

Proposed Mediation (Scotland) Bill

Introduction

A proposal for a Bill to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator. The consultation runs from 29 May 2019 to 20 August 2019. All those wishing to respond to the consultation are strongly encouraged to enter their responses electronically through this survey. This makes collation of responses much simpler and quicker. However, the option also exists of sending in a separate response (in hard copy or by other electronic means such as e-mail), and details of how to do so are included in the member's consultation document. Questions marked with an asterisk (*) require an answer. All responses must include a name and contact details. Names will only be published if you give us permission, and contact details are never published – but we may use them to contact you if there is a query about your response. If you do not include a name and/or contact details, we may have to disregard your response. Please note that you must complete the survey in order for your response to be accepted. If you don't wish to complete the survey in a single session, you can choose "Save and Continue later" at any point. Whilst you have the option to skip particular questions, you must continue to the end of the survey and press "Submit" to have your response fully recorded. Please ensure you have read the consultation document before responding to any of the questions that follow. In particular, you should read the information contained in the document about how your response will be handled. The consultation document is available here: [Consultation document Privacy Notice](#)

I confirm that I have read and understood the Privacy Notice attached to this consultation which explains how my personal data will be used

About you

Please choose whether you are responding as an individual or on behalf of an organisation. Note: If you choose "individual" and consent to have the response published, it will appear under your own name. If you choose "on behalf of an organisation" and consent to have the response published, it will be published under the organisation's name.

an individual

Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)

Academic with expertise in a relevant subject

Please select the category which best describes your organisation

No Response

Please choose one of the following:

I am content for this response to be published and attributed to me or my organisation

Please provide your name or the name of your organisation. (Note: the name will not be published if you have asked for the response to be anonymous or "not for publication". Otherwise this is the name that will be published with your response).

Dr Andrey Kotelnikov - Lecturer, The Law School, Robert Gordon University (Aberdeen)

Please provide details of a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. We will not publish these details.

Aim and approach

Q1. Which of the following best expresses your view of legislating to increase the use and consistency of mediation services for civil cases in Scotland?

Fully supportive

Please explain the reasons for your response.

The benefits of mediation are well understood among the legal profession, academics and other stakeholders. However, there remain two notable directions of criticism. One concentrates on the categories of dispute that would benefit from going to trial rather than being settled behind closed doors; this line of argument goes back to Owen Fiss's article 'Against Settlement'. The other powerful objection considers the degree of compulsion that the government and the judiciary ought to exercise to encourage ADR in preference to litigation – see, e.g., the various works by Dame Hazel Genn. In this light, there is no reason in principle to oppose the proposed Bill as such. The devil, however, lies in detail. There is no doubt that mediation is underused in Scotland. For example, despite the success of the 2010 pilot, in Aberdeen, there are currently only a handful of mediation service providers dealing with a modest number of disputes. I have once had conversations with a professional mediator who pointed out that a lion's share of their income was coming from education and training rather than actual mediations. In my opinion, the regulation of this matter by an Act of the Scottish Parliament is a sensible and desirable way forward. Another viable option could be through the amendment of Court Rules - but it would not bring the same uniformity, and could require considerable time to work out. The solicitors already have a statutory duty to consider various ADR options and make their clients aware of those; this duty does not seem to have had a huge effect on the uptake of mediation in Scotland. At the end of the day, neither the judiciary nor the legal profession has any powerful incentives to upset the status quo and promote mediation to a greater extent than it is now.

Details of the proposal

Q2. Which of the following best expresses your view of requiring the parties to a civil court case (unless it is an excluded case) to complete a self-test questionnaire and attend a mandatory Mediation Information Session with a duty mediator?

Partially supportive

Please explain the reasons for your response.

The proposal strikes a sensible balance between ensuring that the parties are well-informed about the possibility and the advantages of mediation, and the need to keep their involvement one hundred per cent

Q2. Which of the following best expresses your view of requiring the parties to a civil court case (unless it is an excluded case) to complete a self-test questionnaire and attend a mandatory Mediation Information Session with a duty mediator?

voluntary. The existing research demonstrates that settlement and satisfaction rates plummet if the process becomes compulsory. The English approach relying on cost sanctions has been rightly characterised as quasi-compulsory, and there has been a lot of criticism in the academic literature of the approach south of the border. One might be tempted to argue that the proposed bill does not go far enough in leading the parties to mediation. However, the beauty of this proposal is that it by no means precludes further steps in the same direction, should they be deemed necessary. Any additional steps remain perfectly possible. It may sound obvious, but I would insist that the Act in its final form ought to specify that it is the parties themselves, or in case of organisations their suitable representatives with an authority to settle, that should be required to fill out the questionnaire and attend the Mediation Information Session – rather than their solicitors. The latter would be much more likely to deteriorate into a tick-box exercise and ultimately a waste of time and money for everyone concerned. I have one reservation about the duty mediator - please see below.

