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## 1 – INTRODUCTION

1. Mediation is a process involving an impartial third party who assists those in dispute to come to a mutually acceptable solution. Mediation can be used for settling a wide variety of disputes in different settings: in families, schools, and workplaces, and between retailers and consumers, victims and offenders, and commercial partners, to identify but a few.
2. Community mediation services were first established in Britain in the 1980's and expanded rapidly. In 1996 Mediation UK, the umbrella organisation for mediation services, reported that there were 100 schemes the majority of which were concerned with community mediation (Mediation UK, 1996a).
3. Community mediation schemes usually cover a particular area or neighbourhood and are mostly concerned with disputes between neighbours (Mediation UK, 1996a).<sup>1</sup> In the main they use trained volunteer mediators. In Scotland this type of service has been slow to develop and in June 1997 there were only four schemes in operation with a further one in the planning stage.
4. This study looks at the ways in which three of the five community mediation schemes have been developed in Scotland and at the practice of mediation as it evolved in one scheme. In this study we analyse these separate developments, and identify some questions for future development, practice and research. The schemes in the study were Community Mediation Dundee, The Glenrothes Neighbourhood Mediation Service and the Livingston and District Community Mediation Service.
5. The fieldwork for the study was conducted between July and October 1997.

## AIMS AND OBJECTIVES

6. There have been few studies of mediation practice in the UK. Our main purpose in undertaking this study was to identify issues in practice in such a way as to throw light on current practice, and to identify ways in which practice could be examined and evaluated more fully.
7. The main aims of the study have been to
  - 7.1 describe the history, development and practice of the three schemes;
  - 7.2 describe practice and policy in the schemes and examine the issues which arise through undertaking mediation in a community setting; and,
  - 7.3 outline the key methodological, policy and research issues for possible future research in the area.

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<sup>1</sup> It should be noted that 'community mediation' has different meanings in the literature. In the USA community mediation refers to a wide range of mediation services, including what in the UK are referred to as reparation and mediation services, and family mediation. In the UK, it refers solely to mediation relating to neighbourhood disputes.

## **METHODOLOGICAL APPROACH**

8. The methodology we adopted was primarily qualitative, drawing upon a range of different types of material. We conducted interviews with service users, mediators, managers and management committee members, a trainer, and representatives of referral agents and funders. We undertook some direct observation of practice. We also drew upon service documentation and records.

## **THE PROGRAMME OF RESEARCH**

9. The brief for research included an account of the development and practice of the schemes in the study.<sup>2</sup> The study was scheduled to be conducted during the summer of 1997. This coincided with a period of considerable uncertainty for the schemes. During this time, despite their best efforts, two of the schemes suffered critical setbacks to their funding positions. The Livingston scheme, which had taken a small number of referrals, failed to obtain mainstream funding, and did not take on any new work. Glenrothes, which had become fully operational, although for only a short period, lost its bid for funding in a two way squeeze with a bid from another community mediation scheme in the area. Thus two of the research sites were out of operation during the period allocated for fieldwork. The third scheme, in Dundee, also underwent difficulties during the period of study. Conflict within the agency and staffing difficulties adversely affected the scheme's performance.

10. As a result of these difficulties, the research project was unable to capture the range of practice observation data which it had been our intention to gather. However, we were able to compensate for this by carrying out an extended set of interviews with parties who had participated in two of the schemes, and these, together with the other data sets provided material on the range of issues identified for exploration by the study.

11. The difficulties experienced by the schemes themselves have proved to be an important object for the study. They have brought into relief a number of important issues for the development of mediation schemes and for the conduct of practice. This study also highlights some of the pressures operating upon small-scale voluntary organisations at a time when the independent sector is being asked to respond to the challenge of providing a wider range of social services.

## **STRUCTURE OF THE REPORT**

12. The structure of this report reflects the aims and objectives of the study. Chapter 2 examines the literature relating to community mediation, and provides a background for the research we have undertaken. Chapter 3 deals with the history and development of the schemes in the study. Chapter 4 examines and analyses issues of practice which arose from the data. Chapter 5 identifies a number of issues for the development of practice in this area, and questions for further research. Finally, Chapter 6 provides a summary of conclusions of our findings, and recommendations for practice and future research.

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<sup>2</sup> In this report, the research study is referred to either as the 'study' or as the 'project'. The three schemes which were the subject of the study are referred to as the 'schemes'.

## **2 – BACKGROUND AND LITERATURE REVIEW**

13. In this section we will review recent literature having a bearing on the study. We examine the context in which community mediation has been established, including the legal and policy framework, the aims and advantages of this method of conflict resolution and the types of disputes that are most appropriate for mediation. The efficacy of community mediation is also explored together with the process and practice. The critical literature is highlighted and the methodological issues involved in conducting research into this area are summarised.

### **THE LEGAL AND POLICY FRAMEWORK FOR DEALING WITH NEIGHBOURHOOD DISPUTES AND ANTI-SOCIAL BEHAVIOUR**

14. Community mediation is part of the general category of Alternative Dispute Resolution approaches which attempt to deal with disputes without recourse to formal litigation. It has emerged at a time when increasing public concern has been expressed about the extent of anti-social behaviour and incivility, and when government has turned attention to policy making in this area. Mediation for disputes between neighbours and within neighbourhoods has become associated with the development of policy to address anti-social behaviour. It is therefore important to examine the development of policy, because this will provide the formal legal structure to which community mediation will relate in the future.

15. Anti-social behaviour has a general sense of conduct which is experienced as irritating, offensive or harmful to others. It has now acquired currency in a political and social policy context to represent a social problem whose perpetrators are to be identified and punished. The identification of anti-social behaviour with the substance of disputes in neighbourhoods, and its perpetrators and victims with parties in disputes suggests that community mediation primarily serves to process wrongdoing. Such a reading does not acknowledge that disputes in neighbourhoods may result from innocent clashes of interest. It also limits the focus of neighbourhood dispute to individual disputes, leaving out of account disputes which arise from collective problems such as poor noise insulation, poor social facilities and inadequate social provision.<sup>3</sup>

16. The most comprehensive account of the current state of the law in the area is Collins and O'Carroll (1997). They delineate the range of potentially anti-social behaviour which is covered by the criminal law. They also draw attention to the civil remedies available to local authorities and private individuals to pursue cases, and to their limitations in practice. It should be noted that a major source of complaint, noise, may be dealt with under three different types of action: criminal (a variety of measures), common law nuisance and statutory nuisance. They draw attention to the possibility that some problems associated with community care 'returners' may be the result of a failure of the local authority to provide the care required under community care provisions in the Social Work (Scotland) Act 1968 (amended) (ibid, 25). They argue for an incremental approach to the development of policy in

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<sup>3</sup> The definition of neighbourhood disputes which we adopt is that they are 'incidents which:

- \* reflect and underlying or potential conflict
- \* between people living in relational and geographical proximity excluding the immediate family'.

This excludes family disputes (Mackay and Moody, 1994, 3).

this area, which takes account of the variety of circumstance of cases. They suggest a framework of intervention which encompasses measures to be implemented by internal management of housing agencies, inter-agency co-operation, third party assistance (including mediation and arbitration), and finally, court action (ibid, 20). They express concern that law reform in this area will do little to resolve the problems of anti-social neighbour behaviour, but will attack tenants' rights (ibid, 146).

17. The Neighbourhood Noise Working Party (Great Britain, 1995) examined the legal remedies available for dealing with noise disturbance, highlighting gaps in provision. They recommended a number of proposals in relation to management of services, and the creation of a new noise offence.

18. The Scottish Affairs Committee report, Housing And Anti-Social Behaviour (1996) recommended a strengthening of the law in some areas, for example by giving the police a statutory power to take noise-making equipment away, and urges landlords to make greater use of existing legal remedies such as interdict. However it did not support the introduction of new legislation.

19. The Committee urged the expansion of mediation services across Scotland.

20. The government has held a consultation process for the Crime and Disorder Bill, which is now before Parliament. An important new measure in the Bill is the proposed Anti-Social Behaviour Order. This would be applied for by a local authority in the Sheriff Court. The criteria for granting an order would be the fact of previous anti-social behaviour and evidence 'that the individual's conduct or statements indicated that they constituted a threat of serious harm to individuals or groups of individuals in the community' (Consultation Document - Crime and Disorder Bill, Great Britain, 1997, para 5). It may be noted that there is a parallel between this measure and Exclusion Orders under the Children (Scotland) Act 1995 (s 76), in that the local authority is to be the sole permitted applicant for such orders. We wonder whether the inability of ordinary citizens to apply will restrict the effectiveness of this measure to reduce anti-social behaviour.

## **AIMS OF COMMUNITY MEDIATION**

21. Harrington & Merry (1988) have identified three different 'projects' within community mediation: the delivery of dispute resolution services, social transformation and personal growth. They examine how an ideology has been constructed around each type.

