



Family Court of Western Australia

# Mediation Pilot

Interim Report:  
July - December 2019

Date: 13 January 2020

## Snapshot:

**135**

Mediations

**64**

Matters  
settled

**166**

Days of court  
time saved

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## Executive summary

1. From 15 July 2019 until 30 June 2020, the Family Court of Western Australia (the “**FCWA**”) is conducting a mediation pilot program (the “**Pilot**”).
2. The Pilot offers existing litigants in the FCWA the opportunity to participate in a confidential, one-day<sup>1</sup> mediation (called a Pre Trial Conference) to see whether their dispute can be settled or narrowed.
3. The Pilot is being led by two senior and experienced Registrars, the funding for whom is being met from the Court’s own resources.
4. The purpose of this report is to:
  - (a) Provide an overview of the Pilot, including how a typical facilitative mediation is conducted;
  - (b) Provide statistics for the Pilot for the first six months of operation (for the period from 15 July 2019 to 31 December 2019);
  - (c) Analyse and report on the qualitative data collected on the Pilot, by way of feedback forms completed by participants.

## The Mediation Pilot

### What is it?

5. Mediations conducted as part of the Pilot are:
  - (a) **confidential** and **without prejudice** – what is said in mediation is not admissible as evidence if the matter does not settle;
  - (b) usually offered in cases where **at least one party is self-represented**;
  - (c) conducted in accordance with the **facilitative mediation model**.
6. Matters in which an Independent Children’s Lawyer has been appointed are not currently being considered for inclusion in the Pilot, as those matters are eligible for inclusion in Legal Aid Western Australia’s Late Intervention Dispute Resolution Program.

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<sup>1</sup> In appropriate cases, the Court may offer parties a mediation that spans over more than one day.

## How does it work?

7. A typical mediation proceeds through the following stages or steps (but can be tailored by the mediator (Registrar) on a case-by-case basis, to best meet the needs of the parties):
- (a) **Pre-mediation preparation:** The parties are required to complete and file *Papers for the Judicial Officer* (available on the FCWA's [website](#)). This document guides the parties to provide information that is relevant to their case.
  - (b) **Opening by mediator:** The mediator meets with each of the parties separately for pre-conference interviews on the morning of the mediation. Each interview takes approximately 45 minutes. Usually one party will be interviewed at 9:00am, and the second party at 9.45am. Parties are advised that the mediator is not a judge and that the conference provides the parties with the opportunity to tailor a resolution of their dispute, rather than the court imposing an outcome.
  - (c) **Opening statements from the parties:** At 10:30am the conference formally convenes and each party is invited to make an opening statement.
  - (d) **Agenda setting:** The mediator draws up an agenda, using information from the opening statements of each party and the information available on the court file (including the *Papers for the Judicial Officer*). The parties are invited to contribute to the setting of the agenda, which is ordinarily drawn up on a whiteboard.
  - (e) **Exploration of the issues:** The mediator then facilitates a discussion about each of the items on the agenda. In an ideal setting, the parties remain in the same room for this discussion. At this stage, focus is very much on exploring issues and identifying underlying interests and obstacles to resolution. If parties are represented by lawyers, the mediator will generally discourage the lawyer from direct involvement in the discussions at this stage. If lawyers are committed to the facilitative mediation process, they will appreciate the benefits of their clients having an opportunity to say what they want at this stage.

