

Report on the Scottish Ministers' duties under section 23(1) (funding for alternative dispute resolution) and section 24(1) (pilot scheme for mandatory alternative dispute resolution meetings) of the Children (Scotland) Act 2020

Laid before the Scottish Parliament by the Scottish Ministers under sections 23(7) and 24(4) of the Children (Scotland) Act 2020.

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Introduction

1. Section 23(1) of the Children (Scotland) Act 2020 (the 2020 Act) requires the Scottish Ministers to—
 - (a) set up a scheme to make assistance available so that individuals can meet the costs of alternative dispute resolution procedures in relation to a dispute involving any of the matters mentioned in section 11(1) of the Children (Scotland) Act 1995 which has either resulted in an order being sought under that section or is likely to do so if it is not resolved through alternative dispute resolution; or
 - (b) arrange assistance to be made available from the Scottish Legal Aid Fund so that individuals can meet those costs
2. Section 24(1) of the 2020 Act requires the Scottish Ministers to arrange a pilot scheme under which a court, in proceedings to which the scheme applies, may only make an order under section 11(1) of the 1995 Act –
 - (a) where the parties to the proceedings have attended a meeting at which the options available to resolve the dispute giving rise to the proceedings are explained, or
 - (b) if the terms of the scheme allow, where the court has decided on cause shown that it would not be appropriate to require the parties to attend such a meeting.
3. If, at the end of a period described respectively in section 23(8) or 24(5), the Scottish Ministers have not fulfilled the relevant duty, sections 23(7) and 24(5) each require the Scottish Ministers to lay before the Scottish Parliament a statement explaining why not and stating when they expect to do so.
4. The Scottish Government believes that where possible cases should be resolved outwith court. Work has progressed on both establishing the pilot of the meetings on alternatives to court and on funding of ADR.

The Reporting Period

5. Sections 23(7) and 24(4) of the 2020 Act provide that statements must be laid before the Scottish Parliament at the end of a period. The periods are described in sections 23(8) and 24(5) of the 2020 Act:
 - (a) the first period begins on Royal Assent,
 - (b) after that, a new period begins with the last day of the previous period,
 - (c) each period ends with the day falling 6 months after it began,
 - (d) if the previous period ended on the 29th, 30th or 31st of a month and the month falling 6 months later has no such days, the period ends on the last day of that month.
6. The 2020 Act received Royal Assent on 1 October 2020. This statement covers the period from 1 October 2020 – 1 April 2021.

Scheme for funding for ADR

7. Section 23 of the 2020 Act was commenced on 17 January 2021¹.
8. The Scottish Ministers have not fulfilled their duty under section 23(1) of the 2020 Act to establish a scheme for funding for ADR. This is due to a number of reasons.
9. Firstly, the Coronavirus pandemic has led to a reprioritisation of non Covid19 related work.
10. Secondly, some time is required to consider the best way of establishing this assistance scheme. The Scottish Government has given initial consideration to two potential options but more work is needed and this will take time.
11. The first potential option would be to operate a scheme so that eligible individuals involved in a case under section 11 of the Children (Scotland) Act 1995 could claim assistance from a Scottish Government funded scheme. This scheme might not actually provide cash to the individuals but instead might give them an entitlement to ADR sessions. The Scottish Government could then fund providers of ADR so the sessions could then take place.
12. The second potential option would be to fund providers so ADR sessions could be provided and advise eligible individuals, through publicity on the Scottish Government website and elsewhere, that this has been done. (The Scottish Government does already provide funding to the Relationships Scotland network and part of that funding is for mediation and for couple counselling. Legal aid resources are also used to support mediation).
13. Before setting up the new assistance scheme, further thought will be required on:
 - The two options outlined above and any further options (there may be better options than the two outlined above).
 - What would happen if one of the parties wishes to go to ADR and the other does not.
 - Any eligibility criteria to be applied to the individuals (section 23(3) and (4) of the 2020 Act refer).
 - How best to ensure that assistance under the scheme is only available to meet the costs of ADR procedures which ensure regard is had to children's views to at least the same extent as a court would be required to have regard to them by section 11ZB of the 1995 Act (section 23(5) refers. This is particularly important as Scotland moves to incorporate the UN Convention on the Rights of the Child into Scots law).
 - How best to ensure that domestic abuse victims are not forced to go to ADR.

