

## **Discussion Paper on the Integration of Mediation into the Civil Justice System**

**February 2014**

### **Summary**

This discussion paper has been drawn up as part of a response to the Courts Reform (Scotland) Bill ("the Bill") and to input into the work of the Scottish Civil Justice Council and the Scottish Government Justice Department.

- The use of mediation in the resolution of disputes often results in an improved experience and better outcomes for all those involved<sup>1</sup>. It also widens access to justice by providing a swifter and less adversarial dispute resolution option.
- The purpose of this paper is to highlight the pathways that lead to the resolution of disputes, suggest improvements to those pathways and to propose a model for the operation of mediation within the civil justice system.
- The model proposed of a social enterprise mediation organisation is designed to deal with small claims and summary cause cases. It will be equally applicable to simple procedure cases up to £5000 when the new procedure is introduced by the reforms.
- For ordinary actions, at this stage in the development of integration of mediation into the civil justice system, whilst mediation is still encouraged, SMN would suggest that those seeking a mediator would simply be directed to the Scottish Mediation Register.

### **Context**

In the Report of the Scottish Civil Courts Review, Lord Gill noted that the *"structural and functional flaws in the working of the Scottish civil courts prevent the courts from delivering the quality of justice to which the public is entitled. The Scottish civil courts provide a service to the public that is slow, inefficient and expensive."*<sup>2</sup> .

In light of this, the Scottish Mediation Network (SMN) considers that this is an opportune time to make changes which would enhance the proportionality and efficiency of the civil justice system.

There has been a successful mediation service at Edinburgh Sheriff Court for 15 years dealing with Small Claims and Summary Cause cases, with mediation raised as an option either before the initial hearing or by the Sheriff at the initial hearing. In North Lanarkshire the In-Court Advice Service run by the Citizens

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<sup>1</sup> Ross, M. and Bain, D. (2010) Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Edinburgh, Scottish Government Social Research, Paragraph 5.25

<sup>2</sup> Court of Session, (2009), Report of the Scottish Civil Courts Review (The Gill Review), Page i, Introduction by the Lord Justice Clerk

Advice Bureau, also encourages mediation prior to appearance in court. Between 2006 and 2008 mediation pilots in Glasgow and Aberdeen Sheriff Courts included all kinds of civil claims and showed settlement rates of 90%<sup>3</sup>. In Glasgow a new service has been established by the University of Strathclyde Mediation Clinic which offers on the spot mediation at the Sheriff Court.

In light of recent Court closures, the consideration of the use of mediation is particularly relevant as, in addition to being delivered at face-to-face meetings, it can be delivered both online and by conference call, which would allow greater access to justice for those in remote communities.

## **Background to the Proposals**

Our proposals to widen the contribution of mediation to the civil justice system are consistent with the findings, outcomes and key learning points of all of the above projects.

They are also consistent with some of the key recommendations and findings of the Gill Review, namely:

- ADR is a valuable complement to the work of the courts.
- Advisers and agencies that provide first line advice should be aware of all the dispute resolution options that are available and inform litigants of these. The Scottish Court Service website should contain explanatory material on ADR and links to sources for further information.
- The Scottish Government should consider establishing a free mediation service for low value claims which can be dealt with under the proposed simple procedure in the Bill.
- The civil justice system should encourage early resolution of disputes, cases should be dealt with proportionately and efficient use of resources should be made. All of these principles are consistent with the principle that the court should encourage the use of ADR in any type of case, at any stage, *where appropriate*.
- A combination of specific measures should be considered involving the provision of information about dispute resolution options, case management procedures and the development of resources to support the diversion or referral of appropriate cases to ADR.<sup>4</sup>

Underlying these recommendations is the need to increase the awareness and capacity of the Scottish public, and those who advise them, to understand the various conflict resolution options available and so enable them to make an informed decision about the most appropriate route to resolution of their dispute. Improving information about the options available for the resolution of disputes would also enhance compliance with current EU directives on ADR and put Scotland in a strong position to meet any future European requirements in connection with conflict resolution.

