Ministry of Justice Consultation on Dispute Resolution in England and Wales

Consultation Response

October 2021

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible, and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This paper sets out JUSTICE's response to the Ministry of Justice's Consultation on Dispute Resolution in England and Wales. In responding to the consultation paper, JUSTICE has focussed on specific questions that address issues considered by JUSTICE through its working parties *Improving Access to Justice for Separating Families*[1] and *Solving Housing Disputes.*[2]

3. In summary, JUSTICE supports an increase in the use of DR processes across the civil justice system, where appropriate. What makes DR appropriate is the extent to which it allows parties the opportunity to holistically investigate the underlying causes of a dispute, de-escalate tensions between parties and achieve a sustainable outcome that is satisfactory. In order for this to be possible, parties must be able to access early legal advice and support, which will require the provision of legal aid. Parties should also benefit from a range of different types of DR (i.e. formal v informal methods).

4. *When* DR will be appropriate is a separate question that will depend on various factors including the personal characteristics of parties, taking into account any respective vulnerabilities, the extent of resources available to either party, the status of the relationship between parties and often the type of dispute that they are involved in.

5. Deciding when DR will be appropriate also requires an understanding of the reasons *why* parties are more or less likely to engage in it. This will enable lessons to be learnt and where necessary, improvements or adjustments made to both the DR process and the court system. Appreciating these nuances will ensure that DR moves from the 'alternative' to the 'mainstream' and will allow it to achieve its ends of improving efficient and effective access to justice. However, in order for this to happen, JUSTICE considers

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[1] https://justice.org.uk/our-work/civil-justice-system/current-work-civil-justice-system/improving-access-to-justice-for-separating-families/

[2] JUSTICE, *Solving Housing Disputes* (2020).

that reform of DR must be accompanied with investment in early legal support, the improvement of public education about DR and the need for more continuous evaluation.

Drivers of Engagement and Settlement

Q1: Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?

6. In order to understand the drivers of engagement in DR it is necessary to first understand 'what do people do when they have a problem,' i.e., access information, take advice (formal or informal; legal or non-legal), engage in DR processes and/or go to court. This overarching understanding is important because research tells us that people do not crave involvement with any one particular process, they want to resolve their problem.[3] But the extent to which they will act, and the means by which they do so, is influenced by many other factors. This includes the type of problem, how they characterise it (i.e., as bad luck, a community or family problem, or as a legal issue) their knowledge of rights, their subjective legal empowerment,[4] the severity and duration of the problem, any perceived adverse consequences of taking action, and their personal/household preferences.[5] Any strategy designed to improve motivation to engage with DR in appropriate cases, can only be successful if it is built upon the knowledge of what people currently do and where they go, when they have a problem.

7. There is of course evidence that many do nothing – people "lump" it for many reasons. This is not necessarily irrational – it can be because the problem is not that severe – but it also can be attributed to feelings of helplessness and powerlessness.[6] However, the type of dispute will influence the likelihood of parties taking some form of action. For example, consumer, debt and housing are areas in which parties are less likely to seek advice or legal assistance, whilst those experiencing family problems are far less likely to ignore the problem.[7] This was evidenced in a recent survey by the Ministry of Justice

[3] H Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, 1999).

[4] Subjective legal empowerment is the self-belief that an individual can solve problems of a legal nature if they occur, see Gramatikov, M.A. and Porter, R.B. (2011) "Yes, I can: Subjective legal empowerment," in 18(2) Georgetown Journal on Poverty Law & Policy, pp.169-199.

[5] P Pleasence and N Balmer, *How People Resolve 'Legal' Problems: a report to the legal services board* (PPSR, 2014), p.27.

[6] *ibid* p.2.

[7] *ibid* table 1.2, p.12.

(the 'MOJ') which found that all participants facing a family justice problem took at least initial steps to understand their options.[8] An important exception here is domestic abuse, where there was evidence of delays in responding to abuse due to reasons such as domestic abuse *not* being seen as a justice problem, as well as victims of abuse fearing the consequences of taking action.[9]

8. These drivers to take action provide insight into initial motivation to engage in *finding* a process which will resolve the problem. This therefore can indicate where DR engagement is affected by inaction or where it is affected by other things despite motivation to address the problem (availability of advice and information, synchronicity with the other side).

9. For DR to work, both parties need to be engaged and motivated to participate in the process. This contrasts with court proceedings whereby only one party needs to be motivated enough to commence a claim. How to achieve mutual engagement will be different depending on the dispute type and characteristics of the parties, for example the balance of power, the consequence of inaction.

10. Taking the family context as an example, the *Mapping Paths to Family Justice* work found that attempts to engage in DR processes often broke down when one or both parties were not ready to emotionally engage.[10] Other research has found that emotional stability is associated with a decreasing likelihood of a court process.[11] However, couples tend to separate asymmetrically, in terms of the grieving process after the breakdown of a relationship.[12]

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[8] I Pereira et al, *The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems* (Ministry of Justice, 2015), p. 40.

[9] See also P Pleasance and N Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2 Summary Findings* (Legal Services Commission, 2013), which found a high rate of inaction for domestic violence (p. 47) despite it being one of the areas in which, comparatively speaking, people were able to articulate their legal rights clearly. (p.39) This leads to concerns about both the inability to articulate rights clearly in other areas, and indeed the inaction of domestic abuse victims despite this fact.

[10] In that study, collaborative law, solicitor negotiation, and mediation. See A Barlow et al *Mapping Paths to Family Justice Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017).

[11] Pleasence and Balmer, *How People Resolve 'Legal' Problems,* see note 5, p.5.

[12] D Vaughan, *Uncoupling, Turning Points in Intimate Relationship*s. (Vintage Books, 1990), referenced in A Barlow et al *Creating Paths to Family Justice: Briefing Paper and report on key findings* (University of Exeter, 2017).

11. Practical preparedness to engage is also important, and often linked to emotional readiness. Many in the *Mapping Paths to Family Justice* study found it difficult to take things in at the outset and valuing information which they could take away and revisit when ready, rather than a single event or opportunity to receive information. The consequences of DR for parties who were not ready included traumatic experiences, entrenched positions, and settlements which were substantially less than what they would be entitled to in an adjudicated context, whilst for some, delayed mediation until both parties were emotionally ready could be positive.[13]

12. Finally, it must be noted that the motivations to engage in DR are not always benign and should not always be encouraged. DR in such contexts may be the result of subjugation and would undermine access to justice. This is particularly the case in the context of domestic abuse. The *Mapping Paths to Family Justice* work found that most attempts at mediation in the context of abusive relationships were traumatic, with the mediation functioning as a continuation of the abuse, with either no outcome being achieved or the victim capitulating to the abusive partner's wishes.[14]

13. People can also feel pressure to engage in DR due to a lack of understanding or disillusionment with court or tribunal processes.[15] For example, in relation to welfare benefits, the Department for Work and Pensions ("DWP") were calling claimants who had appealed a benefits decision and being encouraged to accept 'offers' that may have been lower than their statutory entitlement. DWP were not informing appellants of their appeal rights and were sometimes calling claimants directly even when it had been made clear they had representatives who should be contacted first.[16]

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[13] *ibid* p.126-127.

[14] *ibid* p.108.

[15] Improving lay users' experience at court is a key theme across all of JUSTICE's work and was the subject of the Understanding Courts working party in 2018 (JUSTICE, *Understanding Courts* (2018)). In addition to providing parties with more information about what is involved in going to court, there must also be better support for users during the court process itself. This includes making adjustments to accommodate parties' particular vulnerabilities and training court staff and professionals to assist with the same.

[16] Frances Ryan, *'DWP accused of offering disabled people 'take it or leave it' benefits'*, (Guardian, 2 March 2020). A judicial review claim was brought by a disabled claimant 'K' against the DWP in relation this policy. The claim settled and the DWP agreed to amend its policies and guidance (PLP, 'DWP to stop 'Cold-Calling' disabled people to make low benefits 'offers' (July 2021)).

Q2: Do you have any experience or evidence of the types of incentives that help motivate parties to participate in dispute resolution processes? Do you have evidence of what does not work?

