

The Scottish Government Response to the Independent Review of Mediation in Scotland

December 2019

SCOTTISH GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF MEDIATION IN SCOTLAND

MINISTERIAL FOREWORD



Background

In October 2018, the Scottish Government agreed to support Scottish Mediation to lead an Independent Review of Mediation in the Civil Justice System in Scotland. Scottish Mediation set up an 'Expert Group' to conduct the review, led by leading mediators in Scotland and representing a wide range of interests which worked through the first half of 2019 to explore how the greater use of mediation might be encouraged in the civil justice system in Scotland.

The Expert Group published a report of its findings and recommendations on 28 June 2019. The report is aimed at improving access to justice for the public and consumer interest, the interests of the professions and providers of legal services; and the interests of the Scottish economy and is available at <https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-In-Scotland.pdf>

Promoting the use of mediation in the civil justice system has been an issue of discussion for some time, and was part of the Scottish Government *Making Justice Work* programme in 2013¹ that developed and delivered a number of improvements in the justice system. As part of that programme of work, a comprehensive review of the range of mediation operating in Scotland was undertaken and research conducted to understand why people choose different routes to resolve their problems. This was very helpful information. While the benefits of mediation were widely acknowledged the best route forward was more challenging, particularly given the range of reforms to the justice system that were underway.

The justice system has undergone further change in the last few years and the time is right to re-examine how best to embed the use of mediation in the civil justice

¹ <https://www2.gov.scot/Publications/2013/02/5302>

system. The proposals for a review by Scottish Mediation were both well timed and very welcome.

The review also provided an opportunity to consider the issues raised in the Justice Committee report “I won’t see you in Court”² which was published in October 2018 and Martyn Evans’ review into legal aid provision in Scotland “Rethinking Legal Aid”, published in February 2018³.

Further evidence that momentum is building towards mediation reform is the publication of a consultation for proposals for a Private Members Bill on aspects of mediation by Margaret Mitchell MSP.⁴

All of these initiatives encourage a greater use of mediation within the civil justice system. Now is the time for serious consideration of action to change the way in which mediation is viewed and deployed within the civil justice system as it is clear that mediation should have a bigger role to play in helping citizens resolve disputes.

The Expert Group report makes 27 recommendations, including a presumption to attend a Mediation Session, the establishment of a case management function within an ‘Early Dispute Resolution Office’ and a recommendation for a Mediation Act. These proposals are aimed at “normalising” mediation within the civil justice system in Scotland and highlight structural and cultural challenges that should be overcome.

In making these recommendations, the report was clear that “Mediation is a tried and tested process for resolving disputes. It is relatively quick, informal, and cost-effective. It gives parties control over the process and can result in solutions that better meet their needs than the court process can. It can also provide wider benefits, both to the parties and to society and the economy. ”

Whilst the Expert Group report is an in-depth report; and Margaret Mitchell’s consultation has added to the debate, I am clear that this matter needs to be dealt with on a whole system approach and that to normalise Mediation in the civil justice system in Scotland, there needs to be systematic reform in a number of areas to overcome the structural and cultural challenges identified in the report. The Scottish Government will give careful consideration to Margaret Mitchell’s proposed Bill if and when it is formally introduced into Parliament.

The Expert Group report contains a number of interesting and evidence based propositions. The Scottish Government considers that there are a series of questions arising out of that report that require to be resolved before legislation should be brought forward and to that end we consider it is necessary to expose those matters in a public consultation to gather views as well as bring together representatives from delivery bodies to understand the implications of the proposals before making decisions about reform.

² <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf>

³ <https://www.gov.scot/publications/rethinking-legal-aid-an-independent-strategic-review/>

⁴ https://www.parliament.scot/S5MembersBills/Mediation_consultation_document.pdf

In the months ahead we will also continue to develop our policy on a collaborative basis with key stakeholders both within a “Collaborative Partnership on Dispute Resolution” as well as a new “Scottish Dispute Resolution Delivery Group”, which will meet for the first time early in 2020.

