SCOTTISH LAW COMMISSION
(Scot Law Com No 136)

Report on Evidence: Protection of Family Mediation

Laid before Parliament by the Lord Advocate under section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons *to be printed*

4 November, 1992

EDINBURGH: HMSO
£7.85

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Davidson, *Chairman,*
Dr E M Clive,
Professor P N Love, CBE,
Sheriff I D Macphail, QC,
Mr W A Nimmo Smith, QC.

The Secretary of the Commission is Mr K F Barclay. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

SCOTTISH LAW COMMISSION

Item 1 of our First Programme of Law Reform

Evidence

To: The Right Honourable the Lord Rodger of Earlsferry, QC,
Her Majesty's Advocate

We have the honour to submit our Report on Evidence: Protection of Family Mediation.

(*Signed*) C K DAVIDSON, *Chairman*
E M CLIVE
PHILIP N LOVE
IAIN MACPHAIL
W A NIMMO SMITH

KENNETH F BARCLAY, *Secretary*
29 June 1992

Contents

Summary

This report makes recommendations in order to protect from disclosure in court information obtained during the mediation of family disputes. It follows on from the Commission's Discussion Paper No 92 "Confidentiality in Family Mediation", published in March 1991, and takes account of the comments submitted on that paper.

Effective mediation requires those participating to discuss the disputed issues frankly, without fear of what they say being used against them later in court. The uncertainty of the present law as to whether participants in mediation sessions can decline to give evidence about what occurred is regarded as having an inhibiting effect on family mediation.

The Commission recommends the introduction of a new statutory rule which would provide that, subject to certain exceptions, no evidence (direct or indirect) of what occurred during mediation sessions dealing with family disputes should be given in court. Family disputes are defined as disputes:

(1) between individuals about the residence, upbringing, legal representation or welfare of, or contact with, children, or

(2) disputes between spouses or cohabitants (or former spouses or former cohabitants) about matters arising from their splitting up.

The new rule that such evidence should be inadmissible would apply only to sessions conducted by mediators who had been approved by the Lord President of the Court of Session.

It is recommended that there should be exceptions to the new inadmissibility rule. It should not apply:

(a) in any criminal proceedings,

(b) in children's hearings, adoption proceedings and certain other proceedings concerning the welfare of children,

(c) where all those participating in the session (other than the mediator) agree that it should not apply,

(d) where the mediator is pursuer or defender in civil proceedings arising out of the mediation,

(e) where a written agreement resulting from the mediation is challenged, and

(f) in civil proceedings relating to personal injury or damage to property which occurred during mediation.

Part 1 Introduction

Scope and origin of the report

1.1 This report deals with whether or to what extent evidence of what occurs during mediation (or conciliation) dealing with family matters can be given in subsequent court proceedings without the consent of all those involved. Our consideration of this topic originated with a proposal made to us by the Scottish Association of Family Conciliation Services (now Family Conciliation Scotland). We decided to investigate this area as part of our work on the law of evidence[1] and published in March 1991 Discussion Paper No 92 *Confidentiality in Family Mediation*. This discussion paper set out the existing law and put forward proposals for reform on which comments were invited. It is referred to in the rest of this report as 'our discussion paper'.

1.2 Responses to our discussion paper were received from 27 organisations and individuals, including all those with a major interest in mediation and family litigation. A list of those who responded is given in Appendix B of this report. We are grateful to all those organisations and individuals and have been greatly assisted by their comments and suggestions.

1.3 In preparing our discussion paper we examined the relevant rules of law in many other jurisdictions and we referred extensively to some of these rules in developing our proposals for reform. In this report our main concern is to present, reasonably succinctly, our recommendations for reform. We do not therefore repeat all the background information which is in our discussion paper.

What mediation is

1.4 Mediation or conciliation can be described as a process whereby people in dispute about matters which are or could be the subject of legal proceedings between them are helped to reach an agreement about matters in dispute, or at least to narrow the areas of disagreement between them, with the active intervention of an impartial third party. Two related but different processes are reconciliation and counselling. Reconciliation has as its objective saving the participants' marriage or relationship. Mediation of disputes may also achieve this but that is not its primary objective. Counselling helps the participants reconcile or resolve differences between them which will never be the subject of legal proceedings or have not yet reached the stage of litigious or potentially litigious disputes. Informal mediation by people such as clergymen, doctors or friends has always been available, but formal procedures for mediation of family disputes are a recent innovation.[2] Family conciliation on a formal basis started in Scotland in 1984 with the setting up of the Scottish Family Conciliation Service (Lothian). The objectives of this body were to promote and support family conciliation in Scotland by development of mediation services. The Scottish

---

[1] Evidence is included (Item 1) in our *First Programme of Law Reform* Scot Law Com No 1 (1965).
[2] Conciliation has been used in the employment law field for many years. See for example the Conciliation Act 1896 and the Industrial Relations Act 1971, s 146 which introduced permanent conciliation officers.

Association of Family Conciliation Services was established in 1986 to promote the development of conciliation throughout Scotland and provide a central voice for the local services. There are now a number of local services (at least one in each sheriffdom) which are affiliated to the Scottish Association of Family Conciliation Services (now known as Family Conciliation Scotland).

1.5 In 1990 new rules of court were made which empowered the courts in actions where custody of, or access to, children is in dispute to refer the litigants to a specified local family conciliation service.[3] In the Court of Session a referral requires the consent of the litigants; the sheriff may make a referral without their consent. People also go to conciliation voluntarily before legal proceedings have commenced. Family conciliation is used extensively. In the 12 months prior to March 1991 just over 2,500 references (court and voluntary) were made,[4] but only a proportion of these resulted in conciliation sessions.

1.6 When the court makes a referral to a family conciliation service the following procedures are adopted. The clerk of court tells the conciliation service which then approaches the litigants to arrange for conciliation to take place. Conciliation takes the same form whether the participants are referred by the court or go voluntarily. It consists of one or more sessions in which the parties and a conciliator are present together. Conciliators may occasionally meet with each party separately. During the sessions the conciliator will try to clarify the areas of dispute, probe their underlying causes, and suggest ways of resolving or limiting the areas of disagreement with the active participation of the litigants. The conciliator remains neutral and does not seek to impose a solution on the parties. The conciliator may sometimes interview children separately in order to find out their views. The parties may also be referred to doctors, social workers or others for additional consultations. A successful conciliation is usually concluded by a written agreement being drawn up which the parties then sign. The conciliation service will inform the court when the conciliation procedures are concluded. This may happen when agreement has been reached or when conciliation proved fruitless because of non-co-operation of one or both of the litigants. The service will also contact the court if more time than that allowed by the court is needed for conciliation. Apart from these contacts no formal report is made by the service to the court.

1.7 The local conciliation services affiliated to Family Conciliation Scotland are at present mainly concerned with disputes relating to custody, access and other matters affecting children. Referrals by the court are exclusively in this area. The services may however expand to take in financial and housing issues, or other services may arise to deal with disputes in these areas. This has happened in England and Wales and some other countries and we have taken account of this possible expansion in our recommendations.

1.8 At present conciliation seems to be the term used in Scotland to describe the procedures outlined above for resolving disputes. However, the term mediation is also being used and is preferred in some other countries. 'Mediation' has the advantage of avoiding confusion between conciliation and reconciliation, the latter being attempts to save marriages in danger of breaking down. In the remainder of this report we shall use the term 'mediation'.

---

[3] Court of Session Rules, rule 170B(15); Sheriff Court Ordinary Cause Rules, rule 132F. These rules came into force on 9 April 1990.

[4] Family Conciliation Scotland, Fourth Annual Report (1990-1991), p 7.

Structure of the report

1.9 Part 2 of the report examines the arguments for and against introducing new statutory provisions protecting what takes place in mediation sessions from disclosure subsequently in court proceedings. It concludes with the recommendation that such provisions should in principle be enacted. Part 3 considers the scope of the recommended new protection in detail and sets out our specific recommendations for reform. Part 4 consists of a list of our recommendations and Appendix A is a draft of the legislation required to implement them.

Part 2 The need for legislative intervention

2.1 This Part examines the present law prohibiting disclosure of information in court proceedings and its application to matters arising out of mediation procedures. It then goes on to look at the arguments for and against introducing new statutory provisions.

The problem

2.2 Generally speaking, people can be compelled to give evidence in court about matters relevant to the issues being litigated and to produce relevant documents unless they can claim exemption on certain legally recognised grounds. The material (facts or documents) is then said to be privileged. These privileges are based on the public interest against disclosure because of the nature of the information or the circumstances in which it was obtained. A person claiming privilege is entitled to refuse to answer questions or produce documents and prevent others from similarly disclosing privileged information or documents in court. The law may also provide, on public policy grounds, that certain information is inadmissible as evidence in legal proceedings.

2.3 The widespread and increasing use of mediation has led to concern about the disclosure of information, or being compelled to disclose information in subsequent court proceedings. The questions that arise are: to what extent (if any) can a mediator who is cited as a witness refuse to give evidence about what happened in a mediation session, whether one participant may give such evidence in spite of objections by the other and whether a participant can be compelled to answer questions designed to elicit such evidence? The existing legal rules that can apply to prevent disclosure of what occurred during mediation are those protecting offers designed to settle disputes or protecting communications between spouses. The courts also have a residual discretionary power to excuse a witness from answering a relevant question but it is confined to quite exceptional circumstances.[1] It has not been exercised in any reported case and we discount its use in the protection of matters arising out of family mediation.

2.4 In order to encourage the settlement of disputes, admissions made by a person in the course of unsuccessful negotiations are privileged and may not be admitted as evidence in subsequent court proceedings.[2] Offers made in such negotiations are usually expressly made on a "without prejudice" basis.[3] The privilege may however still apply to offers not made on a "without prejudice" basis if it is clear that the parties were seeking a negotiated settlement of the dispute, since use of the phrase "without prejudice" simply makes the intention of the writer clear.[4] The privilege has limitations however. Firstly, it applies only to those parts of the communication which strictly relate to the proposals for settlement.[5]

---

[1] *HM Advocate v Airs* 1975 JC 64, 70.
[2] *Fyfe v Miller* (1835) 13S 809.
[3] *Bell v Lothiansure Ltd* 1990 SLT 58.
[4] Wilkinson, *Scottish Law of Evidence*,p 100; *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280, 1299-1300 (an English case likely to be followed in Scotland).
[5] *Burns v Burns* 1964 SLT (Sh Ct) 21; *Ware v Edinburgh District Council* 1976 SLT (Lands Tribunal) 21.

Secondly, the opinion has been expressed[6] that the privilege does not apply to negotiations relating to the custody of and access to children since the court in considering such issues is bound to treat the children's welfare as the paramount consideration.[7]

2.5 Section 3 of the Evidence (Scotland) Act 1853 which made parties to actions and their spouses competent witnesses provides that a husband or wife shall not be a competent or compellable witness in respect of any matter communicated by him or her to the other spouse during the marriage. This privilege may be claimed by either spouse. However, a third party who had overheard or intercepted the communication or in whose presence it has been made is a competent and compellable witness for either spouse.[8] Moreover, the privilege is inapplicable where the conduct of the spouses and their actings towards each other is the subject matter of the legal proceedings.[9] It can be seen that these limitations render the privilege of little use in protecting information acquired during family mediation.

2.6 In England and Wales the courts have developed a privilege attaching to communications made in the course of attempts to bring about the reconciliation of estranged spouses.[10] This privilege is founded on the public interest in the stability of marriage. The attempts may be made between the spouses directly, through their advisers or with the help of a mediator. The privilege is that of the spouses alone.[11] Neither spouse can give evidence of the communication without the consent of the other and the mediator or other third party cannot give evidence unless both spouses consent.[12] There have not been any reported cases on communications in the course of mediation, which, unlike reconciliation, does not have as its prime function preserving marriages or promoting marital harmony. It is at best doubtful whether the courts in Scotland would adopt the English approach and extend it to mediation.

2.7 As the law stands at present it is likely that a mediator called to give evidence in a Scottish court about what occurred during mediation or to produce documents connected with a mediation could not claim privilege and refuse to comply. As Lord Justice-Clerk Ross recently observed:[13]

> "Under the law as it presently exists, if a conciliator were cited as a witness he or she probably could not claim the right to refuse to answer questions on the grounds of confidentiality. In other words, they could not claim that the information which they had was privileged."

