope for settlement. This is also a reason why the majority of practitioners interviewed expressed a preference for a mediator who was familiar with the powers and decision-making processes of the public body in question or with the area of law in dispute.

A **rights-based** model of mediation was identified by the Law Society in 1991 as an alternative approach to that of facilitative mediation. In rights-based mediation, 'the mediator, personally or with other professionals or experts, helps the parties to evaluate their respective strengths and weaknesses with a view to their agreeing a resolution broadly in line with, and which reflects, their respective rights'.<sup>26</sup>

This model is used by the Equalities Mediation Service (EMS) (see Appendix II) and may be suitable for some public law disputes. It has been argued that a rights-based model prioritises legal rights and

'intervenes in the power balance between the parties by allowing an otherwise less powerful complainant to assert legal entitlements which have "an existence and legitimacy separate from the relationship" between herself and the respondent'.<sup>27</sup>

It requires the mediator to be responsible for ensuring the objectives of relevant legislation are furthered in the mediation process and that legislative provisions and rights entitlements are not breached by the terms of the settlement.

In all models of mediation, decisions on settlement are made by the parties themselves, together with their legal advisers when present, and not by the

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<sup>25</sup> An action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. This arises, for example when the legislation relating to a public body does not include the necessary power or has precise limits on when the power can be used. Public bodies acting illegally in this way can be described as acting '*ultra vires*' which means beyond or outside their powers. See PLP's *Guide to Judicial Review* at <http://www.publiclawproject.org.uk/downloads/GuideGroundsJR.pdf>.

<sup>26</sup> R Hunter and A Leonard, 'Sex discrimination and alternative dispute resolution: British proposals in the light of international experience' [1997] *Public Law*, summer: 298–314, quoting the Law Society (1991), p. 14.

<sup>27</sup> Hunter and Leonard, 'Sex discrimination', n. 26 above, quoting Girdner, 'Custody mediation in the United States: empowerment or social control?' (1989) *Canadian Journal of Women and Law* 3:134.

mediator. In contrast to court proceedings, there is no imposed outcome, and so mediations do not always conclude with a resolution of the dispute.

Where proceedings have been issued before mediation has been attempted, the case may have been stayed to allow for mediation. If mediation has not resulted in a settlement, the case can progress to the next stage of litigation.

### 2.3 Key principles of mediation

Although there are several models and approaches to mediation they all have the following principles in common:

- independence and impartiality of the mediator
- voluntary participation by all parties
- confidentiality of the process
- need for authority to settle on the part of the participants

#### *Independence and impartiality*

The mediator is expected to be independent and impartial, with no connection to the dispute or the parties and no personal interest in the outcome. Parties are to be treated fairly and given equal opportunity to present their positions. If a mediation has not resulted in a settlement and the case progresses to litigation or another dispute resolution mechanism, it is not appropriate for the mediator to be involved in subsequent proceedings in respect of that case.

Where mediation is funded by a public body, for example, by the local authority in special educational needs cases, it is important that the mediation service as well as the mediator are independent of that body.

#### *Voluntary*

In the UK, mediation is considered a voluntary process. No party can be compelled to mediate, and one of the reasons put forward for mediation's success as an alternative process to litigation is that parties enter into it willingly and in good faith. This is in contrast to litigation or ombudsman investigations of public law disputes in which one party commences the process and the other party, the public body, responds. Compulsory mediation, i.e. the possibility that parties could be directed by the court to engage in mediation, has been mooted over the years in various contexts and rejected.<sup>28</sup>

Yet, as discussed in relation to the case law on mediation, while judges cannot order parties to mediate, they can apply costs sanctions where a judge considers that a party has unreasonably refused an offer to mediate. (See Section 1.1 'Background' and Section 3.3 'Responding to an offer to mediate')

<sup>28</sup> In Ontario, Canada, there was a successful experiment in setting up a compulsory mediation scheme in 1999/2000 which analysed the results of some 3000 mediations and demonstrated that there were significant reductions in the time taken to dispose of cases as well as a reduction in litigation cost. The conditions and context, however, are very different to those applying in public law. See, also, H Genn et al, *Twisting Arms: Court-referred and court-linked mediation under judicial pressure* (May 2007) Ministry of Justice Research Series 1/07 at <http://www.justice.gov.uk/publications/docs/Twisting-arms-meditation-report-Genn-et-al.pdf>.

### *Confidentiality*

Confidentiality of discussions at mediation meetings is considered essential in order to encourage the parties to engage in open dialogue. Anything said during the discussions cannot later be used as evidence in litigation, and can be understood as being akin to ‘without prejudice’ negotiations.

In practice, this can prove impracticable. For claimants, it is quite likely that information on what has been agreed will need to be shared with colleagues and family members. For public bodies, there cannot be complete confidentiality as they need to report to, for example, district auditors, and have to be accountable for their decisions generally. All this must be explored with the parties at mediation, and what has been agreed should be reflected in the settlement agreement.

The principle of confidentiality does not preclude the parties themselves from agreeing that any resulting settlement agreement should be made public. Indeed, according to one mediator/barrister with experience of many high-profile cases, interviewed in the empirical research study on mediation, some form of publicity can on occasion be unavoidable:

‘Many public law cases are likely to be mentioned in at least local papers or be talked about. In appropriate cases, it is therefore important to get the parties to agree a joint statement at the end of a case. If a local authority is adamant that a case must remain entirely confidential, one may want to question what that is about.’

For more on confidentiality of mediated outcomes, see Section 3.13 ‘Settlement agreements, confidentiality and publicity’.

### *Authority to settle*

The mediation should end with clarity about whether or not the issues in dispute have settled, in full or in part, and, if so, what the specific terms of any settlement are, including timescales for any agreed actions or payments. To achieve that, it is important that those who have authority to settle a legal claim attend the mediation or delegate their authority to someone who can attend. In the absence of such authority, full resolution cannot be achieved at the mediation, and this may be frustrating to all those involved, wasting time and resources.

Limited authority to settle does not mean the mediation cannot proceed. When authority to settle is limited (for example, where a decision has to be made by a panel of professionals), then these limits need to be clarified beforehand and agreement to participate within such limits should be confirmed by all parties prior to the mediation.

For more on the authority to settle, see Section 3.9 ‘Establishing who needs to attend’.

## **2.4 How is mediation different from roundtable?**

Practitioners are familiar with the requirement to consider ADR and to attempt to resolve disputes other than by means of court adjudication. They are likely, however, to be more familiar with settlement processes other than mediation, usually bilateral negotiations resulting in settlement or, less frequently, roundtable meetings.

Settlement negotiations are usually conducted by telephone or in correspondence, except perhaps for last-minute negotiations outside court, when the parties meet face to face. But even then, any communication between the parties tends to occur through lawyers.

Roundtable discussions can be similar to mediation in that the parties and their representatives, as well as other relevant individuals, are involved in face-to-face discussions with a view to reaching a solution. The process and the dynamics of roundtable meetings are different from mediation in various respects, however. The former are not facilitated by a neutral third party, there is no caucusing, and the form of final agreement is likely to be different. The fact that roundtable meetings usually take place at the public bodies' premises can also give rise to an actual or perceived power imbalance in favour of the defendant public body.

In PLP's research on mediation, a number of practitioners identified the formal structure of the mediation process as an asset when compared with roundtable meetings, which some felt could dissolve into a free-for-all. Mediation was considered to offer a guided structure overseen by someone with no personal interest in the dispute or its outcome. A barrister/mediator put it as follows:

'The more straightforward disputes, you would hope could be settled more by roundtable meeting and without the need for a mediator. Another factor that can make a difference is how well the parties know one another or trust one another. If you've got solicitors or counsel who know one another and have a good relationship, they may feel reasonably confident in their ability to have a structured dialogue without the need for external structure. If you have a really messy case or just don't have that trust, and you need lots of bodies there to consult and give instructions or you have more than two parties, then really mediation would greatly improve the prospect of success.'

Interviewees were impressed by the greater clarity about what has been agreed in mediation as compared with roundtable discussions. One practitioner/mediator identified this as a key role for the mediator:

'In roundtable discussions there [are] always arguments about what's agreed, is it binding, is it in full and final settlement . . . there is always a danger that in fact each person will think they've agreed different things from what the other person is agreeing . . .'

In practice, where it is apparent that the parties have established direct positive dialogue with a view to reaching a mutually acceptable solution, it is unlikely that they would consider it necessary to engage in mediation. Mediation, however, can be helpful to the parties and lead to long-term benefits, not only in situations when relationships have deteriorated and parties are in need of outside assistance to communicate effectively, but also where the parties agree on what needs to happen, yet disagree on how it is to be carried out.

The time and cost of arranging mediation requires practitioners to consider carefully whether any additional benefits would derive from involving the third party as opposed to progressing settlement negotiations or holding a roundtable meeting.

The following is an example of a successful roundtable settlement meeting without a third-party neutral. The duties owed by the defendant, an NHS trust,

had been agreed in advance. The client, who had learning disabilities, requested supported independent living, but this was rejected by the NHS trust. After nearly two years of unsuccessful negotiations, and after a judicial review claim was issued, the trust proposed mediation. Initially, the parties discussed who to appoint as mediator, but when it became apparent that the defendants agreed to the request in principle and that it was only a matter of negotiating the details, the parties agreed that there was no need for a mediator. In this case, the claimant solicitor felt that a formal mediation might have been more intimidating for her client than a roundtable meeting with people who were all known to him. She remarked:

‘Here he was being told that he was in charge and that he could take part in the appointment process to the care package. It was very strongly conciliatory in its tone so that he felt very supported.’

In case study 10, ‘No one wants to be the first to blink’ (see Appendix I), mediation succeeded in resolving issues in a dispute where two roundtable meetings had failed because, in that case, both parties feared showing weakness by demonstrating a willingness to compromise. The fact that the judge invited them to mediate enabled the parties to agree to mediation and enabled the mediator to take charge of the arrangements. The mediator was able to explore the issues in private with the key decision makers and their legal advisers, something they had not felt able to do openly in the roundtable setting.

Roundtable negotiations can share similarities with mediation in empowering vulnerable parties and generating satisfactory outcomes. Experiences can vary, however. One mediator considered that roundtable meetings often excluded the clients themselves, and that mediation alone offers the opportunity of full participation by clients. He said:

‘Roundtable conferences . . . are lawyer-centric; they are dominated usually by the senior lawyer present on that team. I do not believe that the parties . . . are involved other than peripherally in the large majority of them. Very frequently they’re in a side room, and the effective debate goes on unmoderated, on a bilateral, probably positional basis, as between lawyers on either side.’

For this interviewee, the mediator’s prescribed role is to ensure that clients have a chance to have their say and this means that the clients have to be present. He gave an example of one mediation in which he went to the trouble of visiting the claimant at home as she was unable to attend the meeting. Moreover, he also arranged for the defendants to visit the claimant at home. In another case, in which the disabled claimant was unable to attend or be visited, he encouraged her parents to bring a photograph of her to the mediation.

In other interviews with mediators, it was argued that mediator–litigant interactions, especially those undertaken in caucuses, allowed for issues and preferences to be teased out in a way which was not encouraged in bilateral negotiations where the lawyers tend to take centre stage. Another mediator emphasised the importance of being able to interrogate the underlying issues in a mediation:

‘We call it the exploring phase, to understand what it is that is driving the parties.’

He suggested that this approach was relevant in public law disputes:

‘where often politics and what’s going on behind the scenes is the main drive for whether [a case] is going to settle or not’.

## 2.5 Assessing the suitability of mediation

The specific characteristics of judicial review mean that the likelihood that mediation will present itself as a preferred option is small. Judicial review is a remedy of last resort, and in most cases practitioners will already have explored settlement opportunities. In addition, judicial review as a process is relatively simple and quick compared with other forms of civil litigation. These factors, combined with the high rate of settlements of judicial review claims, mean that opportunities for mediation might be limited.

### *Timing of judicial review cases*

In order to assess the suitability of mediation in judicial review claims, it is important to identify the stages of the process and the opportunities each presents for settlement.

The judicial review process consists of six key stages:<sup>29</sup>

- 1 The potential claimant sends a letter before claim in accordance with the pre-action protocol, except where exemptions apply. Examples of such exemptions include cases which are urgent or where the defendant is *functus officio*.<sup>30</sup>
- 2 The defendant replies, usually within 14 days, either agreeing to provide the remedy sought or aiming to persuade the potential claimant that the claim has no merit.
- 3 If matters are not resolved and a claim is issued,<sup>31</sup> the claimant must serve the defendant with the claim within 7 days of the date of issue.
- 4 The defendant files an acknowledgement of service within 21 days of service of the claim.
- 5 A judge considers the papers and decides whether to grant permission for the claim to proceed to substantive hearing.
- 6 Substantive hearing.

The majority of judicial review challenges settle before reaching final hearing.

As mediation is one form of negotiated settlement, it may be useful to be reminded of when settlements occur in judicial review disputes generally. *The Dynamics of Judicial Review* study shows that there are three stages in the judicial review process at which settlements occur. These are:

<sup>29</sup> On procedure, see <http://www.hmcourts-service.gov.uk/>.

<sup>30</sup> *Functus officio* ‘is a judicial or official person prevented from taking a matter further because of limitation by certain regulations’, HM Court Service, ‘Glossary of Latin terms’, <http://www.hmcourts-service.gov.uk/infoabout/glossary/latin.htm>.

<sup>31</sup> Judicial review claims must be issued as soon as practicable and, in any event, no longer than three months from the date of the decision being challenged.

- following the letter before claim (LBC) and prior to issue;
- immediately after a claim has been issued; and
- after permission to proceed has been granted at any time before substantive hearing.

As is apparent from research findings,<sup>32</sup> once a public body accepts that a claim has merit, cases tend to settle, unless the public body is unable to provide what is required by reason of resources, e.g. where a family is in need of very large accommodation in a particular area and the authority cannot afford to acquire a suitable property. If merit is agreed, the public body may provide what the claimant requires, or merely agree to reconsider its decision. Either way, once an agreement is reached between the parties with regard to the challenge, there appears to be little reason for either party to want to mediate and, for publicly funded parties, it is highly unlikely that funding would be made available for mediation once the legal challenge has been concluded successfully.

Accordingly, it stands to reason that mediation can happen at any of the stages at which settlements tend to occur as set out above. In addition, mediation can take place after the conclusion of a substantive hearing if practical issues remain to be sorted that Administrative Court judges are ill-equipped to deal with, although public funding may not be available for that. Similarly, while mediation cannot offer a substitute for the court's powers to grant an injunction or a mandatory order, there is no reason why mediation should not take place after the urgent aspect of the case has been dealt with.

There are advantages and disadvantages to early and to late mediations, but each case has to be considered according to its own combination of factors.

#### *What are the concerns of practitioners?*

PLP's research showed that practitioners considered mediation to be unsuitable in judicial review cases for a variety of reasons, both practical and principled. Practical examples included a perception of 'no room for compromise', cases that need an injunction, cases in which the decision-making body is *functus officio*, or cases requiring a legal determination on a disputed question of law or policy. Some practitioners also placed emphasis on 'principled objections', such as the need to develop the law by way of establishing judicial precedents, the need for transparency and publicity in public law cases and issues of power imbalance between unequal parties.

#### **'No room for compromise'**

It is very often the case that in mediations involving disputes over monetary compensation, the parties settle on a sum that is at a mid-point between their respective starting points. Where adequate redress cannot be provided solely by the payment of a sum of money, it may be more difficult to see what the parties can each bring into the process so as to achieve a compromise. However, the notion that mediation is inevitably based on compromise is regarded as a fallacy by mediators. Mediation offers interest-based negotiation and, in this way, it can

shift the focus away from legal entitlements/legal rights and wrongs, to consider practical aspects of needs and resources and what outcomes the parties want, and are able, to achieve. In this respect, mediation offers a qualitatively different process from the adversarial system and should be able to deliver qualitatively different outcomes to those achievable through litigation or bilateral negotiations.

Obviously, such an approach is not always appropriate, or indeed, possible, for example, where the dispute is about whether or not a legal duty is owed or the lawfulness of a local authority policy. However, working out the details of how a particular duty is to be carried out, either when the defendant accepts that a duty is owed or where a court has so ruled, is precisely when mediation can be at its best (see, for example, case study 3, 'Multi-party disputes' (Appendix I)).

### **Power imbalance**

Another concern, raised by practitioners as well as academics, is the potential power imbalance between the parties in public law disputes arising when one party is an individual and the other a public body, with the difference in resources, experience and control that flow from that. However, where lawyers are present at mediation, power imbalances are likely to be less of an issue than when parties are unrepresented.

