Mediation Clinic response to Mediation (Scotland) Bill Consultation
Charlie Irvine, Director, August 2019

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

Additional comments:
I have been reading and writing about court-referred mediation for over 15 years. It is clear that numerous other jurisdictions employ mediation on a routine basis for reasons including docket-management, efficiency, cost, access to justice and improved compliance. The widespread use of mediation is principally triggered by two mechanisms: judicial encouragement and legislation.

Judicial encouragement is the more direct. It is generally when such judicial encouragement is absent that states tend to pass mediation legislation. The Scottish Government's recent international review of mediation in civil justice found: "A majority of the jurisdictions had a judicial champion of mediation (or ADR) who helped to increase knowledge and understanding, build credibility, push legislation or court rules, and/or encourage further support from the wider legal profession" (Scottish Government Social Research (2019) Mediation in Civil Justice: International Evidence Review. Available at https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/ (Accessed: 3 July 2019). Judicial champions exist in numerous US and Canadian jurisdictions, where courts tend to have direct responsibility for their own budgets. The practice of diverting cases to mediation reaps tangible benefits as judges see cases resolved early, freeing up court time and reducing waiting lists. Such courts often take the initiative in promoting and encouraging mediation.

In other jurisdictions the state has taken the initiative in encouraging greater use of mediation through legislation or rules of court. Examples of mediation legislation include Ireland, Singapore, Brazil, Azerbaijan, Romania, Ukraine, Czech Republic, Germany, Georgia, China, Latvia and Italy. Examples of rules of court supporting mediation's use include England & Wales, India, British Columbia, Ontario, Alberta, New South Wales, Victoria and Queensland. Judicial encouragement tends to flow from such enabling legislation or rules.

With the exception of family actions Scotland has been slow to adopt mediation. Before the arrival of Simple Procedure judicial encouragement was rare. It is still confined to low-value cases. The Mediation Clinic's experience of Simple Procedure confirms judicial respect for legislation (in that case secondary legislation). Sheriffs now routinely encourage parties to engage in mediation and express considerable satisfaction when matters are resolved.

We have therefore concluded that 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.

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

Additional comments:
Strathclyde Mediation Clinic has received hundreds of referrals to mediation under Simple Procedure. This has provided valuable experience of explaining the process to a wide range of parties, including unrepresented consumers, small businesses and the legal representatives of large public and private institutions.

In our view the most effective means of ensuring parties properly consider mediation is a personal conversation with the mediator. This is a two-way exchange: parties need the chance to explain the particulars of their case AND the mediators need to provide tailored information about how the process will contribute. Many individuals are sceptical, believing mediation only works with 'reasonable' people; inevitably their opponent is far from reasonable. Mediators operating in the Scottish courts have learned to frame mediation in pragmatic terms, for example as an opportunity to negotiate a settlement, or as a forum in which parties learn about the strengths and weaknesses of their case. They lay great stress on party decision-making and the protections of 'without prejudice' negotiation. In this way mediators not only provide information but, more importantly, demonstrate a mediation approach. (See Elizabeth Stokoe, 2013, 'Overcoming barriers to mediation in intake calls to services: Research-based strategies for mediators.' Negotiation Journal 29, 289–314, finding that parties approaching a mediation service had little interest in learning about mediation as a process; rather they responded to an empathic exchange that focused on practical next steps.)

We therefore take the view that the most important element in the proposed Bill will be the mandatory Mediation Information Session. The questionnaire may help, but in isolation is unlikely to be persuasive. It may even be counterproductive. Those who are sceptical about mediation are likely to remain so, particularly given the phenomenon of 'confirmation bias' (the tendency to interpret available information so as to arrive at conclusions we already hold: see https://www.psychologytoday.com/gb/blog/science-choice/201504/what-is-confirmation-bias.)

One of the questions in the proposed questionnaire is particularly problematic in this regard: Under the heading of 'No-because...' is the question 'I do not see room for negotiation, because…' Our experience suggests that many if not most parties start by seeing no room

for negotiation. And yet between 60% and 70% of our cases reach a successful settlement. Often people are persuaded to lay this prejudice to one side until they have attempted mediation. Skilfully conducted, the process provides previously unknown or neglected information which expands the basis for negotiation. We would therefore suggest this question be removed, or re-located in the 'I feel uncertain because...' section.

To conclude, Strathclyde Mediation Clinic is strongly supportive of the requirement to attend a mandatory Mediation Information Session. It is less convinced about the value of the questionnaire and believes it will need to be revised for use in the Scottish context.

