

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)

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).

Morton Fraser LLP

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.

We think there is a benefit to ensuring individuals and organisations are aware of their options when it comes to the availability of mediation as a tool to assist with settling disputes and think that carefully drafted legislation could assist this. Having considered the report published by Scottish Mediation in June 2019 entitled Bringing Mediation into the Mainstream in Civil Justice in Scotland, we are supportive of many of the views it expresses and think the report's proposals merit detailed consideration.

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.

We can envisage benefits, in certain cases, arising from having parties complete a self-test questionnaire and attend a Mediation Information Session with a duty mediator. However it is our view that one approach will not fit all situations and we do not consider that a blanket imposition of these proposals would be beneficial. Instead it is our view that careful consideration needs to take place regarding how best it can be ensured that parties are aware of the potential for mediation in different types of situations and cases. It is important that any system which is introduced does not operate in a way which will, for example, allow a defender in a debt recovery action who does not have any defence to use the system to simply delay making payment for as long as possible to cause maximum inconvenience and increase costs for their opponent. Care must be taken to ensure that a bill does not operate in such a way as to place practical barriers which prevent parties from being able to access the courts to enforce their civil rights. Again, we would refer to the in depth discussion in the Scottish Mediation report as being useful for assisting a more detailed consultation process and consider the EDRO option stated there should receive further consideration.

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 our view that commercial actions in the Court of Session might be excluded. These cases are currently subject to requirements, detailed in Court of Session Practice Note 1 of 2017, which include the requirement that parties should have carefully considered whether the dispute may be amenable to some form of alternative dispute resolution prior to an action being raised. Commercial actions have enhanced judicial case management and the practice note also includes requirements for the court to be addressed on steps taken to achieve extra-judicial settlement. There is therefore already a process in place for these cases which can facilitate discussion of the potential for mediation to assist in resolving the issues in dispute. In addition we think that it would be important is for a judge to have some flexibility available to them so that they could take a common sense approach where it is clear that mediation would not be appropriate in the circumstances and exempt parties from the need to attend a Mediation Information Session. That said we do consider that a broader legislative approach as set out in the Scottish Mediation report is worthy of consideration.

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?

Partially supportive

Please explain the reasons for this response.

We consider that a clear and simple written agreement setting out how a mediation will operate could be a useful tool for many parties who wish to enter into the mediation process. In addition a written Mediation Settlement Agreement setting out the terms of a settlement agreed between the parties could be of assistance and might reduce the scope for future disputes arising in the same matters. Some flexibility regarding this would be helpful. The contents for Mediation Commencement Agreements would vary depending on the type of dispute which is to be mediated. It would be important to avoid creating situations where delays in the commencement of mediation arose because of disagreements about the contents of a Mediation Commencement Agreement.

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?

Unsure

Please explain the reasons for your response.

We are supportive of the promotion of awareness of mediation before disputes are raised in court. However the way in which this would operate requires very careful consideration. The setting up of a body to assist parties who pro-actively decided they wish to engage in mediation could be very useful, particularly if the service was available with limited cost to the parties. An alternative option could be something akin to the operation of ACAS in employment disputes where it is necessary for parties to engage with the service before they are permitted to commence tribunal proceedings. We have reservations about the introduction of this type of requirement for parties who want to raise court proceedings. We are concerned that the introduction of mandatory pre-action requirement to attend a Mediation Information Session could cause difficulties where urgent proceedings were required, for example, because there is an impending timebar. It might be necessary to consider further changes to the primary legislation relating to timebar matters (The Prescription and Limitation (Scotland) Act 1973) to avoid problems with the introduction of mandatory mediation and this would not be a simple matter. Another potentially problematic situation could be if an interim interdict were urgently required to protect a party's position prior to the substantive issues in a dispute being determined. We consider that it is very important that any provision introduced to encourage increased use of mediation prior to court action being raised does not operate in such a way as to create practical barriers which prevent parties from being able to access the courts to enforce their civil rights. Again we suggest that the Scottish Mediation report sets out a good basis for further consideration of these matters.

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.

It is very difficult to make predictions in relation to the financial implications. We consider that changes which increase the use and consistency of mediation services in Scotland have the potential to result in some reduction in cost. However, it is our view that, further development of the proposals following more detailed consultation would assist the introduction of an appropriately flexible system which could allow for the opportunities for reduction in cost to be maximised. What is clear is that funding of mediation services will be required to meet the proposed bill's aim of increasing the consistency of mediation services. This cannot be achieved by relying on mediation services being provided on a voluntary basis. In addition,

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

further consideration should be given to the levels at which it is appropriate for parties to self-fund mediation services. Again reference is made to the Scottish Mediation report.

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

As noted above, it is our view that further consultation on and development of the bill's proposals is necessary and this could assist with ensuring that the aims are achieved in a cost-effective way.

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?

Neutral (neither positive nor negative)

Please explain the reasons for your response.

No comments

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

No comments

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.

We consider that a bill which encourages parties to consider mediation and makes provision for practical steps in relation to this has the potential to be developed in a way which could, after enactment, operate sustainably. However it is our view that more detailed consideration of the proposals will be necessary to achieve this.

General

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

We welcome the proposal being raised. Whilst we are keen for constructive and expeditious progress to be made in this area, it is appropriate for there to be more substantial consideration before any changes are made. We would reiterate that we consider that the Scottish Mediation report is a good starting point for further consultation. Although its recommendations go beyond the proposals contained in this consultation and cover further ground, a broader brush approach would be of benefit in ensuring that the best value is gained from any changes made.