Consultation response:

Increasing the use of mediation in the civil justice system

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

Summary

Which? welcomes the opportunity to participate in the consultation on increasing the use of mediation in the civil justice system and sets out below our response to both the Ministry of Justice (MoJ) proposals concerning (1) the introduction of automatic referral to mediation for small claims, and (2) strengthening the civil mediation sector.

Whilst we welcome the MoJ proposals to make mediation mandatory in the civil justice system for disputes less than £10,000, and support strengthening the mediation sector, we feel that certain areas of alternative dispute resolution (ADR) are currently failing consumers and will continue to do so regardless of the MoJ proposals. Which? advises that the government should take action to make alternative dispute resolution mandatory for certain sectors before a dispute reaches the civil justice system. We have set out our views on how this should be done in our response to Q11 and we feel these recommendations are consistent with, and would ultimately complement and reinforce the MoJs proposals. If ADR schemes were efficient and widespread in key unregulated sectors for example, home improvement and motoring, and more effective in some regulated sectors, such as aviation, the small claims court system would become a residual arena[1].

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?**

[1] Chapter 10, Improving courts and ADR to help vulnerable consumers access justice by C. Graham in Vulnerable Consumers and the Law-Consumer Protection and Access to Justice, C. Riefa, S. Saintier, Eds., 2020, Routledge

Which? thinks that exemptions should be considered in those circumstances where there is a significant imbalance between the parties creating a risk of injustice and unfairness. Examples might be where the legally disadvantaged, due to their personal circumstances or characteristics are involved and lack the ability to assert their own needs and to produce results that are fair and just[2]. If both parties are not of an equivalent footing in the negotiation, then there is a risk that one of the parties could exploit this imbalance to secure an overly advantageous agreement. This is at the basis of why consumer law protects consumers over businesses practices in the first place and mediation should not be permitted to remove these protections. Additionally, attention should be considered in circumstances where consumers are not aware of what they are entitled to by law. Recent research from a County Court mediation pilot suggests that people involved in mediation settle for less than the amount that they have initially claimed [3]. The research asks the question of whether the observed variances of between 50% and 63% represent a lack of justice or a realistic trade-off between the delay, cost and the stress of hearings and the compromise of settlement[4].

It may be that cases where parties have already undertaken and exhausted a certain level of mediation (say via the Ombudsman or a registered mediator) can be automatically exempt. An MoJ survey found that 33% of consumers and 54% of traders who used the courts reported that they had used ADR before going to court. It may be that this group, if obliged to undertake further compulsory mediation, may be deterred from accessing justice via the civil courts procedure.

Finally, Which? suggests exemptions are considered in the case of claims for an unquantified award amount. In this situation only a judge is qualified to determine the amount of a claim if, for example, the quantum of compensation for a personal injury claim is in dispute. Mediators cannot provide this or interpret a contract or the law.

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?

The MoJ proposal of a mediation session conducted as a telephone-based negotiation facilitated by the court mediator was found to be popular with those parties who opted to use it[5] because it avoided the need to travel to court. However, telephone mediation will not be the best option for some individuals, perhaps due to disability, or lack of access to appropriate equipment or location. There may also be situations where mediation is not appropriate at all, for example where parties have already undergone and exhausted mediation, and even adjudication, via an Ombudsman of a regulated sector, or a qualified mediator if in the

[2] Charlie, Irvine, What Do 'Lay' People Know About Justice? An Empirical Enquiry, June 2020

[3] Chapter 10, Improving courts and ADR to help vulnerable consumers access justice by C. Graham in Vulnerable Consumers and the Law-Consumer Protection and Access to Justice, C. Riefa, S. Saintier, Eds., 2020, Routledge

[4] Ibid.

[5] Small claims mediation – does it do what it says on the tin? Val Reid, ADR Policy Officer, Advice Services Alliance Margaret Doyle, independent researcher and mediator, June 2007

unregulated sector. Which? strongly advises that there should be the facility for parties to apply for individual exemptions. These applications should be assessed by the judge.
Indeed, without the facility to exempt parties, compulsory mediation may be seen as an unnecessary delay and complication to an already resource intensive process, ultimately dissuading parties to seek redress via the small claims court, and thus further reducing access to justice.

