

Mediation (Scotland) Bill proposal

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(Note: Information entered in this “About You” section may be published with your response (unless it is “not for publication”), except where indicated in bold.)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

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

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

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to prevent and eradicate domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our network members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

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.

Scottish Women's Aid

Please provide 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. (Note: We will not publish these contact details.)

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to this consultation which explains how my personal data will be used have asked for the response to be anonymous or “not for publication”.)

Aim and approach

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?

- Fully supportive*
- Partially supportive*
- Neutral (neither support nor oppose)*
- Partially opposed*
- Fully opposed***
- Unsure*

SWA's position on mediation in the context of domestic abuse, namely that this practice is wholly inappropriate in these circumstances, has been extensively publicised and well-documented. We have noted below the various responses in

which we addressed this issue, specifically our detailed submission to the Justice Committee's 2018 Inquiry into the use of Alternative Dispute Resolution (ADR).¹

In relation to family law cases, specifically those involving child contact, a wholesale “system change” is needed, with the current deficiencies rectified so there is a real and cogent understanding of domestic abuse and a clear competence of the issues demonstrated. Until this has been achieved, so women, children and young people experiencing domestic abuse have confidence that the very real risks posed to them by the legal processes themselves have been identified and addressed, we have concerns around raising awareness of the use of ADR among court users and professionals, both within and outwith the courts, and encouraging further use of mediation in family law cases.

SWA is very concerned about the direction of travel within civil proceedings in relation to the use of mandatory mediation and “early intervention” processes. Courts should not be encouraged to use early negotiation and mediation to promote earlier settlement of cases; no steps should be taken to incorporate mediation into legislation or court rules, or expand in-court mediation schemes until a full, independent and comprehensive examination of the issue has been undertaken, noting that financial efficacy alone cannot be the driver for the promotion of the “ costs and benefits” to the civil justice system in Scotland from the use of ADR.

The consultation proposes “... *the court would initiate the mediation process for the parties involved (unless the case relates to an issue excluded by the Bill) by issuing the parties with a self-test questionnaire ...*” The paper then goes on to list these exclusions as being “... *where the nature of the dispute is not suited to mediation or another procedure is prescribed for the determination of that type of dispute, such as- proceedings relating to the Abusive Behaviour and Sexual Harm (Scotland) Act, the Domestic Abuse (Scotland) Act and any proceedings relating to domestic abuse and sexual harassment cases...*”

In the context of this consultation, while we very much appreciate the proposal in the that civil cases involving domestic abuse would be exempt from the “self-test questionnaire assessment” and mandatory referral to the Mediation Information Session process, exemptions on their own will not keep women and children safe.

As we have noted, the solution is for them to have access to informed, competent affordable legal services so that women and are not put in the iniquitous position of having to essentially “choose” between seeming compliant and defending their rights. An exemption will only work if these safeguards are in place and cannot be an alternative to safe, cognisant and appropriate legal practice and responses.

Therefore, with reference to our comments above on informed and competent responses, the “domestic abuse” exemption for family law cases, specifically those relating to Parental Rights and Responsibilities (PRRs) and child contact under section 11 (7)(A)-(E) of the Children (Scotland) Act 1995, *will only operate successfully if domestic abuse is appropriately identified and excluded.*

¹http://www.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-SWA.pdf;
https://www.parliament.scot/S4_JusticeCommittee/Inquiries/FL11._SWA.pdf
https://www.parliament.scot/S4_PublicPetitionsCommittee/General%20Documents/PE1529_D_Scottish_Womens_Aid_05.11.14.pdf
<https://archive.parliament.scot/s3/committees/petitions/petitions/submissions/sub-08/08-PE1120A.pdf>;

There are, however, numerous factors which could likely militate against this happening. Firstly, perpetrators may attempt to circumvent and abuse the system by putting pressure on, and using intimidatory tactics against, women and children, to compel women not to refer to domestic abuse and therefore allow the case to enter the process. This behaviour could involve, for example, perpetrators making various threats against women; “reporting” women to social work so that they “lose” residence of/contact with the children; drawing out the court process and causing financial hardship; refusing to meet child support obligations, financial provisions relating to divorce, division of assets or mortgage payments. The result of this abusive behaviour is that while women appear, on the face of it, to be making a “free choice” via a self-test questionnaire to undertake mediation, the reality is quite the opposite.

