

## **‘Ensuring effective access to appropriate and affordable dispute resolution’**

### **Scottish Mediation Network response to CJAG consultation**

#### **General Comments**

The Scottish Mediation Network (SMN) comprises mediators and others with a commitment to the better resolution of disputes in Scotland. As such, we are working alongside partner organisations, including the Justice Department, to achieve what – in the apt title of the CJAG consultation – is termed “effective access to appropriate and affordable dispute resolution”.

This includes access to the courts and tribunals as well as a range of other, more informal means of resolving disputes. We therefore welcome the broad scope of the CJAG consultation. Many of our members wear or have worn other hats: for example, as advisers, litigators or indeed as “users” of the civil and administrative justice system. Our shared experiences lead us to *prefer* mediation as a way of resolving disputes for ourselves and for those we advise and assist. But we insist that the *choice* to use – or refuse – mediation is a voluntary one. For members of the public to make this choice, consistent information and advice needs to be available throughout Scotland.

Mediation at the right time and for the right situations is an empowering, cost effective and speedy way to resolve disputes: our members typically come into the field because of a strong commitment to seeing conflict dealt with justly and humanely. However, we still recognise that there will always be disputes requiring a court-imposed solution, and our preference for mediation does not detract in any way from our broader commitment to access to justice. We therefore strongly endorse the holistic approach of the CJAG consultation. Anything less would be to view disputes from the special-interest perspective of professionals – whether mediators, legal advisers or judges – and to neglect the fact that any system for resolving disputes should strive to meet the needs of the users.

The Civil Courts Review, the SCAJTC consultation on options for tribunal reform in Scotland and the imminent merger of the Court and Tribunal Services in England & Wales (with knock-on implications for Scotland, as some tribunals have a UK-wide remit) combine to create a once-in-a-generation opportunity for thorough reform. This should prioritise better access to justice for users. At the same time the unprecedented cuts in public spending, inevitably affecting all departments, might be regarded as a “perfect storm” rather than a golden opportunity. Radical change has to happen, is already happening and has to be carried through with an eye to economy as well as effectiveness.

Lord Coulsfield makes this point in his Foreword, drawing attention to the issue of the “cost and practicability of some proposals” which, as he says, may have become more acute. The civil and administrative justice reform agenda, conceived at a time of growing public spending, has to be carried through without the resources which the authors (and all of us, including the Scottish Government) might reasonably have expected to be available. For mediators, this adds a strong financial argument to our

principled preference for people to be assisted to resolve their concerns without, in most cases, having to take legal action.

Because all of these changes have to be “joined up” and resourced in an affordable way, we welcome the Scottish Government’s commitment to establishing a major change programme to manage reform across the system (entitled *Making Justice Work* according to the Consultation). This programme rightly aims to make ‘*proportionate use of resources across the whole system*’ and ‘*promotes early resolution of disputes and deals with cases quickly*’, alongside the aim of having ‘*fair processes*’ and securing ‘*just outcomes*’. We in SMN will support this change programme in any way that we can. Some detailed suggestions are made in our responses to the consultation questions below.

This change programme will inevitably take a broader view than the component prior reviews which looked at civil and administrative justice respectively and, in each case, while showing awareness of the potential advantages of mediation, did not have a wide-ranging focus on ‘*settlement of disputes*’.

The CJAG Consultation sparks off this latest reform process in a welcome manner. It takes the broad view, aims for “practical solutions” to help users “resolve their legal problems” and goes back to the underlying principles before noting some detailed options.

## **Response to the consultation questions**

### **Question 1**

The Scottish Mediation Network supports the principles underpinning the Civil Courts Review. Building on these, it is our view that Scottish people should be empowered, wherever possible, to resolve their own disputes by negotiation or with the assistance of a mediator. As well as freeing up the courts and tribunals to deal with the more serious and intractable cases, this principle is likely to reduce costs, both for the Scottish Courts Service (and putative Scottish Tribunals Service) and for individuals and public bodies whose decisions are subject to challenge by members of the public.

