Some reflections on 'I won't see you in court'[*]

Introduction

This short article is concerned with the recent report of the Scottish Parliament's Justice Committee "I won't see you in court" regarding the future development of Alternative Dispute Resolution ('ADR') in Scotland.[1] The extent to which ADR is and should further be enmeshed within the fabric of Scottish civil justice is a recurrent theme. Reports have come and gone, interest has ebbed and flowed but development of ADR in Scotland has been steady rather than spectacular over the past few decades. This time, however, it may be different. The publication of this report is especially timely. Its emergence occurs in a time when other developments may render the proposals especially meaningful. These initiatives include the ongoing Scottish Civil Justice Council project to rewrite the Scottish Civil Court rules[2] and the recent Scottish Government consultation to modernise family justice.[3] Equally the embedding of ADR in simple procedure has already seen an increasing use of mediation within the civil court context.[4]

It is against this background of increased opportunity for ADR that the proposals set out in this report are scrutinised. As a preliminary point, it should be noted that this article does not cover all issues raised in the report and moreover, is mainly concerned with the impact of the committee's proposals on mediation rather than other forms of ADR. In addition, it can be argued that the term ADR is not an especially helpful one. ADR is an umbrella terms for a collection of somewhat diffuse processes, and as the committee notes, the 'alternative' labelling may have the effect to set different processes against each other.[5] In any case, despite some reference to measures to help develop arbitration throughout the report, the bulk of the committee's proposals pertain to mediation.

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[1] Scottish Parliament Justice Committee, *I won't see you in court: alternative dispute resolution in Scotland* SP Paper 381, October 2018 available at file:///C:/Users/igs04166/Documents/I%20won't%20see%20you%20in%20court%20report.pdf

[2] See http://www.scottishciviljusticecouncil.gov.uk/committees/rules-rewrite-working-group/rules-rewrite-project-work-streams

[3] Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy: A Consultation* May 2018 available at https://consult.gov.scot/family-law/children-scotland-act/user_uploads/children-scotland-act-1.pdf

[4] By virtue of Act of Sederunt (Simple Procedure) 2016, Schedule 1.

[5] At paragraph 20

Lawyers, barriers and mediation

Lawyers as gatekeepers

The first set of proposals pertain to overcoming barriers to the current use of ADR in Scotland. The committee states that there is currently a "lack of information on the availability and benefits of ADR, inconsistency in the provision and funding of ADR and inconsistency in referrals to ADR from the courts".[6] In dealing with the first issue the Committee proposes measures to increase awareness in the legal profession as well as bolstering obligations on Scottish lawyers to inform their clients about the potential utility of ADR[7][8]. Evidence from many jurisdictions suggests that lawyers are gatekeepers to mediation.[9] Clients engage lawyers because of their expertise in law and the legal resolution of disputes. If lawyers are negative in their appraisals of mediation or refrain from raising it as an option, clients are unlikely to find their own way to the process.[10] While this is especially relevant in respect of relatively disempowered 'one-shotter' clients, it also holds true that even sophisticated commercial repeat players may receive information about mediation most commonly from their legal advisors[11]. Thus Scottish lawyers will undoubtedly be instrumental in helping expedite further growth of mediation.

Legal Education

Turning to the issue of legal education, the Committee proposes for greater university coverage of ADR for students of law.[12] Currently, at the Foundation stage of learning,[13] one of the compulsory Law Society of Scotland learning outcomes to be attained in the course of study requires the demonstration of 'an ability to address the resolution of disputes by a

[6] At para 27

[7] For a discussion of the current requirements for lawyers to discuss ADR with their clients see Cross Ref – not sure how you want to handle this –do we need to know the page numbers of the article as it will appear?

[8] At paras 36 and 37

[9] For an overview see B Clark, *Lawyers and Mediation* (2012), Chapter 2.

[10] Client awareness of mediation may be low. For example, contrary to expectations civil legal aid removal and hence decline in involvement of lawyers in English family matters led to a reduction in mediation – see Rosemary Hunter and others, 'Access to What? LASPO and Mediation' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury Publishing PLC 2017) 239,246.

[11] For a discussion see Clark supra n 8 at para 2.3.4

[12] At para 36.

