

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

Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)

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).

Relationships Scotland is a network of 21 Member Services providing support to individuals, couples and families with relationship issues. Relationships Scotland's services include mediation, as well as counselling, child contact centres and a range of other interventions. The Relationships Scotland network

Please select the category which best describes your organisation

has over 30 years experience of providing information sessions and mediation in family cases involving children. This response is on behalf of the network and follows consultation with Member Service mediation providers.

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).

Relationships Scotland

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.

Mediation has been available as an option in Scotland since the mid 1980s for family cases, but understanding of the process remains poor. Legislation would bring about a much needed step change increase in the awareness of and uptake of mediation across a wide range of civil disputes. More detail is provided in response to Question 11.

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.

A requirement to attend a mandatory information session would ensure parties were enabled to make a well informed decision about whether or not mediation would be appropriate for them, whilst retaining the

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?

essential voluntary nature of the joint mediation process. Our recommendation is that these information sessions are offered on a one to one basis with appropriately qualified staff and that any self-test questionnaire incorporates risk screening questions. For Family (Divorce and Separation) cases it may be most effective for the information sessions to be delivered by existing Accredited Family Mediation providers. More detail is provided in response to Question 11.

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

Please explain the reason for your response.

It is important to ensure that parties enter in to mediation voluntarily and that concerns about abusive behaviour, coercive control and safeguarding are taken very seriously. The initial information session, if offered individually, is an opportunity to explore these concerns. If there are proceedings under these other Acts there are alternative processes in place and the parties should be excluded from a requirement to attend a Mediation Information Session. More detail is provided in response to Question 11.

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.

It is important for parties to know what they are agreeing to when they start the mediation process, and a Mediation Commencement Agreement or similar may be appropriate for that. Relationships Scotland's experience of divorce / separation / contact / parenting cases is that many disputes are resolved with a voluntary agreement between the parties that is not formalised in to a legal agreement. It would be important to retain the option to empower parties to make agreements between themselves without a requirement for a formal Settlement 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?

Fully supportive

Please explain the reasons for your response.

Relationships Scotland's experience is that the earlier in the dispute that parties try mediation, the more likely it is to be successful. For this reason we support incorporating in the legislation the power to extend the requirement to attend an information session to earlier in the process. More detail is provided in response to Question 11.

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.

Inspiring Scotland carried out a Cost Benefit Review for Relationships Scotland in 2017 and concluded that 'when compared against the cost of delivery ...the average ratio of Benefits to one pound of Costs for.. family mediation is £12.68.' Publication attached for reference (Appendix 7). As noted in the proposal (page 7) a number of research reports have evidenced a potential financial benefit of mediation for individuals, businesses and the public purse. The likely financial impact of the specific process being suggested in the Mediation (Scotland) Bill proposal would need to be assessed for all of the above sectors, and for different case types within Civil Justice, once the proposals are worked through in more detail. It is expected that the benefits and cost savings would exceed any additional costs.

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

One suggestion is to establish the differing costs to the public purse of different types of civil disputes, including actual court expenses and also legal aid costs for different cases. The most common court actions may not be the most costly. It may be more cost effective to pilot new interventions, and prioritise those areas where costs are highest.

The Bill could achieve its aims cost effectively by capitalising on the existing expertise and infrastructure

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

in the sector, notably Relationships Scotland's Mediation Services for Family Mediation (Divorce and Separation) cases particularly. These Mediation providers would be well placed to undertake the role of the duty mediator, with additional training on the specifics of other Civil Justice case areas. It may make sense to have the role of the duty mediator carried out by different providers, with particular areas of expertise for different types of cases.

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 proposed Bill is likely to have a positive impact on equality. All disputants would be helped to make a fully informed decision about the best way to resolve their differences and the use of modern technologies may overcome some accessibility issues. The training for Relationships Scotland mediators includes a strong emphasis on equality and diversity and all staff work within our National Policy on Equality and Diversity. It is hoped that mediators trained in other areas would also have undertaken learning in this area.

