Ministry of Justice Consultation: Increasing the use of mediation in the civil justice system

Response to Consultation Paper

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1. We propose to introduce automatic referral to mediation for all small claims (generally those valued under £10,000). Do you think any case types should be exempt from the requirement to attend a mediation appointment? If so, which case types and why?

JUSTICE broadly supports proposals aimed at increasing the use of dispute resolution ('DR') in relation to housing disputes, as set out in our 2020 Solving Housing Disputes report. Our answers in response to this consultation are therefore limited to small claims cases relating to housing disputes only, and we defer to other experts across the sector in terms of the implications of these proposals on other small claim types.

To the extent that DR forms part of a holistic, problem-solving approach, we support the greater use of DR in housing. We strongly believe that if offered at an early stage of dispute, alongside the adequate provision of legal assistance, DR can help to identify the underlying causes of a dispute, sustain relationships between parties and bring about lasting solutions, whilst avoiding the need to go to court – a process that many people, especially litigants in person, find overwhelming and intimidating. We highlight the successes achieved by the Tenancy Deposit Scheme's Conciliation Pilot (the 'TDS Pilot') which provided DR in relation to housing repair cases; 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 therefore supports in principle automatic referral to mediation of small housing claims (subject to the ability to apply for an exemption as set out in response to question 2) mediation/DR should be integrated into the formal process rather than provided as an option adjacent to the court pathway. In housing, DR providers are not currently 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 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 the TDS pilot, both of which experienced relatively low uptake, despite achieving results when parties did engage.

We recognise the value in compelling parties to mediate as a means of achieving a meaningful culture change in how disputes are resolved. DR, such as mediation, can provide an opportunity to rebalance the power and resource dynamics which currently play a considerable role in determining outcomes within the adversarial model. Due to this power imbalance, it is common that parties with greater resources are more likely to push on with the court process, having already incurred court and solicitor fees and preferring to "take their chance at court", particularly when they know that they are facing a litigant in person. This may make them reluctant to participate in voluntary DR and/or mediation. Therefore, compelling parties to take part in DR/mediation may be successful at getting parties "around the table".

However, whether it is appropriate to require parties to engage with one another "at the table" depends on a number of factors, that often go beyond the type of case in and of itself. Instead, it may relate to other factors such as personal characteristics and the relationship between parties – as described below. Therefore, we stress the importance of taking a nuanced approach to understanding when DR, and therefore mediation, is the correct approach to take in any given situation. We echo the comments made by the Civil Justice Council in its June 2021 report on

compulsory ADR ('the Civil Justice report'), that the use of (and success of) DR will "*vary widely depending on the context, the value of the claim, the different subject matters in dispute and, to some extent, upon whether the parties are likely to be advised or represented".*

2. Do you think that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge? If so, why? And what factors do you think should be taken into consideration?

We agree that individuals should be able to apply for exemptions from participating in the mediation process. We also agree that exemptions should be decided on a case-by-case basis. As explained above, understanding when compulsory mediation is appropriate requires an examination beyond the type of case. The personal characteristics of parties, and the relationship between parties, also play a significant role in determining whether DR is a suitable way forward. This is especially true in relation to cases where there are suggestions of abuse, intimidation and/or where parties are experiencing vulnerable circumstances.

We propose that parties be made aware that mediation forms part of the court process, at the time they complete their claim form. We also propose the inclusion of an open-ended question at the earliest opportunity, and ideally within the claim and defence forms, that asks parties whether they feel they are entitled to an exemption and the reasons why. Users should be encouraged to provide whatever information they feel is relevant for the court to consider. The decision-maker should also be able to go back and ask for further questions and clarification where appropriate. Decisions around granting or rejecting exemptions must be guided by a holistic understanding of the challenges and circumstances facing vulnerable parties, within the particular context and type of dispute.

