

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 would like this response to be published anonymously

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).

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 accept the value of mediation as a dispute resolution process but subscribe to the view expressed in the Gill Report that it should be a voluntary process,

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 will focus the parties, minds on the option of mediation as an alternative to litigation however I am not in favour or penalising them for ultimately deciding not to mediate.

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)?

certain proceedings under the Family Law (Scotland) Act 2006, such as declarations of validity or dissolution of marriages

proceedings under the Arbitration (Scotland) Act

Please explain the reason for your response.

In the case of sexual crime one party is more vulnerable than the other and the case may not be suitable for mediation. declaration of validity or dissolution of marriage is generally a question of law. In arbitration the parties have exercised their autonomy and selected their dispute resolution process and to try to make them mediate may interfere with that autonomy. Employment disputes have statutory procedures which include an effective early conciliation procedure however employment related court cases which go to court rather than tribunal would benefit from being included in the mediation process.

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 will give them a legally binding agreement at the end of the process which will provide certainty and avoid the need for future litigation.

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.

provided the parties are not ultimately penalised for refusing 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		

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

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

Please explain the reasons for your response.

If cases settle significant court costs may be avoided

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

No Response

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.

There is a significant body of literature which demonstrates that mediation as a dispute resolution process can have an adverse impact on some sectors of the community. Any encouragement to mediate must take into account cultural differences and power imbalances.

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

The early conciliation model used by employment tribunals has been very successful. The fact that the parties have to refer the matter to conciliation but are not forced to actually conciliate nor penalised for not conciliating provided the case is initially submitted to ACAS is a good model. Mandatory, quality assured training of mediators is essential to protect the interests of vulnerable parties and avoid discrimination.

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

General

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

The dangers of compulsory mediation should be avoided and a system should be designed in light of the research which has already been carried out in this field.