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**Response to the Scottish Civil Courts Review Consultation Paper
from Family Mediation Lothian (FML)**

This response from Family Mediation Lothian (FML) which is a voluntary organization and a registered charity; it is affiliated to Family mediation Scotland. FML seeks to prevent damage arising from family break up, particularly emotional damage to children. It aims to help families successfully mediate and sustain arrangements designed to promote the well-being and health of their children through the maintenance of contact, where appropriate, with both parents and their extended family.

FML's response relates to child and family cases of all types, about which we would make the following general points:

- traditional rules of pleading and procedure simply do not provide the right starting point
- there is a very real issue about specialisation; and
- mediation and other forms of alternative resolution are particularly relevant.

Our response is confined to the questions we consider relevant to our activities as follows:

Chapter 1, Questions 1-3 ; Chapter 2, Questions 1 & 2; Chapter4, Questions 4, 10 &13; Chapter 5 Questions's 1-5; Chapter 6, Questions 7 & 12

CHAPTER 1: INTRODUCTION

Question 1

Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

FML believe that mediation is the most appropriate form of dispute resolution in many family cases and could be promoted and offered more widely as an alternative to court proceedings.

The mediation process should have close links with court procedures but should be independent and not prejudicial to the right to adjudication. It should be

consistently available throughout the country. This would require that court personnel, legal advisors and the judiciary be informed about mediation and incentivized to make use of it. Such a service would have to be accessible, securely funded and conform to the principles of mediation by having the following features: ultimately being voluntary; confidential; inclusive of the parties' views; a flexible process managed by an impartial, neutral mediator with the aim of reaching a mutually acceptable settlement agreement 'owned' by the parties. The key would be to ensure that parents have full information on mediation and support to attend. All parties should also be aware of the effect ongoing conflict has on the children involved. The special features of family mediation are the interests of children and the particular need for genuine, lasting agreement.

Question 2

Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?

We agree the principle of proportionality: this should apply in structural considerations as well as in the handling of individual cases; and all types of cases involving the welfare of children should be high in the scale of importance and value to society as well as the children and families.

Question 3

Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?

We would simply make the point that child and family disputes require very different consideration from 'ordinary' disputes: although we realise that the same might be said of some other subject areas, it can perhaps be said that 'ordinary' legal method and process does not really apply. Many parts of the paper should be considered with this in mind.

CHAPTER 2; ACCESS TO JUSTICE

Question 1

What contribution can public legal education make to improving access to justice?

Public (legal) education aiming to encourage, as well as knowledge of law and procedures, a culture of resolving disputes by agreement, should be part of a balanced system of public education.

Question 2

To what extent is it a) desirable or b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

The distinctions among 'taking part' (in the sense of presenting argument), 'being heard' and 'understanding' should be remembered: the first only has its place in relatively simple disputes before courts (although expertise is not confined to lawyers).

CHAPTER 4; THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

Question 4

Should there be a greater degree of specialization within the civil courts in Scotland? If so, in what types of cases and in which courts?

Yes. The inclination and skills required in cases involving children and families are (understandably) not possessed by all judges and sheriffs. The "local" principle in the organisation of our lower courts must give way to an extent to the need to harness those individuals' skills across the country. Each sheriffdom should have designated child and family sheriffs who might travel to cases or have cases travel to them. The lessons from the development of family courts within Glasgow Sheriff Court should be learned although the structural approach must necessarily be different in other areas. There may of course be other subject areas to which the same kind of approach is required.

Question 10

Are the current powers to transfer cases between sheriff courts and between the Court of Session and the sheriff court satisfactory?

No. See answer to Q4 above.

Question 13

Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?

Both. The advantages need to be balanced against the disadvantages – again see answer to Q4.

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

Question 1

Should the rules of civil court procedure have an overriding objective or statement of philosophy, and if so, what should the main elements of that overriding objective or statement of philosophy be?

The overriding objective should be to ensure parties' rights to early, speedy and efficient management of cases thus ensuring just resolution of their dispute and enabling them to move on to manage the fall-out of family break up.

It should include an aim to have a dispute resolution system which minimises conflict, returns ownership and responsibility for decision-making to the parents while allowing the child's voice to be heard in a safe and structured way.

Question 2

Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other form of dispute resolution?

FML believe that successful mediation must be voluntary in nature with parties coming to the process with a desire to resolve their differences outside the court procedure. However, to make the choice to use mediation they must be well informed about the process. The court could legitimately encourage mediation by advising parties' of its benefits and availability. The court could be one important point of access to information about family mediation, not just from the bench but in other ways, e.g. by information with court papers, encouragement also by court personnel, notices, etc. - a whole new look at courts as sources of information. As has been said elsewhere: "a critical policy challenge is to identify and articulate the incentives for legal advisors to embrace mediation on behalf of their clients." ¹

The court could also use its powers to require parents/litigants to attend "Parenting Apart" courses run by FM Services. These sessions inform participants on child-friendly/child-focussed parenting after separation and include information on mediation and how it works.

