AJC ADR Consultation Response

Introduction

A group of individual members from the Administrative Justice Council (AJC) met on 16th September 2021 to discuss the AJC Alternative Dispute Resolution (ADR) Call for Evidence response. The AJC is the only body with oversight of the whole of the administrative justice system in the UK, advising government, including the devolved governments, and the judiciary on the development of that system. Attendees included representatives from public service ombudsman schemes in England and Wales, academics, NGO's and advice sector sector organisations.

Some of the attendees will submit responses either individually or for their own organisations - the meeting was to capture some information from our members to help frame our response. It should be made clear that the response is based on opinions expressed in the meeting but does not reflect the views of all of our members or their organisations/institutions.

For the purposes of this response, it is firstly important to ascertain what types of ADR fall within the remit of ADR within the administrative justice context. The group noted that the following areas of ADR should be included in the AJC response:

- Public Services Ombudsman Schemes
- Adjudication (including online decision-making platforms such as the Traffic Penalty Tribunal)
- Mediation

The AJC will look at the principles of ADR rather than individual processes due to the breadth of the administrative justice landscape. For this response, we aim to provide the over-arching principles. Therefore, we provide examples or evidence where possible but note that more evidence will be covered in members individual responses. We have included links to research and reports by our members which we hope will assist in the evidence-gathering process.

Finally, we focused on those questions which are of most relevance to the AJC and omitted those that are not (they have been numbered accordingly).

Drivers of Engagement and Settlement

1. Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?

Administrative justice issues extend across a very broad range of diverse disputes. Research shows that willingness and ability to engage in settlement varies considerably depending on the nature of the dispute and the circumstances of the parties. [1] Factors such as the urgency of the issues, the factual circumstances, the complexity of the law, and the quality of advice all affect motivation and engagement in settlement. There is no one size that fits all in disputes.

Lived experience also suggests that the vulnerability of a party and the perceived (and actual) balance of power can influence engagement.

The group noted that good communication is key to motivate, engage and co-operate with parties. Any method of resolution should be aiming to reduce bureaucracy and friction as this will encourage

[1] Eg V. Bondy and M. Sunkin, 'Settlement in Judicial Review' (2009) *Public Law* 237-259. See also V. Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project, 2009).

co-operation. Careful management of both parties' expectations, particularly in relation to achievable outcomes, is also imperative in terms of motivation and engagement and this begins with clear communication.

Whilst it was noted that online platforms such as that of the Traffic Penalty Adjudicator enables people to participate effectively and could be invaluable in many jurisdictions, it was also acknowledged that online adjudication may be difficult for those who do not have access to IT, have difficulties accessing the internet or using digital platforms. Alternative methods should be made available for those who are unable to access digital services. Vulnerable people and the elderly are at particular risk from being 'digitally excluded' and this should be factored into any digital process design thinking.

To be successful, ADR needs to be seen as legitimate and to be trusted. This was discussed further in research by Professor Naomi Creutzfeldt, 'A voice for change? Trust relationships between ombudsmen, individuals and public service providers'. Professor Creutzfeldt's research focused on one particular ADR route; Ombudsmen. She found that only a distinct group of people use an ombudsman, with (lack of) trust being a key feature. Further, the socially disadvantaged are less likely to use the ombudsman. Hertogh, who based his studies in Belgium and the Netherlands, found that people feel alienated from the ombudsman; and that the ombudsman is "only used by highly educated, white-collared, politically interested men".[2] Creutzfeldt found the same for other European countries.[3]

While the focus of Professor Creutzfeldt is on ombudsmen, the socially disadvantaged have similar reasons for not using the courts/tribunals and further work needs to be undertaken to ensure that there is access to justice for everyone using the justice system.

Further barriers which prevent people from using ombudsman schemes include the consideration of whether to complain or not. In the report *My expectations for raising concerns and complaints*[4] it cites that some people do not want to raise their voice or simply do not have enough 'fight' in them to do so. A case study is provided of a single man in his early 60s, whose cancer diagnosis left him lacking in confidence to the extent that he didn't have the 'fight' in him to complain about the way in which treatment pathways had been offered to him. The report quoted the individual: "At the time I wasn't in the right frame of mind to make a formal complaint. I had gone from competent to a gibbering wreck after being diagnosed". It had taken sessions with a counsellor before John was able to even describe what had happened to him and why he had been left so traumatised by the way in which his consultant had spoken to him.[5] Similarly, others had reported that were too tired, busy or traumatised to make a complaint.

