

For the children's sake

1. What is the problem our innovation addresses?

Problem: Access to justice in the family context.

For families living at the bottom of the pyramid in South Africa there is a pressing need for access to justice in the family context: judicial, social and community services are overwhelmed, court rolls are overloaded and matters are delayed. The need is so urgent, so widespread and so damaging that it is a crisis. That it is enduring, unseen and institutionalized does not detract from this status.

In disputes concerning children, children are often forgotten in the toxic dialogue of prolonged parental antagonism; they remain part of the tug-of-war and suffer permanent health and psychiatric issues. It's impossible to ignore the trauma imposed upon children as secondary participants in family conflict. Their negative lifelong consequences, the ripple effect, and the erosion of social cohesion is a crisis.

Court applications can take eighteen months for an order to be made even in the lower courts. For alienated parents to wait this long for a parenting plan regulating the care and contact with their children, it is a crisis. To a father waiting this long to exercise his right for access to his child(ren) it is a crisis.

The Children's Act requires that disputes concerning children be mediated by a suitably qualified person but this facility is by and large unavailable. Within the state apparatus there are virtually no resources to resolve parental conflict in a restorative way and in the best interests of the children. This is a crisis.

In family disputes in the domestic violence context (complicated by the fact that a victim and perpetrator often share financial, social and familial ties) the volume of cases pressurises courts into an expedient outcome. The problem is the absence of a therapeutic justice approach. This is a crisis. Orders and interdicts often inflame a situation when what is needed is a deeper attention to relational issues and an attempt at resolution.

How solving the problem helps peoples' lives.

Dispute resolution by mediation rather than by court order has comparative positive outcomes, it saves time and trauma, it reduces court rolls and it provides "justice that works".

Solving the problem for children. By assisting parents in conflict regarding child(ren) to resolve their dispute speedily, cooperatively, and with the child's voice being heard (when appropriate), leads to the best interests of the child being served.

Domestic Violence. Appropriate issues of domestic abuse are better resolved by a therapeutic approach rather than by a court order.

In both cases parties support what they co-create, don't sabotage what is imposed on them and this leads to better family cohesion and in turn to social cohesion.

By scaling what we do (*pro bono* court referred mediation), this will assist the government in its mandate by reducing court caseloads and time to resolution, leading to an improvement in the administration of justice in South Africa. The saving in human suffering is immeasurable.

How does this problem impact people?

This problem affects virtually all litigating/disputing families in SA who can't afford to pay for help.

Most people/litigants in our context live in multigeneration homes. Family disputes, whether they concern children or violence negatively affect between six and ten persons per case. Social cohesion also suffers, increasing the reach of the problem. We are not able to quantify the numbers who suffer countrywide.

Presently our pilot operation positively affects at least 2000 persons per year. As we scale, we expect this to multiply by a factor of ten in three to five years, continually increasing thereafter with accumulating positive outcomes.

2 Our theory of change

Our theory of change: By intervening in an overloaded court system and providing speedy, accessibility to family dispute resolution, the best interests of children are served and family and social cohesion is improved.

Our solution is restorative justice by pro-bono mediation of court-referred matters. We are a voluntary, private, philanthropic initiative assisting the government in its mandate to provide access to justice.

Our innovation is a rather unique public/private partnership. We recruit and manage an association 30 to 40 social work, mental health and legal professionals (and accredited mediators), who work pro bono in court-referred family disputes. Because our constituents are unable to afford paid-for mediation, we create solutions to difficult problems that otherwise would have remained unsolved. We support five individual magistrates' courts in Wynberg Cape Town, South Africa. We recruit and train mediators, we provide orientation for magistrates and their clerks, and we use a basic case management process that interfaces court-referred cases with mediator-expertise and availability. All on a zero budget. (apart from a 2019/20 Hague Institute for Innovation in Law grant that was used to register our organisation as a PBO, and to develop an improved case management system).

By providing free mediation services we help provide workable, enforceable, therapeutic parenting solutions, and help parents in conflict to learn how to work cooperatively with each. Examples of our deliverables are: parenting plans crafted in line with the Children's Act, and with the child's voice being heard. Solutions for parties in appropriate domestic violence matters to resolve their disputes therapeutically, and to restore their relationships where, and as far as is possible.