Similarly one of the spouses could very probably give similar evidence even if the other spouse objected to its disclosure. These conclusions are necessarily tentative as we understand that no case has yet involved a mediator being required to give evidence. Nevertheless several mediators have been cited as witnesses and solicitors may feel obliged to cite a mediator where mediation evidence could be material because failure to do so might lead to a claim of damages for negligence.

---

[6] Wilkinson, *Scottish Law of Evidence*, p 102.
[7] Law Reform (Parent and Child) (Scotland) Act 1986, s 3(2).
[8] Wilkinson, *Scottish Law of Evidence*, p 103.
[9] *MacKay v MacKay* 1946 SC 78; *Gallacher v Gallacher* 1934 SC 339; Wilkinson, p 103.
[10] See for example, *McTaggart v McTaggart* [1949] P 94, *Henley v Henley* [1955] P 202, *Slade-Powell v Slade-Powell* (1964) 108 Solicitors Journal 1033.
[11] *Pais v Pais* [1971] P 119.
[12] *Theodoropoulas v Theodoropoulas* [1964] P 311.
[13] "Family Conciliation," (1991) 36 Journal of the Law Society of Scotland 20, 21.

2.8 The lack of protection against disclosure of information obtained as a result of mediation might make the participants reluctant to take part or might inhibit full and frank discussion in the mediation sessions. This in turn could lessen the effectiveness of mediation as a way of settling legal proceedings or avoiding litigation altogether. Another area of concern is that the law does not seem to be in line with the expectations of the participants. Mediation provided by services affiliated to Family Conciliation Scotland is undertaken in terms of that organisation's Statement of Principles of Conciliation. This includes the following:

> **"4. Conciliation is confidential**
>
> Conciliation services regard proceedings of conciliation interviews and related correspondence and records as strictly confidential, except in the case of a criminal offence against children being firmly alleged."

Similar statements are made in the National Code of Practice for Conciliators and Solicitors issued by Family Conciliation Scotland.[14] Participants are left with the clear impression that anything they say or do during mediation sessions will not be used against them (except where criminal offences against children are concerned). One remedy for this would be for participants to be given an explanation of the existing law on privilege and the lack of protection which it probably affords to mediation sessions. However, doubts about the existing law make that course unattractive. We suggested in our discussion paper that it was urgently necessary that the law should be made clear and predictable.[15]

Should there be new statutory rules?

2.9 If, as seems probable, the law at present does not confer any privilege on matters arising out of mediation should such matters be protected from disclosure in legal proceedings (subject to certain exceptions) and if so by the courts or legislation? There are two conflicting principles involved and it is a question of finding the correct balance between them. The first principle is that where any dispute is being determined by a court all available relevant evidence should be capable of being presented. Litigants may fail to establish their cases or find it more difficult or expensive to establish them if they cannot put certain evidence before the court. Injustice may result. The second principle is that there is a public interest in assisting those in dispute to resolve the issues between them without recourse to the courts or, if they have already embarked on litigation, to be able to settle rather than litigate to the bitter end. In cases where the legal proceedings are being funded wholly or partially through legal aid there is also a public economic interest in settling or avoiding litigation. This second principles lies behind the existing privilege for offers made in the course of negotiations outlined in paragraph 2.4. It is of particular importance in family disputes which often give rise to bitter and protracted proceedings. Mediation or negotiated agreements regarding children will usually have a better chance of working and lead to better long-term relationships between those involved than orders made by the court after contentious litigation.

2.10 The encouragement given to mediation, by the setting up and funding of Family Conciliation Scotland and the affiliated local conciliation services, and the enactment of rules

---

[14] Para 4(iv)(d).
[15] Para 5.13.

of court providing for referral to conciliation services, indicates that there is public acceptance that mediation has a useful part to play in the resolution of family disputes and should be fostered. A study by the Scottish Office Central Research Unit found that in around half the cases surveyed mediation was effective (ie the participants had been helped by attending and there was an agreement on at least one issue which was working at the time of the survey), ineffective in one quarter and beneficial (helpful but no agreement) in one-fifth. Where people attended mediation without having commenced legal proceedings it was effective in terms of preventing defended actions.[16] In our discussion paper we considered that the public interest in effective family mediation appear to require that privilege (with exceptions for certain cases) should attach to information arising out of it. We proposed that in principle some degree of privilege should attach to information acquired in the course of family mediation.[17] All those who commented on this proposal, except the Law Society of Scotland, agreed with it. The views of those in favour can be summarised along the following lines. Development of effective mediation is an important public objective and effective mediation requires frankness and openness between the participants. Participants have to be sure that anything they say or any information they provide will not be used later in court proceedings save in exceptional circumstances. The trust that has to exist between the mediator and the participants for a successful mediation would be difficult to build up if there was a possibility of the mediator giving evidence against the wishes of one of the participants.

2.11 The Law Society of Scotland took the position that the existing privilege in favour of negotiations for settlement of disputes was sufficient. The scope of this privilege is outlined in paragraph 2.4 above. We do not agree with this position. It is arguable that the privilege which relates to bilateral negotiations does not apply to mediation where a neutral third party is actively involved. Even if the negotiations privilege does apply, we do not consider that it offers protection to the extent required. While it is clear that the privilege for negotiations to settle a dispute covers details of the offers themselves it is not clear what else is privileged. Mediation of family disputes is different in content and style from negotiations about commercial matters in which context the privilege for negotiations was developed. The participants in family mediation are encouraged to speak freely about matters not immediately connected with the dispute and to explore their emotions and reactions to past and possible future situations. During this process facts and opinions will inevitably be stated which might not be covered by the privilege and so could be used in court. It would be difficult, if not impossible, for the participants to keep in mind the limits of the existing privilege during sessions. A cautious approach by participants inhibits mediation and tends to render it less effective.

2.12 In our discussion paper we came to the view that a privilege in favour of family mediation (assuming that such a privilege should exist) should be created by legislation rather than left to be developed by the courts.[18] It is possible, perhaps likely, that over the coming years the Scottish courts would develop and extend the existing privilege in favour of negotiations to family mediation in much the same way as the courts in England and Wales have developed a privilege for reconciliation negotiations.[19] This would inevitably be a slow process. Because of the increasing use of mediation and the uncertainty of the

---

[16] *Family Conciliation in Scotland*, Scottish Office Central Research Unit Papers (1990), p 7.
[17] Proposition 1, para 5.11.
[18] Proposition 2, para 5.16.
[19] See para 2.6 above.

existing law we considered that there was an urgent need for the law to be made clear. That in our view required legislation. All of those who commented, with one exception, were in favour of legislation. There was particularly strong support for legislation from all levels of the judiciary. Concern was however voiced by a number of commentators that the legislation should be simple. The Law Society of Scotland thought legislation was unnecessary since in their view the existing law was adequate. They also opposed a legislative solution because legislation would either be too detailed (giving rise to considerable arguments over its construction and a considerable body of case law) or be simply a list of broad principles offering uncertain guidance in particular cases and having to be "fleshed out" by the courts. We have kept these concerns very much in mind in preparing our specific recommendations and the draft legislation required to implement them.

2.13 In our discussion paper we mentioned as a possibility that new legislation might simply confer a discretionary power on the court to excuse a person from providing information relating to mediation sessions by way of giving oral evidence or producing documents.[20] The legislation would set out factors which the court would be required to consider in exercising its discretionary power. This could be seen as a half-way house between leaving the protection of family mediation to be developed entirely by the courts and legislation setting out the ambit of the protection in detail. It would enable the court to weigh up the conflicting principles in each case in light of the particular circumstances. Such legislation has been enacted in New Zealand[21] and has been favourably received there.[22] We came to the view, however, that this type of legislation would not be satisfactory.[23] It would not remove doubt, it would not provide clear and simple rules, and it would present the courts with a time-consuming and difficult job. All but one commentator agreed with our tentative conclusion. The dissenting organisation thought that the court should retain the power in a particular case to remove the statutory protection where the public interest, justice or child welfare ought to prevail. In preparing our detailed recommendations on the new statutory protection we have endeavoured to take account of these interests by recommending exceptions based on them, so that further discretionary powers should be unnecessary. Another argument against discretionary powers which emerged on consultation is that such legislation would offer little reassurance or certainty to those involved in mediation sessions. They could only guess as to how a court would exercise its discretionary powers in future proceedings, and this could have as much inhibiting effect on mediation as the present uncertain state of the law.

2.14 We remain in favour of legislative intervention but have reconsidered the form that this should take. We now think that any new statutory provision should render information arising out of family mediation inadmissible as evidence in subsequent legal proceedings rather than conferring a privilege on those participating in mediation.[24] Firstly, an inadmissibility rule confers greater protection than a privilege. With a privilege the information is admissible and will be admitted as evidence unless privilege is claimed. The parties to legal proceedings and their legal representatives therefore have to be continually

---

[20] Paras 5.14-5.16.
[21] Evidence (Amendment) Act (No 2) 1980, s 35.
[22] *R v Howse* [1983] NZLR 246, 251.
[23] Proposition 2, para 5.16.
[24] Matters communicated by a party to an industrial dispute to a conciliation officer are inadmissible in tribunal proceedings except with the consent of the party, Employment Protection (Consolidation)Act 1978, s 134(5). The Australian Family Law Act 1975 also uses an inadmissibility rule for family conciliation.

alert to the need to claim privilege, and questions designed to elicit privileged information may be asked in the hope that no claim will be made. On the other hand where information is inadmissible as evidence no action by the parties should be necessary to prevent its disclosure in court.[25] The inadmissibility rule would be known to the court and the parties' legal representatives so preventing, or at least discouraging, questions designed to elicit inadmissible information, and objections to any such questions would be sustained. Secondly, making certain information inadmissible as evidence is a more direct method of protecting family mediation than conferring a privilege on participants. Inadmissibility follows more naturally from our "sealed room" approach to family mediation sessions.[26] Finally, the concept of inadmissibility is easier to grasp than the concept of privilege, and hence would be more easily explained to, and understood by, participants in family mediation sessions. The details of the recommended new inadmissibility rule and the exceptions to it are set out in the next Part of this report. Meanwhile we recommend that:

1. **Statutory provisions should be enacted rendering (subject to certain exceptions) information arising out of family mediation procedures inadmissible as evidence in subsequent legal proceedings.**

[25] Information inadmissible by virtue of the rule could be admitted if all parties agreed; see paras 3.53 to 3.57 below.
[26] See para 3.23 below.

Part 3 The new statutory protection in detail

3.1 In this Part we put forward specific recommendations for protecting by means of the new statutory inadmissibility rule recommended in Part 2 what occurs in mediation proceedings from being subsequently admitted as evidence in court proceedings. We first discuss what types of mediation should be protected and whether mediators whose sessions are protected should require to be selected or approved. We then consider what information should be protected by the new inadmissibility rule. Finally, the various exceptions that ought to be made to the new privilege rule are examined.

What mediation should be protected?

3.2 In Part 2 we recommended that information arising from family mediation procedures should in principle be inadmissible as evidence. We turn to consider what family mediation encompasses and the reasons for the protection being restricted to mediation relating to disputes about family matters. In our discussion paper we suggested that any new statutory provisions should contain a definition of the mediation process.[1] This suggestion was made partly because there is no generally accepted definition of mediation and partly because if information is to be inadmissible only if the mediation was carried out by an approved mediator,[2] the person charged with approving mediators may need some guidance as to what mediation is and how it functions. We did not put forward any definition of mediation in our discussion paper. The key elements in mediation are that:

(a) it is a procedure designed to assist people in a dispute which is or could be the subject of legal proceedings between them,

(b) it involves the active intervention of a mediator who is and remains neutral throughout the proceedings and does not attempt to impose a solution, and

(c) its aim is to help those in dispute arrive at mutually acceptable arrangements for settling their dispute or at least narrowing the areas of dispute.

3.3 All those commentators who were in favour of legislative intervention were in favour of a definition of mediation. Many saw a definition as essential in order not to spread the umbrella of protection too widely. Without a definition there is a danger of protecting proceedings carried out by a large number of counselling or advisory agencies. Nevertheless, we have come to the view that a statutory definition of mediation for the purposes of the new inadmissibility rule is unnecessary. The distinguishing features of mediation set out in the previous paragraph are all fairly obvious. We doubt whether the Lord President of the Court of Session, who we recommend should be the person charged with approving mediators,[3] would find a statutory definition along those lines helpful in deciding whether an applicant was offering a mediation service. Indeed there is a danger

[1] Proposition 5, para 5.25.
[2] See Recommendation 5 at para 3.19 below.
[3] See Recommendation 5.

that a statutory definition might unduly restrict the Lord President's powers. In an evolving area such as mediation flexibility to deal with future changes would be desirable.