- (f) **Private session:** After the exploration of issues, the mediator meets privately with each of the parties (and their lawyers, if applicable) to obtain feedback on the conference and to invite the parties to consider options or ideas about how to address the issues that have been identified.
- (g) **Option generation and reality testing:** If the conference is progressing satisfactorily, parties are then invited to reconvene in a joint session where discussion is focussed on generating ideas to resolve issues in dispute. The mediator explains to both parties that, at this stage, no party is committed to the ideas they may propose. Lawyers can be involved in this brainstorming exercise, and are encouraged to think of solutions that address the needs of both parties, as opposed to their client only.
- (h) **Opportunity for reflection:** In private, the parties can consider the options that have been generated, before proceeding to negotiate.
- (i) **Negotiation and conclusion:** The parties are then invited to reconvene in a full session to discuss any offers of settlement that either may wish to make. Parties are provided with the opportunity to have a private session with their lawyer or support people outside the conference room before responding to any offer of settlement. Generally speaking, the mediator (a Registrar) is able to pronounce orders by consent on the day if the parties are able to reach agreement.
- (j) **If complete agreement is not possible:** Even if the parties are unable to reach a complete agreement on the day, it is often the case that the conference will result in a narrowing of the issues in dispute between the parties. In practical terms, this should result in the parties saving costs and time on the residue of the matter as it proceeds through court for final determination.

## **Quantitative data for the period 15 July 2019 to 31 December 2019**

### **What data is the FCWA tracking?**

8. The FCWA is tracking a number of quantitative metrics in respect of the Pilot, namely:
  - (a) **per instance:**
    - (i) number of mediations;
    - (ii) number of mediations that proceeded and were completed;
    - (iii) number of mediations that proceeded and were concluded part heard, and listed to a further mediation;
    - (iv) number of mediations that proceeded and were concluded part heard, but were not listed to a further mediation;
    - (v) number of mediations that did not proceed on the day;
  - (b) **per result:**
    - (i) number of mediations where all issues were resolved;
    - (ii) number of mediations where a majority, but not all issues were resolved;
    - (iii) number of mediations where some issues (but not a majority) were resolved;
    - (iv) number of mediations where no issues were resolved;
  - (c) **per the saving of court time achieved:**
    - (i) number of estimated days of trial time (per matter) required prior to mediation;
    - (ii) number of estimated days of trial time (per matter) required after mediation.

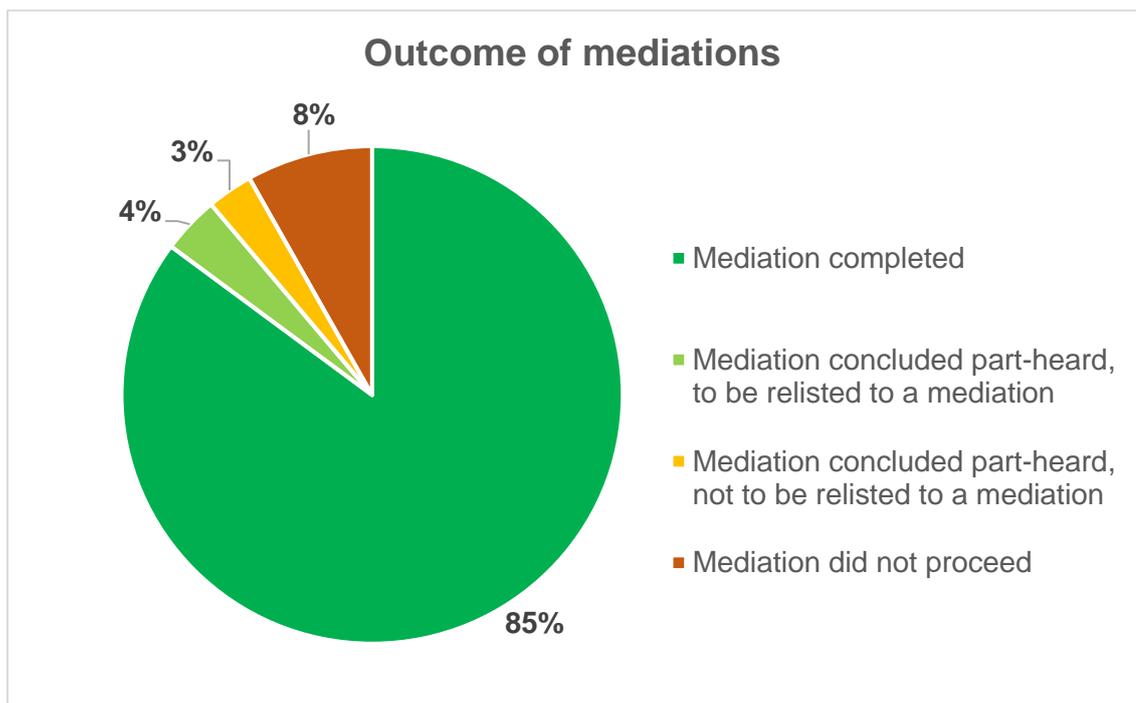
### **Report on the data for 15 July 2019 to 31 December 2019**