22. In the 'service delivery' project emphasis is placed on how mediation can alleviate court congestion and assist in the rationalisation and efficiency of the judicial system. In contrast the 'social transformation project' is located in the community with no formal ties to the justice system. Here mediation has the potential to change society and empowers the community to resolve disputes. Lastly the 'personal growth and development project' emphasises the benefits to the individual, whether these be emotional, spiritual or functional\cognitive. Harrington & Merry point out that the boundaries between the different projects can often be blurred and ideas can be shared between them. Measures of success will differ according to the model espoused. So, for example, in the 'service delivery project' outcomes would focus on the speed with which courts are processing cases, and on reduction of their workload. In the 'social transformation project' the involvement of community

members as mediators would indicate success whereas in the 'personal growth and development project' it would be the satisfaction of the parties.

## **THE ADVANTAGES OF COMMUNITY MEDIATION OVER OTHER WAYS OF SETTLING DISPUTES**

23. Proponents of mediation argue that there are many benefits for the disputants to this process when compared to the use of the legal system (Singer, 1990; Solin, 1996). Its advocates urge that mediation offers a win- win solution, is non-adversarial, confidential, cheap and quick. It enables individuals to pursue a legal remedy if they so choose. In addition it is argued mediation can provide a model of how conflicts can be resolved in the future and is important in improving communication between members of a community and encouraging tolerance (Folberg & Taylor, 1984; Pruitt, 1987; Marshall, 1991). Because the process is voluntary, responsibility for a solution remains with the parties and is not imposed by a court or other authority.

24. For the statutory agencies charged with resolving neighbour disputes community mediation also has advantages. It is generally recognised that many of these conflicts are not amenable to any legal remedy (Dignan et al, 1996). The main agencies to whom neighbour disputes are referred, the police, housing and environmental health departments, may warn the parties or become embroiled in an increasingly intractable situation. Mediation offers another option and one that can save time and money although this does depend on the nature of the case and whether it would have involved statutory agencies (Dignan et al, op cit). There is also a strong preventative argument in favour of mediation which states that by resolving disputes at an early stage more serious trouble can be avoided (Wright, 1994; Great Britain, op cit, 1996).

## **SUITABILITY OF REFERRALS FOR MEDIATION**

25. Are all kinds of neighbour disputes amenable to mediation? Dignan et al (1996) have attempted a categorisation and suggest that mediation is most appropriate in the following types of cases:

- ' - Disputes resulting from inconsiderate or mildly anti-social behaviour on the part of one or both (all) of the parties;
- ' - Disputes involving a more serious personality or life- style clash...' (ibid, 87).

26. They do not rule out cases 'involving a degree of harassment and/or minor criminal acts relating to the dispute itself' but think that a judgement would need to be made in the light of individual circumstances. However Cameron (1988) has said that 'it is difficult to put an " upper" limit on the seriousness of disputes suitable for mediation', and that no dispute is too trivial (ibid, 87).

27. In Britain cases involving criminal acts, or where legal proceedings are in process, are not always seen as appropriate for community mediation either by the services themselves or by referring agents (Dignan et al, op cit). This contrasts with the experience in the USA where the courts are a substantial source of referrals to Neighbourhood Justice Centers which deal with a variety of disputes (Tomasic, 1982). Victim offender mediation schemes are operating in the UK (Warner, 1992; Mackay, 1995) demonstrating that there is nothing inherently antagonistic to mediation in criminal proceedings. However, as Mays & Clark

(1996) indicate, there is still a reluctance in Scotland to consider the courts as a potential referral point for mediation other than for family mediation.

## **DOES MEDIATION WORK?**

28. On what criteria is success to be based? This question addresses the fundamental purpose of community mediation and whether it should be judged on outcome, gaining agreement or on the process alone, for example the attitudes of the parties.

29. Examination of outcome, as judged by British mediation services themselves, shows that in 39% of cases complete or partial agreement was achieved (Dignan et al, op cit, 28)

' However, almost one in three cases terminated for other reasons, usually because one of the parties was unwilling to participate or to proceed further with the mediation.' (ibid)

30. User satisfaction is consistently high (Harrington & Merry, op cit) but the permanence of agreements is more difficult to judge (Kressel & Pruitt, 1985). Roehl & Cook (1985) point out that mediation is a more speedy process than using the courts. One of the most persuasive arguments at times of financial stringency for government is that of cost. Dignan et al (op cit) found that community mediation may be a less expensive way of resolving disputes in complex cases which would have demanded a lot of time from the statutory agencies. However, as many cases are never dealt with formally by these agencies there are no comparative savings to be made.

31. As Carnevale et al (1991) state ' success in mediation is more complex than simply whether or not agreement is achieved.' (ibid, 133)

32. Carnevale et al associate certain mediator behaviours with successful outcomes, as defined by the mediators themselves. They start to address some of the interactive qualities of the mediation process itself and 'contingent effectiveness' - 'the degree to which the tailoring of tactics to certain types of dispute situations is effective in bringing about settlement.' (ibid, 124)

33. Consideration of the many variables at play have led Carnevale et al (op cit) to point out that instead of asking whether mediation works it may be more useful to ask: 'What type of mediation, for what type of disputants, using what kind of tactics, for what type of case, leads to what outcome?' (ibid, 339)

## **CRITICISMS OF MEDIATION**

### **Coercion**

34. Much of the critical literature comes from the USA where, as previously mentioned, mediation schemes often have a close connection to the courts. In these schemes cases can be returned to the court if an agreement is not reached. Hence an element of coercion enters into the mediation process, undermining the principle of voluntariness and the neutrality and non-judgemental qualities of the mediators (Merry, 1982). While community mediation in Britain has developed differently, many schemes rely on the support of local government. For example Dignan et al (op cit, 29) record that 42% of funding comes from local councils

and that referrals from housing and environmental health departments account for 25% of all the referrals. A small number of schemes are being run by statutory organisations (Mediation UK, 1995) which may have the power to take parties to court if mediation proves unsuccessful.

### **Extension of social control**

35. It has been argued (Abel, 1981; Tomasic, op cit) that informal methods of resolving conflict have, far from restricting the court's jurisdiction, extended the net of formal institutions and thereby increased social control. Notwithstanding unwillingness on the part of mediation schemes to take cases where criminal proceedings are in the offing, there is a countervailing danger that cases may become criminalised because there are no alternative ways of dealing with them (Mackay and Moody 1994). Mediation schemes have been enthusiastically supported by state institutions, it has been argued, and co-opted by them. 'By disguising coercion, centralisation and dominance they extend state control to new behaviour.' (Abel op cit, 262)

### **Compromise of legal rights**

36. Bound up with this argument of extending state control is the proposition that mediation schemes deny their users access to the legal system. As the majority of these schemes are located in areas of social disadvantage it is argued that poorer people and those from minority ethnic populations are being encouraged to use mediation, thereby freeing the courts for those who can afford to pay (Tomasic, op cit).

37. Certainly in Scotland the Urban Programme has been the main source of funding for mediation schemes (Mays & Clark, op cit) thereby limiting its operation to areas of deprivation.

### **Power imbalances**

38. Can mediation be conducted fairly when the parties in dispute have unequal power (Mackay, 1995)? Criticisms have been made on the grounds that it is difficult to produce a fair outcome and process unless the mediator(s) take specific steps to counteract imbalances between the parties.

'The result of a typical mediation is an agreement favoring the interests of the complainant and placing larger burdens of compliance on the respondent.'  
(Gillicuddy et al, 1991, 148)

## **WHAT HAPPENS IN MEDIATION?**

### **The process**

39. Typically the process follows a pattern of visiting the parties separately and then bringing them together on neutral ground to work out an agreement. Mediation UK's Survey of Community Mediation Schemes (op cit, UK, 1995) showed that in only 27% of cases was 'direct' mediation used where the parties meet face to face. The most common way in which cases were dealt with was by indirect or shuttle mediation where the mediators meet both

parties separately and act as a go between. In a further 27% of cases there is work with only one of the parties.

40. The identification of stages in direct mediation has been well documented (Folberg & Taylor, op cit; Moore, 1986; Cameron, 1988; Mediation UK, 1996a, op cit). Authors differ as to the number of stages involved but all include the following steps:

- introductions and establishing ground rules
- story telling; each party has a chance to state their view without interruption
- discussion of facts, questions
- generating options and building an agreement
- agreement and writing a plan
- implementation and review.

41. Quine, Hutton & Reed (1990) outline different models of direct mediation involving the mediators in meeting the parties separately before bringing them together or conducting the whole process with everyone together. It is usual, especially in direct mediation, for mediators to work in pairs.

### **Role of the mediator**

42. What do mediators do to achieve agreement? Thoennes & Pearson (1985) have identified certain objectives that need to be met:

- providing information about mediation
- establishing ground rules
- gaining a commitment from the parties
- establishing rapport
- maintaining control of the pace
- identifying the full range of problems
- clarifying issues
- focusing on the most relevant issues
- promoting open, honest communication
- ensuring both parties feel listened to and understood
- balancing power between the parties
- reducing tension and anger
- identifying resources for a solution
- ensuring that parties feel responsible and ready to accept the settlement.