14. Albeit there is no available evaluation yet of the family mediation voucher scheme, JUSTICE does consider that a centralised, non-partisan, funding structure for mediation is an improvement, and avoids one party having to pay whilst the other has access to legal aid, something which will not assist the synchronicity of engagement required.

15. The importance of making DR free or affordable is evidenced by the outcomes of the a 'Conciliation pilot' run by the Tenancy Deposit Scheme ('the TDS Pilot').[17] Originally dealing only with possession cases that were already in the court queue, the scope of the TDS Pilot was expanded to intervene in cases prior to proceedings being raised in court including: housing repair; property standards; entry rights; rent arrears; breaches of tenancy terms on both part of landlord and tenant and anti-social behaviour; and neighbourly disputes. JUSTICE has been made aware that the TDS Pilot received more enquiries and participants after it was relaunched as a free to use service in April 2021 compared to when it originally commenced as a pay-to-use service in July 2020.

16. For more suggestions as to how the uptake of DR can be improved out with the use of incentive schemes and including via investment in early legal support, please see the response to Q11 below.

Q3: Some evidence suggests that mandatory dispute resolution gateways, such as the Mediation Information & Assessment Meeting (MIAM), work well when they are part of the court process. Do you agree? Please provide evidence to support your response.

17. To the extent that DR forms part of a holistic, problem-solving approach, JUSTICE agrees that DR models should be integrated into the formal DR process, rather than being understood as an option adjacent to the court pathway.[18] There are benefits of

[17] Ministry of Justice and Ministry of Housing, Communities and Local Government Mediation Pilot for Possession Hearings, Tenancy Deposit Scheme Conciliation Pilot.

[18] JUSTICE is particularly supportive of comments made by the Master of the Rolls that 'ADR' should no longer be considered 'alternative' but as an 'integral' part of a one-track justice system, see Rt Hon Sir Geoffrey Vos, '*The relationship between Formal and Informal Justice*', speech at Hull University, 26 March 2021, and Rt Hon Sir Geoffrey Vos, *'London International Disputes Week 2021: Keynote Speech*' London, 10 May 2021.

mandatory gateways in some circumstances, however this is very context specific and there is no 'one size fits all' approach.

18. In the family context JUSTICE is not clear that the MIAM has worked well as a gateway to mediation. The uptake of legal aid funded mediation has reduced since their introduction.[19] Nor does the MIAM seem to be part of the court process but is better described as a last-minute attempt to divert away from court before the court process begins. Litigants and support organisations we have spoken to in our current family justice Working Party, *Improving Access to Justice for Separating Families,* have referred overwhelmingly to the MIAM as a "tick box" or a hoop to jump through. We do consider there to be real promise and potential for the court process to incorporate information and assessment for dispute resolution processes for parties in a fair, accessible, and effective way, as part of a holistic one stop shop for litigants trying to resolve their problems. However, we do not consider the MIAM model – sending parties to a private provider for a meeting as a mandatory condition of an application – to be a successful model which should be replicated elsewhere.

19. In housing, DR providers are not integrated within the court process, but instead are marginalised and exist on 'the periphery'. They suffer from difficulties in signposting or marketing their availability, persuading intermediaries[20] to refer or recommend parties to use their service and experience challenges getting parties to understand what DR is all about. This is evidenced in the possession mediation pilot run jointly by the Ministry for Housing, Communities and Local Government and the Ministry of Justice (the 'Possession Pilot') and TDS pilot; both of which have had relatively low uptake, despite achieving results when parties did engage.[21] Introducing a mandatory DR gateway could go some way in addressing these issues. However, it is crucial that more information about DR be made available so that parties know what it is and understand its benefits. There is also significant overlap and disaggregation between current housing DR providers.[22] Therefore, an essential first step in ensuring that a gateway is successful,

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[19] From 2011/12 to 2018/19 the number of publicly funded mediation starts fell by 57.5%. The introduction of the statutory MIAM in April 2014 led to an initial rise but this has since declined. See, 'Legal Aid Statistics Tables October to December 2019' (Ministry of Justice, 2019), Tables 7.1 and 7.2.

[20] Intermediaries including duty solicitors and third sector advice providers. This is especially true in relation to the Possession pilot mentioned above which requires a referral from a duty solicitor.

[21] See further paragraph 40.

[22] JUSTICE, *Solving Housing Disputes,* ch. 4. There are currently too many places a person can go to resolve a dispute, many of which have overlapping jurisdictions. These include: the First Tier Tribunal

is harmonising the provision of DR so that parties know where to go to access the appropriate service.

20. In proposing a new model of DR for housing, the Housing Disputes Service ('the HDS'), JUSTICE recommends that it become fully integrated by replacing the role of the First-tier Tribunal (Property Chamber), the County Court and Magistrates' Court in housing disputes and that it takes on the DR function from redress providers and tenancy deposit schemes. Doing so ensures that the HDS becomes an effective, streamlined mandatory gateway, replacing parts of the existing court pathway Parties' right to progress their claim in the way they see fit would be retained through the right of appeal from the HDS to a court or tribunal for a final determination. This also provides an opportunity to learn from the MIAM – a gateway which has not led to an increase in legally-aided mediation, which is at the door of court but intended to divert parties away from their current pathway. Instead, the HDS becomes the first stage in one pathway towards resolution, within which people will receive information, support, assessment, and appropriate processes for their dispute.

Q4: Anecdotal evidence suggests that some mediators or those providing related services feel unable to refer parties to sources of support/information - such as the separated parents' information programme in the family jurisdiction – and this is a barrier to effective dispute resolution process. Do you agree? If so, should mediators be able to refer parties onto other sources of support or interventions? Please provide evidence to support your response.

21. To the extent that referring parties onto other support forms part of a holistic, investigatory approach designed to tackle the underlying reasons for a dispute, JUSTICE agrees that DR providers should assist parties to access additional sources of support. Disputes are rarely one-dimensional in that they are usually the result of a combination of inter-related or 'clustered' problems. For instance, research has found that housing, benefits, debt, and relationship breakdowns are commonly associated with one another.[23] If DR is limited to focussing on only one element, then it is likely to condemn itself to simply treating the symptom as opposed to the cause.

(Property Chamber), the County Court, the Magistrates Court, private ADR providers and redress schemes and at least 6 types of rental deposit scheme.

[23] R Moorhead and M Robinson, *A trouble shared – legal problems clusters in solicitors' and advice agencies* (Department for Constitutional Affairs, 2006).

22. However, JUSTICE is concerned that any DR model that relies on signposting parties out of the system to external providers will only worsen an already irrational system. In the context of housing, the advice landscape suffers from severe disaggregation[24] meaning that parties are unclear of where to go to for help. Unless the current provision of housing advice and support is harmonised, referring parties to additional and external support services is only going to compound the feelings of confusion, exhaustion and disillusionment already experienced. Furthermore, signposting parties to advice is not a substitute for parties being able to access properly funded legal advice. As contributors to the *Solving Housing Disputes* working party pointed out, lawyers have been assisting clients to access support for underlying issues long before LASPO and the mainstreaming of DR.[25] As explained in answer to Q11, what is needed is more investment in early legal support and advice. Only then will parties have the requisite knowledge and support to effectively engage in the DR process.

23. In response to these issues and as described elsewhere in this response, JUSTICE proposes a new model of dispute resolution for housing, the HDS. The HDS seeks to intervene early in a housing dispute, investigate the underlying issues that give rise to the claim (e.g., welfare and benefits issues, debt issues and mental health needs) and provide holistic support to achieve lasting solutions. By doing so, the aim of the HDS is to de-escalate housing disputes, 'nip problems in the bud,' and thereby sustain relationships between tenants and landlords, mortgage lenders and debtors, beyond the lifetime of the dispute. The proposal for the HDS envisages incorporating elements of DR models utilised elsewhere in the justice system, at home and abroad,[26] to resolve disputes through a staged approach. Following a holistic investigation, there would be an initial and provisional assessment (providing a preliminary view of what should follow from it in terms of resolution), before moving on to a DR stage (employing several DR methods including open discussion, negotiation, and mediation) and if necessary, concluded by final determination. To help identify the underlying issues and ensure that parties have access to expert advice and support, the HDS would be serviced by a range of professionals from various sectors such as housing, benefits, and the health sector

[24] JUSTICE, *Solving Housing Disputes.*

[25] Tenant lawyers we spoke to told us that for the majority of clients who came to them, the disputes were resolved at the pre-litigation stage, even if that negotiation is not initiated by the housing provider as required under pre-action protocols.

