

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.

on behalf of an organisation

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".)

No Response

Please select the category which best describes your organisation

Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)

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).

Edinburgh Sheriff Court Mediation Service has been based in Edinburgh Sheriff Court since 1998 and mediates in Simple Procedure cases. The Service is funded by the Scottish Legal Aid board and managed by Citizens Advice Edinburgh, with a salaried coordinator (28 hours), a Mediation Administrator (14 hours)

Please select the category which best describes your organisation

and (invariably part-time) mediators taking on cases on a pro bono basis. In the last three years, the service has mediated an average of 74 cases with a 71% success rate. There is currently a pilot underway to provide mediation services to Selkirk and Jedburgh Sheriff Courts. Any uplift in the number of cases being mediated beyond present levels would not be sustainable given resource constraints and the number of mediators prepared to mediate on a voluntary basis. A working group was set up to respond to the consultation and the final version was circulated around the wider mediator group for comment. We welcome the opportunity to respond to this consultation.

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).

Edinburgh Sheriff Court Mediation Service

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.

We would strongly welcome legislation to increase the use of mediation in Scotland as despite attempts to encourage court mediation, there is a current lack of infrastructure for consistent Scotland wide provision of mediation services. This, coupled with general lack of public awareness around court mediation, has led to a barrier to the public accessing this route. We welcome this draft bill as contributing to widening access to mediation, encouraging education and awareness of mediation among the judiciary, solicitors and advocates and the public alike. We hope that this leads the way to mediation becoming a welcome, beneficial and integrated part of the structure of the justice system. However, we consider it vital that the infrastructure is put in place at the earliest opportunity with regard to the provision and incentivisation for mediation.

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.

We strongly welcome the idea of a mandatory mediation information session, however would ask some questions regarding the scope of the role of Duty Mediator and how this would fit into the mediation process. It is our experience and understanding that mediation is most successful when there is an overarching support structure throughout the mediation process. At Edinburgh Sheriff Court, the Mediation Co-ordinator speaks to the parties once a referral has been received, gives them information, refers them to the In Court Adviser for legal advice if necessary, allocates mediators and provides ongoing monitoring and support. The Mediation Co-ordinator deals with court administration for the parties and is a point of contact throughout the process. She attends court to pick up any referrals, although around 80% of referrals come directly from the Sheriff. Mediations are then allocated to a panel of part time court mediators and the mediations take place within the court building on a pre-arranged date. We envisage the Duty Mediator role as being the same as the current Mediation Co-ordinator role. It may be seen as a disadvantage for the Duty Mediator to be a different person from the mediator as building rapport and trust is an important part of the mediation process. An allocation system may be preferable to parties choosing their own mediator, which could be a confusing venture for them. There could be mediators available in court on a rota basis so that parties can proceed immediately to mediation following their interview with the Duty Mediator. It may also be more attractive to the parties if the mediation session can be carried out at a time and place which is convenient for all, and this may not be at the time of the information session. It is also our experience that the Parties do not question having a mediator allocated to their case and this avoids any dispute arising as to choice of mediator. The listing of the types of mediation as 'evaluative', 'transformative' or 'facilitative' could also be confusing for Parties, especially when most if not all (part-time) court mediators are on the transformative/facilitative spectrum. The self-test questionnaire is a useful tool for focusing Parties' minds; however, it does not take into account changes in mind-set throughout the court process. Mediation should be accessible throughout the court process including, as discussed below, prior to a claim being lodged. It could be discouraging for a party to have to pay for mediation once they have already paid their court fee, particularly in the lower value cases. One way of addressing this could be the cost of mediation becoming part of the court fee, or the provision of mediation before the claim case has been lodged. Free/low cost mediation should still be available for Parties with low incomes/low value cases, so that all litigants in Scotland have unhindered access to this form of dispute resolution. It also needs to be recognised that the mediation service offered by Edinburgh Sheriff Court is presently provided free of charge to the Parties involved in Simple Procedure cases and the introduction of any charge in the future may have an adverse effect on mediation uptake. Further use of technology in enabling mediation and saving costs for Parties is a positive move as long as it is taken into account that not all party litigants have this access. In Simple Procedure cases it can be preferable to accept telephone mediation rather than pay travel and accommodation costs which may be a significant percentage of the amount of the claim. However, it is also our experience that face to face mediation can often be helpful in reaching resolution of disputes.