Barriers to engagement should be considered when addressing motivation of users, particularly those who are more vulnerable and find it difficult to access ADR processes. More data is needed on the characteristics of parties and how this affects their motivation.

A further factor relevant a broad range of administrative justice disputes is that settlement and early resolution can be very dependent on the attitudes of public bodies. In judicial review, for instance, a high proportion of cases settle without trial when public bodies concede the legal claims. This often

[2] Hertogh, M. (2013). Why the ombudsman does not promote public trust in government: Lessons from the low countries. Journal of Social Welfare and Family Law, 35, 245–458.
[3] See project report https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe
[4] My expectations for raising concerns and complaints (2014)
[5] Ibid p35

only occurs when lawyers acting for public bodies are instructed and advise settlement. Research suggests that earlier involvement of lawyers can be incentivised by pre- trial requirements including clear pre-trial protocols and assist early settlement. [6]

5. Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?

Concerns remain about vulnerable people and how they access justice via alternative dispute resolution, which should not be limited to online engagement (as described above). Those without access to online facilities might be encouraged to use freephone telephone numbers instead, as seen with the success of the Scottish Public Services Ombudsman's Independent Review of the Scottish Welfare Fund.

It was noted that Ombudsman Schemes are not always the best option for people if they want a damages settlement rather than an investigation; this was not something an Ombudsman could achieve for them. In this instance, courts/tribunals would be a more appropriate option for them.

Whilst we are unable to provide examples of low uptake from across the whole administrative justice system, specific examples of low uptake were provided by the Public Services Ombudsman for Wales (PSOW) of complaints from homeless people and those accessing social care (care home issues).

The PSOW reported that they did not receive any complaints in 2020-2021 about homelessness. It was considered that the absence of complaints to PSOW about homelessness suggested that vulnerable individuals affected may have been unaware, did not understand or were unable to exercise their right to escalate their complaint to the PSOW. These low numbers do not evidence that it would be more appropriate to seek resolution through the Courts, but rather that there are multiple barriers to accessing any form of redress that leaves vulnerable people disenfranchised. In Social Care, only one of the nine complaints they received was investigated last year.

Research also shows that non court despite resolution is low where matters are urgent as in many homelessness cases and where disputes, especially public law disputes concern the legal liabilities of public bodies. [7] There could be any number of reasons for this, for example urgency of the situation and concern about how lengthy court processes are, access to funding, access to support and advocacy and so on. Therefore, the AJC considers that more research needs to be provided on the reasons for the low uptake, and where people 'drop-off' the system. The advice sector plays an essential role in supporting people with their problems and better resourcing of the sector would help people to access alternative dispute resolution services.

6. In your experience, at what points in the development of a dispute could extra support and information be targeted to incentivise a resolution outside of court? What type of dispute does your experience relate to?

<u>Ombudsman Schemes</u>

[6] Eg V. Bondy and M. Sunkin, 'Settlement in Judicial Review' (2009) *Public Law* 237-259. See also V. Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project, 2009).

[7] Eg V. Bondy and M. Sunkin, 'Settlement in Judicial Review' (2009) *Public Law* 237-259. See also V. Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project, 2009).

If the complaint is handled well and resolved by the service provider at the outset there is no need to escalate it to the Ombudsman and early resolution can be achieved.

In the Parliamentary and Health Service Ombudsman's (PHSO) report Making Complaints Count, (2021) it emphasizes the need to improve the culture of learning from feedback and complaints. Where leadership does not consider a positive complaints culture as important, and are not visibly committed to doing so, a learning culture cannot 'survive or thrive'. Indeed, this can lead to repeated mistakes and harm to future service users.[8]

The report further notes that "when organisations proactively seek feedback from people who use their services, and resolve any concerns they raise promptly, it can help prevent issues escalating into a protracted complaints process." Research conducted by the PHSO found that organisations were missing opportunities to resolve concerns at an early stage and to deal with people's problems as they arise. Feedback from PALS Outreach service teams (who speak to patients, families and their carers in the hospital setting), indicated that staff would readily commit to resolving complaints earlier; and that frontline staff would benefit from training on early dispute resolution skills to help them resolve complaints at an early stage. The need for frontline staff to deal effectively with patient feedback and concerns had also been noted by the Health Affairs Select Committee in 2011.

