

**SCOTTISH CIVIL JUSTICE COUNCIL
FAMILY LAW COMMITTEE****POLICY PAPER BY THE SCOTTISH GOVERNMENT****IMPLICATIONS OF EXTENDING ORDINARY CAUSE RULE 33.22 TO ALL FAMILY ACTIONS****Introduction**

1. This is an open paper by the Scottish Government
2. At the meeting of the Family Law Committee (FLC) on 8 July 2019¹ the Scottish Government committed to producing a policy paper on the implications of amending Ordinary Cause Rule ("OCR") 33.22 on mediation to all family and civil partnership actions. This policy paper is also prepared in line with the Scottish Government's Family Justice Modernisation Strategy which was published on 2 September 2019² ("the FJMS").
3. This policy paper seeks views on extending OCR 33.22, and the equivalent provisions in the Ordinary Cause Rules for civil partnership actions and in the Court of Session Rules, to all family actions.
4. In addition, the Scottish Government proposes amendments to reflect article 48 of the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence ("the Istanbul Convention")³. There has been UK legislation, extending to Scotland, on the Istanbul Convention.⁴
5. Evidence suggests that court procedure can be costly, lengthy and stressful⁵. The Scottish Government recognises that mediation, and other forms of dispute resolution outwith court (often known as Alternative Dispute Resolution or ADR), can play a valuable role in helping to resolve family disputes.
6. The Scottish Government also recognises that there are cases where ADR outwith court is not appropriate, most notably where there has been domestic abuse.
7. There has recently been an Independent Review of Mediation in the Civil Justice System in Scotland and the Scottish Government has provided a response to this review⁶.

¹ Please see penultimate bullet point in paragraph 11 of the minutes of 8 July 2019 meeting

² The Family Justice Modernisation Strategy is at <https://www.gov.scot/publications/family-justice-modernisation-strategy/pages/14/> Please see paragraphs 4.27 and 7.20.

³ The Istanbul Convention is at <https://www.coe.int/fr/web/conventions/full-list-/conventions/rms/090000168008482e>

⁴ <http://www.legislation.gov.uk/ukpga/2017/18/contents/enacted/data.htm>

⁵ See for example Understanding Child Contact Cases in Scottish Sheriff Courts K.Laing & G. Wilson Newcastle University 2010. Available at: <https://www2.gov.scot/resource/doc/334161/0109246.pdf>

Background

8. OCR 33.22 provides that: "In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation"⁷. There are similar provisions in Ordinary Cause Rule 33A.22 for civil partnership actions⁸ and in 49:23 of the Court of Session Rules⁹.
9. The Civil Justice Statistics show that in 2018-19¹⁰ there were 12,989 family proceedings initiated in the Sheriff Court and Court of Session. The primary craves related to:
 - 9,591 divorce/dissolution;
 - 2,562 parental responsibilities and rights;
 - 310 interdicts;
 - 38 aliment;
 - 15 exclusion orders,
 - 0 nullity of a marriage or civil partnership;
 - 410 other matters (statistics provided by National Records of Scotland in the past suggest there are under 100 declarators a year of non-parentage/parentage).
10. Tables A4 to A6 in the Civil Justice Statistics show (for the first time) a count of craves in family actions.
11. The statistics show that over 99% of family actions are in the Sheriff Court.

Origins of suggestion that OCR 33.22 (and civil partnership and Court of Session equivalents) could be extended

12. Paragraph 117 of Chapter 5 of the Report of the Scottish Civil Courts Review¹¹ recommended:

"The court has power under Rule 33.22 of the Ordinary Cause Rules, at any stage of the action, to refer an issue in relation to parental responsibilities or parental rights to a mediator accredited by a specified family mediation organisation. None of our respondents criticised the existence or operation of

⁶ The Scottish Government response to the Independent Review of Mediation is at <https://www.gov.scot/publications/scottish-government-response-independent-review-mediation-scotland/>

⁷ [https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33-\(actions-lodged-on-or-after-24-june-2019\).doc?sfvrsn=6](https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33-(actions-lodged-on-or-after-24-june-2019).doc?sfvrsn=6)

⁸ [https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33a-\(actions-lodged-on-or-after-24-june-2019.doc?sfvrsn=4](https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33a-(actions-lodged-on-or-after-24-june-2019.doc?sfvrsn=4)

⁹ <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap49.pdf?sfvrsn=24>

¹⁰ <https://www.gov.scot/publications/civil-justice-statistics-scotland-2018-19/pages/12/>

¹¹ The Gill Review is at <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

this rule, subject to the generally recognised caveat that a referral to mediation will not be appropriate in a case involving domestic abuse or threats of violence. On the contrary, most respondents supported the rule and there was a proposal that it should be extended to permit the court to make a referral to mediation of any issue arising in the course of a family action. We recognise that in family cases the court should sometimes take a more interventionist approach in either bringing about a resolution of the issues at its own hand or in encouraging the use of ADR, and we recommend that the current rule be broadened to allow referral to mediation of any matter arising in a family action. Guidance as to when a referral may be appropriate could be made available to sheriffs and district judges.”

