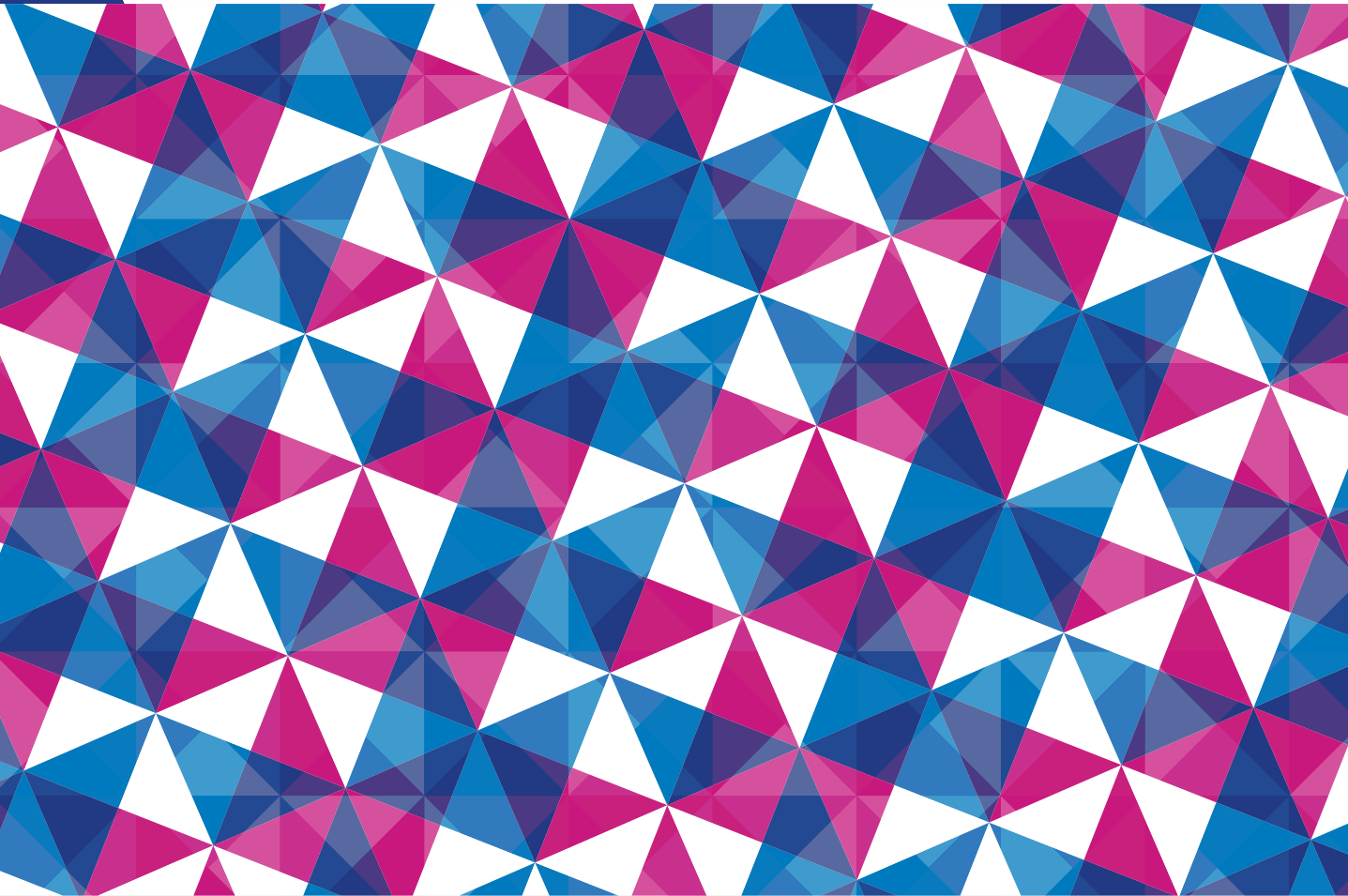


The Commonwealth Guide to Mediation

A Resource for Practitioners and Policy-makers

Matthew Goldie-Scot and Alexandra Tigan



The Commonwealth

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About the Commonwealth Secretariat

The Commonwealth Secretariat is the intergovernmental organisation that supports the Commonwealth's 56 member countries to achieve the Commonwealth's aims of development, democracy, and peace. Its mission is to support member governments, partner with the broader Commonwealth family and others to improve the well-being of all Commonwealth citizens, and to advance their shared interests globally.

About Thuso

Thuso is a strategic consultancy and technical advisory services provider, operating in the humanitarian, development, investment, health, and education sectors internationally, with experience working with the Commonwealth Secretariat and its Commonwealth member states.

Introduction¹

At their meeting in October 2018, senior officials considered a paper on the reform of civil procedure laws in Commonwealth countries. The paper analysed the results of a short questionnaire on civil procedure law sent by the Commonwealth Secretariat to Commonwealth attorneys general, chief justices and members of the Commonwealth Lawyers Association. The paper identified a range of challenges across the Commonwealth relating to the areas of active case management, mediation, laws of evidence, disclosure and discovery, expert evidence, interlocutory applications and appeals. These problems, such as high costs, excessive delays, and burdensome complexity, impede the effective operation of justice systems and equal access to justice for all.

Senior officials indicated that there was significant interest in the topic. They requested that the Commonwealth Secretariat establish an informal, open-ended, expert Working Group, with equitable geographic representation from across the Commonwealth, to identify a core group of civil procedure law and rules challenges commonly encountered, and to propose potential solutions.

Commonwealth Civil Procedure Law Working Group

The Office of Civil and Criminal Justice Reform of the Commonwealth Secretariat (OCCJR) invited interested member countries to nominate representatives to the Commonwealth Civil Procedure Law Reform Working Group (Working Group).

At their meeting in November 2019, Law Ministers welcomed the establishment of the Working Group and endorsed the work of the Commonwealth Secretariat. Law Ministers directed the Secretariat to support the Working Group to develop a work plan for the consideration and development of proposals for the strengthening of select priority areas of civil procedure law, including the use of mediation to resolve disputes.

¹ Wording drawn from the 'Meeting Paper', Virtual Meeting of Senior Officials of Law Ministries (SOLM) (February 2021) and the 'Commonwealth Guide to Mediation – Concept Note'.

Purpose of the consultancy

One of the areas identified by the Working Group in its work plan was mediation, and the proposed output of the Working Group's reformative work in this area was a *Commonwealth Guide to Mediation*.

Based on the Working Group's work plan adopted by senior officials in 2021, OCCJR proposed that a mediation expert be engaged to consider, research and draft the *Commonwealth Guide to Mediation* (Guide), and requested that the input of Working Group members on the suggested topics be considered, researched and included in the Guide.

For this purpose, Thuso Ltd was engaged by the Commonwealth Secretariat. Thuso is a specialist consultancy provider, with a team that has extensive proven experience working with the Commonwealth Secretariat. It has an international mixed-gender team of experts with extensive experience in the areas of mediation, legal research and analysis.

Chapter 1

The History and
Development of Mediation
as an Alternative Dispute
Resolution (ADR) Practice

Chapter 1

The History and Development of Mediation as an Alternative Dispute Resolution (ADR) Practice

The following chapter frames the context of this Guide, providing insight into the historic setting in which mediation has developed as an ADR practice, while noting disparity and convergence of this development in the varied contexts of the Commonwealth.

By examining the position of mediation in a tradition of ‘adversarial’ court-adjudicated disputes, it chronicles the evolution of mediation as a case management tool. Furthermore, it explores the various models that have been adopted, identifying emerging areas of innovation and highlighting exemplars of good practice. In particular, it examines the distinction and relationship between mediation and arbitration, as well as noting the growing role of ‘Med-Arb’ and ‘Arb-Med’ practices by which the mediation and arbitration processes are combined. This is undertaken alongside a wider exploration of the relationship of mediation to broader justice traditions (including, but not limited to, litigation and arbitration) while acknowledging the varied and long-standing indigenous approaches to justice and dispute resolution.

With this context established, the Guide explores the potential impact of mediation on the law throughout the Commonwealth, and the implications this may have for stakeholders.

1.1 The position of mediation in a tradition of adversarial, adjudicated disputes

Definitions

To adequately address the role of mediation in a tradition of adversarial, court-adjudicated disputes, it is first necessary to define terms. This facilitates consistency in drawing comparisons, and ensures appropriate focus in subsequent analysis.

Mediation is, at its simplest, defined as ‘assistance to two or more interacting parties by third parties’ (Kressel & Pruitt, 1989) who, in most cases, are neutral and have no authority to impose an outcome (Wall Jr., Stark, & Standifer, 2001).

As such, mediation is a long-standing practice. Indeed, it is one of the oldest and most widespread forms of conflict resolution found throughout the Commonwealth and internationally, providing for a wealth of examples of its use (*ibid.*, p. 370).

Mediation is distinguished from negotiation in that the former ‘involves discussion between the parties *with the goal of reaching agreement*’ [emphasis added] (Carnevale & Pruitt, 1992, p. 532) while in the latter a third party, or parties, facilitates this process (Cole, et al., 2018, *passim*). Mediation allows the discussion to focus on the parties’ possible options for resolution rather than only their negotiating position.

Further to this, mediation is characterised as being ‘flexible, voluntary, and confidential’ (Thomson Reuters Practical Law, 2022a) ‘with the parties retaining control of the decision whether or not to settle and on what terms’ (*ibid.*). Confidentiality is a critical part of the mediation process because it allows the parties to speak openly and frankly with the mediator and each other, often leading to a better understanding of the parties’ true interests. Indeed for

‘mediation to be effective parties must disclose their private views, needs, and future tactics. They will only be willing to do this if they can be assured that these confidential communications will not later be used against them ... [mediation is] a subtle and delicate process, where the mediator functions as a catalyst, and where privacy is a key element without which the process has little hope of success’

(Brown K. L., 1991, p. 309).

In difficult or high conflict cases, the ability to caucus separately with the mediator has evolved into an effective tool for resolution. This allows the mediator to carefully and frankly address the needs and concerns of each party separately, and then communicate possible options for settlement to the other party.

Mediation is a wide-ranging tool applicable to diverse areas including (but not limited to) ‘marital decision making, industrial relations, interoffice coordination, corporate mergers,

group decision making, and international relations' (Carnevale & Pruitt, 1992, p. 532). It therefore falls within the wider context of ADR, i.e. 'dispute resolution methods other than court proceedings' (Thomson Reuters Practical Law, 2022b), serving as a tool by which 'opposing preferences' can be resolved to the satisfaction of all parties to the dispute in question (Carnevale & Pruitt, 1992).

Benefits of mediation

In common law contexts (which provide a shared legal heritage in many but not all Commonwealth member states), a primary benefit of mediation is that of 'cost reduction' (Miranda, 2014). Given widespread concerns over 'high costs of justice' (ibid.) and associated pressure on courts (Hartnell, 2021), there has been increased demand for approaches to resolving disputes which can reduce both costs and time.

As such, mediation throughout the Commonwealth plays an increasing role in resolving disputes between parties outside the context of traditional adversarial, court-adjudicated disputes. This is a long-running practice that primarily emerged in relation to labour relations (Davidson, 1979) and has particularly been applied to matters relating to 'personal relations' (Miranda, 2014) such as divorce, child custody, inheritance and related matters. This is in part due to the extent to which hostility and animosity arising in such cases has the potential to render adversarial, court-adjudicated disputes protracted and costly, ultimately failing to serve the interests of disputing parties or to resolve underlying discord (ibid).

In many contexts throughout the Commonwealth, mediation is increasingly promulgated as an ADR mechanism which can reduce pressure on the courts (Hartnell, 2021), decrease costs for all parties and lead to satisfactory outcomes for those engaged in disputes (The Tribune India, 2019). A mediated outcome allows the parties to resolve disputes in creative ways. Parties are not limited to solutions that are within the jurisdiction of a court.

Commercially, mediation also allows for the resolution of disputes pertaining to business matters in a way that is less costly than litigation, and enables the preservation of business relationships during dispute resolution (Miranda, 2014). This

is an outcome which is often undermined by the adversarial approach necessitated by court-adjudicated disputes.

Regardless of the nature of the dispute which mediation seeks to resolve, the confidential nature of mediation as an ADR tool is a significant potential benefit to parties in and of itself (Agapiou & Clark, 2018). Commercially sensitive matters, potentially embarrassing allegations and private family matters can be resolved by means of mediation, avoiding the public nature of most court-adjudicated disputes (*ibid.*). This is, nonetheless, intertwined with a countervailing concern that, if parties fail to settle, they run the ‘risk of revealing their hand to their opponents’ (Miranda, 2014, p. 15).

The voluntary nature of mediation

Despite the purported benefits of such approaches, a range of research suggests that ‘people are not as enthusiastic about mediation as the government, the judges, and the mediation community think they ought to be’ (Randolph, 2010, p. 499). Increasingly, these various factors have led to a shift in relation to what had historically been a key distinguishing factor of mediation as opposed to other ADR practices, i.e. that participation in mediation was *voluntary*. A range of Commonwealth (and other) jurisdictions have instigated mechanisms to compel participation in mediation particularly in the case of family law (Miranda, 2014) and in industrial disputes, underpinned by ‘a desire both to alleviate courts’ case burdens and to serve disputants better by offering ADR processes that are efficient and that promote amicable resolution’ (Crowne, 2001, p. 1791).

Such mechanisms are now so widespread that some commentators, including the Master of the Rolls in the United Kingdom (Vos, 2022), have suggested that, in England and Wales “Alternative Dispute Resolution” should really be renamed as “Dispute Resolution” since it is not alternative at all’ (Simmons & Simmons, 2021). Commentators have also posited that, in future, mediation will be integrated fully into the justice system (Vos, 2022). This is echoed in other Commonwealth contexts. In Australia, ‘the practice of mandatory or quasi-mandatory mediation has proliferated ... and, indeed, now occupies the position of Australia’s default dispute resolution mechanism’ (Waye, 2016, p. 214). In Canada, Saskatchewan

(Macfarlane & Keet, 2004-2005), Alberta, Ontario and Quebec 'all have some form of mandatory dispute resolution' (Harrison & Ivanovic, 2019). In South Africa, 'parties are required to consider mediation for every new matter instituted in a High Court of South Africa' (Adams & Adams, 2020; Levenstein, Webster, & Galela, 2021). Likewise, in India the Mediation Bill, 2021 (PRS Legislative Research, 2022) is being deliberated, and seeks to 'settle any civil or commercial disputes through mediation before seeking court or tribunal's intervention' (Hindustan Times, 2022). This emerging consensus has led to the suggestion by some commentators that:

'the power of the mediation message lies not only in the simplicity and consistency of its claims, but in its virtual monopoly on new thinking. Mediation enthusiasts have seized the policy initiative and captured the imagination of thought-leaders while the legal profession and mediation sceptics have largely been spectators in this battle of ideas.'

(Genn, 2010, p. 202)

Historically, it was held in the courts of England and Wales that 'to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court' (Halsey v Milton Keynes General NMS Trust). However, this principle has been increasingly eroded, with a given party increasingly penalised by being 'denied part or all of its costs if it had unreasonably refused an invitation to mediate' (Simmons & Simmons, 2021). As noted above, such approaches are now widespread throughout the Commonwealth. These are not without detractors, with concerns raised over 'just and sustainable outcomes' as well as potential abuse of mediation where a power imbalance exists between the parties (ibid.).

It is likely that mandatory and/or quasi-mandatory mediation will increasingly serve as a primary mechanism for resolving disputes between parties. This is due to an emerging growing consensus that ADR practices, and mediation in particular, have the potential to reduce pressure on courts, to reduce costs to parties and to help them to arrive at settlements in a more amicable manner than in the settling of adversarial court-adjudicated disputes.

Throughout the Commonwealth, this process has been accelerated by lockdowns instigated in response to the

COVID-19 pandemic, with numerous governments expressing the view that disputes arising within these circumstances should be resolved by means of ‘negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes’ (Cabinet Office, 2020, p. 4). Furthermore, there have been suggestions that ‘Covid changes everything. These extraordinary times call for our courts to partner with mediation, integrating mediation with the court’s own process and providing stick and carrot type incentives to mediate’ (Sharp, 2020).

Mediation is, therefore, likely to play an increasingly prominent role in dispute resolution throughout the Commonwealth.

1.2 The evolution of mediation as a case management tool

Courts throughout the Commonwealth and internationally are increasingly ‘inclined to prescribe mediation mandatorily’ (Jagtenberg, 2014, p. 281). However, some commentators have suggested there remains a lack of a clear or consistent ‘evidence-based framework for fundamentally assessing different conflict resolution strategies’ (ibid., p. 281).

That said, there exists a growing set of case studies from throughout the Commonwealth suggesting that mediation can serve as an effective tool for case management and significantly reduce pressure on the courts. This is the case particularly when mediation is implemented alongside other complementary measures.

In Tonga, mediation was implemented alongside wider reforms (specifically, electronic case management). This led to significant reductions in the average time for the country’s Supreme Court to enforce contracts (cut from 510 days to 310) (Ford, 2008). In India, Chief Justice NV Ramana has professed the view that ‘[a]n active effort must be taken by Courts to make negotiation and mediation mandatory, as a part of case management’ (Ojha, 2022) with a view to reducing pressure on India’s court system and improving outcomes for parties to disputes. This is reflected further by the introduction of the Mediation Bill, 2021 (Hindustan Times, 2022). Similar approaches to mandatory mediation have been undertaken in some parts in Canada, such as Ontario (Winkler W. K., 2008). In British Columbia, Online

Dispute Resolution is included in the negotiation phase in the context of the Civil Resolution Tribunal case management system (ibid.; Civil Resolution Tribunal, 2022).

In Australia, ADR guidance on mediation forms a key part of the *Case Management Handbook* of the Law Council of Australia/Federal Court of Australia (2014) to provide structured guidance to affected parties. The guidance is accompanied by associated publications comprising *Ethical Guidelines for Mediators*, *Guidelines for Lawyers in Mediation* and *Guidelines for Parties in Mediations*. These set out guidance for the general application of the process of mediation in a case management context. As such, mediation is an established and important part of the case management of litigation in Australia. Some form of mediation (either formal in-person mediation or other type of settlement or conciliation conference involving a third-party facilitator) is a feature of a standard court timetable in most federal and state courts (and many tribunals) in Australia.

Further to this, in some Australian jurisdictions, mediation is used not just to try and resolve the entire dispute between the parties, but to resolve particular disputes within the litigation itself. For example, the parties may be engaged in a significant dispute around discovery (a pre-trial procedure which allows parties in a lawsuit to obtain evidence from the other party or parties by means of discovery devices such as interrogatories, requests for production of documents, requests for admissions and depositions). That discrete dispute can be referred to mediation with a court-appointed mediator to resolve the dispute quickly and informally and without the need for a costly interlocutory hearing. 'Mixed' approaches are increasingly used (Stipanowich, 2020) with parties integrating dispute resolution mitigation into a wider process during which parties may be mediating, arbitrating and/or litigating at different points in the dispute. This increase suggests that such flexible approaches allow for resolution that could not be achieved through litigation alone.

These selected exemplars form part of a wider context in which 'governments have taken a special interest in introducing mediation as a means of improving judicial performance' (Ali, 2018, p. 25). This includes a particular focus on 'efficiency, reduction of caseloads, private and public sector cost reductions,

as well as extrinsic factors including relational, societal and process-based considerations' (ibid., p. 26).

In the United Kingdom, these took the form of an increased emphasis on consideration by the courts as to whether parties have unreasonably refused to engage in ADR or have behaved in a manner that is unreasonable during ADR proceedings (ibid.). In contrast, in Singapore, mediation under the oversight of the state courts and family justice courts are cited as having contributed to Singapore's current status as 'an example of a highly efficient and effective judicial system' (ibid., pp. 27–28). This mirrors the approach adopted in Australia where its court-annexed mediation programme is posited as being 'one of the oldest and most successful mediation systems in the modern world' (ibid., p. 28), likewise instituted to address historic concerns over 'inefficiency and high costs' (ibid., p. 28). The Australian context included the initiation of a 'Settlement Week'. This is a distinct innovation by which courts set aside their usual court roles for a one-week period, and instead focus on making use of court facilities and mediation to settle civil matters. This reportedly reduced the backlog of cases, with successful mediation of 235 cases pending litigation (ibid.). Broader findings from Australia suggest that such court-based mediation programmes have significantly reduced delays (ibid.). Similar initiatives elsewhere in the Commonwealth have mirrored these successes. A successful pilot of mandatory mediation by means of a two-year pilot rule was introduced in the Ontario Court Rules for the Ontario Superior Court of Justice (ibid.). This resulted in the development of further legislation 'integrating mediation into the civil justice system' (ibid., p. 37). 'Settlement Week' approaches have been adopted in other Commonwealth contexts such as Nigeria, with a view to 'encouraging the use of ADR mechanisms and creating awareness about the effectiveness and benefits of mediation specifically' (Muller & Nel, 2021, p. 46). Given the reported efficacy, similar models could potentially be piloted to achieve the same ends throughout the Commonwealth more broadly.

On balance, it appears that that court-referred mediation increases uptake of mediation, and has the potential to garner marked efficiency savings as a case management tool (ibid.). This is particularly the case in relation to family courts as well as playing a key role in industrial relations cases (Latreille & Saundry, 2014) where proactive use of mediation (and related

conciliation) can serve as a powerful tool for case management (ibid.). While these practical considerations highlight the pragmatic benefits of mediation, its most substantive role is that of potential enhanced access to justice as 'it enables parties to resolve their disputes as cheaply and as quickly as possible' (Winkler W. K., 2007).

The Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers, published by the Investment Climate Advisory Services of the World Bank Group (2011)² is a potential tool on which stakeholders can draw in relation to strengthening provision in this area, particularly in contexts in which resources are constrained. This manual provides an overview of best practice guidelines for the establishment of ADR centres, a set of case studies on ADR centres internationally and a comprehensive set of pro-forma documents for use by ADR centres. The aforementioned case studies include examples from Commonwealth member country contexts, with cases drawn from South Africa and Pakistan, in addition to extensive guidance on the case management processes in both 'court-connected' and 'free-standing' ADR settings. The manual is accompanied by an electronic case management system/database, and associated manual and installation instructions.

Similarly, a mediation development toolkit has been developed by the European Commission for the Efficiency of Justice comprising a *Guide to Mediation for Lawyers*, a document developed jointly with the Council of Bars and Law Societies of Europe (CCBE) of particular relevance to those in European Commonwealth member countries (CEPEJ, 2018).

Case study: Models for good practice to encourage awareness and uptake of mediation

Settlement Weeks

Context: Australia and Nigeria

'Settlement Weeks' have been implemented successfully in a range of other Commonwealth contexts including Nigeria, where an additional incentive in the form of free mediation was used to encourage uptake (Muller & Nel, 2021).

Where innovative and high-profile court-annexed mediation approaches are adopted, there is also scope for a compounding effect by which the use of ADR mechanisms is further encouraged, and increased awareness about the effectiveness and benefits of mediation specifically is achieved. This can lead to increasing the long-term adoption of such approaches. Additionally, backlogs of cases pending litigation can be cleared.

2 Available at: https://web.worldbank.org/archive/website01553/archived/www.wbginvestme ntclimate.org/uploads/15322_MGPEI_Web.pdf

1.3 The relationship of mediation to arbitration and other ADR practices

Arbitration

At its most fundamental, the distinction between mediation and arbitration is that in the case of the latter, the disputing parties ‘commit to conform to the third party recommendation’ (Goltsman, Hörner, Pavlov, & Squintani, 2009, p. 1397). Indeed, in most cases, having accepted to be parties to the arbitration process, the outcome is both binding and enforceable.

This distinct attribute of mediation has been characterised as being one in which the mediator plays a ‘facilitative’ role, educating the parties ‘about the norms that may apply to their situation’ while refraining from telling the parties ‘what to do’ (Miranda, 2014). In contrast, arbitration ‘involves a *decision* by an intervening third party or “neutral”; mediation does not’ (Cooley, 1986, p. 263).

That the third party in the context of mediation is both neutral and is not being invited to adjudicate the dispute allows for a potentially wider range of acceptable outcomes for both parties as well as ‘compromise’ settlements, allowing for a mediated outcome that does not necessitate the emergence of a ‘victor’ to a dispute. The mediator’s role within this context is to render the underlying negotiation ‘more viable’ (Carnevale & Pruitt, 1992) with a view to finding a solution that is acceptable to all parties. When an agreement cannot be reached, the mediation is unsuccessful, and parties maintain their recourse to legal proceedings. In summary:

‘The critical difference between the two roles lies in the nature of decision-making. Arbitrators decide the outcome of parties’ disputes. Mediators help the parties to decide the outcome themselves.’

(Nolan-Haley, 2020, p. 283)

Arbitration is opted for by a wide range of parties despite being viewed by many commentators as being inherently ‘riskier’ (ibid.) than mediation. This is because such parties are primarily of the rationale that their cause is ‘just’ and they ‘believe the arbitrator will rule in their favour’ (ibid.).

In addition to arbitration and mediation, other approaches are prevalent internationally. It is, therefore, necessary to further delineate potential ADR mechanisms which share some

characteristics with both mediation and arbitration, but which are distinct from them, namely conciliation and the use of an ombudsman.

Conciliation

Conciliation bears many similarities to mediation, also making use of a third party (or parties) to support dispute resolution between two or more parties. The role and remit of the third party are what render conciliation distinct. While a mediator seeks primarily to facilitate negotiations with a view to supporting the parties in coming to an agreement, a conciliator plays a more proactive interventionist role, positing potential solutions with a view to 'guide them through his experience, trying to achieve a fair and sustainable agreement' (Miranda, 2014, p. 22). In some Commonwealth contexts, a 'conciliator' may be appointed with a view to resolving a dispute as a judge-initiated practice particularly in a civil suit (UNODC, 2007) though this is not a universally accepted definition (Miranda, 2014)). In other contexts (both Commonwealth and non-Commonwealth), the conciliator may be sought out by parties directly, including 'pre-emptively', with a view to keeping 'the business relations between customers, suppliers, partners, employees, [etc.] good, resolving quickly but also preventing possible disputes' and providing a range of benefits to parties, given the 'inexpensive and flexible' model conciliation offers and the potential benefits it confers 'especially in the business field' (ibid., p. 22). While the distinctions drawn here between conciliation and mediation are marked, the 'flexible' approach applicable to both results in considerable variety in approach, and therefore potential scope for overlap, both within and between Commonwealth member countries.

The ombudsman

The role of the ombudsman in ADR is less explored in the relevant literature than that of mediation, arbitration and conciliation (Gadlin, 2007). In the 'three decades or so after the end of World War Two' (Gregory, 2001, p. 99) with resurgence in the 1970s and 1980s and increased frequency from then on, some Commonwealth contexts have adopted the Scandinavian office of the ombudsman. Originating in Scandinavia, this term refers to an officer appointed by the legislative body to receive

and investigate complaints against unjust administrative action. New Zealand was the first Commonwealth country to adopt this approach, in 1962 (Toxey, 1969), to 'protect the rights of citizens and at the same time counteract the effects of bad administration in dealings between members of the public and governmental authorities' (Gregory, 2001, p. 99).

The ombudsman continues to play a distinct role in resolving disputes particularly when they relate to the relationship between the citizen and the state or regulated sectors (such as insurance or financial services). In most cases, the ombudsman has a clearly defined remit, the strength of which lies in the 'simplicity and concreteness of ombudsmen's decisions' (Miranda, 2014, p. 21). However, depending on the level of delegated authority and area of oversight, the nature of the ombudsman's role may vary significantly (both within and between Commonwealth contexts). In some cases, the ombudsman makes binding edicts (Gregory, 2001) and mechanisms for redress while in others, they provide a function that is much closer to that of a mediator (Miranda, 2014).

Ombudsmen providing redress in cases of grievances against, or disputes with, government and/or government agencies, are particularly widespread in European Commonwealth member countries (Hodges, 2014) and in all regions of the Commonwealth (Toxey, 1969; Zuegel, Cantera, & Bellantoni, 2018). In addition to these ombudsmen and those with oversight of regulated industries, numerous 'membership'-based 'industry body' ombudsmen also exist throughout the Commonwealth. These primarily offer 'consumer protection' dispute resolution between their members and end-customers.

The distinctions between various ADR mechanisms, particularly the distinction between mediation and arbitration, are increasingly 'blurring' (Nolan-Haley, *Mediation: The "New Arbitration"*, 2021). This is particularly the case in what are termed 'Med-Arb', 'Arb-Med', and 'Arb-Med-Arb' approaches, with mediators 'switching hats' (Stipanowich, 2020). In such cases, the above nomenclature relates to the sequence in which there is a 'switch' between arbitration and mediation (such as beginning with mediation that could then switch to arbitration, i.e. 'Med-Arb'). It is posited that such approaches provide a 'flexible and efficient form of [ADR], which combines the advantages of confidentiality and neutrality with enforceability and finality' (SIMC, n.d.). The precise approach adopted

varies significantly depending on context, but in general, it allows parties who have commenced or who are considering commencing arbitration, to seek to resolve their dispute through mediation with any resulting settlement being recorded as a consent award (ibid.). Should mediation fail in such a model, the parties can still proceed with arbitration. Such approaches are not without their detractors, with some commentators suggesting that the benefits of both mediation and arbitration are undermined by a hybrid approach:

'The key principles of both mediation and arbitration are compromised by Med-Arb. The core values of mediator neutrality, party self-determination, and confidentiality cannot be satisfied by Med-Arb. In arbitration, the promise of arbitrator impartiality, the due process right to equal treatment and confrontation, and the enforceability of the arbitral award are weakened.'

(Pappas, 2015, p. 157)

A key attraction of this approach is the scope for 'finality' and 'enforceability' as 'settlement agreement obtained through the Arb-Med-Arb process may be accepted as an arbitral award, and subject to any local legislation and/or requirements, is generally enforceable in 160 countries under the New York Convention' (ibid.). This requires courts of signatory states to give effect to private agreements to arbitrate, and to recognise and enforce arbitration awards made in other signatory states. Such approaches are becoming increasingly widespread in Commonwealth settings (Stipanowich, 2020) such as in the context of the Singapore International Mediation Centre (SIMC, n.d.) and the Mauritius Mediation and Arbitration Center (Mauritius Mediation and Arbitration Center, 2017). In such contexts, it is usually (though not always) the case that the mediator and the arbitrator are not the same individual (SIMC, n.d.). Given the potential advantages and flexibility of the Med-Arb, 'Arb-Med' and 'Arb-Med-Arb' approaches, it is likely that their adoption will increase throughout the Commonwealth. This is supported by industry findings which suggest a trend of 'significant increase in the overall popularity of arbitration combined with ADR' (White & Case, 2018). As a result, the distinction between mediation and arbitration could continue to 'blur' though some commentators have raised concerns that this has the potential to undermine some of the broader benefits of mediation (Nolan-Haley, 2021). Furthermore, this creates

a potentially 'adversarial' setting, which has the potential to recreate many of the disadvantages of litigation that mediation offers the potential to avoid (ibid.).

Two significant potential disadvantages of mediation compared to other ADR approaches are those of uncertainty and 'lost' costs, as mediation does not guarantee an outcome. This is in contrast to arbitration (in which a non-decision cannot arise).

Case study: Hubs of excellence in mediation

SIMC/MARC

Context: Singapore and Mauritius

Singapore International Mediation Centre (SIMC) (SIMC, n.d.) serves as an independent not-for-profit entity based in Singapore. It provides a range of mediation services to international clients and access to a panel of international mediators to support parties seeking to resolve their international commercial disputes amicably.

It has emerged as a leading hub of excellence in mediation internationally. It has pioneered an innovative 'Med-Arb' approach by which resulting settlement agreements can be accepted as an arbitral award. Provided local legislation allows, this is generally enforceable under the New York Convention in 160 countries (ibid.).

The Mediation and Arbitration Center Mauritius (MARC) (MARC, 2017) is an autonomous non-governmental dispute resolution centre based in Mauritius. It was established with a view to 'providing the business community with quick, efficient, flexible and confidential means of resolving disputes through mediation or arbitration, as alternatives to litigation before state courts' (ibid.).

Both SIMC and MARC allow for 'opt-in' arrangements, allowing for a wide range of access to their mediation provision.

Both also allow for 'Med-Arb' arrangements providing for combined dispute resolution proceedings, allowing for confidence in finality and enforcement. Both also allow for high levels of confidentiality. MARC also provides access for Francophone clients, facilitating access for a wide range of clients. Such mediation/Med-Arb arrangements foster investor confidence, with both Singapore and Mauritius serving as onward investment conduits for Asia and Africa respectively.

They provide potential avenues for mitigating risks on major projects involving governments and the private sector and effective models to avoid cost escalation.

As such, they provide both a powerful tool for stakeholders in the Commonwealth, particularly smaller jurisdictions that may wish to 'opt-in' rather than seek to replicate their provision, as well as a model of good practice to inform similar initiatives throughout the Commonwealth.

Other ADR approaches are in use throughout the Commonwealth including (but not limited to) mini trials, summary jury trials (Maitra, 2020) and advisory opinions (Hensler, 2000). While these may influence parties' decisions to opt for mediation, they fall outside the mediation model.

Table 1.1 Summary of the various modalities of ADR and their characteristics

Type of ADR	Role played by third party	Key characteristics
Mediation	The mediator facilitates negotiations with a view to supporting the parties in coming to an agreement. They are neutral and do not adjudicate.	Allows for a potentially wider range of acceptable outcomes for both parties as well 'compromise' settlements, allowing for a mediated outcome that does not necessitate the emergence of a 'victor' to a dispute.
Arbitration	The arbitrator provides a recommendation which is binding and enforceable.	A key attraction of this approach is the scope for 'finality' and 'enforceability' of the arbitrator's decision.
Conciliation	A conciliator posits potential solutions with a view to guiding parties to an agreement.	In some contexts, a conciliator may be appointed with a view to resolving a dispute, while in others they may be sought out by parties directly including 'pre-emptively'.
Ombudsman	The ombudsman role may vary significantly, in some cases making binding edicts while in others providing a function that is much closer to that of a mediator, depending on the level of delegated authority and area of oversight.	Outcome varies depending on context.

1.4 The relationship of mediation to other justice traditions, including restorative justice

UN literature defines restorative justice as being characterised by a ‘restorative process’ by which ‘the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator’. Restorative justice is underpinned by ‘the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community’ (UNODC, 2007, p. 6).

Within a range of Commonwealth contexts, such approaches are ‘pragmatic’. In this sense, they seek to achieve ‘practical benefits for the criminal justice system and explore the human benefits, not only for victims, but also for offenders, the families of both parties and the community’ (Bidois, 2016, p. 596). They also have the potential to improve ‘access to justice’ and to provide ‘fair outcomes’ in addition to serving a role in the ‘prevention and deterrence of crime’ (ibid.).

There is research suggesting that there is growing evidence of the efficacy of such approaches with regard to reduced repeat offences, increase in access to justice, reduced post-traumatic stress symptoms for victims of crime victims, improved satisfaction with outcomes (for victims and offenders), reduced costs of administering justice and reduced recidivism in comparison to custodial sentencing (Sherman & Strang, 2007). However, these benefits are not universal. A restorative justice initiative focused on Aborigines in Canberra for example, saw increased arrest rates, albeit with a small sample (ibid.). Likewise, it is suggested that mediation-based restorative justice approaches may not be appropriate in cases where ‘power asymmetries are very large and an issue of public justice is at stake’ or in cases relating to ‘matters that society wishes to deter outright’ such as domestic violence or child abuse (UNODC, 2007).

Commonwealth contexts that are³ or were until recently members of the European Union⁴ have seen a prioritisation of restorative justice approaches. This was impacted by the European Union Council Framework Decision of 15 March 2001

³ i.e. Cyprus and Malta.

⁴ i.e. the United Kingdom.

on the Standing of Victims in Criminal Proceedings, Article 10. This made an explicit statement that member countries should promote mediation in criminal cases and bring into force their legal instruments by 2006 (2001/220/JHA: Council [of the European Union] Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, 22.3.2001, p. 1–4). However, the extent to which there is a ‘shared understanding’ of the terminology applied in European contexts has been questioned by a range of commentators (Gade, 2018; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA).

The most common model of restorative justice adopted throughout the Commonwealth and internationally is ‘victim-offender mediation’ (UNODC, 2007), by which ‘the victim and offender meeting voluntarily to resolve their dispute, facilitated by a trained mediator’ (ibid.) such as in the case of the model adopted by New Zealand (justice.govt.nz, 2022), South Africa (UN-Habitat) and Papua New Guinea (Dinnen, 1997). As in the case of mediation more broadly defined, the mediator *does not* arbitrate in this model (ibid.).

Two other models of restorative justice identified in the UNODC (2020) *Handbook on Restorative Justice Programmes* are ‘restorative conferencing’ and ‘circles’. ‘Restorative conferencing’ is a model whereby other parties affected by the offence are brought together by an impartial third party acting as a facilitator. This can take the form of ‘family group conferences’ or ‘community conferences’. Furthermore, traditionally used by indigenous communities, ‘talking circles’ have been adapted to the modern criminal justice system and entail communal dialogues. They can be implemented at neighbourhood or community level.

Many approaches to restorative justice, therefore, adopt a mediation model ‘distinct from legal adjudication’ (UNODC, 2007, p. 7) albeit with a focus (in most cases) on criminal justice contexts. This is not to suggest that ‘restorative justice’ approaches preclude adjudication entirely as a wide range of approaches fall under this broader umbrella. Noteworthy examples include the South African Truth and Reconciliation Commission, which had a focus on ‘closure’ and associated powers to grant amnesty to perpetrators of human rights abuses

(Llewellyn & Howse, 1999) and a wide range of ‘arbitration and customary justice or indigenous practices’ as noted in the UN Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power (UNODC, 2007, p. 10).

Sentencing circles are an alternative to a sentencing hearing. These are a community-based process where community members try to agree on an appropriate sentence that everyone is satisfied with.

The sentencing circle includes the accused, an elder, judge, the Crown and lawyer. The circle might also include an indigenous court worker, police or court officers, members of the accused’s family, and the victim and their family.

Sentencing circles vary in structure and process but are generally based on restorative justice principles. This means that, instead of punishing the accused, sentencing circles try to help the accused heal their relationship with the victim and with the community.

Sentencing circles are usually not available for people facing sentences that are longer than two years.’ (Steps to Justice, 2022)

Within the context of the Commonwealth, such ‘customary justice or indigenous practices’ are varied and multifaceted. In Australia and Canada, indigenous informal participation in sentencing procedures (referred to as ‘Circle Sentencing’ in Canada (Marshall, 1999)) has been in place for an extended period in rural areas, and has also seen influence in urban settings since the late 1990s (UNODC, 2007). It has been suggested that these developments have supported a process by which ‘court processes may have become more culturally appropriate and greater trust may have grown between indigenous communities and judicial officers’ (ibid., p. 29). The role of such approaches is particularly relevant in ‘postcolonial settings’ in which ‘the formal State justice system may be seen by indigenous communities as the continuation of illegitimately imposed foreign institutions and laws’ (International Commission of Jurists, 2018).

Further examples applicable to the national experience of Canada that provide access to restorative justice processes or are grounded in restorative justice principles include:

1. The Correctional Service of Canada – Restorative Opportunities Program (Government of Canada, 2022d)
2. The Department of Justice Canada Indigenous Justice Program (Government of Canada, 2021a)

3. Journey to Light: A Different Way Forward – Final Report of the Restorative Inquiry – Nova Scotia School for Coloured Children (Restorative Inquiry, 2019)
4. Report from the Restorative Justice Process at the Dalhousie University Faculty of Dentistry (Llewellyn, Macisaac, & Mackay, 2015)
5. Restorative Engagement Program (Government of Canada, 2022c)

Parallel legal structures exist in a wide range of Commonwealth contexts. In these structures, customary law (often overlapping with and sometimes in conflict with English common law, Roman-Dutch Law and Portuguese Law (UN-Habitat, 2005)) provides for significant devolution of power through a chieftainship system. For example, in Lesotho, chiefs (and village headmen or headwomen) continue to play a formal role in government as well as having a legal duty to ‘resolving disputes over land and livestock’, ‘upholding customs and culture’ and ‘upholding the rule of law’ (De Montfort University Leicester). Similar approaches to mediation are well established in Pacific contexts such as Papua New Guinea (May, 1997). In such settings, traditional local leaders serve a bifurcated role as both mediators and arbitrators, while mediation has a long standing as a traditional approach to dispute resolution (Ahorsu & Ame, 2011). Similar roles are played within Commonwealth contexts with an Islamic legal tradition (and/or a tandem court system such as that in Malaysia) by village and religious leaders (Wall Jr. & Callister, 1999).

Given the continued role played by traditional leaders in many Commonwealth contexts, a range of proactive engagements have been enacted to proactively train traditional chiefs as well as religious leaders as mediators (Este, 2022; CMA, n.d.). Other actors highlight the importance of engaging in dialogue with community elders and chiefs to ensure the efficacy of mediation more broadly (Search for Common Ground, 2022). Actors, including civil society organisations, have also emphasised the importance of proactively communicating the synergy and continuity between traditional practices (such as tribal councils, or ‘jirgas’ in Pakistan) and contemporary mediation approaches as a mechanism for dispute resolution (Hussain, 2019).

Access to the court system is likely to be limited for many Commonwealth citizens living in rural areas, small-island

settings or settings in which both traditional leadership structures and religious beliefs continue to play a significant socio-cultural role. It is, therefore, important that policy-makers build on these examples of collaboration with traditional leaders to leverage the role they play in communities and their potential to continue to facilitate effective mediation and access to justice. This should be undertaken alongside structured measures to ensure this does not disadvantage vulnerable groups, particularly where socio-cultural contexts may 'reinforce harmful gender stereotypes and cultural assumptions that result in discrimination against women and children and otherwise negatively impact upon their rights' (International Commission of Jurists, 2018).

Noteworthy, is the distinct tradition of 'Lok Adalat' which emerged in India in the 1970s and 1980s (Zainulbhai, 2016). It provides 'informal' courts operating on a 'collaborative system' (ibid.) which are intended to serve as 'a forum where disputes/cases pending in the court of law or at pre-litigation stage are settled/compromised amicably'. This model resembles 'conciliation' (ibid.) in other Commonwealth jurisdictions. No fees are payable to access Lok Adalat and, if a settlement is reached, existing fees paid to the courts are refunded to the parties, incentivising settlement (ibid.). The Lok Adalat also bears many similarities to mediation in that it does not 'decide the matter so referred' but rather seeks to achieve 'basis of the compromise or settlement between the parties' (ibid.). Significantly more accessible to citizens (ibid.), it has the potential to 'relieve the overburdened dockets of more formal courts' (ibid., p. 250) and indeed has resolved 'millions' (ibid.) of past disputes. While concerns have been raised over an erosion of the 'collaborative' model which underpinned the Lok Adalat system, derived from historic village-based courts comprising 'informal tribunals headed by village elders' (ibid., p. 252), it remains a key mechanism for providing access to justice for citizens who would otherwise have no recourse. As such, support focused on encouraging a mediatory role for the Lok Adalat could help to address concerns raised by some commentators over a perceived trend ('Over the last two decades, however, the system has become more adversarial, as judges and lawyers have increasingly been unable to work together', ibid., p. 250) towards more adversarial approaches. It could revitalise a long-running ADR system and provide insights into how similar approaches could be adopted elsewhere in the Commonwealth.

