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An International Evidence Review of Mediation in Civil Justice



CRIME AND JUSTICE



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Background

The Justice Vision contains a commitment to ‘empowering our people and communities to exercise their rights and responsibilities, to resolve disputes and other civil justice problems at the earliest opportunity’. There is growing interest within Scotland and internationally in the role of mediation as a mechanism for resolving disputes. For example, the Republic of Ireland has recently introduced a *Mediation Act (2017)* as a mechanism for providing a statutory framework for mediation. Justice Analytical Services has therefore undertaken a review of available evidence on mediation in the civil justice systems of five jurisdictions (Australia; Canada; England and Wales; the USA; and the Republic of Ireland to a more limited extent) to better understand the international landscape of mediation, its operation, and effectiveness.

Purpose of the Review

This review has been undertaken for policy colleagues in the Scottish Government. We understand it will support the work of *Scottish Mediation*, who are responsible for undertaking a research project that aims to develop a range of policy options that will increase and encourage the effective use of mediation in resolving civil disputes.

The purpose of this Review is to:

- Provide a descriptive account of the operation of mediation in the civil justice systems in selected jurisdictions.
- Explore and assess available evidence on mediation as a tool for resolving disputes in these jurisdictions.

Out of Scope

This Review focuses on exploring the evidence base in the selected jurisdictions noted above only; the wider evidence base on mediation was not included.

The Review focuses on mediation in civil/commercial actions; mediation in family actions and in administrative justice are both out of scope.

Finally, this Review focuses on mediation exclusively, rather than any other type of alternative dispute resolution (ADR) method.

Executive Summary

- This review took the form of a literature review and discussion with key informants. It is not comprehensive in nature, but explored the available literature and evidence on mediation in the civil justice systems of the selected jurisdictions: *Australia (New South Wales and Queensland); Canada (Alberta; British Columbia; Ontario); England and Wales; Ireland; and the USA (Florida; Maryland; Ohio).*

Assessment of the Evidence Base

- The evidence base on mediation is variable, making comparison and transferability problematic. Being able to make assured statements about one type of programme working well within the Scottish context based on this evidence is therefore impossible. Instead the evidence base allows for a broad sense of the positives and challenges that mediation presents and should generate useful thinking for those wishing to move ahead with a programme of mediation in Scotland's civil justice system.
- The majority of empirical studies in mediation are focused on short-term settlement and satisfaction rates for users and these act as key indicators of success in mediation. There is also more limited interest in wider and longer-term outcomes, which are recognised as significant benefits of mediation but can be more challenging to research.
- Cost and time savings are also of interest to international jurisdictions. However, the empirical evidence is conflicting on both cost and time savings and there are difficulties in measuring cost savings accurately. There is *potential* for both cost and time savings for users and the civil justice system by making use of mediation, but the evidence shows this cannot be guaranteed.
- There are also a number of key gaps in the evidence base that are important to fill to better understand and measure outcomes. These can be summarised as: drivers to engagement and settlement; characteristics of parties and the dispute; private, pre-court mediation; quality of outcomes, particularly in the longer term;

awareness of and provision of information about mediation; mid-value claims; behaviour of mediators, lawyers, the judiciary and other court staff; robust cost and time savings evidence; negative and unintended consequences.

Operational Summary

- These jurisdictions present a mix of legislative and non-legislative approaches to mediation. Legislation was found to provide a 'focus' for the legal profession, but, from the available evidence, no approach was found to be more or less beneficial for encouraging mediation. Experts were conflicted on what stage in the growth of mediation legislation might be most useful.
- Whether a system is mandatory or voluntary is not always easy to define, and is subject to some discussion. Most systems can fit on a continuum of mandatoriness.
- With some exceptions, most civil cases could go to mediation in all jurisdictions; domestic abuse tended to be an exception. If parties could request to opt-out then there was a mix of formal criteria and judicial discretion used to decide which cases to exempt, with a stronger leaning towards use of judge discretion in these jurisdictions.
- The practice and funding of mediation varies widely across jurisdictions, and is highly context specific. One commonality is a commitment to maintaining mediation as a confidential process, though the extent of this varied.
- Mediation tends to be a self-regulating profession, with Florida an exception in this review. There are court-recognised standards of training for mediators in all jurisdictions, but beyond the courts there are no compulsory standards or single accreditation body (although Ireland is moving towards a nationally recognised set of standards and a single body to regulate the profession).
- The importance of training and mediator experience was reiterated throughout the review, for ensuring fairness of process and reaching settlement.

- Mediation agreements that are written down and signed are either immediately enforceable, as any written contract, or can be made enforceable by lodging the contract with the court, having legal professionals draw up the contract, or having a judge look over the contract and agree/accept it.
- A culture of mediation takes a long time to build, generally over several decades. Experts in these jurisdictions were conflicting in their thoughts on whether legislation and other official routes were more effective in building a culture than important and enthusiastic individuals driving initiatives forward, sometimes from the grassroots up.

Outcomes for Users and the Civil Justice System Summary

- A key message that emerged from the evidence across all jurisdictions was that mediation scores very highly on procedural justice outcomes.
- The evidence reviewed for these jurisdictions suggests that mediation uptake may be encouraged through some level of mandatory process and through use of low fee or free services. However, uptake – or ‘levers’ to encourage mediation – are a recognised gap in the literature and require further research and exploration.
- Settlement rates varied across these jurisdictions, ranging, in general, from 40-90%, with outliers on either side. It was difficult to pin down exact reasons for this variation, but some broad enablers and barriers are identified in this report. Predicting settlement in mediation is very complex and may come down to differences on a case by case basis.
- The evidence in this review was conflicting about whether voluntary or mandatory approaches to referral to mediation provided better user outcomes. Overall, there is not sufficient evidence to suggest that one approach works better than the other.
- Legal advice/representation (or lack of it) is a topic of debate and concern within the mediation literature of these jurisdictions, as lack of knowledge of the law and no

legal advice/representation may lead parties to give away important rights. This may have an impact on settlement, satisfaction, and access to justice outcomes, which suggests serious consideration of legal advice/representation and of wider power dynamics in mediation is needed.

- Mediation should not be seen as a panacea, but used where appropriate. It should be a part of giving users access to a range of dispute resolution processes, including trial.

Introduction

This report explores mediation in the civil justice systems of five international jurisdictions, namely Australia (New South Wales and Queensland); Canada (Alberta, British Columbia, and Ontario); England and Wales; and the USA (Florida, Maryland, and Ohio), with a more limited review of evidence on the recent reforms in the Republic of Ireland.

Focus on these specific jurisdictions was requested by policy colleagues, but some decision had to be made around the specific states/territories/provinces to be explored for the federal nations. This was done through a combination of an initial reading of the literature and through discussion with local (Scottish) mediation experts – both practitioners and academics.

The complexity of alternative dispute resolution (ADR) more widely, and mediation specifically, means that these jurisdictions will not provide a comprehensive understanding of the operation and effectiveness of mediation internationally, but will provide a useful flavour of different approaches, outcomes, and debates around mediation in each area. Much of the discussion focuses on court-connected programmes, due to the greater availability of evidence, with government and community mediation mentioned wherever possible. There is also a great deal of private mediation occurring in each jurisdiction under study here, but the confidential and private nature of mediation means these are much harder to investigate; there is also a lack of regulation of private mediation and therefore less to clearly report. Private mediation appears under-researched and generally ‘off the radar’.

The exact nature of mediation is a debated topic, and there remain a number of ongoing discussions about what exactly mediation should ‘look’ like in practice and therefore how it should be defined. In this review the nuance of this debate has not been strongly delineated when searching for literature; instead we have accepted all literature and evidence available in the time from each jurisdiction. Our review does not therefore subscribe to one particular definition of mediation. However, the *Advisory, Conciliation, and Arbitration Service* (ACAS) – who also provide workplace mediation services across the UK – suggest this broad definition:

Mediation... Is where an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement. Any agreement comes from those in dispute, not from the mediator. The mediator is not there to judge, to say one person is right and the other wrong, or to tell those involved in the mediation what they should do. The mediator is in charge of the process of seeking to resolve the problem but not the outcome.¹

While *Scottish Mediation* defines the process thus:

Mediation is a flexible process that can be used to settle disputes in a whole range of situations. Mediation involves an independent third party, the mediator, who helps people to agree a solution when there is a disagreement. The mediator helps

¹ ACAS/TUC (2010) *Mediation: A Guide for Trade Union Representatives*. London, ACAS Publications: 3.

*parties work out what their issues and options are, then use those options to work out an agreement.*²

These definitions help to situate mediation within the wider ADR landscape and provide a sense of what this process is intended to look like for those taking part. This report works from the basis that mediation is as broadly defined above.

Structure of the Report

Following this introduction, the report will outline the methodology used in this research project and will discuss the nature and quality of the evidence. Beyond this, the main features of the operation of mediation in the selected jurisdictions will be summarised. This will be followed by a discussion of user and system outcomes from across all areas, with a final conclusion and key points and questions for further consideration.

² See <https://www.scottishmediation.org.uk/why-mediation/what-is-mediation/>

Methodology

The Review was initially intended to be carried out through a standard review of literature. However, it soon became clear that a standard literature review alone was unlikely to be able to answer all of the research questions. Accordingly, the research team sought to make contacts in each of the jurisdictions under study to seek assistance in locating any available information/evidence to fill gaps, including any recommendations for further reading. It should be noted that the key purpose of the interviews is around filling gaps in evidence/information, and as such the sample is not intended to be representative.

Research Questions

Subject to available evidence, the review sought to answer the following research questions:

- *To what extent is mediation a part of the civil justice system in each of the jurisdictions (including case types; and uptake levels or volumes) and what are the key features of its operation across the civil justice system?*
- *To what extent is mediation embedded within the civil justice system, and what were the key drivers where applicable?*
- *Is mediation regulated and if so how?*
- *Is mediation in the civil justice system mandatory (and to what degree) or voluntary?*
- *What steps have the jurisdictions taken to encourage the use of mediation?*
- *What are the costs of mediation and who pays (including any cost benefit analysis)?*
- *What does available evidence tell us about the outcomes for users of mediation (including settlement rates; cost; time; access to justice; satisfaction levels)?*
- *What does available evidence tell us about potential outcomes for the wider justice system arising from the use of mediation?*

Literature Review

The literature review has taken a three-pronged approach:

1. A literature search was conducted by the Scottish Government library at the outset of the study (see below for list of library databases). In discussion with the library a schedule for the literature review was created with relevant search terms: mediation; civil justice; effectiveness; cost; cost benefit; UK; international; Ireland; Canada; USA; access to justice; alternative dispute resolution; compulsory mediation; voluntary mediation. These search terms were refined after a first set of search results was produced to include 'legal aid'. The results were worked through for relevance and quality, and an updated and refined search with additional search terms was later added as the project developed: mediation; civil justice; effectiveness; cost; cost benefit; UK; international; Ireland; access to justice; alternative dispute resolution; compulsory/mandatory mediation; voluntary mediation; England and Wales; USA; Maryland; Florida; Ohio; Canada; Alberta; British Columbia; Ontario; Australia; New South Wales; Queensland; court-annexed; community

justice; judiciary; legal aid; lawyer; legal representation; global trends mediation; mediation in civil justice; evidence base mediation; review mediation; outcomes mediation; settlement; settlement rates; satisfaction rates; uptake (and any combination of these).

Justice Analytical Services also conducted a literature review to create a narrative literature review; this was intended to capture any literature that might have been missed in the formal library review. A narrative approach is typically selective, accepting that not all results can be studied. It is therefore useful for a rapid or time-limited project such as this one. It allows for wide gathering of data and information to create 'a narrative' about a topic or, in other words, to gather as much information to create a broad understanding of a new topic area or a wide-ranging topic area, such as this one. Through reviewing as many results as possible, key points of interest that come up time and again are gathered.

2. Next a review of the grey literature was carried out, also using a narrative approach. Grey literature is research produced outside of commonly used academic and commercial channels and is found on the internet. This meant searching using Google and Google Scholar for appropriate literature around mediation, using the search terms: mediation; civil justice; England and Wales; USA; Maryland; Florida; Ohio; Canada; Alberta; British Columbia; Ontario; Australia; New South Wales; Queensland; Ireland; Mediation Act 2017 Ireland; voluntary; mandatory; court-annexed; community justice; judiciary; legal aid; lawyer; legal representation; global trends mediation; mediation in civil justice; evidence base mediation; review mediation; outcomes mediation; settlement; settlement rates; satisfaction rates; uptake; cost; cost effectiveness (and any combination of these).

3. Third, literature suggested or shared by key informants was followed up wherever possible.

Key Informant Discussions

As well as providing useful evidence to read and follow up on, key informants also provided information on the less tangible aspects of the review, namely the extent to which a 'culture of mediation' was embedded within each place. When a history of drivers towards mediation was not available or was incomplete through standard literature and evidence, informants were also helpful in piecing together the growth and development of mediation in that area. Again, these informants were not intended to provide a representative sample of views in the jurisdictions, but to help fill in important gaps in available evidence. They came from a range of areas: academia, courts (judges and court officials), mediation organisations, and government. These individuals are referenced throughout the report. In such a wide field as mediation these key informants cannot be expected to agree with everything stated in this report, but have given their permission to be named in relation to the specific points connected with them.

Library Databases

In the first instance, the search for studies was carried out by the Scottish Government Library Service using KandE. KandE is an online search engine which covers a range of high quality databases, which are detailed in the below table.

