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| Title: Increasing the use of mediation in the civil justice system IA No: MoJ034/2022 RPC Reference No: RPC-MOJ-5212(1) Lead department or agency: Ministry of Justice Other departments or agencies: HM Courts & Tribunal Service (HMCTS) | Impact Assessment (IA) | | | |
| | Date: 01/07/2022 | | | |
| | Stage: Consultation | | | |
| | Source of intervention: Domestic | | | |
| | Type of measure: Primary and secondary legislation | | | |
| Contact for enquiries: Disputeresolution.enquiries.evidence@justice.gov.uk | | | | |

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|--|-------------------------|
| Summary: Intervention and Options | RPC Opinion: Yes |
|--|-------------------------|

| Cost of Preferred (or more likely) Option (in 2022 prices) | | | |
|--|----------------------------|-------------------------------|--|
| Total Net Present Social Value | Business Net Present Value | Net cost to business per year | Business Impact Target Status Qualifying provision |
| £m 386 | £m 377 | £m 36.7 -57.9 | QRP |

What is the problem under consideration? Why is government action or intervention necessary?

Court recovery following the Covid-19 pandemic is a key Government priority. While claim volumes in the civil courts are lower than in 2019, cases are still taking significantly longer to be resolved. To reduce the burden on the courts and help all parties achieve a swifter resolution, HMCTS operates the Small Claims Mediation Service (SCMS) which provides a free mediation appointment for all parties to a small claim dispute (generally those valued under £10k). At present, however, while 55% of cases mediated via the SCMS result in a settlement, only 15-21% of parties utilise the service, with the evidence suggesting this is because many court users do not understand the mediation process and its benefits. Under the preferred option, all parties to a defended small claims dispute will be required to attempt mediation through the SCMS before their claim can progress to a hearing. This will ensure that as many cases as possible are resolved consensually, helping the parties to avoid the time and cost of litigation and freeing up judicial resources for use on more complex cases. Government intervention is required because changes to secondary and primary legislation are required to implement the preferred option.

What are the policy objectives of the action or intervention and the intended effects?

The Government believes this measure will support the delivery of a sustainable and efficient civil justice system. The overall policy objectives of the options considered are to deliver swift access to justice for all civil court users; to ensure that judicial resources are focussed on more complex cases; to reduce the cost of resolving disputes for parties to small claims; and to ensure that parties to small claims are confident in and satisfied with the mediation process as a means to resolve their disputes.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

- Option 0** – do nothing. Continue with current system of optional attendance at mediation for small claims.
- Option 1 (preferred)** – legislate to introduce a requirement to mediate for small claims disputes.

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|--|--|--|-----------------------|---------------------------|
| Will the policy be reviewed? It will be reviewed. If applicable, set review date: OCTOBER 2025 | | | | |
| Is this measure likely to impact on international trade and investment? | | | No | |
| Are any of these organisations in scope? | | | Micro Yes | Small Yes |
| | | | Medium Yes | Large Yes |
| What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent) | | | Traded: N/A | Non-traded: N/A |

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister Date: 25/06/2022

Summary: Analysis & Evidence

Policy Option 1

Description: Legislate to introduce a requirement to mediate for small claims disputes.

FULL ECONOMIC ASSESSMENT

| Price Base Year 2022 | PV Base Year 2022 | Time Period Years 10 | Net Benefit (Present Value (PV)) (£m) | | |
|-------------------------|----------------------|-------------------------|---------------------------------------|-----------|--------------------|
| | | | Low: 291 | High: 481 | Best Estimate: 386 |

| COSTS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|--|--|-------------------------------|
| Low | 10 | 5.9 | 56 |
| High | | 7.4 | 64 |
| Best Estimate | | 6.5 | 60 |

Description and scale of key monetised costs by 'main affected groups'

HMCTS: This option will require expanding the SCMS to manage the increased caseload. Our initial estimates of the associated costs are £2.8m annually, and £22m over the appraisal period (NPV). HMCTS will also lose hearing fee income where mediation diverts cases from court. Depending on the success rates, these costs are estimated to be between £2-3 m annually and £15-25m over the appraisal period (NPV; 35-55% success rates).

