2019

The response of DisputesEfiling.com Limited to Margaret Mitchell MSP's consultation about a proposed Mediation (Scotland) Bill

THE RESPONSE OF DISPUTESEFILING.COM LIMITED
TONY GUISE, DIRECTOR

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In this Response the replies of DisputesEfiling.com Limited (DEF) are shown in plain font whilst the questions raised in the consultation appear in italics. The questions have been copied and pasted from the consultation paper. The phrase "the Proposal" used in our Response refers to the Proposal the subject of this consultation.

Please ensure you have read the consultation document before responding to any of the questions that follow. In particular, you should read the information contained in the document about how your response will be handled. The consultation document is available here:

Consultation document

Privacy Notice *****

◉ *I confirm that I have read and understood the Privacy Notice attached to this consultation which explains how my personal data will be used*

Please choose whether you are responding as an individual or on behalf of an organisation.
Note: If you choose "individual" and consent to have the response published, it will appear under your own name. If you choose "on behalf of an organisation" and consent to have the response published, it will be published under the organisation's name. *****

- ○ *an individual*
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Please select the category which best describes your organisation *****

- ○ *Public sector body (Scottish/UK Government/Government agency, local authority, NDPB)*
- ◉ *Commercial organisation (company, business)*
- ○ *Representative organisation (trade union, professional association)*
- ○ *Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)*
- ○ *Other (e.g. clubs, local groups, groups of individuals, etc.)*

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

DisputesEfiling.com Limited (DEF)

a) DEF developed and owns the intellectual property in a software program providing a Cloud based platform for the management of civil proceedings from pre-action to costs resolution including the principal forms of ADR: evaluation, arbitration and mediation (the Platform).

b) The Platform enables collaborative working for parties to civil proceedings. The Platform provides a comprehensive range of functionality to support civil proceedings including amongst others functions enabling the parties to upload and download documents, manage multi-party actions, conduct pre-action protocol activity including Mediation Information & Assessment Meetings (MIAMs) (used in family law in England and Wales) and enables switching between different types of ADR e.g. mediation and arbitration. The data in one form of ADR (e.g. arbitration) is migrated seamlessly to another ADR method (e.g. mediation) and back again if required.

c) DEF is currently working with the following organisations and ADR schemes, amongst others:

- NHS Resolution (the agency which manages clinical negligence claims against the NHS in England and Wales)
- AXA Insurance
- Aviva Insurance
- Personal Injury Claim Arbitration Service (PIcArbs)
- Hunt ADR
- Trust Mediation
- The International Institute for Conflict Prevention and Resolution (CPR)
- Independent Evaluation
- Costs ADR (C-ADR)
- Clyde & Co
- DAC Beachcroft
- Slater & Gordon

d) Tony Guise practiced as a solicitor specialising in commercial litigation for 30 years and has been closely involved with the campaign for effective IT in the civil justice system since he worked with Lord Woolf on the issue in the 1990s. In May 2016 Tony Guise ceased to practice law to concentrate on developing IT solutions for civil justice.

e) Tony Guise has held the following positions in which he represented the solicitors profession:

2002-2004 – President, London Solicitors Litigation Association

2006-2015 – Founder and Chairman, Commercial Litigation Association

2007-2016 – Member, Civil Justice Committee of The Law Society of England and Wales with special responsibility for IT in the civil courts

As a result of the above work we have experience of the issues concerning the use of ADR in civil justice systems especially in relation to online deployment.

Further information about DEF and our Platform may be found here: www.disputesefiling.com

*Please choose one of the following: **

- ◉ *I am content for this response to be published and attributed to me or my organisation*
- ○ *I would like this response to be published anonymously*
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If you have requested anonymity or asked for your response not to be published, please give a reason (Note: your reason will not be published):

Please provide details of a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number.

We will not publish these details.

*1. Which of the following best expresses your view of legislating to increase the use and consistency of mediation services for civil cases in Scotland? **

- ◉ *Fully supportive*
- ○ *Partially supportive*
- ○ *Neutral (neither support nor oppose)*
- ○ *Partially opposed*
- ○ *Fully opposed*
- ○ *Unsure*

Please explain the reasons for your response.

1.1 The State has a duty to provide the means whereby the citizen can resolve their civil disputes with the following characteristics:

- transparency in operation;
- making full use of modern technology for its administration (i.e. online up to and possibly including the hearing) but with provision for the digitally excluded (more on this below); and,
- affordable in relation to the value of the claim.

