

RESOLVING TAX DISPUTES

**DRAFT PRACTICAL GUIDANCE FOR HMRC STAFF ON THE
USE OF ALTERNATIVE DISPUTE RESOLUTION IN LARGE OR
COMPLEX CASES**

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DRAFT GUIDANCE FOR HMRC STAFF ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN LARGE OR COMPLEX CASES

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1. What is Alternative Dispute Resolution ('ADR')?

Traditionally tax disputes are settled either by litigation or, in the majority of cases, by out of court agreement following discussions between the two parties. The essence of ADR is that a third party is brought in with the agreement of both parties, either to determine the dispute (arbitration) or to facilitate bilateral agreement (as an expert, or through mediation).

Various forms of ADR are used in commercial disputes and by a number of overseas tax authorities. In HMRC, and in this guidance, when we talk about ADR we are generally talking about mediation rather than arbitration. HMRC sees little benefit in using arbitration for tax disputes since there is already clear jurisdiction and a publicly available process in the form of the Tribunal Service and the Courts.

The Centre for Effective Dispute Resolution (CEDR) defines 'mediation' as follows:

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

ADR is specifically referred to in the First Tier Tribunal Rules (SI 2009/273). These rules provide that the Tribunal should, in appropriate cases, make the parties aware of the availability of ADR and facilitate its use as necessary (see [here](#)). The Civil Procedure Rules (Practice Direction – Pre-Action Conduct) also encourages parties to exchange information about the issue in dispute and consider using ADR in order to try to resolve the dispute without the need for formal legal proceedings (see [here](#))

On behalf of Government as a whole, the Ministry of Justice and Attorney General have recently launched the [Dispute Resolution Commitment](#) and associated [guidance](#). The new commitment renews and strengthens the Government's 2001 ADR pledge. HMRC's approach to cost effective resolution of tax disputes, including the use of ADR where appropriate, is fully consistent with the Government-wide Dispute Resolution Commitment.

2. Why is ADR relevant to my work?

In appropriate cases, HMRC considers that mediation can be used as a cost effective, consensual and speedy means of supporting the resolution of tax disputes (whether the dispute is ultimately resolved by agreement between the parties or by litigation).

Over the course of the first half of 2011, HMRC has used two ADR pilots to explore in more detail the criteria for when mediation might be most appropriate for resolving tax disputes. One is a small scale pilot – covering less than twenty cases involving large businesses or taxpayers with complex tax affairs – in which the relevant disputes have been subject to an ADR process which includes the involvement of third-party accredited mediator. The other is a larger pilot for disputes involving mainly Small and Medium-

Sized Enterprises – covering around 150 cases and involving an in-house HMRC-trained facilitator to help the parties agree resolution.

This guidance applies to the use of ADR in large or complex cases, and therefore reflects the interim results of the large business/ complex ADR pilot. Further guidance will be published in due course on the use of ADR in smaller and non-complex cases, once the results of the SME ADR pilot have been fully evaluated. ('Smaller and non-complex cases' are broadly those dealt with in Local Compliance SME and I&PB, although there may exceptionally be some cases handled by those parts of Local Compliance where the nature of the dispute is such that it could meet the criteria for ADR set out in this guidance).

Mediation can be particularly useful in long-running disputes where positions on both sides have become entrenched, or progress for whatever reason has stalled. Mediation can help narrow down the areas of disagreement in one or more component parts of a dispute by clarifying technical issues and identifying points of difference whilst maintaining good working relationships between the parties. For example, mediation could be useful in helping to clarify the key questions which need to be answered in order to resolve the dispute (i.e. agreeing a decision tree) or by narrowing the particular points in dispute in preparation for litigation.

The Litigation and Settlement Strategy (LSS) (see [here](#)) sets out HMRC's overall approach to resolving tax disputes through civil procedures. HMRC is committed to using a collaborative dispute resolution approach wherever possible in order to resolve disputes as efficiently as practicable. In the vast majority of cases, this will involve disputes being settled through bilateral discussion/ agreement between the parties or litigation, without recourse to ADR.

However, mediation is a tool available to HMRC which may be of benefit in certain cases, subject to the criteria and additional governance requirements described below.

Types of mediation:

- (i) 'Facilitative mediation' is a process in which the mediator tries to bring the parties together but offers no opinion on the merits of the arguments being advanced. The mediator may however put forward a neutral opinion as to how a dispute may play out in front of the Tribunal. A facilitative mediator may or may not be a specialist in the subject matter of the dispute.
- (ii) 'Evaluative mediation' is a process in which the mediator will try to bring the parties together in exactly the same way as in facilitative mediation, but also providing his/her view of the matter as a specialist.

It is possible to have a combination of the two approaches in which facilitative mediation is attempted first, with evaluative mediation following if the initial approach is not successful.

- (iii) 'Expert determination' uses a neutral third party who is an expert in a particular field to provide a binding or non-binding opinion. Non-binding expert determination may be suitable in limited tax cases, such as

valuation issues, if both parties are willing to consider the strength of their case in light of the expert's view.

3. How does ADR fit with the LSS?

Mediation, unlike arbitration, leaves decision-making in the hands of the parties. Any decision by HMRC to settle a case during a mediation process will still be governed by the terms of the LSS, and any settlement/ agreement reached as a result of mediation will be subject to exactly the same governance and decision making process as any other case.

One of the fundamental principles of the LSS is that settlement of the full tax due is to be sought wherever possible. Another is that disputes should be resolved in the most efficient and cost-effective method possible. In this way, mediation, where it is used, is supportive of LSS principles as a cost effective way of trying to reach agreement and to provide a process which allows for a better shared understanding of each other's arguments/ contentions regarding what is the 'right tax' to enable HMRC and the customer to make a more informed decision.

The LSS presupposes that disputes will be resolved collaboratively (as opposed to adversarially) wherever possible, as the most effective and efficient means of getting to the 'right' result in a tax dispute. ADR also presupposes such a collaborative approach, but Collaborative Dispute Resolution (CDR) should be the norm and ADR a tool to be used sparingly within this normal way of working.

For further guidance regarding the LSS and HMRC's collaborative approach to tax dispute resolution please see [here](#).

