Nudging mediation

Applying ‘nudge’ thinking to increase the use of mediation and cut the cost of conflict in the workplace
Nudging Mediation: Applying ‘Nudge’ thinking to increase the use of mediation and cut the cost of conflict in the workplace

Presented by John Crawley, Chair and Founder

CMP Resolutions

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Foreword

The notion of government ‘nudging’ not ‘nannying’ arrived in the UK in 2010 with the Conservative Liberal Democratic Coalition. This paper applies ‘nudge’ thinking to mediation in the hope that we can influence people more effectively towards early local dispute resolution and unlock some of the combative habits forming in the UK working landscape.

This is my earliest attempt to use ‘nudge’ thinking. I have many suggestions for ways of changing the choice landscape around mediation including:

 ✓ Abandon the term ADR (Alternative Dispute Resolution)
 ✓ Rebrand grievance procedures as resolution procedures
 ✓ Replace the concepts and terms ‘formal’ and ‘informal’ in grievance procedures

Nudge thinking itself is a nudge. In writing this paper I think I am experiencing what Thaler and Sunstein describe as ‘contagion’ - when an idea catches on, sparks another and builds momentum towards progress. I hope this paper has the same effect on you.

John Crawley - Founder and Chair of CMP Resolutions
Changing the mediation ‘choice architecture’

The ‘Nudge’ principle recently embodied in the Coalition Government’s Nudge Unit was first developed by two American professors, Richard Thaler and Carl Sunstein\(^1\). They argue persuasively that we each have the potential to be ‘choice architects’: “we have responsibility for organising the context in which people take decisions”. Like more traditional forms of architecture there is no such thing as ‘neutral’ design. What we do, particularly if we are in a position of influence, will influence the choices people make.

Thaler and Sunstein persuasively evidence the effectiveness of ‘libertarian paternalism’: “we argue for self-conscious efforts ... to steer people’s choices in directions which will improve their lives ... to influence choices in a way that will make choosers better off, as judged by themselves”. This involves ‘nudges’ – “any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options. Nudges are not mandates.”

Why nudge mediation?

Successive governments have backed mediation as both a sensible, humane response to workplace conflict and as a cost-efficient measure. Policy makers and HR professionals are positive about mediation and the mediation ‘profession’ has mobilised much credible evidence about the benefits of mediation to employees, employers and business\(^2\). The question remains, why mediation is not more widely used in the workplace.

This White Paper contains nudges which will alter the choice architecture around mediation to increase understanding and uptake. Most of the nudges suggested are either free or resource neutral, or will utilise existing resources in a more organised way. These nudges will cut the cost of conflict at work and unlock many of the benefits of mediation, namely its ability to resolve disputes, restore relationships, revive motivation and improve performance.

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\(^1\) ‘Nudge – Improving Decisions about Health, Wealth and Happiness’; Thaler, Richard H and Sunstein, Carl R; Penguin 2009

\(^2\) Contact CMP info@cmpresolutions.co.uk for references and links for research on conflict at work and workplace mediation
‘Nudging’ as a process

The nudge approach encourages focused practical consideration of small steps which have a rapid and observable impact. It gets the mind out of neutral gear so that the journey forward has momentum. Below are CMP’s initial steps in the ‘nudge’ direction of travel.

1. Visibility - overcoming ‘status-quo bias’ and ‘conformity’

One of the initial tenets of Thaler and Sunstein’s thinking is visibility - people are more likely to use something if it is the first, the most visible, and the most often selected choice. People are powerfully attached to the status quo and inclined to conform, particularly if they feel the eyes of their peer group upon them.

Like most measures which offer a solution to a relatively uncommon problem, mediation has not built up a critical mass of usage in the UK to encourage people to opt for it. The main alternative – litigation – has centuries of case-work, famous users, well-known practitioners, and a body of fiction and film in which the litigator is the star. Adjudication and litigation must remain part of workplace dispute resolution. A majority of distressed, hurt, disappointed people choose to put in a grievance and seek an investigation because this option feels more familiar and appears more conventional.

Mediation is not the norm, and many complaints which would be resolved by mediation never enter the process. The following nudges will deflect people from the idea that litigation, or grievance or formal process is the natural choice:

Abandon the term ADR (Alternative Dispute Resolution)

By positioning mediation as an Alternative Dispute Resolution process, we relegate it to a secondary place, reinforce the ‘status-quo bias’ and emphasise mediation’s lack of primacy. The term “alternative” evokes negative connotations: wacky, not for your ‘average’ person, left field. Mediation should be repositioned as concept and term in its own right. Let’s all start talking about ‘mediation’ not ADR.

