<u>MEDICAL PROTECTION SOCIETY:</u>

<u>COMMENT ON THE SA LAW REFORM COMMISSION'S DISCUSSION PAPER 168</u>

<u>PROJECT 94: ALTERNATIVE DISPUTE RESOLUTION</u>

<u>A MEDIATION ACT FOR SOUTH AFRICA</u>

06 JUNE 2025

Executive Summary

The Medical Protection Society (MPS) welcomes the opportunity to provide input on the proposed Mediation Bill and its implications for medical negligence claims. Drawing on decades of experience supporting healthcare professionals and navigating complex litigation, we recognise the potential of mediation to promote early resolution, reduce court backlogs, and foster a more collaborative approach to dispute resolution.

Nonetheless, we emphasise that the effectiveness of mandatory mediation hinges on the establishment of a carefully designed framework prior to implementation—particularly in the context of medical negligence. These cases frequently involve vulnerable claimants, pronounced power imbalances, and intricate legal and medical considerations. While the current proposal is well-intentioned, it raises several critical concerns that must be addressed to safeguard access to justice and ensure the mediation process functions as intended.

Key issues include the incompatibility of upfront mediation costs with the contingency fee model, the risk of inequitable outcomes in the absence of legal representation, and the potential for strategic misuse of the mediation process. We also highlight the need for a robust administrative framework, clear exemption criteria for complex cases, and tailored protocols for the private healthcare sector.

MPS supports the principle of mediation as a valuable tool in appropriate cases. However, we urge that the framework be flexible, fair, and adequately resourced to ensure that it enhances, rather than hinders, justice for all parties involved.

1. Introduction

The Medical Protection Society (MPS) is a leading global not-for-profit mutual organisation that provides expert advice, support and defense to healthcare professionals. MPS has been assisting doctors, dentists and other healthcare professionals since 1892 and in South Africa for over 70 years making it the biggest professional indemnity provider in the healthcare market. MPS plays a crucial role in safeguarding the professional interests of doctors, dentists, and other healthcare professionals. Established with the core purpose of protecting its members' careers and reputations, MPS through its subsidiary company MPS South Africa Services (Pty) Ltd, offers comprehensive medico-legal support to over 30,000 members in the country. MPS has extensive experience and a deep understanding of the unique challenges faced by healthcare professionals in South Africa, including the complex field of medical negligence claims.

It is important to understand the difference between a traditional insurer and a mutual organisation such as the Medical Protection Society (MPS), especially in the context of medical negligence claims. A traditional insurer is a for-profit entity that provides insurance coverage in exchange for premiums. Its primary goals are to manage risk and generate profit. Insurers are contractually obligated to indemnify policyholders for covered claims, up to the limits specified in the policy. Their operations focus on risk assessment, premium setting, and claim payments in accordance with policy terms. In contrast, a mutual organisation like MPS is owned by its members. Instead of operating for profit, it collects member contributions into a collective fund designed to support members when claims arise. Support is not guaranteed by contract but is provided at the discretion of the organisation. This support often includes legal defence and expert guidance throughout the claims process.

The key distinction lies in the philosophy and structure: while insurers are bound by policy terms and profit motives, as a mutual organisation that is owned by members, our default position is to see how the member seeking assistance can be helped.

2. Background

On 27 January 2025, the South African Law Reform Commission (the Commission) released Discussion Paper 168 under Project 94, inviting public input on a proposed mediation framework. The paper highlights the growing need for a unified statute to govern commercial,

civil, and community mediation across the country. The Commission invited stakeholders to contribute their insights, suggestions, and concerns, encouraging detailed responses and the identification of any additional issues not addressed in the discussion paper.These contributions will shape the Commission's final report, which will be submitted to the Minister of Justice and Constitutional Development for potential presentation to Parliament. MPS is pleased to engage with the consultation process and welcomes the opportunity to provide its perspective on the draft Mediation Bill.

3. Objectives of the Bill

The primary aim of the Bill is to encourage the effective use of mediation as a means of resolving disputes, while offering an alternative pathway to justice that reduces the frustration, legal costs, and delays often associated with litigation. MPS acknowledges that the Bill is intended to serve as a foundational framework, establishing key definitions and core principles that underpin mediation across various legal contexts.