4. Benefits of using mediation

The vast majority of tax disputes are settled by bilateral agreement between HMRC and the customer. However 2-way collaboration sometimes breaks down, and in these circumstances mediation can support the reaching of agreement between the parties. Potential benefits of mediation include the following:

- Both parties retain ownership of the decision and can withdraw from the mediation process at any time;
- It can enable parties to begin/ resume negotiations when direct negotiations have stalled and/ or are at an impasse;
- A third party presence automatically changes the dynamics of a dispute and brings a fresh perspective;
- A mediator can change the focus from the past to the present and / or future;
- A new focus on the timetable can inject urgency into decision making;

- Even if there is no settlement, mediation can enable a better understanding of why litigation is the appropriate way to resolve the dispute and help both parties better prepare for litigation;
- The discipline of approaching a dispute by first clarifying the framework by which the dispute will be resolved may lead to the development of principles capable of being applied in other cases;
- The hands-on experience of collaborative dispute resolution techniques in the context of a mediation is likely to benefit the parties in terms of how they are likely to approach their future interactions/ ways of working; in this way mediation is likely to help to maintain (and build) the relationship between the parties;
- Because both parties own the decision, any settlement will be seen by both sides as an outcome preferable to litigation. Both sides 'win'. In disputes settled by litigation at most one side 'wins' and often both sides feel they 'lost'.
- There is little 'downside' to the process as all work and preparation involved is likely to be of direct relevance and use to litigation in the event of an unsuccessful mediation.

5. In what sort of cases might mediation be appropriate?

Mediation should generally be considered in all cases that are headed for litigation or are otherwise protracted.

More specifically, mediation may be appropriate where any or all of the following points apply:

- The parties are seeking to work collaboratively but:
 - it is proving difficult to pin down the essential point(s) of disagreement,
 - HMRC and the customer appear to be at cross purposes, or
 - there is uncertainty about the other party's position, underlying rationale or process for resolving disputes;
- Collaborative working relationships appear to have broken down and facilitated mediation may help to restore them;
- The point at issue appears to be 'all or nothing' but there is a possibility that structured discussions might uncover (an) alternative approach(es) which would enable HMRC to resolve the dispute in accordance with the terms of the LSS;
- The dispute may be able to be resolved by having a wide ranging discussion of the issues on a non-prejudicial basis (although this would not entail setting off issues against others in a 'package deal').
- A narrowing or clarification of the facts or issues in the dispute is necessary. This may be particularly useful in fact-heavy disputes such as transfer pricing.

- Agreement is needed on what facts are relevant and should be disclosed to progress resolution of a dispute.
- Out of court settlement is likely to be preferable to determination by the Tribunal/ Courts, for example, because:
 - It is likely to result in a quicker and more cost effective resolution of the dispute or part of the dispute;
 - Evidentiary difficulties for one or both parties increase the risks of proceeding to Tribunal; or
 - Complex or unique facts mean that a potentially costly and time-consuming judicial determination would be of little or limited precedent value.

Cases can still be considered for mediation even if the parties initially feel that the dispute turns exclusively on points of law. Mediation often uncovers a wider range of possible solutions than those generated by a traditional negotiation process, without detracting from the statutory correctness of the result.

Mediation can help to resolve one or more issues in dispute with the same customer. This could include situations where issues are intertwined or one issue impacts on another. It may also include situations where there are a number of entirely separate issues – in such cases considering a number of disputes simultaneously may help to unlock the resolution process. Where there is more than one dispute between a customer and HMRC, the LSS provides that each dispute must be considered and resolved on its own merits, not as part of any overall “package deal”. As a matter of process, however, it may be that a number of unrelated disputes will be resolved at the same time (each on their own merits), for example as part of a process of bringing a customer’s tax affairs up to date.

Mediation can also be used to try to resolve certain aspects within a dispute, such as factual arguments over what information is relevant, or narrowing either points for litigation or subsets of points of law or fact under dispute, for instance issues of valuation.

When attempting to resolve a dispute through mediation, it is desirable to strive to resolve all aspects of the dispute, including any interest, penalty and/ or payment issues.

Even in an 'all or nothing' case which HMRC is prepared to litigate because it has high expectations of success, the process of a mediation might offer both parties some potential value added compared with litigation. This is the idea of using negotiation to enlarge the pie rather than simply carving it up. The sort of things which could be important to a customer, over and above their position on the point of substance, could include:

- The need to be listened to and have their position or point of view taken seriously;
- Opportunity to engage with HMRC specialist(s) as well as a CRM or other case owner;

- Possible recognition of their motivation in relation to the transaction in question;
- Certainty as a result of retaining control over the detailed outcome;
- Impact on how they are perceived by HMRC in future.

This might mean that even where we see the particular point in dispute as 'all or nothing' in terms of negotiating positions, the dispute as a whole could be susceptible to a range of outcomes in terms of the underlying needs and interests of the parties.

A practical example of a large/complex case which might be suitable for mediation:

UK Group A has been providing services to Group B for a number of years through a Group A subsidiary company based in Singapore. Group A considers that the service is provided by the Singapore subsidiary and so does not attract output VAT. HMRC considers that the service is provided to a UK company (Group B) and that therefore none of the supply is outside the UK. At the same time, HMRC has raised queries about the transfer pricing mechanisms used between the UK and Singapore companies.

The relationship between HMRC and Group A is good but the parties have now reached an impasse in the dispute on the point of law regarding place of supply for VAT purposes. The related transfer pricing enquiry is dragging because of the difficulty in verifying the complex facts involved – the relevant information and personnel are in Singapore. There is also disagreement as to which arm's length method of computing profits is most suitable.

Group A is represented by XYZ LLP, who represent a number of businesses with similar VAT arrangements. However, the facts in this case are sufficiently distinguishable to mean that litigation would probably not have significant precedent value.

In this case, mediation could be useful in untangling the facts surrounding the transfer pricing, or could be useful in helping the parties come to agreement regarding what information is relevant, what is available and how best it can be provided. It could also assist the parties in agreeing a transfer pricing methodology.

Mediation might help the parties agree on the point of law regarding place of supply for VAT purposes. But even if the parties eventually could not agree on the substantive issue, mediation could be useful in identifying the underlying needs and interests of both parties, to enable a framework for a solution to be put in place. It could also be useful in setting a roadmap as to how the disputes with XYZ LLP's other clients could be resolved.

Mediation might enable the parties to agree on the two separate issues by considering them side by side, with agreement on the merits of each issue.

At what stage in a dispute should mediation be considered?

The stage at which a particular tax dispute may be suitable for mediation will vary from case to case.

