Mediation (Scotland) Bill

A proposal for a Bill to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator

Consultation by

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FOREWORD

I first became a member of the Scottish Parliament in 2003. In November of that year the then Justice 1 Committee held an evidence session with John Sturrock QC on **Alternative Dispute Resolution** (ADR). Thereafter I became firmly convinced of the merits of ADR.

Subsequently the Parliament has passed several pieces of related legislation, including the Arbitration (Scotland) Act 2010 and the Apologies (Scotland) Act 2016 which was a member's bill which I introduced. Despite this, and the acknowledgment and recognition of the benefits of ADR, there has been little progress in the last 15 years to actively raise awareness about, promote and use the various forms of ADR.

It was for this reason the Justice Committee held two round-table evidence sessions on ADR, which I convened, in February and March 2018. This resulted in a report on ADR published in October 2018 entitled "*I Won't See You in Court*"[1].

That report included detailed consideration of the use of mediation in Scotland, one form of ADR, and highlighted several issues, including that the awareness, uptake and consistency of mediation services is not nearly as good as it could be. The report also concluded that parties should not be compelled to participate in mediation, as it is most effective when undertaken voluntarily. This is a conclusion with which I wholeheartedly agree.

I am therefore proposing a member's bill to increase the use and consistency of mediation services in Scotland, which will, in turn, increase people's awareness of what mediation is and what it can do for them.

My proposal to achieve this is by establishing a new process of court-initiated mediation for relevant civil cases (cases which are excluded from the process will be set out in the Bill). When a civil case first comes before a court, the court will issue the parties with a questionnaire to help assess suitability for mediation and appoint a duty mediator who will be required to meet with the parties (in a **Mediation Information Session**) to discuss further and to decide whether the parties wish to proceed with mediation (see Annexe). From my discussions with stakeholders I have found that the role of a duty mediator has been a crucial factor in the use of mediation in courts.

Should parties agree to mediation, the Bill will provide for a formal process, which will involve parties signing up to a **Mediation Commencement Agreement**, to guide the process, and, if an agreement is reached, a **Mediation Settlement Agreement**, setting out the terms of what has been agreed.

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[1] Scottish Parliament Justice Committee (1 October 2018). *I won't see you in court: alternative dispute resolution in Scotland*, *9th Report, 2018 (Session 5) SP Paper 381*. Available at: https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf.

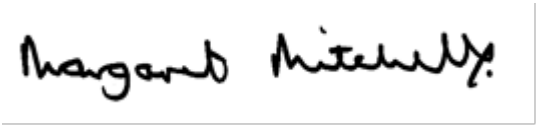
Of course, should parties not wish to proceed with mediation, that is their right and they can continue with the legal process. This ensures, crucially, that the decision on whether or not to mediate will be voluntary.

Furthermore an increase in the use and understanding of mediation may help to encourage the use of modern technology to help reduce any barriers to mediation, and ensure it can be carried out without delay, for example by conducting session via electronic means. This could increase flexibility for participants and allow them to choose the timing, conditions and location of their mediation. Mediation could be carried out without delay even if the parties were in different parts of the country or even in different countries. I have particularly been encouraged about the opportunities for online mediation with the recent announcement of the rollout of the digital court system for simple procedure.[2]

In the current legal system delays can be due to work, caring or family commitments. The use of new technology in the mediation process would help to resolve that problem.

Finally I believe that this proposal will have a significant positive impact on the use and consistency of mediation services across Scotland; improve awareness; modernise and speed up the settlement of disputes; and reduce costs.

I very much welcome and look forward to all the input and contributions to this consultation.



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TBC 2019

[2] https://www.scottishlegal.com/article/fully-digital-process-for-simple-procedure-cases-to-be-rolled-out-next-week.

HOW THE CONSULTATION PROCESS WORKS

This consultation relates to a draft proposal I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:
http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx

At the end of the consultation period, all the responses will be analysed. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy. Consultation, when done well, can play an important part in ensuring that legislation is fit for purpose.

The consultation process is being supported by the Scottish Parliament's Non-Government Bills Unit (NGBU) and will therefore comply with the Unit's good practice criteria. NGBU will also analyse and provide an impartial summary of the responses received.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at The Scottish Parliament, Room M2.11, Holyrood, Edinburgh, EH99 1SP. Tel: 0131 348 5639
Email: Margaret.Mitchell.msp@parliament.scot

Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website (www.parliament.scot) under Parliamentary Business / Bills / Proposals for Members' Bills.

AIMS OF THE PROPOSED BILL

ADR is the acronym for "Alternative Dispute Resolution" and includes negotiation, facilitation, mediation, conciliation, arbitration, med-arb (a combination of mediation and arbitration) and early neutral evaluation. However, this proposal specifically concerns mediation only, as it is the primary form of ADR used for civil disputes, whereas other forms of ADR, such as arbitration, are mostly used in other situations, such as business disputes.

The two broad aims of the proposed bill are—

- to increase the use of mediation; and
- to increase the consistency of mediation services.

It is hoped that achieving these two broad aims will improve general awareness of what mediation is, how to access it, and what it can do for people.

BACKGROUND

What is mediation?

The Scottish Parliament's Justice Committee explained mediation in its report on alternative dispute resolution, entitled "I Won't See You in Court", as follows—

> "Mediation involves an independent and impartial person helping two or more individuals to negotiate a potential solution to a problem in a confidential setting. The people involved in the dispute, not the mediator, decide the terms of any agreement. The outcome is not legally binding, without further steps being taken by the people concerned. Mediation is used in Scotland in relation to families; neighbours and communities; consumers; education; additional support needs; and employment. People can decide to mediate on their own initiative or they can be referred to mediation by a court."[3]

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).[4]

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[3] Scottish Parliament Justice Committee (1 October 2018). *I won't see you in court: alternative dispute resolution in Scotland*, *9th Report, 2018 (Session 5) SP Paper 381.* Page 3. Available at: https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf.

[4] These are three basic styles of mediation, of which there are in total about twenty-five, many with minor variations around the major themes. (See J.A. Wall and T.C. Dunn, 'Mediation Research: A Current Review' (2012) Negotiation Journal 28 217-244).

The parties would agree on the form of mediation in the initial Mediation Commencement Agreement.