For the purposes of this submission, MPS will however focus on how the following objectives of the Bill relate specifically to medical negligence claims:

- Enhancing access to justice for citizens;
- Facilitating timely and cost-effective dispute resolution between litigants;
- Helping parties assess early in the process whether pursuing a trial or opposed application is in their best interest; and
- Preserving the right to return to litigation if mediation does not result in a resolution.

In addressing these objectives, MPS draws on its decades of experience in managing medical negligence claims, underpinned by legal principles, litigation expertise, and practical, real-world insights. This submission does not seek to address every aspect of the Bill but is intended as an initial contribution to support the Commission's early evaluation of the Bill's potential impact on the resolution of such claims. It is offered as a basis for ongoing dialogue and further consultation.

4. Access to Justice

At MPS, we recognise that access to justice is a cornerstone of a fair legal system. In most medical negligence claims, plaintiffs rely on contingency fee agreements with their legal representatives. The Contingency Fees Act 66 of 1997 enables clients to engage legal practitioners on a “no win, no fee” basis, thereby making legal representation accessible to individuals who might otherwise be unable to afford it. Under this model, legal fees are typically calculated as a percentage of the awarded damages or settlement amount. The Act is designed to promote fairness and ensure that financial limitations do not prevent individuals from seeking redress.

However, a significant concern arises from the proposed Mediation Bill’s requirement for upfront payment of mediator fees (Clause 28(3) - Page I). This presents a significant challenge to the operation of the contingency fee model. While mediation is non-adversarial and potentially more efficient, the Bill mandates advance payment for mediator services, costs that are not typically covered under contingency arrangements. For financially constrained clients, those most likely to benefit from contingency-based legal support, these upfront expenses may be prohibitive.

This raises the risk of a two-tiered justice system where only wealthier litigants can access quicker, more amicable resolutions through mediation, while less affluent individuals are left to pursue slower, more adversarial litigation. Claimants who engage contingency-based law firms often do so with the expectation of risk-free legal assistance. The introduction of upfront mediation costs may therefore lead to confusion, dissatisfaction, or mistrust, particularly if claimants perceive that the financial burden is being shifted back onto them.

To mitigate this risk, we believe significant investment in public education and professional training will be essential, particularly for legal professionals accustomed to the contingency fee model. We note that the Bill places a responsibility on legal practitioners to clearly explain the benefits of mediation and the rationale behind any associated costs. This will require time, resources, and careful communication to ensure that clients understand the process and feel supported throughout.

We are particularly concerned that mandatory mediation could unintentionally prioritise expedient resolution over just outcomes. While reducing court backlogs is a valid consideration, it must not overshadow the fundamental imperative to uphold legal principles and deliver equitable results.

While we support the Bill's intention to promote a more efficient and cost-effective justice system, its implementation must be carefully regulated to avoid unintended consequences, most importantly, the erosion of access to justice. If mediation is mandated without flexibility, it risks becoming a barrier rather than a bridge to justice. Any such framework must be designed to complement, not replace, the judicial process, ensuring that the pursuit of settlement does not come at the expense of fairness.

5. Facilitating Expeditious and Cost-Effective Dispute Resolution

We acknowledge that mandatory mediation in medical negligence claims has the potential to offer real benefits, if implemented properly. It can help resolve disputes earlier, saving time, money, and emotional strain for all parties involved. It may also increase the likelihood of settlement and reduce the burden on the courts, freeing up judicial resources for cases that truly require formal adjudication.

However, there are important consequences to consider. If either party is unprepared or lacks access to key information early in the litigation process, mediation can become frustrating and ineffective. While confidentiality is generally a strength of mediation (Clause 20 - Page xlv), it can raise concerns when sensitive medical or legal details are involved. There is also the risk that parties may feel pressured to settle, even when the terms are not fair, simply to comply with the process. In our experience, mediation may simply not be appropriate in complex or high-value cases.

