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RESPONSE TO THE CIVIL COURTS REVIEW CONSULTATION
Approved by the Board of the Scottish Mediation Network
21st February 2008

Deadline: Email to CivilCourtsReview@scotcourts.gov.uk by Monday 31st March 2008.

Introduction

The Scottish Mediation Network (SMN) warmly welcomes the inclusion in the formal remit of this Review that particular regard is to be had to “the role of mediation and other methods of dispute resolution in relation to court process”. Our response focuses mainly on the mediation aspect of the Review’s consultation paper.

The vision of the SMN is to embed mediation as regularly used way of handling differences, disputes and conflict in Scotland. Mediation is one of a range of different methods of conflict management and needs to be available in appropriate situations.

If mediation is embedded into the Court procedures, such a change will need to be accompanied by a programme of education for the professionals. Sheriffs, lawyers and court staff need to be clear about issues like: when mediation may or may not be appropriate, how to explain mediation to parties, what will happen at mediation meetings, and what is involved in representing a client in mediation.

In addition, anyone using mediation as part of the Court system will need to know that mediators have demonstrated an appropriate level of competence. As mediation is a relatively new occupation, work on quality assurance is still developing. We describe more about the ongoing development of a credible and independent structure for quality assurance for all forms of mediating in Scotland, below.

5.1 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 objectives of the procedure which would set the tone of the rules and the culture for the civil courts should be stated as

- (i) Encouraging and facilitating early settlement on mutually acceptable terms;
- (ii) *promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated;*
- (iii) *increasing cost-effectiveness in the court's procedures;*
- (iv) *promoting greater balance between parties;*
- (v) *the expeditious disposal of cases;*
- (vi) *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."*

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

In the Guidelines on the Practice of Mediation (below) which are generally accepted in Scotland as a practice benchmark, mediation is defined as:

"A process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves."

While mandatory forms of dispute resolution may be effective and helpful, they fall outside this definition. Mediation works when people participate willingly, in good faith and free from the fear that what they say in mediation will be used elsewhere. They need to be able to explore all the possibilities, as it is from this rigorous exploration of options that solutions usually emerge.

Although the SMN neither supports nor recommends the concept of compulsory mediation, it is an option open to the Scottish Courts. It should be noted that it is the norm in other jurisdictions like Australia, parts of the USA and parts of Canada, including the province of Ontario.

(<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed>)

The concern is that if parties are told by the Judge or Sheriff that they must participate, then one or both may not come to mediation "in good faith". There is anecdotal evidence from England of someone coming to mediation and sitting in silence for several hours until everyone gave up, just to be able to confirm that mediation had been attempted to avoid a costs sanction.

Also, it has been suggested that the ECHR Article 6¹ issue (raised in Halsey²) was not only a red herring but was (a) not fully argued before the Court of Appeal and (b) put to the English Appeal Court in curious circumstances which appear to detract from the weight of the argument. The argument runs that there can be no breach of Article 6 since the parties are not being denied access to the Courts - there is merely a delay while they engage in mediation. Judges routinely reschedule cases for a wide range of wholly valid reasons and it is not suggested that such delays are a breach of Article 6.

Requiring parties to consider mediation and come to an informed decision on whether it would be an appropriate option in their case would, we suggest, encourage rather than compel the effective use of mediation.

Each party (with or without a lawyer) would have to satisfy the court that all suitable options for settlement had been considered thoroughly and if rejected, that an "informed decision" had been taken. Such a requirement to demonstrate informed decision-making could be linked to the incentive of giving priority for Court dates to cases where mediation has been tried and not resulted in a resolution of all issues. Indeed, this priority might be extended to cases where mediation had been used before the action was raised. An incentive of this sort might also dispel the perception that suggesting mediation is a sign weakness.

