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.â€‹ Please note that you must complete the survey in order for your response to be accepted. If you don't wish to 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".)

Academic with expertise 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:
I am an Associate Professor at the University of Leicester where I teach and research in civil justice system; civil procedure; and alternative dispute resolution (in particular, mediation and commercial arbitration). I have publish extensively on the interrelationship between ADR and the civil justice system and the rules of civil procedure. The consultation paper has quoted one of my leading articles 'Implied Compulsory Mediation' (published in the leading international peer-reviewed journal, the Civil Justice Quarterly) which provides a detailed analysis of the role of mediation within the English civil justice system and judicial attitudes and approaches to the same. I am also a member of the Civil Procedure Rule Committee for England and Wales which is responsible for the drafting and reforming of civil procedure rules.

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).

Masood Ahmed, Associate Professor, University of Leicester.

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.
Mediation is a well recognised and established forms of alternative dispute resolution which continues to work effectively within the civil justice systems of many jurisdictions. Mediation has the various practical and economic advantages as outlined in the consultation paper. As well as those advantages, the use of mediation also increases access to justice because it means that litigants are given a wider choice of dispute resolution process which may be more suitable than the court process to resolve their disputes. Successful mediations also means that the courts' finite resources are preserved and used on those disputes which genuinely cannot be settled and therefore require judicial determination. This latter point also reinforces the principle of proportionality within the civil justice process. The principle of proportionality and the policy rational underpinning the use of ADR within the civil justice system was succinctly explained by Briggs LJ (as he then was) in the leading English case of PGF v OMFS [2013] EWCA Civ 1288 . In that case, Briggs LJ held that where a party ignores an invitation to ADR then that conduct will be considered as unreasonable and will justify the courts penalising the defaulting party in costs. Briggs LJ explained that ADR supported the principle of proportionality because:
"A positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which may save the parties and the court time and resources. The invitation may simply be accepted, and lead to an early settlement at a fraction of the cost of the preparation and conduct of a trial. ADR may succeed only in part, but lead to a substantial narrowing of the issues. Alternatively, after discussion, the parties may choose a different form of ADR or a different time for it, with similar consequences."
I think the Bill can be improved to make the principle of proportionality more explicit and clear. The economic virtues of engagement with mediation should be made an explicit aim of the proposed Bill. By doing this, the mediation process envisaged by the Bill will be firmly rooted in the principle of proportionality which will be clear and visible for the courts, lawyers and the parties.

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this latter point, the increased use of mediation has the advantage of ushering a culture change within the Scottish civil justice system which views 'dispute resolution' beyond simply meaning litigation - it would promote a wider and more modern approach to dispute resolution which encompasses alternatives to litigation (including mediation) as well as the traditional court process. It will also mean that the Scottish civil justice system is reforming and modernising in-line with comparable jurisdictions. For example, Ireland has introduced the Mediation Act 2017 and England and Wales is undergoing major digital refroms to its civil court process including intriduicing the Online Civil Money Claims (OCMC) system for low-value claims. The OCMC has embedded an 'opt-out' mediation stage within the process which encourages parties to engage with mediation and explore settlement options. Thus, the increased use of mediation, through legislation, will increase access to justice for litigants, promote the principle of proportionality, and modernise the Scottish civil justice process.
By placing mediation within a legislative framework, the proposed Bill will further enhance the visibility, role, and function of mediation within the Scottish civil court process. The proposed Bill will also promote a culture change across the wider legal profession in the way civil disputes are managed and resolved. Lawyers, including the judiciary, will be required understand the nature of mediation and actively engage with it. It will no longer be enough for lawyers to simply ‘tick the ADR box’ when advising their clients – they must go further by explaining to their clients the structure of the court-initiated procedure and their obligations to engage with the Mediation Information Session (MIS).
The introduction of a court-initiated mediation process will also provide lawyers with opportunities to broaden their skills. The mandatory nature of the MIS stage and participation with the mediation process will mean that lawyers will be actively part of the process from the outset so that they are able to develop a wider range of collaborative dispute resolution skills and experiences. The involvement of the legal profession will be fundamental because they are perceived as "gatekeepers to dispute resolution" and the creation of the duty mediator and mediator roles will provide lawyers with the opportunity to train as mediators and to actively participate in the new process.

