



# Bringing Mediation into the Mainstream in Civil Justice in Scotland



June 2019

scottish  
mediation

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## Chairs' Preface



This report is the work of a small group of people, representing a range of interests, who came together at the end of 2018 and worked through the first half of 2019 to explore how greater use of mediation might be encouraged in our civil justice system in Scotland.

The fact that the Scottish Government chose to work with Scottish Mediation to address the issue is testament to the fact that the Government is prepared to look at radical steps to attempt to improve users' experience of the civil court system in Scotland and continues the work that is being done across Scottish civil society generally to do all that can be done to make Scotland a better place in which to live and work.

In particular we note that mediation is consistent with the aspirations of the National Performance Framework and, more generally, with a society in which people are valued, relationships are enhanced, choices are made by those most affected, constructive solutions are sought for difficult problems and financial and other resources are wisely deployed. We have no doubt that the recommendations in this report sit well with a civilised and forward-looking approach to our country's future.

Mediation is of course only one part of creating a culture where we seek to resolve difficult issues constructively and with dignity and respect for all concerned. It sits in the wider context of encouraging more skilled negotiation and consensual dispute resolution, and recognising that negotiation and good communication generally should always be encouraged.

Our report is published just weeks after Margaret Mitchell MSP launched her consultation on a potential Mediation (Scotland) Bill, and follows

other independent reports such as the Scottish Parliament Justice Committee's "I won't see you in Court" in October 2018 and Martyn Evans' review into legal aid provision in Scotland "Rethinking Legal Aid" in February 2018. All of these initiatives encourage greater use of mediation within the civil justice system and confirm that now is the time for steps to be taken to change the way in which mediation is viewed and deployed within that system.

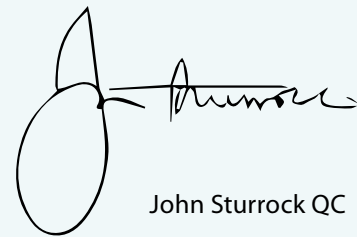
Our report looks at the experience of other jurisdictions in using mediation including Ireland, the US, England and Canada, together with parts of the EU. The lessons learned from their experience has led to us taking a more progressive and directive approach than many of us would have had anticipated as we commenced our work. We are now persuaded that this is the approach which is necessary to make a significant difference.

It is right that we record the contribution that was made by all members of the expert group and thank them for the thoughtful and considered comments that they have made. Thanks too go to Robert Barrett who worked with Scottish Mediation on a short-term contract, and the Scottish Government's Justice Analytical Services for their ground work, without which it would not have been possible to produce the report in such a short period of time.

We do not apologise for the fact that our report is detailed and that it has been produced in only 8 months. We feel that if steps are to be taken to improve the ways in which mediation is used in the Scottish civil justice system, it is better for us to say so clearly and to say so now. That

way we hope to have played our part in helping Scotland to find better ways to deal with the disagreements that its citizens, businesses and communities inevitably face.

A final thought: while we make detailed proposals, the important thing about mediation is that it is informal and flexible unlike many other more costly processes. Therefore care must be taken to encourage and enable, with a light touch, and not to over-regulate, lest the whole point of it is lost.



John Sturrock QC



Alun Thomas

June 2019

# Executive Summary

Mediation is a tried and tested process for resolving disputes. It is relatively quick, informal, and cost-effective. It gives parties control over the process and can result in solutions that better meet their needs than the court process can. It can also provide wider benefits, both to the parties and to society and the economy.

Despite recent civil justice reforms, fewer people are turning to the courts. There is a need to change the 'one size fits all' model of litigation, and various recent developments and reforms within the civil justice system provide an ideal opportunity to consider how the use of mediation might be increased.

Although court reform has created more opportunities for mediation in civil justice, its use remains limited. The necessary infrastructure to support the delivery of mediation has not been provided by the civil justice system. Hoping things will change is not a sustainable policy. Scotland needs to adopt a more proactive approach over time in order to deliver a viable pathway to ensure that more people are enabled to mediate their civil disputes.

The Group has identified a number of structural and cultural challenges to be overcome in 'normalising' the use of mediation:

## Structural challenges

- Coordinating uniform implementation
- Proportionate cost / incentivising mediation
- Clearer signalling of quality standards
- Consistent messaging in rules and legislation

## Cultural challenges

- Changing professional receptiveness
- Building wider awareness in society
- Embodying a new dispute resolution culture

This report proposes concrete ways to address each of these challenges. It proposes a coordinated strategy for 'normalising' the use of mediation in the civil justice system as a viable option in addition to, and often instead of, litigation. It outlines in detail the changes needed to accomplish this goal. It seeks to build on existing infrastructure to minimise the cost to the public purse and ensure mediation is embedded within the civil justice system as seamlessly as possible.

# Structural Challenges

## 1. Coordinating uniform implementation

To normalise the use of mediation in civil disputes and ensure uniform availability across Scotland's courts and tribunals, a coordinated case management approach, with appropriate administrative capacity is needed. Providing a new viable pathway in civil justice means introducing a minimal degree of compulsion, to ensure parties engage in the process.

### Recommendations (Chapter 5)

1. A degree of compulsion should be introduced into the system to encourage the parties to consider mediation. Where mediation is appropriate, parties should be required to attend a mediation session before their court or tribunal case can proceed.
2. An 'Early Dispute Resolution Office' (EDRO) should be established, to 1) review cases and direct them where appropriate to mediation (or other more appropriate form of dispute resolution (DR)) and 2) coordinate the mediation process. It should build on existing structures within the courts and tribunals, to make the most effective use of existing resources.
3. There should be a presumption that cases will be referred to mediation unless there is a good reason not to do so.
4. The EDRO referral system should be implemented via a two-pronged approach: 1) court rules requiring sheriffs and judges to encourage parties to consider mediation where appropriate and 2) introducing mandatory referrals to mediation via legislation, with provision for 'special cause exemptions' under a prescribed list of grounds.
5. An online mediator 'roster' should be introduced, which will be used by the EDRO to make mediation referrals.
6. The requirement to attend an initial mediation meeting should be subject to a 'special cause exemption' provision. While the legislation should not prescribe a list of reasons for exemption, the situations in which special cause exemption may readily apply include:
  1. *Mediation has already taken place, or a mediator is currently engaged*
  2. *Existence of time-bar (unless provided for in legislation)*
  3. *Contractual clauses stipulate specific DR method*
  4. *Another preferable DR method exists*
  5. *The case involves a protective order or enforcement order*
  6. *Disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence.\**
7. Provision should be made for mediation to be available before a court action is raised, as well as during a court action.
8. Unrepresented parties should have access to advice about their legal rights before agreeing to participate in mediation, possibly through in-court advice services.
9. An appropriate data collection mechanism should be embedded in the new system from the start, to ensure that effective evaluations and reviews can be carried out.

\* We are clear that cases of domestic abuse, sexual violence or any other gender based violence should not be required to provide evidence of the abuse or violence. It will be vital that experts in the field of gender based violence are involved in implementation of the proposals

## 2. Proportionate cost/incentivising mediation

All parties, regardless of their financial resources, must be able to mediate their dispute. Consequently, there must be proper funding for low-value cases and for medium to higher value cases, the cost must be proportionate and set at a level which incentivises the use of mediation.

### Recommendations (Chapter 6)

- 10.** Publicly funded free or very low-cost mediation should be made available for those involved in simple procedure (lower value claims).
- 11.** In ordinary cause (medium-higher value claims) and Court of Session actions, a suitable price point should be identified, above which parties should pay commercial rates agreed with the mediator.
- 12.** Below this point, as well as where there is no clear monetary value, appropriate models should be considered, with the goal of proportionate cost and incentivising mediation. Based on international models, it is anticipated that in many cases, the fee payable by each party is likely to be no more than a few hundred pounds.
- 13.** For tribunals, mediation should be publicly funded where appropriate.
- 14.** Mediators should be appropriately remunerated for their work.
- 15.** A firm commitment should be made to ensuring that everyone in Scotland can use mediation to resolve their dispute, regardless of income or their location.

## 3. Clearer signalling of quality standards

It is important to establish the credibility and legitimacy of a mediation pathway in civil justice. To achieve this, the EDRO must be able to refer parties to a body of professionals, which signals clearly to consumers, judges and others working within the system its quality standards, its accreditation process, and that it has an effective and straightforward complaints and disciplinary procedure. Care must be taken, however, not to over-regulate this emerging profession, to avoid mediation being 'legalised' and ending up as an adjunct of the litigation system. Solicitors and advocates play a critical role in the civil justice system, providing advice and guidance for parties seeking to resolve disputes. It is reasonable and appropriate that they advise clients of all the options available to them for resolving their dispute.

### Recommendations (Chapter 7)

- 16.** There should be clear and robust minimum standards and accreditation requirements for admittance to the roster, and an effective and accessible complaints and disciplinary procedure for roster mediators.
- 17.** A robust requirement should be introduced on solicitors and advocates to inform clients of all dispute resolution methods including alternatives to litigation.

## 4. Consistent messaging in rules

Courts, tribunals, and relevant legislation must provide a consistent message, which commits the civil justice system to resolving appropriate cases through mediation. Court and tribunal rules should affirm this commitment. Legislation will establish an appropriate regulatory regime and signal a shift to a multi-path civil justice system.

### Recommendations (Chapter 8)

- 18.** As part of the SCJC rewrite of court rules, rules should be introduced to place a duty on sheriffs and judges to encourage mediation unless there are good reasons for not doing so.
- 19.** Primary legislation in the form of a Mediation Act should be introduced. This would: place a duty on Scottish Ministers to promote the use of mediation; set out a regulatory framework for roster mediators; set out the grounds for special cause exemption; formalise principles; provide definitions; endorse the components of a code of practice for mediators; provide for confidentiality in mediation; and signal a paradigm cultural shift for dispute resolution in Scotland

# Cultural Challenges

## 1. Changing professional receptiveness

To succeed in developing a new pathway for dispute resolution in civil justice, providing the required structural changes is only one aspect. There must be a coordinated effort to encourage a change in culture, which ensures that mediation becomes a normal way, except in cases which are eligible for special cause exemptions, to resolve civil disputes in Scotland. Education and training of the professionals involved, together with professional practice rules and guidance, are the primary tools for achieving this.

### *Recommendations (Chapter 9)*

- 20.** Mediation must become a core part of education and training pathways for solicitors and advocates.
- 21.** Consideration should be given to how non-lawyer advisers might best be trained in mediation.
- 22.** Sheriffs, judges and tribunal members should be trained on the mediation process, and on the EDRO and its functions.

## 2. Building Wider Awareness in Society

Efforts are also needed to achieve a broader cultural shift to mediating disputes, where appropriate, in Scotland. There is a need to build awareness of the benefits of using mediation and to encourage better dispute resolution choices by individuals, businesses and public and other bodies.

### *Recommendations (Chapter 9)*

- 23.** Businesses and public and other bodies should be targeted directly through sector-led initiatives to build awareness of mediation as a constructive choice for dispute resolution.
- 24.** The Scottish Government should commit to include mediation in dispute resolution clauses in its own contracts.
- 25.** Other public bodies should follow the Scottish Government's lead by including mediation clauses in their own contracts.
- 26.** The Scottish Government should consider carrying out research into public awareness of mediation prior to implementation of the measures proposed in this report.
- 27.** Steps should be taken to increase awareness of mediation among members of the public, including the development of an online self-help 'portal' to direct people towards the possible options for resolving their disputes.

## 3. Embodying a New Dispute Resolution Culture

The intention behind this report is that over time, following the implementation of the various proposals described above, which aim to tackle the structural and cultural challenges identified, the Group's aim of 'normalising' mediation within civil justice will be achieved. In turn, this should help to normalise mediation across Scottish society more broadly, and the recommendations in this report taken together, should eventually lead to the embodiment of a new dispute resolution culture across Scotland. The Group views its proposals as part of a shift towards a society in which disputes and differences can be resolved, wherever possible, consensually.



# 1. Background and Approach to the Project

## Background

1. Mediation is a tried and tested process for resolving disputes. It is relatively quick, informal, and cost-effective. It gives parties control over the process and can result in solutions that better meet their needs than the court process can. It can also provide wider benefits, both to the parties and to society and the economy.
2. Despite this, the use of mediation in resolving civil disputes in Scotland is currently much lower than might be expected. While mediation is now used to a greater degree than in the past, various efforts over the past two decades or so to promote its benefits have not significantly changed a legal culture committed to litigation. Even where objectively it might appear that parties' interests would be better served by mediating their dispute, the default position is generally to litigate.
3. It is likely that many of those with disputes do not go to court. There is evidence that people generally prefer to avoid becoming involved in legal and court processes. They are apprehensive about involvement with lawyers and the potential costs, formality, delay and trauma associated with legal processes.<sup>1</sup>

Despite recent civil justice reforms, fewer people are turning to the courts: over the past decade, there has been a general downward trend in the numbers of civil actions initiated.<sup>2</sup>

4. There is accordingly a need to change the 'one size fits all' model of litigation, and various recent developments and reforms within the civil justice system provide an ideal opportunity to consider how the use of mediation might be increased. Scottish Mediation, with support from the Scottish Government, therefore undertook a short-term research project to identify ways in which the use of mediation in resolving civil disputes can become more central to Scotland's civil justice system.
5. The aims of the project were to:
  - Review the current provision of mediation in the civil justice system in Scotland
  - Consider evidence of the use and effectiveness of mediation in other civil justice systems
  - Formulate proposals to enhance the use of mediation in resolving civil disputes in Scotland

## Approach and Methodology

6. The research project began in November 2018 and ran until the end of June 2019. A Project Officer was employed to carry out desk-based

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1 See for example Scottish Consumer Council (1997) *Civil Disputes in Scotland: a report of consumers' experiences*, Glasgow: Scottish Consumer Council; Genn, H. and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*, Oxford – Portland Oregon: Hart Publishing; Consumer Focus Scotland (2012) ) [Facing up to Legal Problems: towards a preventative approach to addressing disputes and their impact on individuals and society](#), Glasgow: Consumer Focus Scotland

2 Scottish Government (2019a) [Civil Justice Statistics in Scotland 2017-18](#). Note: while there was a rise in cases in 2017-18 following years of falling case numbers, this was almost entirely due to a large increase in simple procedure cases

research and provide support to an Expert Group, which oversaw and guided the project. The group comprised of representatives from the judiciary, the Faculty of Advocates, the Law Society of Scotland, the third sector, mediation services, consumer interest, and the small business community. The membership of the Expert Group can be found in Annex 1.

7. The Project Officer produced a review of the current provision of mediation in Scotland. This included existing court and tribunal rules and relevant legislation, as well as pertinent professional rules and guidance to the legal profession. It examined the existing mediation services available to the courts, the professional standards and regulation of the mediation profession. It also considered the existing research into court connected mediation in Scotland, as well as the wider trends and policy developments relating to civil court reforms since Lord Gill's Scottish Civil Courts Review.
8. An international evidence review was also carried out by Scottish Government justice researchers to inform the Expert Group's work. This involved a review of available evidence on mediation in the civil justice systems in Australia (New South Wales and Queensland), Canada (Alberta, British Columbia and Ontario); the USA (Florida, Maryland and Ohio); England and Wales, and Ireland.<sup>3</sup>
9. Over two dozen meetings were held with a wide variety of stakeholders, seeking to gather as broad a range of views as possible in the time available. Details of the stakeholders who participated in these meetings can be found in Annex 2.
10. The Expert Group met on four occasions throughout the lifetime of the project. These meetings included a meeting over two days in Spring 2019 to review the evidence gathered

and to hear from a number of external experts on mediation who provided insights into the use of mediation in other jurisdictions. Details of these experts can be found in Annex 3.

11. Having considered all the evidence before it, and through detailed discussions, the Expert Group has formulated a range of proposals to encourage the greater use of mediation in resolving civil disputes in Scotland. These are set out in detail in this report. The report first considers the use of mediation of civil disputes, including its benefits and limitations, and provides an overview of the current mediation landscape in Scotland. It goes on to consider how the use of mediation in civil justice might be 'normalised' and sets out a proposed strategic framework to deliver a mediation pathway for civil disputes. It then makes a set of detailed proposals and recommendations as to how this might be achieved.
12. While the focus of its work was on mediation, and this is reflected in its proposals and recommendations, the Expert Group supports and encourages the use of other informal means of dispute resolution. It is supportive of the use of negotiation and other means of consensual dispute resolution which parties might use to resolve their disputes early and without the need to resort to formal legal processes. The Group emphasises that it sees its proposals as part of a shift towards a society in which disputes and differences can be resolved, wherever possible, consensually.
13. It should be noted that the views expressed, and recommendations made, in this report are those of the Expert Group as a whole. No particular view or recommendation within the report should be attributed to any individual member of the group. Each member has participated as an individual and not as a representative of any organisation or institution of which they may be a member or office holder.

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3 Scottish Government (2019b) [An International Evidence Review of Mediation in Civil Justice](#).

## 2. Civil Disputes and Mediation

### Civil Disputes

14. It is likely that everyone will become involved in a civil dispute at some point in their life.<sup>4</sup> Disputes can arise in almost every domain of life and finding ways to resolve them is part and parcel of modern life. 'Civil disputes' might also be viewed as 'civil justice problems' experienced by the parties involved. These have been defined by Consumer Focus Scotland as *'problems which raise civil justice issues (whether or not this is recognised by the person involved), and which have the potential to be resolved by a formal legal process, whether or not such a process is used'*.<sup>5</sup>
15. Finding a satisfactory resolution as early and informally as possible is in everyone's interests. It saves people time and money and can help to avoid stress and related health problems. Research has shown that civil justice problems can impact on people's mental and physical health and wellbeing, and on their confidence, attitudes and life choices.<sup>6</sup> Finding an early resolution also allows people to get on with their lives, which consumer research has shown to be the main aim of those with civil justice problems.<sup>7</sup>
16. Civil disputes can arise between private individuals and businesses; between businesses, or between individuals or businesses and public institutions. Neighbours may fall out over boundaries for example; separating parents could struggle to agree on their child's living arrangements; or consumers may experience faulty goods or poor services. Businesses might disagree on which party is financially responsible for delays in a project.
17. Typically, when a civil dispute arises, the parties involved will first attempt to resolve the matter themselves.<sup>8</sup> Businesses will often have policies in place that seek to resolve such disputes quickly, whether they arise with consumers or other businesses. Most disputes end there, with a private resolution between the parties. However, if a party is unable to resolve matters to their satisfaction, they may decide to pursue their claim through a more formal process, which inevitably involves the civil justice system.
18. Traditionally, the civil justice system has been seen to refer to the courts, but it can be considered to encompass other dispute resolution processes. Certain disputes are handled by specialised courts or tribunals. Disputes between tenant farmers and landlords are heard in the Scottish Land Court, for example, while many housing disputes are dealt with by the First-tier Tribunal for Scotland

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4 Approximately 30% of respondents to the Scottish Crime and Justice Survey in 2017-18 had experienced at least one civil law problem in the previous three years. This is fairly consistent with research from previous years. See Scottish Government, 2019a. Note 2, p4.

