Submission by Paul Kirkwood, Law Society of Scotland Accredited Commercial Mediator and Litigation Solicitor, owner of Mediation, Negotiation and Conflict Resolution Services (MNCRS) to the proposal by Margaret Mitchell MSP for a Mediation (Scotland) Bill; in which he suggests adopting the Mandatory Mediation (MM) Model practised in Ontario, Canada as the statutory way forward for Scotland.

First of all, I want to say, that I warmly welcome the fact that Margaret Mitchell MSP has stepped forward and sought to grab the Mediation Bull by the Horns as it were! As she rightly points out, this has been talked about for too long and proceeding to legislate to make mediation a normal dispute resolution process in Scotland is the logical next step forward.

By way of background I have been a litigation solicitor since 1993 and practice now as a commercial mediator accredited by the Law Society of Scotland (one of only five such). I also provide pro bono mediation under the auspices of the University of Strathclyde mediation clinic (USMC) at Falkirk Sheriff Court and at Edinburgh Sheriff Court under the citizens advice bureau (CAB) scheme there. I retrained as a mediator in 2016/2017 undertaking the LLM legal Master's degree in Mediation, Negotiation and Conflict Resolution at the University of Strathclyde under the tutelage of Charlie Irvine, its course leader and a mediation pioneer in Scotland. I am also a member of Scottish Mediation (formerly the Scottish Mediation Network) which is in effect the nationwide umbrella body to which most mediators in Scotland subscribe. I tutor mediation on the postgraduate Diploma of Legal Practice at the University of Edinburgh to law students there and I provide, through the auspices of the Law Society of Scotland CPD programme, training in the theory and practice underpinning commercial mediation in Scotland, to Scottish solicitors. I enjoy practising and teaching mediation.

My personal experience of mediation being used as a means of dispute resolution by solicitors and counsel to help resolve their clients' (the people that this is all about) legal disputes is that there is a reasonably solid, though relatively small, core of solicitors (particularly commercial solicitors whose clients have to pay directly for their legal services) who are prepared to and do use mediation regularly. They do so because they are acutely aware of the cost of litigation, win or lose, and because they put the best interest of their clients first. My wider anecdotal experience is that many practising solicitors do not know what mediation is about and have never experienced it. I make many presentations to Scottish law firms and that is the basis of my knowledge. This lack of experience understandably makes them wary. My further anecdotal experience is that many solicitors (particularly litigation solicitors involved in cases where insurance is a factor) are actively hostile to mediation, and avoid engagement of their clients' cases in it. I speculate that this is in part because of not knowing what the mediation process is about and how actually in practice it is remarkably effective. However unfortunately it is also in part because they view the litigation process as a means of making money and hitting fee targets and they regard mediation as a threat to this. Arguably to some extent in those circumstances this means that clients' best interests may or can become secondary. In this regard, those solicitors are wrong to regard mediation as a threat. I will return to this.

In Ontario, Canada, that state has been running a successful program of MM as part of the litigation process since 1999. After the first two years, an Evaluation Report[1] was carried out which consulted all users including solicitors. Findings from those solicitors included a view that mediation resulted in a decrease in overall costs as a result of generally earlier settlements. There was a caveat that if a

[1] Evaluation of the Ontario MM Program (rule 24.1): Final Report-The First 23 Months by Robert G Hann and Carl Baar. Available at http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf

mediation had had absolutely no overall effect on the legal process of a disputed case, this did increase costs; but that this was a very rare occurrence. There were examples (I have experienced this personally) where later, second mediations were held and were successful. There were observations that mediations could take place too early to be effective-the legislation provides the possibility for a stay/delay. Insurers were concerned that MM would see costs rise, but found their costs had actually fallen. Lawyers found that they were getting reduced costs, but because they were getting more business, they were making more money. One lawyer respondent argued that MM by generating cash flow for lawyers through earlier settlements in a substantial proportion of cases, had promoted 'real access to justice'. This was because lawyers were able to take cases for plaintiffs without a retainer-that is, when lawyers realise that there is a 50/50 chance that a claim may settle at mediation rather than having to wait 3 to 5 years, they are more likely to take it on. 'Everyone is telling me that mediation is certainly adding to front end costs but they are all seeing that overall clients are saving money and cash flow has never been as good.' Another respondent, when asked about increased costs in terms of Rule 24.1 (see below page 5) cited personal injury cases; but then went on to say some medical malpractice cases have had costs reduced as doctors and patients come face-to-face in mediation. Similarly, the same respondent noted that in commercial cases, where parties want to continue doing business with each other, they may well want to settle early, thus avoiding higher legal costs all round.[2]