Civil Court Users: businesses will face an additional cost from preparing for and attending the one-hour telephone mediation appointment. Our initial estimates of these costs are £2.3-3.1m annually and £19m-25m over the appraisal period (NPV). As the mediation service is free, there will be no direct costs to individual court users.

Other key non-monetised costs by 'main affected groups'

Legal profession: lawyers may lose work representing small claims parties; however, we assume that they will find work of equal or next best economic value.

| BENEFITS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---------------|--|--|----------------------------------|
| Low | 1 | | 347 |
| High | | 68 | 545 |
| Best Estimate | | 56 | 446 |

Description and scale of key monetised benefits by 'main affected groups'

HMCTS: This option could free up 4,380 - 6,730 judicial sitting days (35%-55% success rates), with potential savings of £4.6 - £7.2m annually and £36-57m over the appraisal period. These savings will not be initially cashed out as the freed up sitting days will be used instead to support improved performance within the courts.

Civil Court Users: where mediation is successful, businesses will save the time and cost of a court hearing. We estimate this benefit could be between £39 -£61m per annum and £310m-488m over the appraisal period to businesses alone (constant prices, 35-55% success rates).

Other key non-monetised benefits by 'main affected groups'

Civil Court Users: where mediation is successful, individuals will be saved the unquantified cost of a legal dispute (including legal representation / preparation and the court hearing fee). All parties (both individuals and businesses) will be spared the time and stress of litigation; and businesses can benefit from resolution of the dispute in a private and less adversarial manner which is likely to preserve business relationships.

Judiciary – we anticipate that judicial resources will be freed up to focus on more complex cases.

| | | |
|--|-----------------|-----|
| Key assumptions/sensitivities/risks | Discount | 3.5 |
|--|-----------------|-----|

The above impacts depend on certain key assumptions. These relate to the proportion of small claims suitable for mediation; the number of parties that will be exempt from the requirement to mediation; the settlement rate of SCMS mediations; the number of parties that are businesses and individuals; and the cost to businesses of a legal dispute.

BUSINESS ASSESSMENT (Option 1)

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|--|--------------------------------|------------------------------|---|
| Direct impact on business (Equivalent Annual) £m: | | | Score for Business Impact Target (qualifying provisions only) £m: TBC in final IA. |
| Costs: £2.3 m-3.1m | Benefits: £39m - 61m | Net: £36.7- £57.9m | |

Evidence Base

A. Background

1. 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.
2. 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. 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; the fast-track deals with cases usually valued at £10-25,000; and the multi-track deals with cases valued over £25,000.

Problem Under Consideration

3. Court recovery, following the Covid-19 pandemic, is one of the Government's key priorities. Within the County Court, incoming claim volumes are on average 78% of pre-Covid levels. However, timeliness remains below pre-Covid levels. Small claims are taking an average of 51.4 weeks between receipt and hearing (compared to 37.1 weeks in 2019) while fast-track claims are taking 71.7 weeks (57.7 weeks, 2019). Meanwhile, multi-track claims are taking 108.7 weeks (93.0, 2019).¹
4. Small claims (the vast majority of which are specified money claims) make up 61% of all defended claims allocated to a track in the County Court. As a means to facilitate the proportionate and consensual resolution of these modest value claims and free up judicial resource for more complex, high value cases, 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. However, while 55% of the cases that go to the SCMS are resolved, current uptake levels are low, with only 15-21% of small claims utilising the service. A lack of information about mediation may be the reason for the poor uptake.
5. In 2021, the Civil Justice Council (CJC) published a report on "The Resolution of Small Claims", which recommended compulsory attendance at mediation for all claims valued under £500.² The CJC stated that this policy 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".
6. The Government wants to take the CJC's recommendation further and introduce automatic referral to mediation for all defended small track claims. Under our proposed new model, which forms the basis of this consultation, all defended claims will be stayed (paused) automatically for 28 days and the parties (both individuals and businesses) referred to the SCMS on a compulsory basis. Where mediation does take place, there would be no obligation for parties to settle and access to court will remain available to all. Where mediation is undertaken but does not result in a full settlement, litigation would resume as

¹ <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>

² <https://www.judiciary.uk/announcements/civil-justice-council-calls-for-improved-procedure-for-claims-under-500/>

usual. The Government plans to support the success of these measures by improving the information provided to users about the mediation process and its benefits.