1.2 The civil courts are expensive, not fully online and unaffordable for many citizens. Alternatives such as mediation are comparatively cheap, quick and can be easily managed online. Therefore a mandatory process testing the suitability of the dispute and the willingness of the parties to engage with mediation would be of benefit to the citizens of Scotland.

1.3 Legislation is required because most lawyers are resistant to changing working methods from an approach (culturally embedded from training and practice) in which the courts and a Court trial are considered the only solution to a dispute. This leads to a significant number of lawyers who:

- do not like change; and,
- fear the loss of income, which loss they perceive will occur if mediations end cases earlier.

1.4 Evidence to the Justice Committee of the Scottish Parliament from Colin Lancaster, the Chief Executive of the Scottish Legal Aid Board (SLAB), supports this view. His evidence, for SLAB, was that the Government (through SLAB) paying for mediation has not "unlocked" the potential of mediation, as he said to the Committee: (column 26 of the written record of the Committee's proceedings on Tuesday 6 February 2018 http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11357&mode=pdf)

"We have been funding mediation now for more than 20 years and the take-up has not been enormous. As I explained earlier, it has been geographically differentiated depending on local cultures or behaviours by sheriffs or solicitors. I do not think that making funding available was the thing that was going to allow it to flourish, because there are other structural or cultural barriers to moving in that direction."

1.5 The experience of the Republic of Ireland with introducing a legal obligation upon lawyers to advise their clients is also worth considering. An article appearing on the website of the Irish Commercial Mediation Association written by Fergus Armstrong and dated 1 June 2019 deals with lawyers' responses to the Mediation Act of 2017 following its introduction almost 2 years ago. The author writes:

"There is a tendency to assume that a legislative push for mediation involves a zero-sum game for the legal profession. Indeed, there is evidence that developing patterns of mediation use in Ireland – which are not at all in keeping with international models – involve a stifling of the potential of the process. There are frequent reports of mediations in Ireland in which clients, flanked by legal teams on both sides, resist an invitation to participate in dialogue, as they are discouraged from doing so by their lawyers."

1.6 This is said to be in contrast to the correct approach involving face-to-face dialogue because, as the author writes:

"What is not always understood is that when parties in conflict can be persuaded to face each other in the same room, with adequate advice and support, a new dynamic arises. Basic psychology tells us that that the human being has competing tendencies – those of separating and bonding. We want to pursue our separate interests, but we also like to be agreeable and to resolve our conflicts peaceably if we can. A frequent criticism of the legal system is that, whereas the rule of law will prevent or deal with brute violence, it makes no contribution to the social aim of reconciliation."

1.7 Mr Armstrong writes that there are frequent reports of cases where lawyers in the Republic of Ireland actively discouraged face to face meetings. However, in our experience this is only one issue in terms of push-back. It forms part of a nexus of fears: the loss of fees and change. It is this cultural and economic nexus that must be understood and addressed if anything worthwhile is to be achieved by the Proposal for this Bill.

1.8 The full article by Mr Armstrong can be found here:

https://icma.ie/mediation-in-the-mainstream/

1.9 In developing the proposed Mediation Information Sessions the lessons from the Republic of Ireland may be worth bearing in mind to ensure the process must require face-to-face meetings either by video link or by people being together in the same room.

1.10 The same point about compulsion is also made in the excellent report from Scottish Mediation: "Report of the Expert Group on Mediation in Civil Justice in Scotland" published in June 2019 and available here: https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civl-Justice-in-Scotland.pdf

Para 131 makes the point in the final sentence, we precis: that without a measure of compulsion nothing will change.

2. Which of the following best expresses your view of requiring the parties to a civil court case (unless it is an excluded case) to complete a self-test questionnaire and attend a mandatory Mediation Information Session with a duty mediator?

- ◉ *Fully supportive*
- ○ *Partially supportive*
- ○ *Neutral (neither support nor oppose)*
- ○ *Partially opposed*
- ○ *Fully opposed*
- ○ *Unsure*

Please explain the reasons for your response.

2.1 Please see our replies at paragraphs 1.3-1.9 inclusive. The importance of a face-to-face meeting cannot be overestimated. Prior to developing DEF our founder and majority shareholder practiced as a commercial litigator in England and Wales for 30 years. His experience was that nothing works better to bring about the conditions for settlement than a face-to-face meeting whether that is before proceedings commence or on the steps of the court.