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 X**
- **any proceedings relating to civil actions for rape and other sexual offences X**
- **certain proceedings under the Family Law (Scotland) Act 2006, such as declarations of validity or dissolution of marriages X**
- **proceedings under the Arbitration (Scotland) Act**
- **employment disputes which are governed by statutory dispute-resolution processes X**
- **judicial review proceedings**
- **other cases (please specify) – All family law actions**
- **None of the above**

Reasons:

We believe that all family cases should be excluded from the Bill. Family mediation is already well-established in Scotland and existing court rules enable judicial referral to mediation. Scottish judges specialising in family law are familiar with the process and family mediation services have longstanding procedures for providing 'intake' meetings with parties. These fulfil the same purpose as the Mediation Information Session with one important addition: family mediation services routinely screen for intimate partner violence. IPV not only exposes participants and children to risk but can undermine mediation itself; a severe imbalance of power between participants makes informed decision-making unlikely or impossible. Where family mediation does go ahead specific safeguards are put in place, such as separate arrival and departure times and the presence of a supporter.

The proposed Mediation Bill would be better targeted at general civil litigation. This will avoid unhelpful confusion; critiques of family mediation on the grounds above are on occasion applied to all forms of mediation.

Turning to judicial review, we see no principled reason why such cases should be excluded from the requirement to consider mediation. Legal negotiation takes place in judicial review cases just as it does in other areas of litigation. Mediation can be understood as facilitated negotiation, and may thus speed up and improve the negotiation process. Bondy et al's

research found that mediation in judicial review cases, while little used, often provided "innovative and long-lasting benefits" (Bondy M, Mulcahy L, Doyle M & Reid V, 2009, 'Mediation and Judicial Review : An empirical research study.' London: The Public Law Project.) It is therefore logical to ensure that parties to judicial review actions also have the opportunity to consider mediation.

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 Agreement and, where appropriate, a Mediation Settlement Agreement?

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

Reasons:

While we find the terminology of 'Mediation Agreement' and 'Mediation Settlement Agreement' confusing, we strongly support the use of a document setting out the terms on which mediation will take place. This will provide parties and mediators with clarity.

The confusion arises from the similarity between 'Mediation Agreement' (which is signed in advance of a mediation) and 'Mediation Settlement Agreement' (which is signed at the end of a successful mediation). Throughout the English-speaking world the term typically used for the pre-mediation document is 'Agreement to Mediate'. Many practitioners display the terms of their standard 'agreement to mediate' on their website. There seems no reason to depart from this usage. The phrase 'Mediation Agreement' is also confusing in that it could equally apply to the document signed at the end of a mediation.

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 applies to potential litigants who are yet to go to court?

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

Reasons
The idea of drawing mediation to parties' attention prior to raising an action seems sensible. If successful, parties' will save court fees and incur lower legal costs. The justice system will therefore save administrative and, potentially, judicial time.

However, in our experience one or both parties may lack the motivation to engage in mediation until faced with the prospect of an evidential hearing. Until an action is raised, defenders/respondents tend not to believe that the other party is serious. A more practical option would be to adopt British Columbia's 'Notice to Mediate' provision. The Notice to Mediate triggers the equivalent of the Mediation Information Session without involving the courts. Mediation remains voluntary, as parties may opt-out at this first stage, but local practitioners report greater informal use of mediation as a result of the culture change this device has brought about. (See Scottish Government Social Research 2019, pp. 31-31.) In the Scottish context, the service of a Notice to Mediate would exempt parties from the mandatory part of the process in subsequent court proceedings.

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

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

a) Government	**Some increase in cost**
b) Businesses	**Some reduction in cost**
c) Third sector organisations	**Some reduction in cost**
d) Mediators and mediation orgs	**Unsure**
e) Individuals	**Some reduction in cost**

The financial impact of mediation has been difficult to quantify. On the one hand there is a clear saving for courts and parties if a mediation of a single day or shorter achieves the satisfactory settlement of a court action set down for several days of proof. On the other hand many cases settle without the assistance of a mediator. To complicate this, US researchers found between 5% and 50% of cases not proceeding to trial did not in fact 'settle' but ended for a variety of other reasons: see Barkai J and Kent E, 2014, 'Let's Stop Spreading Rumors about Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts.' Ohio State Journal on Dispute Resolution 29, 85–160. A precise figure for the financial savings offered by mediation has proved elusive (see Scottish Government Social Research 2019, pp. 45-49). However, a respected US mediation scholar found significant savings in time to disposal in mediated cases, even when they did not settle (Wissler R, 2002, 'Court-connected mediation in general civil cases: What we know from empirical research.' Ohio State Journal on Dispute Resolution 17, 641–703, p. 671.)

Mediation needs to offer something more than savings of cost and time if it is to make a valuable contribution to the Scottish justice system. Potential additional benefits include:
- more creative outcomes (Adrian L and Mykland S, 2014, 'Creativity in Court-Connected Mediation : Myth or Reality?' Negotiation Journal 30, 421–439)
- improved compliance (Long J J, 2003, Compliance in small claims court: Exploring the factors associated with defendants' level of compliance with mediated and adjudicated outcomes.' Conflict Resolution Quarterly 21, 139–153; Ross M and Bain D, 2010, 'Report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts.' Scottish Government Social Research. Edinburgh)

- greater possibility of explanation and apology (Relis T, 2007, 'It's Not About the Money!': A Theory on Misconceptions of Plaintiff's Litigation Aims. University of Pittsburgh Law Review 68, 701–746).
- financial settlement that is acceptable to both parties. Most mediations do settle and in 2018, Mediation Clinic cases settled for an average of 48% of the sum originally sued for.

