

Increasing the use of mediation in the civil justice system

Lead department	Ministry of Justice
Summary of proposal	Introduction of a requirement into the Civil Procedure Rules for all parties to specified small claims disputes to attend mediation.
Submission type	Impact assessment (IA) – 25 October 2023
Legislation type	Secondary legislation
Implementation date	In the 2019-2024 parliament
Policy stage	Final
RPC reference	RPC-MoJ-5212(2)
Opinion type	Formal
Date of issue	15 November 2023

RPC opinion

Rating¹	RPC opinion
Fit for purpose	On first submission the IA received an initial review notice. The revised IA addressed satisfactorily, the RPC's concerns on the assessment of the direct impacts on business, including specific considerations in respect of small and micro businesses. There remains room for improvement in some areas for improvement in the wider analysis, including providing more detail on monitoring and evaluation plans.

Business impact target assessment

	Department assessment	RPC validated
Classification	Qualifying regulatory provision (OUT)	Qualifying regulatory provision (OUT)
Equivalent annual net direct cost to business (EANDCB)	-£253 million (initial estimate) -£34.5 million (final estimate)	-£34.5 million (2019 prices, 2020 pv)
Business impact target (BIT) score	-£172.7 million	-£172.5 million
Business net present value	£379 million (2023 base years)	
Overall net present value	£383 million (2023 base years)	

¹ The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). RPC ratings are fit for purpose or not fit for purpose.

RPC summary

Category	Quality²	RPC comments
EANDCB	Green	The IA has addressed the points in the RPC's initial review, either revising its assumptions and calculations or providing better evidence for the existing analysis. The much lower net benefit figure appears to be more robust estimate of the direct impact on business of the proposal.
Small and micro business assessment (SaMBA)	Green	The revised IA provides a significantly expanded small and micro business assessment. This now covers greater justification for making mediation mandatory for SMBs, discussion on the proportionate impact on SMBs and consideration of mitigation. The IA would benefit from proportionate discussion of impacts on medium-sized businesses.
Rationale and options	Satisfactory	The IA has improved its explanation of why take-up of mediation is currently sub-optimal but would benefit from further discussion. The IA usefully discusses non-regulatory and other regulatory options considered.
Cost-benefit analysis	Satisfactory	The revisions to the analysis and presentation of more evidence to support assumptions have resulted in a much lower net present value figure, which appears to be more robust estimate of the impact of the proposal on society. The IA would benefit from further analysis or discussion of impacts on individuals.
Wider impacts	Satisfactory	The IA provides a satisfactory assessment of public sector impacts. Given significant potential impacts on individuals, the IA would benefit from including a short summary of the equalities impact assessment.
Monitoring and evaluation plan	Weak	The monitoring and evaluation plan includes useful commitments and initial discussion. However, this lacks detail for a final stage IA and would benefit significantly from further development.

² The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. Please find the definitions of the RPC quality ratings [here](#).

Response to initial review

As originally submitted, the IA was not fit for purpose primarily because of concerns around the evidence and analysis supporting the assessment of the direct impacts on business, in particular regarding the following assumptions:

- i) Benefit per business of a settled mediation claim.
- ii) Settlement rate.
- iii) Staff time preparing for a mediation.

There were also concerns around the appraisal period used, clarity of the counterfactual and a number of issues with the supporting cost model, including price deflation and discounting.

The IA also needed to improve the SaMBA, particularly in relation to identifying proportionate impact on SMBs and potential mitigation.

The department has responded satisfactorily to the issues raised in the RPC's initial review. In particular, the revised IA now uses a more robust, and much lower figure, for i) above, which has driven the much lower estimated net benefits to business and net present social value figures (discussed further below).

Summary of proposal

Civil cases within the county courts are split into three separate tracks that are managed differently according to the value of the claim in dispute. The small claims track deals with cases usually valued under £10,000. HM Courts and Tribunals Service (HMCTS) operates the Small Claims Mediation Service (SCMS), which provides a free one-hour telephone mediation for parties involved in defended small claims disputes, currently on a voluntary basis. However, while 52.5 per cent of the cases that go to the SCMS are resolved, current uptake levels are only 19 per cent. The proposal will require all parties to specified small money claims in the county court (generally those valued under £10,000) and housing condition claims to attend the mediation service. There will be no obligation for parties to settle at mediation, and where mediation is undertaken but does not result in a full settlement, litigation will continue as usual.

The IA estimates a net present value of £383 million over a 10-year appraisal period. This consists of costs of £117 million, with around half being incurred by business in preparing for, and attending, the mediation. The next highest costs are incurred by HMCTS in dealing with the increased case load and from lost hearing fee income where mediation diverts cases from court. Benefits are estimated at £500 million. The large majority of this accrues to businesses in avoided court-related costs. There are also savings to the public sector in avoided judicial sitting days. The impacts on business translate to an EANDCB figure of -£44.0 million, or -£34.5 million in 2019 prices, 2020 present value base year.