5 Consumer Focus Scotland, 2012 above: Note 1. Note: other research has used similar terminology: 'justiciable problems' (Genn & Paterson, 2001- see Note 1) and 'civil law problems' (Scottish Government, 2019a- see note 2)

6 See e.g. Balmer, N. (2013) [Summary Findings of Wave 2 of the English and Welsh Civil and Social Justice Panel Survey Legal Services Commission](#). Franklyn et al (2017) [Findings from the Legal Problem and Resolution Survey, 2014-15](#), Ministry of Justice. Consumer Focus Scotland, 2012 above. Note 1

7 Consumer Focus Scotland, 2012 above: Note 1

8 Genn & Paterson, 2001 above: Note 1.

(Housing and Property Chamber). Employment disputes are dealt with by the Employment Tribunal system which already has its own provisions for conciliation through ACAS and has appointed some of its tribunal judges to act as judicial mediators. Consumer disputes are handled by a wide range of organisations which focus on specific areas, such as the Financial Ombudsman Service. However, the courts remain the default destination for many civil disputes.

## Going to Court

19. In court, an individual may be pursuing a claim, or may have to defend themselves against a claim. The dispute is framed as an adversarial contest, where a judge weighs up the legal rights and responsibilities of parties, considers their actions, weighs up the available evidence, and makes a judgement as to whose position will be upheld. When a judgement is given, a party either wins or loses, with the losing side often responsible for a significant part of the other's legal costs.
20. The court process can take a considerable time: parties may have to wait for months or even years before their case can be decided.<sup>9</sup> Research with court users found reports of frustration on discovering how long a case might take to resolve.<sup>10</sup> Others noted the significant health costs involved in a drawn out legal battle.<sup>11</sup> Perhaps not surprisingly then, most disputes that go to court are settled before a judgement is given.<sup>12</sup>
21. Additionally, the remedies available to the court are relatively limited, usually taking the form of a financial award or declaration of rights. Financial remedies will not always resolve the underlying issues for the parties. There is research suggesting that a significant proportion of people who go to court are seeking non-monetary remedies such as an apology or an explanation, or to be assured that what has happened to them will not happen to others.<sup>13</sup>
22. Not every dispute needs to be litigated and most individuals have the capability to resolve their own disputes. Most people would also prefer to resolve their disputes at an early stage. As the civil courts provide no alternative to litigation, however, parties may be forced to proceed to formal court action simply because no alternative to the adversarial approach of the courts is available.
23. As both the Scottish Civil Courts Review and the Scottish Government's Strategy for Justice in Scotland acknowledged, the civil justice system provides a vital public service. It is therefore reasonable to expect the civil justice system to provide those who need to use it with alternatives to formal court action which are more cost-effective, quicker, and which allow parties to continue to try and resolve their dispute in private and in a less adversarial way. Mediation provides such an alternative.

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9 O'Neill, S. (2001) [Consensus without Court: Encouraging Mediation in Non-Family Civil Disputes in Scotland](#); Glasgow: Scottish Consumer Council

10 Blake Stevenson Ltd (2016) [Research into participant perspectives of dispute resolution in the Scottish courts](#). Edinburgh: Scottish Legal Aid Board

11 See Note 10, at p.30

12 Genn, H., [Why the privatisation of civil justice is a rule of law issue](#), 36th F.A. Mann Lecture, Lincoln's Inn (2012); Friedman, L.M., The day before trials vanished, *Journal of Empirical Legal Studies*, vol. 1, 3 (2004) pp. 689-703.

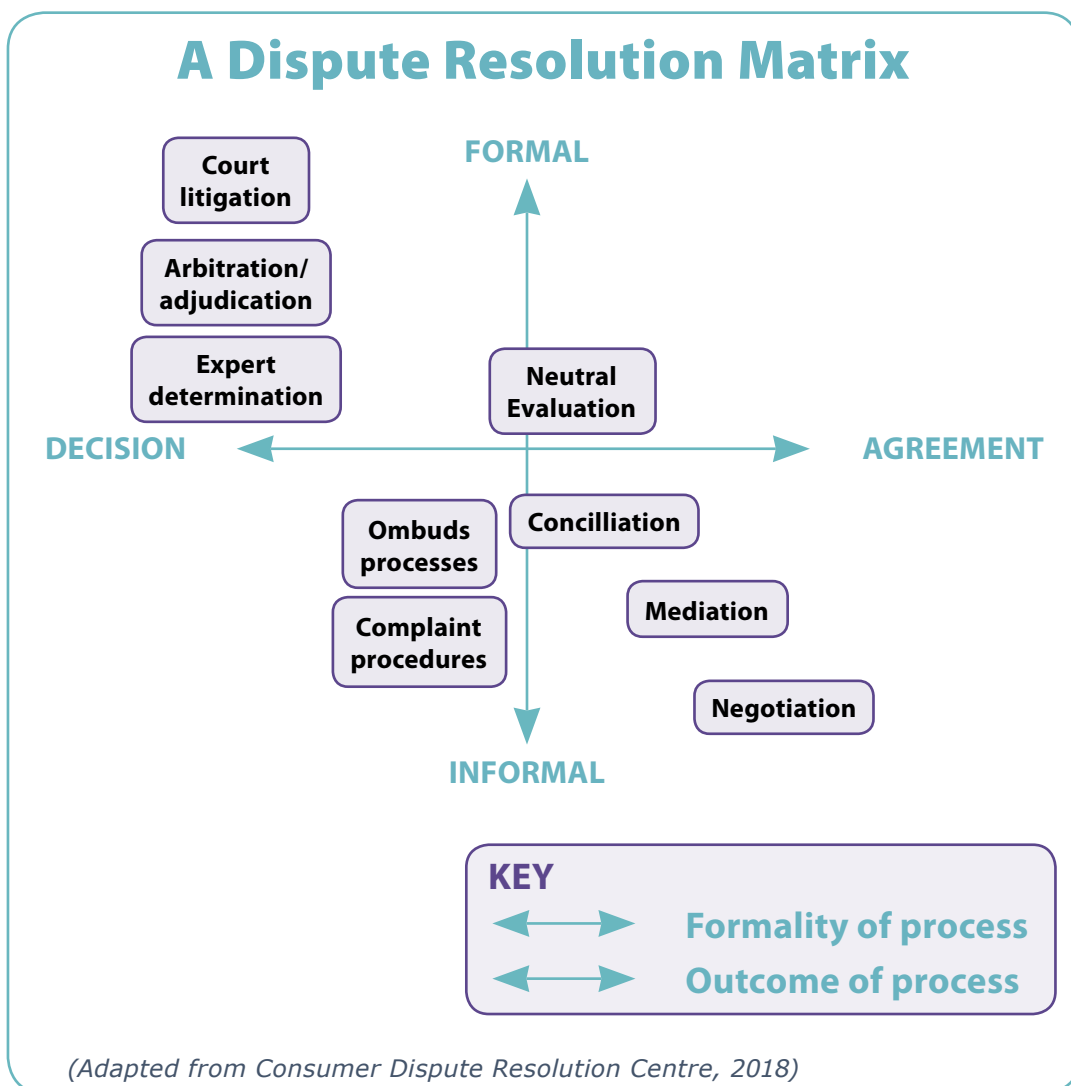
13 Scottish Consumer Council (1997) above. Note 1

## What is Mediation?

24. Mediation is a form of what has to date been called 'ADR' (Alternative (or Appropriate) Dispute Resolution), a term used to refer to less formal means of dispute resolution than the courts. The term "ADR" is much criticised as being inexact, capable of multiple meanings and often a source of misunderstanding. The Group commends using the term "dispute resolution" from now on, to describe the various options available. The diagram below<sup>14</sup> shows various possible approaches to resolving disputes, according to: 1) how formal

or informal they are and 2) the extent to which they are focused on either agreement between the parties or on a decision being made by a third party.

25. When parties are unable to resolve a dispute between themselves, they may seek to involve an impartial third-party. A key consideration in engaging an impartial third-party is the degree to which parties are willing to give their decision-making authority away. At the most informal end of the spectrum is unassisted private negotiations, where the parties retain



14 Adapted from: [Consumer Dispute Resolution Centre \(2018\) Improving Your Complaints Process for Complainants and For You: A Brief Guide for Organisations](#). p13. Edinburgh: Queen Margaret University

complete control over the outcome (with or without the involvement of advisers). At the other formal end is litigation, where the parties give control over the outcome to a judge.

26. Mediation might be considered the first step up from unassisted private negotiations. It involves an impartial third-party, the mediator, who assists the disputing parties in finding a mutually agreeable solution. Unlike other more formal processes, such as arbitration, adjudication or litigation, the mediator is not a decision-maker. In mediation the parties decide on the terms of any outcome and no party can be forced into an agreement. Rather, the mediator will use a variety of skills and techniques to help parties identify and explore possible outcomes together and assist them in trying to find an acceptable solution.<sup>15</sup>

## The Benefits of Mediation

27. Mediation has several advantages over traditional litigation. Due to its simplicity and lack of formality, mediation is likely to be cheaper than going to court. Litigation can be very expensive. The final cost of litigation can be difficult to predict or control. If a party loses in court, they can generally expect to have to pay for their own expenses and a significant part of those of the winning side, on top of any sum awarded against them. Evidence considered by the Scottish Civil Courts Review indicated that in some medium- to low-value cases, the total legal expenses could be greater than the final settlement amount or the damages awarded.<sup>16</sup>

28. Even relatively simple cases can involve multiple court dates. Mediation is in comparison relatively swift. A suitable venue

and mediator can be organised quickly, and the mediation itself rarely extends beyond the day that it is held. This allows parties a chance to resolve their dispute quickly, and to avoid costly and drawn out formal legal action, and the associated emotional distress.

29. The mediator provides an objective and problem-solving framework for parties to negotiate their dispute. Parties retain control over the process and the decision-making. If they wish, they can adjust the scope of their dispute, explore novel ways to resolve their dispute, and most importantly, no one can compel them to agree to anything they do not want.

30. Unlike court, mediation emphasises the interests of parties alongside their legal rights. An interest-based approach will typically widen the context of the dispute, inviting parties to consider their interests beyond the specifics of the dispute. For example, if they have a relationship with the other party that they wish to continue, they may want an outcome that allows that to happen.

31. Mediation produces flexible and creative solutions. While courts are restricted in the forms of legal remedy they can offer, mediation can be more nuanced in finding an extra-legal resolution. As the mediation process is self-determined, solutions will reflect the interests of both parties, producing a 'win-win' solution, rather than the 'win-lose' (or even 'lose-lose') result which can be typical of adjudicative models.

32. Mediation also permits parties to express their views in a private and informal setting. Allowing parties to put forward their views is an important aspect of procedural justice.<sup>17</sup>

15 Brown, H.J. & Marriott, A.J. (2011) *ADR Principles and Practice* (London: Sweet & Maxwell).

16 See Annex to Chapter 4, Annex C, *Scottish Civil Courts Review*, Vol. 1.

17 Van Den Bos, K., Van Den Velden, L. and Lind, E.A. (2014) On the Role of Perceived Procedural Justice in Citizens; Reactions to Government Decisions and the Handling of Conflicts, *Utrecht Law Review*, Vol.10. No.4, pp.1-26

Giving parties the space to express themselves can help them both to release negative emotions they may be carrying, and to identify their underlying needs and concerns, which may go beyond the specific issues in dispute. Parties benefit from hearing each other's perspective and concerns, developing a better understanding of what is in dispute, and what possible agreement could be achieved that would respect the needs of each party.

33. The international evidence review found that 'mediation scores highly on procedural justice outcomes such as fairness of process, mediator lack of bias, feeling heard during the process, being able to tell one's story, and positivity about using mediation again'.<sup>18</sup> It also found that there were high rates of compliance with mediation agreements, generally higher than other processes overall. This finding is supported by research into Scottish in-court mediation pilot schemes.<sup>19</sup>

## The Limitations of Mediation

34. While the court process will produce a decisive outcome, mediation will not always result in a resolution of the dispute. Where this is the case, mediation may cost parties additional time and money. However, even where mediation fails, it can provide benefits to parties. It will have allowed them to express their views and to hear the concerns of the other party, which may help to resolve the dispute at a later stage and maintain relationships. It may also have narrowed the issues under dispute, making eventual resolution easier.<sup>20</sup>

35. The absence of formal rules, which is one of the benefits of mediation, can also be a limitation. For example, courts have formal rules which aim to ensure 'equality of arms', to allow for a fair hearing. In mediation, one party may be more experienced or capable in negotiations, which could result in the other party failing to achieve a fair agreement. However, mediators are trained to be aware of and address any imbalance of power.<sup>21</sup> It is also the case that power and capability imbalances exist in the courts, with access to financial resources believed to be a significant factor in accessing justice.<sup>22</sup>

36. Another issue arising from the lack of formal rules is that there is no formal mechanism for one party to seek evidence from the other party. In court, there are formal rules regarding evidence and penalties for obstructing the court. In mediation, parties are expected to act in good faith.<sup>23</sup> It is possible, however, that a party may not disclose information that would be relevant, but which may disadvantage them in the mediation (although very often the converse is true, and the confidential setting of mediation in fact enables fuller and franker disclosure than in court).

37. There will always be some disputes where the parties require a formal ruling to be made, and in a small percentage of cases, a legal ruling will be important in developing the law. In reality, however, most of the small percentage of disputes which actually end up in court do not reach the stage of a final court judgment. If those cases were resolved by mediation, this would have no impact on the development of the law. The Expert Group takes the view that

18 Scottish Government, 2019b- Note 3, at p32

19 Ross, M. & Bain, D. (2010). [Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Scottish Government, Social Research.](#)

20 Scottish Government, 2019b - see Note 2

21 For example, Parkinson, L., Family Mediation (London: Sweet & Maxwell, 1997).

22 Innovation in Law Report 2014, Hodge, Jones & Allen (2014).

23 E.g. Mediation Rules of the Provincial Court – Civil Division, Provincial Court Act, 271/1997. Alberta's Queen Printer, Edmonton (2003)

encouraging the general development of the law should not, in any individual case, prevent a party from expediting a solution and using mediation, should they wish to do so.

*chances*;<sup>26</sup> and it states that *'in civil matters, early intervention...for problems that arise can prevent the involvement of the courts and can reduce hardship for a large number of people'*.<sup>27</sup>

## The Wider Benefits of Mediation

38. The use of mediation can also bring wider benefits. Research from the European Parliament indicates that even relatively modest success rates in mediation can result in considerable savings in time and money for the parties involved, which indirectly benefits the wider economy. If a dispute can be resolved quickly and in a cost-effective way, the additional resources that might have been spent on litigation can be directed toward more economically productive activities.<sup>24</sup>
39. A 2018 CEDR report on commercial mediation in the UK found that by achieving earlier resolution of disputes that would have otherwise ended up in court: "the commercial mediation profession this year will save business around £3 billion a year in wasted management time, damaged relationships, lost productivity and legal fees".<sup>25</sup>
40. Earlier resolution of disputes can also minimise their impact on the parties involved, such as the impact on their physical and mental health. This is recognised by the Scottish Government's Justice Vision for Scotland: one of its key outcomes is: *'prevention and early interventions improve wellbeing and life*
41. Mediation could also help to ease pressure on the court system. If a proportion of disputes can be resolved through mediation, this will increase the court time available for those cases that need to be heard in court, reducing court waiting times. Mediation could also help to avoid costs incurred by the wider public sector as a result of the impact of disputes on parties, such as increased expenditure on health services.
42. Learning ways to resolve our disputes is an important life skill. Research suggests that skills practised in mediation can help individuals to resolve future issues.<sup>28</sup> Scotland's National Performance Framework is committed to building local communities which are resilient and empowered.<sup>29</sup> Enabling individuals and businesses to mediate their disputes can help realise that vision for Scotland.

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24 De Palo, G., Feasley, A. & Orecchini, F. (2001), Quantifying the cost of not using mediation – A data analysis, Directorate General for Internal Policies, European Parliament.

25 CEDR (2018) [The Eighth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experiences in the United Kingdom](#)

26 [Justice in Scotland: Vision and Priorities \(2017\)](#).

27 See Note 26 above, at page 17

28 Harris, R.D., Unlocking the Learning Potential in Peer Mediation: An Evaluation of Peer Mediator Modeling and Disputant Learning. Conflict Resolution Quarterly, Vol. 23(2), 2005.

