

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 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.

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

Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)

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).

Scottish Mediation is the umbrella body for mediation in Scotland. We hold a register of mediators and

Please select the category which best describes your organisation

promote the adoption of high standards by mediators and provide a system of redress for those with complaints about mediators.

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).

Scottish Mediation

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.

Whilst it would be possible to increase the use of mediation in civil justice without legislation this would be a missed opportunity to engage with a wider audience. That wider discussion would help to clarify why legislation is needed, air the key points of discussion and provide a framework for mediation to become a part of the civil justice system.

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.

Requiring the parties to engage with mediation would be a positive step in embedding mediation in the civil justice system. The mechanism of a questionnaire and a mediation information session would be a

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?

positive step, however Scottish Mediation believes that the way cases are excluded and the questionnaire might not optimise the numbers using mediation. We think that an automatic referral with a requirement to attend a mediation would work better. That would be supported by parties being able to apply for a special exemption where mediation was not appropriate. In the current mediation schemes in Scotland the Mediation Coordinator currently plays an important role in giving parties information about mediation and this works well. The mediation is then passed to a mediator chosen from a roster which allows for flexibility on when cases are mediated. Providing the information in advance of scheduling the mediation allows the time commitment of the parties to be reduced and the possibility of a prompter settlement. In other jurisdictions this has worked effectively and has the potential to remove a step before people are in mediation. Should parties attend the mediation process and not wish to engage they would be able to do so.

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

judicial review proceedings

other cases (please specify)

Please explain the reason for your response.

With the caveat of what was stated in our response to Question 2, Scottish Mediation supports the idea that certain cases should not be required to mediate. We would support a non-exhaustive list of case types and situations where parties would be able to be exempt from mediating. That would include cases which are already in mediation. There may be rare situations where a person who has been subject to abusive behaviour may wish to mediate and as long as appropriate protections were in place we would not wish to deny people that opportunity.

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.

Such access would be appropriate in most cases. In some cases however, such as some family cases a mediation settlement agreement may not always be appropriate as the mediation model may consist of a

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?

number of mediations that may take place over a longer period. Those cases work effectively at the moment and should be able to continue.

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?

Unsure

Please explain the reasons for your response.

Scottish Mediation supports a mandatory element regarding engagement in mediation, though in a slightly different form to that proposed in the Bill consultation.

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		

Please explain the reasons for your response.

The most difficult area to identify costs and savings are for government and court and tribunal services. Mediation may reduce the resources used by the Court and Tribunal service and allow for allocation of those resources to other areas. A switch in resources to support the provision of mediation as part of the court fee for low value cases would potentially have benefits for all involved. Those benefits would include encouraging the take up of mediation, helping earlier settlement of cases and taking pressure off the courts. For business and third sector organisations there is the potential for some reduction in costs. This comes from earlier settlement and a potential reduction in fees paid pursuing their case. For mediators and mediation organisations the costs are described as neutral. The main impact for mediators, particularly those doing Simple Procedure cases, would be that they would be paid for their work. There would however be an opportunity to continue to have pro-bono mediators as part of such a system. For mediation organisations the same would apply. For individuals the use of mediation provides the

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

opportunity of earlier settlement and potentially a reduced cost. Earlier settlement can also bring non-financial savings in terms of time and effort expended in taking a case forward.

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

Yes. As outlined in previous answers a presumption of mediation might lead to a greater uptake and therefore savings for the parties (businesses, third sector and individuals).

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?

Slightly positive

Please explain the reasons for your response.

It is thought that the Bill would have a slightly positive impact on equality. The process of mediation is both shaped to the parties needs and can be more flexible thus allowing for better accessibility. A key part of mediation involves the mediator addressing any potential power imbalances creating a level playing field for the parties.

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

N/A

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.

There may be a positive impact if parties attend court less meaning less journeys, either through disputes being resolved more quickly or being able to be dealt with online or by telephone.

General

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

Scottish Mediation welcomes the proposals in the Bill and agrees with the stated aim, 'to increase the use and consistency of mediation services in Scotland'. In order to deliver that aim we believe that the measures outlined need to go further and, in some instances, need to be adjusted in terms of process to be as effective as possible. Whilst we have outlined a range of measures in our Report Bringing Mediation into the Mainstream in Civil Justice in Scotland, there are a number of key points that we would highlight.

One of our central proposals is that an Early Dispute Resolution Office (EDRO) be established as a part of the court system. EDRO would initially review cases and direct them to the most appropriate form of dispute resolution. Following legislation EDRO would directly refer cases to mediation with a special cause exemption system in operation. One of the key reasons for taking this approach is the experience of mediation schemes in Scotland where being part of the system has encouraged a greater take up. If mediation is not seen as part of the system people are less likely to engage with it. By establishing EDRO a key component for the delivery and enablement of mediation in Scotland would be put in place.

In proposing mediation, we believe that the financial arrangements should encourage take up too. To that end we support a mixture of publicly funded mediation for Simple Procedure cases through inclusion in court fees and suggest there should be an examination of the economics around ordinary cause cases. Related to this we propose that mediation be available for such cases from a roster of mediators prepared to mediate for at a fee level of no more than a few hundred pounds per party. In our research it was commented that the fees of running a case through the courts are often in excess of its value and this discourages people from pursuing their case.

Calling for a wider use of mediation requires a greater transparency about mediator standards and redress should things go wrong. To that end we believe there should be common standards applied to mediators undertaking cases referred by the courts. To do this a robust register would be established with redress options made clear for the parties.

In order for there to be a consistent use of mediation it is important that the court and tribunal rules cover the use of mediation. The current review of rules should be used as an opportunity to include the resolution of appropriate cases through mediation. It is also important that a public debate happens, and a Mediation Bill would be a good way of achieving this. This would also support the development of a better understanding of mediation from the general public.

In addition to measures designed at improving the civil justice system there is also a need for longer term cultural change and that is recognised as being important in the Bill proposals. Scottish Mediation would seek further measures to support culture change. We agree with the Bill consultation on the need for judicial training and would go further to propose that mediation be a core part of legal training. If we are to expect those involved in supporting parties through the justice system to advise on mediation, then provision has to be made. We also believe that there is a need for wider societal initiatives and believe that in addition to sector specific initiatives that the Scottish Government has a role to play in leading change. There is also a strong case for promoting the spread of mediation skills in education, from as early as primary schools. The long term benefits of a society trained to listen, respect and be confident in engaging with conflict would deliver significant positive cultural change.