¹ [The Children \(Scotland\) Act 2020 \(Commencement No. 1 and Saving Provisions\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

14. In addition, there are a variety of forms of ADR which may be used in family cases. These include mediation, arbitration, collaborative law and family group conferencing. The Scottish Government will need to speak to the providers of the various forms of ADR on the proposed assistance scheme. The Scottish Government will also need to engage with the Scottish Courts and Tribunals Service on the practicalities of setting up an assistance scheme and to organisations such as Scottish Women's Aid and Shared Parenting Scotland who work with users of the family court system.
15. Thirdly, the Scottish Government will need to consider the implications of the planned assistance scheme for existing arrangements. Section 23 itself recognises the clear links with the legal aid system. A common criticism of the legal aid system is that it has been set up in an ad hoc way, reacting to changes in the law, but without proper systemic and strategic review. In setting up the new assistance scheme, the Scottish Government will wish to ensure it fits well with the legal aid system generally.
16. In addition, the Scottish Government has been undertaking a review of Mediation and wider Dispute Resolution. In setting up the new assistance scheme, the Scottish Government will wish to ensure it fits well with this review of Mediation and wider Dispute Resolution.
17. Finally, changes to court rules may be needed. As indicated above, whilst ADR can cover mediation, arbitration, collaborative law, family group conferencing and family group therapy, a sheriff can already order parties in a family action to attend mediation under Ordinary Cause Rule 33.22². There are similar provisions in Ordinary Cause Rules (rule 33A.22) for civil partnership actions and in rule 49.23 of the Court of Session Rules.
18. The Scottish Government has already submitted a paper to the Family Law Committee of the Scottish Civil Justice Council on extending Ordinary Cause Rule 33.22 and equivalent rules for civil partnership actions and Court of Session cases to all family actions as opposed to only cases under section 11 of the 1995 Act³. This assistance scheme might require further changes to court rules and, if required, the Scottish Government would submit another paper to the Family Law Committee of the Scottish Civil Justice Council accordingly
19. Section 23(7) of the 2020 Act requires the Scottish Ministers to state when they expect to fulfil the duty to set up an assistance scheme. It is likely to take at least another two years. As indicated above, work on Covid-19 will need to take priority. On the assistance scheme itself, the Scottish Government will need to:
 - Consider the options for establishing the scheme.
 - Consider the eligibility criteria for assistance.

² Sheriff Court Ordinary Cause Rule 33.22 provides that "In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation."

³ [paper-2020-09e-flc-paper-regarding-mediation-istanbul-convention.pdf](https://www.scottishciviljusticecouncil.gov.uk/paper-2020-09e-flc-paper-regarding-mediation-istanbul-convention.pdf)
([scottishciviljusticecouncil.gov.uk](https://www.scottishciviljusticecouncil.gov.uk))

- Consider how to ensure the voice of the child is heard in ADR.
- Ensure that domestic abuse victims are not forced to go to ADR.
- Speak to the providers of the various forms of ADR on the proposed scheme.
- Speak to the Scottish Courts and Tribunals Service on the practicalities of setting up the scheme.
- Speak to bodies such as Scottish Women's Aid and Shared Parenting Scotland who work with users of the family court system.
- Consider how the new assistance scheme fits with the legal aid system.
- Consider how the new assistance scheme fits with a wider review of Mediation and Dispute Resolution.
- Consider if any regulations under section 23(9) of the 2020 Act would be required. (Under section 23(11) any such regulations are subject to the affirmative procedure).
- Consider if any changes to court rules need to be proposed.

Pilot of mandatory meetings on alternatives to court

20. Section 24 of the 2020 Act was commenced on 17 January 2021⁴.

21. The Scottish Ministers have not fulfilled their duty under section 24(1) of the 2020 Act to establish a pilot of mandatory meetings on alternatives to court. This is due to a number of reasons.

22. Firstly, the Coronavirus pandemic has led to a reprioritisation of non Covid19 related work.

23. Secondly, more time is needed to establish this pilot. The Scottish Government's intention is this pilot could be based on proposals which were put forward by Relationships Scotland and by CALM Family Mediators a few years ago and which were not taken forward at the time.

24. In the light of this earlier work, the Scottish Government has prepared an initial policy paper on the pilot of the mandatory meetings on alternatives to court. This paper discusses location of the pilot, how the pilot might operate and funding of the pilot. The paper has been shared with a variety of organisations and included at annex A to this report.

25. A key issue is to ensure the pilot is evaluated so lessons can be drawn as to whether or not meetings of this nature help to drive effective resolution of family disputes.

26. As the next step to setting up the pilot, the Scottish Government is writing to the Lord President to seek his views on the location of the pilot. The letter also seeks views on whether the details of the pilot should be set out in a practice note by the relevant Sheriffs Principal or by secondary legislation laid in draft before, and approved by, the Scottish Parliament and made by the Scottish Ministers.

⁴ [The Children \(Scotland\) Act 2020 \(Commencement No. 1 and Saving Provisions\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

27. Work on establishing a pilot of mandatory meetings on alternatives to court has been proceeding. If the decision is taken that the terms of the scheme could be set by practice note then the pilot may be able to commence in late 2021. However, if the Scottish Ministers decide to lay the details of the scheme down in regulations this will take longer given the parliamentary timetable as these regulations are subject to the affirmative procedure.