Table 1: List of Databases Searched

Search Engines
Academic Search Ultimate (asn)
AGRIS (edsagr)
Australian Research Data Commons (edsard)
BioOne Complete (edsbio)
Bloomsbury Collections (edsblc)
British Standards Online (edsbsi)
Business Source Index (bsx)
Cochrane Database of Systematic Reviews (edschh)
Credo Reference (edscrc)
Credo Reference: Academic Core (edscra)
Criminal Justice Abstracts with Full Text (i3h)
DigitalNZ (edsdnz)
Emerald Insight (edsemr)
ERIC (eric)
FT.com (edsfit)
GreenFILE (8gh)
Military & Government Collection (mth)
New Palgrave Dictionary of Economics Online (edsdeo)
Oxfam Policy & Practice (edsoxf)
Oxford Bibliographies (edsobb)
Oxford Dictionary of National Biography (edsodb)
Oxford Reference (edsoro)
Oxford's Who's Who & Who Was Who (edsoww)
Political Science Complete (poh)
Public Information Online (edspio)
RePEc (edsrep)
SAGE Knowledge (edsskl)
SAGE Research Methods (edsrem)
ScienceDirect (edselp)
Sociology Source Ultimate (sxi)
Journals
Directory of Open Access Journals (edsdoj)
JSTOR Journals (edsjsr)
Books
Books at JSTOR (edsjbk)
eBook Collection (EBSCOhost) (nlebk)
Library Services

Biodiversity Heritage Library (edsbhl)
British Library Document Supply Centre Inside Serials & Conference Proceedings (edsbl)
British Library EThOS (edsble)
Canadian Electronic Library (edscel)
E-LIS (Eprints in Library & Information Science) (edseli)
Library, Information Science & Technology Abstracts (lxh)
Archives
Archive of European Integration (edsupe)

Assessment of the Evidence Base

The evidence base on mediation is variable, making comparison and transferability problematic.

There have been a number of systematic reviews conducted which focus on mediation, as well as small-scale, empirical studies, however experimental, comparable studies that would allow generalization of findings from one context to another are lacking. The most reliable studies that produce empirical data have generally been conducted in the USA.

There are some important and oft-cited systematic review articles that highlight the patchy nature of the evidence base on mediation internationally, making clear that there are a number of variables that are rarely investigated and that those that are may be difficult to draw conclusions from due to the limited nature of the studies. There are also several significant gaps in the evidence base. As Wissler states:

To date, some mediation outcomes have been examined in many studies, but other outcomes have been assessed in only a few studies... Our ability to draw clear conclusions about the relative effectiveness and efficiency of court-connected mediation, neutral evaluation, and traditional litigation is limited by the small number of studies with reliable comparative data based on the random assignment of cases to dispute resolution processes and the use of statistical significance tests.³

An evaluation of the mandatory mediation system in Ontario, which examined the first 23 months of the programme in Ottawa and Toronto, is an example of robust mediation research. In total, 3810 evaluation forms were forwarded to the evaluators, who were external to the court.⁴ This large-scale dataset provides more robust evidence on experiences, viewpoints, and attitudes, allowing greater certainty to be attributed to the findings. Research in Maryland can also be considered robust, if smaller in scale. A research team in Maryland was asked by the courts to review mediator style and impact on long and short-term outcomes.⁵ This research had a carefully thought out, longitudinal design, allowing the researchers to see whether mediation continued to have positive impacts beyond the immediate or short timescale. This robust research design allows greater certainty to be attributed to findings.

The complexity of mediation within the civil justice system makes comparable studies very difficult to design and execute in a meaningful way, and they are therefore lacking. Transferability from one context to another is also problematic, due to the range of different designs, approaches, and models used, as well as local legislative regimes and types of mediation. Differences in what a particular programme may deem as success, given its own drivers (court backlog or greater access to justice, for example) also

³ Wissler, R. L. (2004) The Effectiveness of Court-Connected Dispute Resolution in Civil Cases. *Conflict Resolution Quarterly*. 22 (1-2): 81-82.

⁴ Hahn, R. G. and Barr, C. (2001) Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months. Report for the Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project. Available: <http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf>

⁵ See here for summary and full report: <http://www.mdcourts.gov/courtoperations/adrprojects.html>

influences its design and measurement, and therefore how it can be transferred to other contexts.

To illustrate this point, the examples of an English mandatory pilot in the London County Court in 2004 and the Ontario mandatory mediation programme (evaluated in 2001) will be used.⁶ Despite both programmes being mandatory there were very different outcomes. In the English county court – where a voluntary scheme had been in place for some years, but uptake was low – the new pilot automatically referred parties to mediation, with the option of opting out, but with the risk of incurring cost sanctions for unreasonable refusal to participate; in Ontario (at this time only in Ottawa and Toronto) parties also had the ability to opt-out by applying to the judge and judicial discretion was used to decide whether to grant the request. In Canada there were only a few opt-outs, whereas in England around 80% of parties opted out, with judges communicating concerns about forcing parties into mediation. Genn points out that in England the *Halsey* ruling coincided with the beginning of this pilot. The *Halsey* judgement ruled that the court had no power to force parties to mediation and that force could be seen as a contravention of human rights.⁷ Genn states that the discrepancy between these two pilots in terms of results was:

*a classic example of policies colliding and of the danger of extrapolating from one culture to another. The applicability across jurisdictions of procedural innovations depends on, among other things, the culture of litigation, the formal court structures for dispute resolution, the characteristics of disputes, and costs rules.*⁸

The majority of empirical studies in mediation are focused on short-term settlement and satisfaction rates for users, with more limited interest in wider and longer-term outcomes; cost and time savings for users and the civil justice system are also of interest.

Settlement and satisfaction rates are clear measures of success in the literature on mediation in the selected jurisdictions. The literature surveyed here was strongly focused on short-term, often immediate, assessment of these outcomes by parties, lawyers, and to a lesser extent, mediators. Research in Maryland was interested in longer-term outcomes and style of mediation, but was one of the few studies that looked at a longer-term result. There was some interest in compliance and, to a lesser extent, how parties measured their sense of empowerment, their relationship with the opposite party, and whether they felt they could use mediation techniques beyond the mediation itself to help handle disputes more effectively. Cost and time were also significant outcomes for users and the civil justice system, though empirical evidence that guarantees cost and time savings is lacking. It would appear that mediation *can* save both time and money, for users and the civil justice system, but that this cannot be assured for every case. This assessment of the evidence is summed up by the National Alternative Dispute Resolution Advisory Council (NADRAC) of Australia based on their assessment of the mediation evidence:

For example, the research literature on mediation suggests that rates of

⁶ See Genn, H. (2013) What Is Civil Justice For? Reform, ADR, and Access to Justice. *Yale Journal of Law and the Humanities*. 24 (1): 397-417; see also Hahn and Barr, 2001

⁷ Genn, 2013: 408.

⁸ Genn, 2013: 409.

*agreements seem to be consistent across diverse forms of mediation and service types (about 50-85%), and that there is high client satisfaction rate with mediation. Compared with adversarial methods, mediation produces higher compliance and lower re-litigation rates. Outcomes are at least as positive for mandated as for voluntary referrals. There is low awareness of ADR, and low uptake of voluntary ADR. The long term impacts, substantive fairness and overall cost effectiveness of mediation are unclear.*⁹

Defining what is considered as 'success' in mediation is not straightforward. Agreeing with our assessment of the evidence, Mack notes that settlement and satisfaction rates are the most commonly used measures of success, but that these are not necessarily sophisticated enough to be helpful in measuring the complexity of mediation.¹⁰ Few cases that enter the legal system actually go to trial, and the 'leaky funnel' can be hard to monitor, but is important to understanding what impact mediation may have had.¹¹ Local legal culture will have an impact on the success or otherwise of ADR and makes comparison between local courts and systems difficult, therefore what measures should be used to study the 'effectiveness' of mediation is unclear.¹² Critically, also, baselines are lacking in the civil justice system: if we do not know where we started with mediation and other ADR, we cannot be sure what impact any intervention has had.¹³ Therefore, though settlement and satisfaction rates can be recorded, their true meaning is less clear – particularly when trying to compare the impact of one system with its potential impact elsewhere. The question of success will be revisited below.

Gaps in the Evidence Base

There are a number of key gaps in the evidence base that are important to fill to better understand and measure outcomes.¹⁴

- Drivers to engagement and settlement: there is limited evidence on why certain parties negotiate and settle and why others do not. Though some evidence in the USA and Canada looks to explore barriers and enablers of settlement there is no systematic evidence exploring the reasons for settlement. Though there is evidence that mandatory mediation increases take up, this does not equate to better outcomes. Free services – such as in Small Claims – may also increase uptake, but the discussion in this area remains predominantly based on assumption. With a range of settlement rates (see section 'Settlement Rates') it would be useful to know what makes a case more likely to settle and why a

⁹ NADRAC (2004) *ADR Research: A Resource Paper*. Available: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/ADR%20Research%20-%20A%20Resource%20Paper.pdf>

¹⁰ Mack, K. (2003) *Court Referral to ADR: Criteria and Research*. Report for NADRAC. Available: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Court%20Referral%20to%20ADR%20-%20Criteria%20and%20Research.PDF>

¹¹ Mack, 2003: 19

¹² Mack, 2003: 19

¹³ Mack, 2003: 21

¹⁴ Ministry of Justice (2017) Background evidence pack on civil ADR. PowerPoint Slide Pack. [Unpublished]

substantial set of cases are not settled. It is not possible to make this assessment based on the current evidence base.

- Characteristics of parties and the dispute: detailed evidence on what the case was about and the characteristics of who took part, as well as the history of the dispute and whether it then had to return to court for trial due to non-compliance or appeal, is not available. Mediation is a private and confidential process and this means such data is limited. It was also found that there had been a general shift away from close monitoring of mediation in the selected jurisdictions, with sources in Queensland citing lack of government funding for monitoring, and sources in Florida noting an ideological shift away from seeing simplistic monitoring of cases as useful.
- Private, pre-court mediation: there is a very limited evidence base on mediation outside of court processes, hence why this review focuses in the main on court-connected programmes.
- Quality of outcomes: settlement and satisfaction in the short-term are key measures of the success of mediation. However, the quality of these outcomes, particularly in the longer term, lacks evidence. The USA has stronger evidence around parties' contentment with the outcome but this is rarely followed through in the long-term to establish if it is consistent, saves further court time in appeal, whether the dispute resurfaces, or the agreement fails.
- Awareness and provision of information about mediation: though the literature mentions the importance of party and lawyer understanding of mediation, it does not give guidance on how best to educate and inform.
- Mid-value claims: Small Claims cases are frequently discussed in the literature, with mediation having good outcomes in these courts; high value claims also appear to do well in mediation, often due to maintenance of relationships, the privacy of the process, and more creative solutions available. There is limited evidence on mid-value claims.
- Behaviour of mediators, lawyers, the judiciary and other court staff: though there is some evidence on how these stakeholders see mediation and believe the mediation has gone, there is a lack of evidence on what is happening in practice, as opposed to perception of events. With each group significant to the process and outcome of mediation more research on their behaviour would be highly useful. Research in Maryland shows that mediator behaviour does have an impact on short- and long-term outcomes, but is one of the few studies to do so. With clauses in some jurisdictions demanding lawyers inform clients about mediation and other forms of ADR, it would be significant to see how this works in practice. Judges have a great deal of discretion in many areas, and their attitudes towards mediation, means of referral, and judgements about opt-out are significant. This extends to court staff when they have the duty to divert cases to mediation.
- Cost and time savings: it is difficult to accurately quantify the cost and time savings mediation can make. Though there is general agreement such savings can be made, the evidence base is limited. A more specialist assessment of this is needed.

- Negative and unintended consequences: there is the potential for negative and unintended consequences from mediation, particularly when it is seen as a panacea. More research and evidence is needed on these issues, such as how power differentials manifest during the mediation, what case types mediation is most suitable for, and whether settlement is always a positive outcome. Some further comment will be made on this below.

Approach to Selecting Studies for Inclusion

The review took the form of a literature review and discussion with key informants. It was not comprehensive in nature, but explored the available literature and evidence on mediation in the civil justice systems of the selected jurisdictions.

This review is not systematic or comprehensive, but designed to provide an overview of the operational features of each jurisdiction and to provide available evidence on outcomes for users and the civil justice system for each jurisdiction. Evidence was selected for inclusion based on several criteria: (i) the robust nature of it; (ii) how frequently it was cited in other research; (iii) the relevance of its findings to key outcomes. The outcomes that were selected as key came from initial reading of the literature and discussion with policy colleagues. It was very clear that settlement and satisfaction rates are key measures of mediation success and these were therefore included, as well as efficiency issues around cost and time savings. Beyond this the literature and key informant discussions suggested that there were wider outcomes of significance too: compliance, maintenance of relationships, and ability to handle disputes more effectively in the future. These were evidenced to a greater or lesser extent, but have been drawn out where possible.

This study ranks evidence in terms of its robustness. In social research, large-scale, generalisable (meaning comparable and transferrable) empirical studies are generally viewed as the most robust. These are strongest when they use experimental methods, with comparison available through a control group. Smaller-scale but clearly thought-out empirical research is considered robust, though its findings have to be more cautiously interpreted due to the lack of ability to generalize beyond the specific setting. Theoretical pieces, from more objective authors – academics, for example – are the next most robust pieces, with articles, blogs, and opinion pieces from those immersed in the field at a final level. Court evaluations and data are generally considered robust pieces of work, but their findings would not extend beyond reporting on that one pilot or intervention and they are therefore a step down from the most robust research. In this study, research has been considered in this way, with all of these kinds of research and writing included, but with a focus on finding, including, and relying on the most robust levels of research to a greater extent than those of lower quality.

Key Operational Features of Mediation in the Selected Jurisdictions

Is mediation regulated by statute in these jurisdictions?

These jurisdictions present a mix of legislative and non-legislative approaches to mediation. The federal countries have a more complex system of both federal and state/province/territory level legislative structures, which means governance of mediation is more complex than in those non-federal countries explored in this review. A brief outline of each is provided below.

Australia has federal/commonwealth level and state/territory level legislation, along with court rules. Federal level legislation is focused on what is needed to be done to show an attempt at mediation or other ADR, by parties and lawyers, in court-annexed mediation. State level legislation governs referral by state courts to mediation, fees, confidentiality and privilege, and mediator responsibilities.

Canada has some legislation for particular civil cases at both federal and province/territory level (for example, oil and gas cases) – though most of its mediation processes are guided by province/territory court rules; these become statute in Canada, meaning a legislative route is ultimately taken. Provinces/territories were requested to come up with a local response to encourage greater use of ADR by the federal government. Provincial Courts and Queen's Bench courts (lower and higher respectively) may have different approaches within provinces.