Early resolution of complaints will prevent complainants from pursing their compliant further which in turn will reduce the number of applications to the Ombudsman and the First-tier Tribunal.

Mediation

In special educational needs and disabilities (SEND), in disputes that involve local authorities, it was considered that factors that contribute to good outcomes in mediation include:

- staff training and awareness raising on conflict resolution and in mediation;
- availability of independent advocacy support, and information on accessing independent support for parties if appropriate;
- specialist mediators
- mediator preparation with the parties in advance of any mediation;
- development and exchange of brief statements from the parties in advance; and
- time for planning who will attend mediation.

Where court litigation occurs clear pre-trial protocols can also assist early settlement including by focusing disputes and imposing incentives on public bodies to engage in early resolution. Careful thought must also be given to limitation periods. In judicial review, for example, research suggests that the obligation to proceed "promptly" and in any case within three months, reduces opportunity for settlement and may generate unnecessary litigation. [9]

Consideration should also be given to language as it may be a resolution and mediation approach that is required, rather than formal or formalized mediation.

[8] Making Complaints Count – Supporting complaints handling 2021 para. 1.7. p13

[9] Eg V. Bondy and M. Sunkin, 'Settlement in Judicial Review' (2009) *Public Law* 237-259. See also V. Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project, 2009).

7. Do you have any evidence about common misconceptions by parties involved in dispute resolution processes? Are there examples of how these can be mitigated?

ADR is not well understood by the public, and their needs are often left unmet. The report Confusion, Gaps and Overlaps examines the current ADR landscape for consumers in the consumer sector and finds confusion, areas of under-representation and areas where multiple ADR schemes compete with one another. The Impact Assessment for the recent consultation paper from the Department for Business, Energy and Industrial Strategy on *Reforming Competition and Consumer Policy* highlighted that unless that system was changed, take up of despite resolution would not increase.[10]

Public misconceptions regarding outcomes are regularly picked up by PHSO – many users believe they can claim damages via the Ombudsman Scheme. The provision of clear, upfront guidance enables users to make informed decisions about which dispute resolution route they should follow. A court hearing will not necessarily offer users explanations or evidence of learning, so they should be made aware of such limitations before they embark on such a process.

An educational piece is needed about what other options are available to users. One issue that was raised at the meeting, was that there are a lot of assumptions about why people go to court in the first place. For lots of people they want to be heard; they want their day in court. Although not enough is known about the driver for those who don't make that process, the government should consider what motivates people to use courts versus those who do not.

A report by Creutzfeldt 'What People Expect from Ombudsmen in the UK' offers information on public expectations which is crucial in the context of people's expectations on the outcome of their complaint. The main findings were:

- People have too high expectations as they are unsure what an ombudsman can do for them; this can lead to levels of dissatisfaction if expectations are not managed at the start;

- People will experience an Ombudsman procedure as fair if they perceive they have been listened to, had a chance to raise their concern and that the person had the authority to help them.

A further possible misconception is around reprisals from making a complaint. This is particularly true in the NHS context where patients are nervous that a complaint could affect their ongoing treatment and is also prevalent in social care. The AJC noted the fear of reprisal at our Roundtable event on adult social care which was held earlier in the year. At the event, those working in advice and advocacy reported signs of a cultural 'fear' of complaining and of possible repercussions. It was noted that this is especially felt by those who fear their loved one could be taken away from them if they question a decision.

