

# **CONSULTATION: LEGAL AID FOR MEDIATION IN NON FAMILY CIVIL CASES**

## **CONSULTATION RESPONSE QUESTIONNAIRE**

The DOJ invites views on any issues raised by this consultation and the accompanying impact screenings. While we would prefer responses to be made using this questionnaire document, we are happy to accept responses in the format most suitable to you. Responses can be emailed or posted to the address below:

**E-mail:** [eajdconsultations@justice-ni.gov.uk](mailto:eajdconsultations@justice-ni.gov.uk)

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Please submit your response **no later than close of play on Tuesday 29 June 2021**.

## SECTION 1: ABOUT YOU

### Question (a):

I am responding as... *(Please tick one option only)*

- A member of the Public
- On behalf of an organisation
- Other.....*(Please specify)*

### Question (b):

Please enter your details below:

**Name:** Law Society of Northern Ireland – Law Society Mediation Service

**Organisation:** (if applicable)

**Position:** (if applicable)

**Address:** 96 Victoria Street, Belfast

**Email Address:** ann.mcmahon@lawsoc-ni.org

## SECTION 2: CONSULTATION QUESTIONNAIRE

### **Q.1 Do you agree with the proposed rates payable to mediators?**

- Yes
- No
- No answer

Please give reasons for your response

The suggestion of a set fee for a mediation of up to 4 hours seems appropriate. The availability of an hourly rate if the mediation exceeds 4 hours is also favourable to the Law Society Mediation Service (LSMS) as this provides flexibility within the process, and will ensure continuity should additional time be required to reach resolution.

LSMS are concerned that the proposed fees do not include the costs of hiring a venue to conduct the mediation. Typically, a mediation session will require the use of three rooms, which is essential to allow the process to develop with each party having its own space and then a separate room to bring all together. This is a standard arrangement and therefore the costs of venue hire must be allowed so that mediation arrangements can be put in place by the mediator.

Additionally, the proposed rate of £33.50 per hour of travel does not include travel expenses. It is normal in all legal aid cases to include as a matter of course not only time spent travelling to conduct a case but also travel expenses. Such expenses should commence from the starting point of the mediator's journey to the mediation venue and cover all areas across Northern Ireland, including travel within a city.

In relation to paragraph 8 requiring a non-legally aided party to pay the shortfall if a more expensive mediator is deployed, LSMS believe this might unintentionally result in the non-legally aided party rejecting the mediation process entirely due to additional costs. This would be an opportunity lost and LSMS suggest that this should be very unfortunate. A solution might be have the legally aided and not legally aided party each contributing equally to the mediation fee as per the scale of charges proposed.

### **Q.2 Do you agree that prior authority should be sought for the fee for mediation cases where the value exceeds £250,000 and are there additional criteria which should be considered in determining the fee?**

- Yes
- No
- No answer

Please give reasons for your response

LSMS agree that it would be appropriate to seek prior authority for the mediation fee where the value of the case exceeds £250,000 as a matter under dispute for this quantum is likely to be more complex in nature.

**Q.3 Do you agree that the number of hours proposed is set at the right level to capture the majority of routine cases which require mediation? If not please explain why and quantify the number of hours which you consider would capture routine cases.**

- Yes
- No
- No answer

Please give reasons for your response

LSMS agree that the proposed number of hours is set at the correct level to capture uncomplicated and routine disputes. Flexibility to exceed the 10-hour limit without seeking prior authority is also welcome should a dispute be close to conclusion. LSMS suggest that the process would lose momentum if it had to be paused whilst awaiting authority to exceed the automatic limit which would be counter-productive to the overall mediation process.

**Q.4 Do you agree with the criteria in determining the higher amount of hours to be allowed under a prior authority?**

- Yes
- No
- No answer

Please give reasons for your response

Whilst most mediations conclude within one day, it is important that there is provision for extended hours in more complex cases as they tend to be of longer duration. It would be appropriate to consider the value and complexity of the case in determining the number of hours to be approved, however, the criteria should not be too restrictive and include flexibility to exceed the set number of hours in a situation where a mediation is close to resolution but requires some extra time.

