Justice Committee
Courts Reform (Scotland) Bill
Written submission from the Scottish Mediation Network

1 Scottish Mediation Network
1.1 The Scottish Mediation Network (SMN) was established in 1990 with the aims of:

- Raising the profile of mediation in Scotland
- Acting as a professional body for mediators in Scotland
- Maintaining the Scottish Mediation Register and providing access to quality assured mediation services

1.2 SMN is a registered charity in Scotland and a company limited by guarantee. It is led by a Board of Trustees, currently chaired by Robin Burley MBE. The Board has a wealth of experience in mediation spanning, amongst other areas, family, community and employment, with extensive expertise in civil justice and legal matters.

2 Mediation
2.1 Mediation is a form of alternative dispute resolution (ADR) which involves an independent person (the mediator) facilitating a discussion between the parties involved in a dispute, to help them to move forward towards a solution that everyone can live with. Mediation is an effective alternative to going to court.

2.2 Mediation is:

- Non-judgemental - mediators avoid taking sides, making judgements or giving guidance
- Voluntary – it only takes place if both parties agree
- Confidential – the information discussed in the negotiations between the parties in the course of seeking a mediated settlement are private to them and cannot be used in court
- Flexible – it can be used in a variety of conflict situations including: family disputes; community and neighbour disputes; planning and environmental disputes; construction and commercial disputes; and education disputes

3 Why Mediation and ADR?
3.1 There is a wide range of benefits associated with mediation and ADR. This section outlines many of these benefits and offers some analysis of the evidence supporting these.

User-focused approach

3.2 Many of those involved in disputes are more interested in finding a resolution to their problem or “..getting on with their lives..”, than necessarily vindicating their
legal rights. Many people prefer to avoid becoming involved in legal and court processes. They are apprehensive about the potential costs, formality, delay and trauma they associate with legal processes. The most exhaustive recent study of court-annexed mediation in Scotland concluded that: “Discussing [ADR] with parties in court would ensure that parties have information about available options. It would complement rather than undermine the adjudication elements of civil justice.”

3.3 The Consumer Focus Scotland report *Facing up to Legal Problems*, recommended “a person-centred” approach to solving legal problems as early as possible. The findings of the report challenged the presumption that a legal resolution is necessarily the ‘right’ resolution for everyone, when considered in the broader context of their problem. The report points out that people do not experience a civil justice problem in a vacuum, and the priority for many is to get their life back on track and get rid of the problem. Mediation has the potential to meet these needs and find a resolution to a problem even before it reaches a court hearing.

3.4 The Aberdeen and Glasgow sheriff court pilots showed that the overall satisfaction levels of participants were markedly higher for mediation service users than those who proceeded with their disputes through the court. Satisfaction levels were highest for the time spent on mediation and the overall experience of mediation.

**Savings in time and money**

3.5 Some Scottish evidence of benefits through savings of time and money to both the Court and to users through the use of mediation can be found in the evaluations of the Sheriff Court pilots in Aberdeen and Glasgow (Ross and Bain, 2012), as follows:

3.5.1 In terms of time savings, “the average time spent on [mediation] in Aberdeen was 29 days for summary causes and 20 days for small claims. In Glasgow, average times were slightly longer at 44 days for summary causes and 37 for small claims. Estimates of comparable time spent per case for civil litigation cases going to the sheriff was around 50 days.”

3.5.2 In-court mediation participants in the Aberdeen and Glasgow sheriff court mediation projects as well as a control group who resolved their disputes through different means were asked to estimate their own costs in pursuing their actions. The results show that, on average, the costs for mediation service users were lower (£267 on average) than the alternative court service (£328 on average). This represents an average saving to mediation service users of £61. Other research backs up this evidence. A study of Scottish commercial litigators’ interactions with mediation published in 2007 found that the vast majority of lawyer respondents believed that mediation would save costs and time for their clients. Around 80% of respondents suggested that a reduction in legal costs for their clients was either “always relevant” or “often relevant” in suggesting mediation to their clients, with some 85% of respondents suggesting that saving clients’ time was similarly a relevant factor.
3.5.3 Ross and Bain in their evaluation of the Aberdeen and Glasgow found savings to the public purse and concluded that “the average actual cost per [mediated] case in Aberdeen was £1,142 for the whole pilot period; recurrent costs were around £953. The average actual cost per case in Glasgow was £1,135 for the whole pilot period; recurrent costs were around £981. This compares well with the [estimated] comparative costs for cases brought through the sheriff courts at £2,044 per case”.9