In our view, a holistic justice system needs an ‘*overriding objective*’ akin to that introduced by Lord Woolf and now embodied in the Civil Procedure Rules and in Tribunal Procedure Rules in England and Wales. This is stated as follows:

#### *1.1*

*(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*

*(2) Dealing with a case justly includes, so far as is practicable –*

*(a) ensuring that the parties are on an equal footing;*

*(b) saving expense;*

*(c) dealing with the case in ways which are proportionate –*

*(i) to the amount of money involved;*

*(ii) to the importance of the case;*

*(iii) to the complexity of the issues; and*

- (iv) to the financial position of each party;*
- (d) ensuring that it is dealt with expeditiously and fairly; and*
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

#### 1.2

*The court must seek to give effect to the overriding objective when it –*

- (a) exercises any power given to it by the Rules; or*
- (b) interprets any rule.*

It will be noted that the principles stated above have a good deal in common with those underpinning the Civil Courts Review. The difference is this. The embodiment of the overriding objective in Civil Procedure Rules makes this an imperative for every court in every case – it is not a purely discretionary matter (see rule 1.2 above). The court is also required to actively manage cases, which includes encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating that use. This goes beyond mere acknowledgement that mediation may be a better way of resolving some cases. The court takes upon itself a measure of responsibility for helping the users choose the most appropriate way of resolving issues – through judicial case management, encouragement and facilitation. One way of looking at this is that mediation is not a separate service but part and parcel of the court service. This leads us to the question of structures in response to Question 2 below.

It should be noted that the same overriding principle is now embodied in Tribunal Procedure Rules for the wide range of tribunals covered by the Tribunal Service. To take one example, *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* start with the overriding objective and go on to consider dispute resolution:

#### 3.—(1) *The Tribunal should seek, where appropriate—*

- (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and*
- (b) if the parties wish, and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.*

The principle of *enabling the court to deal with cases justly* does of course beg the question of what is meant by justice. We propose that, in accordance with the evidence on the expectations and experience of users and, consistent with the principles underpinning the Civil Courts Review, a broad view should be taken which encompasses both *substantive justice* (a satisfactory outcome, perceived as fair) and *procedural justice*. The concept of procedural justice comprises three elements of *voice, being heard* and *fair treatment*. It is notable that while the loser is rarely likely to believe that they have experienced substantive justice, in a good resolution process such as mediation, all parties are able to have their say, be listened to and participate in shaping the outcome. Even if disappointed with the substantive outcome they are more likely to feel that they have had justice. Recent research from the Glasgow and

Aberdeen Small Claims Mediation pilots indicated that mediated settlements are also more likely to be implemented than those imposed by the court.<sup>1</sup>

### Questions 2, 3 & 4

We have found that our answer to these questions overlap to such an extent that it is more sensible to take these together.

At present there is evidence that many Scottish people simply ‘lump it’<sup>2</sup>: i.e. put up with legal problems of low and moderate value, because of a perception that the costs of pursuing such a matter in the courts will outweigh any money received. The Scottish Mediation Network believes that people should have access to alternatives to the courts, and be able to make an informed decision about which avenue to pursue in resolving their dispute. Many people already choose, on their own initiative or based on available information and advice, to use mediation before resorting to court action.

These avenues already exist in family cases, and respondents to the Civil Justice Review consultation were positive about the contribution that mediation can make to resolving family cases. The latest figures from Relationships Scotland show that, in 2009, there were 2,673 self-referrals for family mediation, with a further 786 referrals coming via solicitors and 430 from the courts.

Likewise, there is extensive use of community mediation. Scottish Community Mediation services assist well over 6,000 people each year to resolve conflicts around housing, noise, boundaries, use of land, parking, abusive behaviour and other issues, all of which might potentially have otherwise ended up in the civil courts. This role is recognised and supported by Scottish Government through its Housing Section which funds the Scottish Community Mediation Centre.

Although the experience of family mediation suggests that only a minority of referrals to mediation will come from the courts, this is nonetheless an important contribution to resolution of some of the more difficult cases and to alleviating the burden on the courts.

The majority of people should be empowered to choose and use mediation before going to court. This requires a wider and more systematic dissemination of information and advice about mediation, through a range of communication channels and locations. Many people will find direct information such as through website and leaflets accessible. Others will be informed and influenced by advisers and it is crucial that all those who may advise users and potentially refer them for mediation, have access to good information resources and also to guidance from their own professional bodies.