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<sup>3</sup> Ross, M. and Bain, D. (2010) Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Edinburgh, Scottish Government Social Research, Paragraph 1.15

<sup>4</sup> Court of Session, (2009), Report of the Scottish Civil Courts Review (The Gill Review), Chapter 7

The consultation undertaken on the Courts Reform (Scotland) Bill highlighted the need to develop practical ways of introducing ADR into the Civil Justice System. The publication of "Facing Up To Legal Problems"<sup>5</sup> by Consumer Focus Scotland favoured a person-centred, procedurally fair approach. In addition, SMN has consulted with a range of stakeholders including, Citizens Advice Scotland, The Scottish Arbitration Centre, Which and Money Advice Scotland. Part of the reason for doing so was to get a wider perspective on the pathways available to those seeking to resolve disputes and the experience of those using the existing justice system.

The issue of access to justice raised by the current court closure programme highlights one of the potential advantages of a more wide spread availability of mediation. Mediation is flexible in that it can be carried out online and by conference call, as well as face-to-face. Where access to a court building is difficult, for whatever reason, those involved in the dispute and the mediator do not need to be in the same place. Indeed, people can resolve their disputes from the comfort of their own homes. In addition to ease of access there is the added factor that parties are able to resolve their disputes in mediation without have to face those with whom they are in dispute.

## **Civil Justice - Dispute Resolution Pathways**

The schematic (appendix 1) illustrates the different pathways which people facing disputes are likely to use to try to resolve their disputes. SMN has added two key features which it believes would significantly enhance the process.

The first feature is the introduction of an online dispute resolution portal which would provide comprehensive information on options for dealing with disputes.

This portal could be delivered through the proposed DirectScot portal outlined in the Scottish Government Digital Strategy<sup>6</sup> which recognised recommendations along these lines made by the Civil Justice Advisory Group 2<sup>nd</sup> report<sup>7</sup>. This would be linked to and signposted from a range of referral points such as the websites of the relevant advice giving agencies, the Scottish Public Services Ombudsman and commercial company and utility complaints information services. The relevant information and a portal link would also be included on the Scottish Court Service website, ensuring that the appropriate information is available should people initially approach the courts.

It will be essential to provide consistent information across all of these sources to ensure clarity for users. It must also be recognised that, whilst many people look online for help, there is a sizeable minority who don't/can't use the internet. Having common information in different formats (including hard copy) across all the advice agencies would help to ensure that information was available to all.

The second feature is the establishment of a mediation service.

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<sup>5</sup> Consumer Focus Scotland (2012), Facing up to Legal Problems: towards a preventative approach to addressing disputes and their impact on individuals and society, Page 10

<sup>6</sup> Scottish Government (2011), Scotland's Digital Future: A Strategy for Scotland, Page 11

<sup>7</sup> Civil Justice Advisory Group (2011), Ensuring effective access to appropriate and affordable dispute resolution, The Report of the Civil Justice Advisory Group, Page 36

This would provide mediation at any stage of a dispute, both before and during a court process, as outlined in detail below. Where it is chosen at the first hearing stage, mediation could be provided at the time or at a later date if this was more convenient. (On the spot mediation, which draws on experience in Manhattan and Brooklyn Courts, is being piloted by the University of Strathclyde Mediation Clinic in the Glasgow Sheriff Court.) The mediation service would make mediation available at any stage of the dispute, but would ensure that, should it be decided that a dispute needs to go to court at any stage, this route would remain open throughout the process.

## **Recommended Model: Social Enterprise**

SMN has examined a number of possible options for the delivery of an effective mediation service. These included:

- a service run by the Scottish Court Service
- a contracted service from a commercial mediation provider
- provision through the market alone
- delivery through a voluntary/advice-giving agency
- delivery through a social enterprise model

Although any of these delivery methods might be deployed, in the context of this paper it is suggested that the most appropriate solution is to deliver the service via a social enterprise model which is an appropriate vehicle for the mix of Scottish Government funding and income generation which will be required to run the service. That choice is based on the key benefits that social enterprises offer: they have a governance framework suited to their social mission; they are flexible yet have a clear social purpose; they reinvest surplus funds into the provision of the service; and they are accountable and transparent.

## **Access Pathways**

The model would be structured to encourage early dispute resolution as follows:

### **Pre-court stage:**

- Parties make an informed choice about their preferred conflict resolution method from the in-court adviser, other advice agencies, or via the sheriff clerk.
- Court does not set a first hearing (sists the case) pending the outcome of the mediation.
- Mediation normally delivered by conference call and online (except for cases where face to face mediation is agreed to accommodate the circumstances of the parties including when a disability prevents one of the parties from using these methods)

### **At Initial Hearing Stage:**

- Parties are given information by the sheriff clerk and may be reminded of this option by the Sheriff where appropriate.