29 Available from: <https://nationalperformance.gov.scot>



### 3. The Present Landscape of Mediation in Civil Justice in Scotland

#### A Brief History of Mediation in Scotland

43. Family mediation emerged in Scotland from the mid-1980s, and in certain family actions there has been a court rule for discretionary referral to mediation by the sheriff since 1990. There have also been community mediation schemes operating in Scotland since the 1990s. Mediation has, however, been slower to develop in relation to other type of civil dispute.
44. The benefits of mediation as a way of resolving non-family civil disputes began to be recognised in Scotland in the late 1990s and early 2000s. With the rising profile of mediation in England and Wales following Lord Woolf's Access to Justice Report, there was a growing demand for greater consideration of the use of mediation in civil justice in Scotland.<sup>30</sup> The Scottish Consumer Council called for greater use of mediation in resolving civil disputes, but it acknowledged that a cultural change was needed to achieve this. Its recommendations began with a call for a civil justice review, to modernise the civil justice system and broaden dispute resolution beyond the traditional adversarial model of litigation.<sup>31</sup>
45. In 1998, an in-court mediation service was introduced in Edinburgh Sheriff Court, alongside an in-court advice service for unrepresented parties, including those involved in small claims cases. A 2002 assessment of the services reported that demand grew steadily following their establishment. It reported that the mediation service helped clients settle disputes, achieving high success rates as well as high rates of mediation agreements being honoured.<sup>32</sup> Further in-court mediation pilots were run in Glasgow and Aberdeen Sheriff Courts between 2006 and 2008. An evaluation concluded that the projects were effective in resolving disputes, reducing court time, and providing a valued service to parties.<sup>33</sup>
46. In the mid-2000s, both the Sheriff Court Rules Council (SCRC) and the Court of Session Rules Council (CSRC) considered whether, and how, mediation might be encouraged through court rules. While the SCRC accepted a need for encouragement of mediation, it was reluctant to consider any changes to the courts' existing practices.<sup>34</sup> The CSRC took a different, more proactive view. It accepted that the court should be able to require parties to state in their initial pleadings what steps had been taken to resolve the dispute, and that it was appropriate for the court to give due consideration to unreasonable efforts to resolve a dispute early in the awarding of expenses. Ultimately, no changes were made by either council in light of the forthcoming civil courts review.

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30 E.g. O'Neill, 2001. See Note 9.

31 O'Neill, 2001. See Note 9

32 Samuel, E. (2002) [Supporting Court Users: the In-Court Advice and Mediation Projects in Edinburgh Sheriff Court](#); Scottish Executive, Central Research Unit

33 Ross & Bain, 2010. See Note 19

34 [Consultation on The Sheriff Court and Alternative Dispute Resolution](#); Sheriff Court Rules Council, 2006.

## The Scottish Civil Courts Review

47. A decade after the Woolf Review, Scotland undertook its own Scottish Civil Courts Review (SCCR). Led by the then Lord Justice Clerk, Lord Gill, the review sought to address the underlying problems of a civil justice system judged to be *'slow, inefficient, and expensive'*.<sup>35</sup> The review's 2009 recommendations included the adoption of a case management system to permit the courts to control the pace of litigation; the creation of a simplified procedure for claims under £5,000 to improve access to justice; and a call for public legal education to raise awareness among citizens about how to resolve their civil disputes.
48. On alternative dispute resolution (ADR), the review was ambivalent. It noted that negotiated settlement was the most common outcome for civil cases and said that "the civil justice system should encourage early resolution of disputes"<sup>36</sup> and "should offer mechanisms that are conducive to that outcome."<sup>37</sup> Yet the review adopted a cautious approach to articulating how to achieve this. It emphasised a need for more information on ADR for parties, but on court-linked mediation, it suggested only a model aimed at low-value claims.<sup>38</sup>
49. The Gill Review ultimately expressed a preference for the SCRC's approach.<sup>39</sup> This position rested heavily on the view expressed by Professor Genn<sup>40</sup> that, while ADR offers benefits to the parties in resolving disputes, it *"cannot supplant the machinery of civil justice*

*precisely because, in civil cases, the background threat of litigation is necessary to bring people to the negotiating table"* and *"mediation without the credible threat of judicial determination is the sound of one hand clapping"*.<sup>41</sup> Sadly, Professor Genn's views gained disproportionate influence and seem to have affected the understanding of the broad role mediation can and does play.

50. In its response to the review, the Scottish Government expressed disappointment that it had not gone further in its consideration of mediation, noting that *"the Scottish Government agrees that the other Review recommendations concerning mediation are generally worthwhile, but is not persuaded that, by themselves, they will support a major shift towards ADR."*<sup>42</sup>
51. In a real sense, the review left the question of mediation in civil justice unanswered. It had recognised the benefits of mediation for the parties and the courts, but it did not articulate how these benefits could be delivered. The result was a gradual but consistent opening up to mediation, without any accompanying development of the necessary infrastructure to make it a viable alternative to litigation.

## Ongoing Civil Courts Reforms

52. The Scottish Government has implemented many of the Gill review's recommendations. These include the introduction of Simple Procedure, the establishment of the Scottish Courts and Judiciary, and the expansion of the jurisdiction of Sheriff Courts

35 [Report of the Scottish Civil Courts Review](#), Volume 1; Scottish Civil Courts Review, 2009. Pg. i

36 Op cit. Scottish Civil Courts Review. Pg. 171

37 Op cit. Scottish Civil Courts Review. Pg. 169

38 Op cit. Scottish Civil Courts Review. Pp. 171-173

39 Op cit. Scottish Civil Courts Review. Pg. 168

40 Genn, H., *Judging Civil Justice*, Cambridge University Press, Cambridge (2010).

41 Op cit. Scottish Civil Courts Review. Pg. 170

42 [Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review](#); Scottish Civil Courts Review, 2010. Pg. 44

to hear claims of up to £100,000. The reforms of civil justice have continued under the Making Justice Work programme, which has led to reforms of the devolved tribunals,<sup>43</sup> changes to court expenses and case funding arrangements<sup>44</sup> and an ongoing review of the civil court rules.<sup>45</sup>

53. The SCJC is obliged to have regard to the principle that ‘methods of resolving disputes which do not involve the courts should, where appropriate, be promoted’.<sup>46</sup> The Courts Reform (Scotland) Act 2014 gave power to the Court of Session to make provisions in court rules to encourage settlement of disputes and the use of alternative dispute resolution procedures.<sup>47</sup> While provision for ADR in the civil court rules in Scotland is growing, this has not been implemented consistently across different court jurisdictions.<sup>48</sup> Without a clear overarching policy, a patchwork of private and third sector provision has emerged, often with precariously funded services covering only specific geographic areas.
54. The rest of this chapter outlines both the current provision for mediation in court and tribunal rules and legislation and the current availability of mediation services across the civil justice landscape in Scotland. It then goes on to consider the current professional rules and guidance on mediation for solicitors and advocates, and the present arrangements for the training and accreditation of mediators.

## Current Provision for Mediation in the Courts

### Simple Procedure

55. In seeking to improve access to justice, particularly in low-value cases where parties may be unrepresented,<sup>49</sup> the SCCR recommended the creation of a ‘simplified procedure’ for all actions with a value under £5,000, in which the sheriff would take a more interventionist approach to assist parties in resolving their disputes.<sup>50</sup> Simple Procedure was provided for in the Court Reform (Scotland) Act 2014,<sup>51</sup> and was introduced in the Sheriff Courts from November 2016. Judicial encouragement of ADR is embedded throughout the rules of Simple Procedure, even appearing in its principles:
- 1.2 (4) Parties are to be encouraged to settle their disputes by negotiation or alternative dispute resolution, and should be able to do so throughout the progress of a case.<sup>52</sup>
- 1.2 (5) Parties should only have to come to court when it is necessary to do so to progress or resolve their dispute.
56. The responsibilities of the sheriff include an explicit provision to encourage the resolution of cases through ADR, where appropriate:

43 [Tribunals \(Scotland\) Act 2014](#) (asp 10).

44 [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018](#) (asp 10).

45 [The New Civil Procedure Rules: First Report](#); Scottish Civil Justice Council, 2017.

46 [Scottish Civil Justice Council and Criminal Legal Assistance Act 2013](#), Section 2(3)(d)

47 Section 104 (2) (b)

48 E.g. [Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other Jurisdictions](#); Scottish Civil Justice Council (2014). Pg. 27

49 In 2018, the SCJC commissioned Tom Mullen and Halle Turner of the University of Glasgow to carry out research into the experiences of party litigants under simple procedure.

50 Op cit., Scottish Civil Courts Review (2009). Pg. 24

51 [Court Reform \(Scotland\) Act 2014](#) (asp 18). Ss. 72-83

52 [Act of Sederunt \(Simple Procedure\) 2016](#), SSI 2016/200.

- 1.4 (3) The sheriff must encourage cases to be resolved by negotiation or alternative dispute resolution, where possible.
- 1.4 (4) If a case cannot be resolved by negotiation or alternative dispute resolution, the sheriff must decide the case.
57. The powers afforded to sheriffs to encourage ADR are broadly defined:
- 1.8 (2) The sheriff may do anything or give any order considered necessary to encourage negotiation or alternative dispute resolution between the parties.
58. Further to this, there are explicit provisions for discussing ADR with parties and to referring parties to ADR at specific stages. This includes at first written orders:
- 7.6 (1) The first written orders may do any of 5 things:
- (a) refer parties to alternative dispute resolution
- At case management discussions:
- 7.7 (2) The purpose of a case management discussion is so that the sheriff may:
- (b) discuss negotiation and alternative dispute resolution with the parties
- 7.7 (3) The sheriff may refer parties to alternative dispute resolution at a case management discussion.
- And at a hearing:
- 12.3 (1) The sheriff may refer parties to alternative dispute resolution at a hearing.
- 12.4 (1) The sheriff must ask the parties about their attitudes to negotiation and alternative dispute resolution.
59. The inclusion of ADR in the Simple Procedure rules has placed sheriffs in a difficult position. Of Scotland's 39 Sheriff Courts, only seven courts (18%) have arrangements in place to refer parties to mediation. Litigants in some sheriff courts therefore have access to mediation, but those involved in cases elsewhere do not.
60. Citizens Advice Edinburgh operates a long-established mediation service at Edinburgh Sheriff Court for claims up to £5000. A salaried mediation coordinator manages the process, assessing the suitability of cases for mediation, acting as the primary point of contact, and allocating cases to the service's panel of pro bono mediators. The majority of referrals to the service come at first written orders. In the last three years the service has processed an average of 74 cases a year, with an overall settlement rate of 71%.<sup>53</sup>
61. The University of Strathclyde's Mediation Clinic, established in 2014, offers pro bono mediation in six courts. Its mediators regularly attend Glasgow, Paisley and Falkirk sheriff courts and it also receives referrals from Kilmarnock, Airdrie and Dumbarton.<sup>54</sup> It operates a co-mediation model with a voluntary panel of experienced mediators who lead the mediations and are assisted by students undertaking the LLM/MSc in Mediation and Conflict Resolution.

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53 Source: annual statistics provided by Heloise Murdoch, Mediation Coordinator, Edinburgh Sheriff Court Mediation Service

54 [Mediation Clinic Annual Report](#); Strathclyde Mediation Clinic, 2018

62. In its first three years, the clinic had an overall settlement rate of 74%.<sup>55</sup> With the expansion of the service beyond Glasgow and the commencement of Simple Procedure, the number of mediations grew and the settlement rates fell.<sup>56</sup> It was suggested that the fall reflected the increased numbers of parties and legal representatives with little knowledge of the mediation process and who had not had the merits of their case ‘reality-tested’ before the referral.<sup>57</sup> In 2017-18, there were 81 mediations, with a settlement rate of 63%.<sup>58</sup>

63. Tayside in-court advice service, which covers Dundee, Perth and Forfar sheriff courts, does not provide formal mediation, but focuses on assisting parties to settle cases, including negotiating between the parties, both prior to and after raising an action. Dundee University is currently in the early stages of testing the viability of a pro bono mediation service at Dundee Sheriff Court. The Scottish Mediation Helpline also often receives enquiries directly from parties who have been referred by sheriffs at Stirling, Kirkcaldy and Livingston sheriff courts. While unlike the court-based services, this is not offered free of charge, this demonstrates that there is demand for mediation in these cases.

## Ordinary Cause – Commercial Actions

64. There have long been various ordinary cause rules requiring the sheriff to ‘secure the expeditious progress/resolution of the cause’,<sup>59</sup> and in commercial cases, there is provision for the sheriff to make an order relating to ADR:

*The orders the sheriff may make....may include but shall not be limited to...any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution)*<sup>60</sup>

## Family Cases

65. There has also there been a court rule for referral to mediation since 1990 in family actions involving parental responsibilities or rights:

*In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.*<sup>61</sup>

## Mediation in Family Disputes

66. Relationships Scotland (RS), an umbrella organisation for relationship counselling and family mediation services, is the leading third sector provider. In 2018, RS reported mediating in approximately 2,000 cases a year.<sup>62</sup>

55 [Mediation Clinic Annual Report](#); Strathclyde Mediation Clinic, 2017.

56 [Mediation Clinic Annual Report](#); Strathclyde Mediation Clinic, 2018.

57 [Mediation Under Simple Procedure: One Year On](#); University of Strathclyde Mediation Clinic, 2018

58 [Mediation Clinic Annual Report](#); Strathclyde Mediation Clinic, 2018.

59 E.g. Ordinary Cause Rule 9.12 (1); Rule 33.22A; Rule 40.12(1); 44.12(1)

60 Ordinary Cause Rule 40.12

61 [Act of Sederunt \(Sheriff Court Ordinary Cause Rules\) 1993 No.1956 \(S.223\). Rule 33.22](#)

62 [Written Submission to Justice Committee on Alternative Dispute Resolution](#); Relationships Scotland, 2018.

Approximately 15% of RS' cases are referrals from the courts. However, RS reports that there is considerable variability in referral rates across Sheriff Courts,<sup>63</sup> an issue previously highlighted elsewhere.<sup>64</sup>

67. In cases of separation and divorce, RS is primarily concerned with the welfare of the child. This means that in practice, it avoids mediating in cases where property and financial disputes are the focus, referring these to CALM Scotland.<sup>65</sup> CALM Scotland, formed in 1993, is an organisation that helps individuals engage family lawyers trained in mediation. All such mediators are accredited through the Law Society of Scotland.<sup>66</sup> CALM mediators can help resolve all legal issues that may arise in a family breakdown, but do not provide the other wrap around services offered by RS.
68. In 2018/19 the Scottish Government provided £1.5 million in funding to support Relationship Scotland. This funding covers mediation, child contact centres and relationship counselling. As a result, families can access family mediation at no or relatively low cost. Mediations by CALM Scotland are either paid for by the parties directly or through funding from the Scottish Legal Aid Board (SLAB). Figures from SLAB for the past three financial years indicate that in each year, there were roughly 490 active family cases in which SLAB had sanctioned funding for mediation. This represents approximately 7% of the on-going family cases which are in receipt of legal aid assistance.

## Confidentiality in Family Mediation

69. The Civil Evidence (Family Mediation) (Scotland) Act 1995<sup>67</sup> ensures the confidentiality of discussions that take place within family mediation, with some exceptions.<sup>68</sup> This protection is only available for mediations delivered by organisations approved by the Lord President, which are at present RS and CALM Scotland (via the Law Society of Scotland). Anecdotally, there are several mediators outside of these two organisations who offer family mediation, who are not covered by the legislation. In the Consultation on the Review of the Children (Scotland) Act 1995 the Scottish Government sought views on whether to make regulations clarifying that confidentiality of mediation extends to cases involving cross-border abduction of children. An analysis of the responses is available online.<sup>69</sup>

## Efforts to Raise Awareness of Mediation – Mandatory Information Sessions

70. RS and CALM Scotland have expressed the view that family mediation has not achieved its full potential in Scotland. They report that the numbers of mediations have stagnated, suggesting that this reflects, in part, the general public's low awareness of mediation.<sup>70</sup>
71. The two organisations have therefore proposed a pilot project that would provide information to both parties on their options,

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63 Op cit., Relationships Scotland (2018).

64 Lewis J., [The Role of Mediation in Family Disputes in Scotland](#), Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999.

65 Comprehensive Accredited Lawyer Mediators Scotland

66 <http://www.calmscotland.co.uk/who-we-are.html>

67 [Civil Evidence \(Family Mediation\) \(Scotland\) Act 1995](#) (c.6).

68 One example is a case involving international abduction: [FJM v CGM \(2015\)](#).

69 <https://www2.gov.scot/Topics/Justice/law/17867/review-of-children-scotland-act-1995>

70 Op cit., Relationships Scotland (2018).

including mediation, collaborative law, arbitration and the courts.<sup>71</sup> Parties would attend separate meetings and there would be no compulsion on them to take up any particular option. Although the pilot has not been commissioned, the Scottish Government is currently undertaking a review of Part 1 of the Children (Scotland) Act 1995.<sup>72</sup> This includes consideration of how the use of ADR might be encouraged, and whether this would include mandatory information meetings or more signposting and guidance.<sup>73</sup>

*Parties should consider and discuss whether resorting to alternative dispute resolution might be appropriate in respect of some or all of the issues.*<sup>76</sup>

And at the procedural hearing stage:

*in the lead up to the procedural hearing parties should consider and discuss whether resorting to alternative dispute resolution might be appropriate in respect of some or all of the issues.*<sup>77</sup>

## Commercial Actions in the Court of Session

72. From 2017, a practice note was issued by the Lord President for commercial actions in the Court of Session, which strengthened an earlier provision at the pre-action communication stage from “both parties may wish to consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution”<sup>74</sup> to:

*Both parties should consider carefully and discuss whether all or some of the dispute may be amenable to some form of alternative dispute resolution.*<sup>75</sup>

73. It also introduced consideration of ADR at the preliminary stage:

74. Furthermore, the practice note indicates:

*At the procedural hearing parties will be expected to be in a position to discuss realistically the issues involved in the action and the method of disposing of them. Parties will be expected to be able to advise the court on the steps that have been taken to date to achieve an extra-judicial settlement and on the likelihood of such a settlement being achieved. They will be asked to express a view on the stage at which any joint meeting between parties ought to be ordered to take place.*<sup>78</sup>

75. The commercial judge also has the power to compel parties to meet to discuss alternative methods of resolving the dispute:

*The commercial judge has power, in terms of rules 47.11(1)(e) and 47.12(2)(o), to order parties to hold a joint meeting with a view to exploring whether the dispute is capable of extra-judicial settlement or, alternatively, whether the issues requiring judicial*

71 [Written Submission to Justice Committee on Alternative Dispute Resolution](#); CALM and Relationships Scotland, 2018.