That Evaluation Report was written in late 2001 and is obviously now out of date. I approached a personal injury solicitor, Tom Brooker of Brooker Law office, Ottawa, Ontario to ask him about how matters had unfolded since. He in turn introduced me to Ernest (Ernie) Tannis, the grandfather of ADR in Canada, also based in Ontario. Following a 'Zoom' conference with Ernie and his team, their colleague Colin Szkarlat (Ontario lawyer, legal researcher and policy analyst) with guidance from Ernie (Ontario barrister, solicitor, mediator, educator and author) under the auspices of Global ADR Strategies (www.gadrs.com) Canada 2019 prepared a Research Paper-'Ontario's MM Program-Lessons, Outcomes, and the Impact on Dispute Resolution' on the history and progress of the MM scheme up to the current time. This is attached as an appendix to my submission, and I am indebted to Ernie, Colin and their whole team.

In short, this Research Paper-taking its start point as the 2001 Evaluation Report, notes that settlement rates for MM then were around the 40% mark. This was attributed in part to the requirement that the rules then required a mediation to take place within 90 days of defences being filed. This was often too early to allow the mediation to be effective-not enough information was to hand. The MM scheme was revised to extend the period to 180 days with the hope that this increased flexibility would improve settlement rates and reduce the time needed to resolve disputes. These changes were well received by both the Bar and ADR community [3], and taken together with allowing parties to seek extensions, has effectively eliminated very early MM. Thereafter settlements reached in MM were up to 46% in 2011/2012 and by 2016 it was suggested that 60% of matters at MM were settling[4].

[2] Ibid. P56-57

[3] Research Paper P8

[4] Ibid. P8

The Research Paper citing Prof Julie McFarlane's research, which focused 'on dispute resolution and the role of lawyers, has examined the shift in attitudes within the legal profession, noting that lawyers who oppose settlement instead of aiming for trial are more likely to now describe themselves as working outside the mainstream…that…there is growing acceptance of thinking that settlement early in the life of a case rather than settling immediately before trial (is better if possible)… (and that there had been a)…shift in attitudes and values amongst lawyers experienced with mediation, including through… (MM)… Counsel are more willing to move away from a lawyer centric role controlling the process, towards fostering client engagement in dispute resolution'.[5]

The MM scheme has been regarded as successful to the extent that Stuart Rudner, in The Lawyers Daily (April 15, 2019) has written 'It's Time to Take MM National'.

The Proposed 'Mediation Bill'.

I have read this thoroughly and it is admirably short and uncomplicated. I agree with the aim of the bill which is to increase the public use of mediation.

The preamble to the Mediation Bill helpfully identifies that there are different forms of mediation model-naming them as facilitative (where the mediator encourages parties to talk), evaluative (where the mediator has some input on the merits of the dispute) and transformative (where the mediator assists parties in restoring their relationship). It suggests that parties would agree on the form of mediation they want to engage in, in the initial Mediation Commencement Agreement (MCA). I welcome this-some clients want more mediator involvement (towards the evaluative end of the mediation spectrum) and others less (towards the transformative end of the mediation spectrum). Clients should be able to choose-and no form of mediation should be excluded. This is in keeping with for example the Employment Rights Act 1990 in New Zealand, which specifically makes all three named forms of mediation available.