43. In an early British study of the community mediation process Quine et al (op cit) identified a number of key elements in the mediator role:

- not taking sides
- careful listening to and validation of what disputants say
- attention to and validation of each disputant's feelings about the situation
- management of the session in relation to agreed guidelines
- a capacity to keep working despite uncertainty about the outcome
- a commitment to letting the disputants find a resolution (or not).' (ibid, 65)

44. Kressel & Pruitt (op cit) have categorised the range of possible mediator interventions into reflexive, contextual and substantive. Reflexive interventions are those which enable the mediator to start work with the parties. They include gaining entry, building rapport and deciding which tactics are most appropriate for resolving the dispute. Contextual interventions involve:

'the mediator's attempts to alter the climate and conditions prevailing between the parties so as to facilitate mutual problem solving and thus minimize the role of the mediator in developing a solution.' (ibid, 191)

45. Substantive interventions address the core issues of the dispute and include helping the parties assess possible outcomes, exploring areas of compromise and assisting in writing the agreement.

46. These categories also vary along an assertive-passive dimension. Contrary to the view that mediators exert little influence on the parties, Kressel and Pruitt's review of the literature suggests that they can act assertively and that this can often lead to a successful outcome.

47. In their study of divorce mediation Thoennes & Pearson (op cit) found that the ability of the mediator to facilitate communication between the parties and to provide clarification and insight had more impact on a successful outcome, as measured by degree of settlement and willingness to recommend mediation, than the nature of the dispute and the disputants.

48. Carnevale et al (op cit) have identified what mediator behaviours are associated, rather than causally linked, with success or failure as defined by the mediators themselves. Successful outcomes are associated with:

- developing rapport
- keeping negotiations focused on the issues
- expressing pleasure at their progress in negotiation
- avoiding taking sides
- discussing the interests of all parties affected by the dispute.

49. While Lim & Carnevale (1990) suggest men are more forceful in their use of tactics, the gender of the mediator does not appear to effect the outcome.

50. The issue of how much pressure mediators apply has been taken up by Dingwall and Greatbatch (1993) in their research on family mediation. While mediators may present themselves as neutral, Dingwall & Greatbatch assert that they encourage some outcomes while resisting others. Welton (1991) argues that it is perceived impartiality that is important and that mediators have little control over these perceptions.

51. Some researchers have concentrated more on the ways mediators have expressed their role. Kolb (1985) states:

' Instrumental tactics cannot be understood or evaluated for efficacy without attention to the expressive ways in which the process is managed.....to neglect how mediators manage impressions of themselves is to miss a significant component of strategic

behavior, for these expressive tactics are an essential part of what it means to be a mediator.' (ibid, 25)

52. Kolb cites ways in which mediators behave which give the impression of authority and professionalism which enable the parties to think positively about a settlement.

## **METHODOLOGICAL ISSUES**

53. Despite the research interest in mediation, especially in the USA, the results of many studies remain inconclusive as to which mediator behaviours lead to successful resolutions. Kressel & Pruitt (op cit) discuss the five main deficiencies in methodology. First, the range of disputes studied has been too varied to obtain consistent findings. Secondly, researchers need to assume that mediator behaviours are dependent on the circumstances in which they are practised.

'This approach starts with the assumption that mediator activities that are highly effective under some conditions will be highly ineffective under others.' (p.194)

54. Dingwall & Greatbatch (1993) refer to this issue in their debate with Roberts (1992,1994) concerning research into family mediation. They go on to argue that one of the most problematic areas for mediation research has been the failure to ensure that 'we are looking at the same phenomenon each time we try to study it.' Thirdly, attention to the interventions of mediators has been too limited and different studies have focused on different behaviours highlighting the need for an agreed schema of mediator interventions. Fourthly studies have relied on the retrospective reporting of the mediators themselves and not on direct observation. Lastly there needs to be more focus on the timing of interventions and on the behaviour of the parties if we are to understand the effectiveness of mediator behaviour. Dingwall & Greatbatch (op cit) have argued that the tool of conversational analysis is a more effective way of capturing the dynamics of the interaction than relying on field notes of observations.

## **IMPLICATIONS OF REVIEW FOR THIS STUDY**

55. Previous studies have drawn attention to a number of issues and problems in the practice of mediation and in conducting research in this area. In developing our methodology, and in considering the way forward for future studies, we have adopted the approach that in order to understand and evaluate mediation it is necessary to have access to observation of practice. However, it is acknowledged that there are difficulties in obtaining a good bulk of this type of material to provide the basis for analysis and evaluation generally in the mediation field. In developing a conceptual framework for the analysis of practice we drew upon established models of describing mediation practice (eg Folberg and Taylor, op cit), and critiques of practice and evaluative studies cited above. This enables us to locate the experience of the schemes, and in particular Community Mediation Dundee, within the wider context of the mediation movement.

### **3 – HISTORY AND DEVELOPMENT OF THE SCHEMES**

56. In this chapter we chart the development of the three schemes. We look at the background and expectations of the schemes together with their funding mechanisms and management structures. Issues for each scheme are highlighted and finally the common themes are summarised.

#### **METHOD OF DATA COLLECTION**

57. Material for this section is drawn from a variety of sources: background information produced by the schemes themselves, copies of funding applications, management committee minutes, annual reports, statistical records, interviews with members of management committees or steering group and with the co-ordinators where applicable as well as interviews with actual or potential referral agents. During the course of the study the Dundee scheme was evaluated by Dundee City Council and material from the subsequent report has also been utilised.

58. The three schemes we examined were located in Dundee, Glenrothes and Livingston. All were relatively new with Dundee being the longest established (1994), Glenrothes having run for just over a year (April 1996 - August 1997) and the Livingston scheme not operational at the time of the study. While each was at a different stage of development all the schemes were facing a precarious future due to funding difficulties. The development of the schemes has coincided with the 1996 local government reorganisation and consequent cuts to voluntary sector budgets in general. This picture was further complicated in the case of Glenrothes and Livingston whose actual or potential funders were the Development Corporations responsible for setting up the new towns. These were winding down and transferring their responsibilities to the local authorities at the time of the study. It was not surprising therefore that the schemes were affected by uncertainty and insecurity.

#### **COMMUNITY MEDIATION DUNDEE**

59. The Dundee scheme, along with a similar service in Edinburgh managed by Sacro, was the first community mediation service to be established in Scotland.

##### **Background**

60. The scheme originated as a project of the Whitfield Parish Kirk Session. The church had first made an application for Urban Aid monies to support a community care service which included a mediation post. This application was unsuccessful but the group were advised to contact Dundee District Council to develop the mediation aspect of the proposal further. A new proposal to set up a community mediation service in Whitfield and extending to other community regeneration areas in Dundee was submitted to the Urban Programme in 1992 and again a year later. Funding was finally awarded in 1994 for a period of two years with the condition that future funding would be 'dependent on the uptake of the service and the general reaction to the service from the communities where it is targeted'. (Background paper presented to public meeting 25.4.95).

61. A public meeting was called in April 1994 to adopt a constitution and form a management committee. Staff were appointed in November 1994. The office was based in Whitfield Parish Church.

## **Expectations of scheme**

62. The Whitfield area of Dundee was an area of great social need, designated a social priority area, and undergoing radical redevelopment. In formulating their proposal for a service the steering group outlined a number of key principles. Community mediation was seen by the Whitfield Church minister to have a role in rebuilding the community by facilitating neighbour relationships and preventing disputes from escalating. Using the typology of Harrington & Merry (op cit) this scheme could be viewed as a social transformation project. The empowering of the community was to be achieved by the intervention of a neutral third party who would be locally accessible and could help people resolve problems in an informal, non-threatening way. A close liaison was envisaged with the council housing department to which neighbour disputes are often referred.

'The work of mediation is essentially complementary to the housing function, in that it aims to deal with the relationship difficulties inherent in the conflict, leaving the housing agency to deal with any aspect of the matter that is more explicitly their responsibility.' (Draft Urban Programme application).

## **Management Structure**

63. The management committee was elected from the original steering committee comprising representatives from Whitfield Church together with other key agencies: the police, housing, social work and environmental health. This was a useful composition at the start of the scheme but it later ran into problems when officials found it difficult to commit their time on a regular basis to attending meetings. The committee now includes representatives from the volunteer mediators, which it is felt, has improved communication between all levels of the organisation.

## **The Mediators**

64. During the period of the study there were sixteen trained mediators. The mediators come from a variety of backgrounds and mostly live in the Dundee area.

65. All the mediators have been through a training and assessment programme based on material produced by Mediation UK and led by an external trainer. This involves 38 hours work mostly conducted over two weekends where the volunteers role play mediation sessions and receive feedback on their performance.

66. Once they are ready to offer a service the mediators work in pairs. This gives the opportunity for immediate debriefing following a mediation session and also enables each person to evaluate and give feedback on their partner's practice. In addition, as most of the work is conducted in the evening, it is viewed as safer for two people to visit the parties together.

