



Scottish
Civil Justice
Council

**Access to Justice Literature Review: Alternative Dispute
Resolution in Scotland and other jurisdictions**

This report and the materials referred to are correct as at July 2014. The Access to Justice Committee continues to review research and developments in the area of access to justice and alternative dispute resolution methods.

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1. Introduction

1. The purpose of this review is to provide an outline of:

- what the different 'Alternative Dispute Resolution' (ADR) methods are;
- what the current context in Scotland is;
- the different approaches to ADR in other jurisdictions; and
- the approach of the EU

2. ADR is an umbrella term encompassing various techniques for resolving conflict outside of the court and can generally be classified into six types: negotiation, mediation, arbitration, conciliation, collaborative law and early neutral evaluation.¹ With the exception of arbitration, most forms of ADR are a type of facilitated settlement. The 'alternative' aspect is that, in theory, these types of facilitated settlement do not require any involvement of the legal system and so the approach to achieving settlement will not depend on reference to the legal rights or merits of the dispute.² The most critical feature of all forms of ADR is that they are conducted in private; in terms of both the process and outcome.

3. The following is a brief explanation of the different forms of ADR methods and the availability of literature and research in those areas.

Negotiation

4. Negotiation is generally the first action that people will take to resolve a dispute before seeking advice. It is an informal means of resolving a dispute, whereby the two parties involved communicate directly with each other to try and reach an agreement. A negotiation may be conducted with or without the assistance of a third party but will generally be an information process. At a later date if parties chose to progress to more formal means of resolving a dispute, representatives of the parties are likely to engage in some sort of negotiation before reaching court. Due to the generally informal nature of negotiation there is very little statistical information available on the effectiveness of negotiation.

¹Scottish Legal Aid Board, [*International Literature Review of Alternative Dispute Resolution*](#) (Making Justice Work Programme)(2014), provides a useful description and discussion of each of the six ADR methods as summarised in this paper.

² Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, p78.

Mediation

5. Mediation is the most commonly used, and researched, form of ADR. It is a voluntary process in which a neutral third party works to bring disputing parties to a consensual settlement. Mediators may meet with both parties together, separately, or act as a go-between. The mediator will normally have no authority to impose a solution on the parties. Mediation is distinguished from litigation processes on the basis that it focusses on problem solving as opposed to strict legal rights. Mediation is generally said to be capable of producing 'win/win' situations, rather than the 'win/lose' situations, as is characteristic of court adjudications.³

6. There have been a number of studies which state that mediation results in greater benefits compared to adversarial court processes, including faster settlement, lower costs, greater levels of satisfaction and improved compliance with settlement.⁴ Nevertheless, there are other writers who argue that the benefits are over-stated, on the basis that they have not been subject to rigorous empirical scrutiny.⁵ There are also commentators who argue that the effectiveness of mediation will depend on participants' attitudes towards mediation.⁶

7. However, Genn⁷ argues that the assumption that mediation (and by inference other forms of ADR) is an *alternative* to litigation and adjudication is deceptive, as, although the benefits of mediation are generally set in opposition to adjudication, the most common form of conclusion to litigation is in fact an out-of-court settlement. Genn notes that the literature available on mediation is characterised by divergence, and perhaps polarisation, of opinions as to its effectiveness.

Arbitration

8. Arbitration operates like a privatised court system. An expert on the area of law in question makes a judgement at the end of a hearing and the parties agree that by going into arbitration they will be bound by the expert's decision. One of the key features of arbitration

³ *Ibid.*

⁴ Salem, P., *The emergence of triage in family court services: The beginning of the end for mandatory mediation?* Family Court Review, 47 (3) 2009, pp 373-374, cited in Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014).

⁵ Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014), p17.

⁶ Stipanowich, T.J., *ADR and the "vanishing trial": The growth and impact of "Alternative Dispute Resolution*, Journal of Empirical Legal Studies (2004) vol 1 (3), p911, cited in Scottish Legal Aid Board, *international literature review of Alternative Dispute Resolution*, (2014).

⁷ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009) p78.

is that it is consensual and conciliatory, as parties can agree the process and terms. There appears to be scarce empirical studies and data on arbitration outside of the US.⁸

9. Scotland has a long history of arbitration which was eventually modernised by the Arbitration (Scotland) Act 2010. In order to reduce unnecessary court challenges after arbitration, the 2010 Act limits appeals to the Scottish Civil Courts (with no appeal to the UK Supreme Court).⁹

Conciliation

10. Conciliation is a process by which a conciliator attempts to assist parties to resolve a dispute by improving communications and providing technical assistance. The conciliator is generally more interventionist than a mediator. There appears to be no empirical studies and data on conciliation in the UK, however it is widely available to people in dispute over an employment matter. 'Early conciliation' is offered by ACAS to parties who are thinking about going to an Employment Tribunal as a way to try and resolve the dispute out with the tribunal process.¹⁰

Collaborative law

11. Collaborative law is predominately used in divorce cases. The two divorcing parties, along with their legal representation, will meet in a four-way conference and attempt to negotiate a fair settlement without accessing the court. What defines collaborative law is the principle of 'disqualification agreement' whereby from the outset both lawyers must agree to withdraw if their client fails to settle and instead proceed to court. This rule aims to give lawyers the freedom to focus on the interests of their clients and on settlement, rather than preparing for trial. It is thought to offer, in theory, the best of both the legal route and ADR as it combines both strong advocacy and collaborative negotiation.¹¹ Statistics and empirical research into the effects of collaborative law are scarce.¹²

12. The benefits of collaborative law are said to include: more open communication, more creative solutions, less competition, less polarisation of the parties, stronger post-divorce

⁸ Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014), p23.

⁹ Scottish Arbitration Centre, 'Advantages of Scottish Arbitration' <http://www.scottisharbitrationcentre.org/index.php/arbitration/arbitration-in-scotland> (accessed March 2014)

¹⁰ ACAS – the Advice Conciliation and Arbitration Service: <http://www.acas.org.uk/conciliation>

¹¹ Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014), p23.

¹² *Ibid.*

relationships and less negative impacts on children.¹³ It is also thought to compare favourably with mediation which some people argue may disadvantage women because they are usually in a weaker economic position than their spouse.¹⁴ However, there are commentators who discourage collaborative law divorces for couples with a history of domestic violence or abuse.¹⁵ Other commentators that raise concerns argue that it may not be compatible with the lawyer's duty of loyalty to, and zealous representation of his or her client.¹⁶ There is also the criticism that a disqualification agreement may incur more cost to the parties if they fail to settle than if they had just gone straight to court as they will be forced to hire new counsel to proceed to court.¹⁷

Early neutral evaluation

13. Early neutral evaluation (ENE) can be described as a mixture of mediation and nonbinding arbitration. It is a nonbinding form of ADR in which a neutral third party provides the disputing parties with a confidential opinion on: the strengths and weaknesses of each side of the argument, the likely outcome of the case and the awards likely to be granted if it were to proceed to court or tribunal.¹⁸ The third party will normally be a lawyer with expertise in the substantive legal area of the dispute. ENE is generally promoted as being less costly than going to trial. However, settlement is not the primary goal of ENE although but may lead to it. Empirical assessment of ENE as to its value in reducing time and the satisfaction of users is sparse.¹⁹

1.1 Benefits and Criticisms of ADR

14. There is a variety of literature which either favours ADR methods over court adjudication or else warns of the potential adverse outcomes of using these methods.

15. Genn²⁰ provides a good overview of the main arguments, explaining first that there is a body of literature propagated by those who are strong advocates of judicial determination

¹³ *Ibid*, p29.

¹⁴ *Ibid*.

¹⁵ *Ibid*, p30.

¹⁶ *Ibid*.

¹⁷ Schwab W.H, *Collaborative lawyering: A closer look at an emerging practice* (2004) Pepperdine Dispute Resolution Law, Journal, vol. 4(3), cited in Scottish Government, *International Literature Review of Alternative Dispute Resolution* (2014).

¹⁸ Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014).

¹⁹ *Ibid*.

²⁰ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009)

(‘adjudication romantics’).²¹ It is explained that these writers draw attention to adjudication as a critical social practice that resolves disputes, defines and refines the law, reinforces important public values and is itself a defining democratic ritual that works the law ‘pure’.²² It has been commented that a crucial feature of adjudication is its public nature: that it is itself a democratic practice which momentarily equalises the power between individuals and between the individual and the State.²³ In addition, advocates of adjudication processes do not see resort to the courts as necessarily being negative.²⁴

16. Genn summarises the work of Baruch Bush and Folger,²⁵ which cuts across the polarised views of mediation to describe four main schools of thought about mediation and its goals. It is argued that an appreciation of the divergent views in the literature is necessary in order to understand both the philosophy of mediation and also some of the concerns about it as a substitute for judicial determination. Although focussed on mediation, it can be said that these four schools of thought, described as ‘stories’ by the writers, may theoretically be applied to the all other forms of non-adjudicative ADR.

17. The first is the ‘satisfaction’ story. This account of mediation suggests that it is a powerful tool for “satisfying human needs and reducing suffering for parties to individual

²¹ With Judith Resnik, Marc Galanter and David Luban being the cited examples as the most prominent and compelling. Genn refers in particular to Hensler, D.R., *Suppose it’s not true: challenging mediation ideology*, Journal of Dispute Resolution (2002) pp81-100.

²² Luban, D., *Settlements and the erosion of the public realm*, Georgetown Law Journal (1995) 83: “instead of treating adjudication as a social service that the state provides disputing parties to keep the peace, the public life conception treats disputing parties as... an occasion for the law to work itself pure... the litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law. Using litigants as stimuli for refining the law is a legitimate public interest in the literal sense... The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait”, p. 2638, cited in Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009).

²³ Resnik, J., *Courts: in and out of sight, site and cite* Villanova Law Review, 53 (2008), cited in Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009).

²⁴ Ackerman, R.M., *Vanishing trial, vanishing community? The potential effect of the vanishing trial on America’s social capital*, Journal of Dispute Resolution, 7 (2006), cited in Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009)

²⁵ Baruch Bush, R.A., and Folger, J.P., *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005), pp. 9-19, cited in Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009).

disputes”.²⁶ Therefore, the essential characteristics of consensuality, flexibility and informality mean that mediation can expose all of the pieces of the problem facing the parties. In this account, mediation will facilitate “collaborative, integrative problem solving, rather than adversarial bargaining”.²⁷ Thus, it may produce creative win/win solutions which go beyond the formal rights in order to solve problems which satisfy parties’ needs or remedy a party’s difficulties. Finally, in contrast with formal adversarial processes, mediation is characterised by informality that may reduce economic and emotional costs of dispute settlement which is thought to produce private savings to the parties as well as public expense. Moreover, it can free up the courts for other disputes, reduced delay and increase access to justice. In summary, in this account mediation is “quick, cheap, less stressful, more creative and capable of offering the possibility of reconciliation”.²⁸ However, Genn explains that in forming these benefits the comparison is always adjudication, which is “always set up as damaging and negative” and that there is “no possibility of empowerment or self-realisation by securing judicial determination of rights”.²⁹ Baruch Bush and Folger note that while this story of mediation is told by those practicing mediation, it has also been endorsed by influential academics, judges and other judicial opinion makers, some of whom are also mediators.³⁰

18. The second story, or school of thought about mediation, as summarised by Baruch Bush and Folger is the ‘transformation’ story, which describes mediation as having the unique capacity to “transform the quality of the conflict interaction itself, so that conflicts can actually strengthen both the parties and society” of which they are part.³¹ The perceived characteristics of informality, flexibility and consensuality of mediation are thought to permit parties to define their disputes and goals in their own terms, assisting them to use their personal resources to tackle their problems and achieve their goals. Therefore, this helps people to gain a greater sense of self-respect, self-reliance and self-confidence.³² This is the ‘empowerment’ dimension of the mediation process. Furthermore, it is thought that

²⁶Baruch Bush, R.A., and Folger, J.P., *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005), pp. 9-19, cited in Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009).

