PROPOSED MEDIATION (SCOTLAND) BILL – MARGARET MITCHELL MSP

SUMMARY OF CONSULTATION RESPONSES

This document summarises and analyses the responses to a consultation exercise carried out on the above proposal.

The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. These three sections have been prepared by the Scottish Parliament's Non-Government Bills Unit (NGBU). Section 4 has been prepared by Margaret Mitchell MSP and includes her commentary on the results of the consultation.

Where respondents have requested that certain information be treated as "not for publication", or that the response remain anonymous, these requests have been respected in this summary.

In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for, or opposition to, the proposal (or particular aspects of it). In interpreting this data, it should be borne in mind that respondents are self-selecting, and it should not be assumed that their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. A consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

Copies of the individual responses are available on the following website https://www.margaretmitchell.org.uk/mediation-consultation. Responses have been numbered for ease of reference.

A list of respondents is set out in the Annexe.

SECTION 1: INTRODUCTION AND BACKGROUND

Margaret Mitchell's draft proposal, lodged on 28 May 2019, is 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 proposal was accompanied by a consultation document, prepared with the assistance of NGBU. This document was published on the Parliament's website, from where it remains accessible—

https://www.parliament.scot/parliamentarybusiness/Bills/111864.aspx.

The consultation period ran from 29 May to 20 August 2019.

Approximately 50 organisations and individuals were sent copies of the consultation document, or a link to it, including—

- judicial and legal organisations and representative bodies;
- mediation organisations;
- law schools of Scottish universities;
- alternative dispute resolution organisations;
- third sector organisations;
- equalities organisations;
- public sector organisations; and
- academics.

The member's website and Facebook page provided details of the consultation, including a link to the consultation questions which were hosted on Smart Survey, an online survey and questionnaire tool.

The consultation exercise was run by Margaret Mitchell's parliamentary office. The consultation process is part of the procedure that MSPs must follow in order to obtain the right to introduce a Member's Bill. Further information about the procedure can be found in the Parliament's standing orders (see Rule 9.14) and in the *Guidance on Public Bills*, both of which are available on the Parliament's website—

- Standing orders (Chapter 9): https://www.parliament.scot/parliamentarybusiness/26514.aspx.

- Guidance (Part 3): http://www.parliament.scot/parliamentarybusiness/25690.aspx.

SECTION 2: OVERVIEW OF RESPONSES

In total, 63 responses were received. The majority were submitted directly via Smart Survey. Some responses were sent directly to the member, including some who responded directly to Smart Survey and then sent in additional information directly to the member to supplement their response.

Five[1] of the 63 responses did not respond directly to the questions set out in the consultation document and are therefore not included in the statistics set out under each consultation question below. However, the contents of these responses have been reflected in this summary.

In addition to the 63 responses, six[2] responses were received after the deadline had passed. These are available on the member's website[3] but are not included in this summary.

Note that a response from one individual, David Hossack, is identical and/or very similar in most part to the response by the law firm Morton Fraser LLP.

Thirty-three responses (52% of the total) were from individuals, and the remaining 30 (48% of the total) were made by organisations. The 33 individual responses can be categorised as follows—

- 14 (42% of the individual responses) from professionals (including mediators and solicitors);
- 10 (30%) from academics; and
- 9 (27%) from members of the public.

The 30 organisational responses can be categorised as follows—

- 3 (10% of the organisational responses) from public sector organisations (Society of Chief Officers of Trading Standards in Scotland; Scottish Legal Complaints Commission; and Scottish Public Services Ombudsman);
- 11 (37%) from private sector organisations (mediation organisations; legal companies; insurance companies);
- 6 (20%) from representative organisations (legal and insurance bodies; Scottish Council of Jewish Communities); and
- 10 (33%) from third sector organisations (a variety of charities; some mediation bodies described themselves this way).

[1] Pinsent Masons LLP; Scottish Independent Advocacy Alliance; Association of Personal Injury Lawyers; Sandy Wilson (an individual) and Dentons UK and Middle East LLP.
[2] Scottish Courts and Tribunal Service; the Lord President; Scottish Arbitration Centre; Victim Support Scotland; a supplementary response from Pinsent Masons LLP; and Ronnie Conway (an individual).
[3] Consultation responses are available at: https://www.margaretmitchell.org.uk/mediation-consultation.

Of the 63 responses, four (6%) were made anonymously and six (10%) requested that their submission not be published.

There was a significant response from organisations and individuals with a professional background and experience in mediation and judicial matters. However, it should be noted that there was a much smaller response from those who have used, or may have cause to use, mediation.

There was strong support for using legislation to increase the use and consistency of mediation services for civil cases in Scotland. Many respondents believed that mediation can be a very effective method for resolving disputes, delivering various social and economic advantages. It was noted that, compared to the court process, mediation is often cheaper, more flexible, less adversarial, less stressful and more empowering, leading to negotiated, rather than imposed, settlements. Many also agreed that mediation is currently not well understood, or consistently available, across Scotland, and that legislation could help it become more widely used, and firmly embedded, as a method of resolving civil disputes.

There was also significant support for the specific proposals put forward in the consultation, of legislating for the mandatory use of a questionnaire and information meeting to inform parties about mediation and then formalising the process for those who agree to mediate.

Several responses stressed that mediation must not become a mandatory process forced on unwilling participants, some of which felt the proposal risked crossing the line between encouragement and coercion. There were also some responses from specific interest groups (such as those involved with personal injury claims, and those who support domestic abuse victims) that were opposed to their area of interest being included within the scope of the proposal.

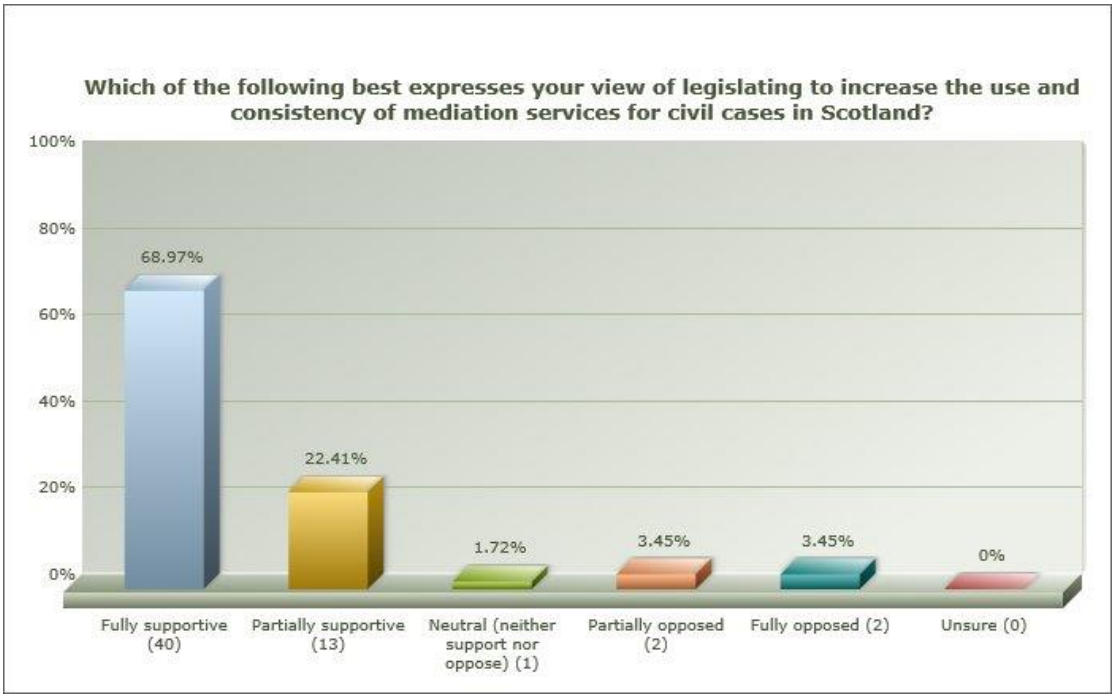
Many responses made after the publication of a report by Scottish Mediation[4] (which was published part-way through the consultation period) referenced its contents. Many respondents highlighted similarities and/or difference between the report's recommendations and the consultation's proposals, with several respondents suggesting that those involved should work together to improve the understanding, availability and use of mediation services in Scotland.

[4] Scottish Mediation (June 2019). Bringing Mediation into the Mainstream in Civil Justice in Scotland. Available at: https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civl-Justice-in-Scotland.pdf.

SECTION 3: RESPONSES TO CONSULTATION QUESTIONS

This section sets out an overview of responses to each question in the consultation document. Note that five respondents did not answer the consultation questions directly and are therefore not included in the following statistical analysis (the maximum number of respondents to the questions is therefore 58). However, views expressed in those responses are reflected below where relevant. Where a respondent is first quoted reference is made to the response number of the published submission on the member's website (and as set out in the Annexe).

Question 1: aim and approach



Fifty-eight respondents (100% of those who responded to the consultation questions) answered this question. A very large majority of respondents were supportive.

Reasons for supporting legislating

Most respondents were supportive of using legislation to increase the use and consistency of mediation for civil cases in Scotland. Fifty-three responses (91%) showed some support (40 were fully supportive, 69%, and 13, 22%, were partially supportive).