67. Mediators are expected to receive monthly support and supervision from the co-ordinator, although this is difficult to achieve in practice. There are also monthly meetings for mediators which have a training function together with occasional meetings for mediators, staff and the management committee.

## **Operation of service until February 1997**

68. The service started with three staff: a Co-ordinator and Assistant Co-ordinator, both full time, and a part time administrator.

69. In June 1995 the service moved from Whitfield Parish Church, which was seen as offering unsuitable accommodation, to city centre offices.

70. With a funding agreement lasting only two years the scheme was under some pressure to prove itself. Establishing an entirely new service such as this takes time and referrals to the scheme were not as plentiful as staff and the management committee would have wished. A number of reasons have been put forward by those involved with the scheme to account for this low referral rate.

71. Firstly the scheme had to convince potential referrers and the community that mediation was a worthwhile option in resolving neighbour disputes. Mediation was not a concept that was familiar or a method that people had experienced.

72. Secondly there was a specific difficulty in gaining referrals from the local authority housing department. While there had been good liaison with housing officers at a local level there had been little direct contact with senior housing managers during the planning and setting up of the scheme. Most of the negotiation with the housing department had been conducted by the Council's Urban Programme Officer in relation to the application for Urban Aid funding. This lack of contact meant that the key people who could influence the referral rate were not familiar with the aims and methods of the scheme.

73. Thirdly the change of premises at an early stage of the scheme's development proved costly for referrals. Although the scheme retained a weekly presence in Whitfield Church its visibility in the local community was reduced while at the same time efforts had to be directed into promoting the scheme at a different base and offering a more extended service within the city. The slow rate of referrals led to some difficulties. For example the mediators felt frustrated that they had been trained but were not being utilised and some left the scheme.

## **Recent developments in the scheme**

74. In February 1997, the Assistant Co-ordinator resigned her post. She was not replaced because of doubts about funding for the next financial year. From that point, the Co-ordinator took on responsibility for managing the casework. During this period a number of problems arose in relation to case management. The main problems for practice were that referrers were not being kept informed of what was happening to cases, and that a number of referrals had simply been not logged and were lost. These problems were exacerbated by the recording practices which did not log the substance and progress of cases. There had been no system for tracking cases. Since the departure of the Co-ordinator from the project, case management has been undertaken by the administrative staff, except for a brief period in August/September when an Acting Co-ordinator was employed part-time. Subsequently the Administrator took on co-ordination of the work as part of her role. A tracking system has now been introduced.

75. From February 1997 until August, therefore, the scheme operated without effective operational management. It took several months before the Management Committee fully recognised that there were difficulties, after a specific complaint by one referral agent.

76. Problems in the operational management of the scheme had coincided with a period of conflict within the Management Committee which involved volunteer mediators' concerns about the scheme, particularly around communication, lack of supervision and failure to promote the scheme. This conflict led to the resignation of the Chair of the Management Committee in February 1997.

77. Until November 1997, the scheme continued to be managed operationally by the Chair and the administrative staff, with the administrative officer increasing her hours, and taking on an Acting Co-ordinator role. However, it should be noted that she had not been given the task of supervising the volunteers, a task which had not been fulfilled since August/September 1997. The scheme has appointed a new Co-ordinator who has experience of working a community mediation scheme.

78. In the financial year 1996/97 the scheme's revenue budget was £74,365. Funding came from the Dundee City Council's regeneration monies. The Council then granted the scheme a six month extension until September 1997, pending an evaluation of the service. As a result of the evaluation extension revenue funding of £37,618 was approved for a period of six months, from 1 October 1997 to March 1998 from the Dundee Partnership's Priority Partnership Area allocation. In addition a further year's funding of £75,235 from 1 April 1998 to 31 March 1999 was awarded. The extension funding of eighteen months was subject to a number of conditions including: a review of the original objectives, instituting management controls so performance could be measured, developing a marketing strategy which would raise the profile of the scheme and improving accessibility by providing an outreach service.

79. The funding discipline requires that service is only provided in those areas covered by the PPA, in the case of Dundee about 15% of streets of the city. In reality, it is said that the actual area covered is less, because not all the addresses of each street are necessarily covered by the PPA. This creates difficulties for the scheme at a time when it needs to build up a broad base to generate a healthy level of referrals.

80. The scheme has appointed a new Co-ordinator who has taken on a number of changes and reforms of policy and practice.

## **Issues for the scheme**

### *Referral rate and work flow*

81. The total number of referrals for each year is given below:

1995 (Feb-Dec)	14
1996	49
1997 (Jan-Sept)	54

82. During the first nine months of 1997 three cases went to direct mediation representing 5.5% of referrals in that year. This compares to the 1995 Mediation UK national survey of

community mediation schemes (op cit) which found 26.49% of cases going to direct mediation. Disputes can of course be resolved without the need for a face-to-face meeting or parties may feel better able to cope with a dispute themselves having talked the problems over with the mediators. However, if one of the main aims of the scheme is to bring parties together then the Dundee scheme is achieving this in a tiny proportion of cases. This is exacerbated by the fact that the overall rate of referrals is not sufficient.

#### *Awareness of mediation*

83. The need constantly to publicise the scheme is an issue for all community mediation schemes (Dignan et al, op cit) which are trying to educate the public and increase their understanding of mediation in general. This view was echoed by an ex-chair of one of the management committees in our sample:

'...[O]ne of the difficult things about mediation is that people don't really understand it. By people I mean all sorts of people both in official organisations and the local folk. People latch on to it fairly quickly once they get in closer touch with it but I think at first contact it's an alien thing which is difficult to understand...'

84. The Dundee scheme has put some effort into this area having made a video for Tayside Police explaining the idea of mediation and how it works. Staff from the scheme have also conducted information sessions with the police to increase their awareness and one of the mediators conducted a piece of work in early 1997 to raise the profile of the scheme. However, it is still the case that the scheme needs to become better known to potential referrers in order to both sustain and develop the work. The evaluation report by Dundee City Council recognised that the market for community mediation remained relatively untapped.

'The potential service users still need to be cultivated and this will take considerable effort and activity that has not yet been fully exhausted.' (Dundee City Council,

85. In order to get their message across schemes need to speak to a range of audiences; the police, housing and environmental health departments and the public at large. This takes an investment and re-investment of time. Furthermore achieving a consistent referral rate within an agency was identified as an issue by the chair of the management committee;

'...we find that we're getting some referrals from certain housing officers but there are other areas that don't seem to have quite cottoned on ..'

#### *A centralised or decentralised service?*

86. In line with the funding criteria for the Urban Programme the scheme had to target Priority Partnership Areas (PPAs). The Steering Group doubted from the start whether Whitfield on its own could generate enough work to sustain the scheme and intended to develop the service to other social priority areas in Dundee. As can be seen from the location of the referrals work now comes from across the city.

## Geographical Service Volume

Central	11%
Lochee	10%
Ardler	1%
Kirkton	9%
Whitfield	38%
Happyhillock	8%
Unknown	23%

(Dundee City Council, op cit, 12)

87. Having a base in the centre of Dundee has meant that the scheme has a distant relationship with the communities it is aiming to serve. This is exacerbated by the lack of involvement of local people in the management and operation of the scheme.

### *Involvement of local people*

88. If, as has been stated earlier, community mediation is concerned with the regeneration and greater cohesion of neighbourhoods then the involvement of local people in the management and operation of the service is crucial. This has proved problematic for the Dundee scheme.

89. The management structure grew from the original steering group which relied heavily on representatives from key agencies. As the scheme developed it became clear that the membership of the group needed to change and involve non-officials.

90. The management committee is considering how the scheme can be promoted in the PPA's by, for example, developing an outreach service. However, it is difficult to see how this could be achieved within the current staffing resources.

## **Summary**

91. The Dundee scheme developed in concept from a primarily neighbourhood to a city-wide service, creating tensions in its identity and physical location. It had a shaky start, being unable to generate a healthy referral rate. This was compounded by failures in management which have led to some shortcomings in practice. These were eventually flushed out and have been dealt with. The scheme has now instituted a range of reforms to its practice and procedures, and is now in a position to meet its potential.

## **GLENROTHES NEIGHBOURHOOD MEDIATION SERVICE**

### **Background**

92. In contrast to the Dundee Scheme the service in Glenrothes arose from a specific neighbourhood dispute that achieved local and national notoriety. A particular family was dubbed "the neighbours from hell" in the media. The family was involved in vandalism, threatening behaviour, noise and generally terrorising the neighbourhood adjoining St. Luke's Episcopal Church in Glenrothes. In September 1994 a member of the family was found guilty of culpable and reckless driving following an incident when he had hit a young woman in a stolen car. The woman sustained serious injuries involving the amputation of one leg. The

family were finally evicted in 1995 from their Glenrothes Development Corporation (GDC) house for persistent anti-social behaviour and failure to adhere to tenancy obligations. It was reported in the local press (Glenrothes Gazette 29/10/94) that in 1993 the police received more than 50 complaints about the family with more than 100 reports going to the Reporter of the Children's Hearing. A seven day eviction hearing cost almost £30,000 with the total costs of dealing with the case estimated at over £100,000. The Glenrothes Gazette (8/12/94) reported the local MP, Henry McLeish, calling for talks with all the agencies involved and saying, ' We have to ask ourselves why, in a modern society, things had to get to this stage.'

