Ministry of Justice

Increasing the use of mediation in the civil justice system

July 2022

CP 721

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Increasing the use of mediation in the civil justice system

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

July 2022

CP 721

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About this consultation

To:	The consultation is aimed at court users, the mediation profession, the legal profession, the judiciary, the advice sector, and all those with an interest in the resolution of civil disputes in England and Wales.
Duration:	From 26/07/2022 to 04/10/2022
Enquiries (including requests for the paper in an alternative format) to:	Dispute Resolution Team Ministry of Justice 102 Petty France London SW1H 9AJ Disputeresolution.enquiries.evidence@justice.gov.uk
How to respond:	Please send your response by 4 October to: Dispute Resolution Team Ministry of Justice 102 Petty France London SW1H 9AJ Disputeresolution.enquiries.evidence@justice.gov.uk
Additional ways to feed in your views:	A series of stakeholder meetings is also taking place. For further information please use the “Enquiries” contact details above.
Response paper:	A response to this consultation exercise will be published.

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Foreword

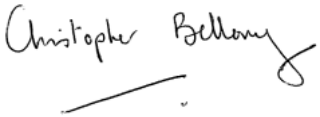
As we continue to build back a better, stronger justice system, the time has come for it to adapt to the needs and priorities of the modern age. This involves not only facilitating swift, online access to the courts, but also providing the encouragement and opportunity for people to resolve their disputes consensually wherever possible. Where the civil justice system can support people to do this, helping them to avoid the time, cost, and stress of an adversarial court battle, I believe it has a duty to do so.

In line with this vision, last year the Ministry of Justice's Call for Evidence on Dispute Resolution in England & Wales set out our ambition, supported by the judiciary, to integrate dispute resolution processes, such as mediation, within users' journey through the justice system. The responses to that consultation exercise confirmed the range of benefits to individuals that stem from resolving their case consensually. However, it also highlighted that public awareness of these benefits was limited and that more needed to be done to help people to access and engage with dispute resolution processes.

As a first step to addressing this problem within the civil justice system, I am proposing to ensure that all people involved in a defended small claims dispute are automatically referred for a free one-hour telephone mediation appointment with Her Majesty's Courts and Tribunals Service (HMCTS) at an early stage of their case. Although the courts will remain open to all, our policy will mean that thousands of people who would not previously have attempted to use mediation to resolve their dispute are supported to do so. Where this attempt leads to a settlement, it also means that judicial resources are freed up for more complex cases where they are really needed, helping such cases to progress more quickly to a court hearing.

I also want to begin laying the groundwork for embedding mediation as an integral step in the court process more widely across the civil justice system. To enable this, we need to ensure high-quality, affordable and accountable mediation services are available outside the court service, which is why I am seeking views on how the Government might work with the mediation sector to support this.

Across the globe, the value of dispute resolution processes – arbitration, mediation, conciliation, online dispute resolution – in enabling parties to achieve effective, consensual resolutions to their disputes is progressively being recognised. The UK has long been a leader in promoting this outlook and we must continue to forge the way forwards by cementing mediation as an essential part of the modern justice system.



Lord Bellamy QC

Executive summary

This document sets out the Government's proposal to introduce a requirement to attempt mediation for all proceedings allocated to the small claims track of the County Court. This is the case management process that applies to most types of claims valued under £10,000, although the level is lower for personal injury and housing disrepair claims.

Under the Government's proposal, unless an exemption is granted by the court, all parties to a defended small claim (the phrase 'parties' includes both the 'claimant' and 'defendant' in a case) will be required to attend a free mediation appointment with HMCTS before their case can progress to a hearing.

The proposal is expected to help an additional 272,000 parties every year to access the opportunity to resolve their dispute consensually through mediation and avoid the time and cost of litigation. It is also expected to divert up to 20,000 cases each year from the court system, freeing up judicial resources to be used for complex cases.

The Government is also considering whether a requirement to mediate should be expanded beyond small claims. To achieve this, we would need to refer parties to external mediators outside the court service. As such, we are seeking stakeholders' views on the right approach to strengthening oversight of external mediators and ensuring that the market is providing high-quality and accountable mediation services outside the court system.

Both of these initiatives form part of the Government's broader efforts and ambition to help parties realise the benefits of consensual dispute resolution processes, such as mediation, and integrate these processes as a key step within the justice system.