The broad thrust of the mechanics of the Mediation Bill are as follows: –

(1) Court initiates the mediation process…by issuing parties with a self-test questionnaire;

(2) Court appoints a mediator;

(3) Parties (not agents?) meet with the mediator (they are statutorily obliged to do so) in a mediation information session (MIS) to consider the questionnaire responses and to decide whether or not to enter into a MCA;

(4) If parties don't want to mediate, the process ends and they can continue with litigation;

(5) If parties want to mediate, they require to appoint a mediator (privately) and sign up to a MCA;

(6) If the mediation succeeds, parties complete a Mediation Settlement Agreement.

Voluntarism in Mediation and its Difficulties

For a mediation to take place, both parties must agree to mediate; and the scheme is largely therefore based on voluntarism. Voluntarism is discussed in the preamble to the bill. It is however implicitly based on a view that all mediators subscribe to the idea that voluntarism is an essential

[5] Research Paper P10 and Prof Julie McFarlane, The New Lawyer: How Clients Are Transforming the Practice of Law, second edition (Vancouver: UBC Press, 2017) at 15 and 34.

part of the “Holy Trinity” of Mediation. This is a mistaken assumption. Many mediators do subscribe to voluntarism as being essential-but many do not. Many mediators are happy that mediation should be mandatory. For them the most important aspects of mediation are the self-determination of parties (including the doctrine of informed legal consent) and the confidentiality of the process, allowing as it does a frank exchange between parties and their advisers.

The following observations on voluntarism are based on my personal experience as a mediator. Most people in legal conflict in Scotland do not know what mediation is or if they have heard of it, they do not know what it entails in practice. When people have mediation explained to them, some express incredulity at the possibility of it working, particularly if they have been involved in bitter, long running and seemingly intractable disputes.

The fact of the matter is that in most mediations, resolution is reached either in full or in part, because people are in effect ‘made’ to interact with each other directly in what can often be uncomfortable and long sessions. The difference between mediation and litigation as forms of access to justice, is that the former does effectively ‘force’ interaction and becomes an ‘inquisitorial’ form of access to justice, where people do get to ask each other questions directly and often get direct answers. By contrast in the latter, people are forced apart into an adversarial stand-off, where questions are not asked directly, and people do not engage directly.

Where parties do engage directly, mediators are largely able to ensure that there is a temperate exchange of views, where people do listen to each other. This form of communication is direct, even when sometimes uncomfortable, and although also stressful, is a lot less stressful than the pitched battle that is a court hearing; where the expression of people’s views and emotional experiences are subject to limitation by ‘legal relevancy’ and ‘cross examination’. I speak as someone who has direct experience of both systems. In mediation respectful dialogue becomes possible. In litigation there is no dialogue between parties directly, just competing positions-with a likely winner and loser. In mediation it is the party who is the principal actor, where they have direct voice, input and control-they decide their own outcome. The prize of mediation is to give parties (people) direct involvement and control that is largely lost in litigation.

The difficulty with voluntarism is that people will not realise the prize of mediation and its human worth if they do not experience it personally and directly.

In my work as a pro bono mediator at Falkirk Sheriff Court, sheriffs often sum up, at case management discussions, in open court, broadly speaking what each party will need to do to take the matter forward; and implicitly point to each parties’ potential difficulties. The sheriffs are then ‘very persuasive’ at suggesting to parties that they ‘should’ speak to the mediators present. This stops short of judicial coercion-but it’s not far off it.

My experience then, over the last two years, has been that everyone so referred has taken part in mediation; even where initially, some were incredibly reluctant to do so. The initial difficulty is to get people to overcome their incredulity that mediation can work-but when they get talking, they can be difficult to stop! In only one case I personally have mediated was there no agreement. Even there, there was a civil exchange of views, and there was movement on both sides-simply not enough. In that particular case, one party could have benefited from legal advice, which would probably have led to settlement. In my role as a facilitative mediator, I could not provide that advice.