B. Policy rationale and objectives

Rationale

7. The conventional economic approach to government intervention is based on efficiency or equity arguments. Government may consider intervening if there are strong enough failures in the way markets operate, for example monopolies overcharging debtors, or if there are strong enough failures in existing government interventions, such as outdated regulations generating inefficiencies. In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. Government may also intervene for reasons of equity (fairness) and for re-distributional reasons (e.g. reallocating resources from one group in society to another).
8. The Government's proposed intervention to introduce a requirement to mediate for small claims disputes is driven by the efficiencies it will generate for both civil court users and the civil justice system. Where mediation is successful, parties to small claims disputes will be saved the additional time and cost of taking their case through to hearing, and the burden on the courts will be reduced. As the appointment is free to the parties, one-hour in length, and conducted via the telephone, we do not believe this proposal presents a disproportionate burden to users.

Policy Objectives

9. The intended outcomes of the option considered in this Impact Assessment (IA) is to:
 - deliver swift access to justice for all civil court users;
 - ensure that judicial resources are focussed on complex cases;
 - reduce the cost of resolving disputes for parties to small claims;
 - to ensure that parties to small claims are confident in and satisfied with the mediation process as a means to resolve their disputes; and,
 - to support the delivery of a sustainable and efficient civil justice system.
10. The policy is estimated to achieve a 13-55% reduction in small claims hearings, and free up 3,000-7,000 sitting days (4-10% of all County Court sitting days).

C. Description of options considered

11. The following options are considered in this Impact Assessment (IA):
 - **Option 0** – do nothing. Continue with the current system of optional attendance at mediation for small claims disputes.
 - **Option 1** – legislate to introduce a requirement for parties to small claims disputes to attend mediation.
12. Option 1 is preferred as it best meets the policy objectives.

Option 0

13. Under this option, as under the current system, attendance at an SCMS appointment would remain optional for parties to small claims disputes. Only where both parties agree to

mediation would the case be stayed (paused) for 28 days and the mediation appointment take place. Where mediation does take place, parties would not be obliged to settle at mediation and if they fail to reach a settlement, the claim would continue as normal to the courts. We assume that uptake levels and settlement rates would remain relatively constant.

Option 1

14. Under this option, all defended small claims would be stayed (paused) automatically for 28 days and the parties referred to the SCMS for a free appointment with a court-trained mediator on a compulsory basis. Parties would not be able to choose to opt-out of the process simply because they wish to.
15. We are consulting on whether particular types of small claims should be exempt from referral to mediation, as well as whether individual exemptions from attending the mediation session should be permitted. All individual requests would be assessed on a case-by-case basis by a judge.
16. We are also consulting on how to evaluate 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 one party is ordered to pay part or all of the other party's legal costs) or striking out a party's claim or defence.
17. 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.

D. Affected stakeholder groups, organisations and sectors

18. A list of the main groups that would be affected is shown below:

- HMCTS who provide the SCMS to small claims users
- Users of the small claims track including businesses and individuals
- Legal professionals
- Judiciary

E. Cost and benefit analysis

19. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
20. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts which cannot sensibly be monetised. These might be impacts on certain groups of society or data privacy impacts, both positive and negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are not monetised.