72 [Review of Part 1 of the Children \(Scotland\) Act 1995 and Creation of a Family Justice Modernisation Strategy: A Consultation](#); Scottish Government, 2018. Pp. 95-97

73 The Scottish Government notes the significance of [Article 48 of the Convention on Preventing and Combatting Violence against Women and Domestic Violence](#), which prohibits the use of mandatory ADR processes, in relation to all forms of violence as covered by the convention, when considering this matter.

74 [Court of Session, Practice Note 4 of 2004, Commercial Actions](#). Para. 11

75 [Court of Session, Practice Note 1 of 2017, Commercial Actions](#). Para. 11

76 *Ibid.*, para. 18

77 *Ibid.*, para. 20(c)

78 *Ibid.*, para. 20(a)

*determination can be restricted.*<sup>79</sup>

76. While the practice note encourages ADR to help resolve or reduce the scope of parties' disputes, there is no publicly available data to establish how often it is used or if the joint meetings are effective. Anecdotally, it has been suggested that joint meetings can replicate the adversarial positions parties are expecting to take in court, failing to establish an environment conducive to considering alternatives to litigation.<sup>80</sup>

## Current Provision for Mediation in Tribunals

### Judicial Mediation in the Employment Tribunal

77. The Employment Tribunal in Scotland has exclusive jurisdiction over employment disputes.<sup>81</sup> Before a claim may proceed to tribunal, it must first go to ACAS to see whether resolution is possible through its free Early Conciliation Service. If unsuccessful, the case may proceed to the Employment Tribunal. The Employment Tribunal in Scotland (and in England and Wales) has offered mediation since 2010 in certain types of case. Mediation is seen as a means of furthering the tribunal's 'overriding objective' to deal with cases fairly and justly.<sup>82</sup> Mediation is provided by a pool of tribunal judges who have been trained as 'judge mediators'.<sup>83</sup>

78. The tribunal rules provide as follows:

#### **Alternative Dispute Resolution**

*3. A tribunal shall, whenever practicable and appropriate, encourage the use by the parties of the services of ACAS, Judicial or other Mediation, or other means of resolving the dispute by agreement.*

Due to limited resources, judicial mediation has to date been focused on more serious cases (such as those involving a claim of discrimination) and more costly cases, such as those predicted to take several days, and in cases where there is a subsisting employment relationship.

79. The normal process is for parties to be invited to mediate at the case management discussion stage. If parties agree to mediate, the Tribunal Vice President will review the case and if satisfied, will refer it to a judicial mediator. Mediations are scheduled for one day, though this may be extended. If agreement is reached, parties will be able to formalise this with support from ACAS.
80. Statistics provided to the Expert Group show increasing numbers of cases going to mediation (40 in 2012-13, rising to 81 in 2018-19), with success rates ranging from 67% - 81% between 2012-2019. The figures also suggest significant savings in terms of hearing days saved, with 355 hearing days saved in 2018-19.<sup>84</sup>

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79 Ibid., para. 35

80 Interviews with several legal professionals working in the Commercial Court

81 Organisations will of course have their own internal procedures regarding grievances and it is expected that these are followed first. This may include employing an independent mediator to resolve the dispute. As these are internal processes there is no publicly available data to establish the volume of private employment mediations.

82 [The Employment Tribunals \(Constitution and Rules of Procedure\) 2013](#) Schedule 1 Rule 2

83 Source: Judicial Mediation in the Employment Tribunal (Scotland): A Paper for (SCJC) Access to Justice Committee Literature Review (2014). Unpublished. Provided by Employment Judge Joseph D'Inverno.

84 Statistics provided by Judge Joseph D'Inverno



## Mediation in Housing and Property Disputes

81. In 2014, a free mediation service was piloted in the Homeowner Housing Panel (HOHP), a tribunal dealing with disputes between homeowners and property factors. The HOHP's procedural rules allowed it to facilitate mediation, where the parties consented. Where both parties agreed to mediation, a mediation carried out by judicial members trained as mediators was arranged. If the mediation failed or the agreement was not honoured, the case could still proceed to the tribunal constituted with different members. In 2014, 14 cases were mediated, with 9 settlements,<sup>85</sup> and in 2015, 32 cases were mediated, with 28 settlements.<sup>86</sup>

82. The HOHP became part of the First-tier Tribunal for Scotland (Housing and Property Chamber) in December 2016. The Chamber no longer provides a mediation service: while its current rules allow it to inform parties about the availability of mediation, it cannot refer parties to mediation or facilitate mediation.

19. In cases identified by the Chamber President as suitable for mediation, the First-tier Tribunal must—

- (a) bring to the attention of the parties the availability of mediation at any point in the proceedings as an alternative procedure for the resolution of the dispute;
- (b) provide information explaining what mediation involves; and

- (c) if the parties consent to mediation, adjourn or postpone the hearing in accordance with rule 28 to enable the parties to access mediation.<sup>87</sup>

## Other Current Mediation Provision for Civil Disputes

### Scottish Legal Complaints Commission

83. The Scottish Legal Complaints Commission (SLCC) is the statutory complaints body which deals with complaints about those providing legal services in Scotland. The SLCC provides a free mediation service for complaints deemed eligible and has reported success rates between 58% and 76% in the past five years, with an average number of cases resolved of 45.<sup>88</sup>

### Mediation in Cases of Additional Support Needs for Learning

84. The Education (Additional Support for Learning) (Scotland) Act 2004 identifies mediation as a primary method for attempting to resolve disputes arising between parents and young people and local educational authorities.<sup>89</sup> If parties agree to mediate, the local authority must source an independent provider and cover the costs of the mediation.<sup>90</sup> Participation in mediation does not affect the right to refer the case to the First tier-Tribunal for Scotland (Health and Education Chamber). Unfortunately, there is no publicly available data on the volume or success of mediations carried out under the Act.

85 [2014 Annual Report of Private Rented Housing Panel / Homeowner Housing Panel.](#)

86 [2015 Annual Report of Private Rented Housing Panel / Homeowner Housing Panel.](#)

87 [The First-tier Tribunal for Scotland Housing and Property Chamber \(Procedure\) Regulations 2017, SSI 2017/328.](#)

88 <https://www.scottishlegalcomplaints.org.uk/resources/annual-report-accounts.aspx>

89 [Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#) (asp 4).

90 [Employment Tribunals \(Scotland\) Judicial Mediation \(T611\)](#); HM Courts and Tribunals Service, 2014. S.15

### Mediation for NHS Scotland Complaints

85. The Patient Rights (Scotland) Act (2011) includes a provision for the use of mediation in resolving patient complaints.<sup>91</sup> An initial pilot mediation project in 2011/12 received very few referrals. Since then, a mediation helpline service has been operated by Scottish Mediation, but mediation rates continue to be extremely low. Between 2011 and 2018, the helpline received 39 enquiries, leading to 13 mediations, of which 7 were resolved (54%).

### Mediation in Tenant Farming Disputes

86. The Scottish Land Commission is currently running a pilot mediation scheme for disputes between tenant farmers and landlords. While this is still developing, and the number of mediations to date is small, the indications so far are that it is proving successful,<sup>92</sup> and this may be an area for future potential development. It is also an example of the kind of sectoral initiative which will help to promote mediation more generally in specific areas.

## Legal aid for mediation

87. It has for many years been possible for the costs of mediation in civil cases to be paid for through the civil legal aid budget, where parties are eligible for legal aid. While there is some (albeit limited) demand for this in family cases as discussed above, the Scottish Legal Aid Board recently told the Scottish Parliament's Justice Committee that overall the uptake of legal aid funding for mediation remained low.<sup>93</sup> As legal aid must be applied for by a solicitor (rather than a mediator), this is perhaps not surprising, given the issues

surrounding education, training and awareness of solicitors about mediation, as discussed later in this report. The recent independent review of legal aid recommended that 'the use of ADR should be a viable and consistent alternative to courts beyond cases, and mediation should be embedded in the legal assistance service.'<sup>94</sup>

## Private Mediation

88. By its nature, mediation is a private engagement between two or more parties. There is a reasonable expectation that mediations which are funded by the public purse, or which occur within public bodies, should be recorded and that the data should be available to the public. However, this does not hold for the private sphere, and consequently it is very difficult to establish the volume and composition of this part of the mediation 'market'. In the absence of credible data, this section draws on the available anecdotal evidence.
89. In the commercial sector, the most significant player is probably Core Solutions Group Ltd. A private company created in 2000, Core Solutions was influential in establishing the role of mediation in the higher-value commercial sector in Scotland. After a period of rapid growth, reflecting the development of this relatively new area, Core Solutions has reported that the market appears to have largely stabilised.<sup>95</sup>
90. From anecdotal evidence, there are only a few relatively full-time commercial mediators in Scotland and these are focused on the higher value end of the market (generally but not exclusively in claims with a monetary value

91 [The Patient Rights \(Scotland\) Act 2011](#) (asp 5). S. 15(5)

92 <https://landcommission.gov.scot/wp-content/uploads/2019/03/TFAF-24.01.19-draft-minutes.pdf>

93 [I Won't See You in Court: Alternative Dispute Resolution in Scotland](#); Scottish Parliament Justice Committee, 9th Report, 2018 (Session 5)

94 Evans, 2018. See note 67, at p62

95 From interview

above £100,000). Success rates are reported to be higher than elsewhere, with figures of 85-90% suggested. There is a perception that there is scope for further growth in commercial mediation, particularly in the middle-value market in Scotland.

91. At present, the private market in Scotland seems to be dominated by a handful of mediators, which is similar to the situation in England and Wales.<sup>96</sup> This may be for a number of reasons, which might include the carrying capacity of the current marketplace and/or the tendency of lawyers who advise clients involved in higher-value disputes to revert to mediators they already know.
92. It should be noted that commercial disputes are only one type of dispute that occurs in the private market. For example, employment disputes may be mediated as part of an organisation's internal procedures or because a case might not be suitable for the Employment Tribunal. The interviews undertaken for this research suggest that such mediations generally involve highly-paid senior personnel in large organisations. Areas such as construction, professional services, sport, insurance, agriculture, business partnerships and management and property reflect the variety of some of the private sector mediation activity.

## Professional Rules and Guidance on ADR

### Solicitors

93. Scottish solicitors are required to comply with the practice rules of the Law Society of

Scotland (LSS) or risk disciplinary action. In contrast, the professional guidance produced by the LSS does not have any disciplinary implications. At present, the only reference to mediation or ADR for solicitors is in the LSS guidance on dispute resolution:

B1.9 Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives.

A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly...<sup>97</sup>

### Advocates

94. There is no mention of mediation or ADR in the rules of professional conduct for advocates. However, the rules do explain the conditions under which European Lawyers<sup>98</sup> may work in Scotland. The Council of the Bars and Law Societies of the European Union, of which the Faculty of Advocates and the Law Society of Scotland are members, has adopted a Code of Conduct for Lawyers in the European Union, which includes a rule on ADR, in relation to the cross-border activities of the lawyer:

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96 [The Eighth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom](#); Centre for Effective Dispute Resolution, 2018.

97 [Guidance B1.9: Dispute Resolution](#); Law Society of Scotland.

98 'European lawyer' is a term which may refer to those individuals who are allowed to practice law in Scotland, having met certain conditions, but who have trained and qualified in another European member state. This reflects the EU's efforts to ensure freedom of movement and provision of services across Europe.

3.7.1 The lawyer should at all times strive to achieve the most cost-effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.<sup>99</sup>

95. It is worth noting that the preamble to this code expresses a wish by its members to move towards greater harmonisation of legal rules across Europe:

1.3.2. The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

...taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

## Mediation Training and Accreditation

96. The mediation profession in Scotland is not currently regulated by law or by a public authority. The fragmented development of mediation, as it emerged in different sectors, has created a confusing landscape, with various training providers and accrediting bodies operating under differing professional standards.

97. For example, training and accreditation for family mediators with Relationships Scotland

(RS) can take up to three years and involve mandatory supervision. In contrast, family mediators accredited by the Law Society of Scotland must have only a minimum of 15 hours mediation training, with no requirement for supervision mentioned in the accreditation application process.<sup>100</sup> It is also possible for someone to set themselves up privately, outside of these two bodies, and work as a family mediator in Scotland.

98. Perhaps the most prominent professional body for mediators in Scotland is Scottish Mediation (SM). While SM maintains a register of mediators,<sup>101</sup> there is no requirement for practising mediators to be on the register. Furthermore, there are peculiarities with the register that would seem to reflect efforts to accommodate the legacy of the fragmented development of mediation. SM has 'passport' members of RS and the Scottish Community Mediation Centre<sup>102</sup> onto its register. While Scottish Mediation has not itself formally accredited these bodies, it is satisfied that the practice standards and training required by their own accrediting bodies meet the requirements for admission to the register.

99. In the absence of one overarching regulator, efforts to accommodate the disparate authorities in mediation in Scotland are understandable. The present situation could however be seen as both counter-productive for the development of the profession and confusing for the general public.

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99 [Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers; CCBE, 2006.](#)

100 <https://www.lawscot.org.uk/members/career-growth/specialisms/accredited-mediators>

101 To be a registered practitioner, an individual must provide evidence of having completed mediation training that is not less than 40 hours, including a minimum of 20 hours of role-playing and practical exercises, and a formal assessment. In addition, they must have led at least two mediations and have mediated for no less than 6 hours in the previous 12 months. CPD requirements fall under 'CPD and practice support' and an individual must have completed a minimum of 12 hours per year. This can include further training, supervision, monitoring, mentoring, shadowing, and peer review.

102 The main community mediation training provider and accrediting body

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## 4. Normalising Mediation in Civil Justice

### Embedding mediation in the civil justice system

100. It is generally in everyone's interests that disputes are resolved as early and informally as possible. Yet at present in Scotland, private disputes can suddenly escalate to formal court action either because no viable alternative exists - or where it does exist, those involved are not aware of it.
101. In reality, most disputes that arise are settled in private. Of those that go to court, the majority are resolved between the parties before a judgment is made. Private settlement is the norm. Therefore, it is right and sensible to expect that the civil justice system should provide a viable pathway for parties to resolve disputes quickly and informally in those cases where the expense of court action is unnecessary. Mediation can provide this. It can bring benefits which the court process cannot, for the parties and for wider society, as discussed in Chapter 2.
102. Although court reform has created more opportunities for mediation in civil justice, its use remains limited. The necessary infrastructure to support the delivery of mediation has not been provided by the civil justice system. Hoping things will change is not a sustainable policy. Scotland needs to adopt a more proactive approach over time in order to deliver a viable pathway to mediate disputes.
103. As more and more countries across the world are promoting greater use of mediation, the time is now right for Scotland to take the steps which are required to 'normalise' mediation as a key part of the civil justice system. To operate effectively 'in the shadow of the court', mediation must have the backing of the civil justice system. As an academic expert in the field recently observed: *"Despite its roots as a form of dispute resolution that represents a turning away from lawyers and courts, evidence suggests that mediation only really flourishes in a jurisdiction when it becomes linked to the formal civil justice system. The role of the court and judges in helping to expedite mediation is hence vital."*<sup>103</sup>
104. A key benefit of raising a court action is that by signalling their intention to formally pursue a claim, it allows one party to leverage the authority of the court to ensure the other party engages in the process. For mediation to be a viable pathway to resolution, it must be possible similarly to use the court's authority to draw parties into the process. It is therefore proposed that, in order to ensure that the parties engage with mediation, there should be an element of compulsion. Requiring a minimum degree of engagement still respects the voluntary principles of mediation, especially the principle that no one can be forced to reach agreement in the mediation process.
105. This report proposes a new pathway that will allow appropriate disputes to be resolved quickly and at reasonable cost. It is not proposed that mediation should replace access to the courts: parties will always have the right to proceed to court if they cannot agree an outcome. It is proposed, however, that there should be a change to the status quo, which can leave parties with little or no alternative to court action, to allow them to follow an alternative route.

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103 Clark, B. (2019) Some reflections on 'I won't see you in court'. 2 Juridical Review 182-189m at p185

### Pre-court mediation

106. If the use of mediation is to increase, the courts must lead the way. It is also important, however, in line with the Scottish Government's focus on prevention, to consider how parties might be encouraged to consider mediation before they embark on court action to resolve their dispute, avoiding the cost and stress that entails. The Civil Justice Advisory Group chaired by Lord Coulsfield recommended that a mediation scheme should be made available which could be accessed before a court action is raised, as well as during a court action.<sup>104</sup>

### An ideal time for change

107. Recent developments mean that now is an ideal time to propose a new framework for the increased use of mediation in civil justice in Scotland. There is a growing political interest in broadening dispute resolution beyond litigation, bringing with it real opportunities for change. In its vision for justice in Scotland, the Scottish Government commits to *"empowering... communities to exercise their rights and responsibilities, to resolve disputes and other civil justice problems at the earliest opportunity"*.<sup>105</sup> To that end, there are a number of existing opportunities that if taken up, could further develop mediation and encourage its use more broadly in Scotland.

There are however also a number of challenges to be overcome if we are to attain the goal of 'normalising' the use of mediation in the civil justice system in Scotland.

### Opportunities

108. The Scottish Parliament's Justice Committee noted in its recent report on ADR that society benefits when there are more informal, timely, and affordable ways to resolve civil disputes. Scotland's National Performance Framework<sup>106</sup> commits to building more resilient and capable communities. Enabling individuals and businesses to mediate their disputes can help realise that vision for Scotland.
109. In the last year, the Scottish Government has received reports from two independent reviews on Legal Services<sup>107</sup> and on Legal Aid.<sup>108</sup> These reports have opened up these areas for possible reform. The Scottish Government is also undertaking a review of Part 1 of the Children (Scotland) Act 1995 in an effort to modernise family justice.<sup>109</sup> The Justice Committee of the Scottish Parliament recently endorsed the greater use of ADR,<sup>110</sup> and in May 2019, Margaret Mitchell MSP launched a consultation on a proposed Mediation (Scotland) Bill.<sup>111</sup>
110. There is also an ongoing review of the civil court rules by the SCJC.<sup>112</sup> Its Access to Justice

104 Consumer Focus Scotland (2011) [Ensuring Effective Access to Appropriate and Affordable Dispute Resolution: The Final Report of the Civil Justice Advisory Group](#)

105 [Justice in Scotland: Vision and Priorities](#); Scottish Government, 2017.