**Q.5 Do you agree that mediation should only be allowed without prior authority in intra-litigation proceedings where a full certificate for lower or higher representation has been issued?**

- Yes  
 No  
 No answer

Please give reasons for your response

The provision of legal aid for intra-litigation proceedings where a full certificate for lower or higher representation has been issued is welcomed. However, there is a need to consider the issue more broadly as there are considerable merits in providing legal aid for mediation in advance of proceedings issuing.

The Law Society of Northern Ireland's Mediation Policy provides that members should always act in the best interests of their clients and ensure that all appropriate options have been considered when advice is given on ways to resolve a dispute. The Law Society's Mediation Policy states that members should inform clients of the options available to resolve disputes and in particular the merits of mediation. The availability of legal aid for pre-proceedings mediation would be useful for solicitors when advising clients of the merits of engaging ADR before issuing proceedings as it would add more weight to this option for clients.

In *Coll v Plymouth City Council* [2001] EWCA Civ 1935, Lord Woolf emphasised that "insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible". Lord Wolf also outlined in the Access to Justice, Interim Report (1995) that: "where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they have made use of that mechanism". The availability of legal aid cover for pre-proceedings mediation could therefore act as an incentive for more clients to participate in mediation rather than pursuing litigation, which could result in many benefits for them, such as, the availability of various outcomes that would not be achieved via litigation, and a quicker, cheaper resolution to their legal problem.

The availability of legal aid for pre-proceedings mediation would lead to other wider benefits such as savings to the public purse. The second Access to Justice report (2015) emphasised that "mediation should no longer be regarded as a cost driver: the alternative is almost always going to cost more". It could also play a role in reducing the number of cases in the court system and address the current backlog following the Covid-19 pandemic. Moreover, allowing for the broader availability of legal aid for pre-proceedings would be consistent with recent Practice Directions issued by the Office of the Lord Chief Justice suggesting mediation be considered by the parties.

The Access to Justice Review Report (2011) also recognised that ADR is not a panacea and does not replace the court as the ultimate means of resolving justiciable

disputes. Therefore, if pre-proceedings mediation is unsuccessful, the parties would still have recourse to the courts.

**Q.6 In which case types and circumstances might mediation help resolve a dispute outside of intra-litigation proceedings or where a full certificate is not in place?**

- Yes
- No
- No answer

Please give reasons for your response

As outlined above, there would be many benefits in extending the availability of legal aid to mediate prior to proceedings being issued. The Access to Justice Review (2011) concluded that the availability of a menu of ADR mechanisms for use in different types of legal disputes enhances access to justice and should be promoted. The Stutt Review (2015) recognised the merits of mediation, such as saving costs and providing better outcomes for clients, and recommended a greater role for mediation in civil cases.

There are many cases in which mediation is known to work well given the flexibility of outcomes that parties can reach. The Jackson ADR Handbook (2<sup>nd</sup> Edition) outlines that mediation can “identify common ground which conventional negotiation does not reach”. Mediation is particularly suitable for certain types of cases e.g. land ownership cases and neighbour disputes. The use of mediation is particularly beneficial in cases which require the preservation of relationships, which could otherwise be damaged through the commencement of litigation. The Stutt Review (2015) recognised the particular benefits of mediation in a range of landlord/tenant disputes given the underlying relationship for parties involved in these types of cases, and the potential for the mediator to help the parties resolve their future relationship. Moreover, in certain matters, it would be more appropriate for mediation to take place prior to issuing proceedings, particularly in commercial matters where reputation issues are at stake. In addition, when litigation is commenced, increased costs are incurred by the public purse including instruction of Counsel.

LSMS would like to point out that clinical negligence cases can often take over a year to be granted a limited legal aid certificate (pre-proceedings certificate). It can take many years before a full certificate is issued by the Legal Services Agency which allows the Plaintiff to issue a Writ. Mediation would be a useful alternative for the non-compensation elements of these cases due to the wide variety of outcomes that can be reached such as an apology or explanation. Neither of which may be available through litigation.

**Q.7 Do you agree that the legal profession should not be present during the mediation process except under the criteria for prior authority?**

- Yes
- No
- No answer

Please give reasons for your response

LSMS are concerned by this proposal. It is simply wrong to suggest that the presence of legal representatives can be counter-productive in mediation proceedings. Also concerning is the suggestion that the contribution of legal representatives during the mediation process may not bring distinct value.