Evidence from the evaluation of court-based mediation schemes in England and Wales (in particular the Automatic Referral to Mediation pilot at Central London County Court), indicates that voluntary mediation is more likely to achieve higher settlement rates when compared to compulsory mediation. Mediation is, by its very nature, a consensual process and works best when parties come to mediation willingly. However, if court-based mediation is to rely entirely on parties requesting mediation, the demand for it is likely to remain small.

Even if they recognise the term 'mediation' most litigants, and many legal professionals, know relatively little about the potential of mediation in settling disputes. There is, therefore, a clear need for good information about mediation. This information should, wherever possible, be made available directly to the parties because research shows that parties represented by a lawyer choose mediation significantly less often than unrepresented³ parties

In the South, the key factor in uptake of mediation for any court mediation scheme is the commitment of the Judges. The judicial role is essential, driving the change process and encouraging parties to mediate - as well as encouraging other members of the judiciary to take an active role.

Research has found that nearly half of people in Scotland have not heard of mediation, but that once the process was explained to them, 59% of people said they would consider using mediation to resolve their disputes.⁴ Moreover, once people have tried mediation, the experience is that they then fully appreciate the benefits to them of this different way of resolving disputes.

¹ "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

² Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

³ H Brown & A Marriott, *ADR Principles and Practice*, 32 (1999); H Genn, University College of London, Faculty of Laws, Research Series, *The Central London County Court Pilot Mediation Scheme* (1998)

⁴ *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Scottish Consumer Council, March 2005

There is a frequently expressed view that lawyers resist mediation because they fear a drop in their fee income. It is suggested that this popular prejudice is too simplistic. More realistic motivators for resistance include: concerns about recommending a course of action that the advisor has little or no experience of and which might result in loss of control of the case (because mediation is regularly described as allowing the parties to reach decisions themselves without being constrained by the law.). Lawyers who have become expert in using mediation say that they now realise how much **more** control they and their clients retain when tailoring creative solutions which are mutually acceptable.

So, if mediation is part of a revised civil court system, a programme of education for the professionals will be necessary. Sheriffs, lawyers and court staff need to be clear about issues like: when mediation may or may not be appropriate, how to explain mediation to parties, what will happen at mediation meetings, and what is involved in representing a client in mediation. Additional education work may need to be done where, for instances, there are particular cultural issues that present inherent barriers to mediation.

In addition, anyone using mediation as part of the Court system will need to know that mediators have had an adequate minimum of training, supervised practice and CPD. As mediation is a relatively new occupation, work on quality assurance is still developing. Mediators who have self certified their credentials in Court mediation settings on Scottish Mediation Register (www.scottishmediationregister.org.uk) should offer sufficient reassurance of competence. These mediators also require to certify that they comply with a recognised code of conduct, have a system of handling complaints and carry appropriate professional indemnity insurance.

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

There is a range of opinion about the optimum time to suggest mediation to the parties. The Report produced by Lord Coulsfield's Civil Justice Review ⁵ contends that Courts should be a last resort so mediation should be an option before a dispute even reaches the stage of a court action.

Once the case is underway, some say that the choice to mediate should be made as quickly as possible, before parties have become entrenched. Others think that the dispute needs to have reached a certain stage of maturity before parties will decide to turn from the courtroom and back to the negotiating table. Depending on the nature of the dispute and the parties, mediation can be used successfully at any stage of an action.

Research demonstrates that a benefit of mediation is that it can be quicker than the Court process. There is no reason why parties who are prepared to mediate should not be provided with mediation services that enable them to have a mediation completed considerably faster than the best estimate of how long the Court process will take.

There is also evidence that mediation is a cost effective option. The National Audit Office 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.⁶

⁵ <http://www.scotconsumer.org.uk/accessjustice/index.htm>

⁶ <http://www.nao.org.uk/pn/06-07/0607256.htm>

The Scottish Mediation Network contends that mediation should be available as an option at any point during the course of a dispute and that parties should be required to demonstrate that they have actively considered its use at every significant procedural step in a litigation.

5.4 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.