106 See Note 29

107 Robertson, E.A., [Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland](#), 2018.

108 Evans, M., (2018). See Note 67.

109 [Review of Part 1 of the Children \(Scotland\) Act 1995 and Creation of a Family Justice Modernisation Strategy: A Consultation](#); Scottish Government, 2018. Pp. 95-97

110 [Scottish Parliament Justice Committee, 2018 -see Note 94.](#)

111 <https://www.parliament.scot/parliamentarybusiness/Bills/111864.aspx>

112 [The New Civil Procedure Rules: First Report](#); Scottish Civil Justice Council, 2017.

Committee recently agreed a considerable number of detailed changes to the simple procedure rules following a review. The SCJC has said that it also intends to carry out a further review at a later date, which will consider whether the policy aims of simple procedure have been achieved.

111. Finally, the Law Society of Scotland is currently reviewing its Learning Outcomes, which prescribe the outcomes which all trainee solicitors should achieve during their two-year legal traineeship, in qualifying as a solicitor. This offers a unique opportunity to ensure that the next generation of Scottish solicitors and advocates are experienced in mediation and other forms of ADR. The Society's Access to Justice Committee is also currently consulting stakeholders on current provision of ADR, and whether more could be done to support its use in Scotland.

## Challenges

112. The Justice Committee report on ADR reported that the main challenges facing ADR in Scotland included: "lack of information on the availability and benefits of ADR, inconsistency in the provision and funding of ADR and inconsistency in referrals to ADR from the courts".<sup>113</sup> Strikingly, this conclusion broadly mirrors the challenges identified by the Civil Justice Council several months later in its report on ADR in England and Wales, in which it outlined three related areas that needed attention:
- The awareness of ADR, both in the general public and in the professions and on the Bench;
  - The availability of ADR, both in terms

of funding and logistics and in terms of quality and regulation of the professionals involved;

- The encouragement of ADR by the Government and Courts.<sup>114</sup>

## Awareness

113. The Scottish Civil Courts Review suggested a need for greater public legal education, combined with a 'just-in-time' approach, where useful information is easily accessible for those who need it, using an online resource or contacting in-court advice services.<sup>115</sup> Those recommendations are arguably now more important given the degree of reforms that have taken place in the civil courts.

## Availability

114. While the availability of mediation is largely a question of adequate funding and logistical support, there is also a need to address the question of regulation of the profession in order to assure the courts and tribunals of the credibility and legitimacy of mediation.<sup>116</sup>

## Encouragement

115. Judicial endorsement of mediation has been noted as a key factor in encouraging its broader use among court users,<sup>117</sup> particularly in the initial stages of embedding mediation when public knowledge is low. Encouragement is also needed from the legal profession and lay advisers, who should receive adequate education and exposure to the mediation process.
116. Building on these concerns, the Group has identified a number of current challenges to be

113 Op cit., Scottish Parliament Justice Committee (2018) – see Note 94. At p6

114 [ADR and Civil Justice: Final Report](#); CJC ADR Working Group, 2018, at p6

115 Op cit., Scottish Civil Courts Review (2009). Paras 48-50

116 Op cit., Scottish Consumer Council (2001) Pg. 35

117 [Mediation Under Simple Procedure: One Year On](#); University of Strathclyde Mediation Clinic (2017)

overcome in 'normalising' the use of mediation in the civil justice system. These fall into two broad categories: structural challenges and cultural challenges, as set out below.

### ***Structural challenges***

- Coordinating uniform implementation
- Proportionate cost / incentivising mediation
- Clearer signalling of quality standards
- Consistent messaging in rules and legislation

### ***Cultural challenges***

- Changing professional receptiveness
- Building wider awareness in society
- Embodying a new dispute resolution culture

117. This report proposes concrete ways to address each of these structural and cultural challenges. It proposes a strategy for 'normalising' the use of mediation in the civil justice system as a viable dispute resolution option in addition to and often instead of litigation.
118. The subsequent chapters of the report outline in detail the changes needed to accomplish this goal. These seek to build on existing infrastructure to minimise the cost to the public purse and ensure mediation is embedded within the civil justice system as seamlessly as possible.



## 5. Case Management

119. To normalise the use of mediation in civil disputes and to ensure that there is uniform availability across Scotland's courts and tribunals, a coordinated case management approach is needed, together with sufficient administrative capacity to support this. Providing a new viable pathway in civil justice means introducing a minimal degree of compulsion, to ensure parties engage in the process.

**Recommendation 1:** A degree of compulsion should be introduced into the system to encourage the parties to consider mediation. Where mediation is appropriate, parties should be required to attend a mediation session before their court or tribunal case can proceed.

120. In order to achieve this, it will be necessary to put appropriate case management arrangements in place. These are discussed in more detail in this chapter.

### 1. The Early Dispute Resolution Office

121. It is proposed that an 'Early Dispute Resolution Office' (EDRO) should be established across all courts and tribunals, for all case types and procedures. This will be central to the structure of the new system. It will have two main functions:

1. To review all cases received by the relevant court or tribunal, identify and direct appropriate cases toward mediation (or other more appropriate form of dispute resolution).
  2. To coordinate the mediation process.
122. The first of these functions is akin to the American concept of the 'multi-door courthouse'.<sup>118</sup> This proposed that courthouses should provide more choice to parties seeking to resolve disputes and should match disputes with appropriate processes for resolving them.<sup>119</sup> Today a number of US states have implemented this system, with parties now being offered a range of alternatives to conventional litigation, ranging from mediation, conciliation to arbitration and adjudication.<sup>120</sup>
123. While the focus of this report is on mediation, it is important to acknowledge that there will be some disputes which may be better suited to another dispute resolution process. Consumer disputes concerning financial services products, for example, might be more appropriately dealt with by the Financial Ombudsman Service (FOS). From 1 April 2019, FOS has jurisdiction in disputes involving SMEs, and can make awards of up to £350,000. The EDRO should be equipped and staffed appropriately to 'triage' cases coming in, identify other appropriate dispute resolution processes, where these exist, and direct the parties towards the most appropriate process or processes. There should be a presumption that cases will be referred to mediation unless there is a good reason not to do so.

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118 Address by Frank Sander, to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Reprinted in *The Pound Conference*, 70 F.R.D. 79, 111 (1976).

119 Kessler, G. & Finkelstein, L., *The evolution of a multi-door courthouse*, *Catholic University Law Review*, Vol. 37, 3, (1988), pp. 577-590.

120 Stempel, J., *Reflections on judicial ADR and the multi-door courthouse at twenty: Fait accompli, failed overture, or fledgling adulthood?*, *Ohio State Journal on Dispute Resolution*, Vol. 11, 2 (1996), pp. 297-395

124. The coordination role will involve liaising with the parties and the mediator, arranging the mediation session, supporting the mediation process, and helping to manage the process where appropriate, such as in simple procedure cases. This will be vital to the success of the new system. The various court-based mediation schemes in Scotland to date have all involved a paid mediation-coordinator, and English research has found that the provision of sufficient administrative support was central to the success of in-court mediation schemes there.<sup>121</sup>
125. If EDRO is to be successful, it will require appropriate and adequate administrative support. It should be seen as a vital preventative resource which will result in significant savings in the number of days spent on court hearings. It should be built on existing structures, making use of existing staff and office resources, which will save costs. This approach will also help to ensure that the EDRO becomes embedded within existing systems, and therefore has the authority which that brings.
126. The EDRO should be located within the Scottish Courts and Tribunals Service (SCTS) to ensure coverage across all courts and tribunals. Consideration should be given to reassigning and training clerks in sheriff courts and tribunals to carry out the EDRO function. The implementation of the EDRO function will need to be sufficiently flexible to respect the operational needs and practices of different jurisdictions. The review and referral function might best be carried out by staff with specialist knowledge in some courts or tribunals. There should also be provision for oversight by a judge, sheriff or legal member of a tribunal, who can make a decision on complex cases and ensure that cases are directed appropriately.
127. The proposed system would operate along similar lines to that which operates in the Provincial Court in Alberta, Canada, as described in the case study on page 34.

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121 Genn, H. (2002) [Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal](#), Lord Chancellor's Department

## Case Study - Mediation in Alberta's Provincial Court

Alberta's Provincial Court's deal with all civil claims up to \$50,000. To initiate a case, a party must file a dispute notice. Once submitted, a mediation coordinator, who is a member of the court clerk's office, reviews the case and decides whether to refer it to mediation. The referral decision is based on professional judgement, informed by a decision matrix designed to help evaluate the case against specific criteria. Also, it is possible for parties to request mediation, or a judge to order it.

All parties to the case must attend the mediation. If an organisation is involved, then a representative must attend who has knowledge of the facts and authority to resolve the action. Parties are expected to negotiate in good faith. Counsel is permitted to attend the mediation.

The mediation is confidential; however any mediation agreement is not. This is so the court can ensure that they are enforced. When a mediation agreement is performed, the parties submit a notice of withdrawal of the action. If an agreement is not honoured, a party can request that the case proceed to court.

To proceed to court, a notice of completion of mediation is issued and filed with the clerk of the court. A certificate of non-attendance is issued if a party fails to attend. This can lead to their pleadings being struck out, unless they satisfy the court that there was a reasonable excuse for not attending.

A party can request an exemption from attending mediation and the court has discretion on whether to grant it.

Mediation is expected to take two to three hours. It is free to the parties.

**Recommendation 2:** An 'Early Dispute Resolution Office' (EDRO) should be established, to 1) review cases and direct them where appropriate to mediation (or other more appropriate form of ADR) and 2) coordinate the mediation process. It should build on existing structures within the courts and tribunals, to make the most effective use of existing resources.

**Recommendation 3:** There should be a presumption that cases will be referred to mediation unless there is a good reason not to do so.

## 2. A Two-Pronged Approach

128. It is proposed that a two-pronged approach should be taken to introducing the EDRO referral system. While the ultimate aim is to introduce legislation, as discussed further in Chapter 8, that will inevitably take some time to put in place.

### (1) Court rules

129. In order to kick-start the move towards encouraging the use of mediation, the system would start with referrals from the court. This would be supported by court rules produced as part of the SCJC rules rewrite project, which would introduce a duty on sheriffs and judges to encourage parties to consider mediation where appropriate. This would be accompanied by training for sheriffs and judges, as set out in more detail in Chapter 9. As discussed in Chapter 4, the encouragement

of parties by the courts to mediate is a key element of embedding mediation into the civil justice system. Sheriffs and judges will therefore have a vital role in encouraging parties to consider mediation.

## (2) Mandatory referrals to mediation

130. The second aspect of the approach will involve introducing via legislation a level of compulsion on parties to consider mediation. It will not compel parties to participate in mediation, or to reach a settlement. Quek's 'continuum of mandatoriness'<sup>122</sup> sets out 5 levels of 'mandatoriness' in mediation: (i) Categorical or discretionary referral with no sanctions; (ii) Requirement to attend mediation orientation session or case conference; (iii) Soft sanctions; (iv) Opt-out scheme; (v) No exemptions. Internationally, there are jurisdictions which range all the way along this continuum.
131. The system proposed here for Scotland contains elements of several of these levels, ranging between (i) and (iv). There is no intention to force parties to mediate, and there can be no argument that the proposed system infringes parties' rights to a fair trial under Article 6 of the European Convention on Human Rights. Experience to date suggests, however, that unless an element of compulsion is introduced, mediation may never become an accepted, integral part of the civil justice system.
132. The recent Civil Justice Council report<sup>123</sup> took the view that mandatory approaches should be considered to improve uptake, while a 2014 EU report on the EU-wide Mediation Directive<sup>124</sup> noted that no other measures are seen by EU-wide stakeholders as having as big an impact on mediation uptake as some level of mandatoriness. There is also evidence from Alberta's Queen's Bench Court that mandatory approaches create a wider culture of mediation: the mandatory rule of JDR (seen as a type of mediation) had to be suspended due to overwork of judges, but demand for JDR has remained high, although there is now a voluntary approach.<sup>125</sup>
133. What is proposed is mandatory referral to mediation, with provision for 'special cause exemptions' under a prescribed list of grounds. It is proposed that an online mediation 'roster' should be introduced, which the EDRO will use to make referrals to a mediator. The parties may agree on a rostered mediator, paying for their services where appropriate at the rates set under the roster scheme, as discussed further in Chapter 6. If the parties are unable to agree on a mediator, or do not wish to decide on one themselves, the EDRO will randomly select a mediator from the roster (taking account of geographic and subject specialism needs).
134. Parties will, however, be free to choose any mediator, whether they are on the roster or not. Where this is the case, the parties are free to agree the rates paid to the mediator. Parties may not have the protections offered by those who are members of the roster in this situation, however.<sup>126</sup> Consideration may also be given to

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122 Quek, D. (2010) Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program. *Cardozo Journal of Conflict Resolution*. 11: 479-509.

123 CJC ADR Working Group, 2018. See Note 115

124 Directorate General for Internal Policies (2014) [Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU. EU Report.](#)

125 Scottish Government, 2019b. See Note 3

126 See Chapter 7

the use of judicial mediators for some disputes – the Group expresses no view on this, but it notes the need to ensure that appropriate safeguards would need to be put in place were this to arise. Judicial mediators would also be required to meet the same standards as ‘roster’ mediators.

135. Where a case has been referred to mediation (or other form of ADR process), the court action should be ‘paused’ or ‘sisted’ until the outcome of that referral is known. For mediation, the parties would be required to provide a summary of the dispute to the mediator in advance of meeting with him/her. The parties and/or their representatives would then be required to attend an initial meeting with the mediator, who would explain what mediation involves, and invite the parties to consider participating in mediation. This meeting will be important not only in encouraging parties to consider mediation, but also in ensuring that they are able to give their informed consent to participating in mediation, should they choose to do so.

**Recommendation 4:** The EDRO referral system should be implemented via a two-pronged approach: 1) court rules requiring sheriffs and judges to encourage parties to consider mediation where appropriate and 2) introducing mandatory referrals to mediation via legislation, with provision for ‘special cause exemptions’ under a prescribed list of grounds.

**Recommendation 5:** An online mediator ‘roster’ should be introduced, which will be used by the EDRO to make mediation referrals.

136. The parties would not then be required to continue with mediation if they do not wish to do so, and the case would go back to the court or tribunal for a hearing. If the parties do wish to proceed with the mediation, this would go ahead either on the day or on a date to be arranged with them.

### (3) Special cause exemptions

137. It is proposed that the requirement to attend an initial mediation meeting should be prescribed in legislation, but subject to a ‘special cause exemption’ provision. This would allow the sheriff or judge dealing with the case to dispense with the requirement on special cause being shown by the relevant party.
138. While there are a number of foreseeable situations in which it might be anticipated that such exemption would be granted, it is considered best to avoid a finite list within primary legislation. The flexibility afforded by a general provision may serve to increase further the scope for the creative use of mediation. Specifying the basis for exemption in a list, even if it is stated to be non-exhaustive, may be unhelpful.
139. However, the situations in which it would be anticipated that special cause exemption may readily apply include:
1. Mediation has already taken place, or a mediator is currently engaged
  2. Existence of time-bar (unless provided for in legislation)
  3. Contractual clauses stipulate specific ADR method
  4. Another preferable ADR method exists
  5. The case involves a protective order or enforcement order
  6. Disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence.
140. There is some support for the suggestion that even those who would normally be excluded from any requirement to mediate, such as people who have experienced domestic abuse, sexual violence or any other gender-based violence involving a party to the proposed mediation, should be permitted to elect to participate rather than be the subject of a mandatory exclusion<sup>127</sup>. One example might

127 [Family Law for the Future – An Inquiry into the Family Law System](#), Australian Law Reform Commission Report, paras 8.60 and 8.79

be where property issues arise between a former couple that both would wish to resolve by mediation, but where there are historic, now resolved, allegations of domestic abuse. Where there is a judicial assessment of whether mediation (or any other form of dispute resolution) is appropriate, the court would be tasked with taking into account all factors that could present a risk, before determining special cause exemption. For avoidance of doubt, the mechanisms for ensuring the court is aware of risks requires to be carefully considered, for example where domestic abuse, sexual violence or any other gender-based violence may be a factor there requires to be an understanding of the risks associated with coercive and controlling behaviour.

**Recommendation 6:** The requirement to attend an initial mediation meeting should be subject to a ‘special cause exemption’ provision. While the legislation should not prescribe a list of reasons for exemption, the situations in which special cause exemption may readily apply include:

1. Mediation has already taken place, or a mediator is currently engaged
2. Existence of time-bar (unless provided for in legislation)
3. Contractual clauses stipulate specific ADR method
4. Another preferable ADR method exists
5. The case involves a protective order or enforcement order
6. Disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence.

141. We are also mindful of the effect of the pressure to mediate where there is a power imbalance in cases of domestic abuse, sexual violence or any other gender-based violence.

One area that will need to be considered is how structures can be developed to support victims of gender-based violence so that they do not perceive that they must participate in mediation, but rather are empowered to make the right choices for them, whether that be mediation, court or another form of dispute resolution.

#### (4) Pre-court mediation and advice

142. Provision should be made for mediation to be available before a court action is raised, as well as during a court action. It is also important that unrepresented parties should be able to access advice about their legal rights before agreeing to participate in mediation.
143. For simple procedure cases, particularly those involving unrepresented parties, this might be done through in-court advice services, which assist clients before they raise an action, as well as during the court process. The Tayside service assists parties to negotiate prior to an action being raised, and research into the service noted that the authority of the court was an important factor in getting parties to engage in early stage negotiation - for example, in-court advice services have the court address in their letterhead.<sup>128</sup>
144. The same research concluded that the potential for mediation to be offered prior to court should be considered, in line with the Civil Justice Advisory Group.<sup>129</sup> Earlier research on the Edinburgh in-court advice pilot found that almost half of the referrals made to the mediation service were made prior to raising an action, most of them by the in-court adviser.<sup>130</sup> Although in-court advice services

128 Blake Stevenson Ltd (2016) - See Note 10, at p36.

129 Consumer Focus Scotland, 2011. See Note 105

130 Samuel, 2002. See Note 32.

are currently only available in some sheriff courts, the recent Independent Review of Legal Aid called for them to be replicated across all 6 sheriffdoms.<sup>131</sup>

145. In other types of case, it will be important that solicitors, advocates and other advisers are sufficiently well aware of the potential role of mediation in resolving their clients' disputes, as discussed in more detail in Chapter 10. These advisers should then be in a position to fully advise their clients about both their legal rights and the possibility of mediation where appropriate.