The Government welcomes views from court users, the mediation profession, the legal profession, the judiciary, the advice sector, and all those with an interest in the resolution of civil disputes.

Introduction

This paper sets out for consultation the Government's proposal to introduce automatic referral to mediation for small claims proceedings in the County Court. It also seeks stakeholders' views on how to strengthen the external civil mediation sector.

The consultation is aimed at court users, the mediation profession, the legal profession, the judiciary, the advice sector, and all those with an interest in the resolution of civil disputes in England and Wales.

A Welsh language consultation paper is available at https://consult.justice.gov.uk/.

An Impact Assessment indicates that the proposals are likely to lead to some additional costs and significant savings for businesses. An Impact Assessment is attached. Comments on the Impact Assessment are very welcome.

Copies of the consultation paper are being sent to:

Association of British Insurers (ABI)

Association of Consumer Support Organisations (ACSO)

Bar Council

Centre for Effective Dispute Resolution (CEDR)

Chartered Institute of Arbitration (CIArb)

Chartered Institute of Legal Executives (CILEX)

Citizens Advice

Civil Court Users Association (CCUA)

Civil Mediation Council (CMC)

HMCTS Equality and Inclusion Engagement Group

Federation of Small Businesses (FSB)

JUSTICE

Law Centres Network

Law Council of Wales

Law Society

Legal Education Foundation

HMCTS Litigants in Person Engagement Group

Which?

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Background

Mediation within the current civil justice system in England & Wales

The civil justice system deals with non-criminal matters of law that are not family disputes or issues handled by the tribunals. Unlike criminal cases – in which the state prosecutes an individual – civil court cases arise where an individual or a business believes their rights have been infringed. Types of civil case include: businesses trying to recover money they are owed; individuals seeking compensation for injuries; or individuals or businesses claiming for poorly provided goods or services. The vast majority of civil cases take place in the County Courts, where judgments usually call for the payment or return of money or property.

Before a person (or 'party') can issue a claim within the civil courts, they are required to follow the guidance set out in the Practice Direction on Pre-Action Conduct and Protocols.[1] This guidance emphasises that litigation should be viewed as a last resort and requires parties to consider whether undertaking a form of dispute resolution might enable them to settle the matter without the need to issue court proceedings.

There are a variety of dispute resolution processes available; however, one of the most commonly used in civil cases is mediation. This is a flexible and confidential process which involves appointing a mediator, who is an independent and impartial third person, to help the parties talk through the issues, negotiate, and come to a mutually agreeable resolution to the dispute.

The pre-action guidance states that the court may ask parties to provide evidence that they have considered using a dispute resolution process. For consumer disputes, this could include using an Alternative Dispute Resolution (ADR) scheme. Where a party is found to have unreasonably refused to do so, the court is empowered to apply sanctions, including pausing (or 'staying') the case until the required steps have been taken, or ordering the party at fault to pay adverse costs at the end of the process (requiring a party to pay all or part of the other party's litigation costs).

After proceedings have been issued, the Civil Procedure Rules (CPR) set out how cases are managed through the court system. They are designed to ensure that cases are dealt with fairly; that they proceed swiftly and in the most cost-efficient way possible; and that the system can be easily understood by its users.

[1] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct

To achieve these aims, as with the pre-action guidance, the rules state that parties and their lawyers should consider using mediation to see if they can resolve their case before it reaches the point of a hearing. Once again, the CPR enable the courts to facilitate the use of mediation by ordering a stay for this to take place and the courts can apply an adverse costs order if they determine a party has not made the effort to try and settle their case.[2] In certain types of cases, the court also provides dispute resolution services, such as HMCTS' Small Claims Mediation Service (SCMS), which offers free mediation appointment for parties involved in lower value claims.

Yet, despite these requirements, powers, and incentives, the evidence available suggests that uptake of mediation has remained limited, particularly for small claims (generally those valued under £10,000), which make up 61% of claims within the County Court. For example, in only 21% of small claims do both parties agree to attend a mediation session with the SCMS.[3]

This means that the vast majority of parties to small claims disputes fail to benefit from a free service that could help them to resolve their case in a substantially swifter and less stressful way.[4] It also means that judicial time and expertise is being utilised on cases where it may not be required, as parties have not attempted to resolve their case consensually.

As a result, court resources are drawn away from more complex cases; it takes longer for everyone to access the justice they deserve; and the courts function less efficiently than they might.