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

Adequate engagement could be simplistically assessed through the litigant's wilful participation in the mediation session and their attempt to express what they would like to gain from the mediation either verbally or in writing. However, Which? feels that any assessment can only apply if the MoJ can be satisfied that the mediation process has been executed to a defined standard, and the parties possess the knowledge required to engage adequately with this mediation process. This is because small claim litigants at the start of their journey with the civil justice system will commonly suffer from a lack of understanding and familiarity with both the court process and methods of alternative dispute resolution[6]. Hence their perceptions and ability to engage with these processes may vary. Thus, any attempt to assess if a party has adequately engaged with the mediation process should not be undertaken until litigants understanding has been developed to a minimum benchmark level.

Part of this understanding will need to include the limitations of mediation. The reasons why people go to court in civil cases vary: sense of fairness, redress, preventing others from falling into the same issues, restitution, sense of honour, out of principle, proportionality, wanting to establish the truth, teaching someone a lesson or exposing someone's errors and mistakes, etc. Given mediation is unlikely to offer satisfaction to most of these motivations[7], litigants are unlikely to engage fully in a process if the MoJ has not made an attempt to manage their expectations as to what they can expect to gain or lose from the mediation process.

It is furthermore important to consider the quality of the mediation in terms of its impact on the users' perception of independence, impartiality, and their ability to reach a shared understanding. This is particularly so given the MoJ is proposing to offer 'shuttle mediation' by phone which could be considered as one of the most basic forms of mediation more akin to facilitation. We feel that whilst shuttle mediation can help with making the parties, who are typically entrenched at this point, comfortable with the idea of mediation, a mutual understanding of what these parties fundamentally seek from the mediation process is only gained when more comprehensive forms of mediation are offered which can facilitate

[6] Chapter 11, ODR and access to justice for vulnerable consumers: The case of the EU ODR Platform by E.Sciallis in Vulnerable Consumers and the Law-Consumer Protection and Access to Justice, C. Riefa, S. Saintier, Eds., 2020, Routledge

[7] Some literature highlights the danger of mediation providing almost "*poor justice to the poor": It does not contribute to substantive justice because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving. The outcome of mediation, therefore, is not about just settlement it is just about settlement.*

compromise. Ideally this would be where the participants can witness each other's respective requests via joint sessions with both parties present. Shuttle mediation as proposed by the MoJ seems to fit uneasily with the claims that mediation helps the parties to communicate with each other and to jointly explore their needs and interests. Hence, before an assessment of engagement can take place the MoJ must also ensure both parties have been treated equally; mediators have an unbiased attitude in their treatment of the parties; and do not favour a particular outcome, etc. Although mediators may be impartial in their behaviour and actions, just as important is the parties' perception of this impartiality[8]. From the feedback arising from the pilot report, justice was not being done when 'too much emphasis is put on expediting cases, and too little on the safety of outcomes in terms of "justice"'[9]. Previous pilots with the courts found that the parties perceived pressure from the other side, from the financial circumstances of the case, from the time limit, and from the mediator himself[10].

We suggest that post mediation, process parties are asked to fill in a questionnaire which collects their opinions and experiences of the mediation against the above elements. The responses to this survey should be taken into consideration against any concerns that an individual has not engaged in the process adequately.

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?

Yes, we feel that it is reasonable to apply sanctions. For example, the court may award some or all the costs against the successful party if the parties have refused to agree to ADR and had acted unreasonably in doing so. However, the court must have followed a rigorous process to determine non engagement (see our recommendations in our response to question 3 above). Critically, sanctions should not be applied where parties have submitted evidence of previous attempts to settle the dispute through other forms of ADR or if parties chose to withdraw from the mediation process after its initiation.