**Recommendation 7:** Provision should be made for mediation to be available before a court action is raised, as well as during a court action.

**Recommendation 8:** Unrepresented parties should have access to advice about their legal rights before agreeing to participate in mediation, possibly through in-court advice services.

## (5) Mediation report

146. A report should be submitted to the EDRO following the initial mediation meeting, or after the mediation, where this takes place. This report should provide basic information about what happened i.e. whether a mediation took place, and if so, what the outcome was - whether it was wholly or partly successful. It should not include observations about the conduct of the parties, or the content of the discussions.
147. If the mediation was successful, and the parties agree to it, the court action can then be dismissed. If no mediation took place, or the mediation was unsuccessful or only partly
- successful, the report will be lodged with the court for information prior to the first court hearing. It is not proposed that specific provision should be made for sanctions by the court where, for example, the parties do not attend the initial mediation meeting. Sheriffs and judges generally already have wide discretion regarding consideration of expenses under existing provisions.
- ## (6) Data collection
148. One of the challenges which has been experienced to date in relation to mediation has been the lack of quality data for researchers to properly assess the effectiveness of mediation services and to establish its benefits and limitations, particularly within the Scottish context.<sup>132</sup> It is therefore vital that systems are put in place to ensure that appropriate data collection is embedded in the new system from the very start, to ensure that effective evaluations and reviews are possible. This reflects both a broader effort in Scotland to improve data reporting across civil justice<sup>133</sup>, and the international evidence that proper assessment of mediation services turns on embedding quality data gathering from the outset of any system.<sup>134</sup> The data gathered might include, for example:
- the geographic location of the mediation
  - the general dispute sector (e.g. family, employment)
  - the duration of the mediation
  - the outcome of the mediation i.e. whether a full or partial agreement was reached.
149. It will be important, however, to ensure that data collection is proportionate and does not overwhelm those working within the system with additional work. Consideration might

131 Evans, 2018. See Note 67.

132 Scottish Legal Aid Board (2014) [Overview Report of Alternative Dispute Resolution in Scotland](#)

133 <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/review-civiljudicial-stats>

134 Scottish Government (2019b). See Note 3

also be given to giving parties the opportunity to provide feedback on their perceptions on the process, giving legitimacy to the process and identifying reforms to improve the process, as in Northern California.<sup>135</sup> This may, however, best be achieved through standalone qualitative research.

**Recommendation 9:** An appropriate data collection mechanism should be embedded in the new system from the start, to ensure that effective evaluations and reviews can be carried out.

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135 Welsh,N. (2019) Dispute Resolution Neutrals' Ethical Obligation to Support Measured Transparency, 71 OKLAHOMA LAW REVIEW 823



## 6. Funding

150. How mediation services are funded is a central question which must be addressed if the goal of changing behaviour and culture in Scotland is to be achieved. If mediation is to become a viable pathway in civil justice, all parties, regardless of their financial resources, must be able to mediate their dispute. Enabling everyone to mediate their disputes is an important aspect of ensuring access to justice for all. It can also help to achieve the key outcomes of the Scottish Government's Justice Vision for Scotland, including empowering communities to resolve their disputes and seeking to increase prevention and early intervention in civil disputes.<sup>136</sup>
151. In order to achieve this, there must be realistic and sufficient funding for cases involving lower monetary values, while for medium to higher value cases, the cost must be proportionate and set at a level which incentivises the use of mediation.

### Simple Procedure (low monetary value claims)

152. It is important that the cost of mediation is proportionate to the financial value of the dispute. If parties with lower value claims are to have access to justice, it is important that they are able to access mediation where appropriate. This was recognised by the Scottish Civil Courts Review, which recommended that free court-based mediation schemes should be available for claims of under £5000.<sup>137</sup> The recent Justice Committee report also recommended that the Scottish Courts and Tribunals Service should consider how in-court ADR services might be funded on a more consistent basis across Scotland.<sup>138</sup>
153. It is proposed that such services should be publicly funded and provided to parties by mediators on the online roster either free or at a very low cost. Consideration would need to be given to where initial mediation meetings and mediations take place, if these are conducted face to face. Where there is space available in the court or tribunal building, this would be a convenient option. Otherwise, other suitable venues would need to be found, which may have cost implications. The use of telephone or online mediation should also be considered.
154. Mediation should also be available to parties prior to raising a simple procedure action, as discussed in Chapters 4 and 6. Parties who are not exempt on income grounds are required to pay a court fee for lodging a simple procedure claim, which is comparatively substantial for lower value cases: from April 2019, the fee is £104 for disputes involving sums of over £300. The existence of a free or very low-cost mediation service could provide a powerful incentive to try mediation in such cases.
155. The costs involved in providing a free/low cost mediation service would be offset by the money saved as a result of fewer cases going through the court process. There is Scottish research which suggests that court-connected mediation can result in savings in both time and costs, for the public purse as well as for the parties.<sup>139</sup> Costs could be further limited

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136 [Justice in Scotland: Vision and Priorities \(2017\)](#)

137 [Scottish Civil Courts Review, Vol. 1 \(2009\)](#)

138 Scottish Parliament Justice Committee, 2018-see Note 94

139 Ross & Bain, 2010. See Note 19.

by considering the employment of salaried mediators, operating across multiple sheriff courts, and/or adopting an online/telephone mediation model, similar to the Small Claims Mediation Service in England and Wales.<sup>140</sup> Time-limiting mediations can also reduce costs, but there is a need to be mindful of the effect this can have, in potentially pushing parties towards a more evaluative model of mediation.<sup>141</sup>

156. Whatever mediation model is decided on, the mediators must be paid appropriately for their work. At present, the mediation services which exist in some sheriff courts are provided by volunteer mediators free of charge to parties. To date this pro bono approach has been workable because it has provided an opportunity for qualified mediators to gain practical experience. If, however, court-connected services were to be rolled out across Scotland, there will be much greater demand and there are unlikely to be sufficient mediators to meet this on an unpaid basis.<sup>142</sup> In any event, it is appropriate to view mediation as a valuable service for which payment should be made.

### Ordinary Cause Procedure and Court of Session actions (medium-high monetary value claims)

157. The access to justice arguments begin to weaken as the value of cases increases, and it becomes more reasonable to expect parties to pay or contribute to the cost of mediation.

For ordinary cause (medium-higher value claims) and Court of Session actions, a suitable price point should be identified, below which mediation will be provided under an appropriate funding model to be identified, and above which parties should pay the full commercial cost for the mediator.

158. Finding a workable price point at which the cost of mediation should shift entirely onto the user is critical. Detailed economic analysis will be needed in order to identify where this price point lies. This difficulty is something that England and Wales have struggled to resolve as reported in the recent Civil Justice Council report in England and Wales.<sup>143</sup>
159. Below the price point identified, appropriate funding models should be considered. The most likely outcome is some form of sliding scale of fees paid at the 'roster rate', to ensure that the cost of mediation would always be proportionate and attractive.
160. Examples of how mediator rates are applied in some other jurisdictions are set out in case studies 1 and 2 on pages 43 and page 44. It can be seen from these examples that, while the fees charged to the parties depend on the number of parties and the length of the mediation, they are relatively modest, equating to somewhere £300-£500 for a three-hour long mediation. This fee is split equally between the parties. Consideration will need to be given to whether time limits should be applied in any mediation service which is provided, or flexibility built into the scheme to allow for time variables.

140 ADR and Civil Justice: Interim Report; CJC ADR Working Group, 2017. Available here: <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>

141 Evidence heard from Professor Nancy A. Welsh, Professor of Law and Director, Dispute Resolution Program, Texas A&M University School of Law. See also: Nancy A. Welsh & Bobbi McAdoo, Eyes on the Prize: The Struggle for Professionalism, 11 DISPUTE RESOLUTION MAGAZINE 13 (Spring 2005); Nancy A. Welsh, You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation, 17 AMERICAN BANKRUPTCY INSTITUTE LAW REVIEW 427, 455 (2009).

142 Clark, 2019. See Note 104

143 CJC ADR Working Group, 2018. See Note 115

161. Where a dispute does not necessarily involve a clear financial value – such as family law disputes over residence of and contact with children - a mechanism will need to be found to work out a proportionate fee.

**Recommendation 10:** Publicly funded free or very low-cost mediation should be made available for those involved in simple procedure (lower value claims).

**Recommendation 11:** In ordinary cause (medium-higher value claims) and Court of Session actions, a suitable price point should be identified, above which parties should pay commercial rates agreed with the mediator.

**Recommendation 12:** Below this point, as well as where there is no clear monetary value, appropriate models should be considered, with the goal of proportionate cost and incentivising mediation. Based on international models, it is anticipated that in many cases, the fee payable by each party is likely to be no more than a few hundred pounds.

## Case Study 1 – Mandatory Mediation Programme and Roster Rates – Ontario, Canada

*Ontario Small Claims Court does not have mandatory mediation, but it does operate an initial case settlement conference which encourages early settlement and has the same requirement as mediation that those present must have authority to settle, whether in person, or have ready telephone access to a person who does have authority.*

*Ontario has a mandatory mediation programme which operates in the Superior Court of Justice, in the cities of Toronto and Ottawa, and the county of Essex. Civil actions are either raised under Simplified Procedure, for claims between \$25,000-\$100,000, (approximately £14,500 – £57,500) or under ordinary rules, for claims above \$100,000.*

*Mediations are carried out by private mediators. The parties have an opportunity to select and agree on their own mediator, who may or may not be on the mediation programme's roster of mediators. However, if they cannot agree, a roster mediator will be appointed by the Local Mediation Committee, which administers the programme and whose members are appointed by the Attorney General.*

*The mediation must be held within 180 days after the first defence is filed, though the court may grant an extension to allow parties to obtain further information. Before the mediation, parties must submit a Statement of Issues, which outlines the dispute, their position and their interests, as well as any documents that are central to the case.*

*Failure to provide a Statement of Issues, or failure to attend the mediation may result in the party being charged cancellation fees by the mediator and possible sanctions from the court.*

*Agreements must be written and signed by the parties or their lawyers. The court must be then notified of the agreement. The agreement is legally binding, and if a party fails to honour the agreement, they may make a motion for a judgement in the terms of the agreement or continue to court.*

*Mediators selected from the mediation programme's roster have fees capped for the first three hours of the mediation. The amount includes a half hour preparation time, per party. If the mediation passes three hours, and the parties wish to continue the mediation, a private rate agreed in advance, between the parties and mediator, will apply. The mediation fee is split between the parties and paid directly to the mediator. If a party meets financial eligibility requirements or has a legal aid certificate, they will not be charged for the mediation.*

Number of Parties	Maximum fee for rostered mediation of 3 hours	
	CAD	GBP
2	\$630	£363.10
3	\$708.75	£408.48
4	\$787.50	£453.87
5 or more	\$866.25	£499.26

*The mandatory mediation programme rules do not require parties to continue the mediation beyond the initial three hours. Also, the mediator can end the mediation early if they believe it is not constructive for the parties.*

## Case Study 2 – Maryland, U.S.A.

The costs of mediation vary across Maryland's courts. Fees for mediation in family courts range from free to low cost mediation. Certain counties offer free mediation for child access cases handled by court paid mediators, while in other areas of the state the fees for such mediations range from \$50-\$150 per hour for a rostered mediator (roughly £38 - £115). Some courts operate a waiver programme for those who cannot afford the fee.

Other courts will refer parties to roster mediators who charge fees on a sliding scale, for example, civil (non-family) mediation operates a roster rate up to \$200 (£154) per hour, for a maximum of two hours, unless further time is requested. Parties are free in each case to engage a private mediator, who does not need to be rostered, at a rate privately agreed.

## Tribunals

162. It is Scottish Government policy that fees should not be charged to parties who bring or respond to applications dealt with by devolved tribunals. Tribunals - whether dealing with party-v-state or party-v-party disputes - are publicly funded. It would therefore be appropriate, as a general principle, for any mediation service dealing with tribunal disputes to also be paid for through public funds. This is currently the situation in the employment tribunal, while the mediation service previously offered by the homeowner housing panel was also provided free of charge to parties and publicly funded. There may, however, be some instances where it may not be appropriate for public funding to be provided, and this should be considered further. As with the courts, it is important that any mediators in tribunal cases should be appropriately remunerated for their services.
163. Consideration would need to be given as to how mediation in tribunal cases would be provided. One possibility would be for the service to be provided by the roster mediators, taking account of any need for specific subject expertise. Another possibility might be the use of judicial mediators - where the mediation is carried out by suitably trained tribunal members (whether legal or ordinary

members). This is the model currently used by the employment tribunals, and that previously offered by the homeowner housing panel. Such mediators would have appropriate specialist knowledge of the subject area, and how a tribunal might approach a dispute. It would be important to ensure, however, that the mediators were not part of any tribunal which might later deal with the dispute, should mediation not result in an agreement. As with the courts, judicial mediators would also need to meet the standards which are required of roster mediators. This report does not express any particular view on the model which should be chosen.

## Remuneration of mediators

164. Whatever funding model is chosen, the mediators providing the mediation services must be paid fairly and appropriately for their services. This is important for two main reasons. Firstly, if mediation is to be widely adopted as a key part of the civil justice system, there will need to be sufficient appropriately qualified and experienced mediators to meet the demand: *"if mediation is to become further embedded within the public civil court system then a properly funded national*

*scheme is required to ensure consistency and high quality services.”<sup>144</sup> Continued dependence on a pro-bono system is counter-productive and unsustainable in the medium to long-term.*

165. Secondly, paying mediators appropriately is important in achieving the cultural shift required. It signals that mediation is seen by the courts and by wider society as a legitimate, important and valuable way of resolving disputes, and that mediators are skilled, regulated professionals, who deserve to be paid at a level that acknowledges and reflects this.

**Recommendation 13:** For tribunals, mediation should be publicly funded where appropriate.

**Recommendation 14:** Mediators should be appropriately remunerated for their work.

**Recommendation 15:** A firm commitment should be made to ensuring that everyone in Scotland can use mediation to resolve their dispute, regardless of income or their location.

## Ensuring access to mediation services for all

166. There are undoubtedly challenges which will need to be overcome in ensuring that mediation is available to everyone in Scotland who becomes involved in a civil dispute. A firm commitment should be made to ensuring that everyone in Scotland can use mediation to resolve their dispute, regardless of income, or their location. Consideration should be given, for example, to how access to mediation can be ensured for those based in more rural or remote locations. This might require measures such as paying a higher fee to mediators where they are prepared to travel a significant distance to provide their services where required. Online provision may also be necessary and/or appropriate in some circumstances.

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144 Clark, 2019. See Note 104

## 7. Standards, Regulation and Professional Rules

### Standards and Regulation of Mediators

167. If mediation is to become embedded in the civil justice system, it is important to establish the credibility and legitimacy of mediation as a pathway for civil disputes. To achieve this, the EDRO must be able to refer parties to a body of professionals, which signals clearly to consumers, judges and others working within the system, its quality standards, its accreditation process, and that it has an effective and straightforward complaints and disciplinary procedure.
168. The international evidence review carried out for this report found that mediation is almost exclusively a self-regulated profession<sup>145</sup> across the jurisdictions reviewed. The review found a range of training and standards across jurisdictions, particularly for court-connected mediators. An expected number of hours of training and real-life mediation experience under supervision are generally required. Private mediation is conducted outwith any regulation or standards, unless mediators choose to sign up to a set of standards.
169. The review found that the importance of mediator training and experience was a common theme. As well as helping parties to reach a settlement, such training and experience can ensure that the process is fair; that parties are given good advice; difficult disputes are well handled; power imbalances are dealt with; and disputes that should not be mediated can be actively recognised.
170. While regulation of roster mediators will be necessary for the reasons stated above, the

Expert Group is mindful of the dangers of over-regulating this emerging profession. There is evidence from elsewhere of the “legalising” of mediation, where it is co-opted by lawyers as part of the traditional way of doing things. Such an approach must be avoided in Scotland or mediation could end up as just another adjunct of the litigation system.

### Online mediation roster

171. There should be clear and robust minimum standards and accreditation requirements for admittance to the mediation roster, and mediators will be required to adhere to these, and to a code of practice. Those who are admitted to the roster will be subject to an effective and accessible complaints and disciplinary procedure for roster mediators. Only mediators who are admitted to the roster will be able to receive referrals from the EDRO.
172. An appropriate regulatory body should have responsibility for overseeing and managing the roster. This could be a new organisation, or an existing body such as Scottish Mediation, which currently maintains a register of mediators. The regulatory body will be responsible for:
  - setting and keeping under review the standards, training and accreditation requirements for entry to the roster
  - admitting mediators who satisfy those requirements to the roster
  - developing and overseeing a code of practice for roster mediators
  - dealing with complaints about roster mediators, including disciplinary issues

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145 Scottish Government, 2019b. See Note 3. Note: Florida was the only exception: it was unusual in its levels of regulation and oversight of mediation. Mediators there are regulated by the court.

- where appropriate, suspending or excluding mediators from the roster
173. The online roster will be available to the public, and will include information about all approved roster mediators, including their experience; geographical location; and area(s) of expertise. It will be important to take steps to ensure that, so far as possible, there are sufficient mediators on the roster who will provide services in remote and rural areas. This might be done through mediators who are based locally and/ or are prepared to travel, or through other means such as teleconferencing, video links or online mediation. It will also be important that the mediators on the roster are seen to reflect the diversity and make-up of the general population so far as possible, helping to instil confidence in mediation among the general public.
174. Consideration will need to be given as to how complaints about mediators might be addressed where there may be other potential complaints routes available—for example, where the mediator is also a solicitor, advocate or other professional.
175. It is envisaged that the roster will follow a similar model to that which applies in British Columbia, Canada, as described in the case study on page 48.