England and Wales have a non-statutory basis to mediation, with the Civil Procedure Rules imposing duties on the court to facilitate settlement before a hearing. In particular the court must further this overriding objective by actively managing cases, this includes (explicitly in the rules): encouraging the parties to co-operate with each other; encouraging the parties to use an ADR procedure if the court considers that appropriate; and helping the parties to settle the whole or part of the case.

The Republic of Ireland chose to create and enact its *Mediation Act 2017*. This sets out the entire process of mediation, including standards, regulation and training of mediators, and, though broad brush, what the process of mediation should look like.

The USA also has some federal level legislation, but in general States govern their own processes, and in the States explored here, this has been through a blended approach with court rules the main form of governance, but some legislation also. A federal level *Uniform Mediation Act (2003)* encouraged greater use of ADR across the USA. States are divided into counties and counties may each take their own local approach, with individual courts having oversight of proceedings under their jurisdictions. For example, Florida has a more uniform approach to mediation across the State due to a uniform funding model, whereas Ohio has a more local approach: each of the 88 counties in Ohio may have slightly different approaches to mediation.

Legislation was seen to provide clarity and coherence for those working with mediation – whether this is the reality in practice is debateable, but this was the intention. In the United States, where there is a more blended approach, key informants noted that governance of mediation had grown up slowly and in a more piecemeal form, and that legislation works when there is already a growing culture of acceptance of mediation. However, in Australia, key informants felt the culture would not have grown *without* legislation. There is therefore some disagreement on the use and importance of legislation between jurisdictions, which may come down to local context.

Voluntary or Mandatory: what is the degree of compulsion to mediate?

Whether a system is mandatory or voluntary is not always easy to define, and is subject to some discussion. There are degrees of mandatoriness, however, again, it is worth stressing that no jurisdiction under study here compels parties to settle, though some compel parties into mediation. As previous work on ADR and family justice by the Scottish Government states:

There are shades between ‘voluntary’ and ‘mandatory’. ADR may be made mandatory by a statutory or court rule for all cases in a defined class; made mandatory by an order issued at the court’s discretion in cases thought likely to benefit; made mandatory by one party electing for ADR; or made a condition of procuring legal aid. ADR may also be voluntary but encouraged by a court backed up with sanctions for unreasonable refusal; or entirely voluntary, with the role of the court reduced to the provision of information and facilities.¹⁵

The most accepted scale of mandatoriness is Quek’s ‘continuum of mandatoriness’¹⁶ – which she references as being adapted from Professor Tania Sourdin’s work – which states that there are 5 levels of mandatoriness in mediation: (i) Categorical or discretionary referral with no sanctions; (ii) Requirement to attend mediation orientation session or case conference; (iii) Soft sanctions; (iv) Opt-out scheme; (v) No exemptions.

Ireland and Maryland have technically voluntary systems of mediation, but our other jurisdictions can be categorised on this scale (though it should be noted that the complexity of civil justice mediation in each jurisdiction means these are very broad brush categorisations):

¹⁵ Making Justice Work (2014) *Enabling Access to Justice: International Literature Review of Alternative Dispute Resolution*. Scottish Government Report: 7.

¹⁶ Quek, D. (2010) Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program. *Cardozo Journal of Conflict Resolution*. 11: 479-509

Table 2: Level of Mandatoriness of Mediation by Jurisdiction

Jurisdiction	Level of Mandatoriness
Australia: New South Wales	New South Wales can be considered to have a category 5 mandatory scheme, as parties can be compelled to enter mediation with or with consent.
Australia: Queensland	Queensland operates something closer to an opt-out category 4 scheme, as there is room for parties to argue not to be sent to mediation.
Canada: Alberta	There is some nuance here, with Alberta’s higher court currently working on a voluntary system, though its Provincial Court has a category 4 opt-out scheme.
Canada: British Columbia	British Columbia’s category 4 opt-out system has stronger guidance on specific exemptions than Ontario, but judge discretion remains significant too. The ‘Notice to Mediate’ can be brought by one of the parties, keeping the courts out of the process initially; if one party wants to mediate, the other party is compelled to try.
Canada: Ontario	Ontario has a category 4 opt-out scheme and the opt-outs are down to judge discretion. This system operates in Ottawa, Toronto, and Windsor, but has not been rolled out beyond these cities.
England and Wales	Category 3, with current cost sanctions in place for lack of engagement with ADR.
USA: Florida	Florida is a case of category 4 mandatoriness, with the potential for opt-out based on judge discretion alongside specific criteria, minimising subjectivity. The ability to opt-out is seen as crucial to maintaining or repairing relationships.
USA: Ohio	Ohio also has an opt-out category 4 system of mandatory mediation – parties may request to be exempt from mediation, but a judge can order or strongly encourage they attend mediation.

Maryland presents a more complicated picture. Maryland has what is officially defined as a voluntary system of mediation, but the court can mandate mediation in certain circumstances, when it feels it appropriate (the courts cannot mandate for mediation if the parties need to pay for it themselves). It was clear from discussion with experts in the area that the definition of mediation as voluntary in this State is much debated. It was pointed out that the court rules of Maryland ask that those who come to court give mediation a ‘good faith try’ before returning to litigation, which could be defined as category 1 mandatoriness. Also, if a judge feels that mediation is necessary they can strongly encourage mediation and ask parties to provide a reason why they should not be exempt, which then comes down to judge discretion and operates more as a category 4 mandatory system.

Ireland has the voluntary nature of mediation enshrined in its legislation, but could also be counted as a ‘soft sanctions’ category 3 mandatory system. Under the *Mediation Act 2017*, in awarding costs in respect of proceedings referred to mediation by a court, the court may, where it considers it just, have regard to any unreasonable refusal or failure by a party to consider or engage in mediation. In short, all the jurisdictions in this review could be categorised on the mandatory continuum, with no ‘pure’ voluntary system.

To delve into the two most local examples in more detail, Ireland has chosen to create legislation that enshrines a voluntary system as central to mediation in civil justice. Speaking to a representative from the Mediators' Institute of Ireland, it was clear that this had been a significant point for them, with voluntariness seen as intrinsic to mediation.¹⁷ The Institute was concerned that making mediation mandatory would turn people away from mediation and/or they might participate in bad faith.¹⁸ It was also very important to them that parties should be able to leave mediation at any time, should they feel uncomfortable – but it is worth noting that all jurisdictions under study in this review allow people to choose to leave mediation once attempted. The Law Commission report in Ireland that led to the *Mediation Act 2017* also noted the importance of mediation being voluntary, to allow for genuine participation and not to diminish access to the courts.¹⁹ Maintaining voluntariness appears to be significant to major stakeholders in the development of Irish mediation. Writing prior to the recent legislation, Moore notes that there have been instances in Ireland of judges appearing to compel parties to mediate and that these decisions created some debate, particularly around the difference between voluntariness *into* and *within* the process.²⁰ Moore stresses the view that voluntariness is central to mediation, but accepts that voluntary processes may not move enough people towards mediation as mandatory processes do.²¹ Ultimately this tension is left unresolved in this discussion and this is illustrative of the wider debate about this issue: mediation is meant to be a voluntary process, with the self-determination of parties at its heart, and yet, without mandatory mediation there is limited uptake.²² Figures for uptake in Ireland since the recent legislation are not yet available.

The use of ADR in England and Wales is at a point of potential flux, with a recent Civil Justice Council report stressing the need for greater action around uptake of ADR – focussing on cost sanctions and the potential in future for a system similar to that of British Columbia, which would move England and Wales towards a greater level of mandatory ADR. As Billingsley and Ahmed argue, England and Wales have an official judicial line of ADR being a voluntary process.²³ However, the threat of cost sanctions leaves parties unsure how much effort they should put into ADR and resolution before court. Billingsley and Ahmed also argue that some judges have taken their powers of encouraging ADR to the point of actually compelling parties and that this has left precedence confused.²⁴ They recommend a move towards clarity, with a level of mandatory mediation built in – either through clear judge powers to compel mediation on a case-by-case basis or by building in court rules of mandatory mediation for all cases.²⁵

¹⁷ Discussion with Brian O'Bryne, Honorary Secretary, Mediators' Institute of Ireland

¹⁸ Discussion with Brian O'Bryne

¹⁹ Law Reform Commission Ireland (2010) *Alternative Dispute Resolution: Mediation and Conciliation*. Report: 2-3. Available: https://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf

²⁰ Moore, T. (2017) Mediation Ethics and Regulatory Framework. *Journal of Mediation and Applied Conflict Analysis*. 4 (1): 544.

²¹ Moore, 2017: 544

²² Moore, 2017: 544

²³ Billingsley, B. and Ahmed, M. (2016) Evolution, revolution, and culture shift: a critical analysis of compulsory ADR in England and Canada. *Common Law World Review*. 45 (2-3): 186-213.

²⁴ Billingsley and Ahmed, 2016: 198

²⁵ Billingsley and Ahmed, 2016: 206-207

At what stage is mediation compelled/encouraged (i.e. pre-litigation or during litigation)?

There are a wide range of practices across and within jurisdictions. Parties may make use of private or community mediation at any time, but court-connected schemes may mandate a specific entry point to mediation that can differ by court, case level, and case type. Some cases are sent to mediation on the day of the trial whereas others will have a pre-arranged appointment; mediation can occur both before and during trial, depending on the specific system. In some jurisdictions mediation can also occur as part of the appeals process, both pre-appeal or during the hearing of the appeal.

The literature tends to suggest that the stage at which mediation occurs could be important to outcome, but is unclear on what the best stage is.²⁶ Early mediation is important to cost and time savings, to preventing parties becoming entrenched in their positions, and to minimising stress – as well as hopefully allowing parties to move on from their dispute with a positive outcome – providing a general impression that pre-litigation mediation would be best.

However, whether all information should be provided to all parties before mediation takes place remains in dispute. Full discovery may slow down the point in the case at which mediation occurs, yet having full information can be important to a fair and positive outcome and to the mediator being able to genuinely help parties, as they will also be fully informed. When mediation occurs can also come down to what staff and resources are available to manage the administrative process of arranging mediations, as well as carrying them out.

Some examples of process are provided in Boxes 1-5 for illustrative purposes and to provide some more detail on each jurisdiction; these can be found throughout.

How is mediation funded?

Systems of funding for mediation vary. Private mediation is always paid for by parties – fees will be set out and agreed in advance. This is the same for court and government systems where parties are expected to pay – parties must agree in writing how much they will each pay (generally a 50/50 split is expected, but this can be changed) and agree to the mediator's fees. Court and government systems usually have lower fees than private mediators for an initial period, which can then rise to normal fees beyond this period though a mediator may agree to continue with the court/government fee. Parties therefore pay in a lot of cases, even if this fee is small.

As an example, for Ontario's mandatory mediation programme²⁷ the current fees are:

²⁶ Boule, L and Field, R. (2018) *Mediation in Australia*. Chatswood, NSW: LexisNexis Butterworths: 294-296.

²⁷ See <https://www.ontario.ca/laws/regulation/050043>

Fees for mandatory mediation session and for any additional time

4. (1) *The mediator's fees for the mandatory mediation session shall not exceed the amount shown in the following Table.*

TABLE

<i>Number of Parties</i>	<i>Maximum Fees</i>
2	\$600 plus GST
3	\$675 plus GST
4	\$750 plus GST
5 or more	\$825 plus GST

O. Reg. 43/05, s. 4 (1).

(2) *Each party is required to pay an equal share of the mediator's fees for the mandatory mediation session, unless the court orders otherwise. O. Reg. 43/05, s. 4 (2).*

(3) *After the first three hours of actual mediation, the mediation may be continued if the parties and the mediator agree to do so and agree on the mediator's fees or hourly rate for the additional time. O. Reg. 43/05, s. 4 (3).*

In Florida fees range from \$30 to \$100 dollars per session depending on the level of court, though there are some exemptions for particular kinds of cases – dependency mediation in family, for example – and for ‘indigent’ parties. In Maryland, parties cannot be made to pay for mandatory mediation.

One court solution to finding funding for mediation is by setting up ‘Trust Fund’ payments – in Florida a fee of \$1 is charged on all civil cases that are filed to go into a Trust Fund to help pay for mediation for those who cannot. Florida also has a State-wide, state-funded ‘Mediation Model’ to allow for consistent funding of mediation across all counties of the State. Before this (prior to 2004) there was a lack of consistency in funding and provision and therefore a decision was taken to bring funding to State level to increase resources and use. This is one of the most consistent forms of funding available in the jurisdictions reviewed.

However, there are also court/government programmes that are free to users. In such programmes, government funding is used to fund court programmes; court budgets and fund-raising initiatives may also be utilised (see Florida example above). In well-funded programmes, the court will pay mediators. Community mediation is generally free to all parties – these programmes are based on government or charity funding and must be continually sustained in this way.

In programmes that are less well-funded, they rely on mediators acting in a voluntary capacity for the court and government to stretch their funding. Where court staff are trained mediators, this work is part of their day job and their salary. There were concerns about voluntary mediators, who are not paid at all, across jurisdictions for two reasons: first, this does not seem sustainable in the long-run, as the goodwill of mediators may run out/cannot be expected to continue forever, and two, it may decrease the credibility of mediation as a profession.

Case Type

With some exceptions – due to other Acts covering particular cases already, or mandating that some cases go to other forms of ADR – most cases could go to mediation in all jurisdictions. For those with voluntary systems – Ireland and England and Wales – concerns around which cases go to mediation was less pronounced as there is limited pressure on parties to attend mediation. In Australia, Canada, and the USA there was more significant discussion around cases where power differentials would be different, including small companies facing larger companies, individuals facing companies, those without representation facing those with representation, and cases of violence. Domestic abuse (DA) cases were generally excluded from mandatory mediation, however there was some debate about this.

Box 1: Process of Mediation: Illustrative Examples

Example 1: The Provincial Court in Alberta, Canada, deals with small claims. A claimant will file a dispute note and this will then go to the court coordinators who will review the claim and case and decide the best course of action. If they decide it is not suitable for mediation it can go straight to court. They will make this decision based on their professional judgement, but they also use a matrix to help guide these decisions, which they change and update over time, based on their in-house agreed criteria. However, if they decide mediation could work then it is mandatory for parties to attend.