In the NHS context, this fear of stigma, negative impact on care and retribution has stopped people from voicing concerns. This was particularly noticeable in cases where someone had wanted to make a complaint about a specific person. An example in the report My Expectations of Raising Concerns and Complaints, is from a cancer patient who stated that, "You get worried that you may be victimised even more for making a complaint. You are very vulnerable in this situation. […] Look, every complaint you make is spread throughout the hospital. Complaining is risky - it makes you even more vulnerable than you already are"[11]

[10] Alternative Dispute Resolution impact assessment (publishing.service.gov.uk)
[11] My Expectations of Raising Concerns and Complaints 2014 p34

Whilst fear of reprisal could be seen as a misconception, there are individual cases where this has become a reality. Procedures need to be put in place to build people's trust and confidence in the complaints process at various institutions to ensure complainants aren't victimised as a result of making a complaint.

Judicial Review and Mediation

Research on judicial review and mediation carried out with the Public Law Project[12] revealed common misconceptions in relation to mediation. One is that the power imbalance inherent in disputes between citizen and state indicates mediation is unsuitable. However, given the high rate of settlement in such cases, this reservation about mediation did not appear to be a principled one:

'Principled objections, important as they are, do not, therefore, appear to inform practitioners' choices of redress mechanism in public law disputes. It needs to be stressed, however, that lawyers and mediators interviewed for this study were almost unanimous in their view that the presence of lawyers at mediations is essential in order to redress the power imbalance between the parties. The view that negotiation and mediation do not raise substantially different concerns about issues of principle must be seen in that context.'[13]

The research also examined claims made that mediation is quicker, cheaper and offers better outcomes than could be achieved through the court process. Only two of these claims were borne out by the evidence – a lack of knowledge among lawyers about the mediation process, and mediation delivering outcomes that cannot be reached through direct negotiations or through adjudication.

Quality and Outcomes

8. Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?

The group were interested in the definition of 'better outcomes'. Is this in terms of cost, time, higher 'uphold' rate, satisfaction? However, it was felt that outcomes should meet the expectations of both parties, even though experience shows that such expectations need to be carefully managed from the outset to clarify people's understanding.

Mediation

The evidence on mediation achieving better outcomes is unclear in relation to small claims in county court. Research commissioned by the Department for Constitutional Affairs on mediation pilots in Manchester and Exeter County courts found that in Manchester only 12% of mediated settlements included an outcome that could not have been ordered by the court. In Exeter, the proportion was even smaller.

However, in the context of judicial review, research has found that although mediation is an unlikely option where more familiar and straightforward routes to disposal are available to lawyers, it can be a useful process where negotiations are impossible, difficult or have broken down. The findings in that study confirmed that mediated judicial review disputes tend to be neither quick nor cheap, yet mediations can, and often do, provide innovative and long-lasting benefits. In several of the research case studies, mediation enabled underlying issues in a dispute to be teased out and all the successful mediations resulted in outcomes that gave claimants more than they would achieve had they been

[12] Bondy, Mulcahy, Doyle and Reid, '
[13] Ibid p84

successful at court. It could therefore be said that, rather than being the 'cheap justice' that mediation providers promote and that practitioners have objected to, mediation might in fact be a Rolls Royce option.

Research has been carried out on mediation in the Court of Protection.[14]

10. How can we assess the quality of case outcomes across different jurisdictions using dispute resolution mechanisms, by case types for example, and for the individuals and organisations involved?

This can be achieved by conducting more academic research to consider both qualitative and quantitative feedback from users; data on settlements alone doesn't offer very much information as a user may have accepted an unfair outcome.

As recommended in Confusion, Gaps and Overlap, it is also important to build data collection and measurement tools into systems that can be easily compared with others. Ideally these are the same throughout the landscape so data can actually be compared, and lessons learned.

At the Traffic Penalty Tribunal, increased communication between parties has led to a reduction in the number of penalties dispensed with, together with an increase in overall satisfaction levels from both parties. Whilst the Traffic Penalty Tribunal didn't build data analysis into the software at the beginning, they are retrospectively pulling out the required data.

11. What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view

Advice

The role of the third sector organisations is fundamental in understanding user's needs and signposting them to the most appropriate dispute resolution process. Tailoring advice to user's needs is essential in ensuring that they can make an informed choice. Resourcing the sector is essential to ensure sufficient capacity to help people resolve their problems. The acceleration of digitalisation and the impact of the pandemic on advice providers and users in particular were relevant factors when considering the capacity of frontline organisations in helping users of the system. This was explored in the AJC reports - Digitisation And Accessing Justice in the Community and Welfare Benefit Advice Provision During the Pandemic.