A mediator has been defined as a third party chosen by the disputants who assists them to resolve their differences through the process of mediation.[5]

Benefits of mediation

As an alternative to court proceedings, mediation has many potential advantages, including—

- it gives parties greater control in the resolution of a dispute thereby reducing stress;
- it reduces the costs, both to the parties and to the public purse;
- as it is voluntary, it allows parties to explore its possible benefits, but return to court proceedings if not satisfied;
- it often can be arranged at short notice, eliminate delays, and therefore result in swifter outcomes;
- it can help preserve relationships by allowing for discussion led by a trained, neutral, experienced person used to dealing with difficult situations, but avoiding the often-confrontational aspects of a court process (also reducing stress);
- it is more flexible, and can be conducted in a variety of ways – for example, conducted with the parties and the mediator being physically present, either in joint sessions (where the parties and the mediator are physically present in the same room at the same time) or in private sessions (where the mediator meets with the one party in the absence of the other), or with a combination of joint and private sessions;
- it is more convenient for the parties, allowing sessions to be fitted around their availability without being constrained by traditional court operating hours and to use modern technologies (for example, mediation can be undertaken anywhere (including online); and
- there is a higher rate of compliance with settlement agreements and outcomes.

Current legal framework and practice

Mediation is already used in Scotland in certain areas of law. It is now established in a court context for family mediation, simple procedure[6] cases (see below), tribunal settings for additional support for learning, and in an ombudsman[7] context. Legal aid is available for mediation.

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[5] P.T. Coleman, M. Deutsch and E.C. Marcus, *The Handbook of Conflict Resolution – Theory and Practice* (3rd ed. Hoboken: Wiley 2014) 817.

[6] Simple procedure was introduced in Scotland on 28 November 2016 and replaced the small claims procedure and part of the summary cause procedure. Simple procedure is a court process designed to provide a quick, inexpensive and informal way to resolve disputes where the monetary value does not exceed £5,000.

[7] An ombudsman is an official who represents the interests of the public by investigating complaints regarding public services.

However, Scotland does not have a formal mediation body for accrediting mediators nor does it have a code of conduct for mediators. Scottish Mediation[8] is a membership organisation that maintains a register of mediators and provides access to mediation services but is not an industry-wide regulating body. Scottish Mediation currently has over 100 members, made up of individuals and organisations. There are 64 individually registered practitioners on the register, along with a number of organisations, including affiliated organisations such as Relationships Scotland, CALM, and the Scottish Community Mediation Centre.

The Law Society of Scotland also provides similar services and operates a family law and a commercial law mediation scheme, with the period of accreditation for both specialisms being three years[9].

The University of Strathclyde Mediation Clinic, in a report to the Scottish Parliament's Justice Committee, set out the availability of mediators in Scotland currently—

> "Current mediation provision across Scotland is as follows:
>
> **Edinburgh** – the only sheriff court where the state contributes to ADR costs. Scottish Legal Aid Board funds a full-time coordinator; mediators provide their services pro bono.
> **West Central Scotland** – [in] … six courts … [Glasgow, Paisley, Falkirk, Kilmarnock, Dumbarton, and Airdrie] the Mediation Clinic relies on University of Strathclyde support and, again, pro bono mediators.
> **The rest of Scotland** – if a sheriff encourages mediation under the Simple Procedure rules parties are referred to the Scottish Mediation Helpline. The recommended fee for mediators under this scheme is £100 per hour (split between the parties)."[10]

There is reference to ADR in two Acts of the Scottish Parliament that have come into force in the last decade, as follows—

- **Scottish Civil Justice Council and Criminal Legal Assistance Act 2013:** this Act established the Scottish Civil Justice Council (to replace the Court of Session Rules Council and the Sheriff Court Rules Council). The Council prepares draft rules of procedure for the civil courts and advises the Lord President on the development of the civil justice system in Scotland. The Act states that the Council must have regard to various principles when carrying out its functions, one of which is that "methods of resolving disputes which do not involve the courts should, where appropriate, be promoted." The Council has an Access to Justice Committee, which has conducted a review of ADR in

[8] Scottish Mediation website: https://www.scottishmediation.org.uk/.
[9] Law Society of Scotland: accredited mediators. Available at: https://www.lawscot.org.uk/members/career-growth/specialisms/accredited-mediators/.
[10] University of Strathclyde Mediation Clinic, Report for the Justice Committee, April 2018. Available at: https://www.strath.ac.uk/media/faculties/hass/law/Mediation_Clinic_Report_for_the_Justice_Committee_April_2018.pdf.

Scotland in 2014[11] and intends to review the arrangements for the use of forms of alternative dispute resolution in the Scottish civil courts as part of a rules rewrite project.

- **Courts Reform (Scotland) Act 2014:** this Act sets out powers to regulate procedure in the sheriff court and sheriff appeal court, which includes giving courts the power to make provisions to encourage settlement of disputes and the use of alternative dispute resolution procedures.

Following the 2014 Act referred to above, in November 2016 the small claims/summary cause procedures in the Sheriff Courts were replaced with a new 'simple procedure'. The rules of the procedure encourage parties 'to settle their disputes by negotiation or alternative dispute resolution'.[12] The rules provide that the sheriff 'may give any order considered necessary to encourage negotiation or alternative dispute resolution between the parties',[13] which can occur at three different stages of the procedure.

If a respondent disputes the claim—

- the sheriff must consider the case in private and send the parties the first written orders in which the sheriff may do certain things, including referring the parties to ADR and arranging a case management discussion[14];
- at the case management discussion, the sheriff may, amongst other things, discuss negotiation and ADR with the parties[15] and may refer the parties to ADR[16];
- during a hearing a sheriff may also refer the parties to ADR.[17]

The effect of these reforms, specifically the introduction of simple procedure, has been some growth in applications for mediation.[18] For example, Strathclyde Mediation Clinic has seen the number of cases it has dealt with significantly increase since February 2017.[19] However, different courts have dealt with the procedure differently, and sheriffs have considerable discretion.

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[11] Scottish Civil Justice Council (December 2014). *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions.* Available at: http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2.
[12] Rule 1.2(4).
[13] Rule 1.8(2).
[14] Rule 7.5(1) and (2) and 7.6(1)(a) and (b).
[15] Rule 7.7(2)(b).
[16] Rule 7.7(3).
[17] Rule 12(3)(1).
[18] University of Strathclyde Mediation Clinic, Report for the Justice Committee, April 2018. Available at: https://www.strath.ac.uk/media/faculties/hass/law/Mediation_Clinic_Report_for_the_Justice_Committee_April_2018.pdf.
[19] University of Strathclyde Mediation Clinic, Report for the Justice Committee, April 2018.

Problems with the current situation

Despite the changes outlined above, and some uptake in the access of mediation services in certain parts of the country, there continues to be evidence of a lack of public awareness of mediation, a patchy uptake of services, and some continued barriers preventing mediation from being more widely used. This includes evidence of inconsistent recommendation of mediation by sheriffs.