²⁷ Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009), p.87.

²⁸ *Ibid*, p88.

²⁹ *Ibid*, p88.

³⁰ Baruch Bush, R.A., and Folger, J.P., *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005), p11, cited in Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009).

³¹ *Ibid*.

³² *Ibid*, p13.

because mediation is non-judgemental it allows people to explain themselves to one another, offering a more 'humanising' process.

19. The third school of thought is the 'social justice' story, which asserts that mediation also "offers an effective means of organising individuals around common interests and thereby building stronger community ties and structures."³³ In this way, those that are initially in dispute and see themselves as adversaries can be assisted to appreciate the bigger picture in order to see that they may have a common goal/enemy. Those who are of this school of thought are, generally, thought to be scholars and commentators involved in grassroots community organisations.³⁴

20. The last school of thought is not as positive with regard to the effects or potential of mediation and Baruch Bush and Folger call this the 'oppression story'. According to this analysis, mediation has turned out to be 'dangerous' as it increases the power of the strong over the weak. Genn explains that:

*"Precisely because it is an informal and consensual process it can be used as an inexpensive and expedient adjunct to formal legal processes seeming to increase access to justice, whereas in fact it can magnify power imbalances and open the door to coercion and manipulation by the stronger party."*³⁵

21. Furthermore, it is argued that the neutral nature of mediation removes any responsibility on the mediator to prevent this power imbalance. Thus, mediation outcomes are unjust and in favour of the stronger party.³⁶ Particularly, the 'dangers' of mediation are said to be exposed in the field of family mediation, in the dangers presented for women.³⁷ Mediation in actions for divorce is said to remove the safeguards that women would have the benefit of in having representation in a court environment.

22. Genn explains that both the benefits and potential 'dangers' of mediation reflect the diversity of conflicts which would require resolution or determination, but also the different

³³ *Ibid.*

³⁴ *Ibid.*, pp.12-13.

³⁵ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009), pp. 90.

³⁶ E.g. Abel, R.L., *The contradictions of informal justice* in R.L. Abel (ed), *The Politics of Informal justice*, Vol. 1: The American Experience (Academic Press, 1982), cited in Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009).

³⁷ Grillo, T., *The mediation alternative: process dangers for women* Yale Law Journal, 100:6 (1001), cited in Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009).

approaches and goals of mediation. This underlines the difficulty in generalising about the relevance, application and possible benefits of mediation, and by inference other forms of non-adjudicative ADR. For example, what might be sought in a family mediation (e.g access to a child) would be different from what might be sought in a dispute between a house owner and a builder (e.g economic compensation), where there is no desire to continue a relationship.³⁸

1.1.1 ADR and Access to Justice

23. Genn goes on to analyse the contribution which mediation makes to access to justice, given that many of the reforms to civil justice which have been implemented in other jurisdictions argue that diverting legal disputes away from the courts and into mediation is a strategy which will increase access to justice.

24. First, the concept of access to justice is explored and it is explained that although it has been said that the term defies definition, at its most basic it is about *“access to procedures for making rights effective through state-sponsored public and fair dispute resolution processes. It implies equal access to authoritative enforceable rulings and outcomes that reflect the merits of the case in light of relevant legal principles.”*³⁹

25. However, it is explained that most of the interest in ADR in jurisdictions around the world has grown out of a failure of the civil courts to provide access to fair procedures. This is because in many parts of the world the criminal and civil courts are overloaded, legal costs are high and disproportionate, enforcement can be difficult and in many jurisdictions there is little or no public funding for legal aid. Thus, ADR can be a means for citizens to side-step the legal systems in which they have no confidence. Moreover, it is asserted that the promotion of ADR could be interpreted as less about the positive qualities of mediation and more about diverting cases to mediation as an easier and cheaper option than attempting to fix or invest in the current legal system. Thus, policy-makers may be interested in promoting ADR in order to clear court lists, reduce the legal aid bill, reduce enforcement problems or reduce court expenditure on personnel.⁴⁰

26. It is concluded that although mediation may be about problem-solving, compromise, transformation and recognition, it does not contribute to access to the courts as it is by

³⁸ See Hensler, D.R., *Suppose it's not true: challenging mediation ideology*, Journal of Dispute Resolution (2002) pp81-100, cited in Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009).

³⁹ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009)

⁴⁰ *Ibid*, p116.

nature not court-based. Further, it does not contribute to 'substantive justice' as mediation requires the parties to no longer focus on or assert their legal rights. Instead, mediation is about searching for a solution to a problem. The mediator does not make a judgement about the quality of the final settlement. Thus, "the outcome of mediation is not about *just* settlement, it is *just about settlement*."⁴¹

27. It is noted that there is in fact 'justice-in-mediation' literature, but that it is evident that the concept of justice is quite different from justice in adjudication.⁴² Genn explains:

"We should not, therefore, be measuring the outcome of mediation in terms of access to justice or what the parties might have achieved via a well-functioning justice system. We should simply be measuring the outcome of mediation against doing nothing... It would offer an access to justice benefit only for those who are currently taking no steps to achieve a resolution of their dispute... What mediation is offering is simply the opportunity to discount their claim in order to be spared the presumed misery and uncertainty of the adjudication process."

28. Although Genn suggests that ADR has no direct contribution to make to access to justice, she does believe that it is an important supplement to the courts, as, in a complex developed society it is reasonable that there should be more than one way of resolving disputes. She goes on to say that the public and the legal profession should be properly educated about the potential of mediation from the earliest possible moment and that mediation facilities should be made easily available to those contemplating litigation. However, three concerns are noted. First, mediation is said to be most appropriate and successful when the parties enter the process voluntarily. Second, that ADR cannot supplant the machinery of civil justice because, in civil cases, the background threat of litigation is necessary to prompt people to negotiate. Finally, it is stated that the case for mediation has generally been made not so much on the strength of its benefits, but by contrasting it with adjudication.⁴³

29. Genn believes that any policy taken on mediation requires more in the way of principled justification, and so poses the following questions: who needs mediation and for

⁴¹ *Ibid*, pp117.

⁴² Hyman, J.M, and Love, L.P., *If Portia were a mediator: an inquiry into justice in mediation*, Clinical Law Review, 9 (2002), and Nolan-Haley, J.M., *Court mediation and the search for justice through law*, Washington University Law Quarterly (1996), cited in Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009).

⁴³ Although, Genn does point to 'elegant advocates' who do provide more sophisticated accounts of the purpose and value of mediation (Menkel-Meadow, C., *The many ways of mediation: the transformation of tradition, ideologies, paradigms and practices*, Negotiation Journal (1995), 7).

what? Is it to reduce expenditure on courts? Is it to provide more access to justice? Is it simply access to a quicker settlement? Or, is it about encouraging harmony and moral growth? Moreover, it is stated that there are questions to be addressed about the quality of mediator and facilitators in other ADR process, which are generally unregulated.

30. Although the focus of Genn's paper is mediation, these questions appear sensible when formulating a policy on the use of ADR more generally within the context of the Scottish Courts.

1.2 'Appropriate' Dispute Resolution

31. In light of Genn's observations about the nature of ADR methods, it may be considered more fitting for the term ADR to refer to "Appropriate Dispute Resolution." The report of the Scottish Consumer Council⁴⁴ recognised that there has indeed been an increasing trend towards defining ADR as 'appropriate' rather than 'alternative' dispute resolution and with non-court based means of resolving disputes being viewed in terms of whether they are the most appropriate method of resolution for a particular dispute.

32. It will be a matter for the Scottish Civil Justice Council, as advised by the Access to Justice Committee, to consider and provide when and in what cases ADR methods might appropriately be promoted within the context of the civil justice system.⁴⁵

⁴⁴ Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001)

⁴⁵ s.3(d) of the [Scottish Civil Justice Council and Criminal Legal Assistance Act 2013](#), which states "methods of resolving disputes which do not involve the courts should, where appropriate, be promoted"

2. The current context in Scotland

2.1 Government Initiatives

2.1.1 Making Justice Work

33. The Scottish Government's *Making Justice Work* (MJW) programme states its aim is to bring together a range of reforms to the structures and processes of the courts, access to justice and tribunals and administrative justice.⁴⁶ MJW project 3 focusses on "enabling access to justice" in order to develop mechanisms which will support and empower citizens to avoid or resolve informally disputes and problems where possible, and to ensure that they have access to appropriate and proportionate advice, and to a full range of methods of dispute resolution, including court and tribunals where necessary, and appropriate alternatives.

34. MJW project 3 is being led by the Scottish Legal Aid Board (SLAB), which has set up various sub-projects as follows, one of which focusses on ADR:

MJW 3.1	Strategic planning and co-ordination of publicly funded legal assistance (PFLA)
MJW 3.2	Legal Capability
MJW 3.3	Review of costs and funding of litigation
MJW 3.4	Development of Alternative Dispute Resolution
MJW 3.5	Family Justice – cross cutting work

35. In pursuit of its ADR objectives SLAB has, in partnership with the Scottish Government, produced two reports. The first is an international literature review of ADR methods (focussing on family law).⁴⁷ The second is an overview of ADR operating in Scotland.⁴⁸ Within this context, SLAB plans to undertake research into court-based ADR and related advice services, along with other further work to understand publicly funded family mediation in Scotland.

⁴⁶ <http://www.scotland.gov.uk/Topics/Justice/legal/mjw>

⁴⁷ Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014)

⁴⁸ Scottish Legal Aid Board, *Overview report of Alternative Dispute Resolution in Scotland*, (Making Justice Work)(2014)

2.1.2 The Scottish Civil Courts Review

36. The report of the Scottish Civil Courts Review (SCCR),⁴⁹ which reported in 2009, gave particular consideration to the role of mediation and other methods of dispute resolution in the court process.⁵⁰ The SCCR stated agreement with the terms of Genn's report⁵¹ as detailed earlier, and went on to acknowledge the value of the role of ADR in certain types of dispute choosing to favour the idea that the court should draw the possibility of ADR to the attention of litigants; although, it was not considered that ADR should be compulsory.

37. The SCCR gave consideration to academic research into the use of mediation which had been carried out in Scotland, England and Wales, and other jurisdictions, which had mainly been based on studies of pilot mediation projects. The SCCR also explored the use of ADR in other jurisdictions (including England and Wales, Germany, Spain, France, the Netherlands, Jersey, Ireland, Australia, New Zealand, Canada and the USA) which will be discussed further on in this paper.

38. In line with Genn's⁵² views, the SCCR considered it right that the courts should ensure that litigants and potential litigants are fully informed about the various ADR options which are available to them. The SCCR embraced the principles that: the civil justice system should encourage early resolution of disputes; cases should be dealt with proportionately; and efficient use should be made of resources. In line with those principles, it was recommended that ADR should be encouraged in any type of case, and at any stage of a case, but only where that would be appropriate. The specific SCCR recommendations are as follows:

- Advisers and agencies that provide first line advice should be aware of all the dispute resolution options that are available. That requires suitable training. (Recommendation 97)
- The Scottish Court Service (SCS) website should contain explanatory material on ADR and links to sources of further information about ADR. (Recommendation 98)

⁴⁹ Report of the Scottish Civil Courts Review (2009) (SCCR)

⁵⁰ *Ibid*, Ch.1, para. 1

⁵¹ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009)

⁵² *Ibid*.