Parties may also request mediation and judges can also order mediation. This will then be a 3 hour session and will always be co-mediation. There is a team of volunteer mediators involved, though they will be paid a modest fee by the court. Users do not have to pay for mediation, but they do have to pay to file their dispute note and for lawyers, should they choose to have them.

The court defines success by settlement rate, as the focus is on reducing court backlog. Currently there is a 67% settlement rate, according to one expert in the area. This has been fairly consistent over the 20 years of this scheme, which is considered a real success.

Agreements will then be made legal by the court through an extra process of court/judge overview of the agreement; this process will be paid for by the court so users do not have to pay. Mediation is entirely confidential, but the settlement will not be, so that it can be enforced.

For example, in Ontario's mandatory mediation programme DA cases can be mediated: this is usually achieved through shuttle mediation so parties do not have to meet face-to-face. On the other hand, Ohio has allowed DA cases to be mediated, but is in the process of reviewing this as there are continued concerns throughout the mediation community about power dynamics within these kinds of mediations.

Box 2: Process of Mediation: Illustrative Examples

Example 2: New South Wales has its own legislation covering mediation and other procedures in civil justice at all court levels: the *Civil Procedure Act 2005*. The Act makes it clear that the main thrust of using ADR is because it is a quick, cheap means of dealing with claims.

Within the Act it is set out that any level of court may refer a matter for mediation with or without party consent. Such referral can only be made once litigation has started, but mediation can be voluntarily started at any time. Sourdin states that ‘matters are increasingly referred on a mandatory basis’ in NSW (2016: 300); she quotes 62% of mediations referred by the Supreme court in NSW as being referred on a mandatory basis (2016: 301). Judges also have the power in NSW to refer parties to mediation information sessions; these sessions are mandatory, will be less than half an hour, and then allow parties to make an informed decision about whether to enter mediation. The state’s statute book now has ‘around 50 statutes that make provision for, or acknowledge the availability of, some form of dispute resolution’ (New South Wales Law Reform Commission, 2018: 1).²⁸

Currently, pre-litigation steps to negotiate, mediate, and settle do not need to be shown if a case goes to trial – though a judge may still be interested in mediation or other ADR possibilities and may mandate mediation after litigation has started.

A recent New South Wales Law Reform Commission report states that mediation continues to be debated within the state, in terms of how it should look, coverage and consistency, and safeguarding of non-judicial contexts. The Commission felt that ‘[n]o sufficient harm has been identified as arising from the current diverse arrangements’ to warrant change to the existing statutes, instead arguing that mediation is so context-specific that the most flexible approach to it is the best one (New South Wales Law Reform Commission, 2018: 4).

Who carries out mediation and what style of approach is used?

There are a range of approaches across jurisdictions. Mediation can be carried out by trained court staff, court-based mediators, mediator-lawyers or mediator-judges, as well as by community and private mediators. Courts usually keep a roster of community or private mediators they are happy to work with based on certain qualification and experience criteria and many court-annexed programmes rely on these mediators to function.

There are a range of styles of mediation, with the main three being facilitative, evaluative, and transformative. These vary across jurisdictions and a range of practices are in operation. In Ireland, for example, the *Mediation Act* appears to recommend a facilitative approach to mediation (Section 2); however, in Section 8, sub-section 4 of the Act it is stipulated that mediators can offer solutions to disputes should the parties request them,

²⁸ New South Wales Law Reform Commission (2018) *Dispute Resolution*. Available: <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20146.pdf>

but parties are not required to accept these. Often, facilitative mediation was held up as the 'purest' form of mediation and therefore the best, but any evidence exploring the reality of mediator practice in these jurisdictions found a range of styles, sometimes even varying within the mediation itself.²⁹

In one of the strongest studies on mediation style, undertaken in Maryland, it was found that offering solutions to parties was associated with less positive outcomes in the long-term, with parties feeling less in control of the situation and less likely to change their approach to conflict. Encouraging parties to find their own solutions had much more positive short- and long-term outcomes. Though 'reflecting' mediator strategies – reflecting on the conflict and reflecting back emotions and responses raised by parties – without actively discussing solutions had positive short-term outcomes, this strategy did not have a strong effect positively or negatively on long-term outcomes.³⁰

It is also worth mentioning here that what mediation 'is' in comparison to other methods of dispute resolution is not always clear in the literature and there are blurred lines in terms of terminology and practice. Settlement conferences, judicial evaluation, case conferences, and other processes are sometimes subsumed under the term 'mediation' or used interchangeably, as if there is no significant difference. Carefully defining mediation – and how it is different to other case management and ADR – is important for moving the discussion forward and creating a sustainable system of mediation in relation to other ADR.

Regulation and Training of Mediators

Throughout the review of evidence the importance of mediator training and experience was reiterated.³¹ This is perhaps unsurprising, but the importance of training, it appears, cannot be overstated. It can help to produce settlement, but it can also help mediators to ensure the process is fair, that parties are given good advice, that difficult disputes are well handled, power imbalances are dealt with, and disputes that should not be mediated are actively recognized. Maryland research has explored this issue in some detail and found that general educational qualifications are not significant to the quality of mediation – the State Judiciary used to have a requirement for a degree for mediators, but this has been removed – and that instead experience as a mediator and the skillset to work on understanding participants in a dispute were the most significant factors in effectiveness.³² The Director of Community Mediation Maryland, Lorig Charkoudian, stressed the importance of a diverse mediator group that can reflect the community and its experiences. Some of her research has found that racial diversity is important for parties

²⁹ Boulle and Field, 2018: 37

³⁰ See: <http://www.mdcourts.gov/courtoperations/adrprojects.html>

³¹ See, for example, Hahn, R. G. and Barr, C. (2001) *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months*. Report for the Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project. Available: <http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf>

³² Discussion with Lorig Charkoudian, Director of Community Mediation Maryland

to feel trust in their mediator and a sense of self efficacy, for example³³. Diversity is an issue to bear in mind when considering qualifications and standards for mediators.³⁴

Excepting Florida, across the jurisdictions in this review, mediation remains a generally self-regulated profession, notwithstanding the regulation that legislation and court rules provide.³⁵ Florida though has a strongly regulated system, with a full system of court regulation in place with committees charged with overseeing: the monitoring and improvement of court-connected ADR; ethics in mediation; mediator qualifications and discipline; mediator training; and a specific complaints committee for mediation in parenting disputes (though family justice is out of scope for this review). Therefore, there is court regulation of mediation and a process of continuous review and improvement.³⁶ Noce *et al.* have described Florida's system of mediation (and ADR more widely) as 'highly regulated'.³⁷ Part of the tradition of mediation has been its 'informality, flexibility and originality' which has meant it has sat apart from regulation and law³⁸; as it becomes more institutionalised, this will require inevitable change.

Elsewhere though, various mediation and ADR bodies have mediation standards, including government standards, which are voluntary to sign up to. There are systems for complaint – such as in Ireland, where the Mediators' Institute of Ireland deals with complaints about those mediators that are signed up to its standards – but these are specific and often limited in scope and resources. Ireland's new legislation has mandated that there should be a regulatory body that goes beyond current provision, though this is not yet in place.

Across all jurisdictions, court-connected mediators can more easily be regulated than private mediators and there are minimum training standards required to act as a court mediator, sometimes with an additional need to be accredited by a mediation body, which is sometimes specified. In Australia and the United States there are federal level standards for mediators, but again these are not mandatory to sign up to, but a suggestion of best practice. States/territories and individual bodies may use these standards as the basis for their own or create their own standards.

The training standards for court-connected mediators varies, but those who wish to take on violence cases or family cases (though this is outwith the scope of this review) would need to take on further training than the basic training for general civil cases.

³³ Charkoudian, L. and Wayne, E. K. (2009) Does it Matter if my Mediator Looks Like Me? The Impact of Racially Matching Participants and Mediator. *Dispute Resolution Magazine*: 22-24

³⁴ Discussion with Lorig Charkoudian

³⁵ In some jurisdictions there is more regulation of family case mediation than general civil mediation; however, family is out of scope for this review. See Boulle and Field, 2018: 207-209 for a discussion of this in Australia.

³⁶ Press, S. (2003) Institutionalization of Mediation in Florida: at the Crossroads. *Penn State Law Review*. 108 (43): 55

³⁷ Noce, D. J. D., Folger, J. P. and Antes, J. R. (2002) Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection. *Pepperdine Dispute Resolution Law Journal*. 3 (1): 12

³⁸ Boulle and Field, 2018: 209

Box 3: Process of Mediation: Illustrative Examples

Example 3: Mediation in Ohio is governed by the *Ohio Uniform Mediation Act, 2005* (OUMA), adapted from the federal-level *Uniform Mediation Act* (2003), which was intended as a guide for States to use in this way. The OUMA allows any civil case to be referred to mediation by a judge or for parties to request mediation. Both pre-filing mediation and mediation between filing and court proceedings exist in the State, with Small Claims courts tending to use pre-filing. Based on the success of initial pilots in the State, many courts began to employ permanent mediator staff, and funded this through local authority funding or court trust funds.

The OUMA also states that the proceedings should be confidential, but that if this confidentiality is to extend beyond those involved in the formal proceedings – i.e. you do not wish parties to discuss the proceedings with family or friends – separate agreements must be made. Mediation is privileged so, as with most states in America, nothing that happens in a mediation can be used in court except in specific circumstances relating to potential or actual harm, malpractice, or breaking the law. Final, signed mediation agreements can be shared with the court. The mediator can always report whether a mediation occurred, who was there, and whether settlement was reached without breaching confidentiality.

The Supreme Court rules allow for the extension of time for mediation and otherwise generally correspond to the Uniform Mediation Act. Though Supreme Court Rule of Superintendence 16 regulates court-connected mediation, and demands that all courts consider mediation, it specifically allows local courts flexibility as to their own content on mediation. There are 88 counties in the State of Ohio, each with their own local courts – there is therefore a great deal of variation and complexity in local practice and governance. This is similar in Maryland, with Florida having a more consistent model due to a programme of state funding.

Confidentiality

Across all jurisdictions there was a commitment to maintaining mediation as a confidential process. However, there was some debate over the extent of confidentiality. Mediation is intended to be a private process, with confidentiality assured so that discussions can occur that will not prejudice the case should it then go to trial; the process is not for public scrutiny. This has led to some debate over the extent of confidentiality and whether a judge can call for details of the process, outcome, and settlement, as well as whether only the mediator and parties are bound by confidentiality or whether others who may attend a mediation session are also bound, and whether the mediation should remain confidential beyond this, i.e. parties should not discuss it with neighbours, friends, or family who did not attend and have no stake in the claim. Overall, in these jurisdictions, mediation was a confidential process, and confidentiality could only be broken in particular circumstances – where there may have been professional malpractice, in cases of potential or actual harm, or where a crime may have been committed. Parties could, however, often write full confidentiality into their mediation agreements. Settlements, if made legally binding, could not be confidential.

Box 4: Process of Mediation: Illustrative Examples

Example 4: In Ireland, mediation can occur before litigation begins or can be triggered during proceedings by one of the parties or by a judge's suggestion. Halting proceedings for mediation does not have an effect on the time allowed for litigation, so the case will not be 'timed out' of court due to an attempt at mediation.

Significantly, the Act creates a requirement for lawyers and barristers to provide clients information about mediation; there should be proof of this, which a judge may call for should the case come to court. This forces legal professionals to discuss mediation with clients and bring it to their attention, and specifically asks lawyers to frame mediation positively:

14 (c) provide the client with information about—

(i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and

(ii) the benefits of mediation.

The mediator should note if the mediation has taken place and whether it has been successful. No further information is required, though mediators should note if one party failed to take part in mediation. A judge can then decide if this failure was unreasonable and distribute more costs to this party; they can also distribute costs unevenly should one party unreasonably refuse to take part in mediation.

Enforceability

Mediation agreements are, or can be made, enforceable. There needs to be a written agreement for enforceability, but once in writing and signed some jurisdictions accept this as a contract as enforceable as any other. Other jurisdictions require a further process before a mediation agreement can be used as a legal contract, such as lawyers having to write up the document, lodging it with the court, or a judge looking over and agreeing the document.

Box 5: Process of Mediation: Illustrative Examples

Example 5: England and Wales: The Small Claims mediation service is a distance mediation service, conducted by telephone in a shuttle system. It is free to users. Mediation tends to take place over 1-2 hours, if both parties agree to be involved. There are good rates of settlement – around 62% – and satisfaction with the service is high. This kind of distance service allows costs to be kept down. There is some concern that if mediation is made mandatory the service would not be able to cope with demand.

Building a Culture of Mediation

Beyond official routes taken to increase use of mediation (making mediation mandatory, using cost sanctions, subsidising costs so mediation is low or no fee) are some less concrete issues and questions – the less tangible aspects of culture creation – that are worth highlighting. This discussion is informed by conversations with key informants. In the American states there was a strong feeling that a culture of mediation existed, though there was some debate about the strength of this culture; the debate about the legitimacy of mediation was seen as concluded and the discussion was focusing increasingly on how best to mediate and what resources are needed for a quality system. In Canada, Australia, and England and Wales expert voices were rather more divided, with some commentators suggesting that a culture did exist, even if there was always more to do, and others less convinced that the wider public understands mediation. Some of the Canadian literature sees a culture of mediation as strong, particularly in those provinces with mandatory mediation, but also in those provinces with voluntary mediation.³⁹ It is hard therefore to draw a conclusion that particular kinds of systems – mandatory versus voluntary, for example – create more embedded cultures. Ireland's new *Mediation Act* means the country is in flux and that further time is needed to assess the impact of the legislation on culture.

A majority of the jurisdictions had a judicial champion of mediation (or ADR) who helped to increase knowledge and understanding, build credibility, push legislation or court rules, and/or encourage further support from the wider legal profession. This champion within the judiciary appears to have been significant to furthering the cause of mediation/ADR – often developing work that was already occurring and using their influence to increase the pace of change and development. In Florida there was general support from the judiciary from the outset for greater use of mediation.