Many respondents supported legislating because of a strong belief that mediation is an established process with strong evidence of its potential benefits and successful outcomes. Respondents stated that mediation, compared to the court process, was often cheaper, more accessible, more flexible, less time consuming, less stressful, and more empowering. Many believed that mediation has a high settlement rate and that mediating a higher proportion of civil cases would free up court time for other cases. There was

also a consistent view that, currently, not enough was known and understood about mediation by people in general, and that mediation was not consistently available across the country. Several respondents noted that trying to encourage better understanding and use of mediation has not delivered the cultural change required to embed mediation as a dispute resolution method in Scotland, and that legislation is therefore needed to provide the required impetus. Many respondents thought it was important that potential litigants were made aware of all dispute resolution options so that they could make informed choices. The University of Strathclyde Mediation Clinic (response 36) stated—

> "… legislation is the most effective way to ensure that mediation is properly employed throughout the Scottish justice system. This will provide a consistent framework for judges, lawyers, litigants and mediators."

Some of those that supported legislating noted that legislation alone would not deliver the aims of the proposal, and that further additional support, buy-in and culture change would be required. Others noted that legislation should be used to better inform people about mediation, but not to require the use of mediation, and that legislators should take care to inform and encourage, but not to coerce or impose.

Other reasons given for supporting legislating included that it will—

- send a message that mediation is being taken seriously and that culture change is desired;
- ensure further consultation and scrutiny; and
- force any reluctant members of the legal profession to properly engage with mediation.

Reasons given for partial, rather than full, support for legislating included that—

- any legislation should include all methods of dispute resolution rather than focusing on mediation only;
- success would depend on Scottish Government funding and support;
- it is of limited use for delivering culture change and raising awareness;
- proposals made in the recent Scottish Mediation report should be considered/included, such as establishing an Early Dispute Resolution Office and introducing a presumption to mediate;
- successful implementation relies on the skills of both the mediator and the parties involved, which cannot be legislated for;
- there is potential for a negative effect on vulnerable people; and that
- it is not appropriate in all cases, and legislation should not increase costs and time delays for some.

Reasons for opposing legislation

A very small minority (7%) were opposed to using legislation to increase the use and consistency of mediation for civil cases in Scotland. Four respondents were opposed: two fully opposed, and two partially opposed. In addition, some of the responses which did not answer the consultation questions directly seemed opposed to legislating to achieve the aims of the proposal.

One individual respondent (Lesley McDade, response 3) was fundamentally opposed to the use of mediation on the basis that it was secretive, open to abuse, not transparent and harmful, forcing compromise rather than achieving justice. Some other respondents were opposed on the basis that legislation would not be appropriate for their specific area of interest. Ellis Whittam Limited (response 33) was partially opposed on the basis that employment law cases would not benefit from any new statutory process as an appropriate process was already in place. Scottish Women's Aid (response 54) was fully opposed on the basis that the proposal posed a significant risk to victims of domestic abuse. It set out concern about the direction of travel away from the courts and towards early intervention and the use of mediation, with mandatory aspects, believing that victims of domestic abuse were vulnerable to manipulation and coercion, or seeming to be uncooperative. It stated—

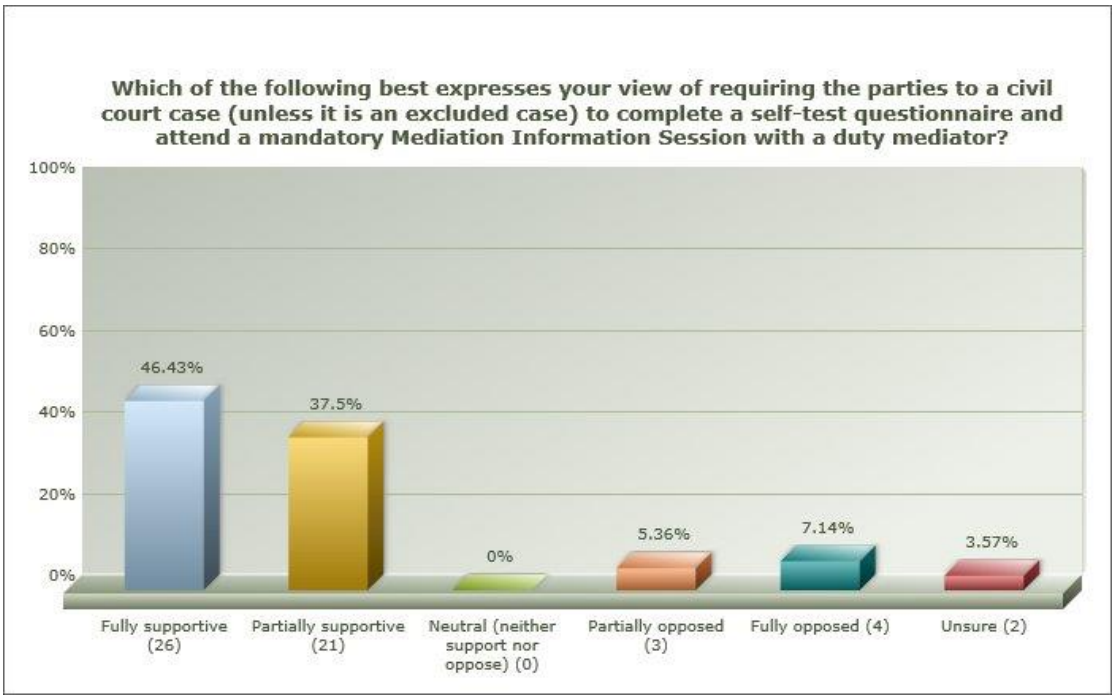
> "Courts should not be encouraged to use early negotiation and mediation to promote earlier settlement of cases; no steps should be taken to incorporate mediation into legislation or court rules, or expand in–court mediation schemes until a full, independent and comprehensive examination of the issue 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."

Other respondents were opposed to legislating for anything which made any part of a mediation process compulsory. This included several respondents who did not answer the consultation questions but made a separate narrative submission. Pinsent Masons urged caution for legislating for any system which had, or was perceived to have, a compulsory element to it, and highlighted the importance of maintaining unhindered access to justice for all. The Association of Personal Injury Lawyers (APIL, response 29) believed that personal injury cases did not require legislation, stating—

> "Access to justice is the cornerstone of our society, and we do not support proposals which will create barriers, increase costs and delays for injured people, and in some cases, could lead to settlement agreements which are not appropriate. APIL supports mediation where appropriate, but it will not be suitable in every case. Mediation will only work effectively if both parties have entered into it freely, and in those situations, parties should remain free to explore mediation on their own."

Dentons UK and Middle East LLP (response 52), commenting about commercial cases only, noted broad support for the aim of increasing use of mediation but did not seem to support legislating to achieve that aim and was also strongly against legislating for any mandatory process. It believed that such legislation would lack flexibility and affect cases which were wholly inappropriate, resulting in a time-wasting, costly, box-ticking exercise.

Question 2: self-test questionnaire and Mediation Information Session



Fifty-six respondents (97% of those who responded to the consultation questions) answered this question.

Reasons for supporting a self-test questionnaire and mandatory information session

There was significant support for introducing a self-test questionnaire and mandatory mediation information session, with 47 respondents (84%) showing support (26 fully supportive, 46%, and 21, 38%, partially supportive).

Many similar arguments were put forward to those made in answer to question 1. Additional points made included that it would—

- ensure consistency of information provision across Scotland;
- help people to make an informed choice about how to proceed with a case;
- enable a duty mediator to assess the suitability of a case for mediation;
- benefit the courts by freeing up time, and wider society by educating people about other methods of dispute resolution; and
- not exclude legal professionals and would allow parties the choice of representation.

Several fully supportive responses made further suggestions, including that—

- data should be collected about how many cases proceed to mediation;
- people with additional support needs must be appropriately supported;
- the information sessions should be conducted on a one-to-one basis, rather than the duty mediator meeting both parties at the same time, and need not happen in court or directly after questionnaires are completed; and that
- the questionnaire must flush out potential coercion or cases of abuse, and the duty mediator must be aware of such issues.

Several respondents who were partially, rather than fully, supportive, noted support for one or other of the two proposed parts of the process, or believed that one or other should be optional, not compulsory. For example, the University of Strathclyde Mediation Clinic strongly supported the mandatory information session but was sceptical about the value of the questionnaire, believing that it was unlikely to persuade anyone to mediate and may prove counterproductive.

Some respondents were partially supportive as, while they were broadly supportive of the system proposed, they felt that certain cases should be excluded (such as personal injury claims, cases where the parties were already familiar with mediation, cases where the parties had legal representation, undefended and incompetent cases, and cases requiring urgent or interim orders) or that there was a risk that the process would cause unintended difficulties. Morton Fraser LLP (response 28) stated—

> "It is important that any system which is introduced does not operate in a way which will, for example, allow a defender in a debt recovery action who does not have any defence to use the system to simply delay making payment for as long as possible to cause maximum inconvenience and increase costs for their opponent. Care must be taken to ensure that a bill does not operate in such a way as to place practical barriers which prevent parties from being able to access the courts to enforce their civil rights."