9. The data recorded for each of the metrics referred to in the preceding paragraph is set out in Tables A, B and C, commencing on the page overleaf:

**Table A: per instance – for the period 15 July 2019 to 31 December 2019**

Ref	Metric	Value (count)
A1	Number of mediations	135
A2	Number of mediations that proceeded and were completed	115
A3	Number of mediations that proceeded and were concluded part heard, and listed to a further mediation	5
A4	Number of mediations that proceeded and were concluded part heard, but were not listed to a further mediation	4
A5	Number of mediations that did not proceed on the day	11

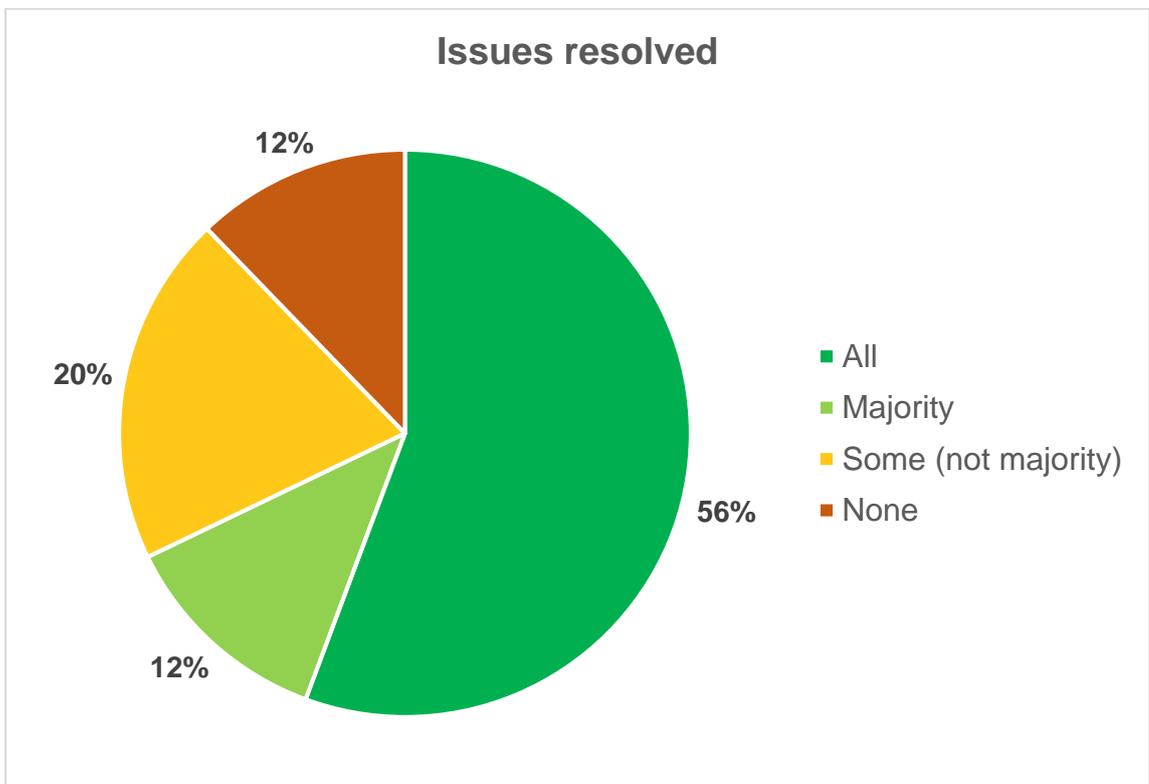
**Chart A for Table A**



**Table B: per outcome – for the period 15 July 2019 to 31 December 2019**

Ref	Metric	Value (count)
B1	Number of mediations where all issues were resolved	64
B2	Number of mediations where a majority, but not all issues were resolved	14
B3	Number of mediations where some issues (but not a majority) were resolved	23
B4	Number of mediations where no issues were resolved	14