Introducing a requirement to mediate

One way to tackle low levels of uptake and ensure that both parties and the courts realise the benefits of mediation is to require parties not only to consider but participate in mediation. In a variety of international jurisdictions, forms of compulsory mediation for civil cases have already been successfully established. In Italy, for example, judges have the power to order parties to attempt mediation in any civil dispute, and, in some cases, parties are required to attend an "initial mediation session" before they can bring a claim. In Australia, similar powers exist. Meanwhile, in Ontario, Canada, for over twenty years parties to civil disputes have been automatically required to attempt mediation at the beginning of court proceedings, with courts able to dismiss or 'strike-out' the non-complying party's claim or defence. By and large, there is strong support for these measures from the legal profession within their respective jurisdictions, success rates are

2 https://www.justice.gov.uk/courts/procedure-rules/civil/rules

3 Figures are drawn from an internal HMCTS evaluation.

4 Cases are stayed for 28 days for the mediation appointment to take place; the current time between issue and hearing for small claims is 50.6 weeks (see: https://www.gov.uk/government/collections/civil-justice-statistics-quarterly).

high, and they have driven a genuine culture change in how people view the resolution of legal disputes.[5]

Reviewing these and other international examples, alongside existing elements of compulsion and caselaw on that subject within the courts of England & Wales, in July 2021, the Civil Justice Council's (CJC) Judicial ADR Liaison Committee published a report which set out their view that not only was compulsory mediation lawful but that its introduction should be encouraged.[6]

The Committee concluded that any form of dispute resolution "which is not disproportionately onerous and does not foreclose the parties' effective access to the court **will be** compatible with the parties' Article 6 rights". Moreover, that if there "is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not … "an unacceptable constraint" on the right of access to the court". In essence, as long as parties are not forced to settle their case at mediation and they remain able to access the court, introducing a requirement to attempt mediation is acceptable.

The CJC's report on the Resolution of Small Claims built upon this conclusion.[7] Here, the Council's Working Party on Small Claims recommended the introduction of compulsory mediation for small claims valued under £500, asserting that this would have "clear advantages to the potential litigants/litigants (who would be spared incurring further costs and devoting more time to the claim) and a beneficial effect upon the availability of judicial and administrative resources for other claims".

The report states explicitly that "as the compulsory use of the SCMS for claims of this value would be "court sponsored" and so costs-neutral for the parties; the requirement should not be viewed as too burdensome or disproportionate in terms of costs and time", and, "as it is a telephone service it should ordinarily cause no additional difficulties for vulnerable parties".

The sanctions that the Working Party recommended attaching to this requirement were a strike out of the claim for a non-compliant claimant or the application of cost sanctions for a non-compliant defendant.

5 https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/

6 https://www.judiciary.uk/announcements/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/. ADR refers to all forms of non-court dispute resolution.

7 https://www.judiciary.uk/announcements/civil-justice-council-calls-for-improved-procedure-for-claims-under-500/

Call for Evidence on Dispute Resolution in England & Wales

In the Call for Evidence on Dispute Resolution, with a foreword co-signed by the senior judiciary, the government posed several questions to stakeholders regarding the potential introduction of a requirement to mediate within the broader justice system.

Many stakeholders agreed that introducing an element of compulsion to mediate was the only means of achieving a meaningful culture change in how disputes are resolved. They also raised a number of critical factors for us to bear in mind as we took this policy forward. In particular, stakeholders stressed the need to ensure any requirement to mediate preserved access to justice and could be tailored to individual needs, and that there should be appropriate mechanisms in place to manage cases with safeguarding concerns.

We firmly believe that the time has come for mediation to be viewed as an integral part of the civil justice system. Therefore, in developing our proposals to begin introducing this reform within small claims (as set out below), we have used stakeholders' views to guide us and ensure that the requirement to mediate is delivered incrementally and in a flexible and proportionate way that ensures vulnerable parties are protected.

Improving confidence in the civil mediation sector

As part of our proposals for small claims, we will be significantly expanding and improving the SCMS to ensure an adequate supply of court-employed mediators trained to handle small claims disputes, as well as a simpler, more digitised process for users.

However, the SCMS serves only one segment of civil court users and the Government wants all parties, whatever the value of their case, to have access to high-quality and accountable mediation services.