[26] As part of its work in *Solving Housing Disputes*, the working party had regard to the UK Tenancy Deposit Scheme and the British Columbia Civil Resolution Tribunal, an online administrative tribunal which resolves low value money claims, strata disputes and certain motor vehicle accidents. Both feature a staged approach to dispute resolution.

as well as legal experts funded by separate legal aid contracts.[27] The involvement of such persons also performs a crucial role in ensuring fairness – especially in circumstances where there might otherwise be an imbalance in resource or power between parties. Rather than being seen as an alternative to court, it is anticipated that in its final form, the HDS would become fully integrated as a mandatory first step in the current court process.

24. Such a holistic process could also inform reform to family processes. For example, it seems counter-intuitive for parents to only be able to access Separated Parents Information Programmes ("SPIPs") via court proceedings, as opposed to a self-referral or referral via a mediator. JUSTICE would support earlier availability of SPIPs, and the Welsh Working Together for Children ("WT4C") courses. Again, like housing however, the disaggregated way in which such support is available should be considered at a system-level. Rather than simply adding one more referral ability, helpful though that may be, the need to better support those going through DR processes and court should be part of a wider reconsideration of how family justice services can better work coherently together within a system.[28]

25. Support available to private family disputes must include support for the child as well, and not be limited to support available to the parents, including giving that child the opportunity to participate in the process if they would like to do so. Children are subjects with their own right to participate in DR processes as well as any proceedings.[29] The evidence of children's experiences of their parents' separation is clear: they are actively, not passively, involved in their parents' separation, yet many processes, including court

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[27] JUSTICE, *Solving Housing Disputes*, para 3.38 – 3.39.

[28] See the recommendation of David Norgrove's Family Justice Review for a Family Justice Service, inclusive of Cafcass, mediation and court ordered contact services. See *Family Justice Review Final Report* (Ministry of Justice, 2011). See too the concern by the Family Solutions Group, a subgroup of the Private Law Working Group, that there is no coherent governmental strategy or responsibility for separating families. See Family Solutions Group, '"What about me?" Reframing Support for Families following Parental Separation' (Courts and Tribunals Judiciary, 2020).

[29] UNCRC Article 12 provides that every child who is capable of forming a view shall have the right to express those views on all matters affecting the child, and these should be given due weight in accordance with the child's age and maturity. In July 2009, the UNCRC adopted a General Comment on Article 12 which outlined the parameters on the child's right to be heard. It states that: States must avoid tokenistic approaches which limit children's ability to express their views or which fail to give their views due weight; if children's participation is to be effective and meaningful it must be understood as a process and not a one off event; processes should be transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, safe and sensitive to risk, and accountable; adults should be given the skills and support to involve children.

and other DR processes, keep them in the dark.[30] This can cause distress, fear, anxiety, and cause them to fill gaps in knowledge with inaccurate information.[31] Furthermore, the evidence tells us that whilst children do not want to be the decision-maker, but they do want to be consulted, with some evidence that participation in a process was associated with how they felt about the outcome.[32] As such, JUSTICE considers that much more needs to be done to encourage, promote and support child-inclusive DR processes.[33]

26. JUSTICE is aware of a recent pilot which has given a concrete example of support working well with DR processes, namely counselling combined with mediation and legal information.[34] However, the same pilot found that:

> Anything more than a temporary agreement in mediation proved elusive, even after legal information and counselling, in cases involving drug or alcohol addiction, mental health issues or where there were issues of domestic violence or coercive control. This suggests that a more intensive, bespoke multi-agency intervention may be needed to make a lasting difference in the lives of those with more complex needs.[35]

27. As such, and in line with our finding in housing, successful identification of appropriate support must come after investigation and assessment of the families' needs, including domestic abuse screening tools. This includes the SPIP, which whilst beneficial in many cases, there are safety cases in which it can be inappropriate and risk worse outcomes for the child and the parent at risk of abuse.[36]

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[30] See the most recent NFJO summary of evidence, *Children's experience of private law proceedings: six key messages from research* (Nuffield Family Justice Observatory, 2021).

[31] *Ibid.*

[32] A 2010 Cafcass study found that when young people were not happy with the outcome of their parents' separation it was mainly because they felt that they had little input into the process or that their views were not taken into account. In addition, some responses suggested that the more children felt that they had been listened to, the more satisfied they were likely to be with the outcome of proceedings. 'Private Law Consultation: "How it Looks to Me"' (Cafcass, 2010).

[33] JUSTICE promotes consideration of the recommendations of the Final Report of the Voice of the Child Dispute Resolution Advisory Group (Ministry of Justice, 2015).

[34] A Barlow and J Ewing, *An Evaluation of 'Mediation in Mind': Final Report* (University of Exeter, 2020).

[35] *ibid*, para 4.

[36] See Liz Trinder et al, *Building Bridges? An evaluation of the costs and effectiveness of the Separated Parents Information Programme* (Department for Education, 2011), p.10; and recently *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (Ministry of Justice, 2020), p.143.

Q5: Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?

28. As set out in response to Q1, Q2 and Q11, there are several factors that may contribute to the level of uptake of DR, these include, but are not limited to, the type of dispute. Even within the same 'type' of dispute, characteristics and motivations of parties may make DR more or less appropriate. Looking simply at the types of disputes that currently have a low / high uptake of DR is only one piece of the puzzle.

29. Our recommendations of improved early information and legal advice also provide for an early intervention so that there can be professional assessment of the suitability of cases for DR and / or court. Without that early help, the appropriateness of court or another form of DR does not receive any professional input and is left to the self-assessment of the lay person, which can be inaccurate especially if they have no experience of DR or litigation.

30. Cases in which there is domestic abuse and other risks of harm to a child are widely recognised as being most appropriately resolved in court, due to the availability of Cafcass to advise on safeguarding, the availability of safeguarding checks, and the court's ability to put protective orders in place. However, it is difficult to know whether there is in fact a 'low uptake' of DR amongst domestic abuse victims. This is because the very fear and intimidation which can cause a victim to choose to placate an abuser will cause them to remain silent about the abuse in the process they undergo. Furthermore, victims of abuse can minimise their own abuse, not recognise it at all, and/or have a very understandable concern of escalating abuse through litigation, particularly post-separation. As such, there is limited data of those who either do not respond to their abuse or do not raise that abuse in any DR or court proceedings. JUSTICE alerts those consulting to this inherent weakness when trying to understand correlations between mediation uptake and propriety of court.

31. The answer to the above question also depends on the type of DR being employed e.g., whether it is informal (party to party negotiation) or formal (facilitated mediation). For example, as explained in JUSTICE's response to the Independent Review of Administrative Law, informal methods of DR are more common in judicial review proceedings with most claims being settled between the parties early in the process,

often because of parties following the Pre-Action Protocol ('PAP').[37] On the other hand, however, there are a number of features of judicial review which may make formal and/or compulsory DR unsuitable:

a. Judicial reviews often involve 'crisis situations' where there is little time for discussion and negotiation.
b. Even where there is not a 'crisis situation,' the tight time limits may limit opportunity for dialogue.
c. There may be little or nothing to negotiate. For example, whether a public authority owes a duty to a claimant or has abused its powers are not generally matters that can be negotiated.
d. There is often a power imbalance between the parties in judicial review proceedings.[38]
e. The importance of judicial review, both in terms of its constitutional function and value to the wider public, militates against a greater role for DR on some occasions, as a settled case does not set a precedent and only provides a remedy for the individual claimant, as opposed to resulting in change that is in the wider public interest.
f. Formal methods of DR are often no cheaper than judicial review.[39]
g. We were also told by advice sector organisations that it is difficult to get public authorities to engage before sending a formal PAP letter. This reflects broader issues beyond the justice system, in particular resource constraints under which many public bodies are operating, particularly at the local level.