Some respondents also believed that the proposal should go further in encouraging and/or requiring parties to mediate. This included Scottish Mediation (response 47), which believed that the proposals were helpful but that a questionnaire and information session (with excluded cases) may not encourage a greater uptake of mediation. It referred to its recent report and suggested that an automatic referral process with a requirement to attend mediation (with parties able to apply for an exemption if they consider their case unsuitable) may be more effective. One individual, Paul Kirkwood (response 25), a solicitor and mediator, argued further for mandatory mediation, stating—

> "I strongly support Margaret Mitchell's desire to make mediation, through statutory provision, a normal part of dispute resolution in Scotland. My genuine concern is that her proposal, with its

> dependence on voluntarism, if successfully implemented in legislation, will see most litigated cases avoid mediation as the result of the reluctance of solicitors and lawyers generally, to engage with the project. Most party litigants would then be disenfranchised from the benefits of mediation and the Act would largely fail to achieve its purpose."

Other reasons given for partial, rather than full, support included that—

- there should be no requirement for information sessions to be face to face, and that they could be conducted online;
- the information session should not be used to sell or force mediation;
- more information is needed about the duty mediator role, its scope and how individuals will be trained;
- Scottish Mediation's recent report (with support expressed for the creation of an Early Dispute Resolution Office) should be considered;
- appropriate funding and infrastructure must be in place to deliver the proposal and a subsequent increase in uptake of mediation services;
- the duty mediator should report to the courts on the willingness of parties to mediate; and
- the timing of the process should be moved to later in court proceedings once the cases of both parties are clearer.

Opposed to a self-test questionnaire and mandatory information session

A small minority of respondents (seven, 12.5%) were opposed (four fully opposed and three partially opposed). Reasons for full opposition included some repeat of arguments put forward in answer to question 1, such as fundamental opposition to mediation as a process, that the proposal would prove onerous, or that it is not appropriate for certain sectors.

Reasons given for partially opposition included similar reasons to some of those given in partial support, such as that the proposal should include the Early Dispute Resolution Office proposal put forward in the Scottish Mediation report. The Scottish Council of Jewish Communities (response 53) supported a mandatory provision of information but not a mandatory attendance at an information meeting, as they believed the latter may make people feel forced into choosing to mediate, adding—

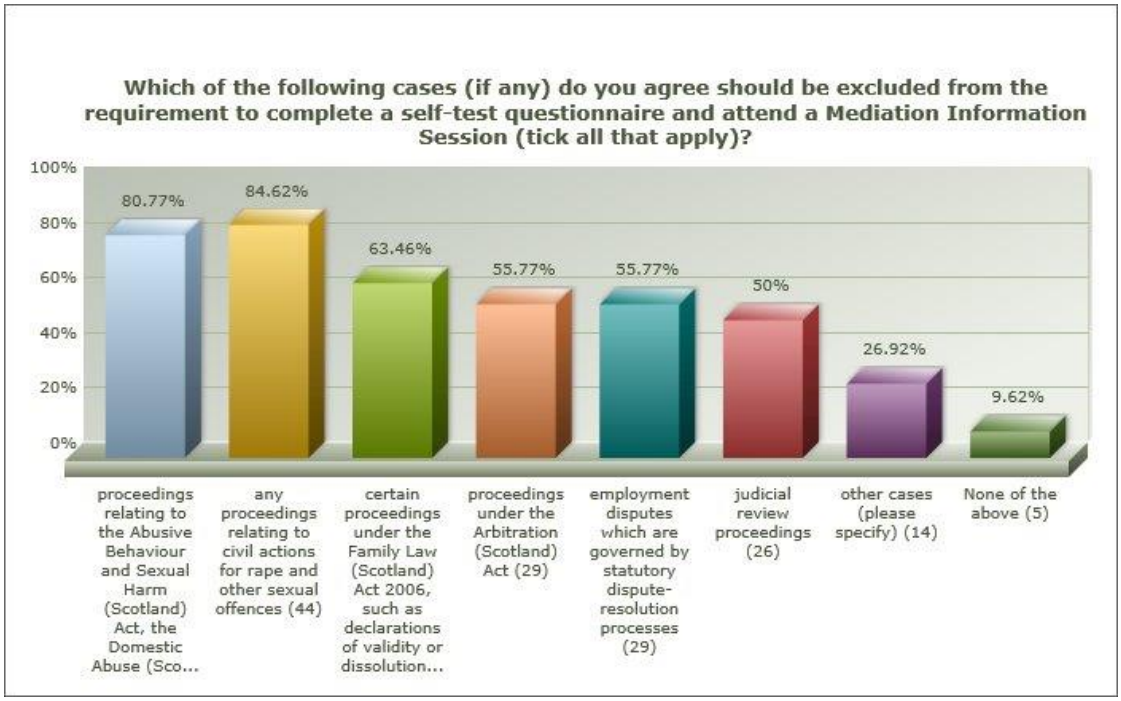
> "We therefore oppose the proposal only as it stands and recommend that it be modified to create a procedure that effectively empowers the parties to discover, access, and appropriately utilise the type and style of Alternative Dispute Resolution most suitable for them."

Unsure

Two respondents were unsure, including Scottish Women's Aid which repeated some of its concerns about the overall proposal and reiterated its concerns about domestic abuse cases and victims being inappropriately brought into the scope of the new processes, even if exempted. With regards

to the proposed questionnaire and mandatory information session, it stressed that duty mediators and mediators must be aware of domestic abuse issues, and that the risks of online mediation to vulnerable women and children must be properly considered.

Question 3: excluded cases[5]



Fifty-two respondents (90% of those who responded to the consultation questions) answered this question.

As can be seen from the table above, there was very strong support for excluding cases of rape and sexual offences (85%) and abuse (81%), and support of between 63% and 50% for excluding: family law cases; arbitration actions; employment disputes and judicial review proceedings. Fourteen respondents suggested other cases which should be excluded, and five respondents believed that none of the listed cases should be excluded.

Reasons why certain cases should/should not be excluded

Many respondents believed that the reasons for excluding their selections were self-explanatory due to their type and background, with many noting that mediation was appropriate for civil disputes rather than criminal cases and should not duplicate existing statutory processes (such as exist in employment law and arbitration legislation).

[5] Note that the end text of the first category, not fully readable in the graphic, is: "… the Domestic Abuse (Scotland) Act and any other proceedings relating to domestic abuse and sexual harassment cases". Note that the end text of the third category, not fully readable in the graphic, is: "… such as declarations of validity or dissolution of marriages".

Some respondents commented on why they had not made certain selections. This included several respondents who believed that while mediation is often not appropriate for some of the cases suggested for exclusion, it may be appropriate in certain circumstances, and that it should be for individuals to choose whether to mediate or not, regardless of the subject of the case. Several respondents highlighted this in relation to domestic and sexual abuse cases. The Mediation Partnership (response 11) noted that there was a risk of re-victimising victims of abuse by removing their ability to decide for themselves, a view shared by Professor Margaret Ross (response 22).

The University of Strathclyde Mediation Clinic stressed that family mediation is well established and that all family cases should be excluded from the suggested process to avoid duplication. Several responses stated that judicial review proceedings should not have a blanket exemption from mandatory mediation processes.

Example of other cases that should be excluded

Fourteen respondents (27%) selected the option for other cases to be excluded; other additional respondents did not select this option but did then note other cases which should be excluded. Other cases suggested included—

- third party/personal injury insurance claims (this was suggested by several organisations);
- actions initiated under the Enterprise Act 2002;
- commercial cases;
- alleged infringements of personal fundamental rights and freedoms;
- undefended cases;
- insolvency petitions;
- recovery of statutory debts, such as tax, council tax, and non-domestic rates;
- certain types of statutory appeals process e.g. appeals against decisions of public bodies or Ombudsmen;
- cases relating to the Housing Grants, Construction and Regeneration Act 1996, which is subject to statutory construction adjudication; and
- cases relating to protecting the legal rights of vulnerable parties.

Zurich Insurance Plc (response 44) was one of several organisations that stated that personal injury cases should be excluded. It explained—

> "There is a mandatory protocol in place for the injured person to make a claim. The ethos basis of this protocol is to encourage the case to settle pre-litigation. If a case progresses to litigation there are set court rules in place to support a person making an injury claim. A mediation process could cause delays and result in additional costs. The reality is that an injured person will be represented by a Solicitor who has experience in handling these types of claims. We, therefore, do not believe that mediation would add any benefit to the outcome for the

injured person. The reality is that adding in a mediation process would result in increased costs to settle an injury claim with no improved outcome for the injured person."

Dentons UK and Middle East LLP noted several further examples of cases suitable for exclusion[6], and observed—

> "This list illustrates that a significant number of court actions do not involve one party demanding that another party provides something (such as payment or delivery of an item) that can be negotiated in a mediation. The position is more complex than that. Sometimes an order from the court is required. There will be many more examples of unsuitable cases across the spectrum of work before the Scottish courts and it is unlikely to be possible to capture an exhaustive list."