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<sup>1</sup> Ross, M & Bain, D (2010) *In Court Mediation Pilots: Report on Evaluation of in Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* Scottish Government, Courts and Constitution Analytical Team

<sup>2</sup> See Genn, H and Paterson, A (2001) *Paths to Justice: What People in Scotland Do and Think About Going to Law* Oxford: Hart Publishing

However, the courts should also be ready and able to refer cases to mediation. We propose extending the powers already available in family cases to the vast majority of civil cases, including housing, small claims and tribunal claims. This would enhance consistency, affordability and the principle that people should be trusted to make their own arrangements wherever possible. We return to this practical proposal in our response to Questions 5,6, 8 & 10 below.

While care needs to be taken to ensure the independence of a mediator from the court, we would suggest that the most useful model is a mediation service provided by the Justice Department through the court and tribunal services. The model of a mediation service attached to the court has been in use for some years in Edinburgh Sheriff Court, and was also used in the Aberdeen and Glasgow small claims mediation pilots. In England and Wales HMCS set up the National Mediation Helpline, providing low-cost time-limited mediation to court users anywhere in England and Wales, primarily for fast and multi track disputes (i.e. cases worth above £5,000). In addition, for lower value disputes in which it would be unrealistic to expect small claims users to pay for mediation, HMCS has now recruited a number of small claims mediators, so that all court users have access to the in-house small claims mediation service. As HMCS reports:

*Together, these services help to deliver the Department's strategic objective for 'fair and simple routes to civil and family justice', in particular by 'providing greater opportunities to help people resolve problems without needing to go to court'<sup>3</sup>*

This model in which the court service itself offers a range of options borrows from the 'multi-door courthouse' ideas of dispute resolution pioneer Frank Sander.<sup>4</sup> Sander proposed that citizens with a legal problem ought to find within a single courthouse the whole range of ways of resolving it: there would be 'doors' marked 'arbitration', 'negotiation', 'mediation' and 'adjudication'.

SMN suggests that a triage (i.e. sifting and allocation) system would allow a speedy and informed assessment of the most appropriate route to resolution. Such a system could be operated by In-Court Advisers or an external body like CAB Scotland. This would avoid using court time unnecessarily, although the evaluation of the Aberdeen and Glasgow small claims mediation pilots states: '*experience of in-court mediation in other countries, and the evidence of litigant motivation changing throughout the case suggest that parties should be reminded of the option [of mediation] at various stages of the litigation.*'<sup>5</sup>

The reform of the civil and administrative justice systems and the likelihood that this will entail a programme to achieve greater efficiency in the use of the estate and in administrative support to courts and tribunals, leads to this suggestion: an all-embracing, dedicated *Mediation for Justice* service in each locality. Publicly funded mediators would be available to serve the needs of all the courts and tribunals – and their users – in the town or city. This will enable sufficient resource and caseload to

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<sup>3</sup> *Civil Court Mediation Service Manual (version 3- Feb 2009)*

<sup>4</sup> Sander, F (1976) 'Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in *70 F.R.D. 111,111*

<sup>5</sup> Ross & Bain (2010) p.74

enable the mediators to maintain their expertise and make the most efficient use of that expertise across the civil and administrative justice system. Serving more than one court or tribunal would also help to keep mediators at arm's length from any particular court and to distinguish the settlements attainable through mediation from the more restricted range of remedies available under each separate court or tribunal jurisdiction. Costs will be offset by savings in court time and, where appropriate, legal aid expenditure. These would need to be measured and evaluated.

While the logistical details of such a service require more careful working out than we have been able to accomplish within the time frame of this consultation, we can offer some further clarification about what we have in mind. *Mediation for Justice* is no more than a working title, on which we have not canvassed views. The key concept which we wish to encapsulate is that court and tribunal related mediation will be a service provided as part and parcel of Scotland's justice system, with the Justice Department taking responsibility for "ensuring effective access" to this form of dispute resolution. The existing resource available will include independent mediators who are already registered through the Scottish Mediation Register. There is likely to be a range of fee levels and, as in England, the need to consider how best to provide mediators for those small claims where it is unrealistic to expect the parties to pay a fee. As courts, tribunals and perhaps existing community mediation centres may well share resources such as mediation rooms and the mediators may be drawn from an external register, it will be crucial that each and every court and tribunal has a designated officer to support the information and referral process and assist the parties with paperwork (such as applications for cases to be sisted pending mediation). This officer, who might be termed the '*In-court Mediation Coordinator*' (again, no more than a working title) would be available to meet parties and explain the option of mediation and would also have the responsibility of keeping the judiciary briefed on the mediation services available so that the option of mediation is not lost sight of in the case management process. Without such a designated officer, it appears to us unlikely that, in practice, the court and tribunals judiciary and administration will view mediation as a mainstream part of dispute resolution.