2.2 The use of the self-test questionnaire will focus the parties' minds on what their case is all about and imbuing the steps preparatory to the Mediation Information Session and the Session itself with the understanding that the process is more than a tick-box exercise and for which parties should and must prepare properly.

2.3 Contrary to some lawyers' fears this process will almost always involve the parties' lawyer in supporting their clients thus creating new fee-earning activity. This will not be money wasted by the parties as it will either lead to the settlement of the dispute or be part of the work that that lawyer would have undertaken in his or her preparation for the case anyway.

3. Which of the following cases (if any) do you agree should be excluded from the requirement to complete a self-test questionnaire and attend a Mediation Information Session (tick all that apply)?

- ☑ *proceedings relating to the Abusive Behaviour and Sexual Harm (Scotland) Act, the Domestic Abuse (Scotland) Act and any other proceedings relating to domestic abuse and sexual harassment cases*
- ☑ *any proceedings relating to civil actions for rape and other sexual offences*
- ☑ *certain proceedings under the Family Law (Scotland) Act 2006, such as declarations of validity or dissolution of marriages*
- ☐ *proceedings under the Arbitration (Scotland) Act*
- ☑ *employment disputes which are governed by statutory dispute-resolution processes*
- ☑ *judicial review proceedings*
- ☐ *other cases (please specify)*
- ☐ *None of the above*

Please explain the reason for your response.

3.1 Our proposed exclusions are public law issues and not amenable to settlement via mediation in our view.

3.2 Arbitral proceedings should be included in the scope of the proposed Bill. Arbitration can be as expensive and protracted as proceedings before the civil courts. Further, modern arbitral practice has seen a close alignment of mediation with arbitration to the benefit of parties. These alignments take the form of a Mediation preceding Arbitration or Mediation taking place during the course of an Arbitration. These combinations are known colloquially as MedArb or ArbMedArb.

3.3 Mediation used in this way may address a discrete issue or issues in the proceedings and thereby shorten the duration of the arbitration. Even a failed mediation can advance one party's appreciation of the other side's weaknesses and, indeed, lead to a better understanding of their own weaknesses quite possibly leading to settlement at a later stage. A failed Mediation Information Session should not therefore be regarded as a failure but as a step toward settlement.

3.4 Arbitration (sometimes incorporating mediation) can arise from a dispute resolution clause within an agreement. In those cases where there is no such dispute resolution clause a forward-looking State introducing a mandatory mediation procedure should include within such legislation MedArb and/or ArbMedArb.

3.5 The DEF Platform is the only online platform which facilitates MedArb and ArbMedArb enabling parties to change ADR method together with MIAM-type procedures through its pre-action module.

4. Which of the following best expresses your view of giving parties who agree to mediate access to a process that can lead to a Mediation Agreement and, where appropriate, a Mediation Settlement Agreement?

- ◉ *Fully supportive*
- ○ *Partially supportive*
- ○ *Neutral (neither support nor oppose)*
- ○ *Partially opposed*
- ○ *Fully opposed*
- ○ *Unsure*

Please explain the reasons for this response.

4.1 The available empirical evidence from Scotland, the Republic of Ireland and our own experience is that the parties will, when face-to-face, contemplate the real issues and their appetite for conflict. Most will prefer the certainty and reduced cost of earlier settlement than the risk and high costs of protracted civil court proceedings.

4.2 Whilst the desire for settlement can be ignited by this process its achievement is as much a function of the parties' desire to mediate as the mediator's skill in bringing parties together around the realities of their opposing positions. Having enabled mediation to be properly considered the State should provide the means to fulfil most parties' desire for settlement.

4.3 A similar approach has been used in Italy with success. The consultation paper draws attention to the Italian experience on page 12. This evidence supports the further development of the Proposal. It is important to note that in Italy the legal profession is fully engaged in the RIMS process either as advisers or mediators. We consider this feature important to break through the nexus of fears we mentioned above and address the issue in greater detail in para 6, below.

5. Which of the following best expresses your view of giving the Scottish Ministers power to extend the mandatory part of the process (the self-test questionnaire and Mediation Information Session) so that it applies to potential litigants who are yet to go to court?

- ◉ *Fully supportive*
- ○ *Partially supportive*
- ○ *Neutral (neither support nor oppose)*
- ○ *Partially opposed*
- ○ *Fully opposed*
- ○ *Unsure*

Please explain the reasons for your response.