- The SCCR proposals in relation to pre-action protocols and active judicial case management provide the opportunity for the court to encourage parties to consider alternatives to litigation. (Recommendation 99)
- There should be no specific provision in court rules for sanction in expenses where a party has refused to engage in ADR. Parties should not have to justify to the court why they did not engage in ADR, or, if they did, why it did not result in settlement.
- As a general rule, parties should bear their own expenses for mediation (unless agreed otherwise) and should not normally be part of an award of expenses by the court. (Recommendation 100)
- The Scottish Government should consider establishing a free mediation service for claims which could be dealt with under the new simplified procedure and a mediation telephone helpline. (Recommendation 101)

39. The Scottish Government did not make any specific initial response to these recommendations in its response to the SCCR.⁵³ Instead, the proposals for ADR were to be considered by the Civil Justice Advisory Group (CJAG), led by Lord Coulsfield.⁵⁴ A summary of the relevant CJAG recommendations are as follows:

- Court rules should be introduced which would encourage, but not compel, parties to seek to resolve their dispute by mediation or another form of alternative dispute resolution, prior to raising a court action.
- A mediation scheme should be available which could be accessed before a court action is raised, as well as being available to the court.
- A system-wide user-focused approach should be taken to future civil justice reforms, looking beyond the courts to the wider civil justice system.

⁵³ Scottish Government, [*Response to the Report and Recommendations of the Scottish Civil Courts Review*](#), (2010)

⁵⁴ Civil Justice Advisory Group, [*Ensuring effective access to appropriate and affordable dispute resolution*](#), (2011)

- The civil justice system should be designed to permit a ‘triage’ approach to help inform and guide individuals in identifying the most appropriate route to resolving their problem.
- An online system should be created to provide information on rights, responsibilities, sources of self-help and advice and options for dispute resolution.

Information provision

40. The SCCR pointed to the England and Wales Court Service website which has a sizeable section on the subject of ADR and provides further links to information. It is noted that in comparison, the Scottish Court Service (SCS) website mainly contains information directly related to the courts. The available guidance for small claims and summary cause actions contain few suggestions about sources of advice, provides two examples of the kinds of letters which might be written before the action is raised, but does not mention ADR.

41. It is understood that the Scottish Government is giving consideration to the matter of information provision for ADR as part of its work under *Making Justice Work* project 3 and the Justice Digital Strategy.

Case management procedures

42. It is noted that the proposals for pre-action protocols and judicial case management offer the opportunity for the court to encourage parties to consider alternatives to litigation and that guidance could be made available to judges and sheriffs to facilitate this. Although, it was emphasised that parties should not have to make averments in their pleadings about what steps, if any, have been taken to resolve their dispute before coming to court.

43. The position in England and Wales was referred to, where the conduct of parties in relation to mediation has been found to be relevant to the awarding of costs.⁵⁵ The SCCR did not agree with this approach and did not consider it necessary to make specific provision in court rules for sanctions in expenses where a party has refused ADR, or that a party should have to justify to the court the reasons why they did not engage in ADR, or, if they did, why it did not result in settlement. However, it is noted that there may be exceptional cases where a party’s refusal to consider ADR has been ‘wholly unreasonable’

⁵⁵ See *Hurst v Leeming* [2001] EWHC 1051; *Dunnett v Railtrack plc* [2002] 1 WLR 2434; *Hasley v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. These cases were explored in Annex C to Chapter 7 of the SCCR.

and that in such instances the court's general discretion at common law in the awarding of expenses would be a sufficient safeguard.

Development of resources to support diversion or referral

44. It was recognised that action by the court to raise awareness of the various ADR options available must be supported by mechanisms to enable litigants, or their advisers, to find a provider of the type of ADR service that they would wish to use, and would be appropriate in the circumstances.

45. On that point, the SCCR recommended that the Scottish Government consider providing a service similar to that developed by the Ministry of Justice for its Mediation Small Claims Service which it described (included at Annex A), for claims for £5,000 or less. It is explained that in the Ministry of Justice model mediators are employed by the Ministry, but that the model in Scotland could take a variety of forms, including over the telephone in more rural areas.

46. The SCCR also recommended that the Scottish Government consider establishing an information service by telephone help-line which would be similar to the National Mediation Helpline set up by the Ministry of Justice in England and Wales.

47. In regard to the proposed simplified procedure, the SCCR stated that it is these types of cases which appear to be the most appropriate to be dealt with by a court-linked scheme and noted that take-up of mediation in such cases would be poor unless provided for free. Moreover, that it would be important to ensure that parties to lower value claims have access to independent advice about their rights so that they can make a properly informed choice.

2.1.3 Courts Reform (Scotland) Bill

48. The Courts Reform (Sc) Bill ("the Bill") makes provision to implement many of the SCCR recommendations. Although, use of ADR is not explicitly provided for as it was not considered that primary legislation would be necessary. The Bill contains provision to enable the Court of Session to consider and make rules which will encourage the use of ADR methods in circumstances where it is felt that settlement might be achieved quicker than by court process.⁵⁶ The Bill also makes provision for rules on the proposed simple procedure, stating that the rules making power of the Court of Session is to be "exercised so far as possible with a view to ensuring that the sheriff before whom a simple procedure cases is

⁵⁶ Sections 96 and 97 (as at Stage 2)

conducted... may facilitate negotiation between or among the parties with a view to securing a settlement.”⁵⁷

49. The SCJC in its written evidence to the Justice Committee on the Bill provisions, stated:

*“The SCJC considers it essential that management of litigation transfers to the courts, and that judges and the judicial system take a proactive stance in managing the progression of cases through the courts. It considers that sections 96 and 97 will enable this. In particular, new section 5(2)(b) of the 1988 Act and section 97(2)(b), (which will enable the Court to make rules encouraging settlement of disputes and the use of alternative methods of dispute resolution, and in relation to pre-litigation behaviour by parties) will support implementation of civil courts reform. Under those provisions, pre-action protocols, for example, could be made compulsory – a matter which is currently being considered by the SCJC’s Personal Injury Committee.”*⁵⁸

2.2 Consideration by the previous rules councils

50. Prior to the SCCR, the Sheriff Court Rules Council (SCRC) and Court of Session Rules Council (CSRC) considered whether the Rules of Court relating to ADR as they were at that time (generally applied only to family and commercial cases, as will be discussed later in this paper) should be extended to other types of cases.

51. To aid its consideration, the SCRC set up a working party called the ‘Mediation Committee’ to consider new rules to encourage the use of ADR.

52. The Mediation Committee was set up in June 2003 and reported in December 2005. Thereafter, a consultation exercise⁵⁹ took place. As noted in the Chairman’s Foreword, the Committee came to the view that in Scotland some greater recognition was required in the sheriff court rules of the role which mediation and other forms of dispute resolution may play in resolving disputes, but that compulsion to mediate was not appropriate in the Scottish context.

53. The Committee’s recommendations were considered by the SCRC, which agreed with some, but not all, of the recommendations. Draft rules were subsequently prepared and considered by both Rules Councils. The SCRC’s considerations were summarised as follows:

⁵⁷ Section 72 (as at Stage 2)

⁵⁸ Scottish Civil Justice Council. [Written Submission to the Justice Committee](#), (2014)

⁵⁹ Sheriff Court Rules Council, [Consultation on the Sheriff Court and Alternative Dispute Resolution](#), (2006)

- Agreed in principle that there should be a provision in the sheriff court rules relating to ADR
- Agreed that the provision would only go as far as allowing the court to encourage and not compel parties to resort to ADR
- Agreed it would apply to all types of action with the exception of commercial actions as governed by Chapter 40 of the Ordinary Cause Rules 1993 and Personal Injury actions governed by new personal injury rules in the Ordinary Cause Rules. The reason the Council decided to exclude commercial actions were essentially (a) that there is already in rule 40.12(3)(m) of the 1993 rules a provision for mediation and (b) that, notwithstanding this, no designated commercial sheriff in Glasgow has ever referred a commercial action to mediation. As for personal injuries actions, the reason for exclusion was that the weight of the responses to the ADR consultation was to the effect that the proposed new Chapter 9A should not apply in these actions
- Against the recommendation of the Committee for having a specific rule requiring the inclusion of averments in the initial writ stating what steps had been taken by parties prior to the raising of the action in resolving the issue by ADR and thus avoiding the need for litigation. The Council was of the view that such a rule was unnecessary and may imply that ADR was compulsory and so act as a barrier to litigation
- Against parties having to give reasons for consenting or not to ADR. This was on the basis that ADR was not compulsory and there may very well be good reason why a party may not wish to make public why they did or did not consent to ADR
- Against a specific rule relating to expenses which would allow the court to take into account any unreasonable conduct of any party in relation to ADR. The Council considered that to do so would (a) have the effect of making ADR appear compulsory rather than voluntary and (b) penalise a party for not actively participating in what is viewed as a voluntary procedure. It was considered in any event that the sheriff generally had an inherent power to award/modify expenses in an action with regard to the conduct of parties.

54. The SCRC prepared draft rules designed to encourage, but not compel, parties to consider ADR. The draft rules provided for the introduction of a non-mandatory ADR order into all actions, at any stage, except in personal injury actions and commercial actions proceeding under Chapter 40 of the Ordinary Cause Rules.

55. The CSRC also gave consideration to the Mediation Committee's work and recommended that:

- the Court of Session Rules should provide for specific recognition of the role of ADR in all types of disputes;
- the court should be able to invite parties to consider the possibility of using ADR at any stage of a dispute, including appeals;
- parties should be required to set out in their initial pleadings what steps, if any, they had taken to attempt to resolve the dispute by ADR;
- if no such steps had been taken why; and
- that the court should have express power to make awards in expenses against a party who has acted unreasonably in refusing to attempt ADR or delaying delayed unreasonably in doing so.⁶⁰

56. The SCRC proposals differed from those of the CSRC in that they did not require the parties to make averments about ADR or propose that the court should take into account a failure to utilise ADR in making an award of expenses.

57. The matter was initially deferred pending the report of the SCCR and then latterly until such time as all the SCCR recommendations had been fully considered. The position of the SCCR was explicitly in favour of the approach taken by the SCRC.⁶¹

2.3 Information currently available to members of the public

58. There are a number of organisations which currently aim to provide the public with information about ADR.

59. First, the Scottish Government has produced a booklet called *Resolving Disputes Without Going to Court*, which provides information on different types of ADR, how they work and where to find further information.⁶²

60. Citizens Advice Scotland's (CAS) online Advice Guide provides information on ADR in Scotland, although with a focus on consumer disputes. The Advice Guide provides an ADR fact sheet⁶³ covering the advantages of using ADR methods and providing advice on things

⁶⁰ SCCR, Chapter 7, para, 15.

⁶¹ *Ibid*, para 15.

⁶² Scottish Government, [*Resolving Disputes Without Going to Court*](#), (2004)

⁶³ Citizens Advice Scotland, [Consumer fact sheets](#), *Alternative Dispute Resolution*

to think about when considering ADR (such as the costs involved, particularly if the claim could be litigated in the small claims court). The types of ADR mentioned are: conciliation, arbitration and mediation, along with ombudsman schemes. The different ADR methods are summarised and explained and the factsheet provides details on three service providers. A further factsheet on 'starting court action' provides advice on pursuing a claim in court, advising, for example, that the court will expect the pursuer to have made a genuine effort to come to a reasonable effort in order to avoid the need to go to court.⁶⁴ The Advice Guide also has a page dedicated to "Using Alternative Dispute Resolution to solve your consumer problem."⁶⁵

61. Shelter Scotland provides similar advice on its website, including information on the types of disputes that ADR could be used for to resolve (such as neighbour disputes).⁶⁶ The Scottish Mediation Network website includes a 'library' of information for the public (although, this information is restricted to mediation).⁶⁷ The Scottish Arbitration Centre website gives a good overview of how arbitration operates in Scotland, including the benefits of arbitration, although does not go as far as the Scottish Mediation Network in providing a library of information.⁶⁸

⁶⁴ *Ibid*, *Starting Court Action*

⁶⁵ http://www.adviceguide.org.uk/scotland/consumer_s/consumer_taking_action_e/consumer_legal_actions_e/settling_out_of_court_s/using_alternative_dispute_resolution_to_solve_your_consumer_problem_s.htm

⁶⁶ http://scotland.shelter.org.uk/get_advice/advice_topics/complaints_and_court_action/alternatives_to_court_action/alternative_dispute_resolution

⁶⁷ <http://www.scottishmediation.org.uk/library/resources-for-the-public/>

⁶⁸ <http://www.scottisharbitrationcentre.org/>

3. An overview of ADR currently operating in Scotland

3.1 SLAB Scoping Study

62. SLAB recently produced a report under the auspices of MJW 3, providing an informative overview of ADR currently operating in Scotland.⁶⁹ Policy issues around ADR were also discussed in the report.