**Chart B for Table B**

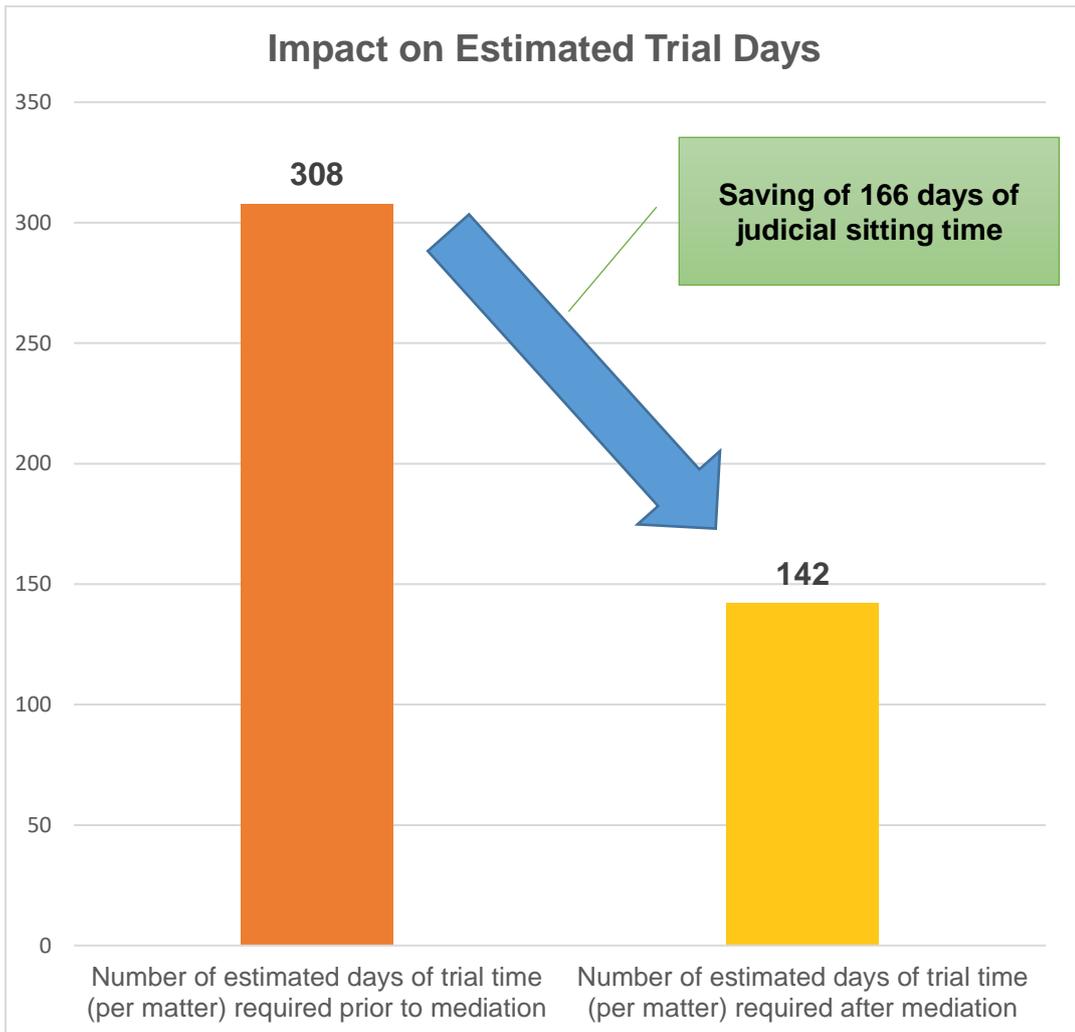


**Table C: per saving of court time achieved – for the period 15 July 2019 to 31 December 2019**

Ref	Metric	Value (sum of all matters)
C1	Number of estimated days of trial time (per matter) required prior to mediation	308
C2	Number of estimated days of trial time (per matter) required after mediation	142

**C1 - C2 = 166 days**

**Chart C for Table C**



## **Qualitative data for the period 15 July 2019 to 31 December 2019**

### **Feedback forms, an overview**

10. The FCWA invites all participants in the Pilot to provide feedback at the end of the mediation.
11. Participants are provided with a one-page feedback form. Feedback is provided on an anonymous basis.