### **The public interest and precedents**

A key objection voiced by practitioners is that mediated settlements do not set precedents and therefore they provide a remedy for an individual only, rather than leading to a change that is in the wider public interest. Yet this objection could be said to be as relevant to the many settlements that are negotiated daily between solicitors as they are to mediation. *The Dynamics of Judicial Review* study shows, however, that lawyers engage in direct and roundtable negotiations, as well as mediations, even where important issues of public interest are involved, wherever they believe that such mechanisms can achieve the best outcome for their clients. For example, in case study 7, 'The human factor' (Appendix I), the solicitor for the claimant explained that achieving the desired outcome in mediation was more important than attempting to set a precedent in a contested judicial review. This is consistent with the lawyer's duty to obtain the best outcome for their client. However, the solicitor in this case also pointed out that other users within the same health trust would benefit from the outcome of the mediation because of the increased availability of trained female carers.

### *Cost of mediation compared with judicial review*

On the whole, interviews with lawyers and mediators did not support the claim that mediation is inevitably cheaper than litigation and have actually highlighted how difficult it is to generalise in this respect. It is clear that in some situations a successful mediation will be cheaper than a lengthy and complex court hearing, but more expensive in other situations. The added expense of mediator and venue may, or may not, be offset by any savings in reduced preparation time. In the case of a judicial review that proceeds all the way to a final hearing and that typically lasts no longer than a day or two, it is unlikely that mediation would lead to costs savings. On the contrary, it is likely to be more expensive, although there can be

other costs aspects that are not quantifiable and other benefits with regard to outcome that might lead parties to wish to mediate. Certainly, in judicial review cases involving a commercial dispute between two privately paying, litigation-savvy bodies, mediation might well provide financial benefits. But, as put by one experienced solicitor/mediator dealing with many community care cases:

‘[Mediation is] really not a cost saving exercise at all in judicial review, if you’re going to do it properly.’

The comparative speed and cost of mediation and litigation can depend on the stage at which mediation happens, on the anticipated duration of a substantive hearing compared with the duration of the mediation and on whether the mediation is successful. Mediation is unlikely to be feasible in cases requiring urgent interim relief, for which the judicial review process is quick and effective. Even in non-urgent cases, the stage at which the mediation is held will influence the time savings achieved.

#### *Assessing the benefits of mediation when considering suitability*

A distinctive benefit of mediation (aside from the potential advantages discussed above, i.e. speed and cost) is that it can lead to outcomes that are more creative and flexible than any remedy the courts can offer. The interaction between the parties, with the support of the mediator, can help improve strained relationships, reduce stress for the client, and even result in giving claimants a sense of empowerment arising from their engagement in reaching a satisfactory outcome with the other side.

Mediation can also have potential benefits for lawyers. The Law Society of New South Wales produced a Mediation Tool Kit in 2007<sup>33</sup> which articulates, on the basis of practitioners’ experience, why lawyers ought to consider mediation:

‘In addition to the advantages experienced by clients, legal practitioners who have referred matters to the mediation program have identified a number of benefits:

- improvement in solicitor/client relations by the provision of an appropriate forum for the parties to make decisions, as opposed to hasty settlements made on the court steps;
- expansion of solicitors’ practices by the provision of an additional service as an alternative to litigation particularly in situations where litigation is neither cost effective nor desirable;
- preparation for mediation facilitates the exchange of outstanding information such as updated medical reports, and additional particulars of claim;
- enhancement of the image of the legal profession as a whole when prompt preparation of a client’s matter can be followed swiftly by structured settlement negotiations; and,
- early recoupment of costs and funded disbursements.’

Although not specifically related to public law disputes, these elements can be relevant nevertheless in many public law cases.

Apart from those situations in which litigation is unavoidable (e.g. urgent cases requiring injunctive relief or cases that require a determination of a point of law), it is not hard to see what claimants have to gain from mediation. Judicial review offers a limited range of remedies which often leave the claimant in no better a position than they were before, e.g. when the successful challenge leads to a reconsideration of a decision, but with the same substantive outcome as before. In disputes over aspects of community care or special educational needs, for example, the court cannot engage with details of any services to be provided, whereas detailed provisions can be agreed in mediation.

For defendants, however, different considerations are likely to apply when choosing or refusing to engage in mediation. In cases that can be readily conceded, either because the authority accepts that it is in the wrong or because it is cheaper to concede a claim than to defend it, a settlement following negotiations between lawyers is obviously cheaper and quicker than mediation. It is therefore in cases that require complex solutions that defendants are most likely to consider mediation.

The experience of a public law solicitor who has conducted many high-profile judicial reviews is that it is easier to get defendants to concede a challenge than it is to engage them in mediation:

'I would say that I probably offer mediation to the opponent one way or the other in about 75% of the cases. In some letters [before claim] I say more about why it is right for a case than in others. For example, I had a community care case . . . that was absolutely ripe for mediation. It was a very long running bitter dispute about needs assessment and the means by which those needs might be met for a disabled woman. It was very complex factually, and judicial review was obviously picking at the various bits of the decision-making process and saying this is wrong for these reasons . . . but in a best case scenario there was going to have to be a series of judicial reviews happening in parallel and it just seemed to me that there were eminently practical solutions to that case which were just not being grappled with by the local authority, and to sit down with an independent person would have been ideal but they just consistently refused it.'

This experience was echoed by a barrister and trained mediator with experience of acting for defendant public bodies who explained:

'In a sense [the defendants] have the control – they make the decision [to settle] based on their criteria, and certainly 99 times out of 100, when they say, “we’ll reconsider it”, then that’s the end of the case, because either the claimant will be happy or the claimant won’t be able to get on with the case, because it won’t be worth it, or because the court won’t entertain it . . . So, when you make that decision – do we regroup and re-decide – you do it from a position of control. If the question is should we participate in mediation, I suppose you know you’re going to have a lot of cost, you don’t know whether it’s going to secure an outcome [and] by definition you don’t have control over that outcome, [as] you’re in a shared exercise. So I suppose that looking at it from a defendant’s perspective, you are often creating a situation where it costs you more and you have less control over it than making the decision [to settle] yourself.

. . . one scenario where there is a motive [to mediate rather than settle] is . . . if that re-decision is going to lead inevitably to judicial review number two or . . . number three, then you might think, well, actually, the exercise of sitting

down and talking face to face – client to client, rather than lawyer to lawyer – that a mediation offers, may actually give us long-term gains over and above what we’re going to achieve through even conceding this case.’

The above quote illustrates that the defendant public body can control the outcome of a challenge by merely agreeing to re-consider a decision without it leading to a substantively different outcome. Therefore, for mediation to happen each party must have a motive, something to gain from participating in mediation.

#### *Relationship between the parties*

The history of the parties’ mutual dealings and the degree of co-operation, or alternatively adversity, between the parties needs to be considered as one of the factors that may make a case suitable or unsuitable for mediation. Mediators and mediation providers contend that mediation is conducive to repairing damaged relationships, which is a particularly important factor in situations in which the parties are likely to remain in contact after the case is over. Case studies have shown that mediation can restore damaged relationships, but does not always succeed in doing so.

An example of where it can is case study 3 (see Appendix I). In this community care case, deep hostility and mistrust between parties was overcome through mediation. It is also an example, albeit not a common one, of the combined use of litigation and mediation to address different aspects of a case.

This mediation took place with all the parties’ representatives together around a table, not through caucusing. The defendant local authority’s counsel felt that without mediation, given the level of distrust and hostility, they would not have reached a resolution.

In case study I (see Appendix I), involving a dispute over special educational needs, the long-term failures and mistrust between the parents of a disabled child and their local authority led to a bitter stalemate that could not be overcome through mediation.

The claimant’s solicitor proposed mediation in an attempt to achieve an outcome that was not available under judicial review remedies, namely an agreement to set up an independent user trust and detailed agreement of its terms. According to the mediator, a QC with relevant expertise, this was:

‘. . . an optimal case for mediation in terms of the subject matter and the continuing relationship, and there was an issue about wrapping up the compensation issue from the past, so it had all the elements you could potentially chuck into the mix, it was a perfect case for mediation’.

However, the mediation occurred too late in the process and:

‘[the parties] have gone beyond the stage at which they were capable of agreeing anything, even the most trivial drafting suggestions’.

#### *Claimants’ participation*

Judicial review requires, on the whole, little participation from the parties compared with other forms of litigation. The claimant’s involvement is usually confined to

giving instructions and signing statements drafted by their lawyers. They need not attend court at all, let alone give evidence. The arguments are often legal and technical. The outcome, even if successful, can be frustrating in that it does not necessarily resolve the substantive issue that was the subject of challenge, due to the limited nature of the remedies available.

A barrister, who is also a trained mediator, described the contrast between mediation and adjudication in the following way:

'If you look at who participates in a court case, it's the judge and barristers, and it's not the client . . . at a mediation, the interests take centre-stage, and you have the ability for the decision-maker and the party to . . . have a direct dialogue that takes place in a structured way, where there [are] checks and balances to secure equality – and that could be very powerful, and that could also lead to a breakthrough in terms of understanding.'

For claimants, therefore, mediation could seem particularly attractive in judicial review disputes if they wish to take an active part in the unfolding of their case. It could also be argued that, because in judicial review the arguments focus on strictly legal issues that are not always easy to explain, lay claimants can feel that they are being marginalised and that the issues that are important to them are being overlooked. Mediation could therefore afford individuals an opportunity to take part in negotiations and present their own narrative. As long as their lawyers are present, they do not risk their rights and entitlements being overlooked. Indeed, empowerment of the parties in the sense of their active involvement in the resolution of the dispute is one of the major advantages mediation is said to offer.

However, this is not always the case. For example, a lawyer with extensive mediation experience suggested that, in situations concerning a determination of the legality of a decision, participation is not necessarily a priority for claimants:

'I don't know that actually parties always want their own outcome. A lot of parties want the judge to decide their case, they think that's what judges are there for, that's what justice is about, and I'm a citizen and I'm entitled to go to court and to get a decision yes or no. And they will accept the judge's decision most of the time.'

Moreover, lawyers pointed out that mediation is not alone in its capacity to strengthen the voice of litigants. Claimants may, indeed, feel empowered by obtaining a High Court judgment against the public body with which they are in dispute. For example, a solicitor who represented a women's rights charity in a challenge to the threatened withdrawal of funding described the charity's clients. The women, some of whom spoke little or no English and could not understand the exchanges in the courtroom, packed the public gallery, cheering and waving when the claim was allowed. Success in the High Court in this case was clearly felt to be greatly empowering of the claimant organisation's constituency user group.

## Conclusion

Lawyers are required to consider mediation and should discuss it with their clients. They should not assume that their client will not be interested or that the case is unsuitable and, therefore, it need not be raised with them. Whether or not it is appropriate to propose mediation will depend on a number of factors:

- the nature of the dispute or claim
- whether the claim can be settled by negotiation
- what outcome the client wants
- what added value the involvement of a mediator might bring
- whether the client wants to be involved in the decision-making process
- time considerations – is it urgent?
- cost considerations – what will it cost to mediate, and how does this compare to the anticipated cost of litigation?

It is easier to identify cases that may be unsuitable, such as:

- cases requiring the declaratory function of the court
- claims based on alleged *ultra vires* issues
- cases where points of law need to be decided
- cases raising issues of public interest
- cases where vindication of rights are at issue
- and cases concerning the requirement of proper and lawful decision making by public bodies<sup>34</sup>

However, such exclusions are not necessarily clear cut. For example, where injunctive relief is required, it would need to be obtained through judicial review proceedings, but it may well be possible or desirable to engage in mediation regarding other aspects of the dispute after this has been achieved. Similarly, where both parties require a determination on a point of law, this must be dealt with by the Administrative Court. Yet, once the point of law is clarified, mediation may be the better forum for working out practical aspects of resolution (see case study 3, 'Multi-party disputes' (Appendix I)).

Accordingly, there are no fixed criteria to identify disputes which are suitable for mediation, nor for matching a dispute with a particular process. A decision to mediate has to be based on understanding of the process, knowledge of the client and the dynamics between the parties, and readiness to think laterally.

# Section Three

## Practicalities

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### 3.1 Introduction

This section gives practical guidance on using mediation in a judicial review claim, including:

- proposing mediation and responding to offers to mediate
- choosing a mediation provider
- setting up a mediation
- preparing for the mediation session
- what happens at mediation
- types of mediated outcomes
- costs implications
- public funding

The aim of this section is to provide practical guidance to practitioners and, in particular, to those practitioners who have not had much, or any, experience of mediation. We have also drawn on the insights of public lawyers interviewed in our research project on mediation and judicial review because we believe it is useful for colleagues to learn from each other's experiences.

### 3.2 Proposing mediation

Although the information required in a letter before claim (LBC), as set out in the judicial review pre-action protocol, does not specifically include a proposal to mediate, it is good practice to include such a paragraph where appropriate. For example:

'We consider that this dispute may be suitable for mediation because . . . and we invite you to liaise with us over the appointment of a mediator and a timetable for this to happen. Please note, however, that we will not delay the issue of the proceedings to engage in ADR/mediation given the requirement that any claim for judicial review be issued promptly. We will, however, subject to our client's instructions, consider agreeing a stay of these proceedings in order to facilitate ADR.'

If your authority is minded to agree to mediation, please provide full details of the issues you consider to be in dispute, contact details of any provider/mediator that you would propose, details of the likely timescales involved, details of the likely costs of mediation and how your authority proposes those costs be met, and details of any concessions your authority is prepared to make pending the outcome of the mediation referral.'

Where appropriate, a reminder could follow that emphasises the relevant authorities and obligations in relation to mediation. For example:

'Our client considers that independent mediation is the most constructive way forward, and remains willing to engage in this process in a committed and open-minded manner, provided you are willing to offer similar commitment. You are reminded that this is consistent with the Practice Direction on the Pre-Action Protocol, as well as with authorities such as *Halsey* (ref) and *Burchell v Bullard* [2005] EWCA Civ 358.'

Some lawyers may be reluctant to propose mediation for fear that this may be seen as an indication of weakness in their case. However, where the LBC clearly articulates the grounds for judicial review as well as the reasons why mediation may be appropriate, this need not be a concern.

Cynical proposals, with no genuine basis for believing mediation to be viable, are to be avoided. The *Halsey* judgment noted that courts should be alert to claimants with a weak case inviting mediation as a tactical ploy, thus using the threat of cost penalties to try to force a settlement (see Section 3.3. below 'Responding to an offer to mediate' (Appendix I)).

### 3.3 Responding to an offer to mediate

If mediation is proposed by the other party, it is important to give it consideration, not least because failure to do so may be deemed to be unreasonable by a judge, giving rise to adverse costs consequences.

In *Hurst v Leeming*, the judge determined that the fact that extensive costs had already been incurred was not a justification for refusing mediation, nor was the fact that one party believed they had a watertight case.

The ruling in the *Halsey* case confirmed this, but it stated that the burden of proving that the refusal to consider mediation was unreasonable rests with the losing party.

As far as we are aware, the existing power to impose costs sanctions for unreasonable refusal to mediate has not been used in a judicial review case as yet.

Not all offers to mediate are necessarily serious. A party may offer mediation as a strategic device, either to delay matters or to ensure that they are seen as reasonable by the judge. As mentioned earlier, this is to be avoided. Where mediation is clearly inappropriate due to urgency, for example, this will have to be explained in the response to an offer.

According to the *Halsey* case, 'reasonable' reasons for refusing mediation include:

- **The nature of the dispute:** while the court in *Halsey* took the view that 'most cases are not, by their very nature, unsuitable for

mediation’, it also gave examples of cases that *are* unsuitable, such as those in which a party wants the court to resolve a point of law, where a binding precedent is sought and where injunctive or other relief is essential to protect the position of a party.

- **The merits of the case:** a *reasonable* belief that a party has a watertight case may be sufficient justification for a refusal to mediate, but an unreasonable belief would not be. This factor is designed to protect large organisations, especially public bodies, from tactical offers of mediation by claimants who have no hope of winning a case.
- **The extent to which other settlement methods have been attempted:** the pre-action protocols, including that for judicial review, make it clear that parties are expected to consider discussions, negotiations, the ombudsman, early neutral evaluation and mediation. The court in *Halsey* noted, however, that ‘mediation often succeeds where other settlement attempts have failed’.
- **The cost of mediation:** in cases where this costs would be disproportionately high.
- **Delay to a trial date:** where this would result from a late offer of mediation.
- **Whether mediation had a reasonable prospect of success:** the burden of showing this lies with the unsuccessful party who proposed mediation and not with the successful party who refused.

