The Sheriff Court and Alternative Dispute Resolution

Submission to the Sheriff Court Rules Council by Scottish Women's Aid

September 2006

Foreword

Scottish Women's Aid ("SWA") is the national, co-coordinating body for the 40 affiliated, local Women's Aid groups in Scotland providing information, support and safe refuge to women, children and young people experiencing domestic abuse. The National Office in Edinburgh both services and supports the network of local groups and brings issues to a national forum on their behalf.

Introduction

SWA welcomes the opportunity to comment on this consultation paper. Our comments are detailed below, in the order that the relevant recommendations and questions appear in the consultation.

Recommendation One

"That there be incorporated into each set of rules applicable to the conduct of civil business in the sheriff court a new rule concerning mediation in the terms set out in the draft rule below (section 3) or in terms similar thereto, adapted as necessary to the context of the set of rules in which it appears. Rule 33.22 of the Ordinary Cause Rules 1993 (OCR) would thereby be superseded."

Note: Even if you answer "no" to question 1a it would be very helpful to have your views on all remaining questions.
Q.1a Do consultees consider that such a rule is necessary or desirable?
Q.1b Please provide comments to explain your reasons.

SWA do not agree with the proposal because it is our professional view and experience, that due to the power imbalance inherent in domestic abuse, mediation is not appropriate for, and endangers the safety of, women, children and young people experiencing domestic abuse.

The proposal refers to "Alternative Dispute Resolution". Given the high profile of domestic abuse on both the political and legal agendas, and the awareness of the high number of civil and family law actions where domestic abuse is an issue, it is disappointing that this issue is neither discussed nor acknowledged, either in the Mediation Committee's background Report which laid the foundation for this consultation, or in the consultation paper itself. By simply referring to "disputes" and disagreements, there is a lack of understanding that civil actions may have a much deeper and serious foundation than the parties simply having a "dispute", or a falling out over an issue.

In a case where domestic abuse is alleged as the prime reason behind a woman seeking either a protective order, such as an interdict, under the Matrimonial Homes (Family Protection)(Scotland) Act 1981, the Protection of Abuse (Scotland) Act 2001, the Family Law (Scotland) Act 2006, the Protection from Harassment Act 1997, or contesting an application by an abusive partner for a contact or residence order under the Children (Scotland) Act 1995, the women is not undertaking an action simply to "resolve differences" between her and the abuser and the situation is not a mere "dispute" - she is seeking to protect the safety and, very possibly, her own life and that of her children.

1) Mediation as an inappropriate disposal in domestic abuse cases

We note that Paragraph 3 of the Mediation Committee's December 2005 Report to the SCRC states that "*The Committee had little difficulty in reaching the view that parties should be required to state at the outset of the litigation by way of averment in their pleadings what prior steps had been taken with a view to resolving the dispute without resort to litigation."*

Further on in paragraphs 2.10 and 2.11 on page 13 of their Report, and also in Question 4 on page 14, it is noted that, as part of the Mediation Committee's discussions on the matter, they state:-

- *" 2.10. Some members suggested that the court's encouragement to parties to mediate should be strong and that mediation should be favoured unless the court ordered otherwise. Others suggested a more moderate approach.*
- *2.11. In discussion it was suggested that in order to ensure that parties to litigation were made aware of the availability of such services initial writs and defences should contain averments stating that parties to the action had considered ADR. The court could then consider the suitability of the case for ADR and if viewed as suitable, where parties without reasonable excuse refused to mediate, the question might arise whether there should be any form of sanction."*
- *Question 4: the Committee envisage mediation being available to take place at all stages in any dispute both during and before an actively running litigation."*

SWA are most concerned as to the tone and content of these discussions. Mediation cannot, as a matter of course, "*be favoured unless the court-ordered otherwise*" in civil cases involving domestic abuse and should not interfere in the court process. While ADR may be suitable in a number of civil actions involving financial, neighbourhood or contractual disputes, it is well-documented and generally accepted, particularly by professional mediation organisations such as Couple Counselling and Family Mediation, that due to the power imbalance inherent in domestic abuse, mediation is not appropriate for women experiencing domestic abuse.

We would refer you to the comments made in the Scottish Executive's Legal Studies Social Research Finding No.50/2004 entitled "The Use of Mediation to Settle Civil Disputes: A Review of Evidence" by Fiona Macdonald, where it is stated, *inter alia:-*

"Certain categories of cases are seen to be more or less suitable for mediation than others. The following are generally regarded as inappropriate for ADR: cases of international wrongdoing, abuse of power, public law, human rights and vexatious litigants; where a legal precedent is needed to clarify the law or inform policy; where settlement would not be in the public interest; or because of a party's past conduct.