In the commercial mediation work that I undertake, of course parties to come to me voluntarily-but even then, with some scepticism. However I have also participated in commercial mediation where parties have arrived there because it has been suggested to them, in informal remarks by judges,

that the case would benefit from mediation, and that parties risked the court approaching the subsequent hearing on the basis of “a plague on both their houses” with the possibility that parties would be found liable to bear their own expenses. So ‘judicial persuasion’ is also used in this field. After the event both in court annexed mediation and commercial mediation, many people have said to me that they did not see how mediation could work-in one case, a woman who had had a previous, awful experience, of five days in tribunal in relation to the subject matter of the same dispute, contrasted that experience with her mediation experience (which did lead to resolution), and advised that mediation was by far the preferable experience.

If we really want to make mediation a normal dispute resolution experience-an inquisitorial form of access to justice, not an adversarial one, we need to make mediation mandatory.

It is important to remember that just because people are mandated to mediate, they cannot be mandated to reach agreement in mediation. If they cannot reach agreement, then they can of course proceed with litigation in the traditional manner. There is no question of parties losing the right to a fair trial/hearing in terms of article 6 of the European Convention on Human Rights.

A failure to mandate people into mediation is likely to lead to a situation where many cases involving solicitors (the vast majority of cases that go to court) will simply avoid mediation, thereby disenfranchising the vast majority of litigation parties from exercising the genuine self-determination and control that arises in mediation and exposing those parties to higher risks of increased legal costs and higher levels of personal stress.

How does MM in Ontario Work?

MM is governed by two rules of court, 24. 1 and 75.1 (the latter rule relates to MM in estates, trusts and substitute decision cases). For the purposes of this consultation and this submission, 24.1 is the rule that matters.

The rule came into force in 1999-20 years ago. It is still used. Tom Brooker (previously mentioned) confirms to me that MM is a normal and frequently used part of his professional life. He expressed no reservations about it. I will return to his personal experience of mediation as a litigation solicitor later in the submission.

Certain cases are exempted from mediation-24.1.04 (2). Parties can apply to be exempted from the rule-24.1.05-there has to be genuine cause shown.

A mediation coordinator is appointed to administer mediation in the relevant geographical area-24.1.06. Each geographical area has a local mediation committee, which includes as representatives, lawyers, mediators, court civil servants, members of the public and a judge-24.1.07. The committee administers a list of mediators and monitors the performance of those mediators and deals with any complaints against them.

In terms of 24.1.08 any mediation will be carried out by a mediator on that list. If parties’ consent, a mediator not on the list can be chosen.

In terms of 24.1.09 a mediation must take place within 180 days (as opposed to the original 90 days) of the date of defences being filed in the court case. This can be extended on application on cause shown (for example to allow parties to recover documents under the discovery process from each other or from third parties). In terms of 24.1.09 (4), (6) parties choose the mediator-if they can’t agree the mediator coordinator will appoint one from the list. In terms of 24.1.09 (7) the mediator will then fix a date for the mediation session and tell everyone where and when it will take place.

In terms of 24.1.10 (1) at least seven days prior to the mediation every party shall prepare a 'mediation statement' and provide a copy to every other party and the mediator. This statement will identify the factual and legal issues in dispute and briefly set out the position and interests of parties. This mirrors what happens in commercial mediation in Scotland now. The parties will also attach copies of any documents to be relied upon and will also provide copies of these to all parties including the mediator together with copies of any legal pleadings. If parties fail to comply the mediator will cancel the mediation and must file a certificate of non-compliance with the mediator coordinator.

In terms of 24.1.11-the parties and their lawyers must attend the mediation session. In terms of the same rule if an insurer will need to satisfy a legal case, a representative of an insurer with authority must be present. Oddly the same rule excuses the insured party from attendance if an insurer representative is present-this is a mistake. In my view it is important to ensure that the 'legal' defender is present. Only if there can be an exchange of views and discussion with regard to 'what has happened' can mediation be effective. Both parties attending the mediation must have authority to settle or be able to reach someone who does regardless of the time, day or night. The rule further specifies that other people can attend by agreement between parties. My experience is that in commercial mediation it is often very helpful to have expert witnesses present in addition when there is dispute about that kind of evidence. The rule should be changed to allow parties to bring additional people, effectively who they want.