### 3.4 Timing of offers to mediate

The particular characteristics of judicial review also affect the timing of an offer to mediate. Although, in theory, the earlier the mediation takes place, the greater the potential for time saving, the realpolitik of public law disputes appears to dictate a more likely role for mediation later on in the process. Mediation may, for example, offer a potential for time saving between grant of permission and substantive hearing, especially when the pressures on the court list mean that cases are waiting many months to reach final hearing. In these circumstances mediation could enable parties to have more control over the pace at which the matter is progressing.

#### *Pre-issue*

Offering mediation prior to proceedings being issued raises a difficulty specific to judicial review: there is the requirement to issue proceedings promptly and, in any event, no later than three months from the date of the decision being challenged. In addition, publicly funded claimants (see Section 3.15 ‘Public funding’) may encounter funding difficulties that would make it more viable for them to consider mediation after a claim has been issued. Often the issues in dispute may not be crystallised until later on in the process, a point made by a claimant solicitor with extensive mediation experience in the area of community care law:

‘[Mediation] is not [likely] pre-issue or pre-letter before claim, because the . . . issues haven’t been crystallised sufficiently for [the parties] to realise that

it's something that they need to give serious consideration to. Public bodies are really reluctant to commit the time and the cost to a formal mediation, unless they're in the context of ongoing litigation.'

For most claimants, therefore, it will be important to issue a claim before offering mediation. However, we are aware of mediations that have taken place after the LBC but prior to the claim being issued.

Finally, where defendants refuse to settle a case because, in their view, it has no merit, they are also unlikely to agree to engage in mediation. They would expect such a claim to be refused permission and disappear. This leaves a very small margin of cases in which both parties are likely to be able or willing to engage in mediation at this early stage.

#### *After issue but pre-permission*

At this stage, there is a very short window of opportunity, but it may be that it is only after a claim has been issued that the claimant is in a good position to consider mediation. Their position is now protected and they will normally have had a substantive response from the defendant. Defendants who might have delayed responding to a threat of proceedings until after issue, will now take a closer look at the complaint. If they consider that a claim has some merit but have been unable to reach an agreement with the claimant, they may be more amenable to considering alternatives to bilateral negotiations, such as mediation after the issue of a claim. However, where defendants are confident that the claim lacks merit, they may prefer to take no action until it has been considered by a judge at permission stage.

#### *Post-permission*

Some practitioners suggest that *post-permission* is the ideal time to offer mediation, and it is true that, where permission is granted, defendants are likely to take more interest in mediation. Indeed, most of the mediations of judicial reviews included in our study took place after permission had been granted. But, at this stage, more than half of cases that obtain permission settle and parties are unlikely to be prepared to expend time and money setting up mediation if they can reach an agreement between themselves.

There remain a small percentage of unresolved cases that proceed beyond the permission stage in which both parties have an interest in reaching a settlement but are unable to do so because bilateral negotiations have broken down or stalled. So there is still an opportunity to propose mediation post-permission.

#### *Post-substantive hearing*

Even after a hearing, mediation could arguably be of benefit to both parties. If it deals successfully with complex matters that cannot be adequately resolved via the limited remedies available in judicial review, mediation may thereby enable the parties to avoid the need for future litigation.

For example, in one case (case study 2, 'The best of both worlds?' (Appendix I)), mediation took place after the court had determined that the local authority had the power to set up an independent user trust, a legal question that could not

have been resolved in mediation. The complex details of the trust were then negotiated at the mediation between the legal representatives of the various parties involved. This is an example of a case in which a combination of the two processes, litigation and mediation, was needed to provide the necessary range of solutions to a complex situation. Neither forum alone could have provided a satisfactory outcome. Similarly, in another case (case study 3, 'Multi-party disputes' (Appendix I)) important legal principles were established with regard to the claimants' rights under Article 8 of the ECHR (right to respect for private and family life) and, at the judge's suggestion, the complex details of care provisions were then agreed in a mediation, mainly between lawyers and representatives of the relevant public bodies.

Publicly funded claimants, however, are unlikely to retain funding after a case has been successfully resolved. Moreover, the defendants would have to be convinced of the benefit of spending time and money at that stage in the hope of savings in the future – not an insignificant challenge.

### 3.5 Setting up: the steps

Making the decision to mediate is a major hurdle and is, as mediators often point out, the first agreement reached by the parties jointly. Setting up the mediation then involves a number of steps that need to be agreed upon by way of mini-negotiations. Even where the parties are well-intentioned, mediations can fall through because of difficulties in reaching agreement on these set-up issues

*How long does it take to set up mediation?*

A claimant solicitor described the frustration of a process that was unnecessarily lengthy and complex:

'I had this idea that mediation would be quick and wonderful, but it has taken so long. First we had to agree a mediator . . . I looked for a profile of someone compassionate with knowledge of special educational needs. I dismissed CVs of those with pure commercial background. This took time. Then we had to co-ordinate dates. I sent [the council] possible dates. They took so long to respond that new dates had to be considered. I needed to find out about location and cost of premises for the mediation to take place . . . After all that, [the council] said that there is already a mediation scheme in place for Special Educational Needs which the council are paying into, so it would be free for us and help keep down costs. Finally, as I was trying to sort out dates yet again, [the council] sent a letter saying that the situation has now moved on and should be resolved through the council's complaints procedure . . . it has all taken too long.'

Such experiences could be avoided by using mediation providers with expertise in public law who have the ability to identify potential mediators with relevant experience and to co-ordinate dates from the start.

Although urgent cases can on occasion be accommodated, most mediation providers give a two- to three-week timeframe for referral to mediation at a minimum. Debates over dates and choice of mediator and delays in providing mediation statements can extend this considerably. In addition, if funding

approval is needed from the Legal Services Commission (LSC), this can delay the start of mediation.

However, there is no reason why a specialist mediator could not be found at short notice, although this may affect the extent of preparation possible.

The main steps are:

- choosing and engaging a mediator
- establishing who needs to attend
- agreeing a date
- finding a suitable venue
- preparing for the mediation

But first, a word about costs.

### **3.6 The components of mediation costs**

A likely starting point for solicitors wishing to inform themselves of the costs involved prior to embarking upon the process is to consider the publicly available information on mediation providers' websites. It is common practice for mediators to charge a fee that includes four hours of preparation and then a set number of hours for the mediation, after which a pre-agreed hourly rate for overtime is charged. Some mediators charge a fee for preparation and a separate fee for conducting the mediation itself.

#### *Mediator fees*

The information on providers' websites is varied and much of it may seem irrelevant to public law disputes at first glance. Unhelpfully, there is no consistent format for mediation providers to set out their fees. However, this is not an altogether different situation from trying to brief counsel for the first time and having to agree a fee. Mediation providers have staff who can provide information on fees and can be expected to be familiar with conditions of public funding, although it is advisable to confirm this from the outset.

Some providers say nothing at all about fees, while others say that fees are negotiable. Where fees are set out, there is no consistency amongst providers regarding how their fees are itemised, or in the amounts they charge. There are also variations in the fee structures, such as whether the rates are calculated on an hourly or daily basis, whether they are set out according to the mediator's seniority and whether they include preparation and travelling. Most disconcertingly for lawyers involved in public law disputes is the fact that, more often than not, the fees are calculated according to the value of the claim. Where daily rates that are not based on claim values are offered, they can be too wide-ranging to provide any real indication of what to expect.

Commercial mediation providers tend to link mediation fees to the value of the claim and/or the seniority of the mediator – these fees start in the region of £500–£1500 per party and can go as high as £3000 per party. (Note that VAT may need to be added.) Free mediation is available on a limited basis from LawWorks

where one party meets LawWorks' financial eligibility threshold – which is more generous than the test imposed by the LSC.

#### *Other costs*

Some providers include venue and administration costs in the quoted fees; with others the administration and venue costs are on top of quoted mediator fees. (For more examples of providers' charges, see Appendix III). It is important to ask about venue availability and costs and to consider whether using your own or your opponent's offices would be an appropriate alternative.

It needs to be borne in mind that normally the parties each pay half the costs of mediation. And, most importantly, costs can be negotiated as part of the final settlement agreement.

It is important also to keep in mind that mediation providers may have policies on cancellation fees that are payable if a mediation is scheduled and then adjourned or cancelled at short notice. This should be clarified in the mediation agreement setting out the terms and conditions of the service being provided.

Other costs to consider are those for the attendance of solicitors and or barristers. It is unusual to have both solicitor and barrister present, but this can be advisable in cases involving sensitive issues and complex negotiations.

If experts are required to attend, this may of course add to the total cost. Wherever possible, parties ought to try to agree, perhaps with the help of the mediator, what aspects of expert opinion can be agreed in advance of the mediation.

### **3.7 Choosing and engaging a mediator**

Legal practitioners choose their mediator with care so as to achieve the best possible match between the needs of their clients, the nature of the dispute, and the skills, expertise and personality of the mediator. Lawyers who have mediation experience would normally have a pool of mediators to choose from. Others may be able to ask colleagues, where possible, for personal recommendations.

Among the key points to consider when selecting a mediator are:

- legal expertise – do you want the mediator to also be a lawyer?
- subject-matter expertise – how much do you expect the mediator to know about the type of case and the type of parties involved?
- style – styles in mediation are many and varied: do you want someone persuasive and personable or do you perhaps need a mediator who is tough and tenacious?
- qualifications and accreditation issues – what did the mediator's training involve, and does she/he hold any recognised accreditation?
- the importance of experience of mediating – how many mediations has the mediator actually conducted and what type of cases were they?

### *Legal expertise*

Mediators need not be lawyers, although they may be, and indeed many are practising barristers and solicitors and some are former judges. Mediators tend to argue that what makes a good mediator is their mediation skill rather than an expertise in any particular type of dispute. However, public law practitioners who had mediation experience expressed a strong preference for mediators who were either legally qualified or who had a working understanding of public law principles and the framework of duties and powers within which public bodies operate. Also, the majority of lawyers interviewed told us that they would prefer to work with a mediator who is an expert in the relevant field (see further below).

This was not because lawyers expected mediators to provide legal advice. Lawyers, naturally, considered this to be *their* job. The reasons given for the clear preference for legally informed mediators were:

- that the mediator's grasp of relevant terminology and concepts saved time and unnecessary frustration
- that legal knowledge helped the mediator to understand the parties' respective positions and enabled the mediator to move along complex issues and to challenge the parties where necessary
- that it ensured realistically practical outcomes
- and that legal knowledge was essential where novel points were being considered

Lawyers did also stress, however, that legal understanding was not the only required skill and that excellent mediation skills and authority were essential.

### *Subject-matter expertise*

In cases involving local authorities or government departments, the parties may find it is useful for the mediator to understand the workings of such public bodies. In particular, because judicial review claims can involve testing the limits of decision-making powers in public bodies, the boundaries of mediation differ from those in commercial disputes. The cases deal with issues of the discharging of legal obligations by public bodies and managing the public purse or public assets. Such situations may require a mediator who can ask whether a decision would be *ultra vires*.

A mediator explained that it is:

‘... useful for me to get a hang of ... both the legal and personal parameters ... I do need to have a sense of where the issues lie, so that I can see where the risks lie, and help people to acknowledge to themselves and occasionally to each other, where the risks actually are.’

Often practitioners in particular areas of law, such as education and community care, identify that they want to use a mediator with an understanding of that area of dispute. Such an understanding is a powerful tool enabling the mediator to challenge parties with authority and encourage them to think creatively about solutions. A barrister/mediator explained that some of his cases involved complicated issues about health care and funding and, for that reason, it was

helpful to have a mediator with some knowledge of the specific area because ‘familiarity with the terminology and the jargon, acronyms and concepts involved and why the different parties might have their respective positions . . . would just shorten the process’.

The practitioners who specialise in these kinds of work, both with and without mediation experience, have presented as being protective of their clients and anxious to minimise any distress that could be caused to them en route to resolving their disputes with public authorities. They described giving careful consideration to the question of what would be the best and most appropriate process for their clients.

In case study 7 (Appendix I), the priority for the claimant’s solicitor was that the mediator had experience of dealing with disputes involving issues of faith and religion rather than expertise in public law. This provided a good match both for the nature of the dispute and the individuals involved.

### *Style*

Personalities are important, and in some cases the personal style and approach of the mediator will be key to the success of the mediation. In considering the appropriate style, it is important for lawyers to take into account their client’s state of mind. An emotional client or a particularly sensitive issue might indicate the need for a calm manner or gently persuasive approach. Lawyers could also consider their own personality and style and those of their colleague representing the other side. An experienced US mediator suggests that:

‘It’s critical to know yourself with clarity . . . if you have a strong, authoritative presence, you may benefit from a mediator who has a softer touch to complement you. If you tend to be . . . a more logical or lineal thinker, you may want a mediator who is more . . . emotionally attuned, and perhaps creative.’<sup>35</sup>

The relationship between the parties and their lawyers can also be a factor in deciding whether you would benefit from a mediator who takes a facilitative approach in encouraging the parties to negotiate directly with each other, or a mediator with a more directive style who will give an evaluative appraisal to each party on the merits of their position. A good mediator will make an effort to understand the styles of all participants and support rather than undermine a good working relationship between them all.

### *Qualifications and accreditation*

Mediators should be trained, have professional indemnity insurance and have a complaints procedure. There is no national regulation of the mediation profession and no single agreed accreditation or qualification for those practising civil mediation. A significant step forward towards achieving agreed standards is the CMC’s initiative of getting all the recognisable mediation trainers round a table to discuss common minimum standards for training civil/commercial mediators.<sup>36</sup>

<sup>35</sup> LJ Berman, ‘Choose carefully: all mediators are not created equal’ (February 2010) *SCMA News*.

<sup>36</sup> For a list of accredited mediation providers, see the CMC’s website at <http://www.civilmediation.org/files/pdf/CIVIL%20MEDIATION%20COUNCIL%20ACCREDITED%20MEDIATION%20PROVIDERS%202010.pdf>.

All mediators should subscribe to a code of conduct, which provides broad guidance on what to expect of a mediator and how mediation is to be carried out.<sup>37</sup>

### *Experience of mediating*

Training and accreditation are important but they do not provide reassurance that a mediator is able to deal with the stress and pressures of an actual mediation. Experienced mediators should be able to provide information on the numbers and types of cases they have mediated and provide references from clients who have used them as mediators. Some mediation providers publish testimonial quotes from clients alongside the biographies of mediators on their panels, but note that these are a marketing tool and will not necessarily provide a balanced view of what clients feel.

### *Complaints*

When choosing a mediation provider it is important to consider whether the provider has a complaints procedure. Many commercial mediation providers are accredited members of the CMC, which insists that each accredited provider must have its own complaints procedure.

The CMC's scheme affords a further port of call if you are not satisfied with the outcome of the complaint to the original provider.<sup>38</sup>

### *Engaging the mediator*

Professional bodies, such as the Bar Council, may list mediator practitioners among their members.<sup>39</sup> If the chosen mediator is a barrister, solicitors can contact their chambers and liaise with the clerk to establish availability and fees.

Often, mediations are set up through a mediation-providing organisation (see Appendix III). The CMC provides on its website a long list of mediation providers, but no details about their expertise, so these organisations would need to be contacted individually for more details.<sup>40</sup>

Another way to engage a mediator is through a specific mediation scheme but these schemes might be suitable only for some judicial review-type disputes (see Appendix II).

Once the parties are agreed, they will often deal directly with the mediator who will suggest a standard form of mediation agreement which covers the whole conduct of the mediation, as well as the terms of engagement.

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<sup>37</sup> One such code is the European Code of Conduct, available at: [http://www.civilmediation.org/files/pdf/adr\\_ec\\_code\\_conduct\\_en.pdf](http://www.civilmediation.org/files/pdf/adr_ec_code_conduct_en.pdf).

<sup>38</sup> CMC Members' Complaints Resolution Service <http://www.cmcregistered.org/pages/12/cmc-independent-mediation-complaints-review>.

<sup>39</sup> <http://www.barcouncil.org.uk/about/find-a-barrister/mediators/index.php>.

<sup>40</sup> For a list of accredited mediation providers, see the CMC, n. 36 above.

### 3.8 Agreeing the date and venue

#### *Date*

Once the mediator has been selected, there are a number of actions to be agreed as part of the preparation for the mediation. The first is likely to be the date, which may involve a great deal of back-and-forth negotiation before it is set. Dealing with a mediator or a provider that can assist with liaison over dates can save a lot of time and frustration.

