

## **Mediation (Scotland) Bill Consultation Response by CMS Scotland**

### **1. Are you responding as:**

- an individual – in which case go to Q2A
- on behalf of an organisation? – in which case go to Q2B

**2A. 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”.)

- Politician (MSP/MP/peer/MEP/Councillor)
- Professional with experience in a relevant subject
- Academic with expertise in a relevant subject
- 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:

N/A

### **2B. Please select the category which best describes your organisation:**

- Public sector body (Scottish/UK Government or agency, local authority, NDPB)
- Commercial organisation (company, business)
- Representative organisation (trade union, professional association)
- Third sector (charitable, campaigning, social enterprise, voluntary, nonprofit)
- Other (e.g. clubs, local groups, groups of individuals, etc.)

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):

Commercial law firm operating in Scotland, the UK and internationally, with a focus on large and complex commercial dispute resolution. We have extensive experience in representing parties in mediation. Some employees are mediators themselves.

### **3. Please choose one of the following:**

- I am content for this response to be published and attributed to me or my organisation
- I would like this response to be published anonymously
- I would like this response to be considered, but not published (“not for publication”)

If you have requested anonymity or asked for your response not to be published, please give a reason. (Note: your reason will not be published.)

N/A

**4. Please provide your name or the name of your organisation.** (Note: The name will not be published if you have asked for the response to be anonymous or “not for publication”.)

Name:

CMS Cameron McKenna Nabarro Olswang LLP

**Please provide 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.** (Note: We will not publish these contact details.)

**5. Data protection declaration**

I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.

**YOUR VIEWS ON THE PROPOSAL**

**Aim and approach**

**1. 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
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

We agree that the introduction of legislation with a policy aim of increasing the use and consistency of mediation services for civil cases in Scotland would be appropriate.

It would not, in our view, be appropriate to mandate a full mediation process at this stage. However, some form of procedure to require the parties to consider/explore mediation at an appropriate stage and to provide information to parties on mediation would assist in embedding mediation more firmly into

the dispute resolution infrastructure. In practice, our clients who are experiencing disputes often already have information on mediation and will consider the appropriateness of the same with us, however we appreciate this is not the case for all parties in the civil justice system.

### Details of the proposal

#### **2. 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
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

As noted above, whilst we support the policy objective behind the proposed bill, we have some reservations as to the detail of what is proposed, chiefly the suggested timing of the questionnaire and mandatory mediation session. We envisage a number of difficulties with mandating this to take place at the stage that proceedings are commenced.

In particular:

- In many cases, the point at which litigation is initiated will be the least optimal point in time to introduce the prospect of mediation. The parties are usually not in the right frame of mind at this point to consider mediation seriously, nor are they usually sufficiently well informed practically to take a full mediation process forward. This is because, at this stage, often only the pursuer's case has been put forward and this may not be fully developed. Once both parties' cases have been articulated to some degree, and the parties have a sense of the strengths and weaknesses of their respective cases, mediation can be more usefully considered. There is a danger that forcing consideration of a mediation process on the parties too early may have the opposite effect from that intended.
- In theory, where pre-action protocols are used (e.g. in the Commercial Court of the Court of Session) lack of information at the outset of the case should be less of a concern. This is because pre-action protocols are intended to ensure early exchange of information between the parties regarding their respective positions in the case. However, at present, pre-action protocols are not consistently enforced by the courts and there is a lack of compliance by parties. In a large and complex litigation, this can mean that it is many months before the parties' positions are fleshed out adequately enough for them to take proper stock of the situation and to allow any meaningful discussion to take place. For this reason, the successful implementation of this proposed process (certainly in relation to complex cases) will require a parallel effort to be made by the courts to enforce pre-action protocols.
- It is not uncommon, particularly in large and complex cases, for additional parties to be joined into the proceedings at a later stage. Those parties could miss out on the mandatory process of

considering mediation if it only occurs at the outset of the case. If this happened at a different stage in the process, this risk could be avoided or mitigated.

- Some cases may not be defended at all – mandating the process of considering mediation at the outset may involve wasted cost and possible delay in those cases.
- Some cases are incompetent / otherwise misconceived and capable of being disposed of in a summary fashion. Again, mandating this process in those cases may not be appropriate.
- In some cases, urgent and/or interim orders will require to be sought at the outset which must be dealt with as a priority – these applications should be allowed to take priority over this process (and indeed, some cases will not be suitable for mediation at all, for example, the lawful enforcement of a restrictive covenant).