5.1 If successful other case types may be recognised as suitable for inclusion and the possibility of further innovation is always reasonably foreseeable.

5.2 Provision should therefore be made to enable appropriate expansion possibly following further consultation as to the particular expansion contemplated.

6. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in costs	*Some increase in cost*	*Broadly cost-neutral*	*Some reduction in cost*	*Significant reduction in cost*	*Unsure*
Government including court services and legal aid etc					**X**	
Businesses					**X**	
Third Sector organisations					**X**	
Mediators and Mediation organisations			**X**			
Individuals					**X**	

Please explain the reasons for your response.

6.1 The central issue raised by this question is whether mediation is successful in resolving disputes. The consultation paper draws attention to experience in other jurisdictions where success has been evidenced, see pp, 11-13 of the consultation paper. In addition we draw attention to the success of the mediation programme developed by the agency which manages clinical negligence claims in England and Wales, NHS Resolution. In December 2018 NHS Resolution authorised the DEF Platform for use in a pilot intended to establish the viability of conducting mediations online. The figures set out below are taken from p. 53 of NHS Resolution's Annual Report and Accounts for 2018-2019 (at this link: https://resolution.nhs.uk/wp-content/uploads/2019/07/NHS-Resolution-Annual-Report-2018-19.pdf)

The year in numbers:

• 400 cases formally instructed under NHS Resolution's claims mediation service

• 397 cases proceeded to mediation

• 3 cases settled before the mediation date

• 74% of cases settled on the mediation day or within 28 days of the mediation date

• 110% increase in the use of mediation up from 189 cases in 2017/18 to 397 cases in 2018/19

• 606 completed mediations undertaken since the inception of the service (December 2016) to 31 March 2019.

These results evidence the success of mediation in resolving disputes. However does mediation also effect a saving of time and legal costs?

6.2 Research undertaken by the European Parliament during 2011 into the cost and time savings that can be achieved using mediation suggest that a significant saving of both time and costs can be achieved using mediation. This was a detailed study and we commend it in the context of developing the Proposal under consultation.

6.3 The research shows that, for example, in Belgium claims for €67,200 would take 505 days to resolve by trial and cost €15,370.50 whereas a claim for €67,200 resolved using mediation would take 45 days and cost €4,369.50. In short, the sooner one mediates the sooner the case ends and costs are reduced accordingly. The research is entitled: "Quantifying the cost of not using mediation" and can be found via this link:

http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf

6.4 This study did not take into account the effect of managing mediation using an online Platform because no such platform existed in 2011. In our experience using an online platform brings parties together in a way not seen in civil court proceedings leading to further reduced costs and greater time saved. The evidence given by the Association of British Travel Agents (ABTA) to the Justice Committee reflects our approach:

"ABTA's dispute resolution service is an online process and ABTA communicates with the consumer through our website, email and SMS text message (postal arrangements can be made for consumers unable or unwilling to use the online system). The purpose of this scheme is to bring consumers and ABTA Members together and ensure that the ABTA Member responds within set timescales to the consumer's complaint." (bottom of page 1 of ABTA's written submission to the Justice Committee, http://www.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-ABTA.pdf)

6.5 Hence mediation is an effective way of resolving disputes as it settles more cases than it fails to resolve and in doing so saves time and legal costs and the more so when conducted online.

6.6 Cases ending sooner means that Court resources are engaged for a shorter period and therefore Court resources are freed up for the public law cases identified as exceptions discussed in our response to question 3, above. This means public law cases can be heard more quickly than would otherwise be the case absent the measures in the proposed Bill. The other consequence is that the costs incurred by the civil justice system will reduce and part of the budget thus unspent can finance the proposed Mediation Information Sessions and the required infrastructure. The same rationale is recognised with approval in the "Report of the Expert Group on Mediation in Civil Justice in Scotland" at para 155.

6.7 The only exceptions to our response that everyone affected would enjoy significantly reduced costs are mediators and mediation organisations. This is because they will be required to undertake many more mediations but this cost is neutral as they will be earning mediation fees which will more than cover the costs incurred.