12. The feedback form asks the following questions:
  - (a) **Question 1:** what was your expectation for the Pre-Trial Conference?
  - (b) **Question 2:** was the process explained adequately to you?
  - (c) **Question 3:** did you consider the Pre-Trial Conference a worthwhile exercise for you?
  - (d) **Question 4:** do you have anything else to add?

### **Number of feedback forms received**

13. During the period 15 July 2019 to 31 December 2019, the FCWA has received **205** feedback forms. Noting that **135** Pre-Trial Conferences were held over that same period and assuming that, on average, there are two participants in each Conference, the response rate is about **76%**.

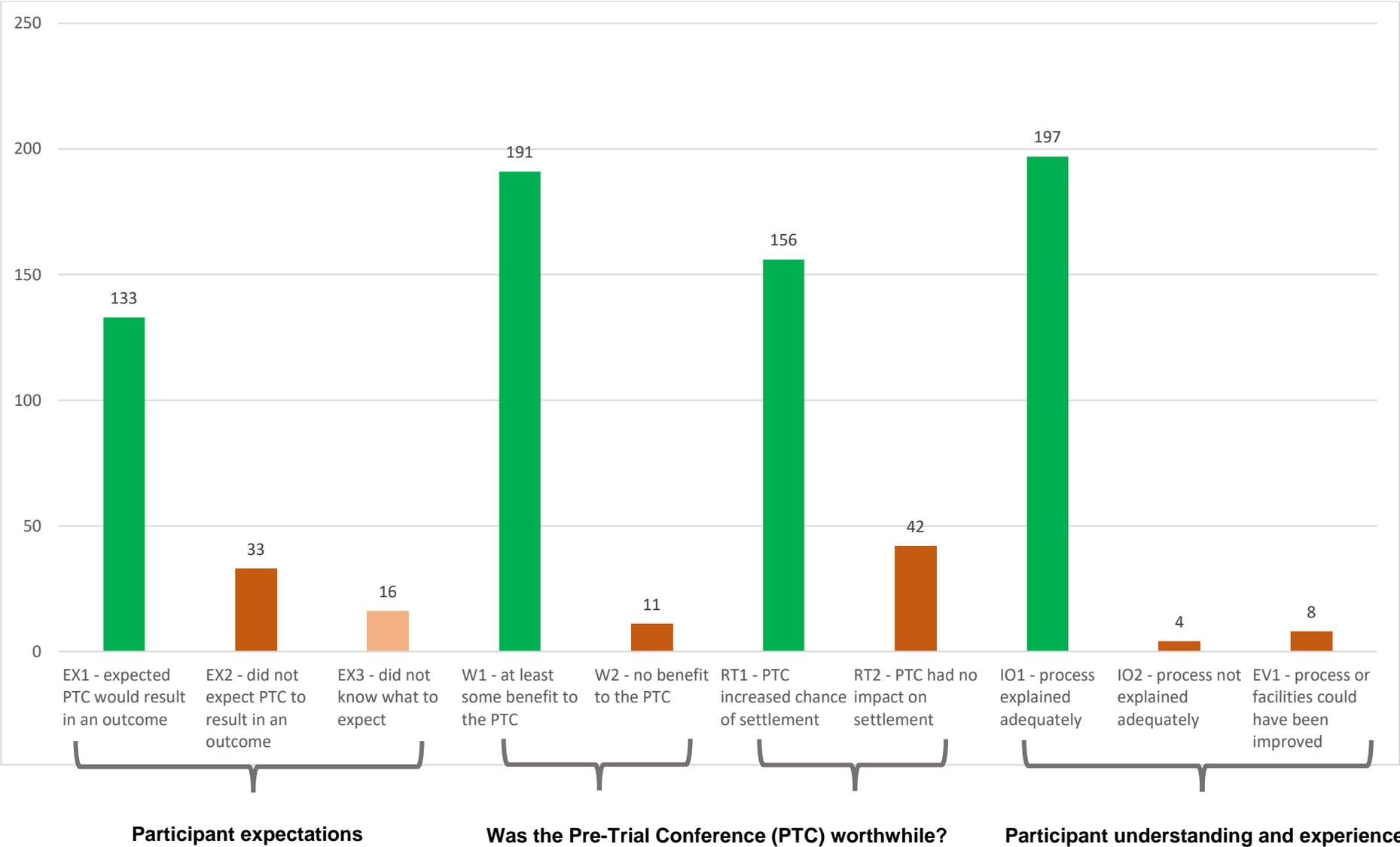
### **Themes and issues arising out of the feedback forms**