It was noted that advice sector organisations themselves do not always have sufficient information to explain whether ADR might be a better option for a client. More knowledge sharing is needed to help advise clients on the best course of action for their problem. The need for better information is imperative both for advice providers and the users themselves; there is confusion about which route people should take to resolve their problem including different points of entry (at different stages of the process). ADR needs to be engrained throughout the whole process so it can be used and entered at any stage. Whilst some people want their day in court, this is not the same for everyone (as indicated above); but users do need to be well informed about what the options are. There is an overlap between different services providers making it even more difficult to know which would be

[14] For example, May 2017 and Lindsey 2020. For summaries, see Lindsey 2020, UKAJI [https://ukaji.org/2020/01/10/researching-mental-capacity-disputes-the-role-of-mediation-in-improving-participation-in-the-court-of-protection-2/]; and May, C, 2017, UKAJI [https://ukaji.org/2017/05/03/mediating-court-of-protection-cases-summary-of-research/] and May, c, 2019, UKAJI [https://ukaji.org/2019/06/18/court-of-protection-mediation-research-where-are-we-in-the-uk/].

the most effective route to take. It is important to note that the process for users can take up to two years, after exhausting different avenues, to get the desired outcome.

Courts and tribunals should provide information on ADR from the outset to indicate that they might not be best placed to deal with the user's problem. Signposting directly from the courts and tribunals to the best alternative would therefore be helpful – education and training would be needed to enable caseworkers to understand the best option. Arrangements for cross-referral of cases between the tribunal and Ombudsman is being explored by the AJC Ombudsman and Tribunals Familiarisation Working Group.

Some helpful research in this area is a new AJC project on administrative justice and the impact of the pandemic - some mapping work is underway in three jurisdictions where there is overlap between the ombudsman and tribunal; exploring whether the two redress mechanisms are aware of where there are overlaps and how best they can work together to cross-refer cases. The three partnerships that are being explored are: a) the special educational, needs and disability (SEND) First-tier tribunal and the Local Government and Social Ombudsman; b) the Housing Ombudsman and Property Chamber; and c) the Parliamentary and Health Services Ombudsman and the First-tier social security tribunal. This will build on existing work of our Ombudsman and Tribunals Familiarisation Working Group which looks at the partnership between these institutions and how they can work better together. An animated user guide will be available to help people to understand the best pathway for them. We would be happy to share our research and findings as part of this process.

Compulsion – Ombudsman Schemes

The Impact Assessment for the Government's *Reforming Competition and Consumer Policy* consultation sets out that, "ADR is currently used only in few cases, because of inconsistent standards, a confusing landscape, and insufficient incentives for businesses to participate." The Impact Assessment goes on to state clearly that "We believe that voluntary actions are unlikely to increase ADR take-up by much in sectors in which business participation in ADR is not mandatory."[15] Standard practice where a statutory Ombudsman exists is that it is mandatory for service providers to participate. We also note that the Mayson Review of Legal Services recommended that mandatory access to redress should be extended to those using non-regulated services (via the Legal Ombudsman). There does therefore appear to be strong agreement across various sectors that it is best practice to have mandatory access to 'alternative' dispute resolution.

That has also been proven to be the case in Germany, where airlines refused to participate in ADR until it was made mandatory for them to do so.

Compulsion - Mediation

In SEND, mediation is part of the statutory SEND framework in England. Under the reforms brought in under the Children and Families Act 2014, it became a requirement, in all but a few exceptions, for parents or young people to consider mediation before appealing to the tribunal. Parents and young people who wish to appeal to the tribunal are required to obtain a mediation certificate (other than in cases involving only educational placement). The certificate is obtained after receiving information on mediation from a mediation adviser (who might also be a mediation provider); the aim is to give parents and young people the opportunity to consider attempting to reach a mutually acceptable

15 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004037/rccp-alternative-dispute-resolution-ia.pdf

agreement through mediation before going to appeal. Whether or not to attempt mediation is voluntary; those parents and young people who decide not to will be issued with a certificate, which will allow them to lodge an appeal (within the deadline, which is two months from the date of the local authority decision). Those who agree to attempt mediation will be given a certificate following the mediation, which allows then to lodge an appeal (should one be considered necessary) within one month of the date of the mediation.