3.4 In our discussion paper we considered possible limitations to the kinds of disputes where mediation should be protected. In Proposition 6[4] we asked whether the privilege in favour of family mediation which we were then considering should attach to mediation relating to disputes about parental rights[5] and other disputes between spouses or cohabitants. Proposition 7[6] invited views on whether the privilege should be extended further and if so to what categories of dispute it should be extended. There was overwhelming support for mediation of parental rights disputes being privileged. Once the principle of protecting some forms of mediation is accepted then it almost inevitably follows that mediation of parental rights disputes should be protected since the vast majority of mediations carried out at present concern custody of, and access to, children. However, to confine protection to such matters seems too restrictive and would leave the mediation of disputes between couples about other matters without protection. While most of those consulted thought that the privilege should also attach to mediation concerning disputes between spouses and cohabitants which could be the subject of civil proceedings involving them (Proposition 6(b)),[7] concern was expressed by some commentators at the potential width of mediation thus privileged. They preferred the privilege to be confined to family matters where mediation has a valuable part to play and where, in their view, there is a real need for protection.

3.5 We accept the need for limiting the new statutory inadmissibility rule to information from family mediation. Applying it to all matters between couples that might lead to civil proceedings would mean including, for example, claims for damages by one spouse against the other in respect of a car accident (in reality one spouse against the other's insurance company) or disputes between spouses about their business affairs. The existing privilege in favour of negotiations and offers to settle would be adequate for such disputes.

3.6 There was some division of opinion as to whether disputes concerning cohabitants should be included or whether protected mediation should be confined to married couples. Most commentators supported the inclusion of cohabitants and we agree with them. Given that a substantial proportion of households nowadays consist of unmarried couples it would be inappropriate to exclude them. As Family Conciliation Scotland pointed out many of those using the existing mediation services are cohabitants and their need for effective mediation is just as great as that of married couples.

3.7 It was suggested by a member of the WS Society that privileged mediation should not be confined to disputes between spouses or cohabitants but should be extended to ex-spouses and former cohabitants. We gratefully accept this sensible suggestion. Disputes over arrangements for the upbringing of children and other family matters which could be resolved by effective mediation occur after termination of the marriage or relationship as well as beforehand. Protected mediation should also be extended to those few couples whose "marriage" was void and was subsequently declared null.

---

[4] Para 5.31.
[5] In our recent *Report on Family Law* (Scot Law Com No 135, May 1992) we have recommended that the statute law should place a greater emphasis on parental responsibilities. The draft Bill appended to that report therefore refers to parental responsibilities and parental rights.
[6] Para 5.31.
[7] Para 5.31.

3.8 Few commentators were in favour of extending protection to mediation other than that concerned with parental rights or disputes between couples. One group wished to include disputes that could be the subject of any civil proceedings. This would involve disputes concerning businesses, companies and local and central government. Such disputes may be resolved outwith the courts by means of various procedures (including conciliation), collectively called alternative dispute resolution.[8] For example, disputes involving hundreds of millions of pounds between the Corporation of Lloyds and others have been settled by conciliation.[9] Our discussion paper focussed on family mediation and it would be wrong for us to make recommendations for commercial and industrial mediation without consulting all those whose interests would be affected. Moreover, the scope of any new protection applicable to commercial disputes and the various exceptions that should be made to it are not necessarily the same as those appropriate to family disputes. Several commentators suggested that protection should extend to disputes concerning access by grandparents to their grandchildren on the break-up of their son's or daughter's marriage, and children's relationships with step-parents or other step-relatives. We agree that these disputes should be included in protected mediation; in our discussion paper we had assumed that they would be, and the draft Bill annexed to this report makes it clear that they are included.[10] Most of the other suggestions for disputes to which protected mediation might extend, such as drug-taking or truancy, seem to us to be matters more suitable for counselling or advisory services rather than potentially litigious disputes to be solved by mediation. However, where such matters were mentioned in mediation relating to disputes between couples or about parental rights they should be covered by the protection recommended for the mediation. For example, in the course of a mediation session about which parent is to look after the children, the children's truancy or a parent's drug-taking might well be discussed as part of the process for resolving the dispute.

3.9 We think that the new inadmissibility rule should be confined to mediation relating to family disputes, but we have found the scope of family disputes difficult to encapsulate in legislative language. Clearly the first element should be a wide range of disputes relating to children. In the discussion paper we referred to disputes about "parental rights". However, we have recently recommended that the law in future should place more emphasis on parental responsibilities rather than parental rights.[11] If our recent recommendations were implemented, the existing definition of parental rights would change. In these circumstances we think that it would be a mistake to tie our recommendations in this report to an existing legal definition, which may soon be abandoned. It would be better to seek a more factual, child-centred definition of this type of family dispute along the following lines; any dispute between two or more individuals relating to the residence of a child; the regulation of personal relations and direct contact between a child and any other person; the control, direction or guidance of a child's upbringing; the guardianship or legal representation of a child; or any other matter relating to a child's welfare. This would clearly cover disputes over custody or access (so long as these terms continue to be used) as well as various other disputes relating to children which parties might voluntarily take to mediation. It would, however, because of the reference to "individuals", exclude disputes involving local authorities - for example, any challenge of an assumption of parental rights

---

[8] *Alternative Dispute Resolution*, ed. Sidney Prevezer, 1991, Euro Conferences Ltd.
[9] *Ibid*, p 51.
[10] Clause 1(2)(a).
[11] *Report on Family Law* (Scot Law Com No 135, May 1992), paras 2.1 to 2.58.

by a local authority[12] or a termination by a local authority of access to a child in care.[13] These are disputes that are not currently mediated nor likely to be mediated in view of a local authority's statutory duties regarding the welfare of children living in its area. The second element, disputes between spouses, cohabitants or former spouses or cohabitants, poses more difficulty as there is no adequate definition of family or consistorial litigation. Section 8 of the Civil Evidence (Scotland) Act 1988 defines actions concerning family relationships as "actions for divorce, separation or declarator of marriage, nullity of marriage, legitimacy, legitimation, illegitimacy, parentage or non-parentage". This definition would leave out financial, housing and other matters arising from the breakdown of marriages and furthermore does not cater for cohabitants. Moreover, it too would be changed if the recommendations in our recent family law report were implemented. We would reject basing a definition of family mediation on a list of applications under various statutes. Disputes that ought to be included could be grounded on common law rather than statutory provisions, it would be difficult during a mediation session to relate what occurs to particular statutory provisions and it would be difficult to include every statutory provision that ought to be included. The list would have to be amended constantly as the statutory provisions changed. In the end we have decided to adopt a general formula - matters arising out of the breakdown or termination of a couple's marriage or relationship.

3.10 We have already considered that family mediation in Scotland might extend at some future time to financial and other matters and thus become a comprehensive service dealing with all the issues a couple face on the breakdown of their relationship.[14] Our definition of the scope of protected family mediation is wide enough to take account of such a development. It may well be that protection of the type we are recommending should be extended to mediation of other types of dispute. We think it would be useful to have some flexibility to cater for future changes without having to have recourse to further primary legislation. Flexibility would also be desirable to correct any deficiencies in the scope of the presently recommended categories of dispute that became apparent after the legislation had been in operation. This could be achieved by conferring power in the primary legislation implementing our recommendations on the Secretary of State for Scotland to make regulations altering the definition of mediation which was protected. These regulations should be subject to Parliamentary control by the negative resolution procedure; they would be laid in draft and would come into effect within a specified number of days unless a resolution to the contrary was passed by either the House of Lords or the House of Commons.

3.11 We recommend that:

2. (a) The new statutory inadmissibility rule should attach to mediation concerning:

[12] Social Work (Scotland) Act 1968, s 18(3).
[13] 1968 Act, s 17B.
[14] A comprehensive service is provided in England and Wales by the Family Mediators Association, established in 1988.

(i) individuals in dispute about any matter relating to the residence of a child; or the regulation of personal relations and direct contact between a child and any other person; or the control, direction or guidance of a child's upbringing; or the guardianship or legal representation of a child; or any other matter relating to a child's welfare, or

(ii) spouses or cohabitants (and former spouses or cohabitants) in dispute about matters arising out of the breakdown or termination of their marriage or relationship.

(b) The Secretary of State for Scotland should have power to make regulations amending the above definition.

(Clause 1(2) and (5))

3.12 In our discussion paper we asked[15] whether any new statutory privilege should apply only to mediation to which the participants had been referred by a court. All commentators felt that the privilege should also attach to voluntary mediation. Voluntary mediation is widely used and indeed one of the main purposes of mediation is the avoidance of litigation or at least defended litigation. The Scottish Office Central Research Unit's investigation into family mediation found that mediation embarked upon before the participants' attitudes had become entrenched as a result of litigation was successful in a large number of cases in preventing defended litigation.[16] It is in our view essential to protect voluntary mediation in order to reap the full benefits of mediation. We therefore recommend that:

3. The new statutory inadmissibility rule should apply to all mediations whether or not the participants were referred to mediation by a court.

(Clause 1(1))

3.13 Another issue is whether the protection should apply to successful and unsuccessful mediations or only to the former. In our discussion paper we proposed[17] that mediation should be privileged whether or not it was successful in producing an agreement. This was approved unanimously. It is in the unsuccessful cases that protection is most useful. Where an agreement has been reached there is unlikely to be any need to lead evidence about the mediation procedures later in court proceedings. Accordingly we recommend that:

4. The new statutory inadmissibility rule should apply whether or not the mediation resulted in an agreement between the participants.

(Clause 1(1))

Approval of mediators

3.14 Family mediation is at present carried out by a wide variety of individuals and organisations, although formal structured mediation seems to be confined to services

[15] Proposition 3(a), para 5.24.
[16] *Family Conciliation in Scotland*, Scottish Office Central Research Unit Papers (1990), paras 5.9 to 5.12.
[17] Proposition 16, para 5.41.

affiliated to Family Conciliation Scotland. Where the court makes a referral it specifies a local affiliated service. In our discussion paper we asked whether the privilege should attach to all family mediation or only to mediation provided by individuals or organisations recognised in some way.[18] Nearly all those responding rejected the proposition that the privilege should extend to mediation provided informally by an individual outside an approved organisation, such as a relative, friend or minister of religion.[19] Extending the protection to informal mediation could considerably restrict the amount of evidence available to the courts. Informal mediation would be difficult to define satisfactorily and consequently participants would be unclear as to whether the proceedings were protected.

3.15 Another option that found little favour on consultation was restricting protection to mediation provided by services affiliated to Family Conciliation Scotland.[20] Although mediation is carried out by such services at present other mediation services may come into existence which would not wish to affiliate. We note for example that solicitors are planning to offer a family mediation service. Solicitors would after suitable training be accredited by the Law Society of Scotland who would regulate the service and promulgate a Code of Practice.[21] Unless affiliation was to be a mere formality, in which case it would serve little purpose, Family Conciliation Scotland would have to investigate candidate organisations and refuse those found unsuitable. This would be a delicate and time-consuming task and is one that should be carried out by some public authority or holder of a public office rather than a private organisation.

3.16 The suggestion that the privilege should be conferred on mediation carried out by those who notified the appropriate court that they were available to provide mediation services[22] was not approved on consultation. Since the rule making mediation information inadmissible would apply in proceedings in any Scottish court, some central authority, rather than local courts, ought to be involved. Secondly, and more importantly, mere notification to a court would not be any guarantee that the person offering mediation services was a suitable person. Commentators generally felt that only people who had been properly trained and were subject to a code of conduct should be allowed to conduct mediations which were protected. There was overwhelming approval for our suggestion that privilege be confined to mediation conducted by officially approved mediators.[23] In our discussion paper we suggested[24] that the Lord Advocate was the appropriate person to grant approval on the basis that evidence lies within the ministerial responsibility of the Lord Advocate.[25] It was put to us on consultation that the Lord President of the Court of Session would be a more appropriate person. On reconsideration we would agree because the admissibility of evidence is a matter for the courts. We note that the Lord President approves nautical assessors who are available to help the Court of Session in maritime matters.[26]

---

[18] Propositions 3 and 4, para 5.24.
[19] Proposition 4, para 5.24.
[20] Proposition 3(b), para 5.24
[21] Council Report, Law Society of Scotland, May 1992.
[22] Proposition 3(c)(ii), para 5.24.
[23] Proposition 3(c)(i), para 5.24.
[24] Para 5.20.
[25] Prime Minister's statement on Scots Law (Ministerial Functions), 21 December 1972; HC Deb, Col 848, col 456 (Written Answers).
[26] Court of Session Rules, rul 46(a).