[13] Fulfilled in the undergraduate LLB.

variety of adversarial and non-adversarial skills'.[14] In the PEAT 1 learning outcomes,[15] students must '[u]nderstand different approaches to the theory of legal negotiation including facilitated negotiation'. One of the stated 'positive indicators' of this outcome is that the student can 'demonstrate an understanding of the rules of mediation'.[16]

These stipulations can be met, however, by relatively scant coverage, although some Scottish Law Schools do provide more advanced, optional provision.[17] The Law Society of Scotland is currently consulting with educational providers on altering the required outcomes, which may entail greater coverage of mediation and other ADR procedures in core classes and this is to be welcomed.[18] Evidence does show, however, that university education may, *per se*, be of rather limited impact in helping expedite mediation. This is so because cultural barriers in the legal profession may militate against the use of mediation[19]. Fledgling lawyers, even as mediation enthusiasts, may have limited opportunities to influence the dominant culture within law firms in which alternative processes may enjoy little recognition.[20] Indeed, although increasing numbers of Scots lawyers may be supportive of mediation, many may remain resistant for a wide range of reasons and thus further measures to expedite the process will be required.[21]

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[14] Under the heading 'Key Personal Skills: Communication and Literacy': see the foundation programme guidelines issues by the Law Society of Scotland and available via www.lawscot.org.uk

[15] Fulfilled in the Diploma in Professional Legal Practice

[16] Education and Training Law Society of Scotland Professional Stage 1 — PEAT 1 Accreditation Guidelines for Applicants p 49 available via http://www.lawscot.org.uk.

[17] For example, at Strathclyde University there is currently a mediation elective at honours level as well as a Mediation and Mediation Advocacy elective on the Diploma in Professional Legal Practice. Aberdeen University has an Alternative Means of Dispute Resolution option at undergraduate level and a Dispute Resolution class on the Diploma in Professional Legal Practice.

[18] Email correspondence with Law Society of Scotland

[19] Mediation may for example, not fit well with existing practice norms relative to civil dispute resolution – see Clark *supra* n.8 at para 2.5

[20] See for example J Sidoli del Ceni, "An Investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales (2011) 3(2) In J Law Built Enviro 182. It is recognised that a cultural shift may be taking place in certain quarters with some Scottish law firms relabelling their litigation departments as 'dispute resolution' departments. Equally, previous research has found a growing number of lawyers enthusiastic about mediation (even if they remained firmly in the minority) – see, for example, A. Agapiou & B. Clark, (2011) "Scottish construction lawyers and mediation: an investigation into attitudes and experiences", International Journal of Law in the Built Environment, Vol. 3 Issue: 2, pp.159-181

[21] For example, the evaluation of the in-court mediation pilot schemes in Aberdeen and Glasgow sheriff courts found some suggestion of a reluctance of lawyers to engage in mediation because of personal financial imperatives: M Ross and D Bain *Court Mediation Pilots: Report on Evaluation of in Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* (Scottish Government, Courts and Constitution Analytical Team, 2010) para 3.38 available via http://www.scotland.gov.uk.

Rules to promote lawyers' consideration of ADR

In this vein, the report turns to the issue of imposing obligations upon lawyers to consider ADR and inform their clients about it. In terms of current professional requirements on Scottish solicitors in this regard, the current Law Society of Scotland rules are rather limited in scope.[22] For example, by dint of rule 1.9, solicitors are obliged to provide sufficiently clear and comprehensive information on which basis clients may make informed decisions about how to progress their case, although the rule does not reference ADR specifically.[23]

The Law Society of Scotland has published guidance relative to complying with Rule 1.9, however, which stipulates that "solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client… [a solicitor] should be able to discuss and explain… the advantages and disadvantages of each (ADR process] in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue and…identify where alternative methods of dispute resolution may not be in the best interests of the client…"[24]. The Guidance is non-binding, however, and including such obligations in the rules themselves would be an appropriate step in helping raise the profile of mediation within the profession. The Justice Committee favours such measures as well as requiring that solicitors keep a record of advice tendered to clients relative to ADR for potential scrutiny by the Law Society of Scotland.[25] It is submitted that this approach would help provide the rules with real teeth.