Rebrand grievance procedures as resolution procedures

Re-brand grievance procedures as ‘grievance resolution procedures’ or just ‘resolution procedures’ to emphasise resolution over grievance. A grievance procedure invites parties to grieve; a resolution procedure encourages parties to resolve.
Replace the concepts and terms ‘formal’ and ‘informal’ in resolution procedures

Mediation is generally located under the ‘informal’ section of a grievance policy. ‘Formal’ in contrast sounds serious, credible, legitimate and powerful, and by implication ‘informal’ process are perceived as casual, relaxed, and ‘soft’. Renaming the processes available within a grievance procedure as ‘resolution options’, or ‘resolution pathways’ will identify each option by what it is, and the circumstances in which each is best used. Rather than an informal and formal section, describe a range of options each with their own characteristics and benefits.

2. Improving ‘accessibility’ ‘relevance’ and ‘salience’ of information about mediation

Thaler and Sunstein recognize how much information material cascades at people in order to influence their living and working habits. This information does its job most effectively when it presents ideas which are ‘accessible’ ‘relevant’ and ‘salient’ to the audience.

Accessibility: positioning of mediation in policies/procedures

Ensure that mediation is prominently and appropriately positioned in all relevant procedures which touch on people’s rights and responsibilities: grievance and disciplinary, dignity (or fairness) at work, performance management, customer complaints, health and safety, sickness absence, corporate and social responsibility, recruitment and retention. The current ACAS model grievance procedure and code mention the importance of ‘informal’ resolution, yet the word mediation barely figures in the model procedure. All model policies from the CIPD and ACAS should be modified accordingly.

Accessibility: creating an appropriate mention of mediation in employment contracts

The debate about whether mediation should be mandatory is ongoing. The Department for Business Innovation and Skills (BIS) could consider recommending employment contracts which include a clause which encourages mediation, as a way of demystifying and normalising mediation.

Relevance: use ‘trigger’ times to remind people of mediation

It is important to alert people to potential workplace hazards at ‘trigger’ times when the risk is high, to counterbalance the unrealistically optimistic view most people have of risk. Including a reminder of mediation in the performance management cycle, or during a restructure or period of intense change, will have a positive impact. When a high value
A successful ET payment is publicised it often sparks copy cat applications. People are considering complaining or raising issues so a reminder of mediation would be relevant.

**Salience: ‘map’ choices in a way that makes sense to potential users**

Nudges work best when they are ‘salient’ – they mean something to the person concerned. Many policy documents or workplace flyers about grievances and disciplinaries are written in ‘procedure speak’ – they offer ‘fairness’ ‘dignity’ ‘treating the issue seriously’. These words are like ciphers with little meaning. We need to map processes and what they offer in a more meaningful way. For example; Thaler and Sunstein noticed how digital camera companies are ‘reframing’ their comparison information from technical specifications to more meaningful information about camera capabilities e.g. from ‘this camera has 3, 4 or 5 megabytes capability’ to ‘this camera can produce high quality images up to 4x6 and that one can produce high quality images up to 8x10’. These types of ‘capability statements’ really help the potential customer understand what they are getting in their own terms of reference. Utilising this principle, information material about mediation would be more salient if it mapped out choices practically rather than technically using:

- ‘Before’ and ‘after’ scenarios: this is how you might be feeling, thinking, behaving now; this is how people using mediation emerge after
- Logistical comparators: mediation 2 days max, investigation 12-14 days
- Who makes the decisions: comparators
- Meaningful examples of likely outcomes: e.g. repairing communication, rebuilding confidence, getting difficult feedback across, understanding one another’s difficulties and being able to move on
- Comparators about levels of paperwork: opportunities for dialogue versus argument
- Risk factors of not using mediation: e.g. confidentiality breaches, loss of face, stress

**Sampling**

Many potential users like to test something out, use it bit by bit. Providers could supply bite sized introductory sessions, or a token for a free first hour (like solicitors). Testing the water – complete CMP’s Ready to Resolve (R2R) questionnaire to help policy-makers and decision makers sample what is involved in setting up a new mediation facility (internal or external). The questionnaire covers all the key ingredients involved, offers a current score and nudges organisational decision-makers to cost-effective next steps.
3. Asking the mediation question in staff surveys

The Nudge authors note how just asking a question about potential usage will increase uptake. People who respond to a survey indicating they would do something are then more inclined to do it if the opportunity arises. Although this is self-evident it is not used enough at a routine level. Recent ACAS and CIPD mediation surveys seem to contribute to an uplift of awareness and thereby uptake. They are limited in their reach and focus. We need a more frequently asked question, say in staff surveys, engagement surveys, bullying and harassment surveys – Would you ever consider using mediation? If so, why? If not, why not? This would also generate useful information to assist the understanding of motivation and resistance around the usage of mediation. It would also assist the ‘mapping’ of options suggested above.

4. Appealing to different decision–making orientations

The Nudge principle recognises that people have different ways of coping with choice:

- **The ‘planner’** – needs good encourager information about what-ifs, precautions and resources to help address the pitfalls in life
- **The ‘doer’** – is more inclined to live in the moment, so likes to know where something is and how it works when they need it.

**Pooling ‘planner’ nudges**

There is a lot of encouraging material about mediation around, for example within government agencies, but there is insufficient pooling. We recommend pooling promotional and information materials across government agencies, sector and interest groups - Universities, NHS Trusts.

