Draft Mediation (Scotland) Bill Consultation

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Background. I have been involved in mediation since 2003 (initially as a user of mediation services on behalf of my former major bank employer) and in 2009 was accredited by Core Solutions Group, Edinburgh. I was in my former banking career role responsible for litigation of very high value and low value claims as both Claimant and Respondent. I currently regularly mediate Simple Procedure cases on behalf of Edinburgh Sheriff Court.

I have provided input into the consultation response to the draft Bill from Edinburgh Sheriff Court Mediation Service and respectfully highlight below in summary form what in my experience are some key observations made with the benefit of having considered carefully Scottish Mediation's recent report and the draft Bill.

Key Points

1. I commend to you Scottish Mediation's above report and its proposals which I believe to be a thorough, well thought through and excellent piece of work. If implemented I do believe the report's proposals would indeed achieve the desired step change in the use and consistency of mediation services in Scotland.

2. Such a step change is only likely to be achieved if Parties are incentivised in terms of costs. This is I believe the case at all levels of claim value and is not merely the case in Simple Procedure claims. The present mediation service provided by Edinburgh Sherriff Court is provided without cost to the Parties and any future change in this policy may have a negative impact on mediation uptake.

3. The proposals put forward in Scottish Mediation's report can only be implemented if commensurate central funding is provided. It is my opinion present (inadequate) mediation infrastructure should be used where possible and improved upon when implementation of Scottish Mediation's proposals takes place. I would however suggest that there may well be benefit (and reduced funding cost implications) if implementation takes place on a phased rolled-out basis from the principal mediation centres to in due course all sheriffdoms.

4. Parties irrespective of claim value should be required to state in seeking to lodge their claim (or in responding to a proposed claim) if they are prepared to enter (voluntary) mediation. If not, Parties should be required to give reason(s) for not being prepared to mediate.

5. Mediation should be available at any stage during the judicial process and before a claim is lodged. I also see considerable merit in British Columbia's 'Notice to Mediate' system being available to Parties.

6. Solicitors and Advocates should be required to evidence they have advised their clients on dispute resolution options including mediation.

7. ‘Evaluative’ mediation may well serve only to confuse (particularly for low value cases where seldom are Parties legally advised) and runs the risk of ‘lawyering’ mediation. Many (part-time) mediators bring to mediation experience from diverse backgrounds other than legal backgrounds and in doing so enrich the mediation process.

8. Matters should be kept as straightforward as possible and as far as Simple Procedure cases are concerned greater mediation uptake is likely to result under a system where mediators are allocated by the court mediation service rather than the Parties in dispute choosing and seeking to agree upon a choice of mediator.

9. Mediation is not labour intensive, and the reality is a business model entirely dependent on mediation (as opposed to mediation combined with say offering training in mediation) is almost certainly not viable. Most mediators mediate only on a part-time basis and necessarily derive income from other non-mediation work.

Sandy Wilson

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