

**Proposed Mediation (Scotland) Bill**

**Response from the Scottish Council of Jewish Communities**

The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families who live outwith any Jewish community or are not connected with any Jewish communities, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community. We are especially grateful for the advice of Rabbi Doniel Grunewald, Beth Din Consultant and Accredited Mediator.

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**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

The Scottish Council of Jewish Communities welcomes the opportunity to comment on the proposed Mediation (Scotland) Bill.

It is widely recognised that many civil disputes may be settled more simply, speedily, inexpensively, and with less acrimony without recourse to the civil courts. Since, in addition to adjudicating on matters of religious law, a Beth Din (Rabbinical Court) can sit

as an Arbitration Tribunal and is able to issue legal and binding arbitration awards<sup>1</sup>, a Beth Din is frequently the arbitrator of choice, by mutual agreement of the parties, for members of the Jewish community, for civil as well as religious disputes.

We strongly support the intentions behind the proposed Bill to "increase the use of mediation in Scotland", and agree that this would be likely to "lead to a dispute being resolved more quickly, less stressfully, and at a lower cost to both parties." and so "improving wellbeing (reducing stress etc) equity, fairness, access to justice, and improving the justice system for future generations."

However, arbitration as well as mediation has the purpose and effect of settling civil disputes without recourse to the courts. Mediation is in practice promoted largely for the fact that it can avoid the often appalling cost of litigation, but in fact this could equally be achieved by other forms of simpler and less costly Alternative Dispute Resolution, and within the Jewish Community this is exactly what the Beth Din system is. Consequently we believe that the aims of the proposed Bill could perhaps better be served by promoting Alternative Dispute Resolution services in general, including by a Beth Din, with the flexibility to adopt the role of mediator or arbitrator as most appropriate, in order to counter the problems that tend to arise with full-blown litigation, rather than mediation alone.

We do not, however, believe that it would be appropriate for mediation to become a mandatory requirement, primarily for reasons elaborated under Q3 below.

**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

As noted in the consultation paper, where it has been tried, "compulsion to mediate ... was not particularly successful with regard to settlement rates", and consequently may actually delay reaching a settlement, and we would oppose this step.

We do, however, support the mandatory provision of information about mediation, and the provision of opportunities to participate in mediation, to enable those involved in a dispute to decide whether it may be appropriate for them. It may sometimes be helpful for the parties to meet with a mediator before coming to a decision. We are, however, concerned that requiring parties to meet together with a mediator could, in some cases,

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<sup>1</sup> Arbitration by a Beth Din applies *Halachah* (Jewish Law) as the applicable system of law, which includes the Talmudic dictum that "the law of the land is the law" (Gittin 10b). Thus, by mutual agreement of the parties, a Beth Din may apply local civil law to resolving a dispute. Its ability to function effectively is therefore dependent on the civil arbitration law recognising arbitration performed according to an alternative system of law mutually agreed by the parties, as legitimate, fully binding, and enforceable, as is the case under the Arbitration (Scotland) Act 2010, and the UK Act 1996, as applied in *Schwebel v Schwebel*, [2010] EWHC 3280.

create a setting in which a more vulnerable, well-meaning, or gentle party feels duty-bound to accept a settlement against their own better interests.

Consequently, although it is agreed by all that the general goal of avoiding painful and sometimes devastatingly costly litigation is highly desirable, on the other hand, the proposal to tackle this with steps that push the parties towards mediation alone can be very counter-productive in certain cases. We therefore oppose the proposal only as it stands, and recommend that it be modified to create a procedure that effectively empowers the parties to discover, access, and appropriately utilise the type and style of Alternative Dispute Resolution most suitable for them.

**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)

As we have already stated, we are concerned that a mandatory Mediation Information Session between both parties and a mediator could, in some cases, result in coercion. One example of this might be in situations currently guarded against by Section 15 of the Family Law (Scotland) Act 2006 which inserted a new clause 3A into the Divorce (Scotland) Act, relating to religious divorce.

We are concerned that the introduction of a mandatory Mediation Information Session could circumvent this provision, enabling a malign husband to coerce his wife into a mediated settlement that 'balanced' her need for a religious as well as civil divorce with a very unequal division of matrimonial property, etc.

