

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 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".)

Professional with experience 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?

Fully supportive

Please explain the reasons for your response.

I firmly believe that mediation will almost always be in the best interests of the parties to a dispute which cannot be resolved by negotiation, either between the parties themselves or with the assistance of a solicitor. I also believe that legislation is needed to bring about a culture change within the legal profession. I understand from my discussions from mediators who practice in Scotland and England, that on the whole, mediation in Scotland usually happens once a claim has been fully prepared and often only once a proof is fixed. That also accords with my own experience. However, in England, mediation usually takes place at a far earlier stage, which is presumably due to the CPR sanctions in relation to costs.

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.

I am generally supportive of this idea but I do have some reservations about the benefit of this approach for all disputes. At one end of the spectrum, I am fully supportive of this approach for Simple Procedure cases where parties may often be dealing with a dispute themselves. That said, I do question whether parties to a dispute of £5,000 or less will want, or be able, to pay a mediator to attempt to resolve a dispute which they could otherwise present in court as a party litigant incurring no costs (and limited cost exposure if they are unsuccessful). This ties in with the effectiveness of our legal aid system (of which I know very little). My understanding is that there is a very large proportion of society who would not qualify for legal aid, but who would also struggle to pay legal fees to raise or defend claims. I would include myself in this demographic if I was not a disputes solicitor capable of raising or defending most claims. This also ties into the interesting point of whether mediation should be encouraged and a duty mediator appointed before a court action is raised. I absolutely believe that it should be available to parties before proceedings are raised. The practicalities would need to be fully considered, for example, how a claimant would notify a defender of its request to mediate. But I think the benefits of a system which encouraged mediation before

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raising a claim would be far reaching, and would achieve the culture shift needed in society as a whole, and the legal profession. In some cases this would also resolve the issue I refer to above, as parties may be more willing to pay for a mediator if court proceedings had not been raised and a fee paid. The level of fee that can be charged for mediators would also need to be considered. Of course, the current system of pro bono mediation also needs to be considered. Is that still going to be available for Simple Procedure cases?

At the other end of the spectrum, I think consideration needs to be given to how this would work in commercial cases, particularly high value claims where parties would have solicitors instructed. It seems to me that for the types of cases I work on, it would be a waste of public funds to have a duty mediator appointed to those disputes. Instead, I am of the view that there should be a mandatory requirement for a self-test questionnaire, and that the mediation information session is conducted by each party's solicitors, who have a professional duty to conduct that session appropriately. It may be that there needs to be a change in the professional practice rules to ensure this happens. The Law Society may need to publish guidance on that session. Alternatively, there could be an option for the session to be conducted by a solicitor who is also an accredited mediator (which many firms now have) failing which, the party to the dispute needs to pay for the duty mediator. My very strong view is that the types of disputes I work on (usually claims between £300,000 and £10 million) would not benefit from this proposal, nor would the public purse.

Disputes in the ordinary courts in the Sheriff Court and Court of Session would also need to be considered. Perhaps an arbitrary line for claims of a certain value, for example, £100,000, becomes the cut off point for a (free) duty mediator as compared to the alternative I propose of a session conducted by a solicitor or "solicitor mediator" (Incidentally I think "Solicitor Mediator" should be a qualification and title in the same way as "Solicitor Advocate"). I also think it should be open to any parties who are conducting a dispute themselves (without legal representation) of any value to have the option of a duty mediator information session (which is particularly important if mediation is going to be offered before court action is raised). Equally, I think where solicitors are instructed for both parties, there should be an option, at any value of claim, for the information session to be conducted by a solicitor or solicitor mediator.

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

Please explain the reason for your response.

I think in such cases the claimant should still be able to suggest mediation if that is what they want to do. Mediation has played a very big part in restorative justice in the USA.

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.

I am fully supportive of this. But as I mentioned earlier, how this process is given effect to will need to be fully considered, particularly in relation to the cost of the mediator, and access to justice questions. How will parties choose a mediator? Will a list of mediators be provided at the information session, together with the fees that they charge? Will fees be fixed depending on the value of the claim? Or will mediators be free to charge what they want to charge? Access to justice cannot be compromised, particularly where parties can run certain claims as party litigants (with limited cost exposure in Simple Procedure cases). If parties do not have solicitors, are standard Mediation Agreements and Settlement Agreements going to be made available? Are the terms of these documents going to be explained? Is it going to be explained to the parties that these documents can be amended to include other settlement terms? Are examples of other possible settlement terms going to be provided? This is particularly when one of the main purposes of mediation is for parties to decide and agree on the outcome.

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.

I have addressed this above. In my experience much is to be gained by parties engaging in mediation at a much earlier stage. At the very least, parties should have the option of exploring mediation before raising court proceedings. I think making mediation mandatory before raising court proceedings would work in certain situations. However, there are important practical considerations, not least in relation to claims that need to be raised quickly due to time-bar (prescription) concerns. Further practical considerations such as how parties intimate a claim that is not first being raised as a court action, would need to be considered

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					

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

(e) Individuals					X	
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Please explain the reasons for your response.

So far as I am aware, mediation almost always has cost savings. Particular when parties engage in mediation at an earlier stage of proceedings. There is a body of published researching which refers to the millions of pounds of savings to the economy as a direct result of mediation, and the cost to the economy of litigating disputes

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

Consideration needs to be given to the fees that are going to be charged by mediators and whether fees need to be fixed fees for certain claims/value of claim. If the pro bono court mediators are no longer going to be offered, this has the effect of potentially increasing costs for some parties to a dispute (ref my answers above)

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 positive

Please explain the reasons for your response.

In my view the flexibility of mediation will have a positive impact on protected characteristics

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

I don't believe there are any negative impacts

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

Please explain the reasons for your response.

I think more information is needed regarding the detail of the Bill. I have raised some questions in my answers above

General

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

I want to congratulate all those involved in presenting this proposed Bill. I am a huge advocate of mediation and would welcome any further opportunities to assist with the development of the Bill