3.17 How should approval be carried out? It would be impracticable for the Lord President to consider, investigate and approve every individual mediator personally; there would have to be a considerable amount of delegation. This could be achieved by the Lord President approving an organisation, membership of which would automatically confer approved status on a mediator. Approval of the organisation would be conditional upon that organisation being suitable, conducting mediations in a responsible manner according to a proper code of practice, and membership only being conferred on individuals with suitable experience and proper training. We have considered carefully whether membership of an approved organisation should be the only way in which a mediator could be approved. We think that that approach would be too restrictive; it would prevent suitably qualified individuals who offer a specialist service and do not wish to join approved organisations from gaining approval. Specialist mediators could, for example, provide a service for particular ethnic or religious communities. In our view it should be possible for a mediator to seek individual approval from the Lord President. We do not consider further the details of procedures relating to the approval of mediators. These are matters best regulated by Act of Sederunt.

3.18 Another suggestion made on consultation was that an Advisory Council should be established to assist the Lord President in granting approval. The Council would also be a forum at which matters relating to mediation could be discussed by a wide variety of interested parties. A similar Advisory Council has been established to assist the Court of Session in making rules and discussing matters relating to messengers-at-arms and sheriff officers.[27] We doubt the need for an Advisory Council on mediation. The Lord President could, and no doubt would, consult the various interested parties about matters of mutual concern but could do so informally. We would not wish to see established an over-elaborate system for dealing with approvals which would divert manpower and resources from other matters.

3.19 We recommend that:

5. The new statutory inadmissibility rule should apply only to mediation carried out by an accredited member of an approved organisation or by an approved individual. Approval should be granted by the Lord President of the Court of Session.

(Clause 1(3))

What matter should be inadmissible?

3.20 A central issue is what matters connected with family mediation should be inadmissible as evidence in subsequent legal proceedings. In our opinion inadmissibility should be confined to matters which are essential to the effectiveness of mediation in order not to restrict unduly the evidence available to the courts. In Proposition 8 we asked whether privilege should attach to any information acquired in the course of, and for the purposes of, the mediation process.[28] Information was not defined but was considered to include oral and written communications, records of such communications, and observations made or impressions formed about the behaviour, conduct or appearance of

[27] Debtors (Scotland) Act 1987, s 76(2).
[28] Para 5.36.

the participants (including the mediator).[29] Alternatively we asked whether privilege should attach only to some or all of the specified categories of information set out in Proposition 9.[30] The specified categories of information were those summarised above with the addition of information acquired by a mediator from a third party.

3.21 Most of those who commented preferred the simpler approach of Proposition 8. A detailed list of inadmissible information leads to complicated legislation which is difficult for mediators to explain to participants. There is also less risk with a general formula that some information which ought to be inadmissible would fall between the categories detailed. Participants should not have to keep detailed categories in mind when taking part in mediation sessions. Other formulae for defining the scope of any protection were suggested on consultation. First, that the protection should be limited to information which would be privileged as between solicitor and client. For the reasons set out in paragraph 2.14 above our recommended method of protection is to make information inadmissible as evidence rather than by allowing privilege to be claimed in respect of it. Moreover, mediators do not stand in an adviser/client relationship to the participants; they are independent impartial people who help the participants achieve a settlement. Secondly, one body favoured protecting all information acquired in the course of, and for the purposes of, mediation (the general formula in Proposition 8) but also suggested that the court should have a discretion in certain circumstances to allow evidence to be led. While there clearly have to be exceptions to the general inadmissibility rule we think any exceptions should be specified. Discretionary powers would lead to uncertainty. Participants could not be certain whether or not they would be exercised and this would have an inhibiting effect on mediation sessions. Finally, it was pointed out that in conciliating disputes relating to employment there was a simple statutory rule which appears to work well. Section 134(5) of the Employment Protection (Consolidation) Act 1978 provides in relation to conciliation of complaints of unfair dismissal that:

> "Anything communicated to a conciliation officer in connection with the performance of his functions under this section shall not be admissible in evidence in any proceedings before an industrial tribunal, except with the consent of the person who communicated it to the officer."

The object of this provision is to preserve the confidentiality of conciliation in the hope of promoting a settlement; the same object as has led us to recommend the protection of information arising out of family mediation. We recommend the same concept of inadmissibility to protect family mediation but consider that the above provision is deceptively simple. It has been held, in construing the predecessor of section 134(5), that a party to an industrial dispute is not able to hide relevant but embarrassing material from an industrial tribunal simply by communicating it to a conciliation officer.[31]

3.22 We prefer a general formula protecting mediation rather than a detailed list of matters which should be protected. However, we have now come to the view that to protect "information acquired in the course of, and for the purposes of," mediation is not the best formula. On the face of it such a provision would enable a participant to prevent embarrassing matter from being subsequently disclosed in court proceedings by producing

---

[29] Para 5.32.
[30] Para 5.36.
[31] *M & W Grazebrook Ltd v Wallens* [1973] 2 All ER 868, 869-70.

it at a mediation session. It may be that the courts would hold that this was not the effect of the provision, as has been held in the employment conciliation field,[32] but meantime there would be uncertainty. Moreover, even if the matter was resolved as in the employment conciliation field the statutory provisions would not mean what they appeared to mean. Another drawback is that information may be used for many purposes. Making all information acquired for the purposes of mediation inadmissible would prevent such information being used in any relevant court proceedings (unless the person providing the information consented) even if evidence about it could be given without any reference to the mediation proceedings. The following examples illustrate this point.

A. A woman writes down a statement of her financial affairs in a mediation session at which she, her husband and the mediator are present. Her husband should be able to lead evidence of his wife's finances in proceedings for aliment or financial provision on divorce, but should not be entitled to give evidence as to the contents of the statement produced at the session or compel his wife or the mediator to do so.

B. A man mentions he is living with a new partner when residential access for the children is being discussed in a mediation session. His wife should be able to use this adultery as a ground for divorce, but should have to prove it otherwise than by reference to the statement at the mediation session.

Making information communicated "for the purposes of" the mediation process inadmissible would also lead to uncertainty as to whether a particular communication was protected. Participants need to talk through their problems in a general way. What they say and do during mediation sessions may be of only marginal relevance to the ostensible purposes of mediation. A court considering whether to admit evidence could find it difficult to decide what the purposes of the earlier mediation had been, especially if the parties had gone voluntarily before commencing legal proceedings. Uncertainty as to whether matters would be admissible later would have an inhibiting effect. Finally, if information includes physical reactions to what was said and a person's demeanour and appearance during mediation, as we think it should, it is hard to see how that these items can be "for the purposes of" mediation.

3.23 On reflection we now think that what ought to be protected from disclosure in court proceedings subsequently is not so much information connected with mediation but anything which occurs during the mediation sessions themselves. Subject to various exceptions which we discuss later in this Part, no evidence should be admitted subsequently as to what occurred in a mediation session unless at least the participants agree that it should.[33] Put simply, a mediation session should be regarded as taking place in a "sealed room". Documents which the parties prepared beforehand for use in mediation would be admissible on this approach.

3.24 As we pointed out in our discussion paper[34] it would not confer sufficient protection merely to provide that the participants and the mediator should not be compellable to give

---

[32] See para 3.21 above.
[33] See paras 3.53-3.57 below for whether the mediator should be entitled to refuse to give evidence if the other participants agree to allow evidence to be admitted.
[34] Para 5.33.

evidence as to what occurred in mediation sessions. Such a formula is used to protect communications between spouses,[35] but a third party who has intercepted or overheard a communication between the spouses can, it is thought, be compelled to give evidence,[36] and there appears to be no privilege for inter-spousal communications in proceedings not involving the spouses as parties.[37] At present evidence of protected information which has been illegally or improperly obtained seems to be admissible in civil proceedings regardless of the circumstances in which it was procured.[38] We proposed that information relative to mediation which had been overheard, intercepted or illegally or improperly obtained by a third party should be protected by privilege.[39] We further proposed that protection should extend to secondary evidence of protected information, such as notes or copies of documents.[40]

3.25 Nearly all of those who commented on these propositions agreed with them. One body suggested that the rule in criminal proceedings should apply whereby the court may excuse an irregularity and allow illegally or improperly obtained evidence to be admitted.[41] We recommend later that the new statutory inadmissibility rule should not apply in criminal proceedings,[42] and have already expressed the view that fixed rules are to be preferred to discretionary provisions allowing evidence to be led in civil proceedings.[43] Our recommended inadmissibility rule would automatically protect secondary sources (interceptions, notes of sessions or copies of written communications between the participants at a mediation session) and follows naturally from the sealed room approach to mediation sessions.

3.26 We have suggested that what occurs during a mediation session should be inadmissible as evidence. Should what occurs between the participants and the mediator prior to the sessions also be inadmissible? In our discussion paper we ask whether privilege should attach to information acquired by a mediator from a potential client or clients.[44] As an illustration of the possible need for privilege we instanced the case where one party saw the mediator alone and discussed matters with him or her. There was strong support for privilege to attach to information acquired from prospective clients although several commentators suggested the qualification that the information would have to be referable to the prospective mediation and thought there might be difficulties in deciding when the mediation process starts. On reconsideration we think there is no need to protect communications and other matters preceding the mediation sessions themselves. However, this is on the basis that a meeting between one of the parties alone and the mediator would constitute a mediation session. We imagine that communications in advance of any sessions involving the mediator and at least one party are of a fairly formal nature, such as giving personal particulars and agreeing a time and place for the first session. There seems no need to encourage frankness and uninhibited discussion in advance of the mediation sessions themselves.

---

[35] Evidence (Scotland) Act 1853, s 3.
[36] Walker & Walker, *The Law of Evidence in Scotland*, p 380; *Rumping v DPP* [1964] AC 814, Lord Reid at 833-4.
[37] Wilkinson, *Scottish Law of Evidence*, p 103.
[38] *Rattray v Rattray* (1897) 25R 315.
[39] Proposition 11, para 5.37.
[40] Proposition 12, para 5.37.
[41] *Lawrie v Muir* 1950 JC 19; *HMA v Turnbull* 1951 JC 96; Wilkinson, *Scottish Law of Evidence*, pp 118-122.
[42] Recommendation 10, para 3.40 below.
[43] Paras 2.13 and 3.21 above.
[44] Proposition 22, para 5.45.

3.27 In disputes concerning a child some mediators find it appropriate to involve the child in the making of certain decisions. A recent survey of family conciliation in Scotland found that children attended at least one session in 15 per cent of the cases.[45] We would protect interviews between mediators and children by extending the definition of a mediation session and thus the sealed room approach so as to include them. We would not, however, extend the protection so as to cover information which the mediator obtained otherwise than from the parties or children during mediation sessions.

3.28 Mediators sometimes refer the participants to another person such as a doctor for consultations. In our discussion paper we asked whether the privilege should attach to information acquired by this other person.[46] This proved a controversial issue. Some commentators saw it as a significant part of the mediation process where the consultation was connected with the subject matter of the dispute. Others saw it as an unnecessary and radical extension of the law of privilege. They pointed out that if privilege were to attach to consultations it would create an unwarranted distinction between a person who consulted a doctor as a result of a referral by a mediator and a person who arranged a consultation privately. The latter type of consultation attracts no privilege.[47] We think that the public interest in promoting mediation does not require consultations between the parties and persons other than mediators to be protected.

3.29 Summing up the discussion in the previous paragraphs, we recommend that:

6. (a) The new statutory inadmissibility rule should apply to any information as to what occurred at a mediation session, and accordingly no evidence (direct or indirect) of such matters should subsequently be admissible in court proceedings.

(b) The above inadmissibility rule should be subject to the exceptions set out in Recommendations 10, 12, 13, 14 and 15 and should be in addition to any rule of privilege.

(c) A mediation sessions should be defined as a session conducted by an approved mediator at which at least one of the participants, a child of a participant, or a child about whom there is a dispute which is the subject of the mediation, is present.

(Clause 1(1), (3), (6))

3.30 In order to protect mediation sessions properly the new inadmissibility rule would have to apply whether or not the parties to any court proceedings were the same as the parties to the mediation and whether or not the subject matter of the proceedings was the same as that of the mediation. For example, a grandfather should not be entitled in an application for contact with his grandchild to obtain evidence as to what occurred in a mediation between the child's parents over a dispute about which parent the child should live with. We recommend that:

---

[45] *Family Conciliation in Scotland,* Scottish Office Central Research Unit Papers (1990), para 3.5.
[46] Proposition 10, para 5.36.
[47] *AB v CD* (1851) 14D 177, 180; Wilkinson, *Scottish Law of Evidence*, p 105.