To make mandatory mediation effective, timing is critical and should occur before significant costs are incurred. In addition, mediators must have expertise in medical negligence to guide the process effectively, and both parties must be well-prepared, with access to legal advice and relevant documentation. Most importantly, the system must be flexible. We believe that mandatory mediation can be a valuable tool, but it must always serve justice, not just efficiency.

We want to emphasise that medical negligence and other intricate legal disputes often involve complex facts, nuanced legal arguments, and expert evidence. While mediation offers a less adversarial and potentially more collaborative process, it is not universally suitable. In cases where legal precedent must be established, or where significant power imbalances persist, even with legal representation, judicial adjudication may be more appropriate to ensure a fair and just outcome.

That said, we recognise that mediation can still play a valuable role in some complex cases. It can help parties better understand the underlying issues, narrow the scope of disputes, and even lead to creative, mutually acceptable solutions that litigation may not offer. However, such cases may require multiple sessions, expert involvement, and highly skilled mediators, factors that can increase both time and cost. If one party is unwilling to engage in good faith, mandatory mediation may simply delay inevitable litigation.

We strongly recommend establishing specific and clear exemption criteria for highly complex matters or categories of disputes, beyond general urgency or hardship (Clause 31 - Page li). This could include developing tailored mediation protocols for complex cases, which could include appointing mediators with specialised expertise which is essential in medical negligence cases (Clause 8(a) – Page xxxvii on mediator qualifications), allowing for more extensive preparation and information exchange under strict confidentiality. However, it cannot be assumed that all parties will act in good faith, our experience suggests otherwise. In high-stakes disputes, parties are often motivated by strategic advantage, and in the contingency fee model, legal representatives are under pressure to recover their fees.

While Clauses 20 and 21 (Page xlv) of the draft Bill provide a framework for confidentiality and legal privilege, explicit safeguards are needed to prevent the strategic misuse of information, particularly expert reports and evidence shared during mediation. The potential for a party to participate solely to gain insight into the opponent's case without a genuine intent to settle is a significant risk.

We recommend enhancing Clauses 20 and 21, by adding clear legislative guidelines within the Bill on the admissibility of expert reports and evidence prepared solely for mediation. This would ensure that if mediation fails, such documents cannot be automatically used in subsequent litigation unless they are independent discoverability or admissibility outside mediation is proven. This may help to maintain the integrity of the mediation process as a genuine attempt at resolution, and not merely a pre-trial discovery tool. Furthermore, the Bill should allow for judicial discretion (perhaps under Section 33 – Page lii) to consider “bad faith participation” (such as strategic misuse of information) when making cost orders, even in a confidential setting.

Additionally, we strongly recommend the development of a framework for continuous monitoring and evaluation of the mandatory mediation system, with clear metrics (e.g., settlement rates, time/cost savings, user satisfaction etc.) and a process for adaptive rulemaking based on lessons learned that may improve the Bill’s objective as part of our jurisprudence.

6. Assisting Litigants in Determining Whether to Proceed with Trial

At MPS, we recognise that medical negligence and other complex legal disputes often involve emotionally charged circumstances, intricate factual scenarios, and the need for expert testimony. In such cases, the involvement of legal representation from the outset is not merely advisable, it is essential. A significant power imbalance frequently exists between an aggrieved patient or their family and a healthcare provider or institution, particularly where the latter is indemnified or represented by the state. Legal practitioners play a vital role in levelling the playing field by helping clients prepare for mediation, articulate their position, interpret complex issues, and ensure that any settlement agreement is legally sound and in their best interests.

Legal representation is especially critical for individuals who may be emotionally distressed or lack legal literacy. It ensures that they fully understand their rights, obligations, and the implications of any proposed settlement. Without such support, there is a real risk of ill-informed decisions or coercion, particularly in a mandatory mediation setting. We therefore strongly recommend that any mandatory mediation framework should encourage, and in complex or high-value matters, specifically require legal representation.

We are also concerned about the financial implications of mediation in cases where no settlement is reached. Substantial costs, such as expert reports, mediator fees, and legal expenses, may be incurred before a party opts out and proceeds to litigation. It would be inequitable for one party to bear these costs alone, particularly where mediation fails due to the other party's unwillingness to engage in good faith.