The Scottish Government
March 2021

Paper issued to organisations regarding pilot of meetings on alternatives to court Annex A

**Pilot of meetings on alternatives to court
in cases under section 11 of the Children
(Scotland) Act 1995**

**Paper by the Scottish Government on how
the pilot might work.**

**Scottish Government
March 2021**

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Background

1. Section 24 of the Children (Scotland) Act 2020 (the 2020 Act)⁵ requires the Scottish Ministers to arrange a pilot scheme under which a court may only make an order under section 11 of the Children (Scotland) Act 1995 (the 1995 Act) where the parties have attended a meeting at which the options available to resolve the dispute are explained. Section 24 provides that the pilot scheme must not apply to proceedings in which there is a proven or alleged history of abuse between some or all of the parties. On cause shown, the court may decide that it would not be appropriate to require the parties to attend such a meeting.
2. This paper considers various aspects of the proposed pilot.
3. The intention of the provision is that:
 - Parties will have the opportunity to learn about alternatives to proceeding with their court action including Alternative Dispute Resolution (ADR);
 - The pilot will be time limited and will be focused on a specific area or areas of Scotland;
 - Parties would typically attend separate individual meetings to allow them to explore the range of dispute resolution options fully;
 - If there are alleged or proven history of domestic abuse between the parties then they would not be required to attend a meeting;
 - There would be other exemptions to ensure that a case is not unnecessarily delayed.
4. The pilot would take place in a wider context, including:
 - One of the actions of the Family Justice Modernisation Strategy (the FJMS) is for the Scottish Government to produce information for parties on alternatives to court⁶.
 - The Scottish Government has produced Your Parenting Plan which is a guide for parents in making practical arrangements for children when they are living apart or separating⁷
 - The Scottish Government already funds Relationships Scotland so its member services can provide a number of services, including family mediation. In certain circumstances, legal aid can also support family mediation.
 - Section 23 of the 2020 Act requires the Scottish Ministers to set up a scheme to make assistance available so that individuals can meet the costs of ADR procedures in relation to section 11 cases or arrange for assistance to be made available from the Scottish Legal Aid Fund so that individuals can meet those costs.

⁵ <https://www.legislation.gov.uk/asp/2020/16/section/24/enacted>

⁶ [Family Justice Modernisation Strategy - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/fjms/pages/18/)

⁷ <https://www.gov.scot/publications/parenting-plan/pages/18/>

Content of pilot

5. In England & Wales parties are required to attend a Mediation Information and Assessment Meeting (MIAM). We would propose that the pilot in Scotland would be wider and cover information on all options available to parties to resolve their dispute outwith court. This would include:
 - Mediation
 - Arbitration
 - Collaborative law
 - Family Group Conferencing
 - Resolving the dispute for themselves and
 - Going to court.
6. Further information on the non-court options are in Annex A to this paper.
7. We would also expect the session would provide information on the option parties have of seeking a formal agreement – through a minute of agreement which is usually drawn up by lawyers and is registered in the Books of Council and Session⁸. We would expect the session facilitator to make the parties aware of the Scottish Government’s Your Parenting Plan publication⁹.
8. The mediator should also discuss with parties options for ensuring the views of the child at the centre of the case can be heard if the case is to be resolved outwith court. Under section 6 of the Children (Scotland) Act 1995 when making a major decision anyone with parental responsibilities and rights should have regard, in so far as practicable, to the views of the child concerned¹⁰.

Logistics of pilot

How would the detail of the pilot be set out?

9. We consider that the details of the pilot could be set out either in secondary legislation or by practice note issued by the Sheriffs Principal of the relevant areas. Practice notes are a matter for the Lord President and the Sheriffs Principal. We are writing to the Lord President to seek his views on this subject.

Who will run the pilot

10. We would intend that the pilot would be overseen by the Scottish Government but run by the bodies who have been approved by the Lord President under the Civil Evidence (Family Mediation) (Scotland) Act 1995¹¹. The two bodies currently so approved are the Law Society of Scotland (for lawyer mediators) and Relationships Scotland (RS)¹². Lawyer mediators have an organisation called

⁸ [Register of Deeds - Registers of Scotland \(ros.gov.uk\)](https://ros.gov.uk)

⁹ <https://www.gov.scot/publications/parenting-plan/>

¹⁰ <https://www.legislation.gov.uk/ukpga/1995/36/section/6>

¹¹ <https://www.legislation.gov.uk/ukpga/1995/6/section/1>

¹² <https://www.relationships-scotland.org.uk/>

Comprehensive Accredited Lawyer Mediators Scotland (CALM)¹³. If more bodies should be approved by the Lord President in the forthcoming few months then we would look to include them in the pilot.

11. RS have 13 member services offering family mediation sessions across Scotland. CALM have a number of lawyer mediators based across Scotland.

Size of pilot

12. The supplementary Financial Memorandum which accompanied the Children (Scotland) Act at stage 2¹⁴ states that we would be looking at referring approximately 500 cases to the pilot. This figure was considered because in 2018/19 according to data from the Scottish Courts and Tribunals Service (SCTS) there were 3,554 family cases raised which involved children (excluding adoption and permanence cases). The provision in the Act excludes cases where there is domestic abuse from the pilot. Research shows that domestic abuse is alleged in around half of all court actions over contact raised in Scotland¹⁵. Therefore, the total number of eligible cases would be 1,777 (3,554 divided by 2). A suitable pilot to give robust evidence for an evaluation would be 25% of those cases. This would be 444, which has been rounded up to 500.

