

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

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

Lawyer involved in dispute resolution and mediator

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).

David Hossack

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 consider think there is a benefit to ensuring individuals and organisations are aware of their options when it comes to the availability of mediation as a tool to assist with settling disputes. Carefully drafted legislation could assist this. I have considered the report published by Scottish Mediation in June 2019 entitled Bringing Mediation into the Mainstream in Civil Justice in Scotland and am of the view that the report's proposals merit detailed and wider consideration.

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 can see benefits, in certain cases, arising from having parties complete a self-test questionnaire and attend a Mediation Information Session with a duty mediator although this may not fit with every situation. I refer to the Scottish Mediation report and consider the EDRO option stated there should receive further consideration.

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.

As matters currently stand commercial actions in the Court of Session might be excluded given the requirements, detailed in Court of Session Practice Note 1 of 2017, which detail a process which can facilitate discussion of the potential for mediation to assist in resolving the issues in dispute. That said going forward a that a broader legislative approach as set out in the Scottish Mediation report is worthy of consideration in order that a consistent approach can be taken to all situations.

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?

Partially supportive

Please explain the reasons for this response.

A clear and simple written agreement setting out how a mediation will operate could be a useful tool for many parties who wish to enter into the mediation process. In addition a written Mediation Settlement Agreement setting out the terms of a settlement agreed between the parties could be of assistance and might reduce the scope for future disputes arising in the same matters.

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?

Unsure

Please explain the reasons for your response.

I am fully supportive of the promotion of awareness of mediation before disputes are raised in court. However the manner in which this would operate requires consideration. The setting up of a central body to assist parties who pro-actively decided they wish to engage in mediation could be very useful, particularly if the service was available with limited cost to the parties. An option could be something akin to the operation of ACAS in employment disputes where it is necessary for parties to engage with the service before they are permitted to commence Tribunal proceedings. Some thought will need to be given

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?

to situations where urgent proceedings are required, for example, because there is an impending a timebar or where an interim interdict is required. The Scottish Mediation report sets out a good basis for further consideration of these matters.

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.

It is very difficult to make predictions in relation to the financial implications. Changes which increase the use and consistency of mediation services in Scotland have the potential to result in some reduction in cost. However further development of the proposals following more detailed consultation would assist the introduction of an appropriately flexible system which could allow for the opportunities for reduction in cost to be maximised. The funding of mediation services will be required to meet the proposed bill's aim of increasing the consistency of mediation services. This cannot be achieved by relying on mediation services being provided on a voluntary basis. In addition, further consideration should be given to the levels at which it is appropriate for parties to self-fund mediation services. Again reference is made to the Scottish Mediation report.

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

It is considered that further consultation on and development of the bill's proposals is necessary and this could assist with ensuring that the aims are achieved in a cost-effective way

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?

It is not considered that there would be a negative impact

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

Please explain the reasons for your response.

A bill which encourages parties to consider mediation and makes provision for practical steps in relation to this has the potential to be developed in a way which could, after enactment, operate sustainably. However more detailed consideration of the proposals will be necessary to achieve this.

General

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

I welcome this matter being raised and consider it should not only be approached from a perspective of financial benefit but also in terms of what might be of overall benefit to Scotland. There is, however, an opportunity to consider a wider spectrum of matters than those contained in this proposal. In that respect, I consider that the Scottish Mediation report details areas on which further consideration would be beneficial.