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 law lecturer at the University of Dundee (since 2013) and a trained meditor (training completed in 2017). I work as a mediator within the University's internal mediation team (see www.dundee.ac.uk/edr) and also conduct mediation on a pro bono basis at Dundee Sheriff Court. The project at Dundee Sheriff Court involves students on the Diploma in Legal Practice co-mediating following appropraite training in mediation skills. This projet started in the academic year 2019/20. I am currently training as a family mediator with Relationships Scotland. Prior to working at Dundee University I was a dispute resolution solicitor in a large Edinburgh law firm.

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).
Sarah King, Lecturer, University of Dundee

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.** Legislation would play an important role in signaling a change in the culture around dispute resolution in Scotland. Using primary legislation signals that mediation is something that is being taken seriously by the government and it would help to raise awareness of mediation amongst the general population. The consultation document sets out that there appears to be evidence of a lack of public awareness of mediation and this matches the experience we have had at Dundee Sheriff Court (where students from the Diploma in Legal Practice have recently been involved in providing a mediation service for Simple Procedure cases). Most parties have not used mediation before, although they may have used the courts before, and have limited prior knowledge of how mediation operates. Using primary legislation also ensures that there is a consultation process which allows interested parties to express views and highlight any areas which require further consideration.

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?

Please explain the reasons for your response.
I agree that to increase the uptake of mediation services the courts will need to encourage parties to take part in the process. It is important that the voluntary nature of mediation is respected and requiring parties to complete and questionnaire and to obtain information about mediation would appear to strike the correct balance. However, for matters to progress beyond parties simply attending an information session, funding of the mediation itself needs to be considered. In very low value cases (eg under Simple Procedure) will parties be willing to pay for mediation? If not, at what point will parties be willing to pay commercial rates for mediation? The funding of mediation has been addressed by Scottish Mediation in chapter 6 of its expert group report entitled Bringing Mediation into the Mainstream in Civil Justice (June 2019). I am supportive of the broad approach taken here of public funding for mediation in low value cases, a contribution by parties towards the cost at the mid-level (taking care that this is set at a level that does not become a deterrent to trying mediation), and through to commercial rates being paid for higher value cases. Under any model consideration should also be given to the proper remuneration of mediators providing services, with a move away from the current expectation that these skills will be provided on a pro bono basis. To conclude, although I agree in principle with parties to a civil court case (unless it is an excluded case) being required to complete a self-test questionnaire and attend a mandatory Mediation Information Session with a duty mediator I cannot be fully supportive of this in the absence of suitable infrastructure being put in place to support the mediation sessions which would hopefully follow on from the information sessions.

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)?

Please explain the reason for your response.
I would advocate that a different approach be taken here to excluding cases from referral to a mediation information session. Specifying cases by reference to specific Acts or types of proceedings (eg excluding all judicial review cases) is both too wide and too narrow (see discussion below). The approach also has practical difficulties in that such a list is unlikely to be accurate at the time of the Act being passed and will also likely become out of date as the law changes. Instead, I would suggest that any primary legislation simply sets out broad principles under which "special cause" excusing a case from referral to mediation can be made out. In this respect, the approach suggested by Scottish Mediation in its expert group report, Bringing Mediation into the Mainstream in Civil Justice (June 2019), provides a sensible starting point; this is discussed further. It should also be kept in mind that any mediation information session should also play a key role in screening for cases which are not suitable for mediation.

In the next two paragraphs I address why the approach of listing specific acts or types of proceedings may be too wide or too narrow by taking judicial review and domestic abuse as examples. The suggested approach excludes all judicial review proceedings but it is suggested that this approach is too wide as some judicial review proceedings may be suitable for mediation. In England & Wales, research has been carried out into mediation in public law cases: see https://www.nuffieldfoundation.org/news/mediation-public-law-litigation and the guide to Mediation in Judicial Review: A practical handbook for lawyers by Bondy and Vardy (available for download) which discusses the relationship between public law and mediation in depth and which identifies public law cases where mediation can provide a better solution to public law proceedings. Although this research is focused on England & Wales there is application to Scotland. Accordingly, it is suggested that this is an area which requires further consideration before applying a broad exclusion.