Matters are referred to us by the Family and Domestic Violence Courts We provide access to the right resources and the parties' buy-in to the solution. Parties appear in court after mediation where the mediated agreement is made an order of court. The litigation process is resolved completely.

Our effectiveness and impact

We do not have the resources to research and access the impact of our work quantitatively. It is a specific aim of our scaling and expansion that we ensure we have sufficient resources to enable us to do impact analysis. We do keep a record of the mediations that we undertake, and a fair measurement of the success rate (80%). Measurable success is a mediated parenting plan or maintenance agreement that is made an order of court, or for example, the withdrawal of an application for an interdict in a domestic violence matter because the applicant feels an interdict no longer serves her/his needs.

Qualitatively our success is measured by the feedback given by parties to the individual magistrates on their experience at their court hearing on their return date, where their agreement is made an order of court. (some magistrates make a note of this feedback in the court file). There is the overt positive change in parties' attitudes at the beginning of the mediation compared to the end, when an agreement has been reached and the matter has been resolved. Even though a specific outcome may not have been achieved, the more subtle changes in parties' attitudes and emotional states as a consequence of receiving our attention and assistance are evidence of success. Tears of relief are common.

Word-of-mouth to magistrates in other jurisdictions has resulted in us being asked to do ad hoc mediations of difficult matters for them, and with requests to expand our services to their courts when we are able to do so. Finally, comments from magistrates to other magistrates that get reported to us, and I quote an example "this mediation is a rip-roaring success, a rip-roaring success, a rip-roaring success" (yes three times).

Presently, we operate in the Wynberg courts only. The strategy 'for the children's sake' is to expand its operations to other magistrates' courts in South Africa, and to offer information and mediation for parenting plans and co-parenting online. In 2021 our intention is to duplicate our model in other courts in Cape Town. From year two we begin the court roll-out country wide.

The political will exists, and appropriate legislation is in place for mediation to happen in courts countrywide. We have met with the DOJ at the right level and office holders are very supportive of mediation in general and is on-sides with our initiative.

In the long term we will use Justice's intention to digitise the department to help achieve scalability. We will streamline our case management process within the courts and include an online process of self-help to enable parties to get an understanding of logistics and parenting plans before going to court.

3 Who does our solution impact?

Access to justice problem impacts everyone who approaches the court unassisted for the resolution of a family dispute, either concerning children or in the domestic violence/harassment context.

We are called "for the children's sake". Our primary target beneficiaries are children. Our intention is to minimize the damage suffered during prolonged parental conflict. However, to deliver our benefits we have to work through the parents. This means we provide coparenting skills and tools, and help parents to work together in the best interests of the children. Disputing parents benefit directly anyway, even if their fight generates marginal trauma to their child(ren).

In matters referred by the DV/harassment courts it is adults engaged in the conflict that benefit directly from a therapeutic approach to their problem. (If there are children involved, they are secondary beneficiaries). It is mostly women who are the applicants, and whose suffering is relieved by the deeper relational issues attended to in a mediated solution to the problem.

The courts benefit. In an overloaded system, family magistrates see 12 to 18 cases per day. They have no time to try and resolve complicated matters, and in the absence of any alternative have to make a finding without being in possession of all the facts and nuances. Diverting matters to mediation lightens up the court roll, remaining parties get better attention and magistrates are less stressed.

The vast majority of our constituents are 'black' people, and range from the unemployed (we have a 35 to 40% unemployment rate in this country), through poor to low-income earners.

4 What has been achieved to date and how many people does our solution currently serve?

Up to now we have mediated over 1200 matters, positively affected over 8000 people, reduced the load on the courts and delivered justice that is accessible and easy to understand. Over 80% of cases are successfully resolved, and the time and emotional damage prevented is difficult to measure. It is justice that works.

Our strategy is to extend our services to other magistrates' courts in greater Cape Town initially, (we have already undertaken pilot mediations) and then throughout South Africa.