Most mediation providers suggest that any case is potentially suitable for mediation. However, it is generally considered inappropriate to mediate 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; and
 - A view that a settlement would not be in the public interest; or because of a party's past conduct.
 - An alleged abuse of power (although imbalance of power is often addressed in a mediated dialogue);

While research has shown that there are no uniform criteria for making referrals to mediation⁷, there are what could generally be termed "referral indicators".

The two key referral indicators are the ***willingness of the parties to negotiate*** and the ***scope for a negotiated settlement***. 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. The parties require to consider and be capable of considering a wide range of options to meet their mutual interests. If these two conditions are not met, research suggests that the other indicators below can be ignored.

Indicators	Counter indicators
<ul style="list-style-type: none"> • Desire for an outcome or result that a Court Decree cannot deliver. • Speedy solution is required. • The parties are fatigued by the Court procedure • Long-term relationships are important (family, neighbours, business contact, company, long-term contract, etc.) • The parties have an interest in undertaking future activities together. • There are wider disputes and differences in addition to those presented in the proceedings. • There may be a need for greater confidentiality. • Private meetings might be helpful. • More parties involved in the conflict than just the parties to the action. • A long lasting solution is essential. 	<ul style="list-style-type: none"> • Earlier mediation attempt failed • Parties have allowed the conflict to escalate too much (i.e. they are comfortable with their conflict) • A precedent is desired. • A public decision is required. • There is an overwhelming power imbalance. • Legal procedure in which only a court ruling can bring about a solution

⁷ H Brown & A Marriott, *ADR Principles and Practice*, 32 (1999); H Genn, University College of London, Faculty of Laws, Research Series, The Central London County Court Pilot Mediation Scheme (1998)

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

For small claims actions, mediation should be free to users and funded through the Scottish Courts Service budget. Mediation co-ordinators should be employed in each of the sheriffdom and they should run a panel of Scottish Mediation Registered mediators who would be paid at a fixed fee sessional rate. The mediation co-ordinators working in Edinburgh, Aberdeen and Glasgow already provide services to the parties and the Court which go beyond simply administering mediations, so it is a natural next step that they be part of the Court administration staff.

For Sheriff Court ordinary actions and actions in the Court of Session, there is a need for an independent matching or allocation service. In England and Wales, the National Mediation Helpline fulfils this function. A similar sort of "clearing service" delivered by telephone and email could be offered by the Scottish Mediation Network office if appropriately funded by the Scottish Government. The service could also have links and information about other methods of dispute resolution, emphasising always the desirability of negotiated settlement. Parties would have to pay for mediation.

General comments

The mediation services that work most closely to the Courts (Family Mediation Scotland services, CALM mediators and in-court services in Edinburgh, Aberdeen and Glasgow) report significant variations in practice and attitude to mediation across the 6 Sheriffdoms and 49 Sheriff Courts in our small country. While this presents a challenge for providers striving to offer consistency of service to those who might use mediation, more importantly, individuals coming into the court system can find it confusing and difficult to navigate.

Also, inconsistency of approach seems to arise from the development of local practices. Shrieval attitudes toward the appropriateness of mediation vary dramatically. For instance, for some years it was well know that in Falkirk Sheriff Court CALM mediation was recommended by the Bench in almost every contested family action.

The Scottish Mediation Network strongly supports the creation of a national structure for Sheriff Courts in a single Scotland-wide jurisdiction as the main court of first instance. The Court of Session should only hear cases at first instance in exceptional circumstances. From the standpoint of the individual litigant, there needs be an unambiguous structure to the civil Court system. The consequential advantage of this administrative configuration would be that a consistent programme of training in mediation and other methods of dispute resolution could be delivered to all court staff and the judiciary that they support.

A systematic approach to integrating early dispute resolution will embed mediation and other forms of dispute resolution into the culture of the courts system as a compliment to the last resort of delivering a judgement. Research consistently shows that people in conflict want a swift and effective resolution of the problem. Training staff throughout a nationally organised system in mediation would put the clear emphasis on resolution from the moment that the disputants first enter the Courthouse.

