Submission from Scottish Mediation Network for the Legal Profession and Legal Aid (Scotland) Bill

Introduction
The Scottish Mediation Network (SMN) welcomes the inclusion of mediation on the face of this Bill in sections 6, 7 and 19. We suggest that care will be need to be taken to ensure that the mediation offered by the Commission is sufficiently impartial, non-judgemental and independent to meet the emerging standards in the mediation field and to engender sufficient confidence in the process.

The Scottish Mediation Network also sees and supports the opportunities for developing the availability of mediation through the proposed changes to publicly funded legal assistance in Scotland by the changes set out in section 45.

This response is limited to comments on sections 6, 7, 19 and 45 of the Bill.

Section 6 & 7
The Bill appears to suggest mediation will be offered by the new Commission. No explanation is given in the supporting documents about what this form of mediation might look like.

We acknowledge that this issue cannot be addressed in detail until the Scottish Legal Complaints Commission is established. The SMN will be available to advise and assist if required.

However, we recommend that guidance notes make it clear that, where appropriate, the Commission will offer to arrange for mediation rather than offer to mediate. We are concerned that if the Commission were to act in the role of mediator, this would conflict with its responsibility to adjudicate on complaints. Also, if the Commission were to attempt to mediate, careful consideration would need to be given to quality and training issues. We refer to the Guidelines on the Practice of Mediation adopted by the SMN (below) which are generally accepted in Scotland as a benchmark.

We are puzzled by the drafting in 7(c)(ii) which refers to a situation where the "outcome of the mediation is not accepted by both the complainer and the practitioner". This wording might imply that the mediator will issue a determination. This would not be mediation. It would be adjudication or arbitration. We propose the words above be deleted and the phrase “no settlement agreement is executed by the complainer and the practitioners within a reasonable period following a mediation” be substituted.

Definition of Mediation
The SMN uses the following definition:

“Mediation is a process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other’s perspectives and to decide how to resolve their dispute themselves.

Section 19
Section 19 appears to suggest that if mediation is “successful” the practitioner will have to pay part of the cost of the mediation and the complainer would not pay anything. It is hard to define success in mediation beyond there being a resolution that the parties can all live with. A mediation results in either a mutually acceptable outcome or it does not. Payment by only one party may upset the power balance that is often delicate when parties are in disputes. We suggest that further consideration is given to this proposal.

Section 45 - Legal aid and mediation
The Scottish Mediation Network sees and supports opportunities for developing the availability of mediation through the proposed changes to publicly funded legal assistance in Scotland. We propose that mediators be included in the Register of those allowed to offer assistance to parties with legal disputes.
Mediators do not give advice nor would it be consistent to call them advisors. **We propose that the register set up in section 45 be renamed “Register of providers of advice and assistance.”** Those registered would be called “registered providers”. If the definition of assistance were to encompass mediation then parties could choose mediation as a first option rather than, as at present, having to go through a solicitor. There is clear evidence that mediation is only offered as an option by a few legal aid solicitors who are very familiar with the process. The majority of solicitors do not yet recommend mediation because they have little or no experience of using it. Allowing legally aided people **direct** access to mediation should help to overcome the natural reticence of gatekeepers to using an unfamiliar process.

We feel that the Legal Aid system could offer other opportunities to encourage the appropriate use of mediation.
GUIDELINES ON THE PRACTICE OF MEDIATION
Adopted by the Policy Committee of the Scottish Mediation Network on 26.5.04

Preamble
These Guidelines are intended to form a baseline for the conduct of all forms of mediation in Scotland. It is expected that the different strands of mediation will, if they have not already done so, develop complimentary and more detailed guidance.

Mediation
is a process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other’s perspectives and to decide how to resolve their dispute themselves.

Voluntary participation and self determination
A mediator shall recognise that mediation is based on the principle of voluntary participation and un-coerced self-determination by the parties.