Reasons why none of the listed cases should be excluded

Five respondents (10%) selected this option. One respondent did so because of their opposition to the whole proposal, rather than because of a belief that the proposal should apply to every case with no exclusions. Other respondents believed that no case should be automatically excluded and that every person involved in a case should be able to choose whether to mediate or not and should therefore be informed about mediation. Dr Andrey Kotelnikov (response 23), a lecturer at Robert Gordon University's law school, believed any list should be indicative only and applied at the sheriff's discretion. Whilst Cyrenians (a charity that works with excluded people and those who may become homeless, response 13) did not select this option, it agreed that any exclusions should be considered on a case-by-case basis rather than applying a broad-brush approach.

Other points made

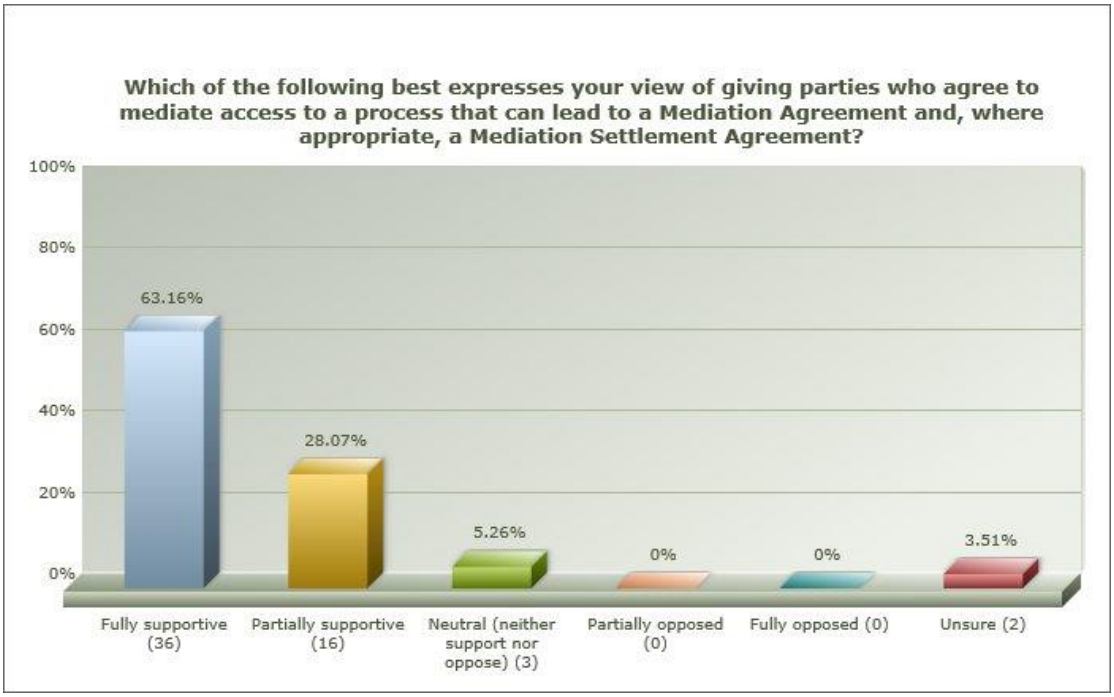
Several other points were made in response to this question, including that—

- rather than being excluded, certain cases (for example, sexual cases and divorce) may benefit from specially tailored mediation;
- it is important to consider the vulnerability of parties when determining whether the process was appropriate;
- while legislation may exclude cases from the mandatory process there would be nothing to prevent individuals seeking to mediate on excluded cases; and
- the questionnaire could be used to screen cases which should be excluded from proceeding to the mandatory information session.

[6] Applications for interim interdict, applications for interim diligence, and applications for "section 1 orders" in terms of The Administration of Justice (Scotland) Act 1972; applications for directions from the court in insolvency situations; actions of decree conform for the registration of foreign judgments; director disqualification applications; and petitions for restoration of a company to the Register of Companies.

Scottish Mediation agreed that some cases should not be required to mediate but favoured a presumption to mediate with a non-exhaustive list of case types and situations where parties could seek exemption from mediating. An individual, Sarah King (a lecturer at the University of Dundee, response 45), thought that a statutory list of exclusions would not be exhaustive and would quickly become out of date.

Question 4: Mediation Agreement and Mediation Settlement Agreement



Fifty-seven respondents (99% of those who responded to the consultation questions) answered this question.

There was strong support for giving parties who agree to mediate access to a process that can lead to a Mediation Agreement and, where appropriate, a Mediation Settlement Agreement. Fifty-two respondents (91%) were supportive (36, 63%, fully supportive and 16, 28%, partially supportive). No respondents were opposed to the proposal. Three (5%) were neutral and two (4%) were unsure.

Reasons for support

Reasons given for fully supporting the proposal included that—

- it is sensible to provide parties who choose to mediate with a clear and consistent process to manage the process and record outcomes;
- it formalises the process and gives it legitimacy;
- it will reduce the chances of parties arguing about aspects of the process as there will be a record;
- it increases the likelihood of outcomes being respected; and that

- the settlement agreement will be able to be given legal effect adding real weight to the mediation process.

On the benefits a settlement agreement could provide, Dr Andrey Kotelnikov stated—

> "The consultation document suggests, and I would strongly support this suggestion, that the parties may opt to make their settlement agreement immediately enforceable by affirming it by a decree of the court. This lack of immediate enforceability has been a downside of mediation for a long time. If one has to go to court again to enforce the mediation settlement agreement, this largely defeats the purpose of having to mediate in the first place. By adopting this approach, Scotland would also align itself with the latest development on the international scene, the signing of the Singapore Convention on Mediation in August 2019, which increases the enforceability of settlement agreements arising out of mediation."

Other suggestions/comments made by those supportive of the proposal included that—

- the outcome agreement should be renamed to avoid confusion as "settlement" is a legal term ("mediation resolution agreement" was suggested);
- consideration needs to be given to how the process will be funded and accessible to those who cannot afford it;
- the type of mediation should not be prescriptive in commencement agreements as this could be restrictive over time.

Reasons given for partially, rather than fully, supporting the proposal included that—

- parties must not be penalised if mediations do not settle;
- the processes should be optional only;
- there may be confidentiality issues with formally recording outcomes in a settlement agreement, particularly if it becomes a court decree;
- it may create a bureaucratic process that puts people off mediating; and
- there should be scope for informal, voluntary outcome agreements, rather than formal, or legal, conclusions.

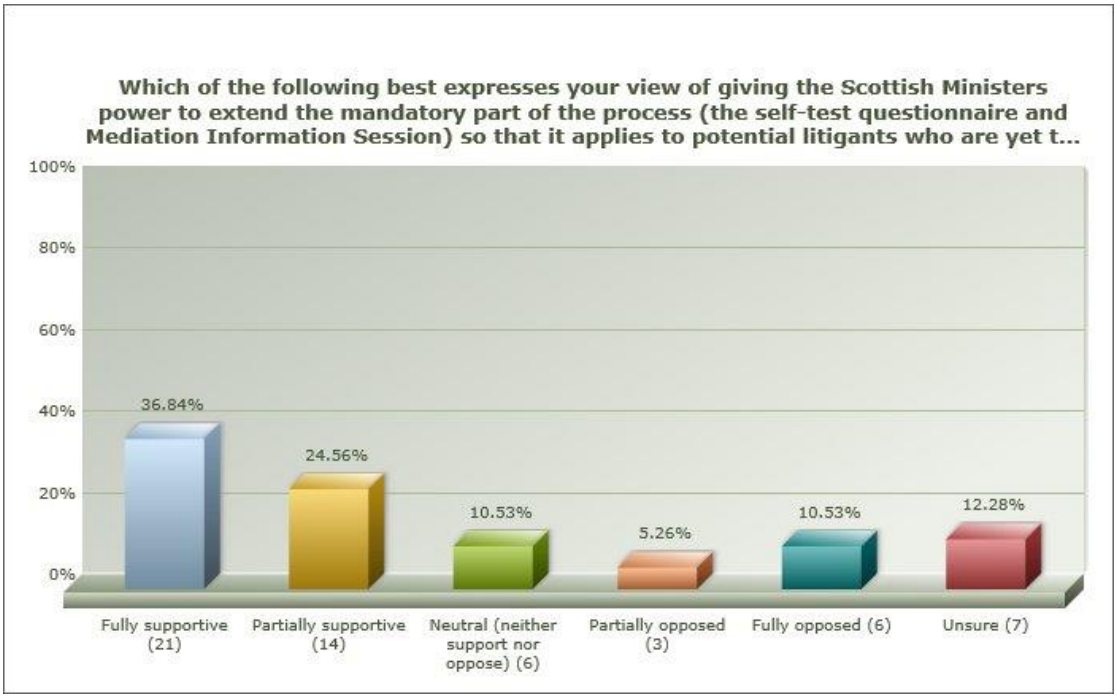
Reasons respondents were neutral or unsure

Three respondents were neutral about this element of the proposal, neither supporting nor opposing. The Scottish Council of Jewish Communities explained it had answered this way because it couldn't be sure that there would not be any coercion or blackmail within the process.