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

Cost may be a prohibitive factor for some people and it would be important to retain the option for Scottish Government funded mediation.

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.

Family Mediation (Divorce and Separation) has been provided through the Relationships Scotland network since the mid 1980s and it has been shown to be delivered sustainably. Refer to our response to Q6 and the Cost Benefit Review carried out by Inspiring Scotland in 2017 (Appendix 7).

General

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

Appendices referred to in the response will be emailed to Margaret Mitchell MSP's email address directly. Relationships Scotland welcomes the proposal to introduce a Mediation (Scotland) Bill to increase the use of mediation and the consistency of mediation services. As noted on page 7 of the proposal 'mediation is established in a court context for family mediation...', and has been available as an option in Scotland since the mid 1980s. However, more people could make use of mediation, even in the more established context of separation and divorce, with better awareness and an increased compulsion to find out about it. Indeed, the Scotsman published an article in 2014, written by Relationships Scotland's Chief Executive Stuart Valentine, highlighting these important points (Appendix 1).

In late 2016 Relationships Scotland and CALM Scotland put forward a joint proposal to the Scottish Government and the Scottish Legal Aid Board (SLAB) for a Family Dispute Resolution (FDR) Pilot which has many similarities to the process being suggested in the proposed Mediation (Scotland) Bill. The aim of the pilot was 'to ensure that parents/carers, who are in dispute over contact arrangements for their child/children, fully explore the different options available to them for resolving their differences. This will be done by way of a Family Dispute Resolution Information Meeting ...'. A consultation meeting with key stakeholders was held to seek input from a wide range of perspectives. The proposal (Appendix 2) remains with the Scottish Government and SLAB pending further consideration and funding. With reference to the Mediation (Scotland) Bill proposal Relationships Scotland would like to highlight the following:

1. Civil Cases – it might be helpful to confirm the scope of disputes to be covered by the Bill. Our reading of the consultation document is that the proposal is for all civil disputes to be managed through the new process, including Family (Divorce and Separation) and some of the other areas mentioned specifically on Page 7, last paragraph, even although they may be more established already. We are presuming that the only exclusions proposed are those highlighted on page 15.

The Civil Law Statistics published by the Scottish Government Civil Justice department indicate that most cases are debt actions (46% in 2017/18), followed by evictions (18%) and family cases (16%). It is estimated that around 10% of Civil Justice cases are concerned with disputes involving children.

The Relationships Scotland network has been providing information sessions and mediation in family cases involving children for over 30 years, many of which will have been helped to avoid court. It would be most effective to learn from this expertise for other Civil Justice cases and build on the existing infrastructure for family cases.

2. Legal Framework (page 8) – another piece of legislation that is very relevant to mediation in Scotland is the Civil Evidence (Family Mediation) (Scotland) Act 1995. This Act protects the confidentiality of the mediation process, where that mediation 'is conducted by a person accredited as a mediator in family mediation to an organisation which is ...approved for the purposes of this Act by the Lord President of the Court of Session.' The two organisations in Scotland approved by the Lord President of the Court of Session to accredit mediators for the purposes of the Civil Evidence Act are Relationships Scotland and the Law Society of Scotland. The Law Society accredit Lawyer Mediators, who are often also members of CALM Scotland.

The confidentiality protection is important in encouraging parties to speak freely in mediation without fear that what is said may be used against them in any court action. It facilitates creative problem solving and testing out of potential solutions prior to a formal agreement. For family contact cases it is particularly helpful for resolving differences around parenting which can be explored openly and incorporate flexibility.

There may be merit in considering extending the Civil Evidence Act to cover civil disputes in other contexts.

There are also Rules of Court Referral to family mediation (Sheriff Court Rule 33.22, Court of Session Rule 49.23). They state that 'In any family action in which an order in relation to Parental Responsibilities or Parental Rights is in issue, the sheriff/court may, at any stage...refer that issue to a Mediator accredited to a specified family mediation organisation'.