### **Questions 5, 6, 8 & 10**

We take together these questions relating to measures to support citizens to have access to justice.

If, as we have argued in response to Question 1 above, we can establish in the Scottish court and tribunal systems an '*overriding objective*' of enabling the court or tribunal to deal with cases justly, defined in accordance with the underpinning principles of the Civil Courts Review, the detailed measures follow from thinking through how to achieve this objective.

As we have argued, the overriding objective should be set out in both civil and tribunal procedure rules.

Routes to justice should be through the '*multi-door court*' approach which we have set out above and, in particular through a proposed *Mediation for Justice* service for every city and town where there are courts and tribunals. Effectiveness, quality of mediation and economy can all be enhanced by providing such a service as a court

service but not attached only to one particular jurisdiction. The key thing is that anyone, anywhere in Scotland should be able to be referred for mediation, from any court or tribunal and that this referral should be seen, not as some second class *alternative* to justice but as part and parcel of the appropriate provision of justice by the state. To an extent this has been achieved in England and Wales and seems to SMN a laudable objective. It will enhance public confidence in the courts, which will be seen to provide more than one route to justice.

It is also widely accepted that the sooner that people are advised of their rights and options the better. If significant cost and time savings are to be made, it is clearly better to know of and choose mediation before lodging a claim with a court or tribunal. This is a powerful argument for ensuring greater information about the range of available dispute resolution options when people first seek advice i.e. the Citizens' Advice Bureaux and other advice and referral agencies including solicitors, trades unions and even MSPs.

A public helpline should also be considered. In the case of employment disputes, the Advisory Conciliation and Arbitration Service was recently funded to greatly expand the capacity of its telephone helpline and, linked to this, to offer pre-claim conciliation for all cases in which a potential Tribunal claim could be identified. This service, publicly funded and free to the user, is essentially the same as mediation, though termed conciliation for historical reasons by ACAS.

SMN is currently developing a telephone-based mediation information service. Given resource constraints, a true 'helpline' is beyond our current capacity.<sup>6</sup> The service will simply direct those with disputes to mediators from a panel drawn from the Scottish Mediation Register. This will provide some meaningful capacity for judges and tribunal chairs and for court and tribunal staff to refer users, in appropriate cases, for mediation. In partnership with the Justice Department a more ambitious service could be offered and there may be scope to develop this incrementally as the *Making Justice Work* programme progresses.

Of course, in practice, many users will only come to appreciate the advantages of mediation after embarking on legal action or, if defending a case, may only be able to suggest mediation after their adversary has commenced such an action. It is therefore important to have the capacity to refer cases for mediation at any stage in the court or tribunal process. We also suggest that in-court advisers are well placed to operate a triage system in the context of a 'multi-door courthouse'.

Case management plays a crucial role alongside rules of procedure in facilitating the consideration of mediation. There are a number of practical steps which may be taken as part of active case management focused on helping the users to consider how best to resolve their dispute:

- 1) A simple and essential proposal is to ask parties to specify in their pleadings/claims when and how they have considered mediation and to confirm that they have taken an informed decision not to mediate or that mediation has been

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<sup>6</sup> See the Helplines Association website for information for the standards that apply to helplines <http://helplines.community.officelive.com/default.aspx>

attempted but has been unsuccessful. The necessity to include such a declaration would propel party litigants towards CAB, in-court or other advisers who could explain and refer to mediation.