Two respondents were unsure about this proposal. Scottish Women's Aid repeated its concerns regarding the potential for domestic abuse cases to

enter the system erroneously, leading to people being bound by outcomes they had been coerced into agreeing to.

Question 5: power to extend mandatory part of process[7]



Fifty-seven respondents (99% of those who responded to the consultation questions) answered this question. Thirty-five respondents were supportive (61%), 21 of them fully supportive (37%) and 14 (25%) partially supportive. Nine respondents (16%) were opposed, six (11%) fully opposed, and three (5%) partially opposed. Six respondents (11%) were neutral and seven (12%) were unsure.

There was a clear majority (61%) for giving the Scottish Government power to extend the mandatory part of the process (the questionnaire and mediation information session) to pre-action situations. However, it is worth noting that this is lower than the level of support (84%) for making that part of the process mandatory for cases that have already gone to court.

Reasons for support

Many respondents repeated reasons for supporting the process applying at the court stage (see question 2). Many noted that a requirement to inform parties pre-action would allow them to make an informed choice about whether to mediate or seek redress through the courts, and could lead to further reductions in time, cost and stress. “The earlier the better” was a message repeated across many responses, with many stating that views could have become entrenched, making mediation harder, once cases get to court. David Sheldon QC (response 12) believed that there was a strong

[7] Note that the end of the question, not fully readable in the graphic, is: “…potential litigants who are yet to go to court?”

public interest in steering people away from courts to resolve disputes via cooperation rather than confrontation, and the Scottish Legal Complaints Commission (response 16) believed it could be of benefit for unrepresented parties.

While supportive of the principle of early intervention, some respondents made alternative, or additional, suggestions. The Edinburgh Sheriff Court Mediation Service (response 48) noted support for the creation of an Early Dispute Resolution Office, as suggested in the recent report by Scottish Mediation. The University of Strathclyde Mediation Clinic recommended adopting the "Notice to Mediate" process which is used in British Columbia[8], and occurs after the filing of a statement of defence, but before court proceedings begin. An individual, Masood Ahmed (an Associate Professor at the University of Leicester, response 30) supported initiating the process at an earlier stage, but acknowledged arguments against not doing so, such as full disclosure not having taken place, and arguments not being fully developed. However, he suggested overcoming these issues by introducing pre-action protocols, used widely in England, stating—

> "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 [do] so can result in cost penalties against the defaulting party."

Professor Margaret Ross was unclear how a legal requirement to inform potential parties about mediation could be achieved. She suggested involving agencies such as Citizens Advice Scotland or making it a condition of legal aid or of registering a claim in court. Some other respondents were partially, rather than fully supportive, with reasons including that—

- further research and consultation should be carried out;
- a trial/pilot should be carried out;
- the voluntary aspect must be maintained, and parties must not be penalised if they don't want to mediate; and
- access to information should be widened without creating a box-ticking process.

Reasons for opposition

One respondent was opposed because of opposition to the overall proposal and to mediation as a process. Of the other opposed respondents, some offered the same reasons they gave to opposing use of the same process for court cases. Some others supported the court process but did not agree with

[8] British Columbia Notice to Mediate (General) Regulation. Available at: https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/mediation/notice-to-mediate/notice-to-mediate-general-regulation.

extending that to an earlier stage as they believed existing methods of informing potential litigants were sufficient.

Those fundamentally opposed to the process included the Forum of Insurance Lawyers (response 34), which noted that potential litigants were already informed and/or encouraged to mediate via existing channels. The Scottish Council of Jewish Communities repeated concerns they had with the process, rather than the timing, and cautioned against any mandatory meeting with a mediator, even if intended for informative purposes only. Ellis Whittam Limited was fully opposed due to its view that the process was not suitable for its area of interest (employment law). Scottish Women's Aid amplified reasons for its overall opposition to the proposal, which centred around the risks it believed it posed to women and children suffering abuse. It noted that the concerns it had about the process being used at the court stage were increased in terms of intervention at an earlier stage. It noted a lack of confidence in the process, stating—

> "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."

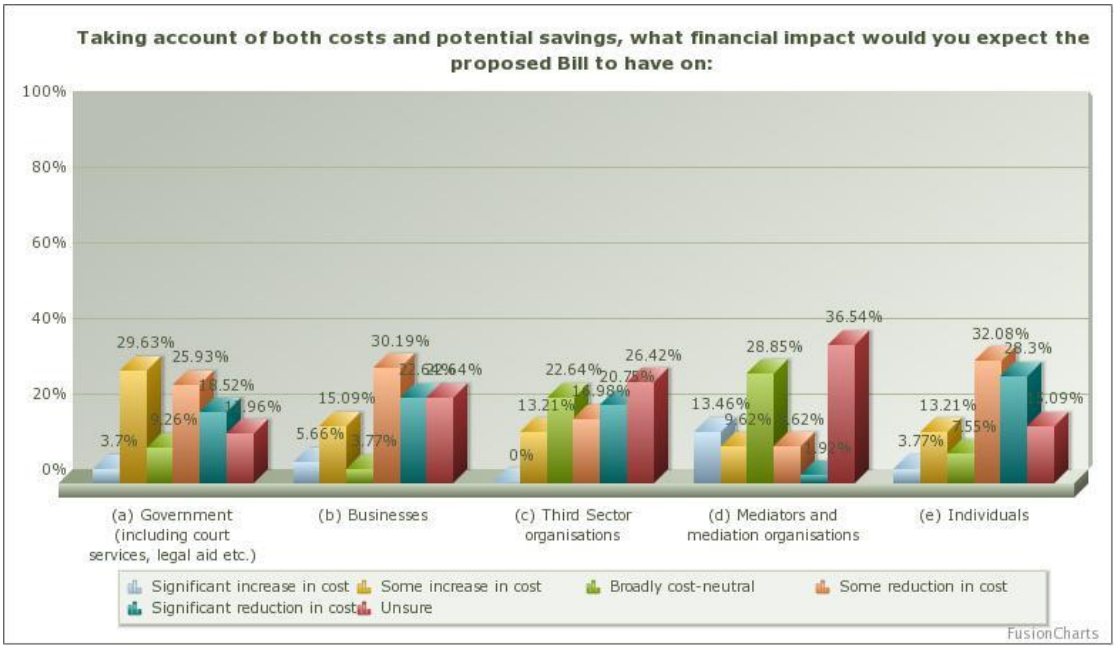
Reasons respondents were neutral or unsure

Several respondents were neutral as they were unclear on issues such as: how potential cases would be identified; how the process would be resourced; how exclusions would be determined; and how urgent cases would be dealt with. Some others felt that it was too early to determine if such a power were necessary and that the original proposal should be considered and tested first.

Of those that were unsure, Scottish Mediation again noted the different approach it had set out in its recent report, where an Early Dispute Resolution Office was recommended, along with a presumption to mediate where opt out could be argued for on a case-by-case basis. Morton Fraser LLP stressed its support for the promotion of awareness of mediation before disputes are raised in court but cautioned that any formal process around this would need careful consideration. It suggested that a body may need to be established to oversee such a process, perhaps equivalent to the Advisory, Conciliation and Arbitration Service (ACAS), which parties would be required to engage with before court proceedings began. It also highlighted potential difficulties such a process could cause for required urgent proceedings (for example, due to an

impending time bar, or because an interim interdict was required to protect a position).

Question 6: financial implications



Fifty-four respondents (93% of those who responded to the consultation questions) answered this question, although not all respondents selected an answer for every category. Details are set out below; however, in broad terms, most respondents thought the Bill would lead to a reduction in costs for the Scottish Government, businesses, third sector organisations and individuals. Within that, views on Scottish Government costs were more balanced, with a higher minority thinking it would lead to an increase in costs. Views on the impact on mediators were different, with fewer respondents predicting reductions in costs and more predicting either an increase in costs or a neutral impact, with many unsure of cost implications.

Many expecting a reduction in costs did so based on a presumption that mediation is often a cheaper and more cost-effective process than court proceedings. Relationships Scotland (response 21) noted that "it is expected that the benefits and cost savings would exceed any additional costs", adding—

> "Inspiring Scotland carried out a Cost Benefit Review for Relationships Scotland in 2017 and concluded that 'when compared against the cost of delivery … the average ratio of Benefits to one pound of Costs for ... family mediation is £12.68.'"

Another theme was that the Bill would see a redirection of costs, with money saved from court cases (including in legal aid applications) becoming available for funding mediators and the new processes.

Some respondents answered specifically in relation to their own sector. For example, the Forum of Scottish Claims Managers (response 42) predicted significant increases in costs if the proposal were applied to third party insurance claims.

Government (including court service, legal aid etc.)

A substantial number of respondents (24, 44%) thought there would be a reduction in costs for the Scottish Government and its relevant agencies. Fourteen, 26%, thought there would be some reduction, and ten, 18%, thought there would be a significant reduction. This was largely because of the view that mediation is a cheaper process, and therefore mediating more cases would reduce court costs. Catalyst Mediation Ltd. (response 2) noted that the high success rate of mediations meant that cases were unlikely to return to court. Many respondents also thought savings would be made to the legal aid budget, even if parties sought legal aid for mediations, given the lower costs involved.

