

# Structural Challenges

## 1. Coordinating uniform implementation

To normalise the use of mediation in civil disputes and ensure uniform availability across Scotland's courts and tribunals, a coordinated case management approach, with appropriate administrative capacity is needed. Providing a new viable pathway in civil justice means introducing a minimal degree of compulsion, to ensure parties engage in the process.

### *Recommendations (Chapter 5)*

- 1.** A degree of compulsion should be introduced into the system to encourage the parties to consider mediation. Where mediation is appropriate, parties should be required to attend a mediation session before their court or tribunal case can proceed.
- 2.** An 'Early Dispute Resolution Office' (EDRO) should be established, to 1) review cases and direct them where appropriate to mediation (or other more appropriate form of dispute resolution (DR)) and 2) coordinate the mediation process. It should build on existing structures within the courts and tribunals, to make the most effective use of existing resources.
- 3.** There should be a presumption that cases will be referred to mediation unless there is a good reason not to do so.
- 4.** The EDRO referral system should be implemented via a two-pronged approach: 1) court rules requiring sheriffs and judges to encourage parties to consider mediation where appropriate and 2) introducing mandatory referrals to mediation via legislation, with provision for 'special cause exemptions' under a prescribed list of grounds.
- 5.** An online mediator 'roster' should be introduced, which will be used by the EDRO to make mediation referrals.
- 6.** The requirement to attend an initial mediation meeting should be subject to a 'special cause exemption' provision. While the legislation should not prescribe a list of reasons for exemption, the situations in which special cause exemption may readily apply include:
  - 1.** *Mediation has already taken place, or a mediator is currently engaged*
  - 2.** *Existence of time-bar (unless provided for in legislation)*
  - 3.** *Contractual clauses stipulate specific DR method*
  - 4.** *Another preferable DR method exists*
  - 5.** *The case involves a protective order or enforcement order*
  - 6.** *Disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence.\**
- 7.** Provision should be made for mediation to be available before a court action is raised, as well as during a court action.
- 8.** Unrepresented parties should have access to advice about their legal rights before agreeing to participate in mediation, possibly through in-court advice services.
- 9.** An appropriate data collection mechanism should be embedded in the new system from the start, to ensure that effective evaluations and reviews can be carried out.

\* We are clear that cases of domestic abuse, sexual violence or any other gender based violence should not be required to provide evidence of the abuse or violence. It will be vital that experts in the field of gender based violence are involved in implementation of the proposals

## 2. Proportionate cost/incentivising mediation

All parties, regardless of their financial resources, must be able to mediate their dispute. Consequently, there must be proper funding for low-value cases and for medium to higher value cases, the cost must be proportionate and set at a level which incentivises the use of mediation.

### Recommendations (Chapter 6)

- 10.** Publicly funded free or very low-cost mediation should be made available for those involved in simple procedure (lower value claims).
- 11.** In ordinary cause (medium-higher value claims) and Court of Session actions, a suitable price point should be identified, above which parties should pay commercial rates agreed with the mediator.
- 12.** Below this point, as well as where there is no clear monetary value, appropriate models should be considered, with the goal of proportionate cost and incentivising mediation. Based on international models, it is anticipated that in many cases, the fee payable by each party is likely to be no more than a few hundred pounds.
- 13.** For tribunals, mediation should be publicly funded where appropriate.
- 14.** Mediators should be appropriately remunerated for their work.
- 15.** A firm commitment should be made to ensuring that everyone in Scotland can use mediation to resolve their dispute, regardless of income or their location.

## 3. Clearer signalling of quality standards

It is important to establish the credibility and legitimacy of a mediation pathway in civil justice. To achieve this, the EDRO must be able to refer parties to a body of professionals, which signals clearly to consumers, judges and others working within the system its quality standards, its accreditation process, and that it has an effective and straightforward complaints and disciplinary procedure. Care must be taken, however, not to over-regulate this emerging profession, to avoid mediation being 'legalised' and ending up as an adjunct of the litigation system. Solicitors and advocates play a critical role in the civil justice system, providing advice and guidance for parties seeking to resolve disputes. It is reasonable and appropriate that they advise clients of all the options available to them for resolving their dispute.

### Recommendations (Chapter 7)

- 16.** There should be clear and robust minimum standards and accreditation requirements for admittance to the roster, and an effective and accessible complaints and disciplinary procedure for roster mediators.
- 17.** A robust requirement should be introduced on solicitors and advocates to inform clients of all dispute resolution methods including alternatives to litigation.

## 4. Consistent messaging in rules

Courts, tribunals, and relevant legislation must provide a consistent message, which commits the civil justice system to resolving appropriate cases through mediation. Court and tribunal rules should affirm this commitment. Legislation will establish an appropriate regulatory regime and signal a shift to a multi-path civil justice system.

### Recommendations (Chapter 8)

- 18.** As part of the SCJC rewrite of court rules, rules should be introduced to place a duty on sheriffs and judges to encourage mediation unless there are good reasons for not doing so.
- 19.** Primary legislation in the form of a Mediation Act should be introduced. This would: place a duty on Scottish Ministers to promote the use of mediation; set out a regulatory framework for roster mediators; set out the grounds for special cause exemption; formalise principles; provide definitions; endorse the components of a code of practice for mediators; provide for confidentiality in mediation; and signal a paradigm cultural shift for dispute resolution in Scotland

# Cultural Challenges

## 1. Changing professional receptiveness

To succeed in developing a new pathway for dispute resolution in civil justice, providing the required structural changes is only one aspect. There must be a coordinated effort to encourage a change in culture, which ensures that mediation becomes a normal way, except in cases which are eligible for special cause exemptions, to resolve civil disputes in Scotland. Education and training of the professionals involved, together with professional practice rules and guidance, are the primary tools for achieving this.

### *Recommendations (Chapter 9)*

- 20.** Mediation must become a core part of education and training pathways for solicitors and advocates.
- 21.** Consideration should be given to how non-lawyer advisers might best be trained in mediation.
- 22.** Sheriffs, judges and tribunal members should be trained on the mediation process, and on the EDRO and its functions.

## 2. Building Wider Awareness in Society

Efforts are also needed to achieve a broader cultural shift to mediating disputes, where appropriate, in Scotland. There is a need to build awareness of the benefits of using mediation and to encourage better dispute resolution choices by individuals, businesses and public and other bodies.

### *Recommendations (Chapter 9)*

- 23.** Businesses and public and other bodies should be targeted directly through sector-led initiatives to build awareness of mediation as a constructive choice for dispute resolution.
- 24.** The Scottish Government should commit to include mediation in dispute resolution clauses in its own contracts.
- 25.** Other public bodies should follow the Scottish Government's lead by including mediation clauses in their own contracts.
- 26.** The Scottish Government should consider carrying out research into public awareness of mediation prior to implementation of the measures proposed in this report.
- 27.** Steps should be taken to increase awareness of mediation among members of the public, including the development of an online self-help 'portal' to direct people towards the possible options for resolving their disputes.

## 3. Embodying a New Dispute Resolution Culture

The intention behind this report is that over time, following the implementation of the various proposals described above, which aim to tackle the structural and cultural challenges identified, the Group's aim of 'normalising' mediation within civil justice will be achieved. In turn, this should help to normalise mediation across Scottish society more broadly, and the recommendations in this report taken together, should eventually lead to the embodiment of a new dispute resolution culture across Scotland. The Group views its proposals as part of a shift towards a society in which disputes and differences can be resolved, wherever possible, consensually.