1.5 The potential impact of mediation on the development of the law

As noted throughout this chapter, there still appears to be some unwillingness to adopt mediation by certain parties to disputes (Randolph, 2010) despite the apparent risks and associated negative outcomes arising from adversarial court-adjudicated disputes. Notwithstanding these apparent reservations, it is clear from both a pragmatic and an outcomes-oriented perspective, that there is significant support for compulsory mediation (*ibid.*). Indeed, this is now a well-established trend in multiple Commonwealth contexts. As noted above, this is the case to such an extent that authorities in numerous Commonwealth member countries suggest that ADR approaches, particularly mediation, have become the norm rather than an ‘alternate’ mechanism (Simmons & Simmons, 2021).

Given ongoing pressure on the courts throughout the Commonwealth, the significant potential cost-savings garnered by adopting mediative approaches (Miranda, 2014) and apparent support by members of the judiciary (Ojha, 2022; Simmons & Simmons, 2021), it is likely that this trend will continue. This means that legislatures will continue to enact enabling measures, to increase the role and the remit of ADR approaches particularly mediation. This is particularly the case with domestic civil disputes, the family courts and disputes pertaining to industrial relations (Carnevale & Pruitt, 1992).

It is likely, however, that variants of the ‘Med-Arb’, ‘Arb-Med’ and ‘Arb-Med-Arb’ (Stipanowich, 2020) will be preferred where parties seek ‘finality’ and ‘enforceability’. This is the case particularly in the context of international commercial disputes, or those pertaining to inward investment (i.e. the investment of money into a country or region by parties, such as companies and investors) and disputes with government bodies. Given that these preferences shape enabling legislation, they warrant consideration by legislators, particularly where this has potential to impact on inward investment or to allow a jurisdiction to emerge as a ‘conduit’ for dispute resolution such as in the case of Singapore (SIMC, n.d.) and Mauritius (Mauritius Mediation and Arbitration Center, 2017).

While such considerations are important for Commonwealth countries, domestic access to justice and reducing expenditure of costs and time for disputing parties remain a priority. For

many Commonwealth citizens, courts remain inaccessible, largely for reasons of financial cost (Zainulbhai, 2016) and socio-cultural factors (International Commission of Jurists, 2018). As such, legislators should not overlook the continued role to be played by customary justice, indigenous practices (UNODC, 2007) and related tribal and cultural structures. For example, traditional and religious leaders can be supported to serve as effective mediators, resolving disputes within their communities, provided that effective checks and measures are in place to ensure the rights of all groups in society are adequately protected, particularly women and girls (International Commission of Jurists, 2018).

Chapter 2

Selected Uses and
Applications of Mediation,
Including Examples from
the Commonwealth

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Selected Uses and Applications of Mediation, Including Examples from the Commonwealth

The following chapter defines and sets out the current uses of both court-annexed and court-mandated mediation, as well as exploring overlaps and distinctions between these contexts. It explores the ways in which mediation is used in commercial contexts and family disputes, as well as broader civil disputes. It then explores selected contexts in which mediation is applied to criminal disputes.

The chapter concludes by providing an overview of the UN Convention on International Settlement Agreements Resulting from Mediation, commonly referred to as the Singapore Convention on Mediation, and other instances in which mediation is widely employed.

2.1 What are the current uses of court-annexed or court-mandated mediation?

As terminology pertaining to mediation is not used consistently in all relevant literature or across varied Commonwealth contexts, for practical purposes this Guide uses the following two definitions.

‘Court-annexed mediation’ will refer to contexts in which an ‘officer of the Court is the mediator’ (Supreme Court of New South Wales, 2019), i.e. ‘mediation services are provided by the court as a part and parcel of the same judicial system’.

(Bhatt, 2002)

‘Court-mandated mediation’ will refer to contexts in which mediation is mandated by the court (i.e. parties are instructed to participate in mediation); however, mediation is not necessarily facilitated by officers of the court, i.e. the mediator could be completely independent of the court’.

(ibid.)

There are, therefore, overlaps and distinctions between these two contexts of mediation:

- it is possible for mediation to be ‘court-annexed’ but not ‘court-mandated’;
- it is possible for mediation to be ‘court-mandated’ and ‘court-annexed’; and
- it is possible for mediation to be ‘court-mandated’ and not ‘court-annexed’.

Separately, it is of course possible for mediation more broadly to be neither ‘court-annexed’ nor ‘court-mandated’.

A range of approaches have been adopted in varied Commonwealth contexts motivated by varied goals responsive to the diverse needs of the Commonwealth.

In Kenya, the primary focus of court-annexed mediation has been to offer an alternative ‘to delayed justice’ (The World Bank, 2017) arising from a significant ‘backlog’. Under the Court-Annexed Mediation Project (CAMP) by which court-annexed mediation is supported by the World Bank’s Judiciary Performance Improvement Project (JPIP), Kenya succeeded in reducing the time taken to resolve cases from 24 months to approximately two months (*ibid.*), releasing an estimated \$7.7m ‘tied up in unresolved cases’ (*ibid.*) back into the local economy.

The approach is characterised by a ‘partial’ adoption of both court-annexed and court-mandated mediation but the process has only been mandated in certain cases, with a ‘screening’ process adopted by which cases are ‘examined by Mediation Deputy Registrar (MDR) to assess whether or not they are suitable for mediation’ (Republic of Kenya - The Judiciary, 2016).

With a similar rationale, the court-annexed mediation approach in Australia is making use of ‘Settlement Weeks’ (Ali, 2018), again with a partial adoption of court-mandating, though ‘only for certain types of cases’ (*ibid.*). As in the case of Kenya, these have proven successful in reducing backlogs as have ‘Settlement Weeks’ adopted in other Commonwealth contexts such as Nigeria (Muller & Nel, 2021), albeit in a context in which court-annexed mediation was incentivised through free mediation rather than by court mandate.

The motivation to clear the backlog of cases has been underpinned by approaches to court-annexed mediation in other contexts such as Malaysia (Yeow Choy, Fatt Hee, & Ooi Su Siang, 2016). Here, free mediation is again used to incentivise participation in mediation, with ‘a free court-annexed mediation programme using judges as mediators in August 2011’ (ibid.) achieving a mediation success rate of over 50 per cent (ibid.). It has been suggested that a range of factors could, if addressed, allow for further improvements to such provision in Malaysia, particularly with regard to ‘consistency and standardisation’, the improvement of ‘mediation guidelines’ and elimination of contexts in which ‘the trial judge and the mediator could be the same person in the same case’ (ibid.). Court-annexed mediation is also practised in the Malaysian Shariah courts under the name of *Al-Sulh* (a term in Islamic law meaning ‘reconciliation, discontinuance or stoppage of dispute or dissension and contention’ (ibid.)). ‘Majlis Sulh’ (Islamic mediation) provides a forum for the mediation of disputes pertaining to ‘suitable Shariah matters’. There is a particular focus on marital discord and child custody disputes, where the mediator has ‘no power to impose a settlement on the respondents, who retain the authority to make their own mutual decision’ (Jen-T’chiang, 2010). This example suggests an additional role for court-annexed mediation in contexts in which religious beliefs and legal structures impact or shape the approach taken to dispute resolution.

In contrast, in a range of other Commonwealth contexts including Ontario, Canada (Government of Ontario, 2022) some court-mandated mediation approaches make no use of court-annexed mediators, with parties selecting a mediator from outside the court (ibid.).⁵ It could be argued that the increasing penalisation of parties in a range of Commonwealth settings by being ‘denied part or all of its costs if it had unreasonably refused an invitation to mediate’ (Simmons & Simmons, 2021)

5 An example of court-annexed mediation in Canada can be found in the federal courts (for clarity, the example of Ontario is at the provincial court level) (Federal Court, 2019). Furthermore, the Ontario courts do offer judicial dispute resolution in certain contexts (Superior Court of Justice, 2022). Other examples include The Court Annexed Mediation Project (CAMP) in Kenya (The World Bank, 2017) and the Court-Annexed Mediation Pilot Project in Barbados (Barbados Judicial System, 2022).

or who have behaved unreasonably during mediation (Ali, 2018) is ‘partial mandating’ in that it potentially sanctions parties for refusing to engage in mediation. This reflects a trend toward mandatory ADR, including mediation, with the United Kingdom Civil Justice Council reporting that ‘Mandatory (alternative) dispute resolution is lawful and should be encouraged’ (Civil Justice Council, 2021).

In light of the above, it is clear that the current uses of court-annexed or court-mandated mediation vary significantly within and between Commonwealth member countries. However, the various permutations detailed above (and variants thereof) have the potential to play a significant role in reducing backlogs of cases, increasing awareness and uptake of mediation, and in reducing costs and time expended on settling disputes. That said, it has also been suggested that in ‘times of austerity’ (Steadman, 2017) an ‘ought implies can’ (i.e. suggesting that an obligation exists to act in a certain way necessitates that it is indeed possible to do so, which may not be the case) challenge may preclude increased implementation of court-mandated and/or court-annexed mediation due to resourcing constraints. The view has been posited in this context that the goal of ‘enabling the courts to deal with cases justly and at proportionate cost’ (ibid.) can, to a large extent, be achieved through the availability of mediation alone without an overriding necessity to rely on court-mandates or court-annexation particularly where these are precluded by the constraints of the current context (Faulkner, Spurin, & Thomas, 2006).

Separately, with regard to court-annexed mediation, various commentators note the ‘prestige’ factor by which ‘litigating parties and the public at large do respect judges and judicial officers as persons of higher authority’ even in mediation contexts in which ‘the judge or the judicial officer as the mediator does not make any decision for litigating parties’ (Yeow Choy, Fatt Hee, & Ooi Su Siang, 2016, p. 289). This factor should be acknowledged, and care taken to ensure that alternate approaches to mediation are not unduly undermined or power imbalances and/or conflict of interest overlooked (though the same risk exists in contexts where mediators have other, non-judicial, social standing, such as in the case of religious leaders, or tribal elders (International Commission of Jurists, 2018)).

Case study: Court-annexed mediation – capacity building & improving access to justice

The Court Annexed Mediation Project (CAMP)

Context: Kenya

In Kenya, the primary focus of court-annexed mediation has been to offer an alternative 'to delayed justice' (The World Bank, 2017) arising from long-running challenges pertaining to a significant 'backlog' in unresolved disputes. Under the CAMP by which court-annexed mediation is supported by the World Bank's JPIP, Kenya succeeded in reducing the time taken to resolve cases from 24 months to 66 days (ibid.) releasing an estimated \$7.7m 'tied up in unresolved cases' (ibid.) back into the local economy.

The approach adopted focused on the use of mediation:

'Mediation has the potential to address complex cases, including those involving companies in conflict. It is not bound by the rules of litigation, allowing more space for creative resolution. It is a solution by the parties, for the parties. As mediator Geoffrey Njenga put it: "Most disputes are not about facts, they are about injured emotions. Mediation allows aggrieved parties to release emotions, allows them to feel heard in the language that they understand best." Njenga is happy that Kenya's judiciary now recognises mediation as "a bigger, better, and sustainable source of peace," one that "endeavours to solve longstanding disputes" amicably.'

(ibid.)

It is anticipated that this venture will normalise mediation in all of Kenya's courts over time. A taskforce is overseeing a roll-out process, with expansion to the Environment and Land Courts anticipated as the next step (ibid.). This provides a clear example of an initiative achieving significant outcomes by focusing on awareness raising, capacity building and improved efficiency, thereby achieving significant savings, reducing delays and improving access to justice – a model of good practice for other Commonwealth member countries to consider.

2.2 How is mediation used in commercial disputes?

Despite a range of evidence to suggest there exists a variety of potential benefits that mediation can bring as a mechanism for resolving commercial disputes, it has historically been underutilised (Abramson, 1998) with commercial parties favouring arbitration, particularly in contexts pertaining to larger companies, to address international cross-border disputes (Commonwealth Secretariat, 2020). That said, mediation is nonetheless 'one of the fastest growing forms of dispute resolution in the world' (Alexander N. M., 2009), increasingly utilised to resolve international commercial and investment disputes (Titi & Gómez, 2019). While research suggests that arbitration remains the most internationally recognised mechanism for dispute resolution, recognition of voluntary mediation or conciliation

is almost as widespread (The World Bank, 2022). In domestic contexts, it is increasingly the case that mediation now forms the 'primary form of dispute resolution' (Alexander N. M., 2009) though this is less the case in cross-border settings, primarily due to concerns over 'finality' and 'enforceability' (ibid.).

There are several benefits to mediation for commercial parties seeking to resolve disputes, including 'better time and cost-effectiveness' and its inherent informality and flexibility. This allows for a tailoring of approach to the 'distinct cultural, structural and commercial' factors faced in resolving disputes as well as its protections with regard to privacy and confidentiality (ibid.). These benefits suggest that, should aforementioned concerns regarding finality and enforceability (ibid.) be satisfactorily resolved, mediation has the potential to surpass arbitration as the preferred ADR mechanism in international cross-border settings as well as domestic commercial disputes (Strong, 2014) given the increasingly globalised nature of business disputes (Green, 1997).

Both arbitration and litigation have often failed to resolve commercial disputes to the satisfaction of the parties involved, and engagement in these processes is at times both 'costly and damaging' (Newman, 2000). Furthermore, the adversarial nature of such proceedings also undermines the potential to secure the 'preservation of existing commercial relationships and market reputation' (ibid.) which mediation offers scope to protect. Likewise, even where professional mediators are engaged, mediation in commercial disputes is significantly less costly than adversarial approaches (ibid.). It is perhaps for this reason that most (non-family-related) increases in civil mediation pertain to commercial disputes (ibid.). In this context, mediation clearly has the potential to be used more broadly in a wide range of Commonwealth settings (Fiadjoe, 2004) as a mechanism for resolving commercial disputes. This is particularly the case in the context of developing countries, where there is a need to 'expedite the resolution of commercial disputes and enhance access to justice' (Investment Climate Advisory Services of the World Bank Group, 2011). In African contexts, there has been significant uptake of mediation-based ADR approaches, including the expansion of mediation-based ADR provision in Nigeria (ibid.) and parallel increases in mediation within Asian contexts including South Asia (Kanuga & Bhosale, 2021) and Malaysia (Yeow Choy, Fatt Hee, & Ooi Su Siang, 2016).

In most cases, mediation in the case of commercial disputes arises voluntarily (Bower II, 2019), often at the instigation of one party, with a view to finding a practical solution to opposing preferences (Carnevale & Pruitt, 1992). In this context, a market dynamic exists in that a successful outcome is one which is as close as possible to each party's 'commercial goals' (McIlwrath & Savage, 2010) – where mediators can effectively facilitate this, particularly at lower cost than litigation or arbitration. As such, the appeal of mediation will ultimately be judged on a commercial and pragmatic basis by commercial parties, i.e. 'how long will it take, how much will it cost, and will we be able to enforce it?' (ibid., p. 4). It is unsurprising, therefore, that commercial mediation is largely self-regulated (Alexander N. M., 2009). It is, therefore, likely that uptake of commercial mediation services will be shaped by considerations relating to these factors – where costs are lower and outcomes improved for the parties, it is likely that commercial application of mediation as an ADR will increase. Of note, there appears to be increasing willingness by commercial parties to engage in 'pre-mediation' through the adoption of 'mediation clauses', which are increasingly supplanting arbitration clauses particularly in 'joint venture agreements, construction, commercial, financing and franchising contracts, as well as in intellectual property transactions' (ibid.).

Parties generally favour mediation as an initial step in seeking to resolve disputes with 'processes based on consensus, negotiation, and mediation' (ibid., p. 171) preferred as early interventions, with recourse to 'directive' mechanisms only if earlier interventions do not resolve the underlying dispute (ibid.). The use of such mediation clauses generally takes place when the commercial relationship between the parties is 'positive and constructive', and avoids potential concerns over perceived 'weakness', which can undermine a willingness to suggest mediation as an ADR mechanism once a dispute has arisen (ibid.). However, while there appear to be significant potential benefits to the growing use of mediation clauses, as very few come before the courts, their validity has not been firmly established (indeed in some cases they have been found to be unenforceable) (ibid.). Nonetheless, particularly in a context which allows for potential escalation via a 'Med-Arb', 'Arb-Med' and/or 'Arb-Med-Arb' approach (Stipanowich, 2020) such clauses potentially constitute an emerging exemplar of good practice and a pre-emptive tool which can mitigate the risk of disputes escalating unnecessarily.

In international contexts, aforementioned concerns over enforceability and finality (Alexander N. M., 2009) can also be remedied through the adoption of hybrid ‘Med-Arb’, ‘Arb-Med’ and/or ‘Arb-Med-Arb’ approaches (SIMC, n.d.) as resulting settlement agreements can be accepted as an arbitral award which (provided local legislation allows for this) is generally enforceable under the New York Convention (ibid.).

The UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 was ‘concurrently developed alongside the Singapore Convention’ (Singapore Convention on Mediation, 2021a) and is ‘designed to assist States in reforming and modernising their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use’ (UNCITRAL, 2022a). Its adoption within the Commonwealth is currently limited⁶ (UNCITRAL, 2022b) potentially offering a ‘quick win’ that could strengthen confidence in mediation in a wide range of Commonwealth contexts (as detailed further in the case study below). The UN Convention on International Settlement Agreements Resulting from Mediation (2019) (commonly referred to as the ‘Singapore Convention on Mediation’) (UNCITRAL, 2022c) provides a complementary path for states to take. The Singapore Convention on Mediation sets out a clear enforcement mechanism for mediation settlements relating to international commercial disputes in signatory states. With increasing numbers of Commonwealth member countries standing as signatories to the convention (as detailed in the table of signatories and parties below), it is likely that this will provide increased ‘confidence’ in mediation as an ADR mechanism and thus increase usage in commercial settings.

2.3 How is mediation used in family disputes?

Objectives and benefits of mediation in family disputes

Mediation is well established in family disputes such as divorce, child custody, inheritance and related matters (Miranda, 2014). It has historically been encouraged by the courts, particularly in contexts where hostility and animosity frequently arise in

⁶ Cameroon, Malaysia and the provinces of Nova Scotia and Ontario in Canada are Commonwealth jurisdictions to have adopted it to date.

protracted and costly adversarial disputes which do not serve the interests of either party (ibid). Indeed, judges have been particularly critical of cases in which parties ‘spend everything they were fighting over – and more’ (Brett Wilson LLP, 2022) such as in the cases of divorce (ibid.) or inheritance (Will Written, n.d.). Commentators suggest that in such cases ‘lawyers are the only winners’ (Brett Wilson LLP, 2022). Mediation in family contexts has distinct characteristics in that it primarily seeks to achieve the following objectives:

- *‘to re-establish contact between the parties;*
- *to provide a neutral forum where the parties may meet face to face;*
- *to provide within that forum an impartial presence supportive of negotiation;*
- *to facilitate the exchange of information between the parties within a structured framework; [and]*
- *to help the parties to examine their common interests and objectives and the possibilities for reaching agreements that are practicable, mutually acceptable and beneficial to themselves and their children.’*

(Roberts M. , 2014, p. 10)

Such objectives are pursued while maintaining the wider characteristics of mediation, i.e. impartiality, voluntariness (in that an outcome cannot be imposed), confidentiality and flexibility (ibid.).

The courts have, therefore, sought to mandate mediation ahead of litigation in many Commonwealth contexts, particularly with regard to marital disputes, with a view to saving ‘salvageable marriages’ (Howarth & Caruana, 2017) and in the context of disputes over children where ‘acrimony generated in litigation does little to promote cooperative parenting after separation’ (ibid., p. 1). The objective of such mediation is to ensure that separation issues are resolved as quickly and amicably as possible particularly where children are involved. As summarised by Randolph:

‘the parties are driven by feelings of anger, frustration, humiliation, and betrayal. It is at this stage that the lure of litigation is at its most powerful, offering everything a litigant yearns for: complete vindication, outright success,

public defeat and humiliation of the other side, and vast sums of money!

Mediation cannot compete with such promises, and so little wonder that litigation is the disputant's preferred choice of a resolution process. It is not until the stress of protracted litigation begins to bite, that litigants start to consider alternative forms of resolution. Is it time for some form of compulsion to be introduced, to protect litigants from their own folly?

(Randolph, 2010, p. 500)

Increasingly, therefore, there is an expectation that parties in family disputes make recourse to ADR, primarily mediation, ahead of engaging in litigation. This is increasingly mandated (ibid.) as part of an international trend by which the courts seek to focus their involvement on 'more difficult cases, namely those involving entrenched conflict, family violence, substance abuse or child abuse' (ibid., p. 1). Legal advisers in Commonwealth jurisdictions are increasingly encouraged (and in some cases mandated)⁷ to advise their clients of the likely benefits of ADR, in particular mediation, except in cases where 'it would be clearly inappropriate to do so' (ibid.).⁸ This reflects wider concerns over potential conflicts of interest for legal professionals in relation to ADR, in that it has been argued that protracted adversarial disputes create a context in which the 'only beneficiaries of this nihilistic litigation [are the] lawyers' (Brett Wilson LLP, 2022).