The inclusion of an open-ended question would achieve two purposes: it would help identify where there are serious/genuine concerns as to why mediation is not appropriate in the particular case, but it would also help identify instances where a party's request for an exemption is based on potential misgivings about mediation which could be overcome by information and support. As explained elsewhere, parties may be reluctant to engage in mediation/DR based on misgivings they have about the process - which could be due to a lack of awareness or understanding of the process. In those cases, such reluctance to engage with mediation could possibly be overcome, by parties being reassured, having their questions answered and/or by being signposted to support. We, therefore, consider that there should be an opportunity for the court to respond to parties, once they have applied for an exemption, over and above simply awarding/denying the application. The court should also be capable of answering procedural questions parties have about mediation or signposting them to appropriate support.

We agree with the points raised in the consultation about the need for increased awareness about DR and the early provision of information about it, via guidance, court forms and at other "junctures" whereby users interact with the justice system. It is very important that if parties are to be obliged to engage in a process, they must be supported through it and legal assistance made available to them. Ensuring that parties have access to sufficient support and information, in terms of the mediation process (and benefits thereof) as well as advice relating to their legal position, their rights and obligations, should go some way to address any concerns they have

about the fairness of the mediation process and therefore their lack of motivation to engage with it.

Finally, it is important to remember that circumstances can change in the course of a dispute, and it is at least possible that a party who does not apply for an exemption at the time, may have reason to require one and/or have serious concerns about mediation when the time comes to engage with it. Mediators should be live to this and be trained to make appropriate enquiries at the time of the scheduled mediation.

3. <u>How do you think we should assess whether a party who is required to mediate has adequately engaged with the mediation process?</u>

We consider that the mediator is best placed to assess whether parties have adequately engaged in the service, applying their discretion. However, to assess what amounts to "adequate engagement", those mediators must understand the various drivers of engagement and settlement, relevant to the type of dispute. For reasons provided above, there are many reasons which may result in parties feeling unable, due to personal characteristics or circumstances, to engage in DR. Some of those reasons are inextricably linked to the type of dispute. For example, in the context of housing, it is common for tenants to feel overwhelmed and as a result, "stick their head in the sand". Mediators must be live to such issues and to that end, we propose that mediators must be specialists in whatever area of the law/dispute type that they are working in e.g., housing.

Care must be taken to ensure that parties are not unfairly penalised for what is perceived as lack of engagement when in fact, parties have genuine concerns about taking part in the process. As above, asking parties open-ended questions early on about why they feel they are entitled to an exemption, may help to identify such "ancillary" concerns and where possible, signpost users to services that can help.

It also highlights the importance of ensuring that parties have access to legal assistance at the start of the process and are supported by a mediator who is qualified in the area in which their dispute arises, e.g., housing. This would ensure that parties understand their legal rights and obligations. 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 lead parties to disengage with the mediation process and/or produce unfair results.

Regardless of the exact assessment process undertaken, engagement should not be linked to outcome. This means that rejecting a settlement offer cannot in and of itself determine whether a party has adequately engaged with the mediation process. Such a position would place undue pressure on the parties involved to accept outcomes that they may not feel are fair. This would then play into the existing problems regarding power dynamics and resource imbalance, already inherent in the adversarial process. Recourse to court should always be available and be seen as a valid option for parties as part of the mediation process.

Finally, we propose that engagement should be defined early and set out clearly so that parties can feel confident in the transparency of the mediation process. Mediators should remind parties of the need for them to engage and any consequences of doing so, provided that such a reminder

does not seek to put pressure on parties to settle. For reasons explained below, mediators will play a crucial role in ensuring fairness is achieved within the mediation process and for them to be able to do so, they must have not only a robust understanding of housing law, but an ability to communicate with those experiencing vulnerable circumstances.

4. The proposed consequences where parties are non-compliant with the requirement to mediate without a valid exemption are an adverse costs order (being required to pay part or all of the other party's litigation costs) or the striking out of a claim or defence. Do you consider these proposed sanctions proportionate and why?

We agree that sanctions are necessary to avoid parties unreasonably "side-step" the requirement to mediate. That being said, we warn against the use of "automatic" sanctions. Instead, sanctions should be discretionary, considering the full facts of the case and the personal characteristics of parties.

