

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.

July 2022



Scottish Government
Riaghaltas na h-Alba
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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 October 2021 – 1 April 2022.¹

¹ The previous statements for 1 October 2020 to 1 April 2021 and 1 April to 1 October 2021 are at [First Report Children \(Scotland\) Act 2020 .pdf \(parliament.scot\)](#) and [Scheme for funding for alternative dispute resolution \(section 23 of the 2020 Act\) - Children \(Scotland\) Act 2020 - section 23\(1\) and section 24\(1\): second report on the Scottish Ministers' duties - gov.scot \(www.gov.scot\)](#)

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). However, the Scottish Government has carried out work in a number of areas.
7. Section 23(5) of the 2020 Act 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”.
8. Scottish Government has engaged with providers of ADR in family cases on how regard is had to children’s views when ADR takes place.
9. The Family Law Arbitration Group Scotland have published guidance for arbiters in child law cases: [Arbitration – decisions relating to children - guidance for arbitrators re \(flagsarb.com\)](https://flagsarb.com). Relationships Scotland refer to a Code of Professional Conduct for Family Mediators and Practice Standards for Family Mediators: [What happens at mediation – Relationships Scotland \(relationships-scotland.org.uk\)](https://relationships-scotland.org.uk). Children 1st have information in their published guide on family group decision-making: [fgdm-leaflet-update.pdf \(children1st.org.uk\)](https://children1st.org.uk).
10. 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.
11. On why the duty has not been fulfilled, there remains a number of detailed issues that the Scottish Government still needs to consider further. These include:
 - the options for funding the scheme.
 - the eligibility criteria for assistance.
 - how to ensure the voice of the child is heard in ADR, taking account of information provided from providers on this (as discussed 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 rules² need to be proposed.
 - ensuring the scheme is fully evaluated.
12. In addition, the Scottish Government will need to discuss the details of the scheme with:
- the providers of the various forms of ADR.
 - 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.
13. It is likely to take at least another 18 months to fulfil the duty. In broad terms, this consists of 6 months to agree the details of the scheme and then another year to put the agreed scheme into place.
14. 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.

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

- putting measures in place to monitor the effectiveness of the scheme.

Pilot of mandatory meetings on alternatives to court

15. 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 is progressing on these provisions.
16. The Scottish Government is proceeding on the basis 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.
 - Facilitators of the meetings should ask those attending to consider how the views of the child have been and will be sought. As noted above, the Scottish Government have engaged with providers of ADR to find out how they ensure regard is had to children's views when ADR takes place.
17. In January 2022 the Scottish Government held a session with ADR providers to discuss how the pilot could work.
18. The organisations who attended were:
 - Calm Scotland³
 - Children 1st⁴
 - Consensus Scotland⁵
 - Family Law Arbitration Group Scotland⁶
 - Relationships Scotland⁷
 - Scottish Arbitration Centre⁸
 - Scottish Mediation⁹

³ [Calm Scotland – Bridge differences with mediation](#)

⁴ [Family Group Decision Making | Children 1st](#)

⁵ [Consensus Scotland | Choose a happier future. Separate or divorce... \(consensus-scotland.com\)](#)

⁶ [FLAGS - Family Law Arbitration Group Scotland - FLAGS \(flagsarb.com\)](#)

⁷ [Relationships Scotland – Counselling, mediation and family support \(relationships-scotland.org.uk\)](#)

⁸ [Scottish Arbitration Centre | Scotland's Arbitration Centre](#)

⁹ [Scottish Mediation – Engaging positively with conflict](#)

19. The agenda included the following discussion points:
- Ensuring all forms of ADR are included in the pilot.
 - Coverage of ADR across Scotland.
 - How the voice of the child is heard in family ADR.
 - Potential way forward.
20. A minute of the meeting is included at **Annex A**.
21. In terms of next steps, the Scottish Government is now considering the following issues:
- who should facilitate the meetings.
 - what training the facilitators should receive.
 - the nature of the information provided to parties.
 - how the pilot should be evaluated.
 - what resources will be required.
22. As well as continuing discussions with ADR providers, the Scottish Government also plans to convene a further session with other key stakeholders, such as Scottish Women's Aid, Shared Parenting Scotland and Citizens Advice Scotland.
23. 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.
24. On why the duty has not been fulfilled, the timescales for the pilot were discussed at the session with ADR providers. It was acknowledged that work will be required up-front, before the pilot could start. This work will include:
- the training of facilitators and time for facilitators to prepare.
 - the development of information for parties, including time to produce the information and seek views on it.
 - the development of any secondary legislation.
 - any proposals to change court rules¹⁰.

¹⁰ The procedure for making court rules in Scotland is outlined at [Rule Making \(scottishciviljusticecouncil.gov.uk\)](http://scottishciviljusticecouncil.gov.uk)

25. In line with what was set out in the previous report to Parliament, this this also suggests that the pilot itself would be unlikely to commence until at least mid-2023.

