FDRS
Faculty of Advocates Dispute Resolution Service

Response

by

THE FACULTY OF ADVOCATES DISPUTE RESOLUTION SERVICE

to

the Consultation Document

on

the Mediation (Scotland) Bill

Introduction

The Faculty of Advocates Dispute Resolution Service ("FDRS") is part of the Faculty of Advocates, and is specially tailored to offer the services of advocates who have particular skills and/or qualifications relating to alternative dispute resolution processes. FDRS welcomes the opportunity to comment on the proposal for a Mediation (Scotland) Bill. Members of the Faculty have a wide ranging and indeed unique experience of practice before the civil and criminal courts in Scotland. Perhaps more pertinently, however, advocates devote equal if not greater time to the effective and efficient resolution of cases outwith court. In this regard, advocates have a long history of seeking to resolve disputes in a manner which maximises outcomes for court users, while seeking to minimise the requirement for court time. Many Members of the Faculty, with specific qualifications, training, experience and continual professional development requirements, are accredited as mediators, arbitrators and adjudicators and offer their services through the Faculty's Dispute Resolution Service (available here). More broadly, and viewing mediation in the wider context of Alternative Dispute Resolution options, the Faculty is a strong supporter of the Arbitration (Scotland) Act 2010 and the work of the Scottish Government, together with the Scottish Arbitration Centre, to help develop Scotland's strong reputation for

effective arbitration – and FDRS very much welcomes the fact that Edinburgh will play host to the 2020 Congress of the International Council for Commercial Arbitration (ICCA2020).

Against that background, FDRS would propose to make a number of general observations on the terms of the Consultation Paper, followed by responses to the specific questions posed in the paper.

General observations

As the Faculty observed at the time of the Scottish Civil Courts Review, there is no doubt that early resolution of a dispute is desirable. The broad experience of those practicing in the civil justice system is that claimants not only desire a swift resolution of disputes, but that delay can lead to entrenchment of parties. In some circumstances, delay in resolution may aggravate a problem.

That having been said, a swift resolution of a dispute should not be permitted to cause injustice. If faced with the choice of a quick and unjust resolution of a dispute, or a slower but correct decision, it is clear which choice the public would prefer. Accordingly, while FDRS does broadly welcome the introduction of mandatory mediation into the civil justice system as a dispute resolution option for the reasons set out in the Consultation document (under 'Benefits of Mediation' at page 7), it is respectfully suggested that the Courts and mediators should maintain an overarching aim to achieve justice as between the parties, and not merely a swift outcome.

We recognise that the two goals are not, of course, mutually exclusive. But it is vital that the principal desire of justice is maintained at all times. As was observed by Peysner and Seneviratne in a research paper for the Department of Constitutional Affairs in 2005:

"The problem we found was in relation to the costs of litigants. Lord Woolf's hypothesis was that by increasing the efficiency of the litigation process, by diverting disputes from litigation, and by cutting delay in the rump of cases that were issued in the courts the

costs would be cut in step with the constrained procedures. Our research suggests that this has been proved wrong. This is perhaps unsurprising. In the business world there is a universal tool, often known, as the 'Quality Triangle'. This offers a virtually iron law, that of the three objectives in a business, speed of delivery, cost of production and quality of production -it is possible to improve two out of three but rarely all three. For example, products or services can be delivered quickly and cheaply but not of the highest quality. We find that the case managed court-based dispute resolution system is delivering quality (justice) at a much improved pace but not any more cheaply, and possibly, at higher cost. To complete the Woolf scheme it will be necessary to introduce further reforms to preserve the gains of the new system by exploring cost control measures, whilst all the time striving to ensure that quality/justice is not sacrificed."

FDRS is anxious that in striving to provide a more cost effective and speedier solution, it is ensured that the sacrifice is not quality.

In our view, the primary goal of a system of civil justice must be the just resolution of disputes, and that this principle must underpin every system of justice. However, the just resolution of a dispute should be able to be achieved in an efficient and effective manner. Early disposal of disputes should be encouraged where appropriate. Further, it should be borne in mind that the current system does facilitate early resolution of disputes. Lawyers who are instructed by the parties to give advice as to how best to deal with their disputes have a professional obligation to advise clients as to the likely expense and time which will be involved in the legal resolution of their claims. Lawyers are generally experienced in understanding the balance between the potential risks and rewards of each potential course of action. Litigants may be unaware of the precise ramifications of early disposal of disputes. It must be borne in mind, therefore, that an undue emphasis on the idea of the early resolution of disputes may lead to some disputes being resolved in a way which is not just and does not fairly reflect the actual legal rights and obligations of the parties.

