

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)

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).

Tom Halpin, Chief Executive, Sacro

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.

We welcome the stated aim to 'have a positive effect on the economy by reducing legal costs', and the measures proposed would assist with this aim to some degree. There is, however, greater potential to reduce costs by extending the use of mediation in Scotland beyond the courthouse door. Community Mediation services have for many years been assisting in the resolution of all types of conflict prior to disputants even consulting a lawyer, thus already limiting pressure on the courts. These services, managed both by third sector organisations and local authorities, have been starved of adequate funding and are patchy in their geographical provision. We consider a more truly preventative and more economically efficient approach would be to secure proper funding for these crucial services.

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.

This seems to be a practical and useful step, although we assume that questionnaire wording and format would be subject to further revision and testing.

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.

Although mediation is not inevitably unsuitable for these contexts, its use is controversial and presents very severe ethical challenges and dilemmas.

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?

Neutral (neither support nor oppose)

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?

Neutral (neither support nor oppose)

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)		X				

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

services, legal aid etc.)						
(b) Businesses				X		
(c) Third Sector organisations			X			
(d) Mediators and mediation organisations						X
(e) Individuals					X	

Please explain the reasons for your response.

see comments at question 1

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

see comments at question 1

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 negative

Please explain the reasons for your response.

Individuals from these protected groups have less financial resources on average than the population as a whole. The proposed fee structure for mediation is therefore likely to affect them disproportionately: availability of legal aid will only mitigate this to a small extent.

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

By providing mediation as a cost-free service for potential litigants at all points of the process.

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

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?

Please explain the reasons for your response.

This would depend on the factors outlined in our responses to Questions 1, 3, 8 and 9.

General

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

In the section 'What is mediation?' on p6 you provide a definition of Facilitative Mediation which states that it 'merely encourages the parties to talk'.

Facilitative Mediation, the model most widely used in Scotland and beyond, can not accurately be described in these terms. A more accurate definition can be found in Wikipedia - "mediators act as guardian of the process, not the content or the outcome...Unlike the transformative mediator, the facilitative mediator is focused on helping the parties find a resolution to their dispute and to that end, the facilitative mediator provides a structure and agenda for the discussion."