The University of Strathclyde Mediation Clinic reported to the Scottish Parliament's Justice Committee regarding its work with certain courts to provide mediation services[20]. That report provides a helpful and informative insight into the clinic's experience of the different approaches taken by different courts with regards to using mediation in simple procedure cases. The report gives the following examples—

- **Glasgow**: referral to mediation at First Written Orders (meaning parties do not attend court prior to the referral). Parties receive a letter advising them to contact the Clinic, which sets up mediations at its office by arrangement.
- **Paisley**: referral to mediation at Case Management Discussion. Duty mediators attend weekly court sittings and provide mediation on the spot.
- **Falkirk**: same as Paisley, with duty mediators attending monthly.
- **Kilmarnock, Dumbarton, Airdrie**: occasional referral to mediation at Case Management Discussion. These courts cannot provide accommodation, so mediations take place in the Clinic's office in Glasgow.[21]

The report goes on to state—

> "Some sheriffs strongly encourage parties to speak to the mediators; others appear unaware of the option and make no mention of it. Some pause the action to allow mediation to take place; others set a date for a further Case Management Discussion. When an action has been paused it is up to the parties to apply to have it restarted. As described above, some courts have a duty mediator scheme; others place the initiative on the parties to make contact with the Clinic."

It can therefore reasonably be concluded that the different ways in which sheriffs exercise their discretion in referring parties to mediation will impact upon the number of cases that go to mediation, as well as the settlement rate achieved at those mediations.

The use of mediation in other countries, states and territories

Overall, both nationally and internationally, mediation is increasingly being recognised as an important part of the judicial process. Many countries, states and provinces around the world have passed legislation relating to mediation. These include countries in Europe, Asia and Australasia, and many states and provinces in the USA.

[20] University of Strathclyde Mediation Clinic, Report for the Justice Committee, April 2018.
[21] University of Strathclyde Mediation Clinic, Report for the Justice Committee, April 2018.

England and Wales

The current position in England and Wales is that, whilst mediation is ostensibly voluntary, Civil Procedure Rules allow for cost sanctions against a party who unreasonably refuses to mediate. This has been described as "implied compulsory mediation".[22] One of the problems with this approach is that to determine whether a party has unreasonably refused to mediate may necessitate a separate enquiry, resulting in the additional expenditure of time and cost.

The Justice Committee's report on ADR stated—

> "While England and Wales have stopped short of making ADR compulsory, statutory provisions and court rules operate together to give ADR, particularly mediation, a greater role in the civil justice system than is currently the case in Scotland. For example:
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> - the court can take into account a party's conduct, including any unreasonable refusal to participate in ADR, when determining who should pay the legal costs of a court action.
> - in family cases, parties are required to attend a Mediation Information Assessment Meeting (MIAM) before making an application to court for a child arrangements order and certain other orders. There are some specific exceptions to the requirement to attend a MIAM, for example, where there is evidence of domestic violence or a risk of domestic violence."[23]

Two mediation schemes in England, one a voluntary scheme and the other a pilot quasi-mandatory (automatic referral to mediation) scheme, were evaluated by Dame Hazel Genn and others in 2007. The resulting report, "Twisting Arms",[24] noted that demand for mediation can be created by facilitation, education, encouragement, pressure, sanctions or incentives. But it concluded that, whilst compulsion to mediate increased the number of mediations, it was not particularly successful with regard to settlement rates. The report added—

> "Settlement rates matter because unsettled mediation may increase the cost and the delay that mediation is intended to reduce. The indications from these evaluations are that a more effective mediation policy would combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications[25] for a positive outcome. The ultimate challenge in policy

[22] Masood Ahmed, "Implied Compulsory Mediation" (2012) Civil Justice Quarterly 151.
[23] I won't see you in court: alternative dispute resolution in Scotland, 9th Report, 2018 (Session 5), 15.
[24] Hazel Genn and others, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (2007) Ministry of Justice Research Series 1/07. Available at: https://webarchive.nationalarchives.gov.uk/+/http:/www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf.
[25] This is a medical term used to describe reasons for not using a particular treatment or procedure.

terms is to identify and articulate where the incentives might lie for the grass roots of the legal profession to embrace mediation on behalf of their clients."[26]

Europe

The European Union introduced cross-border mediation under Directive 2008/52/EC, which came into force in the EU member states, excluding Demark, on 20 May 2011. Mediation is regulated by legislation in many EU countries, including Ireland, France, Spain, Germany, Italy and the Netherlands.

In 2017 Ireland passed the Mediation Act[27] which created a statutory obligation for solicitors to inform their clients of the option of mediation and provided judges with the option of recommending mediation in suitable cases, coupled with a possible costs sanction.

In Italy, there is provision for mandatory mediation when ordered by a judge (introduced in 2010[28]), and provision for mediation by voluntary agreement (including by voluntary agreement during a "Required Initial Mediation Session" (RIMS)). In 2017, the combination of these options produced approximately 200,000 mediations out of about two million civil cases.

About 2% of the mediations were initiated by a judge's order (successful settlement rate unknown), while approximately 10% were initiated from a voluntary agreement (with a successful settlement rate of 60%). The remaining mediations (approximately 88%) were the result of a voluntary agreement after a RIMS, with a successful settlement rate of almost 50%.[29] I consider such a voluntary approach to be an example of good practice and my proposal is similar to the RIMS option, namely a mandatory information session with a mediator, followed by voluntary mediation if the parties so choose.

By contrast, mediation in the Netherlands, whilst receiving strong governmental support, is not regulated by legislation. However, a pilot court-annexed mediation project was introduced in 2000 whereby parties were referred to mediation either by the judge (orally during the hearing), by way of a written invitation letter giving the parties the choice to opt for mediation and explaining its benefits, or by a referral by court staff. The written invitation contained a self-test questionnaire[30] to enable the parties to assess whether mediation would be suitable for them. This proved to be the most successful referral option. The settlement rate was over 50% and the satisfaction

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[26] Hazel Genn and others, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (2007) Ministry of Justice Research Series 1/07. Available at: https://webarchive.nationalarchives.gov.uk/+/http:/www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf.

[27] Mediation Act 2017. Available at: http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html.

[28] Legislative Decree No. 28 of 2010.

[29] Leonardo D'Urso, 'Italy's "Required Initial Mediation Session": Bridging The Gap between Mandatory and Voluntary Mediation' (2018) Alternatives to the High Cost of Litigation' 36 (4) 49. Available at: https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/07/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso.pdf.