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

Alternative Dispute Resolution (ADR) is an important part of the consumer enforcement regime and is commonly understood to provide consumers and businesses with an accessible and affordable alternative to court proceedings. By making mediation mandatory after commencing proceedings in the small claims court a paradox is created where consumers may understand they will need to go to court and pay a (minimum) fee of £35 to access ADR, hence blurring the definition of ADR as something that exists as an alternative to court. There are examples of other jurisdictions, for example Italy, where mediation has been made a mandatory prerequisite to court but the distinction from court is maintained as mediation

[8] Small claims mediation – does it do what it says on the tin? Val Reid, ADR Policy Officer, Advice Services Alliance Margaret Doyle, independent researcher and mediator, June 2007
[9] Ibid.
[10] Ibid.

takes place outside the court process. A legal representative needs to file a mediation claim and engage in ADR procedures before going to court.

We are concerned the MoJ impact assessment has not taken impacts related to changing the accepted sequence in which mediation takes place into account. In the long term, by implementing mandatory ADR for small cases within the court process, there is a risk that potential small claims court users may see this as an additional hurdle, and thereby a deterrent to having their cases heard by a judge, whilst potential ADR users, either unaware of alternatives or in sectors lacking ADR, perceive the registration fee as a financial barrier to using an ADR process. Both outcomes thereby reducing access to justice for parties involved.

Currently most approved consumer ADR schemes are free for the consumer; however, a small number of providers are charging a nominal fee. Which? survey results[11] suggest that any move to introduce fees for ADR is likely to have a significant impact on the number of consumers that use ADR to resolve disputes. Our survey suggests that even a nominal fee would discourage a significant number of consumers from bringing a case to ADR with almost a quarter (24%) saying that they would not pay a fee in any circumstances and significant numbers reporting they would not pay a fee if the transaction was less than £200.

In the consumer sector, Which? considers making ADR mandatory outside the court process in key regulated sectors (such as home improvement and motoring, and in some regulated sectors, such as aviation), and that companies within these sectors clearly signpost the availability of ADR, is likely to be the most effective way to increase the uptake of dispute resolution processes and is the most efficient way to respond to consumers' needs when they arise. Although all consumers have the right to take their case to the small claims court, the enhanced availability of ADR should make this unnecessary in most cases. Which? survey results[12] found only 11% of respondents said they would consider making a claim against a company using a small claims court if they were unable to resolve the complaint with the company. This compares with 28% who said they would contact an Ombudsman. These results suggest that, whilst we welcome the MoJ proposals, independent ADR has a significant role to play in providing access to justice even prior to court proceedings being issued.

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

A Mediation project providing free mediation for small claim civil and commercial cases at the Royal Court of Justice (in the August and September of 2019 and 2022) found some litigants were unwilling to participate in the project due to poor experiences with phone or online mediation run by the court. However, some of these litigants were swayed by the idea of face-to-face mediation offered by the project once they had spoken face to face with mediators involved [13]

[11] Survey conducted by Yonder, on behalf of Which? 2145 UK adults were surveyed online between 13th and 15th August 2021. Data were weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status

[12] Ibid.

[13] Society of Mediators (SoM) - Free Mediation Project reports, 2019 and 2022

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

8. How can we improve the information provided to users about this service?
We urge the MoJ to improve their evaluation processes, for example by requiring parties to complete feedback forms post mediation and to use this to generate publicly available satisfaction rates to promote informed consumer choices, as well as including a clear route to complain/appeal if the parties perceive that the negotiation process has not been carried out pursuant to the principles of fair mediation contained in the mediation code of conduct.

Also, there needs to be clarity on the interdependence between the proposed mediation process and the established court procedure. For example, if the mediation is successful and an agreement is reached, is the outcome of the mediation automatically legally binding and reflected in court order or is this optional as per a standard mediation outside the court process?

9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?
Which? feels particular care should be taken with parties who are considered vulnerable, especially when a case is complex. Given mediation parties can potentially choose not only the outcome to their dispute but also the criteria by which that outcome is evaluated, this complex form of thinking involves finely tuned judgements about personal and community norms as well as factors like expectation, risk, commitment, and personal resources which are usually part of a cost/benefit analysis. [14]

Which? is concerned that there may be negative impacts and unintended consequences where there is no distinction of vulnerability for mediation users. Even fair processes may impact negatively on consumers in vulnerable circumstances if adjustment is not made. For example, consumers with learning disabilities may find it difficult to understand forms and procedures. An important question here is whether the system proposed by the MoJ has an effective means of identifying those users who need additional help, and then supplying this help to them.
The MoJ must ensure multiple accessible channels for consumers to bring a complaint. For example, making sure that the website and forms are fully accessible to those with disabilities or impairments. The MoJ must ensure staff are properly trained to be sensitive to the indicators of the vulnerability which will help them to identify consumers in vulnerable circumstances. Furthermore, it is often useful to have a specialist who can deal with people in especially vulnerable situations available at short notice[15].