We take the view that there will be an increased cost for the government if the Bill is passed. This is because the consultation envisages payment for duty mediators being met by the Justice Department. There may be some savings in court time but in our view this will be offset because the courts will also need to provide rooms for the Mediation Information Sessions, and hopefully the mediations themselves, to take place.

We believe that greater use of mediation will lead to reduced costs for businesses, charities and individuals. The cost of pursuing court action is not limited to legal fees; time spent on preparing for and attending litigation is a less visible but nonetheless significant drain on resources.

The financial impact on mediators is likely to be mixed. Some may be remunerated for working as duty mediators; others will be able to charge for their services in higher value cases. However, we doubt whether it is realistic to charge significant fees for mediating under Simple Procedure in cases with a value of below £5,000. Without assistance from Scottish Government or the Scottish Legal Aid Board it is likely that mediators will continue to have to work pro bono, thus subsidising state provision of dispute resolution for low value claims.

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

The Bill could increase savings by encouraging the earlier resolution of disputes via a Notice to Mediate (see earlier answer 5 for information on this British Columbia innovation.) This will enable either pursuer or defender to require a Mediation Information Session prior to raising an action, potentially saving court time and reducing court fees and legal expenses for litigants.

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

- **Positive**
- **Slightly positive X**
- **Neutral (neither positive nor negative)**
- **Slightly negative**
- **Negative**
- **Unsure**

The Mediation Clinic's experience suggests that many unrepresented parties find the court experience stressful. Some find it intimidating and unpleasant and this is likely to be heightened for those experiencing disability or discrimination. Mediation can offer advantages to these individuals. We have worked with a number of parties with a disability and our mediators take steps to ensure the mediation process is humane and fair. Mediation's flexibility enables us to tailor times, location and attendees to increase the possibility of informed decision-making by all participants, whether or not legally represented.

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

See our early comment that family law cases should not be included in the proposed Bill. This will avoid the risk of harm to those who have experienced domestic abuse. Even in non-family cases mediators need to be trained and alert to the possibility of threats or intimidation between parties. In these instances mediation should not proceed. The Bill should ensure that judges make it clear to parties that non-participation in mediation, following a Mediation Information Session, will not be held against them in any subsequent hearing.

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**

The overall economic impact of the Bill is likely to be positive. If Scotland can develop a thriving justice sector providing a range of options for the resolution of disputes it will benefit individuals and improve business confidence. The social benefits will include reduced stress and improved legitimacy for the justice system. There are also likely to be environmental benefits if disputes are resolved more speedily and with fewer days of hearings in court buildings that are expensive to staff and to heat.

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

I have a number of additional comments on the proposal, listed by page number:

PAGE 8
The consultation states:
"Mediation can be—
• facilitative (where the mediator merely encourages the parties to talk);
• evaluative (where the mediator has some input on the merits of the dispute); or
• transformative (where the mediator assists the parties in restoring their relationship)"

This typology is confusing and unnecessary in a public consultation. It would be like saying some lawyers have a conciliatory approach and others are more combative. The categories

listed are controversial and contested within the mediation profession and will not help the public make informed choices. Furthermore the definition of facilitative mediation is simply inaccurate, omitting proactive questioning, conducting negotiation and leadership.

PAGE 10
The consultation states that referral to mediation in Glasgow Sheriff Court takes place only at First Written Orders. In fact Glasgow sheriffs refer cases to mediation throughout the progress of a case, including at Case Management Discussions and Evidential Hearings.

PAGE 17
The consultation states: "There could be an additional financial impact on the parties if mediation was agreed to, but unsuccessful, and litigation continued. This is because the mediation paid for would be in addition to the cost of court action."

This raises an important challenge for the duty mediator. Where it is clear that one or both parties are intransigent, or that one party believes its case so strong or important that litigation is preferable to negotiation, it must be open to the duty mediator to recommend that mediation NOT take place. In a small number of instances parties have made clear to the Mediation Clinic that they were only proceeding with mediation because of a (hopefully mistaken) belief that the sheriff would hold it against them if they did not participate. In these cases we have written to the court explaining that it is the Clinic's decision not to offer mediation - meaning that neither party need fear being blamed for the decision.

PAGE 17
The consultation states:
"An increase in the use of mediation may reduce the amount that solicitors and advocates receive in fees, compared with where cases go through the courts."

This may be accurate under the current fee regime, where solicitors generally charge an hourly rate. In many US states attorneys are permitted to charge contingency fees, where the fee is proportionate to the sum settled for. Such a fee regime reverses the incentive structure, rewarding lawyers who encourage the early settlement of cases, as occurs in mediation. This would be a matter for the Scottish Civil Justice Council to consider.