As well as being too wide, the approach of referring to specific legislation may also be too narrow. For example, the first exclusion is 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". Does this refer only to proceedings taken under those pieces of legislation or cases where the subject matter of the action is directly related to the content of these Acts? If so, this would appear to be too narrow. For example the subject matter of a case may appear to be unrelated to the subject matter of these Acts (for example a contractual dispute over repayment of a loan between former partners) but would generally be unsuitable for mediation if there has been, as an example, a history of coercive control between the parties. We would encourage consultation with organisations such as Relationships Scotland who have experience of screening family law cases to ensure that mediation is appropriate. As mentioned above any mediation information session which parties are required to attend

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)?

should include a robust screening process to ensure that mediation is appropriate and that vulnerable parties are given the protection of the law. This screening process is an essential part of any wider role out of mediation in civil justice.

As referred to above I would support an alternative approach of setting out broad principles upon which a special cause exemption could be shown. Scottish Mediation's expert group report (Bringing Mediation into the Mainstream in Civil Justice (June 2019)) addresses grounds for showing a special cause exemption in chapter 5 (at paras 137 – 141). This approach recognises the importance of excluding cases where there is a risk of domestic abuse or sexual violence but does not limit this to proceedings under particular Acts. Similarly, cases where there is a contractual stipulation for a different type of dispute resolution are also excluded (which would cover cases where parties have selected arbitration as well as other cases where, for example, parties to a commercial lease may have agreed that a matter should be referred to a specified expert to determine). Scottish Mediation's report sets out a sensible foundation for further discussion around excluding cases from the requirement to attend a mediation information session.

Further consideration should also be given to cases which are before tribunals or courts other than the Court of Session and sheriff courts. Only employment law cases are mentioned in the list above (to exclude cases where there are statutory dispute resolution processes – presumably ACAS conciliation and employment tribunal cases?). However, it is not clear that all employment law cases should be automatically excluded. Although judicial mediation of employment law cases is available before the tribunal only certain cases qualify with one of the grounds of qualification being a minimum length of time the hearing in the case is estimated to take meaning cases estimated to take less time could be suitable for mediation but are not referred under the current system. In any case, it is noted that employment law and the tribunal are reserved to Westminster which raises questions around legislative competency.

I would also suggest that further consideration be given to cases before other courts or tribunals in Scotland, taking the Lands Tribunal for Scotland as an example (due to my professional background in property law). This tribunal regularly hears cases under the Title Conditions (Scotland) Act 2003 concerning the variation of real burdens. Real burdens often restrict development of a property and are often enforceable by a neighboring land owner. In cases before the Tribunal one party generally seeks to vary the burden (to allow development) while the other seeks to have the burden upheld (to prevent the development). The development in question often concerns an extension to a house or the building of a second property in garden ground. Many of these cases may be suitable for resolution through mediation but it is unclear whether these cases would currently fall within the proposals in this consultation (or whether these proposals are restricted to cases in the sheriff courts and the Court of Session). If cases before other courts and tribunals were to be included, how would these cases fit into any funding model regarding a mandatory information session or for the mediation itself?

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.
I support the proposition that parties who wish to mediate should be supported in doing so and that any agreement reached in a mediation should be given effect to in the court process. However, more consideration needs to be given to the funding and supply of mediation services. At the moment there is an over reliance on mediation being provided on a pro bono basis in civil cases (eg for Simple Procedure cases) despite ADR (alternative dispute resolution) being specifically referred to in the Simple Procedure Rules as something the sheriff should encourage and support. At the moment mediation is used mainly for either high value cases or for Simple Procedure (where mediation is accessed on a pro bono basis) but there is much more limited use in the middle (outside of specialist areas such as in family law). The reliance on pro bono services and the lack of government investment in mediation feeds into the cycle of services becoming available and then disappearing again (for example there was a successful pilot project at Aberdeen Sheriff Court which came to an end with the funding for the pilot) and means that it is difficult for mediators to develop a career out of mediation. To increase the use of mediation in the future, there needs to be a clear career path which could encourage students to diverge from traditional legal career paths. At Dundee University we have been providing a pro bono mediation service at Dundee Sheriff Court

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?