However, as a general rule, mediation should only be considered when both sides have attempted to explore fully the facts and their respective technical arguments. As such, mediation should not be seen as (or sought to be used as) a substitute for collaborative working/ discussions as part of the usual enquiry process.

Mediation can help to focus areas of disagreement in long-running, complex disputes. Where disputes turn on points of law, case-teams should seek legal advice before considering mediation. Case-teams are encouraged to critically evaluate advice received from Counsel with the help of HMRC Solicitor's Office.

In cases where it is proving exceptionally difficult to reach agreement on the relevant facts, or where there is a breakdown in collaboration over what factual disclosure is needed to elicit the relevant facts, there may possibly be a role for mediation in helping to unblock this aspect. This is however expected to be very much an exceptional situation.

Mediation can be considered either before or after the issuing of a formal decision by HMRC.

Interaction between ADR and the appeal/ litigation process

If HMRC and a customer agree to use mediation in a case after a formal decision has been made by HMRC, it is important that the customer also separately considers (and actions) any appeal of the HMRC decision within the relevant time limit, otherwise the dispute will be determined in accordance with HMRC's decision, notwithstanding the parties' agreement to using mediation to try to help resolve the dispute.

Once an appeal has been made, it is up to the parties to discuss and agree how to manage the ADR process and work in relation to any potential future litigation. Depending on the particular case and, for example, how much work has already been undertaken in relation to potential future litigation, the parties may wish to:

- Temporarily 'park' work relating to the litigation process in order to allow the parties to commit fully all time/ resource to the ADR process. However, it is important to guard against ADR unnecessarily delaying the litigation process (or being used as a stalling tactic).
- Work the ADR process and litigation as a "twin track" approach. This approach is likely to be more resource-/ time-intensive for both parties and could impact the ability of one or both parties to commit to the ADR timetable. However, such an approach might be appropriate where, for example, the parties have already undertaken a significant amount of work in preparing for litigation and a date has already been set for the case to be heard by the Tribunal (or Court). In such circumstances, assuming the mediation process can be completed prior to the date of the hearing, the parties may wish leave the date of the hearing in the diary in

order to provide some momentum/ impetus to the ADR process and to allow the litigation process to be used as a “back stop” if the parties are not able to resolve fully the dispute through the mediation process.

6. In what sort of cases is mediation unlikely to be suitable?

Mediation should only be considered in cases where the process is likely to add value. Therefore, in general, mediation is unlikely to be appropriate if the benefits of using mediation in the particular case (and how it might help the parties resolve a dispute) cannot be clearly identified, articulated and agreed between the parties.

More specifically, mediation is unlikely to be appropriate where any or all of the following points apply:

- The customer does not work with HMRC in a collaborative manner or on the specific dispute has indicated that they do not wish to try mediation.
- It would be more efficient to have an issue judicially clarified so that the precedent gained can be applied to other cases;
- Resolution can only be achieved by departure from an established ‘HMRC view’ on a technical issue, and no exceptional facts or circumstances exist to justify a departure from the law or practice;
- There is reason to suspect lack of integrity on the part of the customer, whether or not criminal proceedings are envisaged;
- There is doubt over the veracity or strength of evidence provided and HMRC wish to test it by cross-examination in a public tribunal.

Mediation should not be entered into unless there is a possibility of adding to or creating efficiencies in an existing dispute resolution process. For example, cases in HRCP are already utilising mediation techniques in certain areas and increasingly a collaborative approach is being adopted across risk working/ compliance checks more generally. Equally, an issue within HRCP governance could potentially ‘fast-track’ to a mediation session if much of the preparatory work has already been done.

A practical example of a case where mediation is unlikely to be suitable:

A member of K Group claims Corporation Tax relief for goodwill under the corporate intangible fixed asset regime in respect of its acquisition of a business that was carried out by another member of K group before commencement of the regime (1 April 2002).

In making this claim, K Group and its advisers are challenging HMRC's interpretation of the law, which is set out clearly in guidance. There is no disagreement regarding the facts of the dispute, which turns exclusively on the interpretation of the relevant legislation.

HMRC is aware that there are a large number of businesses who could make similar claims, were K Group to be successful in its claim.

Mediation in this circumstance is unlikely to be suitable because of the policy implications. Unless the customer is prepared to concede the point, it is likely to be preferable in these circumstances to obtain a judicial precedent which would clarify the situation for similar arrangements in other businesses.

7. Who within HMRC decides whether or not mediation is appropriate in a particular case?

It is anticipated that mediation will normally be taken forward by the CRM/ case-owner; they will generally retain ownership of decisions, with support from the Dispute Resolution Unit (DRU) as required.

As mediation is a relatively new dispute resolution tool and has application across HMRC, case teams considering mediation should liaise with and seek advice from the DRU, who will arrange for a decision on whether or not the case is suitable for mediation to be made by the ADR Panel. The ADR Panel consists of the Head of the Dispute Resolution Unit, the Director LBS, and the General Counsel and Solicitor. Other governance processes and procedures (e.g. HRCF, Counter Avoidance Group, Contentious Issues Panels, MCRP, etc) should be followed as usual.

If you consider that mediation might be suitable in a particular case or you receive a request for ADR from a customer/ agent, you should discuss the matter – and in particular what might be the potential benefits of using ADR -- – with the customer, as well as with all internal HMRC stakeholders involved in the issue.

In the interests of consistency and best practice, the DRU should be informed of any case where ADR has been requested or is being actively considered. A template which should be completed and submitted to the DRU is attached at [Annex 1](#).

The DRU is available to provide advice and support in all cases and help talk through the potential advantages / disadvantages of ADR in a particular case.

This might, in particular, be helpful where not all HMRC stakeholders agree as to whether or not the use of mediation is appropriate in a given case.

Subject to **the views of the ADR Panel**, existing governance procedures and once the matter has been discussed with HMRC stakeholders involved in the case and the DRU, if a customer has a CRM, the CRM should make the decision as to whether or not mediation is suitable for a particular dispute. Where a customer does not have a CRM, the decision to proceed with mediation must be made by the business Director in the relevant Line of Business.

There may be occasions where a request for ADR is made to HMRC by a party other than the customer's usual tax agent. It is therefore important to ensure that you have the appropriate confirmations that the customer has authorised the particular party to act, before you discuss any aspects of the customer's case further with that party.