- The aim would be to mediate on the day of the court appearance, ideally face-to-face in the Court building. It is recognised, however, that some Court buildings may not have suitable space and some people may not like to attend court due to the association with criminal processes, or other reasons. In these circumstances, alternatives such as online and telephone mediation and/or the identification of alternative venues, will be required.
- If mediation at a later date is requested by the parties, this can be arranged via telephone or online mediation or if required a face-to-face mediation.
- The Court would not set the next hearing date, pending the outcome of the mediation.

## **During the Case:**

- Mediation should be encouraged as early in the process as possible but would still be available once the case has progressed into the court process.
- The mediation process followed would be the same as for the initial hearing, outlined above.

## **Quality Control**

All mediators engaged in the service throughout Scotland would be managed by the social enterprise. The social enterprise would offer ongoing training and continuing professional development at various locations throughout the country and would complete the SMN Accredited Mediator Training process.

All mediators would need to meet the professional standards required by the Scottish Mediation Register. Such professional standards are already in place. They provide an objective set of criteria to assist in quality control, including in particular ensuring the mediators have the requisite amount of experience to mediate. Trainee or recently qualified mediators (who would initially work on a pro-bono basis – see below) would be supervised and mentored by more experienced mediators until they reach the experience requirements set out by the service.

Any concerns regarding competence would be dealt with through the Register's own systems where a complaints system is already in place. The Social Enterprise would develop competence requirements and would use feedback and peer review techniques to ensure a continuous quality improvement culture.

## **Flexibility**

The delivery method for the mediation would be dependent upon the stage of the process, the availability of rooms within Court buildings and the preferences of the parties. It is therefore essential that the mediation service is flexible and able to accommodate the needs of parties as much as possible.

Where parties choose mediation before a court appearance or if requested or required due to the availability of venues, mediators would normally arrange

online or telephone mediation and conduct the mediation from their homes/personal offices. The social enterprise would also ensure that mediators would be available in court on small claims and summary cause calling dates to carry out on the spot, face-to-face mediations.

## **Fee and Funding Structure**

It is proposed that the social enterprise is funded by statutory/Government sources in addition to any income generated.

In terms of costs to the parties, there would be a small administrative charge in line with the costs for currently lodging a small claims or summary cause submission.

Experienced mediators would be paid per mediation by the social enterprise. Trainee mediators gaining experience would be supervised and mentored by experienced mediators and would initially work on a pro-bono basis until they have the necessary experience.

## **Phased Implementation**

It is proposed that the scheme is launched via a phased implementation with a roll-out period over 1-2 years across the 12 Sheriffdoms in Scotland.

## **Why does this make sense?**

There are a number of reasons why SMN believes the proposals outlined make sense for implementation within the Civil Justice System. These include the wide ranging benefits for both the courts and their users, some of which are outlined below.

### Processes rather than court rules

The proposals outlined do not require a change of legislation or revised court rules to allow for effective implementation. They are process driven and could be implemented without a requirement for major legislative or rules changes. There would, however, be potential for the processes to be built into any future new rules or procedures.

Notwithstanding the above, SMN is aware of Sheriff MacPhail's Report for the Sheriff Court Rules Council and the extensive work carried out by both the Court of Session and the Sheriff Court Rules Councils after 2006. SMN understands that the implementation of consequent rules was deferred by both Councils pending the outcome of the Gill Review. SMN considers that it might be appropriate for this issue to be re-visited in early course.

## An Individually Tailored, Procedurally Fair Approach

One of the key features of mediation is the focus on the parties involved. Mediation encourages parties to take responsibility for resolving their own disputes, rather than having a decision made for them.

Evidence shows that people would generally prefer to avoid becoming involved in legal and court processes. Many are apprehensive about the potential costs, formality, delay and trauma they associate with legal processes<sup>8</sup>. Mediation can enable parties to reach an outcome which could not be determined by a Court and which may be a better outcome for all of the parties involved.

The model outlined is flexible and allows parties to access mediation at any stage during the life of their dispute. This places the focus upon the user and accounts for the fact that every dispute is different and parties will have different needs.

The evidence shows that those involved in disputes are more interested in finding a resolution to their problem or getting on with their lives, rather than necessarily enforcing their legal rights. Ross and Bain (2010) outlined the needs of parties when going to court. More often than a legal remedy, these needs involve, amongst other things, the desire for an apology, and the opportunity for the other party to listen to their point of view.<sup>9</sup>

## Consistency of Practice

The use of mediation fits very well with the existing practice of encouraging parties to negotiate a solution to their dispute. Indeed the use of an independent facilitator skilled in mediation adds significant value to the process.

