



Informing Progress - Shaping the Future

A Response by the Forum of Insurance Lawyers to
the consultation on the Mediation (Scotland) Bill.

August 2019



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FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for respondents in civil proceedings.

The consultation was drafted following consultation with the membership in Scotland. It has been prepared by the following members of the FOIL Scotland Rules Sector Focus Team and the ADR Sector Focus Team.

A Response by the Forum of Insurance Lawyers to the consultation on the Mediation (Scotland) Bill.

Question 1: Are you responding as:

- An individual - in which case go to Q2A
- On behalf of an organisation - in which case go to Q2B

Question 2B: Please select the category which best describes your organisation:

- Public sector body
- Commercial organisation
- Representative organisation (trade union, professional association)
- Third sector
- Other

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

FOIL member firms have very considerable experience in handling claims for insurers and self-insured organisations, across many areas of civil litigation, with a particular focus on personal injury claims.

FOIL operates through Sector Focus Teams (SFTs), bringing together senior lawyers with experience in specialist areas. This response has been prepared by members of the FOIL Scotland Rules SFT, and a representative from the ADR SFT, which focuses on all forms of alternative dispute resolution including mediation. It has been drafted following consultation with the wider membership.

Question 3: Please choose one of the following:

- I am content for this response to be published and attributed to FOIL
- I would like this response to be published anonymously
- I would like the response to be considered but not published.

Question 4: Please provide you name or the name of your organisation:

FOIL, the Forum of Insurance Lawyers.

Question 5: Please provide a way we can contact you if there are queries regarding your response. Email is preferred.

YOUR VIEWS ON THE PROPOSAL

Aim and Approach

Question 1: Which of the following best expresses your view of legislation to increase the use and consistency of mediation services for civil cases in Scotland?

- Fully supportive
- Partially supportive
- Neutral
- √ Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

FOIL has been a long-standing supporter of the use of ADR to resolve claims, in place of litigation. It believes it has a useful role to play in achieving early settlement and reducing costs. It has run a number of events promoting the benefits of ADR, including a recent Roundtable looking at alternative methods of resolving serious injury claims.

Whilst obviously FOIL's view would depend upon the proposals being put forward, in general, FOIL does not believe that legislation is the right way to increase the use and consistency of mediation services. In particular, it does not support mandatory mediation and is wary of proposals which have a mandatory element.

FOIL has concerns that the use of legislation to push parties towards mediation is a blunt instrument. Research in Scotland and in other jurisdictions indicates that complex issues arise around the drivers and outcomes of ADR. A CJC working group in England and Wales, reporting in October 2018¹, identified three challenges in increasing the use of ADR:

- Awareness of ADR, both in the general public and in the professions and on the Bench
- The availability of ADR, both in terms of funding and logistics and in terms of quality and regulation of the professionals involved
- The encouragement of ADR by the government and the courts.

The recommendations it puts forward go well beyond a legislative solution.

Research undertaken for the Scottish government "Mediation in Civil Justice: international evidence review"² concludes that "*mediation should not be seen as a panacea, but used where appropriate*". The report raises important issues around the preservation of parties' rights, and the need to ensure that access to the "*full justice spectrum*" is not inappropriately curtailed. The report warns against an assumption

¹ <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADRWG-Report-FINAL-Dec-2018.pdf>

² <https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/>

that early settlement is always a positive outcome and raises concerns that individuals may feel pressured to settle through mediation, with the potential for important rights to be inadvertently relinquished. As the report notes *"it is necessary to think through what 'success' would look like for any planned system of mediation and whether there should be several measures working in conjunction or whether one single measure would be considered more significant."*

Reflecting the complexity of the issues, rather than immediate legislation FOIL would prefer to await the outcome of the current Scottish Mediation project, supported by the international review research, which is considering a range of measures including legal aid, changes to court rules, and training and CPD.

Details of the proposal

Question 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
- Partially opposed
- √ Fully opposed
- Unsure

Whilst it is a keen supporter of mediation and supportive of the aims of the Bill, FOIL does not believe that the proposals in the Bill are the right way to achieve those aims. As the "Mediation in Civil Justice: international evidence review" indicates, *"mandatory processes of referral do not necessarily lead to better outcomes for users. The evidence only shows increased uptake"*.

FOIL is concerned that the requirement for a mandatory questionnaire and initial mediation meeting will prove onerous, will not increase settlement rates (particularly in cases where parties are legally represented) and will increase parties' legal expenses overall. Although it is stressed that the mandatory elements of the process will be free, a meeting with a mediator at which issues may arise concerning liability, evidence and settlement would require legal representatives to be present. Parties would need to pay their own expenses, with the party ultimately unsuccessful also paying the expenses of the other side.

There are particular concerns over the application of the proposals to personal injury claims. This is a sector involving a significant number of claims – nearly 9,500 in 2017/18 - with the parties invariably legally represented. Lawyers working in this field, for both pursuers and respondents, are usually specialist practitioners, well-versed in the process and procedure of various methods of dispute resolution, and mindful of the interests of their clients. Personal injury claims are handled under a mandatory Pre-Action Protocol, applying to claims worth up to £25,000, with the aim of encouraging early settlement of claims without the need for litigation. As noted in the consultation paper, the rules of the new 'simple procedure' in the Sheriff Courts for

personal injury claims encourage the settlement of claims by negotiation or alternative dispute resolution: the Sheriff will steer parties towards ADR if he or she believes that would be appropriate.