While disputing parties are often reluctant to shift from an adversarial approach initially, those who do engage in mediation often encounter positive (or improved) outcomes (Randolph, 2010) and report positively on the process (Nordien-Lagardien, Pretorius, & Terblanche, 2021) across a wide range of Commonwealth contexts. Such approaches, by which 'a faster solution' (Nair, 2014) is provided allowing disputes to be

⁷ Such as in the case of Canada (Government of Canada, 2022b).

⁸ Furthermore, Justice Canada has developed a free online course for legal advisers which focuses on family dispute resolution and the new duties for parties and legal advisers under the Divorce Act (Government of Canada, 2022e). Justice Canada's website also lists family justice services offered by provincial or territorial governments. The list indicates the services available in the provinces and territories whether publicly funded mediation or non-government-based services such as mediation, negotiation, arbitration and collaborative law (Government of Canada, 2022f). Similar approaches have been adopted elsewhere in the Commonwealth (Dispute Settlement Centre of Victoria, 2022), though not on a free basis.

resolved ‘peacefully without the Court’s intervention’ (ibid., p. 154), would be of benefit to all parties.

Challenges of mandated mediation in family disputes

Such approaches are not, however, without challenges. Some such approaches overlook significant socio-cultural considerations (Howarth & Caruana, 2017). There is a need for particular care in contexts where there is a history of family violence. Commentators suggest that ‘women’s economic, social, and psychological vulnerabilities in a patriarchal society are heightened after separation, and engaging in mediation presents particular risks for women that are magnified when family violence is present’ (ibid., p. 13). This concern is highlighted by advocacy groups (Stop Violence Against Women, 2019) focusing on contexts in which an ‘imbalance of power’ places vulnerable groups at risk, and is increasingly reflected in official guidance on best practices (Government of Canada Department of Justice, 2015). Such concerns are not limited to ADR, with long-standing concerns raised over power imbalances impacting on access to justice in the context of litigation also (Glaeser, Scheinkman, & Shleifer, 2003).

Separately, wider concerns exist over the extent to which any degree of mandatory mediation is appropriate, with ‘purist’ mediators suggesting the ‘cornerstone of mediation is that it is a voluntary consensual process’ (Randolph, 2010, p. 500). Likewise, while there is a distinction to be drawn ‘between being coerced into mediation, and in mediation’⁹ (Howarth & Caruana, 2017, p. 11), selected findings suggest ‘one may influence the other’ (ibid.). However, a review of the wider literature in this area suggests that research findings are mixed (ibid). The most widespread context in which mediation is mandated, or at least strongly encouraged, relates to the wider practice by which even a winning party deemed to have failed to enter into, or meaningfully engage with, mediation may not be awarded costs in certain circumstances (Simmons & Simmons, 2021). This practice is common to other areas of ADR.

Furthermore, the role of customary and religious mediators is prominent in multiple Commonwealth contexts. This includes rural societies in developing states where local leaders continue to play a significant role in mediating disputes (International

⁹ i.e. during the process of mediation.

Commission of Jurists, 2018), and where religious leaders engage directly in mediation practices (Jen-T'chiang, 2010). Such mediation practices are also widespread within minority communities in developed Commonwealth contexts (Cusairi, 2013). Caution is needed when these merge into 'Med-Arb' (ibid.) practices to ensure the human rights of all parties to disputes under law are adequately protected (Patel, 2008).

The role of mediation in family disputes is, therefore, widely established; has potential benefits for parties; and should be encouraged where appropriate given that outcomes are more likely to be positive for all concerned (Randolph, 2010). Due consideration should, however, be given to socio-cultural considerations (Howarth & Caruana, 2017), risks to vulnerable groups, and concerns over access to justice (ibid.), with clear safeguards established to ensure these are satisfactorily addressed.

2.4 How is mediation used in other civil disputes?

Outside the context of commercial and financial disputes, the most frequent occurrence of mediation arises in the context of employer relations, i.e. cases pertaining to industrial relations, discrimination or other disputes between employees and employers (Carnevale & Pruitt, 1992). Mediation is reportedly 'by far the preferred process across all industry types' in a survey of large ('Fortune 1000') private sector businesses (in a paper focused on the United States but with reference to other international contexts also (Bingham, 2004)). Indeed, this is arguably the longest-standing context in which mediatory and conciliatory ADR practices have been placed on a statutory footing (Liebmann, 2000b). Employment legislation throughout the Commonwealth frequently encourages or mandates mediation and/or conciliation, ahead of litigation in the courts or recourse to industrial tribunals (ibid.). In many Commonwealth contexts, there exist specialist government agencies which serve to provide conciliation and/or mediation services to endeavour to resolve disputes between employers and employees, such as the Advisory, Conciliation and Arbitration Service (ACAS) in the United Kingdom (ibid.), regional bodies such as The Western Australian Industrial Relations Commission (The Western Australian Industrial Relations Commission, 2021) and the Federal Mediation and

Conciliation Service in Canada (Government of Canada, 2022a). In many cases, these offer access to conciliation and mediation support free of charge to disputing parties. Despite widespread adoption, there is limited empirical evidence on the efficacy of such approaches.

A key benefit of mediation in such contexts is the that it increases the likelihood of a preserved and positive relationship between employer and employee (ILO, n.d.) as well as reducing pressure on the court system and minimising expenditure of time and resources by disputing parties. Such approaches also have the potential to prevent as well as resolve disputes (ibid.) and are, therefore, increasingly encouraged by national government and intergovernmental organisations (ibid).

In Commonwealth contexts in which resources are more limited (Fashoyin, 2007), concerns have been raised that conciliation mechanisms (particularly where these are not adequately funded) are not providing the level of ADR and mediation support which is required to satisfactorily resolve disputes (Noronha & D'Cruz, 2019). Where such mechanisms are established (and potentially mandated) but under-resourced, it is likely they will not be successful in improving settlement rates (Bendeman, 2007). Likewise, where such approaches become overly 'legalistic' (ibid.) or adversarial, their efficacy can be undermined. Given the scale of resourcing constraints faced by many Commonwealth governments, it is likely that, where they offer a quality, low-cost, mediation approach, private sector providers are best placed to bridge the gap with regard to current need (ibid.). Likewise, other ADR avenues, particularly those which have historically taken a mediatory approach, such as the 'Lok Adalat' system in India (Zainulbhai, 2016) or 'jirgas' in Pakistan (Hussain, 2019), have the potential to serve as avenues for offering improved access to mediation services, provided that concerns over quality are addressed.

Mediation also provides a potentially effective mechanism for addressing land disputes (Sullivan & Solomou, 2011) particularly in contexts where complex socio-cultural or historic contexts render such matters sensitive (Mtshali) as well as in Small Island Developing States where the availability of land is very limited. Given the significant role that land disputes can play in undermining social cohesion or precipitating violence (Allen & Monson, 2014), intergovernmental organisations place increasing emphasis on establishing ADR mechanisms

to address these issues ranging from practical guidance, case studies and tools (UN-Habitat/GLTN, 2013) to practical guides (Wehrmann, 2008). Given the increasing significance of land disputes in developing Commonwealth contexts (ibid.) as well as in contexts pertaining to the land rights of indigenous peoples (Bauman, 2006), it is likely that the role of mediation in resolving land disputes within the Commonwealth will develop further in the medium to long term.

2.5 How is mediation used in criminal disputes?

The primary context in which the use of mediation arises in relation to criminal matters is focused on the use of ‘victim-offender mediation’ (UNODC, 2007). In this, victim and offender meet voluntarily to have a better understanding of the crime that was committed and to explain to the offender the impact the crime had on the victim. This approach is primarily justified on the pragmatic basis of serving the interests of ‘both parties and the community’ (Bidois, 2016, p. 596) as well as broader notions of fairness, access to justice and the prevention and deterrence of crime (ibid.). A range of findings suggests there is efficacy to at least some of these approaches, particularly when combined with broader interventions by social workers (Severson & Bankston, 1995; Budeva, 2021) though the area warrants further research (Sherman & Strang, 2007).

Such approaches are not without risk or criticism, with theorists raising a number of potential concerns. These include issues with bias in selection criteria, the ‘protective’ nature of public process (Brown, 1994) and long-running (Lerman, 1984), significant concerns over potential dangers arising when mediation approaches are adopted in contexts of domestic violence. These dangers continue to be emphasised by advocacy groups (Stop Violence Against Women, 2019).

For mediation in the context of criminal disputes, the process is generally presented as part of the resolution process following conviction or as an alternative following conviction (Sherman & Strang, 2007). This primarily affects sentencing or reconciliation (as well as, potentially, the likelihood of reoffending) rather than the outcome of a trial.

There is scope for increased engagement with mediation in the criminal context for criminal intellectual property theft, often

termed ‘piracy’. This crime is addressed by both criminal and civil sanctions in a range of Commonwealth contexts (Alexander, 2007) with authorities encouraging the use of mediation (Government of Canada, 2021b). There is scope for additional research into such practices within Commonwealth contexts.

Mediation is also used by a wide range of jurisdictions, Commonwealth (Tran-Nam & Walpole, 2012) and otherwise, to address (potentially criminal) disputes relating to taxes (Thuronyi & Espejo, 2013). Such approaches are primarily adopted with a view to keeping tax disputes out of the courts (Nias & Popplewell, 2014). It has been suggested that such approaches have the potential to serve as an ‘increasingly popular and successful [...] cost effective, consensual and efficient means of resolving tax disputes’ (Deloitte Legal, 2019). This is particularly the case where this is informed by a genuinely collaborative approach (Nias & Popplewell, 2014) as opposed to the adversarial model which characterises some approaches to such matters by authorities (ibid.). As such, there may be significant benefits to expanding such approaches more broadly throughout the Commonwealth.

In selected contexts throughout the Commonwealth, minor criminal matters may also be mediated (formally or informally) by traditional, community or religious leaders (Mboh, 2021). Where such practices are in place, it is important that they do not impact negatively on the human rights of parties to disputes or those of vulnerable groups (International Commission of Jurists, 2018).

2.6 How is mediation used in international disputes, and what is the Singapore Convention?

In considering what is meant by ‘international’ disputes, to ensure consistency and coherence, the meaning of international will mirror that set out within the relevant portions of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018. Specifically, contexts are deemed to be international if ‘at least two states are involved’ (Alexander N. M., 2009, p. 393) with a connection to a state being:

- *‘the place of business of one or both parties;*
- *the place where a substantial part of the commercial obligation is to be performed; or*

- *the place with which the subject-matter of the dispute is most closely connected.*

(ibid., p. 393).

Mediation in such contexts is increasingly emerging as an alternative to arbitration, offering the potential to reduce costs, maintain existing business relationships (Miranda, 2014) and resolve disputes collaboratively and amicably without the costs (both tangible and intangible) arising from adversarial litigation and international arbitration (which can often prove as costly as litigation for parties to disputes) (Alexander N. M., 2009). Given that mediation is often entered into by parties actively seeking to resolve their dispute and to avoid litigation or arbitration, it provides a useful tool in these contexts (ibid.). Commercial preference for mediation as opposed to arbitration is reportedly increasing (ibid.) as further demonstrated by the emergence of ‘mediation clauses’ supplanting, or serving as a complement to, ‘arbitration clauses’ (ibid.).

Such disputes may pertain to a wide range of commercial matters.

In international contexts, aforementioned concerns over enforceability and finality have been the primary factors undermining uptake of mediation in preference to arbitration or litigation (ibid.). The UN Convention on International Settlement Agreements Resulting from Mediation, 2018 (commonly referred to as ‘the Singapore Convention on Mediation’) (UNCITRAL, 2022c) provides a clear enforcement mechanism for mediation settlements in signatory states.

The Singapore Convention comprises ‘a multilateral treaty which offers a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute’ (Singapore Convention on Mediation, 2021b). In doing so, it seeks to ‘facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders’ (ibid.).

First coming into effect on 12 September 2020, signatories to the Convention are obliged to uphold the outcome of mediated disputes in cases where:

- *the settlement was concluded posterior to the date that the Convention comes into force in the relevant country;¹⁰ and*
- *the party seeking award enforcement under the agreement can supply competent authorities with relevant, mediator-signed documentation as proof of their award.*

(United Nations, 2019)

As of 4 April 2022, the Commonwealth countries listed in [Table 2.1](#) below are signatories to the Singapore Convention.

Table 2.1 Commonwealth countries that are signatories to the Singapore Convention

Country	Date of signature	Country	Date of signature
Australia	10 September 2019	Maldives	7 August 2019
Brunei Darussalam	7 August 2019	Mauritius	7 August 2019
Fiji	7 August 2019	Nigeria	7 August 2019
Eswatini	7 August 2019	Rwanda	28 January 2020
Grenada	7 August 2019	Samoa	7 August 2019
Ghana	22 July 2020	Sierra Leone	7 August 2019
India	7 August 2019	Singapore	7 August 2019
Jamaica	7 August 2019	Sri Lanka	7 August 2019
Malaysia	7 August 2019	Uganda	7 August 2019

Source: United Nations Treaty Collection (2022)

It is anticipated that further growth in the recognition of the Singapore Convention among Commonwealth member countries will provide greater confidence to the international business community of the security of potential business transactions in member countries. This will support international trade, and the ease of doing business, as well as reduce costs for parties to disputes (Alexander N. M., 2009) and increase inward investment.

¹⁰ Or where the state in which the parties have their places of business is different to the state in which the substantial part of the obligations under the settlement agreement is performed or the state with which the subject matter of the settlement agreement is most closely connected.

Case study: Potential 'quick wins' for member countries to enhance confidence in mediation

The UNCITRAL Model Law on International Commercial Mediation/ Singapore Convention on Mediation

Context: Commonwealth-wide

The UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (UNCITRAL, 2022a) has been developed 'to assist States in reforming and modernising their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use'. In addition, it 'addresses procedural aspects of mediation, including appointment of conciliators, commencement and termination of mediation, conduct of the mediation, communication between the mediator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-mediation issues, such as the mediator acting as arbitrator and enforceability of settlement agreements' (ibid.) as well as '...uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure. It provides an exhaustive list of grounds that a party can invoke in a procedure covered by the Model Law'.

Its adoption within the Commonwealth is currently limited (UNCITRAL, 2022b) potentially offering a 'quick win' that could strengthen confidence in mediation in a wide range of Commonwealth contexts.

The UN Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (commonly referred to as 'the Singapore Convention on Mediation') (UNCITRAL, 2022c) provides a clear enforcement mechanism for mediation settlements relating to international commercial disputes in signatory states. With increasing numbers of Commonwealth member countries standing as signatories to the Convention, it is likely that this will provide increased 'confidence' in mediation as an ADR mechanism and thus increase usage in commercial settings.

2.7 How is mediation used in other instances?

There is a range of other contexts in which mediation may be applied as a mechanism for dispute resolution, the three most prominent of which are examined below:

1. **Consumer protection** (UNCTAD, 2018) – particularly where consumers engage with members of trade organisations or professional bodies. Such models have been implemented throughout the Commonwealth and aim to make use of mediation 'as an effective tool to resolve consumer disputes' (Patil, 2021, p. 3) in a wider context in which the judiciary is encouraging ADR practices to minimise adversarial litigation (ibid.). Such provisions are increasingly

widespread internationally (OECD, 2002), and provide a potentially powerful mechanism for resolving disputes within consumer contexts.¹¹

2. **Redress of grievance against public bodies** (Bondy & Le Sueur, Designing redress: a study about grievances against public bodies, Queen Mary University of London, School of Law Legal Studies Research Paper No. 121/2012, 2012) – there are several contexts (Kavalné & Saudargaitė, 2011) in which it is preferable that ADR practices allow for resolution of disputes between individuals or groups and public bodies. Cases to which such approaches can be applied are wide-ranging, including social care services, special educational needs and housing disrepair (Bondy & Le Sueur, Designing redress: a study about grievances against public bodies, Queen Mary University of London, School of Law Legal Studies Research Paper No. 121/2012, 2012). Mediation has particular significance where it has the potential to impact on building confidence to facilitate inward investment.¹²
3. **Mediation in international relations contexts** (Bercovitch & Rubin, 1992) – mediation has a key role to play in fostering positive working relationships between nation states, and in minimising the risk of discord and conflict, allowing disputes to be resolved without recourse to adversarial approaches. While of potential significance to all Commonwealth member countries, such uses of mediation fall outside the purview of this Guide.

¹¹ For example, Regulation 22 of the Mediation Regulations, made under the Mediation Act, Chap. 5:32 Trinidad and Tobago provides as follows: 'A community mediation centre shall be used to facilitate the resolution of disputes including but not limited to the following type of matters: (a) Landlord and tenant disputes; (b) Merchant and consumer disputes; (c) Organisational disputes; (d) Small claims; (e) Threat and harassment problems; (f) Neighbourhood conflicts; (g) Family and relationship disputes; (h) Small contractor and home owners disputes; (i) Community disputes; and (j) Juvenile conflicts (truancy, delinquent children beyond control and gang related activities)' (Government of the Republic of Trinidad and Tobago, 2004). Community Mediation Centres also operate in other Commonwealth contexts including Singapore (CMC, 2022) and Canada (CICR, n.d.).

¹² As mentioned above, an example of court-annexed mediation in Canada can be found in the federal courts. Other examples include The Court Annexed Mediation Project (CAMP) in Kenya (The World Bank, 2017) and the Court-Annexed Mediation Pilot Project in Barbados (Barbados Judicial System, 2022).

Chapter 3

Benefits, Potential
Challenges and Limitations
of Mediation

Chapter 3

Benefits, Potential Challenges and Limitations of Mediation

The following chapter gives an overview of the potential effects of mediation on access to justice in a range of contexts throughout the Commonwealth. It explores the ethical considerations of which those engaged in mediation must be cognisant.

There follows an overview of the effects of mediation on the court system, as well as the use of technology. Drawing on thematic issues addressed throughout the document, it explores compulsory and encouraged mediation.

3.1 What are the potential effects of mediation on access to justice?

A historic criticism of mediation and of ADR more broadly was that it served as ‘second class justice’ (McEwen & Williams, 1998) fuelled by ‘a view of justice as the vindication of legally defined rights through formal and public procedures’ by which ‘mediation programs were largely aimed at the poor and disadvantaged, diverting them away from courts where they had rights and where procedural protections gave them a chance to prevail against more advantaged parties’ (ibid., p. 865).

This argument suggests that a long-term shift toward mediation has the potential to impact negatively on access to justice:

‘...if mediation were to become the primary method of dispute resolution, the right of an individual to enforce his or her legal rights would become lost. Mediation puts the policy of pragmatism above the notion of enforcement of strict legal right. Justice – or at least the kind that can be achieved through the court system – is predicated on the determination of a person’s legal rights and the enforcement of those rights. Mediation is designed to a large extent to ignore those rights; parties are required to put aside their strict legal entitlements and look for a practical solution to the problem that they have. While this no doubt works for

some individuals, there will be those for whom a 'practical' solution is no substitute for the determination of the correct position at law. Further, society as a whole will be the poorer for it. The public resolution of disputes demonstrates to society at large the operation of one of the fundamental characteristics of a democracy, that disputes are resolved through the fair and impartial application of the law.'

(Bochner, 2019)

A contrary view is espoused by those sceptical of 'the capacity of courts and formal adjudicatory processes to deliver justice', suggesting that 'the central issue of access to justice involves access to a process like mediation, not to courts' on the basis that 'disputants presumably have the power to participate actively, and to decide outcomes and the criteria for them themselves' (McEwen & Williams, 1998, p. 866).

It is likely that both perspectives have valid bases – in a context in which the rights of a party have been impinged upon, redress may be the 'just' outcome sought by the wronged party. Likewise, in cases where a pragmatic outcome meeting the needs of both parties is the most beneficial outcome for all concerned: a traditional 'confrontational' legal approach is likely to escalate costs and may not result in a desirable outcome. Both should also be weighed in a broader context in which most disputes never reach the courts or indeed any other forum (including ADR modalities).

This is potentially compounded by several interconnected factors. There are increasing instances of unrepresented litigants internationally (Paul, 2021) who, often for financial reasons, are unlikely to receive a 'just' outcome through legal remedy, particularly when engaging with a party with more significant access to resources (financial and/or otherwise). While mediation may provide access to a lower-cost avenue to address concerns by those without access to resources, there is a risk that a power imbalance will continue to disadvantage one party. There are, however, mechanisms which can offset this risk, such as mediators retaining 'residual authority (either real or de facto) to terminate the mediation process if they believe that the litigant does not have enough information to make an informed settlement decision' (ibid.). Additionally, '[t]he presence of a second independent and neutral participant (other than the mediator) with detailed knowledge of the law and the subject

can close the information gap that lay-litigants may encounter in a proceeding' (ibid.).

'Access to justice' within the context of mediation could be served by a 'middle path which certain key characteristics', including (but not limited to) 'the robustness of the intake processes; the skills and experience of the mediator; and the quality of support available to parties in mediation' underpin the approach adopted. (Noone & Ojelabi, 2014a, p. 563).

It has also been suggested that appraisals of 'access to justice' in the context of mediation are best gauged through the lens of overarching 'principles' (ibid.):

- accessibility;
- appropriateness;
- equity;
- efficiency; and
- effectiveness.