As noted in the proposal (page 10) Relationships Scotland's experience is that even when there are Court Rules the extent to which they are used by sheriffs/courts is very variable and depends on the particular sheriff/judge. A process that incorporates some degree of compulsion would be likely to increase the use of mediation and the consistency of opportunity across the country.

3. Accreditation of mediators – page 8 of the proposal states that '...Scotland does not have a formal mediation body for accrediting mediators nor does it have a code of conduct for mediators..'. As noted above, however, Relationships Scotland's National Office and the Law Society of Scotland are both

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

approved as organisations to accredit family mediators, for the purposes of the Civil Evidence (Family Mediation) (Scotland) Act, by the Office of the Lord President of the Court of Session for Scotland.

In order to achieve this approval organisations are required to submit an application which covers selection procedures, initial training and assessment processes, continuing professional development, supervision and on-going practice requirements. Accrediting bodies are required to evidence procedures for the monitoring of mediators against standards and for the removal of mediators from their register if necessary, as well as to report annually to the Office of the Lord President. Organisations have to re-apply every three years for this approval to be maintained.

Court referred family mediation, and legal aid funded mediation, should be to an Accredited mediator.

Scottish Mediation maintains a register of mediators, with minimum standards for mediators who work across a wide range of contexts. As noted above there are specific requirements that have to be met to become an Accredited Family (Divorce and Separation) mediator, that are additional to the standards for entry to the Scottish Mediation Register. This means that a mediator might be on the Scottish Mediation Register but not necessarily Accredited to provide Family (Divorce and Separation) mediation. This has the potential to cause confusion to professionals and clients. Relationships Scotland is very clear about the standards that family mediators are required to meet in order to be named on the Relationships Scotland Register of Family Mediators, and our Practice Standards are attached for reference (Appendix 3).

Relationships Scotland and the Law Society of Scotland have Codes of Professional Conduct for Family Mediators. Scottish Mediation also has a Code of Practice for Mediation in Scotland that mediators on their register across all contexts are required to follow. Other areas of mediation delivery may have their own codes of practice. The Relationships Scotland Code of Conduct is attached for reference as Appendix 4.

Despite these registers, it is the case that anyone can set themselves up as a mediator and there is no requirement to be on any register. It is incumbent upon the court, the solicitors or the clients themselves to check whether the mediator is Accredited for Family (Divorce or Separation) work, on the Scottish Mediation Register for other case work or otherwise adequately qualified.

Any new regulatory framework would need to recognise the unique requirements of particular specialisms, such as the Family (Divorce and Separation) context.

4. Availability of mediators – As noted on page 8 Relationships Scotland is a partner organisation with Scottish Mediation (SM). The thirteen Relationships Scotland Member Services that provide mediation are listed on the SM website - Find a Mediator search function. This provides clients with access to a further 80 (as at March 2019) Accredited Family Mediators working across Scotland, the majority of whom are additional to those listed as individuals on the SM Register.

Clients who pursue mediation through a Relationships Scotland Member Service are able to access a wide range of additional support for families, such as Child Contact Centres and Counselling. This ensures an integrated, flexible and customised support package with clients moving between services in response to their needs and development. Clients are signposted to specialist agencies as appropriate.

Children's needs are a key concern of all Relationships Scotland's services and within the mediation process parents are encouraged to focus on what their children may be thinking or feeling. Children and young people can be involved in the mediation process directly. A specially trained mediator can meet with the child or young person to hear their views about what their parents are discussing in mediation and feed these back in to the decision making process. This is an important service that supports the voice of the child being heard in matters that affect them and in supporting children's right to access services.

This wrap around support for families ensures outcomes from mediation are most effective, where children are involved and there are contact and parenting issues particularly, and helps to make sure agreements are taken forward positively.