<u>ADR and the court</u>

The report further sets out a range of proposals relative to the role of the court in promoting ADR. There are three aspects to the committee's proposals around court promotion: first, is to ensure greater consistency of practice relative to existing rules regarding mediation referral

[22] Law Society of Scotland Practice Rules 2011 available at https://www.lawscot.org.uk/rules-and-guidance/.
[23] Ibid, Section B1, r 1.9.1
[24] Law Society of Scotland Guidance related to rule B1.9 (Dispute Resolution): see http://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b1-standards-of-conduct/guidance/b19-dispute-resolution/.
[25] At para 37.

in courts through for example greater education in ADR for judges; secondly, is to use the ongoing rules rewrite for Scottish for civil courts to greater embed mediation within the rules; and finally is to ensure that there is systematic funding for mediation especially in relation to simple procedure.[26] Before discussing these proposals specifically, it is worth noting that despite its roots as a form of dispute resolution that represents a turning away from lawyers and courts, evidence suggests that mediation only really flourishes in a jurisdiction when it becomes linked to the formal civil justice system.[27] The role of the court and judges in helping expedite mediation is hence vital.

Consistency in court provision

On the first point, it should be recalled that there are a variety of current rules that already make provision for recourse to mediation. Aside from the new simple procedure provisions there has for some time been a rule in consistorial matters allowing court referral to mediation in both the sheriff courts and the Court of Session[28]. Moreover, a Practice Direction applies in respect of commercial actions in the Court of Session with the aim of promoting ADR.[29] These rules do not, however, seem to currently operate as effectively as they could. In respect of family actions, it has been reported that application of the court referral rule is patchy with significant shrieval resistance evident in some geographical areas.[30] There is also scant evidence of the effectiveness of the commercial Practice Direction. Clearly there is a marked variation in awareness levels of, and positivity towards mediation from sheriffs and judges across Scotland.[31] Against this backdrop, the committee's proposals for greater judicial education in ADR is valuable.[32]

Funding

[26] Set out in paras 75-77.
[27] For a discussion see B Clark 'Can courts enhance the use of mediation?' Asian Journal on Mediation Vol 2015, pp. 49-59

[28] RCS, r 49.23; OCR rr 33.22, 33A.22 (OCR r 33A added by SSI 2013/139) (set out in the Sheriff Courts (Scotland) Act 1907 (c 51), Sch 1).
[29] Court of Session Practice Note 1 of 2017 (re Commercial Actions).
[30] See the Scottish Mediation Network response to the Sheriff Court Rules Council Consultation on Mediation at Q8b, available via http://www.scotcourts.gov.uk and Family Mediation Scotland response to the Court Reform Bill at p 2 available via http://www.scottish.parliament.uk.
[31] See C. Irvine 'Scotland's 'Mixed' Feelings About Mediation' (July 12, 2012). Available at SSRN: https://ssrn.com/abstract=2713346 or http://dx.doi.org/10.2139/ssrn.2713346
[32] At para 76

Funding for mediation is a controversial issue. As Charlie Irvine the director of the Strathclyde University Mediation Clinic makes clear in his response to the consultation which fed into the Justice Committee's report, the lack of financial provision for mediation in the current simple procedure context is problematic.[33] Mediators providing their services in the Edinburgh and Strathclyde court schemes provide their services for free. *Pro bono* delivery has occurred not least because of the difficulty that mediators have had in gaining experience. Equally those currently training or taking academic mediation programmes are generally keen to gain experience through co-mediating, so the supply of mediators willing to operate gratis seems secure. The roll out of mediation throughout sheriff courts in Scotland, however, has the potential to lead to much greater demand for mediation services. A properly funded national scheme is required to ensure consistency and high quality services. In this vein the committee proposes that "[t]he Scottish Government and the Scottish Courts and Tribunals Service should therefore consider how in-court ADR services, particularly for simple procedure cases, could be funded and provided on a more consistent basis throughout Scotland."[34]

Although a properly funded service requires upfront funding, evidence suggests that court based mediation can be cost effective in the longer term[35]. In terms of the model for delivery, Scottish Mediation[36] have argued that a Social Enterprise model should be deployed which is 'an appropriate vehicle for the mix of Scottish Government funding and income generation which will be required to run the service'.[37] The proposal anticipates charging a small administrative fee from users to complement Scottish government funding.[38] Fee charging for public goods such as civil justice is a controversial issue but consonant with the fee regime

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[33] Strathclyde Mediation Clinic written submission available at http://www.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-USMC.pdf. It has also been reported that mediators operating in the Aberdeen and Glasgow pilot mediation schemes did not think that *pro bono* offering was sustainable in the long term – Ross and Bain at *supra* n. 20 para 4.43

[34] At para 77.