Value for money and cost-effectiveness are important principles and must be considered alongside other principles, but they are not paramount. The overriding reason for having

an effective and efficient civil justice system is to ensure that all have access to good quality justice within a reasonable time. The justice system serves both to ensure access to justice and to protect justice itself. Justice exists through respect for, and the proper operation of, the rule of law. But a system that does not work properly can certainly create injustice. Just decisions are made by judges who understand the law and how it is to be correctly applied: that is a fundamental aspect of the rule of law. An efficient system cannot by itself 'deliver' justice.

Accordingly, the early disposal of any dispute can only be achieved in a just way with: (a) a proper understanding of the factual and legal issues involved in the dispute; and (b) a proper appreciation of the prospects of ultimate success.

The benefits of mediation are case sensitive. Experience suggests that while some forms of dispute or claim are amenable to such resolution, others are not.

Although mediation is commonly resorted to in England and Wales, it should be borne in mind that the vigorous rules under the Civil Procedure Rules concerning disclosure permit the mediator to act as the judge at trial would. Each side will, generally speaking, attend mediation with full knowledge of the opponent's case; full disclosure of all witness statements; and clear and vouched valuations of the claim, as contained in schedules and counter schedules; and all preliminary issues determined. The circumstances of mediation are not markedly different to the procedures that would subsist at trial. In effect, in most cases, the mediator is acting as a substitute judge.

The Scottish system does not, at this stage, have rules which would permit such an informed mediation to take place and this would perhaps have to be carefully considered. It has discernible advantages and disadvantages, an advantage being that it ensures the mediator and parties are properly informed of all relevant facts and circumstances, a disadvantage being that it might tend to formalise and therefore potentially lengthen the mediation process itself.

In the context of the current proposal, it is our view that the scope of mandatory mediation across the civil justice system, as envisaged in the Bill, and in addition to the full list of excluded proceedings listed at Question 3, would certainly not be appropriate in connection with personal injury cases. The negotiation that currently takes place between Counsel, and indeed between solicitors, almost invariably leads to the effective and satisfactory resolution of these disputes in the best interests of the parties. Personal Injury cases are already closely monitored by the court by virtue of the applicable Personal Injury Rules both in the Court of Session and in the Sheriff Court. Pre-trial hearings and the requirement to hold pre-trial settlement meetings are a fixed and very highly effective element in the efficient disposal of these actions. We would also observe that in most, if not all, personal injury litigation cases, the parties have not chosen to be in a legal relationship with each other. There is often a significant imbalance between the rights of an individual on the one hand, who is often the innocent victim of an accident, and the interests of an insurer or other larger entity on the other. We are firmly of the view that mandatory mediation is often unsuited to claims of this kind and, in some circumstances, could lead to victims accepting settlements which are unjust when measured against the eventual outcome of a litigated decision.

This should be contrasted with the position of mediation within, for example, a contractual setting. Indeed, parties in the latter situation may wish to continue in that relationship, or work with the other party in the future, and thereby mediation should certainly be encouraged. Accordingly, we suggest that a 'one size fits all' mediation requirement for parties should be avoided.

In the sphere of commercial disputes and broader civil litigation, however, it is already recognised that mediation does have an important role to play. Very often, for the parties involved, mediation can represent the most satisfactory means of achieving a resolution to a dispute and in those circumstances the court may be seen as a last resort.

It is also important not to lose sight of the principle that the development of the law depends on litigation. This is true not just in areas of our law rooted in common law,

particularly delictual and contractual cases. Within public law, statutory interpretation and, perhaps especially, the development of human rights jurisprudence, depend on cases coming before the courts. For these reasons, FDRS fully supports excluding all of the categories within Question 3, together with all personal injury actions, from a mandatory mediation requirement.

FDRS is also of the view that the limited system of mandatory mediation proposed in the consultation should be introduced in Scotland's Sheriff Courts. Consideration could also be given to whether the format proposed could be adapted to operate in some Tribunals, though we anticipate that there are some tribunals in which mediation is simply not appropriate (for example, the Mental Health Tribunal for Scotland). Given the existing rules and threshold for actions brought in the Court of Session, on balance we are of the view that mandatory mediation is neither required nor would it be appropriate. Experience of practitioners at the Bar strongly suggests that parties litigating in the Court of Session are frequently aware of the mediation option and often take it up, particularly in commercial cases, and sometimes in family cases. Making mediation information sessions mandatory for those cases would accordingly be an unnecessary exercise.

With those general observations, FDRS responds to the questions set out in the Consultation Document as follows:-

Question 1

FDRS is fully supportive of legislating to increase the use and consistency of mediation services for civil cases in Scotland. However, we have some reservations about extending the mandatory aspects of the regime as far as is proposed (as explained above and in the answer to Question 2 below). FDRS would observe that legislation, by itself, will not be sufficient. Public funding and cultural change will also be required to provide consistent access to mediation in low-value cases wherever in Scotland they are raised.