More information on our provision of services and the positive outcomes that are achieved can be read in the Relationships Scotland Annual Statistics report (Appendix 5) and Relationships Scotland Client Outcomes 2018-19 (Appendix 6). These are attached and can be retrieved from <https://www.relationships-scotland.org.uk/about-us>

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

5. Funding for family mediation – The Scottish Government provides funding to the Relationships Scotland network to support the provision of a range of services which includes Family Mediation (Divorce and Separation). This funding represents about 35% of the total funding for the network and contributes towards mediation being offered to clients at a reduced fee or for free / a donation depending on ability to pay. The Scottish Legal Aid Board will also cover the cost of mediation in some cases.

6. Information Session – The proposal for the mediation process to start with the parties being required to attend an information session is welcome. In Family (Divorce and Separation) mediation currently, when a court referral is made the parties may feel that this has made mediation 'compulsory', as the sheriff/judge has required them to attend. If parties are referred to a Relationships Scotland Service they would each be offered a separate individual 'intake' appointment lasting about an hour. This meeting is an opportunity for the client to talk about their situation, for risks to be screened and for mediation, as one option for resolving their disputes, to be explained. At the end of this initial one to one meeting (either in person or by phone) a decision would be made as to whether or not that party wished to proceed to a joint session.

Relationships Scotland's model is in line with the proposal for an initial information session prior to a decision about progressing to mediation, however it is unclear whether the information session in the proposal is joint (both/all parties) or individual. If the proposal is for this to be a joint session there are concerns about risk assessment, potential abuse of power and the ability of an individual to explore freely the pros and cons of a joint mediation process.

It is our recommendation that the information sessions are offered on a one to one basis and that any staff undertaking these sessions are appropriately trained to assess risk (refer to point 8 below).

7. Voluntary mediation following a mandatory information session – The proposal to require parties to find out about and make an informed but voluntary decision about whether or not to proceed to joint mediation sessions would have the potential to increase the uptake of mediation whilst retaining the essential voluntary nature of the mediation process. This is very similar to the ideas presented in the Family Dispute Resolution Pilot proposal that was put to the Scottish Government by Relationships Scotland and CALM Scotland in December 2016 for contact cases (referred to earlier, Appendix 2).

Whilst the Mediation (Scotland) Bill proposal is for this process to be a requirement once a case goes to court initially, Relationships Scotland's experience is that the earlier in the dispute that parties consider mediation the better. The potential to include in the Bill the power to extend the first part of the process to potential litigants is welcomed (page 16).

8. Training of court based duty mediator - The training or accreditation requirements of the duty mediator conducting the initial information session would need to be clearly specified. If the proposal is that the court based duty mediator was to cover all civil cases, they would need to have sufficient knowledge and understanding about all contexts, including specific additional considerations for Family (Divorce and Separation) work. In this context particularly risk assessment, domestic abuse and safeguarding are critical components of adequate training for information session workers.

Relationships Scotland's training for family mediators consists of an initial foundation course, the Certificate in Family Mediation (Accredited), followed by a second stage in the learning, the Certificate in Family Mediation (Registered). Each stage of the course involves 250 hours of student learning and is a combination of distance learning, face to face learning and practice based learning. The first stage of the course takes around 18 months to complete, and the second stage about 2 years. The Certificate in Family Mediation is managed, delivered and awarded by Relationships Scotland and it leads to an award on the Scottish Credit and Qualifications Framework (SCQF). Both stages of the course have been awarded 25 credits at SCQF level 9 by Edinburgh Napier University. The course also has external professional validation from the College of Mediators.

Mediators are assessed throughout the course using a variety of methods including written work where they evidence their ability to integrate theory, practice and reflection. All mediators undertake a minimum of 10 hours mentored co-mediation practice prior to meeting with clients on their own and continue to complete a further 30 hours (minimum) of mediation practice during the second stage of the training. They are required to undertake supervision and be observed during their training and their on-going practice.