Quality and Outcomes

[37] Approximately 80 to 85% of pre-action protocol letters written as part of the Pre-Action Protocol Project between 2016 and 2019 were successful in that they were acted upon by the public body in question and resulted in the client receiving the relevant service. The project was run by Deighton Pierce Glynn and involved lawyers assisting frontline migrant advisors prepare pre- action protocol letters in relation to a number of areas of law, including social care, asylum support and housing. R Malfait and N Scott-Flynn, *Evaluation of the Pre-Action Protocol Project* (DPG Law, 2019), p.4, 17-18 and 29.

[38] V Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (The Public Law Project, 2010), p.18-19.

[39] V Bondy and M Doyle, *Mediation in Judicial Review: A practical handbook for lawyers* (The Public Law Project, 2011), p.19.

Q6: In your experience, at what points in the development of a dispute could extra support and information be targeted to incentivise a resolution outside of court? What type of dispute does your experience relate to?

32. JUSTICE considers that any reform of DR should focus less on incentivising resolution outside of court and more on investing in processes that empower parties and lead to efficient, sustainable, and fair outcomes - regardless of the forum. This necessitates investing in both DR and in the court system to address the issues outlined in answers provided earlier in this consultation.

33. Nonetheless, DR will only work well if parties understand what it is, and the advantages of using it. Those involved in the TDS Pilot have attributed the relatively low uptake of the service to the public's lack of knowledge about DR and difficulties experienced by TDS in advertising the pilot. JUSTICE have been advised that once parties are 'through the door,' engagement has been good and successful resolutions, including early settlements, have been achieved. Nonetheless, outreach remains challenging. Similarly, the Possession Pilot has also experienced low uptake. Again, confusion on the part of tenants about what mediation offered was stated as a probable reason for this.

34. JUSTICE considers that more can be done to explain and promote DR at an early stage in the court process. For example, information about DR services, including the Possession Pilot, should be provided to tenants by landlords at the initiation of possession claims. More information about DR should also be provided at the pre-action stage via the use of Pre-action Protocols ('PAPs').[40] The Civil Justice Council's recommendation in 2018 that a specific website for DR be established is also welcomed.[41] Finally, JUSTICE has recently been made aware of plans by the Ministry of Justice to update the way information about legal areas and court processes is provided via the Gov.uk website. JUSTICE welcomes this initiative and hopes that this will include providing targeted information about DR and signposting to DR services for each legal sector.

[40] See Judicial Review PAP which provides helpful and encouraging information about DR.

[41] The Civil Justice Council has recommended the establishment of a new mediation/ADR website called "alternatives", which would describe the various forms of ADR available, illustrate each by video and indicate how quality guaranteed ADR providers could be accessed, see Civil Justice Council, *ADR and Civil Justice: Final Report* (Courts and Tribunals Judiciary, 2018), para 6.11.

Q7: Do you have any evidence about common misconceptions by parties involved in dispute resolution processes? Are there examples of how these can be mitigated?

35. We have included in Q2 an example of a mother who was concerned about the cost of mediation and who had potentially incorrect assumptions about legal aid eligibility for mediation. This can be mitigated by better provision of information, or preferably a simplified funding structure as is the case with the family mediation voucher scheme pilot.

36. More fundamentally, however, we consider that misconceptions will always be present when people are navigating a system of which they have no knowledge or experience, be that DR or court litigation. JUSTICE has also heard evidence through consultation about the misconceptions of litigants in person about family court proceedings, for example that they will receive a decision, and everything will be "sorted" at the first hearing, knowing very little of the elongated process which can follow. Many of those we have spoken to have identified that a reality check for litigants in the family court is desperately needed before they decide on their preference of resolution pathway.

37. We consider the availability of information about different processes, including DR and court, and advice about their suitability for the person and the dispute, to be best provided together. This is preferable to information being provided on a specific process from the process provider (e.g., information on mediation from mediators in a MIAM) with the user left to put the pieces of the puzzle together unaided.

Q8: Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?
Q9: Do you have evidence of where settlements reached in dispute resolution processes were more or less likely to fully resolve the problem and help avoid further problems in future?

38. Whilst JUSTICE is aware of international research that suggests that mediation produces greater compliance with decisions and lower rates of re-litigation than adversarial methods of dispute resolution[42], much depends on the facts of the case, the personal characteristics of the parties and the relationships at stake, as set out in response to Q1. For example, in JUSTICE's experience, the same DR process can

[42] *'An International Evidence Review of Mediation in Civil Justice'* (Scottish Government, 2019).

achieve better or worse outcomes than the court, depending on these same variables. Of course, a good outcome is not always synonymous with settlement. Unless the evaluation of current DR schemes includes evaluation of the substantive outcomes, including follow up reviews of the sustainability of such outcomes, the extent to which parties were able to engage in the process and feel satisfied with the outcome, any settlement rate in and of itself will only show improvement of mediation take up, as opposed to improved access to justice.

39. JUSTICE's view is that housing is one legal area that could benefit from more focus on consolidatory methods of dispute resolution. Our report found that DR affords the opportunity to holistically investigate all underlying causes of a dispute, including issues such as debt, mental health, and a person's inability to access welfare and benefits, which may otherwise go unaddressed during a court procedure. JUSTICE also found that DR minimises the stress of going to court and can lead to more sustainable solutions.[43] The Possession Pilot and TDS pilot provide good opportunities to gather further evidence of this and to fully evaluate outcomes. To this end, JUSTICE has shared with both pilots a set of evaluative criteria developed during the *Solving Housing Disputes* working party. These evaluative criteria are set out in more detail in response to Q10 below.

40. That being said, initial evidence from the TDS pilot supports this view. Almost 50% of cases reached resolution prior to mediation day with further resolutions reached thereafter. Anecdotal evidence from the TDS pilot found that conciliation allowed the reasons for disputes to be investigated more fully. For example, in the context of rent arrears, the TDS found that many of the cases concerned circumstances where tenants could pay but had been withholding rent in response to what they perceived as a failure on part of the landlord to uphold his/ her obligations. Of course further evaluation will be required to fully understands the benefits of both this and the Possession Pilot scheme.

41. In response to Q1, we have already observed that motivation to engage in a DR process can result from unfair pressure, fear or intimidation felt by a weaker party, be that in a dispute with an institution (social housing, benefits) or an individual (private housing, some family cases, particularly domestic abuse). This can also impact the outcomes, when settlement is reached as a result of giving in or placation rather than because it is a fair result.

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[43] *Ibid*

42. In terms of sustainability of the resolution, there is little data on cases which try DR and turn up in court later, which would assist in understanding the comparative sustainability of DR processes. However, the above referenced pilot for private children's cases, which combined counselling, mediation, and information, found that:

> Anything more than a temporary agreement in mediation proved elusive, even after legal information and counselling, in cases involving drug or alcohol addiction, mental health issues or where there were issues of domestic violence or coercive control.[44]

43. In line with our observations in housing and family, this requires a more holistic understanding of the problems through an investigatory approach. This will not only assist engagement when combined with the provision of information and advice, but also give the service provider an understanding of the level of support required to give the DR process a realistic prospect of sustainable success. For example, if a narrow view of the problem is taken – contact arrangements – whilst the problems underlying that problem, such as mental health issues and alcohol, are not addressed, a DR process may be technically "successful" in that an agreement is reached, but in reality, could be unsuccessful. At best this unsuccessful DR process could be the agreement simply breaking down, and at worst could result in an arrangement inadequately informed by safety issues which could thereafter put the child at risk of harm.