Women are also influenced by the advice of their legal representative, who should not encourage or direct their clients into undertaking mediation during the process and should also vigorously oppose, in their clients’ interests, any consideration by the court that proceedings should be suspended while women “attempt” mediation. Unfortunately, we know from our services that women are still routinely advised by solicitors “not to mention the domestic abuse.” This is especially prevalent in cases where children are involved, with pernicious effects for many children and women. In addition, we hear from every Women’s Aid service in Scotland that women cannot count on accessing affordable, competent, and timely legal services. Until that position changes, relying solely on legal system processes to apply the exemption is not a safe option.

For this exclusion to operate successfully, women and children’s legal representatives would require have an appropriate level of understanding of domestic abuse to enable them to positively “gate-keep.” The Law Society’s current approach to ADR is contained within Rule B1.9 - Dispute Resolution. This requires a solicitor to advise a client on possible ADR options but also to be able to identify situations in which this is not appropriate, namely ² “... *A solicitor providing advice on dispute resolution procedures is also expected to be able to identify where alternative methods of dispute resolution may not be in the best interests of the client. For example, this may be a particular consideration for mediation or arbitration in the context of family disputes or other situations where one party may be at risk of violence or intimidation by the other.*”

Unfortunately, we cannot confidently confirm that this situation currently exists. Women’s experience indicates that this direction to family law solicitors by their regulatory and professional body is not being consistently or appropriately followed. Our local Women’s Aid groups members report regularly to us that women are routinely being steered towards mediation by solicitors. As mentioned above, during court actions involving domestic abuse, reference to the abuse is discouraged and even repressed, with the result that it is not being given appropriate consideration as a major factor in the court’s decision.

In relation to the wording of Rule B1.9, we would comment that this should be updated to reflect the evolved understanding of the role coercive control plays in the perpetration of domestic abuse and that violence or intimidation are not the sole risk indicators of abusive behaviour. On the matter of professional guidance for solicitors,

² <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-9-dispute-resolution/>

we note the positive message within the Code of Practice and Statement of Principles for Family Mediators³ in force for Family Mediators accredited by the Law Society of Scotland, as set out below.

With our comments on Rule B1.9 above in mind, it is strongly recommended that these specific principles, as below, are adapted and incorporated as general principles into Rule B1.9 above, as this would reflect the wider understanding of the dynamics of abuse and clearly enforce and reflect solicitors' duty and considerations around domestic abuse when discussing mediation with women experiencing domestic abuse.

“...The Family Mediator must be non-judgmental in approach and careful not to impose his or her values on the parties or the mediation process. The Family Mediator shall not conduct a mediation between the parties in any way in which the Family Mediator perceives as likely to cause harm to any child.

Safety: *The safety of the parties and the Family Mediator in conducting mediations must be a paramount consideration. Family Mediators must be alert to the possibility of violence, and other domestic abuse and control, such as coercive control, between the parties. If domestic abuse and control has not emerged as an issue at the commencement of the mediation, the Family Mediator should remain aware of its possible existence throughout mediation.*

If mediation has to be terminated for this reason, then it must be terminated safely and alternatives explored with the clients. Family Mediators must work to ensure that at all times the principles of voluntary participation, fairness and safety are upheld.

Welfare of Children:

- 1. Family Mediators must have a special concern for the welfare of the children of the family. They must encourage the parties to focus on the needs of the children as well as upon their own and must explore the situation from the children's point of view. In order to do so, Family Mediators should:*
 - Encourage the parties to consider their children's own wishes and feelings.*
 - Where appropriate, discuss with the parties whether and to what extent it is proper to involve the children themselves in the mediation process in order to consult them about their wishes and feelings.*
- 2. If, in a particular case, it is thought that it may be appropriate to consult any child directly in mediation, the Family Mediator carrying out the direct consultation, including the preparation with the parents should be trained for that purpose and must obtain the child's consent. Appropriate facilities should be provided.*
- 3. Where it appears to a Family Mediator that any child is suffering or likely to suffer significant harm, the mediator must indicate to the participants that they should seek help from an appropriate agency. If the parties refuse to or delay to act, then the Family Mediator may disclose this to the appropriate authorities as set out in the exceptions to the duty of confidentiality as set out above...”*

Similarly, the process also relies on the court being able to identify and exclude cases that should rightly have been excluded by the parties themselves. Again, this role for the court in formally excluding cases involving domestic abuse that have “slipped through” will only work if the court accepts the pleadings and acknowledges the fact that domestic abuse is an issue in the case, treating children's safety and welfare as the paramount consideration. We are not confident that existing practice is anywhere near this standard.