The Access to Justice report (2015) outlined that “for many vulnerable clients, legal aid may be the only practical means of enforcing basic rights” and recognised that “legal aid lawyers provide frontline services for the public across a range of criminal and civil cases”. If the non-legally aided party is able to afford to pay the cost of their legal representative attending mediation, and the publicly funded party is prevented from doing so by the general authority, this would create a difficult and unfair situation. It would result in one party having the benefit of advice, with the other feeling isolated, and potentially unable to engage and participate fully with the process due to their hesitancy or lack of confidence. It would also result in an inequality of arms resulting in an adverse impact on access to justice.

LSMS would suggest that solicitors are very well placed to act as mediators as well as attending a mediation process as advisors given their practical and legal expertise. It is important to emphasise that a solicitor in attendance during the mediation process *does not* represent their client, but rather attends in an advisory and supportive capacity. Solicitors and mediators can co-work effectively during the mediation process through recognising each other’s contributions and strengths in dealing with disputes of various degrees of complexity. Legal representatives can bring many important benefits to the parties involved in the mediation process, including making the client feel comfortable and confident to engage in the process and the merits of it. They can also empower the client to ensure that their voice is heard during the process and provide an assessment and reassurance that the options/solutions being proposed are fair. The involvement of legal representatives in the mediation process is particularly beneficial where there are complex issues at stake.

The LSMS suggests that the exclusion of legal aid to meet the costs of legal representatives attending mediation may be counter-productive and could impact on the success rate of mediation. It is entirely foreseeable that parties may feel hesitant to agree to settlement terms without receiving advice from their solicitor. It should be remembered that without the availability of legal advice during mediation may result in a client accepting an outcome which is unrealistic or unsustainable and which might

ultimately lead to the failure of the process. Whilst it is not a function of the mediator to provide advice due to their role being neutral, impartial and facilitative, the individual parties to a mediation are entitled to receive advice. The mediation process would not function well without direct legal advice as this is central to the successful conclusion of many mediations. Thus, LSMS suggest that a better approach would be to allow one legal representative to be present per party to the mediation process, and if a party is legally assisted then their solicitor's attendance should be met by the legal aid fund. If a party believes that Counsel is required, then LSMS suggest that prior authority be sought or a special application made.

LSMS have concerns about the suggestion in paragraph 16 which proposes that a legally aided party may contact their legal representatives during the mediation process for further advice. The concern of LSMS is that a solicitor so contacted will not have been present during deliberations and therefore will be unaware of the tone and dynamics of the mediation session. Consequently, the solicitor may not understand the reasons for the outcome reached and its merits or otherwise, partially due to the client not being able to articulate what happened. This presents difficulties for the legal representative in analysing the position and providing informed advice to their client due to their absence from the process. Legal representatives would be hesitant to rubber stamp an agreement that they did not participate in as they will not fully understand the reasons behind the options or the outcome reached. Ultimately this poses an issue for a solicitor in terms of their Professional Indemnity Insurance.

**Q.8 Do you agree with the proposed criteria for considering whether it is appropriate to fund the additional legal costs for legal representatives to be present during the mediation process? If not, what criteria would you propose?**

- Yes
- No
- No answer

Please give reasons for your response

Further clarity is required in respect of paragraphs 17 and 18 of the consultation document. However, as set out above, legal representatives play a fundamental and important role within the mediation process, thus it is appropriate to fund costs for them to be present.

**Q.9 Do you agree that mediators receiving public funds should be properly accredited to provide that service and that the standards defined are the correct ones?**

- Yes
- No
- No answer

Please give reasons for your response

Given the distinguished and unique role of a mediator, it is vital that they should undergo appropriate training. LSMS suggest that it is also important that mediators fulfil ongoing CPD requirements annually to refresh their training and keep up to date with best practice.

LSMS advocates specific standards and requirements for its members. LSMS also maintains a panel of persons trained and approved to act in the capacity of a mediator. This panel, provides choice for members of the public to avail professional mediators.

**Q.10 Are there other accreditation bodies which meet the standards above which should be added to the list?**

- Yes
- No
- No answer

Please give reasons for your response

**Q.11 Do you have any comment on the Impact Screenings and the Regulatory Impact Assessment?**

- Yes
- No
- No Answer

Please give reasons for your response

In relation to the reference at paragraph 25 regarding individual providers in Northern Ireland who charge much higher rates, usually for mediation in commercial cases, it is important to point out that due to the nature and complexity of these types of cases, they may often merit charging higher rates.