93. In the face of these events, Housing Department staff who were aware of the imminent demise of the GDC, wanted to institute a positive legacy for the community in the future. They had heard of the Dundee Community Mediation scheme and went to visit. Impressed by the involvement of the church they were convinced that mediation had to be offered by an independent organisation and that it should involve people from the community as mediators.

94. Towards the end of 1994 local churches in Glenrothes were approached by the Housing Department of the GDC and asked if they would join together in setting up a mediation scheme in the town. A small group met early in 1995 to look at the possibilities of such a scheme under the chairmanship of a local housing official. The group included the minister of St. Luke's Episcopal Church which is located on the edge of the area in which the trouble had occurred. After two meetings it was agreed to investigate this further on a more formal basis and a Steering Committee was set up under a new chairman but with housing officials remaining part of the group. Representatives from the Police and the Social Work Department were also invited to become members of the Steering Committee.

95. A start-up grant was awarded by Glenrothes Development Corporation to enable the committee to carry out preliminary work. The committee members discussed possible models of organisation, finance and the geographical area to be covered. In this work they made extensive use of the material provided by Mediation UK. Members of the committee also visited other schemes in Dundee, Bolton and Manchester.

96. In order to publicise the proposed service and to encourage the involvement of local people an open meeting was held on 1st June 1995 chaired by the local MP, Henry McLeish. About fifty people attended the meeting. There was general agreement that there was a need in the town for some form of mediation between neighbours, and the meeting gave support to the committee to set up a scheme in Glenrothes.

97. A management committee was subsequently formed from the nucleus of the steering group together with those who had expressed interest at the open meeting.

## **Funding**

98. The initial plan was to set up a three year project employing two staff and operating for five days a week. In September 1995 the scheme received a grant of £10,500 from the Glenrothes Development Corporation (due to wind up in December 1995). This represented a third of the budgeted running costs for the first year minus the set up grant. This was subject to Kirkcaldy District Council and Fife Regional Council giving sufficient financial aid for the scheme to proceed. It was here that the scheme ran into serious difficulties.

99. The application to Fife Regional Council coincided with an application from Sacro to set up a community mediation scheme for Fife, to be financed through the Urban Programme and requiring the council's sponsorship. Both the Regional and District Councils were unable to support the Glenrothes scheme financially and the management committee then had to decide whether to wait until the next financial year, and try again or set up a smaller scheme for a much shorter period.

100. It was decided to run a full time scheme for six months to demonstrate effectiveness and to use the money from the GDC rather than have to hand it back. The service was based in St. Luke's church. In February 1996 Fife Regional Council seconded a social worker to the scheme to assist in the setting up of the office and the appointment of staff. In April 1996 a full time Co-ordinator started work who was herself a trained mediator with experience of community mediation.

101. During the early part of the study the scheme was operating on a month-to-month basis with a Co-ordinator and an administrator, both employed on a part time basis. Small amounts of money had been received from the church and others but applications to major funders had all been unsuccessful. Serious consideration was being given to the future of the service and whether it could survive. This culminated in a decision to close the scheme by August 1997 when funding ran out and it appeared clear that the scheme was not going to attract any further significant finance. Referring agencies were informed of the decision and volunteer mediators were put in touch with Sacro's Fife Community Mediation scheme. The management committee has since disbanded although the assets of the organisation have still to be wound up.

### **Expectations of the scheme**

102. Members of the management group reported that the scheme was intended to fulfil a number of functions:

- to prevent anything like the notorious Glenrothes case happening again
- to provide a service for neighbours in dispute who, otherwise would not receive a service
- to cover the whole town of Glenrothes and not just the area where trouble had occurred
- to encourage self help and growth.

### **Management of the scheme**

103. The management committee included two Church ministers and other members of local churches together with representatives from the Police, Social Work and the Glenrothes Federation of Tenants and Residents Association.

'The people that are on our management committee are local but they are professional locals and I really wanted to get more people who live here and need something like mediation to get involved in running it.' (Co-ordinator)

104. Volunteers were not officially represented on the committee although one member happened to also be a mediator. There were different views as to whether this would be beneficial or not.

'This is usually quite a thorny point with mediation schemes, whether or not to have mediators on the management committee, because it puts the Co-ordinator in quite a difficult position of being a supervisor on the one hand but being employed by the person they are supervising.' (Co-ordinator)

105. This was not an issue that those involved in the scheme had formally discussed, but there was general agreement that it was worthy of exploration. Members of the management committee were aware of some frustration on the part of the volunteers that they were not doing enough to secure the future of the scheme but pointed out that their time was very committed and that the constant battle for funding had been 'soul destroying'. There was a recognition that more communication between mediators and management committee would be helpful.

### **The Mediators**

106. Seven volunteer mediators were trained through the scheme. All except one are from Glenrothes. There is a good mix of age and gender. All the mediators were unemployed at the time they approached the scheme and all have subsequently found work or are studying.

107. The training was organised and delivered by the Co-ordinator, herself a trained mediator. Much of the material was taken from Mediation UK's training manual and the training organised by the Dundee scheme.

108. The volunteers met on a monthly basis and had regular phone contact with the Co-ordinator. Constraints of time prevented individual face-to-face support and supervision.

109. Initially mediators worked as a trio, both during home visits and in face-to-face mediation, so they could further develop their skills and feel more confident. Having gained in experience they then operated in pairs. Face to face sessions were managed by one mediator acting as a receptionist while two others were involved in the mediation meeting.

### **Referrals**

110. During its brief history the scheme was referred 17 cases. Of these 8 came from Housing, 3 from the Police, 1 from a Councillor and 5 were self referrals.

111. The main referral agency to the scheme was the local authority housing department. One of the Housing Area Managers was instrumental in establishing the scheme and played a role in disseminating information about the scheme to colleagues.

### **Issues for the scheme**

#### *Funding*

112. The scheme has been dogged by funding difficulties from the start. While there was a high level of verbal support for the scheme this did not translate into funding. The management committee therefore spent a great deal of time making and chasing funding applications.

113. The development of the Sacro scheme at the same time undoubtedly effected the ability of the Glenrothes service to attract significant funds from the same local authority, Fife Council. The consequence was that the scheme existed on a hand- to-mouth basis which could not be sustained in the long-term.

#### *Empowering the community*

114. The Glenrothes service arose from difficulties in the community and a general desire on the part of both the authorities and the local people to construct a more positive future. The Steering Committee were determined to consult the community and successfully managed to involve local people in the design, management and delivery of the service. This poses a real dilemma for small scale organisations who may be strong on community involvement but are weak when having to compete for funds with much larger, well known professional agencies. The reliance on already heavily committed management committee members to lobby for resources also put the scheme at a disadvantage when staff were also part time and not available to take on this task as well as running the service.

115. One of the distinctive features of this scheme was that it was aiming to provide a service for the whole community of Glenrothes:

'...because our scheme is for everybody in Glenrothes, regardless of who their landlord is, whether they are an occupier or what street they live in, I thought we had a unique opportunity to show that mediation is for everybody. Every other scheme in Scotland is banned...by these rules about areas of deprivation and its really something that annoys the hell out of tenants' associations because it looks like its only council house tenants that need mediation. It's difficult to get over that barrier with tenants. That's just the way the government wants it. It's not how mediators want it or see it.'  
(Co-ordinator)

#### **Summary**

116. The Glenrothes scheme was initiated by a combination of official response to a perceived problem and the enthusiasm of local church activists. A useful initial grant enabled a service to be successfully established. However, the passing of the Development Corporation's functions to Fife Council, and the emergence of another bid for funding by Sacro for a scheme to cover a wider geographical area, weakened the scheme's bidding position with the local authority, and led to its demise. It is therefore impossible to assess whether the practice and management of the scheme could have been effective in the longer term.

### **LIVINGSTON & DISTRICT COMMUNITY MEDIATION SERVICE**

#### **Background**

117. This scheme was set up in September 1995 by local people who had been trained in community mediation skills. The impetus for the training had come from the Foundation for Community Leadership Development (FCLD). A paper giving general information about the scheme describes FCLD as ' an Edinburgh based charity that fosters the development of effective grass roots leadership by the provision of inter personal skills training and organisational development consultancy.' In late 1993 the FCLD linked up with the

Livingston Federation of Residents & Tenants Associations to make an approach for financial support to Sun Microsystems who have a large factory in West Lothian. The grant from Sun enabled the FCLD to organise and pay for the training.

118. A large number of community organisations were contacted with the result that ten people participated in the training, the majority being local residents. Once the training was complete, a steering group was formed with a view to establishing a community mediation service for Livingston extending gradually throughout West Lothian. It was envisaged that this would be staffed by a full time Co-ordinator and a part time administrative assistant and would start to operate from the 1st April 1996. Premises were made available to the scheme in a community resource centre.