[30] The Netherlands Council of Judiciary (2011) *Customized conflict resolution: Court-connected Mediation in The Netherlands 1999-2009*. Page 53 – Mediation Self-test. Available at: https://www.rechtspraak.nl/SiteCollectionDocuments/Customized-conflict-resolution-Court-connected-Mediation-in-The-Netherlands-1999-2009.pdf.

rate over 80%.[31] I consider this aspect of the Dutch system to be another example of good practice. This pilot project led to the institution of a court-annexed mediation scheme whereby judges in civil and administrative courts assess claims that are brought before them to determine whether or not they are suitable for mediation. In cases where the judge believes that mediation is suitable, he or she will refer the parties to a mediator. The referral is not binding on the parties.[32] Despite the promotion of mediation in the Netherlands by way of court-annexed mediation, the referral through a judge apparently accounts for a small percentage of all mediations, with the majority of mediations resulting from private initiative. Two pillars of the successful integration of court-annexed mediation have been the establishment of a court infrastructure featuring a mediation coordinator at the centre and the integration of mediation into the system of legal aid. The Netherlands Council of Judiciary produced a report entitled "Customized conflict resolution: Court-connected Mediation in The Netherlands 1999-2009"[33]

USA

One of the earliest surveys on the effects of mandatory mediation was conducted in Boston, Massachusetts in 1997.[34] There were both voluntary and mandatory sessions and the process followed in both sessions was the same. The findings were that mandatory mediation cases had a lower settlement rate than those who undertook mediation voluntarily (46% compared to 62%)**.** Those who were required to mediate felt more pressure to settle from the mediator than those who mediated voluntarily (17% versus 6%)**.** Those involved in mandatory mediation saw the process as less fair than those who did so voluntarily (58% v 84%), were less satisfied with the process (65% v 83%) and less likely to make use of mediation in the future (52% v 80%).

Alternative approaches

Earlier this year, Scottish Mediation announced that it was undertaking a civil justice mediation project. The project which is being supported by the Scottish Government, is considering changes to legislation, as well as to legal aid, court rules, training and CPD and dedicated judicial resource. An expert group has been formed and is intending to produce an audit of mediation services in Scotland as well as conducting a literature review. The timescales anticipated in January were that a draft report would be considered by the Group in mid-April.

An alternative approach to pursuing this Member's Bill proposal would have been to either wait for this project to conclude its work and publish its findings and

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[31] Bert Niemeijer and Machteld Pel, 'Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations' (2005-2006) Penn State Law Review 110(2) 345.

[32] Klaus J. Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford Scholarship Online 2013) Chapter 13,697. Available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199653485.001.0001/acprof-9780199653485-chapter-13.

[33] The Netherlands Council of Judiciary (2011) *Customized conflict resolution: Court-connected Mediation in The Netherlands 1999-2009*. Available at: https://www.rechtspraak.nl/SiteCollectionDocuments/Customized-conflict-resolution-Court-connected-Mediation-in-The-Netherlands-1999-2009.pdf.

[34] Roselle L. Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts' (1997) Willamette Law Review 33(3) 565, 565.

recommendations, or to have tried to engage directly with the group and influence the outcomes of the project.

However, I consider that the project is likely to involve a lengthy process and is unlikely to result in any legislative changes in this session of the Scottish Parliament (which is due to end in March 2021). I believe that legislative change is required to stimulate a real step-change in the use of mediation services, and I have a clear and focussed proposal to enable that change. I have therefore concluded that seeking views on my Member's Bill proposal is preferable to any alternative approaches.

DETAIL OF THE PROPOSED BILL

The Bill will establish a new mediation process for courts and litigating parties to follow each time a civil case comes to court—

1. Court initiates the mediation process for the parties involved (unless the case relates to an issue excluded from the Bill) by issuing parties with a self-test questionnaire;
2. Court appoints a mediator;
3. Parties meet with the mediator (in a Mediation Information Session) to consider the questionnaire responses and to agree whether to enter into a Mediation Commencement Agreement;
4. If parties do not wish to mediate then the process ends and parties are free to proceed as they wish (including by continuing with litigation);
5. If parties do wish to mediate, then they will be required to appoint a mediator and sign up to a Mediation Commencement Agreement;
6. If mediation is successful, then parties will sign a Mediation Settlement Agreement.

Note that there will be no cost to parties for stage 1 to 3 of the process, but parties will be required to pay for the cost of any mediation under stages 5 and 6.

Court initiation and self-test questionnaire

The Bill will require that, for civil cases (unless statutorily excluded – see below), the relevant court (most likely the sheriff court) will require the parties to complete a self-test questionnaire issued by the court. My proposal is that such a questionnaire would be based on the one used in the Netherlands, outlined in the section on mediation in other countries above. The questionnaire would assist the parties involved, and the mediator, to assess whether the case is suitable for mediation.

Duty mediators

I am proposing that the courts appoint a duty mediator who will be responsible for conducting the initial Mediation Information Session. The cost of this would be met from the Scottish Government's Justice budget. (If the parties agree to mediate then they would be required to appoint a mediator, likely to be a different person, and pay for that service themselves).

This process would have some similarities with the Public Defence Solicitors' Office (PDSO) in Scotland. The PDSO is funded by the Scottish Legal Aid Board and only provides support for criminal cases. First meetings with solicitors are free, and subsequent funding will be provided by application for legal aid.

Mediation Information Session

The Bill would create a statutory obligation on parties to attend a Mediation Information Session with a duty mediator to—

- discuss the self-test questionnaire outcomes;
- acquire information on the benefits of mediation; and
- determine the suitability of their case for mediation.

This meeting would be centrally funded, and would have no cost implications for the parties. The parties involved would then be able to choose whether to continue with mediation or not. If they did, then the process would continue as outlined below (and at their own cost). If they did not, then the duty mediator would be required to provide both parties with confirmation that the Mediation Information Session had taken place. Parties would then be free to continue with court proceedings if they wished (however, they could not do so without confirmation that the Mediation Information Session had taken place). I propose that the confirmation should not disclose whether or not the case is suitable for mediation, which would preserve the voluntariness of the process, as the parties may decide not to mediate even if the case is suitable for mediation.

Mediation Commencement Agreement

If the parties decide to mediate, they would sign a **Mediation Commencement Agreement**, setting out the terms upon which the mediation would be conducted. This would not prevent either party from terminating the mediation at any time, thereby preserving the voluntary nature of mediation.

Mediation Settlement Agreement

If the mediation is successfully concluded, the parties would sign a **Mediation Settlement Agreement**, the terms of which would be determined by the parties. The parties could also determine whether or not the settlement agreement should be made a decree of the court, which would make it immediately enforceable without having to commence court proceedings for breach of contract in the event of the one party failing to perform in terms of the agreement.

