

## 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?**

The speedy resolution of disputes should be encouraged wherever possible and the system of Civil Justice provision should not delay the resolution. A Civil Justice system which provided clear and user-friendly information on all types of dispute resolution and which initially encouraged appropriate dispute resolution (ADR) would assist the users to find the best way to resolve their dispute. ADR should be encouraged at all stages of the process and wherever Civil Justice provision is mentioned, as many users will not consider alternatives to court without a clear endorsement from the Civil Justice authorities. If this endorsement is to be successfully achieved it will be necessary to include ADR as an essential part of continued professional development for sheriffs, judges, solicitors and advocates. Support and information might also be provided via the internet and any other interaction which potential litigants might have with the Civil Justice system.

Figures from the report *Public Awareness and Perceptions of Mediation in Scotland* show that the main two reasons why an individual would not consider using mediation were "Don't know" (about mediation) : 39% and "I don't understand how mediation works." 24%<sup>1</sup> These reflect that over 50% of those surveyed required more information about mediation in order to make a decision.

## Chapter 2: Access to Justice

### **Question 6: Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?**

Mediation services provided via the telephone have worked successfully in pilots in England. Once mediation is accepted by both the legal profession and the public as a valid method of dispute resolution this could be a practical extension to current services in Scotland. Whilst such a provision does not necessarily need to be within the existing court structure, it does need to be endorsed as a valid option. Referrals would probably come initially from within the existing court structure.

Mediation lends itself to use in a variety of formats, including telephone and online dispute resolution, because it is a flexible process driven by the parties themselves. If the parties are prepared to work through their dispute on the telephone, a mediation service which provides skilled mediators and appropriate technological support can facilitate this process. It is unlikely that such a service would be developed without strong encouragement from the in-court system.

## Chapter 5: Principles for Reform to Civil Procedure and Key Procedural Issues

### **A comment on paragraph 5.27: "...There was, however, still some scepticism as to whether mediation always resulted in a fair outcome, with a third of lawyers in the Toronto sample of the evaluation disagreeing with the statement that 'justice was served by this process'".**

Mediation is often assessed by reviewing the comments of legal advisers who have been part of the process. Whilst this assessment has a value, it is perhaps more important to focus on the disputants experience of mediation. As a result of mediation being able to consider many various issues within a dispute and not just those of legal relevance, it is able to resolve disputes to the satisfaction of the parties involved. As mediation is a voluntary process, there is no requirement of the parties to settle but given that the majority do come to a resolution this might indicate a degree of satisfaction with the process.

Whilst it has been suggested that some mediators use a degree of coercion to reach resolution, this is not generally considered to be a valid approach. If, in hindsight, parties felt that the resolution reached in a mediation was unfair, they still have the option of going to court. The small percentage of users (3) who reported that they "felt pressurised to reach an agreement that they weren't happy with"<sup>2</sup>. would be helped by increased education about mediation as a process and its position within the range of options available.

<sup>1</sup> The Scottish Government (2007), *Public Awareness and Perceptions of Mediation in Scotland (2007)*, page 16.

<sup>2</sup> *Ibid*, page 11.

The report quoted above also indicates that 84% of previous users of mediation would use it again but only  $\frac{2}{5}$  of those surveyed who had not used mediation would consider it<sup>3</sup>. This suggests that those who have used mediation have found it useful and valuable. The decrease noted in the numbers who indicated a “future intention to use mediation” from 59% in 2005 to 40% in 2007, could be caused by confusion in those who have not used mediation or inadequate provision of accurate information about the mediation process.

**Question 2: Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution? and Question 3: If so, how should this be done and at what point or points in the progress of a dispute?**

This court should encourage the use of mediation by:

- endorsing it as a valid form of dispute resolution;
- facilitating its use on an equivalent basis to the use of courts;
- the provision of clear information about the various forms of dispute resolution at every stage of the court process;
- incentivising mediation by guaranteeing that when a resolution has not been reached by mediation these cases are fast tracked to court, or by otherwise ensuring that such cases are not penalised within the court system;
- requiring legal professionals to undertake some continued professional development in mediation.

**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.**

Mediation has been used across the spectrum of civil cases in various countries and has been successful in provided positive results for users. Mediation allows disputants to decide for themselves how and in what circumstances the process can work, as a result it is necessary for parties to be prepared to take control of their dispute, and be prepared to try mediation. Therefore most mediation providers would suggest that mediation is useful in most cases however it is generally considered inappropriate to mediate when:

- the court or the parties require a legal precedent or a public decision (although there might still the opportunity to use mediation in parts of a dispute).
- an earlier attempt at mediation has failed
- the parties are particularly aggressive and/or vexatious and therefore unlikely make the compromises necessary to come to an agreement

**Question 5: What form should mediation or other methods of dispute resolution take and how should this be funded?**

The form of mediation should be determined by the parties, their advisers and the mediator(s) in each case.

Mediation, and other methods of dispute resolution, should be funded in such a way that disputants are not discouraged from their use due to cost. For small claims actions, mediation should be free to users. Where parties can pay for mediation they should, just as they pay for advisors in court proceedings. There should be equity in the funding provided for the different types of dispute resolution..

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<sup>3</sup> Ibid, page 12.