

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

Please select the category which best describes your organisation

No Response

Please choose one of the following:

I would like this response to be published anonymously

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).

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?

Neutral (neither support nor oppose)

Please explain the reasons for your response.

I'm not sure that legislation is necessary to increase the use and consistency of mediation. But I would suggest that if appropriately managed, it would not be bad thing - although the devil will be in the detail of the legislation.

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 opposed

Please explain the reasons for your response.

There is a danger about viewing civil court cases "as one". A small £10k dispute, in ordinary procedure, is not the same as a larger commercial dispute with commercial solicitors on both sides. The self-test questionnaire seems unnecessary, and would be a pointless step in 99% (or probably all) of my litigation. A mandatory Mediation Information Session would likewise be an expensive waste of time. First of all it should be noted that solicitors have a duty to ensure clients are informed about Alternative Dispute Resolution, and this includes mediation. I always encourage clients to consider this in appropriate cases (which is the vast majority of them). That does not mean that all cases go to mediation of course. Forcing people to go to what may be deemed a pointless exercise will diminish the value of mediation - which to be truly worthwhile needs to be an approach which both parties agree to voluntarily to resolve their disputes.

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

other cases (please specify)

Please explain the reason for your response.

At the very least, I would suggest removing actions in the commercial roll/commercial court from this. Albeit, that will still catch commercial actions in sheriff courts which do not have a commercial roll (e.g. I have commercial actions in REDACTED at the moment, which are ordinary actions, due to there not being commercial rolls in these courts).

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.

Style agreements, providing they are properly drafted etc, can be useful.

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 opposed

Please explain the reasons for your response.

This is unnecessary and will get in the way of the resolution of litigation in Scotland. It will make it an unattractive forum for resolving of disputes. It will lead to unnecessary delay and cost in the resolving of disputes.

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.

(a) - it will lead to another "step" in the process, perhaps with more hearings, leading to more cost. (b) - it will lead to additional unnecessary legal fees in dealing with additional mandatory steps in the process (d) it will lead to increase in costs but one would assume an increase in revenue (e) As (b) above (assuming they have solicitors - if party litigants, then perhaps cost neutral).

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

Yes, you could beef-up the requirements and duties on solicitors involved in litigation - to ensure they are properly advising on mediation/ADR. You could add flexibility into the rules to allow sheriffs/judges to suggest mediation and if parties wish to take that up, to allow them a process to follow (but no mandatory steps if not). Finally, you could if you so wished require a mandatory mediation process in situations where both sides are party litigants (although that would perhaps be a small number of cases).

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?

Unsure

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

No Response

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.

Providing changed to remove mandatory elements, there are ways in which it could be delivered sustainably to meet overall aims.

General

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

No Response