This is important because Scots law recognises Jewish marriage, so that a single religious ceremony brings into effect two separate marriages, religious and civil. It therefore follows that fully to end a marriage both the civil and religious ties need to be terminated. Jewish religious law requires that both parties consent to the religious divorce or *get*, which cannot be imposed on them by any court, religious or civil. This means that if one of a divorcing couple withholds consent, whether simply out of ill-will or as a bargaining tool in a dispute over alimony or access to children, there can be no religious divorce, and a woman in this situation is unable to remarry. Prior to Section 3A, we are aware of occasional cases in which the parties would come to the civil court with an apparent agreement as to division of the matrimonial property, alimony, etc that was very unbalanced, usually as a result of hidden blackmail. Since the settlement had been formally agreed between the parties, the civil court was unable to intervene, however unfair it appeared to the court. Following the enactment of Section 3A, we are not aware of any such incidents having taken place in Scotland, and we wish to ensure that no new legislation would inadvertently reopen the possibility of such coercion.

It is conceivable that there could be similar coercion in other cases in which there is any form of power imbalance between the parties, including, for example, in access to legal representation, or where one party has a particular hold over the other, including in cases involving business matters. While, therefore, we would not object to the introduction of a self-test questionnaire – indeed, our submission that the proposals be amended to enable the parties to identify the form of Alternative Dispute Resolution most suitable for them could be furthered through the use of such a questionnaire – we would oppose a mandatory meeting between both parties and a mediator.

**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

In cases in which it is possible to be certain that there is no risk of behind-the-scene blackmail or coercion, we would support the principle of parties being able to enter into a formal agreement to commence mediation, and, if appropriate, subsequently to accept the outcome of that agreement. However, since it may never be possible to be certain that there been no behind the scenes bargaining, as a matter of public policy the risk may outweigh the benefit, and since that is a matter of fact which we are not able to judge, we remain neutral.

In addition, there may be situations in which a mandatory meeting between the parties is simply inappropriate, for example where there has been physical or psychological abuse, or one of the parties is otherwise vulnerable.

**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 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

We support the desire of many potential litigants to avoid the time and expense of court proceedings, and value the expertise that many mediators, including the Beth Din, may be able to contribute in such situations. However, as we have already stated, we do not believe that a Mediation Information Session should be mandatory, either before or after the parties go to court, but should only take place with the genuinely free agreement of both parties.

## **Financial implications**

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

We do not have any view on this question.

#### **(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

#### **(b) Businesses**

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

#### **(c) Third Sector organisations**

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

#### **(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

#### **(e) Individuals**

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

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

We do not have any view on this question.

**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

Provided that the Bill includes appropriate safeguards fully to protect vulnerable parties to any case, we support the right of parties to a dispute having the right to choose an alternative route to dispute resolution than an expensive and often long, and long-delayed court case. Trained Mediators and Arbitration Tribunals potentially have much to offer both to the individuals concerned and the overloaded court system, enabling many civil disputes to be settled faster, more cheaply, and with less rancour than would otherwise be the case.

We hope that the proposed system would also enable individuals from particular sectors of the community to choose a Mediator or Arbitration Tribunal that understood the tenets of, and accorded with their lifestyle. This may particularly be the case for Jewish people who may prefer to submit civil cases to a Rabbinical Court or Beth Din that, while ruling according to civil law, also understands the background of the disputants. This reflects numerous Biblical and Talmudic injunctions<sup>2</sup> that instruct judges to act in a manner that is demonstrably fair and impartial.

We consider it likely that many other minority communities will prefer to present their case to an appropriate tribunal within their own community for very similar reasons, and we would support that, provided that such arbitration is entered into with the genuine consent of the parties, and the procedure is compliant with all relevant civil legislation including the Arbitration Act.

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

The most important safeguard to prevent any negative impact from the proposed Bill is to ensure that there is no compulsion to enter mediation, and no mechanism that might

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<sup>2</sup> For example: "You shall appoint Judges and officers ...; and they shall judge the people with righteousness. You shall not pervert judgment; you shall not respect, persons nor take a bribe; for a bribe blinds the eyes of the wise, and perverts the words of the righteous. Justice, only justice, shalt thou pursue." (Deuteronomy 16,18-20)

Every judge in a Beth Din must have the following seven qualities: wisdom, humility, fear [of Gd], hatred of money, love of the truth, love of his fellows, and a good reputation." (Maimonides)

inadvertently manoeuvre a vulnerable party into a position where they may become subject to blackmail that goes unrecognised by the Mediator or Arbitration Tribunal.

In addition, the parties to a dispute should have the right to choose their Mediator or Arbitration Tribunal from a list of recognised individuals and organisations. The choice should not be imposed upon them.

**Sustainability**

**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

We do not have any view on this question.

**General**

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

We welcome the proposal to give legal status to mediated agreements provided that these are voluntarily entered into by both parties, to abide by the ruling of a tribunal acceptable to both parties, in order to resolve disputes fairly, impartially, quickly and without incurring unnecessary expense. We would not support compulsory mediation since, in some cases, this is likely to expose vulnerable individuals to blackmail that may be hidden behind an apparent but inequitable agreement.