Exclusions

As previously mentioned, my proposed Bill will exclude certain matters from its provisions, where the nature of the dispute is not suited to mediation or another procedure is prescribed for the determination of that type of dispute, such as—

- proceedings relating to the Abusive Behaviour and Sexual Harm (Scotland) Act, the Domestic Abuse (Scotland) Act and any other proceedings relating to domestic abuse and sexual harassment cases;

- any proceedings relating to civil actions for rape and other sexual offences;
- certain proceedings under the Family Law (Scotland) Act 2006, such as declarations of validity or dissolution of marriages;
- proceedings under the Arbitration (Scotland) Act;
- employment disputes which are governed by statutory dispute-resolution processes;
- matters under tax and customs legislation; and
- judicial review proceedings.

Possible extension of the mandatory process

I am considering including in the Bill a power for Scottish Ministers to extend, by regulation, the first, mandatory, part of the process (involving the self-test questionnaire and Mediation Information Session) to apply to cases before they come to court. This would involve potential litigants being advised of the requirement to complete the questionnaire and attending a Mediation Information Session before being able to pursue litigation.

The details of this would obviously require further consideration, but, once the court-initiated process has become established and is running smoothly and effectively, it may be prudent for the Scottish Government to have the power to extend the process, and for its benefits to have an even greater effect on civil disputes.

OTHER RELATED ISSUES

Judicial training
While I am not proposing, at this stage, for the Bill to include specific provision on judicial training, it will be important for the success of the Bill that it is supported by the promotion and encouragement of additional training in mediation for members of the judiciary. I envisage that the Judicial Institute would lead on this work, and I acknowledge that the Institute has already considered, and is continuing to consider, such matters.

Awareness raising
I would also encourage Scottish Ministers to deliver an awareness campaign to outline the potential benefits of mediation as an alternative to adversarial court proceedings.

POTENTIAL IMPACTS

The Bill would predominantly affect claimants and respondents in civil actions, as well as members of the legal profession, mediators, the judiciary, the Scottish courts system and the Scottish Legal Aid Board. It would also have implications for the Scottish Government.

Claimants and respondents

The Bill would have a positive impact upon claimants and respondents as it would provide them, free of charge, with information and an assessment of the suitability of mediation as a way of possibly resolving their dispute. This may lead to a dispute being resolved more quickly, less stressfully, and at a lower cost to both parties.

Also, the growth of video-conferencing and other new technology allows for a level of flexibility in the delivery of mediation that the current court system cannot replicate. New technology allows mediation to occur between parties separated by geography or who due to physical impairment would find it complicated, expensive and burdensome to make traditional court hearings.

The Bill would also not prevent the claimant from pursuing litigation if they wished to do so.

If the parties decide to mediate then there would be a cost implication as the mediation would need to be paid for after the initial Mediation Assessment Session. However, this would still likely amount to a cost saving, as mediation services are usually cheaper than pursuing court action.

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.

Solicitors and advocates

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. However, there is also the potential for solicitors to have a role in the process, such as by encouraging their clients to mediate and possibly assisting their clients both prior to, and during, a mediation.

It is my hope that Scottish lawyers do not view mediation as a threat but see mediation as a process which includes their participation. A study by Bryan Clark and Charles Dawson sum up the situation as follows:

> "One factor that it has been argued will be key to the development of ADR in Scotland is the reaction of lawyers thereto. Given lawyers' traditional role in handling disputes on behalf of their clients, legal professionals clearly act as gatekeepers to dispute resolution fora. The responses of lawyers are therefore crucial in charting the future development of commercial ADR in Scotland."[35]

It may be that some solicitors and advocates will also train as, or become accredited, mediators (or are already trained/accredited as mediators) and therefore able to be appointed as duty mediators. More generally, I consider that the increased use of mediation presents an opportunity for solicitors and advocates who are mediators to take on more of these cases that involve mediation.

[35] Clark B and Dawson C, 'ADR and Scottish Commercial Litigators: A Study of Attitudes and Experience' (2007) Civil Justice Quarterly 26 228.

Mediators

One of the aims of the bill is to increase the use of mediation in Scotland. It is therefore likely that it would increase the workload of mediators and has the potential to grow the mediation profession in Scotland. As noted above, there are currently over 200 mediators on the Scottish Mediation Register.

It is important that there are enough trained and available mediators in Scotland to perform the role of the duty mediator (to manage the initial Mediation Assessment Session) set out in this proposal, and then that there are enough mediators to fulfil the demand for mediation from that point onwards. It will also be important that mediators are available to people in all parts of Scotland, which is why I intend to encourage the use of modern technologies to deliver mediation services.

The Judiciary and the Judicial Institute for Scotland

The Bill would impact on the judiciary and on the Judicial Institute for Scotland, which has a remit for providing education and training to judicial office-holders in Scotland. The Institute supports around 1,000 judicial office-holders in Scotland and has provided training on ADR, during its training courses on the introduction of simple procedure. In its report on ADR, the Justice Committee recommended that:

> "there needs to be more systematic and regular training for the judiciary in ADR, and that this should be reviewed by the Judicial Institute. This should include sheriffs and judges spending time with mediators, arbitrators and other providers of ADR to observe sessions and to better understand when it would be appropriate to refer parties to ADR in practice."[36]

As stated above, it will be important for the Institute to promote and encourage appropriate training in mediation for members of the judiciary. As this is not a new issue for the Institute I do not envisage this having a significant financial impact.

Scottish courts and Scottish Civil Justice Council

The Bill would impact upon the Scottish courts system as, by requiring parties to eligible civil cases to consider mediation rather than progressing through the courts, it would be likely to reduce the number of court cases. The early and effective resolution of disputes via mediation has the potential to free up court time and reduce the length of time cases are currently taking to be heard.

The Bill would also impact upon the Scottish Civil Justice Council (the body which prepares draft rules of procedure for the civil courts and advises the Lord President on the development of the civil justice system in Scotland). The Council is currently engaged in a Rules Rewrite Project[37] which is a comprehensive review of the existing

[36] Justice Committee Report "I won't see you in court: alternative dispute resolution in Scotland", 14
[37] Scottish Civil Justice Council, Annual Report 2017/18 and Annual Programme 2018/19. Available at: http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/scjc-annual-report-2017-2018-and-annual-programme-2018-19.pdf?sfvrsn=2 .

Court of Session and sheriff court rules, and which is considering opportunities to "encourage the use of mediation as part of case management procedures".[38] I do not anticipate any significant financial implications for the Council as a result of this proposal.

Scottish Legal Aid Board (Scottish Government)

Currently, some parties in certain civil cases are eligible for legal aid (or for help with advice and assistance), which is payable by the Scottish Legal Aid Board. The Board is funded directly by the Scottish Government. It is expected that a proportion of the current caseload will be resolved by mediation rather than by litigation, which would be likely to reduce overall demand on the legal aid budget.