Eighteen respondents (33%) thought there would be an increase in costs for the Scottish Government and its relevant agencies. Sixteen, 30%, thought there would be some increase, and two, 4%, thought there would be a significant increase. This was largely because of predicted additional costs involved in implementing a new system, including funding duty mediators throughout courts in Scotland and providing training for staff. The Forum of Insurance Lawyers predicted some increased costs because of the blanket approach being taken and the fact that it would encompass cases that may otherwise have settled early.

Businesses

A majority of respondents (28, 53%) thought there would be a reduction in costs for businesses. Sixteen, 30%, thought there would be some reduction, and 12, 23%, thought there would be a significant reduction. This was largely on the basis that, as litigants, businesses would see reduced costs as mediation is mostly a cheaper process than court actions.

Eleven respondents (21%) thought there would be an increase in costs for businesses. Eight, 15%, thought there would be some reduction, and three, 6%, thought there would be a significant reduction.

Some respondents predicted that the proposal would result in the need for additional training and preparation of guidance for legal professionals which would increase cost for law companies. The Forum of Scottish Claims Managers believed there was a risk that businesses would face increased insurance premiums if the proposal were applied to personal and third-party injury claims. The Forum of Insurance Lawyers believed that there would be some increase in costs for businesses that are regular litigants stating—

> "The cost of preparation and attendance by a legal representative (and the expenses of the other side in the event of an adverse expenses

award) in every claim is likely to exceed the savings obtained on the very few cases likely to settle through mediation as a result of the new process."

Third sector organisations

Twenty respondents (38%) thought there would be a reduction in costs for third-sector organisations. Nine, 17%, thought there would be some reduction, and 11, 21%, thought there would be a significant reduction. Some respondents explained this was based on third-sector organisations being litigants which would benefit from the generally lower cost of mediation compared to court proceedings.

Seven respondents (13%) thought there would be some increase in costs for third-sector organisations (none thought there would be a significant increase). Several respondents explained that they believed a new mandatory process and the likelihood of increased mediations would create greater demand for support from third-sector organisations. Some of those respondents, such as Citizens Advice Scotland (response 40) and Professor Margaret Ross, noted that the extent to which this led to extra costs depended on whether additional funding was made available (which could perhaps be redistributed from other savings made by the proposal).

The remaining respondents thought the costs would be neutral or were unsure.

Mediators and mediation organisations

Twelve respondents (23%) thought there would be an increase in costs for mediators. Five, 10%, thought there would be some increase, and seven, 13%, thought there would be a significant increase. Several respondents thought this was likely because of the introduction of new mandatory processes and an expected increased uptake in mediation services. Some believed this would require investment in training, preparation, and improving and maintaining standards.

Six respondents (12%) thought there would be a reduction in costs for mediators. Five, 10%, thought there would be some reduction, and one, 2%, thought there would be a significant reduction. Some respondents explained that reduced costs would result from an increase in income for mediators because of more cases being mediated.

Fifteen respondents (29%) thought there would be a neutral cost impact and 19 (36%) were unsure. Some believed the cost impact would be neutral because the increase in mediations would be balanced by an increase in fees earned by mediators. Several unsure respondents commented on the remuneration of mediators and believed that the proposal was not sustainable if it were to rely on mediators providing their services for free. Several believed that mediators must be paid, whether directly by the attending parties, via legal aid, or by other state funding. Sarah King stated—

> "… greater use of mediation should mean more work for mediators which is positive, provided such services are paid for (i.e. 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)."

Individuals

Most respondents (32, 60%) thought there would be a reduction in costs for individuals. Seventeen, 32%, thought there would be some reduction, and 15, 28%, thought there would be a significant reduction. This was largely because, as was the case with business and third-sector litigants, respondents believed that individual litigants would benefit from the generally cheaper cost of pursuing mediation rather than court proceedings. Catalyst Mediation Ltd. noted "in 15 years of mediating we have never heard a complaint that mediation was too costly for the participants".

Nine respondents (17%) thought there would be an increase in costs for mediators. Seven, 13%, thought there would be some increase, and two, 4%, thought there would be a significant increase. A few respondents predicted increased costs due to individuals having to go through a mandatory process, many with legal support, when many cases would end up going back to court for resolution. The Forum of Insurance Lawyers noted that some research has shown that mediation cannot guarantee cost savings. Scottish Women's Aid predicted a significant increase in costs for individuals involved in domestic abuse cases, as they would need to access professionals with relevant experience which could involve additional travel and cost.

Four respondents (7%) thought there would be a neutral cost impact and eight (15%) were unsure. Some of those unsure highlighted unknowns such as whether legal aid would be available, what the increase in mediations would be, and how many of those would be successful or would see cases return to court.

Question 7: improving cost-effectiveness

Forty-six respondents (79% of those who responded to the consultation questions) answered this question. Some respondents stated that no additional measures to improve cost-effectiveness were required, that they were unsure or not able to comment, or that further research was needed into funding the proposal. One respondent opposed to the proposal noted that the best way to save costs was not to pursue it. Remaining respondents offered a wide variety of suggestions to reduce costs and/or increase savings, including—

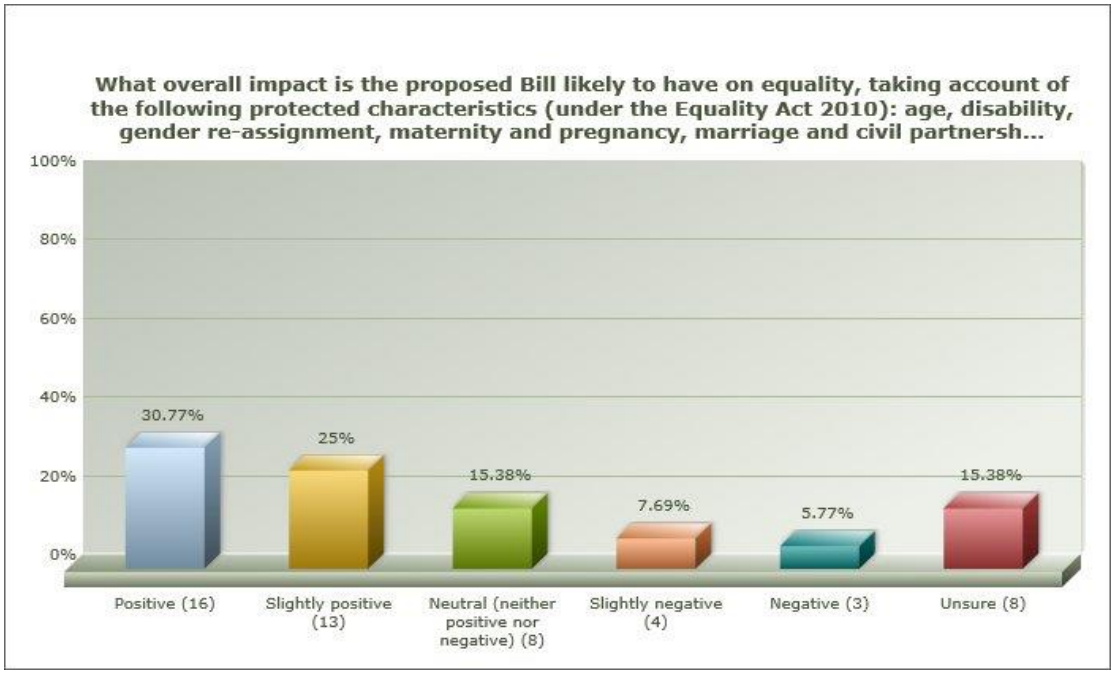
- maximising use of existing expertise and infrastructure;
- maximising use of technology;
- holding information session and mediations locally to the parties;

- court staff and/or mediators performing the role of duty mediator;
- funding the proposal via savings made in the justice budget;
- ensuring compatibility between mediation and court processes;
- the duty mediator going on to conduct agreed mediations;
- legislating for fees chargeable by mediators;
- requiring solicitors to inform clients of mediation options; and
- prioritising mediation of the costliest cases.

Several responses were made on the presumption that mediation is, overall, more cost effective than court proceedings and that therefore increasing the uptake of mediation would result in greater savings. It was suggested, for example, that the public be informed of changes to help maximise the uptake of mediation services. Scottish Mediation noted that if its suggested approach of establishing a presumption to mediate was adopted then it may lead to more uptake and therefore more savings. The University of Strathclyde Mediation Clinic stated that savings could be increased by encouraging the earlier resolution of disputes, thus saving court time and reducing court fees and legal expenses for litigants. Paul Kirkwood stated that a form of mandatory mediation would lead to greater cost savings.

Several respondents answered this question by noting concerns about the funding of the proposal and the ability of people with limited financial resources to participate. Cyrenians noted a concern about the access to justice for parties involved in an unsuccessful mediation who then return to court, therefore increasing their costs.

Question 8: equalities[9]



[9] Note that the protected characteristic referred to in the question (not fully readable in the graphic above) are: age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Fifty-two respondents (90% of those who responded to the consultation questions) answered this question.