³ <https://www.lawscot.org.uk/members/career-growth/specialisms/accredited-mediators/>

Sheriffs are currently using their powers under the court rules, where cases before them involve domestic abuse, to send women to mediation. Given the potential in the proposed system for women to be inappropriately referred to mediation, it is clear from current experience and practice that, until and if legal representatives and judiciary take domestic abuse seriously, women will be at risk.

A further general issue around the consultation proposals, particularly in relation to cases involving children, is that there is no mention as to how the process with adult parties would include the views of children and there is no provision for this specifically stated in the paper. It is not at all clear how this could be incorporated into the "Self-Test Questionnaire" aimed at the adult parties and we are aware it has been suggested, in some quarters, that Child Welfare Reporters (CWR) could "*ensure that a child's voice is heard in mediation*". Given the current widespread problems experienced with CWR, we would emphatically state that this is an unacceptable proposal.

Children's views on legal processes that impact on their future wellbeing and safety, regardless as to whether or not they are experiencing domestic abuse, is a fundamental requirement in any reform.

As a consequence, we would suggest that any family law cases involving children are specifically excluded from the process.

Details of the proposal

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?

- Fully supportive*
- Partially supportive*
- Neutral (neither support nor oppose)*
- Partially opposed*
- Fully opposed*

Unsure

We have noted our support above for the exemption to cover cases involving domestic abuse and would welcome further clarity on this issue, specifically explicit confirmation that cases involving child contact and residence, where section 11 (7)(A)-(E) of the Children (Scotland) Act 1995 was part of the pleadings, would automatically be exempt. Further, for the reasons we have set out above, the exemption should explicitly provide that where domestic abuse was identified as an issue, mediation would not take place, particularly in child contact cases, even where one or both parties indicated a willingness to the court to undertake this process.

We emphasise this point because those experiencing domestic abuse may still be placed in situations where they feel pressured to undergo ADR processes. By its very nature, domestic abuse may restrict choices to the extent that a woman can not refuse. We are aware that there will be times where women participate in a mediation process because they are unaware of their right not to; they believe that they will lose custody of their children; they fear repercussions from the perpetrator

or purely because they are not in an empowered state of mind sufficient for them to assert their rights.

This blanket exemption is, therefore, a necessary safety precaution to ensure that, as stated, perpetrators do not abuse the system by pushing for mediation during the process or using tactics such as concealing domestic abuse; attempting to divert attention by claiming the existence of so-called “parental alienation” or pressurising women to participate. The increased understanding of the broad spectrum of abusive behaviours, particularly the control and coercion exercised by perpetrators against women and children, introduced into the justice system via the new criminal offence in the recently commenced Domestic Abuse (Scotland) Act 2018, underlines this danger and supports our position for a consistent and blanket exemption.

“Duty Mediators” must also be alert to any cases involving domestic abuse inappropriately entering the system so that these can be swiftly excluded and removed from the mediation process. However, this also relies on the mediator having a thorough and in-depth understanding of the dynamics of abuse, as we have examined above and discuss further below.

Noting policy moves to increase access to civil justice and ADR via digital facilities, we would also caution against including use of ADR as an alternative, or precursor, to court action within online “dispute resolution” facilities or advice portals. These can pose an unwitting risk to women, not only by, often inadvertently, labelling domestic abuse as a “dispute” and directing women experiencing domestic abuse towards “dispute resolution solutions” but also by providing opportunities for perpetrators to coerce women into undertaking mediation since there is no third party to regulate or oversee applications for the use of ADR and the process.

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)?

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)

none of the above (no cases should be excluded)

Please explain the reasons for your response.

We support the exemptions listed since any proceedings involving domestic abuse and/or sexual abuse/harassment are, by their nature, wholly unsuited to any form of mediation.

Our comments above have identified the absence of any provision for the views of children and in these circumstances, family law cases including children must be automatically excluded from the process.

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?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed

Unsure

We would reiterate our concerns above in ensuring that civil cases involving domestic abuse are not erroneously “entered into” the mediation process through women being coerced by perpetrators into participating. Having women then bound by a Mediation Settlement Agreement that she has been coerced into entering into would be manifestly unsafe for women and children.