I envisage that funding for duty mediators, who would handle first meetings only, would be provided by the Scottish Government, perhaps as part of the Scottish Legal Aid Board budget.

Overall, the likely reduction in legal aid costs that can be expected by more cases being mediated, rather than being heard in the courts, may be offset by the additional cost of duty mediators.

EQUALITIES

It is not anticipated that the proposed Bill would have any negative impact on any groups with protected characteristics under the Equality Act 2010, and could have a positive impact. Improving the consistency of the mediation process, and making self-test questionnaires and mediation information sessions compulsory, would ensure that everyone in such a position, regardless of any protected characteristic, would receive the same information about mediation, and not be disadvantaged. It would also ensure that anyone who may currently be unaware of mediation options as a result of a protected characteristic, such as someone who has a visual impairment or for whom English is not a first language, would be made aware of their rights. It is also my hope that the new process will encourage the use of modern technology, which could have benefits for those who may find it difficult to attend, due to a variety of circumstances, a face-to-face meeting.

However, it is important that consideration is given to individual circumstances and potential adjustments that may be required for some people, such as people with a disability, or for whom English is not a first language. This could involve, for example, ensuring that relevant information is available in appropriate formats, such as a variety of languages, braille etc, that interpreters are available for mediation information sessions, and that sessions are held in suitable accessible locations.

In addition, the Bill would help to make the dispute resolution process more accessible to less affluent people including by taking advantage of the flexibility and convenience digital technology lends to the mediation process, by, for example, avoiding the cost of travel to court or additional costs of organising care for a dependent. In this way, the Bill would assist Scottish courts to satisfy the requirements of section 1 of the

[38] Justice Committee Report "I won't see you in court: alternative dispute resolution in Scotland".

Equality Act 2010 (public sector duty to reduce the inequalities of outcome which result from socio-economic disadvantage).

SUSTAINABILITY

It is not considered that any issues would arise from the proposed Bill which would negatively impact on the sustainable development of the economy, society, environment and governance, and there would likely be a positive impact.

The promotion and increased use of mediation would be likely to have a positive effect on the economy in reducing the costs associated with an over-burdened court system, as well as reducing the legal expenses for disputing parties if they elect to proceed by way of mediation.

The proposal also has the potential to make a positive contribution to social sustainability, helping to ensure a strong, healthy and just society by improving wellbeing (reducing stress etc) equity, fairness, access to justice, and improving the justice system for future generations. The proposal could also improve governance by increasing involvement in decision-making processes.

There are also possible minor environmental benefits which could result from the use of modern technologies to conduct mediation meetings, saving on the need to travel as already highlighted.

QUESTIONS

ABOUT YOU

(Note: Information entered in this "About You" section may be published with your response (unless it is "not for publication"), except where indicated in **bold**.)

1. Are you responding as:
   - ☐ an individual – in which case go to Q2A
   - ☐ on behalf of an organisation? – in which case go to Q2B

2A. Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)
   - ☐ Politician (MSP/MP/peer/MEP/Councillor)
   - ☐ Professional with experience in a relevant subject
   - ☐ Academic with expertise in a relevant subject
   - ☐ Member of the public

   Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

2B. Please select the category which best describes your organisation:
   - ☐ Public sector body (Scottish/UK Government or agency, local authority, NDPB)
   - ☐ Commercial organisation (company, business)
   - ☐ Representative organisation (trade union, professional association)
   - ☐ Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
   - ☐ Other (e.g. clubs, local groups, groups of individuals, etc.)

   Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole):

3. Please choose one of the following:
   - ☐ I am content for this response to be published and attributed to me or my organisation
   - ☐ I would like this response to be published anonymously
   - ☐ I would like this response to be considered, but not published ("not for publication")

   If you have requested anonymity or asked for your response not to be published, please give a reason. **(Note: your reason will not be published.)**

4. Please provide your name or the name of your organisation. **(Note: The name will not be published if you have asked for the response to be anonymous or "not for publication".)**

Name:

Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. **(Note: We will not publish these contact details.)**

Contact details:

5. Data protection declaration

☐ I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.

YOUR VIEWS ON THE PROPOSAL

Aim and approach

1. Which of the following best expresses your view of legislating to increase the use and consistency of mediation services for civil cases in Scotland?

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

Please explain the reasons for your response

Details of the proposal

2. Which of the following best expresses your view of requiring the parties to a civil court case (unless it is an excluded case) to complete a self-test questionnaire and attend a mandatory Mediation Information Session with a duty mediator?

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

☐ Fully opposed
☐ Unsure

Please explain the reasons for your response.

3. Which of the following cases (if any) do you agree should be excluded from the requirement to complete a self-test questionnaire and attend a Mediation Information Session (tick all that apply)?

☐ proceedings relating to the Abusive Behaviour and Sexual Harm (Scotland) Act, the Domestic Abuse (Scotland) Act and any other proceedings relating to domestic abuse and sexual harassment cases
☐ any proceedings relating to civil actions for rape and other sexual offences
☐ certain proceedings under the Family Law (Scotland) Act 2006, such as declarations of validity or dissolution of marriages
☐ proceedings under the Arbitration (Scotland) Act
☐ employment disputes which are governed by statutory dispute-resolution processes
☐ judicial review proceedings
☐ other cases (please specify)
☐ none of the above (no cases should be excluded)

Please explain the reasons for your response.

4. Which of the following best expresses your view of giving parties who agree to mediate access to a process that can lead to a Mediation Commencement Agreement and, where appropriate, a Mediation Settlement Agreement?

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

Please explain the reasons for your response.

5. Which of the following best expresses your view of giving the Scottish Ministers power to extend the mandatory part of the process (the self-test

questionnaire and Mediation Information Session) so that it applied to potential litigants who are yet to go to court?

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

Please explain the reasons for your response.

Financial implications

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

(a) Government (including court services, legal aid etc)

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

(b) Businesses

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

(c) Third Sector organisations

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

(d) Mediators and mediation organisations

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

☐ Unsure

(e) Individuals

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

Please explain the reasons for your response.

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

Equalities

8. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?

☐ Positive
☐ Slightly positive
☐ Neutral (neither positive nor negative)
☐ Slightly negative
☐ Negative
☐ Unsure

Please explain the reasons for your response.

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

Sustainability

10. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

☐ Yes
☐ No

☐ Unsure

Please explain the reasons for your response.

General

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

ANNEXE

Netherlands Mediation questionnaire example

Below you will find a number of questions that may assist you in deciding whether or not to opt for mediation. A common obstacle is that one party may think, mistakenly, that the other party is unwilling to enter into a dialogue.