Key informants across all jurisdictions spoke of the importance of lawyers in embedding culture too. Lawyers are key stakeholders in the growth of mediation and their fears and worries were seen to be important to allay, particularly around the potential for mediation to take business and money from them. Key informants across the board spoke of the need to talk to lawyers – and the judiciary – and bring them along with mediators and other stakeholders so that they become a part of the development of any system of mediation: if they are involved and informed they will be more likely to feel buy-in. Essentially, as Professor Catherine Bell from the University of Alberta stated, *collaboration* with all stakeholders is significant in creating a credible and sustainable system of mediation. This position is backed-up by some of the literature: Hébert argues for the importance of all stakeholders to a mediation system being educated about what it means and its uses, so that their support will help to guarantee the success of the programme.⁴⁰

³⁹ Billingsley and Ahmed, 2016

⁴⁰ Hébert, L. C. (1999) Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study. *Ohio State Journal of Dispute Resolution*. 14 (2): 448-449

A number of informants across jurisdictions, though particularly in Maryland, which has a well-developed system of mediation, stressed the need for resourcing and infrastructure.⁴¹ Culture can only be built and sustained if mediation is available in a consistent and ongoing way to the population.

Australian, American, and Canadian key informants tended also to be keen to stress that their mediation processes have developed over a number of decades. If mediation is intended to become a normal part of the civil justice system it will take time to do this. However, this was balanced in England and Wales and Ireland by concerns to keep momentum around mediation and ADR moving, and to decide on a model and pilot it – or actually establish it – without too much delay. There may be room for middle ground between these viewpoints, but these opposing views reflect the different contexts and stages of the debate within the chosen jurisdictions at the point of carrying out this research.

⁴¹ For example, Toby Guerin, Associate Director, Center for Dispute Resolution at the University of Maryland Francis King Carey School of Law.

Outcomes for Users and for the Civil Justice System

Uptake of Mediation

The evidence reviewed for these jurisdictions suggests that mediation uptake may be encouraged through some level of mandatory process and through use of low fee or free services. However, uptake – or ‘levers’ to encourage mediation – are a recognised gap in the literature and need further research and exploration.

The Civil Justice Council in England’s 2018 report on ADR and a recent EU-wide report – including England and Wales and Ireland – have both recognised that voluntary mediation processes have low uptake.⁴² Therefore, some level of mandatory mediation process was seen to be the best way of increasing uptake in both reports.⁴³ Key informants in Australia also felt that mandatory systems are the only way to increase uptake. There is some debate on this in the literature, with some authors arguing that mandatory mediation should be a short-term measure to increase uptake before a voluntary process is returned to. There is only limited guidance on how that process would work in practice.⁴⁴ Experience in Alberta shows there may be some credence to this viewpoint though, as the mandatory system of JDR – sometimes referred to as mediation – in Alberta’s Queen’s Bench court (the higher court) had to be suspended due to judicial workload, but has left a legacy of reasonably strong voluntary requests for JDR due to increased knowledge and understanding of this system.⁴⁵ Some Australian key informants felt mandatory mediation was leading to wider voluntary uptake also, though there were conflicting views here.

A popular model for mandatory mediation is the ‘Notice to Mediate’ procedure used in British Columbia, which mediators in the sector believe may be producing a wider culture of mediation.⁴⁶ As this model is very popular in discussions of good practice around embedding mediation it will be briefly outlined here. If all parties agree voluntarily to mediate the Notice to Mediate process is not needed, but if one party wishes to compel another to mediate, this process will be used. Courts can also compel parties to mediation using the Notice to Mediate. There are some exceptions to cases that can be mediated,

⁴² Civil Justice Council ADR Working Group (2018) *ADR and Civil Justice*. Final Report. Available: <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADRWG-Report-FINAL-Dec-2018.pdf>; Directorate General for Internal Policies (2014) *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*. EU Report. Available: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

⁴³ Though the EU report is more forceful in its encouragement than the CJC report; the CJC report continues to focus most strongly on use of cost sanctions, with the future potential of a more mandatory opt-out system raised as a possibility.

⁴⁴ Peltz, S. (1999) Only For A Season: Mandatory Mediation As A Temporary Measure. Available: http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17460-only_for_a_season.pdf; Quek, 2010

⁴⁵ Discussion with Professor Catherine Bell

⁴⁶ Swanson, D. (2018) Creative Mediation System in British Columbia: A Model for us All. Available: <https://mediatbankry.com/2018/01/09/creative-mediation-system-in-british-columbia-a-model-for-us-all/>

but it is generally expected that general civil cases will attempt mediation before going to court – British Columbia has an opt-out system⁴⁷ – however the Supreme Court notes that, since 2001, they only have one request for exemption and this was from the Crown on the basis that mediation was not appropriate.⁴⁸ A Notice to Mediate may be served ‘no earlier than 60 days after the filing of the first response to civil claim in the action and no later than 120 days before the date of trial’.⁴⁹ According to mediator opinion, the BC system is becoming increasingly informal as it becomes more normalized.⁵⁰ This is put down in part to the fact the Notice to Mediate can be served without court interference and that this means parties take responsibility for mediation themselves and are then encouraged to use mediation in future.

As will be discussed below, mandatory processes of referral do not necessarily lead to better outcomes for users. The evidence only shows increased uptake. Quek also argues that mandatory processes need careful thinking to ensure parties’ rights to the full justice spectrum are maintained and that there are careful guidelines for what cases can be referred and how opt-out works, recommending following Florida’s process of providing criteria for opt-out, to reduce judge discretion.⁵¹

Key informants also stressed the need for low cost or free mediation services to ensure uptake. If mediation is prohibitively expensive then the majority of users will not be able to make use of the process. Maryland, for example, does not allow mediation to be mandated if a party cannot pay – costs are factored into the case for whether mediation is appropriate or not. As noted in the operational section of the report, there are a variety of systems of funding and certain courts may be able to provide free services. Community mediation, in the United States, is a free service, while private mediation will require payment.

Beyond these levers to uptake there is a gap in the literature around what encourages engagement with mediation and then settlement; further research is required.⁵²

Access to Justice: Procedural Justice and Substantive Justice

A key message that emerged from the evidence across all jurisdictions was that mediation scores highly on procedural justice outcomes.

Mediation scores highly on procedural justice outcomes such as fairness of process, mediator lack of bias, feeling heard during the process, being able to tell one’s story, and positivity about using mediation again. Wissler⁵³ reviewed several studies from Ohio that

⁴⁷ See: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/4_2001#section5

⁴⁸ Swanson, 2018

⁴⁹ See: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/4_2001#section5

⁵⁰ Swanson, 2018

⁵¹ Quek, 2010: 508

⁵² Ministry of Justice slide pack

⁵³ Wissler, R. L (2002) Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research. *Ohio State Journal on Dispute Resolution*. 17: 641-702. In this piece of work she reviews 3 empirical studies of 9 Ohio courts of common pleas (excluding domestic and small claims cases), with two studies focusing on a mediation pilot in 5 courts and another looking at ‘Settlement Week’ in four courts.⁵³ Mediation was free to users in all cases. There were no

investigated user outcomes of mediation. This study made it clear that mediation produced strongly positive procedural outcomes. Litigants were highly positive about the mediator and the process of mediation, with 72% stating that the process was fair and 84% that they had a chance to tell their own story. Ninety-seven percent noted that the mediator treated them with respect and 63% that they felt they had ‘considerable input’ into the outcome. Seventy-nine percent would recommend mediation. Attorneys were equally as positive, with 89% saying the process was fair, 97% stating that the mediator was impartial, and 88% that they were effective in engaging the parties in meaningful discussion. Eighty-five percent would recommend mediation to their colleagues for similar cases.

In a study by Charkoudian, Eisenberg, and Walter on ADR in Maryland (including, mediation and settlement conferences, with 88% of the study participants being referred to mediation) it was found that it, in comparison to those who went to trial without ADR, those who used ADR experienced immediate positive impacts, which were described as ‘significant’. These impacts were experienced if parties settled their dispute through ADR or had to go to trial but had been through ADR beforehand – it seems the positive benefits are experienced simply by going through the process.⁵⁴ The short-term impacts reported are as follows:

ADR participants were more likely than those who proceeded through the standard court process to indicate that: (1) they could express themselves, their thoughts, and their concerns; (2) all of the underlying issues came out; (3) the issues were resolved; (4) the issues were completely resolved rather than partially resolved; and (5) they acknowledged responsibility for the situation. Importantly, this was true for all ADR cases, including those that reached an agreement in ADR and those that did not settle.⁵⁵

This procedural positivity was replicated in other areas, with Ontario’s mandatory mediation programme evaluation – conducted after 23 months and used to justify the continuation of the programme in Toronto and Ottawa, and then expanding it to Windsor – finding that 82% of Ottawa litigants and 65% of Toronto litigants were satisfied with the overall mandatory mediation experience.⁵⁶ In Ottawa 61% of litigants agreed that justice

penalties for failure to reach a settlement. Mediators were asked to report whether or not a settlement had been reached. The length of time mediators had to study case information varied. These studies used questionnaires of mediators, attorneys, and participants exploring their thoughts on the mediation process and outcome. In the two studies focusing on the pilot project another two sources of data were also used: mediator logbooks about the mediation (in 88% of cases) and information from court files compiled by programme staff (e.g. characteristics of the case, dates of litigation events), which included information on the 1060 cases assigned to mediation and the 683 assigned to non-mediation.⁵³ The percentages quoted are an average across studies.

⁵⁴ Charkoudian L., Eisenberg D. T. and Walter J. L. (2017) What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court. *Conflict Resolution Quarterly*. 35 (1): 7-45.

⁵⁵ Charkoudian, Eisenberg and Walter, 2017: 38

⁵⁶ Hahn, R. G. and Barr, C. (2001) *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months. Report for the Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project*. Available: <http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf>

was served by mediation, with a rather more mixed picture in Toronto, but nevertheless the largest category (39%) of litigants agreeing that justice was served. Eighty-eight percent of litigants in Ottawa would use mediation again and seventy-three percent in Toronto also, with similarly positive responses from lawyers (86% in Ottawa and 66% in Toronto).

The Community Justice Centre (CJC) of New South Wales also provides some useful satisfaction and perceptions of access to justice statistics from their work, showing positive feelings about mediation:

What clients say about CJC after attending mediation:

*95% were satisfied with the assistance CJC provided in resolving their dispute
98% found the staff and mediators helpful and courteous
79% said mediation with CJC helped with their situation
94% said CJC mediators understood their concerns
98% stated they felt they were able to have their say in mediation
83% stated they were provided with useful information before the mediation
85% would use CJC again
88% would recommend CJC to others.⁵⁷*

Rates may vary depending on the programme being run, but overall, in Australia, from the 'existing survey research, it seems that dispute resolution processes can provide greater satisfaction to disputants [than litigation] in many instances'.⁵⁸ Throughout Mack's National Alternative Dispute Resolution Committee (NADRAC) report high satisfaction levels are reported from a number of studies and evaluations, ranging from around 60-80%.⁵⁹ Although Sourdin reports studies with satisfaction rates ranging from 36-59%. This range depended on exactly what parties were asked: they were less satisfied with the mediation outcome, but were more satisfied with mediation as a process and overall.

In conversation with Australian academics, they argued that mediation can provide 'personal justice' and 'procedural justice'.⁶⁰ Mediation can provide a solution to parties' disputes much more quickly than litigation, allowing parties to get on with their life and providing relief. It can be a process of more creative solutions, which allow parties to make agreements on areas and issues that the law cannot touch. This can mean a more satisfying, win-win scenario and that different kinds of conversation can be had, equivalent to a day in court, but maintaining relationships. This kind of comment on the potential positives of mediation was made by the majority of key informants across all jurisdictions, though with some notes of caution that will be outlined in this report.

⁵⁷ Community Justice Centres (2018) Facts and Figures 2017-18. NSW Government website. Available:

http://www.cjc.justice.nsw.gov.au/Pages/com_justice_aboutus/com_justice_aboutus.aspx

⁵⁸ Sourdin, T. (2016) *Alternative Dispute Resolution*, 5th Edition. Melbourne, Australia: The Law Book Company of Australasia: 38.

⁵⁹ Mack, K. (2003) *Court Referral to ADR: Criteria and Research*. Report for NADRAC. Available: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Court%20Referral%20to%20ADR%20-%20Criteria%20and%20Research.PDF>

⁶⁰ Discussion with Professor Rachael Field, Bond University; discussion with Professor Tania Sourdin, University of Newcastle Australia

Finally, looking at another jurisdiction, the Small Claims mediation service in England and Wales receives positive feedback, with 94.4% of clients whose cases settled stating they would use the service again, and 85.9% of those whose cases did not settle saying they would use the service again (these statistics reflect responses from 2007-2011).⁶¹

However, the evidence does not present a purely positive picture: while satisfaction levels are high in terms of process, they are not necessarily as high in relation to the outcome. There is a lack of evidence around causality on this issue, so debate remains speculative. For example, in the same study above by Wissler – which was a review of several studies conducted in Ohio – though process was viewed very positively, with 79% stating they would recommend mediation to others, a rather smaller percentage (55%) felt satisfied with their outcome in the present case. Wissler is not fully clear why this drop in percentage occurs, as none of the studies reviewed investigate this. Those who settled were likely to be more positive about mediation than those who did not, showing that outcome does have an impact on how people view their general experience, however those who did settle were also more likely to report pressure to settle from the mediator or from others involved.

The Ontario Mandatory Mediation evaluation asked whether the settlement was fairer in mandatory mediation than it would have been going through another process of resolution (left unspecified), and the results were mixed. In Ottawa, 41% agreed, with 16% disagreeing and the rest unsure; this was improved when lawyers were asked, with 50% agreeing it was fairer than other processes, 18% disagreeing, and the rest unsure. Toronto litigants were unsure in 49% of cases, with 30% agreeing, and the rest disagreeing; lawyers provided similar results, with 48% unsure, 31% agreeing, and the rest disagreeing.⁶² It should be noted that Toronto as a city was less used to mediation than Ottawa at the time, which the evaluators note, may have an impact on the results.