## Professional Rules

176. Solicitors and advocates play a critical role in the civil justice system, providing advice and guidance for parties seeking to resolve disputes. They are critical 'gatekeepers' to the system for their clients. It is therefore

reasonable and appropriate to expect that they should advise clients of all the options available to them for resolving their dispute. The international evidence review found that getting the legal profession on board is important to a robust and successful system of mediation.<sup>146</sup>

177. Improved education of law students and lawyers about mediation will be a key aspect of achieving greater recognition of mediation and its potential benefits among the profession, as discussed further in Chapter 10. Research from Ontario, Canada found that the greater lawyers' knowledge and experience of mediation, the more positive they were about mediation.<sup>147</sup>
178. In addition to education and training, and to complement this, it is important that there should be a requirement on lawyers to advise their clients about mediation and other forms of dispute resolution (DR). As discussed further in Chapter 3, currently the only reference to mediation or DR for solicitors is in Law Society of Scotland guidance on dispute resolution, and there is no direct mention of mediation or DR in the rules of professional conduct for advocates.
179. In its recent report, the Justice Committee recommended that there should be a more robust duty on solicitors to advise their clients about the range of available dispute resolution methods.<sup>148</sup> This report recommends that such a requirement should be introduced, and that consideration should also be given by the Faculty of Advocates for clearer rules on this in relation to advocates.

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146 Scottish Government, 2019b. See Note 3.

147 Hahn, R. G. and Barr, C. (2001) Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months. Report for the Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project. Available from: <http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf>

148 Scottish Parliament Justice Committee, 2018. See Note 94



**Recommendation 16:** There should be clear and robust minimum standards and accreditation requirements for admittance to the online mediation roster, and an effective and accessible complaints and disciplinary procedure for roster mediators.

**Recommendation 17:** A robust requirement should be introduced on solicitors and advocates to inform clients of alternatives to litigation.

### **Mediator Roster Case Study: The Mediate BC Society's Roster of Mediators - B.C. Canada**

The Mediate BC Society is the authorised roster organisation for British Columbia. It manages two mediator rosters, one for family mediators and another for all other civil disputes. The organisation sets the standards for training and experience for its mediators, which includes 14 hours of instruction on civil procedure. All roster mediators must undertake continuous professional development and adhere to a specific standard of conduct. There is a complaints and disciplinary process, which can lead to a suspension or exclusion from the rosters. The rosters are publicly available and list all registered mediators, providing their background information, mediation experience, mediation style, rates of pay, areas of expertise, etc.

In British Columbia, after an action is raised in court, a party may wish to initiate a mediation through a Notice to Mediate, which formally invites the other party to mediation. Both sides have a set period to agree on a mediator, who may or may not be registered on the rosters. However, if the parties cannot agree on a mediator, Mediate BC, as the authorised roster organisation, is required to identify six appropriate mediators and ask the parties to rank their preference. It will then review the stated preferences and select a mediator, also considering:

- the need for the mediator to be neutral and independent,
- the qualifications of the mediator,
- the mediator's fees,
- the mediator's availability,
- the nature of the dispute,
- the geographic location of the parties and mediation, and
- any other consideration likely to result in the selection of an impartial, competent and effective mediator.

In small claims, if parties cannot agree a mediator, Mediate BC will assign one without consulting the parties, but still consider the points listed above. Once a mediator has been provided, the roster organisation has no further role. Parties are not charged for these activities.

The rosters have established a quality standard that is now being leveraged by other bodies. For example, since 2001, the Insurance Corporation of British Columbia requires any mediation of ICBC claims to be carried out by mediators listed on the Civil Roster of the Mediate BC Society.

## 8. Court Rules, Tribunal Rules, and Legislation

180. To embed mediation into the civil justice system, courts and tribunals must provide a consistent message, which commits the civil justice system to resolving appropriate cases through mediation. Court and tribunal rules should affirm this commitment. Mediation should also be enshrined in legislation, which will establish an appropriate regulatory regime for roster mediators and help to signal a cultural shift towards mediation being viewed as a key component of the civil justice system.

181. As discussed in more detail in Chapter 5, it is proposed that a two-pronged approach is taken to introducing a system of referral to mediation. While the eventual aim is to introduce mediation legislation, that will take some time to put in place. In the interim, changes to court and tribunal rules will help to begin a move towards shifting the culture within the civil justice system.

### 1) Court and Tribunal Rules

182. It is therefore proposed that the first phase focuses on voluntary referrals from courts and tribunals. This would be supported by court rules produced as part of the SCJC rules rewrite project, which would introduce a duty on sheriffs and judges to encourage parties to consider mediation, unless there are good reasons not to. This would be accompanied by training for sheriffs and judges.

183. As noted in Chapter 3, there is currently a discrepancy between provision for referral to ADR in relation to simple procedure and provision in ordinary cause and Court

of Session procedure. There is a need for consistency across all court processes, if the ultimate aim of changing the culture is to be achieved.

184. Similar rules should be introduced for tribunals within the devolved tribunals structure, taking into account the specific operational requirements of individual tribunals. This would be in keeping with the guiding principle of the Tribunals (Scotland) Act 2014:

12 (3)The principle is the need for proceedings before the Scottish Tribunals—

(a) to be accessible and fair, and

(b) to be handled quickly and effectively.<sup>149</sup>

185. The use of mediation would also support the overriding objective of the First-tier Tribunal for Scotland to deal with proceedings fairly and justly, which includes:

2 (2) (a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring so far as practicable, that the parties are ...able to participate fully in proceedings...".

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149 [Tribunals \(Scotland\) Act 2014 \(asp. 10\)](#).

(e) avoiding delay, so far as compatible with the proper consideration of the issues.<sup>150</sup>

## 2) Primary Legislation

186. In the longer term, a Mediation Act for Scotland should be introduced. In its recent report, the Scottish Parliament Justice Committee recommended that consideration should be given to introducing such an Act, along the lines of the Irish Mediation Act 2017.<sup>151</sup> Margaret Mitchell MSP has also recently published a consultation on her proposal for a Mediation (Scotland) Bill.

187. It is appropriate that such a significant shift within the civil justice system should be considered and agreed by the Scottish Parliament. The international review found that, while mediation has been introduced into civil justice in various different ways, each of the jurisdictions examined have a legislative component, be it at federal, state, or national level.<sup>152</sup> As Professor Bryan Clark has pointed out,<sup>153</sup> a Mediation Act would have two broad functions.

188. Firstly, it can provide clarity in areas of law relating to mediation which are currently unclear, such as confidentiality in mediation, setting standards for mediation conduct and possibly enforceability of mediation agreements. Secondly, and perhaps more importantly, it would raise the profile of mediation among the judiciary, solicitors,

business and the wider public. This would help to legitimise mediation in the eyes of the legal profession and of wider society, leading to its increased use, and ultimately to behavioural and cultural change. As a prominent Irish mediator said of the Irish Mediation Act: 'It takes mediation out of the 'alternative' space, and making it a viable option for many who have dismissed it as being 'out there' or not having enough teeth in the past.'<sup>154</sup>

189. In keeping with this, it is proposed that the legislation should have the following broad aims:

1. Introduce a duty on Scottish Ministers to promote the use of mediation as a way of resolving civil disputes
2. Outline a regulatory framework for roster mediators, including setting out minimum standards
3. Set out the grounds for special cause exemption and the process for requesting this
4. Formalise the principles underpinning mediation
5. Provide a definition of mediation
6. Endorse component parts of a code of practice for mediators
7. Provide for the confidentiality of all mediations
8. Signal a paradigm shift for dispute resolution in Scotland.

190. The ultimate goal of the proposed legislation is to improve the civil justice system for the benefit of everyone in society through behavioural and cultural change. As the

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150 The [First-tier Tribunal for Scotland Housing and Property Chamber \(Rules of Procedure\) Regulations 2017](#), Schedule, Rule 2. The wording for other Chambers within the First-tier Tribunal is very similar- see e.g. [The First-tier Tribunal for Scotland Health and Education Chamber \(Procedure\) Regulations 2017](#), Schedule, Rule 2

151 Justice Committee, 2018. See Note 94

152 Scottish Government, 2019b. See Note 3. At Pp. 21-22

153 Clark, 2019. See Note 104

154 Walsh, S. 'Et Voila! Ireland's Mediation Act 2017 Kluwer Mediation Blog, 6 November 2017 available at: <http://mediationblog.kluwerarbitration.com/2017/11/06/et-voila-irelands-mediation-act-2017/>

Justice Committee pointed out<sup>155</sup>, other legislative opportunities should be explored, as part of this cultural shift, in addition to a Mediation Act. Mediation could continue to be incorporated into specific legislation, as was done, for example, in the legislation which established the Scottish Legal Complaints Commission and legislation on additional support needs disputes. The proposed introduction of a legal duty on Scottish Ministers to promote mediation, as discussed in Chapter 8, would help to ensure that this is taken account of in new legislation, where appropriate.

191. While the proposed rules and legislation will be vital in precipitating cultural and behavioural change, they will not achieve this alone. They must therefore be seen as part of an overall package of wider measures, as proposed in this report.

**Recommendation 18:** As part of the SCJC rewrite of court rules, rules should be introduced to place a duty on sheriffs and judges to encourage mediation unless there are good reasons for not doing so.

**Recommendation 19:** Primary legislation in the form of a Mediation Act should be introduced. This would: place a duty on Scottish Ministers to promote the use of mediation; set out a regulatory framework for roster mediators; set out the grounds for special cause exemption; formalise principles; providing definitions; endorse a code of practice for mediators; provide for confidentiality in mediation; and signal a paradigm cultural shift for dispute resolution in Scotland.

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155 See Note 94, at para 125

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## 9. Education, Training and Awareness Building

192. While making the structural changes required to develop a new pathway for dispute resolution will be vital in embedding mediation within the civil justice system, such changes will not be sufficient on their own. There must also be a coordinated effort to encourage a change in culture among all those involved in the civil justice system, in order to ensure that mediation becomes a 'normal' way to resolve civil disputes in Scotland. To achieve this, there must be a strong focus on education, training and awareness building.

193. This should include educating and training the legal profession, the judiciary and lay advisers, all of whom have a key role in the resolution of civil disputes. This will be very important in raising awareness among those who are likely to become involved in disputes - individuals, businesses and public and other bodies as well as society in general. Beyond this, further initiatives should be considered to directly target business and the public and raise their awareness of the existence of mediation as an option for dispute resolution, how it works and what its potential benefits might be.

### The Legal Profession

194. The long-term goal of the proposals in this report is the normalisation of mediation. The first step in achieving this goal is ensuring that the legal and lay professionals who enable and support parties to access the civil justice system are appropriately trained on mediation. Solicitors and advocates are important 'gatekeepers' to mediation, and they should therefore be fully aware of the potential of mediation in resolving their clients' disputes, preserving relationships and saving time and

money. Unless they have a full knowledge and understanding of the mediation process, they will be unable to advise their clients adequately.

195. The introduction of a robust requirement on solicitors and advocates to advise their clients about the range of available dispute resolution methods, as discussed in Chapter 7, will help to change the culture within the legal profession. It should also be acknowledged that many solicitors are already well aware of mediation - some will be experienced in representing clients in a mediation, while others are themselves trained and/or practising mediators. It is also vital, however, that future solicitors receive training in mediation before they enter the legal profession. The Scottish Consumer Council noted in 2001 that the extent and nature of the inclusion of mediation as part of the law degree curriculum varied between universities,<sup>156</sup> and this is still the case: key interviewees for this report noted that mediation and wider DR still tend not to be core modules on a law degree.

196. Mediation should be included as a core part of the education and training pathways for solicitors and advocates throughout Scotland. These include the LLB degree and Post-Graduate Diploma in Legal Practice offered by a number of Scottish universities. They also include the two-year traineeship, which all solicitors and advocates<sup>157</sup> must complete following their Diploma in order to become fully qualified. The learning outcomes for trainee solicitors are prescribed by the Law Society of Scotland, and these are currently under review. It is recommended that the Society should include an emphasis on

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156 O'Neill, 2001. See Note 9

157 Unless subject to an exemption, for advocates

mediation in the learning outcomes as part of this review, leading the way in changing the curriculum for the next generation of solicitors and advocates.

197. Interviewees for this report noted that even if a new lawyer had a full DR background, they may currently be faced with a culture that is not attuned to wider DR, and they may be able to do little about this themselves. This underlines the importance of changing the culture more widely, including among existing members of the profession and the judiciary. It will therefore be important that the relevant professional bodies work with solicitors and advocates who are already qualified, through avenues such as professional rules and guidance, and CPD requirements.

## Other Advisers

198. Many non-lawyer advisers provide legal advice and support to those with civil disputes. Various studies have found that the proportion of those with civil justice problems who seek help from other advisers such as those in citizens advice bureaux is similar, and sometimes higher, than the proportion who approach a solicitor. Which type of adviser they go to depends on various factors, including whether they see the problem as a 'legal' one, the type of problem and the cost involved. People are more likely to go to a non-lawyer adviser than a solicitor about benefits, debt, housing and employment problems, for example.<sup>158</sup> Given that civil legal aid is not available for representation in simple procedure cases with a value of £3000 or less,

it is also likely that those involved in such cases will not consult a solicitor, but may seek advice from another adviser, such as an in-court adviser.

199. Non-lawyer advisers therefore have just as critical a role as 'gatekeepers' to mediation as solicitors do. Recognising this, the Civil Justice Advisory Group recommended that there should be a requirement on all advisers within the advice sector to discuss the range of dispute resolution options with their clients to enable them to make informed decisions about which option to pursue.<sup>159</sup> It noted that one of the guiding principles of the CAB Service in Scotland is that clients have a right to decide, and that all options available to the client should be identified and presented fairly to the client so that they can make a decision without any pressure.<sup>160</sup> The recent Justice Committee report also recommended that bodies such as the Citizens Advice Service should be resourced to advise people on ADR.<sup>161</sup>
200. Given the crucial role of non-lawyer advisers, consideration should be given to how they might best be trained to ensure that they are aware of mediation and make their clients aware of this as a possible option for resolving their disputes.

## The Judiciary

201. Judicial buy-in is critical to the success of mediation, as has been noted in other jurisdictions.<sup>162</sup> There is evidence to suggest that where sheriffs have access to a court-based mediation service, they have a clear role in influencing parties to consider

158 For a discussion of the research evidence see O'Neill, S. (2018) [The Role of Citizens Advice Bureaux Within the Access to Justice Landscape in Scotland](#), pp10-11. Edinburgh: Citizens Advice Scotland

159 Consumer Focus Scotland, 2011. See Note 105

160 [Scottish Citizens Advice Bureau Values and Principles](#)

161 Scottish Parliament Justice Committee, 2018, at p25. See Note 94

162 Scottish Government, 2019b. See Note 3. At p32

mediation, and in raising its profile.<sup>163</sup> If the culture within the civil justice system is to change, all sheriffs, judges and tribunal members should receive appropriate training about mediation through the Judicial Institute. They should also receive training and clear guidance on the EDRO and its function.

**Recommendation 20:** Mediation must become a core part of education and training pathways for solicitors and advocates.

**Recommendation 21:** Consideration should be given to how non-lawyer advisers might best be trained in mediation.

**Recommendation 22:** Sheriffs, judges and tribunal members should be trained on the mediation process, and on the EDRO and its functions.

## Business and Public (and other) Bodies

202. The Civil Justice Advisory Group expressed concerns that some organisations, particularly those who are bulk users of the courts, may tend to use the court as a first, rather than last resort. It noted that encouraging such organisations to consider other dispute resolution options to resolve their disputes might require a significant change of culture among these organisations and their advisers.<sup>164</sup> The introduction of court rules on referral to mediation, together with training for solicitors and advocates, should help to achieve this change in culture. Commercial organisations, as likely 'repeat players' in the court process, may be better informed than individuals about their options and more

realistic about the possible outcomes. Unlike individual clients, however, it is possible that commercial clients hold the balance of power in their relationships with their lawyers rather than vice versa.<sup>165</sup> Therefore, their legal advisers may have less power and influence as gatekeepers to mediation than those who advise individual clients.

203. There is accordingly a need to target business directly, through sector-led initiatives to build awareness of mediation as a rational choice for dispute resolution. This would present mediation as a quick, effective and affordable approach to dispute resolution that helps to maintain relationships with other businesses, clients and consumers.
204. Similar sector-led initiatives should be aimed at public and other bodies, encouraging them to use mediation rather than defaulting to the courts. The Scottish Government should lead the way by making a commitment to include mediation, where appropriate, in dispute resolution clauses in its own contracts, including its procurement contracts, and in its commissioning of services. Other public bodies should follow its lead and do the same.