Filling out this test, do not consider the other party's point of view – please answer the questions from your own perspective.

Are you willing to cooperate in reaching a solution by mutual agreement?

Yes, because:

• I see opportunities for a reasonable solution
• a quick solution would serve my interests
• I have frequent dealings with the other party (or parties)
• I would like to retain control of the solution
• poor communication is part of the problem
• I think mediation might solve other conflicts I have with the other party (or parties)
• it probably saves money on legal fees.

No, because:

• it is extremely important to me to get a court ruling because…
• a previous mediation attempt failed and I do not wish to try it again
• I do not see room for negotiation, because…

I feel uncertain, because:

• I do not know exactly what I am letting myself in for
• I do not know how much room there is for negotiation
• I think it will be difficult to sit at the same table with the other party (or parties)
• I do not know whether the other party (or parties) will cooperate
• I see few possibilities

If your answer to one or more questions is 'yes', contact the mediation officer at your court and sign up for mediation.

If you feel uncertain or if you would like to have more information, you can discuss the matter with the mediation officer at your court or visit 'www.mediationnaastrechtspraak.nl'.

HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Format of responses

You are encouraged to submit your response via an online survey (Smart Survey) if possible, as this is quicker and more efficient both for you and the Parliament. However, if you do not have online access, or prefer not to use Smart Survey, you may also respond by e-mail or in hard copy.

Online survey
To respond via online survey, please follow this link:
https://www.smartsurvey.co.uk/s/MediationBill/

The platform for the online survey is Smart Survey, a third party online survey system enabling the SPCB to collect responses to MSP consultations. Smart Survey is based in the UK and is subject to the requirements of the General Data Protection Regulation (GDPR) and any other applicable data protection legislation. Any information you send in response to this consultation (including personal data) will be seen by the MSP progressing the Bill and by staff in NGBU.

Further information on the handling of your data can be found in the Privacy Notice, which is available either via the Smart Survey link above, or at the end of this document. Smart Survey's privacy policy is available here:
https://www.smartsurvey.co.uk/privacy-policy.

Electronic or hard copy submissions
Responses not made via Smart Survey should, if possible, be prepared electronically (preferably in MS Word). Please keep formatting of this document to a minimum. Please send the document by e-mail (as an attachment, rather than in the body of the e-mail) to: Margaret.Mitchell.msp@parliament.scot

Responses prepared in hard copy should either be scanned and sent as an attachment to the above e-mail address or sent by post to:

Margaret Mitchell MSP
M2.11
Scottish Parliament
Edinburgh
EH99 1SP

Responses submitted by e-mail or hard copy may be entered into Smart Survey by my office or by NGBU.

If submitting a response by e-mail or hard copy, please include written confirmation that you have read and understood the Privacy Notice (set out below). You may also contact my office by telephone on (0131) 348 5639.

Deadline for responses

All responses should be received no later than **Tuesday 20 August 2019**. Please let me know in advance of this deadline if you anticipate difficulties meeting it. Responses received after the consultation has closed will not be included in any summary of responses that is prepared.

How responses are handled

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses received (other than "not for publication" responses) on my website https://www.margaretmitchell.org.uk/. Published responses (other than anonymous responses) will include the name of the respondent, but other personal data sent with the response (including signatures, addresses and contact details) will not be published.

Where responses include content considered to be offensive, defamatory or irrelevant, my office may contact you to agree changes to the content, or may edit the content itself and publish a redacted version.

Copies of all responses will be provided to the Scottish Parliament's Non-Government Bills Unit (NGBU), so it can prepare a summary that I may then lodge with a final proposal (the next stage in the process of securing the right to introduce a Member's Bill). The Privacy Notice (below) explains more about how the Parliament will handle your response.

If I lodge a final proposal, I will be obliged to provide copies of responses (other than "not for publication" responses) to the Scottish Parliament's Information Centre (SPICe). SPICe may make responses available to MSPs or staff on request.

Requests for anonymity or for responses not to be published

If you wish your response to be treated as anonymous or "not for publication", please indicate this clearly. The Privacy Notice (below) explains how such responses will be handled.

Other exceptions to publication

Where a large number of submissions is received, particularly if they are in very similar terms, it may not be practical or appropriate to publish them all individually. One option may be to publish the text only once, together with a list of the names of those making that response.

There may also be legal reasons for not publishing some or all of a response – for example, if it contains irrelevant, offensive or defamatory content. If I think your response contains such content, it may be returned to you with an invitation to provide a justification for the content or to edit or remove it. Alternatively, I may publish it with the content edited or removed, or I may disregard the response and destroy it.

Data Protection

As an MSP, I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request anonymity or ask for it not to be published. I will not publish your signature or personal contact information. The Privacy Notice (below) sets out in more detail what this means.

I may also edit any part of your response which I think could identify a third party, unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person's consent in writing and include it with your submission.

If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response. Further information about data protection can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, NGBU may have access to information included in, or provided with, your response that I would not normally publish (such as confidential content, or your contact details). Any such information held by the Parliament is subject to the requirements of the FOISA. So, if the information is requested by third parties the Scottish Parliament must consider the request and may have to provide the information unless the information falls within one of the exemptions set out in the Act. I cannot therefore guarantee that any such information you send me will not be made public should it be requested under FOISA. Further information about Freedom of Information can be found at: www.itspublicknowledge.info.

Privacy Notice

This privacy notice explains how the personal data which may be included in, or is provided with, your response to a MSP's consultation on a proposal for a Member's Bill will be processed. This data will include any personal data including special categories of personal data (formerly referred to as sensitive personal data) that is included in responses to consultation questions, and will also include your name and your contact details provided with the response. Names and contact details fall into normal category data.

Collecting and holding Personal Data

The Scottish Parliamentary Corporate Body (the SPCB) processes any personal data you send to it, or that the MSP whose consultation you respond to shares with it (under a data-sharing agreement) according to the requirements of the General Data Protection Regulation (EU) 2016/679 (the GDPR) and the Data Protection Act 2018 (the DPA)

Personal data consists of data from which a living individual may be identified. The SPCB will hold any personal data securely, will use it only for the purposes it was collected for and will only pass it to any third parties (other than the MSP whose consultation you respond to) with your consent or according to a legal obligation.

Further information about the data protection legislation and your rights is available here:
https://ico.org.uk/for-the-public/is-my-information-being-handled-correctly/

Sharing Personal Data

The data collected and generated by Smart Survey will be held by the Non-Government Bills Unit (NGBU), a team in the Scottish Parliament which supports MSPs progressing Members' Bills, and shared with the MSP who is progressing the Bill and staff in the MSP's office. Data submitted by other means (e.g. by email or hard copy) will be held by the MSP's office and shared with NGBU for the purpose of producing a summary of responses to the consultation. The MSP and NGBU are joint data controllers of the data. Under a data-sharing agreement between the MSP and the Scottish Parliament, access to the data is normally limited to NGBU staff working on the Member's Bill/proposal, the MSP and staff in the MSP's office working on the Member's Bill/proposal; but data may also be shared by NGBU with the Scottish Parliament's solicitors in the context of obtaining legal advice.