7. The new statutory inadmissibility rule set out in Recommendation 6 should apply (subject to the exceptions stated there) whether or not the parties to the court proceedings are the same as the parties to the mediation or the subject matter of the proceedings is the same as that mediated.

(Clause 1(1))

Factual information about sessions inadmissible?

3.31 We have recommended that what occurred during a mediation session should be inadmissible; but should basic facts about the session, such as who participated in it and when and where it took place, also be inadmissible? In our discussion paper[48] we proposed that such facts should not be privileged and nearly all commentators agreed. The Sheriffs' Association however were in favour of even these matters being privileged. They pointed out that allowing the facts of mediation to be given in court could give rise to people using their apparent willingness to go to mediation as enhancing their position as caring parents or to suggestions that the other party's failure to attend was due to lack of co-operation whereas in fact it was due to intimidation. In the Association's opinion where the court referred the parties to a mediation service all it needs to know is whether the mediation has resulted in an agreement; when the parents attended without any reference the court need not be aware of the mediation at all. We think that making such basic facts about a mediation session as who attended and where and when it took place inadmissible as evidence is not necessary to promote the effectiveness of mediation. The inadmissibility rule should be restricted to those areas where it has a definite protective role. It seems to us that any attempt by parties or their agents to make propaganda in court out of the facts of mediation is something that lies within the power of the sheriffs themselves to ignore or control. We therefore recommend that:

8. The new statutory inadmissibility rule should not apply to the fact that a mediation session has taken place, the time and place of the session or the identities of the participants.

(Clause 1(1))

Results of mediation inadmissible?

3.32 Mediation may result in an agreement between the parties as to some or all of the matters in dispute or it may fail to resolve matters. We understand that the terms of any agreement are normally set out in writing and the document is then signed by the parties, but oral agreements are also possible. Should the existence of an agreement, the terms of an agreement or the failure to reach agreement be facts that could be mentioned in court or should these matters be inadmissible?

3.33 In our discussion paper we proposed that no privilege should attach to the fact that an agreement was reached, the terms of any written agreement[49] or the fact that agreement was not reached (whether the parties were referred to mediation by the court[50] or attended

[48] Proposition 13, para 5.38.
[49] Proposition 14, para 5.40.
[50] Proposition 18, para 5.43.

without any referral[51]). Virtually all those who responded were in favour of no privilege attaching to the existence and terms of any written agreement or the failure to reach agreement in a court referred mediation. As we pointed out in our discussion paper[52] the court determining the matter should be made aware of the terms of any agreement so that it can give effect to them or take them into account in determining the parties' case. The failure to reach agreement could readily be inferred from the return of the parties to court and the absence of any agreement. Documents prepared after the sessions containing draft proposals for settlement would not be protected under our recommendations, but would be protected from disclosure in court under the existing privilege in favour of offers made to settle disputes.[53] The Sheriffs' Association and Family Conciliation Scotland were in favour of attaching privilege to the fact of failure to reach agreement in mediations to which the parties had not been referred by the court. Privilege was considered necessary in order to counter arguments being advanced in court based on the fact of failure, as described in paragraph 3.31 above. We disagree for the reasons set out there and think that the fact of failure to reach an agreement should be admissible. Allowing the reasons and circumstances for the failure to reach agreement to be ventilated in court is a different issue which we discuss later in paragraph 3.36.

3.34 In Proposition 15[54] we asked whether privilege should attach to agreements reached as a result of mediation which had not been recorded in any document (oral agreements). Responses were divided on this issue. Those in favour of attaching privilege thought that allowing oral agreements to be put before the court could lead to disputes about the existence or the terms of the agreement. It might be necessary to lead evidence as to what occurred in the mediation sessions in order to resolve such disputes. Those against attaching privilege saw no differences between written and oral agreements; they were both way of evidencing the underlying agreement between the parties to mediation. We deal with the question of disputes about the existence or terms of an agreement (written or oral) later in paragraphs 3.59 to 3.63. Where there is no dispute about the existence or terms of an oral agreement or the fact that an agreement was not reached we see no reason for this information to be inadmissible.

3.35 We recommend that:

9. The new statutory inadmissibility rule should not apply to the fact that an agreement (written or oral) was reached or was not reached as a result of mediation, or to the terms of any agreement.

(Clauses 1(1) and 2(1)(a))

3.36 We have just recommended that the fact that mediation resulted in failure to reach agreement should be capable of being disclosed in court. We now deal with the related question whether in such a case evidence should be admitted as to why the mediation failed. Proposition 19 in our discussion paper[55] asked whether the circumstances of failure to reach agreement should be privileged where the parties had been referred to mediation by the

[51] Proposition 20, para 5.44.
[52] Para 5.39.
[53] See para 2.4 above.
[54] Para 5.40.
[55] Para 5.43.

court. Proposition 21[56] asked the same question for mediations which had taken place without a reference by a court. Most of those commenting on the propositions favoured the attachment of privilege. In their view examining the circumstances of failure would inevitably lead to the mediation sessions being opened up in court. The "sealed room" approach we have adopted in relation to mediation sessions enables the issue to be addressed in a different way. Where the failure can be explained without reference to what occurred during the mediation sessions themselves we see no objection to the disclosure of these facts. For example, failure may have occurred because one party refused to attend any mediation sessions. The identities of participants at mediation sessions would be admissible under our previous recommendation,[57] as would communications between the mediation service and prospective participants prior to any sessions.[58] On the other hand it should not be permissible to disclose that failure resulted from one party attending but being obstructive and uncooperative there, since that would involve leading evidence as to what occurred during the mediation sessions.

Exceptions to inadmissibility

3.37 We turn now to discuss what exceptions should be made to the recommended new statutory inadmissibility rule. Although making information arising from mediation sessions absolutely inadmissible would be a simple and readily understandable rule, we think that, for reasons explained subsequently, limited exceptions have to be made. In brief the inadmissibility rule should not apply:

(a) in criminal proceedings,

(b) in children's hearings, adoption proceedings and certain other proceedings involving children and local authorities,

(c) where the parties agree,

(d) where the mediator is the pursuer or defender in civil proceedings arising out of the mediation,

(e) where a written agreement resulting from the mediation is challenged, and

(f) in civil proceedings relating to personal injury or damage to property which occurred during mediation.

3.38 **Proceedings in which information should be inadmissible.** In our discussion paper we consider the types of proceedings in which the proposed new statutory privilege should be applicable.[59] We noted that in many jurisdictions protected information is declared to be inadmissible in any proceedings whatsoever, without exception.[60] Similarly absolute privilege was suggested for England and Wales by the Booth Committee.[61] The Law

---

[56] Para 5.44.
[57] Recommendation 8, para 3.31 above.
[58] Para 3.26 and Recommendation 6 at para 3.29 above.
[59] Paras 5.55-5.63.
[60] Australia, Family Law Act 1975, ss 18, 62 and 62A; Ontario, Family Law Act 1986, s 3(6); New York, Family Court Act, article 9.15.
[61] Report of the Matrimonial Causes Procedure Committee (1985), para 3.5.

Commission for England and Wales recently made a similar recommendation[62] on the view that since what occurred during mediation was not confidential (in the legal sense)[63] facts or suspicions relating to serious crime or child abuse could be passed on to the appropriate authorities who would then investigate. Prosecutions would then rely on evidence uncovered as a result of the investigations rather than anything that had been divulged by the mediator. The counter-argument is that information should not be absolutely protected because the public interest in the successful prosecution of serious crime or the protection of children outweighs the public interest in successful family mediation. In Australia the apparently absolute statutory inadmissibility of information is thought to be qualified by similar common law "public policy" exceptions.[64]

3.39 Proposition 25[65] invited views on whether the privilege in favour of family mediation should apply in all categories of proceedings, although our tentative view was that it should not. Most commentators supported our provisional stance, taking the view that the protection and detection of serious, if not all, crime should have priority. It was pointed out that what occurred during a mediation session might be a major item of evidence or corroboration. For example, facts may be revealed which only the perpetrator of the crime could have known, or the demeanour of a participant, stains on clothing or bruises may be valuable corroborative evidence. The others present during the session ought not to be precluded from giving evidence about these facts at a subsequent criminal trial. Only one body was in favour of absolute privilege, although the Court of Session Judges thought that the privilege should apply to criminal proceedings unless a crime against the person of a party to the mediation or a child was involved. While we share the Judges' view that information should not be withheld where crimes against children are concerned, because of their vulnerability and the difficulty in obtaining evidence from the victims, we think the public interest in securing convictions of other crimes, such as assaults on neighbours, causing serious injury or death through driving under the influence of drink, or serious fraud is just as great. We would also be against any system whereby the criminal court had a discretion whether or not to allow evidence of privileged matters to be admitted, as was proposed by another commentator. Another argument in favour of excepting all criminal proceedings is that the legislation protecting family mediation would be simpler and hence easier for mediators to understand and explain to participants. If the inadmissibility rule were to apply in criminal proceedings there would have to be a detailed list of exceptions to that general rule.

3.40 We are now firmly of the opinion that the new rule making family mediation information inadmissible should be restricted to civil proceedings and accordingly should not apply in criminal proceedings. The balance to be struck between the competing public interests is different in the two kinds of proceedings. In practice we doubt whether allowing information from family mediation sessions to be admitted as evidence in criminal proceedings would have a deleterious effect on family mediation. The authorities would only be alerted as to what occurred in a mediation session if a serious crime was concerned since the mediator and the other parties would not lightly disclose information. Furthermore, we believe that it would only be in the last resort that the Crown or a reporter

---

[62] *Family Law: The Ground for Divorce*, Law Com No 192 (1990), para 5.48.
[63] If information is confidential in the legal sense unauthorised use or disclosure to a third party gives rise to a liability in damages and such use or disclosure may also be prevented by interdict.
[64] M D Broun and S G Fowler, *Australian Family Law and Practice Reporter* (1988), paras 628-633.
[65] Para 5.60.

to a children's panel would call the mediator or other participants to give evidence as to what occurred during mediation sessions. We therefore recommend that:

10. The new statutory inadmissibility rule should not apply in any criminal proceedings.

(Clause 1(1))

3.41 Propositions 31[66] and 32[67] of our discussion paper asked whether privilege should apply to expressions of intent to commit a serious crime in the future and information relevant to the commission of a crime during the mediation process respectively. Those consulted were overwhelmingly of the opinion that privilege should not apply in these circumstances. Similarly in response to Proposition 33,[68] which enquired whether any other exceptions to the privilege should be made in the interests of justice, many commentators mentioned information about crimes already committed. The responses to these propositions are subsumed into our recommendation[69] to exclude the inadmissibility rule from criminal proceedings generally.

3.42 A person may give evidence in subsequent court proceedings which is at variance with what he or she said previously during mediation sessions. Proposition 29(b) and (c)[70] asked whether privilege should be inapplicable where the person was subsequently charged with perjury or attempting to pervert the course of justice on the basis that the evidence given in court was not true. Most commentators were in favour of disapplying privilege and this view would be given effect to by our general exclusion of the inadmissibility rule from criminal proceedings. Only rarely would either of these crimes be charged in relation to evidence given in family proceedings. Even then we imagine it would be unusual for the Crown to rely on what was said or done in mediation sessions as evidence of the truth rather than the results of investigations by the police and other authorities.

3.43 **Inadmissibile in all civil proceedings?** If the new statutory inadmissibility rule is to be confined to civil proceedings, should it apply to such proceedings generally or only to certain categories of proceedings? In our discussion paper we were inclined to favour the latter approach and suggest that privilege should be limited to proceedings whose subject matter included any of the issues with which the mediation process was concerned.[71] Our suggestion was based on the view that this would restrict privilege to those proceedings where it had a real part to play and would meet the current concern over the absence of privilege. Thus, for example, a couple could confidently enter into mediation over which parent their children were to live with knowing that what they said during mediation could not be used if they had to fight it out in court later.

