



## **Response**

### **Mediation (Scotland) Bill**

**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**

**Joint Submission from :**

**James Connolly & Tracy Kirk on behalf of:**

**Glasgow Caledonian Law**

**August 2019**

## QUESTIONS ABOUT YOU

(Note: Information entered in this “About You” section may be published with your response (unless it is “not for publication”), except where indicated in **bold**.)

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

**Ms Tracy Kirk & Mr James Connolly are Lecturer in Law and Senior Lecturer in Law respectively at Glasgow Caledonian University Dept of Economics & Law. They have made a joint submission to this consultation.**

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

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

**University**

3. Please choose one of the following:

**I am content for this response to be published and attributed to me or my organisation**

4. Please provide your name or the name of your organisation.

Name: **Glasgow Caledonian University**

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.

### *General Comments:*

We are pleased to be able to respond to this Consultation. Please note that our responses are also made in consideration of the recent Report by Scottish Mediation.<sup>1</sup> We are supportive of their recommendations, particularly in relation to the novel “Early Dispute Resolution Office”. We believe that there is merit in exploring this idea further.

We view this proposal as one which would make mediation a default stage in litigation. We recognise that there would be implications for example in Legal Aid and Rules of Court .

We would also suggest consideration of the approach taken within the Irish Mediation Act 2017.<sup>2</sup> There have been several reports looking at mediation in Scotland in recent years, for example, Lord Gill devoted a chapter to it in his Report on Civil Justice in 2009.<sup>3</sup> Lord Gill was supportive of following the English model for mediation of small claims, but that refusal to mediate or frustration of mediation should not be a matter that reflected on expenses in a litigation (unlike in England). The Irish Mediation Act, effectively uses the whole question of expenses as a powerful lever to encourage ‘voluntary’ mediation. We are broadly supportive of that approach.

### Specific Responses:

#### **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?**

We are fully supportive. We believe that legislation is the most appropriate mechanism for changing the traditional legal culture concerning the primacy of mediation as being the best means of resolving disputes, rather than the last resort.

#### **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?**

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<sup>1</sup> Scottish Mediation(2019) Bringing mediation into the Mainstream in Civil justice in Scotland. Available from : <https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-in-Scotland.pdf> [Accessed August 12 2019]

<sup>2</sup> Kirkwood P.,(2018) Should Scotland have a medication Act? The Irish experience. Available from: <https://www.scottishlegal.com/article/blog-scotland-mediation-act-irish-experience> [Accessed August 15 2019]

<sup>3</sup> Report of Scottish Civil Courts Review (2009) Available from: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4> [Accessed August 10 2019]

We are partly supportive. We would favour consideration of an Early Dispute Resolution Office .

**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)?**

These are broadly equivalent to most of the Irish exclusions, except that the Irish also exclude: proceedings in court relating to alleged infringements of the fundamental rights and freedoms of a person, which we would also exclude. The civil aspects of abuse and harassment (as opposed to criminal offences) would seem to mainly concern reparation claims and interdicts. We recognise that there are strong views that mediation is not appropriate if it means risking safety and recurrence of abuse through the mediation process. We agree that could be a very real concern, however, we believe that one thing that mediation can do is be 'transformative' .

Put simply, it can restore trust and respect so that harms are less likely to recur. For that reason, the following boxes are ticked:

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.

**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?**

We are partially supportive. Additional detail on this proposal would be helpful.

**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 24 questionnaire and Mediation Information Session) so that it applied to potential litigants who are yet to go to court?**

We are fully supportive. This would 'level the playing field' particularly where it may be in one of the parties interests to delay.

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)

(b) Businesses

(c) Third Sector organisations

(d) Mediators and mediation organisations

Much of the literature suggests that mediation is cheaper, faster and more effective generally than litigation, so long as it is properly funded and supported. On this basis, we believe that there would be some reduction of cost for all the agencies mentioned, except for mediators, where there may be significant increase in costs.

7. No comment to make

8. No comment to make

9. No comment to make

**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.

***Other comments:***

Please note 3 final observations.

First, while mediation was historically seen as something which should not be used in cases where there has been a history of domestic abuse cases, there has been a fairly recent shift to encouragement of using mediation in such situations. This use of mediation is subject to a risk assessment with the victim of the domestic abuse. However, we understand that it may be the case that there is a charge for the victim to attend the risk assessment. There is a concern that some victims may be in the position of being forced to pay for this risk assessment because it is a court ordered

process. We would hope that those who are vulnerable may be taken into consideration.

Second, although one of the exceptions is in cases of domestic abuse, we believe that this requires further explanation. There have been victims of domestic abuse who suffered prior to the Domestic Abuse Scotland Act 2018. As such, coercive control protections are not something that many victims may have had. There is a concern, that victims of domestic abuse who have not been able to get recourse through the criminal law system due to the lack of domestic abuse legislation until the enactment of this bill, will not be included within this exemption and therefore will be recommended for mediation, subject to a risk assessment.

A final point to note is that whilst we note that the Scottish Government are currently consulting on the issue of incorporation of the UNCRC and they have held the Children (Scotland) Act 1995 review as a result, it is important that mediation from a children's rights perspective to be considered. There are some participatory rights frameworks which would allow older children to take part in mediation, if done in a child friendly manner. That there should be no discrimination on grounds of age emphasises that children, and adolescents should be considered. The impact mediation could have for disputes in several different key areas of Scottish Government focus should be embraced to ensure mediation plays a proactive role in disputes across legal areas. Incidentally, if a participatory children's rights based framework was used as the underpinning, mediation may be something which is better considered by a greater number of individuals, as opposed to court action as it would be led by the individual who could assess (and educate themselves) on the merits of mediation.