Question 3

If so, how should this be done and at what point of points in the progress of a dispute?

FML agree that Courts should be a last resort therefore mediation should be an option before a family dispute reaches the stage of a court action, However, each case is particular and mediation can be used effectively at any stage of

¹ *Twisting arms: court referred and court linked mediation under judicial pressure* Ministry of Justice Research Series 1/07 p.vi

an action, if the parties so desire. Mediation can be effective at every stage but not in every case.

One incentive for parties to choose this option may be that mediation has proved to be quicker than the Court process.

Question 4

Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

In Family Mediation the willingness of the parties to actively participate, negotiate and compromise coupled with the potential for reaching a negotiated settlement agreement are essential therefore the absence of these features would be a contra indicator. Experienced mediators agree that it is not the type of case that determines the chances of reaching a mutually acceptable outcome, but the attitudes and insights of the parties themselves.

Cases where there has been domestic abuse and concerns about an imbalance of power between parents need to be considered on an individual basis. Family mediators are trained to empower parties equally, but there is a class of case in which the power imbalance is too great and can only be redressed by adjudication.

It is generally acknowledged that in cases where court proceedings might lead to the creation of a legal precedent mediation is inappropriate. However, we would ask whether it is in the best interests of a child to create a legal precedent if the dispute could be resolved by mediation?

The basic principle should be that all cases involving family and children should be considered suitable for mediation (although some, e.g adoption, require some court scrutiny even where there is agreement).

Question 5

What form should mediation or other methods of dispute resolution take and how should this be funded?

Family Mediation Lothian is well embedded and accounts for a significant proportion of all the activity offered by the thirteen local FM services. These are funded by both local and national governments. In February 2007, the former Justice 1 Committee discussed the funding and availability of family mediation services and found it lacking in some areas. If children are involved in a family law dispute the court can refer the parties to mediation which is available free of charge. If parties in family litigation are in receipt of Legal Aid, and the case is remitted to mediation, the cost of that mediation should be borne by the Legal Aid fund. Parties should have to pay for mediation when they can. Voluntary donations are currently sought and these requests have been well tolerated by users which may indicate a willingness to pay for the service,

Services take the form of child-focussed mediation, all issues mediation, running contact centres and provision of specialist programmes for young people and parents which aim to reduce the negative impact of separation and divorce. The current provision is fully utilised with waiting lists in some cases. This is without any initiatives to reach out to potential users. Self-evidently were any growth to take place in court referrals or consumer demand additional funding would be required.

In 2006 c13,000 divorces were recorded in Scotland, a 19% increase in the 2005 number largely due to the changes in divorce legislation introduced by the Family Law Act. The former Executive noted that:

Evidence suggests that where the process of separation is handled well, the adverse impact on children may be minimised. However, when separation is protracted and conflict ridden(...) this may be damaging for children. Conflict appears to be an important influence on a number of adverse outcomes for children.²

Adverse outcomes are generally costly on a number of levels. However, it is difficult for FML to quantify the value of their preventative work in financial terms. However, there is some evidence that mediation is a cost effective option. The National Audit Office has found that, on average, a mediated family case takes 110 days to resolve, and costs £752 compared to 435 days and £1,682 in cases where mediation is not used.³

While courts should provide an important link with FM services, securely funded community-based services provide a better solution, partly because there is already a well established network of such provision involving highly skilled workers; partly because family disputes can be resolved by mediation before they reach court and partly because they are likely to provide better value for money.

CHAPTER 6 : WORKING METHODS OF THE CIVIL COURTS

Question 7

Should there be a single initiating document for a) all types of action and/or b) at all levels of the court structure? If so, what format should that document take?

(a) No - there is no reason whatsoever why initial writs in child and family matters should follow adversarial logic and language or formal pleading rules; (b) Yes - there is no reason

² Policy Memorandum, Family Law (Scotland) Bill, para 25

³ <http://www.nao.org.uk/pn/06-07/0607256.htm>

whatsoever why a similar case raised in one court should not have a similar form of initiating document to a similar case at a different level.

Question 12

Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?

Yes and yes, although flexibility, coupled with acknowledgement that skilled practitioners may often be best placed, with encouragement from the court, to reach realistic estimates in relation to time - the point is that practitioners should know that they are subject to courts' control in this as in other areas.

Cases should be firmly controlled by the court with maximum flexibility. A good example of control and flexibility is contained in the Practice note for adoption cases in Lothian and Borders.

Deirdre Armstrong, FML Chair

Suzanne Dunne, FML Director

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