119. Originally the steering group decided to seek funding from the charitable sector. They were not optimistic about securing finance from statutory bodies for a number of reasons:

- voluntary organisations' budgets were being cut as a result of local government reorganisation
- Livingston Development Corporation was being wound up and could not commit itself to any future schemes
- the Urban Programme, a major source of funding, was changing and targeting a relatively few areas of extreme deprivation linking these to local authorities' regeneration strategies.

120. The steering group was successful in gaining a grant from the Tudor Trust of £25,000 over a two year period provided matched funding could be obtained. The Scottish Housing Association's Charitable Trust also gave a start up grant of £1,000. The problem then arose as to where the matched funds would come from. This has proved the sticking point for this scheme. Funding difficulties made it impossible to launch the service as originally planned. In late 1996 the steering group approached the local police to ask for their assistance in stimulating interest in the scheme and securing funding. The police were instrumental in arranging a meeting in October 1996 of interested parties in West Lothian Council together with representatives from housing associations and Sacro which had experience of running a community mediation scheme in Edinburgh. The steering group then started to discuss with Sacro how they might form a partnership. A proposal was drawn up for a West Lothian Community Mediation Service based in Livingston and managed by Sacro. Despite an interest in the scheme from both the officers and the members the council has been unable to support the venture financially.

### **Expectations of scheme**

121. In their submission for funding the steering group identified a number of benefits resulting from a community mediation service:

- preventing the escalation of conflicts by catching them at an early stage
- fostering individual self help by helping people to come to their own solutions
- promoting social cohesion by developing skills in the local community
- contributing to a process of regeneration in disadvantaged areas
- reducing stress and ill health among individuals.

122. It was envisaged that there would be close collaboration with the key agencies in the area particularly housing and that mediation would come to be seen as a 'natural fall back' rather than a remedy of last resort.

### **Referrals**

123. In order to practice their skills and develop a pilot service the volunteer mediators publicised the service and took on a limited number of cases during 1996. They established systems for processing referrals and agreed from the outset that, as they all lived in Livingston, they would not mediate with any party they knew or with anyone living in the same area.

124. Eight referrals have been received by this scheme, six of which came from non-statutory housing agencies. The volunteers did not conduct any face-to-face meetings.

### **Issues for the scheme**

125. This scheme was successful in attracting some funding, but not enough to make it viable. Unlike the other schemes they undertook training and took referrals before money for a service was secure. It was therefore trapped in a state of limbo for two years. The steering group was reluctant to promote the service too heavily because they feared that if they had too many referrals they would not be able to manage. As a group of local people who came together to provide a service to the community they had no official backers. The group decided that the involvement of Sacro would lend them some credibility and experience particularly when seeking funding. The volunteers were unable to launch the scheme as they had originally intended.

126. Potential, or actual overlap with other agencies, particularly housing departments can be a stumbling block for emerging mediation schemes. This was highlighted in the case of the Livingston scheme:

'I think what's been very frustrating is the fact that the local council .....were actually bringing professional trainers in costing x hundreds of pounds to train housing staff in mediation...' (member of steering group)

127. Housing staff from West Lothian Council confirmed that they had, in the last year, trained all their housing officers in the principles of mediation and had two staff who were trained mediators. In their view it would not be in their interest to refer tenant disputes to an external organisation. Failure from the start to involve housing staff and recruit them as allies has resulted in the scheme being stranded and the idea of mediation being taken over by a more powerful statutory agency.

### **Summary**

128. The Livingston scheme arose from a combination of an interest in locally active members of the community and the initiative of a charitable training body. This led to a successful bid for start up training. However, the gambit of establishing a trained group of mediators who were willing to take on a small number of cases – as it were as a demonstration of the usefulness of mediation – had not, at the time of the study, succeeded in persuading the local authority to provide matching funding for a large charitable grant. The

offer of assistance by Sacro in the provision of management support did not tip the balance in favour of the scheme, partly because the local authority was pursuing a strategy to set up an in-house service. Nevertheless, the members of the scheme are still seeking funding from the local authority for development of community mediation in Livingston, with the support of Sacro.

## **GENERAL ISSUES**

### **Collaborative development of practice between community mediation schemes**

129. Community mediation is a discrete area of mediation/ADR practice. The development of this work depends upon the quality of relationships between all those who are involved in the development of the practice. Agencies such as Sacro which operate more than one scheme are able to offer in-house support. However, all schemes need to develop external reference groups for support. The re-emergence of a networks for community mediation in Scotland, in particular the Scottish Mediation Network and the Scottish Community Mediation Network, is therefore to be welcomed and encouraged. Mediation UK has a major part to play in developing standards and supporting schemes through a variety of means including organising opportunities for practitioners to communicate with each other.

### **Perceived needs of referral agents**

130. One of the selling points for mediation services was that they could reduce pressure on statutory agencies by dealing with some of their inappropriate referrals and helping to alleviate their increasing workloads. For example, one Environmental Health Officer remarked on the increase in noise complaints. This, together with a heightened public perception of anti- social behaviour and a demand that local authorities should have strategies for dealing with anti-social tenants, has placed additional demands on the statutory agencies. However there was some scepticism from agencies about whether mediation could make a significant difference to their workload and whether in fact there might be duplication of effort.

'I don't think we're talking about a large enough number of complaints that they would deal with.....so it's a relatively small amount of saving that would provide for us...'  
(Environmental Health Officer)

131. None of the schemes engaged in any formal market research strategy. This is not surprising in the light of the absence of funding for this. The conventional approach to service development, of persuading a funder to provide resources to try out an idea in practice, does not give a place to feasibility studies. There would be merit in funding bodies considering feasibility studies which can identify viable markets for new products on the lines of Mackay and Moody's study (1994) of the scope for diverting neighbourhood disputes from prosecution.

132. As can be seen from the table on Referral Sources,<sup>4</sup> the main referral agencies for the Dundee scheme were the Police, the Housing Department and Environmental Health Department. This seems to reflect the investment of the scheme in selling the concept to these agencies. However, it would appear that there is scope for trying to identify other sources of

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<sup>4</sup> See para 158 below.

referral, for instance, from Social Work, schools, further and higher educational establishments and GPs.

### **Promoting an awareness of community mediation**

133. For the Glenrothes and Livingston schemes which were surviving on very little, or no money at all, the promotional work had major implications for resources.

'I haven't been able to get the kind of network going that I would have liked.....getting our name known so that we're the first port of call rather than the call of desperation..' (Co-ordinator, Glenrothes)

'There's not enough of us and we need a worker to go out and seek people and seek referrals.' (Volunteer, Livingston)

134. In the case of the Livingston scheme there were fears that if the service were promoted too heavily volunteers would be inundated with referrals and would not be able to cope.

135. Promoting mediation was not only important in terms of securing referrals but also in attracting funders. Some agency staff had learned about mediation from attending conferences or hearing about other schemes.

'The thing I was quite impressed about was that they (Sacro Edinburgh scheme) were claiming to have over 50% success rate and I thought that's more than we could claim for ...domestic noise complaints.' (Environmental Health Officer)

136. In the case of the Dundee scheme, the issue of promotion was problematic. Active promotional work as a priority was not seen to be a priority, reliance being placed rather on developing the reputation of the project by word of mouth report in the community (Dundee City Council, op cit). Whilst this might work in the original small target area of Whitfield, this could not work for the city-wide area.

137. In one area the Dundee was very effective in promotion. This was in recruiting mediators. Its strategy of placing an advertisement for volunteers in the job advertisement columns in the regional newspaper, and its message of seeking to recruit people for a professional task, made a very positive impact on applicants.

### **Location of community mediation in the voluntary sector**

138. An important issue for those involved in all the schemes was their independence.

'I think one of the important aspects is that it's an independent person, somebody who's got no interest or who is totally non-judgemental. They're not working for the Council they're just volunteers, they're just ordinary people.' (Steering Group member)

139. Furthermore, the principle that parties' participation in the process should be entirely voluntary and the idea that community mediation has an empowering function in local areas all combine in suggesting that these schemes should be managed and delivered in the

voluntary sector. However, the experience of these schemes demonstrates that unless they have financial backing from local government they struggle to survive. In this regard they are no different to other small service-providing voluntary organisations. Volunteer managers, whose time is often limited, are putting most of their energy into raising funds.

140. Whether the location of community mediation in the voluntary sector lends credibility to schemes or not is a matter of debate. Evidence from this study is mixed. The Livingston volunteers certainly suffered from not having any official backing whereas in Glenrothes staff from the Development Corporation took the view that any scheme needed to be independent of the authority. A respondent commented that this might help in giving the scheme a more approachable image in the eyes of the public. Certainly in some areas community mediation schemes are located within local authority departments. While this may offer greater financial security and credibility, the danger is that conflicts of interest may arise and that referrals may be restricted, for example in Livingston, to council tenants.