***Approved by the Board of the Scottish Mediation Network
21st February 2008***

GUIDELINES ON THE PRACTICE OF MEDIATION

Adopted by the Scottish Mediation Network on 26.5.04

Preamble

These Guidelines are intended to form a baseline for the conduct of all forms of mediation in Scotland. It is expected that the different strands of mediation will, if they have not already done so, develop complimentary and more detailed guidance.

Mediation is a process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves.

VOLUNTARY PARTICIPATION AND SELF DETERMINATION

A mediator shall recognise that mediation is based on the principle of voluntary participation and un-coerced self-determination by the parties.

Impartiality, independence and neutrality

A mediator shall remain impartial, independent and neutral. If a mediator becomes aware of any reason which may diminish her/his impartiality, independence or neutrality, he/she shall disclose this to the parties at the earliest opportunity and withdraw from the mediation unless the parties do not wish her/him to do so.

CONFLICTS OF INTEREST

A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator whether before or during a mediation and shall withdraw from the mediation unless the parties do not wish him/her to do so.

COMPETENCE

A mediator shall be responsible for undertaking sufficient training, supervision and continuing professional development to maintain necessary mediation skills. A mediator shall mediate only when she/he believes that he/she has the necessary skills to carry out the mediation.

CONFIDENTIALITY

Confidentiality in mediation is important to encourage all participants to speak truthfully and candidly, and to enable a full exploration of issues in dispute. Unless compelled by law, a mediator shall not disclose any of the information given during the mediation process.

UNDERSTANDING OF MEDIATION

A mediator shall ensure that the parties understand:

- the purpose and procedure of the mediation;
- the role of the parties and the mediator;
- any fee arrangement;
- The obligation of confidentiality.

ADVERTISING AND SOLICITATION

In advertising or offering services, mediators shall not guarantee settlement or promise specific results. All information provided by mediators about their education, background, mediation training and experience shall be accurate.

GIFTS AND FAVOURS

A mediator must not accept from or exchange any gift or favour with any party in any mediation. A mediator must use judgement that reflects the high ethical standards which mediation requires.

DISCRIMINATION

People should always be treated with respect and without discrimination.

Complaints and Professional Indemnity Insurance

A mediator shall provide information about the process for handling any complaint made about their conduct or service, and about any professional indemnity insurance cover they may have.

Background about the Scottish Mediation Network

The Scottish Mediation Network is a Company limited by guarantee registered in Scotland, Company No. SC258173, Scottish Registered Charity Number SC 034921, with its registered office at 18 York Place, Edinburgh, EH1 3EP. All its members endorse the SMN's *Guidelines on the Practice of Mediation in Scotland*.

Our Vision

We are working to embed mediation into the way that conflict and disputes of all forms are handled in Scotland.

Mediation is a process in which disputing parties seek to resolve their differences in a mutually acceptable way with the assistance of a trained mediator acting as an impartial third party.

Our Values

We value:

- ❖ working together collaboratively
- ❖ mutual respect
- ❖ clear and open communication
- ❖ voluntary participation
- ❖ an inclusive Network and
- ❖ financial prudence

Our Purpose

The Objects clause of the Scottish Mediation Network's Memorandum of Association states, in summary, that we aim:

To promote mediation and other related forms of conflict management **for the benefit of the public, individuals and society in Scotland** and elsewhere and:

- ❖ to **encourage awareness, understanding and appropriate use** of mediation;
- ❖ to **support and promote education, training and research** in skills and best practice in the use of mediation;
- ❖ to **create and encourage links** among the various fields of mediation; and
- ❖ to **promote and organise standards** of professional conduct and training.

www.scottishmediation.org.uk

www.scottishmediationregister.org.uk

Publication of this document and evidence

We are content that this document be published and would welcome the opportunity to give oral evidence to the Review.