

# 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

Representative organisation (trade union, professional association)

**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).**

The Forum represents member's interests and views in the handling of Third Party insurance claims – in this context, we mean claims arising from Motor accidents, Employers Liability and Public Liability matters. (which can be injury claims or claims for damage to property) 1. The Forum aims to promote

Please select the category which best describes your organisation

improvements to the law which enable consumers easier, quicker and more cost effective access to justice. 2. The forum membership covers a number of major insurers, financial institutions as well as claims handling companies and Local Authorities. 3. Insurance companies exist to provide financial protection for customer (consumers and businesses) in the event that the unforeseen happens.

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).

Forum of Scottish Claims Managers

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?

Partially supportive

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

Whilst we support the general aims of the Bill, we think it could have unintended consequences of additional cost and delay for personal injury matters. Any delay would affect Pursuers and Defenders alike and would run contrary to the aim of speed of access to justice. At the moment, personal injury claims are different because there is already a Mandatory Pre-Action Protocol to promote dispute resolution before litigation. In the main, Defenders are backed by insurers or professional organisations who are familiar with the system or represented by Solicitors who are also familiar with the current legal process. As such, mediation could have the unintended consequence of adding complexity and cost to the injury claims process – the cost of which would be passed on to consumers and businesses by way of increased insurance premiums. We believe there are improvements which could be made to further promote quicker dispute resolution without having to involve the Courts. These are: 1. An Online Portal (one already exists in England & Wales, paid for by Insurers levy to the Motor Insurers Bureau) for registering injury claims arising from Motor accidents, routing claims to the correct insurers quickly and efficiently and imposing tight deadlines upon insurers to respond. This portal should encourage earlier settlement at the fair amount to the injured party and we see the practical effect of a portal as reducing litigation volumes and cost of litigation at the same time as delivering a faster outcome for the injured person. 2. Fixed legal costs for low value injury claims – in the current process, the Pursuers Solicitor (on a litigated case) will be paid for the work carried on that case. We see this driving the wrong behaviours as it encourages effort over outcomes. The level of reward a solicitor receives is also disproportionate to the value to the Pursuer – we would advocate an overhaul of these aspects to re-introduce proportionality. We do see merit in the aims for Family Law cases and perhaps also Consumer Debt cases where the landscape is entirely different to

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?

personal injury in that the parties do not tend to be repeat players in the system and there isn't the same level of clearly defined protocols for the parties to follow.

## 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.**

Please see our answer to Question 1. We think these steps would add complexity and cost to injury claims as well as delay settlement, so we would advocate that Third Party Insurance claims should fall within the 'excluded' category of cases. We have had experience of certain high value claims going down the mediation route and have seen benefits from this, but as experienced users of the legal system, we are comfortable that we can identify the right cases to mediate without mandatory rules.

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)?

other cases (please specify)

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

Our experience is limited to Third Party insurance claims – either personal injury arising from Motor accidents, accidents at work (Employers Liability) or accidents in a more general setting (Public & Products Liability) and we would advocate these cases should be excluded for the reasons outlined in answers 1. and 2. We are not qualified to comment on the other excluded cases and will leave that to other respondents who are more experienced in these areas.

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.**

Please see earlier answers – we believe mediation can work on the correct cases and giving parties a process to follow can lead to better outcomes. As per our comments regarding the Mandatory Pre-Action Protocol for Injury claims, we believe our suggestion of a Claims Portal would be a better and faster dispute resolution process for low value injury claims, saving mediation resources for cases where more value could be added.

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.**

Please see earlier answers.

## 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
<b>(a) Government (including court services, legal aid etc.)</b>		X				
<b>(b) Businesses</b>		X				
<b>(c) Third Sector organisations</b>		X				
<b>(d) Mediators and mediation organisations</b>						X
<b>(e) Individuals</b>		X				

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

For the reasons outlined in our answers to questions 1. & 2., we believe if the Bill proposals apply to Personal Injury and Third Party Insurance claims in general, there will be increased costs passed on to consumers and businesses by way of increased insurance premiums as well as the Government via the cost to the public purse so we have answered this section accordingly. We believe that a mediation step or process will not stop these types of cases proceeding to litigation because the Pursuers and Defenders are repeat users of the system and understand the legal processes fully.

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 our answer 1. regarding the potential for an Online Portal to streamline Motor Personal Injury claims and provide better and faster outcomes for injured people.

## 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?

We are not aware of any impact on equality.

## 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.**

We are not aware of any impact on sustainability, other than to re-iterate our answer to 6. that we believe if the Bill proposals apply to Personal Injury and Third Party Insurance claims in general, there will be increased costs passed on to consumers and businesses by way of increased insurance premiums as well as the Government via the cost to the public purse.

## General

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

We agree with the overall aims of the proposed Bill, but, would advocate that Personal Injury and Third Party Insurance claims are added to the 'excluded cases' for the reasons outlined in our answers.

We would advocate other methods may be more appropriate for reducing litigation and cost of litigation at the same time as providing quicker access to justice – see answer 1. For more details.