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.â€‹ 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

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:
I have taught dispute resolution - with a focus on construction disputes - at undergraduate and post graduate level, I am involved in various dispute resolution organisations and have published on issues around arbitration and dispute resolution, more generally. I have experience of all forms of dispute resolution from time in private practice in a large commercial law firm.

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).

David S. Christie

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.
For the reasons set out in the consultation, and in line with my existing views and experience, mediation is a vital option in the suite of dispute resolution options available to parties. With its consensus building approach, it offers a solution to disputes which is of a different character from most other forms of dispute resolution. These solutions are not necessarily always the most appropriate in particular cases but they are an important option to consider. I think action to promote and encourage - and also to facilitate - mediation in Scotland is required. That said, the voluntary nature of mediation is central to its success and so I would not favour making mediation compulsory. As the current proposals attempt to do, the key is to strike a balance between encouragement and compulsion.

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.
It is not clear who precisely - or what sort of disputes - the current proposals are aimed. Disputes which lie outside the excluded categories cover a multitude. While I may have picked this up wrongly, the proposal seems to be aimed at disputes within the the paradigm of either the consumer or small business owner, namely, the sort of person who does not often get into court based disputes and who cannot afford legal advice at early stages of dispute resolution processes. Certainly the requirements identified in relation to

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this question would be helpful to parties in that situation. My support for this particular aspect of the proposal is on the basis of the assistance given here. In terms of the qualifications I would make to that support, these are as follows. 1. For parties who are experienced in litigation or have engaged a professional team which is, then this is less likely to be effective and may serve to slow down or add cost to the process. That does not mean that these parties ought not to be encouraged to consider mediation and there is scope to consider an analogous process for them. 2. While the aim of promoting early engagement with the mediation process is to be commended, the duty mediator would need to be properly resourced in order to be able to take appropriate time to consider and reflect on matters with the parties. My experience of mediation is that the mediator needs some time to assess the parties in the round to get a feel for the scope for compromises. In the absence of appropriate time, it is easy to imagine this role becoming stretched and less effective. That may be counterproductive to the aim of mediation since it would provide parties with a poor "first impression" of the process. 3. There would need to be some form of oversight for the duty mediator, given their position of importance and influence - as well as the lack of transparency which is inherent in the (otherwise wholly necessary) confidentiality of the process. There are a number of issues in the balance here. For example, one option might be to ensure that the ground rules are made clear in standard terms at the start (although there is the risk of 'information overload') - and the parties can self police the process based on that. However, in that situation, there would need to be consideration of the danger that a party could then seek to challenge the mediation if they got 'cold feet' about the result. 4. Another point for consideration is that the questionnaire may be seen simply as a bureaucratic step in the adversarial process rather than the first step of something more consensual - but which is engaged in freely. That, again, may weaken the impact of mediation. On the terms of the questionnaire, I wonder if the groupings under headings of "yes", "no" and "maybe" might be removed and instead those questions deployed in a more 'open' way. The confidentiality of the questionnaire results ought to also be assured. 5. As a final - minor - point, the use of the word 'mandatory' is to be avoided. While its clear in context that it is the information about mediation which is mandatory, rather than the process itself; that might be misunderstood by the casual reader - who may feel that more is being required of them than actually is.

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.
It is not clear whether the mediation under this Bill would seek to resolve the issue being brought to court - or any wider issues between the parties. I would tend to favour facilitating that wider approach - and adjusting the questionaires accordingly. This would have an impact on the categories of exclusion. For example, in arbitraiton, cases often go to court for consideration or resolution of a narrow point of law. This

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would not be particularly suitable for mediation: its a largely black and white issue. However, when parties raise such a challenge to arbitral proceedings in court, it is seldom because the parties are - at base - particularly concerned with the formal resolution of disagreement about the application of rules around (for example) kompetenz-kompetenz but, rather, the matter comes to court because the underlying dispute remains unresolved. That underlying dispute might be resolvable by mediation - and there is at least an argument that these proceedings should be brought within the scope of these mediation processes. However, without further reflection, I would tend to support exclusion as it muddies the waters to mix three sets of proceedings (arbitration, mediation and court). If the parties wish to mediate - this Bill would not prevent them doing so, by their own agreement. In terms of additional exclusions, statutory construction adjudication is a process flowing from s108 of the Housing Grants, Construction and Regeneration Act 1996 (as amended). That gives parties the right to seek to have a dispute resolved by an adjudicator "at any time". This process is quick - a decision is to be reached with 28 days of the referral of the dispute to an adjudicator. The scope for extensions is limited. The purpose of this is to ensure cash flow within construction projects. The enforcement of these disputes can be raised in court. In line with the statutory intent of speed and ensuring cash flow, it would not be appropriate for enforcement proceedings (or other proceedings related to adjudication) to be subject to mediation: it would simply provide parties with an opportunity to delay enforcement.

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.
With the caveat about creating a process which is overly bureaucratic and to the extent that that discourages the parties autonomy, the creation of a process is a valuable step in providing parties with a framework for resolution which has a degree of clarity and certainty. In particular, there may be scope to explore some draft standard terms of settlement agreement. Parties would not be bound by these unless they agreed to them but to the extent that the mediation process as envisaged here is aimed primarily at those who would not customarily engage lawyers - and would try and minimise legal expense - there is merit in having a pro-forma agreement which is robust and appropriately balanced. That would help speed up resolution since it would be readily available, when needed and, moreover, would not require parties without lawyers to engage them to formalise the agreement (with the risk of back tracking that might entail). That, of course, would need to be accompanied by appropriately understandable guidance as to the terms - or else there would be a risk of a party having terms imposed upon them. Such a model would have some precedent in the analogous application of mandatory and default provisions for the parties agreement to arbitrate (and the process following from that) under the Arbitration (Scotland) Act 2010, or from the Scheme for Construction Contracts which is part of the regime for Statutory Adjudication. Both of these provide a framework for the parties - but allow them flexibility to agree other things. Both these examples are relatively legalistic, however - and the draft settlement agreement ought to be framed in more straightforward terms. While it would need to be considered further, there is also scope to have "summary warrant" language included in this draft settlement agreement - that would facilitate faster enforcement of the agreement and that might serve to make mediation more appealing, as it might remove an obstacle to enforcement. Such language, by way of precedent is found in the Scottish Scheme for Construction Contracts - creating a mechanism for summary enforcement.

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

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Please explain the reasons for your response.
One of the keys to the success of mediation is that it can be deployed when both parties are open to it. By the time parties raise court proceeding, their positions may be entrenched and they may have - for example - undertaken significant cost in the preparation and execution of proceedings. The desire to recover these costs would add a further barrier to resolution. The ability to get parties to mediate earlier - if appropriate - would be valuable (although it ought to only be an optionto mediate at that stage - rather than simply being a case of moving the whole process earlier).

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		

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

There is benefit in having pre-prepared and relatively standard materials at various stages in the process. This would mean that time spent face to face with duty mediators more efficient (and give the parties time to consider the position fully).

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?

Slightly positive

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?

Please explain the reasons for your response.
The facilitation of the dispute resolution by a trained third party ought to help in overcoming the innate bias of the parties - which might otherwise impact within the dispute.

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

There would need to be training and oversight for the duty mediators to ensure that they were able to manage their own reactions and possible biases.

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.
The setting up of a duty mediator scheme that facilitates appropriate engagement with the parties is likely to be costly - but the wider efficiencies within the system would mitigate these.

General

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

No Response