## **CONCLUSION – COMMUNITY MEDIATION AND POLICY DEVELOPMENT**

141. The development of community mediation by these schemes has reflected the attempts of grass roots groups to respond to actual needs and problems in their own communities. It has encountered many of the difficulties associated with the development and management of small scale voluntary organisations, and this is reflected in the restrictions and constraints observed in this study. However, these limitations are not a good measure of their significance as social policy initiatives. The objectives of these schemes fit very closely with current policy concerns to improve order and civility in neighbourhoods and to provide speedier and more cost effective ways of dealing with civil disputes. It is therefore important to see how this approach fits alongside these policy objectives.

142. The Crime and Disorder Bill provides two measures for enforcement of civility, Anti-Social Behaviour Orders (ASBOs) (s 19), and new powers for seizure of noise-making equipment (s 24). Section 19 gives the responsibility for seeking ASBOs to the local authority. The role of the local authority raises some important questions which have a bearing on the development and practice of community mediation.

143. It is unclear how this new function of application for ASBOs is to be integrated into current local authority functions, and how it is to be funded. Further consideration will also be needed on how the restriction of the right to apply for this measure to the local authority will sit alongside a commitment to promote access to justice, and the proposal in the Labour Party Manifesto to establish a community legal service (CLS) (Labour Party, 1997, 33-34). Nevertheless, measures for enforcement of civility are clearly necessary.

144. Section 19 gives the courts unfettered discretion on the imposition of requirements upon those subject to orders. It will be important to ensure that this measure is applied in a spirit of proportionality so that civil liberties are not unjustly compromised.

145. Legal sanctions provide the outer ramparts of measures of social integration and control. However, it will be important to establish how alternative measures can be employed before recourse is had to legal sanctions. It is therefore necessary to establish not only what part community mediation can play in a range of intermediate measures, but also how it will fit in with existing and future structures such as the courts and the CLS.

146. It is possible that mediation services such as community, family and consumer/commercial mediation could be aligned with a community legal service (CLS) and with the courts. The CLS might provide access to referrals for people in dispute over a variety of issues. Courts may wish to have the option of referral to community mediation as an alternative to the imposition of an ASBO, rather as they are able to refer family disputes to family mediation.

147. For community mediation to play an active part in the development of access to justice, it will need to ensure that it has established a clear role for itself in the delivery of justice, particularly in relation to due process. Some issues about the relationship between mediation practice and the legal system are examined in the next chapter. However, the key development issue for community mediation is the extent to which it is visible to policy and funding decision makers, and is perceived to be a credible alternative to more formal sanctions.

148. As well as needing to establish itself as an intermediate measure, community mediation needs to be seen to fit into wider policy objectives and strategies for crime reduction and the promotion of civility. Local authorities have wide ranging responsibilities and powers in this area, from the regulation of anti-social behaviour in their role as landlord or regulator of environmental health issues, as a provider of supervision of offenders on behalf of the courts and the Scottish Office, and in relation to the support of victims through the purchasing of victim support services. Community mediation could be developed as an important component of a comprehensive strategy to promote civility and social integration, to reduce conflict, to deal with some offences which arise in the course of neighbourhood disputes, and to prevent the escalation of disputes at an early stage. It can also assist in resolving difficulties arising between members of the community and the local authority in its role of provider and purchaser of services.

149. The promotion of community mediation can be achieved through the efforts of individual local agencies, such as those in this study, through Sacro, as a national agency which has developed schemes in this field, and through the Scottish Community Mediation Forum. It is important that agencies develop a common view of the nature of the service they are offering, so that Community Mediation is seen to operate on a widely understood set of common principles throughout Scotland.

## **4 – THE PRACTICE OF COMMUNITY MEDIATION**

150. In this chapter we examine the process of mediation primarily as it was practised in the Dundee scheme. We make reference to material from one case worked in Glenrothes, which throws some light on the practice of multi-party face-to-face mediation. We will present the method of data collection for this section followed by an outline of the practice procedures, and examinations of the referral process, the structure and models of intervention, methods and process, issues arising from practice, and finally issues relating to management and training.

151. This account does not purport to be an exhaustive analysis of all the issues which may emerge in community mediation. Rather it presents material which emerged from the accounts and concerns of mediators, referrers and service users, and analyses it within a framework of current practice issues in mediation.

### **METHOD OF DATA COLLECTION**

152. In order to examine the process of mediation we undertook semi-structured and unstructured interviews with referral agents, mediators, and parties. We had also planned to undertake observations of practice, including face-to-face mediation. In the event we were able to observe two visits by mediators to parties. We interviewed 8 referral agents, and supplemented these with telephone conversations with two key staff members to clarify points. We informally interviewed administrative staff. We interviewed the scheme's trainer by telephone. We interviewed 8 mediators (5 female; 3 male), just over half the population of 15 mediators (12 female; 3 male). We interviewed 18 parties (16 from Dundee; 2 from Glenrothes, involving 11 cases (1 from Glenrothes). The original sample of 32 parties in Dundee was derived from the following categories: closed cases; cases where the parties had met in face-to-face meetings; current cases and new cases (some of these latter were already closed by the time of our scheduled visit). The cases were chosen by the scheme staff. We received the names only of those who did not decline to be interviewed. In 5 cases we obtained accounts from both parties in the case, and in one of these we also observed practice by mediators, and were thus able to develop case studies. Interviews with mediators and parties were tape-recorded, and transcribed. Observational visits were tape-recorded. We also examined the records of the cases in which we had interviewed parties. In order to obtain an up-to-date view of new record keeping procedures we also examined the records for new referrals in August and September 1997. One of these cases happened to be a case in our main sample which had been re-opened. We also had access to other scheme documentation.

153. In presenting our data, we have deliberately not indicated any coding reference to parties or mediators in order to prevent any attribution of data by profiling to any individual.

### **OUTLINE OF PRACTICE PROCEDURES<sup>5</sup>**

154. Normally the Dundee scheme takes a referral of one party in a dispute. In the case of Police referrals, both parties are referred simultaneously. The scheme writes to the party to give further information about the scheme, and invites them to make contact if they wish.

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<sup>5</sup> This account is based on practice at the time when fieldwork was undertaken. After feedback from the researchers, the Dundee scheme has made some changes in practice relating to a number of matters raised in this chapter. These are noted at the end of this chapter.

This party is designated Party A. If Party A makes contact, an appointment is set up for a home visit by two mediators. If Party A does not reply or is not in when visited, a further appointment letter is sent, known as a cold-call letter. If Party A is not available at this point, or having been seen, does not wish to participate, the case is closed. If Party A does wish to participate, then a similar approach is made to the other party, designated Party B.

155. In both visits the mediators seek to elicit from the parties their perceptions of the issues, and to recruit them to the idea of holding a face-to-face meeting. If Party B does not agree to mediation, the case is closed. If both parties agree to mediation, but not to face-to-face mediation, the mediators will consider shuttle mediation, involving caucus meetings at the same venue without direct contact between the parties.

156. Either form of mediation may lead to an agreement, which is signed by both parties and the mediators. A copy is sent to both parties.

157. It is prescribed that there should be follow-up contact with parties to monitor the effectiveness of agreements. With some referral agencies, such as the Police and the Housing Department of Dundee City, there is an agreement to inform them of the outcome, but not the content of intervention and agreements. In addition, each user of the service is invited to fill in an evaluation form.

## **REFERRALS**

### **Referral Types**

158. The Dundee City Council Study (p 12) shewed the following distribution of primary referral types and sources from the project's inception (March 1995) until June end 1997:

Referral Types (N = 97)	
Noise	29%
Children	21%
Anti-social	10%
Harassment	7%
Pets	6%
Garden	5%
Boundaries	3%
Relationships	1%
Other	6%
Unknown	12%
	(100%)

Referral Sources (N = 97)	
Police	26%
Housing Department	12%
Envir'tal Health	7%
Scottish Homes	3%
Solicitors	3%
Council Helpline	1%
Others	48%
	(100%)

159. In our own sample the types of case included problems with children 5 (includes Glenrothes case), noise (3), harassment (2), pets (1), boundary (1) other (1). On analysis, the case described as 'other' was in fact a case of racial harassment. The sources of referral were self (4), Police (1, but possibly 2; record unclear), Housing Department (2, includes Glenrothes case), Housing Agencies (2), lawyer (1), employer (1).

### **Suitability of referrals and bars to continuing work**

160. Among agencies which made referrals to the Dundee and Glenrothes schemes, as well as those which would have referred to the Livingston scheme, there was overall consensus about the types of case suitable for community mediation. These included domestic noise complaints, problems with children, pets, clashes of life-style, disputes over parking, litter and boundaries. This list was similar to that which was produced by mediators. One mediator thought that community mediation should also tackle more disputes involving members of ethnic minorities, and that mediation should attempt to deal with multi-party mediation, including work with youth gangs. It was suggested that the scheme should go beyond disputes between neighbours to mediating within communities, and with particular groups such as students.

### **Contra-indications**

161. A number of types of case were seen as contra-indicated. These categories cut across the problem types suggested as being suitable.