44. Finally, JUSTICE would stress the importance of a child-inclusive approach in private children's proceedings, as mentioned above. Children's opportunity to be heard in the decision-making process has been found to be connected to their happiness about the outcome.[45]

<u>Q10: How can we assess the quality of case outcomes across different jurisdictions using dispute resolution mechanisms, by case types for example, and for the individuals and organisations involved?</u>

45. The comprehensive evaluation of DR pilots is something that is discussed in *Solving Housing Disputes.* Members of the working party were concerned with creating a set of key performance indicators that would judge not only the quality of the outcomes or

[44] Barlow and J Ewing, *An Evaluation of 'Mediation in Mind,* see note 34.

[45] 'Private Law Consultation: "How it Looks to Me"', see note 32.

settlements, but parties' overall experience and engagement with DR. A set of evaluative criteria were established[46] that looks at: timelines involved in DR (including the procedural justice outcomes (including whether parties understand the process, have access to other sources of legal help and advice and are treated with dignity), substantive outcomes (including whether there was some degree of consensus on settlement and what longer term outcomes were achieved), user satisfaction (including how satisfied parties are overall with DR process), settlement percentage and vulnerability (including data capturing any vulnerabilities of parties and what adjustments have been made to accommodate the same). These evaluation criteria have since been shared with both the Ministry of Justice in relation to the Possession Pilot and the Tenancy Deposit Scheme in relation to their Conciliation Pilot.

Q11: What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view.

Early legal help and legal support

46. DR should naturally empower parties to resolve their disputes in a manner that is appropriate and beneficial to them. However, parties will only feel empowered if they have choices. This includes choices about how to progress their dispute and choices about how to settle. To understand their choices, parties must understand their legal position and know their rights. Expecting parties to understand complex laws and legal rights, without access to a legal advisor to appraise them of their position, is unrealistic and may produce unfair results.

47. This is particularly true in the context of housing law which is notoriously complex and difficult for lay users to navigate. The prospect of early legal advice and intervention to address housing problems, homelessness and associated or underlying issues (such as benefits, debt, or mental health issues) has been greatly attenuated by the cuts to civil legal aid introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). This is despite research in 2017[47] showing that early advice has a significant

[46] JUSTICE, *Solving Housing Disputes*, para 2.75.

[47] Ipsos MORI, 'Analysis of the potential effects of early advice/intervention using data from the Survey of Legal Needs', (The Law Society, 2017), p. 6. At the London regional training day for the FTT (PC) in 2019 JUSTICE were also advised told that 89 cases had been listed for mediation in 2019, with a 73.8% success rate.

impact on parties' ability to bring their disputes to an early resolution in the context of welfare benefits, homelessness, and eviction proceedings.[48] There is also substantial evidence that early legal advice has economic benefits for parties and reduces public spending elsewhere.[49]

48. In *Solving Housing Disputes*, JUSTICE recognises that providing access to early legal advice for parties engaging in pre-action negotiation or DR is crucial to DR achieving its intended objectives of settling disputes efficiently and effectively. It serves an important purpose in ensuring that resource imbalance between parties is mitigated and helps to ensure sure that DR does not depend on initiation by the wealthier party. JUSTICE makes several recommendations about how early advice can be made accessible in the context of DR and in accordance with the Legal Support Action Plan.[50]

49. In the context of family, it is not coincidental that more mediation took place prior to the removal of legally aided advice than is currently the case.[51] Family problems are strongly associated with the instruction of lawyers.[52] However, there is also an evidenced reluctance to go to court.[53] Wanting a legal *process* is an uncommon reason for obtaining help from a lawyer, with the more common reasons being inability to agree; it being

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[48] *ibid*. The report found that early advice had a significant impact on getting issues resolved. "Participants in the survey who did not receive early advice were, on average, 20% less likely to have resolved their issue at a particular point in time (compared to those who did receive early advice)."

[49] A 2010 Citizens Advice report suggested that for every £1 spent on legal aid, the state saves £2.34 from housing advice; £2.98 on debt advice; and £8.80 from benefits advice. Citizens Advice, *Towards a business case for legal aid: Paper to the Legal Services Research Centre's eighth international research conference* (2010).

[50] JUSTICE, *Solving Housing Disputes*, paras 3.7 - 3.9; Amongst other proposed changes, this will require the definition of "legal help" under legal aid contracting for housing to be amended to capture acting and advising through pre-action ADR processes and legal aid practitioners should not have to obtain prior authority from the Legal Aid Agency to engage in ADR but be free to pursue it as part of an ordinary legal aid certificate.

[51] The number of publicly funded MIAMs has dropped from 31,336 in 2011/12 (pre-removal of legal aid) to 10,508 in 2018/19 (a fall of 66.5%). Alongside the decline in publicly funded MIAMs, mediation starts have also declined. From 2011/12 to 2018/19 the number of publicly funded mediation starts fell by 57.5%. The introduction of the statutory MIAM in April 2014 led to an initial rise but this has since declined. See, 'Legal Aid Statistics Tables October to December 2019', Tables 7.1 and 7.2 (*Ministry of Justice*, 26 March 2019). Available at: https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2019

[52] P Pleasence and N Balmer, *How People Resolve 'Legal' Problems,* see note 5, Figure 3.21, p. 53. Furthermore, this is not unique to England and Wales, the roadmap report found that lawyers were most frequently instructed to help resolve family problems in 19 of 20 surveys available internationally, including Australia, Netherlands and Taiwan, with the 20th, Moldova, finding family came second to housing. See P Pleasence et al, *Paths to Justice: A past, present, and future road map* (UCL Centre for Empirical Legal Studies, 2013), p. 34-35.

[53] Pereira et al, *The Varying Paths to Justice*, see note 8, p. 44.

suggested to them; feeling the problem was legal therefore it needed a legal expert; and a desire to understand their rights and the situation.[54]

50. JUSTICE considers this combination of factors to be critical to understanding drivers of engagement with dispute resolution processes in private family disputes. People know family law exists and they want someone who knows the system and the law to advise them about their case and their options. It should be trite to say that seeking legal advice is not the same as wanting to go court, and JUSTICE considers that private children's cases are a clear example of how legal advice plays a key part in confidently avoiding court, by enabling engagement with dispute resolution after receiving a professional steer on the issues from someone who is there for them.[55] The legal aid statistics further show that pre-LASPO, going to a solicitor did not necessarily mean wanting to litigate. Post-LASPO, statistics show a concerning drop in the number of legal aid funded mediations rather than a rise, at the same time as a rising number of cases are being brought in the family court by litigants in person. JUSTICE considers this to be important evidence that a number of mediations were being started as a result of solicitor referral, and the legally aided solicitor as a critical part of access to the most suitable justice process, be that court or another form of DR. Having an early, free, legally trained professional offering partisan and confidential advice also allows for the safest environment for those who are victims of abuse to disclose that fact, which will of course change which process is most suitable as well as identify any requirements for court protective orders.

51. Further to the points raised in relation to family cases at Q1, it is clear to JUSTICE that the removal of legal aided advice for the vast majority of private family disputes – including for those who may be victims of abuse but who cannot prove with documentary evidence their own abuse – has not improved participation in dispute resolution processes. More families are now in court than before LASPO came into force, but so many more now feature one or two litigants in person, trying to navigate a system still designed for lawyers.[56] JUSTICE considers this to be overwhelming evidence that

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[54] Pleasence and Balmer, *How People Resolve 'Legal' Problems,* see note 5, p. 60, table 4.1.

[55] As observed by Mavis Maclean, on the lack of uptake in mediation: At a time of stress, men and women seek information, advice and support from someone who is committed to helping them, in preference to an impartial facilitator whose primary task is to promote an agreement rather than meet the needs of the individual client' Maclean, Mavis. 2010. 'Editorial – Family Mediation: Alternative or Additional Dispute Resolution?', *Journal of Social Welfare and Family Law* 32(2): 105–106.

[56] Only one fifth of cases feature both a legally represented applicant and respondent (Ministry of Justice, Family Court Statistics Quarterly: January to March 2021, table 10)

removing legal advice does not motivate parties to participate in the DR process. Furthermore, it will not always be appropriate to motivate individuals to participate in DR processes. A confidential interaction with a professional who has received training in screening for domestic abuse is also an important safeguard for those who may otherwise feel pressure to agree to inappropriate dispute resolution processes due to fear.