#### *Venue*

Ideally, three separate rooms are required for mediation, in particular where shuttle mediation is used and the parties are predominantly in different rooms. Practicalities to consider include accessibility (e.g. for wheelchair users) and availability of refreshments and other facilities.

A venue can be arranged by mediation-providing organisations. This is probably the most costly option, but also the most neutral in terms of being independent of the parties.

Alternatively, a venue can be arranged by the parties or their solicitors. Mediations are often held in solicitors' offices, public bodies' offices, hotels and in chambers.

Defendant local authorities who are parties to mediation can often offer a venue at no cost. However, such an arrangement may detract from the perceived neutrality of the event, and needs to be carefully considered before it is accepted.

### 3.9 Establishing who needs to attend

One of the key tasks in setting up mediation is deciding who is to attend. The questions to ask include:

- Who has authority to make a decision on this matter which can be legally binding?
- Who is familiar with the issues in this dispute?
- Who needs to be there to offer an apology, if that is agreed?
- Do the parties need/want their lawyers to be present?
- Is counsel needed?

#### *Authority to settle*

If the mediation is going to have any chance of delivering a legally binding settlement of the dispute then someone with authority to agree must attend. In the public law context, this usually means the person from the defendant organisation who has sufficient seniority to make a commitment to specific action at the mediation, without having to refer to a more senior person or, as in the case of education disputes, a panel.

A constant problem in the public law field is, however, that the decision maker does not participate in the mediation and the best outcome is an agreement that

the officers present will recommend the agreed solution. If, for example, the decision maker is a government minister or government committee, or in cases where local authorities use a panel system for decisions on statutory assessment or statementing of special educational needs, this must be made clear to all parties at the start, as some claimants will not want to proceed if there is no prospect of a binding settlement at the end. However, some will agree to proceed on the basis that recommendations can be made or other conditional agreements can be reached within a set timeframe after the mediation. In judicial review, it will be important to ensure that any such timeframe for securing action on conditional agreements does not prejudice a claimant's right to proceed with litigation. The person(s) with the power to make the decision may be at the end of the telephone during the mediation for consultation and approval of settlements.

One thing to consider, particularly for defendants, is that the non-monetary costs of having several senior people attend a mediation can be considerable.

#### *Should lawyers attend mediation?*

In mediation concerning private law matters, such as neighbour, housing or consumer disputes, lawyers would not typically be expected to be present. In a mediation concerning major commercial or public law disputes, however, the parties will usually attend together with their legal representatives. Usually, parties will be accompanied by their solicitors, or alternatively by counsel. More rarely, both solicitor and counsel will attend.

Interestingly, the Local Government Ombudsman's (LGO) use of mediation (see Appendix II) excludes lawyers from attending. In the past, the specialist services offering mediation of special educational needs disputes and disability discrimination claims also excluded lawyers from attending, but there has been a recent shift in this and now both services allow legal representatives to attend if both sides are represented.

The view of most public law practitioners in our study was that it is important for lawyers to attend. A typical view was:

'People just won't have the confidence to do without their lawyers there – they need their lawyers to hold their hands and advise them, and particularly so in judicial review, where often one will have to be very careful to ensure that the parties are not doing anything unlawful or inappropriate. So I think they definitely need lawyers there. I think it will depend on the nature of the dispute whether it's useful to have barristers and/or solicitors there.'

#### *Other attendees*

Claimants might attend with supporters, such as friends or family members, or with specialist advocates, as long as all participants agree to the confidentiality boundaries of the meeting. This might be important if, for instance, close friends or family members can contribute to the effectiveness of the mediation or compliance with the mediated agreement. Lawyers might want to discuss this with the parties and the mediator beforehand.

One of the stated benefits of mediation is its potential to repair past damage to relationships between the parties in situations where the contact is ongoing,

as is often the case in community care or special educational needs disputes. It is therefore important that the person, or persons, directly involved with the complainant attend, unless it is considered that the past damage is irretrievable, in which case a change of personnel may be considered at that point.

If explanations will be part of the mediation discussions, then those with technical knowledge and expertise may need to attend, even if they were not directly involved in the incidents or issues giving rise to the dispute. Their contribution could also be made in advance – either with documents exchanged before the mediation, or with a written document brought to the mediation meeting.

If financial settlements are a possible outcome, then it may be that a finance officer will need to attend, either for all or part of the mediation, in order to finalise arrangements for payment of any compensation. This can also be arranged over the telephone at the mediation.

If an apology is a possible outcome, then it is important to consider whether this is to be a written or spoken apology and, if a spoken one, then who it should come from within the organisation.

### 3.10 Preparation

Preparation for mediation is essential, and it involves a number of elements. The Mediation Tool Kit produced by the Law Society of New South Wales in 2007<sup>41</sup> (mentioned previously in the context of assessing suitability of mediation) sets out a useful checklist for the key roles of lawyers in advance of mediation for preparing their clients:

#### **'Preparing Clients for Mediation'**

The legal representative's role in preparing clients for mediation includes:

- I.1 Explaining the process, including the mediator's neutral role (See Law Society Mediation Model).
- I.2 Assisting clients to identify their needs, interests and issues. (As well as the legal issues, the legal advisor should explore with the client why an issue has arisen and what kind of things he or she would like to see happen. This is often wider than just the legal issues and assists in generating options.)
- I.3 Encouraging the clients to prepare their opening statements. If necessary, assisting clients to prepare their opening statement.
- I.4 Discussing the issues that would be considered by the court and the range of possible outcomes.
- I.5 Assisting the client in thinking through options for resolution that may be wider than those remedies available in a court. Ensure the client has information about the feasibility of options prior to the mediation commencing.
- I.6 Discussing ways to achieve the client's desired outcomes or priorities.
- I.7 Explaining the nature of a "without prejudice" and confidential discussion.

<sup>41</sup> See n. 33 above.

- 1.8 Explaining that the mediator will not be deciding the matter and that the settlement decision must be their own.
- 1.9 Advising of the legal costs incurred to date and likely to be incurred if the matter does not settle.
- 1.10 It is recommended that the above check list be explored with clients prior to the mediation, whether or not a preliminary conference is held.'

### *Position statements*

Many practitioners with mediation experience have found it useful to have an exchange of information in advance of mediation to help to frame issues for discussion on the day. This is most likely to take the form of a position statement, which sets out each party's perspective on the issues in dispute and their respective positions.<sup>42</sup> Position statements are useful for the mediator to familiarise him or herself with the each party's stance before the mediation, but it can also be valuable to agree to a mutual exchange of these statements so that each party is aware of the other's position in advance.

One mediator/barrister said:

'I do like, if I get the chance, to emphasise to the parties the importance of preparing properly for the mediation, in terms of having the right material there, and more particularly good and timely position statements, and also having thought internally about what a settlement might look like. Rather too often people seem to think that all they need to do is to summarise their pleaded case and then turn up on the day, which is not the best way to maximise the value of the process.'

The position statement should be brief. One mediation-providing organisation suggests no more than four pages.<sup>43</sup> The mediator does not need a detailed history of the dispute, but an indication of what settlement discussions have taken place and what, if any, proposals or agreements have been made, is helpful. Also important is for the position statement to set out what your client is hoping to achieve in mediation.<sup>44</sup>

### *Pre-mediation telephone calls*

The mediator might also want to have a pre-mediation telephone call with each lawyer and, more rarely, with the clients as well. The latter option is a matter for individual mediators; some expect to, and some do not. This contact is not to undermine the relationship between lawyer and client, but to provide a brief introduction for the clients to the mediator and the mediation, invite questions about the process and determine if they, and indeed all participants, have any particular access needs to be addressed.

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<sup>42</sup> Particulars of claim can be useful background for the mediator but they may not reflect the current position at the time the mediation is taking place. They may also be articulated in an adversarial approach targeted at the court, which might not be appropriate as a basis for negotiation in mediation.

<sup>43</sup> 'Preparing your case for mediation', ADR Group, [http://www.adrgroup.co.uk/images/.../Case\\_Preparation\\_Documents.pdf](http://www.adrgroup.co.uk/images/.../Case_Preparation_Documents.pdf) (last accessed 7 December 2010).

<sup>44</sup> Useful tips on preparing a mediation position statement are available at: <http://www.heskethmediation.com/mediation/position-statements-made-easy/>. Philip Hesketh is a professional mediator at [www.heskethmediation.com](http://www.heskethmediation.com).

One mediator/barrister said that this is very helpful as it:

‘gives you an idea of where they are really coming from, which helps in preparation, and also makes it easier to get quickly to the heart of the matter on the day. However, again all too often I find that people only arrange the mediation or provide their documents and position statements too late in the day for this to happen.’

In addition, as noted above in the New South Wales checklist, lawyers will want to have their own pre-mediation discussion with their clients as an essential part of the preparation. Among the issues to be discussed beforehand by client and lawyer are:

- Who will speak at the mediation? Some clients prefer their representative to speak for them, others do not (for more on this, see below).
- In addition to the legal aspects of the case, what are the practical boundaries for reaching agreement?
- Identifying risks and strategies, including considering the strategies of the other party.

#### *Schedule of costs*

Costs are not always part of mediated agreements. If costs are an issue to be agreed at mediation, it is important that both sides bring to the mediation an up-to-date schedule of costs. Without that information to hand, there is a risk that this issue will not be agreed, leaving a loose thread that can cause the outcome to unravel later, or else, necessitating an application to the court for a costs order.

### **3.11 Lawyers’ and advisers’ roles**

We have discussed earlier the issue of whether or not lawyers should attend mediation. In our interviews with public law practitioners, we found that overwhelmingly they felt that lawyers were essential to the process. Not surprisingly, claimant representatives were clear about the important role of lawyers in mediation. There are exceptions and there is also recognition on the part of lawyers that they may sometimes view the case through a legal prism in a way that can be unhelpful in mediation.

The lawyer’s conduct will have an impact on the success of the mediation:

‘Nothing is less effective and loses more credibility than an attorney who is offensive, argumentative or arrogant in an opening statement. Advocates must understand that everything they do during their opening statement lays the groundwork for the day’s negotiations.’<sup>45</sup>

Lawyers attending mediations should discuss with the mediator and their client beforehand who will speak at mediation. Some relevant considerations are:

- whether the difference in the status of the parties might mean that they would prefer to speak through their legal representatives

<sup>45</sup> LJ Berman, ‘Mediation strategies’ (June 2010) *SCMA News* at [http://81.136.210.253/exchange/V.Bondy/Inbox/Standing%20Conference%20of%20Mediation%20Advocates%20\(SCMA\)%20Newsletter-11.EML?Cmd=open](http://81.136.210.253/exchange/V.Bondy/Inbox/Standing%20Conference%20of%20Mediation%20Advocates%20(SCMA)%20Newsletter-11.EML?Cmd=open). Lee Jay Berman is a mediator in Southern California.

- how confident individuals are and whether they wish to speak
- even if an individual wishes to communicate through their lawyer, a brief opening statement from them can be more powerful than a lawyer's presentation of the case.

Mediation is about establishing understanding and dialogue between the parties and the client may be best placed to articulate their own needs and the impact of a particular act or omission or, conversely, why a particular decision had been reached. A lawyer's role may be in exploring legal issues where appropriate and considering the legal implications of any agreements.

The checklist in the Mediation Tool Kit produced by the Law Society of New South Wales in 2007<sup>46</sup> identifies key aspects of the lawyer's role during mediation:

## **'2. Role of Legal Representatives during Mediation**

Essentially the role of the legal representative is:

- 2.1. To assist clients during the course of the mediation;
- 2.2. To discuss with the mediator, with the other party's legal representative and with clients such legal and evidentiary, or practical and personal matters as the mediator may raise or the clients might wish. (It is likely that once the client has heard the other party's version, the legal representative may need to take further instructions from his/her client and perhaps review the legal advice);
- 2.3. To participate in a non-adversarial manner. Legal representatives are not present at mediation as advocates,<sup>47</sup> or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party.  
A legal representative who does not understand and observe this is a direct impediment to the mediation process; and,
- 2.4. To prepare the terms of settlement or heads of agreement in accordance with the settlement reached at the end of the mediation for signature by the parties before they leave.'

In *Twisting Arms*,<sup>48</sup> Hazel Genn reported that in nearly three-quarters of settled cases in the county court pilot scheme, the mediators attributed part of the success to contributions made by the legal representatives and commented favourably on their approach to settlement. Significantly, mediators in PLP's study who had been involved in public law mediations also considered solicitors to be an integral part of the process. One non-lawyer mediator stressed the role of lawyers in helping to frame realistic expectations and their involvement in drawing up the settlement agreements, as being of considerable benefit. In his view:

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<sup>46</sup> See n. 33 above.

<sup>47</sup> This refers to 'advocates' in adversarial mode. Note that the Standing Conference of Mediation Advocates (SCMA) describes mediation advocacy as follows: 'the technique of presenting and arguing a client's position, needs and interests in a non-adversarial way'; <http://www.mediationadvocates.net/79/> or <http://members.scma.enstar.net/71/>. Mediation advocacy training includes aspects such as how a lawyer's preparation for mediation differs from that for litigation, the importance and nature of the opening address, and getting the most out of mediation.

<sup>48</sup> Genn et al, *Twisting Arms*, n. 28 above.

‘Lawyers’ presence at mediation is important, not because I am not a lawyer but because I think it is important that the parties have their legal advisors there and I think it’s important that the legal advisors be the ones to draw up the settlement agreement. I do think it’s tough for lawyers to take a back seat in mediation because they are used to being the problem solvers and the advisors. But I think now lawyers are getting more and more experienced in mediation, they understand that it’s a different role and lots of them will take the back seat, be a supporter, give advice when needed and let the client take the lead.’

### *Mediation training*

Public law practitioners who have trained as mediators find the training enhances their ability to play an effective role in the mediation. Mediation training undoubtedly leads to insights into the process that can assist practitioners in identifying suitable cases, as well as in understanding their role during the mediation itself. Many practitioners, both solicitors and barristers, have qualified as mediators in recent years. Indeed, many of the practitioners who engaged in mediated public law disputes in our sample were qualified mediators, and several of the mediators who had conducted public law mediations were practising lawyers. However, such training is costly, and is clearly not essential in order to be able to assist clients through the process.

Lawyers are advised to inquire in advance of attending courses as to focus of the training material presented. Many courses use examples from the field of personal injury, medical negligence and commercial disputes in which financial settlements are central. Although mediation providers suggest that the principles are transferrable, public law practitioners might gain greater benefit from courses that are specially designed to address the specific issues in judicial review-type disputes.

## **3.12 At mediation**

### *What happens at a mediation?*

Apart from fixed-term mediations that are part of specific schemes,<sup>49</sup> the duration of a mediation session is open-ended. Typically, meetings last a day or part of a day, though on occasion mediations can extend over longer periods, or last late into the night. The process is flexible and can be adjusted to suit the needs of the parties. It is possible, for example, to mediate via telephone and/or video link, although this is unlikely in public law mediations.

Mediation is not simply an informal discussion. It uses a structured approach that begins with exploratory work. The mediation meeting consists of several distinct stages:

- Identification of the issues in dispute: the mediator aims to clarify each party’s understanding of the issues and to examine what each party wishes to achieve through mediation

<sup>49</sup> For example, in special educational needs and discrimination cases run by specialised providers in those areas, the mediations are often set for a maximum of four hours. For more details of these providers, see Appendix II.

- Exploration of issues and interests
- Exploration of possible solutions: there is usually more than one solution to a problem. Mediation allows parties to explore a wider range of options than may be possible in court, and the mediator helps them to explore the full range of options and to consider the advantages and disadvantages of each. Although mediators do not impose solutions, they will often contribute ideas and will encourage the parties to be realistic in their expectations about possible solutions
- Negotiation
- Drafting of terms of agreement and closure: the mediator will ensure that the parties are clear about what has been agreed and that agreements are recorded in writing at the mediation

### *Format*

Typically, mediations begin with a joint session with all participants in the room. The mediator gives an opening statement explaining her/his role, the roles of all attendees and the structure of the mediation. Parties then each present their opening statements, setting out their positions.

After this initial joint session, some mediators then work with the parties separately. In this approach, the parties are kept in different rooms for the duration of the mediation, with the mediator shuttling between them, conveying offers of settlement and responses to offers and working with the parties individually to challenge their positions and help move them forward to an agreement. This model is called shuttle mediation, and the separate sessions are often referred to as caucuses.

Other mediators keep the parties together in a face-to-face meeting for the duration of the mediation, possibly also holding brief caucuses with each party where necessary to have confidential discussions with each.