3.44 Some commentators agreed with our suggestion for restricting the privilege, but others favoured allowing the privilege to apply to all civil proceedings. In view of the division of opinion we have reconsidered the matter. We now think it would be legislatively simpler and cause less potential difficulties if information arising from

---

[66] Para 5.75.
[67] Para 5.76.
[68] Para 5.77.
[69] Recommendation 10, para 3.40 above.
[70] Para 5.73.
[71] Proposition 26, para 5.63.

mediation was inadmissible in all civil proceedings. Otherwise the court would have to decide whether or not the mediation had been concerned with an issue which included any of the issues presently before the court. It might be possible to do this where the parties had been referred to mediation by a court since the pleadings in the proceedings in which mediation had occurred and the pleadings in the present court proceedings could be compared. Even this ignores the fact that people in mediation sessions do not always confine themselves to the issues in dispute. Indeed they may be encouraged by the mediator to discuss matters in a more general fashion. The court's task would be much harder where the parties had gone to mediation in order to avoid litigation, since then there might be nothing apart from the contents of the mediation sessions themselves to indicate what issues were discussed. In these cases the admissibility or otherwise of information could be determined by the court only after it had been told what had been said during mediation, so depriving the new rule of much of its protective value.

3.45 Another argument against confining the inadmissibility rule to specified civil proceedings is that restrictions could give rise to uncertainty in the minds of the participants and hence tend to inhibit free discussion. Although the rule would apply to civil proceedings generally it would normally apply only in proceedings concerned with issues similar to those explored in the previous mediation sessions. This is because evidence of what occurred in mediation would have to be relevant to an issue before the court.

3.46 Some commentators suggested that if the privilege were to apply to civil proceedings generally then an exemption should be made for proceedings before the sheriff to establish the grounds of referral to a children's hearing. Such proceedings are regarded as civil proceedings,[72] albeit of a unique kind.[73] We readily accept this helpful comment and discuss in the next paragraph these and other proceedings involving children where the new inadmissibility rule ought to be disapplied. Some other exceptions to the general rule of inadmissibility also seem necessary. These are discussed later in this Part. We therefore recommend that:

11. The new statutory inadmissibility rule should apply in civil proceedings generally, subject to the various exceptions contained in Recommendations 12 to 15.

(Clause 1(1))

3.47 **Proceedings relating to children**. We have already expressed the opinion that there should be exceptions to the inadmissibility rule in order to protect the interests of children. There is considerable support for the view that the interests of children must be taken into account in some way, and the services operating in Scotland regard their obligations of confidentiality as qualified to this extent. Thus, for example, the conciliation services affiliated to Family Conciliation Scotland regard sessions and associated records and correspondence as strictly confidential "except in the case of a criminal offence against a child being firmly alleged".[74] In our discussion paper we acknowledged the difficulty of formulating exceptions which would appropriately qualify the privilege in favour of family mediation and the importance of keeping any list of exceptions as short and simple as

[72] *Kennedy v O* 1975 SC 308, 315.
[73] *McGregor v D* 1977 SC 330, 336.
[74] Statement of Principles of Conciliation, para 4.

possible. We tentatively suggested that the privilege should be inapplicable to information relative to any of the following issues in court proceedings:[75]

(a) whether any person is of such habits or mode of life as to be unfit to have the care of a child;

(b) whether any person has neglected a child;

(c) whether any person has persistently or seriously ill-treated a child;

(d) whether any person has committed a sexual offence against a child, and

(e) whether any person has committed an offence involving bodily injury to a child.

3.48 All those who commented were agreed that some exceptions should be made to the rule of privilege where children's interests were concerned and many approved of our suggested list of issues, especially those involving crimes against children. Others voiced concern at the width of some of the categories. The Court of Session Judges pointed out that allegations of neglect, bad habits and inappropriate mode of life are often flung at each other by parties to a custody or similar dispute about family matters. If evidence of information from mediation was to be admissible for these issues (items (a) and (b) on our suggested list) this would render an inadmissibility rule practically worthless. Yet other commentators with experience in the field of children's hearings pointed out that because the list did not contain all the grounds of referral to a children's hearing[76] (set out in paragraph 3.50) the inadmissibility of mediation information could cause problems in proceedings for determining whether grounds existed. These comments, and in particular the point made by the Judges, have led us to reconsider our approach. We now think a better way is to make the inadmissibility or otherwise of mediation information depend on the type of proceedings, rather than on the issues which might arise in proceedings.

3.49 In our discussion paper we also asked whether there were any other circumstances relevant to the interests of children where privilege should not apply.[77] One issue that many commentators mentioned was the abduction of children. We think this is more a question of deciding whether to disclose information rather than whether it should be admissible as evidence in subsequent proceedings. Where a mediator becomes aware as a result of mediation sessions that one participant intends to remove a child from the United Kingdom he or she should carefully consider telling the other participant or alerting the appropriate authorities directly so that steps can be taken to prevent removal.

3.50 We have already recommended that the inadmissibility rule should not apply in any criminal proceedings. Information would therefore not be withheld from a criminal court dealing with alleged neglect or persistent or serious ill-treatment of a child, or a sexual offence against or causing bodily injury to a child. This by itself would not afford sufficient protection to children. The rule should also not apply in proceedings to establish the

[75] Proposition 27, para 5.71.
[76] Social Work (Scotland) Act 1968, s 32.
[77] Proposition 28, para 5.71.

grounds of referral to a children's hearing and in the hearing itself. The grounds for referring a child to a children's hearing are that:[78]

(a) he is beyond the control of his parent; or

(b) he is falling into bad associations or is exposed to moral danger; or

(c) lack of parental care is likely to cause him unnecessary suffering or seriously to impair his health or development;

(d) any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975 has been committed in respect of him or in respect of a child who is a member of the same household; or

(dd) the child is, or is likely to become, a member of the same household as a person who has committed any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975; or

(e) the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes a crime of incest has been committed by a member of that household; or

(f) he has failed to attend school regularly without reasonable excuse; or

(g) he has committed an offence; or

(gg) he has misused a volatile substance by deliberately inhaling, other than for medicinal purposes, that substance's vapour; or

(h) he is a child whose case has been referred to a children's hearing in pursuance of Part V of the Social Work (Scotland) Act 1968; or

(i) he is in the care of a local authority and his behaviour is such that special measures are needed for his adequate care and control.

Information from mediation sessions should also be admitted in other proceedings relating to the question of future care of children. For example, in adoption proceedings, a court may dispense with a parent's or guardian's refusal to consent to adoption on the basis that he or she has persistently failed without reasonable cause to discharge the parental duties in relation to the child, has abandoned or neglected the child, or has persistently or seriously ill-treated the child.[79] In all these proceedings the public interest in the protection and future well-being of children should rank above the public interest in the promotion of family mediation. Appeals relating to children's hearings,[80] and proceedings for rescission of a local authority parental rights resolution, involve similar issues.[81]

---

[78] Social Work (Scotland) Act 1968, s 32(2).
[79] Adoption (Scotland) Act 1978, s 16(2) applying to petitions for adoption and applications for freeing a child for adoption.
[80] Social Work (Scotland) Act 1968, ss 49 and 50.
[81] 1968 Act, s 18.

3.51 We have not found it easy to arrive at a formula for encompassing all the civil proceedings involving children where mediation information should be admissible. We reject simply listing excluded proceedings by reference to the statutory provisions governing them. This is partly because parental conduct or suitability could also be raised in common law proceedings such as *M and Another v Dumfries and Galloway Regional Council*,[82] and action by parents against the local authority for delivery to them of their child in the authority's care; and partly because a long list of statutory provisions soon becomes outdated through amendments and re-amendments of the statutes. We suggest that the inadmissibility rule should not apply where a local authority[83] or an appointed official such as a reporter to the children's panel is involved as a party[84] to proceedings concerning a child's care or protection. In such cases the involvement of a body or official charged with statutory duties in the field of child care adds a public dimension to the proceedings and justifies making mediation information available. However, the participation of a public body should not by itself be a sufficient condition. Proceedings by a local authority against a parent for contributions in respect of a child in care[85] raise issues no different from proceedings for aliment or maintenance by a child against a parent where mediation information would be inadmissible.

3.52 We recommend that:

12. The new statutory inadmissibility rule should not apply in children's hearings, proceedings relating to children's hearings, adoption of children, or proceedings relating to the care and protection of children in which a local authority or voluntary organisation is a party.

(Clause 2(3)(a) and Schedule, paragraphs 1 to 4)

3.53 **Agreement to admit otherwise inadmissible information**. In our discussion paper we consider whether a privilege should be conferred only on the parties to the dispute or whether the mediator should have a separate and independent privilege as well.[86] The effect of a separate and independent privilege would be that even if all the participants in a mediation session wished the mediator to give evidence as to what occurred, the mediator would be entitled to refuse and to prevent any of the participants from giving such evidence. In the context of an inadmissibility rule the question becomes whether the mediator as well as the participants would have to agree before information was admissible.

3.54 The responses on consultation showed this to be a controversial issue. Most of the legal commentators favoured limiting the privilege to the parties. The arguments put forward in favour of limitation are:

(a) If the mediator declines to give evidence the court may be unable to decide between different versions of what happened during mediation if the parties waive their privilege and wish to put the matter before the court.

---

[82] 1991 SCLR 481.
[83] Or a voluntary association in whom a local authority has vested parental rights by virtue of a resolution under s 16(1)(b) of the Social Work (Scotland) Act 1968.
[84] As pursuer, defender or party minuter.
[85] Social Work (Scotland) Act 1968, s 80.
[86] Proposition 24, para 5.54.

(b) A solicitor is compelled to give evidence about matters covered by the solicitor/client privilege if the client waives the privilege; giving mediators a greater privilege would place them in a unique position.

(c) A mediator by refusing to waive privilege could prevent the parties from giving evidence as to what occurred during mediation, even though the parties wished to present such evidence.

(d) It is unnecessary to give mediators an independent privilege in order to achieve an efficient mediation service.

On the other hand, Family Conciliation Scotland, the Tayside Family Conciliation Service and Tayside Social Work Department supported mediators having a separate and independent privilege. The following reasons have been adduced in support of an independent privilege:

(a) If mediators could be called to give evidence as to what took place in mediation sessions it would jeopardise their independence and neutrality.

(b) People might become reluctant to become mediators if there was a possibility that they would be called to give evidence in court.

(c) Successful mediators take an active part in the session and probe for underlying causes of the dispute. The possibility of having to give evidence might inhibit mediators who might simply adopt a low profile, noting the parties' positions and statements for example.

(d) Mediation is not the same as negotiation. One should not simply adopt the "without prejudice" rules applicable to the latter.

(e) Mediators are not professional advisers, they have an independent role. The solicitor/client analogy is false.

The Sheriffs' Association were undecided and the remaining individuals and organisations were fairly evenly divided.

3.55 In our view protection of mediation information should be restricted to the minimum necessary to promote an efficient family mediation service. On this ground we do not think conferring a separate and independent power on mediators to withhold evidence can be justified. We appreciate the concern felt by mediators about having to give evidence in court, but it is a duty which many other professionals have to carry out when called to do so. Furthermore, we imagine that mediators would only rarely be called to give evidence. At present the courts seek to deter the questioning of priests whom parishioners have consulted, although no legal privilege exists. This practice might well be extended to mediators.

3.56 In the course of mediation the mediator may have had sessions with both parties to the dispute present together, with each separately, or with the children. As far as the admissibility of information is concerned we think each session should be treated separately. All the participants, but not the mediator, in a particular session should have to agree before evidence of any of the contents of that session would be admissible. Children aged 16 and

above have the capacity to agree.[87] We have considered carefully the position of children under the age of 16. In our opinion children who are old enough to participate to a meaningful extent in mediation sessions will have sufficient understanding and judgment to decide whether to agree that evidence of what occurred should be admitted. The Age of Legal Capacity (Scotland) Act 1991 would have to be disapplied as agreeing to the admission of otherwise inadmissible information is not an existing exception to the general rule that children under the age of 16 have no legal capacity.[88] Young children may, however, come under pressure from parents and others. The court hearing the proceedings may have to take steps to ensure that a child's decision is taken after proper advice and assistance. This may require appointing a curator *ad litem* to the child.

3.57 We recommend that:

13. (a) Information as to what occurred in a mediation session should be admissible as evidence if each and every participant (other than the mediator and any child too young to understand the significance of what occurred) in that session agrees that such evidence should be admitted.

(b) A participant below the age of 16 who understands the significance of what occurred in a mediation session should have the legal capacity to agree.

(Clause 2(1)(c), (2))

3.58 **Mediator personally involved in proceedings.** We pointed out in our discussion paper that it might be desirable to protect the interests of the mediator by disapplying the privilege where the mediator is charged with a criminal offence or is a party to civil or disciplinary proceedings in respect of matters arising out of mediation. The parties should not be entitled to obstruct the court and prejudice the position of the mediator by claiming privilege. We invited views on whether a provision was necessary.[89] All those who responded were in favour of an express disapplication of the privilege. Our previous recommendation that the inadmissibility rule should not apply in criminal proceedings generally[90] means that there would have to be a specific disapplication only from civil proceedings. We recommend that:

14. The new statutory inadmissibility rule should not apply where the mediator is a party to civil or disciplinary proceedings arising from the mediation process.