for Simple Procedure cases since September 2018. However, while this offers a valuable learning experience for students from the Diploma in Legal Practice (who mediate alongside a trained mediator from the University's internal mediation team) the limits of this need to be recognised. It is difficult for this project to expand to meet demand from court users (staff from the University can only be released from University duties for a limited amount of time) and the longevity and sustainability of the project cannot be guaranteed by the University (neither should the University be expected to make any guarantees in this regard). Scottish Mediation addresses the funding of mediation in chapter 6 of their report, Bring Mediation into the Mainstream in Civil Justice (June 2019) and we would agree with its recommendations that mediation should be available to all (regardless of income or location) and that mediators should be appropriately remunerated for their work. The proposal that mediation should be funded by the court service for Simple Procedure/low value cases with parties being expected to pay for the cost of mediation as the value of cases increases is a sensible approach which would ensure uniform availability in Simple Procedure cases across Scotland and would also help increase awareness of mediation. At present, court users in Simple Procedure cases across Scotland are offered different levels of services (ranging from no mediation at all, to mediation at a fixed time as at Dundee, through to mediation at a time that suits both parties) despite all users paying the same court fees.

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?

Neutral (neither support nor oppose)

Please explain the reasons for your response.
Until mediation becomes more firmly embedded in Scottish culture, it may be that the threat of court action is required for parties to engage with the dispute. Would attending a mediation information session be intended to divert cases from entering the system? If this is the case, how would the defender obtain information about mediation? There would need to be careful consideration of how any screening process would operate so as to exclude cases which are not suitable for mediation (such as those involving domestic abuse). There would also need to be consideration of how information sessions would be financed if it were to take place before the action were raised (no court fee would have been paid at this point). Would the party seeking to raise the action be required to finance this session? And who would the party obtain information from? Would the party attend a session with the duty mediator at a court? Or would the requirement be satisfied by consulting with any mediator?

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	

Q6. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

(c) Third Sector organisations					X	
(d) Mediators and mediation organisations						X
(e) Individuals					X	

Please explain the reasons for your response.
Diverting cases to mediation could save significant court time and could reduce wasted court time (where cases settle "at the door of the court" on the morning of a proof. In terms of other parties (eg businesses, third sector, individuals) their experience is likely to be as a party to a dispute. For some parties, mediation may not be successful and so would represent a small additional cost in the course of a court action. However, where mediation is successful this is likely to save the party considerably in legal fees and lost time (eg time spent away from work or diverted from running a business to manage a litigation). Overall, therefore, this Bill is likely to have a positive effect. The precise impact on costs will also depend on how cases are funded at the lower level. Requiring parties in a Simple Procedure case to fund a mediation is a much more significant financial burden compared to requiring this of parties to a high value litigation in the Court of Session. If mediation were to be provided free of charge in Simple Procedure (ie state funded) then this would be cost neutral to parties using that process. In terms of costs to mediators and mediation organisations, greater use of mediation should mean more work for mediators which is positive, provided such services are paid for (ie mediators are properly remunerated). If the current expectation that mediation services be provided pro bono or at rates below the commercial value of the services being provided, then this bill would represent a cost to mediators/mediation organisations which is unlikely to be met (in other words, there will not be sufficient mediators to meet demand).

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

See comments in question 6 above in respect of ensuring the mediators are properly remunerated.

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?

Suitable training for duty mediators and mediators around issues of diversity.

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.
Increased use of mediation is likely to have a positive effect on the court service and mean that court time is used more efficiently for cases which require a legal determination rather than, as is often the case, being asked to determine between competing versions of facts (with both versions often being the result of different perspectives). As mediation becomes more embedded in Scotland's culture, there could be social benefits as parties become more aware of considering matters from another perspective and develop skills to resolve conflict and disagreements without having to have recourse to the courts (which can in itself be a stressful experience).

General

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

It is important that mediation is not seen as a substitute for access to legal advice. Where parties are not represented by a solicitor it is important that they are able to access either free or affordable legal advice. Mediation only works where parties are able to fully understand and evaluate their own position and interests. In other words, parties need to be able to understand the alternative to negotiating an agreement in mediation (when a court action has been raised, the alternative is proceeding with the court action) and what the best and worst outcomes of that alternative may be. Parties, therefore, need to be able to appreciate what law the court will apply and to be able to obtain that advice.