52. JUSTICE considers that the reintroduction of free, early, legal advice as well as accessible support and information, would ensure that parties are better enabled to understand, and therefore be motivated to engage in, suitable DR processes.[57]

Pre-Action Protocols

53. JUSTICE considers that the use of pre-action protocols ('PAPs') in housing disputes could significantly improve outcomes by encouraging parties to reach early, fair and well-informed settlements via DR, whilst avoiding the stresses, delays[58] and costs associated with court proceedings.[59] PAPs also help to create a streamlined pathway between DR and the court process which is otherwise disaggregated. In the *Solving Housing Disputes*, JUSTICE recommended that the government take forward plans to expand the current Pre-Action Protocol for Possession claims by Social Landlords (the 'Social Landlords PAP') to apply equally to the private rented sector.[60] Evidence gathered during the *Solving Housing Disputes* working party found that that the Social Landlords PAP generally works well and encourages landlords and tenants to work together to find

[57] The reintroduction of free early legal advice for private children's cases has also been recommended recently by the House of Commons Justice Committee and the Westminster Commission on Legal aid. See The Westminster Commission on Legal Aid, *Inquiry into the sustainability and recovery of the legal aid sector* (October 2021), page 28 and *The Future of Legal Aid: Third Report of Session 2021-22* (House of Commons, July 2021), para 98.

[58] The Residential Landlords Association highlighted that the current average wait time in London for certain possession claims is 30 weeks from court application to bailiff enforcement. J Wood, 'The wait of justice: the slow pace of the courts in Greater London' (Residential Landlord Association Blog, 15 January 2020).

[59] JUSTICE is mindful of the Pre-Action Protocol for Possession Claims by Social Landlords which states at paragraph 1.4 that the aims of the Protocol include: encouraging more pre-action contact and exchange of information between landlord and tenant, and to enable landlords and tenants to avoid litigation and settle disputes out of court.

[60] The Ministry of Housing, Communities & Local Government confirmed in March 2020 that the government was working with the Master of the Rolls "*to widen the existing 'pre-action protocol' on possession proceedings, to include private renters and to strengthen its remit*". Ministry of Housing, Communities and Local Government, 'Press release: Complete ban on evictions and additional protection for renters' (18 March 2020).

solutions to their problems out of court i.e., by agreeing payment plans to resolve rent arrears. Nonetheless, the housing working party was also made aware that some social landlords did not engage with tenants at the pre-action stage meaningfully or at all.[61] As a result of the Covid-19 pandemic, a new measure was introduced by Practice Direction 55C that required social landlords to provide a certificate proving that they had complied with the Social Landlords PAP.[62] This has been a positive step forward in addressing the issue and encouraging DR out with court. JUSTICE recommends that similar rules accompany any new PAPs. However, before further PAPs should be introduced, more work needs to be done to simplify and make existing PAPs more user friendly[63] as well as ensuring that they include information explaining what DR is and the value of engaging with it.[64]

Timing

54. Findings shared by the Tenancy Deposit Scheme show that the conciliation pilot received more engagement and referrals once it was made accessible to parties not yet engaged in the court process.[65]Anecdotal evidence from TDS suggests that by the time cases were in the court queue, the relationship between many parties was already impacted by the adversarial process and therefore was too damaged to allow for successful negotiation and compromise at DR. This supports the findings by the *Solving Housing Disputes* working party that the earlier DR is offered, the more successful it is likely to be. The outcomes of the TDS pilot also align with comments made above in terms of the value of PAPs in the context of encouraging early take up of DR in housing disputes.

55. As discussed in Q1, the timing of DR processes is critical in private family when there is asynchronous emotional or practical readiness to negotiate.

Compulsion

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[61] JUSTICE, *Solving Housing Disputes*, para 3.31.

[62] Practice Direction 55C, para 6.1(a)(i).

[63] In *Solving Housing Disputes*, the working party found that that housing PAPs can frequently be lengthy and complex to follow. For example, pre-action protocols for disrepair claims run to over 5,000 words.

[64] For example, paragraphs 9 to 12 of the Judicial Review PAP offer a clear and encouraging explanation of ADR.

[65] The TDS Conciliation Pilot was relaunched in April 2021 and changed its focus from redirecting cases that were already in the court queue to instead reach parties at an earlier stage in their dispute.

56. JUSTICE is aware of the Civil Justice Council's report confirming the legality of making DR compulsory in certain circumstances. Whilst JUSTICE supports the findings made therein and considers that housing is one area where mandatory DR could achieve successful outcomes, it emphasises the need for a nuanced approach. This includes the recognition that compulsory DR will not be appropriate in all cases.

57. Much will depend on the relationship between parties as discussed at Q1 above. JUSTICE is mindful of comments made by Dyson LJ in *Halsey v Milton Keynes*[66] when he stated that without willingness on part of the parties to the dispute, compulsory DR may only serve to cause further delay and unnecessarily increase costs with parties simply paying lip service to DR to comply with the procedural rules.

58. In the context of private family disputes, it is generally accepted that most cases raising domestic abuse or child protection issues will not be suitable for mediation. The rules currently reflect this, providing an exemption to the MIAM when there is evidence of domestic abuse and/or child protection concerns.[67] However, there are serious concerns about the evidential burdens placed on victims of abuse and their ability to meet them.[68] As such, effective screening by DR practitioners is essential to ensure that those who can and indeed should be exempt are identified.

59. However, the current MIAM screening has been found to be inadequate.[69] Contributing factors have been found to be time pressure and simplistic exploration of abuse[70],

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[66] [2004] EWCA Civ 576, 1 WLR 3002. Dyson LJ stated:" If *the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process".*

[67] FPR 3.8(1) and 3A PD 20.

[68] Ministry of Justice research on the legal aid evidential requirements, which are very similar to the MIAM exemption evidential requirements, has identified various difficulties with this evidential burden: organisations, and health professionals in particular, can be unwilling to write letters; data protection issues arise when attempting to access evidence from the police; language or other vulnerabilities create barriers; and victims who do not disclose abuse to an organisation that can supply evidence end up significantly disadvantaged. See, F Syposz, 'Research investigating the domestic violence evidential requirements for legal aid in private family disputes' (Ministry of Justice, 2017), p. 2-3.

[69] Barlow et al, *Mapping Paths to Family Justice Resolving Family Disputes in Neoliberal Times*, see note 10, p. 108.

[70] Morris noted in 2013 that MIAMs could be a tick box exercise with some only lasting 3 minutes. See, P Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35 Journal of Social Welfare and Family Law 445, 453.

deferring to parties' self-determination of the severity of violence rather than undertaking an objective risk assessment,[71] and excessive faith in the mediation process compounded by the lack of alternatives.[72]

60. Inadequate screening, should mediation follow, can lead to a traumatic mediation process, functioning as a continuation of the abuse, with outcomes of mediation failing or involving the victim of abuse capitulating to the abusive partner's wishes during the mediation.[73] Women's Aid have further highlighted that inadequate screening can mistakenly conflate domestic abuse and 'parental conflict', helping to conceal domestic abuse while placing blame on survivors who are seen as 'difficult' or prioritising 'conflict' over their child's best interests.[74]

61. Compulsion to mediate therefore brings with it serious risks if victims of abuse are forced by it into mediation with their perpetrator. Furthermore, even if domestic abuse and child protection cases are exempt, compulsion places the burden of proving exemption on the victim of abuse, when we know from the evidence of the issues faced by victims of abuse trying to navigate the legal aid evidential burdens.

62. Furthermore, in relation to Dyson LJ's comments in *Halsey*, there is an additional consideration of delay when it comes to cases involving children: the statutory principle that delay in determining a question of a child's upbringing is likely to prejudice the welfare of the child.[75] This places a different focus on consideration of process; whilst other types of disputes may be suited to a "no harm in trying" approach to DR, even if some will progress to court, the impact on delay to the child places a greater premium on getting the process right first time for a family. For this reason, the current JUSTICE work in family is developing recommendations based on differentiated case management, rather than compulsory tiered services (try mediation and if it fails, court is permitted). In this model the dispute, its context, and the positions of the parties (and their readiness to negotiate) are all factored into an initial assessment of what would be

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[71] M Roberts, *Mediation in Family Disputes: Principles of Practice* (Ashgate Publishing, 2014) 274-5.