Location of pilot

13. The location of the pilot is important. We would want the pilot to cover both rural and more urban locations.
14. We would need to discuss location of the pilot with the SCTS, Sheriffs Principal, the Lord President, RS and CALM. We would want to ensure that there is sufficient coverage in RS member services and CALM mediators to undertake a pilot in a specific area of the country.
15. One option would be for the pilot to be undertaken in a Sheriffdom or more than one Sheriffdom. This would allow a practice note to be issued by each Sheriff Principal; or reference to specific Sheriffdoms or sheriff court districts could be made in secondary legislation made by the Scottish Ministers setting out how the courts should refer parties to the meeting. We are aware that there may be other pilots going on in various Sheriffdoms and we would wish to ensure that the courts are not overburdened. Another option is to limit the pilot to one Sheriffdom but extend the pilot for two years. However, this may not obtain the necessary number of participants.
16. A small percentage of cases under section 11 of the 1995 Act are heard in the Court of Session. We would not envisage that the pilot would cover cases heard

¹³ <http://www.calmScotland.co.uk/>

¹⁴ <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/children-scotland-bill/stage--2/supplementary-financial-memorandum-children-scotland-bill.pdf>

¹⁵ Mackay K. 2013 The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse. Available at: <https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

in the Court of Session as this would require further provision for a limited number of cases.

17. Relationships Scotland and CALM put forward a previous proposal for a pilot some years ago. The original focus of this previous proposed pilot was on child contact actions in 4 court areas: Hamilton, Paisley, Dumbarton and Aberdeen. Paisley and Dumbarton both fall within the Sheriffdom of North Strathclyde. Hamilton is in South Strathclyde, Dumfries & Galloway. Aberdeen is in the Sheriffdom of Grampian Highland and Islands

When would the pilot commence?

18. Once the pilot has been established the Act requires the Scottish Ministers to lay before the Parliament a statement describing the pilot scheme, setting out why any exemptions (apart from where there is a proven or alleged history of abuse between some or all of the parties) are considered necessary and how the Scottish Ministers intend to evaluate the scheme

19. The Act gained Royal Assent on 1 October 2020 and we commenced this section of the Act on 17 January 2021¹⁶. When the pilot has not been established, the Act requires the Scottish Ministers to lay before the Parliament, within six months of Royal Assent, a statement explaining why not and stating when Ministers expect to fulfil the duty to establish the pilot.

20. Time is needed to identify the location of the pilot and to set the pilot up. We would envisage the pilot could commence late in 2021. Timing also depends on whether or not the pilot will be set out in secondary legislation or whether this could be done by practice note. We are seeking the views of the Lord President on this. Secondary legislation would take more time due to the parliamentary time required. We expect the pilot would last for a year. The evaluation would be carried out after this and could take a further six – twelve months. A particular issue will be the need to track individuals to understand how they eventually resolved their dispute.

Funding of pilot

21. We would expect the meeting to be free to the people who attend regardless of whether they are eligible for legal aid. We would expect reasonable travel expenses will be paid and more details on this are set out below.

¹⁶ [The Children \(Scotland\) Act 2020 \(Commencement No. 1 and Saving Provisions\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Overall costs

22. The revised Financial Memorandum which accompanied the Act at stage 2 estimated the costs of the pilot to be between £126,382 and £224,001, broken down as follows:

Activity	Cost
Cost of mediators	£75k - £150k
Administrative support	£15k
Training of mediators	£1k - £2k
Travel expenses for people attending meeting	£0 - £7k
Leaflet to be handed out to people	£120
Evaluation of pilot	£35k - £50k

Costs to RS/CALM

23. We would need to discuss with RS and CALM the split of the costs for the mediators between them.

24. We would expect to pay a certain amount initially to RS and CALM to cover any initial set up costs. We would then expect RS and CALM to invoice on a regular basis with the number of meetings they have undertaken and we would then remunerate the organisations.

Travel expenses for attendees

25. In the supplementary Financial Memorandum, the Scottish Government said it would pay travel expenses for people attending the meeting. RS and CALM would need to pay the individuals. This could be done by cheque, cash or bank transfer. There are issues with each of these options – cheques may require the party to then travel to a bank to pay the cheque in, cash would require RS and CALM to hold petty cash on the premises and bank transfers would require RS and CALM to obtain the individual's bank details. Any claims would need to be receipted.

26. We would also need to set the allowances that a person would be able to claim. We propose these would be at Scottish Government rates. The current Scottish Government rates are set out at Annex B to this paper. We would expect RS and CALM to send anonymised information on the expenses claimed to the Scottish Government who would then reimburse RS and CALM.

27. As discussed later in this paper, we would expect that if a party is having to travel a significant distance then the meeting would be offered virtually or the party would be exempt from attending. We would not expect to pay for overnight accommodation or meal allowances.