## Members of the Public

205. While encouraging the legal profession and other advisers to explain the availability of other dispute resolution options to their clients will in turn help to raise awareness among the public, therefore leading to the increased use of mediation. There is evidence that where people have been involved in mediation, they like it and feel that it is fair, and are more satisfied than those whose disputes were

163 See e.g. Blake Stevenson Ltd, (2016) - see Note 10; [Mediation Under Simple Procedure: One Year On](#); University of Strathclyde Mediation Clinic, 2018

164 Consumer Focus Scotland, 2011. See Note 105

165 Clark, B. and Dawson, C. (2007) 'Scottish Commercial Lawyers and ADR: Awareness, Attitudes and Experience', *Civil Justice Quarterly*, April 2007

- dealt with in the courts.<sup>166</sup> Those with civil disputes are often looking for outcomes that the courts cannot provide, such as an apology, an explanation or an assurance that the same thing will not happen to others.<sup>167</sup> Mediation will therefore very often be better able than the courts to provide the outcomes people are seeking.
206. Research into the former in-court mediation pilots in Glasgow and Aberdeen found low levels of awareness of mediation among court users however, noting that 'Parties who did not mediate who indicated why not most often said it was because they did not have information about it.'<sup>168</sup>
207. While there is no recent Scottish evidence of levels of public awareness of mediation, research carried out by the Scottish Consumer Council in 2005<sup>169</sup> found that only 57% of people in Scotland had heard of mediation. Two years later, the Scottish Government replicated that research<sup>170</sup>, finding that the proportion of those who had heard of mediation had fallen to 53%. Both studies found, however, that once mediation was explained to them, more than half of respondents said that they would consider using mediation if they had a dispute.
208. The Scottish Government should consider carrying out this research again prior to implementation of the measures proposed in this report. This would both confirm whether public awareness of mediation has increased since 2007 and provide a baseline against which the success of the proposals might be measured in the future.
209. To deliver on the community outcomes of the National Performance Framework and the Scottish Government's Justice Vision, citizens need to be aware of how they can resolve their disputes in a timely fashion. While there have been calls in the past for a public legal education campaign to be launched in Scotland,<sup>171</sup> more recent thinking is focused on the need to build consumers' 'legal capability'. Rather than educating people about their legal rights 'just in case' they might need to know them, this takes a 'just in time' approach, focusing on building their knowledge and skills, so that they are able to recognise problems when they arise and know what to do about them.<sup>172</sup>
210. Both the Civil Justice Advisory Group and Consumer Focus Scotland made a number of recommendations as to how this might be taken forward, including the development of an online self-help 'portal' which would direct people towards the various possible dispute resolution options for resolving their disputes. This report echoes this recommendation, and notes that the Scottish Government is currently working on developing such a portal through mygov.scot. The Group is aware that, in other jurisdictions, innovative means have been used to promote mediation, including TV and social media campaigns in Turkey.

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166 See e.g. Ross and Bain, 2010. See Note 19; Blake Stevenson, 2016. See Note 10; Eisenberg, D. (2016) What We Know (And Need to know) about Court Annexed mediation South Carolina Law Review Vol 67: Pp 245-265

167 Scottish Consumer Council, 1997. See Note 1

168 Ross and Bain, 2010. See Note 19

169 Scottish Consumer Council (2005) [Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland](#), Glasgow: Scottish Consumer Council;

170 Scottish Government (2007) [Public Awareness and Perceptions of Mediation in Scotland](#), Edinburgh: Scottish Government

171 O'Neill, 2001. See Note 9. Scottish Civil Courts Review, 2009. Vol 2: Chapter 11

172 Consumer Focus Scotland, 2012. See Note 1



**Recommendation 23:** Businesses and public bodies should be targeted directly through sector-led initiatives to build awareness of mediation as a rational choice for dispute resolution.

**Recommendation 24:** The Scottish Government should commit to include mediation in dispute resolution clauses in its own contracts where appropriate.

**Recommendation 25:** Other public bodies should follow the Scottish Government's lead by including mediation clauses in their own contracts.

**Recommendation 26:** The Scottish Government should consider carrying out research into public awareness of mediation prior to implementation of the measures proposed in this report.

**Recommendation 27:** Steps should be taken to increase awareness of mediation among members of the public, including the development of an online self-help 'portal' to direct people towards the possible options for resolving their disputes.

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# Annex 1 – Expert Group

Scottish Mediation is extremely grateful to the Expert Group who have overseen the development of the report. Through their deliberations they have made an immense contribution to the development of ideas and the recommendations made. Their contributions are made in a personal capacity.

## John Downie

At SCVO John is responsible for maximising the strategic role of SCVO and ensuring that the organisation, its members and the third sector are at the forefront of the debate on key issues affecting Scotland and the third sector.

A key element of his role is to provide strategic guidance to the SCVO's Board of Trustees on SCVO's public positioning, reputation management and forward policy agenda and increase SCVO's overall reach and influence

The role of Director of Public Affairs includes operational responsibility for: the Policy & Research Team, Communications Team, SCVO's New Service – Third Force News, Membership strategy & growth, Information Service, Events & Training department, and Funding Scotland.

John was previously chair and is a current Board member Impact Arts, one of Scotland leading social enterprises, which uses the arts to help people change people's lives – [www.impactarts.co.uk](http://www.impactarts.co.uk)

He is Alumni of Cranfield School of Management and a Common Purpose Graduate.

## Angela Grahame QC

Angela became an Advocate in 1995 and took silk in 2009. She was admitted to the Bar of England and Wales (Middle Temple) in 2019. She is a practising member of Compass Chambers in Edinburgh and retains a Door Tenancy in 3PB in London. She is a Fellow of the Chartered Institute of Arbitrators and is an Honorary Lecturer in International Arbitration in the University of Aberdeen.

She undertakes a wide range of civil litigation and arbitration. Recently, her principal areas of practice have been in cases relating to personal injury and clinical negligence, frequently in large value and complex claims. She has a specialism in high profile public inquiries. She was elected Vice Dean of the Scottish Bar in 2016 and remains in that role to date.

Angela has been instructed in cases at all levels, including the sheriff court, Court of Session (Inner & Outer House), Court of Criminal Appeal, High Court of Justiciary, United Kingdom, Judicial Committee of the Privy Council and in Public Inquiries and Arbitral Tribunals. Angela is also a serving Chair of the Police Appeals Tribunal, Scotland.

## Alison Grant

Alison had a commercial litigation background for 20 plus years but now specialises in professional indemnity and commercial insurance.

She is heavily involved in professional negligence and risk management work, particularly for solicitors. The Law Society of Scotland Master Policy recently re-appointed her as one of the select Panel of Solicitors to handle professional negligence cases.

This involves interface with the insurers and with insured firms, often in complicated circumstances where numerous issues of fact and law must be analysed and balanced. The renewed appointment has increased Alison's already high profile in the Scottish legal profession.

Alison is a regular speaker and chair of seminars on professional indemnity and risk management issues for the Law Society and others. She is also accredited with the Law Society of Scotland as a Commercial Mediator. Mediation has been a growing area of her practice and she has brought many disputes to a successful close through her mediation and negotiation skills.

Alison's commitment is always to resolve disputes quickly and fairly. Clients and fellow professionals recognise her "enthusiastic and client-focused" approach. She is a popular and well-known face in Scottish legal circles, having practised in both Glasgow and Edinburgh, as well as for a short period in Dumfries.

Alison also has a wealth of experience in defending solicitors and other professionals such as surveyors, accountants and a wide range of construction professionals including architects, engineers and D&B contractors

## Sarah O'Neill

Sarah O'Neill is an independent legal and consumer policy consultant. She is a non-practising solicitor, with more than 20 years' experience of working on consumer and access to justice issues. She was formerly Legal Officer at the Scottish Consumer Council and was Director of Policy at Consumer Focus Scotland from 2008-2012. She is a chairperson member of the First-tier Tribunal for Scotland (Housing and Property Chamber), and a former Lecturer in Dispute Resolution at Queen Margaret University. Sarah holds an MBA and is an accredited mediator. She is currently a member of the Scottish Legal Aid Board.

Sarah has written numerous policy and research reports in the areas of civil and administrative justice, consumer redress and alternative dispute resolution. She has represented the consumer interest on various high-level working groups, including the Scottish Tribunals and Administrative Justice Advisory Committee and the Expert Panel on Redress which advised the Working Group on Consumer and Competition Policy for Scotland. She also sat on the policy group established by Lord Gill to advise on his review of the civil courts and the reference group for Sheriff Principal Taylor's review of expenses and funding of civil litigation in Scotland. She was a member of the Sheriff Court Rules Council from 2005-11 and is a former member of the board of trustees of the Scottish Mediation Network.

## Lewis Shand Smith

Lewis Shand Smith was Chief Executive and Chief Ombudsman of Ombudsman Services, the Energy and Telecommunications ombudsman, from 2009 until 2018. He is President of NEON, the network of European energy ombudsman schemes and a past Chair of the Ombudsman Association.

He was Deputy Ombudsman and a member of the Executive Board at the Scottish Public Services Ombudsman (SPSO) from 2002 – 2007.

He is a priest in the Scottish Episcopal church and has served several congregations in Motherwell, Shetland and Dumfries. He was a Canon of St Andrew's Cathedral in Aberdeen. From 1990 to 1999 Lewis was a member of Shetland Islands Council, becoming Convener/Leader in 1994. He has served as a non-executive director or trustee with a number of companies and charities. He is a former Vice President of the Convention of Scottish Local Authorities, was a member of the Executive of the Scottish Constitutional Convention and represented the UK on the European Committee of the Regions.

## John Sturrock QC – Co Chair

As the founder and senior mediator of Core, John has pioneered mediation and high quality training in business, the professions and commerce across the UK and elsewhere. He is listed in Band 1 in the Best of the UK Mediators in Chambers Guide. As the leading commercial mediator in Scotland, and as a door tenant with Brick Court Chambers in London, John has been involved in hundreds of mediations covering a broad range of disputes in the public and private sectors in the UK, mainland Europe, Middle East and Africa.

John trained in negotiation at Harvard University and was named Specialist of the Year at the Scottish Legal Awards in 2003 and Mediator of the Year at the Law Awards of Scotland in 2009. He was awarded the Honorary Degree of Doctor of Laws from Edinburgh Napier University in 2010. He is an internationally recognised coach, facilitator and strategic adviser in the fields of negotiation, mediation and communication and has worked with business leaders and executives, senior civil servants, top athletes and parliamentarians and has been described as “one of the best teachers of mediation.” He became a Queen’s Counsel in 1999, is a Visiting Professor at Edinburgh University and, as the first Director of Training and Education in the Faculty of Advocates from 1994 to 2002, designed and led the Scottish Bar’s award-winning advocacy skills programme.

## Alun Thomas – Co Chair

Alun leads the top-rated employment department at Anderson Strathern heading the education group. Having worked extensively in the higher education sector, he is lead partner for a number of their higher education and public sector clients. As well as representing clients in the Employment Tribunal Alun is a practising mediator and is often asked to assist parties in conflict to reach mediated solutions to the issues they face.

Using the experience gained over 30 years as a solicitor (during the last 20 of which he has been accredited as a specialist in Employment Law) Alun creates positive and productive relationships with clients. He is especially aware of the challenges that public sector clients face and their need to manage organisations under intense public scrutiny whilst balancing reputational risk in a context of ever restricted public expenditure. Alun is able to address the issues that confront organisations dealing with change and believes in the importance of engaging and consulting collectively.

Alun is recognised as a leader in the field of employment law by the legal directories Chambers & Partners and the Legal 500. He is on the committee of the Scottish Discrimination Law Association, and is the Chair of the Scottish Mediation.

## The Hon Lady Wise (Morag Wise)

Lady Wise was appointed Judge of the Supreme Courts in February 2013.

Lady Wise is a graduate of the University of Aberdeen and of McGill University, Montreal. She qualified as a solicitor in 1989 and worked for Morton Fraser from 1989 to 1992, dealing in general civil litigation. She called to the bar in 1993, working in civil litigation and specialising in family law. In 2005 she became a QC. She was a member of the Disciplinary Tribunal of the Faculty of Advocates since 2005 and from 2008 acted as a Temporary Judge in the Court of Session. From 2013 Lady Wise has chaired the Access to Justice Committee of the Scottish Civil Justice Council and she was a Judge of the Employment Appeal Tribunal for three years to December 2018.

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## Annex 2 – Stakeholder Engagement

As part of the research for this report meetings were held with a number of people and organisations. They are listed below.

<b>Tim Edwards</b>	Dentons UK and Middle East LLP
<b>Alison Bean</b>	Policy Development Officer, Scottish Legal Aid Board
<b>Susanne Gibson</b>	Dispute Resolution Executive, Royal Institution of Chartered Surveyors
<b>Ysella Jago</b>	Dispute Resolution Executive, Royal Institution of Chartered Surveyors
<b>Louise Johnson</b>	National Worker – Legal Issues, Scottish Women’s Aid
<b>Roseanna MacDonald</b>	Scottish Women’s Aid
<b>Professor Bryan Clark</b>	Professor of Law and Civil Justice, Law School, University of Newcastle
<b>Hilary Wiggans MBE</b>	Regional in Court Adviser, Tayside courts.
<b>Heloise Murdoch</b>	Mediation Coordinator, Edinburgh Sheriff Court Mediation Service
<b>Rosanne Cubitt</b>	Head of Practice for Mediation, Relationships Scotland
<b>Craig Cathcart</b>	Senior Lecturer, Queen Margaret Business School
<b>Charlie Irvine</b>	Senior Teaching Fellow, Law School, University of Strathclyde
<b>Michael Stuart QC</b>	Faculty of Advocates
<b>Cat MacLean</b>	MBM Commercial
<b>Arlene McDaid</b>	Legal Hackers Scotland
<b>Nicos Scholarois</b>	CALM Scotland
<b>Sarah Allen</b>	Head of Tenant Farming / Land Rights & Responsibilities, Scottish Land Commission
<b>Pamela Lyall</b>	Mediator and Facilitator
<b>Sarah King</b>	School of Law, University of Dundee
<b>Simple Procedure Sheriffs</b>	Dundee Sheriff Court
<b>Edinburgh Sheriff Court Mediators</b>	Group meeting

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## Annex 3 – International Experts

The Expert Group were delighted to be able to call on the services of an esteemed group of international experts in order to provide insight into the experience of mediation in other jurisdictions. Those who contributed are listed below and are thanked sincerely for their contribution.

### Dr Felix Steffek

Felix Steffek is an academic at in the Faculty of Law at the University of Cambridge. In addition he holds the following visiting positions: Visiting Fellow, Max Planck Institute for Comparative and International Private Law (since 2015). Visiting Professor, Mykolas Romeris University (2017–2018). Research Associate and Max Planck Fellow, University of Oxford and St Catherine’s College (2014–2015). Faculty Visitor, University of Cambridge (2013). Academic Visitor, University of Oxford (2012). Visiting Fellow, Wolfson College (2012). Visiting Researcher, Harvard Law School (2008)

At the Faculty he lectures Commercial Law, Corporate Finance Law and Corporate Insolvency Law and serves as Deputy Director of the LLM programme from 2015 to 2017. In college he supervises Company Law and Commercial Law and serves as Graduate Law Mentor.

Further research interests include alternative dispute resolution, law and economics, comparison of laws and justice theory. He has acted as policy advisor and expert for the European Commission, the World Bank, national governments and parliaments. He took his education at Cambridge (LLM), Heidelberg (PhD, undergraduate) and Hamburg (Habilitation, court clerkship).

### Alan Stitt

Allan is the President and CEO of ADR Chambers, the largest, private alternative dispute resolution service provider in the world. ADR Chambers has administered over 55,000 mediations and arbitrations since 2012.

Allan is a mediator, arbitrator, negotiation consultant, facilitator, trainer, and ADR systems design specialist. Allan is both a Chartered Mediator (C.Med.) and a Chartered Arbitrator (C.Arb.). He has mediated two-party and multi-party disputes in numerous contexts, including commercial, employment, corporate governance, workplace, banking, personal injury, sports, entertainment and breach of contract. He has also arbitrated numerous commercial cases including cases for the National Transportation Agency and the Ontario Farm Products Marketing Board. His book on ADR systems design, *ADR For Organizations*, and *Mediating Commercial Disputes*, were both business books bestsellers. He also wrote *Mediation: A Practical Guide* and he is the Editor-in-Chief of the LexisNexis ADR Practice Manual.

He was an Adjunct Professor at the University of Toronto Law School between 1992 and 2018, and has been a Special Lecturer at the University of Windsor Faculty of Law, a Lecturer at the University of Notre Dame, the University of Lisbon (Portugal), and the University of the Philippines. He has taught ADR and Negotiation courses throughout North America, Europe, Asia, Africa and Australia with the Stitt Feld Handy Group, a division of ADR Chambers.

## Nancy Walsh

Nancy A. Welsh is Professor of Law and Director of the Dispute Resolution Program at Texas A&M University School of Law. In 2016-2017, she was Chair of the ABA Section of Dispute Resolution.

Professor Welsh is a leading scholar and teacher of dispute resolution and procedural law. She examines negotiation, mediation, arbitration, judicial settlement, and dispute resolution in U.S. and international contexts, focusing on self-determination, procedural justice, due process, and institutionalization dynamics. Professor Welsh has written more than 60 articles and chapters that have appeared in law reviews, professional publications and books and is co-author of *Dispute Resolution and Lawyers*, 5th ed. In 2006, she conducted research in the Netherlands as a Fulbright Scholar and taught at Tilburg University. In 2016, she was named a Visiting Scholar of the Program on Negotiation at Harvard Law School and a Visiting Fellow of the Institute for Advanced Study at Indiana University-Bloomington. Her article, *The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, was recognized as one of the three most-cited articles from the first ten years of the existence of the Harvard Negotiation Law Review. In 2018, the Texas Bar Foundation selected her article, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, for its Outstanding Law Journal Article Award.

## Sabine Walsh

Sabine Walsh is a former President of the Mediation Institute of Ireland and served during the period when the Irish Mediation Act was passed.

Sabine practised as a solicitor before qualifying as an accredited mediator. She is the Course Director of the Postgraduate Certificate in Mediation and Conflict Resolution and MA in Conflict Management in St. Angela's College Sligo (NUI), and also offers private training in mediation and conflict management in Ireland and Europe. She is a certified cross-border family mediator and member of the European Network of International Family Mediators. She also holds qualifications in Child-Inclusive Mediation, Online Mediation and Professional Practice Consultancy.

## Bill Wood

Bill Wood QC is one of the UK's leading commercial mediators.

Bill Wood was awarded Mediator of the Year 2018 and is ranked #1 Mediation Silk 2019 in WWL's UK Bar Guide. He is consistently ranked in the top tiers by Legal 500 and Chambers and Partners. He has been included in the Who's Who Legal top ten list of commercial mediators globally every year since the list was first published in 2011. His mediation practice now takes him to Dubai, Hong Kong, Singapore, France, Switzerland, Spain, South Africa, Kenya, Mexico and the US as well as to all parts of the UK and the Channel Islands.

Bill is the ADR representative on the Civil Justice Council and chairs its ADR Working Group.



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