[72] Barlow et al, *Mapping Paths to Family Justice Resolving Family Disputes in Neoliberal Times*, see note 10, p. 108.

[73] *ibid.*

[74] See Women's Aid's contribution to the Private Law Working Group consultation. Private Law Working Group, *Second Report to the President of the Family Division* (Courts and Tribunals Judiciary, 2020), para 69.

[75] s.1(2) Children Act 1989.

the best forum for the family. This prevents unsafe processes whilst also preventing the unnecessary delay of having to go through a process which is unsuitable for the dispute/ parties. Such an approach has been adopted by some courts in the US, moving away from mandatory mediation and adopting a "triage" approach, so families spend less time and resources and avoid the frustration of repeated failed attempts at resolution.[76]

Increasing knowledge of DR generally

63. As stated elsewhere in this consultation response, JUSTICE considers that there is currently a significant 'knowledge gap' when it comes to parties understanding what DR is, who provides it, how much it costs and how it can help them to resolve their disputes. For parties to take up DR, they need to first understand it and know where to go to take part in it. This is evidenced by the outcome of the two housing DR pilots referred to above. Whilst achieving positive results, both pilots have experienced difficulties in attracting parties to the service. Both pilots consider that a reason for this is that members of the public do not really understand DR nor its benefits.

64. The Tenancy Deposit Scheme ('TDS') also considers that many members of the public do not understand who TDS is; existing users of TDS are more likely to engage with the service compared to parties who are not familiar with it. Again, this corresponds with the findings of the *Solving Housing Disputes* working party that heard evidence about the difficulty parties face in identifying and accessing services that could help them.

65. Both the TDS Pilot and the Possession Pilot also highlighted the need for external parties to be more active in referring users to the service. This is relevant to the Possession pilot which requires a referral by a housing advisor before parties can access the service.

66. It is also important to provide clear information about the provision of funding for dispute resolution so the idea of navigating complex eligibility criteria does not become a barrier to engagement with dispute resolution processes. This is especially the case for would-be respondents who have less time to understand everything and get up to speed. This was raised in one of JUSTICE's conversations with a litigant in person in the context of family. When asked about why she did not consider formal mediation to be an option, a

[76] See Salem, P. (2009). The emergence of triage in family court services: The beginning of the end for mandatory mediation? *Family Court Review, 47*(3), 371–388.

respondent told us she was taken by surprise by the potential of an application and was not sure what was happening or what to do (see discussion of emotional and practical readiness above). She was then told by her ex-partner that mediation would cost about £100 which she said she simply could not afford, and which she found very difficult to comprehend given that non-payment of child maintenance was a co-existing and chronic problem. As such, she decided to allow the process to go to court. On further discussion with her, it did appear this mother's income fell below the legal aid means threshold for mediation. However, the combination of her emotional and practical unreadiness, plus her confusion about who would pay, and her reluctance to pay for mediation of a dispute which she was not choosing to escalate (being the respondent to the proposed case) were reasons for her not to engage in mediation.

67. As discussed more fully in response to Q6, JUSTICE has identified several opportunities to improve the way information about DR is provided and therefore tackle the issues set out here. These include the creation of a DR-specific website that explains available services and funding options, the inclusion of information explaining and encouraging the use of DR in current and future PAPs and improving the way information is provided via the Gov.uk website. Key to all the recommendations is the need for signposting directly to accredited providers. In the context of housing, harmonising the assorted services that provide housing advice, support and DR will also lead to improved communication and cross-referrals between organisations.

The Housing Disputes Service

68. As discussed elsewhere in this response, in *Solving Housing Disputes* JUSTICE set out a long-term proposal for a completely new system of DR for housing, the HDS, that addresses the factors raised above. The HDS seeks to intervene early in a housing dispute, investigate the underlying issues that give rise to the claim and provide lasting solutions. To help identify the underlying issues and ensure that parties have access to expert advice and support, the HDS would be serviced by a range of professionals from various sectors such as housing, benefits, and the health sector. Legal support will be provided to parties alongside the HDS process by way of a separate legal aid contract.[77] It is envisaged that the involvement of non-partisan professionals alongside the availability of legal support and advice will ensure fairness and mitigate against any imbalance of power or resource between parties. Rather than being seen as an

[77] JUSTICE, *Solving Housing Disputes*, para 2.71.

alternative to court, it is anticipated that in its final form, the HDS would become fully integrated within the current court process.

Q12: Do you have evidence of how unrepresented parties are affected in dispute resolution processes such as mediation and conciliation?

69. Anecdotal evidence from the TDS pilot suggests that they did not identify any negative affects during the DR process itself. However, JUSTICE considers that it is important to wait and see if evaluation produces any different findings in this regard. JUSTICE is also aware that the TDS pilot is a small sample made up of willing participants who may already have considered or taken steps to mitigate any adverse effects. Instead, it would be valuable to revisit this question with parties that have engaged with DR providers that operate as part of a mandatory pre-court process.

70. In family proceedings, we have drawn attention above to the removal of the legal aid solicitor and the impact that has had on referrals. This is further evidenced in studies on clients attending MIAMs post-LASPO, who are less knowledgeable about MIAMs and mediation and less screened for suitability for mediation.[78] It was found these left mediators with insufficient time in MIAMs to explain everything to clients from scratch and assess their eligibility for legal aid, with the result that screening for suitability often suffered.[79]

71. JUSTICE's current work in family is identifying a very similar difficulty for judges, legal advisors, Cafcass officers and magistrates in first hearings with unrepresented parties: they are more likely to be uninformed of what to expect from the process and thereby require more time simply going back to basics and explain everything from scratch. In hearings, this includes judicial time being taken up by explaining fundamental concepts and procedural matters, including the concept of parental responsibility and the distinct roles of the judge and Cafcass. It is clear therefore that unrepresented parties are in need of tailored information and advice, and that provision of said advice and information at an early stage will be of benefit to the eventual process they chose, be that DR or court, and indeed will help them in that choice.[80]

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[78] A Bloch et al, 'Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings' (Ministry of Justice, 2014), p.15.

[79] *ibid* p.26.

[80] JUSTICE's consultations in this area throughout 2021, including current PhD researchers, support the conclusion that there is still the "overwhelming need" for practical and emotional support, tailored

72. Finally, it is important to note the value of early information and advice can have benefits not only on the parents in a private family dispute but also on children. Children are subjects of such proceedings and have their own participatory rights, which include a right to information, to be heard and to receive feedback about the outcome.[81] Unfortunately, children's rights continue not to be prioritised in current court proceedings nor in out of court DR,[82] despite the role such processes play in assisting or indeed deciding fundamental aspects of their upbringing. If children therefore are reliant on parents to receive information about the processes, and those parents are themselves lacking information and advice, the child will also be negatively impacted.

Q13: Do you have evidence of negative impacts or unintended consequences associated with dispute resolution schemes? Do you have evidence of how they were mitigated and how?

73. As discussed above, the removal of legal aid in family has led to a reduction in mediation uptake, a result which was clearly unintended. In addition, the challenges particularly with screening for abuse and delay for children have been set out above.

74. JUSTICE notes the move away from mandatory mediation towards more differentiated case management of family cases in some US states.[83] We are further aware that concerns with mandatory mediation have been raised in Australia, concern being that such processes can result in coercion or stigmatisation of the weaker party.[84]

75. JUSTICE notes the recent pilot referenced above, which found that whilst a combination of legal information, mediation and counselling resulted in increased engagement in mediation for many, this was not the case in cases involving drug or alcohol addiction,

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legal advice, and more and better information for litigants in person, as was found in 2014, see Liz Trinder et al, 'Litigants in person in private family law cases' (Ministry of Justice, 2014), p.80-83.