63. The authors explain that research in this area is difficult as not all providers of ADR keep records, or are willing to share this type of information, as these methods are usually private. Overall, it was concluded that in some areas (most notably consumer and employment) ADR is well-known, well-used and appears to be on the increase. In other areas, however, (such as Additional Support Needs, or resolving workplace disputes in the NHS) the availability of ADR does not appear to have been matched in uptake by the people whom it has been designed to assist. Specifically in regard to mediation, the authors state that the availability of organisations and individuals with the necessary skills do not appear to have been matched by a demand for their services.

64. The report does not draw any conclusions on the use of arbitration, as statistics were unavailable. It was considered that given the lack of data on the uptake of ADR across all dispute areas and ADR processes, it is impossible to draw any firm conclusions, except to say that the availability of an ADR process will not automatically lead people to use it.

65. Reasons why uptake of ADR can be lower than expected are listed by the authors, with references provided to various studies and articles, as follows:

- Lack of publicity about the availability of ADR as an option
- Unwillingness by solicitors to inform clients about it as an option
- Lack of knowledge amongst solicitors about its value
- Lack of understanding amongst the public about its role and the potential value
- Preference for formal tribunals' courts or other means of resolving disputes, such as informal negotiation, over formal ADR processes
- Lack of support from court service, Scottish Government and other agencies for ADR

⁶⁹ Scottish Legal Aid Board, *Overview report of Alternative Dispute Resolution in Scotland, (Making Justice Work)*(2014)

66. The report states that there are three policy interests in ADR in Scotland, including within Scottish Government directorates, departments and other public bodies who fund or promote ADR as a means of improving outcomes for those groups/issues that come within their remit. The report emphasises the prevalence of mediation as an ADR technique and notes the funding that it has attracted from Scottish Government and others over the past twenty years.

67. The reasons why ADR is generally thought to be desirable are listed as follows by the authors:

- It is perceived to be a cheaper way of resolving disputes than going to court
- It is perceived to be a quicker way of resolving disputes than going to court
- It is thought to be more likely to provide solutions that people actually want, which is not always the case with the courts
- All of the above and it is a means by which particular sectors, industries or services can be compelled to deal with disputes involving their products or services in a way that removes the financial burden from the complainant
- People don't like going to court and it therefore provides some form of access to some sort of justice that they would otherwise be denied
- The court process – particularly its adversarial aspect - and the system of civil justice is not designed to provide an appropriate means of dealing with certain disputes – neighbour disputes and family disputes may be an example
- It is a private dispute resolution process not a public one – unlike the courts - and therefore enables disputes to be dealt with 'under the radar'. This may explain its popularity with Trade Associations
- Choice is perceived to be a good thing and ADR therefore offers disputants a range of paths to enable them to resolve their dispute (see the extracts from the solicitor firms mentioned)
- For all of the above reasons, it represents a feasible business opportunity to a company, individual or firm with the skills to provide such a service.

68. The report identifies the role of solicitors as 'gatekeepers' to ADR and provides that in light of the lack of public awareness and, possibly, enthusiasm, some pressure may have to be brought on parties and their lawyers to consider using ADR; although, it is not discussed what kind of pressure would be required or from whom.

69. The authors pick up on the point that there is currently no regulation of ADR, and no universal standard for the training or monitoring of ADR provision in Scotland.

70. The issue of compulsory ADR is discussed, as it is thought that if the Scottish Government is to fund ADR process then the question arises as to whether it should bring

with it any compulsion on parties to use it. It is discussed that there is an argument which advocates that:

“...if public funds are to be invested in promoting or providing/supporting the use of ADR as an alternative to court procedures there is an argument for advocating that parties should not be allowed the luxury of wilfully ignoring the existence of such services. This would replace the luxury of choice advocated by commercial solicitors’ websites with a pragmatic acknowledgement that the system may not be able to sustain the costs of a dual system (the courts and the ADR alternative).”

71. Thus, the authors state that provision of ADR may only be sustainable if it reduces the call on the resources of the civil court system, or allows the courts to deal more effectively with other cases.

3.2SLAB Initiative: Edinburgh Sheriff Court In-court Mediation Service

72. The Edinburgh Sheriff Court Mediation Project has been running since 1998. It shares an office and cross refers cases with the Edinburgh Sheriff Court in-court Advice Service. Although the project operates for small claims actions (and some summary cause actions) only within Edinburgh Sheriff Court, it may be described as the most significant mediation initiative currently available in Scotland. Volunteer mediators are recruited by advertisement through the Scottish Mediation Network and other mediation providers and the project is funded by SLAB. The project is managed by Citizens Advice Edinburgh together with the Edinburgh Sheriff Court in-court Advice Service. The Scottish Consumer Council report⁷⁰ noted that the majority of mediation schemes throughout the world apply only to cases which have been lodged in court, with many being court-annexed like the Edinburgh mediation project is.

73. The mediation project was formally reviewed by the Scottish Government in 2002.⁷¹ For the period evaluated, of the 151 referrals made to the mediation service dates were fixed for a mediation hearing in 24 cases (16%) and 22 mediation cases were conducted (15%). Of those cases where mediation was conducted two were unsuccessful in reaching settlement, providing a settlement rate of 90%.

⁷⁰ Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001)

⁷¹ A formal evaluation of the project was conducted by the Scottish Executive Central Research Unit in 2002, which is available at: <http://www.scotland.gov.uk/Resource/Doc/46910/0030657.pdf>

74. Thereafter, in its annual report in 2007 the Edinburgh Sheriff Court Mediation Service recorded a settlement rate of 78% among the cases which proceeded to mediation.⁷² No further published research or information is available on settlement rates or otherwise for the mediation project, however it is understood that SLAB intends to explore the possibility of further empirical research in this field in due course.

75. In 2010,⁷³ an evaluation was conducted into the then pilot In-Court Mediation Schemes which were operating in Glasgow and Aberdeen, both of which are now closed. The schemes differed from the Edinburgh service at the outset they were intended to apply to all values of civil claim including summary cause and ordinary actions. However, for a variety of reasons the pilots were unable to publicise their services to parties in ordinary cause actions and no ordinary cause actions were mediated by the pilot schemes. The pilots also excluded certain grounds of claim.

76. The evaluation found that the number of cases in which the service was used fell short of that anticipated. There were some limitations as to the evaluation results which were listed as being as a result of the small number of cases involved, incomplete records and the absence of comparator baseline data in government statistics. However, the following conclusions were drawn:

Awareness and provision of information

- Parties want more information about alternatives.
- Information about the in-court service could be more effectively disseminated to ensure that parties are well enough informed to select or reject the option of the service. Information could be sent directly to parties by the court or legal adviser and again at critical stages in the case. Advisers could be better informed about alternatives to litigation. Sheriffs could raise the issue of alternatives to litigation without that undermining the role the court as expected by litigants. If a party or agent is unsure about a referral to mediation a proof could be fixed, but mediation explored pending proof. Mediation can free court time for scheduling other matters. This is proven in relation to small claims and summary causes but could not be tested in ordinary actions due to lack of referrals. Parties in ordinary actions should have the same access to information as parties in small value actions.

⁷² SCCR, Ch. 7, para. 22.

⁷³ Ross, M., and Bain, D., [*Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts*](#), (2010)

- Court rules would help to ensure that all parties have equal access to information about options, particularly when an in-court process exists. Although essential at an early stage in the case information has value as the case progresses and further critical (and expensive) procedures are embarked upon. On balance, rules mandating advice and information rather than mandating mediation should be sufficient to increase awareness and usage in appropriate cases, assuming that the spirit of informing parties about options is embraced by all court users.

Parties' views of mediation and the service

- Parties were happy with the quality and integrity of the mediation service provided in the pilots. Referral to mediation increased their satisfaction with services rather than undermined the recognised role of the court.
- Those respondents who used the service found it satisfactory in terms of cost, effectiveness and use of time compared to litigation. Parties were frustrated with limited options to speak or be listened to within early hearings in small claim and summary cause litigation. Mediation provided an early opportunity to air the case in conversation and explore solutions. Confidence in mediation grew throughout the pilot and through use of mediation. It was valued by the parties even if it did not lead to settlement.

Costs

- Costs of the pilot mediation services appeared to be lower than litigation (in so far as overall cost of civil cases can be calculated) but with added satisfaction for parties. However, this was on the basis of the mediators' services (other than the coordinator) having been provided on a voluntary basis and the comparison with litigation is not on a 'like-for-like' basis.
- Mediation annexed to courts could be funded from within court and legal aid funding model as a less costly alternative to litigation, with some party contribution according to case value or means.

Evaluation

- Robust evaluation of future reforms (set against reliable baseline data) was considered essential.

More recent monitoring

77. Recent reports from the in-court mediation project for the year 2013 (January to December) have been made available for the purposes of this review and a summary of the statistical information is available at Annex B.⁷⁴

- The statistics show some variations in the volumes of cases referred to mediation and the number of cases mediated at different points during the period. For example, 36 mediations took place in Q4 2012/13, compared to 11 in Q2 2013/14. The reports note a range of factors contributing to the variances, including promotion of mediation by sheriffs (although the project reports that all the Sheriffs at Edinburgh are very supportive of the Mediation service), seasonal fluctuations in court business across the course of a year and a drop in Landlord/Tenant disputes due to the introduction of the Tenancy Deposit Scheme. However it was thought that where litigants felt expected to attempt mediation, the lower the likelihood that mediation would be taken up subsequently, (as this could detract from the voluntary nature of the process). This reflects the experience in England and Wales of various large-scale pilot mediation projects, which will be discussed later on, where it was found that increased pressure to mediation depresses settlement rates.⁷⁵
- Consistency of provision of information provided to parties: self-referrals appeared to increase or decrease in line with whether self-referral forms to the Mediation service were provided along with court summons.
- Seasonal changes: the Tenancy deposit Scheme resulted in much fewer cases coming through the small claims court, which was a large proportion of the mediation service's caseload. However, it is noted that this has resulted in an increase in other landlord/tenant disputes being referred to mediation.
- There were good results from those cases where parties chose to mediate. On average throughout the period there was an 84.4% success rate. The cases which were unresolved at mediation were monitored and it was found that most of those cases went on to settle out of court or were continuing to negotiate, which suggests that mediation could have served to facilitate towards settlement.

⁷⁴ In-court Mediation Project reports (Q1-Q4) 2013/14 as provided to SLAB.

⁷⁵ Genn H., et. al., *Twisting Arms: court referred and court linked mediation under judicial pressure* (2007) Ministry of Justice Research Series.

78. The reports describe a variety of promotional activities taking place within the court, including the Mediation Service attending the Small Claims and Summary Cause court (which takes place every Thursday), as this is the main source of referrals which will normally be from either the Sheriff or solicitors. The Mediation Service provided a presentation to court staff as a way of raising awareness of the service, information was included on the SCS external website and 'tickertape' advertising was installed in the court building.

79. The reports highlight that even where parties have indicated that they will attempt to mediate, it would still be best to set the date of the Proof (trial) not only so that litigants do not have to return to court for another procedural hearing but because, even if the mediation is unsuccessful, having a Proof outstanding helps them to focus on the issues of their case.