In a study conducted in Queensland's Community Dispute Resolution Centres, 1339 users took part in a survey. Over the studied period of 1999-2003, 81.5% reached a written or verbal settlement during mediation, with a further 18.6% reaching partial settlement, on average across the 5 years.⁶³ There is a mixed picture for satisfaction with outcomes, with participants in the study being asked whether their agreement had addressed the concerns they raised in mediation – only in results for the year 1999 did more people respond 'yes' than 'no'. Results for the other four years of study were not so positive – between 57.7% and 70.4% reported that their agreement had *not* addressed these

⁶¹ Gill, C., Williams, J., Brennan, C. and Hirst, C. (2014) *Models of Alternative Dispute Resolution (ADR): A report for the Legal Ombudsman*. Queen Margaret University Consumer Insight Centre: 50. Available: <https://www.legalombudsman.org.uk/downloads/documents/research/Models-Alternative-Dispute-Resolution-Report-141031.pdf>. Small Claims mediation service for HMCTS in England and Wales works from Northampton with a staff of 17 administrators based there and a further 17 mediators based throughout the country. Parties to small claims disputes will be asked if they would like to try mediation and if both say yes a book request will be created. The service has more booking requests than can be managed given current staffing levels – around 1200 a month – with only 35% of requests being able to be accommodated. Mediation occurs on average within 4.3 weeks of the booking. Full time mediators conduct around 20-25 mediations a week and are expected to have worked through 550 cases a year.

⁶² Hahn and Barr, 2001: 101

⁶³ Brennan, T. (2010) *An Evaluation of the Sustainability of Agreements Reached through Mediations Conducted by the Dispute Resolution Centres of the Department of Justice and Attorney General Queensland between 1999 and 2003*. Masters Thesis. Unpublished: 57-59. Available: https://eprints.qut.edu.au/47162/1/Teresa_Brennan_Thesis.pdf

concerns. Nevertheless, all years under study show a strongly positive response to the question ‘Did you feel heard [in mediation]?’ with between 78.4% and 83.6% stating that they did so. This suggests that the process of mediation was a positive one, but that the final outcome may not have felt as satisfactory. These agreements have nevertheless, in the majority, been sustained.⁶⁴ These results chime with findings from across the jurisdictions.

Though not one of our specific state jurisdictions, one of the most significant studies of the impact of mediation on court processes ever undertaken – and therefore important to cite here – looked to explore a variety of case management principles that were put forward by the Civil Justice Reform Act in California in 1990. These principles required more action on ADR in federal district courts, intended to save costs and time. These studies were divided up into a number of different themes and results published accordingly.⁶⁵ Participants in this study – lawyers and litigants alike – appeared to like ADR processes and the pilot raised awareness of mediation and other ADR amongst lawyers and the judiciary. However, there are more mixed outcomes for users and the system otherwise, with positive outcomes more focused on case management by judges than use of a specific form of ADR:

This report discusses the effects of the CJRA [Civil Justice Reform Act] case management principles on time to disposition, costs, and participants’ satisfaction and views of fairness. The study found that the CJRA’s package of case management policies, as it was implemented, had little effect on any of these outcomes. However, what judges do to manage cases does matter. A package of procedures containing early judicial management, early setting of a trial date, and shorter time to discovery cutoff could reduce time to disposition by 30 percent, with no change in litigation costs, satisfaction, or perceived fairness.⁶⁶

Though our review is not systematic, these results suggest that mediation provides strong procedural justice, but may not provide as strong satisfaction around the settlement itself.

Settlement does not necessarily reflect a purely positive outcome – with the potential for a feeling of being pressured to settle – and should be reviewed in relation to other outcomes. However, as much of the empirical research on mediation does focus on settlement, this data will now be examined.

Settlement Rates

Settlement rates varied across our jurisdictions. It was difficult to pin down exact reasons for this variation, but some broad enablers and barriers can be identified.

The evidence on settlement rates extends across a varied type and quality of evidence, and this should be borne in mind. Settlement rates in mediation are highly variable, **with the majority in this review falling between 40 and 90%**, with some rates below or

⁶⁴ Brennan, 2010

⁶⁵ For an overview of the publications see: RAND Institute for Civil Justice (2008) *Annotated Bibliography*: 4-6. Available: https://www.rand.org/content/dam/rand/pubs/corporate_pubs/2008/RAND_CP253-2008-06.pdf

⁶⁶ RAND, 2008: 4

above. The range may relate to the context-specific nature of programmes and pilots, but without strong evidence about what encourages or prevents settlement this remains speculative. There was no jurisdiction with higher or lower rates than any other, but variety across jurisdictions and between programmes.

As an example of this variability, in a large review of US studies on mediation (general civil cases), Wissler found most studies reported between 27 and 63% settlement rates, but two reported a lower rates of between 13 and 22% and two a higher rate of 71-80%.⁶⁷ However, to illustrate the importance of looking at settlement in connection with other outcomes, this major review of US data presents a mixed picture of mediation outcomes overall, with it being unclear whether mediation *relative to trial* improves settlement rate, increases compliance, reduces time to disposition, or actually reduces trial rates; cost savings and perceptions of savings are also varied.⁶⁸ It is clear mediation settles cases and people feel the process is fair, but *in comparison to litigation* the picture is less clear.⁶⁹ The same review found no conclusive evidence around whether the method of referral made any difference to outcome either.

However, Maryland specific research contradicts this on some measures, finding ADR (the majority of participants went to mediation) was popular with parties in terms of fairness, saved resources, and increased confidence in the courts just by going through the process, in the short and longer term, whether or not settlement was reached and litigation required.⁷⁰ This research noted that mediation can provide more creative solutions to disputes, and have wider outcomes such as self-empowerment, improved relationships, and increased skills to handle disputes in the community. Both the Maryland based research and Wissler's review found improved relationships between parties overall. There are, therefore, important outcomes that require consideration alongside settlement.

As a Supreme Court contact in Florida stated, although they have an experiential sense of positive settlement outcomes, such simple, quantified outcomes without other types of information may not be useful in the long-term:

We do not require the court ADR programs to report the settlement rates of mediations or any type of consumer satisfaction data. One reason for not requiring them to report settlement rates is that we do not want the success of mediation to be evaluated only on the settlement rates. Our experience is that of the cases mediated about 50% of appellate and circuit court cases settle, 60-75% of family law cases settle, and 70-75% of county and juvenile dependency cases settle.⁷¹

Similarly, Noce *et al.* argue that qualitative measures are better for an understanding of mediation than quantitative measures. They argue that qualitative questions can truly get

⁶⁷ Wissler, 2004. 15 of these had a comparison group, and 4 randomly assigned parties to mediation/non-mediation (with 2 of these 4 having a third group who volunteered to enter mediation and were analysed as a separate group). One study compared mediated cases to cases that were not mediated but were closed prior to the study period. In some studies that had random assignment there was an element of judicial decision-making around this assignment, so 'randomness' was diluted.

⁶⁸ Wissler, 2004: 81

⁶⁹ Wissler, 2004: 80

⁷⁰ Charkoudian, Eisenberg and Walter, 2017

⁷¹ Discussion with Susan Marvin, Chief of Alternative Dispute Resolution, Florida Dispute Resolution Center, Office of the State Courts Administrator

at what is 'good' about mediation for all parties and quantitative data is rarely of useful quality.⁷² The current evidence base can provide few certainties about mediation, given the complexity of carrying out meaningful, quality, empirical research.

Barriers to and Enablers of Settlement

Predicting settlement in mediation is very complex and may come down to differences on a case by case basis.

Barriers to Settlement

As Genn argues, predicting settlement in mediation is very complex, and may come down to 'personalities, depth of grievance, degree of conflict, willingness to negotiate and compromise'.⁷³ These factors are very difficult to quantify and change with each and every case. There is therefore only a limited amount of evidence that explores barriers and enablers to settlement, but this will be explored here: it should be kept in mind that these are broad brush comments and cannot be guaranteed to help or hinder mediation settlement in every case.

Looking at Small Claims examples, where mediation tends to do well in terms of settlement, a study in British Columbia – which made use of available court data on 4136 mediations of Small Claims cases that took place between 1998 and 2004 – found that:

*56% were fully settled at mediation, 2% were partially settled at mediation, and 42% were not settled at mediation.*⁷⁴

In this study the barriers to settlement were being investigated from the mediators' perspective. Mediators rated 'unrealistic expectations' on the part of parties as the most significant barrier (69%), with lack of legal representation coming second (39%). These results will reflect the sample bias, but do chime with other research across the jurisdictions that stresses the need for education around mediation and the complexities that can arise for users who are self-represented and may need advice to achieve settlement.

This author goes on to state that case type might have had an impact also:

In this study, real estate cases had the lowest settlement rates overall, and mediators' barrier ratings provided some insight as to why this might be the case. Unsettled real estate mediations were rated substantially higher than other dispute types on the expertise/authority barrier scale and on all three items that compose

⁷² Noce, D. J. D., Folger, J. P. and Antes, J. R. (2002) Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection. *Pepperdine Dispute Resolution Law Journal*. 3 (1): 13

⁷³ Genn, 2013: 406.

⁷⁴ Vander Veen, S. (2005) *Barriers to Settlement in Court-Connected Small-Claims Mediation in the Lower Mainland of British Columbia*. Unpublished Student Research Project. University of British Columbia: 5-6. Available: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.497.9245&rep=rep1&type=pdf>

*that scale (i.e., 'lack of authority to settle', 'lack of representation/legal advice', and 'missing a necessary participant').*⁷⁵

Genn notes that active coercion to mediate tends to be a barrier to engagement and settlement and that 'facilitation [and] encouragement... with selective and appropriate pressure' are better methods of increasing both willingness to engage and to finding a solution.⁷⁶

Enablers of Settlement

As argued in the last section, case type may make a difference to settlement. The evidence is not always clear on what case types are being referred to when settlement is discussed, but there is some evidence that divides civil cases up clearly, which will be drawn on here to discuss enablers to settlement. Small Claims cases appear to be particularly suited to mediation, with good settlement rates across jurisdictions.

The Small Claims mediation service for England and Wales, based in Northampton, sets its settlement targets at a minimum of 62%: this would be seen as a good rate of settlement.⁷⁷ In general, they find that cases with 2 companies, rather than 2 consumers or 1 consumer and 1 company, are more likely to settle, as are those with smaller amounts in dispute.⁷⁸ The staff here feel that most of their clients want resolution and that mediation saves the cost, time, and stress of a court case, allowing parties to move on with a resolution that suits both sides.⁷⁹ A Manchester County Court pilot saw 90% settlement rates for a similar telephone mediation service, so there is potential for strong settlement rates via a distance service, which reduces certain costs.⁸⁰ Gill et al.⁸¹ note that there has been some debate about whether distance mediation is 'true' mediation, as it takes place as a relay set of phone conversations between parties – meaning parties do not meet and discuss together. There are therefore both positive and negative voices around these kinds of schemes.

In Alberta, the Provincial Court – dealing with claims of less than \$50,000 – has seen a 67% settlement rate, according to one local expert, which is deemed to be very successful.⁸² In Ontario, Small Claims cases that were mediated also have good settlement rates. Vidmar's study⁸³ looked at reasons for compliance in these cases, focusing on the level of admitted liability. In full liability cases, there was an 89% settlement rate and in no liability a 43% settlement rate, with 69% for partial liability.

⁷⁵ Vander Veen, S., 2005: 19

⁷⁶ Genn, 2013: 406

⁷⁷ Gill et al., 2014: 49

⁷⁸ Gill et al., 2014: 49

⁷⁹ Gill et al., 2014: 49

⁸⁰ Civil Justice Council/Judicial Studies Board (2009). *Court Mediation Service Manual*: 4. Available: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf

⁸¹ Gill et al., 2014: 50

⁸² Discussion with Professor Catherine Bell, University of Alberta

⁸³ Vidmar, N. (1985) An Assessment of Mediation in a Small Claims Court. *Journal of Social Issues*. 41(2): 127-44.

Compliance was between 93 and 100%. However, Wissler has disputed Vidmar's claims⁸⁴, findings that admitted liability made no difference to settlement. However, parties saw mediation as fair and as more fair than trial (for those who did ultimately go to trial).

In Ontario, settlement rates also vary by case type, with wrongful dismissal, negligence, Simplified Rules, and real property cases having the highest settlement rates (50-54%) and contract/commercial, collection and trust and fiduciary duties cases having the lowest (21-36%).⁸⁵ This evidence therefore suggests some case types may work better with mediation than others, though provides no specific detail on *why* case type might make this difference.

However, Community Justice Centre (New South Wales) data from 2017-2018 show that they arranged 1061 mediations and though there was some variation in settlement rate based on case type and referral method, they argue the range reflects a good rate of settlement *across all cases types*.⁸⁶ Similarly, key informants were generally agreed that there is the *potential* to mediate any case, but that professional judgement should always be used to consider this on a case-by-case basis. Though this review did not focus on family cases, domestic abuse (DA) was the one case type most people were willing to accept may not be suitable for mediation, with some systems based on explicit exemption of DA cases from mediation and some systems based on judge discretion and precedence.⁸⁷ There were dissenting voices here also though, with, for example, Justice Beaudoin from Ontario suggesting it is possible to mediate DA cases if the mediator has the correct training and by using a shuttle system.⁸⁸

With good evidence around Small Claims, but conflicting evidence around case type more generally, evidence on broader enablers to settlement in mediation were explored. Hahn and Barr found that across case type, the experience of the mediator and the ability of parties to choose their own mediator influenced the possibility of being able to settle in cases in Ontario, with more experience of mediation by the mediator and greater choice of mediator for the parties meaning greater likelihood of settlement. Non-roster mediators were as likely as roster mediators to completely solve disputes 'but roster-led mediations were more likely than non-roster mediations to resolve some (but not all) the issues'.⁸⁹ If 6 or more plaintiffs and defendants are involved the case becomes much less likely to settle.⁹⁰ The experience of mediators is defined as significant to settlement and satisfaction rates and the need for training is emphasised; the authors also stress the need for education about mediation more broadly.⁹¹

⁸⁴ Wissler, R. (1995) Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics. *Law and Society Review*. 29(2): 323-357.