Reasons for predicting a positive impact

A majority (29, 56%) of respondents believed there would be some positive overall impact on equalities. Sixteen respondents (31%) thought there would be a positive impact and 13 respondents (25%), thought there would be a slightly positive impact.

A common view expressed was that vulnerable people, including any with protected characteristics, are likely to find mediation more flexible and less formal, and therefore less stressful and intimidating, compared to court proceedings. Some believed that mediation offers more chance of a successful outcome, and that vulnerable or disadvantaged people may feel empowered due to negotiating a settlement, rather than having one imposed upon them. It was also suggested that unrepresented parties can experience added stress and difficulty negotiating the court process, which was often enhanced for those with a disability or facing discrimination. Mediation therefore offered the chance of a better experience and outcome. Another shared view was that suitably trained mediators would be well placed to redress power imbalances and take account of any equality issues. It was also noted that using technology to deliver mediation would make dispute resolution more accessible to those with a disability or anyone who found attending court difficult.

Cyrenians believed that mediation had the potential for further equality benefits, stating—

> "Mediation could potentially give parties the opportunity to address some of the issues that the court process may not be able to undertake. Disputes where the protected characteristics play a part, may be managed more appropriately and effectively using mediation, than by a legal route. Mediation agreements may also give the parties involved, if they agreed, the opportunity to change process and procedure within organisations."

Relationships Scotland explained that its own mediators are trained in equality and diversity issues, adding, "it is hoped that mediators trained in other areas would also have undertaken learning in this area."

Among those who felt the impact would be slightly positive, the Scottish Council of Jewish Communities suggested that the proposal should allow individuals from particular communities to choose a mediator that understood that community. It also added that particular faiths and cultures may prefer to seek dispute resolution within their own communities, giving examples within the Jewish community of the Rabbinical Court or Beth Din. It noted that such courts/processes operate within civil law but better understand the backgrounds of the parties involved.

Reasons for predicting a negative impact

Seven respondents (13%) thought there would be some negative impact, with four (8%) of those respondents believing the impact would be slightly negative. Several respondents believed that some vulnerable and disadvantaged individuals could struggle to effectively participate in mediation and achieve successful outcomes. Sacro (a community justice organisation, response 8) believed there would be a slightly negative impact, explaining—

> "Individuals from these protected groups have less financial resources on average than the population as a whole. The proposed fee structure for mediation is therefore likely to affect them disproportionally: availability of legal aid will only mitigate this to a small extent."

Scottish Women's Aid believed there would be a negative impact for women and children in particular, due to their overall opposition to the proposal based on concerns that victims of domestic abuse would not be properly protected, and that cases of domestic abuse would not be sufficiently exempted from the proposal.

Reasons for predicting a neutral impact or why respondents were unsure

Eight respondents (15%) thought the impact on equalities would be neutral (neither positive nor negative). In addition, two further responses, by Citizens Advice Scotland and the Faculty of Advocates Dispute Resolution Service (response 50), stated that there may be either a neutral or slightly positive impact. The Faculty of Advocates Dispute Resolution Service noted that the Scottish Courts and Tribunal Service (SCTS) is legally bound by the public sector equalities duty (which includes socio-economic considerations) and speculated that formalising mediation within the court process may extend the scope of the SCTS's responsibilities to that process. The Faculty noted—

> "These would be particularly important considerations for: (i) the qualifications, experience and training of the proposed duty mediators, since SCTS would be responsible for their conduct of the mandatory mediation; and (ii) the location, facilities and other organisational aspects of the mandatory mediation itself."

Eight respondents (15%) were unsure of the impact on equalities. Only one of those, the Scottish Legal Complaints Commission, added a comment, namely that it was not aware of any equalities concerns being raised within its own experiences of mediation.

Question 9: reducing negative equalities impacts

Thirty-nine respondents (67% of those who responded to the consultation questions) answered this question. Various suggestions were made to minimise or avoid any negative equalities impacts, including—

- ensuring the questionnaire includes relevant questions about any additional support needs so that these can be considered;
- not penalising parties for deciding not to mediate;
- parties being able to choose their own mediator;
- ensuring mediators are appropriately trained and monitored;
- putting a complaints process in place;
- providing mediation free (to all or to those who need it);
- providing translation services;
- monitoring equality of access to mediation and collecting data on use;
- using a mixed panel of mediators (in terms of disability, ethnicity, gender etc.) to reflect the wider population; and
- ensuring participation is not online only.

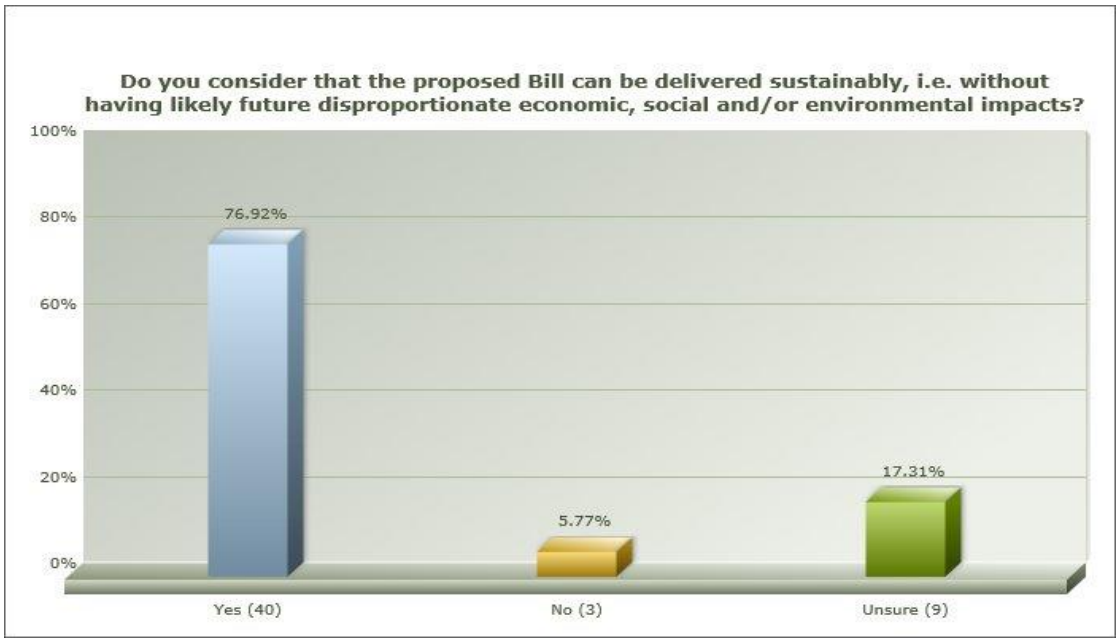
The University of Strathclyde Mediation Clinic believed that the exclusion of family cases would avoid risk of harm to those who have suffered domestic abuse and highlighted the importance of no-one feeling forced to mediate, stating—

> "The Bill should ensure that judges make clear to parties that non-participation in mediation, following a Mediation Information Session, will not be held against them in any subsequent hearing."

The Scottish Council of Jewish Communities also commented on the issue of compulsion, noting—

> "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 inadvertently maneuver a vulnerable party into a position where they may become subject to blackmail that goes unrecognised by the Mediator…".

Question 10: sustainability



Fifty-two respondents (90% of those who responded to the consultation questions) answered this question.

Reasons to think the Bill could be delivered sustainability

A significant majority of respondents (40, 77%) thought the proposed Bill could be delivered sustainably. Reasons given included that the proposal would be—

- economically sustainable due to generally lower costs of mediation compared to litigation;
- environmentally sustainable due to mediation being able to be conducted online, reducing travel and energy use; and
- socially sustainable due to reductions in stress, improved access to justice, improved wellbeing and empowerment, and improved relationships.

Harper Mcleod LLP outlined potential wider social benefits—

> "If family conflict can be reduced, this will impact positively on society, e.g. reducing the number of children exposed to ACEs [Adverse Childhood Experiences] and the associated trauma/impact on their childhoods and in turn the effect this has on them into adulthood and the knock-on repercussions for society; strain on education sector in trying to support them etc".

Potential environmental benefits were detailed in the response by DisputesEfiling.com (a provider of online dispute resolution software, response 19). Its view was that using technology for the completion of the questionnaire and delivery of information sessions would be effective in reducing the carbon footprint of dispute resolution delivery, noting that—

> "Conducting the hearing via Skype or other provider e.g. Zoom will reduce the carbon emissions that occur if parties travel to a mediation session. Especially in Scotland where frequently significant distances must be travelled … the option to conduct a hearing via the mobile telephone network should also be catered for with any platform being responsive i.e. capable of running on a desktop computer, tablet and mobile phone."

However, the response also noted that limitations of infrastructure may inhibit the extent to which technology could play a part in the roll out of the proposal. Some other respondents also caveated their answers. One individual mediator, Christopher Cox (response 38), suggested that the new process be phased in, firstly using it for three years for civil claims up to £5,000 before rolling it out more widely. Professor Margaret Ross drew attention to the importance of appropriately funding the proposal.

Reasons to think the Bill could not be delivered sustainably

A very small minority of respondents (three, 6%) thought the proposed Bill could not be delivered sustainably. Two of those explained the reason for their answer.

