

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).

Prof Bryan Clark, University of Newcastle Law School

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.

My own view is that mediation has been present in Scotland for some time. The process has proven benefits but awareness levels amongst potential users and sections of the legal community (and judiciary) remain low. Given the patchwork availability of mediation in Scotland currently, I think a uniform referral process for simple procedure and potentially higher value cases is a step in the right direction.

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.

I am generally in favour of a mandatory mediation information and assessment meeting in this context. Mediation is a hard sell to those in dispute. Awareness levels are patchy. A MIAM would help ensure consistency of referral into mediation, has the potential to provide fair, balanced information to potential users about what mediation may hold for them and allow them to give informed participatory consent - important in the context of civil justice. It is important that MIAMs do not become exercises in selling mediation - although certainly user barriers caused by eg unfamiliarity, desire to win and potentially legal advice to the contrary may need to be overcome - but rather present a 'warts and all' neutral appraisal of what mediation may offer. I have written about this previously - see B Clark, 'I won't see you in court...' (2019) 2 Juridical Review 181-188 and also B. Clark 'No so simple? Court referred mediation in Scotland' Civil Justice Quarterly 2019 forthcoming. I am not as sure about the value of the self test questionnaire

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.

The exempted categories seem sensible. There is general consensus that mediation is inappropriate in cases where domestic abuse may be present. More generally, screening is important in the MIAM to route out cases where the power imbalances inherent in the dispute may be too great - eg where there may be issues around the capacity of one side to engage meaningfully in 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?

Fully supportive

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.

I certainly think that the earlier the better in so far as parties are enabled to make informed choices as to whether mediation may be in their best interests. The practicalities of this will need some thought.

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.

My own view here is that mediation can provide potential cost savings in the administration of civil justice - Ross and Bain tentatively conclude this in their previous study of small claims mediation in the Aberdeen and Glasgow sheriff courts. In this of course, there may need to be up front public spend - eg in funding duty mediators that may lead to savings - eg through reduction in judicial time in the future. I do not think that mediations after a MIAM can always be paid for by users. I argue (see Clark, 2019 Juridical Review article cited previously) that there should be a state subsidy of the mediation function itself (not just the MIAM) where it is provided free for some (in simple procedure, or at least lower value simple procedure cases), means tested perhaps (although administration of such approaches are admittedly difficult) with charges being levied for higher value cases (eg in ordinary cause). Charging too much will turn potential users away. That said, businesses and individuals using mediation should see their own costs in resolving disputes reduced. Mediators are likely to see an increase in work. For lawyers too, mediation does not necessarily herald the end of their involvement. They have a potential role to play as mediation representatives for their clients which is of course commonplace in commercial mediation currently in Scotland. There may be some increased administrative costs for mediation organisations, if for example, standards have to be raised/regulation needs to be more pronounced as the bonds are formed tighter between courts and mediation.

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

Trying to save money in the short term is likely to decrease the effectiveness of the measures set out in this proposal in the longer term and decrease potential cost savings in the longer term

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

General

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

I am generally supportive of this Bill and its main provisions. Evidence suggests that mediation is underused currently in Scottish civil justice and what we know from research is that parties often settle cases, and report positive experience, satisfaction with process and outcome and adhere to agreements reached in mediation. One concern I have reflects the lot of litigants in person who may often appear in simple procedure cases and other court actions. I do think that mediation may often prove a good option for them but the lack of any legal advice and assistance in the process is worrying from a justice perspective and to allow them to give informed consent to any outcomes agreed in the mediation (understanding what they are agreeing to and what they might be giving up in terms of possible legal claims). Some LiPs in simple procedure are vulnerable and may find it difficult to negotiate in mediation against more powerful, better informed opponents. The facilitative, impartial nature of mediation means that mediators may be limited in what they can do to bridge power gaps that exist. Greater access to some measure of legal or process assistance (provided by lay advisors perhaps in) simple procedure, or an expansion and greater role of in court advisors in mediation) would be a useful and proportionate development. I discuss this more fully in B Clark, "Not so simple? Court referred mediation in Scotland" Civil Justice Quarterly 2019, forthcoming.