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?

Fully supportive

Please explain the reasons for your response.
The questionnaire certainly has its advantages. It serves the function of focusing the parties' minds on the nature of their dispute and to consider whether it would be more suitable for settlement. The MIS stage is also a significant procedural element which seeks to educated and inform the parties on the nature and virtues of mediation and to focus their minds on consider whether mediation is appropriate in resolving their dispute. It serves to promote a structured and consistent form of ‘encouragement’ of mediation which requires active participation of the parties with an expert duty mediator. The MIS also reinforces the drive to introduce a culture shift in civil dispute resolution away from a pure adversarial system to one in which mediation performs a necessary and important function. However, these elements of the process can be improved. The example questionnaire in the consultation paper is taken from the Netherlands does provide some guidance to the parties on why they may or may not consider mediation to be appropriate. However, the questionnaire could be vastly improved by providing the parties with information on the nature of mediation from the outset and how it could benefit the parties in resolving their dispute and this information can easily be incorporated in the questionnaire. The MIS stage could also be improved to deal with those mediations which have not resulted in a settlement (i.e. a non-settled mediation) but where the parties have been able to narrow the issues in dispute through there participation with the mediation process. The wider benefits realised through engagement with mediation should be carried forward to the court process which has the potential to lead to a future settlement of the dispute or will assist judicial case management. Capturing the wider benefits of a non-settled mediation can be achieved by explaining to the parties (in the self-test questionnaire and, more importantly during the MIS) the importance of narrowing

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the issues in disputes and how it can benefit the parties and the management of their dispute at a later stage. I have conducted research on this aspect of successful mediations and ADR which support my comments - the reference to my detailed research paper (which contains detailed empirical data) is: Masood Ahmed 'An investigation into the nature and role of non-settled ADR' (2017) 7(2) International Journal of Procedural Law 216-249 - I am able to provide a copy of the paper if you require.

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

Please explain the reason for your response.
I do not agree that judicial review proceedings should be excluded from the Bill. Although the consultation paper does not provide an explanation for excluding public law cases, it may be because these cases concern the legality of the exercise of powers by public bodies and the impact this has on the rights of citizens which, some may contend, should be determined by the courts and in the public domain. However, excluding judicial review proceedings from ADR is a thing of the past. Early English ADR jurisprudence strongly endorsed the use of ADR in public law matters. In R (Cowl) v Plymouth City Council [2002] EWCA Civ. 303, a case concerning the review of the defendant council's decision to close the claimants' care home, Lord Woolf made clear the importance of ADR in a matter concerning public law issues when he held The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress. Further, parties wishing to bring judicial review proceedings parties must engage with the judicial review pre-action protocol, which includes the requirement that the parties must consider and engage with appropriate ADR procedures (including mediation).

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?

Fully supportive

Please explain the reasons for this response.
The proposed Bill incorporates an innovative procedural feature: the option for the parties to have their Mediation Settlement Agreement converted into a court order so that it becomes immediately enforceable. This feature is lacking in the Irish Mediation Act 2017 which simply provides for the enforceability of mediation settlement agreements – there is no option to convert the agreement into an enforceable order

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and, if the settlement agreement in breached, then the innocent party must incur the cost and time of enforcing the agreement through the courts. Thus, the enforcement option is a procedural feature of the proposed Bill that deserves particular praise. It provides the parties with the flexibility to elect how their agreement is to be recorded and this may be important due to the nature of the dispute. The parties may be comfortable with recording their settlement in an agreement because they may have had a long-standing trading relationship which they wish to restore and preserve; a court order may be perceived as too draconian as compared with a settlement agreement. On the other hand, there may be circumstances where a court order will be more suitable (for example, where the parties have completely lost trust in each other). Providing for the enforcement of the settlement agreement is also consistent with current developments in international dispute resolution. For example, in June 2018, the United Nations Commission on International Trade Law (UNCITRAL) finalised drafts of the Convention on the Enforcement of Mediation Settlements, to be called the 'Singapore Mediation Convention' and accompanying Model Law. The rationale underpinning this initiative is to introduce a uniform standard for the enforcement of mediated settlement agreements equivalent to the successful New York Convention on the recognition and enforcement of foreign arbitral awards. It will mean that mediated settlement agreements are easily recognised and enforced by the courts of signatory states.