Whilst I will continue to listen to the evidence, I am highly sceptical that mediation should be used in cases involving domestic abuse, sexual violence or gender based violence.

I will issue a public consultation to seek the views of the general public, key stakeholders and other interested parties on the proposals for increasing the consistency and use of Mediation within the civil justice system in Scotland during 2020.

I would like to record my thanks to John Sturrock QC and Alun Thomas, Chair of Scottish Mediation and the members of the Expert Group for their full and comprehensive report and to Margaret Mitchell MSP for her contribution in this area.

Both pieces of work have made a significant contribution towards stimulating public discussion and conversation towards “normalising” the use of Mediation in the civil justice system in Scotland and I look forward to testing with the people of Scotland what measures will be required to make the Expert Group’s vision a reality.

A handwritten signature in black ink, appearing to read 'Ash Denham', written in a cursive style.

Ash Denham
Minister for Community Safety

Introduction

Since the publication of the report “*Bringing Mediation into the Mainstream in the Civil Justice System in Scotland*” in June 2019, the Scottish Government has given careful consideration to the content of the Report. It was vital to have a sense of the wider reaction to the Report and we encouraged and supported the work undertaken by Scottish Mediation and members of the Expert Group to conduct informal information sessions to discuss its findings and recommendations. The Scottish Government has also held informal discussions with some stakeholders to help identify those aspects of the Report stakeholders were most interested in, and that time with stakeholders has been very helpful and appreciated.

From our analysis of the Report and the consultation responses to the Margaret Mitchell Bill proposals, the Scottish Government has concluded that the time is right to move towards reform of the civil justice system in Scotland to normalise Mediation and other forms of Dispute Resolution to resolve disputes effectively and efficiently at the earliest opportunity but that public consultation is required in advance of our proceeding with reform to test key issues such as the financial model as well as how the proposals could work in practice.

Background

The Scottish Government Vision for Justice contains a commitment to *'empowering our people and communities to exercise their rights and responsibilities, to resolve disputes and other civil justice problems at the earliest opportunity'*. There is growing interest within Scotland and internationally in the role of mediation as a mechanism for resolving disputes.

In October 2018, The Scottish Government supported Scottish Mediation to explore how greater use of mediation might be encouraged in the civil justice system in Scotland. Scottish Mediation set up an expert group to lead the review comprising representatives of the judiciary, Faculty of Advocates, Law Society of Scotland, the third sector, mediation services, consumer interests and the small business community). The expert group was co-chaired by John Sturrock QC and Alun Thomas, Chair of Scottish Mediation.

The aims of the review were to:

- review the current provision of mediation in the civil justice system in Scotland;
- consider evidence of the use and effectiveness of mediation in other civil justice systems; and
- formulate proposals to enhance the use of mediation in resolving civil disputes in Scotland.

Methodology

Scottish Mediation and the Expert Group based their report on a sound evidence base and the Group drew upon examples and experience from across Scotland and internationally. Scottish Government Justice Analytical Services undertook a review of the evidence base for Mediation in the commercial/civil justice system in five other jurisdictions across world (Australia, Canada, England and Wales, Ireland, and the USA) and the report was published on 25 June 2019 and is available at <https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/pages/1/>

The report “Bringing Mediation into the mainstream in the civil justice system in Scotland”, which can be accessed at <https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-In-Scotland.pdf>, contains 27 recommendations aimed at encouraging the greater use of mediation in resolving civil disputes in Scotland.

Expert Group Report

The report begins by looking at the concept of mediation in civil disputes, what it is, its benefits and limitations. The report goes on to look at the present landscape of mediation in civil justice in Scotland. This is a detailed review of the current position of mediation in the Scottish courts, tribunals and elsewhere, including in the context of ongoing civil court reforms. The report identifies that provision for alternative dispute resolution in Scotland’s civil court rules is growing, but that its implementation has been inconsistent and made without the necessary infrastructure to support its delivery. As a result, the use of mediation remains limited. This section also highlights the currently unregulated system of training and accreditation of mediators in Scotland by a range of bodies, noting that this could be seen as counter-productive for the development of the profession and confusing for the general public.