80. During the period two sheriffs had instructed solicitors to ensure that they had instructions from their clients regarding mediation, prior to representing them in court. It is understood that sheriffs continue to advise solicitors to be prepared for the question of whether their client is open to mediation.

81. It is worthwhile noting that there have been a variety of methods for in which the mediation might take place, including Skype (videoconferencing). Skype is now being offered to all clients as of Q3 2013/14 and it will be interesting to see if uptake of this option increases. The project reports that they have now carried out three 'Skype' mediations which have all been resolved at mediation.

3.3 The current court rules

82. As mentioned earlier, the previous Rules Council's considered making new rules to encourage the use of ADR, but the proposed rules changes were postponed pending consideration of the SCCR. Therefore, the current position should be noted.

83. In small claims and summary cause actions, the sheriff is under a duty to seek to negotiate and secure settlement of the claim at the first hearing of the action.⁷⁶ The court may direct a referral to mediation in family cases in an action in which an order in relation to parental responsibilities or parental rights is at issue, at any stage of the action.⁷⁷

⁷⁶ Rule 9.2(2) of the Small Claim Rules 2002; Rules 8.3(2) of Summary Cause Rules 2002

⁷⁷ Rules 49.23 of the Rules of the Court of Session; rules 33.22 and 33A.22 of the Ordinary Cause Rules of the Sheriff Court 1993

84. For commercial actions in the Court of Session the court rules provide that at a preliminary hearing the commercial judge may make such order as he thinks fit for the speedy determination of the action.⁷⁸ A Practice Note issued in 2005 provides that it is important before a commercial action is commenced, that matters in dispute should have been discussed and focused in pre-litigation communications between the prospective parties' legal advisers:

*"Both parties may wish to consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution"*⁷⁹

85. The sheriff is also under a duty in commercial matters to secure the expeditious resolution of the action by means of a range of orders including the use of ADR.⁸⁰

Consistency in approach

86. Research on the operation of Ordinary Cause Rule (OCR) 33.22 found that there is a real diversity of approach among sheriffs.⁸¹ Some sheriffs were found to have never referred parties to mediation, while others did so only where this was specifically requested by the parties' solicitors. Other sheriffs, however, referred all or most disputed cases automatically. This variation in practice seemed to depend both on the sheriff's views on the role of the courts in family cases and on the value of mediation.

87. While this research focussed on OCR 33.22 specifically, and whilst recognising that family mediation will have characteristics which are unique, it is likely to be desirable that a consistent approach be taken. This could be achieved by court rules or by way of a Practice Note/directions.

3.4 Judicial mediation in the Employment Tribunal (Scotland)

88. A turning point came for the Employment Tribunal Scotland (ET(S)) in 2006 when the President of the Employment Tribunals (for Scotland) provided a practice direction providing that a case shall be sisted for mediation where all parties are agreed to that effect, which was followed by the introduction of Judicial Mediation (JM) in 2009. The first mediation pilots targeted complex cases which were set to take up a lot of tribunal time. This resulted in the same percentage success rate as occurs elsewhere, and some of the other

⁷⁸ RCS rule 47.11

⁷⁹ Practice Note 6 of 2005.

⁸⁰ Rule 40.12 of the Sheriff Court Rules.

⁸¹ Lewis J., *The Role of Mediation in Family Disputes in Scotland*, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999.

cases settling shortly after without a hearing at all.⁸² The JM scheme subsequently introduced, and currently operating in the ET(S), only exceptionally allows for a case to be sisted for judicial mediation but more generally requires that the case be progressed towards its Final Hearing in the main stream formal procedure, concurrently with the allowance and occurrence of judicial mediation. This concurrency is considered to have a beneficial impact on parties' engagement with and disposition towards making the most of the opportunity to achieve resolution of their dispute.⁸³

89. There are currently 8 judge-mediators in Scotland who are formally trained in Mediation. Prior to the introduction of a general fees regime in 2013, judicial mediation came free to the parties at the point of delivery.⁸⁴ The Employment Tribunal Rules of Procedure were updated in 2013,⁸⁵ and specifically provide for judicial mediation to be available, as one way to further the overriding objective:

“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”

90. Cases where JM is requested are referred to the Vice President of the ET(S) who, subject to the availability of resource and if satisfied on the information available, will approve the making of an offer of JM to the parties. Alternatively, where not satisfied, the VP may instead remit the case to a Judge Mediator for assessment and confirmation of its suitability, at a Judicial Mediation Case Management Discussion (CMD).

91. Where JM is offered, it will be for a single day. CMD's may proceed, on the direction of the appointed JM, by telephone conversation or in person and will normally last no more than 1.5 hours.

Statistics

92. In the year to end September 2013, 35 Judicial Mediation hearings took place in Scotland. The success rate was 77%, with 89.5 net hearing days saved. However, it is worth

⁸² Nicholson P., [Embedding ADR in the civil justice system](#) (2012) The Journal of the Law Society of Scotland.

⁸³ d'Inverno, J., *Judicial Mediation in the Employment Tribunal (Scotland)*, (Unpublished 2014)

⁸⁴ See; Ministry of Justice, [Employment Tribunal and Employment Appeal Tribunal Fees Stakeholder Factsheet](#) (2013)

⁸⁵ The Employment Tribunal's (Constitution and Rules of Procedure Regulations) 2013, Schedule 1 ([SI 2013 No. 1237](#))

bearing in mind that the cases which proceed to JM are ones in which ACAS⁸⁶ has already had an opportunity to assist the parties to settlement, through conciliation. It remains to be seen whether the current fees (£600), payable by the respondent for JM, will lead to a decline in interest in the scheme. Historical figures for the duration of the scheme (from April 2010 to 2013) show an average of 104 net sitting days saved per year and an average success rate of 73%.⁸⁷

Scope

93. Due to limited resources the JM in the ET(S) has so far been focussed on the more serious (e.g. involving an element of discrimination) or more costly cases, where the greatest potential for savings of resources exists. These mainly comprise those which are listed for Final Hearings or Open Preliminary Hearings, of 3 days or more. In addition, cases which involve a subsisting employment relationship are favourably considered. Although the model is equally applicable to shorter and less complicated cases, the cost-benefit considerations are less pronounced where multiple day hearing diets are avoided by successful mediation.

Characteristics

94. The main characteristics may be listed as follows:⁸⁸

- **Consensual** (however informed consent is emphasised)
- **Confidential:** both in the conventional sense but also without prejudice to parties positions in any future litigation.
 - i. Nothing which forms part of the JM can be founded upon, or referred to, in the main litigation.
 - ii. A separate JM Clerk (i.e. other than the clerk responsible for the file in the formal litigation) is appointed and a separate confidential file created for the JM.
 - iii. Where a Case Managing Judge has conducted an unsuccessful JM may not continue with the case to litigation.

⁸⁶ ACAS stands for Advisory, Conciliation and Arbitration Service:

<http://www.acas.org.uk/index.aspx?articleid=1342>

⁸⁷ d'Inverno J., *Judicial Mediation in the Employment Tribunal (Scotland)*, (Unpublished, 2014)

⁸⁸ *Ibid.*

- **Judicial:** although the Judicial Mediator is not functioning in the traditional judicial determinative role, they may be regarded as a person of gravitas and subject matter expertise.
- **Concurrent:** the JM process runs concurrently with the time-table for the formal litigation. In practice, this appears to beneficially focus parties on making the most of the JM opportunity.
- **Suited for engagement of Party Litigants:** direct communication both between the parties and via the Judge Mediator generates an atmosphere of “equality of engagement” which is thought to be well suited to the party litigants who brings informed consent to the process.
- **Benefits:**
 - i. A sense of ‘honourable settlement’ because of the lack of compulsion.
 - ii. It may rehabilitate relationships.
 - iii. It is within one’s own control.
 - iv. Parties are free to craft the terms of the settlement and to incorporate any element that they are agreed upon. This allows for creativity in the resolution.
 - v. Savings to the public purse in terms of hearing days.
 - vi. Savings to the parties in time, financial cost and also the hidden costs of litigation.
- **Limitations:** JM is not thought to be appropriate for every case. It does not, and cannot deliver a judicial determination of matters of fact or issues of law. It is not designed to give parties an indication of how a fully litigated dispute may be determined (as would be the case in early neutral evaluation). In cases where it is important to determine the facts or rights of the individuals, it would not be appropriate.

Conclusion of a successful JM

95. The agreed resolution from a successful JM is usually reflected in the creation of a set of “Heads of Agreement”, which are recorded by the Judge Mediator. This may be registered with ACAS which has the immediate effect of binding parties to the terms of the agreement.

6.5 Regulation of Mediators

96. In Scotland there is no government regulation of mediators. The Scottish Consumer Council Report⁸⁹ states that lack of demand for mediation services in Scotland has meant that regulation and quality control of mediators has not been a priority but, that if the use of mediation were to be encouraged then the need for regulation and quality control will follow, if those using mediation (or ADR) services are to have confidence.

97. The only means of current regulation in Scotland is informal and is summarised in three ways:⁹⁰

- the control of mediation organisations themselves⁹¹
- market forces; and
- those who fund mediation schemes and are able to withdraw that funding.

98. Thus, anyone may establish a mediation service, regardless of their competence, experience or training.

99. Whilst there is no universally accepted set of quality standards for mediation, there are a variety of organisations with common standards for mediators operating in different fields or schemes of mediation.⁹²

6.6 Law Society of Scotland: solicitors as 'gatekeepers'

100. The SLAB scoping study on the use of ADR in Scotland⁹³ identified that the legal profession has an important role to play in helping people to decide how to resolve their disputes. The study identifies Scottish solicitors as the 'gatekeepers' to ADR and provides that in light of the lack of public awareness (and possibly enthusiasm) some pressure may have to be brought on parties and their lawyers to consider using ADR.

101. The Scottish Consumer Council Report⁹⁴ also considered that if the potential benefits which mediation offers to the public, as well as solicitors, are to be realised then the Law

⁸⁹ Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001)

⁹⁰ *Ibid.*

⁹¹ E.g. accreditation by CEDR and/or the Law Society of Scotland (as a Solicitor Mediator)

⁹² E.g. the Association of Mediators, the Law Society of England and Wales, Mediation UK and the Scottish Mediation Network.

⁹³ Scottish Legal Aid Board, *Overview report of Alternative Dispute Resolution in Scotland*, (2014)

⁹⁴ Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001)

Society of Scotland (LSS) must take steps to promote mediation actively to its members as a source of future business. Thus, it states that the LSS must encourage its members to consider becoming mediators and to consider acting as a representative in mediation:

“It is essential that mediation is presented to solicitors as complementary to the court, rather than as its polar opposite”

102. Further, solicitors should be encouraged to view mediation as a means of achieving the best outcome for both parties, which preserves relationships while saving time and money. The report suggests that the LSS could also take a more formal approach to promoting mediation which could include requiring, by means of a practice note, solicitors to consider mediation as an option and to make their clients aware of its existence.

103. Presently, there is a Law Society initiative and funding for the advancing and embedding of the use of mediation in the civil justice system.⁹⁵ It held a conference (together with the Scottish Government) on promoting mediation in May 2012. The conference aimed to explore ways of imbedding ADR into the civil justice system. The LSS expert group on mediation has prepared a proposal paper to prompt discussion on how the LSS can practically support and promote mediation for Solicitors.⁹⁶ A report was produced on the conference,⁹⁷ which was later discussed in the Journal of the LSS.⁹⁸

104. At the end of 2013, the LSS published new guidance for solicitors on advising clients about ADR options.⁹⁹ The guidance aims to ensure that solicitors provide their clients with relevant and appropriate information about a range of ADR procedures and discusses suitable options for them. The guidance does not place any new responsibility on solicitors. David Preston, convenor of the Society’s expert group on mediation, stated:

“The guidance is not prescriptive and it very much remains with the solicitor to use professional judgement based on the facts of the particular dispute. The intention is to ensure that all options are discussed with clients and that solicitors can fully advise on the appropriate process in their situation. Of course this includes the solicitor advising their client if they believe that going to court is the most appropriate method – there will always be some cases which need to be heard in a

⁹⁵ CALM, [Response to Making Justice Work: Courts Reform \(Scotland\) Bill – A Consultation](#), (2013)

⁹⁶ This is not publicly available.