Publishing Personal Data

"Not for publication" responses will not be published and will only be referred to in the summary of consultation responses in the context of a reference to the number of "not for publication" responses received and, in some cases, in the context of a general reference that is considered by you to be consistent with the reasons for choosing "not for publication" status for your response.

Anonymous responses will be published without your name attached, your name will not be mentioned in the summary of consultation responses, and any quote from or reference to any of your answers or comments will not be attributed to you by name.

Other responses may be published, together with your name; and quotes from or references to any of your answers or comments, together with your name, may also be published in the summary of consultation responses.
Contact details (e.g. your e-mail address) provided with your response will not be published, but may be used by either the MSP's office or by NGBU to contact you about your response or to provide you with further information about progress with the proposed Bill.

Where personal data, whether relating to you or to anyone else, is included in that part of your response that is intended for publication, the MSP's office or NGBU may edit or remove it, or invite you to do so; but in certain circumstances the response may be published with the personal data still included.

Please note, however, that references in the foregoing paragraphs to circumstances in which responses or information will not be published are subject to the Parliament's legal obligations under the Freedom of Information (Scotland) Act 2002. Under that Act, the Parliament may be obliged to release to a requester information that it holds, which may include personal data in your response (including if the response is "not for publication" or anonymous).

Use of Smart Survey software
The Scottish Parliament is licensed to use Smart Survey which is a third party online survey system enabling the Scottish Parliament to collect responses to MSP consultations, to extract and collate data from those responses, and to generate statistical information about those responses. Smart Survey is based in the UK and is subject to the requirements of data protection legislation.
Any information you send by email or in hard copy in response to a consultation on a proposal for a Member's Bill may be added manually to Smart Survey by the MSP's office or by NGBU.

The privacy policy for Smart Survey is available here:
https://www.smartsurvey.co.uk/privacy-policy

While the collected data is held on Smart Survey, access to it is password protected. Where the data is transferred to our own servers at the Scottish Parliament, access will be restricted to NGBU staff through the application of security caveats to all folders holding consultation data.

Access to, retention and deletion of personal data
As soon as possible after a summary of consultation responses has been published, or three months after the consultation period has ended, whichever is earlier, all of your data will be deleted from Smart Survey. If, three months after the consultation period has ended, a summary has not been published, then responses may be downloaded from Smart Survey and saved (with all the information that would normally not be published – including contact details – removed) to SPCB servers and retained until the end of the session of the Parliament in which the consultation took place. If the MSP lodges a final proposal, he/she is required to provide a copy of your response (unless it was "not for publication"), together with your name (unless you requested anonymity), but not your contact details, to the Scottish Parliament Information Centre (SPICe), where it may be retained indefinitely and may be archived.

Purpose of the data processing

The purpose of collecting, storing and sharing personal data contained in consultation responses is to enable Members to consider the views of respondents to inform the development of the Bill, with the support of NGBU. Personal data contained in consultation responses will not be used for any other purpose without the express consent of the data subject.

The legal basis

The legal basis for collecting, holding, sharing and publishing your personal data is that the processing is necessary for the performance of a task carried out in the public interest, or in the substantial public interest, in accordance with Art 6(1)(e) GDPR, s8(d) DPA, or Art 9(1)(g) GDPR, s10 of and paragraph 6 of Schedule 1 of the DPA. The task is the support of Members seeking to introduce Members' Bills to the Parliament. This is a core task of the SPCB and therefore a Crown function. The adequate support of the Members Bill process and the ability to seek, use and temporarily store personal data including special category data is in the substantial public interest.

If the person responding to the consultation is under the age of 12 then consent from the parent or guardian of the young person will be required to allow the young person to participate in the consultation process (however, the legal basis for the processing of the personal data submitted remains as the public interest task basis identified above).

Your rights

Data protection legislation sets out the rights which individuals have in relation to personal data held about them by data controllers. Applicable rights are listed below, although whether you will be able to exercise data subject rights in a particular case may depend on the purpose for which the data controller is processing the data and the legal basis upon which the processing takes place. For example, the rights allowing for erasure of personal data (right to be forgotten) and data portability do not apply in cases where personal data is processed for the purpose of the performance of a task carried out in the public interest. The right to object to the processing of personal data for the purpose of a public interest task is restricted if there are legitimate grounds for the processing which override the interest of the data subject. This would be considered on a case by case basis and depends on what personal data is involved and the risks further processing of that data would pose to you. As described above, the collection, storage, sharing and publishing of personal data contained in consultation responses is a task carried out in the public interest, which means that these three data subject rights do not apply here or only in a restricted scope.

Access to your information – You have the right to request a copy of the personal information about you that we hold.

Correcting your information – We want to make sure that your personal information is accurate, complete and up to date and you may ask us to correct any personal information about you that you believe does not meet these standards.

Objecting to how we may use your information – Where we use your personal information to perform tasks carried out in the public interest then, if you ask us to, we will stop using that personal information unless there are overriding legitimate grounds to continue.

Restricting how we may use your information – in some cases, you may ask us to restrict how we use your personal information. This right might apply, for example, where we are checking the accuracy of personal information about you that we hold or assessing the validity of any objection you have made to our use of your information. The right might also apply where this is no longer a basis for using your personal information but you don't want us to delete the data. Where this right is validly exercised, we may only use the relevant personal information with your consent, for legal claims or where there are other public interest grounds to do so.
Please contact us in any of the ways set out in the *Contact information and further advice* section if you wish to exercise any of these rights.

Changes to our privacy notice
We keep this privacy notice under regular review and will place any updates on this website. Paper copies of the privacy notice may also be obtained using the contact information below.

This privacy notice was last updated on 22 May 2019 (version 3).

Contact information and further advice
If you have any further questions about the way in which we process personal data, or about how to exercise your rights, please contact:

Head of Information Governance
The Scottish Parliament
Edinburgh
EH99 1SP
Telephone: 0131 348 6913 (Text Relay calls welcome)
Textphone: 0800 092 7100
Email: dataprotection@parliament.scot

Complaints
We seek to resolve directly all complaints about how we handle personal information but you also have the right to lodge a complaint with the Information Commissioner's Office:

- Online: https://ico.org.uk/global/contact-us/email/
- By phone: 0303 123 1113