Mediation is not a route to bypass any of the existing governance arrangements such as CAG, CIP, HRCP, etc. All normal governance applies to any agreement reached within a mediation.

Summary of decision making process

On receipt of a request for ADR:

1. Depending on who receives the request for ADR in the particular case, notify the CRM/ case owner and DRU of the request as soon as is practicable
2. Clarify why the customer/ agent considers ADR may be appropriate and specifically what potential benefit(s) they believe it can bring to the particular dispute
3. Seek advice/ input from DRU and arrange internal discussion with all HMRC stakeholders with an interest in the case **before the suitability of the case for mediation is considered by the ADR Panel**
4. **Subject to the views of the ADR Panel**, discuss the matter further with the customer/ agent
5. If, following internal discussion and further discussion with the customer, HMRC agrees that ADR would be beneficial:
 - Where there is a CRM in place, he/ she may take the decision to proceed
 - Where there is no CRM in place, the matter should be discussed with/ approved by the business Director in the relevant Line of Business before proceeding.

In cases where HMRC consider that ADR might be appropriate (and there has been no specific request from the customer/ agent), steps 3 – 5 apply.

Costs of a mediation

The concept of mediation requires that the cost of the mediator, together with any other costs directly associated with the mediation (e.g. costs of hiring a neutral venue, if this is considered to be necessary in the particular case) be

split equally between HMRC and the customer, even if the customer offers to bear the whole cost.

Professional mediators generally charge between £200 - £500 per hour. As a general rule, depending on the complexity and nature of the issues in dispute:

- A mediator is likely to require between 3 -10 hours of preparation in advance of the actual mediation day; and
- The actual mediation day could last anything from 4 hours up to 14 hours +. Typically, a mediation will initially be scheduled for a full working day (08.30 – 17.30). If, at the end of this time, the parties have not resolved the dispute, but they agree that it is likely that a resolution could be agreed if discussions continued, then the mediation would continue into the evening. Unless there were genuine exceptional circumstances in a particular case, it is likely that most mediators would want the parties to continue dialogue in the evening rather than seeking to resume discussions the following day.

However, in the vast majority of cases we would expect the cost of a mediation to be significantly less than the cost of litigation bearing in mind, for example, the likely legal costs (for both parties) associated with litigation as well as resourcing requirements. The intangible costs arising from the strain litigation can put on the relationship between HMRC and the customer can also be significant.

Authorisation for costs should generally be agreed by the relevant business Director. In LBS, authorisation for proceeding with the mediation and for potential costs can be given by the Urban Centre Manager.

8. Typical ADR timetable / process, including mediation

ADR process agreement

Once HMRC and the customer are agreed that mediation is an appropriate way forward for the particular dispute, an 'ADR process agreement' should be drawn up and agreed. This should cover:

- Scope of the dispute (issue and periods affected)
- Timetable/ steps in the proposed ADR process, including structured discussions (see further below) if necessary, leading to mediation if the dispute is not resolved at an earlier stage in the ADR process
- Named individuals for both sides who will take responsibility for ensuring actions are completed on time
- Contact details for all relevant people
- Where meetings will take place
- Criteria for choice of mediator

- Confidentiality of proceedings
- Without prejudice nature of proceedings
- Aims and possible outcomes of the ADR process
- A presumption that mediation will follow the structured discussions if these do not resolve the dispute.

A template ADR process agreement is attached at [Annex 2](#).

Pre-mediation structured discussions

Mediation will generally be part of a wider process which envisages (and normally begins with) structured discussions, with a view to narrowing down the issue and possibly resolving the dispute without the need to go to a mediator. However this step may be skipped if it has already genuinely taken place (e.g. as part of an HRCP process) or as we embed CDR within our normal way of working.

Therefore, depending on the nature/ detail of the dispute and the historical discussions between the parties in the particular case, a typical ADR process is likely to include some or all of the following “pre mediation steps”:

1. Both parties to agree and document the particular point(s) of fact or law which are in dispute and / or the particular question(s) which need to be answered in order to resolve the dispute. This could take the form of a decision tree.
2. Both parties to summarise, and meet to discuss, their respective positions in relation to the particular point(s) in dispute or question(s) which need to be answered (identified at step 1).
3. The summaries/ discussions of positions (at step 2), could be supplemented by the exchange of, and further meeting to discuss, more detailed technical analyses where appropriate.
4. Parties to jointly prepare a document setting out the key facts and / or legal issues which are agreed between the parties and summarising the principal areas of disagreement.

The benefits of including some or all of these pre-mediation steps in the ADR process include:

- Helps to focus discussions and identify if there has been any misunderstandings on the part of either party regarding particular point(s) in dispute, facts or legal issues;
- May help to “unlock” the dispute and allow the parties to identify a suitable basis for resolving the dispute without the need for incurring the cost of appointing a third party mediator. During the course of the small mediation pilot run by HMRC in 2010/11, a number of long running disputes were resolved by HMRC and the customer during these pre-mediation steps; the process of a structured dialogue helped focus the

discussions and helped identify acceptable bases for agreement without needing to progress to the formal mediation stage.

- Enables the parties to prepare some specific, focussed documents which, if it is necessary to go to formal mediation, can be provided to the mediator in advance of the mediation.
- Helps to ensure that both parties get the most out of any formal mediation, by ensuring that both parties are as fully prepared as possible in advance.

Where specialist advice is likely to be needed on a particular issue which is the subject of dispute then you should consider including those specialists early in the discussions – including at meetings with the customer – to ensure that all discussions through the process are made on an open and transparent basis and include all HMRC personnel who are likely to be involved in the decision making process (including in an advisory capacity).

Mediation

If, following any pre-mediation structured discussion steps, the parties have not been able to resolve the dispute they will need to discuss and agree on the appointment of a mediator, together with the various procedural matters relating to the mediation (e.g. dates for mediation, any pre-mediation meeting with the mediator) as set out in the ADR process agreement. Further details regarding the various procedural and practical matters are set out in section [10](#) below.

