

# 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".)

Member of the public

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

During 2013 to 2015 I was a party litigant in the Sheriff Court, Court of Session, and Mental Health Tribunal. I was forced to defend my family life because of the instigation of legal action by the Local Authority, and regrettably lost the services of two solicitors. Because of my experience I think that I have a good appreciation of the weaknesses and failings of the courts and tribunals as a means of resolving disputes, particularly when there is a significant imbalance of power and status between the parties. I have no experience of mediation nor of other forms of alternative dispute resolution.

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).

Mr Barry J S Gale

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.**

In my view a settlement negotiated between the parties is far better than one imposed by an imperfect outsider who has a much shallower appreciation of the nuances of the case. My experience of the Scottish Courts and Tribunals has been a very negative one. I was a party litigant defending my family life against state interference in two closely related but judicially separate cases involving the same people. Justice was not done in either case, in my opinion. The judiciary did not understand the facts, took a one-sided view of what was going on, formed an opinion then made findings in fact to support that opinion. The result was that my mother was locked up in hospital for the last 2 years of her life, deprived of rehabilitation and exercise, and died there. She could have spent that time at home in my care, she would probably have lived longer, and certainly been far more happy. During the legal process I made three offers or suggestions to negotiate a mutually acceptable outcome. These were ignored by my opponent (the local Joint Integration Board) and by the Courts and Tribunals, either because the offers did not give the JIB's medical and social work professionals everything they wanted, or because the Courts did not know how to take them forward. The decisions gave one party total control over the family life of the other, against their wishes and in breach of their human rights. One party was fully satisfied, the other was bitterly aggrieved. Appeals were made, but there was an overwhelming procedural desire to uphold the decisions at first instance, declaring there to be no merit in any facet of the appeal. If there had been an emphasis on negotiation, and an acknowledgement that the parties knew the facts far better than the Courts themselves, then it is very likely that the issues in contention would have been central and openly debated. The Courts would have seen which side was flexible and which was inflexible. A mutually acceptable outcome could have been achieved, and my mother could be alive today.

## 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 requirement would remind the parties of the option and the social obligation to discuss the key issues of their dispute and negotiate a mutually agreeable settlement.

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)?

None of the above

**Please explain the reason for your response.**

While I have no experience of litigation in any of the above categories, I think that that if mediation is beneficial in one category then it is likely to be beneficial in all categories. The major impediment to the success of mediation is not the category of the case but the willingness of the parties to be flexible, to discuss their motives and wishes openly, and to negotiate with each other.

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.**

A negotiated settlement is far better than one imposed by an imperfect outsider, so it should be promoted and enabled as an alternative means of reaching a legally binding 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.**

In order for mediation to be integrated into the legal process, so that the case can be transferred to court efficiently if mediation fails, then I think it might be necessary for it to be instigated after the dispute is lodged in court and becomes formally subject to statutory or judicial requirements. The possibility of the proceedings being transferred to the court could have an influence on the manner in which mediation is conducted.

## 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.**

I do not feel competent to answer this question with any authority. I am sceptical of your claim that the cost of mediation to settlement will be less than court fees, which I feel sure do not reflect the full costs of the providing suitable surroundings and covering the salaries of the judiciary and support personnel. The solicitors I engaged estimated fees of several thousand pounds, so I expect the fees of the mediator to be comparable. Whereas court fees were in the hundreds, and even the cost of appealing to the Inner House of the Court of Session amounted to about £2000. This does not include any award of costs for losing the appeal, which was not made in my case, perhaps because I was a party litigant. Unless the cost of mediation is significantly less in a particular case, or could be covered by legal aid, I expect this could deter many from using it as an alternative to the court.

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

The duplication of effort in transferring a case from mediation to the court could be minimised by making the mediation process compatible with the court process. For example, the mediation process could be used to generate documents which could be used in court.

The mediator could assist the parties in making a joint statement of the issues in dispute and the relevant facts which are agreed and those which are not. Not only would this assist mediation, it would avoid duplication when lodging Pleas and Answers in the court (which I found were ignored in the drawn-out court process). It could also reduce the scope of the proof hearing. Thorough debate of the issues during mediation is likely to enable the judge to identify and focus on the crucial aspects of the case.

## 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?

Unsure

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

Don't know.

## 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 lack the expertise to comment on this matter.

## General

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

I think that the proposal should go further than making it mandatory to consider the option of mediation. Parties should be required to make a fair attempt to settle their dispute out of court. Otherwise if one party has vastly more power than the other it could force the matter into court where it could use its superior legal resources or its professional status to gain an unfair advantage.

I hope that the requirement to consider (or initiate) mediation will extend to disputes between citizens and the state, potentially avoiding cases going to the Mental Health Tribunal which could have been negotiated to a mutually acceptable outcome.