EANDCB

On issue i) above, the IA assumes a benefit per business of a settled mediation claim to be £1,214, drawing upon the median figure of the cost of legal disputes for small businesses within a 2017 Legal Services Board's report (figure updated to 2023 prices). This is a major downward revision on the previous, mean-based, figure of £5,028 and appears to be more representative of the avoided court-related costs to a business of a settled small claim through mediation. This adjustment accounts for the large majority of the revision to the overall EANDCB figure, from - £253 million to -£34.5 million.

On issues ii) and iii) above the department has maintained its assumptions but now provides evidence and greater reasoning to support them. On the assumed 35 per cent settlement rate this includes presenting evidence for a similar rate being achieved by the Ontario Mandatory Mediation Programme in Canada (paragraphs 34-35). On iii), this includes evidence from the United States on preparation for mediation in comparatively high value and highly-complicated medical malpractice cases (paragraph 67). The IA explains how UK evidence is limited in these areas and how the department plans to gather evidence as part of its monitoring and evaluation.

The IA's appraisal period has been adjusted to ten years, running from 2023-24 to 2032-33. The department has also clarified that its counterfactual takes account of the existing number of mediations and their settlement rate. The issues identified with the supporting cost model have been corrected.

The RPC is now able to validate the revised EANDCB figure.

SaMBA

The revised IA provides a significantly expanded small and micro business assessment (paragraphs 78-81). This now covers greater justification for making mediation mandatory for SMBs, discussion of the proportionate impact on SMBs and consideration of mitigation. The latter describes how accessible information, in a variety of formats, is being developed to help small and micro businesses prepare for mediation effectively. The IA is now sufficient in this area.

Medium-sized business considerations

The IA would benefit from proportionate discussion of impacts on medium-sized businesses.

The IA has been improved in some other areas following the RPC's initial review, as described below.

Rationale and options

The IA discusses information failures and now includes greater discussion and evidence for why take-up of mediation is currently sub-optimal (for example, paragraph 7). The IA would benefit from further discussion of this, for example addressing whether businesses may prefer going directly for a court settlement, perhaps anticipating that mediation will not work or that a court settlement will provide a more favourable outcome for the business. The IA would benefit from addressing further why businesses are not able to judge for themselves which is the most cost-effective route to settle the dispute.

The IA helpfully discusses non-regulatory and other regulatory options (paragraphs 23-26). The IA would benefit from further discussion of why a lower small claims cap was rejected, given that this would appear to be more in line with the CJC's recommendation. The IA would also benefit from discussing potential exemptions, where both parties prefer not to go to mediation (for example, if parties' positions are so far apart that there is no realistic prospect of mediation being successful).

Cost-benefit analysis

The IA uses a sufficient level and quality of evidence and modelling to support the monetised assessment of impacts on businesses and the public sector. The IA includes a useful presentation of assumptions, risks and sensitivity analysis. The IA would benefit from monetising costs and benefits to individuals, or at least providing much greater discussion of these impacts.

The IA would benefit from further discussion of potential indirect impacts, such as a resultant less satisfactory compensation to injured parties or additional harm or costs over time, resulting from non-settlement followed by litigation or a failure to pursue a claim.

Wider impacts

The IA provides a satisfactory assessment of public sector impacts, with impacts on HMCTS monetised and discussion of impacts on the judiciary added. The assessment includes a cost to HMCTS of lost fee income as some cases would no longer proceed to court. The IA would benefit from explaining why the estimated net savings to the public sector are relatively low. The IA would benefit from addressing the associated benefit to HMCTS of having resources freed to undertake other activity, which might also yield fees. The IA would also benefit from discussing risks associated with timely delivery of the proposal's objectives, such as sufficient funding of the SCMS to handle the volume of disputes effectively and the adequacy of supply, including any training needs, of mediators.

Other wider impacts of the proposal appear to be limited. The IA addresses trade impacts and could usefully be similarly explicit on an expected lack of competition or innovation impacts. As noted above, the IA could discuss impacts on individuals further - the IA references an equalities impact assessment but would benefit from including a short summary of this. The IA could discuss the importance and complexity of some small claims and the balance between speed and a credible justice system that promotes consumer confidence.

Monitoring and evaluation plan

The monitoring and evaluation plan usefully commits to process impact and economic evaluations but is at a high level for a final stage IA. The IA would benefit from providing further detail, in particular developing the consideration of key indicators begun at paragraph 84. The plan could discuss the time taken to reduce the backlog of cases and whether the review planned for May 2025 will inform any potential rollout to other levels of claims.

Regulatory Policy Committee

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