9. Who from HMRC should be involved in the ADR process?

The HMRC “cast list” and stakeholders will need to be considered and agreed on a case by case basis. However, the following sets out the likely HMRC stakeholders who might be involved in the ADR process, together with their particular role in the process:

- *CRM (or case owner, if no CRM)*
Role: Principal point of contact for customer regarding ADR process and to lead all stages in process. Must attend all calls / meetings with customer and must attend the mediation.
- *Product/ process group specialist (where relevant)*
Role: Member of the core team to support case owner where a point of tax law is in dispute. Likely to attend some meetings, as well as the mediation.
- *AAG specialist (where relevant)*
Role: Member of the core team to support case owner. Likely to attend some meetings, as well as the mediation.
- *DRU contact*
Role: Provide support to CRM and HMRC team throughout ADR process, as required. Where appropriate, during HMRC preparation and in the

stages/ meetings prior to the mediation, could act as a “quasi-facilitator” in order to question, challenge assumptions etc. May attend mediation. The DRU will also ensure that appropriate regular progress reports are provided to the ADR Panel, and that progress reports are in any event provided to the ADR Panel in the event that agreed timetables in a case approved for ADR slip by more than a month.

- *Solicitor’s Office representative*
Role: Review ADR process agreement and formal mediation agreement and provide any other support as required. Might attend mediation (otherwise to be “on call” on day of mediation in order to advise regarding documenting any agreement between the parties).
- *Decision maker (where case is subject to possible escalation for a decision)*
Role: Wherever possible the decision maker(s) from both sides should attend the mediation. In any event, the HMRC decision maker should agree parameters for possible settlement with HMRC team prior to mediation and must be “on call” on day of mediation in case a potential settlement outside of pre-agreed parameters is put forward by the other party.
- *Others?*
In each case, the relevant HMRC team should consider the nature of the issue (is it a tax technical or commercial argument) and the nature of the composition of the team who will be representing the business at any meetings/ mediation etc (e.g. senior management, advisors, Counsel etc). Understanding this will indicate the thrust and nature of the taxpayer’s approach to mediation and will help you to decide whether or not it is appropriate for any other HMRC attendees to also attend (e.g. Sector Lead).

10. Preparing for the mediation

Practical issues

1. Choosing a mediator

The parties should discuss whether facilitative mediation, evaluative mediation or non-binding expert determination is most suitable for the particular case, and whether there are any particular individuals who might be appropriate to mediate the issue. The DRU is available to advise on what might be the most appropriate form of mediation and also help find a suitable mediator.

2. Mediation agreement

Once the parties have agreed on who should be appointed, in order to appoint a particular individual, a separate ‘formal mediation agreement’ will need to be entered into by both parties and the appointed mediator.

Typically the mediator will be able to provide the parties with a standard template formal mediation agreement, however, it is recommended that the terms of this agreement are discussed with / reviewed by the DRU. The CRM/ case worker will

usually be responsible for signing the formal mediation agreement on behalf of HMRC.

Examples of model formal mediation agreements can be obtained from the CEDR website [here](#).

3. Choosing a date for the mediation

Once the parties are agreed on who should be appointed they will need to agree a date for the mediation. The date should be one on which the mediator, the customer's representatives (and "decision makers") and HMRC's team are all available, and should be far enough in advance to allow all agreed pre-mediation steps to be completed.

Mediations can be - and often are in commercial disputes - arranged and held at fairly short notice (subject, of course, to the availability of the mediator and the representatives of the respective parties). However, if the parties want a particular individual it is often possible to "hold" an agreed date in the diary. Therefore parties may wish to consider agreeing a date at the outset of the ADR process, prior to the pre-mediation steps. This can help to ensure that the parties keep to the agreed timetable of the ADR process and can also help to maintain momentum in the process. However, the parties should bear in mind that it is possible that they may resolve the dispute prior to the formal mediation, therefore if a date is reserved in advance the parties need to consider / understand any potential cost implications of subsequently cancelling the mediator; which is likely to depend on each mediator's specific terms.

4. Availability of HMRC team members (and customer's team)

Whilst mediations are typically scheduled for a full working day they can – and very often do – overrun and can sometime finish very late in the evening. This generally reflects mediators' experience of the effectiveness of continuing a session until agreement is reached, rather than reconvening the mediation on a future occasion.

If a dispute has not been resolved by the end of the scheduled time, it is up to the parties whether or not to continue discussions. A decision as to whether or not the mediation should continue is likely to be influenced by the likelihood of a resolution being reached.

However, in order to ensure that the benefit of any progress is not lost, it is important to ensure that representatives of both HMRC and the customer (in particular the respective decision makers) are, if necessary, able to stay beyond the scheduled time for the mediation. This should be discussed in advance with the customer as it is likely to influence the choice of date of the mediation and will enable individuals to make necessary arrangements (e.g. child care). Consideration should be given in advance to practical matters such as transport, accommodation requirements in case a mediation does overrun and provisional booking may need to be made in advance.

5. Choosing a venue

Careful thought should be given to where the mediation is held – typically at least three separate rooms will be required which, preferably, should not be next to one another. In some cases it may be necessary to hire a neutral venue, however, the parties should try to minimise costs wherever possible

and consider the availability of meeting rooms in their own offices or perhaps of the customer's agent. The parties will need to consider any impact of the mediation overrunning (e.g. costs, does the building shut at a certain time, etc).

6. Pre-mediation discussion with mediator

Before the actual mediation, the mediator may suggest a pre-mediation meeting (or conference call) with both parties present. The purpose of this meeting is for both parties to meet the mediator and, typically, to provide an opportunity for the mediator to give an outline of how the mediation day will be structured, discuss any of practical issues and also allow either party to ask any questions.

As set out in the template ADR process agreement, unless expressly agreed with the other party, neither party should seek to contact or discuss any aspect of the case or point(s) in dispute with the appointed mediator prior to the mediation, outside of any pre-agreed meetings/ conference calls with the mediator.

7. Administrative points

The mediation is likely to last a whole working day, and may carry on into the evening. The parties will need to consider and agree catering requirements. Each party may wish to arrange their own catering options and to bear the costs separately.

The parties should also discuss the availability of internet access, printers, paper, projectors, computers, cables, fax machines and other equipment as required.

If spreadsheets are needed, they should be exchanged before the day as it may be difficult to import documents between laptops, for example if ports have been disabled for data security reasons.

8. HMRC checklist

A checklist of other practical matters to be considered by the HMRC team prior to the mediation is set out in [Annex 3](#).

This includes guidance in relation to identifying HMRC's 'red', 'amber' and 'green lines' prior to the mediation (i.e. what, if any, parameters there might be for agreeing particular matters).

What typically happens on the day of the mediation?

This will generally be set out for the parties by the mediator during the any pre-mediation meeting or conference call.