13. It is not clear from the last sentence of this recommendation who would issue guidance to sheriffs on when a referral to mediation may be appropriate.

14. The report of the FLC’s sub-committee on case management in family actions said at paragraph 4.15:

“4.15 Recommendation 9: Alternative Dispute Resolution. The sub-committee accepts that in principle, the sheriff’s power to refer an action to mediation should be widened to apply to all family and civil partnership actions, rather than being restricted to cases involving a crave for a section 11 order. This recommendation is subject to two caveats.

Firstly, there is a need to ensure that the rule is not inadvertently applied to a type of action that is not listed in section 1(2) of the Civil Evidence (Family Mediation) (Scotland) Act 1995 (inadmissibility in civil proceedings of information as to what occurred during family mediation). That appears unlikely, as the list is very broadly framed.

Secondly, the sub-committee understands that Scottish Women’s Aid has expressed concerns to the Scottish Government about the appropriateness of mediation in cases with a domestic abuse background. The sub-committee noted two points which may address this concern: (i) mediation is a voluntary process, and if a party is unwilling to participate the mediator will not allow it to go ahead; (ii) in the proposed new case management structure, it will be open to parties to move for a proof – or at least raise concerns about the appropriateness of mediation – at the initial case management hearing, which will take place at a very early stage in proceedings, often before there has been a child welfare hearing.

The sub-committee recommends that the Committee should consider consulting on this recommendation.”¹²

¹² The report of the sub-committee on case management in family actions is at [https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-\(revised\)--private34ae4ba7898069d2b500ff0000d74aa7.pdf?sfvrsn=2](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-(revised)--private34ae4ba7898069d2b500ff0000d74aa7.pdf?sfvrsn=2)

15. The Scottish Civil Justice Council consulted on the report by the sub-committee and summarised the responses. On recommendation 9, the summary said:

“ Recommendation 9: Alternative Dispute Resolution

45. 18 respondents answered this question: 11 respondents agreed with the recommendation, 3 disagreed, and 4 were not sure.

46. Respondents who agreed with this recommendation suggested that parties must be allowed to address the court on the appropriateness of mediation; that no one should be pressured into mediation, particularly where there are allegations of domestic abuse; and that no adverse inference should be drawn from a party's unwillingness to attend mediation. One respondent proposed allowing a referral to arbitration as well as mediation.

47. Two alternative approaches were suggested:

- in their pleadings, parties could be required to outline what steps they have taken to settle the dispute extra-judicially, which would allow ADR to be considered at the warranting stage;
- rules could require the sheriff to ask parties' views on ADR at the initial case management hearing

48. One respondent disagreed with the recommendation on the basis that the absence of a power to refer parties to mediation does not prevent the court from exploring ADR if it is considered it might be of assistance.

49. The strongest opposition came from a respondent who asserted that “the majority of family mediators are not trained in family law” and another who expressed concerns that there would continue to be “inappropriate referrals” to mediation of cases with a domestic abuse background.”

Implications of extension of rules to cover all family actions

16. As noted above currently the rules cover family actions where an order in relation to parental responsibilities or parental rights is in issue. Extending the provisions could have implications in relation to:

- mediation services;
- courts;
- legal aid; and
- victims of domestic abuse.

Implications for mediation services

17. Section 1 of the Civil Evidence (Family Mediation) (Scotland) Act 1995¹³ (“the 1995 Act”) makes provision so that no information as to what occurred during family mediation conducted by a person accredited as a mediator in family mediation to an organisation approved for the purposes of the 1995 Act by the Lord President is admissible as evidence in any civil proceedings.
18. Section 1(2) outlines the types of family mediation covered by the 1995 Act. Under section 1(2)(e), the Scottish Ministers may add other types by SSI. In line with paragraph 7.22 of the FJMS the Scottish Government intends to make an SSI under section 1(2)(e) to ensure that parties are able to rely on the confidentiality of mediation in international child abduction cases.
19. Some types of family actions¹⁴, by their very nature, are not suitable for mediation. Examples where mediation is unsuitable by the very nature of the action include divorce (in cases where no issues are raised on children or financial provision); declarators of parentage or non-parentage; and declarators of nullity of marriage.
20. The main area other than parental responsibilities and rights where mediation could be used seems to be financial provision (in respect of divorce, dissolution and cohabitants). The Scottish Government notes that other forms of dispute resolution outwith court, as well as mediation, are already used in financial provision cases: examples include arbitration and collaborative law.
21. During previous brief discussion in the FLC on the possibility of extending OCR 33.22, it was suggested that any referrals to mediation should generally take place at an early stage of a family action, rather than later.
22. There are two organisations approved by the Lord President for the purposes of the 1995 Act. These are the Law Society of Scotland (for lawyer mediators) and Relationships Scotland (“RS”). RS are approved for the purposes of accrediting mediators and also provide mediation services through a network of member services across Scotland. Lawyer mediators have an organisation called Comprehensive Accredited Lawyer Mediators Scotland¹⁵. (“CALM”). CALM mediators are instructed or receive referrals individually.
23. RS figures for 2015/16 show that there were 153 court referrals to their organisation for family mediation. This is 6% of the total number of mediation referrals to RS bodies. 33% of mediation referrals come from solicitors or the courts. It does appear that some solicitors will encourage their clients to go to mediation prior to going to court, on the basis that the court will refer them at a later stage if not. So the number of referrals as a consequence of the rule is higher than the 6% which come directly from the courts.
24. An extension of the Ordinary Cause Rules to cover all family actions is likely to lead to an increase in workload for the two mediation organisations but in particular for RS as they handle the majority of court ordered mediation.