⁹⁷ This no longer appears on the LSS website and was unavailable for this review.

⁹⁸ Nicholson P., [Embedding ADR in the civil justice system](#), (2012) The Journal of the Law Society of Scotland.

⁹⁹ Law Society of Scotland, [Guidance related to rule B1.9: Dispute Resolution](#)

court room – but clients must be able to make informed choices on how they want their case to proceed...”

4. Approaches to and use of ADR in other jurisdictions

4.1 General overview

105. The Scottish Government, in partnership with SLAB, recently conducted a literature review of ADR in five other similar jurisdictions: England and Wales, Canada, United States, Australia and New Zealand.¹⁰⁰ Whilst the report particularly focused on family law, it provides a useful overview of ADR in general terms.

106. The report describes the approach taken by each jurisdiction to formally institutionalise ADR (by statute, rule or other means) and considers the effect of ADR on court caseloads. The report then goes on to review empirical research of the four main forms of ADR which it identified (mediation, arbitration, collaborative law and early neutral evaluation).

107. The overall findings were as follows:

- ADR (usually mediation) is mandatory for some types of cases in Australia, England and Wales, and many parts of the US and Canada, but is voluntary in most of Europe. Some programs make mediation compulsory for a defined class (e.g. Ontario); some give discretion over referrals to a judge (Florida); some make mediation a condition of legal aid (England); some use sanctions for unreasonable non-compliance (England); and, others make mediation mandatory if one party elects to mediate (British Columbia). Australia has invested heavily in Family Relationship Centres, which are intended to replace court as the point of entry into the family justice system. In New Zealand, mediation conferences are commonly chaired by judges.
- ADR has grown at the same rate as civil trials have decreased, but no study has been able to decisively credit the former with the latter.
- Mediation is the most common form of ADR and the best researched. The majority of studies reviewed compared mediation favourably with litigation at court. Settlement rates varied, but generally were above 40 per cent and in some studies reached 80 per cent. Satisfaction was generally very high, the

¹⁰⁰ Scottish Legal Aid Board, *International literature review of Alternative Dispute Resolution Approaches*, (2014)

chief exception being those cases that involved violence. Mediated cases generally cost less (but only if mediation was successful) and took significantly fewer days.

- Empirical studies on arbitration, the second most common form of ADR, were as a rule limited to employment disputes in the US and produced mixed findings. Compared with litigation, arbitration generally led to higher win rates for employees and were resolved in significantly shorter time (as much as half the time) as compared to litigation. Two studies found median monetary awards were lower after arbitration; one study found awards were higher.
- Early neutral evaluation (ENE), a combination of mediation and non-binding arbitration, has not been subject to rigorous empirical testing but a few published studies reported positive results. ENE sample groups took fewer days to complete than comparator groups and reported high levels of satisfaction. Settlement rates were inconsistent; but settlement was not the primary purpose of ENE.
- The defining principal of collaborative law is the 'disqualification agreement', in which lawyers must agree to withdraw if their clients fail to settle and instead proceed to court. A few published studies of collaborative law suggested that clients typically came from a wealthy demographic and that collaborative settlements were cheaper and speedier. The settlement rate was very high (over 80 per cent in all studies) and satisfaction levels were high.

108. The report then positions each jurisdiction which was evaluated in the report on a "Quek" scale. The Quek scale positions the degree to which different jurisdictions make mediation compulsory from one through to five; with one being the most liberal regime, five being the strictest. The report lists the jurisdictions which were reviewed as follows:

1. **Categorical or discretionary referral with no sanctions**

- In England, an automatic referral to a mediation pilot scheme at the Central London County Court was attempted between 2004 and 2005. Although cases were automatically referred to mediation the disputing parties had the option to object. 81 per cent of those referred did object and the scheme was eventually abandoned.

2. **Requirement to attend mediation orientation session or case conference**

- In Virginia, US, parties are required to attend mediation orientation sessions before deciding whether or not to attempt mediation.

3. Soft Sanctions

- English courts actively encourage ADR, and take into account a party's conduct—including any unreasonable refusal of ADR or uncooperativeness during the ADR process—when determining the proper order of costs. Parties seeking legal aid must first attend a meeting to determine whether mediation is appropriate.

4. Opt-out scheme

- The mandatory mediation program in Ontario, Canada, refers all civil cases, except family cases, to mediation unless the court exempts a party by order.

5. No exemptions

- Courts in some Australian states, such as South Australia, Victoria and New South Wales, are empowered by legislation to refer parties to mediation with or without their consent.

The SCCR

109. As mentioned earlier, the SCCR also reviewed ADR in other similar jurisdictions¹⁰¹ and similarly made the observation that some jurisdictions have made ADR compulsory, whilst others have taken a less strict approach and introduced measures to encourage ADR only. It is noted that, *"In Australia, New Zealand and Canada interest in and use of mediation and other forms of dispute resolution has grown. In these jurisdictions it is accepted that they are important elements of a modern civil justice system."*

110. The SCCR looked into the background of the growth of interest in and use of mediation and other forms of ADR, particularly in England and Wales. It is noted that:

"The key elements of this system are the provision of a free court-linked mediation service for claims up to £5000 and a telephone helpline for higher value claims. There is also a significant emphasis on improving awareness and understanding of mediation as an option at an early stage of a dispute and on ensuring that all settlement options have been fully considered before proceedings are raised."

111. It is commented that the judiciary have generally demonstrated a very positive attitude towards ADR and although the recommendation in Lord Woolf's *Access to Justice* report¹⁰²

¹⁰¹ Provided in Annex D to Chapter 7 of the SCCR.

¹⁰² Lord Woolf, [*Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*](#), (1996)

was not to make ADR compulsory, there is now a body of case law which suggests that any party who unreasonably refuses to engage in a form of ADR risks sanctions/costs penalties at the conclusion of litigation.¹⁰³

112. The SCCR noted the general concern that there may be Article 6 challenges under the European Convention on Human Rights (ECHR) if mediation was to be made compulsory. The report noted the views of the then Master of the then Rolls, Sir Anthony Clarke, at the Civil Mediation Council Conference on in 2008, where he explained that a number of EU States who are signatories to the Convention have introduced compulsory ADR schemes without any successful Article 6 challenges, and that the EU Directive on Mediation envisages the possibility of “national legislation making the use of mediation compulsory or subject to incentives or sanctions... provided that such legislation does not impede the right of access to the judicial system.” It is noted that, in his view, the European approach “appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6”.

4.2 Specific Examples

4.2.1 England and Wales

113. The approach in England and Wales followed on from the Lord Woolf’s review of the civil justice system in 1996.¹⁰⁴ Lord Woolf promoted ADR as he considered it to have the advantage of saving scarce judicial resources, and because it offered benefits to litigants, or potential litigants, by being cheaper than litigation and producing quicker results. In line with many of Lord Woolf’s recommendations, new court rules were made to facilitate case management within the court and to encourage use of ADR.¹⁰⁵

114. Under the new rules of court, the court has a duty to manage cases actively; this includes encouraging the parties to use alternative dispute resolution proceedings where appropriate. The parties are asked at the start of proceedings whether they would like a

¹⁰³ Notable cases decided after the SCCR include: *Nigel Witham Ltd v Robert Smith and others* [No.2] [2008] EWHC 12 (TCC), where it was held that a successful party might (although did not on the facts) receive an adverse costs order if it agreed to mediate but delayed unreasonably in doing so. In *7th Earl of Malmesbury v Strutt & Partner* [2008] EWHC 424 (QB) the Court held that if a party appears at mediation and conducts itself in such a way as to make successful mediation all but impossible, that behaviour is similar to simply refusing to mediate altogether and accordingly that party can be penalised in costs.

¹⁰⁴ Lord Woolf, *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) HMSO

¹⁰⁵ Civil Procedure Rules 1998, available: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules>

one-month stay (suspension of the case) to attempt to settle the case by mediation. If both parties are consensual then the court will order a stay. Nevertheless, the court still has the power to order a stay on its own initiative if it is considered appropriate.¹⁰⁶

115. As such, the rules do not make mediation compulsory and so are consistent with Lord Woolf's recommendations. However, they do allow the courts to apply considerable pressure on the parties to consider mediation. If the stay does not lead to settlement, the court may ask the parties questions about the mediation, which may include why mediation might not have been agreed to. The court will then also be able to use costs as a sanction for not mediating or not giving it their full co-operation. This is because the court has discretion as to the costs awarded and in so doing must have regard to the conduct of the parties, including the manner in which one has pursued or defended the case. This discretion is of great significance in cases where the legal costs are often equal to, or perhaps greater than, the amount of money at stake in the dispute.

116. The emphasis on ADR was further prescribed by the publication of eight pre-action protocols, all of which encourage the parties to attempt to settle their dispute (including by use of ADR) before litigation at court.

117. Thus, although Woolf did not propose that ADR should be compulsory, the inclusion in the Civil Procedure Rules of a judicial power to direct the parties to attempt ADR, together with the court's discretion to impose a costs penalty on those who behave unreasonably during the course of litigation, has created an atmosphere in which litigants may feel that they have no choice.¹⁰⁷

118. At around the same time there were changes made to the legal aid system under the Access to Justice Act 1999. This Act introduced a new set of rules¹⁰⁸ governing the eligibility for legal aid support. The new rules include the cost of mediation within the legal aid system and a condition that an application for legal aid for representation may be refused if there are ADR options which ought to be tried first.

119. Although Lord Woolf was against the idea of making ADR compulsory, there was frustration at the low voluntary uptake of ADR in the early 2000s and growing concern about the number of trained mediators without work.¹⁰⁹ This led to an experimental compulsory mediation scheme being set up, the justification being that even if disputing

¹⁰⁶ CPR R1.4(2) and CPR R26.4: stay of proceedings for settlement at the court's instigation.

¹⁰⁷ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009)

¹⁰⁸ Funding Code and Funding Code Guidance

¹⁰⁹ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009), pp.

parties were forced against their will to mediate, soon the benefits of the process would overcome the resistance and the parties would be likely to settle; moreover, that compulsion would expose a larger number of people to the positives of mediation.¹¹⁰

120. Reflecting on the results of a successful mandatory mediation programme for civil disputes in Ontario, Canada¹¹¹ the Department of Constitutional Affairs decided to set up a one-year pilot in Central London County Court in which cases were automatically referred to mediation. The pilot was launched in April 2004, however, the timing coincided with the court judgment in *Hasley*¹¹² which stated, unambiguously, that the court had no power to compel parties to enter a mediation process.

121. The result of the pilot was not in line with the experience in Canada where only a handful of cases where the parties opted out of the mandatory mediations scheme. In the England and Wales pilot, around 80% of those referred objected. As a result, after the first year the pilot was abandoned.

122. Primary legislation also sought to promote mediation in family cases by the provision detailed in section 29 of the Family Law Act 1996. Section 29 provided that solicitors would have to advise clients seeking legal aid for family disputes to attend a meeting with a mediator to assess how suitable the dispute is for mediation (although there were a number of exemptions). The Act was piloted prior to consideration of full implementation and a three year research project was commissioned by the Legal Services Commission (formerly the Legal Aid Board) to monitor this section 29 component.¹¹³ However, section 29 only resulted in a modest increase in the number of mediation starts and the report did not support section 29 as being an effective means of getting those who might benefit from mediation to consider it as an option. As a result of the disappointing results most parts of the legislation have not been brought into force (including section 29) or have been completely repealed.