21. The impact of the present option will be determined by the number of parties exempt from the provision and the settlement rate of the mediations that do take place. In this analysis, we have modelled for a 35-55% settlement rate; this factors in that there may be a dip in settlements when parties are required to attend mediation but assumes this will be mitigated by improved information provided to parties about mediation and its benefits.
22. At this stage, the analysis assumes that no cases are exempt. We are consulting on whether there will be provision for certain cases to be exempt. Stakeholder feedback will inform the policy decision on exemptions, and the impact of this will be considered in the final IA analysis (published alongside the Government's response to the consultation). However, the sensitivity analysis (section F) considers a range of 10-40% exemptions to account for the possible variations. This aims to account for a range of policy scenarios from a limited number of case types being eligible for exemption up to individual exemptions being permitted.
23. The costs and benefits of the option are compared to option 0, the counterfactual or "do nothing" scenario, where no requirement to mediate is introduced and fees are maintained at their current levels. As the counterfactual is compared to itself, the costs and benefits are necessarily zero, as is its net present value (NPV). The price year used for the analysis is 2022 and the appraisal period is for the 10 years from 2022-2032. Optimism bias of 20% has been applied to costs of this policy.
24. We are confident in the data sources used for the analysis of the costs and benefits to HMCTS. The data sources for the costs and benefits for business are less robust. For the benefit to business, we are primarily using figures provided within the Legal Services Board's report on the legal need of small businesses (2017), which gives the average cost to a small business of a legal dispute.³ This represents the latest available estimate of this cost. It is based on survey responses from small businesses, with no breakdown of the different types of cost incurred.
25. In using this data, we assume that small businesses are most likely to be involved in smaller, less complex disputes; as such, the costs should be reasonable reflection of the business cost of a small claim dispute. However, small businesses may still be involved in larger disputes, and large businesses may also be involved in smaller disputes. It is also possible that disputes soluble by mediation are less likely to otherwise lead to long and costly disputes. In light of this, we will apply Optimism Bias to the savings ahead of the final IA, as well as reviewing whether there are any more accurate data sources available.

Option 1: Legislate to introduce a requirement for parties to small claims disputes to attend mediation.

Costs of Option 1

Monetised Costs

HMCTS

26. There would be monetised costs to HMCTS associated with the expansion of the SCMS, including: the recruitment and training of additional mediators; IT improvements; public information improvements; internal resources; and evaluation costs. Excluding the upfront costs required to expand and improve the SCMS, the policy is expected to cost HMCTS an additional £2.8m annually.

³ <https://legalservicesboard.org.uk/our-work/ongoing-work/the-legal-needs-of-small-businesses-2013-2020>

27. HMCTS would also incur costs in terms of the lost hearing fee income from cases that settle through mediation. This is estimated to amount to £2-3m annually. The HMCTS fee payable to issue the case would be unaffected.

Users of the Small Claims Track

28. There would also be a monetised cost to businesses as they will be required to prepare for and attend the one-hour telephone mediation appointment. These costs are based on an hourly rate of staff time of a business manager, assumed to be £30 - £40 per hour.⁴ This cost is estimated at approximately £2.3-3.1m annually.

29. As the mediation service is free, there will be no direct costs to individual court users.

Non-Monetised Costs

Legal professionals

30. Lawyers may lose work representing small claims parties; however, we make the assumption that they will find work of equal or next best economic value.

Benefits of Option 1

Monetised Benefits

HMCTS

31. There would be monetised benefits to HMCTS from the sitting days saved through the reduction in small claims hearings. This is estimated to amount to £4.6m -7.1m annually. However, the Government does not intend to cash out these sitting days; instead, they would be used to help improve performance across the County Court.

Users of the Small Claims Track

32. The monetised benefits for businesses would derive from the swift resolution of legal disputes. Based on analysis from the Legal Services Board's report on the legal needs of small businesses for the cost of a legal dispute (on average £3,410 in 2017), our initial estimate of the cumulative savings for all businesses affected are in the region of £36.7 - 57.9 m per annum.

Non-Monetised Benefits

Users of the Small Claims Track

33. The non-monetised benefits of this option would include the unquantified cost savings for individuals where their disputes are resolved through mediation (including legal representation / preparation and the court hearing fee); the reduced burden for all parties in terms of the time and stress associated with protracted litigation; and the benefits to businesses who can preserve their relationships with partners through achieving a consensual resolution.