[35] See Ross and Bain *supra* n. 20 para 6.3 for evidence of costs and time savings in the Edinburgh and Aberdeen court mediation pilots.

[36] Scottish Mediation (previously the Scottish Mediation Network) is a membership body that seeks to provide minimum standards for practice in mediation across a range of dispute areas in Scotland – see https://www.scottishmediation.org.uk/

[37] Scottish Mediation Network Discussion Paper: on the Integration of Mediation in the Scottish Civil Justice System (Feb 2014) available at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/access-to-justice-committee-files/10-march-2014-papers/6-1b-civil-justice-mediation-model---discussion-paper-(incl-flowchart)---scottish-mediation-network.pdf?sfvrsn=2 p 4

[38] Ibid p6

that applies in Scotland for accessing civil courts with its recent shift towards a 'user pays' principle[39]. Any additional fee for mediation, unless modest and tightly means-tested is likely,however, to act as a barrier to development. Equally it can be argued that truly means tested systems are often prohibitively expensive to operate. So for example, family mediation services run under the aegis of Relationships Scotland generally charge a small fee unless users self-declare as unable to pay.[40]

Mandatory Mediation

One issue that exercised the minds of the committee in their deliberations is the extent that participation within mediation should be rendered compulsory. Mandatory mediation is a controversial practice even if relatively commonplace in other jurisdictions.[41] Although it may seem anathema to the voluntary ethos of mediation and of questionable legality[42] it has been shown in some jurisdictions to be a useful way of expediting the process without necessarily reducing satisfaction and settlement rates.[43] Mediation tends not to develop well in purely voluntary environments, mainly because of the resistance of parties themselves, and their legal advisors. Mandatory mediation can cut through such resistance – some of which is arguably misguided – and might even effect a cultural change where mediation becomes an accepted norm in disputing practices.[44] It is of little surprise that mandatory mediation was eschewed by the committee,[45] however, given that it seems that compulsion in mediation is not widely supported even within the Scottish mediation community.

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[39] The Scottish Government recently raised court fees by 2.3% from April 2018 with further 2% rises from April 2019 and April 2020 respectively. See *The Sheriff Courts Fee Order 2018* (SSI 2018/81). available at http://www.legislation.gov.uk/ssi/2018/81/made

[40] See for example, the information provided by Family Mediation Scotland Borders at http://www.fmborders.org.uk/fees-and-contributions.html

[41] Including in parts of the US, Canada and in continental Europe

[42] in the English Court of Appeal case of *Halsey v Milton Keynes General Trust NHS* [2004] EWCA (Civ) 576 Dyson, LJ viewed that compulsory referral by the court to mediation would amount to an infringement of Article 6 of the European Convention on Human Rights. This view has generally been discredited since the European Court of Justice ruled in the case of *Rosalba Alassini v Telecom Italia (*Joined Cases C-317/08, C-318/08, C-319/08 and C-320/0) that an Italian court's imposition of compulsory mediation was not a breach of Article 6(1) of the Convention of Human Rights at least in so far as any such scheme does not result in decisions binding against the parties, or is subject to substantial costs or delays.

[43] See, for example, the Ontario experience reported in Robert G. Hann and Carl Baar, 'Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months' (Toronto: Queen's Printer, 2001)

[44] Ibid

[45] At para 122 where the Committee refers to the notion that many of mediation's benefits stem from its voluntary nature and also that in some cases parties should have a right to seek legal recourse through the courts.