Earlier I alluded to the fact that some litigation solicitors regard mediation as a threat to their financial well-being-I suggested that they were mistaken in this regard. Under the MM model because mediation is an integral part of the court rules and system, solicitors must prepare thoroughly for mediation and they must also prepare their clients to participate and negotiate in it as well. Mediation becomes a 'step' in the court process and as such solicitors will recover legal costs in preparing for and taking part in mediation-just as they currently do when they undertake the obligatory pre-trial meeting (PTM) that has to take place approximate four weeks before a proof hearing in court. A mediation earlier in the court process is similar to an early PTM, but with the mediator facilitating discussions in a mediative and inquisitorial fashion. Currently PTM's can fail as a result of the excessively adversarial positions often taken by competing legal teams. In an MM there will be a higher likelihood of a successful outcome.

Failure to Attend and Non-Compliance

24.1.12 requires the mediator to file a certificate of non-compliance with the mediator coordinator if either of the parties do not submit a mediation statement or they do not attend at the mediation. The matter is then referred to a judge. In terms of 24.1.13 the judge may dismiss an action if the noncomplying party is a pursuer or strike out the defence of the party is a defender. The judge can make an order in relation to costs. That is always likely to be a financial or even worse penalty for failure to comply. Non-engagement in mediation is effectively off the table. Of course, in England and Wales already it is open to the judge in the exercise of his discretion to penalise parties in legal expenses who unreasonably refuse to take part in mediation, or who take part in mediation, but not in good faith. A failure to have such a sanction is likely to render mediation ineffective.

Confidentiality

Aside from parties right to self-determine their own dispute-this is, in my opinion the other fundamental principle in mediation.

24.1.14 provides that ‘All communications at a mediation session and the mediators notes and records shall be deemed to be without prejudice settlement discussions’. There is no civil law definition in Scotland, outside of family cases, of confidentiality in mediation. We do need a definition, as the current common-law of without prejudice privilege which effectively underpins confidentiality in mediation is too narrow, even by comparison to England and Wales. In this regard see my article- ‘The Black Box of Mediation: Can It Be Broken Open?’. [6]

Outcome of Mediation

In terms of 24.1.15 the mediator must provide parties and the mediator coordinator with a report on the mediation. The support is very similar to the document that both parties to optional procedure action at the Court of Session in Edinburgh must produce following a pre-trial meeting, which takes place approximately four weeks before a proof hearing. The agreement records whether or not agreement is reached and if so, what it was, or if there was a partial agreement and if so, what it was or if there was no agreement. Different heads of claim are identified in that document. It does not comment on ‘who said what’. It is a factual document.

There is a failing here. In some jurisdictions where mediation is mandatory, parties attend the mediation but do not engage. In commercial mediation in Scotland, parties who attend agree to take part in the mediation, contractually, in good faith. In my view there should be a requirement for good faith in participating in mediation. Good faith could be defined in contractual terms by requiring parties to ‘use their best endeavours’. If parties do engage but cannot agree, then so be it- they proceed with the traditional route through litigation. The mediator should be required to confirm in his report that both parties did participate in good faith, without divulging the content of the discussion. Good faith is not difficult to diagnose. If a party does not participate in good faith there should be expenses sanctions. Thereafter in terms of 24.1.15 (3), (4) & (5)-mediation agreements can be recorded and enforced.

Finally, if at first you don’t succeed…

In terms of 24.1.16, both parties can request to participate in additional mediation sessions. I have participated in court cases where an initial mediation has not succeeded, but where factual circumstances have changed and the subsequent second mediation has succeeded.

Costs of mediation

In MM (as with Margaret Mitchell’s proposed mediation bill) mediators are instructed and paid for privately. I agree with Scottish Mediation’s contention (their report 28-6-19-Bringing Mediation into the Mainstream and Civil Justice in Scotland) that mediation should be open to all-either through state provision, up to say a limit of £5000, or through state legal aid where parties qualify. Thereafter in my view mediators should be instructed privately and parties should meet the cost of that.

Tom Brooker’s Experience of MM from the Perspective of a Personal Injury Solicitor.