The Centre for Educational Development, Appraisal and Research (CEDAR) carried out a DfE-commissioned review of these new arrangements; the report[16] discusses the effectiveness of procedures for resolving disagreements with local authorities and education, health and care agencies including information, advice and support services; mediation; complaints; and the First-tier Tribunal SEND. The review found that, of just over 3,000 parents/young people from 109 local authorities (LAs), the majority (58%) chose not to go to mediation. A substantial minority (42%) decided to go to mediation. This minority represented a marked increase in demand for SEND mediation since before the new legislation. The review found that use of mediation reduced the likelihood of an appeal to the tribunal; of the group who chose not to use mediation, 36% went on to appeal, compared to 22% of those who had been to mediation, a 14%-point reduction in the likelihood of registering an appeal. The researchers noted a marked increase in impact from Year 1 to Year 2 of the new system, suggesting the impact on appeal numbers would be likely to increase.

There has therefore been an element of compulsion to mediate in SEND disputes since the reforms brought in by the Children and Families Act 2014. One element is the 'mandatory gateway' (a term used in the MoJ call for evidence under Drivers of Engagement and Settlement) in the form of the requirement for parents or young people to obtain a mediation certificate.

The other element is a requirement on LAs to engage in mediation. Since 2014, when a parent or young person wants to attempt mediation (before, for example, registering an appeal in the SEND Tribunal), the local authority is required to attend (and pay for) independent mediation. This has had an impact on LA habitual behaviour, as before the reforms LAs would sometimes decline to mediate even when the parent or young person wished to. Mediation is the default position now for some LAs in responding to a SEND dispute. This is borne out by the exponential increase in SEND mediations since 2014. In 2020 there were 4,100 SEND mediations (compared with 75 in 2014).

There were 4,100 mediation cases held during 2020, similar to 2019. Of these, 1,100 (27%) were followed by appeals to the tribunal. This is the highest percentage since Educational, Health and Care (EHC) plans were introduced.

Research is needed to understand the impact of the increase in mediations on the tribunal's work. The tribunal's caseload has also increased in that period, but both increases (in mediations and in appeals) could be attributed to the widening of eligibility for statutory EHC Plans under the Children and Families Act 2014.[17]

[16] Cullen, MA et al (2017), 'Review of arrangements for disagreement resolution (SEND): Research report', Department for Education and Ministry of Justice, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/603487/C EDAR_review.pdf

[17] See Doyle, 'A Place at the Table: A report on young people's participation in resolving disputes about special educational needs and disabilities', 2019 [https://aplaceatthetablesend.wordpress.com/final-report/] and Doyle, 'Anecdote rich but data poor': The exponential growth of mediation in a shadowy corner of administrative justice', 2019 [https://aplaceatthetablesend.wordpress.com/2019/02/26/anecdote-rich-but-data-poor-the-exponential-growth-of-mediation-in-a-shadowy-corner-of-administrative-justice/]

It is therefore impossible to determine if compulsory mediation as it exists in the SEND framework has an impact on tribunal appeal numbers.

13. Do you have evidence of negative impacts or unintended consequences associated with dispute resolution schemes? Do you have evidence of how they were mitigated and how?

Feedback from tribunals is helpful in improving decision-making by public bodies. Data from tribunals such as overturn rates, can help identify when there is a systemic problem with public body decision-making. The judgement, which is sent to both parties, can help public bodies understand the reason behind the decision and use it as a lesson learning opportunity for future decision-making. Where presenting officers attend the hearing, they can also provide essential feedback to departments/local authorities. Therefore, the negative impact of using dispute resolution schemes may result in essential feedback not being fed back to public bodies to help improve their decision-making. That said, Ombudsman Schemes are able to make recommendations for improvement where maladministration has occurred. Many will give feedback in relation to wider learning or processes. This does not, for some Ombudsmen Schemes, rely on a finding of maladministration, but it is important to make it clear that feedback is not integral to a decision, but more in the nature of an observation.

