Response to Consultation on the Sheriff Court and Alternative Dispute Resolution

submitted by Core Mediation
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Introduction:

Our response is informed by our experience as providers of mediation services in the commercial, professional and public sectors over the past five years. We have seen significant growth in the use of mediation by all the major law firms and by many smaller firms throughout Scotland and also by organisations and businesses of varying sizes, from Scotland's largest through to SME's and others. Many have become regular users.

Our experience in conducting over 130 mediations, most of which have occurred in the past two years, leads us to believe that mediation is a very useful process with real potential to help parties and their advisers to resolve disputes and other differences (whether litigated or not) quickly, effectively and with less cost than ongoing antagonism and litigation.

We welcome this proposal that the courts more actively encourage the use of mediation in those matters which come before the courts. This can only help parties in many cases to find satisfactory ways to achieve earlier resolution and bring Scotland into line with most other jurisdictions where the courts and the judiciary have played a leading role in encouraging greater use of mediation. This also gives Scotland the opportunity to build on the experience gained elsewhere and to further enhance the system of justice in our courts.

While the consultation paper refers to "ADR", we feel that this is now an expression which is less helpful and less used elsewhere. As the background paper to the EU draft directive stated, mediation can now stand on its own as a recognised process separate from, and complimentary to, the courts. To describe it as, or to include it within, "alternative dispute resolution" is probably no longer appropriate. "Mediation and other forms of non-court dispute resolution " may be more accurate, reflecting the reality that, in most countries, mediation is the process to which parties are turning to help resolve disputes if traditional negotiation is ineffective and before using more adversarial or adjudicative processes (such as arbitration). We note that the proposed rule refers to "mediation or another form of dispute resolution".

We firmly believe that resources and energy should be devoted to resolving disputes as early and collaboratively as possible, leaving the courts to provide a forum where those matters which need judicial determination or which are incapable of other resolution can be given speedy and high quality attention.

Responses to Questions posed:

Q.1a) We consider that such a rule is both necessary and desirable

Q.1b) Mediation is, as the committee has commented, now recognised in many jurisdictions as being an essential part of dispute resolution. Courts in other jurisdictions have been active in promoting and encouraging mediation, the use of which has assisted parties in many disputes to resolve these without further recourse to the court. This is generally a good thing overall for society, for the parties and for the courts. A rule is necessary as this recognises the role which the courts can play to help overcome natural resistance and scepticism.

Q.2a) We believe that a rule should encourage rather than compel parties to seek resolution of matters by way of mediation before resorting to litigation.

Q.2b) Mediation and other forms of non-court dispute resolution (and there is a real need to differentiate between these as noted above) are essentially voluntary. It seems consistent with this voluntary nature to seek to persuade parties, with every encouragement possible, to utilise the process but not to compel them to do so. There may come a stage when, with a track record, the benefits of mediation are clear to all and that it is in the interests of all concerned, including the parties, the courts and the public, to introduce a greater level of compulsion. This is the case in other jurisdictions and there is evidence to suggest that the success rate and acceptability of mediation is no different when there is an element of compulsion. However, we may not yet be at that stage in Scotland.

Q.3a) Yes

Q.3b) If this is not done, it is likely that parties (and their advisers) who are less aware of, and perhaps more resistant to, alternatives to the court process will be less willing to make the effort to consider mediation and other forms of dispute resolution.

Q.4a) It is our view that parties should be required to give notice of reasons if they do not consent to a referral to mediation.

Q4.b) We believe that, should they not consent, parties should be required to make the reasons known orally. This would allow the Sheriff to question parties and elicit whether or not the reasons are genuine and justified. This will be important in encouraging parties to consider matters fully and not hide behind a mere form. If this is thought to be too onerous in small claims and summary causes, then we would suggest that at least in Ordinary Causes, an oral explanation would be appropriate.

Q.5 We believe that consideration of referral to dispute resolution, including mediation, should be given at any stage (as set out in the proposed rule). Each case may have different circumstances. In our experience, successful mediation often occurs

at a very early stage in (or even before) a court action, in addition to the later stages. Mediation has a track record of success at each stage. However, the earlier it can appropriately be utilised, the more saving in time and cost will be achieved.

Q.6a) Yes.

Q.6b) This is an essential part of the encouragement which will need to be given to parties to make use of mediation. It is clear from other jurisdictions that a sanction in expenses has been effective in encouraging parties to look realistically at the prospect of utilising mediation and settling the matter out with the court if possible, and thereby reducing the cost in both time and expense of unnecessary court action.

Q.7a) Yes to all

Q.7b) The approach should be universal.

Q.8a) Yes

Q.8b) In the interests of clarity and integrity of the rules.

Q.9a) This would appear to be a helpful provision, again to encourage parties and their advisers to think in advance about utilising other forms of dispute resolution and with a view to raising awareness and ensuring as much engagement in mediation and non court dispute resolution as possible.

Q.9b) All, for the reasons in response to Q.8b) above.

Q10) It seems to us that it would be inappropriate to seek to facilitate mediation and other forms of dispute resolution in relation to disputes at all levels by provision of an in-court mediation service.
Firstly, this will be difficult to manage in terms of cost, logistics and relevant experience.
Secondly, there is a strong argument that the parties should be allowed to select whom they wish to work with in mediation and other forms of dispute resolution and that choice within the market place should prevail.
Thirdly, in any event, any such provision should be optional only, to ensure that parties have the widest possible choice in selecting the services they wish to use.
Fourthly, mediation and other forms of non court dispute resolution are examples of services with a much wider scope and utility than merely as an adjunct to the court system. Like other such services, they should be permitted to flourish and develop independently. The provision of information is of course important, about the services available and the standards reached by mediators and providers.

We recognise that it may be necessary to provide such an in-court mediation service for low value claims but would submit that appropriate value be placed on such a service which cannot be adequately sustained, in our view, on a pro bono basis.

Q.11a) It would seem to be appropriate for such a new paragraph to be inserted in both rules. Certainly, it is more likely that Sheriffs will be effective in this function if they are able to conduct discussion with parties in private, for the reasons set out by the committee.

Q.11c) There is a general concern that sheriffs are being asked to fulfil a role that is quite separate from their judicial function, when being invited to encourage negotiation between parties. This raises fundamental issues about the role of judges and the adversarial system, together with appropriate training and allocation of resources and time.

Q12) Regarding paragraph 9A.3(1), please see our comments about the value of an oral presentation, referred to in response to Qu.4b above. Requiring an oral indication of reasons for declining mediation (at least in Ordinary cases) might avoid the development of a few stock phrases on forms which are considered to give sufficient reasons without the need to explore further.

Paragraph 9A.3(2) refers to "some or all of the matters" in dispute being referred to mediation. In our experience, mediation usually addresses all matters in dispute. As this is negotiation and not adjudication, being able to discuss all of the issues is helpful in the bargaining and analysis of options which occurs. Sometimes this does not become clear until the mediation is being prepared for or until the mediation itself. We suggest that deleting "some or all of" would be consistent with encouraging a holistic approach to resolving matters. However, we recognise that there may occasionally be cases where not all issues can be discussed in mediation. The process of educating parties and advisers should help to make this clear.

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