(Clauses 1(7) and 2(3)(b))

3.59 **Disputes about mediation agreements**. At the conclusion of a successful mediation a written agreement signed by the parties is generally prepared. Less commonly there is simply an oral agreement. We have previously recommended that the existence or terms of agreement (whether written or oral) should be admissible information.[91] If there is no

[87] Age of Legal Capacity (Scotland) Act 1991, s 1(1)(b) as read with s 9.
[88] 1991 Act, ss 1(1)(a) and 2.
[89] Proposition 34, para 5.78.
[90] Recommendation 10, para 3.40 above.
[91] Recommendation 9, para 3.35 above.

dispute about the agreement it can be put before the court. We now consider whether or not evidence of what occurred during the mediation sessions should be admissible where the validity or terms of an agreement are disputed.

3.60 Proposition 17 in our discussion paper[92] invited comment on whether the privilege should be applicable where there was a dispute about whether an agreement had been reached. Most of those consulted took the view that mediation sessions should not be opened up in court to resolve disputes about agreements. These responses have, however, to be viewed against the background that mediation currently deals with disputes about custody of and access to children. Agreements over such matters are not binding and the court may decline to make orders implementing them if it feels that they would not be in the best interests of the children. Accordingly it would hardly ever be necessary to lead evidence as to what occurred during a mediation session to challenge the validity or terms of an agreement between the parties as to custody or access. The Faculty of Advocates observed that if and when mediation extended to other matters, particularly financial agreements between husband and wife on divorce, then such agreements would be legally binding[93] and could be set aside only on limited grounds. Evidence to support a challenge to the validity or terms of such a written agreement might well have to come from what occurred during a mediation session.

3.61 We agree with the point made by the Faculty of Advocates. The terms of an agreement on financial provision on divorce, for example, are binding unless it can be shown that they were not fair and reasonable at the time they were entered into[94] or are challengeable on other common law grounds such as error, misrepresentation or force and fear.[95] Fairness and reasonableness could well depend on what each party said and disclosed about their financial circumstances during mediation. Similarly, an apparent error as to what property was to be transferred by one spouse to the other might require investigation into the proposals made during mediation for clarification of the situation.

3.62 We consider that oral and written agreements should be treated differently in relation to the admissibility of mediation information in proceedings where the agreement is disputed. In the case of an agreement which had not been set down in writing information from the mediation sessions should not be admissible. Otherwise it would be all too easy for one participant who wished to lead evidence as to what occurred during mediation to aver an oral agreement, the existence of which would be challenged by the other participant. Evidence from the mediation sessions in support or rebuttal of the terms or existence of an oral agreement could therefore be admitted only if all participants (other than the mediator) agreed. If all participants did not so agree the court would very probably have to ignore the agreement or any disputed terms because evidence to resolve the dispute, apart from what occurred during mediation, would be unlikely to be available. Written agreements on the other hand are likely to have been carefully prepared and thus may be expected to reflect accurately the intentions of the participants. We therefore consider that the validity or terms of written agreements are seldom likely to be challenged and that the prospect that evidence of what occurred during mediation would be admissible in the event of a challenge would not be detrimental to the confidentiality and hence the effectiveness of the mediation

---

[92] Para 5.42.
[93] *Milne v Milne* 1987 SLT 45; *Horton v Horton* 1992 SLT (Sh Ct) 37.
[94] Family Law (Scotland) Act 1985, s 16.
[95] Nichols, *The Family Law (Scotland) Act* 1985, (2nd edn) para 6.1.

process. We would stress that mediation information would be admissible only if a party in his or her pleadings challenged the validity or the terms of a written agreement and claimed that the agreement should be set aside or varied, and only to the extent necessary to enable such a challenge to be made.

3.63 We recommend that:

> **15. (a) Where the validity or terms of an oral agreement arising out of mediation are challenged in civil proceedings, information from the mediation sessions should not be admissible as evidence unless all participants agree.**
>
> **(b) Where the validity or terms of a written agreement arising out of mediation are challenged in civil proceedings, information from the mediation sessions should be admissible but only to the extent necessary for such a challenge.**
>
> (Clause 2(1)(b))

3.64 **Other exemptions**. In our discussion paper we asked whether one party who had suffered unnecessary delay and expense due to the other's uncooperative conduct during mediation should be entitled to put this before the court so that it could be reflected in the expenses of the proceedings.[96] This exclusion of privilege was to apply only to mediations to which the parties had been referred by a court. Some commentators were in favour since time wasting and uncooperative behaviour could thereby be penalised. The majority, however, were of the view that allowing evidence of the contents of mediation sessions to be led for this purpose would seriously undermine the protection. Under our recommendations it would be possible to lead evidence of a person's refusal to take part in mediation sessions since the identity of those present is admissible information.[97] We do not think potential liability for expenses is important enough to justify opening up the mediation session to scrutiny. It would be all too easy to force disclosure of what occurred during mediation under the guise of an application for expenses. Furthermore, as the Catholic Marriage Advisory Council said, it is difficult to assess conduct objectively. What appears to be non-cooperation may be a response to harassment or time-wasting tactics by the other party.

3.65 We also asked in our discussion paper[98] whether the privilege should be applicable where it was alleged that the evidence being given in subsequent proceedings was inconsistent with what the witness said during mediation. Most of those commenting thought that the privilege should be claimable otherwise it would lessen the protection of mediation sessions. Furthermore, people may very well change their minds, for perfectly proper reasons, about their intentions in the interval between mediation and the subsequent proceedings. If the evidence being given is factually incorrect then criminal proceedings for perjury or attempting to pervert the course of justice could be brought in which information from the mediation sessions would be admissible under our recommendations.[99]

---

[96] Proposition 30, para 5.74.
[97] Recommendation 8, para 3.31 above.
[98] Proposition 29(a), para 5.73.
[99] Recommendation 10, para 3.40. See also para 3.42 above.

3.66 Where a participant in a mediation session assaults another or damages property he or she could be charged. In the subsequent criminal proceedings information as to what occurred would be admissible.[100] We think the information should also be available in any civil proceedings arising out of personal injury or damage to property. This formulation excludes defamation proceedings. If what occurred was admissible in defamation proceedings, mediation sessions would be less well protected.

3.67 We recommend that:

> **16. (a) Information arising from mediation sessions should be inadmissible as evidence even where:**
>
> > **(i) an award of expenses in view of a party's alleged misconduct during the mediation is being considered, or**
> >
> > **(ii) it is alleged that the evidence being given in proceedings is inconsistent with what the witness said during mediation.**
>
> **(b) Information from mediation sessions should be admissible as evidence in proceedings claiming damages for personal injury or damage to property resulting from a participant's conduct during mediation.**
>
> (Clause 2(3)(a) and Schedule, paragraph 5)

Procedural matters

3.68 In court a privilege usually cannot receive effect unless it is claimed by the person entitled to it, whether that person is a witness or a party. If called as a witness, he or she cannot refuse to give evidence at all because of the possibility that he or she may be asked questions about matters to which the privilege may apply. He or she must enter the witness box and claim the privilege if such a question is asked. In the absence of a claim the evidence is admissible. In our discussion paper we set out a number of practical issues where the existing law of privilege seemed unclear or in need of amendment. Should the judge tell the witness that he or she need not answer a question, the answer to which might contain privileged information? Should the asking of such a question be forbidden? If a witness who is not a party states a claim to the privilege which is wrongly rejected, or states an invalid claim which is wrongly upheld, should a party be entitled to appeal? Should there be a rule that no adverse inference may be drawn if the privilege is claimed? What if the witness divulges such privileged information where no claim to privilege has been made through ignorance? We asked for views as to whether it was necessary for special provisions to be made for these matters in connection with the proposed new privilege.[101] Most commentators agreed that express provisions were unnecessary in connection with the new privilege, although some thought that judges should be required to warn witnesses against answering questions which entail revealing privileged information and that there should be an express rule against drawing an adverse inference from a claim of privilege. Many of the issues we raised are resolved or become less problematic if, as we recommend, information from mediation becomes inadmissible rather than privileged. Since the

[100] Recommendation 10, para 3.40.
[101] Proposition 36, para 5.81.

evidence would be inadmissible in terms of a statutory provision, it would not become admissible merely because a witness had not been judicially warned or because a party had not objected to a question designed to elicit it. It would be admissible only if the judge was satisfied that all the participants had agreed that it should be admissible. While it would not be possible to prevent questions calculated to elicit mediation information being asked, the fact that the inadmissibility of the evidence would be known to the questioner, his or her opponent and the judge should limit the frequency with which such questions would be asked. Appeals on the ground of the wrongful admission or exclusion of evidence about what occurred during a mediation session would be competent to the same extent as any other appeal on the ground of wrongful exclusion or admission of evidence. Finally, no adverse inference could be drawn from a claim that mediation information was inadmissible. Even if it were necessary to draw the court's attention to the point, the information would be inadmissible by force of the statutory provision alone.

Confidentiality and inadmissibility

3.69 So far this report has been concerned with the admissibility of information relating to family mediation as evidence in court proceedings. In this final section we look at confidentiality - whether and to what extent the possessor of information about matters relating to family mediation is entitled to use and disclose it otherwise than in court proceedings. We understand that the question whether to breach confidentiality and disclose any matter to the appropriate authorities seldom arises in practice but may cause serious difficulties for mediators when it does. Mediators are reluctant to disclose information arising out of mediation because it prejudices the credibility of mediation and compromises their impartiality. The Statement of Principles of Conciliation issued by Family Conciliation Scotland makes it clear that conciliation services regard mediation sessions and associated records as strictly confidential "except in the case of a criminal offence against children being firmly alleged".[102] These principles are outlined to prospective participants by the mediator. Breach of this promise of confidentiality or implied undertaking as to confidentiality could give rise to proceedings for breach of confidence if the mediator discloses matters other than those relating to criminal offences against children.[103]

3.70 In our discussion paper we suggested that the problems faced by mediators might be alleviated by providing an additional defence of disclosure in the public interest[104] and that disclosure of information to which the privilege did not attach would be deemed to be in the public interest.[105] Most commentators supported this approach, although there was concern about the public interest formula from several bodies. First, it was said that public interest is too vague. The fact that disclosure would be justified in the public interest would not be of much assistance to a mediator faced with the difficult decision of whether or not to disclose information in a particular case. Secondly, public interest is a concept with political overtones. One body took the view that privilege and confidentiality should be co-extensive: what is privileged should not be disclosed and what is not privileged could be disclosed without fear of proceedings for breach of confidence. The approach we have adopted in this report whereby the admissibility of information as evidence depends on the

[102] Para 4.
[103] See our *Report on Breach of Confidence* (Scot Law Com No 90, Dec 1984), Part II.
[104] Proposition 37, para 5.85.
[105] Proposition 38, para 5.85.

nature of the proceedings, rather than the nature of the information itself, makes it impossible to adopt this approach even if we were in favour of it. In our opinion, however, the public policy considerations underlying inadmissibility and confidentiality are not identical.

3.71 We have come to the view that there should be no new legislative provisions about confidentiality in this area. The existing law, such as it is, should continue to apply. The mediation services could protect mediators without legislation by amending their statements about confidentiality provided to prospective participants and making the limits clear. The Lord President in dealing with an application for approval by a mediation service or an individual mediator could require the terms of any confidentiality statement to be submitted to him for consideration and approval. We therefore recommend that:

17. There should be no new statutory provisions dealing with confidentiality in family mediation proceedings.

Part 4 List of Recommendations

1. Statutory provisions should be enacted rendering (subject to certain exceptions) information arising out of family mediation procedures inadmissible as evidence in subsequent legal proceedings.

(Paragraph 2.14)

2. (a) The new statutory inadmissibility rule should attach to mediation concerning:

(i) individuals in disputes about any matter relating to the residence of a child; or the regulation of personal relations and direct contact between a child and any other person; or the control, direction or guidance of a child's upbringing; or the guardianship or legal representation of a child; or any other matter relating to a child's welfare, or

(ii) spouses or cohabitants (and former spouses or cohabitants) in dispute about matters arising out of the breakdown or termination of their marriage or relationship.

(b) The Secretary of State for Scotland should have power to make regulations amending the above definition.