This is particularly vital as we look towards expanding the requirement to mediate to higher-value and more complex cases in the County Court, which would necessitate referring parties to third-party mediators, rather than those employed directly by HMCTS.

We are therefore also inviting views on what we might do to support the continued growth of a thriving external mediation market with a robust level of quality assurance and high levels of consumer confidence.

Other Government initiatives

The Government does not only support the formal integration of mediation within the civil justice system. We believe in the value of mediation to help parties achieve swift, effective, and consensual resolutions across all jurisdictions. To this end, the Government is also consulting on reforms that will introduce mandatory mediation within the Special Educational Needs and Disability (SEND) tribunal,[8] as well as proposing to support UK's intention to ratify the UN Convention on International Settlement Agreements (the

[8] https://www.gov.uk/government/consultations/send-review-right-support-right-place-right-time

"Singapore Convention on Mediation"[9] – all of which contribute to our aim to make mediation an essential part of the modern justice system.

In Spring 2022, BEIS published its Government response to the 'Reforming Competition and Consumer Policy consultation. A key focus for BEIS is to enhance the quality and oversight of ADR services by introducing a mandatory accreditation requirement and raising the minimum standard ADR bodies are accredited and assessed against. This supports our own proposed reforms by driving business and consumer confidence in ADR as a reliable and trusted service that solves many disputes before court action is required.

[9] https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements; https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation

The proposals

(1) Introducing automatic referral to mediation for small claims

Current process for mediation for small claims
The small claims track is generally for claims valued up to £10,000 although lower limits apply in some cases. It has a specific set of rules (Part 27) within the CPR with the aim of setting out a proportionate method of dealing with straightforward cases of limited financial value. To aid this objective, HMCTS operates the SCMS, which offers parties a free one-hour mediation appointment (usually over the telephone) with a mediator employed by HMCTS.

Parties can access the SCMS through a variety of different entry points after a formal claim has been made, including via: Online Civil Money Claims (OCMC); Money Claims Online (MCOL); the County Court Money Claims Centre (CCMCC); or by judicial referral. Participation is not compulsory, and only where both sides consent to mediate is a case referred for the appointment.

HMCTS recently conducted a pilot within the OCMC service whereby all claims under £500 were automatically referred to SCMS mediation (requiring parties to actively opt out, if they did not wish to participate). Following an evaluation of the pilot, from May 2021, the opt-out model has been extended to cover all claims issued through the OCMC i.e., up to £10,000. Where mediation does take place, parties are not obliged to settle at mediation and if they fail to reach a settlement, the claim continues as normal to the courts.

Examples of cases that use the SCMS
Each year, almost 80,000 parties are referred to the SCMS to help them resolve a variety of different legal problems. Here are some positive examples of the typical types of cases that the service deals with and the parties it supports:

Helen

Legal problem
Helen had a new roof installed at her home. Six months later, the roof began to leak. When Helen contacted the roofing company to ask them to fix the problem, they denied that there had been faulty workmanship and said that Helen would need to pay for the repair. Helen felt she had no choice but to ask another contractor to repair the roof and issue a court claim to the roofing company for the cost.

Why mediation?
Helen wanted the money she felt she was owed for paying the other contractor, but she did not want to deal with the stress of going to court unless it was really necessary. Mediation seemed like a more sensible way to resolve the issue.

Outcome
After several offers and counter-offers, the roofing company settled Helen's case for the full amount of the repair on the condition that they were not held liable for any further issues with the roof.

Quote
"I was nervous at the beginning, but the mediator explained the whole process to me, so I felt very comfortable."

Jakub

Legal problem
Jakub is a small, independent timber merchant. He had a longstanding contract with a local furniture maker. However, the customer cancelled their contract unexpectedly as they were selling their business. Jakub insisted that the customer had not provided the required notice, but the customer disputed this and said they were within their rights to cancel.

Why they chose to use mediation?
Jakub just wanted to resolve the issue as quickly as possible and get on with running his business without the time and cost burden of litigation.

Outcome
Through mediation, Jakub was able to arrange that the new owner of the business would enter into a similar contract for his services as a condition of the sale.

Quote
"Mediation saved me a lot of wasted time and money. I managed to secure a just and reasonable outcome that I wouldn't have been able to get through court."

Gurdeep

Legal problem
Gurdeep runs a small travel company offering adventure tours. One of his customers was unhappy with their experience and demanded a refund of £1,675. Gurdeep thought the customer's criticisms were unfair, but he offered them a discount on a future booking as a gesture of goodwill. The customer refused to accept this offer and eventually issued a court claim.

