

Justice Committee

Alternative Dispute Resolution

Written submission from Relationships Scotland

1. Background: The Courts Reform (Scotland) Act 2014 was passed in October 2014. The Bill followed on from recommendations in the Report of the Scottish Civil Courts Review published in 2009 and led by Lord Gill. The Review examined, “the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods having particular regard to the cost of litigation to individuals and the public purse; *the role of mediation and other methods of dispute resolution in relation to court process*; the development of modern methods of communication and case management and the specialisation of courts or procedure, including the relationship between the civil and criminal courts (italics ours).
2. Relationships Scotland acknowledges the support and encouragement that the Scottish Government already gives to mediation and the use of ADR where appropriate, but believes that additional action is required to secure a step change in the uptake of mediation for family actions, especially in relation to separation, divorce and child contact.
3. There has been a rule of court referral to mediation in Scotland (Sheriff Court Rule 33.22) for family actions since 1996. Relationships Scotland’s Family Mediation services have been helping families to resolve disputes arising from separation or divorce since 1984. We currently mediate over 2,000 cases per year. There are about 10,000 divorces each year in Scotland, and an unknown but likely equivalent number of separations leading to around 18,000 family law actions per year. Many more people could be helped to avoid the acrimonious and adversarial court process by being encouraged to find out more about family mediation as early in the process as possible.
4. Relationships Scotland is asking the Scottish Government to build on the support that they have provided to date and to take the next step in ensuring greater understanding and proper consideration of alternative methods of resolving disputes, particularly for family cases where an on-going parenting relationship is needed for the sake of the children.
5. Relationships Scotland would like to see the introduction of mandatory information meetings with a mediator, to find out more about the mediation process and how it might help, prior to hearing a family case in court. There would be no compulsion to mediate, only to find out more about the options available for resolving disputes. We believe this would deliver a step change in the use of family mediation, resulting in better outcomes for children and families. This would also deliver a significant saving to the Scottish Court system and the Scottish legal aid bill.
6. We recognise that there are some cases where mediation is not appropriate, for example when domestic abuse is an issue, and processes would be set up to

respond to that appropriately. We also appreciate that there needs to be confidence in the competency and professionalism of the mediators. We are fortunate in Scotland in already having a system in place to ensure that mediators are trained, assessed and working appropriately. The Lord President of the Court of Session approves organisations to accredit mediators for the purposes of the Civil Evidence (Family Mediation) Scotland Act 1995 and there are rigorous procedures in place to ensure standards are maintained. Relationships Scotland family mediators, of which there are about 80 working across the country, are all professionally trained and our current course has been credit rated by Napier University at SCQF level 9. Our mediators are required to undertake a minimum number of hours of casework per year. They are also required to participate in clinical supervision and on-going training (Continuing Professional Development) in order to remain on the Register of practicing mediators within the network. Mediators work to the Relationships Scotland Code of Professional Conduct for Family Mediators and to a number of National and local policies including those relating to equality, safety and protection. Relationships Scotland's National Office reports annually to the Lord President's office and participates in a three yearly approval process as an organization approved to accredit mediators.

7. Relationships Scotland already has a process in place to assess, manage and monitor risks, including those arising from domestic abuse and child protection concerns. Parties are all offered an initial separate intake meeting with a trained worker where issues are explored and the appropriateness of mediation is discussed. There is no requirement to proceed to mediation. Where it is decided that mediation is not appropriate the mediation service assumes responsibility for the decision and informs any referring agencies, including the court. Parties are supported to make contact with other agencies that can help.
8. Around 15% of Relationships Scotland's mediation cases are currently referred from the courts. Practice varies throughout the country, however, with some sheriffs choosing to use the rule of court referral (33.22) and others not. In one area 40% of cases are referred from the court, in others it is nearer 2%. If it became standard practice that all sheriffs would refer parties to consider family mediation it is likely that this option would be investigated earlier in the legal process, leading to fewer family actions and better outcomes for families.
9. By referring family cases to Relationships Scotland services parties are also able to explore other support services that might help, for example relationship counselling and child contact centres. Parents often find that using a child contact centre is a stepping stone to establishing contact with a non-resident parent and they can subsequently make their own arrangements without reverting to the courts. 23% of Relationships Scotland's child contact centre cases are currently referred from the courts.
10. Many respondents to previous consultations have felt that ADR 'should not be compulsory or mandatory and/or that there should not be sanctions to compel individuals to make use of ADR'. Relationships Scotland agrees that there should not be compulsion to make use of ADR, but that some level of compulsion to find out about mediation, and perhaps other services such as

Parenting Apart Groups (which are run by Relationships Scotland), in order to make an informed choice would be of significant benefit.