¹³ <http://www.legislation.gov.uk/ukpga/1995/6/contents>

¹⁴ OCR 33.1 defines what is meant by “family action”.

¹⁵ <http://www.calmscotland.co.uk/>

Therefore, if the FLC should decide to extend OCR 33.22, and the equivalent provisions for civil partnership actions and for Court of Session Rules, the Scottish Government would discuss workload implications with RS and with CALM.

25. As mentioned above there are two organisations who are approved by the Lord President under the 1995 Act. The Scottish Government is aware that there may be mediators who are currently offering services in financial provision cases but are not members of either of the two organisations. Even if OCR 33.22 should be extended, the court would not be able to refer cases to them as they have not been approved by the Lord President. Consideration would need to be given to this and whether any organisations would wish to apply to the Lord President to be on the list of approved organisations.

Implications for legal aid

26. The Scottish Government's understanding is there is no restriction on the type of case that can be considered suitable for mediation and assessment of whether legal aid would be available is based on the usual eligibility criteria.
27. If OCR 33.22 were expanded to cover all family actions then this may lead to more court orders for mediation which would in turn lead to an increase in legal aid costs. Against that, however, a reduction in court time could lead to a reduction in costs for the legal aid budget.
28. It is difficult to quantify costs/savings in this area¹⁶.

Implications for courts

29. The Scottish Government assumes that a decision to refer an action to mediation is because the court considers it may be possible to resolve the issues in dispute (or some of the issues in dispute) outwith court, thus reducing the amount of court time needed. The Scottish Government again notes it is difficult to quantify costs/savings in this area and also notes that it is difficult to quantify any savings in court time through referring cases to mediation.

Implications for victims of domestic abuse

30. As noted above, whilst the Scottish Government recognises the potential benefits of dispute resolution outwith court in certain circumstances we appreciate that this is not appropriate where there has been domestic abuse.
31. Article 48 of the Istanbul Convention¹⁷ prohibits the use of mandatory alternative dispute resolution processes including mediation and conciliation, in relation to all forms of violence covered by the scope of the convention.

¹⁶ The Scottish Government is aware of this study:

<https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>

¹⁷ <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

32. The Scottish Government suggests that OCR 33.22, and the equivalent provisions in relation to civil partnership actions and in the Court of Session rules, should include an exemption in cases where there is domestic abuse. This would be in line with Article 48 of the Istanbul Convention.

33. Such an exemption raises the question of how the court would be aware of the existence of domestic abuse. Domestic abuse may be raised in the initial writ or defences but it is not guaranteed to be raised.

34. South of the border, the President of the Family Division has issued a Practice Direction in this type of area¹⁸.

35. The Scottish Government suggests the FLC may wish to consider:

- how in a family action the court is made aware of domestic abuse; and
- how the proposed exemption to OCR 33.22 when there has been domestic abuse could be applied.

Conclusion

36. The Scottish Government:

- Asks the FLC whether it considers that OCR 33.22, and equivalents for civil partnership actions and in the Court of Session rules, should be extended to cover all family actions.
- Suggests that any such extension would probably be most useful in financial provision actions.
- Notes that other forms of dispute resolution such as arbitration and collaborative law are already available in financial provision actions.
- Recommends that OCR 33.22, and equivalents for civil partnership actions and in the Court of Session rules, be amended so that the court cannot refer an action to mediation when there has been domestic abuse.
- Suggests the FLC may wish to consider how in a family action the court is made aware of domestic abuse; and how the proposed exemption to OCR 33.22 when there has been domestic abuse could be applied.

Scottish Government
May 2020

¹⁸ https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12