I exchanged email correspondence with Tom in June and July of this year on this topic. His email to me of 12 July 2019 is also attached as an appendix to this submission. As a personal injury solicitor, it is apparent that all such cases are covered by MM, including automobile accidents. Tom observes that MM works in Ontario in part because it is part of the case management system (CMS) and that

[6] https://paulkirkwoodmediator.co.uk/2019/01/28/the-black-box-of-mediation-can-it-be-broken-open/

but for that CMS, which compels parties to move the litigation forward, the MM component would be less effective. He also opines that 'Voluntary mediation is in my view effectively useless. Parties have always been free to negotiate, mediate or arbitrate so to develop a system but then make it voluntary brings little added value in my view'.

Tom goes on 'I continue to be a strong supporter of MM. There are some who argued way back when it started that since the goal of mediation is to arrive at an agreement to resolve the litigation, you cannot force an agreement so it makes no sense to make it (sic mediation) mandatory. However, the system works. It is fully open to a party to appear at a mediation and state simply that they will make no offer to settle and will not engage in any negotiations. However, in practice while this sometimes occurs litigants have seen the benefit of it. When it was first introduced as a voluntary process some old-school litigants (lawyers!) saw it as signalling weakness or doubt about the strength of their case to suggest to the other side that mediation might be helpful. By making it mandatory, this issue is taken off the table. There were some old-school litigants who first responded to MM by saying in effect, we don't mediate-we assess a case and establish our position and it's take it or leave it. If you don't agree, we go to court…this approach was quickly seen as short sighted and there are few….who take that approach'.

Tom concludes 'In terms of negatives, I don't see any as long as there is flexibility in the system to allow parties to elect when the mediation takes place'.

It will be evident from the above that the MM scheme is not 'absolutely' mandatory-it does require people to attend at a diet of mediation having exchanged mediation statements and documents (in other words having prepared properly to take part in mediation) but it allows those same people to then choose not to participate in the mediation. Tom advises that since parties have had to prepare and attend, most then participate in good faith-very few don't.

The Ontario MM scheme does not go as far as my suggestion of 'requiring good faith' in taking part in mediation. On reflection, perhaps that aspect of my suggestion goes too far, given Tom's observations on the actuality of the experience in Ontario at MMs. The further potential difficulty that that aspect of my proposal creates is that it requires the mediator to ascertain good faith. Whilst I don't think that good faith difficult to ascertain, I can understand some mediators would be uncomfortable about being asked to 'judge' in that regard.

Video Prepared by Ernest Tannis and Doreen Kahale of GADRS

Ernie and his colleague and collaborator Doreen have also prepared a 35-minute video which gives the history and the actuality of experience of MM in Ontario over the last 20 years. This deals head-on with concerns about MM and makes the very important point that unless people are compelled to attend mediation, they may not engage with it. Ernie deals with these issues by referencing cases he has been involved in with lawyers where there was significant resistance to involvement in mediation, which ultimately resulted in those lawyers embracing it and settling cases through it. Here is a link to that video which can be found on YouTube. It is very much worth watching and explains how mediation was developed with support of both the judiciary and the Bar/Law Society. https://youtu.be/QwkbkonO7vc .

Conclusion

I strongly support Margaret Mitchell's desire to make mediation, through statutory provision, a normal part of dispute resolution in Scotland. My genuine concern is that her proposal, with its dependence on voluntarism, if successfully implemented in legislation, will see most litigated cases

avoid mediation as the result of the reluctance of solicitors and lawyers generally, to engage with the project. Most party litigants would then be disenfranchised from the benefits of mediation and the Act would largely fail to achieve its purpose.

The advantage of adopting the Ottawa MM scheme means that mediation would be adopted easily into the architecture of the court system without the wheel needing to be reinvented. It would lead to a change in the culture of our approach in Scotland to dispute resolution overnight and it would avoid the resistance to change that is inevitable if the scheme based on voluntarism is adopted.

Ask yourself this in relation to people in legal dispute:

- Do we as a community in Scotland want to put people into an adversarial, winner takes all, court system-or do we want to encourage ‘real access to justice’ through a system that encourages inquisitorial mediation?

Why would we actively want to expose people to the former?