Which? feels that the MoJ should offer options for mediation in formats other than telephone, and further support in accessing and reaching a necessary understanding should be

[14] Charlie, Irvine, What Do 'Lay' People Know About Justice? An Empirical Enquiry, June 2020
[15] Chapter 10, Improving courts and ADR to help vulnerable consumers access justice by C. Graham in Vulnerable Consumers and the Law-Consumer Protection and Access to Justice, C. Riefa, S. Saintier, Eds., 2020, Routledge

proactively made available to all vulnerable parties. This is particularly important in sectors where transactions are complex or of case values close to the maximum threshold, or where there is evidence of high levels of consumer harm.

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

Critics of ADR are concerned about the loss of procedural protections, claiming that informal processes 'provide advantaged plaintiffs with a sword to enforce their rights while denying disadvantaged defendants an equivalent shield'[16] and we lose the benefit of public judgments in developing societal norms[17] Which? feel it is important that the MoJ take adequate steps to ensure consumers and businesses trust ADR schemes to provide an independent and fair process. Besides our recommendations made elsewhere in the consultation response, Which? recommends an advice and assistance service for users (like those offered by the ombudsmen) is provided by the MoJ, to support parties as the case proceeds through the 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?

New regulation to make ADR mandatory for certain unregulated sectors

Whilst we welcome making mediation a mandatory first step for small claims disputes, this is not enough. We think that the government should take measures to strengthen the dispute resolution provisions available to consumers much earlier in the consumer journey and ideally at a time soon after the dispute originates. These measures should go further than those outlined in the recent BEIS proposals[18].

We recommend this as we know that the number of people going to court for a small claim dispute, and who would thus be included in the MoJ's mandatory mediation, are considerably less than the number of consumers experiencing consumer detriment. For example, research suggests that of those UK consumers which have experienced harm, whilst a significant proportion are simply reluctant to make complaints[19]; of those that do complain, many will give up on their rights if they find the trader does not agree to resolve the dispute.

This leaves a significant number of consumers requiring help with dispute resolution at an earlier phase, but Which? research suggests that the current systems of ADR available prior to court are failing consumers in many unregulated sectors[20]. We therefore suggest that ADR should also be made mandatory for businesses earlier on in the non-regulated sectors, and in particular the motor vehicle and home improvements sectors, which were the sectors highlighted by BEIS[21] and additionally for aviation, given the significance of these sectors and

[16] Charlie, Irvine, What Do 'Lay' People Know About Justice? An Empirical Enquiry, June 2020
[17] Ibid.
[18] BEIS consultation 2021, https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response
[19] Consumer Action Monitor Report, Consumer Ombudsman, 2020.
[20] Which? policy report 2021: https://www.which.co.uk/policy/consumers/7428/adrschemes
[21] BEIS Consultation 2021, https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response

scale of consumer detriment involved. We ask the government to ensure a single mandatory ombudsman is established in these sectors[22].

In our analysis of ADR in different sectors, aviation stands out amongst other regulated sectors with high value transactions and significant consumer detriment for not having mandated membership of an ADR scheme.[23] In the absence of mandatory membership, businesses are able to leave a scheme if the ADR does not find in their favour. The impact of this was starkly illustrated when Ryanair withdrew from AviationADR after the scheme made decisions the airline did not like. Other airlines have also decided not to be members of an ADR scheme; at present, 20% of air passengers are not covered by ADR leaving millions without access to a suitable alternative process to court proceedings[24].

