

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).

Provider of mediation services and mediation training. Very experienced in conducting mediations in civil and commercial disputes.

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).

Core Solutions Group

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?

Partially supportive

Please explain the reasons for your response.

We are broadly in favour of the limited use of legislation to establish principles and a framework but we recognise that legislation has limited utility in achieving some of the main goals of public and business awareness, judicial encouragement and effective delivery of services. It is a question of finding the balance. We refer to the Report of the Expert Group supported by Scottish Mediation.

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.

We are fully supportive of measures to help parties to make informed choices and to be guided towards mediation at an early stage. We believe that a degree of further direction may be necessary and again refer to the Expert Group recommendations.

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)?

Please explain the reason for your response.

We take the view that blanket exclusions could remove choice. There may be circumstances, in any matter, in which, after provision of information, parties may view it to be in their interests and to be their express choice to use mediation. That said, we recognise the need for great sensitivity in a number of areas. Certainly, there seems no reason in principle to exclude judicial review, employment or tax/customs (as mentioned the consultation paper).

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.

This is essential to develop a more constructive way of dealing with disputes in Scotland. Please note that the definitions of facilitative, evaluative and transformative as approaches to mediation tend to be academic constructs and not really relevant in the practical world. We would counsel not referring to these in any agreements. It would be hard to be definitive about these in advance. Most competent mediators will move within a continuum of strategies in the course of mediation as circumstances determine. We suggest referring to the final agreement as a Mediation "Resolution" Agreement. "Settlement" has overly legal connotations.

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.

The earlier parties can be helped to find a constructive solution, the better for all concerned.

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	

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

(d) Mediators and mediation organisations			X			
(e) Individuals					X	

Please explain the reasons for your response.

Handled well, the broader introduction of mediation in Scotland ought to reduce dispute costs, including time and relationship costs in addition to direct expense, while encouraging the redirection of energy and financial resources in productive and more socially useful ways.

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

The consultation paper seems to recognise use of mediation in a limited way, referring to civil disputes as distinct from "business disputes" where, it says, arbitration is more used. This seems to be a misunderstanding. Mediation is used a vast range of business and commercial cases in Scotland. It will be helpful to place emphasis on this too. Encouraging small and large businesses and small and large organisations (public and private sector) to embrace mediation will have very significant impact. Rather than focussing on relatively small reductions in cost or increases in savings, a country wide, multi-sectoral approach will reap much larger gains overall. Rather than cutting corners on costs, providing high quality, really effective mediation services will lead to higher quality performance and real overall economic gains.

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.

The process of mediation should encourage recognition of equality issues both substantively and procedurally in the introduction of interest-based, transparent, creative and less adversarial settings and approaches to problem-solving.

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

by ensuring good standards of service and monitoring the overall impact; by ensuring adherence to appropriate codes of conduct by mediators (note Scottish Mediation does have such a code and other organisations such as ours have our own code which is aligned to the SM code).

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.

A Bill or, more widely, development of mediation generally should have positive economic, social and/or environmental impacts. Mediation is a more sustainable and environmentally friendly dispute resolution process than litigation.

General

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

The consultation paper in a few places feels rather narrow in its description of mediation and its present use. That is perhaps understandable given timescales. It will be important to align this proposal with the work and Report of the Expert Group referred to in an earlier answer. It is perhaps a pity that the two initiatives were conducted simultaneously but separately. However, the plus side is that there is now an opportunity in Scotland to consider and try to synthesise the two sets of quite similar proposals. We must use our mediation skills to find the common ground, identify the best ways forward, and explore a course of action that optimises the prospects of delivering a whole new approach to mediation in Scotland.