Mediation of complex cases might involve staggered sessions that allow for developments to take place and for parties to revisit these and, if necessary, to discuss issues in stages.

It is important to consider whether a particular approach would suit the parties and the nature of the case, and to discuss this with the mediator beforehand. Some practitioners suggest that caucuses can provide a useful opportunity for reflection in the course of mediation, and caucuses can provide a safe environment in which the mediator is able to push each side harder in evaluating their respective positions. A mediator described the value of such separate meetings as follows:

‘The mediator is able to have private conversations with each team, out of the hearing of the other people, to try to expand the options that are available and the courses that might be attempted to move things on; and, with permission, can bring the fruits of that exploration team-to-team, and help them see if they want to make progress.’

Despite their advantages, caucuses can be unhelpful in certain situations. In PLP’s research on practitioners’ views, the shuttle diplomacy method of caucusing

in mediation was perceived as unwieldy and time-wasting by some lawyers, who preferred more direct face-to-face contact with the other party. One claimant solicitor with mediation experience argued that, if the legal representatives know each other, ‘then all of that to’ing and fro’ing [in] mediation is completely hopeless’. In one case, this interviewee insisted that the mediation be held with all parties seated around the table because, in his words: ‘I prefer to see the whites of people’s eyes that I’m negotiating with.’ Another practitioner described her experience in mediation consisting of sitting in a room doing nothing for an hour:

‘talking to your client, saying “right, we’ll say that when [the mediator] comes in” and then you’re waiting, and then he comes in and says “the other side is saying this, now what do you say?”.’

Some practitioners, both lawyers and mediators, have strong views about the suitability of one format or another. In one mediation (case study 3, ‘Multi-party disputes’ (Appendix I)), the dynamics of the previous negotiations indicated that a face-to-face format was preferable, in the view of one of the lawyers attending:

‘I think that because the fundamental issue of principle had been resolved . . . the local authority was now amenable to setting up the provision of services through a trust, and because there had been so much distrust and hostility, it was much better to sit round and have everyone face to face and participate and not being in separate groups behind closed doors. And also because there were lots of bits of details involved, if you had it in separate compartments, it would have just taken forever to achieve anything. At least this way when an observational comment was made everyone could hear it, rather than [the mediator having] to go and repeat it to each room and so on.’

In order to maximise the benefits of the mediation process, it ought to be tailored to the nature of the dispute, the characteristics and wishes of the parties and the experience of the lawyers involved. Solicitors should discuss with the mediator beforehand what format to use at mediation – shuttle mediation or face-to-face mediation. Even if a face-to-face format is agreed on, there may be a need for flexibility later on during the mediation.

#### *Agenda items and their timing*

Deciding which issues to discuss in what order can be strategically important. One of the mediator’s skills is to determine if there are identifiable stumbling blocks and, if so, when they should be tackled in the course of the mediation. The most divisive issue, the one in which the parties’ positions are furthest apart, is not necessarily the best place to start because reaching agreements on more straightforward aspects can give incentive to settle on harder points. The order of agenda items might be dictated by a logic particular to the dispute, e.g. once one aspect is agreed, options for dealing with other aspects can become clearer. Or it might be determined by a party’s perception that one particular issue must be resolved first before others are addressed.

The question of costs can present a severe stumbling block and impede other potential areas of agreement. In a case in which the parties’ greatest concern was the level of costs accrued prior to mediation, a barrister described how, to his surprise, the mediator suggested dealing with costs at the end of the mediation rather than at the beginning. The parties were then able to reach agreement

on a number of other substantive issues, as a result of which they were then more inclined to compromise on costs. The barrister remarked that it would not have occurred to him to approach the problem in this way; it was the mediator's insistence that forced the parties to try something different:

'The way in which the mediator handled the really difficult issue between us challenged my ideas about how you settle proceedings and the way you go about it, that you don't immediately lock horns on the really difficult issue that you're in complete loggerheads on, that you see where all the agreements are and how far you can get with that. That's not the way I would have dealt with it.'

### *Apologies*

Apologies have been mentioned earlier in the context of ensuring the right people are at the mediation. In addition, it is important that, where a written apology has been agreed, the wording is at least broadly set out at the mediation. The wording of apologies can be unexpectedly sensitive.<sup>50</sup> Aim to get the exact wording of a written apology agreed at the mediation to avoid post-mediation satellite disputes.

### *Building agreements*

Mediators will be responsible for ensuring that written mediated agreements are SMART: specific, measurable, achievable, realistic and timed. The 'who does what when' details need to be specified, with exact dates given and named individuals taking responsibility for particular actions. Conditional agreements should be avoided wherever possible (i.e. expressing outcomes as depending on speculative factors or occurrences) because they are difficult to enforce and they leave the parties uncertain as to the finality of the settlement.

## **3.13 Settlement agreements, confidentiality and publicity**

Mediated settlement agreements should cover:<sup>51</sup>

- actions agreed and timing of implementation
- how to deal with costs
- withdrawal of claim where applicable
- confidentiality and publicity

### *Nature of outcomes*

The in-built flexibility of mediation includes the possibility of outcomes that are of wider public interest, despite the confidential nature of the process – such as agreements to changes in policy or practice on the part of the public body. For example, in one mediation (case study 7, 'The human touch' (Appendix I)) involving the gender of carers providing intimate care, the Primary Care Trust agreed to train more female auxiliary staff to provide home care and to use female

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<sup>50</sup> For useful guidance on drafting apologies, see 'Leaflet on apologies' produced by the Scottish Public Services Ombudsman, <http://www.spsso.org.uk/online-leaflets/leaflets-for-complaint-handlers>.

<sup>51</sup> For a model settlement agreement (not specific to public law), see <http://www.cedr.com/library/documents/2009%20Model%20Settlement%20Agreement.doc>.

agency staff where necessary. These arrangements would have benefited not just the claimant, but other service users as well.

In another case (not a judicial review), a mediation between a government agency and a district council ended years of litigation and a failed roundtable meeting with a memorandum of agreement which was offered as a template to other councils with similar problems. (See Appendix I, 'Other mediations').

Outcomes are not always neatly wrapped agreements. In one case (case study 3, 'Multi-party disputes' (Appendix I)), the agenda was too extensive and it was impossible to decide everything in a single day. However, the big picture was agreed and the finer points were negotiated later between the lawyers, who had maintained a good working relationship. This resulted in a complicated memorandum and detailed articles of a trust being negotiated after the mediation.

A mediation involving plans to close a local hospital (between Cranleigh Village Hospital and NHS Surrey)<sup>52</sup> concluded with agreement on a number of options for development to be issued for public consultation. In cases such as this, the final outcome will not be arrived at until the consultation has concluded.

Agreements reached in mediation might reflect full settlement or only a partial resolution. Sometimes it will be possible to resolve some issues but not others, in which case part of the dispute may need to progress (or return) to court. Where issues remain unresolved, the settlement agreement could usefully identify what remains outstanding for the court to determine.

Where a claim has been issued but resolved in mediation, the agreement will need to confirm that the parties agree to withdraw the claim by consent.

#### *Consent orders and enforcement*

A mediated settlement agreement can be formulated as a consent order if proceedings have been issued. A consent order approved by the court allows the parties to enforce the terms of the agreement as they would a court order. Otherwise lack of compliance may require enforcement through an action for breach of contract.

#### *Confidentiality and publicity*

There are two aspects of confidentiality in mediation: the confidentiality of the discussions during mediation and the confidentiality of the mediated agreement. Before engaging in mediation, parties usually sign an agreement (the 'mediation agreement') confirming that the mediation discussions are confidential.<sup>53</sup> Such agreements are standard, and will also usually specify that the mediator will not be required to give evidence in any subsequent legal proceedings concerning issues

<sup>52</sup> For more on this mediation, see [www.guildfordeye.com/visitor/news/more.detail/news.php?record\\_id=458&news\\_category=Health&cat=Health](http://www.guildfordeye.com/visitor/news/more.detail/news.php?record_id=458&news_category=Health&cat=Health) and.

<sup>53</sup> For a model mediation agreement, see [www.cedr.com/docslib/Model\\_Mediation\\_Agreement\\_12th\\_Edition.pdf](http://www.cedr.com/docslib/Model_Mediation_Agreement_12th_Edition.pdf).

mediated upon.<sup>54</sup> Agreeing to engage in mediation (and to honour the commitment to confidential discussion) does not require a commitment to confidentiality of the outcome. Mediated agreement in public law cases can include both the issuing of public statements after the mediation, and the attaching of mediated agreements to a consent order.

For example, in one mediated judicial review claim, although the parties signed a confidentiality agreement at the start of the mediation, by the end of it, they agreed to waive confidentiality because they needed to explain to the court how and why the particular agreement was reached. The claimant's solicitor explained that this was needed to ensure enforceability of the agreement should problems arise in future. In another example, the case of Cranleigh Village Hospital above, the trust issued a press release and the mediated agreement was published on the trust's website because the outcome of mediation was of interest to the wider community. Indeed, the NHS trust used the fact of mediation to illustrate its willingness to engage in constructive dialogue on a campaigning issue.

CEDR, in a booklet on mediation for public authorities, explains why confidentiality needs to be treated differently in public law cases than it is in most private civil matters:

'For public policy reasons, it may also be undesirable for multi-party public policy disputes to be mediated confidentially. Public policy mediations usually include specific negotiations concerning how information conveyed during mediation is to be used. Some public policy mediations are open to the public. The boundaries of confidentiality, therefore, need to be established at a very early stage and the advantages and disadvantages of different approaches evaluated.'<sup>55</sup>

The issue of confidentiality can itself be contentious, so it should be seen as an integral part of the discussion in mediation. Like the issue of costs, it is a satellite issue arising from the claim, but it also has the potential to unravel agreements reached on the fundamental issues. Altogether, confidentiality is more likely to be seen as a potential advantage to defendants rather than to complainants in the sense that defendants may wish to keep the facts of a dispute out of the public domain. Indeed, the prospect of avoiding publicity and/or the setting of an unwanted and potentially costly precedent can be one of the major incentives for defendants to mediate.<sup>56</sup> But while confidentiality is an essential feature of mediation to ensure that no party is penalised for frankness and goodwill should mediation fail, this could be problematic in disputes involving public bodies whose dealings must be transparent, open to scrutiny and non-discriminatory.

In answer to the question 'Do you think that confidentiality might be a problem, perceived or real, in public law mediations?', a barrister, who is also a trained mediator, said:

'It can be. Public law disputes are disputes about public administration, and for various reasons we feel that's something that ought to be in the open –

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<sup>54</sup> However, see the case of *Farm Assist Limited*, discussed at [http://www.adrnow.org.uk/go/SubPage\\_154.html](http://www.adrnow.org.uk/go/SubPage_154.html), in which the court made clear that parties have the power to open up the mediation discussion to judicial scrutiny if all parties agree to do so.

<sup>55</sup> CEDR, *ADR for Public Authorities: A guide for managers* (June 2003), London, p. 31.

<sup>56</sup> *Ibid*, p. 13.

for reasons of consistency etc. Why do we feel that? I suppose reasons to do with the upholding and vindication of rights, and the need for public bodies to be seen to be acting at all times in accordance with the law. So all of those things tend against confidentiality; and also there are often specific factors to do with obligations that the defendant is under to make public what it's doing and so forth – it's not like a private individual who can choose what they do in the open, or what they don't . . . you have freedom of information, and . . . the Human Rights Act – and all of that makes confidentiality more controversial in the public law sphere than in the private [law sphere].'

### 3.14 Where costs cannot be agreed

As mentioned in section I 'Why mediation?', there are currently no reported judicial review judgments which impose costs sanctions on a party that refuses an offer to mediate, nor are there any reported cases on costs orders following mediation where the parties have been unable to agree on the issue of costs. The case of *Boxall*,<sup>57</sup> however, provides a helpful review of the principles to be applied on the application of CPR Part 44.3<sup>58</sup> to compromised judicial review proceedings.

In that case, the claimants sought to issue a review of the local authority's alleged failure to assess their needs and provide their family with suitable accommodation. The local authority provided accommodation and the final hearing was not therefore necessary.

Scott Baker J (as he then was) summarised the general principles at paragraph 22 of the judgment as follows:

- '(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
- (ii) it will ordinarily be irrelevant that the claimant is legally aided;
- (iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;
- (iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties;
- (v) in the absence of a good reason to make any other order the fall back is to make no order as to costs;
- (vi) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.'

The case of *Boxall* was decided 15 months before the pre-action protocol for judicial review came into effect and, therefore, did not take account of the importance of compliance with the pre-action protocol, which includes inviting the

<sup>57</sup> *R (Boxall) v Waltham Forest LBC* [2001] 4 CC 0R258.

<sup>58</sup> [http://www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part44.htm#IDAD21EC](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part44.htm#IDAD21EC).

parties to attempt to resolve disputes using ADR processes, including mediation. Where it can be shown that a defendant failed to comply with the pre-action protocol, should there be a presumption that claimants are entitled to their costs unless there is a good reason to order otherwise?

In the case of *Scott*,<sup>59</sup> the claimant solicitors argued this in their appeal against the court's refusal to make a costs order in favour of the claimant. PLP, as intervener, made submissions in relation to the appropriate principles to be applied to cases that settle before permission is granted and to cases that settle once permission has been granted.

The appeal was dismissed and *Boxall* remains the relevant authority on the matter of costs orders. The furthest the judges were prepared to go 'along the path urged upon [them]' by the claimant and the interveners was 'to urge all judges to bear in mind that, when an application for costs is made, a reasonable and proportionate attempt must be made to analyse the situation and determine whether an order for costs is appropriate'.<sup>60</sup>

The question of costs following settlement of a claim prior to consideration of permission by a judge was considered in the case of *Mendes*.<sup>61</sup> In that case, the claimant withdrew the judicial review claim by consent after the London Borough of Southwark conceded that it had made an erroneous decision on his eligibility for housing assistance under Part VII of the Housing Act 1996. The judge made no order for costs on the basis that there was no good reason to award costs. The claimant appealed successfully against the order made on the papers. The proceedings were compromised because the defendant had conceded the point and the costs were incurred reasonably.

Accordingly, although mediations do not necessarily involve acknowledgement of wrongdoing, where it can be shown that a claim was properly brought, this case is helpful in supporting an argument for a costs order to be made.

### **3.15 Public funding: LSC rules on funding for mediation costs**

Mediation of a judicial review-type dispute is likely to run into thousands of pounds if it involves preparing and attending mediation as well as mediation fees.

Solicitors who represent publicly funded claimants need to ensure that any work they do is covered by Legal Help or a full Community Legal Service funding certificate for legal representation. According to the LSC manual, non-family mediation is an allowable disbursement for licensed work but 'the fact that an item is listed as an allowable disbursement means that it is capable of being allowed, not that it will be usual to do so'.<sup>62</sup>

The funding code guidance in the LSC manual, Volume 3, Part C states:

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<sup>59</sup> *R (Scott) v London Borough of Hackney* (2009) EWCA Civ 217, [2009] EWCA Civ 217: <http://www.bailii.org/ew/cases/EWCA/Civ/2009/217.html>.

<sup>60</sup> *Ibid.* at para. 51

<sup>61</sup> *Mendes & Anor v Southwark LBC* (2009) CA (Civ Div) 24 March 2009 (not on Bailii).

<sup>62</sup> [http://www.legalservices.gov.uk/docs/fains\\_and\\_mediation/LSC\\_Manual\\_Pt\\_C\\_para\\_2.5\\_final\\_version\\_Nov\\_08.pdf](http://www.legalservices.gov.uk/docs/fains_and_mediation/LSC_Manual_Pt_C_para_2.5_final_version_Nov_08.pdf).

## 7.6 Non-Family Mediation

1. The Commission supports the wider use of mediation to resolve disputes, both for family and non-family cases . . . Non-family mediation may be funded as a disbursement under Legal Help or Legal Representation.
2. No prior authority is necessary to mediate a non-family dispute but, like all other fees, the cost of mediating must be reasonable in all the circumstances. Therefore mediation should only be funded where it appears to be the most cost-effective way of proceeding and where the fees of the mediator are reasonable in all the circumstances. As a general starting point, non-family mediators will need to justify any rates in excess of prescribed basic remuneration rates for lawyers providing county court advocacy under certificates for Legal Representation.<sup>63</sup>

The county court advocacy rates for lawyers are £66 per hour for solicitors.<sup>64</sup> This therefore might appear unrealistic in the light of the mediation fees quoted by several mediation providers (see Appendix III). However, if the mediation fees are covered by the public body concerned, Legal Help funding may well be adequate. In any event, it would be a brave practitioner who would risk undertaking this work without a guarantee from the LSC that the work would be covered.