## High Rates of Compliance

Settlement rates for mediation mean there is more chance that agreements will be implemented than when a decision is made in court. Some Scottish evidence in this regard can be found in the evaluations of the Sheriff Court pilots in Aberdeen and Glasgow<sup>10</sup> where compliance was 90% for mediated cases against 67% for court judgement, and in Edinburgh<sup>11</sup>. This is primarily because the settlement is an agreement between the parties which increases the likelihood of compliance. Should settlement not be achieved then there is still the option to go to court. It may be that mediation will have reduced the number of issues to be dealt with in court, even if agreement hasn't been reached.

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<sup>8</sup> See for example Genn, H and Paterson, A (2001) Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law and Consumer Focus Scotland (2012), Facing up to Legal Problems: towards a preventative approach to addressing disputes and their impact on individuals and society

<sup>9</sup> Genn, H. and Paterson, A. (2001) Paths to Justice in Scotland: What People in Scotland Do and Think About Going to Law, Oxford – Portland Oregon

<sup>10</sup> Ross, M. and Bain, D. (2010) Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Edinburgh, Scottish Government Social Research, Paragraph 5.17

<sup>11</sup> Samuel, E. (2002) Supporting Court Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court

## If Agreements are Broken

Should a mediated agreement not be complied with, rather than the whole dispute coming back to court, only the breach of agreement would be discussed thereby considerably simplifying the dispute in question.

## Time Savings

The use of mediation instead of court processes can result in savings in judicial time through cases being diverted from the courts which can be dealt with more appropriately through alternative means. This frees up court time to deal with other cases, which need to be dealt with in this manner. Such case diversion is likely to have a major impact upon the capacity of the courts to deal with cases in an effective and timely manner.

The mediation pilots in Aberdeen and Glasgow Sheriff Courts saw small claims mediation cases take 20 days and 37 days respectively and summary cause cases take 29 and 44 days respectively. This was compared to 50 days for civil litigation cases going to the sheriff.<sup>12</sup>

Verbal discussions with colleagues from the Court service in England where mediation is embedded into the system, have indicated that mediation is likely to take between 11 and 22 weeks to resolve a dispute compared to the 31 weeks on average that it takes for a court case.

## Cost Savings

There is evidence to suggest that mediation can reduce costs for both the parties involved in the dispute and the public purse.

Evidence from the Glasgow and Aberdeen mediation pilots highlight that the costs to the parties were lower (at £267 on average) for mediation, than those for litigation (at £328 on average). In terms of the savings for the public purse, Ross and Bain (2010) concluded that "the average actual cost per case in Aberdeen was £1,142 for the whole pilot period; recurrent costs were around £953.

The average actual cost per case in Glasgow was £1,135 for the whole pilot period; recurrent costs were around £981. This compares well with the comparative costs for civil litigation cases brought through the sheriff courts at £2,044 per case".<sup>13</sup>

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<sup>12</sup> Ross, M. and Bain, D. (2010) Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Edinburgh, Scottish Government Social Research, Paragraph 6.31

<sup>13</sup> Ross, M. and Bain, D. (2010) Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Edinburgh, Scottish Government Social Research, Paragraphs 6.23 and 6.30

## **Recommendation**

SMN recognises that there are a variety of debates taking place regarding the future of the civil justice system at present and it is timely for the mediation option to be introduced for the benefit of both the Courts and the Parties in dispute.,

SMN suggests that the proposal outlined above could be put in place quickly and easily as it is based on tried and tested practical solutions already understood and investigated by SMN and other court mediation providers.

It could provide one of the first practical steps in implementing change in the civil justice system, and provide time and cost savings fairly immediately.

Looking at the bigger picture, it could in time lead to a change in attitude, providing the public and the legal profession with a better understanding of alternative dispute resolution and allowing parties to take responsibility for resolving their disputes.

Over time this may lead to less conflicts reaching the Courts where an interests based resolution is available, freeing up the courts to determine cases where legal rights are truly in dispute.

The system proposed is a practical recommendation based on relevant evidence which will contribute to the effectiveness of the Scottish civil justice system and improve the user journey.

Civil Mediation Model - Flowchart