Why mediation?
Gurdeep wanted to avoid any negative publicity and preserve his reputation. Mediation offered another opportunity to resolve the dispute consensually and confidentially.

Outcome
Through the mediation process, Gurdeep recognised that the customer's experience had been impacted by some issues. As a result, he agreed to settle the case with his customer for £800 and the customer agreed not to write a negative review.

Quote
"The mediator listened to my side, but she also helped explain the customer's perspective. This meant we reached a fair compromise."

New process for mediation for small claims
We propose to expand upon the CJC's recent recommendation and require that all defended small claims will be stayed automatically for 28 days and referred to the SCMS for a free appointment with a court-trained mediator on a compulsory basis. **Parties will not be able to choose to opt out of the process simply because they wish to**.

We are considering whether particular types of small claims should be exempt from referral to mediation, as well as whether parties should be able to request an individual exemption. If taken forward, individual requests for exemption could be assessed on a case-by-case basis by a judge and decided at their discretion.[10]

We are also considering how to assess whether a party has adequately engaged with the mediation process. Where a party is assessed to have been non-compliant with the requirement to attend mediation, we propose to enable a judge to provide for a further stay of the case. In the event of continued non-compliance, a judge would be able to choose a suitable consequence for this refusal. This might be making an adverse costs order (where

[10] Where the Government itself is party to a civil small claim dispute, the case will be exempt from the requirement to mediate.

one party is ordered to pay part or all of the other party's litigation costs) or striking out a party's claim or defence.

Where mediation does take place, parties would not be forced to settle their case if they do not wish to. Where a settlement is reached, this agreement can be registered with the court as an enforceable settlement order. Where mediation is undertaken but fails to result in a settlement, litigation would resume as usual.

Process flowchart

Legal Problem

A person or company (or 'claimant') has a dispute with another individual or business (the 'defendant') and believes that their legal rights have been infringed. They are unable to resolve the problem themselves.

Claim

The claimant decides to launch legal proceedings against the defendant by issuing a claim form with the County Court.

Defence

Where the defendant disagrees with the claim, they file a defence with the court setting out their side of the case. If the defendant does not do this, the claim progresses straight to a default judgment on the request of the claimant.

Directions Questionnaire

Following the defence, the case is provisionally allocated to the small claims track (for claims generally valued under £10,000) and both parties are informed that the case will be referred for mediation, unless the case-type is exempt. They are asked to provide information to the court including setting out all the evidence relevant to their case. This stage could also be the point at which individuals request an exemption from mediation and set out the reasons for this.

Referral to the Small Claims Mediation Service or exemption granted

If neither party applies for an exemption, the case is paused for 28 days and referred to mediation. If a party does request an exemption, this request could be assessed by a judge. If the judge agrees that the case is not suitable for mediation, litigation would resume. If the judge determines that it is suitable, the case would be paused for 28 days and referred to mediation.

Mediation

A telephone appointment with the court mediator is arranged and both parties are advised how to prepare for this process. On the day of the appointment, the mediator speaks to each party separately and helps to facilitate a negotiation to see if they can agree a settlement that they are both happy with. If a party is non-compliant with the requirement to mediate, the case will be re-stayed, with sanctions applied for continued non-compliance.

Outcome

Where the claimant and defendant do agree a settlement, this is written up as a formal contract that is legally binding and registered with the court as an enforceable order. This means that if one of the parties fails to act as agreed, the claimant can take enforcement action. Where the claimant and defendant do not reach an agreement, the case is returned to court and litigation resumes.

Questions:

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?

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?

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

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?

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

Expanding and enhancing the SCMS

The introduction of automatic referral to mediation for small claims will necessitate a significant expansion on the SCMS to ensure that it has the capacity to cater for the increased numbers of cases using the service. We are developing plans for the recruitment and training of the additional mediators needed for the service to be able to deliver on a mediation appointment for every user within the 28-day timeframe.

We also view this as an opportunity to invest in improvements that could enhance users' experience of the SCMS. We are exploring how the process for handling cases referred into the service might be further digitised and integrated within the wider online court service following Reform, which is the HMCTS programme for modernising the courts. We are also looking to improve the information provided to users about the service and the mediation process.

