

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).

Professor Margaret Ross

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.

I am supportive of the Bill as far as it goes, but think it could further along the lines suggested in the paper published in June 2019 by Scottish Mediation, entitled Bringing Mediation into the Mainstream in Civil Justice in Scotland. That paper proposes an Early Dispute Resolution office within the civil courts (a step further than the Mediation Information Meeting) and a presumption in favour of attempting mediation in civil cases (but with some clear exceptions). I would be happy to offer further comment on this if requested.

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.

But see comments on previous question in relation to taking this one step further.

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

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.

While i agree in relation to the first two categories I do have some concerns about excluding from the option of court-supported mediation anyone who is in proceedings that have involved domestic abuse or sexual violence. While mediation in such proceedings would rarely be attempted and would involve very careful handling and avoidance of confrontation, it does seem potentially inequitable that a person in such proceedings is excluded from mediation as compared to not being required to consider mediation as an option. The latter is permissive for the person abused, whilst the former is restrictive of their choices when they are have already suffered domination of will.

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 follows from introducing parties to the option. I think the state should consider how this can be funded either within delivery of civil court services or by access to legal aid or state aided third sector providers for those without means to pay private mediation fees.

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 am not yet sure how this can be done, other than by good information via advice agencies such as CABx or making it a condition of legal aid, or of registering a claim in the court, that this step has already been taken. One needs to avoid box-ticking about mediation as a gateway to litigation, but widen access to information in situations where people are seriously considering what their options are to have a dispute determined.

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		

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

(c) Third Sector organisations			X			
(d) Mediators and mediation organisations			X			
(e) Individuals				X		

Please explain the reasons for your response.

the headings only refer to cost when the question refers to potential savings. This question does not address income. Whether this would be cost neutral for third sector depends on whether they will be delivering additional advice and/or mediation (as some third sector family and community organisations do at present). If they are expected to deliver more (e.g. lay advice and mediation via CABx) they would require extra funding which is the only basis on which it could be 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)?

Following the conclusions of our evaluation of In-court Mediation in Glasgow and Aberdeen Sheriff Courts, published by the Scottish government in 2010 the costs to the justice system should be achievable by the redirection of resources from other justice services on which there will be lower demand caused by mediation uptake.

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

Please explain the reasons for your response.

If one makes the assumption that civil litigation is rarely a welcome option for anyone, and more so for those in minority groups, the option of an alternative that involved assisted negotiation should be positive. However attention is needed to the alignment of mediators to the demographics and characteristics of disputants, and the strong evidence that mediation success is context dependent (see An International Evidence Review of Mediation in Civil Justice published by the Scottish Government in June 2019) so it is difficult to draw general conclusions without ensuring that the context is maximised.

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

See answer to question 8. Enhanced information about what mediation can and cannot do is likely to counter negative impact, if backed up by high quality mediator input.

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.

It can, if there is a commitment to funding this as a core part of a civil justice system. The saving in time to individuals of attending and waiting for court proceedings, and their engagement with problem-solving techniques in mediation could, in theory at least, equip them better to put fewer demands on formal and expensive litigation processes.

General

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

I am very pleased to see the proposal emerge and feel that it is a step towards instilling further pragmatism under the umbrella of the Scottish civil justice system.