14. The FCWA has coded the responses received to the feedback form to identify common themes and issues, and (to the greatest extent possible) standardise the data for analysis.
15. The following coding key has been applied in analysing the feedback forms. The number of times a particular theme or issue has been raised in the feedback forms has been counted in the right-hand column:

**Table D – count of themes/issues raised in the feedback forms for the period 1 July 2019 to 31 December 2019**

Code	Theme / issue	Count
EX1	Prior to the Pre-Trial Conference, the participant expected that the Conference would result in an outcome (whether that be settlement, or something else)	133
EX2	Prior to the Pre-Trial Conference, the participant <b>did not</b> expect the Conference to result in an outcome	33
EX3	Prior to the Pre-Trial Conference, the participant did not know what to expect	16
W1	The participant thought there was at least some benefit to the Pre-Trial Conference	191
W2	The participant thought there was no benefit to the Pre-Trial Conference	11
RT1	The participant thought the Pre-Trial Conference increased the chances of settlement (or did achieve a settlement)	156
RT2	The participant thought the Pre-Trial Conference had no impact on the chances of settlement (or the participant was unsure)	42
IO1	The participant thought the process for the Pre-Trial Conference was explained adequately (overall)	197
IO2	The participant thought the process for the Pre-Trial Conference was not explained properly, or it could have been explained better	4
EV1	The participant thought the process or facilities provided for the Pre-Trial Conference could have been improved	8

**Chart D to Table D – themes / issues raised in feedback forms – count of responses**



## Specific examples of feedback received

16. Set out in Table E below is a selection of the responses received to the feedback forms, grouped by theme/issue. Not all feedback received by the Court has been transcribed in Table E. Instead, the FCWA has sought to provide a representative sample of feedback received.