6.8 The position of law firms as a sector affected financially by the Proposal needs to be considered. The livelihoods of lawyers practising as litigators depends, in large part, upon the lawyer taking cases to trial in order to earn legal fees. It is one of the two reasons why lawyers fear the wider introduction of mediation. We have shown that if the mediator does his or her job well up to 74% of mediated cases settle (see para 6.1, above). Lawyers conclude this means they will earn less. Hence their conscious or sub-conscious reticence to engage with mediation.

6.9 Some law firms argue various points against mandatory mediation. Some of these points include:

- Mediation should not be attempted unless the parties voluntarily agree; and,
- Mediation before proceedings or at an early stage in the court proceedings is too early and non-one properly understands a case until much later in Court proceedings.

Fortunately we need not engage with such issues as the Proposal under consideration is not to introduce mandatory mediation. However this does lend impetus to the case for Mediation Information Sessions to be mandatory.

6.10 The position of lawyers is an important consideration in relation to the Proposal because the support of the legal profession will be required to make a success of the new approach by advising parties to participate and by providing a body of appropriately qualified mediators. Hence it is important to engage fully with the profession as suggested (drawing on the experience of Turkey) in paragraph 11, below. If the Proposal is successful lawyers will derive less of their fee income from trial-related work but gain opportunities to earn fees in other ways. The Proposal must be presented to the legal profession as the opportunity that it is. This is so even if the Proposal is mandatory because it is important that lawyers, Judiciary, Court staff and citizens work together for the common good.

7. Are there ways in which the Bill could achieve its aim more cost-effectively (e.g. by reducing costs or increasing savings)?

7.1 Making the process entirely online or almost entirely online, to the point of any Mediation Information Session meeting.

7.2 By making the process online the savings already achieved via the increase in mediation taking place will be magnified to the benefit of the justice system in Scotland as explained in paragraph 6.6, above.

7.3 It is worth mentioning the points relevant to cost-effectiveness in the "Report of the Expert Group on Mediation in Civil Justice in Scotland". At para 148 there is, rightly, expressed a plea for data to be collected to provide a sound basis for research as to the efficacy of mediation and how it may be further improved. We support the aim of data collection. However if data is collected via paper forms the process will only end up costing a great deal more. Managing the process through an online platform will enable rapid collection of data for almost no cost. The DEF Platform is already set up to provide data streaming.

8. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, maternity and pregnancy, marriage and civil partnership, race, religion or belief, sex, sexual orientation?

- *Positive*

- *Slightly positive*
- *Neutral (neither positive nor negative)*
- *Slightly negative*
- *Negative*
- *Unsure*

Please explain the reasons for your response.

8.1 Online management of the process will enable a greater number of citizens to participate more easily than would otherwise be the case irrespective of disability, mobility issues and pregnancy. Whilst this end might be achieved using traditional, paper-based processes such methods are slower and therefore give rise to greater costs. Paper becomes a drag on the efficiencies that can be achieved using modern technology. Furthermore paper based processes cannot assist vulnerable users (sight impaired and others) as effectively as digital processes.

8.2 Consideration must be given to those citizens who are digitally excluded whether by reason of low income, age (unfamiliarity with the internet and the required tools) or disabilities such as deafness, sight impairment and/or blindness. Modern technology can assist for example by increasing the size of words on screen. Using programs such as ReadSpeaker is useful because that program converts words on screen to spoken words: https://www.readspeaker.com/solutions/speech-production/

These approaches to supporting the vulnerable user are not possible using paper-based processes.

9. In what ways could any negative impact of the proposed Bill on equality be minimised or avoided?

9.1 A call centre will be required to provide support for those digitally excluded by reason of age or low incomes. It is necessary to retain a paper process as not all of those unfamiliar with the internet have friends and/or family members who can support them in this respect. Consideration might be given to enabling those Mediation Information Sessions which begin on paper to send notifications by text messages and/or email.

9.2 Those affected by disabilities such as deafness, blindness and sight impairments will or should have technologies available (talking screens and other systems) to assist. The call centre should be set up so as to support this community of users.

9.3 The Ministry of Justice for England and Wales (MoJ) has undertaken important work in addressing these issues. We suggest that liaison with colleagues in the MoJ may prove invaluable in informing the development of this process in Scotland in relation to providing support for the digitally excluded. The link below is to an interview with Sidonie Kingsmill, HMCTS' Customer Director, in which she describes some of the issues and the approach taken by HMCTS toward supporting vulnerable users: https://insidehmcts.blog.gov.uk/2019/06/19/supporting-access-to-justice-services-for-vulnerable-users/

10. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

10.1 Yes, the online management of the process removes paper from the process and potentially from the Mediation Information Sessions as well. Online management of the procedure leading to the Mediation Information Session is a very effective way of reducing the carbon footprint of ADR. Environmental benefits increase as more Mediation Information Sessions take place.