Given the high level of disbursements, mediation is more realistically contemplated under a full certificate. As a rule, practitioners would be unlikely to enter mediation without first issuing judicial review proceedings for two reasons: firstly, in order to preserve their client's position with regard to the judicial review and not fall foul of the three-month time limit; and, secondly, because many believe that the defendants will not take a complaint seriously unless it is backed up by court process. Another advantage of issuing (and staying) proceedings is that a successful outcome can be approved by the court as a consent order.

According to the funding code, solicitors will need to engage with the question of what are reasonable costs for mediation and whether mediation is the most cost-effective way of proceeding. However, the apparently low benchmark for the level of mediators' fees (i.e. £66 per hour Legal Aid advocacy rates) should not put solicitors off considering an experienced mediator, despite the fact that the mediation fee may appear to be far in excess of those rates. Firstly, when considering mediation fees, it needs to be remembered that these are shared by the parties. Moreover, the research suggested that, in practice, neither solicitors nor mediators experienced any difficulties with obtaining payment from the LSC of their fees in public law disputes, some of which lasted several days.

One solicitor with experience of setting up publicly funded mediations said:

'I suppose funding is an issue, but I haven't found that to be a difficulty with the Legal Services Commission . . . in one [mediation], we'd already commenced proceedings, the other one was before proceedings had been commenced,

<sup>63</sup> [http://www.legalservices.gov.uk/docs/cls\\_main/Alternative\\_Dispute\\_Resolution.pdf](http://www.legalservices.gov.uk/docs/cls_main/Alternative_Dispute_Resolution.pdf).

<sup>64</sup> See Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 SI 1994/228 for prescribed rates of pay.

but I granted emergency legal representation for the proceedings, and then we applied for an extension of that.’

The safest way is, of course, to obtain prior authority from the LSC for the mediator’s fees and the cost of venue. Failure to obtain it could mean refusal by the LSC to pay profit costs on the basis that mediation was not a reasonable step to take in the circumstances. One solicitor/mediator suggested:

‘The legal aid position is unclear and varies from case to case. Usually I ask the LSC to confirm that they are happy for mediation to proceed. It’s paid at civil rates. There is the option of seeking prior authority for the disbursements (mediator fees plus venue costs) but you don’t have to – this just gives you a guarantee that those costs will be covered at the end of the case. As for practitioner time, well usually this is covered by our liaison with the LSC, but it might be helpful to clarify this.’

*Recovering costs from the other side when funded by legal aid*

The problem of low rates of pay is exacerbated by the fact that, where agreements are achieved as a result of mediation, unless costs are agreed by the parties as part of the settlement, it can prove difficult for claimant solicitors to obtain authority from the LSC to pursue their costs against defendants by way of a court order. This means that all the work done is paid at legal aid rates, rather than the much higher hourly rates the lawyer would have obtained from defendants in a successful judicial review.<sup>65</sup>

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<sup>65</sup> This was reported as a concern by solicitors with extensive mediation experience. See also Appendix I, case study 7, ‘The Human Factor’ (p. 55) and case study 8, ‘The costs trap’ (p. 56).

# Appendix I

## Case studies

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### Mediations of judicial review cases

#### *Case study I: A question of trust*

*Long-term failures and mistrust between the parents of a disabled child and their local authority led to a bitter stalemate. Mediation was an attempt to get them talking, and to establish trust (and a trust).*

Jack and Rita, the parents of a severely disabled child, had lost all trust in the local authority's attempts to provide suitable educational provision. Jack and Rita asked the local authority to set up and fund a user independent trust, so that they could take over responsibility for arranging the support their child needed. This had never been done before and the judicial review proceedings were partly about the local authority's refusal to consider this request. Jack and Rita also wanted compensation for the local authority's many past failures. An earlier complaint to the ombudsman had been upheld and permission to go ahead with judicial review had been granted. At this stage the court proceedings were stayed for mediation to be attempted.

The mediation was initiated by the parents' solicitor with all the parties and their legal representatives attending. The mediator was also a barrister and was specifically selected for his expertise in education law. Despite the entrenched positions of both sides, the parents' solicitor felt that mediation could achieve more than a hearing. They reasoned that a judge could only determine whether the local authority had the power to set up a trust. Even if that proved to be the case, the local authority would still have to decide whether or not to establish one, and there would be lengthy ongoing discussions about what the trust would look like. Based on what had happened in the past, the claimants felt that this would inevitably lead to protracted debate. It is likely that the local authority, with an ombudsman finding against it and knowing that permission for judicial review had been granted, felt that it had little to lose by entering into negotiations. The mediator thought that this was an optimal case for mediation, because of the detail and complexity of the issues, and the need to salvage what was left of the relationship between the parents and the local authority.

**Case study 1:  
the claimant's solicitor**

'... the most we could have got from the proceedings was the judge saying to the authority you have a power to enter into a user independent trust, and you therefore have to make a decision as to whether to do so or not, properly, rather than just not make a decision or wrongly assume you have no powers to do so. And we realised that even if we'd got that, they could make a decision not to do it and we could only then challenge them if it was based on unlawful grounds. Or if they agreed to do it, we'd still have ongoing significant discussions about the nature of the user independent trust and what would it look like; what would be its terms; who would sit on it; who would be the trustees? So for all of those reasons we thought mediation ...'

The mediation, which the claimant's solicitor described as gruelling for the parents, took place over two days in the mediator's chambers. On the first day the negotiations went on until three in the morning. No final settlement was reached, as Jack and Rita's distrust of the local authority made it very hard for them to see eye to eye over even the most trivial things. According to the mediator, although this appeared to be an optimal case, the mediation failed partly because there were some issues that one of the parties did not want to be mediated and because the parents had reached the point where they assumed there was a hidden agenda behind everything the

local authority said. In the words of the mediator, 'They have gone beyond the stage at which they were capable of agreeing anything, even to the most trivial drafting suggestions.'

However, the principle of the trust was agreed and most of the terms were drafted. The final details were to be agreed later, but in the end no agreement was reached. Both the mediator and the parents' solicitor felt that mediation would have been more effective at an earlier stage, before so much mistrust had built up between the parties. Soon after, the child turned 19, and the local authority's educational responsibilities came to an end.

*Case study 2: The best of both worlds?*

*Sometimes the adjudicatory process is not enough to sort out the detail involved in resolving a case. In this instance, mediation and the judicial review process provided complementary solutions.*

The Leander family had been in dispute with their local PCT for six years about their daughter Susan's care. It seemed impossible to agree either a home-based care package or a care plan which centred on a residential facility. What the family wanted was enough money to be set aside by the authority in an independent user trust so that they could arrange care in the way they thought best. However, the PCT did not believe it had the power to allow this.

Mediation took place just a week before the final hearing was due to take place. The mediator visited the Leander family at home and met with Susan. Afterwards, at the mediator's suggestion, the representatives from the PCT did so too. Both

separate and joint meetings were held with the family and the PCT to work through complex financial details and to explore the role the family could or should play in managing the care package. No settlement was reached because the PCT was still reluctant to commit to a trust fund unless it knew whether or not it was within its powers to do so. Despite the lack of agreement, the mediator believed that the process had been beneficial because communication had been restored between the parties and ‘things actually looked different at the end of the day than they had looked at the beginning of the day’.

At a final hearing, the judge ruled that the PCT did have the power to set up a trust fund for the Leanders with the result that the detailed arrangements worked out at mediation could be implemented. The judge commented that ‘Judicial Review is an unsatisfactory means of dealing with cases such as this’, but the mediator recognised that in this case the parties needed both the formality of a judicial determination and the flexibility of the mediation process.

### *Case study 3: Multi-party disputes*

*Getting 20 people around a table to talk is never going to be easy, but in this case it overcame deep-seated hostility and restored a sense of dignity to the disabled sisters at the heart of the dispute.*

Grace and Alice East were adult sisters who were severely disabled. The local authority provided home carers and for many years things went smoothly; but when a new manual-handling protocol was introduced, the carers were told that they should use hoists to lift Grace and Alice. The sisters reacted badly to this and their parents were furious. The carers stopped working as a result and trust between the East family and the local authority had completely broken down.

Lengthy litigation followed. In a five-day hearing, the judge tried to balance the health and safety of the carers, with the Article 8 rights of disabled people and the process resulted in a ‘ground-breaking’ ruling about the principles which should govern manual-lifting protocols. The claimant then requested that an independent trust be set up because of the bad feeling between the parties. It was argued that this would allow the local authority to provide the public funding and the family to arrange their own care. The judge agreed to this

#### **Case study 3: the defendant’s barrister**

‘I think without mediation, it probably wouldn’t have reached a resolution because the dispute between the parents were so deep-rooted and intractable and hostile really, they could never have sat down and had a sensible discussion and just sorted it out as you would expect most disputes could be sorted out . . . Where you’ve got that level of hostility or distrust, as you had from the parents towards the local authority in terms of distrust and then from the local authority’s perspective, they were utterly fed up with the parents and feeling that nothing they ever did would ever be good enough, you’re never going to get them round a table to sort things out in the absence of some formalised structure.’

but referred the matter to mediation so that the details of the proposed trust and the care plan could be agreed.

The claimants' solicitor proposed the mediator, who was accepted by the large number of parties with an interest in this case. The mediation took place over a long day in which a detailed agenda was worked through during a series of joint and separate meetings. Grace and Alice attended the first part of this post-adjudication hearing in their wheelchairs and their parents were there for part of the mediation as well. In fact, the agenda was too extensive and it was impossible to decide everything in the course of a single day. However, the big picture was agreed, and the finer points were negotiated later between the lawyers, who had maintained a good working relationship. This resulted in a complicated memorandum and detailed articles of trust being negotiated after the mediation.

There were a number of different perspectives on whether the mediation had added value to this process. Both sides' lawyers felt that the arguments and ill feeling had become so deep-rooted that they could never have resolved things without the help of a mediator, though one observed that since the judge had 'decided all the difficult stuff the mediator had an easy time'. The mediator felt strongly that involving Alice and Grace in deciding how they were cared for was the focus of the whole procedure.

*Case study 4: A journey of a thousand miles . . .*

*It's not always possible to tie everything up neatly in a single settlement. Sometimes mediation is a tool within the context of wider litigation and ongoing negotiations, not a straightforward alternative to a judgment.*

Pamela had severe learning difficulties and lived in a residential care home. When she plucked up courage to tell her parents that she had been sexually abused at the home and at a day centre she attended, they took her straight back to live with them at the family home. They could not forgive the local authority for what had happened and were unable to agree with them about the nature of a new care plan for Pamela. They also planned to claim for damages because of what had happened to her.

Before the application for judicial review was submitted, mediation was suggested. Although Pamela was too vulnerable to attend, her parents brought a photo of her along to the mediation sessions, so that local authority representatives, lawyers and everyone there remained focused on her needs. With the help of a very experienced mediator, they talked for two days and met again three months later for a review. A temporary care plan was agreed and Pamela's parents promised not to issue the damages claim immediately while they waited to see how things would work out.

It was impossible for the family and the local authority to make definite long-term plans, so this was not a 'nice, tidy, ribbon-tied settlement'. But, it was argued that the mediation did offer a place where Pamela's parents could vent their anger and gave them an opportunity to agree interim measures so that Pamela could start to get on with her life after her trauma.

*Case study 5: Lack of powers*

*Although this highly unusual case was issued as a judicial review, it had much in common with a commercial dispute. However, the government department involved felt that it had no power to negotiate a business compromise because the issue was ultra vires.*

Widgets plc complained to a government department that a change in regulations had affected the market for its product despite an undertaking to the contrary that the company claimed the department had given. The company argued that its legitimate expectation had been undermined by the department's decision. The department, on the other hand, felt that it had no power to change the regulations once made.

A judicial review was issued and, although the department believed its interpretation of the law was correct, it offered to go to mediation. The mediation took place over the course of a single day, but no agreement was reached. The company was unwilling to accept the department's offer and the department felt it had no power to offer further concessions.

The department ultimately 'lost' the case at the court hearing. The judge decided that it did have a responsibility to try to mitigate the effect of the changes in the regulations. The judge was not aware that mediation had been attempted, or what had been offered at that stage but his proposed solution was similar to that proposed by the department at the mediation.

*Case study 6: The devil is in the detail*

*Despite the paucity of data on this case, it illustrates a common claim for the added value of mediation.*

The Madden family were exasperated by their ongoing battles to secure special educational provision for their son. Their solicitor sent a letter before action to the Local Education Authority (LEA) threatening a judicial review if the LEA could not reach an agreement. The LEA suggested mediation and the solicitor held off from issuing proceedings while the mediation took place.

A detailed agreement was worked out between the LEA and the Maddens at the mediation. The family's solicitor confirmed that the most they could have got from taking the case to court was an order that the LEA should make some form of special educational provision for their son. The judge could not have specified all the practical details agreed in mediation of how their child's needs would be best met.

*Case study 7: The human factor*

*Strong feelings about personal treatment clashed with a health trust's worries about the wider implications of permitting a patient to have a say in the choice of carers. Mediation provided a place for a severely disabled woman to tell her story in her own words.*

Marion, a severely disabled woman in a long-term NHS facility, required regular intimate care. This had been provided by female nursing staff for 32 years. Changes in shift procedures meant that the PCT could no longer guarantee female carers; Marion was horrified that her intimate care might be provided by a man, as this

went against her Christian principles and said that she would stop eating and drinking whenever male staff were on duty so that she wouldn't need that care. Her solicitor made several attempts to resolve the issue with the PCT through letters and by requesting a meeting or a mediation. The PCT felt unable to promise female carers because of the resource implications for other service users. They were concerned that it could lead to patients being able to insist on other specific characteristics with regard to carers. Proceedings were issued, an injunction obtained and permission for judicial review was granted. The last circumstance provided the trigger for the PCT to agree to mediate, as proposed by Marion's solicitor.

The mediation took place over a single day and involved Marion, her solicitor, and representatives of the PCT and its legal team. The mediator, who was not a lawyer, was experienced in dealing with disputes involving religious principles. By the end of the day, a settlement was reached. The PCT agreed to train female auxiliary staff to provide home care and to use female agency staff where necessary. This would apply not just to Marion herself, but to other service users as well. Marion's solicitor believed strongly that by meeting her client and hearing her tell her own story the PCT was made aware of the day-to-day reality of her disability and the depth of her concern about who should provide her intimate care. It was suggested that being faced with a human being made all the difference to the PCT's attitude.

The agreement reached in the mediation was attached to a consent order. However, Marion's solicitors had to go back to court to get a decision on who should pay the costs of the case and ended up being awarded only 50 per cent of the costs. If they had won the case in court, they would have been able to claim all the costs at a higher rate.

#### *Case study 8: The costs trap*

*Although mediation produced the outcome which the claimants wanted, there were disadvantages in this case. The confidentiality of the agreement kept other residents who might benefit in the dark and there were costs implications for the claimants' solicitor as well as the LSC.*

Jimmy and Martin were adults with severe mental health problems. They had a history of being hard to place, but had lived for nearly 10 years in a residential home where they were very happy. However, when the care home increased its fees, the local authority refused to pay and the care home gave Jimmy and Martin notice to leave. The care staff believed that a move would have had a disastrous effect on the men and their solicitor suggested mediation in order to discuss the situation. The local authority refused. As a result the claimants' solicitor applied for judicial review and permission, as well as an injunction, was granted at an oral hearing. At this point, Jimmy and Martin's solicitor repeated the mediation proposal to the judge. After pressure from the court, the local authority agreed to mediate. Possibly, this was because they were nervous of the knock-on effect of a court order requiring them to pay the higher fees. It was also suggested that a mediated agreement would enable them to keep the outcome confidential from other service users and insulate them from further claims.

It was anticipated that both the local authority and the care provider would participate in the mediation, but when the local authority failed to confirm to the care providers that it would meet their costs of attending the mediation, the care home refused to attend. The clients were too ill to attend. Despite the absence of the main players, the mediation, which lasted a whole day, was successful in that the local authority agreed to pay the cost of a further mediation with the care providers, albeit on condition that the claimants' solicitor did not attend. The claimants' solicitor felt that both sides gained a better understanding of their respective positions and that this led to an improvement in their relationship.

The second mediation took place between the two parties with a financial interest in the outcome and a settlement was reached. Although the details were kept confidential from everyone else involved, it meant that Jimmy and Martin could stay in the home. Further negotiation produced an agreement to use arbitration to resolve any future disputes about fees.