11. Stuart Valentine, Chief Executive of Relationships Scotland has previously written on this subject and his article, published in the Scotsman in Feb 2014, is included in Appendix 1 for reference.

Stuart Valentine,
Chief Executive
Relationships Scotland
2 February 2018

Appendix 1 – Mandatory Mediation for Scotland?

Article published in the Scotsman, 12 Feb 2014.

Stuart Valentine, Chief Executive of Relationships Scotland, presents the case for some level of automatic compulsion from the Scottish Courts system to be introduced to increase the use of family mediation.

- *There are 10,000 divorces each year in Scotland, with an annual total of around 18,000 family law actions. 45% of all separating couples, whether married or not, seek the professional help of a solicitor or family mediator.*
- *Relationships Scotland is the sole voluntary sector provider of family mediation in the country. Their local services support over 2,000 people each year who are separating to agree the future care of their children.*
- *It is estimated that around 70% of family mediations end in full or partial agreement.*

Family mediation helps resolve issues between separating couples more quickly and more cheaply than those cases that go through the courts. Family mediators work directly with separating partners to improve communication, reduce conflict and to help the couple themselves agree on practical, workable arrangements for the future care of their children. It is estimated that around 70% of mediations result in an agreement being reached.

Mediation is currently receiving high levels of media attention across the UK, The Westminster government is currently progressing legislation to require separating couples involved in parenting or financial disputes to meet with a mediator prior to going to court. The new Children and Families Bill will, however, only apply to England and Wales. Scotland has a different legal system in the area of family law and currently there is no level of automatic compulsion for separating couples to consider family mediation. This often leaves court action as the default route for many, resulting in longer, more expensive and more damaging disputes between separating couples.

No one would dispute that divorce and separation are a challenging process for all concerned, and that children are often caught in the middle of a war that is raging around them. Parents often lose their focus on their children as they battle with their ex-partner to determine who gets what, and who the children are going to live and spend their time with.

Lawyers are the first port of call for many separating couples, and legal advice is important. It can, however, further polarise separating couples as each solicitor acts in the best interest of their own client. By the time the case gets to court accusations will often have been made, positions may have become entrenched and conflict will have frequently escalated.

There is, however, a better way to resolve disputes, and this has been recognised by the Scottish Government and judiciary for some time. The proposed reforms to the Civil Justice system in Scotland, through the Courts Reform Bill, include the increased use of alternative dispute resolution (or ADR) processes including mediation, and for a range of issues not just family cases. There has been a rule of court referral to mediation in Scotland (sheriff court rule 33.22) for family actions

since 1996. Judges may refer couples to a mediator to encourage them to resolve their disputes themselves. Additionally, the Civil Evidence (Family Mediation) (Scotland) Act 1995 ensures that the matters discussed in mediation cannot be used as evidence in court, where the mediation has been conducted by a mediator accredited to a specified mediation organisation. This means that people can talk more openly in mediation without the concern that what they say will be used against them in court. In Scotland the only two organisations approved to accredit mediators for the purposes of this Act are Relationships Scotland and the Law Society of Scotland.

But there is still a problem in Scotland. The level of awareness and understanding about family mediation remain low. Many people haven't heard about mediation, haven't needed to use a mediator and aren't sure what the process involves. When crisis hits, many couples will automatically think that their first port of call is to see a solicitor. Making it compulsory for couples to see an accredited family mediator before going to court, to determine if mediation is right for them, would ensure that they had considered all the options open to them. In Scotland, if introduced, the mandatory requirement would be to attend an information meeting where the individual's situation can be explored, the mediation process would be explained, and a decision made as to the best option for resolving the dispute – which may or may not be mediation.

There are certain situations, for example where there are domestic abuse issues or child protection concerns, where mediation would not be appropriate and in such cases there would be no requirement for couples to explore the potential of family mediation. Mediation is, essentially, a voluntary process in which people need to be prepared to listen, discuss and negotiate. Compulsory referral to mediation, to find out what it is all about, would however shed light on a process that could lead to better outcomes for many families.

The UK government is encouraging families in England and Wales to resolve their disputes without recall to the court process, wherever possible. Relationships Scotland believes that this is better for children and families. The Scottish government is also supporting families to work together in the best interests of their children, however we believe it could go further in ensuring greater understanding and proper consideration of alternative methods of resolving disputes. Mandatory meetings with a mediator, to find out more about the mediation process and how it might help, prior to hearing a family case in court, would deliver a step change in the use of family mediation, resulting in better outcomes for children and families. This would also deliver a significant saving to the Scottish Court system and the Scottish legal aid bill.

Anyone wanting to find out more about family mediation and the work of Relationships Scotland can go to www.relationships-scotland.org.uk or call 0845 119 2020.