The report then considers “*normalising*” mediation in civil justice. The report says, “*hoping that things will change is not a sustainable policy. Scotland needs to adopt a more proactive approach over time in order to deliver a viable pathway to mediate disputes*”. In doing so, the report identifies opportunities – such as the ongoing review of civil court rules by the Scottish Courts and Tribunals Service; the ongoing review and reform of legal aid and legal services; and how this sits well with Scotland's National Performance Framework.

The report also identifies challenges, which it divides into *Structural Challenges* (co-ordinating uniform implementation, proportionate costs / incentivising mediation, clearer signalling of quality standards and consistent messaging in rules and legislation); and *Cultural Challenges* (changing professional receptiveness, building wider awareness in society and embodying a new dispute resolution culture).

Overall, the report is clear in its view that now is the ideal time to propose a new framework for the increased use of mediation in civil justice in Scotland.

Recommendations

The report then identifies **27** recommendations as to how this can be achieved. The recommendations can be categorised as:

- **Case Management**: The primary recommendation in the report is “*that a degree of compulsion should be built into the system to encourage parties to consider mediation. Where mediation is appropriate, parties should be required to attend a mediation session before their court or tribunal case can proceed*”. To ensure that only appropriate cases are required to do this, the report envisages that litigants should be able to apply to the court for a *special cause exemption* from that duty. To normalise the use of mediation in civil disputes and ensure uniform availability across Scotland’s courts and tribunals, the report envisages a coordinated case management approach, with appropriate administrative capacity is needed. The case management system would be managed by an Early Dispute Resolution Office (EDRO). A mediator “*roster*” would be introduced, to be used by the EDRO in making referrals, or parties could choose their own mediators.
 - **Funding**: the recommendations on funding are based around the type and value of the disputes in question. The report states that “*all parties regardless of their financial resources must be able to mediate their dispute. Consequently, there must be proper funding for low-value cases and for medium to higher value cases, the cost must be proportionate and set at a level which incentivises the use of mediation*”. The report also recommends that Mediators should be remunerated for their work rather than relying on the supply of “*pro bono*” mediators.
 - **Standards, Regulation and Professional Rules**: the recommendations are aimed at ensuring there are robust minimum standards and accreditation requirements for admittance to the roster; and an effective and accessible complaints and disciplinary procedure for mediators. The report also recommends that as part of the Scottish Civil Justice Council rewrite of court rules, rules should be introduced to place a duty on sheriffs and judges to encourage mediation unless there are good reasons for not doing so.
- Legislation**: the report recommends that Primary legislation in the form of a Mediation Act should be introduced. This would place a duty on Scottish Ministers to promote the use of mediation; set out a regulatory framework for roster mediators; set out the grounds for special cause exemption; formalise principles; provide definitions; endorse the components of a code of practice for mediators; provide for confidentiality in mediation; and signal a paradigm cultural shift for dispute resolution in Scotland
- **Education and Training**: the report recommends that there must be a co-ordinated effort to encourage a change in culture, which ensures that mediation becomes a normal way, except in cases that are eligible for special cause exemption to resolve civil disputes in Scotland. Education and training of the

professionals involved, together with professional practice rules and guidance, are the primary tools for achieving this.

- **Awareness Raising:** the report recommends that efforts are also needed to achieve a broader cultural shift to mediating disputes, where appropriate, in Scotland. It suggests there is a need to build awareness of the benefits of using mediation and to encourage better dispute resolution choices by individuals, businesses and public and other bodies.

Scottish Government Response to the Recommendations in the Report/Margaret Mitchell MSP Private Member's Bill

The Scottish Government thanks Scottish Mediation and the Expert Group for their proposals for a significant package of reforms aimed at “normalising” the use of Mediation in the civil justice system in Scotland.

