

**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.**

**November 2021**

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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.

## The Reporting Period

4. 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 of 6 months.
5. The 2020 Act received Royal Assent on 1 October 2020. This statement covers the period from 1 April 2021 – 1 October 2021.<sup>1</sup>

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<sup>1</sup> The previous statement for 1 October 2020 to 1 April 2021 is at [First Report Children \(Scotland\) Act 2020 .pdf \(parliament.scot\)](#)

## **Scheme for funding for alternative dispute resolution (section 23 of the 2020 Act)**

6. The Scottish Ministers have not fulfilled their duty under section 23(1) of the 2020 Act to establish a scheme for funding for alternative dispute resolution (ADR).
7. Further 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. The two potential options were set out in the first report to Parliament. These would be either 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; or
  - 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).
8. The Scottish Government is aware of the [Family Mediation Voucher Scheme - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/family-mediation-voucher-scheme) being established south of the border for a time-limited period. We will consider if any lessons can be drawn from this scheme.
9. However, as stated in the first report to Parliament 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. When preparing a scheme under section 23, the Scottish Government will need to take account of all forms of ADR which can be used in family cases.

10. The Scottish Government will also need to take account of section 23(5) which provides that “any scheme set up, or arrangement made ... must be framed so that assistance under it is only available to meet the costs of alternative dispute resolution procedures that 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 Children (Scotland) Act 1995”.
11. Section 23(5) will require the Scottish Government to engage with providers of ADR in family cases and with other key stakeholders on how regard is had to children’s views when ADR takes place.
12. Section 23(7) of the 2020 Act requires the Scottish Ministers if they have not fulfilled their duty under subsection (1) to explain why not and to state when they expect to fulfil it.
13. On why the duty has not been fulfilled, there are a number of detailed issues which the Scottish Government need to consider further. These include:
  - the options for establishing the scheme
  - the eligibility criteria for assistance
  - how to ensure the voice of the child is heard in ADR (as discussed briefly in paragraphs 10 and 11 above)
  - ensuring that domestic abuse victims are not forced to go to ADR
  - how the new assistance scheme will fit with the legal aid system
  - how the new assistance scheme fits with wider reviews of Mediation and Dispute Resolution
  - 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)
  - if any changes to court rules<sup>2</sup> need to be proposed
  - ensuring the scheme is fully evaluated.

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<sup>2</sup> The Scottish Civil Justice Council has published information on how court rules are made: [Rule Making \(scottishciviljusticecouncil.gov.uk\)](https://www.scottishciviljusticecouncil.gov.uk)

14. In addition, the Scottish Government will need to discuss the details of the scheme with:
  - the providers of the various forms of ADR. (As indicated above, the Scottish Government will engage with providers of ADR in family cases and with other key stakeholders on how regard is had to children's views when ADR takes place).
  - the Scottish Courts and Tribunals Service (SCTS). The SCTS will have a strong operational interest in how the scheme will work.
  - bodies such as Scottish Women's Aid and Shared Parenting Scotland who work with users of the family court system
  - the Scottish Legal Aid Board
15. It is likely to take at least another two years to fulfil the duty. In broad terms, this consists of a year to agree the details of the scheme and then another year to put the agreed scheme into place.
16. Work in the second year could include:
  - preparing regulations under section 23(9) of the 2020 Act
  - proposing changes to court rules
  - public facing guidance
  - putting the funding in place
  - putting measures in place to monitor the effectiveness of the scheme.

## **Pilot of mandatory meetings on alternatives to court**

17. 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. However, work has progressed on these provisions.
18. The Scottish Government shared an initial policy paper on the pilot of the mandatory meetings on alternatives to court with a variety of organisations during the first reporting period. The first report included this paper at Annex A. The Scottish Government has received responses from organisations. A number of themes emerged from the responses:
  - concern that the pilot could focus too much on mediation and exclude other forms of alternative dispute resolution (ADR) used in family cases
  - whether the voice of the child would be heard in the meetings
  - how the exemption from attending a meeting where there has been a proven or alleged history of abuse would work
  - a preference for the pilot being set out in regulations rather than in a Practice Note
  - the meetings should be individual rather than both parties attending at the same time
  - there is need to consider where pilots should take place and how many meetings would be required for evaluation purposes.
19. Following this feedback, the Scottish Government considers that:
  - the meetings under section 24 should be individual
  - if provision to establish a pilot scheme is required, this should be done by regulations made under section 23(6) rather than by way of a Practice Note. Regulations under section 23(6) are subject to the affirmative procedure.



20. On voice of the child, the Scottish Government agrees that the facilitators of the meetings should ask those attending to consider how the views of the child have been and will be sought. In addition, the facilitator will need to emphasise to those attending that the welfare of the child at the centre of the case must be the paramount consideration. As the Scottish Government will be funding the pilot, the funding conditions could lay down these requirements on the facilitators of the meetings.
21. It will also be important to ensure that any subsequent ADR following the meeting obtains the views of the child. As noted above, section 23 of the 2020 Act, on funding for ADR in family cases makes provision in subsection (5) that assistance should only be made available to meet the costs of ADR which ensures regard is had to children's views. The Scottish Government will engage further with providers of ADR services in family cases on how they ensure regard is had to children's views when ADR takes place.
22. On the exemption when there has been abuse, section 24(2)(b) of the 2020 Act provides that the pilot of mandatory meetings on alternatives to court must not apply to proceedings in which there is a proven or alleged history of abuse between some or all of the parties. Therefore, if a party declares that there has been proven or alleged abuse a meeting should not take place. Under the terms of section 24, a party would not need to provide evidence of the abuse for the exemption to apply.
23. If during a meeting under section 24, a facilitator becomes aware that there is a proven or alleged history of abuse between some or all of the parties then the facilitator should stop the meeting. If required so the case can proceed to court, the facilitator could issue a certificate to confirm that a meeting had been attended.
24. The Scottish Government agrees it is important that the pilot covers all forms of ADR and that when a party attends a meeting, the party is given information on the various forms of ADR in family cases. The Scottish Government will discuss further with ADR providers how this can best be achieved.

25. Section 24(4) of the 2020 Act requires the Scottish Ministers if they have not fulfilled their duty under subsection (1) to explain why not and to state when they expect to fulfil it.
26. On why the duty has not been fulfilled, further work is required to:
- ensure the pilot covers all forms of ADR used in family cases
  - ensure facilitators of the meetings ask those attending to consider how the views of the child have been and will be sought
  - consider if regulations are needed and, if so, prepare them accordingly
  - consider if changes need to be proposed to court rules
  - agree exactly how the required pilot is to be evaluated.
27. It is likely to take at least another year before the Scottish Government is in a position to:
- agree the terms of the scheme with ADR providers
  - lay any required regulations under section 24(7) before Parliament
  - send any required policy paper on proposed changes to court rules to the Family Law Committee of the Scottish Civil Justice Council.
28. This means the pilot itself would be unlikely to commence until at least mid-2023.

**Scottish Government  
November 2021**



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