To mitigate this risk, we strongly recommend that the Mediation Bill include clear and enforceable mechanisms for the recovery or equitable allocation of such costs in subsequent litigation. While cost orders may offer some relief, they may not be a sufficient deterrent on their own. Accordingly, we propose that courts be granted explicit discretion to consider the conduct of parties during mediation when making cost orders. This would encourage genuine participation and discourage strategic or bad-faith disengagement from the process.

We also wish to comment on the opt-out provision (Clause 29(7) - Page li). While we support the inclusion of an opt-out mechanism to provide flexibility, we caution that if it is too easily accessible, without requiring parties to demonstrate compelling reasons, it risks undermining the mandatory nature of the framework. In such a scenario, the Bill may replicate the limited impact of existing voluntary models, thereby failing to promote a culture of alternative dispute resolution or reduce litigation backlogs.

In specialised fields such as medical negligence, assurances of mediator expertise are essential to ensure both the effectiveness and fairness of the mediation process. To this end, we recommend that Clause 5(4) (Page xxxvi) and Clause 8 (Page xxxvii) explicitly mandate the development and enforcement of rigorous, specialised accreditation standards and continuous professional development (CPD) requirements for mediators handling such claims. These requirements should apply across all specialised fields, ensuring that mediators possess not only core mediation competencies but also a foundational understanding of the relevant medical and medico-legal issues.

Given the complexity and ethical sensitivity of medical negligence cases, there must also be robust mechanisms for ongoing quality assurance and disciplinary oversight. These mechanisms should be tailored to address the unique ethical and procedural considerations inherent in medical mediation. Accordingly, the establishment of a dedicated Mediation Council is essential.

Furthermore, the success of the Bill depends on widespread understanding and adoption from all key role players, including healthcare professionals, legal practitioners, the judiciary, court staff, mediators, and the public. We therefore recommend that the Bill mandate the development and adequate funding of comprehensive training and awareness programmes to ensure that all role players are well-informed and prepared to engage meaningfully in the mandatory mediation process.

In the context of medical negligence and other complex legal disputes, the involvement of legal representation, not just legal assistance, at an early stage of the litigation process is not merely advisable, but essential. A significant power imbalance often exists between an aggrieved patient or their family and a healthcare provider or institution, especially where the latter is indemnified or represented by the state.

Legal practitioners are crucial in levelling the playing field, especially in medical negligence disputes. In the context of mediation, their involvement is essential to ensuring that the process is fair, informed, and legally sound. Legal representatives assist clients in preparing for mediation, articulating the nature and scope of the dispute, interpreting complex medical and legal issues, and safeguarding their clients' interests throughout the process. They also play a vital role in reviewing and negotiating settlement terms to ensure that any agreement reached is enforceable and just.

This support is particularly important for parties who may be emotionally distressed or lack legal literacy. Without legal guidance, there is a real risk that individuals may misunderstand their rights, misinterpret the implications of a proposed settlement, or feel pressured into accepting terms that are not in their best interest, especially in a mandatory mediation setting.

Accordingly, MPS strongly recommends that any mandatory mediation framework should strongly encourage, and in certain high-stakes or complex matters, require, specifically require legal representation, potentially by adding a sub-section to Clause 22 (Page xlv) or linking it to Clause 30 (Page li). This is essential not only to protect the rights of vulnerable parties but also to uphold the integrity and credibility of the mediation process itself.

MPS is concerned about the financial implications that may arise when substantial costs, such as expert reports, mediator fees, and legal expenses, are incurred during the mediation process, only for one party to subsequently opt out, resulting in formal litigation. This scenario is particularly problematic when mediation fails due to the other party's unwillingness to engage in good faith.

It would be inequitable for one party to bear these costs alone, especially when they have participated in the process sincerely and in accordance with the requirements of the proposed framework. To address this, we strongly recommend that the Mediation Bill incorporate clear and enforceable mechanisms for the recovery or equitable allocation of mediation-related costs in subsequent litigation. Such provisions would discourage opportunistic opting out and ensure that expenses incurred in good faith are not rendered futile.