**Other considerations:**

It is the view of LSMS that the scope of this consultation is narrow and that there may be merit in considering the broader context, particularly to use mediation pre-proceedings as outlined above, given the many benefits this would present. This would be consistent with the overriding objective to conduct civil claims to achieve best outcomes efficiently and also Court Practice Directions/Pre-Action Protocols that expect parties to have actively considered alternatives to litigation before commencing proceedings.

The *Edmunds* judgment recognises the progression of ADR within the civil justice system, which has become a “settled feature of the civil litigation landscape in Northern Ireland”, and the subsequent benefits of mediation. The more cases that mediation brings to resolution, the more savings there are to the legal aid budget avoiding additional costs being incurred due to lengthy litigation. Mediation also reduces court time and frees up judges to deal with more complex cases that are worthy of litigation. Given the current difficulties in the justice system as a result of Covid-19 with increased time for cases to be listed this can have negative impacts on the parties to proceedings. Mediation offers an alternative quicker and cheaper solution to many disputes, and presents undeniable benefits to both clients and the wider justice system.

It is notable that throughout the consultation document, there is a lack of reference to confidentiality, which is an integral part of the mediation process. In relation to any traditional reporting requirements by the Legal Services Agency at the conclusion of legally assisted cases, LSMS believe it is important to emphasise that the scope for providing information to the Agency in a case that had a mediated conclusion would be limited due to the fundamental principle of confidentiality. LSMS say it is vital that the legal Services Agency respects the confidentiality of any agreement and the terms of it.

## SECTION 3: PRIVACY NOTICE

**Data Controller Name:** Department of Justice

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Massey House  
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BT4 3SX

**Telephone:** 028 9016 9526

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**Data Protection Officer Name:** Department of Justice Data Protection Officer

**Telephone:** 02890 378617

**Email:** [DataProtectionOfficer@justice-ni.gov.uk](mailto:DataProtectionOfficer@justice-ni.gov.uk)

Being transparent and providing accessible information to individuals about how we may use personal data is a key element of the [Data Protection Act \(DPA\)](#) and the [EU General Data Protection Regulation](#) (GDPR). The Department of Justice (DoJ) is committed to building trust and confidence in our ability to process your personal information and protect your privacy.

### **Purpose for processing**

We will process personal data provided in response to consultations for the purpose of informing the development of our policy, guidance, or other regulatory work in the subject area of the request for views. We will publish a summary of the consultation responses and, in some cases, the responses themselves but these will not contain any personal data. We will not publish the names or contact details of respondents, but will include the names of organisations responding.

If you have indicated that you would be interested in contributing to further Department work on the subject matter covered by the consultation, then we might process your contact details to get in touch with you.

### **Lawful basis for processing**

The lawful basis we are relying on to process your personal data is Article 6(1) (e) of the GDPR, which allows us to process personal data when this is necessary for the performance of our public tasks in our capacity as a Government Department.

We will only process any special category personal data you provide, which reveals racial or ethnic origin, political opinions, religious belief, health or sexual life/orientation when it is necessary for reasons of substantial public interest under Article 9(2) (g) of the GDPR, in the exercise of the function of the department, and to monitor equality.

### **How will your information be used and shared**

We process the information internally for the above stated purpose. We don't intend to share your personal data with any third party. Any specific requests from a third party for us to share your personal data with them will be dealt with in accordance the provisions of the data protection laws.

### **How long will we keep your information?**

We will retain consultation response information until our work on the subject matter of the consultation is complete, and in line with the Department's approved Retention and Disposal Schedule [DoJ Retention & Disposal Schedule](#).

### **What are your rights?**

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- You have a right to have personal data [erased and to prevent processing](#), in specific circumstances
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### **How to complain if you are not happy with how we process your personal information**

If you wish to request access, object or raise a complaint about how we have handled your data, you can contact our Data Protection Officer using the details above.

If you are not satisfied with our response or believe we are not processing your personal data in accordance with the law, you can complain to the Information Commissioner at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF  
[casework@ico.org.uk](mailto:casework@ico.org.uk)