Factors with a general bearing on the progress and success of mediation include:

- *the nature of the case;*
- *the stage at which mediation is, and would be best, initiated which will vary;*
- *uptake should usually be voluntary and arise through informed choice;*
- *the experience, skills and knowledge of the mediator are important;*
- *the expectations of all involved must be clarified throughout the process;*
- *various mediation models may be needed.*

User satisfaction

Arguments for increased use of mediation are not founded on financial considerations alone, but also on such claims as that it offers a more constructive way of resolving disputes. Success must be judged by the satisfaction of the parties, at resolution and the longer term.

The claim that mediation is a more positive experience, with better potential for achieving closure, compared to the probable discomfort of a court one, might seem a 'common sense' observation. However, this should not be over-stated. Research has also shown that parties may feel less than empowered and relations may be no less damaged than if litigation were pursued; people may find the experience painful and distressing, and feel coerced into participation (Brown et al 2003; Genn 2001). Mediation can also magnify power imbalances if a skilled mediator does not manage these well. Furthermore, if one side feels that justice has not been done, or that they have compromised too much, success is doubtful. And, if residual or peripheral issues are unresolved in the settlement, the dispute may recur, possibly negating cost or time savings.

Refusal reasons can include when one does not wish to engage with the other party, fears reprisals or escalations, or wants an external judgement (Brown et al 2003). These can help to identify ways to encourage use. Having a choice of mediative models (e.g. shuttle mediation, group mediation, or co-mediation) also emerges as important for minority ethnic families (Pankaj 2001), community mediation (Mackay and Brown 1999) and applies to other client groups. Low enthusiasm for mediation can also arise partly from the amount of preparation required, with low value cases carrying little incentive. "

Referrals to the Mediation Project were typically individuals involved in cases against small businesses (35%), individuals involved in cases against other individuals (26%) and small businesses involved in cases against other small businesses (19%). Only one client referred to mediation was legally represented, though 47 clients (34% of referrals) were involved in cases where the other party was legally represented. The large majority of cases involved monetary claims (over 80%), followed by disputes over products and services (9%), and damages or personal injury claims (9%).

A negotiated settlement was more likely to be reached by 'arms-length' negotiation when clients were individuals, and by a mediation hearing when clients were small businesses. Mediation hearings were found to be most appropriate when parties desired to maintain relationships (whether personal or business) over the long term."

There have been several articles written on, and research conducted [1]into, the objectives and process of mediation which, incidentally, identify that mediation alone

- [1] Fiona Riatt, SCOLAG Legal Journal 1996 p.68 *" Limitations of Family Mediation*"
- Joseph Rowntree Social Policy Research Paper 117- July 1997 *"Family Court Welfare and voluntary sector mediation in relation to domestic violence"*
- Family Law Association Bulletin Summer 1998, p3 *" Playing devil's advocate with the holy cow of mediation"*
- Scottish Office Central Research Unit Research Study Report 1999, Jane Lewis "The Role of Mediation in Family Disputes in Scotland" pp52- 55
- Scottish Executive Central Research Unit, Legal Studies Research Findings No.38 "Supporting Court Users: The In-court Advice and Mediation Projects in Edinburgh Sheriff Court Research Phase 2 "Elaine Samuel, University of Edinburgh pp 5-6

is not sufficient to resolve disputes in the divorce and separation context and that access to appropriate legal services is also essential. There is no evidence to suggest compulsory mediation will result in easier/swifter resolution of matrimonial and relationship disputes

Apart from the clear issues of the Committee's proposals being inappropriate in civil cases involving domestic abuse, it would be completely wrong to pressure vulnerable women and children into the position where they felt that, in able to obtain justice or receive Legal Aid to proceed with their case, they would first have to engage in mediation with the very person they were seeking protection from, and any reluctance to do so would lead to a suspension or refusal of a grant of Legal Aid.

You have stated *"If parties were not agreed, there would be no such referral, but the basis on which one or more parties had elected to withhold agreement might, in due course, become a ground on which an award of expenses could be made*." A reference to "*unreasonable conduct*" is also made in paragraph 2.7 of the consultation paper. We are very concerned by what this implies. Will a woman fearing for her safety who does not wish to engage in mediation be regarded as "withholding" her agreement and will she be accused of "*unreasonable conduct*" in this regard? Such a stance by the court could force women to agree to mediation against their better judgement, the decision undertaken in the fear that an award of expenses would be made against them, and that these expenses would not be funded by her grant of Legal Aid, being a personal liability.