High Levels of Resolution and Compliance

3.6 The study of Scottish commercial litigators found a settlement rate for general commercial mediation (from a total of 147 tracked cases) of 79%. When partially settled cases were added, the percentage grew to 84%.10 A study of Scottish contentious construction lawyers’ interaction with mediation carried out in 2010 found a settlement rate (from a total of 178 tracked cases) of 74%. When partially settled cases were added, the percentage grew to 83%.11

3.7 Settlement rates for mediation mean there is more chance that agreements will be implemented than when a decision is made in court. Some Scottish evidence in this regard can be found in the evaluations of the Sheriff Court pilots in Aberdeen and Glasgow where compliance was 90% for mediated cases against 67% for court judgement12, and in Edinburgh where it was noted during Research Phase 2 that “almost all mediation hearings conducted were concluded with an agreement, and all agreements were thought to have been honoured”.13 This is primarily because the settlement is an agreement between the parties which increases the likelihood of compliance. Should settlement not be achieved, then there is still the option to go to court. It may be that mediation will have reduced the number of issues to be dealt with in court, even if agreement hasn’t been reached.

3.8 Extensive evidence from other EU jurisdictions which supports the findings outlined above with regard to levels of resolution, compliance and savings in time and cost, can be found in the European Parliament Note ‘Quantifying the cost of not using mediation – a data analysis’14

4 The Courts Reform (Scotland) Bill Consultation

4.1 In its response to the consultation, SMN highlighted the value of the wider use of alternative dispute resolution for civil disputes in Scotland. SMN considers that a requirement to consider the use of ADR, which would enable mediation to take place, should be embedded in legislation in view of the general lack of awareness amongst the public and the professions about the benefits and process of mediation.

ADR should be a viable alternative to court for the users of a modern civil justice system. Users should be able to make an informed choice as to how they would like their case to proceed and ADR should be embedded into the system and be available as an option in appropriate cases. This is supported by Citizens Advice Scotland, Money Advice Scotland, Which? and the Scottish Arbitration Centre who have joined together recently to consider the interests of consumer-litigants in the context of the preparation of the Bill.
4.2 SMN is pleased to note that there is some flexibility built in to the rule-making provisions which give the courts the power to regulate procedure “..encouraging settlement of disputes and the use of alternative dispute resolution procedures..” (Clauses 5 and 97). This has the potential to encourage wider use of ADR in the civil courts in Scotland and SMN welcomes this. In the opinion of SMN, however, this does not go far enough. Indeed, it is considered by SMN that the limited changes proposed in the Bill miss a major opportunity to embed ADR and other forms of ADR in to the Scottish Civil Justice System as an alternative to litigation.

4.3 A mediation infrastructure which can successfully deal with cases needs to be put in place. There are a number of possible models which could be considered for the delivery of this and SMN has recently submitted a discussion paper to both the Scottish Civil Justice Council and the Scottish Government Justice Department outlining an appropriate approach.

4.4 The Bill could go much further in providing the foundations for a model of mediation to be embedded into the system. While the Bill offers the opportunity for rule changes to be made, there is no guarantee that these changes will ever be made, nor that any changes would embed ADR more fully into the system.

4.5 SMN believes that without a route to ADR that is both endorsed by the Scottish Court Service and the Courts, and seen as an important part of the justice system, any attempts to promote ADR will be significantly weakened.

5 Conclusion

5.1 SMN suggests that ADR could be embedded into the civil justice system in Scotland. This could be implemented quickly and easily as it is based on tried and tested practical solutions and a compelling evidence base regarding the use of mediation. It could provide one of the first practical steps in implementing change in the civil justice system, and provide time and cost savings fairly immediately.

5.2 Looking at the bigger picture, it could in time lead to a change in attitude, providing the public and the legal profession with a better understanding of alternative dispute resolution and allowing parties to take responsibility for resolving their disputes. Over time this may lead to less conflicts reaching the Courts where an interests based resolution is available, freeing up the Courts to determine cases where legal rights are truly in dispute.

5.3 SMN asks that the committee reviews the evidence outlined in this paper and, in light of this, adapt the Bill to include a stronger commitment to the embedding of ADR and, in particular the use of mediation, into the civil justice system in Scotland.

Scottish Mediation Network
18 March 2014


4. Consumer Focus Scotland (2012), Facing up to Legal Problems: towards a preventative approach to addressing disputes and their impact on individuals and society; Glasgow: Consumer Focus Scotland, Page 8