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.
I am of the view that the MIS should be incorporated at the pre-action stage (i.e. pre-litigation) stage. The mediation process will be initiated after the parties have formally engaged the court process (i.e. post-action) which is different to the English MIAM procedure which takes place before court proceedings are initiated (i.e. pre-action); engagement with a MIAM is a necessary procedural pre-condition to court proceedings. Although the consultation paper recognises the potential to extend the MIS stage to the pre-action stage, the proposal to incorporate the process post-action is misconceived. There is no reason to restrict the procedure to the post-action stage of litigation. Indeed, the consultation paper acknowledges the potential virtues of extending the process to the pre-action stage because it "would allow the benefits of the process to be realised." Initiating the procedure post-action has a number of potential difficulties. There is a real danger that the parties, having incurred the time and cost of formally engaging with the court process, will have already become entrenched in their respective positions and, consequently, will be less inclined to incur additional costs of engaging with a mediation at a later stage. Rather than the mediation process taking effect after proceedings have been issued, the procedure should be embedded within the pre-action stage. It is acknowledged that there are valid arguments against having the mediation process at the pre-action stage. It could be argued that it is far too early for the issues to fully mature, not least because full disclosure has not yet taken place. Thus, engagement with a pre-action mediation may be futile and lead to the parties incurring unnecessary and wasteful costs. However, these potential difficulties can be effectively dealt with by the introduction of a basic pre-action protocol. Pre-action protocols are a relatively new procedural phenomenon within Scottish civil procedure as compared with English civil procedure where they are the gateways to the formal court process. Disputing parties must engage with any applicable pre-action protocol and a failure to so can result in cost penalties against the defaulting party. The purpose of the pre-action protocols is to focus the attention of litigants on the desirability of resolving disputes without litigation; to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; and if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings. The pre-action protocols have been effective in promoting ADR and the early settlement of disputes. Indeed, in his Review of Civil Litigation Costs, Sir Rupert Jackson noted that the pre-action protocols were achieving their stated aims. A general pre-action protocol would take the following basic procedural framework: 1. the parties must draft and exchange letters of claim and reply in which they must set out their respective arguments in detail; 2. the parties must disclose any necessary documents which support their arguments; and 3. the claimant must provide a schedule of loss and disclose any supporting documents. A further benefit of the having a general pre-action protocol to support the mediation process is that information can be provided on the nature and benefits of mediation earlier on in the litigation process rather than after proceedings have been issued

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and when the parties attend the MIS. Hence, the parties will be better informed and educated on mediation from the outset of a dispute.

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

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

See my previous comments regarding improvements to the Bill and the procedure.

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

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

No Response

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.
Please see my previous comments.

General

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

The enactment of a Mediation (Scotland) Act would be a revolutionary development for Scottish civil procedure. It would formally recognise and enhance the function of mediation within the civil justice system and represent a necessary and welcome culture shift away from the once overly cautious approach to mediation to one which fully embraces it as a necessary part of a modern civil justice system. However, there are potential weaknesses in the current proposals which have the potential to undermine the aims of the proposed Bill and the efforts of policy makers to usher in a major culture shift in the manner in which civil disputes are managed and resolved. Those weaknesses can be remedied by strengthening the MIS process so that duty mediators are permitted to record whether a dispute was suitable for mediation; expressly making proportionality an aspect of the aims; situating the procedure at the pre-action stage which is supported by a basic pre-action protocol; and providing for non-settled mediation.