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

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)?

employment disputes which are governed by statutory dispute-resolution processes

judicial review proceedings

Please explain the reason for your response.

We would query who would make the decision regarding exemptions and the criteria for assessing vulnerability, for example.

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.

We would agree with the signing of a Mediation Commencement Agreement, which is currently signed under our existing procedures when Parties agree to mediate. With regard to a Mediation Settlement Agreement becoming a court decree, there could be possible issues around confidentiality with this. Currently compliance rates with the terms of Mediation Settlement Agreements are 98% within ESC, but this also reflects the monitoring role of the Mediation Co-ordinator and the fact that the case remains in the court system until the settlement terms are carried out. If a settlement is not implemented, it is therefore not necessary to file a separate claim.

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?

Fully supportive

Please explain the reasons for your response.

We would strongly support the option of mediation prior to a claim being lodged and propose that there should be more information available about mediation at an earlier stage. It would be beneficial to have an office for early dispute resolution across all courts and types of cases irrespective of claim values, which could refer potential litigants to alternative forms of dispute resolution. This would result in savings of both cost and time for the court and litigants alike. We presume what is proposed is that the self-test questionnaire is completed by the Claimant when lodging their claim (and that the Respondent will similarly be required to complete a self-assessment questionnaire in providing their response to the claim).

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.

We consider that it is not possible to accurately predict cost benefits without knowledge of the degree to which mediation would be embedded within the court system and funding allocated beyond the scope of your proposal. However, overall there are likely to be cost savings for the court system with an increase in the number of parties opting for mediation rather than the more adversarial court route. As referred to elsewhere in this document, Simple Procedure parties may be disincentivised by having to make an additional payment to use the services of a mediator.

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

Please see response to Question 6.

There could also be cost and time savings for parties if mediation information sessions/ mediations were to be held at appropriate venues (for example the use of community resources) outside the court and closer to the parties' locations. This would be particularly beneficial in rural areas and taking into account the closure of local courts and pressure on limited court space.

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?

Positive

Please explain the reasons for your response.

We believe that more accessibility to flexible dispute resolution can only have a positive impact on equality. Preserving the voluntary nature of mediation would avoid putting pressure on more vulnerable parties to mediate.

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

By the monitoring of equality of access to mediation and the provision of information to parties.

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.

The bill would have a positive social impact from the perspective of access to justice, and the increase in wellbeing and empowerment of party litigants.

General

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

We welcome the proposed increase in training in ADR for the judiciary, Solicitors and Advocates which will help address the issue of inconsistent referrals throughout Scotland.

The system of mediators acting on a pro bono basis is not sustainable and mediators should be appropriately remunerated. This would go some way in changing the culture and perceptions around mediation, and help embed it within the court framework as a valuable alternative pathway to dispute resolution.

We anticipate that building upon existing court infrastructure where possible in order to increase the use and consistency of mediation services will achieve cost savings in the funding of the proposals. Our sense is that further funding savings may also be achieved through a phased roll-out of the proposals from the present main mediation centres to the rest of the country.

We welcome the recommendations of the Scottish Mediation Expert Group (Bringing Mediation into the Mainstream in Civil Justice in Scotland, published June 2019). These proposals include the establishment of an Early Dispute Resolution Office based on existing resources, with an online roster of mediators and funding for low value cases, with the costs for higher value cases being charged on a sliding scale. This would widen access to mediation for all litigants, with mediation being available at any stage in the court process and all parties, whatever their financial resources, having the opportunity to mediate.