“Model Settlement Agreements” referring to child contact and PRR cases could, similarly, be wholly counter-productive in this case as general principles would be applied to cases where the generalist approach was inappropriate, unfair and unsafe.

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?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed

Fully opposed

Unsure

This would pose even more difficulties for women and children experiencing domestic abuse unless any civil proceedings involving domestic abuse continued to be explicitly and expressly excluded from any mandatory process, be this for potential or existing litigants.

Our comments above relating to women being pressurised to undertake mediation during court action are even more relevant before the case commences. There is the very real prospect of perpetrators coercing women, and children, into participating before they have had the opportunity to seek advice on their rights or obtain support from Women’s Aid. Also, given the current experience of women, we have no confidence that solicitors would not direct women toward mediation, perhaps promoting this on a cost-saving basis or misinterpretations of SLAB requirements around “resolving cases” before legal aid is granted, or even that the courts would “expect” mediation to have been “tried.”

If women are pressurised into undertaking mediation by the perpetrator, legal representative or the courts, they will feel equally under pressure to comply and not

discuss domestic abuse during the mediation sessions, for all the reasons we have previously discussed.

Additionally, feedback from women served by our local Women's Aid groups indicates a wholesale lack of confidence in the conduct of mediation services. Reassurances that "good practice" is in place, that practitioners understand and can identify domestic abuse, take women's safety into account and will not undertake or will end sessions already commenced where domestic abuse is an issue, are simply not evident in practice.

The reality is that there is an endemic lack of understanding of domestic abuse and the dynamics within mediation practices and procedures. This has manifested itself in repeated reports of mediation being allowed to continue by professional mediators, despite the presence of domestic abuse. Women are routinely being abused during mediation with no intervention by the mediator or cessation of the mediation. Safety concerns and risk to women and children are being ignored, with women being made to feel that they must "be reasonable," "make concessions," minimise the abuse and come to an agreement that is, inevitably, at odds with their own and their children's best interests and welfare.

As stated above, there is an urgent need for system reform in relation to the practice of mediation, with better regulation, training, accreditation systems, complaint procedures and practice guidance.

Financial implications

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.)

Significant increase in cost

- Some increase in cost*
- Broadly cost-neutral*
- Some reduction in cost*
- Significant reduction in cost*
- Unsure*

If the intention is to effect wide-spread reform to encompass the majority of non-exempt cases into mediation process, this will necessitate parties being able to access legal aid funding to provide mediation, noting that this will cover a wide variety of commercial and other actions. There is the potential for the legal aid budget to increase if the reforms intended to secure "early resolution of disputes" and "early intervention" processes suggested in the current Scottish Government's consultation on reform of civil legal aid are enacted.

As stated above, it will be important for members of the judiciary to have appropriate training to be able to identify and respond appropriately to domestic abuse so this will also have cost implications.

(b) Businesses

Significant increase in cost

Legal professionals will require appropriate training to be able to identify and respond appropriately to domestic abuse, along with a more robust accreditation process, regulatory regime and guidance.

(c) Third Sector organisations

- Significant increase in cost
- Some increase in cost**
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

We would anticipate an increase in women and children seeking the support of Women's Aid groups and their expertise in identifying domestic abuse.

(d) Mediators and mediation organisations

- Significant increase in cost**
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

We reiterate the comments made above in that there is an urgent need for mediators and mediation organisations to be trained on identifying and responding appropriately to domestic abuse, which will necessitate the creation of a more robust accreditation and training process, regulatory regime, complaints process and guidance.

(e) Individuals

- Significant increase in cost**
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

Women attempting to access legal services and support from practitioners in their local area with an understanding of domestic abuse will face increased costs if these services are not available locally since they will be required to travel further to find appropriate support and representation, with all the attendant expenses and inconvenience this entails. They will also incur higher costs if these legal services are not provided via legal aid funding or women are unable to afford contributions toward a grant of legal aid.

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

Equalities

8. 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, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?

- Positive
- Slightly positive
- Neutral (neither positive nor negative)

Slightly negative

Negative

Unsure

For all the reasons set out above, we consider that the proposals will have a disproportionately negative impact on women and children.

9. In what ways could any negative impact of the proposed Bill on equality be minimised or avoided? See our comments above

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

No

Unsure

There is likely to be a disproportionate economic impact on women attempting to access informed and domestic-abuse competent legal services and support from practitioners in their local area if these services are not available locally, are not provided via legal aid funding or women are unable to afford contributions toward a grant of legal aid.

General

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