¹¹⁰ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009) p107

¹¹¹ Hann, R., G and Baar, C., *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1: Final Report – The first 23 Months)* (Ontario Ministry of the Attorney General, March 2001), cited in Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009) p107.

¹¹² *Halsey v Milton Keynes General NHS Trust* [2004] EWCA 3006 civ 576

¹¹³ Davis, G., et. al., *Monitoring Publicly Funded Family Mediation: report to the legal services commission* (2000), cited in Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009) p107.

What has been learned about mediation in England?

123. The UK government has invested heavily in evaluating a variety of court-based mediation schemes and as such there is a significant body of empirical evidence commissioned by the Department for Constitutional Affairs about the potential of mediation to resolve civil disputes.¹¹⁴ The results can be summarised as follows:

- **Demand:** all of the court-based schemes demonstrated weak 'bottom-up' demand, particularly in personal injury (PI) cases. Genn notes that, if the effect of the Woolf reforms has been to increase pre-action settlement then those cases that go to court are likely to be the most contentious and therefore least likely to be interested in mediation soon after the issue of proceedings.¹¹⁵
- **Customer satisfaction:** the evaluation reports showed that there was high levels of satisfaction amongst those who had volunteered to enter the process. Parties valued the informality of the process and the opportunity to be fully involved in the proceedings. Parties also liked the speed of the process. However, they did not like being pressured to settle and some complained that they felt pressurised.
- **Speed and cost:** there was no evidence to suggest any difference in case durations between mediated and non-mediated cases. However, the same analysis provided that time-limited mediation can avoid trials in non-PI cases. It is noted that it was difficult to assess the cost implications, as the touchstone is always litigation and the overwhelming majority of cases would not proceed to trial in any case.¹¹⁶ Moreover, the results did show that an unsuccessful mediation may increase the costs for the parties.
- **Outcomes:** first, the analysis shows that readiness of parties to mediate is a salient factor in settlement; thus, increased pressure to mediate depresses settlement rates.¹¹⁷ Second, only a small minority of settlements are 'creative' or provide something different from what would be available in court. Third, claimants significantly discount their claims in reaching mediated settlements.¹¹⁸

¹¹⁴ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009) p107

¹¹⁵ *Ibid*, pp109

¹¹⁶ *Ibid*, pp 112

¹¹⁷ Genn H., et. al., *Twisting arms: court referred and court linked mediation under judicial pressure*, (2007)

¹¹⁸ *Ibid*, pp113

Current developments in England and Wales

124. The Civil Justice Council's current work on ADR aims to provide in due course an ADR Mediation Handbook, in light of the Ministry of Justice consultation on reforming civil justice in England and Wales.¹¹⁹ The Civil Justice Council has also recently established an advisory group (chaired by Richard Susskind OBE) to explore the role that Online Dispute Resolution (ODR) can play in resolving lower-value civil disputes.¹²⁰ This group is to analyse the costs and benefits of ODR as well as the potential shortcomings.¹²¹

125. In an article in the Times¹²² Richard Susskind explains that ODR is more radical than the traditional court setting as the process of resolving a dispute would be conducted via the internet. Thus, ODR allows for a more cost-effective way of resolving a dispute. It is mentioned that there are already a number of ODR systems used worldwide to resolve a range of disputes, including consumer disputes and conflicts between individuals and the state.

126. Examples of this include Cybersettle,¹²³ where each party will submit, in confidence, the highest and lowest figures that they will accept and if the two ranges overlap then a settlement can be achieved. There is also Modria, the system which underpins eBay's dispute resolution process but is also a generic system which other organisations may use.¹²⁴ Another example is "e-arbitration" and the example provided is the Internet Corporation for Assigned Names and Numbers (ICANN) system for resolving domain names.¹²⁵

127. The article then explains that ODR is already being utilised in the England and Wales Courts & Tribunals Service through its Money Claim Online system, which was launched in 2002. The system allows litigants with no legal skills to recover money owed to them (up to £100,000) without the need to complete complex court forms.¹²⁶

¹¹⁹ <http://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/adr-mediation-handbook/>

¹²⁰ HM Courts and Tribunals Judiciary, [Media Release](#) (April 2014)

¹²¹ Susskind R., *Cheap and accessible – virtual courts work for the internet generation*, The Times (24 April 2014) p57.

¹²² *Ibid.*

¹²³ An online system which handles over 200,000 personal injury and insurance claims, with a combined value of almost \$2bn. See www.cybersettle.com

¹²⁴ www.modria.com; the American Arbitration Association has recently bought in to this system for its New York No Fault caseload which exceeds 100,000 case annually.

¹²⁵ www.icann.org - of which there have been more than 30,000 so far.

¹²⁶ www.icann.org

4.2.2 Northern Ireland

128. In Northern Ireland the court rules state that the Court may, on the application of the parties or of its own motion, when it considers it appropriate and having regard to all the circumstances of a case, order that proceedings be adjourned for such a time so that the parties may pursue an ADR method. ADR is not mandatory, but the court can invite the parties to use an ADR process or will refer the issue to such a process where the parties opt for this themselves.¹²⁷

129. Where parties think that ADR might be useful, the court office will provide a list of contact addresses.¹²⁸

4.2.3 USA

130. In the USA, there is a great emphasis on 'case management' in the courts. Federal legislation has been in place since 1990¹²⁹ which requires all federal district courts to introduce cost and delay reduction plans by encouraging the use of ADR, and since 1998 all district courts had been obliged to require litigants in civil cases to consider ADR and each court has a responsibility to provide all litigants with access to at least one ADR process.¹³⁰

4.2.4 Massachusetts, USA

131. In Massachusetts, USA, there is a 'multi-door' approach towards ADR. Thus, cases arriving at the multi-door courthouse are 'screened' on intake and directed to the most appropriate type of dispute resolution option available which includes mediation, arbitration and trial.¹³¹

4.2.5 Ohio, USA

132. In Ohio a court may order all parties to attend an ADR process, or else it may be voluntary between the parties. Legislation provides the authority for State courts to

¹²⁷ s19-22 Rules of the Court of Judicature (Northern Ireland) 1980; and, s12-15 of the County Court Rules (Northern Ireland) 1981

¹²⁸ Northern Ireland Courts and Tribunals Service, [*A guide to proceedings in the High Court for people without a legal representative*](#), (online)

¹²⁹ Civil Justice Reform Act 1990

¹³⁰ Alternative Dispute Resolution Act 1998

¹³¹ Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001)

consider and adopt a local rule providing for mediation or arbitration.¹³² It is provided that local rules shall include procedures for: ensuring that parties may participate, that domestic violence is screened for, that appropriate referrals are made to encourage parties and to prohibit ADR when necessary. Separate provisions are listed for rules dealing with child abuse, neglect, dependency, domestic relations and juvenile matters. Furthermore, the rule also outlines qualification and training requirements for mediators.¹³³

133. The Ohio Uniform Mediation Act provides for the environment in which mediation will take place. The statute states that the communications made during mediation proceedings are privileged and prohibits mediators from being compelled to testify as to those communications, except in certain circumstances.¹³⁴

134. The Ohio Dispute Resolution Centre was established in 1998 and offers mediation, arbitration and conciliation. The Centre has developed many practical elements such as mediation and arbitration standard procedures and agreements.¹³⁵

4.2.5 The Netherlands

135. Hodges et. al provides that there is a strong national culture of settlement and ADR in the Netherlands.¹³⁶ This reflects the primary principle of the Dutch legal doctrine that although people should have access to justice, litigation should only be available as an *ultimum remedium* (final option) after all other options have been exhausted. Following on from that primary principle is the principle that litigation should not be free, so that litigation costs serve as an incentive to parties only to use litigation after other routes. These principles are realised in the rules of professional conduct for lawyers, the rules on civil procedure and on legal aid as follows:¹³⁷

- The rules of conduct for lawyers stipulate that a lawyer should realise that a settlement is often preferable to a litigated outcome.¹³⁸ This effectively places a duty on lawyers to pursue settlement.

¹³² <http://courtadr.org/court-adr-across-the-us/state.php?state=475>

¹³³ The Supreme Court of Ohio Rules of Practice are available:

<http://www.supremecourt.ohio.gov/Clerk/mediation/default.asp>

¹³⁴ Ohio Uniform Mediation Act: <http://courtadr.org/library/view.php?ID=4391>

¹³⁵ <http://www.cfrdmediation.com/mediation.aspx>

¹³⁶ Hodges C. et. al, *Consumer ADR in Europe*, (2012, Hart Publishing), pp129

¹³⁷ *Ibid*, pp131

¹³⁸ Rules of conduct for lawyers 1990 Rules 3

- If a case is still brought before the court, then the court will order for the parties and their representatives to appear for a meeting. The meeting, amongst other things, explores the possibility of a settlement¹³⁹ and the judge may facilitate settlement by giving a preliminary view of the case.
- Parties are also encouraged to settle their disputes by way of mediation. To effect this, the Netherlands have a system of court-annexed mediations and the first 2.5 hours of mediation are free of charge.
- Mediation is covered by legal aid.
- There is the possibility of provisional examination of witnesses or a provisional report by an expert, to further facilitate settlement by reducing uncertainty.
- In some rare circumstances the law obliges parties to negotiate before they are allowed to litigate.

136. The government has pursued a policy which perceives ADR and the courts as complementary to each other and as such aims to enhance ADR. The Ministry of Justice conducted an investigation into the suitability for mediation in court hearings and after a successful pilot mediation scheme in five courts (reporting in 2003), every court now has a mediation facility.¹⁴⁰ More recently, the Legal Aid Board in the Netherlands has, with its stakeholders and the support of the government, developed a website called the 'Rechtwijzer' which can be translated as 'conflict resolution guide' or 'signpost to justice'.¹⁴¹ The Rechtwijzer provides an interactive user journey where the user is led through a series of questions about their problem before being provided with options on how to resolve it. As such, the Rechtwijzer aims to provide good signposting to ADR methods.

¹³⁹ Art 87 Dutch Code of Civil Procedure

¹⁴⁰ Singer J., *The EU Mediation Atlas: Practice and Regulation* (Centre for Effective Dispute resolution, 2005)

¹⁴¹ Smith R., [*I've seen the future: it works maybe and it's in Dutch*](#), (2013)

5. ADR in the European Union

4.1 EU Directive and Regulations on Alternative Dispute Resolution and Online Dispute Resolution (Consumer Disputes)

137. Over the last decade, the EU has become increasingly more active in the regulation of consumer ADR. Although this has initially been done through soft-law recommendations, more recent trends have been towards adopting binding measures.

138. Initially, the European Commission adopted non-binding Recommendations which influenced ADR schemes in the Member States to respect quality standards within their organisation and procedures.¹⁴² Thereafter, a Mediation Directive 2008¹⁴³ sought to harmonise national rules concerning cross-border mediation; although it is relatively limited it is binding.