The claimants' solicitor who initiated the mediation thought, in hindsight, that it would have been quicker and cheaper to have obtained a ruling in a judicial review if they had won at that point. It was accepted that a court-based precedent could also have been of benefit to other care-home residents faced with an uncertain future. The costs implications of the case were also significant. If the court had decided the case in Jimmy and Martin's favour, they could have recovered the full costs of the case, at a realistic rate, from the local authority. But in mediation, parties usually bear their own costs. Although the claimants' solicitor could claim the basic legal-aid rate for the work, the LSC on that occasion refused to fund an application to try to recover the full costs from the local authority.

#### *Case study 9: A wasted opportunity*

*Although it seemed as though mediation was the ideal forum for getting down to the details, a combination of high conflict between the parties and poor mediator tactics sabotaged any possibility of agreement on the day.*

Beatrice had difficulty with the care provided for her father, Frank, after his stroke. Although the local authority was responsible for Frank's care needs, the care plan was constantly being changed, carers often did not turn up, and the care agency was far from helpful. The repeated arguments, accusations and conflict between Beatrice, the agency and the authority escalated into a messy personal dispute. Frank's solicitor began a judicial review action and a judge granted permission for the case to go ahead. The claim was repeatedly amended as circumstances changed and several hearings were

#### **Case study 9: the defendant's solicitor**

'If we'd found a way to have a 15-minute chat with all of us there... then we'd have been much better off. I suggested that we sack the mediator and try to reach an agreement between us. [However, the mediation] helped bring us together and focused our minds on the details. The fact of saying let's mediate means that you're already thinking is this the kind of case in which we can get the answers we want?'

adjourned, but nothing was resolved. Frank's solicitor suggested mediation, as things seemed to be going round in circles. There were no legal principles at stake, as the local authority accepted that Frank was entitled to care. What they were all arguing about was who should provide his care, how it should be provided, and how it should be paid for.

The mediation took place over a long day in the local authority offices and seemed to the parties to drag on forever. Although there was a good working relationship between Frank's solicitor and the defendant's lawyers, the bad feeling between Beatrice and the local authority made face-to-face discussion difficult. For this reason, the mediator decided the parties should remain in separate rooms, while he 'shuttled' between them passing on comments, suggestions and offers.

However, this proved to be unsuccessful. In addition, the representative from the local authority did not have the authority to settle on the day and everyone became frustrated that they couldn't talk face to face. The mediator suggested a second day of mediation, but everyone agreed that it would be a waste of time.

The two solicitors met later and it did not take them long to draft an agreement. It was suggested by the claimant solicitor that the fact that a mediation had been agreed by both sides meant that the lawyers were predisposed to negotiate reasonably and were able to do so once they were away from the heated atmosphere of the mediation day.

*Case study 10: No one wants to be the first to blink*

*An 'invitation' from a judge and the efforts of a proactive mediator brought two recalcitrant organisations together.*

A local authority was pursuing a judicial review against a regulatory body over the process which had led to a report which had been critical of the authority. Two attempts at a roundtable meeting had been unsuccessful and both sides were waiting for a date of hearing to be listed. More than 250 pages of written pleadings had been exchanged, with inevitable cost consequences. The judge 'invited' the parties to try to settle, or at least to narrow the grounds of their dispute. Both agreed to try mediation in principle, but neither would actually commit to a date.

A breakthrough was achieved by a proactive mediator who proposed back-to-back preliminary meetings with both sides and even suggested the dates. This meant that neither side risked showing weakness by being the first to consider compromise. An interviewee suggested that mediation went ahead without any loss of face and a provisional settlement was reached for the court to endorse. The mediator believed that the opportunity to explore issues between the in-house decision makers and their external advisers in private was an important element in reaching agreement. Given the failure of two previous roundtable discussions, the mediator argued that it was unlikely that this dispute would have been settled without the aid of a mediator.

*Case studies 11–13: Strategic offers of mediation*

*In three similar cases where the claimants' case was weak, a canny solicitor gambled that the defendant could not refuse to mediate and achieved a good deal for his clients.*

In three separate cases, licence-holders applied for permission for a judicial review of the regulator who had threatened to withdraw their licences because conditions had been breached. In each case permission was granted. All three licensees were represented by the same solicitor, who had a realistic view of his clients' positions. On his advice, his clients agreed to propose mediation, on the ground that if the cases went to court they might well lose, whereas a deal might be possible in mediation. He rightly assumed that the regulator would not want to be seen to refuse to mediate.

And so it proved. All three cases settled, and more quickly than they would have done if the court process had continued to the end. The outcome was especially good for the licensees because the agreements reached at mediation included a number of issues which could not have been resolved in court. The solicitor also felt that the cost to his clients was significantly less, as mediation did not involve as much detailed legal preparation as a court hearing would have done.

*Case study 14: A troubled teenager*

*In this dispute between a family and a local authority, there were no clear grounds for judicial review but some kind of agreement needed to be brokered for the sake of a troubled teenager.*

Kevin was out of control and his mother Martha simply couldn't cope. Social services wanted to carry out a needs assessment, but Martha refused to let them, as she was so fed up with what she saw as their unhelpful attitude. It seemed impossible to agree about what would help Kevin but Martha and her husband thought he needed plenty of sporting opportunities, especially cricket. The local authority felt this was extravagant and inappropriate.

Although the family's solicitor was threatening judicial review, the local authority lawyer knew that it was unlikely to succeed. It wasn't that the authority was refusing to carry out its duty to assess Kevin's needs. Rather, the solicitor argued, it was Kevin's parents who were refusing to let the local authority do so. But she could see that something needed to be done to end the stalemate. So she suggested mediation, as she thought that an independent person who was not part of the council or the family might help to calm things down. The outcome of this attempt is not known as the lawyer who recounted it had no further involvement in the case.

*Case 15: Home closure*

*In this case the local authority decided to close down a residential care home and to move its residents elsewhere. The residents did not want to move to another home and their lawyer was able to demonstrate that an enforced move could be detrimental to their health.*

This pre-permission mediation lasted for a full working day and was attended by solicitors and counsel for both sides and some additional 20 people supporting

the defendants. The claimants' solicitor had suggested mediation. She expected that in the course of the mediation there would be some discussion about the financial implications of closure as well as about the effect of the proposed move on the residents. In fact, she found that the only point that the local authority's representatives were prepared to talk about was that the residents simply had to move elsewhere. This is an example of a situation in which one party, having entered mediation in which there was the expectation of engaging with the other side and exploring options together, did not, in fact, do so in good faith. Indeed, the claimants' solicitor could not, on reflection, understand why the local authority had agreed to take part in the first place.

### **Other mediations involving public bodies**

- A failed asylum seeker who resisted deportation was injured by the control and restraint techniques used by immigration officers. Her claim for £35,000 damages was settled through mediation and the Home Office agreed to suspend her removal order for two months while she recovered.
- A dispute over fee increases between a local authority and a care home was resolved through mediation shortly before the court judgment was due.
- A student with mental health problems began a disability discrimination claim against his university in the county court. The university proposed mediation as a way of dealing with the issue out of the public eye. The case was settled through mediation with a payment of £5000 to the student, which the mediator felt was a higher award than he would have received in court.
- A defendant government agency proposed mediation in a long-standing acrimonious dispute with a district council, following years of litigation and a failed roundtable meeting. The proposal to mediate, the agency hoped, would place it in an advantageous position with regards to court costs in the forthcoming High Court hearing should the other side refuse. The claimant accepted the suggestion. At the start of the mediation, the mediator insisted that the parties concentrate on various substantive and practical aspects of the dispute and leave to the end the most contentious issue, that of the costs that had accrued over time in the course of the dispute. This proved to be a wise tactical decision as, by the time this matter came up, the parties had already reached agreement on many important matters. A memorandum of agreement was drawn up and, although it was not turned into a court consent order, it was offered as a template to other councils who had similar problems. Both sides felt that an agreement had been reached which could never have been achieved in court.

# Appendix II

## Mediation schemes

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In this section we provide a brief overview of specialised mediation schemes which practitioners might come across or might find useful to know about in relation to public law disputes. It is not an exhaustive list but is intended to give a flavour of mediation provision in particular public law contexts.

The schemes cover disputes involving local authorities; disputes between voluntary sector organisations and central and local government; discrimination claims against public bodies; and the Court of Appeal.

Schemes are included either because they have specialist expertise in, and relevance to, public law or because they present useful models to consider.

### **Local Government Ombudsman mediation**

The Local Government Ombudsman (LGO) for England can consider complaints of administrative or service failure by local authorities in England. The largest categories of complaints involve planning, education, adult and children's care services, housing, transport and highways, and local taxation. The usual method by which the LGO handles complaints is through inquisitorial investigation, followed by a determination by the ombudsman. Frequently, however, complaints are resolved through 'local settlement', whereby the LGO proposes, or the council offers, a reasonable resolution to the complaint, and there is no published report of findings. One quarter of all complaints investigated are now resolved through local settlement.

The Regulatory Reform Order 2007<sup>66</sup> gave the ombudsman the power to appoint and pay a mediator, thus enabling the LGO to use mediation to resolve complaints. Since 2008 the LGO has trialled the mediation of complaints using trained internal mediators. This was piloted in the LGO's Coventry office with a view to rolling it out across all LGO offices in future. Three experienced LGO investigators have been trained and accredited as mediators for the pilot. Complaints can be considered for mediation at any stage. Mediation is voluntary and parties can decline participation. Although the LGO has not widely publicised the availability of the mediation pilot, complainants or local authorities can request that mediation be considered.

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<sup>66</sup> The Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 SI 2007/1889.

So far mediation has been used in only a minority of LGO complaints. The LGO has identified that cases which may be suitable for mediation include those in which:

- complainants have an ongoing relationship with the local authority
- there is a benefit to the parties in meeting face to face to discuss the issues
- trust between the parties has broken down
- there is an obstacle to a settlement being achieved
- a simple resolution of the complaint is unlikely to be achieved
- there is a history of complaints, sometimes leading to positions becoming entrenched

According to the LGO the key factor is whether there is an ongoing relationship between the complainant and the local authority. Cases that have been successfully settled at mediation include those concerning social care services (both adults and children), special educational needs and housing disrepair.

The LGO considers that its new jurisdictions relating to schools and private care home providers are likely to generate complaints suitable for mediation because they involve ongoing relationships and confidence in service provision.

#### **LGO case study**

Ms X complained that the council delayed approval of residential provision for her son, that there was inadequate communication with her, and that the council failed adequately to plan her son's transition from children's services to adult services. The investigation was concluded with a local settlement of financial compensation and the council's agreement to review its procedures for transitional planning and its social services complaints procedures. Following the transfer of her son's care to adult services, Ms X had further complaints about continuing failures in provision for him and support for herself during holidays. The council failed to respond to Ms X's telephone calls and letters and both she and other family members were distressed by the failure to resolve the issues. Ms X's son was by this time in a permanent residential placement but came home for holidays, and the council offered only piecemeal provision for him. Ms X had had a carer's assessment but the recommended provision had not been put in place. She was on the point of making a fresh complaint to the ombudsman. A mediated agreement was reached whereby the council undertook to take a more structured approach to provision for her son, including forward planning for when he left the residential placement. An apology was made for past failures, the council agreed to carry out a new carer's assessment and to appoint a social worker for Ms X. A meeting was set up for relevant officers to explain decisions taken in respect of her son and give her the opportunity to continue to be involved in decisions about his future.

The model used by the LGO involves mediators working in pairs, holding face-to-face meetings between the complainant and the local authority, if possible at a neutral venue near to where the parties are located. Mediations are usually held over one day and an agreement signed on the day. The timescale for achieving an outcome is therefore much shorter than when a full investigation is carried out. Although mediated agreements are not legally binding, the LGO expects the parties to comply with their terms. Complainants do not waive their right to have the LGO consider their complaint, and if mediation is unsuccessful or settlements are not complied with the case can be returned to the LGO for investigation.

Of interest to public law practitioners is that the mediation agreements reached in the scheme are private documents. In addition, the LGO's current practice is not to invite lawyers for either side to attend the mediation.

Of the mediations carried out so far, none have resulted in direct financial awards to complainants, in contrast to the more than 50 per cent of LGO local settlements and determinations that involve elements of financial redress.

Unlike LGO determinations, mediated outcomes are not published.

**Contact:** <http://www.lgo.org.uk/guidance-inv/settling-complaints/mediation/>

### **Court of Appeal Mediation Scheme**

The Court of Appeal Mediation Scheme (CAMS) has been operating since 1997. It began as a pro bono scheme using volunteer mediators nominated by the court. Findings from research and evaluations (including Hazel Genn's research on court-based ADR in 2002) resulted in a revised scheme which was launched in 2003. This scheme has a panel of paid mediators approved by the court and since 2003 has been administered by CEDR on behalf of the Civil Appeals Office. Although CEDR provides annual reports to the Court of Appeal, there is no published report on the activity of the scheme.

CAMS is intended to provide a fixed-fee mediation. The fee is £850 plus VAT per party, which includes CEDR's administration costs. A fees waiver can be sought from the court by parties with little money, though in practice these have been sought very rarely. Legal aid is available where parties are eligible for it. Referrals are made to CEDR in cases where either mediation has been agreed or sought by one party, or mediation has been recommended by a Lord Justice at permission stage. Mediation is voluntary and can be declined by the parties.

Between 2003 and 2010, 180 referrals were made, resulting in 120 mediations (with four outstanding as at 31 May 2010), an average of 17 mediations per year. The pattern over the years has shown a marked decline in both referrals and mediations, from 63 referrals and 38 mediations in 2003–04 down to 12 referrals and eight mediations in the first nine months of 2009–10. The settlement rate (of cases settled at or before mediation) has also declined since the start, from 66 per cent in 2003 to 50 per cent in 2008–09 and 2009–10, with a low of 25 per cent in 2007–08.

Mediators are asked to provide a brief anonymised summary of each case and these are included in the unpublished annual report submitted by CEDR to the

Court of Appeal. The summaries indicate that no public law case has been mediated in the scheme. Cases cover a range of issues, including road traffic accidents and personal injury, clinical negligence, employment and others. One case involved an employment dispute and the mediation was attended by all 13 claimants and their trade union representative. Another mediation involved the drafting of an apology in a race discrimination claim.

Although the cases themselves may not be of obvious relevance to public law practitioners, the issues arising from the mediations and, in particular, relating to the administration of the scheme will be of interest to those considering any court-based or court-referred scheme for mediating public law cases. In its unpublished annual report, CEDR made the following recommendations to the Court of Appeal:

- The court should insist that mediators have contact with both parties before the mediation; this apparently increased the settlement rate
- The court should set a timescale for fixing the mediation date within 10 weeks from referral. This allows the court to oversee and prevent undue delay to the substantive hearing
- Judges should exercise their discretion more often to recommend mediation
- The court should send cases to mediation where the judge has recommended mediation at permission stage or where only one party has agreed to mediate – i.e. the court should not wait for agreement by both parties. The administering body can then engage with the parties to explore their willingness to mediate and this will possibly increase the referral rate

**Contact:** <http://www.cedr.com>

#### **CAMS case study**

C was a solicitor and claimed race discrimination as a result of being unsuccessful in two applications for promotion. He was unsuccessful at the Employment Tribunal and the Employment Appeal Tribunal (EAT), but he was granted leave to appeal by the Court of Appeal. Despite finding in favour of the employer, both the Employment Tribunal and the EAT made criticisms of the employer, which were rejected by the employer. The court advised the parties to use mediation. The initial value of the claim was in excess of £100,000, although by the time of the mediation a valuation of £25,000 was agreed. At the mediation, settlement was reached on the basis of a payment to C by the employer of £8000 inclusive of costs. Virtually the whole of the mediation day was spent in negotiating the wording of an apology to be given by the employer and a joint press statement. The core issues in this case were apologies and reputation rather than financial settlement.

## Equalities Mediation Service

The Equalities Mediation Service (EMS) is funded by the Equality and Human Rights Commission (EHRC) and managed independently by Mediation Works. It is available for disputes involving any strand of discrimination (disability, race, sex, age, sexual orientation, religion or belief, transgender) in cases involving work and employment, education, and goods and services (both private sector and public sector). The service has mediated cases involving local authorities and central government departments as well as schools, colleges and universities.

The cases referred to the mediation service by the EHRC are not generally public law cases but there is some overlap with public law issues. Among the discrimination claims that have been successfully mediated are:

- a government department that failed to provide a consultation document in an accessible format;
- a local authority that failed to provide a sign-language interpreter for a benefits interview;
- a town hall that did not have an induction loop system for public meetings.

