

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

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

As a law lecturer, part of my post graduate teaching at the Robert Gordon University includes . deliverin a ost raduate module on ADR in business and commercial law.

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).

Name: Nicolas Maulet- Robert Gordon University

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.

Subject to statutory limitations and exclusions, the majority of, if not all, civil litigants should receive the opportunity to consider mediating their cases. The cost and time required to fully litigate a case, in addition to systemic issues of access to justice, fully justify this policy choice in a modern, XXIst-century, Scotland.

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.

Parties should not be forced to attend a meeting. The questionnaire should be mandatory. Not the meeting.

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 under the Arbitration (Scotland) Act

Please explain the reason for your response.

Arbitrations proceedings should be left out of the reach of this new law, due to the specific nature of arbitration processes. Civil actions connected to serious crimes should be treated as special cases. It does not mean that an option for mediation on civil interests should be totally excluded. The proposed approach may also raise issues in terms of repeat offenders.

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.

Please, refer to the answer for question No.1 above. The process should prove all-encompassing and thorough. Including at the stage of mediation

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 opposed

Please explain the reasons for your response.

Going to mediation should remain a choice that stays within the parties' control. Even if the courts and law should certainly strongly support it. I am in favour of limited cost sanctions for parties unreasonably resisting a reasonable offer to mediate.

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.

Access to justice remains notoriously expensive in Scotland. This reality underlies the main reason (cost) for citizens not to go to raise claims, even when they have a reason to feel that they would have a strong case.

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

The Bill could also seek to include a schedule regulating the fees chargeable by mediation service providers. Fees could be means tested and capped. For people with low income, fees could be further regulated/ or even government-subsidised.

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

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

No Response

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?

Unsure

General

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

A bill coming with some innovations in relation to the important aspect of enforcement of mediated outcomes would be welcome. Understanding the process of enforcement, also in anticipation of any decision to mediate, is crucial to successfully see litigations opt for mediation. Mediating parties should be empowered to understand that if compliance with the mediated settlement becomes a problem they can/could (i) usefully require enforcement of the terms of the settlement; (ii) do not need to start proceedings to secure a decree/court instrument that, then, would be enforceable with the help of a sheriff officer, or any other suitable means of enforcement. Where either of the parties does not comply with the terms of mediated outcomes, sanctions should be substantial to deter parties who, whether intentionally or not, might subsequently ignore the terms of a mediated outcome. Such a device should deter parties from resisting enforcement and reassure those who commit to the process.