28. In the supplementary Financial Memorandum we estimated a range of costs for travel expenses as not everyone would necessarily claim expenses, for example

we would not expect people to claim if they have taken a bus and have a monthly bus pass. People may also decide not to claim expenses.

29. In addition, some of the meetings may be virtual and therefore no travel expenses would be required.

Scottish Government staff

30. The supplementary Financial Memorandum estimated that there would be additional Scottish Government resource required to administer the pilot. This would be half an member of staff at A4 band. We would expect this post to be a time limited post for the duration of the pilot and evaluation. Their role would be to answer queries from RS and CALM about the operation of the pilot, process the payment of invoices to both RS and CALM, obtain information on a regular basis (eg monthly) from RS and CALM about progress of the pilot and liaise with the SCTS around data to be collected during and after the pilot as part of the evaluation.

31. Based on the assumption that the pilot starts towards the end of 2021 we would expect this person to start in September 2021.

Evaluation

32. We have estimated that the evaluation could cost between £35k and £50k.
33. We would expect that we would contract out this work. Evaluation of this pilot is particularly important as this could help determine whether or not these meetings do help to promote ADR when this is a feasible and safe alternative to court. More details on the proposed evaluation are at paragraphs 65- 69 below.

Reporting during the pilot

34. We would expect RS and CALM to provide information on a monthly basis on the number of people who have attended the meetings and the time between parties approaching RS/CALM and the meeting taking place. This would also allow us to monitor progress and ensure that any issues are identified and resolved quickly.

How will pilot run

35. Section 24 of the Act requires that under the pilot scheme a court may only make an order under section 11 of the 1995 Act if parties have attended a meeting at which the options available to resolve the dispute giving rise to the proceedings are explained or, if the terms of the scheme allow, on cause shown the court decides that it would not be appropriate to require the parties to attend such a meeting.
36. We would expect that when we set up the scheme we would allow the court on cause shown to decide that it would not be appropriate to require the parties to attend a meeting. This would give the court flexibility.

When will parties be required to attend the meeting?

37. We consider there are three options available regarding when a party will be required to attend a meeting:

- 1. Parties self-refer to a meeting before starting the court process or apply an exemption;
- 2. Parties are referred by the court; or
- 3. A combination of self-referral and court referral.

38. At this stage we think that whilst option one should be the default, the option of the court referring parties is still needed. Annex C to this paper provides a flowchart of this process.

39. This would mean that if parties had attended a meeting prior to lodging a court application then they would be able to produce the certificate alongside their initial writ or notice of intention to defend (NID) and this would mean that they do not have to attend a meeting. We would assume that the certificate would be a generic certificate. This would be issued by the mediator. Annex D provides a sample certificate.

40. A party could also apply an exemption (for example, that there has been abuse) and declare this in the initial writ or the NID. Annex E provides a sample form to be completed by an individual when they are either lodging initial writs or the NID.

41. If parties do not provide information alongside their initial writ or NID or the information provided is different, then the sheriff may wish to seek clarification from parties as to why they are not either (a) seeking an exemption or (b) stating that they have already attended a meeting.

42. The parties would then need to either agree to attend a meeting or explain to the sheriff why they consider this is not appropriate. The sheriff could then either require a party to attend a meeting or use the “on cause shown” option to exempt parties from attending.

43. One of the actions of the FJMS is for the Scottish Government to produce guidance for parties on attending court. We would expect that this would include information on the need in certain areas of the country to attend a meeting or seek an exemption. This information would include details on where the relevant RS Member Services or CALM mediators are based.

How would RS/CALM be made aware of the need for the meeting

44. We would expect the parties to approach a RS member service or CALM mediator themselves.
45. If the court is referring parties to a meeting then we would expect that they would ask parties to contact either a RS member service or a CALM mediator and provide details, passed to the SCTS by the Scottish Government, as to how to find information on this.
46. It would not be practical for the court themselves to refer parties to a particular RS Member service or CALM mediator as they may not have this information to hand or may not know about any waiting times/backlog at a specific centre or with a specific mediator.

Virtual session or face to face?

47. If the current Covid19 situation continues, then we would expect that all the meetings would be virtual. Even if the situation eases and face to face meetings are possible we think some parties may prefer to have the meeting virtually if, for example, a face to face meeting involved significant travel. Where this is the case, we would be keen for a virtual meeting to be encouraged.

Would both parties be required to attend the meeting together?

48. The supplementary Financial Memorandum estimated costs of parties attending meetings separately or together. If parties both are happy for the meeting to take place together then this could be possible. However, we assume that in the majority of cases parties would attend separate sessions. This would allow the mediator to target any information to reflect whether they are a pursuer or defender in a court case. This would also mean a party could attend a session that is closer to where they live which may be more convenient for them.

Could one party attend an RS member service and one a CALM mediator?

49. Parties could attend different meetings run by different services. We would look to ensure that a certificate of attendance could be provided by both services

How would the court be aware that a party has attended a meeting with an approved mediator?

50. We would expect the RS member service or the CALM mediator to issue a certificate to the party which could be shown to the court. This would remove dubiety if one party alleges that the other party has not attended an approved meeting.