Scottish Government
June 2022

Annex A

Children (Scotland) Act 2020 – pilot of mandatory ADR information meetings

Meeting with ADR providers - Friday 14 January 2022: 10.00 – 12.00

Minute of meeting

Attendees:

Simon Stockwell (chair)	Scottish Government
Helen Hughes	CALM Scotland
Vonnie Sandlan	Children 1 st
Sara Ali	Children 1 st
Emma Somerville	Consensus (Scotland)
Craig Samson	Consensus (Scotland)
Rachael Kelsey	Family Law Arbitration Group Scotland (FLAGS)
Ruth Croman	Family Law Arbitration Group Scotland (FLAGS)
Rosanne Cubitt	Relationships Scotland
Stuart Valentine	Relationships Scotland
Andrew Mackenzie	Scottish Arbitration Centre
Wendy Georgeson	Scottish Government
Graham Boyack	Scottish Mediation

1. Introductions

1. The attendees introduced themselves and the ADR organisations they represent.

2. Scene-setting

2.1 The Scottish Government noted that the second report on progress regarding implementation of sections 23 (funding of ADR) and 24 (pilot of mandatory information meetings) of the Children (Scotland) Act 2020 (the 2020 Act) has been laid in the Scottish Parliament but has

not yet been published. The Scottish Government will publish the report¹¹.

2.2. In terms of work to date, some matters relating to the pilot are clear:

- Scottish Women's Aid and others continue to have concerns about the use of any form of ADR in cases where there has been domestic abuse.
- There is consensus that the meetings under section 24 should be individual rather than both parties attending the same meeting.
- There is consensus that details of the pilot should be set down in regulations made by the Scottish Ministers rather than in court practice notes. Rules of court may still be required and, if so, the Scottish Government would prepare a policy paper in the usual way¹².

3. How to ensure all forms of ADR are included in the information meetings

3.1 The Scottish Government noted this was the main topic of the meeting. The mandatory meetings in the pilot should include all forms of ADR used in family cases. It has been suggested the Scottish Government may have been too focussed on mediation. The question was whether that was right and if so, how that should be tackled.

3.2 During the discussion, the following points were made:

UNCRC

- We need to ensure the meetings in the pilot are based on the principles of the UN Convention on the Rights of the Child (UNCRC) and children's rights.

¹¹ [The second report has now been published and is at Children \(Scotland\) Act 2020 - section 23\(1\) and section 24\(1\): second report on the Scottish Ministers' duties - gov.scot \(www.gov.scot\)](#). The first report is at [Children \(Scotland\) Act 2020 - alternatives to court and funding of alternative dispute resolution pilots: report - gov.scot \(www.gov.scot\)](#).

¹² Information on the process for making court rules is at [Rule Making \(scottishciviljusticecouncil.gov.uk\)](#).

Information provided to parents

- Parents should be advised on all forms of ADR.
- There has to be a large enough budget to ensure there is information to be given to parents at the meetings, whilst not providing too much information and overwhelming parents at a stressful time.
- The meetings should be factual, rather than advising the person on which way to go. However, there may be a role for advice after the meeting. Parties may, for example, need (further) legal advice.
- The meetings should provide robust information and signposting to help empower parents make the best decision for their children.

Nature of meetings and the facilitators

- The meetings are for information only.
- The facilitators need to be thoroughly trained.
- Training and input needs to be provided by the various professionals in all forms of ADR.
- Facilitators will need information about all forms of ADR and would also need to know the availability of services across the country. Facilitators will also need information on going to court.
- Facilitators of the meetings coming from a specific ADR background would need to listen to other providers as facilitators may inevitably be more comfortable explaining the form of ADR they themselves practice in.
- There needs to be training in family group decision making (FGDM) as facilitators may be less familiar with this.
- In relation to FGDM in particular, there was a need to consider carefully the scope and length of pilot. FGDM providers work with other professionals and services. If the pilot is only 6 months long, it may not fully capture the benefits of the FGDM process when it comes to evaluating the pilot.
- Local authorities should be providing FGDM but it is not clear that all of them are.
- The pilot is designed to keep parties out of court, to give them information and direct them to support available. The pilot is a good opportunity but there may be a need to go back to first principles and move away from a MIAMS type approach¹³.

¹³ MIAMS are Mediation Information and Assessment Meetings and operate south of the border: [What is a MIAM? \(familymediationcouncil.org.uk\)](http://www.familymediationcouncil.org.uk).

- The meetings should be a focussed set of discussions, not aligned to one type of ADR.
- The facilitators should be drawn from a wide variety of ADR backgrounds and not just mediation.
- All relevant organisations need to have an input into the training and into written information provided to the parties attending the meetings.
- Although there are a number of relevant forms of ADR, it is still a relatively small number. Mediators recognise that mediation is not right for everyone and are able to talk about all forms of ADR. Whilst there might be concerns about facilitators having a detailed knowledge of one type of ADR, some thought this seemed preferable to using facilitators without knowledge of any type of ADR.
- The key is for facilitators to be trained in all forms of ADR, not necessarily what organisation the facilitators come from.
- Parents are likely to have practical questions on the ADR process and the facilitator will need to have knowledge and clear information.
- There is a risk of making things too complicated. The meeting is to empower parents to make their own decision and the best decision for their children. They could then be signposted to the relevant organisations and could approach them as they see fit. We shouldn't over-complicate the intended purpose of the pilot.