[81] UNCRC Article 12.

[82] Cafcass statistics suggest only around a third of children are spoken to, although there is an absence of data on children who participate other than through Cafcass, e.g., speaking directly to the judge or through a local authority social worker. Whilst child inclusive mediation is a popular training course for practitioners, JUSTICE understands that it is rare in practice for mediators to directly consult with children. The voice of the child advisory group report (above) found it to be a minority activity in 2015.

[83] For example, Connecticut and Alaska .

[84] Field, Rachael & Lynch, Angela (2014) Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence. *Journal of Social Welfare and Family Law*, *36*(4), pp. 392-402.

mental health issues or where there were issues of domestic violence or coercive control." Their suggestion of a more intensive, bespoke multi-agency intervention needs careful consideration, as does how this can fit currently within our current processes.

76. On that basis, JUSTICE is actively considering the holistic investigatory model of the *Solving Housing Disputes* model and how its ideas would need to be adapted for the needs of separating families.

Q28: Do you have evidence of how technology has caused barriers in resolving disputes? / Q29: Do you have evidence of how an online dispute resolution platform has been developed to continue to keep pace with technological advancement?

77. JUSTICE's *Preventing Digital Exclusion* working party was borne out of concerns that the modernisation of the justice system and the increasing digitisation of court processes and hearings,[85] meant that significant proportions of the population were left unable to access justice.[86] Excluded persons include not only those without access to technology but those with low digital capability or other vulnerabilities that are compounded by online court processes and / or procedures.

78. It is therefore important that any digital DR scheme exists in parallel with paper-based processes[87] for those who are digitally excluded. As explained above, both family and housing disputes can feature vulnerable persons and forcing people online, as has been done with Universal Credit, risks further marginalising people who already struggle to access help and support. Providing exclusively digital processes also risks creating a "digital underclass," who are unfairly excluded from DR.[88]

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[85] It is intended that most of the court claims by SMEs and individuals will be brought substantially online by the end of the HMCTS Reform Project in 2023, see Rt Hon Sir Geoffrey Vos, *'London International Disputes Week 2021: Keynote Speech'* London, 10 May 2021.

[86] Lord Justice Briggs' final Civil Courts Structure Review report estimates that 70% of the UK population can be "digital with assistance" and/or "digitally excluded," meaning they will need support to engage in proceedings online.

[87] For instance, HMCTS has undertaken to maintain paper-based channels to access courts and tribunals through the Reform Programme for those who are unable to get online, see Inside HMCTS blog, 'Helping people access our services online' (12 October 2017).

[88] A 2016 academic study of internet non-use in the UK and Sweden suggested that digital exclusion can become concentrated over time and that "non-user populations have become more concentrated in vulnerable groups", i.e. those who are "older, less educated, more likely to be unemployed, disabled and socially isolated", E. J. Helsper and B.C. Reisdorf, 'The emergence of a "digital underclass" in Great Britain and Sweden: changing reasons for digital exclusion', (New Media and Society, 2016).

79. However, these issues can be addressed by making sure that necessary support (including offline support) is fully integrated into DR and that any digital DR service adopts a user focussed approach.[89] This includes ensuring that any form of online DR services embraced a "multi-channel" approach – helping people to move between digital access, phone assistance, face to face contact and paper-based communications. The Traffic Penalty Tribunal[90] (the 'TPT') does this particularly well, continuing to communicate with users via traditional offline channels whilst following a 'digital by default' methodology. The TPT operates a digital interface for appeals against traffic penalty notices and provides administrative assistance to those who lack digital capability. Administrative staff answer telephone inquiries and act as "proxy users" for appellants, complete paper-based appeal forms for users, which they post out to them for signature with a reply-paid envelope addressed to the TPT. These measures are welcomed and should be considered when developing further DR services that seek to incorporate a digital element.

80. Another DR service which offers a successful online model is that of Resolver.[91] The Resolver website provides a free online tool for consumer complaints and claims. The initiation of a claim through Resolver allows a consumer to select the providers against whom they have their complaint, before tailored guidance and structured pathways assist the consumer in articulating their issues. Resolver uses online tools such as successive decision trees which, combined with contextual rights guides, help to increase the accuracy of a consumer's decision on who to complain to and how. By adopting clear design principles, the Resolver website provides information in a way that is appropriate, relevant, and concise. It is free of legalise jargon and explains processes that might otherwise be difficult for lay users to understand, using clear and straightforward language. Resolver also illustrates the importance of futureproofing: its service is adaptable, continuously reviewed and regularly tested.

81. JUSTICE is also aware of research undertaken by The Legal Education Foundation ('TLEF'), which has published several reports looking at the pros and cons of justice in

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[89] See JUSTICE, *Preventing Digital Exclusion* which makes 19 practical recommendations to ensure that necessary support is an integral feature of the digital justice system and that the HMCTS reform programme continues to work to instil a user focussed approach recommendations, including through the 'Assisted Digital' project.

[90] See www.trafficpenaltytribunal.gov.uk.

[91] See https://www.resolver.co.uk/

the digital age, including in the context of the HMCTS reform programme[92] and in relation to the rapid expansion of remote hearings in response to the Covid-19 pandemic.[93]

82. In terms of the latter, JUSTICE draws particular attention to the following findings from the report which aligns with concerns raised by JUSTICE in its previous work. In surveying a total of 1077 people in relation to the operation of 480 online hearings, the Civil Justice Council, in collaboration with TLEF, found that:

    a. Almost half of all hearings experienced technical difficulties94
    b. Most persons surveyed found that remote hearings were worse than hearings in-person in terms of facilitating participation95
    c. That many lay users did not have access to the types of technology required to effectively participate. For example, the means by which many lawyers sought to communicate with their clients during hearings required the use of multiple devices and required parties to have a sophisticated grasp of technology and was also predicated on parties being able to communicate effectively via writing.
    d. Lack of communication from court staff prior to hearings was having a disproportionate impact on lay users and led to anxiety.96

83. When taken together, the above factors serve to compound feelings of fear, distrust and disenfranchisement already experienced in relation to the court process.97 As explained elsewhere in this response, there are several emotional and practical barriers that get in the way of effective participation in court and DR processes. JUSTICE considers that technology can play an equal part in either improving or worsening those obstacles. Continuing evidence gathering and improved evaluation is needed to ensure that the voices of those trying to access online justice, especially those of lay users and vulnerable persons, are amplified. Thereafter, continuing adjustment to online

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92 N Byrom, '*Digital Justice: HMCTS data strategy and delivering access to justice, Report and Recommendations',* (The Legal Education Foundation, 2019).

93 N Byrom et al, *'The impact of covid-19 measures on the civil justice system; Report and Recommendations',* (The Legal Education Foundation, 2020).

94 *ibid* para 1.17.

95 *ibid* para 1.20.

96 *ibid* para 1.22-1.23.

97 JUSTICE, *Understanding Courts.*

processes and rigorous user testing should be undertaken to design online processes that guarantee, rather than impede, access to justice.

Public Sector Equality Duty

Q32: Do you have any evidence on issues associated with population-level differences, experiences and inequalities that should be taken into consideration?

84. JUSTICE strongly recommends the Ministry of Justice consider the ongoing work of Family Justice Data Partnership—a collaboration between the University of Lancaster and the University of Swansea and funded by the Nuffield Family Justice Observatory.[98] It is, for the first time, linking the Cafcass data of families coming to court in private law children's proceedings with population level data. Their work in both England and Wales has identified that there is a clear link between economic vulnerability and private law applications, with private law families being disproportionately deprived in comparison to the wider population.[99] JUSTICE understands that the programme of research is continuing to link population-level data sets with Cafcass data, including health, in upcoming reports, which will be critical to understanding the wider vulnerabilities, characteristics and needs of families in private family proceedings.

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[98] See L Cusworth et al, *Who's coming to court? Private family law applications in Wales* (Nuffield Family Justice Observatory, 2020) and *Who's coming to court? Private family law applications in England* (Nuffield Family Justice Observatory, February 2021).

[99] *Ibid.*