However, in outline, a 'typical mediation' would generally involve the following steps:

- Welcome from mediator in separate rooms
- Plenary opening statements from both sides – length agreed in advance (typically maximum of 10-20 mins)

- Brief responses to opening statements
- Parties return to separate rooms and mediator holds separate sessions with both parties, alternating between the two. The mediator's role is to challenge assumptions and strengths / weaknesses of positions held by both parties, help to clarify the parties' interests and needs underlying their negotiating positions, and provide a channel of communication. The usual protocol is that the two parties do not speak directly to each other between the end of the opening session and the next plenary session.
- Any movement or offers to the other party is usually made by the mediator.
- Each party's conversations with the mediator are confidential and the mediator does not relay any information to the other party without express permission.
- The parties come together in plenary when both sides are ready to talk face to face – this is usually at the stage when agreement in principle is reached/ imminent.
- When an agreement has been reached, it is documented (in outline) and signed by the parties immediately

11. Resolving the dispute within a mediation

Documenting the agreement

It is likely that, for the majority of tax disputes going to mediation, the intention of both parties will be to try to resolve the dispute if possible.

Where HMRC and the customer are able to reach an agreement through mediation it is important that the agreement is documented and signed by both parties on the same day. At this time, it is possible that the parties may not be able to agree the detailed calculations of liability that flow from the terms agreed, but this should not prevent the parties from documenting the key points or principles agreed.

The document might include reference to terms and conditions outlined in the ADR process agreement and/ or formal mediation agreement (see section [8](#) above).

Where litigation proceedings have already begun, a settlement agreement may be made by consent order (also known as a 'Tomlin order') under Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009— see [here](#).

This allows the settlement to take effect immediately, without the 30-day 'cooling-off' period provided for in S54 TMA 1970/ S85 VATA 1994. It may be advisable to initially document heads of agreement on the day, with consent order to follow so that the terms can be reviewed/ agreed by Solicitor's Office.

As an alternative, and in cases where litigation proceedings have not begun, the settlement will need to be formalised in the same way as for any out of court settlement of the tax matters in dispute (e.g. contract settlement or S54 TMA 1970 agreement for direct tax disputes, or S85 VATA 1994 agreement for VAT disputes). Here too, it may be advisable to initially document heads of agreement on the day, with the formal settlement process to follow once reviewed/ agreed by Solicitor's Office.

CEDR's model Settlement Agreement and Tomlin Order is available [here](#).

What happens if only partial agreement is reached?

Generally, discussions and any negotiations in a mediation are on a 'without prejudice' basis and therefore any partial agreement on any matter of substance will not be recorded.

However, it may be the case that during the mediation, progress is made in narrowing particular points of disagreement or in clarifying facts and the parties may agree that it is useful to document these points (e.g. for use in subsequent litigation).

What happens if no agreement is reached?

This should be pre-agreed between the parties and is likely to be set out in either the ADR process agreement or the formal mediation agreement.

As with any tax dispute, if HMRC and the customer are not able to resolve the dispute through bilateral discussion then – unless either party concedes the issue – it is likely that the dispute will ultimately need to be resolved by litigation.

Confidentiality of proceedings

The status of information provided in the course of the ADR process/ mediation, including documents drafted in preparation for and during the mediation session should be pre-agreed between HMRC and the customer. Standard confidentiality clauses can be found in the ADR process agreement and are likely to be used in the majority of cases.

However, where a dispute is not fully resolved through mediation, it is possible that certain information / documentation prepared during the course of a mediation process could be beneficial in subsequent litigation (e.g. where parties narrow down points in dispute). In such circumstances, it is envisaged that the parties are likely to agree that particular information / documents could be disclosed and used in the litigation.

In common with all casework, mediation proceedings and documents should be kept on a 'need to know' basis within HMRC.

12. Where to go for further information

The Dispute Resolution Unit is there to give further advice and information on ADR within HMRC.

The DRU's role in relation to ADR includes the following:

- Provide support to case owners and CRMs, drawing on lessons learned and feedback from pilot cases;
- Act as a repository for management information relevant to mediation for metrics purposes;
- Act as a central point of contact for internal / external queries regarding mediation;
- Act as guardians for best practice, training and guidance for mediation;
- Collate internal and external feedback from mediation participants in order to inform development of the ADR programme and to provide metrics information;
- Maintain a list of relevant directorate contacts.

DRAFT

Template for notifying the DRU of a potential ADR case

Notification of potential ADR

Once completed to be sent to: [INSERT EMAIL / CONTACT DETAILS], DRU

[Customer Name]

CRM/ case worker:	
Directorate:	
ADR requested by customer/ proposed by HMRC	
Case Details:	
- <i>Point at issue</i>	
- <i>Tax at risk</i>	
- <i>Type of tax / duty</i>	
- <i>Tax specialist contact details</i>	
- <i>Other HMRC stakeholders</i>	
- <i>Agent</i>	
- <i>Date issue/risk taken up</i>	
- <i>Stage reached</i>	
Potential ADR case because:	
- <i>Dispute over facts</i>	
- <i>Likely to be cost efficient</i>	
- <i>Impasse in negotiation</i>	
- <i>Preparation for litigation</i>	
- <i>Involves multiple parties</i>	
- <i>Litigation unwelcome / sensitive</i>	
- <i>Other (provide detail)</i>	
Brief narrative (explaining role ADR likely to play):	
CRM/ case worker agreement to ADR?	
HMRC stakeholders agreement to ADR?	
Other governance procedures in place?	
Assistance required from DRU:	
DRU Notes	

Template ADR process agreement

WITHOUT PREJUDICE

DRAFT FOR DISCUSSION PURPOSES

[INSERT CUSTOMER NAME]

SUGGESTED ADR PROCESS FOR RESOLVING [INSERT DISPUTE]

1. Introduction

On *[insert date]*, *[insert names of HMRC representatives]* of HM Revenue & Customs (HMRC) met with *[insert customer representatives]* of *[insert customer]* to discuss the possibility of resolving their current *[insert tax type]* dispute through the use of Alternative Dispute Resolution (“ADR”). The dispute concerns *[insert brief summary, including overview of issue and period(s) impacted]*. Both parties are keen to resolve the dispute without litigation if possible and have agreed to enter into the process in good faith and use their best endeavours to resolve the dispute through ADR, including facilitated discussions between the parties and if necessary, a mediation process.