3.3. Following this open discussion, the Scottish Government set out the main conclusions:

- There was general support for the concept of the pilot.
- The pilot needed to be in line with the UNCRC and with children's rights.
- The pilot itself just related to information meetings, and did not involve the actual provision of the ADR.
- There was a recognition that whoever delivers the meetings need to be properly trained on all forms of ADR.
- There was a recognition that a person may be (unconsciously) biased towards what they are more familiar/comfortable with. The facilitators will need to be aware of the risk of this unconscious bias.
- If the creation of the information and training is right, who delivers the information may be less important.

- Evaluation of the pilot was key although evaluating longer term outcomes may be difficult.
- Resources would be key to a successful pilot.
- The Scottish Government would ensure material/information/literature to be provided to parents would be shared beforehand with all providers and other stakeholders with an interest (e.g. Shared Parenting Scotland, Scottish Women's Aid, Children and Young People's Commissioner).

4. Training of facilitators

4.1 The Scottish Government asked for views on how facilitators could be trained and whether there should be "practise" meetings as part of the training before the actual ones take place. Points raised were:

- Giving information to facilitators would not be enough. There may be assumptions that need to be dispelled. There would need to be information sessions and in-person training, which could be online if necessary.
- Children 1st already do information sessions on FGDM for children's panel members and reporters.
- There would need to be something in place to ensure facilitators have followed the training. Options could include follow up calls with facilitators or a survey after the training.
- It can be hard to foresee what parents may ask
- The training could perhaps be 1 or 2 days. People from the various providers could give information and go through scenarios. Those taking part would need a safe environment to role-play and demonstrate their understanding. There could then be evaluation.
- Scottish Mediation carry out training for people working on their helpline. This training includes "dummy" calls, etc. This helps people know what they are supposed to know. People are also trained to know what to do if they **don't** know the answer: this is important too.
- There should be training on all forms of ADR at the one time.
- Practice meetings as part of the training would be good.

5. Geographical coverage of ADR

5.1 The Scottish Government set out their understanding on the current geographical coverage of the different types of ADR in Scotland:

- Family mediation: Scotland-wide.
- Arbitration: although perhaps not used in many child contact cases it is available Scotland-wide.
- Collaborative: likewise, Scotland-wide.
- FGDM: not available in all parts of Scotland. Some local authorities do work in this area but not all of them do.

5.2 Attendees agreed with this summary on geographical coverage.

6. How the views of the child are heard

6.1 Section 23 of the 2020 Act on funding of ADR has specific reference to funding being conditional on ensuring the voice of the child is heard in the types of ADR used. The Scottish Government would also wish to ensure this is an integral part of any ADR following on from the information meetings

6.2 The Scottish Government had received information from attendees on how the views of the child are heard in the various forms of ADR.

6.3 Any information provided in information meetings should outline and emphasise the need for the views of the children involved to be obtained.

6.4 During the discussion, the following points were made:

- child-friendly leaflets should be available alongside literature for parents in the information meetings;
- there could be a pre-recorded video for children to view, instead of written information.

7. Scale and timings of the pilot.

Scale

7.1 The meeting discussed the potential scale of the pilot and on how many facilitators will need to be trained for the pilot. It was noted that training a small of number of facilitators would be significantly different to training a larger number.

7.2 The Scottish Government noted that it had been suggested that the 500 cases [which would be 1,000 meetings] originally proposed by

the Scottish Government was too ambitious and that it could be difficult to get that many eligible cases over the length of the pilot. The intention is that the pilot would only be run in certain parts of the country.

7.3 During the discussion, the following points were made:

- During the pandemic people have become more comfortable with using online platforms. On this basis it is possible to reach more people in rural areas. This is an opportunity to look at rural areas rather than just cities and urban areas.
- Facilitators would need to know, for training purposes and providing information, how different types of ADR would work online.

Timings of the pilot

7.4 The meeting discussed timescales for the pilot, noting that a lot of work needs to be done before the pilot can start such as training and development of literature.

7.5 The Scottish Government said that establishing the pilot would take some time. Policy development would have to place in relation to the meetings, the training, the information and any required secondary legislation. Time would be needed to produce the information and seek views on it; for training to take place and for facilitators to prepare. The Scottish Government would also need to work closely with the Scottish Courts and Tribunals Service and other stakeholders.

7.6 All this suggested that the pilot would not be running in 2022 and would be more likely in 2023.

8. Next steps?

8.1 The Scottish Government set out planned next steps:

- The minute of this meeting will be circulated among all attendees, for comments.
- The minutes will be published, as part of the next report to Parliament under the duty in sections 23 and 24 of the 2020 Act.
- The Scottish Government will consider further the points made on facilitating the meetings; training the facilitators; the nature of the information provided to parties; evaluation of the pilot and the resources required.

- Further discussions with attendees and others will take place.

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