MIAMs

Save in domestic violence cases, the committee, however, favours a mandatory mediation information approach where the compulsion is not to mediate but to receive information on the process.[46] It can be contended that the introduction of Mediation Information and Assessment Meetings ('MIAMs') would be a useful development. Even though evidence arising from the use of MIAMs in England and Wales in family actions is mixed, it does not mean that as a concept this approach is not without merit. Some of the criticism of MIAMs in the family context in England has emanated from the poorer than expected take up of full mediation – as well as its coupling with the demise of civil legal aid in family matters[47] – although on a more positive note the recent MOJ study suggests a conversion rate from MIAM to mediation between 66-76%.[48] Conversion itself should not be the goal, however, but rather to raise awareness of mediation and afford an opportunity for litigants to make informed decisions as to whether to participate or not in the process by the provision of consistent, thorough and balanced information. Furthermore, as the committee notes, given the large number of litigants in person in the sheriff courts, MIAMs may also provide would-be users with an opportunity to prepare more meaningfully for participation in mediation than is currently the case.[49] In terms of who should provide such mediation information, existing mediation service providers could be called upon although proper funding of this activity needs to be put in place. An alternative option might be to develop on-line, automated mediation assessment and information which becomes a default part of case filing processes.

Proper vetting for inappropriate cases in any intake process for mediation[50] must be carried out. In terms of screening we should be aware of the perverse incentives that particular funding models may hold for an over-zealous approach to client conversion thus channelling

[46] At para 124

[47] By virtue of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

[48] B Hamlyn et al Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings (2015, Ministry of Justice Analytical Series), p 3. s.

[49] At para 124

[50] Where there are significant issues around capacity for example.

inappropriate cases into the process[51]. In this sense, the concerns voiced by Scottish Women's Aid as set out in the report are important[52]. Screening in family cases already takes place and the main professional body in the field, Scottish Mediation, could work with current and future providers to develop and establish best practice here across different civil dispute areas.

A Mediation Act for Scotland?

Finally, the Committee also expressed support for the consideration of a Mediation Act for Scotland.[53] A Mediation Act can be seen to have two broad functions. One is to make new provision for current areas of mediation law that may arguably be seen as ill-served or unclear including perhaps such issues as confidentiality, sanctions for refusal to mediate, obligations upon lawyers to discuss mediation with clients, setting standards for mediation conduct and enforceability of mediated outcomes. Indeed, many of the proposals for mediation set out in the report could be introduced by way of a Mediation Act. Furthermore, much of the law that currently pertains to mediation in Scotland can be described as the law *in* mediation rather than the law *of* mediation in that many provisions are not crafted for mediation specifically but rather are more general legal concepts that have been adapted to the mediation context.[54] For example, new legislation for confidentiality and evidential privilege in non-family mediation in Scotland - replacing the general vagaries of law relative to the without prejudice rules for negotiations and contractual confidentiality - may be seen as welcome in clarifying the current rules.[55]

The second and arguably more important function of a Mediation Act, however, is broader in that legislating for mediation in Scotland in this way may serve to raise the profile of the

[51] Although in the context of MIAMs in the family law field the cautionary tales of Barlow et al regarding the inadequate screening and over optimism regarding mediation needs to be borne in mind, see Barlow A., Hunter R., Smithson J., Ewing J. (2017) Entering Family Dispute Resolution. In: Mapping Paths to Family Justice. Palgrave Socio-Legal Studies. Palgrave Macmillan, London, chap 4.
[52] See the discussion in paras 102-113
[53] At para 125
[54] See N Alexander 'What's law got to do with it? Mapping modern mediation movements in civil and common law jurisdictions' (2001) 15(2) Bond Law Review 1.
[55] For a discussion of this issue see A. Agapiou and B. Clark, 'The practical significance of confidentiality in mediation' (2018) 37 (1) Civil Justice Quarterly pp. 74-97

process with the judiciary, lawyers, business and society in general. As Sabine Walsh has noted in respect of the recent Irish Mediation Act 2017, "the Act is likely, in my view, to legitimise and endorse mediation as a mainstream dispute resolution option. It takes mediation out of the 'alternative' space, and making it a viable option for many who may have dismissed it as being 'out there' or not having enough teeth in the past".[56] It is hoped that a similar approach in Scotland coupled with some of the measures outlined in the Justice Committee's report may lead to a new era for mediation in this land too.

[56] Sabine Walsh, 'Et Volia ! Ireland's Mediation Act 2017' Kluwer Mediation Blog, November 6th 2017 available at http://mediationblog.kluwerarbitration.com/2017/11/06/et-voila-irelands-mediation-act-2017/