(Paragraph 3.11; Clause 1(2) and (5))

3. The new statutory inadmissibility rule should apply to all mediations whether or not the participants were referred to mediation by a court.

(Paragraph 3.12; Clause 1(1))

4. The new statutory inadmissibility rule should apply whether or not the mediation resulted in an agreement between the participants.

(Paragraph 3.13; Clause 1(1))

5. The new statutory inadmissibility rule should apply only to mediation carried out by an accredited member of an approved organisation or by an approved individual. Approval should be granted by the Lord President of the Court of Session.

(Paragraph 3.19; Clause 1(3))

6. (a) The new statutory inadmissibility rule should apply to any information as to what occurred at a mediation session, and accordingly no evidence (direct or indirect) of such matters should subsequently be admissible in court proceedings.

(b) The above inadmissibility rule should be subject to the exceptions set out in Recommendations 10, 12, 13, 14 and 15 and should be in addition to any rule of privilege.

(c) A mediation session should be defined as a session conducted by an approved mediator at which at least one of the participants, a child of a participant, or a child about whom there is a dispute which is the subject of the mediation, is present.

(Paragraph 3.29; Clause 1(1), (3), (6))

7. The new statutory inadmissibility rule set out in Recommendation 6 should apply (subject to the exceptions stated there) whether or not the parties to the court proceedings are the same as the parties to the mediation or the subject matter of the proceedings is the same as that mediated.

(Paragraph 3.30; Clause 1(1))

8. The new statutory inadmissibility rule should not apply to the fact that a mediation session has taken place, the time and the place of the session or the identities of the participants.

(Paragraph 3.31; Clause 1(1))

9. The new statutory inadmissibility rule should not apply to the fact that an agreement (written or oral) was reached or was not reached as a result of mediation, or to the terms of any agreement.

(Paragraph 3.35; Clauses 1(1) and 2(1)(a))

10. The new statutory inadmissibility rule should not apply in any criminal proceedings.

(Paragraph 3.40; Clause 1(1))

11. The new statutory inadmissibility rule should apply in civil proceedings generally, subject to the various exceptions contained in Recommendations 12 to 15.

(Paragraph 3.46; Clause 1(1))

12. The new statutory inadmissibility rule should not apply in children's hearings, proceedings relating to children's hearings, adoption of children, or proceedings relating to the care and protection of children in which a local authority or a voluntary organisation is a party.

(Paragraph 3.52; Clause 2(3)(a) and Schedule, paragraphs 1 to 4)

13. (a) Information as to what occurred in a mediation session should be admissible as evidence if each and every participant (other than the mediator and any child too young to understand the significance of what occurred) in that session agrees that such evidence should be admitted.

(b) A participant below the age of 16 who understands the significance of what occurred in a mediation session should have the legal capacity to agree.

(Paragraph 3.57; Clause 2(1)(c), (2))

14. The new statutory inadmissibility rule should not apply where the mediator is a party to civil or disciplinary proceedings arising from the mediation process.

(Paragraph 3.58; Clauses 1(7) and 2(3)(b))

15. (a) Where the validity or terms of an oral agreement arising out of mediation are challenged in civil proceedings, information from the mediation sessions should not be admissible as evidence unless all participants agree.

(b) Where the validity or terms of a written agreement arising out of mediation are challenged in civil proceedings, information from the mediation sessions should be admissible but only to the extent necessary for such a challenge.

(Paragraph 3.63; Clause 2(1)(b))

16. (a) Information arising from mediation sessions should be inadmissible as evidence even where:

(i) an award of expenses in view of a party's alleged misconduct during the mediation is being considered, or

(ii) it is alleged that the evidence being given in proceedings is inconsistent with what the witness said during mediation.

(b) Information from mediation sessions should be admissible as evidence in proceedings claiming damages for personal injury or damage to property resulting from a participant's conduct during mediation.

(Paragraph 3.67; Clause 2(3)(a) and Schedule, paragraph 5)

17. There should be no new statutory provisions dealing with confidentiality in family mediation proceedings.

(Paragraph 3.71)

Appendix A

Civil Evidence (Family Mediation) (Scotland) Bill

ARRANGEMENT OF CLAUSES

DRAFT
OF A

BILL

TO

A.D. 1992

Make provision for the inadmissibility as evidence in civil proceedings in Scotland of things which have occurred or been said, written or observed during a session of mediation relating to a family dispute.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Inadmissibility in civil proceedings of information obtained at mediation session

1.-(1) Subject to section 2 of this Act, no information as to what has occurred or been said, written or observed during a session of mediation to which this Act applies relating to a family dispute shall be admissible as evidence in any civil proceedings, whether or not the parties to the proceedings are the same as the persons who were present at the mediation session.

(2) In this Act a "family dispute" means -

(a) dispute between two or more individuals relating to -
  (i) the residence of a child;
  (ii) the regulation of personal relations and direct contact between a child and any other person;
  (iii) the control, direction or guidance of a child's upbringing;
  (iv) the guardianship or legal representation of a child; or
  (v) any other matter relating to a child's welfare;

(b) A dispute between spouses or former spouses concerning matters arising out of the breakdown or termination of their marriage;

(c) a dispute between parties to a purported marriage concerning matters arising out of the breakdown or annulment of the purported marriage;

(d) a dispute between cohabitants or former cohabitants concerning matters arising out of the breakdown or termination of their relationship;

(e) such other type of dispute as the Secretary of State may prescribe in regulations as being a family dispute for the purposes of this Act.

(3) This Act applies to a session of mediation which is conducted by a person -

(a) approved as a mediator in family disputes by the Lord President of the Court of Session; or

(b) accredited as a mediator in family disputes to an organisation concerned with mediation in such disputes and approved as aforesaid;

and at which any of the parties to the dispute or a relevant child are present.

(4) For the purposes of subsection (2)(d) above "cohabitants" means a man and a woman who are not married to each other but who are living with each other as if they were husband and wife.

(5) The power to make regulations under subsection (2)(e) above shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) In subsection (3) above "a relevant child" means a child of any of the parties to the dispute concerned or in relation to whom there is such a dispute as is mentioned in subsection (2)(a) above.

(7) In this Act "civil proceedings" does not include an arbitration or proceedings before a tribunal or inquiry.

EXPLANATORY NOTES

Clause 1

Subsection (1)

This subsection sets out the general rule that information from sessions at which family disputes are mediated is inadmissible in civil proceedings. It implements Recommendations 1, 3, 4, 6(a), 7, 10 and 11. The various exceptions to the rule are contained in Clause 2. The protected information is so described as to exclude from the scope of the protection information about when and where the sessions took place, who was present at them and any agreements reached as a result of them, so implementing Recommendations 8 and 9 (in part).

Subsection (2)

This subsection defines a family dispute.

Paragraph (a) implements Recommendation 2(a)(i). Confining this paragraph to disputes between two or more individuals eliminates disputes where a local authority or some other organisation having statutory duties in the child care field is involved.

Paragraphs (b) and (d) implement Recommendation 2(a)(ii). Cohabitants are defined in subsection (4).

Paragraph (c) extends the definition in paragraph (b) to parties to a void or voidable marriage.

Paragraph (e), taken with subsection (5), implements Recommendation 2(b).

Subsection (3)
The provisions of this subsection dealing with approval of mediators implements Recommendation 5. The approval procedures will require to be further regulated by Act of Sederunt. The remainder of this subsection, together with subsection (6), implements Recommendation 6(c).

Subsection (4)
This subsection contains the normal definition of cohabitants. "Former cohabitants" in subsection 2(d) would be construed accordingly.

Subsection (6)
This subsection, together with subsection (3), implements Recommendation 6(c).

Subsection (7)
This subsection makes it clear that civil proceedings do not include proceedings before a tribunal or inquiry or an arbitration. It implements Recommendation 14.

Exemptions from Ambit of s.1.

2.-(1) Nothing in section 1 of this Act shall prevent the admissibility as evidence in civil proceedings -

(a) of the content of any agreement (whether written or oral) entered into during a mediation session or of the fact that no such agreement was entered into during such a session;
(b) if any written agreement entered into as a result of a mediation session is challenged in civil proceedings, of information as to anything which occurred during a mediation session in relation to that challenge; or
(c) of information as to anything which occurred during a mediation session, if every participant (other than the mediator) at that session agrees that the information should be admitted as evidence.

(2) For the purposes of subsection (1)(c) above, a child under the age of 16 years who was present at the mediation session -

(a) shall be regarded as a participant; and
(b) notwithstanding anything in the Age of Legal Capacity (Scotland) Act 1991, shall have legal capacity to agree that the information should be admitted as evidence,

but only if at the time when the mediation session took place he was capable of understanding the nature and significance of the matters to which the information relates.

(3) Nothing in section 1 of this Act shall prevent the admissibility as evidence of information as to anything which occurred during a mediation session at any civil proceedings -

(a) specified in the Schedule to this Act; or
(b) arising from the mediation process in which the mediator is a party.

(4) Any reference in this section to anything which occurred during a mediation session shall include a reference to anything which was said, written or observed during such a session.

EXPLANATORY NOTES

Clause 2
This clause sets out the exceptions to the general rule of inadmissibility contained in Clause 1.

Subsection (1)
Paragraph (a) implements Recommendation 9. Only agreements entered into during a session are mentioned because information about agreements entered into afterwards is not made inadmissible evidence by Clause 1(1).

Paragraph (b) implements Recommendation 15(b). Confining the paragraph to written agreements, so excluding oral agreements, implements Recommendation 15(a).

Paragraph (c) implements Recommendation 13 in part. Subsection (2) deals with children under 16 who are present at mediation sessions.

Subsection (2)
This subsection implements Recommendation 13 in part. Persons aged 16 or over are automatically treated as participants and have the capacity to agree to the admission of information under the Age of Legal Capacity (Scotland) Act 1991, s 1(1)(b).

Subsection (3)
This subsection, taken with the Schedule, sets out the civil proceedings in which the inadmissibility rule in Clause 1(1) does not apply. Paragraph (a) and paragraphs 1 to 4 of the Schedule deal with proceedings involving the care and protection of children so implementing Recommendation 12. Paragraph 5 of the Schedule relates to damages claims arising out of the conduct of a party during mediation. Paragraph (b) implements Recommendation 14.

Short title, commencement and extent

3.-(1) This Act may be cited as the Civil Evidence (Family Mediation) (Scotland) Act 1992.

(2) This Act shall come into force at the end of the period of 2 months beginning with the day on which it is passed.

(3) This Act extends to Scotland only.

SCHEDULE

Proceedings referred to in section 2(3)(a) of this Act

1. Proceedings (whether under an enactment or otherwise) relating to a child's care or protection in which a local authority or a voluntary organisation is a party.

2. Proceedings under Part III of the Social Work (Scotland) Act 1968 before, or relating to, a children's hearing.

3. Proceedings for an adoption order under section 12 of the Adoption (Scotland) Act 1978.

4. Proceedings for an order under section 18 of that Act declaring a child free for adoption.

5. Proceedings against one of the parties to a mediation referred to in this Act in respect of damage to property, or personal injury, alleged to have been caused by that party during a mediation session.

EXPLANATORY NOTES

Schedule

Paragraphs 1 to 4 implement Recommendation 12.

Paragraph 5 implements Recommendation 16(b). "Party" rather than "participant" is used to make it clear that the mediator is not included. Civil proceedings in which the mediator is involved are dealt with in Clause 2(3)(b).

Appendix B

List of those who submitted comments on the Discussion Paper

Aberdeen University, Faculty of Law Working Party
Association of Chief Police Officers in Scotland
Association of Reporters to Children's Panels
Association of Scottish Police Superintendents
Association of University Women, Dundee and St Andrews
Association of University Women, Glasgow
Association of University Women, Perth
Mr Ronald Beasley, Student Counsellor, Queen Margaret College, Edinburgh
The Catholic Marriage Advisory Council
Convention of Scottish Local Authorities
The Court of Session Judges
The Faculty of Advocates
Family Charter Campaign
Family Conciliation Scotland
The Humanist Society of Scotland
The Law Society of Scotland
Ms Macnab and Others
The Mothers' Union, Scotland
Scottish Child and Family Alliance
The Sheriffs' Association
The Sheriffs Principal
Sheriff A L Stewart, Dundee
Society of Writers to HM Signet (a member)
Ms Elaine Sutherland, Lecturer, University of Glasgow
Tayside Family Conciliation Service
Tayside Regional Council, Reporter to Children's Panel
Tayside Regional Council, Social Work Department