This could also be used by the abuser as a means of coercing the woman into agreeing to mediation; by threatening to report to the court that he wanted to mediate but she unreasonably withheld her consent, the abuser could use the sanction of an award of expenses, or a judgement in his favour, over the woman.

There is also the suggestion that the court would be biased against those who had not resorted to mediation, a situation which would disadvantage and could endanger women. This, the safety aspect, the question of unjust treatment and the matter of Legal Aid could all be construed as a breach of various fundamental Convention rights of women, children and young people - Article 6 in respect to the right to liberty and security of person, Article 24 in respect of the rights of the child and Article 47, in respect of the right to an effective remedy and a fair trial.

2) Issues surrounding mediation and domestic abuse

In order for you to fully understand the reasoning behind our stance in this matter, we feel it is of merit to provide you with some background in relation to the position of mediation in domestic abuse.

Mediation can only work where both parties enter the process voluntarily and there is no power imbalance between them, as mediation relies on informed, equal participation. In relation to women experiencing domestic abuse, mediators have to be aware that because of the history of abuse, mediation is not an option and should advise the client accordingly. They cannot take the decision or reserve the right as to whether or not mediation is appropriate in the circumstances. Those specialist organisations such as FMS are trained to recognise domestic abuse, have in place relevant polices, procedures and guidelines

Participants cannot be compelled to proceed with mediation and must be able to opt out of the whole process. It is of the utmost importance for participants to have no sense that mediation is mandatory; many of our service users have "gone along"

with a mediation process because they have believed that the court will look unfavourably on them if they decide not to. This has resulted in highly unsatisfactory outcomes for some women and we believe it is crucial to fully inform women that it is for them to decide whether or not to attend, proceed or terminate the process. We are concerned that, having been forced into the process, the woman would not be aware that she can terminate both the session and the process if she wishes to do so.

In terms of the argument that women who enter into any such mediation agreement do so voluntarily, having made a free and fully informed choice, this is not correct. By its very nature, domestic abuse may be debilitating to the extent that a woman can no longer make choices. We are aware that there will be times where women participate in the mediation process because they are unaware of their right not to, they believe that they will lose custody of their children or purely because they are not in an empowered state of mind sufficient for them to assert their rights.

There is also the issue that in contact cases, women can be advised not to disclose domestic abuse, or are afraid to bring this issue before the court, on the grounds that they will be seen as "difficult" or trying to influence the child's views on the matter. As a result, women who have not previously disclosed abuse may be forced into mediation; hopefully, the mediator would be suitably experienced enough to ascertain that abuse is a factor and then immediately terminate the process but this supposes that the mediator has the knowledge, experience and understanding that mediation is not appropriate because the woman had not made the choice to participate freely.

Although we appreciate that there will always be participants who do not wish to disclose abuse or who are emotionally strong enough to go through the process notwithstanding their abuse, the issue of domestic abuse may not become apparent to the mediator until a late stage of the process.

3) ADR and other Civil Procedures

While the main issue of concern in this issue is domestic abuse, we wish to make the point that we cannot speak for the suitability or desirability of this procedure in cases outwith family law, it is in the experience of solicitors that couples take a family law grievance to court only when other mechanisms such as voluntary mediation have failed. It is therefore unjust and inequitable to have the court force parties who are beyond this type of discussion to have to undergo what is likely to be a painful and unpleasant experience.

In relation to divorce, the courts will not consider divorce until arrangements for child contact and residence has been agreed, which presumes that a degree of discussion and co-operation has already taken place between the parties. Further, if a couple have taken the step of separating for two or 5 years, it is not within the providence or the right of the court to force parties who have already made a decision to reconsider what must be an untenable position.

Q. 2a Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?
Q.2b Please provide comments to explain your reasons.

For all the reasons above, parties in a family law, or other civil law action where domestic abuse is an issue should in no way be compelled to seek resolution of matters by ADR.

Q.3a Should the court have the power to require parties to an action to consider ADR?
Q.3b Please provide comments to explain your reasons.

Paragraph 1 of the Executive Summary of the Mediation Committee's December 2005 Report to the SCRC states, inter alia, *"…..that the right note for the sheriff court in Scotland would be struck by giving the court power, ex proprio motu if not on a motion of a party, to require parties to consider resolving their differences by some means other than simply proceeding down the often long and expensive path to a judicial decision. The court would consider whether the dispute appears suitable for such another means of resolution before requiring parties to consider it and would set a timetable for such consideration (extendable if it seemed proper to do so) at the end of which parties would be required to state with reasons their attitude to the notion that the disputed matter(s) be resolved by other means.*
This could take place at any stage in the proceedings. If parties were agreed the disputed matter(s), or some of them, would be referred to mediation or another form of dispute resolution and the cause could be sisted for that purpose. The court could recall the sist or even referral at any time if it thought it appropriate or was persuaded to do so."