The Scottish Government also recognises the significant work done by Margaret Mitchell MSP in developing ideas to encourage the greater use of Mediation in the civil justice system in Scotland.

The Expert Group report proposals are a detailed examination of the issues and imply a “multi-door courthouse approach”⁵ to civil justice where the parties involved in a dispute can access a suite of dispute resolution options to try to resolve disputes using the most appropriate processes for them. Several respondents to the Margaret Mitchell Private Member's Bill commented that they would like to see the proposed Private Member's Bill go further and take on board the proposals made in the Scottish Mediation Expert Group report.

Whilst the Expert Group report is an in-depth report; and Margaret Mitchell's proposed Bill has added to the debate, the Scottish Government believes that this matter has to be dealt with as a whole system approach. There needs to be systematic reform in a number of areas to overcome the structural and cultural challenges currently preventing the normalisation of Mediation in the civil justice system in Scotland.

The Scottish Government will give careful consideration to Margaret Mitchell's proposed Bill if and when it is formally introduced into Parliament. We are clear from listening to the mediation community, however, that, any legislation will require to tackle all of the issues simultaneously to bring mediation into the mainstream and that reform short of this may have limited effect in practice.

The Scottish Government intends to take some time to examine the Expert Group proposals, in parallel with the proposals contained in Margaret Mitchell's Private Member's Bill, to assess the impact of the proposals on the general public, businesses, the legal profession, and the overall justice system.

⁵ “see e.g. <https://www.pon.harvard.edu/daily/international-negotiation-daily/a-discussion-with-frank-sander-about-the-multi-door-courthouse>

The Scottish Government policy on dispute resolution is currently being developed on a collaborative basis with key stakeholders including the Law Society of Scotland and the Faculty of Advocates within a “Collaborative Partnership on Dispute Resolution”. The direction of travel is for an integrated approach to helping citizens resolve their disputes in the most proportionate way, but with the right of access to Scotland’s courts always preserved. A critical element of this (which was proposed by the Scottish Mediation Expert Group) is the creation of an Early Dispute Resolution Office to triage appropriate court cases away from unnecessary litigation.

Next Steps

A Scottish Dispute Resolution Delivery Group will meet for the first time early in 2020 with representatives from key organisations including Scottish Mediation and the Scottish Courts and Tribunal Service to develop and shape an evidence-based package of reform.

The work of the Group is expected to focus on:

- Consideration of how the Early Dispute Resolution Office would work in practice.
- Consideration of the wider Dispute Resolution infrastructure to ensure that that provision of advice, assistance and representation for resolving civil disputes is co-ordinated, seamless, effective and efficient.
- Consideration of the standards required for mediators and complaints process
- Consideration of the possible financial model for mediation and other forms of Dispute Resolution in the civil justice system in Scotland.
- Consideration of the need for public awareness raising of a range of options for resolving disputes effectively and within a reasonable timeframe.
- Consideration of what training is required for the legal profession on dispute resolution. The Scottish Government is clear that any such training must involve training on dealing with domestic abuse to ensure that victims of domestic abuse and children are not put at risk.
- Consideration of whether legislation is required and to what extent amendments can be made to the current system of dispute resolution without the need for legislation.
- Consideration of implementation arrangements (for example, whether the approach would be phased in initially through particular court or tribunals).

Following initial discussions with the delivery group and the Collaborative Partnership in 2020, the Scottish Government will issue a public consultation to seek the views of the general public, stakeholders and other interested parties on the proposed package of reform for dispute resolution.

We will publish a public consultation to seek to build consensus on the way forward for Mediation and wider dispute resolution reforms in the civil justice system in Scotland in 2020.

In moving this work forward, it will be critical to focus on the user of the system to ensure that the reforms empower our people, our organisations and our communities to resolve disputes and other civil justice problems at the earliest opportunity and in the most appropriate way, whilst always retaining the rights of people in Scotland to access courts in determination of their rights.



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