We recognise that there are reasons the proposal seeks to identify a uniform and early point in time at which to introduce the mandatory process. However, we consider the policy aim of increasing the use and consistency of mediation services would be more likely to be successful if the point at which this occurred was slightly later (though still early) in the process, for example, this could be:

- Once defences/answers have been lodged by the other party(ies). This would avoid wasted cost in undefended cases and allow the point to be raised again where additional parties are joined later;
- Around the stage at which the next steps in the procedural path are being set down (e.g. around the time of the Options Hearing in a sheriff court case / the Procedural Hearing in a Commercial Action / following the end of adjustment in an ordinary case in the Court of Session); or
- At an appropriate time to be determined by the court provided this occurs prior to the fixing of a substantive hearing;
- And/or it should be made clear to the parties at the end of the mandated process that they could opt to proceed with a mediation at a later, more appropriate stage. I.e. in addition to choosing that they will or will not proceed with a mediation, parties should be able to choose a “not now, maybe later” type option.

Finally, we consider that in cases where mediation fails and the case proceeds to a full hearing / decision by the court, it may be potentially appropriate to allow the successful party in the case to recover the costs of the failed mediation (i.e. the mediator’s fees and potentially associated legal expenses, plus potentially any legal expenses arising from attending the mandatory Mediation Information Session) as part of any expenses awarded in their favour. This would, however, require safeguards to be put in place to protect the confidentiality of the mediation process.

**3. 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)
- none of the above (no cases should be excluded)

Please explain the reasons for your response.

In addition, we consider the following are potentially types of proceedings that ought to be excluded:

- Undefended proceedings (see our comments at section 2 above re undefended cases)
- Insolvency petitions
- Proceedings to recover statutory debts such as tax, council tax, non-domestic rates etc.
- Potentially certain types of statutory appeals process e.g. appeals against decisions of public bodies or Ombudsmen
- Enforcement of adjudication decisions

**4. 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 Commencement Agreement and, where appropriate, a Mediation Settlement Agreement?**

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

We agree that parties who decide to mediate should be given access to such a process, however, we do not consider that process should be mandatory. Many mediators have their own style agreements (which have evolved in light of developments in practice) and preferred ways of working (e.g. some parties also find it helpful to agree a mediation statement at the outset of the process). Parties should have freedom to determine how they wish to shape and conduct the process, either by accessing a standard process that is made available or by making their own private arrangements. For example, the suggested requirement for parties to agree on one form of mediation (facilitative, evaluative or transformative) in the Mediation Commencement Agreement would be unusual, overly prescriptive (particularly where mediators use a mix of the first two forms, as is often the case) and potentially problematic. Parties – and mediators – may wish to have their own agreements and arrangements to mediate to reflect their preferred approach.

**5. 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 applied to potential litigants who are yet to go to court?**

- Fully supportive

- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

This would have to be subject to clear safeguards, including:

- The exclusion of certain cases (e.g. where there are time bar issues or a need to obtain interim orders); and
- Making provision to allow parties to opt-out of the process until a later point in time if they so choose.

### Financial implications

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

(a) Government (including court services, legal aid etc)

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

(b) Businesses

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

(c) Third Sector organisations

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost

■ Unsure

(d) Mediators and mediation organisations

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

(e) Individuals

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

Please explain the reasons for your response.

We envisage the set-up cost to government (providing the necessary infrastructure, paying for duty mediators, training staff and the judiciary and revising rules and forms) will be reasonably significant. This is particularly so if the process applies to all cases from the outset, rather than only defended cases. We cannot comment, in the absence of data, as to what effect such a process may have on operational costs in the longer term (i.e. the extent to which there may be cost savings from cases settled at an earlier stage).

We envisage the proposal will create some additional costs for parties notwithstanding the proposal that the Duty Mediator would be funded by Scottish Government. This is because in many cases the parties will wish their legal representatives to be in attendance at any mediation information session.

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

Skype could be used for the mediation information meeting(s) to eliminate the costs of attending in person.

Alternatively – and more radically – it may be possible for the mediation information session to be delivered online e.g. by developing an interactive session that takes parties through the requisite information, obtains their responses to certain questions and certifies their compliance for the information of the court.

It may also be appropriate to consider allowing certain parties to opt-out of the information session in certain limited circumstances e.g. where both parties are of a particular size and certify they are already well-informed as to how mediation operates and will consider this at the appropriate time. The cost of

duty mediator could be saved in such cases. This would have to be subject to safeguards to ensure this was not used to undermine the primary policy objective of the Bill.

### Equalities

**8. 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, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?**

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

Please explain the reasons for your response.

While we do not consider that the proposed Bill will have an overall positive or negative impact, we can see that some equality-related issues could arise. So, for example, the following may be worth considering:

- Making it part of the process to ask individual parties (or in some cases, the principals of parties) if they suffer from any disability and if so, whether any reasonable adjustments are required to enable them to engage with the process (see in this regard comments at section 7 above re the use of Skype and online options); and
- Allowing a support person to accompany a party in appropriate cases.

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

See no.8 above.

### Sustainability

**10. 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
- No



No comment