Currently our mediator membership is drawn from the social work, mental health and legal professions. We provide training and hands-on co-mediation opportunities for novice mediators. As we scale, we will include nonprofessional members of the communities in which we work and we will provide training and orientation.

The DoJ, through the South African Law Reform Commission, intends to solve the problem of family dispute resolution and parental care and contact with children issues via mediation (eventually).

Our services are an example to what can be achieved by the private sector taking the initiative. When the DoJ eventually does introduce mediation formally in the family space, there will already be trained and experienced mediators able to be drawn into the formal system.

We routinely serve four courts in a single complex. Each court refers at least two matters per week. (Each mediation can comprise multiple case files and multiple parties). Most of our disputants live in multigenerational homes with between six and eight people on average directly benefitting from a mediated solution, with an unknown additional ripple effect into the community. We average about 8 mediations per week, and at our measured success rate of 80%, we positively affect about 60 people per week, 250 per month. In an 11-month service year that's about 2500 to 2700 beneficiaries per year (excluding the ripple effect).

Our degree of scaling is dependent on our funding success. Our strategy is to operate in at least 20 more courts after 3 years. This would provide approximately 10,000 beneficiaries per year by year 5. Eventually 40 000 beneficiaries per year country wide should be possible.

5 What make our solution better, more cost-effective and more appealing than alternatives?

The problem: families in dispute need justice in the form of therapeutic jurisprudence, and the courts are unable to provide this.

Existing alternative solutions: Paid counselors, attorneys or mediators. The family advocates' office.

Our solution differs from existing alternative solutions in the following ways: paid counsellors, attorneys and mediators are unaffordable to our constituents. The family advocates office is extremely overloaded with waiting periods of up to 6 months for assistance for a first court application and their services are purely legalistic with no attempt to resolve any underlying problem. Courts eventually hear adversarial arguments and impose a ruling

(solution) upon the parties. It is generally a win/lose result and the parties are often further alienated from each other.

Our solution differs is free to users, and it is speedy. Mediation applies a therapeutic approach to the resolution of the problem and the parties themselves agree on a solution. It is not imposed upon them.

The advantages of our solution; Parties appear in court immediately after the mediation and their solution, eg parenting plan, is made an order of court. The matter is resolved completely. (It is a tenet of mediation that parties keep agreement they co-create as opposed to those that are imposed upon them). The parties almost always emerge from the process with an improved relationship.

Our solution is radically different to the standard development which the advancement of alternate dispute resolution (ADR) within the DoJ. This development process is via the legislative route, of enquiries, discussions and eventual legislation. This process has been in 'progress' for more than 10 years and it is probable that another 10 years will pass before mediation is in place within the DoJ. By that time our solution, which enjoys the approval of the DoJ, will be comprehensively established in its own right, and able to support and assist the formalized introduction of ADR with resources.

This is taken from the South African Law Reform Commission discussion paper 100/2015.

Long court battles often cause harm to children and their relationships with their parents. Cases that are especially problematic are those where there are claims of violence or abuse, cases which have care and contact or care and protection issues, or cases that involve voluminous files or recurring litigation.

There is no coherent procedural family law system in place. As a result, a patchwork of piecemeal measures in response to short-term demands and resource crises is applied. The result is an unstructured dual and fragmented court system that is confusing and burdensome to users, expensive to operate and fails to satisfy many people.

Therefore, a proper evaluation of the family dispute resolution processes is called for. Courts and their orders are neither the best venue nor the best vehicle to resolve matters affecting children, who are often relegated to being innocent bystanders between two warring factions.

This is taken from the South African Law Reform Commission discussion paper 148 June 2020

4.1.1 Given the country's unjust and unequal past,¹ the concept of access to justice is valued highly and is regarded as "an inalienable constitutional right flowing from its constitutional democracy".

4.1.7 Based on the above, access to justice in a civil justice system may therefore be deemed to include the right of access to courts together with other affordable, procedurally simple, and expedient methods of alternative dispute resolution.

4.1.8 In its comments to the Rules Board, the LSSA, for example, indicated that it viewed the move towards mediation a positive one if the aim and outcome are to make justice more accessible.