We have already stated above that in a case where domestic abuse is alleged as the prime reason behind a woman seeking either a protective order, such as an interdict under the Matrimonial Homes (Family Protection)(Scotland) Act 1981, the Protection of Abuse (Scotland) Act 2001, the Family Law (Scotland) Act 2006, or the Protection from Harassment Act 1997, or contesting an application by an abusive partner for a contact or residence order under the Children (Scotland) Act 1995, the women is not undertaking an action simply to "resolve differences" between her and the abuser and the situation is not a mere "dispute" - she is seeking to protect the safety and, very possibly, her own life and that of her children.

- Women can experience repeated and prolonged abuse before they are in a physical or mental position to seek help. Having come this far, it is unacceptable that a Sheriff should "consider" that the action being brought by them is a "dispute", the resolution of which can simply be obtained by mediation. To do so will only erode all the work that has been undertaken to build women's confidence in the court process and in the treatment of their abuse by the courts.

- On what grounds would the Sheriff "consider" that the "dispute appears suitable for such another means of resolution "? We have already commented at length in our answer to Question 1 on the definition and use of the work "dispute", the unsuitability of mediation in general as a disposal in relation to domestic abuse and the strict conditions and procedures that must be in place to ensure that women are not forced into mediation.

- We are unsure as to whether Sheriffs receive training on mediation, including the issues of this being used in relation to domestic abuse matters, as part of the Judicial Studies Committee's programme. As we have indicated in some detail above, the dynamics of abuse are such that if the court and/or the abuser voice the opinion that mediation is an appropriate method of dealing with the issue before the court, the woman may well feel pressurised into agreeing that mediation can take place, a decision that she would not otherwise have made, particularly if she has fled from the abuser.

Issues of safety arising from courts forcing a woman to mediate

At a time when both the Scottish Parliament and Executive have both made a stated commitment to the safety of women, children and young people in terms of child contact arrangements, under the amendments to section 11 of the Children (Scotland) Act 1995 enacted in the new Family Law (Scotland) Act 2006, it is disappointing that the proposals in this consultation seek to undermine and reverse the good work that has been done in the area of child protection and domestic abuse awareness for the judiciary. The Parliament has recognised that the safety of a non-abusing parent should not be compromised by having to enter into an arrangement whereby they would be forced to work with, or be in the physical proximity of, the abuser but the proposals in this consultation will result in the very opposite.

A Sheriff making an order for mediation in a domestic abuse situation is likely to compromise the safety of the woman and her children and make it more difficult for then to escape the abuse. Since there would be a time lapse before the case would be heard again, this could result in the woman having no option but to continue living with the abuser, would take longer for her to obtain a protective order, and could worsen the exposure of a child to unsafe contact.

It is unconscionable that the court would choose to endanger a woman by putting her in a situation where she would be expected to negotiate and "sit around the table" with her abuser, particularly if she had fled the abuse and was living elsewhere. There are very real safety issues inherent in such a decision.

As for the suggestion that the parties could "persuade" the court to lift a sist on the action or the referral to mediation, it is unacceptable that women in crisis should have to undertake such action. A woman seeking a protective order or disputing contact is already going to have to evidence and persuade the court that an order should be made in her favour, so why should she also have to "persuade" the court that mediation is not appropriate, when it is clearly acknowledged as inappropriate elsewhere.

Q. 4a Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?
Q.4b Please provide comments to explain your reasons.

If the case has any element of domestic abuse, which will be evident, hopefully, from the condescendence and should be referred to in the pleadings, then the court should assume that mediation is not appropriate, as a default position.

Q. 5 Do consultees have any comments to make in relation to this part of the recommendation?

See above

Q. 6a Do consultees consider it appropriate to have an express reference in the rule relative to the awarding of expenses?
Q. 6b Please provide comments to explain your reasons.

See above.

Q. 7a Is it appropriate to include a reference to ADR in each set of court rules namely Ordinary Cause Rules 1993, Summary Applications, Statutory Applications and Appeals etc. Rules 1999 . Summary Cause Rules 2002, Small Claim Rules 2002?

Q. 7b Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.
Q.7c If you think that the reference should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

As you have seen, our position is that these proposals are unacceptable in relation to cases where domestic abuse is an issue, and for divorce actions, while recognising that they may they may be appropriate in other areas of civil law.