What happens if a party refuses to attend a meeting?

51. If a party refuses to attend a meeting we would expect that if a case has been sisted the other party could lodge an motion to recall the sist. The court would then be able to explore why a party has refused to attend a meeting. For example there may be undisclosed allegations of domestic abuse. A party may also need reassurance that they do not have to attend the meeting with the other party.
52. Assuming that the pilot allows this, the court could decide that on cause shown it would not be appropriate to require the parties to attend such a meeting. The court might also determine that the circumstances of the case fall within one of the exceptions so that the scheme does not apply to the case.
53. If the court decides that there is no cause shown for a party not attending a meeting then the court could refuse to make an order under section 11 of the 1995 Act.

What happens if a party delays approaching a mediator?

54. If a party deliberately delay approaching a mediator once a court case has started then we would expect the other party to lodge/enrol a motion to recall the sist. The court may then wish to explore why the delay has taken place.
55. If an individual has delayed approaching a mediator prior to an application to the court being lodged then this information could be included in the initial writ/NID.

What if there is a backlog of meetings?

56. We would plan to set a time limit in the letter of grant award for RS member services/CALM mediators between them being notified by a party and holding the meeting. We would discuss what would be a realistic timeframe with RS and CALM. We would not expect there to be a significant delay in a court case.
57. There will be an expectation that the meeting will take place as soon as practicably possible after the referral is made with the aim being for the Information Meetings to take place within 2 to 4 weeks.

What happens if a party is based outwith Scotland?

58. As the case will usually take place in the Sheriffdom where a child is currently residing there may be situations where a party lives in another part of Scotland or outwith Scotland. In these situations we would expect a party to attend a meeting virtually unless the party does not have the required technology.

How will abuse be identified?

59. The provisions in the Act specifically state that the pilot must not apply where there is a proven or alleged history of abuse between some or all of the parties.

60. Abuse is wider than domestic abuse. In section 11(7C) of the 1995 Act abuse is defined (for the purpose of subsection (7B)) as including:

- Violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
- Abuse of a person other than the child; and
- Domestic abuse

61. We would propose that this definition of abuse be adopted for the purposes of the scheme. The exemption applies to both convictions for abuse, civil findings of abuse and also allegations of abuse.

62. Parties may disagree as to whether there has been abuse. In other provisions of the Act on prohibition of personal conduct of a case we would expect the courts to establish whether or not abuse has occurred. In this case if a party has alleged that there has been a history of abuse then the pilot scheme will not apply: that is what this particular section of the Act provides.

What exemptions will there be apart from abuse?

63. In England & Wales there are a number of exemptions as to why a meeting does not have to take place. The table at Annex F to this paper lists these.

64. The provisions in the 2020 Act allow the Scottish Ministers to set the terms of the scheme to allow the court to make an order under section 11 of the 1995 Act where the court has decided on cause shown that it would not be appropriate to require the parties to attend such a meeting. At the discretion of the Sheriff Principal, examples of “cause shown” could be included in any practice note.

Evaluation of the pilot

65. A full and detailed evaluation of pilot is crucial in order to assess whether the meetings are meeting their objectives. We will ensure that the pilot has clearly expressed objectives to generate a clear set of corresponding research questions for the evaluation to answer.

What would be evaluated

66. A range of information both qualitative and quantitative will need to be collected. We have identified the information and who would likely be responsible for collecting it:

Information	Qualitative/Quantitative	Source
Number of times parties referred to meetings	Quantitative	RS/CALM
Whether parties continue with court proceedings	Quantitative	Follow up with individuals
Time between parties contacting RS or CALM for meeting and availability of appointments	Quantitative	RS/CALM
Number of virtual v face to face meetings	Quantitative	RS/CALM
One party or both parties attending together	Quantitative	RS/CALM
Summarised report on attitude between parties at the start of the meeting and at the end (receptiveness of parties) Including, how did they feel about the Meeting, how did the meeting change their views, how did they feel about going to court now, did they still want to go to court.	Qualitative	RS/CALM
Anonymised summary of views of RS/CALM on how the meetings went	Qualitative	RS/CALM
Subject to the permission of the Lord President, views of the judiciary on any changes in parties' behaviour as a result of meeting if the meeting happens after a court case has been initiated.	Qualitative	SCTS
How parties will seek children's views	Qualitative	RS/CALM

67. Once a party has attended a meeting we would ask them to complete a feedback form. This would be followed up in a percentage of the cases by a phone call to discuss their experiences. The percentage would be decided at a later date.

68. We would expect the pilot to include interviews with individuals attending the meeting, RS and CALM mediators and other qualitative approaches, as well as

the collection of quantitative data. This would help evaluate whether the pilot has met its objectives as noted above.

Evaluation of the impact on children's participation

69. The provisions in the Act require the Scottish Ministers to evaluate whether regard has been given to the child's views in the method used to resolve the dispute to at least the same extent as a court would have had regard to the child's views when making an order. The most appropriate approach would be a matter for successful researchers to suggest, in agreement with the Scottish Government.

