

Catalyst Mediation

Response to Scottish Civil Courts Review : a consultation paper

March 2008

Catalyst Mediation

OUR EXPERIENCE

The Directors have experience as mediators with the Edinburgh Sheriff Court pilot and in establishing, managing and mediating with the Glasgow and Aberdeen Sheriff Court mediation pilots.

In addition we have many years experience as mediators and in establishing companies.

That experience has reinforced our view that the provision of a mediation service within the Scottish Civil Court system should focus on the needs of the parties in any dispute and their expectations of the Civil Court system itself.

OUR PERSPECTIVE

In this regard we note, and will refer to in this response, the findings of the Scottish Government's recent report on Public Awareness and Perceptions of Mediation in Scotland which notes

"were the government to make a commitment to use mediation to resolve disputes (where appropriate) 35% of all respondents felt they would be more inclined to use the service. Considering only those potential users of the service the inclination appears to greatly increase ...to 56%"

Given the overall low level of awareness of what mediation is, this research would suggest to us that with more information and a greater awareness of the provision of such a service, it would be welcomed and used by a large proportion of the Scottish public as a route to resolving their disputes.

We also agree with the undernoted responses of the Scottish Consumer Council to the Consultation paper:

"the Scottish Civil Courts Review should be underpinned by the central principle set out in the report of the Civil Justice Advisory Group set up by the Scottish Consumer Council and chaired by Lord Coulsfield: "that the system should encourage the resolution of disputes as early as possible, and that the courts should be viewed as a last, rather than a first resort".

"We very much welcome the statement in paragraph 1.9 of the consultation paper that the primary purpose of the review is to improve access to justice for the people of Scotland. It is vital that the review focuses on the needs of those who have to use the civil justice system. The present system is too focused on the needs of the lawyers, rather than on the needs of the ultimate users of the system, those individuals who become involved in civil disputes."

OUR RESPONSE

Given our experience and perspective, we have limited our response to those questions posed in Chapter 5 of the Consultation Paper which refer to the provision of mediation.

We have deliberately avoided theoretical or philosophical discussions about the benefits of mediation itself, in the knowledge that responses from other organisations fully cover these points and that research from around the world, the growing use of mediation within the English Civil court system, demonstrates mediation's effectiveness as a process of resolving disputes.

Rather we have concentrated on providing practical suggestions as to how a mediation service could be integrated, with the support of Government, within the Scottish Civil Court system.

Catalyst Mediation

RESPONSES TO CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

<p>1 a</p>	<p><u>Should the rules of civil procedure have an overriding objective or statement of philosophy</u></p>
	<p>The Remit of the Review is to make recommendations which aim to ensure that <i>“cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised”</i>. The test of proportionality is said to be <i>“whether the level of legal, and where appropriate, judicial resource applied to an issue is proportionate to the importance and value of the issue to the parties and to society in general”</i></p> <p>Given the tone of Chapter 5 of the Consultation paper, the findings of the Government’s research into mediation referred to above and Lord Coulsfield’s report, it seems reasonable to believe that mediation could be seen by the Scottish Public, as a “judicial resource”, i.e. as one of a number of resources, including “a judicial determination”, provided by the Civil Court system.</p> <p>If this is the case, then we believe that an overriding statement of philosophy which uses proportionality as one of the criteria, would have distinct advantages, including:</p> <ul style="list-style-type: none"> ➤ Providing through an explicit statement, clear expectations for parties and advisors of the Court’s approach to dispute resolution. ➤ setting the tone of the rules and the culture for the civil courts. ➤ bringing Scotland in line with other jurisdictions ➤ not restricting the Court’s ability to regulate the conduct of proceedings or ensure that the business of the Court is conducted efficiently.
<p>1 b</p>	<p><u>If so what should the main elements be?</u></p>
	<p>We agree with the submission of the Scottish Mediation Network in that the objectives of any statement of philosophy could be stated as:</p> <ul style="list-style-type: none"> ➤ Distributing the court’s resources fairly, always recognising that the primary aim of judicial case management should be to secure the just resolution of the parties’ dispute in accordance with their substantive rights. ➤ Encouraging and facilitating early settlement on mutually acceptable terms; ➤ Promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated; ➤ Increasing cost-effectiveness in the court’s procedures; ➤ Promoting greater equality between parties; ➤ The expeditious disposal of cases; <p>We further believe that from the Public’s perspective, mediation would therefore be seen as one means of dispute resolution within the “judicial process”.</p>
<p>2</p>	<p><u>Should the court (a) encourage (b) require or (c) in some other way facilitate the</u></p>

