

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.

on behalf of an organisation

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".)

No Response

Please select the category which best describes your organisation

Commercial organisation (company, business)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

Mediation provider in Scotland for 15 years. Organised the Glasgow and Aberdeen Mediation pilots,

Please select the category which best describes your organisation

currently provide commercial and workplace Mediation throughout Scotland and train government staff in conflict management.

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).

Catalyst Mediation Ltd

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.

Use of : For all the individual, societal, financial and judicial reasons in the proposal. Research in most countries supports common sense that being helped to solve your problems yourself is more satisfying than being told what to do - self-determination being a powerful motivator. Procedural Justice says you are happier with the outcome of a process if you have some input to it, rather than no control over stages, timing or in some cases understanding the language. Solutions you create are more likely to be followed through than those which are imposed, because you understand how they are in your best interests. Consistency of mediation : as with any service to the public, if they are paying for it, they will expect a level of professionalism in the provider. All mediators, however experienced, should have training in Court process and relevant law; they should also have their practice monitored at least once every two years and engage in supervision sessions to ensure their practice stays true to the principles of mediation. Scottish Mediation may or may not be the best "policing" body, but there should be one. Consistency of provision : given the case types suggested as being suitable, the party questionnaire and details of the mediation process should be issued to all parties, by all courts in all appropriate cases as a first step following intimation of the case being raised. The Courts are rightly concerned about the principle of Access to Justice, so to provide a route to justice as the parties view it in some courts but not others would be against that principle. It would also restrict the delivery of the many benefits of mediation that accrue to members of the public, the judicial system and the wider Scottish economy.

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.

Fully supportive of the principle. However technology should be used whenever possible to reduce the Party's costs of travel / time off work for a face to face meeting when they haven't yet made a decision to mediate. The questionnaire should also explain the different processes and time commitments between court cases and Mediation, along side the potential benefits of mediation and the risks if they can't reach agreement. Questionnaire completion would ideally be done on a Scottish Courts secure website or if necessary in hard copy by post. A duty mediation co-ordinator (In our Glasgow and Aberdeen court trials non mediators were just as good at convincing parties to engage as mediators were) who could be a suitably trained member of the Clerk's staff with access to the completed questionnaire could then contact both parties by phone or a video app for a Mediation Information Session and answer questions leading to parties making an informed decision. Whatever the decision, the Co-ordinator would issue to the Parties and the Court confirmation that the MIS had taken place.

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.

Mediation is not suitable for criminal cases, although restorative justice may be appropriate in some cases where a relationship has involved physical or mental violence.

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.

Mediation or facilitated negotiation is a route to justice in the eyes of the Parties. The Mediation Agreement (we call it the Agreement to Mediate) commits each Party to work together in good faith to seek a resolution acceptable to both Parties. It can set the objectives and outline the strategy and measures the process has to allow parties to feel heard, safe, informed and have certainty and clarity about the future relationship if there is to be one. If as in many cases, actions result from the agreements reached, the

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?

Mediated Settlement Agreement can test the agreement by asking detailed practical questions about the how, when, where and by whom, giving certainty and clarity. The classic case is where a payment is to be made by Party A to Party B. Party A says they will issue a cheque on the Wednesday and Party B says they need the cleared funds by the Friday. Writing the detail in the Settlement Agreement forces potential problems like these into the open for discussion.

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.

People wishing to instigate a court proceeding usually do so in a state of some emotion, which is why many ask a lawyer to do it for them. Faced with a new process (mediation) which they may have heard of in relation to say a divorce in the family, the argument would be that it is the responsibility of the Courts to ensure the Parties are able to make an informed decision, whether that is to mediate or not. A questionnaire will force people to think about the dispute they have and the MIS will give them the opportunity to consider it further and the relative benefits of the court or mediation route. It would be "our" responsibility to ensure they have enough information so that they can make the decision they believe to be in their best interests.

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.

Party Costs: in court based cases the costs cover the emotional cost of being in court, being in the same room as the other person and the financial costs of taking time off work, paying baby minders, costs of travel plus the often considerable costs of pulling together evidence to support their argument. In cases where the Parties might otherwise employ a solicitor, with or without legal aid, there could be further

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

savings. In 15 years of mediating we have never heard a complaint that mediation was too costly for the participants. Government Costs : one of the statistics about mediated solutions is that the vast majority tend to be carried through - the parties do what they agreed to do because they made the decision to do something they believed to be in their best interests. So in addition to all the savings in court time (which would enable the courts to shorten waiting times for other cases,) one would expect the vast majority of mediated cases to stop and not return to court seeking redress because of non-completion of a judgement. Will this put Sheriff's Officers out of business, unlikely. The only oncosts are likely to be in training court staff and sheriffs, although these are likely to be negligible within the overall budget. SLAB costs : are likely to reduce as the costs of a mediation is likely to be lower than the cost of progressing a case through the court system.

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

1) Have the court mediation coordinator as a suitably trained member of the Clerk's staff. This would reduce on costs of paying additional people.

2) Ensure the use of internet & video based technology used by the Courts is used to enable the mediation coordinator to receive questionnaires and conduct the MIS wherever possible.

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.

A mediator is required to ensure parties negotiate on a level playing field - that no one Party is able to exert pressure over the other for any reason. Most Agreements to Mediate allow for the mediator stopping the mediation where either they or a Party believes the mediation process or the other Party is causing physical or psychological harm to the other. So "equality of arms" is a fundamental principle. Parties involved in mediations need no specialist skills or knowledge to partake. Where they have a physical disability or where language is an issue, there are known actions that can be taken to ensure a balanced playing field. Where there are issues of mental ill health there are also known methods of understanding whether a mediation should start or carry on. Some would say that a court process may be unintentionally unequal, where for example one Party fields a more expensive lawyer than the other can afford. Or one Party can afford for a case to drag on where the other can't. Neither of these situations exist within mediation.

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

As long as all Parties were able to be financially supported to cover the costs of mediation and the process itself was managed with the "equality of arms" principle clearly enacted, there should be no negative impact.

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.

Because the additional costs involved to all sides are minimal and the potential benefits significant. Over time, were mediation to become the norm, the number of civil court cases might decline, even substantially, which might have an impact on the number of civil litigators / solicitors required. However one could argue that the Court system is there as a route to justice for members of the public, rather than a revenue source for solicitors.

General

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

We wish it luck and would be happy to contribute any experience or thoughts towards it's development that we can.