Question 2

FDRS is partially supportive of the proposal in the consultation document. We are fully supportive of legislation for the wider geographical use and consistency of mediation services in Scotland but would be opposed to the introduction of self-test questionnaires and mandatory Mediation Information Sessions for personal injury actions, in addition to those actions already excluded. In addition, as discussed above for actions in the Court of Session parties and their representatives will normally be well aware of the possibilities of alternative dispute resolution in general and mediation in particular, so an additional mandatory process would be inappropriate. It should be noted that, for Commercial Actions in the Court of Session, the judge already has the power to order parties to hold joint meetings to explore extra-judicial options. We note that any proposed compulsory regime should be sufficiently flexible to apply in different ways to different classes of action. Mediation in a commercial dispute will often be very different in practice and procedure from mediations in family disputes.

Question 3

Subject to the observations at 2 above, we are partially supportive of requiring parties to a civil court case (other than the full list of excluded cases, plus personal injury actions) to attend a mandatory mediation information session with a duty mediator.

Particular concerns which we would express include the status, qualifications, experience and role which a duty mediator would be required to have, the content of any self-test questionnaire and precisely what any questions should be, and the responsibility as between the parties for the costs of the mediation session (and there is a risk that the introduction of mandatory mediation merely adds to the existing cost of litigating). A vital consideration in the context of any self-test questionnaire is Equalities, and reference is made to Answer 8 below in that regard.

Question 4

For the reasons set out above, and subject to the exceptions referred to above, FDRS is partially supportive of this proposal.

Question 5

For the reasons set out above, and subject to the exceptions referred to above, FDRS is partially supportive of this proposal.

Question 6

(a) FDRS anticipates that if there is some element of public funding for mediation in low money value cases even allowing for a consequent avoidance of a proportion of cases proceeding (and the generation of related court fees), there may be a net cost increase to the Scottish Government, because of the fixed cost of the mediation advice, set against the variable cost of litigation (including the court fees received by SCTS). This must be assessed against the public good in the outcome of more disputes being resolved more quickly and at a lower cost to the parties.
(b) Broadly cost neutral.
(c) Broadly cost neutral.
(d) The Faculty is of the view that the introduction of mandatory mediation, with the additional regulatory costs and requirements this would bring, has the potential to increase the overall costs of mediation and mediators.
(e) Broadly cost neutral.

Question 7

FDRS has no observations to make in this regard.

Question 8

We note that possible equalities impacts are discussed at pages 19-20 of the consultation document. We recognise that there may well be benefits of the kind mentioned there in some cases; however, in our view, there are further equalities questions to be considered.

The Scottish Courts and Tribunal Service ("SCTS") have a public service duty under Section 1 of the Equality Act 2010 as regards socio-economic inequalities. As such, it must safeguard the Protected Characteristics provided for at Section 4, which are age,

disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

While mediation is currently voluntary in Scotland, and SCTS has no structural role in the provision of service, no issue arises under the Equality Act. However, we suggest that the introduction of mandatory mediation on the model proposed would place SCTS in a position whereby it must maintain its public service duty through the mandatory stages of the mediation process (steps 1-3, on page 14 of the consultation). Since the public sector duty cannot be delegated, this means that the mediation information and assessment process must safeguard Protected Characteristics and take account of socio-economic inequalities.

While ideally the introduction of mandatory mediation should accordingly be neutral, or positive, in terms of its equality impact, we wish to emphasise that SCTS would be responsible for policing the mandatory mediation process and its delivery, and ensuring that SCTS continued to meet its public service duty at all times. These would be particularly important considerations for: (i) the qualifications, experience and training of the proposed duty mediators, since SCTS would be responsible for their conduct of the mandatory mediation; and (ii) the location, facilities and other organisational aspects of the mandatory mediation itself.

Question 9

FDRS would not be able to support the introduction of the Bill in circumstances where its impact on Equality Act matters would be negative.

Question 10

Yes.

Question 11

We are aware that Scottish Mediation have recently published their report "Bringing Mediation into the Mainstream in Civil Justice in Scotland". This report makes

recommendations which have significant overlap with the proposals in the consultation, especially the publicly-funded provision of mediation for low-value cases on a consistent basis across Scotland; and the introduction of a compulsory initial mediation meeting except in cases where it is clearly not appropriate. Whilst this consultation response is not the place for us to provide its detailed response to that report, we note that many of the issues raised by the consultation are explored in detail by the expert group which authored Scottish Mediation's report.

While we consider that Personal Injury actions should be excluded from the proposed mandatory mediation for the reasons discussed above, for the avoidance of doubt, we do not consider that the exclusion should extend to defamation actions and those should be subject to mandatory mediation as proposed.

Edinburgh
20 August 2019