**Table E – select feedback**

Theme / Issue	Select feedback
<p>EX1 - expected PTC would result in an outcome</p> <p>(133 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “To get it resolved without the need for Trial”<sup>2</sup></li> <li>▪ “To stop all court proceeding to go further and come to all agreements between the parties”<sup>3</sup></li> <li>▪ “To sit down face to face and sort through matters without going to trial”<sup>4</sup></li> <li>▪ “To resolve unresolvable issues with a professional”<sup>5</sup></li> <li>▪ My expectation was to reach an agreement and to have assistance to come to an agreement. As self representing parties”<sup>6</sup></li> <li>▪ “To be listened to”<sup>7</sup></li> </ul>
<p>EX2 - did not expect PTC to result in an outcome</p> <p>(33 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “I didn’t have much experience and therefore I did not have much of expectations”<sup>8</sup></li> <li>▪ “Had no expectation for other party to move positions”<sup>9</sup></li> <li>▪ “Given my experience from previous mediation (5 previous mediations before going through the Family Court, without agreement) I had no expectations”<sup>10</sup></li> </ul>

<sup>2</sup> Ref: 190806:SF:B

<sup>3</sup> Ref: 190910:SF:B

<sup>4</sup> Ref: 191016:SF:A

<sup>5</sup> Ref: 191104:JC:A

<sup>6</sup> Ref: 191120:JC:A

<sup>7</sup> Ref: 191025:JC:B

<sup>8</sup> Ref: 190819:SF:A

<sup>9</sup> Ref: 190820:SF:A

<sup>10</sup> Ref: 191021:JC:A

Theme / Issue	Select feedback
<p>EX3 - did not know what to expect</p> <p>(16 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “Beforehand I did not know what to expect. I was worried and thought that it would be more adversarial”<sup>11</sup></li> <li>▪ “Was unaware of the pre-trial conference taking place. Expectation of aiding in a resolution once process of the day explained”<sup>12</sup></li> <li>▪ “I was not sure how it worked, but without argument we were trying to come [to] sort of agreement”<sup>13</sup></li> </ul>
<p>W1 - at least some benefit to the PTC</p> <p>(191 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “Yes, absolutely! We ended our legal disputes from 2016 in under 6 hours”<sup>14</sup></li> <li>▪ “Yes because it gave me more information – no because [the other party] still minimises [their] actions which led us to be here today and that [they] had not completed [their] court ordered courses”<sup>15</sup></li> <li>▪ “Yes I do. I see value in this process. Few issues were solved today. I[t] gave me hope our child would not be lost in the system”<sup>16</sup></li> <li>▪ “Yes – 2 years in the family court system and this helped now settled”<sup>17</sup></li> <li>▪ “Yes, orders were finally made after almost 4 years of family court”<sup>18</sup></li> <li>▪ “Very worthwhile! This process should have come into play a lot sooner in terms of the structure towards diverting from Trial”<sup>19</sup></li> </ul>

<sup>11</sup> Ref: 190828:SF:B

<sup>12</sup> Ref: 191128:SF:B

<sup>13</sup> Ref: 191217:SF:A

<sup>14</sup> Ref: 191017:SF:A

<sup>15</sup> Ref: 190820:JC:B

<sup>16</sup> Ref: 190826:JC:B

<sup>17</sup> Ref: 190902:JC:B

<sup>18</sup> Ref: 191014:SF:A

<sup>19</sup> Ref: 191121:SF:A

Theme / Issue	Select feedback
<p>W2 - no benefit to the PTC</p> <p>(11 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “No, not because of the Registrar, but because of the other party”<sup>20</sup></li> <li>▪ “No we were too far apart before the conference started”<sup>21</sup></li> <li>▪ “For my case no, but I can see how for other cases it would be very good to be given this opportunity”<sup>22</sup></li> </ul>
<p>RT1 - the PTC increased the chances of settlement</p> <p>(156 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “After airing opinions it was satisfactory under the guidance of registrar but I don’t think it could have been discussed without assistance”<sup>23</sup></li> <li>▪ “We got close – good to have open dialogue”<sup>24</sup></li> <li>▪ “Yes, a worthwhile investment to enable negotiations to cut court costs”<sup>25</sup></li> <li>▪ “Yes all issues resolved except one”<sup>26</sup></li> <li>▪ “Yes and we did [settle], after a large financial hit, but at least I can move on with my life”<sup>27</sup></li> <li>▪ “Yes I believe that orders can be developed on information shared, discussed and agreed upon”<sup>28</sup></li> <li>▪ “I [have hope] for the first time in nearly four years...”<sup>29</sup></li> <li>▪ “Hopefully yes, but if the other party co-operates and comply. It may not require trial”<sup>30</sup></li> </ul>