In addition, we propose that courts be granted discretion to consider the conduct of parties during mediation when making cost orders in later proceedings. This would serve to promote genuine engagement with the mediation process and deter strategic disengagement or bad-faith participation. Ensuring fairness in the allocation of costs is essential to maintaining the credibility and effectiveness of mandatory mediation.

7. **Allow litigants to return to litigation should the attempt at mediation not be successful**

Mediation has long been part of South Africa's legal landscape, with mechanisms available under the Labour Relations Act and Rule 41A of the Uniform Rules of Court (as amended in 2020). However, these voluntary frameworks have not led to a significant shift in dispute resolution culture or a measurable reduction in court congestion. When mediation fails to produce a settlement, it becomes an additional procedural step that consumes time and resources without resolving the dispute. This will be particularly problematic in cases where mediation is mandated or where one party participates in bad faith.

While MPS acknowledges that mediation can be a valuable tool for resolving disputes, where parties are unwilling to settle or a matter is simply unsuitable, mandatory mediation may offer limited practical benefit. Rather than facilitating resolution, it risks introducing delays and additional costs without yielding meaningful outcomes. Mediation cannot replace court proceedings, as it fundamentally lacks the authority, procedural safeguards, and enforceability inherent in the judicial system. Furthermore, in cases marked by existing power imbalances, mandatory mediation may unfortunately deepen inequities rather than resolve them. Therefore, the framework must proactively and comprehensively address the cost burden associated with failed mediation.

To address this, we recommend that the costs associated with failed mediation, including legal representation, mediator fees, expert fees, and related disbursements, be treated as party-and-party costs. This approach would allow for recovery through the normal course of subsequent litigation and ensure that parties who engaged in mediation in good faith are not financially penalised for complying with procedural requirements and engaged in mediation in good faith. Such an approach acknowledges mediation's evolving role in the justice system, discourages strategic misuse of the process, reinforces the principle that no party should be disadvantaged for complying with procedural requirements, and promotes sincere engagement from all parties.

MPS acknowledges that the opt-out provision (Clause 29(7) – Page Ii) is intended to introduce flexibility into the mandatory mediation framework, recognising that not all disputes are suitable for mediation. It aims to prevent parties from being compelled to participate in a process that is clearly inappropriate or unlikely to succeed. However, if the opt-out mechanism is too easily accessible, without requiring parties to demonstrate compelling reasons, it risks rendering the mandatory nature of the framework ineffective. In such a scenario, the Bill may replicate the limited impact of existing voluntary models, undermining its core consideration of promoting a culture of alternative dispute resolution and reducing litigation backlogs.

8. Conclusion and recommendations

MPS supports the overarching goals of the Mediation Bill namely to promote efficiency, reduce litigation backlogs, and encourage alternative dispute resolution. However, we believe that these objectives must not come at the expense of fairness, access to justice, or the rights of vulnerable litigants.

To that end, we recommend the following:

- Ensure that mediation costs do not create financial barriers for claimants relying on contingency fee arrangements.
- Require or strongly encourage legal representation in complex or high-stakes cases in medical negligence claim, particularly where power imbalances exist.
- Establish clear and justifiable criteria for opting out of mediation and for exempting complex matters in relation to medical negligence cases
- Provide mechanisms for cost recovery when mediation fails due to bad faith or strategic disengagement, explicitly empowering courts to consider parties conduct during mediation when making cost orders
- Develop a dedicated funding model and tailored protocols for the private healthcare sector.
- Engage meaningfully with role players and stakeholders on a framework suitable for medical negligence claims in the private sector, including rigorous, specialised accreditation and continuous professional development requirements for mediators handling medical negligence claims.
- Ensure that the Bill explicitly aims for just and equitable outcomes rather than solely prioritising settlement, and that mediators are trained and incentivised accordingly, with safeguards against coercion.
- Mandate the development of comprehensive training and awareness programmes for all role players on the new mediation process, their roles, and the parties' rights.

MPS remains committed to working collaboratively with the Commission and stakeholders to ensure that the Mediation Bill achieves its intended outcomes without compromising the integrity of the justice system or the rights of those it seeks to serve.