

<b>Mediation in Scottish Civil Justice</b>
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<b>Progress Since Bringing into the Mainstream in Scottish Civil Justice was published in 2019</b>
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## 1. Background

Bringing Mediation into the Mainstream in Scottish Civil Justice was published in 2019. Publishing was the result of a six-month review into mediation in Scotland led by an Expert Group chaired by John Sturrock KC and Alun Thomas.

It contained 27 recommendations to address structural and cultural challenges that stood in the way of a wider use of mediation in the civil justice system. Those recommendations were grouped into six areas examining Implementation, Costs and Incentives, Quality Standards, Court Rules, Professional Receptiveness, Society Awareness.

One of the key calls was for a Mediation Act, when covid hit the possibility of achieving that reduced and the Scottish Government put their focus what could be achieved with the introduction of legislation.

## 2. Key Areas Assessed for Progress

### 2.1 Coordinating Uniform Implementation

Included in the recommendation to achieve this were, an element of compulsion to mediate, the setting up of an Early Dispute Resolution Office, and a presumption that cases would mediate. This would be supported by an online roster of mediators, access to legal information for parties and a data collection mechanism.

***In this area there has not been any significant progress compared to what had originally been envisaged.***

### 2.2 Proportionate Cost/Incentivising Mediation

Included in the recommendations were, the provision of low or free mediation for Simple Procedure cases, a suitable price point for ordinary actions, free provision in tribunals, that mediators are remunerated and an across Scotland provision

***There has been progress in this area with Mediation available for parties free of charge for Simple Procedure Cases across Scotland. Mediators carrying out these cases receive a flat fee of £100. With the final Sheriffdoms coming on stream in 2025 it is estimated there have been over 600 referrals with 350 mediations and a success rate of 70%.***

### 2.3 Clearer Signal of Quality Standards

Included in the recommendations were that mediators should have clear standards, with accompanying complaints and disciplinary systems. It also asked that Solicitors and Advocates advise clients on all dispute resolution options.

**Standards for mediators have been reviewed with new Practice Standards (2021), A new Code of Professional Conduct (2025) and a new Complaints Process all introduced. Further work is taking place around specific court mediation standards which are at draft stage. There has been no change in the rules governing Solicitor and Advocate duties to advise their clients around mediation.**

#### 2.4 Consistent Messaging in Rules

Included in the recommendations were for all court rules to include reference to mediation with a duty to encourage mediation unless good reason existed. It also called for a comprehensive Mediation Act which would set up a regulatory framework, grounds for special cause exemption, to formalise principle, provide definitions, endorse a code of practice and provide for confidentiality in mediation.

**Whilst the Simple Procedure Rules do provide for encouragement of mediation, the Ordinary Cause rules remain under review and there has not been significant change in the higher courts. As mentioned in the introduction a Mediation Act is not currently on the government agenda.**

#### 2.5 Changing Professional Receptiveness

Included in the recommendations were that mediation should become a core part of education for solicitors and advocates, that consideration be given into how non-lawyer advisors might best be trained in mediation and that Sheriffs judges and tribunal members be trained on the mediation process.

**There has been no change in the core path for solicitors and advocates, however mediation has become popular option in the Diploma in Legal Practice and at Undergraduate level some courses offer a mediation option. For judges and Sheriffs, the Judicial Institute has delivered courses on mediation.**

#### 2.6 Building Wider Awareness in Society

Included recommendations including sector wide initiatives to build awareness, Scottish Government and Public Bodies adopting dispute resolution clauses that include mediation, Scottish Government Research into mediation awareness and the development of a self-help portal for the public.

**There has been success in some sectors such as construction where groups like the Conflict Avoidance Coalition have promoted a wider approach to dispute resolution. Scottish Mediation have promoted mediation in Housing, Health, Outdoor Access and the Third Sector via seminars and tailored schemes. The Scottish Government whilst using mediation in many areas has not promoted mediation in contracts and no research has been undertaken.**

### 3. Commentary

It is hoped that the new ordinary cause rules will provide an opportunity for a wider take up of mediation. Mediation would be an attractive option for many of such cases given the economics involved and the proposed changes to allow for

#### Turning Disagreement into Opportunity



Sheriffs to ask the parties to consider mediation (and other forms of dispute resolution) would be a welcome addition. The need for some form of Early Dispute Resolution Office would help to provide consistency in how cases are dealt with and provide access to legal advice for unrepresented parties.

Other jurisdictions are beginning to show what's possible with a wider adoption of mediation and taking on the learning in Scotland would be very welcome. In order to achieve some of the wider objectives and injection of resources is required. There is no doubt it would pay for itself in the long run.

Ultimately however to achieve the sort of paradigm shift envisaged in Bringing Mediation into the Mainstream a Mediation Act is needed.

**Turning Disagreement into Opportunity**

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