We propose that judges have a range of sanctions available to them and again, can use discretion to decide which is most appropriate in any given case. JUSTICE's position on the proportionality of adverse costs, striking out of claims or defence or any sanctions, also depends on how "compliance" and "engagement" is assessed, as explained above. We strongly feel that engagement cannot be taken at face-value alone but also feel that the process must be as up-front and transparent as possible – so that parties fully understand what is expected of them and the consequences of them not meeting their obligations in that regard. Where possible, mediators should remind parties of their obligation to engage, at the mediation itself, short of applying any pressure on parties to settle.

As set out above, if courts are able to impose potentially serious sanctions, it is crucial that the drivers of engagement and settlement are well understood – particularly in the context of housing disputes where for tenants, the stakes are incredibly high. Given the clustered nature of housing disputes, housing issues are often inextricably linked to related problems with debt, welfare, and mental health. Were a tenant who is already facing difficulties in those areas, to enter mediation knowing that they risk being subject to an adverse costs order, this is likely to only worsen the power imbalance and the feeling of overwhelm that many parties to housing disputes face. It increases the risk that parties, particularly more vulnerable parties, will feel compelled to accept settlement offers for fear of being seen to be "not compliant" or "not engaged". In our *Solving Housing Disputes* report, we highlighted that many tenants are likely to "stick their head in the sand" when it comes to disputes regarding their home, and we feel that adverse costs orders may only serve to make such problems amongst tenants, worse. Again, we highlight the importance of mediators and judges being aware of such issues and taking them into account when assessing appropriate sanctions.

5. Please tell us if you have any further comments on the proposal for automatic referral to mediation for small claims.

We understand that mediation is to be provided via a one-hour telephone call for all claims with a value of £10,000. Whilst we support this approach in the context of qualifying housing claims, we

also highlight that there may be limitations to this. For example, it is not clear whether a one-hour telephone call will be effective when it comes to some of the more complex cases. Therefore, we encourage the Ministry of Justice to consider expanding the provision of SCMS and/or explore whether parties can be directed to external, free mediation services that could provide for longer appointments or face-to-face/virtual mediation.

We also highlight the importance of timing in relation to DR, with previous research and DR pilots demonstrating that pre-action DR is more successful than DR that takes place after court action has been initiated. The latter often results in parties having entrenched positions and relationships being irrevocably damaged due to the adversarial nature of court proceedings.

For these reasons, we draw attention to the proposals made in our *Solving Housing Disputes* report, for an all-new model of housing dispute resolution. When considering the future of DR across the civil justice system, JUSTICE believes that there remains a need for greater reform and a new approach to resolving housing disputes. The system, in its current iteration, prevents a coherent understanding of the structural problems that lead to housing disputes. Automatic referral for small claims may improve avenues for redress but it will not resolve the systemic issues that contribute to housing disputes or that underpin the current housing dispute system.

JUSTICE proposes a new model of dispute resolution for housing, the Housing Disputes Service ('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, 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 as well as legal experts funded by separate legal aid contracts. 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.

In proposing a new model of DR for housing, 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.

8. How can we improve the information provided to users about this service?

As stated above, we consider that information about the service must be provided at the earliest opportunity and ideally prior to claims being issued. This may mean providing information about the mandatory mediation service on the claim form itself and/or in accompanying documents. Either way, we feel that this is crucial to focus claimants' minds on the role that DR will play within their case.

Parties must be supported to access information and support as early as possible during the dispute. Advice should be available not only in relation to mediation but also to help inform parties of their legal position: their rights, entitlements and obligations Expecting parties to understand complex laws and legal rights, without access to a legal advisor to appraise them of their position, is unrealistic. It may lead parties to disengage from the mediation process and/or produce unfair results.

Given that many parties involved in the small claims procedure are litigants in person, signposting users to relevant frontline organisations who can support them is crucial. Again, papers accompanying claims and defence forms should reference where people can go to find legal assistance.

As set out elsewhere, we consider that mediators themselves will play a crucial role in ensuring that parties are able to engage in the process and that mediation proceeds fairly. This requires mediators to have appropriate training and an understanding of the type of disputes they are dealing with, including an understanding of the potential power dynamics involved.