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MARCH 2021**

Annex A Information on alternatives to court

Mediation

Mediation is a joint decision making process where individuals are invited to cooperate with each other to find mutually satisfactory agreements on a range of topics, including contact and residence, in front of an independent third party. The focus on mediation is in finding the middle ground between individuals.

Sheriff Court Ordinary Cause Rule 33.22 provides that: “In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation”. There are similar provisions in Ordinary Cause Rule 33A.22 for civil partnership actions and in 49:23 of the Court of Session Rules.

The Scottish Government has sent a policy paper to the Family Law Committee of the Scottish Civil Justice Council on extending these rules to all family actions¹⁷ (e.g. those about financial provision on divorce).

Arbitration

Arbitration is a more formal process than mediation as the parties enter into an agreement under which they appoint a suitably qualified person to adjudicate a dispute and make an award. On entering into the Agreement to Arbitrate, the parties agree to be bound by the arbitrator's determination.

The arbitrator in family cases is usually a family lawyer who has received special training.

Collaborative law

Collaborative law is based on principled negotiations. In contrast to mediation, where both parties meet with one neutral mediator, in collaborative law each party has their own solicitor and issues are resolved in meetings of all four of them (the two parties and their solicitors) with topics planned in advance.

Family Group Conferencing

Family Group Conferencing (FGC) involves an extended family meeting to resolve issues of child welfare concerns. FGC generally incorporates four stages:

- Referral. Family members agree that FGC is required and an independent coordinator is appointed.
- Preparation. The coordinator identifies the family network and meets with people to discuss the reason for the meeting and invite them to participate.
- Meeting. Everyone attends to discuss the situation. The family meets in private to discuss a plan of action and this is agreed by all attendees.

¹⁷ [paper-2020-09e-flc-paper-regarding-mediation-istanbul-convention.pdf](https://www.scottishciviljusticecouncil.gov.uk/paper-2020-09e-flc-paper-regarding-mediation-istanbul-convention.pdf)
([scottishciviljusticecouncil.gov.uk](https://www.scottishciviljusticecouncil.gov.uk))

- Review. The operation of the plan is reviewed and if necessary further meetings are arranged.

Parties settling the case for themselves

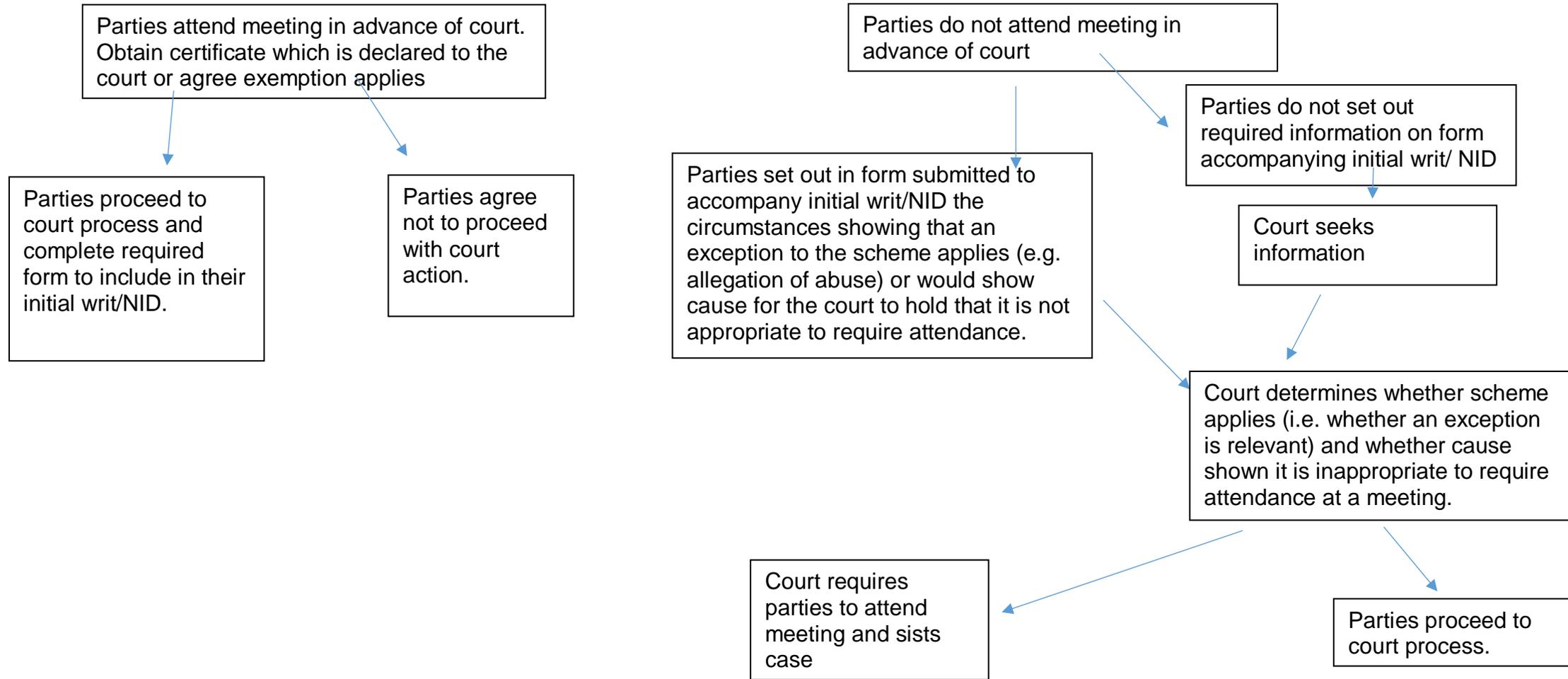
In many cases, issues on child contact and residence are settled by the parties themselves, without going to court or to ADR. Parents could draw up a Parenting Plan¹⁸ In some cases, parties may wish, with the help of solicitors as required, to draw up a minute of agreement for registration in the Books of Council and Session. The meeting should check that the parties consider that settling the issue for themselves is no longer an option.