<sup>20</sup> Ref: 190828:JC:B

<sup>21</sup> Ref: 191001:JC:B

<sup>22</sup> Ref: 191025:JC:B

<sup>23</sup> Ref: 190813:JC:A

<sup>24</sup> Ref: 190903:SF:A

<sup>25</sup> Ref: 191017:JC:A

<sup>26</sup> Ref: 191108:JC:B

<sup>27</sup> Ref: 191121:SF:B

<sup>28</sup> Ref: 191129:JC:B

<sup>29</sup> Ref: 191209:SF:A

<sup>30</sup> Ref: 191217:SF:A

Theme / Issue	Select feedback
<p>RT2 - the PTC had no impact on the chances of settlement</p> <p>(42 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “No, because the other party who didn’t want to cooperate”<sup>31</sup></li> <li>▪ “Possibly not for my case but would certainly be the case I’m sure for other cases [that is, the prospect of settling]”<sup>32</sup></li> <li>▪ “No, it will have to go to trial”<sup>33</sup></li> </ul>
<p>IO1 - process was explained adequately (overall)</p> <p>(197 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “Yes, I was aware of the process and appreciated the protection I had while the process took place”<sup>34</sup></li> <li>▪ “Very clearly explained – it helped me see more clearly and understand why we were there. I think the other party feels the same. Structure of conference very helpful”<sup>35</sup></li> <li>▪ “Explained very well and helped me understand, [the registrar] was very understanding and made the whole conference not overwhelming like court cases”<sup>36</sup></li> <li>▪ “It was explained well at the beginning of the day and I felt, I had a good understanding of how thing were going to run”<sup>37</sup></li> <li>▪ “On the day, but not prior to the day”<sup>38</sup></li> </ul>

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<sup>31</sup> Ref: 190819:SF:A  
<sup>32</sup> Ref: 190925:SF:B  
<sup>33</sup> Ref: 191122:JC:A  
<sup>34</sup> Ref: 190806:SF:A  
<sup>35</sup> Ref: 190828:SF:B  
<sup>36</sup> Ref: 191212:SF:A  
<sup>37</sup> Ref: 190917:SF:A  
<sup>38</sup> Ref: 191104:JC:A

Theme / Issue	Select feedback
<p>IO2 - process was not explained / could have been explained better</p> <p>(4 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “Very little information as to how to proceed online ie what documents to bring”<sup>39</sup></li> <li>▪ “Yes and no, I didn’t anticipate such pressure to be involved”<sup>40</sup></li> </ul>
<p>EV1 - process, structure or facilities could have been improved</p> <p>(8 responses coded to this category)</p>	<ul style="list-style-type: none"> <li>▪ “Probably require a meeting prior for emotional out letting in some cases”<sup>41</sup></li> <li>▪ “I didn’t feel we had a lot of time”<sup>42</sup></li> <li>▪ “Maybe some food and fizzy drinks should be provided as it is a long day. My lawyer says there should be a specific Pre-Trial document to prepare rather than papers for the Judge”<sup>43</sup></li> </ul>

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<sup>39</sup> Ref: 190806:SF:B

<sup>40</sup> Ref: 191216:JC:B

<sup>41</sup> Ref: 191011:SF:A

<sup>42</sup> Ref: 191105:JC:B

<sup>43</sup> Ref: 191204:JC:A