10.2 In our experience the ability to work together using the DEF Platform encourages users to collaborate in the process leading to greater participation and quicker resolutions than is the case using paper based processes e.g. the civil courts.

10.3 Conducting the hearing via Skype or other provider e.g. Zoom will reduce the carbon emissions that occur if parties travel to a mediation session. Especially in Scotland where frequently significant distances must be travelled.

10.4 The ability to conduct the process online (including the hearing) is infrastructure dependent. That is to say, to work there must be a good quality connection to the internet either via landline or WiFi. This is not always available in the UK especially in remote rural locations. The Government recently announced its intention to provide full fibre broadband connection to every household in the UK by 2025 so this issue may not be such a concern in the longer term (Prime Minister's Statement to the House of Commons, 25 July 2019). In any event, the infrastructure point is not an argument against online management and conduct of Mediation Information Sessions. The point is made to draw attention to the limitations of the infrastructure which may inhibit the roll out of the Proposal.

10.5 The option to conduct a hearing via the mobile telephone network should also be catered for with any platform being responsive i.e. capable of running on a desktop computer, tablet and mobile phone.

11. Do you have any other comments or suggestions on the Proposal?

11.1 Our comments in this part of our Response c oncern the practical requirements involved with the introduction of the Proposal.

11.2 <u>Mandatory mediation in Turkey</u>

The following points have been informed by a literature review and discussion with a Turkish lawyer and member of the Chartered Institute of Arbitrators familiar with the mandatory mediation system in force in Turkey since November 2017 for employment related disputes and which is being extended to commercial and consumer disputes. On 7 August 2019 the Ministry of Justice in Turkey is reported to have announced that in the past 12 months 140,000 mediations have taken place, see: https://www.dailysabah.com/turkey/2019/08/08/mediation-breaks-record-relieves-judiciary

11.3 No pilot was undertaken, instead online discussion fora were created whose members included representatives from Government, mediation schemes and mediation parties. These discussion groups have worked well enabling immediate feedback, supervision and rapid adoption and communication of better practice. This speed of monitoring was crucial as the Government intends to roll-out mandatory mediation to commercial and consumer disputes.

11.4 An enhanced public and professional information project which included meetings, seminars and panels to explain the benefits of mediation to the legal profession together with TV advertising and the inclusion of mediation as a story-line in prime-time TV series aimed primarily at the citizen. Compare this with the work being done in the Republic of Ireland by The Mediators' Institute of Ireland (MII) which has conducted a campaign to raise public awareness of mediation via interviews with MII's officer holders and broadcast from local radio stations in the Republic - http://www.themii.ie/news

11.5 Costs sanctions were introduced into the Turkish system which meant that if a party did not participate meaningfully in the mediation process yet succeeded at the trial the non-participating party could not recover any costs, despite winning.

11.6 The number of mediations taking place in Turkey is now significantly greater post-January 2018 than took place during the voluntary phase. The Turkish Ministry of Justice developed an online Platform as the only way to manage the high volume. DEF was fortunate to recently gain insights about the progress of this mandatory mediation scheme from a Turkish lawyer, Dogan Baydar, MCIArb, who explained the process is known colloquially in Turkey as the Prerequisite Mediation Law. Dogan said he found the online platform something that will play an increasingly important role. We are grateful to Dogan for sharing his experiences.

11.7 Finally there was a critical shortage of appropriately qualified mediators. In this connection mediation institutions should be encouraged to play a leading role in training mediators and to train lawyers in this role. A similar point is made at para 156 of the "Report of the Expert Group on Mediation in Civil Justice in Scotland" referencing a paper written by Professor Bryan Clark at footnote 142. However in filling this gap the legal profession in Scotland has a huge role to play.

11.8 Turkey's journey to mandatory mediation has been tracked in a 2 year study undertaken by the Council of Europe. The final report from that study was published in December 2017. The study is highly relevant for anyone contemplating the introduction of a scheme of mandatory or implied-compulsory mediation in the UK and can be found via this link: https://rm.coe.int/mediation/168075fa4d.