⁸⁵ Hahn and Barr, 2001: 12

⁸⁶ Community Justice Centres (2018) Facts and Figures 2017-18. NSW Government website. Available: http://www.cjc.justice.nsw.gov.au/Pages/com_justice_aboutus/com_justice_aboutus.aspx

⁸⁷ Billingsley, B. and Ahmed, M. (2016) Evolution, revolution, and culture shift: a critical analysis of compulsory ADR in England and Canada. *Common Law World Review*. 45 (2-3): 201-202.

⁸⁸ Discussion with Justice Beaudoin, Ottawa Courthouse, Ontario, Canada; see also an overview of research and discussion about domestic violence from Boule and Field, 2018: 220-221

⁸⁹ Hahn and Barr, 2001: 12

⁹⁰ Hahn and Barr, 2001: 12

⁹¹ Hahn and Barr, 2001: 16

Wissler's review of Ohio mediation projects also explored broad characteristics of those cases more likely to settle, to focus on which cases could be quickly, cost-effectively, and beneficially brought to conclusion using mediation.⁹² The factor found to have the most impact on likelihood of settlement was disparity between parties' initial positions – the closer to one another the more likely they were to settle. Other characteristics

were associated with an increase in the rate of settlement of more than fifteen percentage points: greater cooperation between the attorneys during the session, the mediator recommending a particular settlement, and the mediator assisting the parties in evaluating the value of the case.

There were a further set of statistically significant factors increasing likelihood of settlement, but of less significance than those above:

- *Case entered mediation by judge referral or party request rather than by random assignment*
- *Mediator previously had mediated a larger number of cases*
- *Parties had more preparation for mediation by their attorneys*
- *Fewer months between case filing and mediation session*
- *Mediator evaluated merits of case for parties*
- *Mediator did not keep views of case silent*
- *Motion to dismiss or for summary judgment was not pending*
- *Issues in the case were less complex*
- *Non-dispositive motions were not pending*
- *Liability was less strongly contested*
- *Attorneys spent more rather than less time talking during mediation*
- *Parties spent more rather than less time talking during mediation*

Furthermore, if parties were better prepared for mediation they assessed it more positively afterwards.

With settlement a significant measure of success in the mediation literature, but with its usefulness debated, other outcomes for users are also worth exploring to examine the wider impact of mediation in civil justice.

Compliance

Rates of compliance across these jurisdictions were high, with empirical evidence strongest in the United States.

From the evidence reviewed here, compliance with mediation agreements is strong. In an oft-cited overview of US studies of mediation by Wissler, compliance was between 62 and 90%, with those studies that included a comparison group generally finding higher rates of compliance for mediated settlements than in other processes overall – though with one study finding no difference. Whether referral was voluntary or mandatory was not found to make a difference to outcomes overall.⁹³

⁹² Wissler, 2002: 694-695

⁹³ Wissler, 2004: 60

In a study by Charkoudian, Eisenberg, and Walter they cite a range of literature from America that found compliance with ADR settlements (not exclusively mediation, though predominantly) as between 59 and 93%.⁹⁴

Key informants across jurisdictions spoke of compliance being strong with mediation settlements because of the ownership of the process and settlement that mediation entails.

Voluntary versus Mandatory Systems: is one approach better than the other for user outcomes?

The evidence in this review was conflicting about whether voluntary or mandatory approaches to referral to mediation provided better user outcomes; overall, there is not enough evidence to suggest that one approach works better than the other.

The discussion of whether mediation should be a voluntary or mandatory process was divided within and between jurisdictions and clearly has ideological overtones, depending on how mediation is defined and what its ultimate goal is seen to be. The difficulty of definitively defining a system of mediation as voluntary or mandatory is dealt with in the operational features section of the report.

In terms of outcomes for users, there was no conclusive evidence that favoured mandatory systems more than voluntary or vice versa: the evidence is conflicting, with some studies favouring one system, some another, and some stating that there is limited or no difference in terms of outcomes between voluntary or mandatory systems. For example, Wissler⁹⁵, examining the difference between voluntary and mandatory schemes of mediation *in small claims and common pleas courts* in the USA, found mandatory mediation had lower rates of settlement than voluntary mediation, but neither group felt a greater pressure to settle. Fewer mandatory participants felt mediation to be fair or were satisfied with the outcome than voluntary participants. However, in a review *across US evidence* Wissler concludes that voluntary and mandatory mediation provide no higher rate of settlement than one another; compulsory mediation does not compel settlement.⁹⁶ However, Mandell and Marshall found that mandatory mediation improved settlement rates overall. They also found that it was important to mediate early in the life of the case to achieve settlement.⁹⁷ This literature shows the range and conflicting nature of conclusions on this issue, as well as the conflicting comments about their impact on outcomes for users.

⁹⁴ Charkoudian, Eisenberg and Walter, 2017: 10

⁹⁵ Wissler, R. (1997) *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*. *Willamette Law Review*. 33: 565-604.

⁹⁶ Wissler, 2004

⁹⁷ Mandell, M.B. and Marshall, A. (2002) *The Effects of Court-Ordered Mediation in Workers' Compensation Cases Filed in Circuit Court: Results from an Experiment Conducted in the Circuit Court for Baltimore County*. Maryland Institute for Policy Analysis and Research. Available: www.umbc.edu/mipar.

There was some concern that if parties feel compelled to mediate they may also feel compelled to settle: Moore, discussing the recent legislation in Ireland, explores the conflict between this concern and the increasing recognition that mandatory mediation processes may be needed to improve uptake.⁹⁸ Furthermore, key informants were concerned that the authority of judges may have an impact on the pressure to settle, as parties are concerned to do what they think the judge will want.⁹⁹ Ensuring parties are not pressured to take part in mediation and settle should they not wish to is therefore an important consideration. Part of ensuring this may be access to legal advice.

Legal Representation and Legal Education

Legal representation is a topic of debate and concern within the mediation literature of these jurisdictions as lack of knowledge of the law may lead parties to give away important rights – this may then have an impact on settlement, satisfaction, and access to justice outcomes.

If parties have limited knowledge of their rights, both taking part in mediation and settling can become problematic – they may give away important rights or not know of requests and demands they could make – and mediators may not be able to help such parties, either because of their own lack of legal knowledge or because they are restricted by rules or legislation as to what advice they can offer.¹⁰⁰ This then has an impact on the settlement, sense of satisfaction with the process, and access to justice. The jurisdictions under study here do not mandate for legal representation in mediation, but mediators are allowed to give parties time to ask for legal advice if needed, speak to court advice services if available, or to allow lawyers to attend mediation. Lawyers' fees obviously add costs to mediation for users. Certain key informants felt that, nevertheless, mediation with lawyer advice was the best form of mediation. Others noted that it forms a place for lawyers within ADR, alongside the potential for them to act as lawyer-mediators. Most felt that parties were best served with the full support of legal advice in mediation, wherever this came from (i.e. mediators require legal knowledge to support self-represented parties or lawyers should attend). Research in Maryland found that those with representation were more likely to feel they had been heard throughout the process.¹⁰¹

In a US study by Engler¹⁰² about the unrepresented facing a represented adversary in mediation, the unrepresented party will be faced with the fact no one in the mediation setting is meant to provide legal advice. This can mean unfair settlement, unequal settlement, or the signing away of rights. This article cites a case in Florida where a mediator asked whether they could advise an unrepresented party that they knew to be unaware of certain rights they had and were therefore not getting a full and fair settlement

⁹⁸ Moore, T. (2017) Mediation Ethics and Regulatory Framework. *Journal of Mediation and Applied Conflict Analysis*. 4 (1): 543-551.

⁹⁹ Discussion with Professor Rob Rubinson, University of Baltimore

¹⁰⁰ Engler, 1999; MoJ slides

¹⁰¹ Charkoudian, L. (with colleagues) (2016) *Impact of Alternative Dispute Resolution on Responsibility, Empowerment, Resolution, and Satisfaction with the Judiciary: Comparison of Short- and Long-Term Outcomes in District Court Civil Cases*: 62. Available: <https://mdcourts.gov/sites/default/files/import/courtoperations/pdfs/districtcourtcomparisonfullreport.pdf>

¹⁰² Engler, 1999

– the courts said no. This article argues that this is not impartiality, but a favouring of the represented. This article points out that mediation can become harmful in this situation and represent negative outcomes for users.

There is recognition in the literature and from key informants that lawyer culture may need to (further) change before discussing mediation with clients and negotiating within the mediation setting will be second nature, even where legislation exists to mandate lawyer-client discussion – more information and education is needed, both formally in law degrees and informally through discussion within the legal profession and beyond.¹⁰³ Such awareness will also help to ensure mediation is used appropriately, with an understanding of the power dynamics involved.

Power Dynamics

The issue of power dynamics in mediation, across case types, is an important issue to pay attention to and consider in detail.

As Boulle and Field note¹⁰⁴, there are contexts in which power imbalances within mediation will be significant and there are understandable and important questions to ask and be aware of here: these imbalances may not be mitigated and unfair settlement can result. They argue that such inequality can be found in many places in the justice system, but that judges and arbiters should be using objective standards to make decisions, minimising subjectivity.¹⁰⁵ Thinking carefully about the appropriate use of mediation may help to alleviate some of these concerns, as well as proper training for mediators to help them spot potential problems between parties. Mediators also need to try to recognise and minimise their own power within mediation, especially when their life experience may be very different to that of their clients.¹⁰⁶

Mediators are generally not empowered to impose ‘fair’ settlements, even when they can recognise power imbalance.¹⁰⁷ The above example from Engler¹⁰⁸ of the Florida mediator shows how difficult mediators can find this and how process may prevent them from assisting those with less power during mediation. They may be able to stop the mediation, but again, only if they are trained well enough to recognise a difficult situation.¹⁰⁹ The impartiality and neutrality of mediators become significant issues – they can lead to actually favouring a more powerful party.¹¹⁰ There may be space for mediators’ evaluation of disputes or at least ensuring fairness, though this may be a significant ask of mediators who may not have proper legal training. It may also make the case for the involvement of lawyers or other legal advice for parties throughout.

¹⁰³ Corbin, L., Baron, P. and Gutman, J. (2015) ADR Zealots, Adjudicative Romantics and Everything in Between: Lawyers in Mediations. *University of New South Wales Law Journal*. 38 (2): 492-513.

¹⁰⁴ Boulle and Field, 2018: 216

¹⁰⁵ Boulle and Field, 2018: 216

¹⁰⁶ Boulle and Field, 2018: pp. 216-225; Rubinson, R. (2018) Stories of Experience: Economic Inequality in Mediation. *South Carolina Law Review*. 70: 85-117.

¹⁰⁷ Boulle and Field, 2018: 223

¹⁰⁸ Engler, 1999

¹⁰⁹ Boulle and Field, 2018: 223

¹¹⁰ Boulle and Field, 2018: 223

It is also worth stating that power is not straightforward and there are nuances in how it works, shifts, and changes in any given setting. Boulle and Field, following Astor, note that ‘power is not a commodity that a mediating party has or does not have, but a situated phenomenon involving subtlety and contradictions in its exercise’.¹¹¹

Cost and Time Savings for Users and Civil Justice System

There is *potential* for both cost and time savings for users and the civil justice system by making use of mediation, but the evidence shows this cannot be guaranteed. Empirical evidence is conflicting on both cost and time savings and there are difficulties in measuring cost savings accurately.

All jurisdictions were interested in the efficiency agenda, to a greater or lesser extent. For some areas this was described by key informants as the major reason for using mediation – particularly mandatory mediation – as something dramatic needed to be done to clear the court backlog. In others a more mixed picture was presented, with a sense that efficiency was balanced with wider aims, such as increasing access to justice (though this is in part connected with efficiency), empowerment, and self-determination. In the American states in particular, community justice values around mediation are frequently seen as the first narrative around mediation, with the efficiency agenda coming only later or at least very much hand-in-hand.¹¹²

Overall, this review found very limited cost effectiveness evidence that was underpinned by strong empirical evidence. There are therefore very limited statements that can be made about this, however, it is worth noting all jurisdictions in this review have, to some extent, moved forward with mediation despite this lack of empirical evidence.

The Law Reform Commission of Ireland sums up the general viewpoint in the mediation literature around cost and time savings and is therefore quoted at length here:

Research on the efficiency of ADR processes (some based on Irish experience) indicates that mediation and conciliation processes often provide a speedy resolution to a specific dispute. That research also indicates that there is – to put it simply – no such thing as a free conflict resolution process, alternative or otherwise. Where the resolution process is provided through, for example, the courts or the Family Mediation Service, most or all of the financial cost is carried by the State. Where the resolution process involves private mediation, the cost is often shared by the parties involved. The Commission accepts, of course, that the additional financial costs involved in an individual case that goes through an unsuccessful mediation and must then be resolved in litigation has to be balanced against the possible savings where a complex case is successfully mediated. The Commission nonetheless considers it is important not to regard ADR as a patently cheaper alternative to litigation costs; in some instances, it may be, but where a mediation or conciliation is not successful it obviously involves additional expense. On the whole, the Commission accepts that careful and appropriate use of ADR processes is likely to reduce the overall financial costs of resolving disputes.

¹¹¹ Boulle and Field, 2018: 224

¹¹² Press, 2003: 46; Johnson Jr, P Dayton. (2003) Confidentiality in Mediation: What can Florida glean from the Uniform Mediation Act?. *Florida State University Law Review*. 30 (3): 487

*In addition, the other aspect of efficiency – timeliness – may be of great value to the parties. The Commission is also conscious of other values associated with ADR processes, including party autonomy and respect for confidentiality. The point of noting the narrow issue of financial cost is primarily to indicate that the available research strongly supports the view that ADR assists timely resolution of disputes, but is less clear that direct financial costs savings may arise for the parties.*¹¹³

There is a lack of clear evidence on cost savings, though there is a common sense feeling that, in the correct circumstances – that cannot be guaranteed – mediation can save costs, either for litigants, the civil justice system, or both. Time may also be saved, though the wider literature debates this also. These potential positives of mediation should, as the Law Reform Commission of Ireland note, be reviewed in relation to other values of mediation and ADR. Some of the wider literature will be highlighted here to give a sense of this uncertainty around cost and time.