Exiting nudges for planners that have not been pooled or rolled out:

- Putting mediation contact numbers on pay slips
- Mediation on TV information points
- Mediation narratives in newsletters
- Mediation stress balls
- Mediation mugs etc.

**New resources for doers**

Help with informing about and accessing mediation should not be left to specialists (see ‘managerial competencies’ below), but all possible points of contact with a conflict need clear, self-explanatory material about mediation. The following suggested new resources
may have a cost, but could be resourced creatively through sponsorship\(^3\), partnership or donations of time in kind. These can be on line or hard-copy:

- Mini open-out credit-card sized mediation ‘map’ – which contains contact details for mediators and key evidence about the benefits of mediation.
- A ‘money off’ mediation token scheme – mediation providers who sign up to the scheme distribute a voucher for 10% off to a wide range of potential customers and key influencers, to be used when needed.
- A link to a (BIS or Ministry of Justice (MoJ) sponsored) one minute mini-mediation animation or video showing ‘before’, ‘during’ and ‘after’, available on web-sites, social network or intranet.
- Invest in a simple messaging brand for mediation, to create a simple reminder to establish a new routine, similar to the ‘clunk, click, every trip’ slogan.

**Sampling**

Many potential users like to test something out, use it bit by bit. Providers could supply bite-sized introductory sessions, or a token for a free first hour (like solicitors).

**Testing the water – complete a Ready to Resolve (R2R) questionnaire**

Completing the Ready to Resolve (R2R) questionnaire\(^4\) will help policy-makers and decision-makers sample what is involved in setting up a new mediation facility (internal or external). The questionnaire covers all the key ingredients involved, offers a current score and nudges organisational decision-makers to cost-effective next steps.

**The nudges in section 4 require a degree of readiness in mediation provision, so they will be most useful for those organisations which have an underused or underdeveloped mediation facility which they want to boost.**

**5. Reducing the ‘social contagion’ of negative conflict**

‘Social contagion’ describes trends which develop fast and take on a life of their own. Many significant indicators suggest that conflict at work has reached the level of a ‘contagion’. It has become more socially acceptable, as has challenging authority. All the nudges in this paper can change this conflict negative culture. Mediation is not about banning conflict; it is about handling it positively and preventing escalation. Handled well conflict is a force for good, a vehicle for understanding and a way of galvanising people around a cause. This section is for internal stakeholders and influencers who are seeking to reduce this trend and get more return and less risk from conflict at work.

\(^3\) In 2011 CMP Resolutions are sponsoring a national award for excellence in workplace dispute resolution
\(^4\) Contact cmpresolutions.co.uk
Create a measure to calculate the cost of conflict and ROI of mediation

In ‘Nudge’ Thaler and Sunstein mention how a ‘reference point’ can help people improve the way they make difficult decisions, and reduce the impact of ‘social contagion’ in which people just follow the popular choice, without really applying a critical eye to the situation. CMP Resolutions have devised a simple tool to measure the cost and scale of unresolved workplace conflict \(^5\) which will give you a very powerful reference point to remove any complacency around your difficult conflict management decisions. It clearly shows the lost productivity caused by workplace conflict in your workplace, and can calculate the cost benefit of mediation and effective dispute resolution. This will generate tangible and local evidence to change resolutions decisions and culture.

Create organisational targets or health indicators which give advantage to those organisations who choose mediation

Once you have the direction of travel towards effective dispute resolution why not set your people and your organisation targets. This would incentivise organizations and key stakeholders like HR, the Unions and managers to see, for example, mediation as ‘proper work’ properly rewarded. Measures of organisational health could include use of levels of complaints and use of mediation as an indicator.

Positioning mediation awareness and knowledge in managerial competencies

This is a nudge which has already been used successfully in some sectors when dispute resolution and conflict management skills and competencies are introduced to core competencies. As a minimum all managers need to know enough about mediation to talk any prospective party through the process and talk about its benefits. Ideally CMP also recommends mediation skills as essential for team leaders. At the top end, mediation skills are proving to be a huge asset to senior managers in changing times.

Identify a key resistant group and deliver a tough targeted message from careful chosen influencers.

This involves mobilising people who may appeal to a particularly resistant group. The example in ‘Nudge’ is the ‘Don’t Mess with Texas’ campaign which aimed to reduce littering and was targeted at young men and delivered by the popular Dallas Cowboys. Who delivers the message and how is critical.

\(^5\) More information on the Conflict Profile tool available from CMP Resolutions
Model mediation values and behaviours at senior level

Reports on managing bullying at work have commented on the influence which behaviours from senior level staff have on what is perceived as acceptable – where the ‘zero’ in zero tolerance is set. A consistent message coming from the highest levels advocating mediation would have a powerful impact.

Reward excellence

CMP Resolutions is looking to jointly sponsor awards for excellence in workplace dispute resolution. It maybe that excellence in nudging could be one category.