

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".)

Professional with experience in a relevant subject

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

I was the first solicitor to be accredited by the Law Society of Scotland as a family mediator and now I am retired from legal practice I continue to work as a family mediator freelance, as Inkdance Family Mediation, now on the Scottish Mediation Register. I am on the LSS mediation accreditation committee. I provide training in mediation skills.

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).

Anne Hall Dick

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.

Fully supportive of increasing the use and consistency of mediation services for civil cases in Scotland because there is insufficient awareness of the option and this would provide a clear endorsement from the justice system of the legitimacy of mediation as a dispute resolution option

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?

Fully supportive

Please explain the reasons for your response.

Fully supportive of requirement (other than in excluded cases) to complete a self-test questionnaire and attend a mandatory MIS with a duty mediator since it would ensure parties are clear about what is involved and a suitably qualified mediator could assess suitability. It would be important for those sessions to be individual ones and for the questionnaire to include questions to include preliminary checking about the possibility of domestic abuse or coercion. Duty mediators appointed would need to be fully aware of those issues. It is not entirely clear whether it is envisaged that the duty mediator would be present in court to see parties on the day. It refers to schemes where parties use mediation within the court building on the day of a hearing in simple cases. In family cases that is unlikely to be feasible in most cases. However the scheme appears to envisage the MIS taking place after the questionnaire is issued and before a court

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hearing. There would have to be some time constraint for attendance at the MIS but if it worked in that sequence the parties could make individual appointments outwith the court setting.

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)?

proceedings relating to the Abusive Behaviour and Sexual Harm (Scotland) Act, the Domestic Abuse (Scotland) Act and any other proceedings relating to domestic abuse and sexual harassment cases

any proceedings relating to civil actions for rape and other sexual offences

certain proceedings under the Family Law (Scotland) Act 2006, such as declarations of validity or dissolution of marriages

proceedings under the Arbitration (Scotland) Act

employment disputes which are governed by statutory dispute-resolution processes

judicial review proceedings

Please explain the reason for your response.

All the exclusions listed appear to be valid with the possible modification to excluding actions relating to the divorce or dissolution of civil partnership since there could be financial or child related claims which would be appropriate for mediation.

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?

Partially supportive

Please explain the reasons for this response.

Partially supportive of a process which can lead to a Mediation Commencement Agreement and where appropriate a Mediation Settlement Agreement. In the case of the Mediation Commencement Agreement there is reference to including in that document whether the mediation will be facilitative, evaluative or transformative. The definition of those approaches in the consultation document is necessarily truncated. Family mediation undertaken by lawyers accredited by the LSS is generally based on building on shared interests and needs to create mutually acceptable plans but will include elements of facilitative, evaluative and transformative mediation. In many cases children are involved and mediation is an important transition to being separated parents. It would be unhelpful to parties to restrict the scope of the style of mediation. Turning to the Mediation Settlement Agreement, there is a quote in the consultation document describing mediation which narrates that 'the outcome is not legally binding without further action taken by the people concerned' which is certainly the case in family mediation. A document narrating what has been identified as potential plans, called a summary by solicitors who are members of CALM, is often produced and in the case of matters concerning children might be enough of a road map for the family for the future. Alternatively, elements of what has been identified could become court orders with the assistance of advising lawyers. Plans in relation to financial aspects could be incorporated into binding agreements or court orders, again with the assistance of solicitors. It would change the nature of family mediation for the

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mediator to be involved in drawing up binding agreements and non binding summaries could be included as possible outcomes.

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?

Fully supportive

Please explain the reasons for your response.

Fully supportive of extending the mandatory part of the process to litigants yet to go to court on the basis that it is usually helpful for mediation to start as early as possible in a dispute

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						
(c) Third Sector organisations						
(d) Mediators and mediation organisations						
(e) Individuals					X	

Please explain the reasons for your response.

It is difficult to assess without data the potential financial impact but it might be expected that (a) It could reduce the overall cost to the Government by reducing the number of cases which are fully litigated. (b) Legal businesses might lose some income (c) Unsure about any impact on third sector organisations (d) Mediators and mediation organisations should find the impact either broadly cost neutral or to increase their income although initial training for those eligible to be duty mediators would have to be funded. (e) Individuals should in general find a reduction in cost which could be significant depending on the nature of the case though the costs would increase for those individuals who used the mediation process without resolving the dispute and subsequently went on with litigation

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

The Bill could probably achieve its aim more cost effectively by an effective information campaign, envisaged by the consultation, which would provide the public with an improved general level of understanding about the place of mediation

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?

Positive

Please explain the reasons for your response.

In terms of the impact on equality, mediation is likely to have a positive impact since it is a bespoke process which can respond to and cater for diverse needs and orientations.

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

Potential negative impact of language barriers could be minimised by making resources such as translation services available.

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 seems likely that the proposed Bill can be delivered sustainably and that the social and economic impacts would in fact be positive since it could help repair relationships and avoid financial resources being diminished because of fighting over them

General

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

This does seem a good way of moving away from the term 'ADR' as being seen as meaning 'alternative dispute resolution' and instead being seen as 'appropriate dispute resolution', which could include litigation as one option on the spectrum of dispute resolution, to reflect the reality that few disputes are in fact decided in court, most are resolved on an agreed basis, even once brought to court. It would help people find the best way of tackling their disputes in a way which left the court process readily available

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

for the minority of people who do need a third party decision and the protection of a court order. It would be essential for whoever acts in the capacity of a duty mediator to be aware of the different types of mediation and mediation services available for the particular type of dispute. The Expert Report produced recently by Scottish Mediation could provide useful pointers for the more detailed working through of the implementation of the proposal.