This note sets out *[HMRC’s / customer’s / a]* proposal for how the process might work, together with an indicative timetable and dates which the parties will endeavour to meet. It is agreed between the parties that the ADR process is on a without prejudice basis.

2. Administrative Points

The following administrative points need to be agreed.

(i) Who should be instructed as mediator?

In terms of appointing a mediator, the following are possible options:

- The parties can appoint a mediator recommended by a Civil Mediation Council accredited mediation provider organisation (see list [here](#))
- The parties can approach Counsel’s chambers who also offer mediation services, and choose from their panel of mediators (e.g. an accredited mediator like *[insert possibilities]*) or choose to appoint a non-accredited mediator (e.g. a recognised expert with experience in the relevant sector).

[Insert any other possibilities, including if wished the preferences of either party, and relevant considerations in choosing a mediator]

(ii) Who should be involved from the parties?

[Customer] will be represented by the following people who will jointly lead the discussions on behalf of [customer]:

- *[Insert names of customer representatives, including agent]*

HMRC will be represented by the following people who will jointly lead the discussions on behalf of HMRC:

- *[Insert names of likely HMRC representatives]*

[Optional: It is possible that other HMRC specialists may become involved in the process or at particular meetings, as and where necessary.]

- (iii) Who should bear the cost of mediation and what are the costs?

It is suggested that both parties will bear the third party costs of mediation (that is the costs referred to in this subsection of these proposals) equally and each bear their own internal costs. Mediators charge out at an hourly rate, normally ranging from £200 to £500 per hour depending on their experience and the circumstances of the case. It is also possible to agree a daily rate which is usually 13 times the hourly rate, consisting of 8 hours mediation and 5 hours preparation.

[Insert fees for specific mediator to be appointed or mediators to be put forward as suggestions, if known]

Estimated total fees for a mediator for 1 day including full preparation (i.e. to cover Steps 4 & 5 below) could be up to £10,000.

Additional expenses may include:

- Venue fees and associated costs, assuming the parties agree to hold the mediation at neutral venue and not at one of their offices; and
- Further mediator costs in relation to drafting the settlement agreement.

- (iv) When and where should the mediation take place?

[Insert estimated date of mediation and location possibilities]

3. Suggested process for a facilitated discussion process and mediation

The following details the steps the parties have agreed to follow. If at any stage either party decides that the dispute can only be resolved by litigation, they can notify this to the other party and the ADR process will be discontinued.

Preliminary step: *[Insert details of any preliminary steps required prior to commencing the ADR process.]*

[Insert detail of how preliminary step is to be carried out, including timescales and dates].

Step 1: Parties to identify which facts and issues are in dispute and which are not

[Insert detail of how this is to be carried out, including timescales and dates. This could entail a series of structured discussions around all potential outcomes of the mediation.]

Step 2: If there was no resolution after Step 1, the parties to prepare position papers based on the key facts and issues identified still to be in dispute.

[Insert description of papers to be provided and dates for exchange, along with method of exchange, i.e. electronically or by same day courier.]

Step 3: Presentation of parties' positions

[Insert agreed timescale]

[Optional: The meeting will take place on DDMMYY. The parties will take turns, with (customer) going first to present their viewpoint. The presentations can take any format and involve any media, but each party may only present for a maximum period of 2 hours. Following both presentations, the parties will go to separate rooms and take a break of 1 hour to reflect and to identify an outcome which is agreeable to them and possibly, agreeable to the other party 'offer'. After the break, the parties will meet and discuss their respective offers. It is hoped that the parties will agree to a mutually acceptable offer and, by doing so, will have resolved the dispute.]

- If the parties are unable to reach agreement then the need for mediation will be considered. The intention is that a mediator will be appointed to facilitate negotiation of an agreement.
- If the parties are still not able to resolve this dispute, the parties are to agree to appoint a mediator.
- If it is agreed that a mediator should be appointed then that should happen by *[insert time and date]*.
- The dates and detailed timetable in relation to Steps 4 – 6 will (if needed) be discussed and agreed by the parties in due course. In particular, it is likely that any timetable will be subject to the availability of the particular mediator which the parties agree to appoint. However, the parties will be mindful of the desire to maintain momentum with the process and will endeavour to ensure that Steps 4 – 6 are completed as quickly as possible.

Step 4: Appointment of a mediator

[Anticipated date]

- On *[date TBC]*, *[Insert name, i.e. agent]* on behalf of *[customer]* and HMRC will:

- formally appoint the mediator agreed by the parties; and
 - send copies of all documents prepared by the parties for Steps 1 to 3, and any further submissions the parties wish to make, to the mediator, and copy these documents to the other party.
- Unless expressly agreed with the other party, neither party will seek to contact or discuss any aspect of the case or point(s) in dispute with the appointed mediator prior to the mediation, outside of any pre-agreed meetings / conference calls with the mediator (as set out in this document).
 - Between [dates TBC], the mediator is expected to review the documents sent by [...].
 - On [date TBC], the parties and the mediator will talk via a conference call. The purpose of this call is to give the mediator an opportunity to seek clarifications and clarification of any issues (if required) and to ask questions in order to gain a better understanding of this dispute. During the call, the parties and the mediator will agree on mutually convenient day(s) to meet for the formal mediation process. *[Alternatively, this could take place at a face to face meeting]*.
 - By 5 pm of [date TBC], the mediator must have familiarised himself/herself with the facts and the issues in dispute. By 5pm on the same day, the parties and the mediator must have also agreed the amount of time required to complete the mediation process.

Step 5: Mediation Process

Week commencing [...]

- On the agreed day(s), the parties and the mediator will meet at the chosen venue.
- The process will begin with a short plenary session in which each party will make a brief presentation in relation to what they would like to achieve in the mediation and provide a brief summary of their position following the facilitated discussions.
- Both the parties and the mediator will be allocated their own separate rooms. During the course of the day(s), the mediator will move between the two rooms to hear and discuss the views of both the parties.
- The object of these discussions is that the mediator will facilitate agreement of the parties to a solution to their dispute, which could include one of the range of outcomes identified in Step 1.

Timings:

- [Optional: The parties are to meet, at least once, between [dates TBC]
- The mediation process to commence at 9am on the chosen day(s) and to conclude by 5pm, unless both parties agree that they wish to continue for a longer time.

Step 6: Settlement Agreement or document summarising key points of agreement / difference

Week commencing [...]