We know from the Call for Evidence on Dispute Resolution that awareness and understanding have a significant impact on people's ability to engage successfully with the mediation process. Many parties have not heard about mediation before they have a legal problem. Without reliable and realistic guidance, we cannot expect them to understand what mediation can offer them or how the process will work. This means that even where mediation is attempted, parties are often not appropriately prepared.

Our aim will be to ensure that, throughout their interaction with the civil justice system, users are provided with clear and accessible information that helps them navigate the mediation process for small claims effectively. This means giving users upfront explanations of mediation and its benefits, as well as the requirement to mediate, so they are aware of the process from the outset. But it also means working to guide users more successfully throughout that process, so they know what to expect at each stage and what is needed from them.

We welcome views from stakeholders regarding any other improvements that we could make to the SCMS to ensure that the service it provides is as accessible as possible for users.

Questions

6. Do you have experience of the Small Claims Mediation Service?
7. Did you receive information about the Small Claims Mediation Service? If you received information, how useful was it?
8. How can we improve the information provided to users about this service?
9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?
10. What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?

Anticipated benefits (per year in England & Wales) of the proposal

The anticipated benefits of this proposal include:

- Helping an additional 272,000 parties to small claims each year access the opportunity to resolve their dispute consensually and avoid the time and cost of litigation.
- Diverting an anticipated 20,000 avoidable cases from the court system and freeing up an expected 7,000 judicial sitting days to be used for more complex cases.
- Supporting the timely, proportionate, and efficient delivery of civil justice.

(2) Strengthening the civil mediation sector

Current system of accreditation / regulation

While our current proposals address small claims, with free mediation provided by the SCMS, our future ambition is to extend the requirement to mediate to all County Court users. As any extension will involve referring parties to external mediators, rather than those employed directly by HMCTS, this ambition will rely on the readiness and quality of the civil mediation market. All the information we have points to this currently being a thriving market, delivering high-quality dispute resolution services. However, we are looking at ways we can ensure that the market is supported and strengthened, in line with its increasingly central role in resolving legal disputes.

The civil mediation market is currently self-regulated, with voluntary accreditation administered by sector-led professional bodies. There is no single set of requirements that applies across mediation providers. This differs from the situation in the family jurisdiction, where the Family Mediation Council is the leading body setting standards, and only FMC accredited mediators are able to perform Mediation Information and Assessment Meetings (mandatory meetings for disputants to learn about mediation before they can proceed to court).

It also differs from arrangements for the consumer sector, which is regulated under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, and where designated competent authorities provide oversight. All ADR providers are independent third parties who provide dispute resolution to remedy a complaint between a consumer and trader. It can take several forms from informal mediation or conciliation to binding arbitration. In most regulated sectors such as financial services and energy, the use of ADR is mandatory for business if a consumer cannot solve a dispute with a business directly. In non-regulated sectors, business use of ADR is voluntary. Over 2.5 million disputes were resolved through ADR in the past six years and 80% of consumers who used ADR thought their problem would not have been resolved without it.

While respondents to the Call for Evidence on Dispute Resolution did not identify any serious market failure within the civil mediation sector, many did support the increased formalisation of – and government involvement in – standards for civil mediators and highlighted the importance of simplifying the current accreditation arrangements. We are now considering whether we should increase government involvement in oversight of the sector. We want to ensure that the approach that we take is proportionate to any risk and appropriate to the sector's needs, boosting public confidence and guaranteeing high-quality services without over-burdening providers. This consultation is the first step in looking at how we can achieve this balance.

It is also the case that a number of professionals who work as mediators already have to adhere to professional regulatory standards in other aspects of their professional lives – solicitors and barristers, surveyors and engineers, other legal services professionals. We need to ensure that these individuals are not over-regulated, while also ensuring that the additional skills and qualities needed for mediation are properly supported and assessed.

Options for strengthening accreditation / regulation

A key aim of our work on accreditation and regulation is to improve public confidence in the civil mediation services that they receive.

We are considering a range of approaches to how we strengthen oversight of the sector. In this context, accreditation is a voluntary arrangement whereby mediators can choose to be accredited by a body, and their compliance with the requirements checked. Regulation means the government establishing a regulator or competent authority and requiring all mediators to be registered and inspected.

For accreditation, we are looking at ways that we can enhance or endorse the existing arrangements in the civil mediation market. This could involve working with one or more bodies that already operate in the sector, to ensure that their standards address our concerns for future delivery, and publicly endorsing them as an approved body, or bodies, in the sector. This would mirror the approach taken for family mediation.