In sum, this suggests that the 'potential effects of mediation on access to justice' are dependent on the nature of the mediation and, in particular, the counsel (or lack thereof) informing the decisions of participants throughout the mediation process. Further to this, there is a clear set of 'pragmatic' considerations pertaining to resourcing, i.e. there is an 'ought implies can' consideration. If poverty (Zainulbhai, 2016) or other related constraints, such as geographic isolation, render access to the courts challenging or impossible for a significant portion of the population, then ensuring access to justice of some form (even where this lies outside the court system) provides an outcome preferable to the alternative. This is relevant also to more highly developed economies within the Commonwealth, many of which also face significant challenges, and are operating under 'austerity' conditions (Steadman, 2017). In such contexts it has been argued that mediation provides a practical and pragmatic mechanism by which justice can be accessed by those who would otherwise remain without recourse in case of disputes. The extent to which in many cases backlogs and long delays serve as an impediment to access to justice should not be understated – mediation and ADR more broadly have the potential to play a key role in addressing this issue.

A separate, but likewise significant set of considerations relates to whether or not access to justice is likely to be eroded by making recourse to mediation (Nolan-Haley, 2015). A range of sources from throughout the Commonwealth and elsewhere align on key characteristics of disputes ill-suited to mediation if access to justice is to be maintained:

1. Contexts in which there is a risk of violence to parties, or where there is a significant imbalance of power (Government of Canada Department of Justice, 2017) as ‘courts may provide better protection for parties who have been the victim of violence or threats of violence’ as well as being ‘better equipped to handle’ the context of power imbalance (ibid.). Considerations pertaining to imbalance of power should also give due weight to the relative significance of the matter at hand to the parties in question:

‘A system which places mediation as the primary method of dispute resolution arguably gives greater power to larger organisations, which receive a significant volume of complaints and claims, over the smaller company or individual for whom a claim may be a one-off occurrence in a lifetime. It permits ‘justice’ to be carried out behind closed doors, in such a way that there are no checks to ensure that the law is being applied equally to all, with outcome-based benchmarks opaque at best and non-existent at worst.’

(Bochner, 2019, p. 350)

2. Contexts in which a public hearing is considered important for justice to be served (ibid.) or where doing so may better reconcile with the ‘collective interest’ (Mulcahy, 2013). It is important that some types of case reach a public forum (ibid.) including disputes concerning ‘matters that society wishes to deter outright’ such as domestic violence or child abuse (UNODC, 2007) as well other contexts where ‘visibility’ (Randolph, 2010) may be viewed as a key outcome by a party such as copyright cases or disputes relating to personal status or defamation.
3. Contexts in which a party wishes to establish a precedent, i.e. ‘where a definitive ruling on the

law is required' (ibid.): 'it is not possible to obtain through ADR a decision that would set a public legal precedent. The results of an ADR procedure, an arbitral award, or a settlement agreement, are in principle binding only on the parties involved. So, for example, if a party wished to obtain a generally binding decision that the claims of a particular patent were valid/invalid, the only means of obtaining such a "public" decision would be a court judgment' (WIPO, 2006). This also relates to instances in which, while not a matter of priority to the parties to the dispute, there is an argument for such a precedent serving the interests of society and justice more broadly (Mulcahy, 2013). With widespread use of common law in many Commonwealth settings, this has significant potential ramifications:

'The resolution of disputes through mediation does not allow this public exposition of the law, or its principled modification and change. There is a risk that if the majority of disputes are resolved through mediation, the fluid nature of the common law, which allows both certainty and change with the times, would be lost. The common law would become fixed at one point in time, as it is no longer being tested and challenged, and statute law would become opaque. The ability of individuals to satisfy themselves, as well as they can, that they are complying with the law, would be greatly diminished, and the ability of lawyers to give advice to their clients based on previous decisions would be lost.'

(Bochner, 2019, p. 349)

4. Contexts in which one party has no good faith interest in engaging meaningfully in the mediation process, i.e. given 'both parties must agree to use ADR, no party can force another to participate' (Government of Canada Department of Justice, 2017). Even in contexts in which mediation is compelled, the nature of mediation is such that a third party cannot 'impose' a decision on the parties (Cooley, 1986).

As can be seen in the review of legal scholarship on this issue, there is a disparity between the positions held by certain theorists and practitioners in relation to questions of access to justice (Bochner, 2019).

This is particularly the case with regard to questions as to whether parties can be compelled to participate in the mediation processes. Notwithstanding distinctions between ‘between being coerced *into* mediation, and *in* mediation’ (Howarth & Caruana, 2017, p. 11), the matter remains divisive with polarised perspectives at the extremes of both viewpoints being characterised as:

1. ‘Purist ... aversion to compulsion’ underpinned by the axiomatic view that ‘a cornerstone of mediation is that it is a voluntary consensual process’, with compulsory mediation viewed as an anathema ‘unfairly imped[ing] the public’s right of free access to the courts’.
2. Pragmatists’ concerns are perhaps expressed most concisely by Lord Clarke’s view that ‘only a fool does not want to settle’ (Randolph, 2010, p. 500), underpinned by a repudiation of the purist view on the basis that ‘court ordered mediation merely delays briefly the progress to trial and does not deprive a party of any right to trial’ (ibid.).

This question is particularly fraught in contexts in which the distinction between mediation and arbitration is blurred (Nolan-Haley, 2021); while a defence of mediation as merely delaying, rather than substantively impeding, access to justice carries weight, such logic would not readily apply to compelled arbitration.

The question of compulsory mediation is significant, and is explored at length elsewhere within this Guide. The divided views on questions of access to justice more broadly highlight the potential challenges faced by judiciaries and legislators when seeking to balance important abstract notions of justice with pragmatic questions of resourcing, particularly in a context in which there is often considerable pressure on the courts (Miranda, 2014). It is important that concerns are not dismissed out of hand – while pragmatism and an ‘ought implies can’ lens can help to shape practical approaches, the rights of parties should not be overlooked in the interests of expediency. It should be noted that this gives rise to a fundamental question as to the

expectations of the parties to a dispute, who may have varied priorities, views and preferences relating to 'justice' with regard to outcome (i.e. some may favour additional control of process and outcome while others may seek 'external' validation).

A related consideration pertains to the outcomes of mediation and the extent to which these are 'just'. While the 'effectiveness' of mediation, i.e. that it 'saves time, reduces cost, and increases satisfaction' (Shack, 2003) is often highlighted, considerations such as 'just outcomes' (ibid.) are given less prominence. A potential criticism of mediation is that, rather than promoting 'Just Settlement' it is potentially 'Just About Settlement' (Caponi, 2015). Some critics of the increased role of ADR suggest that '[t]he push for less law is supported by the growing ADR profession which professes a mission to rid society of conflict but which is more interested in the profits to be made from large commercial dispute settlement than the small change of the county courts' (Thirgood, 1999) and that a primary consideration underpinning advocacy for increased ADR has been government officials looking 'for savings in civil justice' (ibid.). More broadly, it has been suggested that contexts in which mediators intervene in matters of substance rather than process are likely to undermine the likelihood of just outcomes in mediation (ibid.). In the private sector, mediators who are perceived by parties as facilitating just outcomes are more likely to remain commercially successful (Allen T., 2007), suggesting that risks of unjust outcomes are potentially higher in non-commercial contexts. It has been suggested that 'the use of mediation can indeed be compatible with pursuit of social justice, depending on the specific kinds of practices mediators employ' (Baruch Bush & Fogler, 2012, p. 2), specifically:

'When mediation moved away in practice from these defining principles, it moved away from a unique ability to address issues of social justice. At base, mediation rests on the premise that people have the capacity to make their own decisions about the issues that confront them, that people can and should assess their own risks, abilities, and limitations in making decisions and addressing issues – including issues that involve power imbalances, inequities and unfairness. When this foundational principle of self determination is compromised, mediation loses its uniqueness as an instrument for both civility and justice.'

(ibid., p. 49)

Examples of mediation available throughout the Commonwealth include:

- Canadian Human Rights Tribunal (2016);
- Occupational Health and Safety Tribunal Canada (Government of Canada, 2017b);
- Federal Public Sector Labour Relations and Employment Board [Canada] (n.d.);
- Sport Dispute Resolution Centre of Canada (SDRCC, n.d.);
- International Dispute Resolution at the Singapore International Mediation Center (SIMC, n.d.);
- Mediation to work out parenting disagreements in New Zealand (New Zealand Ministry of Justice, n.d.);
- Domestic Mediation at the Nairobi Centre for International Arbitration (NCIA, 2022);
- Mediation for Parish Courts in Jamaica (Jamaica Information Service, 2022); and
- Civil and Commercial Mediation in Cyprus (Ministry of Justice and Public Order Republic of Cyprus, 2022).

3.2 What ethical considerations arise in mediation cases?

Moldaver's (2018) article on the 'Proactive Avoidance of Mediation Dystopia' closes with a description of the kind of practical implications which neglect for the ethical considerations of mediation may have on practice:

'Litigators without mediation training [may] gravitate to the process as a path to access to justice and increased business. Pillars of impartiality could cave to the allure of evaluative mediation. Evaluative mediation [may] be construed as a toe-dipping exercise with an escape valve, therefore more attractive than arbitration. The idea of confidentiality being sacrosanct could corrode as litigators try to pry open agreements after-the-fact, dissecting the mediation process like a trial. Ill-intentioned parties may start using mediation as a litigation refuge where "truth does not matter" and agreements can be stitched together based on falsehoods. This sounds like the dystopia of alternative dispute resolution but could be the reality.'

(Moldaver, 2018, p. 280)

While 'high-level' areas of overarching concern with regard to ethical considerations in mediation cases have historically focused on 'confidentiality and conflict of interest'

(Barthel, 2008), there is a wide range of broader considerations which are pertinent to the context at hand.

Commentators have, for example, highlighted the potential power imbalance in mediation involving a client of 'modest means' (Burns, 2001), which brings potential negative consequences in the context of mediation:

'Even if moral dialogue is generally the best path, it is not always the best path. Even if it should be given every chance, it is sometimes not available. A lawyer is usually someone who knows the legal, political, and bureaucratic worlds better than most individual clients of modest means. His task is to put this knowledge to the service of clients without imposing a style of purely instrumental thinking and speaking that may make clients worse. The only real certainty is that the interpersonal and legal skills necessary to fulfil this role are extremely subtle.'

(ibid., pp. 716-717)

There are significant broader ethical issues of which mediators should also be cognisant. One of potential roles of mediation is to correct the power imbalance through the mediation process (Government of Canada Department of Justice, 2017) and to recognise where a context is not best suited to mediation.

This is not to suggest that headline concerns over a potential conflict of interest do not arise from the reality that the 'whole purpose of mediation is usually to avoid the cost of fully contested litigation' (Ash, 2019). This does not necessarily align the pecuniary interests of legal professionals (who, as noted in commentary on protracted high-profile divorce cases, are potentially the only 'winners' in such disputes (Brett Wilson LLP, 2022)) with their fiduciary duty to their client. This is pertinent in both commercial and individual mediation, as noted with the emergence of 'no-fault' divorces in many jurisdictions (which potentially serve the interests of clients far more than adversarial litigation which, in contrast, serves the pecuniary interest of lawyers representing the parties). Given that legal professionals have both a moral and a legal duty to serve the interests of their clients, potential gaps in understanding highlighted in some research findings (Sidoli del Ceno, 2011) suggest some are not sufficiently aware of current practice to adequately fulfil these responsibilities. Given the significant potential benefits of mediation for clients, there is a

case to be made that it would be beneficial for more countries to adopt the model already in place within some Commonwealth settings by which legal professionals have an obligation (Government of Canada, 2022b) to advise their clients of the potential benefits of mediation, other than where ‘it would be clearly inappropriate to do so’ (ibid.).

Concerns over mediator neutrality, i.e. ‘the absence of any bias in relation to either disputing party, and the mediator’s utilisation of his position to appropriately balance the distribution of power between the parties’ (CIArb, 2019) as well as an overarching principle of ‘fairness’ (ibid.) are also raised by a range of commentators. This is particularly pertinent in light of research findings that suggest some mediators, despite their official mandate, view themselves as having an evaluative, rather than a facilitative role (CEDR, 2018), and that this is reflected in their approach to mediation in practice (ibid.). Commentators have also suggested concerns over issues of ‘unconscious bias’ potentially impacting on neutrality of mediators (Jakeman & Clark, 2019).

Any lack of neutrality, perceived or real, has the potential, therefore, to undermine both the ethical standing of the mediation process and resultant trust in it as a vehicle for effectively settling disputes. In extreme contexts, applicable to settings in which there are systemic issues pertaining to rule of law, transparency and corruption (CIArb, 2019), there is a risk of apparently ‘neutral’ mediators illicitly supporting the interests of one party. Similar issues can arise in contexts of political corruption and political oppression as these undermine rule of law and confidence in processes overseen by the state, including the operation of the courts and related institutions (García-Sayán, 2017).

Likewise, issues over professional competence (given how varied the ‘barriers to entry’ are for mediators throughout the Commonwealth, which is an area that brings potential advantages and disadvantages) as well as accountability (particularly given that much mediation is confidential and, in some cases, lightly regulated) allow for potential ethical abuses as well as disadvantages arising from iniquitous access to resources and/or knowledge (Noone & Ojelabi, 2014b).

Significant ethical questions arise with regard to equitable access and provision for all groups, including vulnerable groups and

minorities. Evidence suggests that a failure to be cognisant of the distinct needs and expectations of different groups can leave them ill-served (Howarth & Caruana, 2017) or excluded from the support that mediation could offer in resolving disputes affecting them. It is important that such considerations are anticipated, respected and accommodated if engagement with such individuals in the mediation process is to be successful. Failure to adequately consider the role of customary justice or indigenous practices has the potential to exclude groups from access to justice by means of ADR, or pose barriers to effective engagement. This is particularly the case in 'postcolonial settings' where there may be issues of trust between historically marginalised groups and state actors as well as contexts where there is a resulting imbalance of power relations (International Commission of Jurists, 2018). These key ethical considerations should be weighed alongside the importance of ensuring that the human rights of all individuals are upheld, particularly those of women and girls (ibid.).

The overarching implication of these complex factors is reflected in the observation that 'mediators have varying moral compasses that lead to a variety of responses to ethical and practical challenges. This is not unlike other professions' (Noone & Ojelabi, 2014b, p. 190). The associated suggestion by commentators that '[t]he current high utilisation of mediation and the lack of public accountability of mediators necessitate further research and an ongoing critical reflection from both the mediation sector and scholars' (ibid. p. 190) is warranted, and it is likely this will remain an area of valid and emergent research.

A code of ethics (or 'code of conduct' etc., nomenclature varies) for mediators may be useful to build public trust and confidence and to develop capacity in the sector – such an approach has been adopted in a range of Commonwealth contexts. For example, in the case of Trinidad and Tobago in the Americas, a Code of Ethics for Mediators is included in the First Schedule to the Mediation Act, Chap. 5:32 (Government of the Republic of Trinidad and Tobago, 2004). Similar approaches are in place throughout all Commonwealth regions including the Pacific (New Zealand Ministry of Business, Innovation, and Employment, n.d.), in Asia (Singapore Mediation Centre, n.d.), Africa (The Association of Arbitrators (Southern Africa), n.d.) and Europe (Malta Mediation Centre, 2004).

3.3 What effects does mediation have on the operation of the court system?

At its most fundamental level, mediation can serve as a powerful tool to achieve significant cost reductions for the court system (Miranda, 2014) as well as addressing wider issues pertaining to the ‘high costs of justice’ (ibid.) and associated pressure on courts (Hartnell, 2021) across the Commonwealth (The Tribune India, 2019).

Evidence suggests that more widespread adoption of mediation as a mechanism for dispute resolution could also allow for more timely access to justice by reducing the time taken to resolve cases, clear ‘backlogs’ (The World Bank, 2017; Muller & Nel, 2021) and achieve high success levels with regard to settlement (Yeow Choy, Fatt Hee, & Ooi Su Siang, 2016). This also has the potential to offset challenges arising from constraints on spending by government (Steadman, 2017).

Backlogs of cases pending litigation can be cleared in cases where innovative and high-profile court-annexed mediation approaches are adopted, such as ‘Settlement Weeks’, as adopted in various Commonwealth contexts including Australia (Ali, 2018) and Nigeria (Muller & Nel, 2021). Additionally, in such cases there is also scope for a compounding effect, by which the use of ADR mechanisms is further encouraged, and increased awareness about the effectiveness and benefits of mediation specifically is achieved (ibid.) thus increasing long-term adoption of such approaches.

Where court-annexed mediation approaches (see 2.1) are adopted with the financial support of multilateral donors, there is scope for significant improvements in access to justice within relatively short timeframes (The World Bank, 2017) such as in the case of the CAMP by which court-annexed mediation is supported by the World Bank’s JPIP in Kenya (ibid.).¹³

¹³ Another example is court-annexed mediation in Trinidad and Tobago under section 14 the Mediation Act, Chap. 5:32: (1) Where in any matter other than a criminal matter the Court considers it appropriate to refer parties to mediation, the Court may refer them to a certified mediator who is – (a) a public officer; or (b) in the employment of the Judiciary; or (c) on the Judiciary’s roster of mediators. (2) The parties to any matter before the Court, may with the approval of the Court, agree to retain the services of a mediator who is not included under subsection (1). (3) Any expenses incurred under subsection (2) shall be borne by the parties or either of them as the Court may direct or as the parties may agree (Government of the Republic of Trinidad and Tobago, 2004).

More widespread adoption (UNCITRAL, 2022b) by member states of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation would provide uniform rules for the mediation process and encourage the use of mediation, and ensure greater predictability and certainty in relating to its use (UNCITRAL, 2022a). Likewise, more widespread adoption of the Singapore Convention would allow for increased recourse to the courts to enforce settlements pertaining to international disputes (UNCITRAL, 2022c).

Similarly, increased adoption of ‘Med-Arb’, ‘Arb-Med’ and ‘Arb-Med-Arb’ approaches, with mediators ‘switching hats’ (Stipanowich, 2020) would (where local statute enables this) allow for resulting settlements to be recorded as consent awards, and thus be enforced under the New York Convention (*ibid.*).

The increased adoption of mediation clauses (Alexander N. M., 2009) gives rise to a potential scenario in which a stay of court proceedings could arise from a failure to honour an agreement to engage in mediation (though the enforceability of such clauses remains largely untested, and there remains scope for parties to simply ‘go through the motions’ to proceed to arbitration or litigation (*ibid.*)).

Should customary justice or indigenous practices be increasingly adopted (UNODC, 2020) and other alternative mediative dispute resolution avenues leveraged, such as the ‘Lok Adalat’ tradition in India (Zainulbhai, 2016), there is scope to further ‘relieve the overburdened dockets of more formal courts’ (*ibid.*, p. 250). Similar outcomes could potentially also be achieved in contexts where religious, tribal or traditional leaders can play a mediative role in dispute resolution (International Commission of Jurists, 2018).

Where mediative restorative justice approaches are adopted, research suggests there is potential for such approaches to reduce repeat offences, increase access to justice, reduce crime victims’ post-traumatic stress symptoms, improve satisfaction with outcomes (for victims and offenders) and thereby reduce the costs of administering justice, as well as reducing recidivism in comparison to custodial sentencing (Sherman & Strang, 2007). All of the above have potentially positive medium-long-term benefits with regard to reducing pressure on the courts (*ibid.*).

Finally, there is some evidence to suggest that adoption of compelled mediation has the potential to improve settlement rates, and thus reduce pressure on the courts (Randolph, 2010). This requires good faith engagement with the process by all parties (Government of Canada Department of Justice, 2017), and also raises a range of practical and ethical questions over the extent to which such approaches are warranted (Randolph, 2010) or desirable (Bochner, 2019).

This is not to suggest that mediation represents a panacea that will resolve all challenges faced by the courts. In many cases, such as family law (Miranda, 2014) and in Commonwealth member countries in which there is a particularly well-established tradition of mediation, such as Australia (Magnus, 2012), courts continue to face issues of resourcing and related pressures. However, the prominence of mediation is increasing rapidly (Alexander N. M., 2009), and questions over ‘alternate’ nomenclature (such as Med-Arb, Arb-Med etc.) (Simmons & Simmons, 2021) are increasingly valid. This has potential significant long-term implications for the courts, and also raises important policy questions for legislators over questions relating to the role of the courts throughout the Commonwealth (Bochner, 2019).

3.4 How is technology used in mediation?

Technology has a well-established and varied role in mediation practice (CEDR, 2020) with technology-enabled mediation being underpinned by ‘the same fundamental principles and methods as standard face-to-face mediation’ (ibid.), though with distinct characteristics to be considered (ibid.).

While some international research suggests that historically ‘technology play[ed] little to no role in most practitioners’ work, other than in relation to ancillary activities’ (Carrel & Ebner, 2019), COVID-19-related lockdowns inevitably had a substantive impact on mediation practice (Ahmed, 2021). This impact has been widespread, with international research suggesting the following trends have emerged:

- *the development and accelerated use of online platforms for the commencement and conduct of proceedings, document management, and hearings;*
- *the development of practice notes, codes, protocols, and guidelines; and*

- *increasing adoption of innovative technology, practices, and scheduling*

(Rooney, 2021)

Lockdowns also precipitated, and in some cases (e.g. Australia and India) initiated, mechanisms for ‘provision of electronic filing, document exchange and storage, and communications services in litigation’ in addition to ‘the provision of these services in arbitration and mediation’ (ibid.). In this context there has been a marked increase in the use of online and hybrid hearings (ibid.).¹⁴ This has raised practical challenges pertaining to protocol, particularly as they relate to ‘fairness, efficiency, use of innovative technology, confidentiality, and cybersecurity’ (ibid.)