Our proposal, therefore, is that a reference should be inserted into the court rules to the effect that, where a civil action involves an application being brought under any or all of the:-

- Matrimonial Homes (Family Protection)(Scotland) Act 1981;
- Family Law (Scotland) Act 1985, section 14 (exclusion order after divorce
- Children (Scotland) Act 1995, section 11
- Protection from Harassment Act 1997
- Protection of Abuse (Scotland) Act 2001;
- Family Law (Scotland) Act 2006 - sections 5- 10, 11, 15 23, 24 or 31 , then the court cannot make an order for mediation.

This would protect women, children and young people experiencing domestic abuse from the possibility of being further abused and will avoid the issues we have raised above. We are unsure as to whether this should be incorporated into one single rule or all the rules.

Q.8a Do consultees consider that rule 33.22 should be deleted from the OCR in the event of the all-encompassing rule being introduced?
Q. 8b Please provide comments to explain your reasons.

We consider that rule 33.22 should be amended to reflect our proposal above and that if the pleadings and condescendence make reference to an action as outlined above, then mediation should not be appropriate.

Recommendation Two

That a new para (5A) be inserted into OCR 3.1 in the following terms:- "(5A) An article of condescendence shall be included in the initial writ averring the steps taken by the parties prior to the raising of the action by other forms of dispute resolution (whether by way of mediation, negotiation or otherwise) with a view to avoiding the need for litigation. ".
A similar provision should be inserted into each of the other sets of rules applicable to the conduct of the civil business in the sheriff court, adapted as necessary to the context of the set of rules in which it appears.
Q. 9a Do consultees have any comments to make in relation to this recommendation?

We would enquire as to whether this does not already happen to some extent, in civil actions involving family matters. In relation to domestic abuse, the condescendence will relate the circumstances of the matter so it will be clear that all steps safely and reasonably available to the woman will have been taken.

Q. 9b Please indicate, with reasons, whether this reference provision should be
(a) All or (b) Some or (c) None of the court rules
Q. 9c If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

For the reasons outlined above, we do not consider that this should in any way be incorporated into the condescendence.

Recommendation Three
That, subject to questions of cost and practicability, the use of mediation or another form of dispute resolution should be facilitated in relation to disputes at all levels by the provision of an in-court mediation service in the manner piloted in the sheriff courthouses of Edinburgh, Glasgow and Aberdeen.
Q.10 Consultees are invited to provide comments on the terms of Recommendation Three.

Our stated position is that mediation is not appropriate in cases involving domestic abuse and we refer you to our comments above.

Recommendation Four

"That rule 8.3 of the Summary Cause Rules 2002 and rule 9.2 of the Small Claim Rules 2002 should be amended by the incorporation into each of a new paragraph in the following terms: - "8.3(2A)/9.2(2A): In carrying out the duties referred to in paragraph (2) (b), the sheriff may hold discussions in private and not in open court."; and that otherwise the said rules 8.3 and 9.2 should remain for the time being unaltered."
Q. 11a Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both Rule 8.3 of the Summary Cause Rules 2002 and Rule 9.2 of the Small Claim Rules 2002?
Q.**11b If you think that the reference should only be incorporated into one set of the court rules please indicate, with reasons, which set(s) of court rules.**
Q. 11c Do consultees have any views on the recommendation that rules 8.3 and 9.2 should otherwise remain for the time being unaltered?
Q.12 Do consultees have any comments about the proposed rule as drafted? It should be clear to which part (s) of the rule the comments relate.

We can only comment in relation to the matters we have raised above. In relation to the draft rule, at 9A.2 (1), the rule should be amended to include the wording in black italic, as follows:-

- **9A.2.** (1) In any defended action, ***except for those brought under the Matrimonial Homes (Family Protection)(Scotland) Act 1981; Family Law (Scotland) Act 1985, section 14 ; Children (Scotland) Act 1995, section 1; Protection from Harassment Act 1997; Protection of Abuse (Scotland) Act 2001 or the Family Law (Scotland) Act 2006 - sections 5- 10, 11, 15 23, 24 or 31,*** the court may, at any stage of the action where it considers it appropriate to do so or on the motion of any party, make an order requiring the parties within such period as may be specified in the order to consider together settlement of the dispute or referral to mediation or to another form of dispute resolution.

Q. 13 Do consultees have any comments to make on the proposed form of notice? It should be clear to which part (s) of the notice the comments relate.

Under our amendment, parties to the relevant actions would not be obliged to comment and could simply enter- “Exempt action under Rule 9A.2 (1)