Another route to improving public confidence in civil mediation is the creation of a national Standard for mediation. This would be a publicly available document, setting out a set of requirements that mediators could choose voluntarily to adhere to in order to demonstrate that their services were of a high quality. The existing bodies in the sector could assess mediators against the Standard and support them to achieve it.

The development of a national Standard would be led by BSI, the UK's national standards body, and would need to be developed with the participation of the mediation sector.

Questions:

11. 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?

12. Which existing organisation(s) could be formally recognised as the accreditation body for the civil mediation profession and why?

13. What is your view on the value of a national Standard for mediation? Which groups or individuals should be involved in the development of such a Standard?

14. In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?

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?

Equality Assessment

Section 149 of the Equality Act 2010, the Public-Sector Equality Duty (PSED), provides that:

> "A public authority, must in the exercise of its functions, have due regard to the need to-
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this [the 2010] Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and those who do not share it."

Paying 'due regard' needs to be considered against the nine "protected characteristics" under the Equality Act 2010 – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Equalities considerations

Direct discrimination
The proposal to introduce automatic referral to mediation for small claims is considered unlikely to be directly discriminatory and is not likely to treat people less favourably on account of a protected characteristic.

Indirect discrimination
Based on the limited data available, we consider that the introduction of automatic referral to mediation for small claims is unlikely to be indirectly discriminatory as it is unlikely to result in a particular disadvantage for people with a protected characteristic when compared with people without the protected characteristic.

Discrimination arising from disability and duty to make reasonable adjustment
We recognise that it remains important that the Small Claims Mediation Service continues to make reasonable adjustments for individuals with disabilities to ensure access to justice when using the service. At this stage, our assessment is that the service already includes steps to ensure accessibility for persons with disabilities, such as in-person appointments. We will continue to review and amend the provision of adjustments as our proposal develops and are committed to ensuring that the service will not result in any particular disadvantages to persons with disabilities.

Harassment and victimisation
We do not consider there to be a risk of harassment or victimisation as a result of the proposal.

Advancing equality of opportunity
Consideration has been given to how these proposals impact on the duty to advance equality of opportunity by meeting the needs of claimants who share a particular characteristic, where those needs are different from the need of those who do not share that particular characteristic. We consider that the proposals in this consultation provide a significant opportunity to advance equality of opportunity in the context of supporting all parties to a small claims dispute to access a free mediation appointment, irrespective of protected characteristics.

Fostering good relations
We have considered the need to foster good relations between people who share certain protected characteristics and those who do not. The proposal will support parties to resolve their disputes consensually, and the requirements and exemptions will apply irrespective of protected characteristics. The proposals will reduce lengthy disputes between parties and are likely to have a positive impact on fostering good relations.

Your views are important
We would like to understand if there are further equalities issues that we have not yet considered. In light of the ongoing nature of the PSED, we will consider all responses and amend the Equalities Assessment post consultation as needed.

Questions:

16. Are there any measures that the Small Claims Mediation Service could take to ensure equal access for all to their services, considering any specific needs of groups with protected characteristics and vulnerable users?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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?**

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?**

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

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?**

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

6. **Do you have experience of the Small Claims Mediation Service?**

7. **Did you receive information about the Small Claims Mediation Service? If you received information, how useful was it?**

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

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

10. **What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?**

11. **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?**

12. **Which existing organisation(s) could be formally recognised as the accreditation body for the civil mediation profession and why?**

13. **What is your view on the value of a national Standard for mediation? Which groups or individuals should be involved in the development of such a Standard?**

14. **In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?**

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 professionals be exempt from any additional regulatory or accreditation requirements for their mediation activities?**

16. **Are there any measures that the Small Claims Mediation Service could take to ensure equal access for all to their services, considering any specific needs of groups with protected characteristics and vulnerable users?**

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

Are you content for the Ministry of Justice to include your affiliated organisation in a public list of respondents to the consultation exercise?

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 04/10/2022 to:

Dispute Resolution Team
Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: Disputeresolution.enquiries.evidence@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available online at https://consult.justice.gov.uk/.

Alternative format versions of this publication can be requested from Disputeresolution.enquiries.evidence@justice.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in due course and available on-line at https://consult.justice.gov.uk/.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

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