Q3. Which of the following cases (if any) do you agree should be excluded from the requirement to complete a self-test questionnaire and attend a Mediation Information Session (tick all that apply)?

None of the above

Please explain the reason for your response.

While the list makes sense in principle, it may be better to keep it indicative, subject to the sheriff's discretion, rather than mandatory. On the one hand, some individual claims falling under the categories within the list may turn out to be perfectly suitable for mediation. For example, some judicial review cases do settle, and the parties may well be able to find a much better solution than a standard legal remedy would offer. A blank exclusion could deprive the parties of a valuable opportunity. On the other hand, some cases not listed in the proposal could be quite unsuitable for mediation. For example, Lord Jackson's review of civil litigation costs found that large commercial cases between sophisticated parties did not benefit much from the introduction of a pre-action protocol, because such parties would have already exhausted all opportunities for settlement before initiating the proceedings. What's more, the parties' contract may provide for several rounds of negotiation between progressively senior managers of the parties (as it is often the case in the UK oil and gas industry), or provide for mediation which the parties may have already attempted before drafting their initial writ. It may be next to impossible to categorise all such cases, which suggests that judicial discretion might be a better solution.

Q4. Which of the following best expresses your view of giving parties who agree to mediate access to a process that can lead to a Mediation Agreement and, where appropriate, a Mediation Settlement Agreement?

Fully supportive

Please explain the reasons for this response.

I would support in particular the introduction of this new terminology into the legislation - a Mediation Commencement Agreement and a Mediation Settlement Agreement. All too often, the term 'mediation agreement' sounds too ambiguous. Additionally, as it has been done in other jurisdictions, Mediation Commencement Agreement may – in this proposed Act or subsequently – be provided with some procedural consequences, such as pausing the statute of limitations for any connected claims or counter-claims. The consultation document suggests, and I would strongly support this suggestion, that the parties may opt to make their settlement agreement immediately enforceable by affirming it by a decree of the court. This lack of immediate enforceability has been a downside of mediation for a long time. If one has to go to court again to enforce the mediation settlement agreement, this largely defeats the purpose of having to mediate in the first place. By adopting this approach, Scotland would also align itself with the latest development on the international scene, the signing of the Singapore Convention on Mediation in August 2019, which increases the enforceability of settlement agreements arising out of mediation.

Q5. Which of the following best expresses your view of giving the Scottish Ministers power to extend the mandatory part of the process (the self-test questionnaire and Mediation Information Session) so that it applies to potential litigants who are yet to go to court?

Partially supportive

Please explain the reasons for your response.

As I argued above, it may be better to keep the list of exclusions indicative, subject to the sheriff's discretion in every individual case. The Scottish Ministers may be in a suitable position, however, to provide further guidance on the criteria.

Financial implications

Q6. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in cost	Some increase in cost	Broadly cost-neutral	Some reduction in cost	Significant reduction in cost	Unsure
(a) Government (including court services, legal aid etc.)		X				
(b) Businesses				X		
(c) Third Sector organisations			X			
(d) Mediators and mediation organisations					X	
(e) Individuals				X		

Please explain the reasons for your response.

An investment into setting up the system, the suitable premises, and the salary of the duty mediator would represent a cost that has to be covered. In the long run, it is likely to be offset by freeing up judicial time and resources, but that impact would be harder to quantify with precision. Mediators and mediation organisations are likely to welcome this step as it would bring additional business their way. Finally, the litigants are unlikely to be overburdened with the new requirements, and even if only a fraction of cases get settled in mediation, overall this would mean less spending on legal fees for litigants as a class.

Q7. Are there ways in which the Bill could achieve its aim more cost-effectively (e.g. by reducing costs or increasing savings)?

The figure of a duty mediator does invite some questions. It might be worth considering the alternative of accrediting several mediation organisations who might be prepared to perform this function free of charge, given the possibility of further mediation that would attract a fee.

Equalities

Q8. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, maternity and pregnancy, marriage and civil partnership, race, religion or belief, sex, sexual orientation?

Neutral (neither positive nor negative)

Q9. In what ways could any negative impact of the proposed Bill on equality be minimised or avoided?

N/a

Sustainability

Q10. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

Yes

Please explain the reasons for your response.

It is difficult to envisage any negative impact in those areas.

General

Q11. Do you have any other comments or suggestions on the proposal?

No Response