



**Response by Core Mediation
to
Scottish Civil Courts Review Consultation Paper**

Creating a More Collaborative Culture?

1. We suggest that it is useful to set out some basic principles which will help to identify the role of the courts and processes such as mediation in a modern dispute resolution system. We do so in paragraph 12.
2. First, however, we offer the suggestion that it is vital to the future of Scotland as a wealth generating economy and as a centre of excellence in dispute resolution to embrace modern approaches and to recover ground which seems to have been lost to other jurisdictions recently. There is a fear of “loss of law”. The greater concern is about “loss of work” to other jurisdictions which are perceived to be more effective and efficient in their approach. This has occurred over a number of years and is a well recognised phenomenon. Much could be done to arrest this trend and this review is a unique opportunity to re-position Scotland in the field of dispute resolution.
3. We believe that there is a more fundamental point that may be addressed in this discussion and in this review. Much of the focus is on rights and remedies. This addresses problems after they arise. We think that it is consistent with modern thinking and indeed with the Scottish Government’s policies to ensure that resources are focussed also on interests and prevention. This would help to address problems as they arise or before they escalate. Mediation and other interest-based processes have a significant role to play here. This is also about a move from what may be perceived as a hierarchical, paternalistic approach to problem-solving to a more collaborative approach where greater responsibility and power is given to those whose problem is being addressed. We comment on this further in paragraphs 12 and 13.
4. It is essential to emphasise that we see the court system and mediation as complimentary. We accept that mediators have tended to be critical of the court system in the past and that this may have given an impression of hostility. In fact, mediators have often simply reflected the views held by users of the courts but, in using these arguments to support mediation, have been perceived to pursue a self-interested approach. It is timely to acknowledge the separate, valid and useful contribution which both the courts and mediation (together with other processes) can make in a modern approach to helping individuals, businesses and organisations to resolve disputes.
5. By way of background, mediation in what might be described as civil and commercial matters in Scotland has developed in the past five years from minimal use to much greater frequency and utilisation. While definitive figures are hard to come by, it seems likely that well over 100 commercial/civil (non-

family, non-community, non-neighbourhood) disputes are mediated each year. To this would be added cases under court schemes.

6. While there is no formal general encouragement by the courts, judges are increasingly inclined to mention the possibility of mediation to parties. Many of these matters are already in court and are mediated at all stages, from the moment of raising an action through to appeal. Many other mediations occur in matters which hitherto would have been taken to court but where lawyers and clients now identify mediation as an alternative to using court in the first place and recognise mediation as more than a mere tool for brokering a settlement, seeing it as a way to find a range of options for constructive solutions to often intractable problems.
7. Core Mediation, a division of Core Solutions Group, has conducted well over 200 mediations since 2002, involving nearly 300 days. Being a lower volume, higher value service, those matters which we mediate tend to be in the higher value, more complex areas. A number require more than one day of mediation. Most however are concluded within one day and, in approximately 83% of matters, a resolution is achieved, usually on the day, occasionally soon thereafter.

Recent examples include:

- *differences in a multi-million family business*
- *a long-running agricultural agency dispute*
- *differences between sporting governing bodies*
- *breakdown in relationships among senior executives and academics in educational institutions*
- *claims and counter-claims arising out of a house-building project*
- *succession in an international family business*
- *claims of professional negligence and misconduct directed against solicitors*
- *board level disputes about intellectual property and shareholdings in a business start up*
- *management difficulties in a local authority*
- *allegations of discrimination and bullying at work and*
- *contractual complications in an iconic construction project.*

Nearly 300 solicitors have been involved from firms across the whole country and elsewhere. Approximately 100 law firms and 20 in-house departments have participated in mediation with Core, nearly 50 of which utilised our service in 2007. In 2007, 39% of our mediations involved a public body. These included health trusts, local authorities, emergency services, universities, other higher education bodies, sporting bodies, housing bodies and not for profit organisations. Seventeen law firms have undertaken over 5 mediations; eight firms have undertaken over 10 mediations and a few of these are past 15 mediations. Most of the major financial institutions in Scotland have used mediation more than once, some on several occasions, and a significant number of the largest plc's in Scotland are users.

8. An issue for discussion is whether mediation is properly viewed as an adjunct to, or part of, the court system. Many mediations occur out with the traditional court or legal system. This trend is likely to continue and to grow. We submit that it is important that, whatever is done in the context of the present review, the growth of what is essentially a private form of dispute resolution is

encouraged. In the context of court-related activity and especially if court encouragement is to be enhanced, we support the recognition, maintenance and improvement of standards among mediators to ensure that there is judicial and public confidence in the provision of mediation services.