Impartiality, independence and neutrality
A mediator shall remain impartial, independent and neutral. If a mediator becomes aware of any reason which may diminish her/his impartiality, independence or neutrality, he/she shall disclose this to the parties at the earliest opportunity and withdraw from the mediation unless the parties do not wish her/him to do so.

Conflicts of Interest
A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator whether before or during a mediation and shall withdraw from the mediation unless the parties do not wish him/her to do so.

Competence
A mediator shall be responsible for undertaking sufficient training, supervision and continuing professional development to maintain necessary mediation skills. A mediator shall mediate only when she/he believes that he/she has the necessary skills to carry out the mediation.

Confidentiality
Confidentiality in mediation is important to encourage all participants to speak truthfully and candidly, and to enable a full exploration of issues in dispute. Unless compelled by law, a mediator shall not disclose any of the information given during the mediation process.

Understanding of mediation
A mediator shall ensure that the parties understand:
- the purpose and procedure of the mediation;
- the role of the parties and the mediator;
- any fee arrangement;
- the obligation of confidentiality.

Advertising and solicitation
In advertising or offering services, mediators shall not guarantee settlement or promise specific results. All information provided by mediators about their education, background, mediation training and experience shall be accurate.

Gifts and favours
A mediator must not accept from or exchange any gift or favour with any party in any mediation. A mediator must use judgement that reflects the high ethical standards which mediation requires.

Discrimination
People should always be treated with respect and without discrimination.

Complaints and Professional Indemnity Insurance
A mediator shall provide information about the process for handling any complaint made about their conduct or service, and about any professional indemnity insurance cover they may have.
Background about the Scottish Mediation Network

The Scottish Mediation Network is a company limited by guarantee registered in Scotland, Company No. SC258173, and recognised as a charity by the Inland Revenue. As at 1\textsuperscript{st} September 2005, we have 85 individual members and 52 organisational members, all of whom endorse the SMN’s Guidelines on the Practice of Mediation in Scotland.

Our Vision

We are working to embed mediation into the way that conflict and disputes of all forms are handled in Scotland.

Mediation is a process in which disputing parties seek to resolve their differences in a mutually acceptable way with the assistance of a trained mediator acting as an impartial third party.

Our Values

We value:

- working together collaboratively
- mutual respect
- clear and open communication
- voluntary participation
- an inclusive Network and
- financial prudence

Our Purpose

The Objects clause of the Scottish Mediation Network’s Memorandum of Association states, in summary, that we aim:

To promote mediation and other related forms of conflict management for the benefit of the public, individuals and society in Scotland and elsewhere and:

- to encourage awareness, understanding and appropriate use of mediation;
- to support and promote education, training and research in skills and best practice in the use of mediation;
- to create and encourage links among the various fields of mediation; and
- to promote and organise standards of professional conduct and training.

www.scottishmediation.org.uk
Information about the Director
Ewan A Malcolm, W.S., L.I.B (Edin), Dip L.P., N.P.

Ewan set up the Scottish Mediation Network office in September 2002 and in 2005 was appointed as its first Director.

The main focus of his development work is to host a collaborative discussion and devise a process to move toward linking quality assurance and qualifications across all spheres of mediation in Scotland. Ewan is also charged with facilitating consensus-building conversations about linking the development of excellent practice in training across all spheres of mediation.

He was in private practice as a solicitor for nearly two decades and started his mediation training in 1995. Ewan is trained as a commercial, a family and a community mediator. In his own time, he freelances as a mediator in high value family and commercial disputes. He also volunteers with both the Edinburgh Sheriff Court and the Edinburgh Community Mediation Services, where he is working toward his SVQ in mediation. Ewan has presented training across the UK and is an associate member of the Chartered Institute of Personnel and Development.

Publication of this document and evidence
We are content that the document be published and would welcome the opportunity to give oral evidence to the Committee.

Acknowledgements
Invaluable comments have been contributed by a number of members of the Scottish Mediation Network. Responsibility for the final version of this response rests with Ewan Malcolm.