Judiciary

34. We would also expect to see judicial resources freed up for use on more complex cases.

⁴ <https://www.reed.co.uk/average-salary/average-business-manager-salary>;
https://www.payscale.com/research/UK/Job=Business_Director/Salary

F. Assumptions, risks and sensitivity analysis

35. The key assumptions used in calculating the impact of the preferred option include: that most small claims are suitable for mediation; the proportion of defended small claims that require a hearing; the number of parties that will be exempt from the requirement to mediation; the rate of successful mediations; the number of parties to small claims disputes that are businesses and individuals; the cost to businesses of a legal dispute; and the cost of a judicial sitting day for HMCTS. We will work to refine these assumptions as the detail of the policy is finalised.
36. The main risks associated with the preferred option are a) that a significant proportion of parties are granted exemptions from the requirement to mediate; and b) that the current rate of successful mediations within the SCMS is not maintained. We are working to mitigate these risks by working with the judiciary to establish clear criteria for exemptions to be granted; improving public information to ensure that users understand mediation and how to prepare to engage with this process, as well as the benefits of resolving their case through mediation; and investigating whether there is any additional mediator training that might be provided to support success.
37. We have presented the range of costs and benefits that factor in a 35-55% settlement rate where mediation takes place. We hope success rates would increase over time as mediation becomes an integral part of the small claims track and users are familiarised with the process.
38. In the above analysis we have assumed there are no exemptions. Applying sensitivity analysis to factor in exemption rates, results in a reduction of the range of NPV to £246-£417m with 10% exemptions, and to £129-£226m with 40% exemptions. The impact on businesses is also a factor of the optimism bias assumed.

| Net Present Value Rates under different exemption rates | 35% success rate £m | 55% success rate £m |
|---|------------------------|------------------------|
| 0% exemptions | 291 | 481 |
| 10% exemptions | 246 | 417 |
| 40% exemptions | 129 | 226 |

G. Wider impacts

Better Regulation

39. This measure is a qualifying provision under Section 22(3) of the Small Business Enterprise and Employment Act 2015. It is in scope of the department's Business Impact Target.

Equalities

40. The equalities assessment has been undertaken and the resulting statement is included within the consultation document.

Impact on small and micro businesses

41. Data from the Civil Court User Survey indicated that 60% of specified money claims (which make up the majority of small claims disputes) involve micro or small businesses. Given the

anticipated cost savings, the measures would have a positive impact on helping to mitigate the burden of legal disputes upon micro and small businesses.

H. Monitoring and Evaluation

42. We will aim to build in evaluation from the start of policy development, using management information along with economic indicators and qualitative attitudinal indicators to provide benchmarks from which we will be able to observe changes in behaviour and outcomes in dispute resolution related to this change in policy.
43. Key indicators that we will use to measure the above include: timeliness statistics for the County Court; small claims hearing data within the County Court; settlement rates for the SCMS; and user satisfaction rates for the SCMS. A full logic model and list of the data requirements needed to evaluate the policy will be developed following consultation
44. Process, impact and economic evaluations will all be necessary to fully demonstrate the outcomes of the policy in terms of how the policy is applied, the impact of the policy and its value for money. These evaluations are described in more detail below:
 - **Process evaluations** will examine the activities involved in the preferred option's implementation and delivery pathways. They cover questions such as:
 - What worked well and less well, and why?
 - How was the intervention implemented?
 - What could be improved?
 - How has the context influenced delivery?
 - **Impact evaluations** will measure whether the preferred option has achieved its intended outcomes, and whether it was the cause of any changes in outcomes. Such evaluations can also identify any unintended consequences of the policy.
 - **Economic evaluation** will consider the value-for-money of the preferred option, including whether the benefits are outweighed by the costs, and whether the intervention remains the most effective use of resources. Benefits can include both direct financial savings for MoJ and potentially other government departments, along with wider social benefits.