Macfarlane conducted an evaluation of the mandatory mediation system in Ontario in the 1990s, and found that parties and lawyers felt mediation saved them processing time – this was then confirmed by examining court records. Lawyers estimated cost savings for their clients of between \$1000 and \$5000. Overall the experience of mediation was positive, in terms of cost and time savings and sense of fairness of process. If a party settled, they were more likely to be satisfied with mediation overall – confirming above findings.¹¹⁴ Similarly for Florida, Shultz's work found that processing time decreased (cases were looked at from time of referral, rather than filing). As few cases were mediated in this study, judicial workload was not significantly reduced, but parties perceived a cost saving and felt that they had greater access to justice than those whose cases were adjudicated.¹¹⁵

Although not of the strongest quality, a synthesis of cost effectiveness evidence in mediation by *Mediate British Columbia* is useful as an overview of what is known about this particular aspect of the outcomes of mediation for users and civil justice systems.¹¹⁶ This report suggests that mediation can save costs in a number of ways, noting that it has the potential to resolve cases before reaching court or earlier in the process; that mediated agreements are complied with more than court-imposed outcomes, hence preventing further trial or appeal; and that court proceedings, when they do occur after mediation, can

¹¹³ Law Reform Commission Ireland (2010) *Alternative Dispute Resolution: Mediation and Conciliation*. Report: 2-3. Available: https://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf

¹¹⁴ Macfarlane, J. (1995) *Court-based mediation of civil cases: an evaluation of the Ontario Court (General Division) ADR Centre*. Cited in Shack, J. (2007) *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs*. Center for Analysis of Alternative Dispute Resolution Systems Report: 13-14. Available: https://www.researchgate.net/publication/228388717_Bibliographic_Summary_of_Cost_Pace_and_Satisfaction_Studies_of_Court-Related_Mediation_Programs

¹¹⁵ Schultz, K. D. (1990) *Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment*. Cited in Shack, J. (2007) *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs*. Center for Analysis of Alternative Dispute Resolution Systems Report: 16-17. Available: https://www.researchgate.net/publication/228388717_Bibliographic_Summary_of_Cost_Pace_and_Satisfaction_Studies_of_Court-Related_Mediation_Programs

¹¹⁶ Vander Veen, S. (2014) *A Case for Mediation: The Cost Effectiveness of Civil, Family, and Workplace Mediation*. Report by Vander Veen Research and Evaluation on behalf of Mediate British Columbia. Available: <https://pdfs.semanticscholar.org/c9d6/ea19a55f165d936277f372737a270eb4a301.pdf>

be shorter and cost less due to issues being narrowed, clarified, or settled etc.. Court resources can therefore be reallocated. Also, legal and court fees are less and disagreement and conflict are lessened, in workplaces, for example, so cost savings are made through this greater harmony. The report also states that 'Mediation can reduce the cost of civil litigation in which government and/or crown corporations are involved.'¹¹⁷ This report does note that there is evidence that suggests that mediation is not cost effective, but argues that this evidence shows that mediation needs to be used appropriately – for example appellate cases may be too complex for mediation – and that there is always the possibility for mediation to save money, even if it cannot be *guaranteed* in every case. The report suggests empirical research into which circumstances mediation and other forms of ADR work best, including around cost effectiveness.¹¹⁸

Charkoudian studied the benefits to the police in Baltimore City, Maryland, in referring callouts to personal conflicts to community mediation.¹¹⁹ This type of mediation can prevent disputes escalating to reach the civil courts. These services were provided free of charge. Such calls were allowed to accumulate for several months before referral, to test whether the dispute could be resolved by the parties without intervention; there were on average 7.56 calls before referral. The results from this in time and cost savings were:

Mediation saved 273 minutes per situation per six-month period, or 4 hours and 33 minutes of patrol time. Assuming two officers to a patrol car, this is 9 hours and 6 minutes of personnel time. Financial savings resulting from this can be assessed using the officer's salary. The upper bound of the cost of conflict-related calls is \$193.35 (found by dividing the police budget by the number of calls), and the lower bound is \$24.38. With these figures, the financial savings to the police department in a six-month period from one mediation lies somewhere between \$1,649.27 and \$208.00.¹²⁰

Overall, Charkoudian argues that time savings are probably more significant than cost savings, but that cost savings do exist.

In the Court of Appeals in Maryland, according to a report prepared by Malhotra-Ortiz, there are around 1300 cases a year, and most will be screened for ADR, including mediation; a large proportion will go to mediation and other ADR.¹²¹ This same report states that mediation helps to minimise the return to court of the same disputes and reduces time and cost of appeals, though without quantifying these savings.

A more negative study, looking across the USA, is Kuhner's study of court-mandated mediation, which cites settlement rates of between 21 and 60%. Linked to these settlement rates, Kuhner notes there is no saving of time or money for *parties* who settle and there was in fact some increase in lawyer work in some States, though this was

¹¹⁷ Vander Veen, 2014: 2

¹¹⁸ Vander Veen, 2014: 33

¹¹⁹ Charkoudian, L. (2005) A Quantitative Analysis of the Effectiveness of Community Mediation in Decreasing Repeat Police Calls for Service. *Conflict Resolution Quarterly*. 23 (1): 87-98.

¹²⁰ Charkoudian, 2005: 96

¹²¹ Malhotra-Ortiz, M. (2012) *Mediation*. Maryland Court of Special Appeals Report: 7. Available: <https://www.mdcourts.gov/sites/default/files/import/publications/pdfs/cosamediation.pdf>

balanced by a decrease in work in other areas.¹²² Kuhner argues that court backlog is reduced by using mediation, however mediation can add money and time costs that exhaust the capacities of parties (particularly as mediated cases may be highly complex and require litigation anyway, at least of some points), meaning they give up on their case: he notes this is a serious justice concern.¹²³

Kuhner goes on to argue that *courts* save money by using mediation (as opposed to parties), as mediation costs a fraction of the cost of litigation (he suggests between 3 and 10% of the cost).¹²⁴ He states that even if only a small percentage of cases go to mediation and settle, courts will save money; however, he does not find that parties necessarily save time or money.¹²⁵ He is concerned that judges may push for settlement, adding pressure to parties and mediators, and also that mediators may have no incentive for quick settlement due to fee structures. In some cases then, mediation may be drawn out unnecessarily and in others pushed towards a conclusion too quickly.¹²⁶ He is therefore sceptical of the use of mediation as a means of access to justice, seeing it as more a means to save court money and reduce case backlog. However, Kuhner does note that lack of settlement or rising costs for parties does not mean they did not get something important from mediation in terms of understanding their opponent better or narrowing the focus of their concerns, but that these are not definite outcomes of mediation. The courts can have juxtaposed interests to parties who bring cases.¹²⁷

McEwen's study of corporate mediation in America, and views on cost and time savings, makes clear that large corporations can save money through mediation rather than litigation, and that ADR should be standard.¹²⁸ However, this article also shows corporations are concerned about the costs of discovery and feel this is where much of the cost lies, though they think discovery is important to negotiating well. There may also be structural, cultural, and reputational incentives not to settle (concern with being seen as weak if suggesting ADR, for example) and certainly not to settle early and a new approach is required to challenge these issues.¹²⁹ Corporate and commercial mediation may therefore present a specific set of issues that do not pertain to wider civil cases with smaller claims and/or individual parties.

¹²² Kuhner, T.K. (2005) Court-Connected Mediation Compared: The Cases of Argentina and the United States. *Roger Williams University School of Law Legal Studies Research Paper Series*. Research Paper 22: 17

¹²³ Kuhner, 2005: 18

¹²⁴ Kuhner, 2005: 19

¹²⁵ Kuhner, 2005: 19

¹²⁶ Kuhner, 2005: 21-22

¹²⁷ Kuhner, 2005: 19

¹²⁸ McEwen, C.A. (1998) Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation. *Ohio State Journal on Dispute Resolution*. 14 (1): 1-27

¹²⁹ McEwen, 1998

Mediation: not a panacea

Mediation should not be seen as a panacea, but used where appropriate, giving users access to a range of dispute resolution processes including trial.

The importance of viewing mediation as a tool that *people* influence – parties, mediators, lawyers – is significant to understanding its success. McEwen argues this clearly:

Once said, the importance of lawyers and parties to mediation seems pretty obvious. Certainly, it was readily apparent to one of the corporate counsel we interviewed... As he put it: 'Mediation in and of itself is not going to reduce costs or time. You could go back and forth for years and then go into mediation. Or you could go into mediation immediately. It's everything that happens around mediation that makes it more or less expensive.... Mediation itself, sitting in a room with a so-called neutral third party, is no panacea. In this view, mediation is a tool. Its effects depend on its uses and on the skills, goals, and orientations of its users'.¹³⁰

Though there are some voices who believe any case may be mediated, with appropriate judge or other professional discretion used in decision-making, most comment and evidence from this review agrees that the right dispute resolution process is needed for the right case. As a 2004 report for NADRAC states¹³¹, the most appropriate resolution tool/approach for each dispute is needed, rather than a blanket response. Trial may sometimes be the right response, as may another form of ADR. The situation of litigants – self-represented, having suffered abuse from the other party, etc. – needs to be taken into account when deciding this, as much as the case type and other characteristics of the dispute.

¹³⁰ McEwen, 1998: 3

¹³¹ NADRAC, 2004

Conclusions

In reviewing this evidence it becomes clear that context is highly significant to mediation, its operation, and effectiveness. The evidence is often conflicting or unclear and there are some issues that cannot be decided definitively. Nevertheless there are some important conclusions that can be made, as well as a point to consider going forward on what success in mediation looks like.

What the evidence tells us

The evidence shows that mediation can have a range of positive outcomes for both users and the civil justice system. There is the potential to save court costs and time, as well as user costs and time. Though this may be hard to accurately quantify – and to guarantee in every case – there is the potential, and the jurisdictions under review here are all working under the assumption that cost and time savings can be made, despite the limited empirical evidence base. Beyond the efficiency agenda there are further significant positive outcomes noted throughout the literature: self-determination, empowerment, building dispute resolution skills that may be taken back to the community, enduring compliance with settlement, strong procedural justice outcomes, and the potential to maintain relationships.

Nevertheless, these positives are not straightforward or without caveat, and these caveats are important to bear in mind. The strong procedural justice outcomes are twinned with rather less positive substantive justice outcomes – it is not fully clear from the evidence why this is the case, though there is some evidence of a sense of pressure to settle. Settlement may not always be the best measure of success in mediation therefore, and other outcomes should be considered equally significant. Access to justice should be of the highest significance to the justice system and careful consideration given to what kind of justice mediation offers and when it is appropriate. Mediation is not a panacea, and may do better for some cases than others, bearing in mind power dynamics, the privacy and confidentiality requirements, cost, and speed. On top of this there are important concerns in the literature about the role of legal representation, which can add to costs, but may be important to justice as parties have the advice and guidance needed to make good decisions and create useful, fair settlements. Though lawyers may not always be on board with mediation, their role in ensuring quality justice is important, therefore finding a balance between representation and costs, and ensuring education and information about mediation to all stakeholders, is important. Finally, the quality of mediators is significant to outcomes of all kinds, so there should be a sustainable system that allows for good and ongoing training, and the availability of services that are resourced and adequate to need.

Mediation needs to be flexible in meeting the demands of jurisdictional context, with a structure in place that allows space for this flexible response, potentially on a case-by-case basis.

What is success?

Any programme of mediation needs to define its measures of success and monitor those carefully and robustly. In the case of mediation and other ADR processes, it can be difficult to define success. As NADRAC have said:

The traditional approach to evaluating the ‘success’ of dispute resolution is to define intended outcomes and the criteria or indicators by which achievement of those outcomes can be judged... [However] there are diverse objectives for ADR and consequently many different ways to define success. For example, fairness may be more important than settlement of the dispute. Durability and long term impact may be more important than the immediate outcome. ADR also may have broader goals such as capacity building, skills development and reductions in social friction.

Any evaluation of outcomes, however, needs to take into account unintended and unplanned consequences, whether positive or negative. It is also important to note that the ‘success’ of dispute resolution may refer as much to the process (for example, satisfaction with how a session was conducted) as to the outcome (for example, whether an agreement was reached)... [We have found] indicators for success are determined largely by the context.¹³²

NADRAC suggest that unintended consequences may come in the shape of more parties seeking mediation because they have greater knowledge of it, which may actually increase court workload (depending on how the scheme is administered) – and indeed, this did occur in Alberta, leading to the suspension of the mandatory scheme. However, a mandatory requirement to try ADR may mean more people seek private mediation or other ADR and settle before reaching an official programme, which may mean that programme statistics of use are low or settlement rates on the official programme are low due to more complex cases reaching that stage.¹³³ There may also be positive outcomes that are indirect, such as use of mediation meaning parties take the skills learned back with them to their communities and are more able to deal with disputes themselves in future.¹³⁴ The very knowledge of what is being measured as ‘success’ may encourage people to work towards it to the detriment of other things: for example, if settlement is key this may risk increased pressure to settle on parties.¹³⁵

Therefore it is necessary to think through what ‘success’ would look like for any planned system of mediation and whether there should be several measures working in conjunction or whether one single measure would be considered more significant: combining qualitative and quantitative data would seem the strongest way forward. Positive qualitative outcomes may produce poor quantitative outcomes, and vice versa, so combining them to get a fuller picture is important.¹³⁶

¹³² NADRAC, 2004: 29

¹³³ NADRAC, 2004: 30

¹³⁴ NADRAC, 2004: 30

¹³⁵ NADRAC, 2004: 32-33

¹³⁶ NADRAC, 2004: 30

Similarly, when considering success, McEwen has noted the importance of case management, especially in large corporate cases: this can help to keep costs to a minimum, maintain relationships, and reduce the time of the process.¹³⁷ He argues that case management is as significant to the result of the dispute as mediation itself, though having the 'perspective' that mediation provides can promote general, effective management of disputes.¹³⁸

Whether and *what* to measure, as well as *why* these particular factors are chosen, are significant questions to consider when thinking of a 'successful' future programme; evaluation should be considered from the start.

¹³⁷ McEwen, 1998: 6

¹³⁸ McEwen, 1998: 6



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