Where there are multiple providers in a sector and businesses have a choice, such as within the aviation sector, we are concerned that this can create pressure on providers to make decisions about processes and cases that favour businesses over consumers. Moreover, there is an issue with whether consumers are getting their money promptly after a ruling in their favour. In the lack of mandatory participation to ADR through a single provider, it is difficult to incentivise businesses to comply with the rulings as the sanction for non-compliance tends to be to remove their participation from the scheme. We believe that ombudsman schemes generally have better systems for dealing with non-compliance and for driving improvements in the sector, which would ultimately reduce the overall number of complaints made. We are urging the government to establish a single, statutory-backed ombudsman in aviation to ensure consumers have access to a service with higher standards.

In cases where the company they are in dispute with is not a member of an ADR scheme, the consumer must incur the financial cost and time challenges of taking the case directly to a small claims court in order to resolve their complaint and many will either be unwilling or unable to do this. Research conducted by BEIS in 2018[25] found that the most common reason given by consumers who took their dispute to court rather than using ADR was that the trader refused to participate in the process (70% of consumers who didn't use ADR beforehand). Therefore, we encourage the government to develop initiatives that encourage businesses in other sectors to participate in an ADR scheme and for businesses in those sectors to become members, with the aim of making ADR readily available to consumers across the economy. More generally, there should be better signposting to ADR schemes, they should be free to access, timescales for submitting a case and reaching a decision should be reduced and compliance with decisions improved.

[22] Which? policy report 2021: https://www.which.co.uk/policy/consumers/7428/adrschemes
[23] Are Alternative Dispute Resolution schemes working for consumers?, Which?, 2021 https://www.which.co.uk/policy/consumers/7428/adrschemes
[24] Airlines including Jet2 (over 14 million passengers in 2019), Aer Lingus (11.6 million passengers in 2019) and Emirates have chosen not to be part of these ADR schemes.
[25] Resolving Consumer Disputes. Alternative Dispute Resolution and the Court System, Department for Business, Energy and Industrial Strategy, 2018.

Strengthening accreditation:
Strengthening ADR regulations will be important in building trust in consumers and litigants in general. It is important that consumers and businesses trust ADR providers to provide an independent and fair process. A Which? survey found that consumers are most likely to say that they would be reassured that a resolution scheme is unbiased, independent and can be held to account if the scheme had to meet national standards for consistency and fairness (64%) and if there were an independent body responsible for approving and reviewing each scheme (61%). This underlines the importance of strengthening the ADR regulations that set high standards and ensuring ADR schemes have effective competent authorities that are responsible for approving applications and monitoring standards.

Regulations on the use of data and intelligence
Data and intelligence must be used to drive improvements in business practice and regulation. Whilst ADR regulations stipulate data collection requirements many ADR schemes are failing to use the data they should be collecting about consumer disputes to inform businesses and regulators about recurring issues and help prevent complaints arising in the first place. This demonstrates that the ADR regulations are neither detailed enough nor consistently enforced to deliver the sort of reporting that could be used to drive improvements. This leaves it to individual regulators and competent authorities to mandate or agree enhanced reporting requirements that go beyond these minimum requirements. The ADR regulations should require data from disputes to be collected, analysed, and published in a consistent way[26] and for providers to work with businesses, regulators and consumer groups to prevent poor practices, promote cultural change and drive improvements across the sector they are responsible for[27].

Accessible sources of information
There should be a single accessible source of information on the advantages of mediation to improve consumer awareness of ADR. This could be a single, accessible online platform with consumer information on ADR in general with clear links to approved ADR schemes across all sectors, so even before reaching the courts. Giving consumers clear information about the ADR process will also reduce the number of enquiries that ADR schemes must handle, which will in turn reduce their costs. This should be done in conjunction with the ADR regulations. Steps should be taken to ensure ADR is accessible and meets the needs of all consumers regardless of age, income, or education level[28].

12.Which existing organisation(s) could be formally recognised as the accreditation body for the civil mediation profession and why?
If these proposals are to go ahead, the government should consider mandating a single authoritative body with responsibility for setting common performance standards for all ADR schemes and ensuring consistency across all sectors. The body should be adequately

[26] Chapter 11, ODR and access to justice for vulnerable consumers: The case of the EU ODR Platform by E.Sciallis in Vulnerable Consumers and the Law-Consumer Protection and Access to Justice, C. Riefa, S. Saintier, Eds., 2020, Routledge
[27] Which? policy report 2021: https://www.which.co.uk/policy/consumers/7428/adrschemes
[28] Ibid.

resourced, have consumer redress expertise, a clear consumer protection duty, sufficient legal powers and be independent of the competent bodies it oversees. The authority in charge should be capable of fully representing both consumer and business issues and thus within BEIS or another governmental organisation, such as a regulator.

