Editorial

Mediation Theory and Practice
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Editor's note

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Mediation: Theory and Practice (MTP) emerged in 2016 from the College of Mediators under the editorship of Professor Elizabeth Stokoe with the objective of filling a gap in the academic literature. Up until then there was no academic journal in the UK (and very little elsewhere) with an exclusive focus on the field of mediation. Moreover, as far as we are aware, this is the only journal that publishes both peer-reviewed original research as well as practice notes that seek to identify best practice used by mediators in various sectors who employ different styles. The growing theoretical work in this arena, the rich variety of processes and techniques, and the growing institutional support for mediation justified the launch of this journal, which in a way is a testament to the evolution and growth of mediation in recent decades.

Since the last issue was published in 2018, there have been important developments in the field of mediation. To name a few, in 2019 many states started ratifying the Singapore Convention on Mediation facilitating the enforcement of mediation settlements across borders in the same way as

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the New York Convention of 1958 has done for international arbitral awards. The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation 2018, which replaces the original Model Law on Conciliation. The Singapore Convention, formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, was adopted on 20 December 2018 and it was opened for signature on 7 August 2019. At the time of writing (March 2020), 46 states have already ratified the Convention. Although the EU has not ratified (partly due to inconsistencies with Mediation Directive on the formal requirement, and partly because the EU is considering whether sign it as a block of countries), it has already been ratified by many Asian countries (including People's Republic of China and India), Middle Eastern countries, as well a few American countries (including the USA). By securing the enforceability of mediated decisions, the convention as the Mediation Directive did within the EU, ensure greater certainty on commercial settlements emerging from cross-border disputes. Therefore, the Convention has turned international mediation into a more appealing dispute resolution option for parties based in the signatory countries, as settlements will be readily enforceable in those jurisdictions.

In terms of court annexed mediation initiatives, a notable recent development in England and Wales has been the Civil Money Claims Online (CMCO), which is a new innovative online court process to resolve claims under £10,000 (though it is expected to increase soon to £25,000). The CMCO has started to pilot an opt-out telephone mediation scheme (the same process that is still being offered to those using the Small Claims Track on an opt-in basis) for claims initially under £500, with further increments expected in the near future. The novelty of the opt-out model for small claims is that it embeds mediation within the litigation procedure for money claims, thus making court-sponsored mediation (or conciliation), as Justice Briggs said in his Civil Court Structure Review 2016, 'culturally normal'.

Over the last year there have been many important publications on ADR and mediation. A notable development in the UK was the Civil Justice Council ADR Report, which focuses on making recommendations for the promotion of mediation, especially as a complementary mechanism for civil litigation. Some of its findings reflect what other reports, such as that produced by the Federation of Small Businesses, have said in

the past with regards to the need to increase awareness among potential users. The need to raise awareness has also been the rationale behind the launch of the Small Business Commissioner, whose role is to assist small businesses to resolve disputes with large businesses. To that end, an important part of its toolkit is to refer parties to mediation through the Ministry of Justice Online Directory, the Law Society of Northern Ireland and the Scottish Mediation Register.

There have been other remarkable initiatives, such as the NHS Resolution, which now provides mediation in healthcare claims against the NHS, making a significant cultural shift in the resolution of NHS disputes. Its most recent report, only published in February 2020, found that the new scheme is working very well, with 74 per cent of mediated cases settled on the day of mediation or within four weeks after the mediation.

Over the last year, we have also seen a growing number of sectorial ombudsperson that employ mediation techniques to facilitate the resolution of many different types of consumer disputes. A recent newcomer has been the Rail Ombudsman, which covers passengers' grievances with the rail companies.

However, not all news has been good in recent times. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 had a huge impact on family mediation. Ironically, although the LASPO Act removed legal aid for early legal advice and retained it for family mediation, instead of diverting families from courts to mediation, the lack of legal advice meant that fewer case were referred to mediation, leading to the number of family mediations plummeting to nearly half of what it was before the LASPO Act. Nevertheless, significant debates among family mediators have flourished during the last two years. Among others, discussions concerning the consultation of children during mediation, and mediation pilot schemes within the Court of Protection, are worth mentioning.

The present issue contains an interesting collection of theory and practice papers, and a book review. Tony Allen's paper reviews the confused legal position in England and Wales concerning mediators as a source of evidence, analysing two recent cases (*Abberley v. Abberley* and *AB v. CD*) in which, for the first time, mediators gave evidence in court about the contents of the mediation and post-mediation party communications. It suggests greater resistance by mediators to attempts to call them as

witnesses and greater willingness by judges to protect mediators from being called unnecessarily, questions what truly is 'in the interests of justice' in such decisions, and suggests considering such matters in private hearings first.

Roger Seaman's article engages the reader with an analysis of the role of the mediator. It suggests a style of intervention as 'follower' in which the mediator is relatively passive and mostly seeks to follow the parties' conversation. This follower style is set within a wider spectrum of practice in which mediators, to a lesser or greater extent, manage and lead the parties in their discussions. Resting upon an understanding of the social construction of identity, Seaman argues that by predominantly 'following' the parties, a conversational space may be opened up, thereby increasing scope for the parties to enter into an exploratory dialogue about their conflict to find their own, robust solutions.

This issue inaugurates a new section dedicated to conversations with mediators, which we named 'Case studies'. This section is dedicated to real-life practice with mediators engaging in storytelling and analysis of cases they have dealt with. The aim of the case studies section is to stimulate constructive exchanges of experiences between mediators and eventually open up to further discussion on selected practical and theoretical issues that must be addressed to make mediatory intervention effective. Pieces in this section foreground challenges for mediators, good practice and specific issues that mediation process present. Stuart Hanson offers a first important contribution to this section. He brings the reader within the resolution of a family dispute focusing on finance, and raises important questions concerning the extent to which limited legal knowledge influences the mediation process.

The handover of the editorship caused a delay in organisation of the 2019 volume, which unfortunately meant that it could not be published on time. Thus, this issue is published as the 2019 volume (albeit appearing in June 2020), and the next will be the 2020 volume (to be published in November 2020). From 2021 onwards we plan to publish again on a bi-annual basis, with one issue in the spring and the second in the autumn.

Going forward we welcome submissions on any topic related to mediation, understood in its broadest context, relying on a variety of methodologies and fields of application, from family, community and medical mediation to civil, intergenerational, commercial and peer mediation, as

well as on related approaches to alternative dispute resolution (ADR) and online dispute resolution (ODR). At the time of writing, most of the UK, and a great part of the world, is under an unprecedented lockdown triggered by the COVID-19 pandemic outbreak. The social distancing restrictions led to the suspension of most non-urgent mediations, while many mediators scrambled to offer telephone and video conferencing (mostly over Skype and Zoom) hearings. We are particularly keen to include practice notes describing the adjustments you have made to meet the current challenges insofar as these can be helpful to a variety of practitioners and mediation stakeholders. To that end, as it can be seen in this issue, we welcome case studies from mediators to be included in the Conversations section.

It is with a sense of responsibility and gratitude that we take on the editorial responsibility of this journal. We will endeavour to maintain and build upon the excellent work carried out by our predecessor, Professor Elizabeth Stokoe. We are grateful to her and to the College of Mediators for entrusting to us the responsibilities of editing this journal.