Public service Ombudsman Schemes that have complaints standards authority powers (CSA) and monitoring duties, can take these types of issues further under those powers rather than through the lens of a particular complaint. The Scottish Public Services Ombudsman, for example, tracks and monitors feedback given and if trends are emerged may take direct action about complaint handling under CSA powers.

Integral for an Ombudsman Scheme is providing feedback to improve services, however there are barriers which can prevent users accessing the Ombudsman, such as the 'MP filter'. To complain to the Parliamentary and Health Services Ombudsman (PHSO) complainants need to contact their MP who then decides whether to direct their complaint onto the Ombudsman. This adds an additional stage to the process and can deter people from complaining. For various reasons, users may not want to approach their MP and this additional layer can lead to complaint fatigue (where users become tired of complaining and give up). The PHSO is the only Ombudsman Scheme in the world where this barrier exists (it does not exist for the public services Ombudsman in Wales, Scotland, or Northern Ireland). The removal of the MP filter has been argued for repeatedly.[18]

A downside of the element of compulsion on local authorities to mediate that now exists in the SEND dispute resolution framework is the disincentive to improve initial decision-making processes and communication with families. This is based on experience of one of our academic panel members, Margaret Doyle, who has mediated both before and after the 2014 reforms. Cases are coming to mediation that should have been dealt with earlier and more locally. In addition, making mediation the default appears to have resulted in less preparation for mediation by some LA representatives, which makes mediation less likely to result in good outcomes. There is a need for research on the impact on local authority behaviour of mandating mediation.

Dispute resolution service providers

[18] Kirkham and Gill Manifesto for Ombudsman Reform

We are keen to gain a greater understanding of the Dispute Resolution workforce and how they are currently trained, how standards of work are monitored and how quality is assured to users of their services.

19. Do you think there are the necessary safeguards in place for parties (e.g., where there has been professional misconduct) in their engagement with dispute resolution services?

Firstly, it is essential that users know that even though there may be an in-balance in power (between them and the public body), there is help available through advice providers and ADR schemes. Secondly, as mentioned above, people need to be reassured that they will not be put on a forbidden list because of going through a dispute resolution process and that there would not be any reprisals e.g. on-going treatment impacted.

In terms of professional misconduct, there is an of issue of confidentiality and case handler's need to be able to be open, accountable and transparent in dispute resolution services that would allow resolution to be more forthcoming.

Safeguards need to be in place for institutions themselves – Ombudsmen, for example, can't be held liable for their decisions nor be held as witnesses in court.

20. What role is there for continuing professional development for mediators or those providing related services and should this be standardised?

Ombudsman Schemes

The AJC welcomes the Caseworker Competency Framework for caseworkers by the Ombudsman Association in identifying the key capabilities that a caseworker needs to be successful and to support the development of the caseworker profession and guide the way that caseworkers approach their role, including the way they make decisions and interact with others.

In addition, we support the Parliamentary and Health Service Ombudsman's (PHSO) work with NHS regulators, service users, advocates and NHS organisations to produce a new Complaint Standards that will standardise complaint handling across the NHS. The driver for this piece of work was research that found that although there was much good practice in complaint handling across the NHS, there was no single source of guidance. There was also no recognised training path or qualification for complaint handlers. Complaint staff, who do a difficult and professional job for their organisation, often feel their expertise goes unrecognised and medical staff do not value their contribution to complaint investigations.

Work is now underway on devising Complaint Standards with government departments in PHSO's jurisdiction, and staff from PHSO have set up a working group with representatives of government departments and their agencies, alongside advice and advocacy groups, to discuss a way forward. Again, there is much good practice across government departments and agencies but there is no one voice that shows what good looks like.

A finding in the first report was that frontline staff are ill-equipped to give tailored advice to where people can go for their concerns; one of most important issues along with training staff, as addressed above.

Mediation

In SEND, mediators in England are required to be accredited under national SEND Mediation Practice Standards. A register of accredited SEND mediators is held by jointly by the Civil Mediation Council and the College of Mediators.[19]

The AJC values the work undertaken by organisations to ensure ADR providers are accredited, trained and understand what is expected of them to deliver mediation and complaints handling services.