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?
We welcome the introduction of a national standard in mediation which promotes consistency and fairness in the mediation process. The European code of conduct[29] is a good starting point for such a standard as it is recognised by many professional mediation bodies. A working group of ADR professionals and regulators should be formed, including BSI and Which?.

We believe that the development of high standards should also consider matters such as the adoption of a single ADR provider in each sector as this is more likely to result in a service with high standards that works for both businesses and consumers. A single provider would also deliver benefits in relation to:

- Gathering intelligence. A single provider will be much better placed to gather data and insight on the whole sector and engage with stakeholders to improve standards.
- Consumer awareness. Awareness is a critical issue in relation to ADR with only about 20% of people aware of the term[30]. Increasing awareness of ADR will support the use of ADR and increase the value of ADR membership for companies, as membership will provide assurance and build trust for potential customers. It is much easier to promote a single brand, such as the Financial Ombudsman Service, than it is to promote multiple brands.

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?
ADR should provide an accessible, affordable, and convenient means for consumers and businesses to resolve disputes, but beyond this it should also be a fundamental tool in the regulatory and enforcement environment. Whilst seen only as a first step, the £10,000 ceiling for small claims is not an insignificant amount for a large majority of households, particularly in the context of the cost-of-living crisis. Rigorous safeguards, feedback and court data are needed to support any proposed expansion of the mandatory model within the civil justice system: the ADR regulations should strengthen requirements on the collection and publication of data as well as engagement with businesses and stakeholders. The MoJ must have the ability to fully evaluate the impact of the proposed scheme once it is put in place and use the outcome of this to inform further expansion of the mediation process in civil claims beyond small claims.

[29] European Code of Conduct for Mediation Providers by the European Commission for efficiency of Justice (CEPEJ): https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6 as adopted by the CMC: https://civilmediation.org/membership/membership-rules/
[30] Modernising consumer markets Citizens Advice formal consultation response, Citizens Advice, 2018.

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?

We feel all mediators should comply with the regulations and that there should be no exceptions.

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?

We believe that ADR should provide an accessible and affordable means for all consumers to resolve a dispute with a company, regardless of income or education or ability. However, the age, income and educational profile of people using consumer ADR[31] suggests that older people with higher educational qualifications and income tend to access ADR services more often. This underlines the importance of ensuring ADR is made more accessible to all consumers. Which? suggests the following should be taken into consideration to improve accessibility of the Small Claims Mediation Service:

● Any costs involved in engaging with mediation, whether they are financial costs, costs in time, stress or anxiety are likely to create a more significant barrier for vulnerable groups. Therefore, the ADR regulations and ADR providers themselves should seek to minimise these costs as much as possible. Requiring parties to pay a court fee to access ADR may be a deterrent to some parties. It would also be important to avoid delays in the provision of mediation once a claim is lodged in court.

●The terminology and language used in mediation should be reviewed and simplified as it can appear technical and legalistic to many people. One of the aims of ADR is to avoid the formality and complexity of the legal system, however Alternative Dispute Resolution, arbitration, conciliators etc are not words that are used in most people's day to day experience and can be off putting.

● The Small Claims Mediation Service should put safeguards in place to handle claims where a consumer is vulnerable, including consumers that haven't been able to access a service because of a disability.

● The Small Claims Mediation Service should seek opportunities to promote their services through organisations that vulnerable groups use and trust, for instance charities that represent people with disabilities or who may have English as a second language. These groups should also be asked to advise how ADR services can be made more accessible to the groups they work with, and this should be regularly reviewed.

● The Small Claims Mediation Service should be able to offer additional support to vulnerable consumers to help them engage with the process depending on the users' need. However, establishing effective support may need a period of intensive research and data gathering.

[31] Resolving consumer disputes: alternative dispute resolution and the court system. Department for Business, Energy and Industrial Strategy, 2018.

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