Relationships Scotland has a wide range of National Policies, including those on Domestic Abuse, Child

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

Protection, Equality and Diversity that all mediators are required to work to alongside the Code of Professional Conduct.

For Family (Divorce and Separation) cases it may be most effective for the information sessions to be delivered by existing Accredited Family Mediation providers such as Relationships Scotland's Member Services that provide mediation.

9. Mediation process – The proposal identifies a number of different approaches to mediation (Page 6). Relationships Scotland's mediation model is primarily facilitative, but often delivers transformative outcomes. Communication between parties improves and relationships can be repaired. Mediators can adopt a combination of approaches. Relationships Scotland's experience from divorce / separation / contact / parenting cases is that mediation and solicitor negotiation can work well alongside each other, if managed appropriately, and are not mutually exclusive. This should provide reassurance to the legal profession and attend to some of the issues highlighted on page 17 of the proposal. It is important that the courts remain an option for parties for whom mediation is not appropriate or successful for all of the issues.

10. Online mediation– the possibility of using modern technologies, including online, is highlighted on page 7 of the proposal. This is an interesting area of development with many potential benefits. Relationships Scotland has some experience of mediation by video conferencing. One point to note is that online video mediation requires strong and reliable broadband which is not always available in remote geographical areas where it might be most beneficial. It is important to have procedures in place to ensure the safety and voluntary participation of participants when mediation is offered online.

11. Judicial training and Awareness raising – these two areas are highlighted in the proposal on page 16. Relationships Scotland considers training for legal and non-legal professionals who work in this area to be essential. Relationships Scotland delivered two separate training sessions for the Judicial Institute in 2015, one on Family Law and Mediation, and one on Mediation Skills for the Judiciary. Training on mediation and alternative dispute resolution needs to be embedded for the judiciary and extended beyond, to include other professionals.

As noted in the introduction to this response more people could benefit from mediation with increased awareness and understanding, as well as a compulsion to explore alternative dispute resolution options. Education and training of professionals, and building wider awareness in Society are also key recommendation areas in the Scottish Mediation / Scottish Government report: Bringing Mediation into the Mainstream in Civil Justice in Scotland.

12. Impact of change – As noted in the proposal many jurisdictions have moved towards a greater compulsion to find out about mediation, and the changes to legislation in England and Wales, and Ireland, are of particular interest. In reviewing the impact of these changes it is important to note some of the learning. In England and Wales there were changes to the Legal Aid system at the same time as the introduction of MIAMs, which had a significant impact on the uptake of mediation. In Ireland the process for the regulation of mediators was not finalised within the legislation, and the consequences of this are still being managed.

13. Co-ordinated action – The Scottish Mediation and Scottish Government joint project on Mediation in Civil Justice is noted on page 13 of the proposal. The recently published report from this project: Bringing Mediation into the Mainstream in Civil Justice in Scotland is very detailed and includes a number of recommendations that are in line with the Mediation (Scotland) Bill proposal, including greater compulsion to consider mediation, legislation, training for professionals and building awareness. There are some points of difference, however, and it would be good to explore these further in collaboration.

The Scottish Government are due to publish a Family Law Bill in the autumn, in response to their consultation on Part 1 of the Children (Scotland) Act 1995. In contrast to this proposal and that of the Scottish Mediation/Scottish Government project, a move towards greater compulsion to consider family mediation in the context of separation and divorce is not anticipated within that Bill. This is very disappointing. Ideally the two proposed pieces of legislation would align to a greater extent.

Relationships Scotland's expertise and infrastructure have been built up over more than 30 years. We are keen to be involved in any discussions about the best and most cost effective way forward for increasing the uptake of mediation across the Civil Justice sector in Scotland, including the introduction of a Mediation (Scotland) Bill.

We would welcome MSPs and any colleagues who would like to meet with us to find out more about our

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

mediation provision and support for families, or who would like to visit one of our Member Services. Please get in touch with us to arrange for this further exchange of information and experiences.