On a more granular level, the information provided to users in court forms should be set out in a manner that is simple and accessible for everyone regardless of the resources they have available. This includes making them accessible for vulnerable and neurodivergent individuals and we suggest the Ministry of Justice continue to work with organisations best suited to providing guidance on this.

9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?

The best approach to ensuring that there are suitable options available for vulnerable people is to anticipate the potential needs of users with a clear understanding that the civil justice system has traditionally been poor at meeting these needs. On this basis, JUSTICE suggests that the Ministry of Justice work closely with frontline advice organisations that regularly support those with complex needs, those experiencing situational vulnerabilities and those to whom English may not be their first language. Ensuring that signposting takes place prior to parties commencing mediation will also help to ensure that those who are vulnerable are supported. JUSTICE also highlights the need for information to be accessible via multiple channels, in several languages

and in a variety of forms, including easy read. This is especially important given the movement towards digitisation.

In the context of housing, it is common for disputes to arise because of clustered problems relating not only to rent or housing but to difficulties accessing welfare entitlements, health services and mental health support. To the extent that such clustered issues arise during the mediation process, mediators should be trained and have the resources available to signpost users to external services that can provide support and advice on those issues.

The clustered nature of housing disputes is a key factor in JUSTICE's recommendation for a more holistic, multi-disciplinary approach to resolving housing conflicts, e.g., via the proposed Housing Disputes Services, explained above.

11. / 13. Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government?

As an organisation deeply dedicated to improving procedural standards, transparency and consistency, JUSTICE supports proposals that seek to assimilate and strengthen the regulatory standards of mediators across the profession. We consider that revisiting accreditation requirements provides a good opportunity to explore the types of skills and expertise required of mediators – especially in the context of discussions around reforming the role that mediation and DR play within the modern justice system.

Innovations in training, methodology and new ways of thinking about the relationship between laypersons and the justice system are continually developing. For example, in our Understanding Court report, JUSTICE emphasised the role that all legal professionals – be they barristers, solicitors or other legal actors including frontline advice providers – ought to play in ensuring that clients or witnesses, especially lay persons, are able to understand and engage in the legal process. Lawyers must be trained in the skills to identify, and adapt their communication style to suit, any additional support needs that the client or lay person may have and the same must be true of mediators or anyone who comes across parties to a dispute. We consider that these responsibilities extend to mediators too.

Any lay person involved in a legal process is, in some sense, vulnerable – owing to the fact that the legal system and process is likely to be unfamiliar and foreign to them, on top of the stress and emotional challenges associated with their specific legal problem. It is vital that such considerations are reflected in the training of mediators – especially given the role that mediators are to play as a neutral third party, exploring options for resolution within a less formal, less adversarial process. Mediators must be alive to safeguarding issues, as well as other factors that may raise concerns regarding the relationship of the parties. For example, in the context of housing, it is not uncommon for there to be uneven power dynamics between parties. Mediators should not only be trained in relation to safeguarding issues and communication but must also be specialists within the different areas of law involved in the small claims track e.g., housing, debt, personal injury etc. One way to ensure consistent training across the sector is to ensure that regulations embody such principles.

Regulation and standardization provide an opportunity to “level the playing field” for mediators across the sector and across the country – ensuring that quality service delivery is not reliant on a postcode lottery. It has the chance to bring the mediation sector in line with other professional sectors, whilst also scaling up standards and building public confidence in the profession.

15. Some mediators will also be working as legal practitioners, or other professionals and therefore subject to regulation by the relevant approved regulator e.g., solicitors offering mediation will already be regulated by the Solicitors Regulatory Authority. Should mediators who are already working as legal practitioners or other regulated professionals be exempt from some or any additional regulatory or accreditation requirements for their mediation activities?

JUSTICE does not agree that the existence of a legal qualification (or other professional qualification), in and of itself, should preclude mediators from having to demonstrate their achievement of some or all of the additional regulatory or accreditation requirements within their mediation activities. Rather, we consider that such qualifications should be considered and, where appropriate, help to evidence that the said requirement has been met.

In any event, we consider that achievement of the requisite criteria will require to be assessed on a case-by-case basis. Only then will standards continue to be driven upwards.