11.9 Self-financing?

The effect of introducing the Proposal will be to lead to a significant increase in the number of mediations taking place in Scotland. This is clear from the Italian experience mentioned in the consultation paper (p.12).

11.10 Doing the best we can and working with the published Civil Justice Statistics in Scotland for the period 2017-2018 we have attempted to estimate the anticipated volume of Mediation Information Sessions. This work has been undertaken to assist the further thinking about the resource implications of the proposed Bill. The statistics can be found via this link:

https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/pages/6/#Table_12

11.11 The proposed scope of the Mediation Information Session appears to encompass cases where claims are made for Debt, Personal Injury (which is defined as including claims of clinical negligence) and Damages (any other claim seeking monetary compensation). In 2017-2018 the number of such cases commenced in Scotland are shown in the table below:

Claim type	Number of cases issued 17-18

Debt	37,364
Personal injury including clinical negligence	9,443
Damages	2,883
Total	**49,690**

11.12 The introduction to the 2017-2018 statistics states that the year under report was unusual in that it was only the second year in ten years that the number of cases issued had increased (by 10% more than in 2016-2017). This may be attributable to the introduction of cheaper and quicker processes.

11.13 Whilst it is the case that some parties to Mediation Information Sessions will not want to mediate some will. This has been the experience in Italy where a similar system has been in operation for some years. The figures given in the second paragraph on p.12 of the consultation indicate that in Italy 10% of the total civil cases will lead to mediations under the Italian system. Applying that empirical evidence to Scotland that is about 5,000 mediations each year.

11.14 5,000 is a significant number to resource and whilst the funding is available (from savings achieved elsewhere in the civil justice system) it remains necessary, as Turkey found, to use an online platform and ensure enough Mediators were available to support the process.

11.15 For the purposes of this Response we assume there may be 5,000 Mediation Information Sessions each year leading to a need to train and recruit suitably qualified mediators. Many may be found in the Scottish legal profession.

11.16 It may be said that mediating 5,000 cases will not free up enough of the Justice budget to finance the Proposal. However, we take the view that absent the Proposal those 5,000 cases would proceed to trial. By settling 5,000 cases earlier significant funds within the Justice Directorate's budget will be saved even allowing for the cost of running Mediation Information Sessions. The "Report of the Expert Group on Mediation in Civil Justice in Scotland" at para 155 says that the more mediations can be paid for via savings made from trials avoided and lower demand on the civil courts.

11.17 GDPR

The introduction of the General Data Protection Regulation in May 2018 gave rise to the need to protect, as far as reasonably possible, the data of the individuals involved in the Mediation Information Sessions. Paper processes and internet based processes each have their own data security risks. GDPR applies whether the data is on paper, processed electronically or a mixture of both.

11.18 It is possible to leave a lever arch or laptop containing mediation papers on a train. Whilst this is not possible with papers stored digitally in the Cloud other risks arise. The worst, but typical, scenario arises when the mediation is conducted on paper but parties (and their advisors) exchange documents using unencrypted email which can easily be sent to the wrong party or hacked. The worst of both worlds.

11.19 The data in question under the Proposal will include health data as claims involving personal injuries and clinical negligence are within the scope of the Proposal. Health data is a special category of data as explained in Article 9(1) of the GDPR and gives rise to greater obligations to ensure the security of such data.

11.20 When considering a risk assessment of the two systems (paper vs electronic) the key differentiator is the time and costs savings that can be achieved. The environmental gains are also significant.

11.21 GDPR should be carefully considered if the Proposal is taken further. As this process will be a Court initiated procedure the Justice Directorate will be the Data Controller for the data in the Mediation Information Sessions. This is not a function that can be delegated to third parties (such as the parties' solicitors or the mediator) as the Information Commissioner made clear in the Equifax UK decision. In that case Equifax UK entrusted control of its customers' data to its US parent company without ensuring the security of that data. The ICO decision in that case is here: https://ico.org.uk/action-weve-taken/enforcement/equifax-ltd/

11.22 The obligation of confidentiality

Every mediation assures participants that the proceedings will be confidential. This obligation would also apply to the Mediation Information Sessions. The online management of such proceedings can do much to support this fundamental assurance encouraging the parties to participate safe in the knowledge that their grievances will remain private.

If we can contribute further do not hesitate to contact us.

TONY N GUISE

Director, for and on behalf of DisputesEfiling.com Limited

14 August 2019