9. We submit that recognition and use of mediation has a significant role to play as part of a modern court system and that courts can and should recommend mediation in appropriate circumstances. We believe that the court can identify benefits for the court service (including better use of time and resources) and for parties (including more creative and interest-based outcomes, in a quicker and less costly process). We believe that it is important that people understand the benefits that accrue from mediation, which are different from those which are available in court. Many disputes are multi-dimensional in their underlying causes and in the factors which parties need to take into account in their resolution: these can include time; cost (direct and indirect); present and future commercial, professional and personal relationships; need for closure, apology and/or explanation; addressing emotion, stress, morale and other features of unresolved conflict; and issues about publicity and reputation. Where appropriate, these can be addressed in mediation more easily than in court.
10. We believe that it is helpful to differentiate “informal” dispute resolution (including negotiation and mediation) from “formal” dispute resolution based on rights and remedies. We submit that, in most cases, informal dispute resolution is to be preferred, leaving formal dispute resolution for the courts when less formal means are not appropriate or the parties cannot reach a conclusion using them. In other words, the court should be a “last resort” in most cases. Resources should be devoted to encouraging earlier and more constructive solutions and not to settlement later in the litigation process.
11. We submit that it is essential to use language which is appropriate to modern circumstances. Thus “ADR” as an abbreviation for “alternative dispute resolution” is apt to mislead and should not be used. It is sometimes used as a synonym for mediation which is clearly wrong and the idea of “alternative” requires consideration of what is the reference point for the “alternative”. In reality there is a range of appropriate ways to resolve disputes of which the court and mediation are two.
12. We propose the following **principles** to ensure that there is a world-class approach to the resolution of business, civil and other disputes in Scotland:
 - (i) effective resolution of disputes by parties themselves, either using their own resources (including advisers) or with assistance by an appropriate third party, is generally to be preferred to a decision by a third party acting in an adjudicative role;
 - (ii) generally, private resolution of disputes will be a matter for the parties; where appropriate, state resources should be directed to encourage such resolution rather than recourse to a court or other adjudicative function;
 - (iii) courts should encourage the use of negotiation by parties and their advisers as the first and preferred method of resolving – or at least narrowing – disputes which come before them;
 - (iv) whenever it seems that the assistance of a third party to facilitate negotiations may be useful to the parties in a court action, courts should encourage the use of mediation; if appropriate with an incentive which

- recognises the resource implications of an unreasonable failure to do so;
- (v) the court system should exist as a resource for situations where parties are unable to resolve matters for themselves or where issues of public importance require to be addressed by a state-appointed judge;
 - (vi) in certain situations, including where there is urgency or a need for interim remedies, declarator or enforcement, the decision of a court or other adjudicator may be necessary;
 - (vii) the court system should be efficient and designed to meet the needs of users, including expeditious resolution of disputes;
 - (viii) the role of judges should be to adjudicate in those situations where adjudication is necessary and to encourage the approaches outlined above;
 - (ix) the development of other techniques, including arbitration and early neutral evaluation, to assist parties to achieve resolution based on mutual interests is desirable in a modern dispute resolution system.
13. These principles would enable a really first class, properly resourced, independent civil court service to be developed for those cases where that is necessary. Complementing that, the increased use of mediation and negotiation, consistent with the way in which lawyers in Scotland have traditionally tended to work, could ensure that a greater number of disputes are resolved earlier and by the parties themselves, returning the responsibility for deciding outcomes to those who are most affected by them. The senior US judge, Wayne Brazil, has described this as “democratising” the litigation system.
14. **Response to paragraph 5.28 of the Consultation Paper (following the bulleted paragraphs there):**
- The stage at which consideration should be given to mediation: mediation, negotiation and other methods of dispute resolution can be used at any stage: each case will present its own unique circumstances. It is desirable to use negotiation or mediation as early as possible, subject to parties being in a position to negotiate effectively. However, there are many instances of mediation being effective at later stages, including after an initial court pronouncement. Ideally, parties would be encouraged to use negotiation or mediation prior to substantial commitment of court time and resources. There is an argument that in most cases, prior to utilising the services of the court system, parties should demonstrate that attempts have been made or will be made to negotiate and/or mediate.
 - Mediation, negotiation and other methods of dispute resolution can generally be used in any kind of dispute. There may be particular circumstances in which any of these may be unsuitable (for example, urgency of the matter, need for interim remedy, matter of public interest or concern) and the time at which to utilise mediation or other methods may vary depending on the circumstances of a case. Otherwise, experience shows that mediation can be effective in all kinds of dispute.
 - The court should inform parties of these options. To the extent that parties are resistant to, or ignorant about, the use of mediation or other methods, court encouragement may be essential, in the form of a sanction in expenses (It is generally agreed that this raises no ECHR complication).