One individual, Lesley McDade, was fully opposed to the proposal as a whole due to a belief that mediation is undemocratic, undermines the rules of law, and is harmful when used in the public domain and should not be encouraged. Scottish Women's Aid, which was also opposed to the whole proposal, stated—

> "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."

Reasons why respondents were unsure

Nine respondents (17%) were unsure whether the proposed Bill could be delivered sustainably or not. Reasons given included that sustainability depends on—

- parties being willing to mediate;
- the extent of technology use;
- whether different social groups are treated fairly, and mediators are non-judgmental; and
- the affordability of mediation and how any new system will be funded.

Question 11: other comments

Forty-three respondents (74% of those who responded to the consultation questions) answered this question.

Several responses repeated answers to previous questions and/or provided summaries of their views. Several repeated support for aspects of Scottish Mediation's recent report, including: establishing an Early Dispute Resolution Office; establishing common standards for mediators; including mediation in court and tribunal rules; and providing training for justice professionals. Core Solutions Group noted that—

> "… there is now an opportunity in Scotland to consider and try to synthesise the two sets of quite similar proposals. We must use our mediation skills to find the common ground, identity the best ways forward, and explore a course of action that optimises the prospects of delivering a whole new approach to mediation in Scotland."

Some responses set out views on mediation, and how it could be legislated for and implemented in significant detail (such as the responses from DisputesEfiling.com and Relationships Scotland). Several respondents also supplemented their responses with additional material, including copies of academic articles, previously published materials and research papers (such as the responses by Relationships Scotland, Paul Kirkwood, Ellis Whittam Limited, and Masood Ahmed). Some of these examined example of mediation processes in other parts of the world.

Several respondents made specific comments about the consultation document. The University of Strathclyde Mediation Clinic and Sacro both commented on the document's description of the different types of mediation (facilitative, evaluative and transformative), with both stating that the description given of facilitative mediation is incorrect (it being much more than merely encouraging parties to talk), and the University of Strathclyde Mediation Clinic suggesting that all the descriptions were unhelpful. Relationships Scotland clarified several issues which it felt were either not quite right, or were absent, from the consultation document, including that—

- Relationships Scotland's National Office and the Law Society of Scotland are both approved as organisations to accredit family mediators, for the purposes of the Civil Evidence (Family Mediation) (Scotland) Act, by the Office of the Lord President of the Court of Session for Scotland;
- Scottish Mediation maintains a register of mediators, with minimum standards for mediators who work across a wide range of contexts - a mediator might be on the Scottish Mediation register but not necessarily accredited to provide Family (Divorce and Separation) mediation;
- anyone can set themselves up as a mediator and there is no requirement to be on any register. It is incumbent upon the court, the solicitors, or the clients themselves to check whether the mediator is accredited for Family (Divorce or Separation) work on the Scottish Mediation Register for other case work or otherwise adequately qualified;
- the Civil Evidence (Family Mediation) (Scotland) Act 1995 is another relevant piece of legislation (adding that there may be merit in considering extending this Act to cover civil disputes in other contexts).

The Society of Chief Officers of Trading Standards in Scotland (response 14) noted—

> "… in consumer disputes, businesses are required to provide information about Alternative Dispute Resolution (ADR), in contractual obligations, following the requirements of the Alternative Dispute Resolution Directive which was implemented in the UK by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015."

Some respondents expanded on their views that the scope of the proposal is too limited and/or made specific suggestions about other aspects that should be incorporated into the proposal. Comments included that—

- any new system should be piloted and/or phased in across case types;
- an attempt to mediate should be mandatory;
- the duty mediator should be able to recommend that mediation not take place;
- effective enforcement measures and sanctions should be put in place;
- the involvement of children and children's rights should be carefully considered;
- the availability of legal aid for mediation needs to be clarified;
- online processes must be secure and screened to protect from coercion.

Masood Ahmed stated that there were weaknesses in the proposal that could undermine its aims, adding—

> "Those weaknesses can be remedied by strengthening the MIS [Mediation Information Session] 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."

Finally, a retired solicitor and current mediator, Anne Hall Dick (response 15), noted that the proposal could provide an opportunity for considering dispute resolution in the round, stating—

> "This does seem a good way of moving away from the term 'ADR' as being seen as meaning 'alternative dispute resolution' and instead being seen as 'appropriate dispute resolution', which could include litigation as one option on the spectrum of dispute resolution, to reflect the reality that few disputes are in fact decided in court, most are resolved on an agreed basis, even once brought to court. It would help people find the best way of tackling their disputes in a way which left the court process readily available for the minority of people who do need a third-party decision and the protection of a court order."

SECTION 4: MEMBER'S COMMENTARY

I thank all the many individuals, academics and organisations who have responded to my consultation on a proposed mediation bill. I am particularly grateful to Scottish Mediation and the Scottish Government's Expert Group for their input, and to Professor Charlie Irvine and the advice group he chaired which provided guidance for the consultation. All this work coupled with the very thoughtful and helpful responses to the consultation has been of immense value.

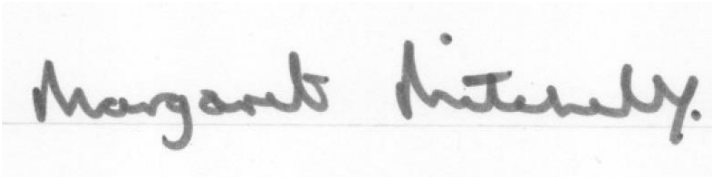
More than 60 responses were received and over 90% of those were in favour of legislating for mediation. This was in recognition of the inconsistency of mediation provision in Scotland as well as the huge lack of awareness of its benefits and its availability for civil court procedure.

Significantly there was overwhelming support from respondents for a mandatory process for informing parties about mediation services and crucially to ensure that the choice, over whether to mediate or not, is taken by the individual parties.

Moving forward I will reflect and take on board the many issues raised with a view to introducing a bill to the parliament which will seek to introduce a new standardised process for mediation provision in Scottish courts. In doing so, I will take into account the evidence and contributions made in the submissions.

I note in particular that many of the respondents referred to the recommendations of the Expert Group Report. I can confirm I intend to work with Scottish Mediation on the development of a bill.

Finally, I would like pay tribute to the work of the staff at the Non-Government Bills Unit for all their help and support with all aspects of the mediation consultation with special mentions for Nick Hawthorne, William Adamson and Kate Blackman.



Margaret Mitchell
Member of the Scottish Parliament for Central Scotland Region

ANNEXE

The 63 responses are listed as they appear on the member's website for ease of reference: https://www.margaretmitchell.org.uk/mediation-consultation.

1	Anonymous – individual	33	Ellis Whitham – organisation (+ 1 attachment)
2	Catalyst Mediation – organisation		
3	Lesley McDade – individual	34	Forum of Insurance Lawyers – organisation
4	Pam Wardlaw – individual		
5	Bryan Clark – individual	35	Glasgow Caledonian Law – organisation
6	Anonymous – individual	36	University of Strathclyde Mediation Clinic – organisation
7	Pamela Lyall – individual		
8	Sacro – organisation	37	Scottish Public Services Ombudsman – organisation
9	Core Solutions Group – organisation		
		38	Christopher Cox – individual
10	Brenda Boyd – individual	39	CMS LLP – organisation
11	The Mediation Partnership – organisation	40	Citizens Advice Scotland – organisation
		41	Faye Wilson – individual
12	David Sheldon – individual	42	Forum of Scottish Claims Managers – organisation
13	Cyrenians – organisation		
14	Society of Chief Officers of Trading Standards – organisation	43	Harper Macleod LLP – organisation
		44	Zurich Insurance Plc – organisation
15	Anne Hall Dick – individual	45	Sarah King – individual
16	Scottish Legal Complaints Commission – organisation	46	Families Need Fathers Scotland – organisation
17	Nicolas Maulet – individual	47	Scottish Mediation – organisation
18	Pinsent Masons – organisation	48	Edinburgh Sheriff Court Mediation Service – organisation
19	DisputesEfiling.com – organisation		
		49	Sandy Wilson - individual
20	Scottish Independent Advocacy Alliance – organisation	50	Faculty of Advocates' Dispute Resolution Service – organisation
21	Relationship Scotland – organisation (+ 7 attachments)	51	Anonymous – individual
		52	Dentons UK and Middle East LLP – organisation
22	Margaret Ross – individual		
23	Andrey Kotlenikov – individual	53	Scottish Council of Jewish Communities – organisation
24	David. S. Christie – individual		
25	Paul Kirkwood – individual (+ 3 attachments)	54	Scottish Women's Aid – organisation
		55	Linn Phipps – individual (+ 1 attachment)
26	Roderick Campbell – individual	56	Anonymous – individual
27	Valentine Scarlett – individual	57	Barry JS Gale – individual
28	Morton Fraser – organisation	58	Not for publication – individual
29	Association of Personal Injury Lawyers – organisation	59	Not for publication – individual
		60	Not for publication – individual
30	Masood Ahmed – individual (+ 5 attachments)	61	Not for publication – individual
		62	Not for publication – individual
31	Jacqueline Mitchell – individual	63	Not for publication – individual
32	David Hossack – individual		