- Following the mediation process:
 - If a basis for settlement has been agreed between the parties, [Party A] to draft a written settlement agreement formalising the outcome agreed upon. [Party A] to send [Party B] the draft agreement electronically by 9am on [date TBC]. [Party B] to review and the parties to sign the same on or before 13 January 2011.
 - If a basis for settlement has not been agreed between the parties, [Party A] will draft a document which summarises the key points which have been agreed as well as the principal points of difference (either factual or technical) between the parties.
- In either case, [Party A] will send [Party B] the draft settlement agreement or draft summary of key points of agreement / difference electronically by 9am on [date TBC]. [Party B] will review and provide any comments / suggested amendments to [Party A] on or before [time on][date TBC].

Timings:

- The parties will draft, review, amend and sign the settlement agreement over the course of [date TBC] and no later than 5pm of on that day or agree the summary of key points of agreement / difference by [time on date TBC].

4. Ultimate Outcome

The parties will have resolved the scope of their dispute. In the alternative, they have narrowed the scope of the dispute and, through review and discussion of the facts and arguments, advanced the preparations for litigation. The parties will have reached an understanding of each party's litigation aspirations.

5. Rules of conduct

Confidentiality

The ADR process proceeds entirely on a 'without prejudice basis'. Anything said and all documents produced during the ADR process are confidential and without prejudice to the parties and shall not be disclosed to any third party, other than the parties' professional advisors (including statutory auditors), unless the express consent of each of the parties is obtained and subject to the obligations placed on the parties by the operation of English law.

Record of action points

At the beginning of any meeting, (either via telephone conference call or face-to-face) the parties will agree a note taker in order to record the action points emerging from the discussions. The notes taken will not be formally settled by the parties but may assist in the event of any misunderstandings that may have occurred during the course of these discussions.

Compliance with ADR best practice

By entering into this process, the parties have demonstrated a reasonable attempt to resolve the dispute by ADR, as encouraged under the Tax Tribunal Procedure Rules and more generally, the Civil Procedure Rules.

HMRC checklist for mediation

This checklist is intended as a suggestion of items that the case-team may wish to consider in preparation for the mediation. It draws on the checklist produced by the ICAEW, together with specific feedback from the ADR pilot.

HMRC case

- 1.1 List evidence – witnesses, documents, reports, statements, etc.
- 1.2 List financial liability for each point in dispute (including interest, penalties, etc).
- 1.3 List strengths and weaknesses for each point in dispute
- 1.4 Clarify what, if any, parameters for negotiation are there on the issue in dispute (i.e. HMRC's 'red', 'amber' and 'green lines'):
 - Red: no movement possible
 - Amber: can be pushed a little
 - Green: reasonably flexible
- 1.5 Calculating potential settlement range:
 - What would HMRC ideally like?
 - What would HMRC accept?
 - What is HMRC's bottom line?
 - At what point would HMRC walk away?
 - How did HMRC value the case? (including consideration of non-financial aspects)
 - What is the best alternative to no agreement (BATNA)?
 - What is the worst outcome to no agreement (WOTNA)?
 - How much will it cost to go to trial?
 - How long will it take?
 - What are the % chances of winning in court?
 - What does the other party consider its % chance?
 - What questions or line of argument do you want the mediator to put to the other party?
- 1.6 Identify HMRC's core interests and needs with relation to the other party, assessing alternative ways in which they can be met. This could include commitments in relation to aspects other than the particular issue / dispute in mediation.

Customer's case

- 2.1 List their evidence
- 2.2 What are their likely arguments regarding liability on each point in dispute?
- 2.3 List the strengths and weaknesses of their case

- 2.4 Consider (or guess) the basis of their demands
- 2.5 Consider (or guess) the basis of their offer
- 2.6 How else may they have valued their demand (including non-financial aspects)?
- 2.7 How else may they have valued their offer (including non-financial aspects)?
- 2.8 Try to identify the customer's core interests and needs, and assess whether they can be met within the bounds of LSS.

Considering all dimensions of the dispute

- 3.1 Something may have financial cost for one party which does not impact the other party in the same way – i.e. an offer by HMRC to undertake complex calculations may not incur extra financial cost for HMRC, but may save the customer incurring hours of adviser fees. Conversely, a customer may have access to sophisticated document management systems which could save HMRC resource time.
- 3.2 Burden of proof can be a significant factor, especially in fact-based disputes. How important is it to each party?
- 3.3 What else can be brought to the negotiating table? This does not mean contemplating 'package deals', but considering what other issues / disputes could be considered simultaneously, and what other aspects of the relationship between HMRC and the customer could be usefully discussed. Some things may be worth more to the customer than expected, for example receiving certainty on a transaction before a key accounting date.

Things that the mediator will need to know

- 4.1 A clear, concise background to the case, with all points in dispute highlighted.
- 4.2 Are there any unique features of the case which the mediator should be aware of?
- 4.3 What was the outcome of previous negotiations?
- 4.4 Have any without prejudice offers been made? What was the basis for refusal / acceptance?
- 4.5 Are there any issues HMRC considers to be 'red herrings' which the mediator should be aware of?
- 4.6 Would a chronology of events help the mediator?
- 4.7 If legal proceedings have already commenced, does the mediator need to see relevant documents?
- 4.8 What stage of disclosure has been reached? In mediation there are no formal rules of disclosure – it is important that the mediation process does not get bogged down with unnecessary documentation.

- 4.9 What are the particular points of fact or law which the parties agree / disagree? It is likely to be helpful to provide the mediator with some or all of the documents prepared by the parties during the pre-mediation steps – what is to be provided should be agreed between the parties.

Mediation case-team – roles and responsibilities

- 5.1 Identify all the individuals who will need to be at the mediation session, remembering that it may go on long beyond the end of a normal working day.
- 5.2 Identify any individuals who will need to be available 'on-call'.
- 5.3 Agree a clear decision-making process which enables a decision to be taken on the day.
- 5.4 Allocate roles and responsibilities to members of the mediation case team: for example, monitoring the other party's non-verbal communication; deciding who makes the opening statement at the first joint session; who is responsible for drafting responses, etc. A brief role-play rehearsal of difficult discussions likely to come up is well worth considering.

Witnesses of fact and expert evidence

- 6.1 Expert witnesses are not usually called during mediation sessions. However, this is a matter which should be agreed by the parties prior to the mediation.