Experience in other jurisdictions suggests that this form of exhortation is necessary in order to achieve the kind of culture and systems shift which is required.

- In other countries, the use of expenses penalties has been a way to encourage greater use of mediation. Undoubtedly, there is a period of transition from the traditional approach to a new approach where the authority and sanction of the court may be a necessary prompt. Whether this would require to continue when mediation has further established its credibility is a matter for discussion and research.
- We do not believe that a court can “mediate” a settlement itself in the strict sense of that word. Mediation is a different function from adjudication and ought to be carried out by those who are clearly separate from the judicial function in order to preserve the integrity (and understanding of the role) of each. “Brokering” a settlement is quite different from mediating a resolution. A danger for courts and mediation is to view mediation as just a form of brokerage. It is and should be much more than that. However, there may well be a role for courts to encourage and “facilitate” parties’ movement to negotiated resolution.
- As a generally private method of dispute resolution, funding of mediation will often be logically a matter for the parties, justifiable on the basis that it will generally be successful and therefore considerably cheaper than drawn out negotiation or litigation whether ultimately settled or not. There may be a value in securing mediation of lower value claims through publicly-subsidised schemes on the basis that this will be a cheaper model for use of public money than the court system.
- The need for training and standards among practitioners is clear. This includes those who are advising parties and those who are acting as mediators. There are a number of initiatives in this area including the Scottish Mediation Register and the International Mediation Institute. The key is to enable the development of a still emerging profession, the recognition that there are a variety of effective ways to practice mediation, that information to the market about what to expect of a mediator and mediation is critical, and that benchmarks be established against which to measure competence and capability. Ultimately, as with the selection of other professionals, including solicitors and advocates, the informed market place has to play its role.
- Mediation is a flexible process, with its shape and substance varying according to the circumstances of the difference or dispute. Again, education of users is critical, to enable choices and assessment to be made.
- Mediation is not primarily concerned with delivering justice in the narrow sense of that word, if by justice we mean determining or vindicating rights and wrongs. It exists to serve the needs and interests of parties who wish help to negotiate solutions to difficult problems. It enables them to take account not only of interests and needs, but also of objectives, costs, time, relationships, risks and other factors, in addition to legal rights and remedies. In reality most problem solving depends upon an intricate matrix of issues such as these.

- Most mediations result in an outcome which brings the matter to an end. To that extent, the result should be a considerable saving in cost. If mediation does not result in immediate resolution, very often parties are able to identify and narrow the issues in dispute and utilise the preparation for mediation as part of the next stage in the court or other dispute resolution process. Inevitably, there will be occasions where the process of mediating does not produce a result and might then be viewed as an “additional” cost. However, no process is perfect and it is necessary to look overall at the gains which adopting a more modern approach to problem-solving can bring. Paradoxically, if the system can be streamlined, better justice should be achieved in those cases which need to be resolved by a judge, in enabling quicker and more effective decision-making where the court is required to adjudicate.
- The concern about “loss of law” is we believe a misunderstanding of the role and impact of mediation and the courts. Firstly, most matters in the courts (over 90%?) are settled without adjudication in any event. No doubt many of these would provide interesting points of law for deliberation. But they are settled in the conventional sense. Mediation is another way to encourage, expedite and support this voluntary resolution of disputes by parties without using the resources of the court. Cases which are not apt for such resolution or where parties wish to have a point adjudicated by a court will remain. Unless it is suggested that the courts are entitled to select the cases which they wish to decide, even against the wishes of parties, it seems that the law will continue to develop as it always has done, according to the frequency with which parties elect to bring disputes to a judge. To an extent, the selection of those cases which are decided by a judge is somewhat random (a snail in a bottle might have been a prawn in a sandwich). In any event, as noted above, a streamlined service should enable quicker, more effective and more thoughtful decisions to be made in those cases which are decided by the court. As noted above in paragraph 2, “loss of work” should, we believe, be a very important consideration – as should its counterpart: “acquisition of new work in Scotland”.

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