Catalyst Mediation

	<p><u>use of mediation or other methods of dispute resolution?</u></p>
	<p>Given such an overriding principle, we believe that :</p> <ul style="list-style-type: none"> ➤ Parties should have the ability to request a judicial determination. ➤ Equally the Court should have the right to ask, before it commits judicial resource, whether other alternatives have been considered and if rejected, why. <p>Therefore the court should <u>require</u> <i>informed consideration</i> by Parties and their advisors, where present, of the use of mediation and other methods of dispute resolution.</p>
<p><u>3</u> <u>a</u></p>	<p><u>If so how should this be done</u></p>
	<p>We would recommend that this could be facilitated by:</p> <ul style="list-style-type: none"> ➤ The Scottish Court Service (SCS) providing through their website and by other means, concise information on the options available, their benefits and risks if any, to legal advisors and party litigants. (See also 6b below) ➤ Requiring any party litigant or solicitor bringing a case to the Court, to indicate when submitting initial papers, that they had read this information and in the case of a solicitor discussed it with their client; and ➤ To state in their initial papers what they had considered and why they had rejected the alternatives and were requesting judicial resources. ➤ The Court should have the option to reject the reasons given and require an alternative to be adopted first. <p>To encourage careful consideration of alternatives to using judicial resource, the SCS information recommended above could reasonably raise incentives, such as :</p> <ul style="list-style-type: none"> ➤ giving priority for Court dates to cases where an alternative has been tried, either before or after the action was raised and where it had <u>not</u> resulted in a resolution of all the issues. ➤ waiving Court fees where an alternative had been tried after the action was raised and where it <u>had</u> resulted in a resolution. <p>In addition to such incentives, disincentives could be mentioned, such as the awarding of court costs to parties and their solicitors where, in the opinion of the Court, alternatives had been rejected and judicial resource committed disproportionately.</p>
<p><u>3</u> <u>b</u></p>	<p><u>At what point or points in the progress of a dispute?</u></p>
	<p>We would suggest that an <i>informed consideration</i> should be required:</p> <ul style="list-style-type: none"> ➤ When a party litigant first obtains the forms to submit their case to the Court. ➤ When a solicitor is first briefed by his client and before submission of any papers. ➤ At any time when the case is in the court at the request of the Parties or suggestion of the Judge.
<p><u>4</u></p>	<p><u>Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and which a judicial determination is essential?</u></p>
	<p>From SCS statistics it is clear that the majority of cases lodged with the Court do not proceed to proof and, anecdotally, in excess of 95% of cases are said to be settled “on the steps of the court”.</p> <p>This suggests that in the majority of these, the parties or their advisors negotiate a settlement. Therefore we would agree with the Scottish Mediation Network, in that in our experience it is the <i>willingness of the parties to negotiate</i> and the <i>scope for a negotiated settlement</i>, rather than the type of case that determines the</p>

Catalyst Mediation

chances of reaching a mutually acceptable outcome.

However we also agree that mediation is usually not appropriate where there is:

- A requirement for an interim interdict or summary judgement;
- A vexatious litigant;
- A need for a legal precedent to clarify the law or inform policy;
- A view that a settlement would not be in the public interest;
- An overwhelming imbalance of power between the parties;
- A requirement for a public decision by one or more of the Parties;
- A dispute involving a legal procedure in which only a court ruling can bring about a solution

5 **What form should mediation or other forms of dispute resolution take**

a

If a mediation service is to be seen as part of the court process, then we would suggest it should be under the control of the Scottish Courts Service, funded initially by Government.

Parties would therefore see the mediation service as part of the provision of access to justice, solicitors would see it as a central option and Court staff would see it as an integrated part of their process.

Our experience would suggest a mediation service should have the following elements:

- A Panel of local mediators registered with the Scottish Mediation Network's Mediators Register, which requires both initial training and continuing professional development (CPD).
- Panel mediators would receive a session fee on a scale published by SCS. Such a scale is already in use in the Aberdeen and Glasgow courts. This would have the added benefit of encouraging mediators to continue their professional development to remain on the Mediation Register.
- An in-court coordinator, who would be a trained mediator, should be available to
 - ✓ work alongside court staff,
 - ✓ discuss options by telephone / email or in court from parties / advisors before or after a case is lodged.
 - ✓ provide a service to Judges who may suggest to Parties / advisors they reconsider an alternative to court action.
 - ✓ Canvass from the Panel two mediators with suitable experience to conduct the mediation.
- Single location in each Sheriffdom and in the Court of Session (supposing it is not to be only an Appeal Court) in which mediations could take place and be equipped with suitable equipment for telephone mediations where necessary.
- Parties would pay a session fee (see 5b below).

Our experience suggests that the provision of this service could be based on one of two models or a mix of both. Each model has arguments for and against it and these are shown.

	Pros	Cons
Model 1: SCS		
Employs the in-court coordinator.	The mediation service would be clearly seen by the public and the legal profession as part of the Court process.	Increasing costs of employment when SCS are tasked with achieving savings over the coming years.