139. The most recent ADR initiative brings forward wide ranging measures obliging Member States to ensure that ADR schemes are available for all consumer disputes and that certain quality principles are met. The proposals leave Member States free to decide how to transpose that obligation. The relevant proposals were [consulted on this in 2011](#). As a result, [Directive 2013/11/EU](#) on ADR for consumer disputes and [Regulation \(EU\) 524/2013](#) on online-dispute resolution for consumer disputes were made. The Directive does not make ADR mandatory but does aim to promote its use.¹⁴⁴

140. The EU is aiming to promote ADR and ODR on the basis that having an effective means of redress will ultimately save consumers money, and that efficient ODR procedures will bring an increase in online purchases and cross-border trade in particular, giving consumers more choice and businesses more opportunities to grow.¹⁴⁵

141. The main features of the legislation is summarised as follows:

- The Directive sets minimum standards for all ADR entities: businesses to inform customer of relevant ADR entity to deal with dispute, ADR entity must resolve dispute within 90 days of referral, ADR entity must be impartial and provide

¹⁴² Two Recommendations were effected to promote the quality of consumer ADR: Recommendation 98/257/EC (1998) and Recommendation 2001/310/EC (2001)

¹⁴³ 2008/52/EC

¹⁴⁴ The Commission proposals which preceded the legislation are [available on its website](#)

¹⁴⁵ European Commission, [Alternative Dispute Resolution for EU consumers: Questions and Answers](#), (2012)

transparent information about their services, offer services at no or minimal cost to the consumer;

- The Regulations on ODR provides for the EU commission to establish an EU wide platform, to be created as a single point of entry to transfer cases to appropriate ADR entity. The standard is that disputes are to be resolved within 30 days;
- The Directive is to apply no matter what is purchased (excluding disputes involving health and higher education) and whether they purchased it online or offline, domestically or across borders; and,
- The Directive only applies to complaints made by consumers against traders/businesses. It does not apply to traders complaining about consumers, or in trader-to-trader disputes.¹⁴⁶

142. The Directive and Regulations are to be implemented by all EC countries 24 months after the entry into force of the directive to transpose it into national legislation, which will be mid-2015. The UK Government is currently looking at implementing the proposals and has recently concluded a public consultation on the issue (with analysis of the responses pending).¹⁴⁷

¹⁴⁶ <http://hsfnotes.com/adr/2013/05/15/improving-consumer-protection-on-a-european-level/>

¹⁴⁷ <https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers>

5 Key Considerations

143. Whilst not necessarily increasing ‘access to justice’, ADR can have a positive role to play and value to add within the civil justice system, in resolving disputes early. However, as Genn states:

*“We need a strategy for the cases that we want to encourage into the system and those that we would prefer to discourage and we need to articulate our reasons for both of these choices. Our judgment about the quality of our civil justice system should not be measured simply in terms of speed and cheapness, or by how many cases we can persuade to go elsewhere.”*¹⁴⁸

144. The Scottish Consumer Council considered some questions around the suitability of incorporating ADR into the civil justice system which appear useful to bear in mind when considering the use of ADR in the civil justice system, as follows.¹⁴⁹

When does ADR work best?

- The report thought that the most appropriate solution will ultimately depend on the circumstances of each particular case.
- Generally, it was thought that mediation can be useful when parties are in dispute over something other than, or in addition to, money. For example, one or more of the parties may be seeking an apology. It is noted that the research available on family mediation has shown that the effects of mediation can extend beyond simply resolving the specific issues in dispute as one of the main objectives of family mediation is the improvement of communications between the parties.¹⁵⁰

What types of dispute are suitable for ADR?

- Generally, there is no limitation, although mediation has been most prevalent in the family and commercial spheres. Research has suggested that where the

¹⁴⁸ Genn H, ‘ADR and Civil Justice: what’s justice got to do with it?’ in *Judging Civil Justice*, (2009)

¹⁴⁹ Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001)

¹⁵⁰ Lewis J., *The Role of Mediation in Family Disputes in Scotland*, Legal Studies Research Findings No 23 SOCRU (1999), cited in Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001).

parties have both volunteered to accept mediation, that it is capable of success across a wide range of civil cases.¹⁵¹

- This can also be seen in the experience of the mediation project at Edinburgh sheriff court which has dealt with a wide range of civil disputes.
- However, there are some cases that may never be suitable for mediation, including where there is a severe imbalance of power (such as domestic abuse cases) or where there is a need for an objective assessment of complex factual evidence.

Power imbalances

- The report points to research¹⁵² which suggests that mediation can heighten any imbalance of power between parties.
- However, it should be acknowledged that were such a dispute to go to court, and in the absence of legal aid, the imbalance between the parties would still exist.
- It is commented that in an adversarial system, the unrepresented litigant is clearly disadvantaged and that in the case of mediation, a good mediator should be aware of any power imbalance and take steps to minimise this balance so far as possible.¹⁵³ However, this is inconsistent with Genn, who states that the impartial quality of a mediator would prevent this from happening.¹⁵⁴

Available resources

- The report also considered the question of funding. It is noted that while there are a considerable number of private mediators operating in Scotland, there is a lack of public funding for mediation services out-with the family and community fields. In this context, it is highlighted that private mediators charge considerable fees which would be beyond the reach of most

¹⁵¹ The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor's Department Research Series No 5/98; Genn H., (1998), cited in Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001).

¹⁵² The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor's Department Research Series No 5/98; Genn H (2008), cited in Scottish Consumer Council, [*Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*](#), (2001).

¹⁵³ As is acknowledged in existing codes of practice for mediators.

¹⁵⁴ Genn H, 'ADR and Civil Justice: what's justice got to do with it?' in *Judging Civil Justice*, (2009)

consumers with low-value disputes.¹⁵⁵ Thus, the report concludes that if the use of mediation is to be promoted in civil disputes, mediation services must be supported by public funding.

- The report considers that pilot projects could be set up in different geographical areas, based on a variety of models, before rolling out the most successful models throughout the rest of Scotland. It is also considered that there is a need for further in-court advice projects throughout Scotland which would be able to identify and refer appropriate cases to mediation, either before a court action is raised or before the full court hearing.
- Finally, it is noted that how such schemes would be funded and administered would require extensive consideration and that whilst the experience so far of the Edinburgh Sheriff Court appears positive, the model is not sustainable in the long term as it relies on private mediators providing their services free of charge in exchange for the experience, in a market where there is little demand for those services.

Other considerations

145. In addition to those identified by the Scottish Consumer Council, the following issues merit consideration when giving thought to the use of ADR in the Scottish civil justice system. In particular, consideration should be given to: the information available to parties; whether ADR should be compulsory or voluntary; and, timing.

146. As referred to above, there are concerns that the more pressurised parties feel to mediate, the more resistant they may be to the process which will lead to negative outcomes.¹⁵⁶ If freedom of choice is to be considered key, then perhaps it would be fitting to ensure that litigants, and potential litigants, have all of the information necessary to enable them to:

- 1) be aware of what ADR methods are available to them;
- 2) understand the advantages and disadvantages of ADR; and
- 3) understand how ADR differs to judicial determination.

¹⁵⁵ For example, current CEDR costs for a dispute value of less than £75,000 is £1,000 (£500 per party) plus VAT.

¹⁵⁶ Genn H., (2007) and SLAB In-court Mediation Project reports (2013).

147. If litigants are empowered to be able to make an informed choice about whether they wish to proceed to court or to attempt ADR, they may be more invested in the process which may in turn achieve better outcomes).

148. With regards to timing, it may not be appropriate to encourage certain cases to ADR which have/have not reached a certain point in the dispute. For example, as commented on in the observations of the In-court Mediation Service at Edinburgh, parties were more likely to try mediation where the date had been set for trial. Indeed, this is the practice followed in the Employment Tribunal where imminence of the trial is found to focus parties on the issues and on their desire to reach a settlement or conclusion to their dispute. On the other hand, it may be that cases which are just about to go to trial should not be encouraged to try ADR as the parties may feel that this is an additional process or hurdle in the way of achieving a decision on their respective legal rights. It seems preferable to reach cases as early on in the process as possible, so that those cases which are appropriate for ADR are swiftly able to be filtered out of the court system.

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Ministry of Justice Court-Linked schemes (Extract: Annex C to chapter 7 of the SCCR)

Court-linked schemes

43. The Ministry of Justice have taken the view that the in-house mediation service at Manchester County Court, described above, had been shown to be the most effective for lower value claims, demonstrating the highest levels of both settlement and customer satisfaction. Following the success of the Manchester pilot, throughout 2007/08, the service was rolled out across England and Wales - so that now the whole of England and Wales is served by the small claims mediation service. The mediators are civil servants employed by the Ministry of Justice and have mostly been recruited from the ranks of HMCS staff, usually at court manager level. They receive training and are provided with administrative support. They deal with small claims cases (which have an upper limit of £5000), such as disputes involving goods and services and private disputes between individuals. They do not deal with housing or undefended debt negotiations.

44. In its report for 2007/08¹⁵⁷ on the effectiveness of its commitment to use alternative dispute resolution, the Ministry of Justice reported that during the first year (April 2007 to March 2008) of its small claims mediation service, 3,745 mediations were conducted, of which 2527 settled, a settlement rate of 67.5%. By far the largest proportion of small claims mediations (87%) took place over the phone. The average length of time from date of allocation to date of settlement was 5.2 weeks, as compared with the 14 weeks that it normally takes from allocation to a small claims hearing. 98% of users said they were satisfied or very satisfied with the professionalism and helpfulness of the mediators, with 94% saying that they would use the service again.

45. For higher value claims, above £5000, a low-priced time-limited mediation service via the National Mediation Helpline is available. The August 2008 edition of the Ministry of Justice's Out of Court newsletter reported that of the cases referred to the Helpline in the calendar year 2007, 787 mediations were conducted and there was a success rate of 66%. The helpline is broken down into geographical areas and works with panels of mediation providers who have obtained accreditation on a system developed by the Civil Mediation Council. They agree to go on a rota and provide a service on a fixed-fee basis. It is essentially a "cab-rank" system, so people who use it are not offered a choice of possible providers.

46. The Ministry of Justice's policy is to mainstream mediation into the work of the courts, so that small claims mediation becomes an integral part of the court process, and the larger courts in particular are encouraged to refer higher value cases to the National Mediation Helpline. The case allocation questionnaires for both small claims and fast track and multi-track cases have recently

¹⁵⁷ The Annual Pledge Report 2007/08, available on the Ministry of Justice website.

been updated to reflect this policy. Both questionnaires, which have to be completed by both the claimant and the defendant, have an initial section entitled "Settlement". The small claims form asks whether the person completing the form would like to use the free small claims mediation service provided by HMCS and requires a tick in either "Yes" or "No". The fast and multi-track form starts with a reminder that under the Civil Procedure Rules parties should make every effort to settle their case before the hearing and that the court will want to know what steps have been taken. Legal representatives have to confirm that they have explained to the client the need to try to settle, the options available and the possibility of costs sanctions if they refuse to try and settle. There is a box on the form which can be ticked and the court will arrange a mediation appointment.

47. In January 2008 the Judicial Studies Board published a Civil Court Mediation Service Manual, for which the Master of Rolls, Sir Anthony Clarke,¹⁵⁸ provided the Foreword. The aim of the Manual is to provide "a valuable reference tool to help guide staff and judiciary through the 'nuts and bolts' issues of supporting a mediation service for small claims as well as part and multi-track disputes."

¹⁵⁸ Available on the Judicial Studies Board website: <http://www.jsboard.co.uk/publications.htm>

Annex B

Summary of Monitoring and Evaluation Framework for Edinburgh Mediation Project

	2012/13	2013/14				
	Q4	Q1	Q2	Q3	Total	
Mediations taking place	36	17	11	13	77	
Successful mediations	31	16	8	10	65	84.4%
unsuccessful mediations	5	1	3	3	12	15.6%
Type of Referral						
Court	24	12	9	11	56	72.7%
Self-referral	12	5	2	2	21	27.3%
Type of claim						
Small Claim	35	17	10	13	75	97.4%
Summary Cause	1	0	1	0	2	2.6%
Type of cases						
Unpaid invoices	14	10	5	2	31	40.3%
Landlord/Tenant	8	5	3	3	19	24.7%
Refund for faulty goods/services	5	1	3	6	15	19.5%
Compensation for faulty goods/services	2	1	0	0	3	3.9%
Unpaid Wages	0	0	0	1	1	1.3%
Breach of Contract	0	0	0	1	1	1.3%
Neighbour dispute	5	0	0	0	5	6.5%
Return of personal possessions	1	0	0	0	1	1.3%
Landlord v letting agency	1	0	0	0	1	1.3%
Type of mediation						
Face to face	35	16	9	12	72	90.0%
Telephone	3	1	2	1	7	8.8%
Skype	1	0	0	0	79	1.3%

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