This has served as a catalyst for the broader uptake of innovative digital technology (Tahir bin Mohamed, 2021) to facilitate, enhance and render efficient and secure this increase in digitally enabled (and increasingly online) mediation provision including (but not limited to):

‘...flexible scheduling and flexible cost structures. Innovative digital technology being used for dispute resolution proceedings includes auto-transcription, document management and automated docketing, blockchain, inferential artificial intelligence (AI), natural language processing (NLP) and visual perception tools (including facial recognition technologies, radar, light detection and ranging (LIDAR) and ultrasound sensors)...’

(Rooney, 2021)

as well as reported use of ‘chatbots’ (Dontsov, Neugodnikov, Bignyak, Kharytonova, & Panova, 2021).

Research is inconsistent as to whether these innovations have resulted in substantive cost reductions – in such contexts hearings can also take longer (ibid.; Tahir bin Mohamed, 2021). Nonetheless, various commentators have suggested that the significant increase in Online Dispute Resolution (ODR) should be harnessed long-term (Kulkarni & Dua, 2020) to address historic challenges in the context of mediation and ADR more

¹⁴ A national experience example from Canada includes guidance regarding when virtual hearings may be appropriate in the court context (Office of the Commissioner for Federal Judicial Affairs Canada, 2022). Similar approaches have been adopted elsewhere, including Singapore (SIMC, 2020) and Australia (Australian Disputes Centre, n.d.).

broadly (Arinze-Umobi & Okonkwo, 2021). This is particularly the case where social distancing measures are likely to be adopted long-term (Tahir bin Mohamed, 2021) (i.e. retained in a post-pandemic context). Concerns have been raised over the implications of online, video-based ADR when engaging with ‘less IT literate persons’ as such shifts in practice have the potential to hinder access to dispute resolution for these individuals (Tallodi, 2020) particularly as they are probably drawn from groups most likely to be at risk of COVID-19. Likewise, the extent to which such approaches are appropriate to the context of certain issues, particularly for mediation pertaining to family matters (Sourdin, Li, Simm, & Connolly, 2020), requires careful consideration.

While these developments are noteworthy, there are pre-existing and parallel developments over the use of technology in relation to mediation. This includes the development of digital toolkits to facilitate and render more efficient the process of mediation and ADR more broadly. A well-established example is Resolve Disputes Online (RDO), a proprietary subscription-based platform which is used by a range of governments, ADR practitioners, courts and tribunals internationally (RDO, n.d.). RDO provides access to mobile-enabled platforms for dispute resolution allowing users to engage in mediation through mobile electronic devices, marketplaces for engaging with users, blockchain base record-keeping, bespoke digital tools to support mediators in ‘building’ settlements, statistical reporting on cases, access to collaborative knowledge bases, and workflow, file sharing, encrypted communications, and case management tools. Most significantly, the platform is increasingly making use of artificial intelligence (AI) allowing for the resolution of high-volume disputes using an ‘AI mediator who can negotiate financial settlements’ (ibid.). This reflects wider developments in technology by which disputes can be mediated on a fully automated basis (Barnett & Treleaven, 2018). However, it also raises significant questions as to the extent to which such ‘mediators’ can or should be considered equivalent to humans undertaking the same role. There are significant concerns about AI’s potential effects on access to justice (Salyzyn, 2021).

Such approaches primarily build on either knowledge-based or machine learning AI technologies, with the former

encompassing rule-based systems and case-based systems, and the latter making use of supervised and/or unsupervised learning. ADR-related use of AI also draws significantly on the field of natural language processing (NLP) and sentiment analysis (ibid.) as well as use of blockchain technology.

Mediation algorithms in this context ‘do not decide who is right and who is wrong, or where the truth lies, but reduce the conflict into areas of consensus, to find a “win-win”’ (ibid., p. 406). It is anticipated that as these technologies develop further, they will result in ‘significant reductions in the cost of litigation, and bring about certainty for those who are involved in the most complex and difficult disputes around the world’ (ibid., p. 407).

Wider commentary has noted the increasing significance of ‘human-centred design’ in the context of artificial-intelligence-based approaches to ADR, identifying a set of key characteristics required for user-centric intelligent ODR systems:

- case management;
- triaging;
- provision of advisory tools;
- communication tools;
- decision support tools; and
- drafting software and agreement technologies.

It has also been suggested that ‘the development of a six-step hybrid ODR system will be [a] very significant [and] important starting point for developing Intelligent Negotiation Support Systems and Intelligent Online Dispute Resolution Systems’ (Zelevnikow, 2021, p. 809).

Such technology can serve as an effective tool for mediators and legal professionals, though it also has the potential to supplant human mediation entirely (Beioley, 2019) particularly in cases where it can do so at low cost in ‘low stakes’ contexts. Technology also has the potential to remove biases, such as in the case of technology-facilitated resolution models in Canada (Bhalla, 2019-2020).

These developments are likely to have significant and continued impact on the practice of mediation as shifts toward ODR are unlikely to reverse, and the potential cost-savings of

Case study: Artificial intelligence – automated mediation

Resolve Disputes Online (RDO)

Context: United Kingdom

RDO provides a digital toolkit to support ADR, including mediation, which is used by a range of governments, ADR practitioners, courts and tribunals internationally (RDO, n.d.).

The toolkit includes a mobile-enabled platform for dispute resolution, allowing users to engage in mediation through their mobile electronic devices, marketplaces for engaging with users, blockchain based record-keeping, bespoke digital tools to support mediators in 'building' settlements, statistical reporting on cases, access to collaborative knowledge bases, and workflow, file sharing, encrypted communications, and case management tools.

Most significantly, the platform is increasingly making use of AI, allowing for the resolution of high-volume disputes using an 'AI mediator who can negotiate financial settlements' (ibid.). This reflects wider developments in technology by which disputes can be mediated on a fully automated basis (Barnett & Treleaven, 2018).

Developments such as this are likely to have significant and continued impact on the practice of mediation as shifts toward ODR continue.

AI-based and digitally enabled mediation also provide significant cost-savings, and are thus likely to be attractive to governments and private clients. Such approaches have the potential to reduce pressure on the courts.

artificial-intelligence-based and digitally enabled mediation are likely to appeal to users and governments. These technologies also have the potential to reduce pressure on the courts.

3.5 Can the introduction of compulsory mediation or the grant of power to judges to encourage the use of mediation assist with effective case management?

The question as to whether introducing compulsory mediation or granting power to judges to encourage the use of mediation to assist with effective case management is one that can draw on the practical experience of various Commonwealth contexts in which such approaches have been adopted, in many cases for a significant period of time. Mandatory ADR has been 'accepted' in Australia, New Zealand (Randolph, 2010) as well as parts

of Canada.¹⁵ The United Kingdom has engaged in a range of related mediation approaches ranging from automatic referral to arrangements by which a party to a dispute can be ‘denied [even if successful] part or all of its costs if it had unreasonably refused an invitation to mediate’ (Simmons & Simmons, 2021) or behaved unreasonably during mediation (Ali, 2018). This constitutes ‘partial mandating’ in that it potentially sanctions parties for refusing to mediate, particularly for divorce, childcare and employment proceedings.

Justifications for such approaches are largely rooted in the position that there is a clear distinction ‘between being coerced *into* mediation, and *in* mediation’ (Howarth & Caruana, 2017). That is, while mediation may be mandated, parties are not compelled to settle. As such, the argument follows: ‘court ordered mediation merely delays briefly the progress to trial and does not deprive a party of any right to trial’ (Randolph, 2010, p. 500).

This raises interesting questions as some (but not all) research findings suggest that compulsion to mediate may result in higher settlement rates (Howarth & Caruana, 2017) posing a potential quandary as to whether parties are being ‘compelled’ to settle, and would not have done so had they not been compelled to participate in proceedings. Some may argue this is a positive and pragmatic outcome, reducing pressure on the courts and encouraging settlement (Randolph, 2010). Others suggest this undermines the fundamental principle that mediation is a ‘voluntary consensual process’ (ibid.). Selected survey data have suggested that some mediators, despite their intended ‘neutral role,’ nonetheless consider themselves as having an evaluative, rather than a facilitative role, particularly

¹⁵ Examples from the national experience of Canada of the compulsion to consider mediation include: Rule 4.16 of the Alberta Rules of Court, Alta Reg 124/2010, where the matter cannot proceed to trial unless the parties certify that they have participated in a form of dispute resolution. In Ontario, Rule 24.1 of the Rules of Civil Procedure provides for mandatory mediation in certain actions (Government of Ontario, 2022). Under rule 5-3(1)(o) of the Supreme Court Civil Rules, in British Columbia, a judge may order that the parties must attend a mediation. Under article 1 of the Code of Civil Procedure, CQLR c C-25.01, in Quebec, parties must consider private prevention and resolution processes before referring their dispute to the courts. Similar approaches have been adopted in other Commonwealth contexts, including Australia (Waye, 2016, p. 214), while other contexts have adopted ‘partial mandating’ approaches (Civil Justice Council, 2021).

in protracted and challenging stages in the mediation process (CEDR, 2018) with this reportedly informing their approach to mediation in practice (ibid.). This potentially gives additional weight to concerns over blurring of lines between mediation and arbitration (Nolan-Haley, Mediation: The "New Arbitration", 2021) as compulsion to engage in arbitration has far more significant implications regarding access to justice (Randolph, 2010) than compulsion to engage in mediation.

This raises further questions about the ultimate practical significance of such compulsion given that (provided parties are not compelled to reach a settlement), as mediation definitionally requires good faith interest in engaging meaningfully in the process by parties to the dispute, no party can force another to participate (Government of Canada Department of Justice, 2017). In such contexts, a third party cannot 'impose' a decision in the context of mediation (Cooley, 1986). This presents a risk that unwilling parties will merely 'go through the motions' as is often the case in existing contexts of protracted disputes where mediation is effectively mandated but parties take an adversarial approach, such as employment disputes (Liebmann, 2000b) and cases before the family courts (Brett Wilson LLP, 2022).

As such, it is clear there is an established history of mandated mediation in several Commonwealth contexts, and support for its introduction in cases where this is not yet established (Ojha, 2022).

There remains a disconnect, however, between the views of the judiciary (and increasingly legislatures) with a 'tougher approach' (Simmons & Simmons, 2021) adopted to those not engaging in mediation and those engaging with the justice system who are 'not as enthusiastic about mediation as the government, the judges, and the mediation community think they ought to be' (Randolph, 2010, p. 499). Research into an automatic referral to a mediation pilot scheme in London found that, in around 80 per cent of cases, one or both parties objected to mediation, with a further analysis of findings noting that:

'When parties were called on to explain their objections to a judge, judicial pressure was unlikely to persuade them to mediate;

Only 14% of the cases initially referred to the scheme actually ended up in mediation;

The settlement rate followed a broadly downward trend over the year, from 69% to 36%;

The majority of cases in the ...scheme settled out of court anyway, without going to mediation;

In cases where mediation took place, but which did not settle at mediation, parties found that they added 1,000.00 GBP – 2,000.00 GBP to their costs;

Parties who failed to settle during mediation complained about compulsion, pressure, and the risk of revealing their hand to their opponents. They also criticised the hot and cramped mediation rooms at the court; and

Judicial time spent on mediated cases was lower, but administrative time was higher.'

(Miranda, 2014, p. 15)

Notwithstanding the above, parties who settled during mediation were generally positive about the process (Miranda, 2014) and the Australian experience (Nesic & Boule, 2001) suggests significantly higher settlement rates can be achieved (Limbury, 2018). As such, caution should be applied in drawing hard lessons from a single pilot scheme.

Furthermore, the positive experience of the process by those who had participated and settled (and the generally low uptake within the pilot) suggest that the issue may be one of education and awareness building. It is noteworthy that the Australian model does not apply compelled mediation universally. It has been accompanied by a range of initiatives specifically intended to drive awareness of, engagement with and popularity of mediation, such as 'Settlement Weeks' (Ali, 2018) which have also been adopted elsewhere in the Commonwealth (Muller & Nel, 2021). If mandatory mediation is to be adopted, this should be with due regard to legitimate concerns over its impact on the judicial system and the law (Bochner, 2019); be accompanied by proactive mechanisms to raise awareness; and highlight the benefits of mediation to potential users (Randolph, 2010).

Chapter 4

Attitudes towards
Mediation

Chapter 4

Attitudes towards Mediation

The following chapter explores 'attitudes' towards mediation. It focuses initially on the judiciary and then considers in turn the attitudes of mediators, legal professionals and end users of mediation services (i.e. individuals and businesses). In doing so, it addresses potential conflicts between the attitudes expressed as well as their broader implications where relevant.

4.1 Judiciary

There has been increasing support expressed by senior members of the judiciary from a range of contexts in the Commonwealth for mediation and ADR more broadly. This includes Sir Geoffrey Vos, Master of the Rolls, 'Alternative Dispute Resolution should really be renamed as "Dispute Resolution" since it is not alternative at all' (Simmons & Simmons, 2021) echoing the earlier views of his predecessor Lord Neuberger (Neuberger, 2015) and the Chief Justice of India, NV Ramana (Ojha, 2022). In Australia, a Commonwealth context in which mediation (and indeed mandatory mediation) is particularly well established (Magnus, 2012), 'it is evident that there is a greater level of support for [than concern about] mediation in Australia by the judiciary' (Hanks, 2012, p. 948). In Canada the view has been expressed that the question for the judiciary is not 'whether we approve of the increased role of mediation – that role is upon us, like it or not' (Winkler W. K., *Some Reflections On Judicial Mediation: Reality Or Fantasy?*, 2010) and that no one 'can doubt that the arrival of mediation has made its mark on the litigation culture' (ibid.). There is judicial support for mediation in South Africa particularly in divorce and family disputes (De Jong, 2005) and in the Caribbean (Canto, 2017; Byron, 2017). Consistent shifts by the courts to encourage and in some cases mandate mediation, reflect this broad support base. Furthermore, there are innovative approaches adopted to support the uptake of mediation throughout the Commonwealth such as 'Settlement Weeks' (Ali, 2018; Muller & Nel, 2021) and other court-annexed mediation approaches (The World Bank, 2017).

It appears that in many cases, judges have progressed considerably further toward approbatory sentiments to mediation than the parties to disputes themselves.

The prevailing rationale underpinning this support is that of reducing pressure on the courts (OMMCOM NEWS, 2022) though the vehemence of support by many members of the judiciary is undoubtedly born out of repeated encounters with protracted disputes that result in poor outcomes for all parties (Brett Wilson LLP, 2022), in addition to placing a considerable burden on the courts. Human factors and preferences are also likely at play, with one commentator noting '[s]ome judges have found that by referring, for example boundary disputes to mediation, they relieve themselves of having to hear the most tiresome and futile cases in their lists' (Randolph, 2010, p. 499).

This suggests a broad consensus that, where possible, disputes should be kept out of the courts, with ADR, and mediation in particular, being the primary mechanism for resolving such matters; 'the existence of the judges and the courts remain in order to determine the rights and obligations of the parties in the very few cases in which settlement is impossible' (Clift, 2009, p. 511). While such perspectives have historically focused most significantly on disputes pertaining to family matters (Brett Wilson LLP, 2022), there has been similar support in contexts including commercial disputes over franchise payments by a plumbing business (Simmons & Simmons, 2021) and judicial review (Bondy & Doyle, *Mediation in Judicial Review: A practical handbook for lawyers*, 2011). The emergence of initiatives to further increase awareness of mediation and other ADR practices among the judiciary (UNCTAD, 2018) will likely increase support for mediation further.

This is not to suggest unanimity of opinion on the part of judiciaries throughout the Commonwealth. Indeed, there remains considerable discord on matters such as court-annexed mediation (Winkler W. K., 2010) and court-mandated mediation (Simmons & Simmons, 2021). It is clear that in some cases (most notably Australia), support for mediation has been shaped by its long-standing role within a country's legal system (Magnus, 2012). This suggests that, as mediation continues to rise in prominence, there will continue to be a commensurate rise in support from the judiciary, particularly given the potential of mediation and other ADR practices to address the

challenges faced by judges in their day-to-day work (Randolph, 2010; Speers, 2022).

On the distinct but related question as to whether or not judges themselves should engage in mediation, contrasting views are encountered. Detractors have identified the risks: blurring of the role of the judge, ruling the judge out of being able to sit on a trial should mediation be unsuccessful, potential constitutional issues in some national contexts, a disconnect between judicial skills and those of an effective mediator, potential for the 'status' of a judge to lead to statements made by him or her as being wrongly viewed as 'authoritative', 'brain drain' in the judiciary and the potential for parties to make use of such mediation as a 'test run' for litigation (Smith, 2015).

In contrast, proponents of judicial mediation suggest that it increases the likelihood of settlement, saving time and money; enhances a 'culture of mediation'; makes the work of judges more varied, and thereby more interesting; and has a high settlement rate (and is therefore successful) (ibid.). There is general consensus that judges involved in mediation should 'be precluded from taking any decision making role in the proceedings should mediation fail' (ibid.).

4.2 Mediators

As in many Commonwealth contexts mediators are unregulated, and research into mediator attitudes is limited, therefore conclusions regarding insights into mediators' perspectives should be couched cautiously. Findings from a mediation audit of commercial mediator attitudes and experience in England and Wales, under the auspices of the Centre for Effective Dispute Resolution (CEDR, 2018) collated the recommendations of mediators as to 'the piece of advice that they most frequently wished to give to parties (or actually gave them) about how to improve their own performance in the mediation process and get the best out of it' (ibid.). There was a marked degree of convergence in responses, with the following reflecting the views most widely expressed:

Prepare for the day – not only by thinking about your needs and expectations but also doing the same thing thinking about your opponents. Read Getting Past No. Arrive early. Check the parking.

Being in the right does not bring anybody closer to a mutually beneficial position.

Reflect on the offer you are making to the other party – if this offer was put to you how would you feel? Is the offer realistic?

Do more preparation! Come to the mediation with a properly executed risk assessment and a realistic range of acceptable outcomes, based on needs rather than just regurgitating a position that has already been stated in correspondence, pleadings and the position statement (which is frequently itself a rehash of the pleadings).

I always want to tell very senior lawyers to try to take their own emotion out of the process – it isn't about them, it's about their client!

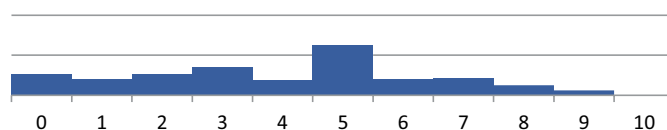
(ibid., p. 8)

Of particular note, given the intended and agreed role of mediators (Thomson Reuters Practical Law, 2022a) as a 'neutral' third party who expressly does not arbitrate, when asked to scale their approach with regard to 'philosophy of mediation' on a scale from 0 (fully facilitative) to 10 (fully evaluative) (where a facilitative approach seeks solely to serve as a neutral facilitator of a negotiated resolution to a dispute, while an evaluative position entails a mediator making assessments of the views posited by the parties), while there was a marked preference at the lower end of the spectrum, many mediators appeared to view their role as being an evaluative one (see [Figure 4.1](#)).

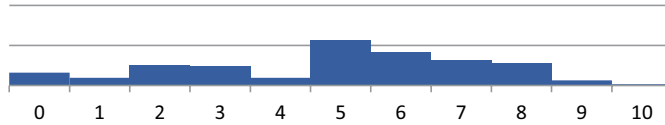
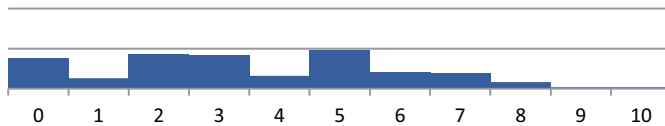
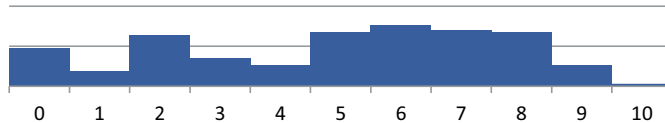
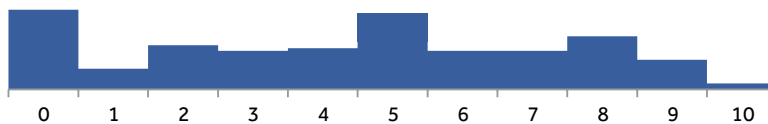
This may reflect 'market demand', in that mediators' reported perceptions of disputing parties' expectations of the mediator's role, on the same scale, suggests a preference for a more evaluative role (see [Figure 4.2](#)).

When mediators' perceptions of the 'philosophy' of mediation were further disaggregated by distinct stages of the mediation process, a clear pattern emerged (see [Figures 4.3–4.6](#)).

Figure 4.1 Personal philosophy of mediation



Source: CEDR (2018)

Figure 4.2 Parties' expectationsSource: *ibid***Figure 4.3 First phase of mediation – when you are uncovering information**Source: *ibid***Figure 4.4 Trying to get negotiations moving**Source: *ibid***Figure 4.5 When everything is stuck**Source: *ibid***Figure 4.6 Closing the deal**Source: *ibid*

This suggests an approach by which ‘mediators trained in a facilitative doctrine tend to favour that approach and start out using it, but many (although clearly not all) veer towards more evaluative strategies when the going gets tough’ (*ibid.*). This raises questions over whether there is a broader risk of the role of mediators increasingly ‘blurring’ with those of arbitrators

(Nolan-Haley, 2021). This is particularly problematic if this shift is not transparently communicated to parties (notwithstanding the apparent preference by some parties of a more evaluative approach). While there has been considerable debate over the extent to which mediation should adopt an evaluative or a facilitative approach, it has been argued by some commentators that, particularly within commercial contexts, 'evaluative methods are inseparable from facilitative methods' (Roberts, 2007) and that 'in the real world of complex commercial mediation, evaluative methods together with facilitative methods have proven essential and indispensable for achieving success' (ibid.).