Cases are referred to the EMS by the EHRC (via its helpline or Casework and Litigation Team) or by third-party referrers (law centres and advice agencies, for example).

There is no charge to either party for use of the mediation scheme.

### EMS case study

A disabled inmate claimed that he was being discriminated against due to inadequate facilities being provided at the prison where he was detained. The inmate needed assistance when taking a shower, access to more suitable washing facilities, better access to education and religious services, and improved general assistance from the prison staff. The inmate claimed that reasonable adjustments had not been made to enable him to access these facilities.

At the mediation, a full and final settlement of the legal claim was reached. It was agreed that the prison would order auxiliary aids that would help towards toileting and washing, and raised flooring for the shower would be installed. The prison agreed to undertake a full education and accessibility assessment, review the location of specific religious services, reinforce requirements for professionalism and decency with staff during the next month and on a regular basis thereafter. The possibility of the complainant being moved to another wing in the prison was discussed in the meeting but it was acknowledged that the facilities on offer there would be worse than those currently being experienced, and the complainant agreed that the changes made within the wing where he was located would address his access needs.

The EMS handles several hundred mediations per year. The majority are face-to-face time-limited meetings (usually two to four hours), although telephone mediations can also be carried out.

The timescale is approximately eight weeks from referral to mediation. Mediations are held in neutral venues near to the complainant. Full and final legally binding settlements are agreed on the day. Lawyers are allowed to attend mediation if both sides are represented.

**Contact:** <http://www.equalities-mediation.org.uk>

## **SOLACE Mediation Service**

The Society of Local Authority Chief Executives (SOLACE) has run a fixed-fee mediation scheme for local authorities since 2005. The service is administered by CEDR and has a small panel of about six specialist mediators.

SOLACE mediations involve workplace disputes; disputes with regulators including those in which judicial review proceedings have been started; town planning and development; procurement; housing matters; and commercial and property disputes. It is able to offer mediation services in conjunction with organisational and developmental conflict resolution consultancy.

The cost is £1250 plus VAT<sup>67</sup> and expenses for a one-day mediation, which includes preparation and follow-up time.

There is no published information available about the cases mediated in the scheme. However, according to a mediator involved in the scheme, three judicial review cases have been mediated, all involving local authorities and regulators and all initiated by the local authorities after proceedings had been commenced. All three cases settled in mediation.

**Contact:** initial contact can be made with SOLACE via its Pontefract Office on 0845 601 0649 for enquiries and to discuss suitability. See also <http://www.solaceenterprises.com>.

## **Mediation of special educational needs disputes**

Local authorities must make available an independent disagreement resolution service for disputes involving special educational needs (SEN). In practice, this is usually mediation. Many of these disputes result from local authority decisions that trigger a right of appeal to the First Tier Tribunal (Special Educational Needs and Disability). Mediation is not strictly an alternative to tribunal and participating in mediation does not affect parents' right to a tribunal hearing, but it can be attempted prior to a tribunal hearing, either before or after an appeal has been registered.

Disagreement resolution services are not limited to taking on cases where there is a right of appeal to tribunal. An increasing number of services are also mediating in cases involving school and parent, and even school/parent/local authority disputes. Mediation is also used to resolve disputes between local

authorities and academies involving naming a school in an student's statement of special educational need.<sup>68</sup>

The mediation involves a meeting between the parents and local authority and sometimes involves the school and other relevant agencies, such as social services. The child who is the focus of the mediation is often not invited to the session, although practice varies from service to service. The meeting usually lasts two to four hours and takes place at a venue that is acceptable to both parties – ideally an entirely neutral venue, although in practice this can be the council's offices or the school, if parents agree.

The cost of mediation is borne by the local authorities, although the provider must be independent of local authorities. SEN mediation is provided by a range of mediation providers, most of which are not-for-profit and cover a regional area.

**Contact:** (for London) <http://www.kids.org.uk/mediation> and (for all services in England and Wales) <http://www.sendist.gov.uk/Parents/mediation.htm>

### SEN case study

Communication between Mr and Mrs P and the school attended by their 13-year-old son, T, had deteriorated. T had Down's syndrome and other complex needs, including difficulties with communication. The school, a mainstream secondary school, had excluded T after he had hit one of the other pupils. Mr and Mrs P did not deny that T had hit the boy, but said that the school's treatment of their son amounted to disability discrimination.

His parents felt that the school had not taken T's disabilities into account when considering the appropriate action to take after the incident. The school argued that T's behaviour was not due to his special educational needs, and that therefore the school had not discriminated against him because of his disabilities.

The solicitors for the school had used mediation before and felt that it would be a good way to resolve the disagreement and produce a satisfactory outcome for all. The parents' solicitors also agreed that mediation was the best way forward, so, after checking with the two parties that they were also happy to attend mediation, a mediation session was arranged.

At the mediation, the school's headteacher stated that some mistakes had been made by the school regarding T's exclusion and apologised to the parents. She agreed to provide disability discrimination training for all staff. The parents accepted that it had not always been easy to get in touch with them, which had contributed to the deterioration in communication between themselves and the school. They agreed to withdraw their claim on the basis that the school agreed to welcome T back and remove any reference to the expulsion from his record. The school's representatives were also content with the outcome and felt satisfied to have been able to avoid a lengthy and stressful legal process in such a productive way.

<sup>68</sup> Because local authorities do not have the power to require an academy to accept a student, in the way they do with maintained schools, these disputes, if unresolved, are ultimately decided by direction from the Secretary of State.

## Mediation for homelessness

In recent years, mediation schemes have been set up in many areas to try to help in cases where teenagers have become, or are at risk of becoming, homeless because of a breakdown in their relationship with their families. Mediation aims to restore communication between family members and explore whether it is possible for the young person to return home safely, or to stay at home, with some outside support. Many of these schemes are funded by the local authority, which often has the aim of having the young person remain in their home rather than needing to be housed. Some schemes are funded independently. Alone in London, for example, is funded through central rather than local government and is available to young people and their families in London. It gives young people access to independent advice about their legal rights. Cases are self-referred or referred by professionals working with young people. The service uses trained mediators to offer face-to-face meetings for family members. The mediators also have specialist expertise in child and adolescent mental health, working with young offenders, and lone teenage parents. The mediation process varies in terms of time and the number of sessions required, depending on the issues and circumstances of individual cases. Urgent cases can be dealt with in a week, whereas some need months of intervention. On average, families will attend four to five sessions over a period of up to six weeks.

### Homelessness case study<sup>69</sup>

In this Court of Appeal case,<sup>70</sup> the judges criticised a local authority's use of mediation when it caused a delay in assessing a young person's homelessness application until she was 18 and no longer considered to be in priority need. Using mediation, the judges said, should not be confused with the duties owed by the local authority.

A 17-year-old applied for housing to her local authority after her mother had asked her to leave the family home. She approached the local authority on 17 February 2005; her 18th birthday was on 11 March that year. The local authority initially told her that it would take 28 days to assess her application, by which time she would be 18 and no longer in priority need. After obtaining advice from a law centre, she re-applied, and was given interim accommodation while the local authority arranged a mediation appointment for the girl and her mother. Two days before her 18th birthday her mother refused to mediate, and on the following day the local authority decided that the girl had no priority need, and told her so on the telephone. They delayed sending the written reasons until the next day, when she turned 18.

The girl asked for an internal review, which upheld the decision. An appeal to the county court found that the delay by the local authority was justified in order for mediation to be attempted. However, the Court of Appeal found that the local authority's decision that she was not in priority need was unlawful, as the girl was not 18 at the time. In particular, the court was critical of the local authority for using the attempt at mediation to justify delaying their decision, in order to avoid their housing responsibilities.

<sup>69</sup> See [http://www.adrnow.org.uk/go/SubPage\\_126.html](http://www.adrnow.org.uk/go/SubPage_126.html).

<sup>70</sup> *Robinson v Hammersmith and Fulham London Borough Council* [2006] EWCA Civ 1122.

## **Compact Mediation Scheme: now Compact Advocacy and local dispute resolution**

Compact is the agreement governing the partnership relationship between local and central government and voluntary organisations. When it was established in 1998, a mediation service (the Compact Mediation Scheme) was also established to resolve any disputes arising from Compact agreements, including potential breaches of the Compact, bad practice, and issues of funding, consultation and equalities. CEDR was appointed as the administering body for Compact mediations.

The scheme was open to voluntary and community sector organisations and central and local government departments, executive agencies and non-departmental public bodies. It appears to have been discontinued on the whole, although some local Compacts have set up their own arrangements for resolving disputes, including mediation. These include Leeds, which has produced a Mediation and Dispute Resolution Toolkit for resolving local compact disputes.

Compact advocates, third parties with specific experience who help to broker resolutions of Compact disputes, advise and assist organisations in their dealings with the public agency. Advocates are local elected members, public bodies (most commonly the Office of the Third Sector) and national bodies (most commonly Compact Advocacy). Some advocates who have been involved with Compact schemes from the outset reported that, in their experience, there was never any recourse to mediation by parties to disputes. In their understanding, this was because the scheme was seen by community groups as too costly, too formal, and not sensitive to local issues.

Lawyers and advisers who are consulted by community groups in the voluntary sector who are part of a Compact agreement will be able to direct such groups to the Compact Advocacy programme. (<http://www.ncvo-vol.org.uk/compactadvocacy>).

It is, of course, always open to parties to propose mediation directly in appropriate cases.

Other resources on resolving compact disputes include the Mediation and Dispute Resolution Toolkit used by Leeds Compact partners<sup>71</sup> and a research report (January 2010) on the work of Compact Advocacy in resolving public law compact disputes.<sup>72</sup>

## **Central London County Court and the National Mediation Helpline**

The National Mediation Helpline (NMH) is a government-funded source of referral to mediation in money-value claims only. Mediation providers are all approved by the Ministry of Justice – essentially approval is given to any mediation provider accredited by the Civil Mediation Council.

<sup>71</sup> Leeds Mediation and Dispute Resolution Toolkit downloaded from <http://www.compactvoice.org.uk/category/resources/leeds-mediation-and-disputes-process>.

<sup>72</sup> Report of the work of Compact Advocacy on resolving public law compact disputes (January 2010) downloaded from <http://www.compactvoice.org.uk/category/resources/review-compact-disputes-report>.

The Central London County Court was the first court in England to establish an in-court mediation scheme. This was first piloted in 1996 and ran for 10 years. The mediation was provided by approved commercial mediators at a subsidised cost for all fast-track and multi-track cases (cases above £5000) and took place after the court had closed in small rooms on the court premises.

Since 2007, all county court mediations in England and Wales other than small claims are organised through the NMH, not through individual courts. This means that anyone now issuing a fast-track or multi-track claim in Central London County Court will be given a mediation leaflet and invited to try mediation. If both parties agree to mediate, their details will be passed to the NMH which will arrange a mediation appointment with a local provider. The mediation will be arranged at a location and at a time that is convenient to the parties and room may be made available in the court building during the day.

# Appendix III

## Using a mediation-providing organisation

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Not many mediation providers specify their expertise as being in the field of public law, but they would nevertheless be able to assist in identifying a mediator from their panel who has suitable public law knowledge and expertise.

We contacted several mediation providers to find out more about how mediators are allocated, what the costs of the service are,<sup>73</sup> and how quickly mediation can be set up. The examples here give a snapshot of the practicalities of arranging a public law mediation through:

- two commercial mediation providers with large panels of accredited mediators;
- a pro bono mediation provider, again with a large panel of mediators;
- a barrister's chambers with a dedicated mediation service;
- a publicly subsidised telephone-based mediation referral system.

This is not intended as a recommendation of these providers but to give readers a flavour of what to expect when they contact a mediation-providing organisation.

### **CEDR Solve**

CEDR Solve is a commercial mediation provider with a panel of mediators.

**Mediator selection:** CEDR Solve can recommend mediators with a public law background and can either appoint one or produce a list of three suitable mediators from which the parties can select. Alternatively, parties can select a particular mediator themselves.

**Costs:** costs relate to an application fee for appointing a mediator (£125 per party) or making recommendations for appointment (£250 per party), plus hourly rates for mediators ranging from £180 per hour to £500 per hour for senior mediators. A one-day mediation would involve eight hours of mediating plus five hours of preparation, or about 13 hours. So a one-day mediation can cost, in mediator fees, £2340–£6500, plus the appointment or recommendation fee as explained above. Venue costs are in addition to the application and mediator fees.

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<sup>73</sup> All fees mentioned are correct as at January 2011.

CEDR Solve can provide a London venue at £275 per party. Often clients use their solicitor's offices for the mediation venue.

**Timescale:** it is possible to set up a next-day mediation but this limits the preparation time for parties and the mediator, so it is not ideal. More typically it takes two weeks from referral to mediation.

**Preparation:** parties are expected to provide CEDR Solve with relevant papers at least one week in advance of the mediation – these are then passed to the mediator. Papers include a case summary or mediation statement and any supporting material – CEDR can give guidance on this.

## Clerksroom

Clerksroom is a commercial mediation provider with a panel of about 600 mediators.

**Mediator selection:** parties can choose a mediator or ask Clerksroom to identify suitable mediators and produce a list from which the parties can select. Clerksroom can identify mediators with public law experience. Alternatively, parties can request a specific mediator.

**Costs:** cost of mediation depends on choice of mediator – an indication of rates charged in civil cases, the fees range from £500 per party for a four-hour mediation, to £1500 per party for a one-day mediation with a specialist mediator. Venue charges are included in the mediation costs.

**Venues:** consist of three rooms and teleconferencing facilities and are available in Birmingham, Cardiff, Leeds, London, Manchester and Taunton. All costs are expected to be paid upfront, but if a party is legally aided then Clerksroom would check that the mediator is willing to be paid after the mediation.

**Timescale:** although mediations can be set up urgently, even the following day, the usual timeframe is three weeks from referral to mediation.

**Preparation:** the mediator, once appointed, will have contact with the parties, usually by email, but sometimes by phone, and explain what papers she/he needs in advance.

## LawWorks

LawWorks is a pro bono mediation provider which conducts 70–80 mediations per year, typically in employment, landlord and tenant, consumer, family, and probate.

**Mediator selection:** LawWorks appoints a mediator from its panel of 185 mediators, taking into account area of expertise, which includes public law, as well as geographical location and availability.

**Costs:** in cases in which one party cannot reasonably afford to pay (and meets the service's financial merit test), mediation is free to both parties. A public body cannot apply for the free mediation but it can suggest it to a complainant/claimant. Venue costs are avoided as mediations are either at face-to-face meetings held in offices provided by local law firms or are conducted by telephone.

**Timescale:** LawWorks will liaise between parties. It usually takes about six weeks from referral to mediation. Urgent mediations can be arranged via telephone, but this would be unsuitable for judicial review-type disputes.

### **Garden Court chambers**

**Mediator selection:** parties can request a specific mediator or ask the mediation team clerk to identify suitable mediators and produce a list from which the parties can select. Mediator profiles are available on the website. Many of the mediators are barristers who have extensive experience in public law/judicial review.

**Costs:** Referrals from the NMH are charged at the rates specified by the NMH, but may not apply to public law cases. Mediator fees in non-referred cases are £500 per party per half-day, then if the meeting goes beyond the half day, £75 per hour per party. Venue is available at chambers and the charges are £75 per party per day (introductory rate). Alternatively, parties can arrange their own venue. All costs are to be paid upfront, but if a party is legally aided then Garden Court will accept payment when funds are received from the LSC.

**Timescale:** mediations can be set up urgently, even on the following day, provided the parties are all agreed on attending. The timeframe from referral to mediation usually depends on the availability of the parties.

**Preparation:** the clerk sends out a letter of instructions confirming the arrangements for mediation, including cost, date and time. After the mediator has been appointed, the clerk to the mediation team will send to the parties' solicitors an agreement for mediation document containing the terms and conditions of the agreement, a brief explanation of the process and advice on preparation, including what papers the mediator needs in advance. The mediator may also send a letter of introduction with further information if time allows.

### **National Mediation Helpline<sup>74</sup>**

The NMH is a government-funded source of referral to mediation which provides mediators for private law disputes referred to it by the county courts. The NMH is not suitable for public law cases for two reasons: cost is determined by the value of the claim and, where a claim is valued at less than £5000, the mediator is assigned on a random basis, so the nature of the case and any specialist expertise needed are not taken into account.

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<sup>74</sup> Although the helpline was not designed to deal with public law disputes and is undergoing changes, it is included here for the sake of completion.

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