¹⁸ [Parenting Plan – Scotland - mygov.scot](https://www.mygov.scot/parenting-plan)

Annex B Civil service travel expenses rates

Expense type	Rate/unit
Motor cycle allowance	£0.24 per mile
Motor mileage rate	£0.45 per mile
Passenger supplement	£0.05 per mile
Pedal cycle allowance	£0.20 per mile
Public transport bus	Receipted, no maximum
Public transport ferry	Receipted, no maximum
Public transport rail (standard)	Receipted, no maximum
Public transport taxi	Receipted, no maximum
Public transport Tube	Receipted, no maximum

ANNEX C Flowchart of how decision to attend a meeting is made



Annex D Sample certificate to be issued by mediator to individuals who attended an information meeting

Name:

attended a meeting under section 24(1) of the Children (Scotland) Act 2020 at which the options available to resolve the dispute were explained on (insert date)

Signed:

Name:

Organisation:

Date:

Annex E Sample form to be completed with initial writ/notice of intention to defend (NID)

If you are applying to a court in Sheriffdom for an order under section 11 of the Children (Scotland) Act 1995 or are a party to an action in which such an order is sought you must attend a mandatory awareness meeting. At this, the options available to resolve the dispute will be explained. There is no charge for this meeting and reasonable travel expenses will be paid. You do not have to attend this meeting if one of the exceptions described below applies.

At the meeting you will be asked to consider whether a form of alternative dispute resolution, rather than court, would be a more appropriate way of settling your dispute.

Alternatives to court can include:

- Mediation
- Arbitration
- Family Group Conferencing
- Collaborative Law
- Resolution of disputes by parties themselves

You must attend a meeting unless:

- there is a proven or alleged history of abuse between some or all of the parties; or
- the court has decided on cause shown that it would not be appropriate to require the parties to attend such a meeting.

Please complete this form and return with your initial writ or NID.

1) I have attended a meeting on the options available to resolve the dispute are explained Yes/No

If your answer is Yes please sign and return this form with the initial writ or NID and a copy of the certificate issued by the mediator. If you have lost your certificate please contact the mediator for a replacement.

2) Are you claiming an exemption from the requirement to attend a meeting Yes/No (If your answer is yes, please go to question 3. If your answer to both this question and question 1 is no, please seek a meeting).

3) If you answered Yes to question 2) please state which of the following applies:

- there is a proven or alleged history of abuse between some or all of the parties;
- There is another reason where the court should consider whether on cause shown that it would not be appropriate to require the parties to attend such a meeting.

Signature:

Date:

Annex F Exemptions to meetings in England and Wales

Exemption in England and Wales
You, or the other party, has made an allegation of domestic violence against the other supported by clear evidence, for example either a police investigation took place or an injunction was issued.
The application you want to make to the court relates to other family law matters which you are currently involved in.
An application to the court needs to be made urgently because there is a risk to the life or safety of the person who is making the application (the applicant) or his or her family (for example, their children) or his or her home.
The dispute is about money and you or your husband, wife or civil partner (the respondent) is bankrupt.
You and your husband, wife or civil partner are in agreement and there is no dispute.
You do not know where your husband, wife or civil partner is.
You wish to make an application to the court but for certain reasons you don't want to tell your husband, wife or civil partner in advance.
You are currently involved with social services because there are concerns about the safety and wellbeing of your child or children.
You can't find a mediator within 15 miles of where you live, or you have contacted three mediators based within 15 miles of where you live and you are unable to get an appointment with any of them within 15 working days.
You or your partner cannot access a mediator's office because one of you has a disability. However, if the authorised mediator can provide the appropriate facilities then you will both still be required to attend the meeting.
A mediator shows on the court form that mediation isn't suitable, for example the other person isn't willing to attend a MIAM.
In the past four months you've tried mediation but it hasn't been successful. A mediator has to confirm this and state that mediation is not the best way for you to resolve your dispute.
You or your partner do not normally live in either England or Wales and therefore cannot be considered as "habitually resident".



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