When considering wider 'trends' in mediation, some mediators (around ten per cent) expressed a broad view that 'negotiations are becoming tougher', potentially due to simpler cases 'settling before getting to mediation' (ibid.). Some mediators also suggested 'more skilful' engagement in mediation by legal professionals (particularly barristers) though others voiced frustrations over 'being told by solicitors how to run the mediation' with some mediators also noting 'an increase in joint meetings between lawyers and/or clients during the course of the mediation (as opposed to at the start of the day)' (ibid.).

When questioned on growth areas in mediation practice, responses suggested that 'general commercial disputes remain the most frequently mentioned sector, whilst Employment/ Workplace, Professional Negligence and Personal Injury were also prominent' while also noting the emergence of trust and estates as a new area of provision (ibid.). Mediators also expressed broadly positive views of the voluntary membership body in place for mediation within the United Kingdom: the Civil Mediation Council (CMC).

While these findings have clear implications for mediation in general, their limitations (given the context in which the sample of evidence was collated) should be weighed with care.

Examining them against findings from elsewhere in the Commonwealth allows for some degree of comparison. A similar study in New Zealand, for example, (the LEADR/ Victoria University Commercial Mediation in New Zealand Project Report), provided further granularity with regard to the nature of cases mediated:

Table 4.1 In your commercial mediations, what are the most common legal subject areas (for example, contractual disputes, banking, insurance etc.)?

#	Answer	Response	% of respondents
1	Contracts (general)	25	74%
2	Property (leases)	7	23%
3	Building/construction	7	23%
4	Employment/workplace	5	15%
5	Family (incl. relationship property)	4	12%
6	Insurance	4	12%
7	Trusts, estates, and/or wills	5	15%
8	Business/commercial	4	12%
9	Tort	3	9%
10	Other	2	6%

Source: Morris & Schroder (2015)

Findings also suggested low adoption of ‘co-mediation’ practices, and suggested that a significant proportion of mediators¹⁶ also work in arbitration and other areas of dispute resolution.

This is perhaps, in part, explained by the high proportion of mediators in New Zealand reporting having a law degree (around 68 per cent) (ibid.).

As in the case of the United Kingdom, a significant proportion of respondents suggested that their mediation approach was often evaluative, as well as being facilitative, again suggesting a potential ‘blurring’ of lines between different areas of ADR practice (Nolan-Haley, 2021):

Table 4.2 Which of the following forms of dispute resolution are you commonly involved in as a professional?

#	Answer	Response	% of respondents
1	Litigation	10	30%
2	Arbitration	16	48%
3	Negotiation	25	76%

Source: ibid.

¹⁶ Based on a sample of approximately 33 respondents.

Table 4.3 Please note the mediation styles that you use in commercial disputes and rank them in order of frequency of use (i.e. 1 = most frequent, 4 = less frequent)

#	Style of mediation	Response
1	Facilitative	1.45
2	Settlement	2.20
3	Evaluative	2.73
4	Transformative	3.38

Source: *ibid*

This is also reflected in broader literature from elsewhere in the Commonwealth, such as Canada (ADR Institute of Ontario, 2020), with an increased emphasis on ‘Med-Arb’ approaches (*ibid.*).

When asked to identify which jurisdictions have been the most influential for their practice in terms of scholarship, mediators in New Zealand identified the following:

The only ‘other’ response recorded was Singapore (*ibid.*), with four out of the five jurisdictions identified as being most influential being Commonwealth member countries, with the one exception (the United States) having a particularly long-running tradition of mediation, often considered along with Australia as being one of the most ‘established’ contexts of mediation practice (Neuberger, 2015).

Wider research into mediator perceptions has reiterated some of the factors highlighted by these findings, however, such as shifts toward evaluative, rather than facilitative processes

Table 4.4 In terms of scholarship, which jurisdictions have been the most influential for your practice? (Not including NZ)

#	Answer	Response	% of respondents
1	Australia	14	47%
2	UK	7	23%
3	USA	15	50%
4	Canada	3	10%
5	Other	1	3%

Source: Morris & Schroder (2015)

Table 4.5 Do you think commercial mediation should be mandatory in NZ?

#	Answer	Response	% of respondents
1	Yes	3	9%
2	No	12	35
3	In certain contexts	19	56
	Total	34	100%

Source: Morris & Schroder (2015)

(Nolan-Haley, 2021), though commentators differ as to whether this is a positive or a negative trend (Gibson, 2007).

Mediator views garnered on whether mediation should be compulsory varied, and reflected a potentially nuanced set of views, though a lack of follow-up analysis precludes an exploration of this topic in further granularity.

Wider findings are again limited by the constrained scope of the primary research, but are nonetheless of potential interest for stakeholders more broadly. In Australia, it is reported that ‘mediators’ attitudes, and strategies for addressing emotional expression in mediation’ primarily focus on an approach by which mediators ‘encourage or allow emotional expression rather than simply seeking to control it’ (Douglas & Coburn, 2014, p. 111). This is an area which warrants additional future research and exploration.

While the analyses collated above provide some potential areas of interest, and are to some degree ‘triangulated’ by broader findings in the wider literature, what is noteworthy is how little such systematic research has been undertaken in other Commonwealth settings, suggesting that replicating and expanding such research would be of benefit to all stakeholders engaged in mediation and ADR contexts.

There are efforts in some Commonwealth contexts to facilitate the emergence of a mediation ‘profession’. If this is to be achieved, such bodies will in most cases be self-regulating with high barriers to entry; expect high professional standards of members (and sanction those who do not adhere to these); and ensure a focus on continuing professional development and training (these are the core characteristics that allow a ‘profession’ to emerge (Williams, 1998)).

4.3 Legal profession

The ‘attitudes and role of lawyers’ play ‘an important role in determining success and satisfaction in mediation’ (Alexander N. M., 2009). It is, therefore, important to examine and to give due consideration to the attitudes of legal professionals throughout the Commonwealth.

Lawyers have played a key role in supporting the increased adoption of mediation internationally (Clark, Lawyers and Mediation, 2012) in line with a general expectation that they ‘adjust their practice to serve their clients’ needs in a changing legal environment’ (Douglas & Batagol, 2014). Even in the most established Commonwealth context for mediation, Australia, engagement with mediation by legal professionals nonetheless raised challenges and considerations:

‘Lawyers in mediation can embrace the underlying philosophy of much of mediation practice and engage in collaborative problem-solving that is non-adversarial in orientation. Alternatively, lawyers may stymie the potential for settlement by taking an adversarial, rights based approach in mediation. At times lawyers may need to advocate vigorously for their clients’ rights, but automatically approaching mediation with an adversarial mindset may defeat some of the potential of mediation to meet their clients’ needs.’

(*ibid.*, p. 759)

Nonetheless, in these more established contexts, findings suggest that selected lawyers have ‘progressed beyond the traditional rivalry of the two professions and towards a high level of inter-professional collaboration’ (*ibid.*).

Despite the growing role of mediation as an approach to ADR (Alexander N. M., 2009), some research suggests that, particularly in areas where it is nascent, engagement with legal professionals is still undermined by misunderstandings regarding the nature of mediation, such as in the case of mediation in commercial property disputes in the United Kingdom (Sidoli del Ceno, 2011). This echoes findings from other Commonwealth contexts, such as the suggestion that, in Malaysia, certain lawyers are ‘reluctant to advise the clients to seek alternative dispute resolution (ADR) mechanisms such as mediation’ as a result of an ‘unwillingness or inability to appreciate the advantages of non-adversarial proceedings’

(ibid.). This suggests a need for improved awareness building, education and training efforts, and advocacy (ibid.).

Other commentators have suggested a more systemic set of working culture issues, i.e. that ‘mediation [is] being stifled because it is anathema to the “macho”, adversarial litigation culture’ of legal practice, suggesting that if a lawyer engaged more frequently in ADR approaches, his or her ‘standing amongst colleagues would suffer’ (Clark, 2011), though also suggesting that hesitancy around mediation may often be led by client demands – ‘often clients do not want to mediate’ (ibid.).

There has nonetheless been a significant increase in alignment between the legal profession and ADR, and mediation in particular, as well as a clear systematisation of how ADR should be addressed (Law Council of Australia/Federal Court of Australia, 2014) and legal advisers are increasingly encouraged (and in some cases mandated) (Government of Canada, 2022b) to advise mediation or other ADR approaches.

Selected survey data on lawyers’ attitudes to mediation suggest that the primary factor informing decisions to engage mediators is that of ‘professional reputation – experience/status’, though it is noteworthy that the second most prominent consideration is ‘availability’, suggesting issues with quality supply in the context of the United Kingdom where the survey took place (CEDR, 2018). Lawyers also reported a preference for appointing legally qualified mediators, with one respondent expressing the following opinion:

‘Since lawyers are usually more comfortable dealing with fellow lawyers, there is an ingrained tendency for lawyers to choose lawyers over non-lawyers. I think they think that non-lawyers do not have the necessary legal knowledge to assist in reaching settlement. It tends to be only where complicated numbers or technical issues are involved that they will look beyond this to other professions.’

(ibid., p. 6)

Most lawyers reported a high level of satisfaction with the mediators they engaged as well as high settlement rates (ibid.), though an area of discord pertains to resistance by lawyers to ‘joint meetings, particularly at the start of a mediation day’. Lawyers argue that ‘no purpose is served by such meetings given that the parties are already familiar with each other’s cases– a

view which the majority of mediators do not appear to accept' (ibid.).

While the conclusions that can be drawn from these findings are limited, common themes emerge. There appear to be continued gaps in understanding in some contexts within the Commonwealth relating to mediation practice. These warrant training and awareness building efforts (Randolph, 2010). Likewise, there remain some potential clashes of culture between 'adversarial' litigation and the consensus-building process of mediation. This has been cited as a factor undermining historically mediative 'Lok Adalat' dispute settlement in India (Zainulbhai, 2016) by rendering it increasingly competitive. That said, significant progress has been made in strengthening collaboration between the legal profession, and there is appetite for continued lesson-learning (Speers, 2022) within the legal community in the Commonwealth (Holohan, 2022) with scope for continued collaboration in this area. This could be facilitated by the Commonwealth Secretariat and approved Commonwealth partner institutions such as the Commonwealth Lawyers Association and the Commonwealth Magistrates' and Judges' Association (CMJA).

4.4 Users of mediation (individuals and businesses)

Literature suggests that parties who engage in mediation report high levels of satisfaction with outcomes. There is significant growth in mediation as an ADR mechanism (Alexander N. M., 2009) including in the context of international commercial disputes (Lim, 2019). Likewise, research suggests widespread support from members of the judiciary (Simmons & Simmons, 2021; Ojha, 2022) and increasingly, the legal profession (Alexander N. M., 2009). Despite this, there remains hesitancy over adoption of mediation by individuals and businesses who are parties to disputes (Randolph, 2010).

For individual parties, this probably stems from the primary contexts in which they are likely to be involved in disputes warranting mediation (or indeed litigation) (Miranda, 2014), particularly issues relating to divorce, care of children and disputes with employers. Personal disputes are often characterised by issues leading to anger and frustration

(Randolph, 2010), resulting in a desire by parties to have their 'day in court'.

Such motivations are not, it appears, restricted to individual parties to disputes. A study of chief executives and in-house lawyers found that 47 per cent of respondents admitted that 'a personal dislike of the other side had driven them into costly and lengthy litigation' (*ibid.*, p. 499).

Such findings potentially strengthen the case for increased pressure on parties to seek recourse to mediation ahead of litigation or arbitration, particularly given the high level of success achieved in mediation as an ADR mechanism, with high settlement rates achieved (Alexander N. M., 2009). While concerns are raised over selection bias in this context (i.e. parties involved in mediation, particularly voluntary mediation, are likely seeking to settle), it has been argued that a horse 'led to water' will not always refuse to 'drink' (Stilgoe, 2011). Some compelled mediation statistics suggest that there is a positive correlation with settlement rates (Randolph, 2010).

Likewise, for some parties to disputes, a wide range of socio-cultural, religious and gender considerations may impact on willingness to engage with mediation (Howarth & Caruana, 2017). It is important that such considerations are anticipated, respected and accommodated if engagement with such individuals in the mediation process is to be successful.

Aside from contexts in which these emotive factors perhaps hold sway, commercial parties have historically favoured arbitration as an ADR mechanism. This is particularly the case with larger companies and in the context of international cross-border disputes (Alexander N. M., 2009). This has shifted in the wake of the Singapore Convention with increased uptake of ADR approaches in trade disputes (Love, 2019).

This preference has largely been driven by considerations over 'finality' and 'enforceability' with concerns over the latter in particular prompting reservations over the adoption of mediation. Given the considerable commercial drawbacks of both arbitration and litigation, which is often 'costly and damaging' (Newman, 2000, p. 177), there is clear appetite for mediation if these concerns can be mitigated.

As such, there is perhaps scope to increase buy-in to mediation by both individual and commercial users by engaging in education efforts (Randolph, 2010) and by adopting legal

frameworks that strengthen the enforceability of mediation settlements. Examples are the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, and the Singapore Convention (United Nations, 2019), in the case of international commercial disputes.

Alternatively, or in parallel, user concerns and expectations (particularly in commercial contexts) regarding enforceability can perhaps be encouraged through increased awareness and adoption of 'Med-Arb', 'Arb-Med' and 'Arb-Med-Arb' approaches (Stipanowich, 2020) with enforcement achieved under the New York Convention (SIMC, n.d.).

A lack of resources precludes engagement in dispute resolution by many parties in the Commonwealth (Zainulbhai, 2016). One solution to this may be to harness traditional mediatory bodies, or to engage community leaders as mediators (International Commission of Jurists, 2018).

Chapter 5

Mediators and Modes of Mediation

Chapter 5

Mediators and Modes of Mediation

The following chapter focuses on modes of mediation, the quality of mediators in varied Commonwealth contexts, systems of registration and the training of mediators. It also explores diversity among mediators and regulatory systems for overseeing mediation practice.

5.1 Modes of mediation

The following provides an overview of how mediation works in practice, exploring in sequence the:

1. process for mediation;
2. skills of a good mediator;
3. settlement agreement which evidences the agreement reached by the parties;
4. role of the mediator post mediation;
5. importance of confidentiality;
6. ethics of the mediator (when to stop the mediation, when does public interest trump confidentiality?); and
7. records a mediator should keep.

Practically, mediation ‘involves one or more structured meetings between disputing parties, chaired by a neutral third person whose purpose is to help them negotiate and hopefully resolve a contentious problem’ (Macmillan, 2016).

While there is inevitable diversity of approach, meetings are approached along the following lines:

- *‘the parties will agree to **meet** together with an impartial mediator in order to try to settle the dispute through negotiation with the mediator’s help;*
- *the mediator will **establish a positive and constructive atmosphere**, setting ground rules and guidance for respectful and productive interaction between the parties;*
- *each of the parties will **explain** to the other party and the mediator its account of the facts, its goals and its perspectives on the matter;*

- *the mirror of the previous point, each of the parties will **listen** to the other with a view to understanding where it is coming from;*
- *the mediator will help the parties **explore** their underlying interests and choices, sometimes together, and sometimes separately;*
- *the parties, enlightened by a deepened understanding of their needs and the options before them, will **negotiate** with each other with the assistance of the mediator; and*
- *where possible (as it often is), the parties will reach and sign an agreement and thereby **settle** their dispute.’*

(ibid., p. 2)

For this process to be effective, there must also be an effective mechanism of ensuring that any settlement agreed upon can be effectively enforced (Sussman, 2008).

A capable mediator achieves the process set out above by applying the following skills effectively:

- *‘assist the parties to overcome miscommunication, misunderstanding and confusion by helping them clarify what is agreed and disputed, and identifying the underlying issues;*
- *develop awareness of the real needs of those who are involved by drawing out information and probing each party for their underlying interests;*
- *help the parties to generate and evaluate options to resolve the dispute;*
- *be a sounding board and reality check for parties to reflect on the reasonableness of their positions and demands and alternative approaches; and*
- *facilitate communication and motivate the parties to find a way to work co-operatively towards finding a mutually acceptable solution; and*
- *build on areas of agreement and assist parties to craft a satisfactory and effective settlement.’*

(Macmillan, 2016, p. 4)

When parties arrive at a settlement agreement, it should be emphasised that this is not in and of itself a satisfactory

outcome. Rather, the aim of effective mediation should be to ensure 'a settlement that is viable and durable' (ibid.).

While the precise wording and structure of settlement agreements vary depending on the jurisdiction in question, the enforcement mechanism to be adopted and the specific details of the dispute in question, in most cases a settlement agreement will include the following key components:

1. introductory statement (also known as 'recitals');
2. terms of agreement;
3. statement that the agreement is a 'full and final settlement'; and
4. statement on confidentiality considerations.

(ibid.)

In cases where parties are unable to settle a dispute, a partial or interim agreement may be reached.

There is a continued role to be played by mediators as a 'Post-Conference Continuing Resource' (Harkavy, 2014) both when a settlement has been agreed and when disputes remain unresolved.

First, 'parties may need the mediator's assistance in resolving differences about effectuating their settlement' (ibid.). Second, 'when a settlement is subject to judicial approval because of minor parties or inchoate beneficiaries, a mediator's work might involve participation in post-conference negotiations over documentation and court approval' (ibid.), and in cases involving government parties requiring 'post-conference approvals by city councils, county boards and similar governmental bodies' (ibid.). In cases in which disputes have been resolved on the basis of anticipated legislation (ibid.) or precedent, it is likely that mediators will be required to continue to serve as a 'go-between' until the matter is definitively resolved (ibid.). Third, many settlements effectively comprise, or include, an 'agreement to agree' (ibid.), which may require continued support from a mediator should issues arise in relation to this.

Confidentiality is key to ensuring the confidence of parties to a dispute, in that it allays concerns over revealing one's hand (Miranda, 2014, p. 15). It is very rare that confidentiality can be breached:

'On very rare occasions, a mediator may encounter proposals or activities which may raise the suspicion of illegality or

crime. In the case of proposals, you can use challenging and reality-testing techniques to question the wisdom of any such course and to seek out alternatives. As a last resort, a mediator can withdraw from the mediation, and yet without obligation to breach any confidentiality.

Very rarely will circumstances require breach of confidentiality without permission – only where such matters are subject to laws requiring disclosure such as in the case of public safety, national security and criminality.’

(Macmillan, 2016, p. 72)

Mediation is underpinned by ethical principles. These primarily relate to impartiality and conflict of interest as shortcomings in either regard have the potential to undermine both the outcome of mediation and the confidence of parties in the process (ibid.). An effective mediator should also know ‘when to stop’ (ibid.) i.e. when continued engagement in the process is unlikely to be of benefit to the parties to a dispute. A mediator should also withdraw if:

- *‘a party so requests;*
- *there is a conflict of interest; or*
- *the mediator is in breach of a law, ethical code or the mediation agreement.’*

(ibid., p. 73)

Guidance on record-keeping by mediators varies. Records generally include a ‘bare minimum of facts, tasks yet to be undertaken and any other information that assists both clients [to] progress the mediation’ (Lake-Carroll, 2021). Care should be taken to ensure accuracy, confidentiality and compliance with relevant data protection legislation.

5.2 Quality of mediators

Literature suggests a varied level of quality throughout the Commonwealth, both between and within Commonwealth member countries, as well as elsewhere internationally. In many contexts, mediation is non-regulated (GOV.UK, 2022). Limited barriers to entry allow for the possibility of low-quality providers. In such contexts, mediation is overseen by voluntary member, non-regulatory bodies, which maintain complaints procedures (AMINZ, n.d.; CMC, 2021a) with accountability mechanisms largely market-oriented (Velikonja,

2009) and contractual (i.e. a consumer rights issue, rather than a professional standards issue).

Concerns have also been raised over the quality of mediation and mediators in selected Commonwealth contexts where systemic issues in legal systems preclude ready access to mediation, with commentators suggesting ‘a complete lack of information and knowledge regarding mediation even among attorneys. An understanding of mediation in comparison with traditional litigation would actually enable parties to choose the most appropriate mechanism for resolving their disputes’ (Plevri, 2018, p. 255). They also note that, in such contexts, ‘the actual practice of mediation in general happens rarely, and there is no mediation culture’ (ibid., p. 255). Separate concerns over quality have been raised by practitioners in several Commonwealth contexts with commentators from Canada suggesting:

‘In many communities, poorly trained “mediators” are plentiful. Uninformed participants are often led to “settlements” that are unfair and contrary to legislation. Mediation sessions are at times coercive; there is no screening for power imbalances as is necessary in arbitration. If we are to encourage mediation, we should also encourage mandatory training, mandatory continuing professional development (CPD), mandatory insurance and regulation. If not, we risk settlements that have not been determined in a fair manner sensitive to the dynamics of the relationships and consistent with legal principles.’

(Joseph, 2021)

This has led to calls by some in a range of contexts for ‘legislation to regulate mediators’ (ibid.) though many governments have continued to maintain a ‘hands-off’ approach, and allow a marketplace to develop rather than relying on regulation to drive quality.¹⁷

¹⁷ As noted in sub-section 3.2, a code of ethics (or ‘code of conduct’, etc., nomenclature varies) for mediators may be useful to build public trust and confidence and develop capacity in the sector – such an approach has been adopted in a range of Commonwealth contexts. For example, in the case of Trinidad and Tobago in the Americas, a Code of Ethics for Mediators is included in the First Schedule to the Mediation Act, Chap. 5:32 (Government of the Republic of Trinidad and Tobago, 2004), and similar approaches are in place throughout all Commonwealth regions, including the Pacific (New Zealand Ministry of Business, Innovation, and Employment, n.d.), in Asia (Singapore Mediation Centre, n.d.), Africa (The Association of Arbitrators (Southern Africa), n.d.) and Europe (Malta Mediation Centre, 2004).