In this field in particular, in light of the above, it is very unlikely that the requirement for an initial questionnaire and a mandatory meeting with a duty mediator would have any significant effect on the number of claims which go to formal mediation. Bearing in mind the large volume of personal injury claims, the imposition of the mandatory process would be likely to result in a backlog, causing a delay in the handling of cases. Overall, it would also be likely to increase expenses, with the vast majority of cases incurring the additional cost of the questionnaire and the meeting without benefit.

The proposal that the new court process should apply to all cases (except those excluded) is very broad brush. Civil Justice Statistics indicate that in 2017/18 there were 81,184 civil cases in Scotland: introducing the new process over this volume of claims will be a very significant undertaking. The example questionnaire included in the consultation paper would most appropriately be aimed at parties who are unrepresented: there may be narrow categories of case where the proposals could be beneficial, particularly involving litigants in person, although it seems unlikely that many litigations in person would be able to commit to mediation at their own expense, even if convinced of the benefits.

Question 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 and dissolution of marriages
- ✓ Proceedings under the Arbitration (Scotland) Act
- ✓ Employment disputes which are governed by statutory dispute-resolution processes
- ✓ Judicial review proceedings
- ✓ Other cases
- None of the above (no cases should be excluded)

Please explain the reasons for your response

FOIL does not believe that it would be appropriate to introduce a mandatory questionnaire and a mandatory meeting into the civil justice process. However, if the proposals are to be implemented, FOIL would agree with the exclusions listed above.

In addition, in view of the points raised in the answer to Question 1, personal injury claims should also be excluded from the process. Claims where a form of ADR has already been unsuccessfully attempted prior to the issue of proceedings should also be excluded.

Question 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

If the proposals are to be introduced FOIL can see no harm in support being offered to parties who wish to mediate.

Question 5: Which of the following bests 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

FOIL does not support the proposals in relation to claims before the court and therefore does not support similar proposals applying to pre-issue claims.

In practice, the proposals would be very difficult to implement pre-issue. Many claims settle before litigation without formal ADR or mediation, by way of negotiation or informal meeting. In many circumstances there will be no value in the formal process proposed, and it would be difficult to prescribe the point at which it should apply.

Court rules already encourage the consideration of ADR to resolve disputes pre-issue. As well as the personal injury pre-action protocol and the simple procedure rules, the Court of Session practice note 1 of 217 of 2017 relates to commercial actions in the Court of Session. It addresses pre-action communication and sets out a protocol to be followed by the parties. It requires that both parties should consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution and that recourse to the court should only be when truly necessary. The Sheriff Court rules for commercial actions enable the sheriff to make any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution). As in the case of litigated claims there is already encouragement and the possibility to mediate prior to litigation.

Financial implications

Question 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 neutral cost
- Some reduction in cost
- Significant reduction in cost
- Unsure

The financial impact will depend on the extent to which the use of mediation increases, and the extent to which it is successful in resolving disputes and removing claims from the court process. It should be noted that the vast majority of claims settle before trial in any event, and the cost of a new stage early in the process, affecting all claims, is likely to exceed any savings achieved at later stages through a proportion of claims settling early.

The "Mediation in civil justice: international evidence review", found that *"there is the potential for both cost and time savings for users and the civil justice system by making use of mediation, but the evidence shows this cannot be guaranteed"* It also noted *"very limited costs effectiveness evidence that was underpinned by strong empirical evidence."*

FOIL is concerned that with government policy being full-cost recovery in the courts, although the proposals in the Bill would be free at the point of delivery, either savings would need to be made in other parts of the court service or court fees would need to rise to cover the additional costs. On the back of court fee increases in September 2015 and April 2016, the significant increases in court fees introduced in November 2016 were said to be necessary to move further towards full-cost recovery. The government indicated in 2017 that *"inflationary pressures in the wider economy"* meant that fees would have to rise again for the three year period 2017-2020. FOIL opposed those increases and would be opposed to further court fee increases as a result of the current Bill.

(b) Businesses

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

The effect on businesses which are infrequent litigants will depend on the extent to which mediation is encouraged, how successful it is, and the degree to which the cost of mediation is less than resolution without mediation. As indicated above, recent research has shown that use of mediation cannot guarantee savings in cost and time.

Businesses that litigate on a regular basis, including insurers, are likely to suffer some increase in cost as the expense of the proposed process. The cost of preparation and attendance by a legal representative (and the expenses of the other side in the event of an adverse expenses award) in every claim is likely to exceed the savings obtained on the very few cases likely to settle through mediation as a result of the new process.

(c) Third Sector Organisations

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

The position will be the same as 'businesses' above for third sector organisations involved as litigants. There is the possibility that charities and advice organisations may receive more enquiries on how to complete the questionnaire and advice on the process.

(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

On the basis that the proposals will create a new post of 'duty mediator', requiring a significant number of mediators to be recruited, and with the possibility that the overall number of mediations may increase to some extent, the proposals are likely to be financially advantageous for mediators and mediation organisations.

(e) Individuals

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

The effect on individuals, who are likely to be infrequent litigants, will depend on the extent to which mediation is encouraged, how successful it is, and the degree to which the cost of mediation is less than dispute resolution without that mediation. As indicated above, recent research has shown that use of mediation cannot guarantee savings in cost and time.

Equalities

Question 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 reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?

FOIL is unable to comment

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

FOIL is unable to comment.

Sustainability

Question 10: Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely further disproportionate economic, social and/or environmental impacts?

FOIL is unable to comment

General

Question 11: Do you have any other comments or suggestions on the proposal?

No