Financial and economic costs / benefits of dispute resolution systems

22. What are the usual charges for parties seeking private dispute resolution approaches?

It is worth highlighting that an Ombudsman is free for members of the public to use (at the point of service). Ombudsman Schemes are funded either from public funds or from a levy on the businesses in their jurisdiction.

Technology infrastructure

We are interested to learn what evidence informs the potential for technology to play a larger role in accessing dispute resolution. Although we are aware of many domestic and international platforms, we must continue learning from new and novel approaches to digital technology that can remove barriers to uptake, improve the user experience, reduce bureaucracy and costs, and ultimately improve outcomes for parties.

26. Do you have evidence of how and to what extent technology has played an effective role in dispute resolution processes for citizens or businesses?

Ombudsman Schemes

The pandemic has increased the need for technology where face-to-face meetings have not been possible. Video-conferencing has provided accessibility to staff, however, the provision of multiple channels is favourable to avoid 'digital exclusion'. At the PHSO, they improved their service during the pandemic to offer web-based support for services including interactive decision-trees and online compliant forms. This will continue to be developed to ensure that the online services are accessible for users.

Traffic Penalty Tribunal

Whilst, the Traffic Penalty Tribunal (TPT) is a regulatory tribunal, so not 'alternative', it is, however, a good example of where technology has worked well to resolve disputes. The parties engage with the tribunal online through their browser, using a variety of devices, including smartphones. In submitting an appeal, the appellant can dictate what they want to say and can upload screenshots and photographs (of documents, for example), directly into their case. They can see the other side's

[19] The Register is available here: https://docs.google.com/document/d/e/2PACX-1vQpM1szkbAfa4IfE0OU7FK6xgEgSv8qB30Au92FOn3Y3I6qJen1uvEvVFYFk0yv10TY3pLcoiVgRxcP/pub

evidence and comment on each item. The parties can send messages, as can the adjudicator, contributing, again, to the enabling approach that focuses on the issue being decided.

All cases are decided by the adjudicator, who writes short reasons designed to be read on screen. The decision screen is headed 'You have won your appeal' or 'You have lost your appeal'. The only automated outcome is where the respondent authority decides not to contest the case, in which case they give a short explanation and press a 'no contest' button. The system then sends a notification to the appellant explaining they have won their appeal and the case is closed. This usually happens the same day the appeal is submitted.

The TPT Customer Liaison team supports appellants who cannot, or prefer not, to use the online platform by providing 'Assisted Digital' support. Appellants are walked through the online appeal submission process or it is completed on their behalf by proxy. This support has taken on a greater significance during the COVID-19 period. In order to restrict the level of incoming and outgoing mail, efforts have been made to help those not appealing online with cases being registered over the phone, rather than by post.

Much can be learnt from the model at the TPT in providing digital support to appellants to assist with their case. However, it should be noted that in more complicated disputes, and those with more vulnerable appellants/complainants who need more support (whether in the form of legal advice or digital support), the digital platforms may not be as straightforward or accessible. The potential for digital exclusion needs to be factored into all new digital systems and alternative channels should always be provided.

28. Do you have evidence of how technology has caused barriers in resolving disputes?

It was considered that the technology itself was not always the barrier in resolving disputes - barriers were caused by organisations not providing alterative channels of communication, sufficient helplines and trained personnel to deal with queries and guide 'offline' users through the process. It is crucial that in digital systems, every case is processed to enable the other party and the decision-makers to deal with the case, but this cannot take place without sufficient personnel and channels for those who cannot or prefer not to manage their case themselves online. In Ombudsman Schemes, experience has shown that digital contact is useful, but does not lend itself as a predominant channel for engagement for many of the difficult and sensitive cases they handle.

Professor Moira Clarke at the Henley Business School Centre for Customer Excellence is currently undergoing research into the difficulties vulnerable and disadvantaged people experience with online processes. Research into consumer experiences is invaluable in designing service provision for dispute resolution.

Thank you for the opportunity to respond to this Call for Evidence. If you would like more information from the AJC on any of the evidence we have provided, please contact Heidi Bancroft, Secretary to the AJC at hbancroft@justice.org.uk.