Catalyst Mediation

	<p>Model 2 : Independent Providers</p> <p>SCS could issue an Invitation to Tender for each Sheriffdom/ area of appropriate jurisdiction, as was done with the Aberdeen and Glasgow Sheriff Court pilots.</p> <p>This would contain a common set of objectives and requirements, including training provision and standards, mediation format, documentation and the provision of statistics on performance.</p>	<p>Commonality of approach, ease of management and measurement, improved quality of mediators and standards of mediation.</p> <p>SCS would have no employment costs.</p>	
<p>5 b</p>	<p><u>How should this be funded?</u></p>		
	<p>Party Fees : Overall Principle</p> <p>From our experience with the Aberdeen and Glasgow Court pilots and from the Government’s Public Awareness and Perceptions of Mediation research, there is evidence that once the purpose of mediation is understood <i>and, we would suggest, if it is seen as part of the Court process</i>, parties would be willing to pay a fee.</p> <p>From our wider experience, parties regard mediation fees, where they are proportionate, as fair and good value, which is why large organizations are increasingly using mediation more often.</p> <p>If the scale of fees charged were proportionate to the value of the case (based on the claim or counter claim value), similar to the scale used in the Glasgow and Aberdeen Court pilot schemes, and clearly publicized in the SCS information referred to above, this fee would represent a significant saving to the parties vs. the legal costs of a court case.</p> <p>Overall Funding Objective</p> <p>We have carried out an initial analysis of potential costs vs. fee income, which suggests that the costs of providing a national court based mediation service could be <u>self funding</u> after a few years, assuming a total of some 300 cases of mixed values were mediated in a year. We would be happy to discuss the basis of this analysis with the Review Committee.</p> <p>Assuming such an objective, the implications for the two models of providing a service discussed above could be as follows:</p> <p>Model 1 : SCS</p> <p>SCS could employ the in-court coordinators and provide the mediation offices. Fees generated from parties according to the published scale would then be divided between SCS and the mediators on a fixed sessional fee basis.</p> <p>Model 2 : Independent Providers</p> <p>As with the Glasgow and Aberdeen pilots, providers would submit fixed monthly budgets for approval to provide the service over a three year period and charge parties fees to the agreed scale; any excess on annual fee income over budgeted costs could be remitted to SCS on an agreed basis. As promotion of the</p>		

Catalyst Mediation

	<p>service leads to greater use, SCS could expect to fund a reducing proportion of the service to a point where it could be self financing within 3 years.</p>
6	<p><u>In what respects can modern communications and information technology be harnessed to improve access to the civil courts.</u></p>
	<p>One of the Directors of Catalyst Mediation has experience of managing the public information campaigns for what was then the Scottish Office and it is this experience, combined with more recent use of modern communication methods that informs these recommendations.</p> <p>We also believe that these suggestions would contribute to a “public legal education”, in answer to question 1 in Chapter 2 of this Consultation.</p>
6a	<p><u>Awareness</u></p> <p>The findings of the Scottish Government’s recent report on Public Awareness and Perceptions of Mediation in Scotland indicate that only about half of the Scottish public is aware of mediation or understand what it means.</p> <p>Were a national mediation service to be provided it would be a self evident benefit to usage of the service, for these awareness and understanding levels to be increased.</p> <p>Suggestions as to how this could be achieved could include:</p> <ul style="list-style-type: none"> ➤ A national awareness campaign using national press. ➤ Provision of a video explanation / example available by post or via the SCS website. ➤ Availability of such a video through Citizen’s Advice Bureau offices.
6b	<p><u>Information</u></p> <p>In our answer 3a above, we referred to “The Scottish Court Service (SCS) providing through their website and by other means, concise information on the options available, their benefits and risks if any, to legal advisors and party litigants.”</p> <p>We would suggest that this should encompass a number of elements.</p> <ul style="list-style-type: none"> ➤ A clear explanation of the options the public have to resolve their disputes, along the lines of the Scottish Government’s publication, Resolving Disputes without going to Court. ➤ A clear explanation of what mediation is, how it works and it’s benefits and risks, together with a clear statement of when it may be inappropriate. ➤ A clear explanation of the court process, what a judicial determination relies on (i.e. points of law and of fact). ➤ A clear graphic representation of the steps each option entails, together with some idea of the timescales of each. ➤ A revised set of forms for submitting a Small Claim or Summary Cause case to the courts, using simple graphic representations and less formal language, to be easier to complete. We believe this will also be important following the recent revision of the case values included in each case type. It should have the added benefit of reducing procedural complications through incomplete or incorrect submissions. <p>Again much of this information could be provided in video, audio (for the visually impaired) and written format (allowing for translations into different languages) and would be ideal for access through the SCS website, CAB offices and other easily accessible locations such as public libraries.</p>

Catalyst Mediation

It is outwith the scope of this response, but worth mentioning that one of the Directors of Catalyst Mediation has direct experience of translating complex legislation into an understandable form, so we believe that this is achievable.