It has also been suggested that training, rather than or in conjunction with regulation, would also serve to address issues of quality, particularly in contexts in which mediation is increasingly mandated, such as South Africa (RICS, 2020), as well as more broadly to raise standards, in South Asia (Jain, Mohindroo, & Manchanda, 2021) and elsewhere (Kumar, Jauhar, Vohra, & Tripathi, 2016).

In some Commonwealth and international contexts, the perceived standing and quality of mediation providers has allowed for the emergence of 'opt-in' hubs for mediation and potentially arbitration should mediation fail, or where 'Med-Arb' models are preferred by parties to allow for enforcement of settlements. Notable examples are the Mediation and Arbitration Centre (MARC) in Mauritius (MARC, 2017) and the Singapore International Mediation Centre (SIMC, n.d.). Given that such centres increasingly provide lesson-learning opportunities internationally, collaboration within the Commonwealth facilitated by the Commonwealth Secretariat and accredited Commonwealth organisations, such as the Commonwealth Lawyers Association (Speers, 2022; Holohan, 2022), would allow for this resource to be leveraged further.

In summary, there is a marked inconsistency in the quality of mediators throughout the Commonwealth. This is primarily a product of a consumer-based model, which aligns with the non-mandated context in which much mediation takes place (i.e. parties select mediators who provide solutions they are willing to accept). This suggests that calls for 'regulation' may be overstated, as low-quality providers are unlikely to enjoy sustained commercial success, while noting a place (as within many professions) for self-regulation and voluntary associations. In contexts where mediation is mandated, or where mediation overlaps with potential arbitration, the potential need for effective regulation (though this could remain self-regulation by professional bodies) is clearer.

More significantly, a range of research (Liebmann, 2000a) suggests the factor most likely to impact positively on quality is engaging training to allow mediators to undertake their role effectively. Likewise, while the lower cost of mediation is often posited as a key benefit of the offering, this has implications for resourcing that are likely to impact on quality (ibid.). The role of membership-based accreditation bodies has the potential to provide increased customer protection as well as confidence

in quality assurance (Boon & Whyte, 2004). Particularly where resources are constrained, this potential provides an avenue by which quality can be improved in the absence of government spending. In this context, there is increased support from donor organisations to build capacity in this area such as the *Alternative Dispute Resolution Center Manual – A Guide for Practitioners on Establishing and Managing ADR Centers* published by the Investment Climate Advisory Services of the World Bank Group (2011).¹⁸ Such resources potentially provide a low-cost, high-quality training asset, which can contribute positively to improvements in quality.

5.3 Registration and training of mediators

A review of registration and training of mediators in the Commonwealth identifies a highly varied and inconsistent pattern both within and between member countries.

Some Commonwealth member countries including Canada,¹⁹ Malaysia, New Zealand, Pakistan and the United Kingdom do not have any mandatory mediation training requirements nor an official accreditation system in place. There is no uniformity in the type of training programmes conducted for certification as a mediator in these contexts, with individual accreditation institutions setting their own criteria for accreditation and regulation.

There is little if any consistency arising from analysis. For example, many mediators practising in Pakistan are accredited by the CEDR and the Pakistan Mediators' Association (Josh and Mak International, 2016). In England and Wales, training courses which can lead to CMC registered status include courses offered by CEDR and 20 other providers (CMC, 2021b). Scotland has its own mediation organisations and training providers.

¹⁸ Available at: https://web.worldbank.org/archive/website01553/archived/www.wbginvestmentclimate.org/uploads/15322_MGPEI_Web.pdf

¹⁹ In Canada, the province of Québec has certification of mediators by bodies recognised by the Minister of Justice (article 606 (2) Code of civil procedure) or persons, bodies or associations designated by the government (616 and 619 C.c.p.) (Justice Québec, 2021a; Justice Québec, 2021b). Accreditation models have been adopted in other Commonwealth contexts including Australia (Mediator Standards Board, 2022) and Malta (Servizz.gov, 2022).

In contrast, in Kenya, mediator accreditation is gained by registering with the national Mediation Accreditation Committee. In order to do this, prospective mediators need to complete a mediation training course of at least 40 hours offered by an established mediation training centre (Kenya Law, n.d.). Other requirements include possessing an undergraduate degree from a university accredited by the Commission for University Education and having completed at least three mediations (ibid.).

Likewise, in Australia, mediators can be trained and accredited as mediators through specialised training organisations. There is a structured framework for the ongoing accreditation and professional development of mediators. For example, the Federal Court of Australia is registered as a self-accrediting organisation. All of its mediators (who are registrars of the court) are nationally accredited and subject to the professional development requirements for ongoing training (Federal Court of Australia, n.d.).

There is no uniform response to this enquiry as the pattern of responses is so inconsistent even between states in federated members and within Commonwealth regions sharing significant legal histories. In part this reflects the highly varied socio-economic, geographic and legal contexts throughout the Commonwealth. It is unlikely that significant convergence of approach will emerge. But this is not to suggest that member states cannot take measures to improve mediation appropriate to their own context.

5.4 Diversity among mediators

Data suggest a varied range of ‘diversity’ among mediators if ‘diversity’ is taken to mean immutable characteristics over which the individual mediators in question have no control (i.e. race, gender, age, place of birth and so on). For example, within the United Kingdom, around 33.6 per cent of commercial mediators are women (an average commercial mediation panel has around 28.7 per cent women members); 96 per cent of commercial mediators are white; and 5 per cent of commercial mediators are over the age of 50 (CEDR, 2022).

In some Pacific contexts such as New Zealand, increased emphasis is being placed on ‘cultural practice’ with commentators suggesting potentially positive outcomes arising

from this while highlighting concerns over risks of ‘tokenism’ (Morris & Alexander, 2017).

Some initiatives have sought to actively engage with specific groups on the basis of shared characteristics, such as Women Mediators across the Commonwealth (WMC), as part of the Global Alliance of Regional Women Mediator Networks (Women Mediators Across The Commonwealth, n.d.). UN guidance suggests a range of approaches to addressing concerns over representation of sexes in mediation (UN Department of Political Affairs, 2017). Guidance from the Organisation for Security and Co-operation in Europe (OSCE) provides recommendations on achieving gender balance (OSCE, 2013) with some literature suggesting relationships between gender factors and approaches to mediation (Klein, 2005) and long-running concerns expressed over ‘Diversity Issues’ (Gunning, 1995) in mediation. Likewise, there has been positive and proactive engagement with traditional and religious leaders throughout Africa to take on mediation roles, drawing on their local insight and contextual expertise as well as their social standing (International Commission of Jurists, 2018). This is thought to help ensure engagement with these groups, and to leverage mediation informed by ‘customary justice or indigenous practices’ (UNODC, 2020, p. 6) such as indigenous informal participation in sentencing procedures (ibid.) (‘Circle Sentencing’) in Canada (Marshall, 1999). Similar approaches have been adopted in engagement with Islamic leaders in Malaysia as well as with religious leaders (Wall Jr. & Callister, 1999), particularly with regard to ‘Majlis Sulh’ (Islamic Mediation’ (Jen-T’chiang, 2010) and tribal councils, ‘jirgas’, in Pakistan (Hussain, 2019). In such contexts, due consideration should be given to ensuring that the human rights of all groups, including religious minorities, women, girls and minority ethnic groups, are also consistently protected (International Commission of Jurists, 2018).

There have been calls for erosion of artificial barriers. These have arisen from stereotypes, with commentators expressing the view that ‘[a]s mediation progresses to its next 30 years, we want there to be no stereotype as to who a mediator is’ (Castellanos, Schuler, South, & Way, 2019, p. 3).

More significant, however, are consistent findings suggesting that a failure to be cognisant of the distinct needs and expectations of different groups can leave them marginalised

and excluded, potentially undermining access to justice (Howarth & Caruana, 2017). This is particularly the case in ‘postcolonial settings’ in which certain groups (including indigenous peoples) may have been historically disadvantaged (International Commission of Jurists, 2018), as well as where minority groups may require culturally sensitive approaches.

5.5 Regulation of mediation

The regulation of mediation, like training and registration, is varied and inconsistent throughout the Commonwealth. In a wide range of Commonwealth contexts mediation is not formally regulated, with mediators organised into professional bodies that accredit mediators and arbitrators by their own standards. For example, The CMC is the largest membership organisation for mediation in England and Wales that operates a scheme for the accreditation of mediation providers. This provides a system of voluntary regulation whereby mediators are required to undergo approved training in mediation; maintain full insurance against any legal claims; follow a professional code of conduct; and if necessary provide access to a complaints process (GOV.UK, 2022; CMC, 2021c). Similarly, Pakistan has no regulations in place for mediators. The Pakistan Mediators Association represents the largest national mediation body, followed by the Lahore Chamber of Commerce and Industries Mediation Centre and the Karachi Centre for Dispute Resolution (Josh and Mak International, 2016).

In contrast, in Kenya, a Mediation Accreditation Committee was established under the Civil Procedure Act to regulate the quality and accreditation of mediation and mediators in the country, maintain a register of qualified mediators and enforce a code of ethics (Muigua, 2015; Kenya Law, 2016).

As discussed, there is no uniform model of regulation, and the range of approaches is varied. In this context, policy considerations for legislators and other policymakers, stakeholders, industry bodies and advocacy groups should focus on ensuring they draw on exemplars of good practice. Furthermore, the approaches used should be contextual and appropriate to the respective member country.

Chapter 6

Recommendations

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Recommendations

The following research questions have been considered for this chapter:

- What recommendations can be drawn for governments?
- What recommendations can be drawn for the legal profession?
- What recommendations can be drawn for the Commonwealth Secretariat?
- What recommendations can be drawn for mediation bodies?
- What recommendations can be drawn for mediators?

6.1 Recommendations for governments

A range of high-level lessons can be derived from analysis.

Consider adoption of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation

For Commonwealth member countries that have not already done so, due consideration should be given to the potential benefits of adopting the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018. It provides a clear mechanism ‘to assist states in reforming and modernising their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use’ (UNCITRAL, 2022a).

Consider becoming signatories to the Singapore Convention on Mediation

Member countries should consider becoming signatories to the UN Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (commonly

referred to as 'the Singapore Convention on Mediation') (UNCITRAL, 2022c). This provides a clear enforcement mechanism for mediation settlements relating to international commercial disputes in signatory states.

Seek to build long-term on increased use of technology arising from the COVID-19 pandemic and associated lockdowns

Lockdowns enforced during the COVID-19 pandemic led to a significant increase in the use of technology for undertaking mediation (and a range of related activities). Given significant court backlogs arising from lockdowns, there is a strong case for retaining flexibility for using technology (such as online mediation, technology-assisted dispute resolution and so on). Literature suggests strong buy-in from practitioners as well as scope to further reduce cost. Given that mediation, as a result of its flexibility, is likely to be at the forefront of innovation involving the use of technology, particularly AI, governments should encourage such innovation when it may support and enhance access to justice, while addressing potential ethical and consumer protection concerns. Where possible, shifts in regulations toward increased ODR should remain in place.

Ensure inviolability of 'without prejudice' discussions and support the enforceability of settlements

Consumer confidence in mediation is underpinned by the effectiveness of privacy guarantees, the inviolability of 'without prejudice' discussions and the enforceability of settlements. It is essential that governments ensure these are not undermined. Agreements between governments to ensure enforcement of settlements internationally are likely to foster increased investor confidence and strengthen trade.

Avoid unnecessary duplication of effort – draw on existing Commonwealth resources

There is no need to duplicate existing systems – many mediation providers have established a strong reputation, and allow for 'opt-in' participation on proceedings, including (increasingly) online mediation. Small and low-income countries have the potential to partner with established providers throughout the Commonwealth to provide citizens, as well as parties to commercial transactions, with access to quality mediation. This may help foster confidence in inward investment,

particularly where these allow a potential escalation to ‘Med-Arb’ proceedings should mediation fail. This is not to suggest that countries should not seek to build their own capacity nor provide opportunities for citizens and residents to undertake mediation work, but to emphasise that existing resources within the Commonwealth and elsewhere should not be overlooked.

Seek to raise awareness and uptake

Where governments choose to implement mandatory mediation, this should be undertaken alongside broader efforts to raise awareness and increase uptake of mediation. Approaches such as court-annexed mediation, ‘Settlement Weeks’ and fee waivers or refunds for settling parties have the potential to incentivise engagement.

Recognise the continued role of customary justice and indigenous practices

For many Commonwealth citizens, courts remain inaccessible, largely for reasons of financial cost (Zainulbhai, 2016) and socio-cultural factors (International Commission of Jurists, 2018). Legislators should not overlook the continued role to be played by customary justice, indigenous practices (UNODC, 2020) and relating tribal and cultural structures. In particular, traditional and religious leaders can be supported to serve as effective mediators, resolving disputes within their communities, as long as there are effective checks and measures to ensure that the rights of all in society are adequately protected, particularly women and girls (International Commission of Jurists, 2018).

Consider the use of mediative restorative justice

Consider use of mediative restorative justice in addressing appropriate cases, including in collaboration with indigenous groups, as well as traditional and religious leaders.

6.2 Recommendations for the legal profession

Educate the legal professional about mediation

For those jurisdictions where mediation is more entrenched and understood by the profession, greater education of the legal profession as to the role of the mediator could improve the quality of mediation. Practitioners would be more attuned to the unique characteristics of the mediation process, and less

likely to treat a mediation as another adversarial environment. The fiduciary duty of a legal professional is often best served by keeping clients ‘out of court’, working proactively to find practical solutions and improving commercial outcomes or the personal interests of private clients. Research suggests that some Commonwealth contexts have a limited tradition of mediation, and instead rely on litigation to the detriment of all parties. The legal profession would benefit from being more aware of mediation and seeing it as an essential part of the ‘toolkit’ required to serve client interests effectively. Awareness building is key in this context, as is educating clients who often oppose mediation.

Legal professionals may be well placed to serve as mediators

Legal professionals have insights that render them well placed to serve as ‘honest brokers’ and as effective mediators. In contexts where there are concerns over the quality of training of mediators, or where there is a shortage of provision, legal professionals could potentially fill the gap and add significant value, as is the case in many Commonwealth contexts in which legal professionals fulfil this role.

Inform clients of the potential benefits of mediation and ADR

Many clients would benefit from being provided with a greater understanding of which avenues for mediation would best serve their interests and resolve the challenges they face. It may well be that ‘opt-in’ mediation providers in other Commonwealth contexts are best placed to facilitate the emergence of creative solutions, particularly in international trade and inward investment contexts. This is especially the case in ‘gateway’ jurisdictions, such as Singapore, and Mauritius, as well as ‘Med-Art’ variants of mediation.

Strengthen collaboration between mediators and legal professionals

In many contexts there remains a gulf between legal professionals and mediators, at times characterised by misunderstanding or a lack of professional trust and collaboration. Proactive collaboration between legal professionals and the mediation profession is key to ensuring that both parties are aware of how to best serve the interests of clients.

Encourage advocacy, education and awareness raising

The local legal profession should play a key role in supporting advocacy, education and awareness-raising initiatives pertaining to mediation. These have the scope to achieve significant savings for clients and to reduce pressure on the courts, thereby improving access to justice.

6.3 Recommendations for the Commonwealth Secretariat

Support the development of training resources and collaboration

There is a clear need for improved training of mediators internationally, particularly in some low-income Commonwealth countries. Commonwealth training materials on mediation, and potentially access to common mediation guidelines, could support in building capacity and allow for aligned approaches in member states. The Commonwealth Secretariat could play a key role in supporting the development of such resources and in fostering collaboration between expert parties through accredited organisations.

Highlight exemplars of good practice within the Commonwealth

The Commonwealth Secretariat could raise awareness of potential 'regional hubs' already serving as exemplars of good practice in mediation throughout the Commonwealth. It could provide a platform for the development of agreements between Commonwealth member countries on international enforcement of settlements arrived at through mediation. Facilitating events, lesson-learning forums and engagement (alongside accredited Commonwealth organisations) has the potential to build on this existing capacity.

Leverage the expertise of Commonwealth accredited organisations

While Commonwealth collaboration on international trade facilitation has historically focused substantively on arbitration (Anaenugwu, 2019), there is scope to increase focus at a Commonwealth level on ease of access, domestically and internationally, to quality mediation (Commonwealth

Secretariat, 2020). This would significantly improve efficiency and reduce the cost of doing business. There is scope for extensive collaboration with Commonwealth accredited organisations, notably CWEIC (2022), the Commonwealth Lawyers Association (n.d.) and the CMJA to achieve this.

Highlight the potential role mediation can play in enhancing access to justice

In contexts where there are concerns over access to justice because of poverty, instability, geographic isolation or other issues compounding vulnerability, there is scope for the Commonwealth Secretariat to advocate for increased access to low-cost mediation from national and international providers, creating a marketplace in which ‘consumers’ can effectively circumvent corrupt, inefficient and prohibitively expensive (Dyrmishi, 2014) local dispute resolution mechanisms, as well as local courts (where mediation can escalate to arbitration in case of non-settlement). This has the potential to incentivise the strengthening and capacity building of existing provision (both in the courts and in domestic mediation provision).

6.4 Recommendations for mediation bodies

Avoid monopolies or undue barriers to entry

Mediation bodies should ensure they do not seek to monopolise provision through convenient regulation. Such attempts undermine many of the potential benefits of mediation, such as reduced costs for parties to disputes and the scope for ‘choice’ and flexibility of approach.

Work to strengthen quality and training of mediators

Concerns over quality and training are widespread. Establishing and strengthening professional bodies are likely to achieve higher levels of consumer confidence and, therefore, commercial success. Such bodies should be voluntary organisations that are self-regulating. They should set high barriers to entry, and expect high professional standards of members (and sanction those who do not adhere to these), while ensuring a focus on continuing professional development and training (these are the core characteristics that allow a ‘profession’ to emerge (Williams, 1998)). It is essential that multiple professional bodies with varied approaches are able to exist in tandem to allow for

consumer choice. Resources developed by intergovernmental agencies, particularly the *Alternative Dispute Resolution Center Manual – A Guide for Practitioners on Establishing and Managing ADR Centers*, published by the Investment Climate Advisory Services of the World Bank Group, are powerful tools which should be leveraged appropriately to minimise duplication of effort and to raise standards.

Mediation can serve as a tool to enhance prosperity

Mediation bodies have the potential to serve as ‘gateways’, facilitating, incentivising and fostering inward investment, ongoing investor confidence and ease of doing business. This is particularly so in contexts where there is limited confidence in the rule of law, and thus the efficacy of litigation through the courts. This has scope to improve prosperity through increased trade, commerce and collaboration. Active engagement by mediation bodies with the Commonwealth Secretariat, with bodies in other Commonwealth countries and with Commonwealth accredited organisations to facilitate this is likely to benefit all parties.

Engage collaboratively with the legal profession

Mediation bodies should engage closely with the legal profession to build a collaborative approach by which end users’ interests can be best served.

Be aware of the need for cultural sensitivity

Mediation bodies should emphasise the need for cultural sensitivity to avoid marginalising or excluding vulnerable groups. They should actively seek to collaborate with indigenous, tribal, village, religious and customary leaders, including engaging community leaders as mediators as appropriate.

6.5 Recommendations for mediators

Professional development and training are key

Professional development and training are viewed as being key marks of quality. They improve confidence in the mediation process. Continued access to training; engagement in development; collaboration with colleagues; and active membership of professional bodies are essential.

International collaboration offers significant benefits

International collaboration, particularly given the emergence of increased online mediation, allows for international practice, collaboration and client bases, especially given the growing prominence of mediation ‘hubs’ in a range of Commonwealth and international contexts.

Innovation and technology can strengthen mediation

Innovation is a key factor underpinning the popularity and success of mediation. Members of the profession should continue to focus efforts on the innovative adoption of technology, community engagement and other practices that will continue to strengthen provision to parties in the future. This includes awareness of the distinct needs of clients, including vulnerable and minority groups, as well as emerging approaches to mediation such as Med-Arb variations and technology-enabled online and AI-based mediation.

Mediation should not be confused with arbitration

Mediation is distinct from evaluative ADR approaches including conciliation and arbitration. It is important that these distinctions are maintained to avoid a situation in which expectations and needs of clients are not met, even if this results in settlements not being made. This is not to suggest that there is no overlap of approach, but that mediation is primarily characterised by its facilitative nature.

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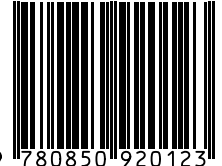
The Commonwealth

By examining the position of mediation in a tradition of 'adversarial' court-adjudicated disputes, *The Commonwealth Guide to Mediation: A Resource for Practitioners and Policy-makers* chronicles the evolution of mediation as a case management tool. Furthermore, it explores the various models that have been adopted, identifying emerging areas of innovation and highlighting exemplars of good practice.

It examines the distinction and relationship between mediation and arbitration, as well as noting the growing role of 'Med-Arb' and 'Arb-Med' practices by which the mediation and arbitration processes are combined. This is undertaken alongside a wider exploration of the relationship of mediation to broader justice traditions (including, but not limited to, litigation and arbitration) while acknowledging the varied and long-standing indigenous approaches to justice and dispute resolution.

With this context established, the *Guide* explores the potential impact of mediation on the law throughout the Commonwealth, and the implications this may have for stakeholders.

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