- 2) The issue of whether or not to award costs in the event of the absence of such a declaration and/or the unreasonable refusal to mediate, is a tricky one. The award of such costs as a matter of course offends against the concept that mediation should be voluntary. However, there may be cases where the more reasonable party can demonstrate that an offer was made at an early stage which, had it been accepted, would have avoided any need to pursue the case in court or tribunal. There may already be powers, at least in some courts and tribunals, to award costs against parties whose conduct is vexatious or unreasonable. These powers would allow the courts and tribunals to penalise the refusal to discuss or contemplate settlement, including by mediation, where this is demonstrably unreasonable. We suggest that it would be worthwhile exploring, across the court and tribunal systems, the extent of such existing powers. Where there is good practice this might form a basis for a common approach across the system.
- 3) The power to sist a case in order to allow the parties to mediate i.e. where both parties inform the court that they have agreed to attempt a mediated settlement, should be used as a matter of course. This exists in the Employment Tribunals in Scotland and could easily be embodied in practice directions and applied across the court and tribunal systems. It is also common practice in referrals to family mediation under Rule 33.22 of the Ordinary Cause Rules.
- 4) There will also be cases where the court itself refers the parties to mediation. The Civil Courts Review (page 129) described the power of the court under Rule 33.22, at any stage of the action, to refer an issue in relation to parental responsibilities or parental rights to a mediator accredited by a specified family mediation organisation. A case involving domestic abuse or threats of violence would not, however, be appropriate for mediation. The Review recommended *that the current rule be broadened to allow referral to mediation of any matter arising in a family action*. We would support this and take this further. We propose simply extending the Sheriff Court's existing power under Rule 33(22) to make a referral to family mediation to most types of civil cases, including housing and small claims. Similar powers should be available to Tribunals.
- 5) Where the court may not have powers to directly refer parties to mediation, it can and should provide judicial encouragement. As in England and Wales, active case management should be used to encourage parties to mediate where the court thinks this appropriate. If it is the right thing to do it should become a matter of policy and not merely of individual inclination, where a few judges who happen to have knowledge and experience of the benefits of mediation plough a lonely furrow. It cannot be right, for example, that parties in the Edinburgh Sheriff Court should have both judicial encouragement to try mediation and have access to an in-Court mediation service, free of charge, while parties in every other Sheriff Court in Scotland do not. We do not

suggest that judges should be impaired in exercising their discretion on what to do in a case. Nor do we seek compulsory referral to mediation. But judges need to be guided by an *overriding objective* set out in Rules of Procedure and, to understand, through their own training and CPD, the value of judicial encouragement of mediation. Case management is a powerful process for clarifying the issues in dispute and the judge has a key role in guiding the parties, at every stage before a hearing, towards whatever form of dispute resolution would be the most appropriate and proportionate.

- 6) Judicial mediation – that is judges acting in the capacity of mediators – is now available in the Employment Tribunals in Scotland. This is a relatively new initiative and, thus far, the number of cases is small. However, we understand that it is proving worthwhile for cases which would otherwise involve many days of hearing at great expense to the parties and the public. It is probably too early to assess the success of this scheme and whether it might be of wider application. We think it likely that, at least for cases in the more usual range in terms of value and complexity, judicial mediation will not offer the best use of resources. There may well be a special situation in the Employment Tribunals, because judicial mediation sits alongside the ongoing obligation of ACAS to seek to conciliate. It thus provides a last opportunity for warring parties in a particularly difficult, costly and time consuming matter to be helped to make peace.

### Question 7

SMN appreciates the likelihood of funding constraints in the coming years. In our view this factor forcefully supports the need for a *Mediation for Justice* scheme. Taking the example of small claims, in their evaluation of the Aberdeen and Glasgow pilot, Ross and Bain found that the cost of a mediated case, while still high at just over £1,100 (in part owing to low numbers during the pilot), was significantly lower than that of an adjudicated decision, at £2,044 per case.<sup>7</sup> Equally importantly, the cost to small claims users averaged £61 less for mediation than traditional court processes. There was also a reduction in time taken. It is important to stress that in tandem with this reduction in costs user satisfaction with the treatment received was substantially greater for mediation.

We consider that, if our *Mediation for Justice* proposal is adopted, together with appropriate triaging and advice, higher numbers of cases will be diverted to mediation thus leading to lower costs per case.

Scottish Mediation Network

24 September 2010

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<sup>7</sup> Ross & Bain (2010) p.70