162. **Length of dispute:** The main problem was seen as being the length of time a dispute had continued. This can mean that the dispute is beyond the scope of mediation, but this was not always thought to be the case. One party involved in a long-standing and bitter dispute in which he had been charged with assault stated that mediation was still necessary despite all that had happened. Nevertheless there was support from parties and from one mediator for the view that early referral may pre-empt trouble. There were indications that some referrers were referring cases which were already very entrenched, and could be seen to be beyond the scope of voluntary mediation.

163. **Escalated disputes:** A distinction should be drawn between long-standing and escalated disputes. The former may be very bitter, intractable and difficult to settle, not least because the issues in dispute increase, and 'the truth can be distorted'. On the other hand a dispute may escalate very quickly, but may still be susceptible to mediation, as with a street mediation which had arisen over a dispute between two families, but which had engulfed many families in the street. However, it was also suggested by a mediator that if one family with an anti-social attitude was in dispute with the rest of their neighbours, there was nothing to be achieved by mediation.

164. **Mental illness:** Mental illness in one of the parties was seen as a contra-indication. One mediator reported a case in which a party was living in very poor conditions, and that he was clearly not receiving the level of support he needed. It was suggested that a key issue here is the capacity of people who have a mental illness to make an agreement and to keep to it. This is not something which can be judged easily by volunteer mediators, and is clearly a

matter on which they need support. One mediator thought there should be further guidelines in this area, if only about how to refer parties to the appropriate agency.

165. **Criminal charges:** Cases in which crimes had been alleged to have been committed by one or both of the parties also presented difficulties. There was consensus among referrers and mediators that this was a contra-indication, but in one case it appears that the possibility that both parties might drop charges may have been mooted by the Police. The Police indicated that they did not have a firm set of criteria for referral, and that they would not exclude the possibility of referral simply because there had been a charge. The general policy of the scheme is that, if there are criminal charges, referrals cannot proceed to mediation, although in one case mediators continued to be in contact with the parties and were canvassing the possibility of proceeding to a face-to-face meeting after the prosecutions had been dealt with at court. One party did, however, argue that mediation was still needed even before their case did proceed to court, and indeed whether or not it did so. One mediator reported a case reaching a mediated agreement even though a court case was pending. Mediators were concerned that mediation conducted in these circumstances might be seen as part of a strategy by the accused or defender to impress the court. In a letter to one party the Acting Co-ordinator wrote:

'There are very few circumstances where we will not mediate, and one of these is where there are ongoing court proceedings (because the outcome of these proceedings will affect any agreement between neighbours).'

166. The possibility that charges might be dropped is an interesting mechanism for facilitating mediation. It is the basis of Reparation and Mediation diversion schemes. However, it raises an uncomfortable fear that some parties who are not acting in good faith, would manipulate this to compromise the rights of the other party.

167. One mediator suggested that the reason for not mediating in cases where there were criminal charges was that '[w]e cannot agree that you will only do the criminal act once a week instead of four times a week.' However, we would suggest that it is never compliance with the law which should be negotiated, but the invocation of a criminal sanction, the circumstances which may contribute to the behaviour (if any), and the means of settling the insult or injury caused by the offence. We would also suggest that the fact that a party has been charged may itself be a product of the way in which the dispute has presented to the Police. The application of the charge of breach of the peace is somewhat elastic, and it may be that the person charged may be guilty of less than the official victim. Thus mediation focuses not on whether crime is condonable, but rather on the issues arising from a crime having been committed.

168. **Seriousness:** The Police indicated that there were no formal limitations to what could be referred other than what is acceptable to the public, although that must be taken to be read as latitude within the guidelines laid down by the Procurator Fiscal. This view was strongly echoed by one party who had been visited by mediators:

'[The mediators] did what they could, but my problem is that great acts of vandalism, racism and almost violence were committed against me, and I feel these were not being addressed.'

169. This case gave rise to serious concerns about whether it had been appropriately referred.

170. **Allegations of sexual abuse:** A further complication arises when, after referral, an allegation is made of sexual abuse involving, typically, a party and the child of another party. This has implications for child protection policy and confidentiality within the scheme. However, it is referred to here because it is an example of how criminal allegations affect the mediation process. It would be difficult to see how mediation could effectively proceed in a climate where such serious abuse has either been committed or falsely alleged. In one case where this occurred any agreement between the parties would have been worthless if allegations had remained on the table.

171. **Threats of violence:** There was a consensus among referral agents that threats of violence were a contra-indication to referral and continuing mediation.

172. **Substance abuse:** Mediators recognised this as a bar to work, and would not proceed with a session where a party was intoxicated.

173. **Civil proceedings and breach of tenancy:** The issue of outstanding court proceedings also encompasses referrals where civil action is in progress. A similar set of considerations affected the referral policy of the Housing Department. The Department took the view that it should not make referrals where there was sufficient evidence for a breach of tenancy agreement (except in trivial cases) or if there were many sources of complaint. This means that some cases which may be diverted to mediation are not being referred. This could lead to a position in which the actual criterion for referral is that it is impossible to make a judgement about who is at fault, or indeed that there is anyone at fault. This could result in quite inappropriate referrals of serious cases which are incapable of resolution because of bad faith on the part of one or both parties.

174. One problem for Housing in the perception of tenants is that except for the draconian action of eviction proceedings, there appears to be little that it can do to influence tenants. As one party put it

'... Housing can do absolutely nothing about him [the other party]. They just call him in and tell him to behave himself. And this has been going on for four years now.'

175. An official acknowledged that the powers of the Housing Department were limited in cases like this.

176. In one case, one of the parties was pursuing the other for breach of interdict by continued harassment. It was reported by the party that in a previous action for breach, the Sheriff had attempted to mediate between the parties. Although this case was not susceptible to mediation at the point of interview, it raised the point that the existence of civil proceedings in the case is no bar to mediation. Indeed, the whole project of Alternative Dispute Resolution is founded on the policy that it is good to settle cases out of court, and for space to be given within the formal court process to allow mediation to take place to that end.

## **Structural factors in referral policy**

177. There are a number of structural issues which give occasion to disputes which are not themselves within the control of the parties. There are three which have emerged as relevant to in this study.

178. **Insulation:** The lack of insulation was the main source of conflict in two cases. In one case differences in life style, especially the use of music, became the focus for dispute through a lack of insulation. In the other it became an instrument for intensifying an existing conflict. In these circumstances, mediation may be able to help the parties to moderate their actions, but the solution to the problem lies beyond mediation.

179. **Facilities for children:** It was suggested that the dispute in the Glenrothes case, although arising from tensions between one family, actually had its source in the mis-siting of a play area in unsuitable ground which could not be supervised from the street. Once again, although mediation can assist the parties to live with the limitations of their environment, unless it takes on the extended definition of community mediation between communities and local authorities, the solution lies outside the scope of mediation. However, in this case part of the agreement included an intention to set up a residents' association which could then campaign for more appropriate play facilities.

180. **Mixed tenure:** One party felt that the reason her case had been referred to mediation by the Housing Department was because it did not have jurisdiction in a case where one party was a tenant and the other had become an owner occupier. She thought that all the mediators could do was to advise. She thought the Housing Department should resolve it.

181. It is clear that the Housing Department has a dilemma in this type of dispute. If it is the feudal superior, it may still have some hold over the owner occupier, but if not, its intervention can only be to put pressure upon the tenant. Under the Crime and Disorder Bill, it is proposed that local authorities will have the power to seek a court order to secure compliance with standards of pro-social behaviour. However, in many disputes where there is a need for accommodation on both sides, the prospect of one-sided pressure is likely to produce a sense of partiality in the mind of the tenant. It is therefore understandable that the Housing Department will make referrals of these cases to mediation. The problem is that an assumption on the part of new owners for a continued interest from the Housing Department is undermined, leading to dissatisfaction.

182. **Community Care policy:** We recognise that the inappropriate discharge of patients into the community, or discharge without sufficient support, is likely to be the source of tension for their neighbours. Mediation is unlikely to be successful where fundamental issues connected with the health and welfare of parties is not being addressed. We note Collins and O'Carroll's suggestion that local authorities may not always be meeting their requirements under community care legislation (op cit, 25).

## **Motivation of parties**

183. An important factor in the effectiveness of referrals is the motivation of the parties at the point of referral. Some parties were perceived by mediators and by one party to have an investment in the continuation of conflict. Even though many parties doubtless did want their dispute finished with, that does not necessarily mean that they were well motivated to accept

mediation. One wanted advocacy on her behalf and confrontation with the other party. She stated: 'What he is doing is wrong. I want someone to say that'. She thought the Housing Department would hold it against her if she did not accept a referral to mediation. Another admitted this strategic reason for accepting referral:

'... [T]he reason I agreed to it was because I didnae want the Housing coming along here and saying to me "Well, they've agreed to mediation. You're not agreeing, so therefore you are at fault."...'

184. One mediator, in recognizing the problem of parties' expectations said that the parties:

'... don't fully understand what mediation can do, because they think you're going to come in and solve the problem for them, and that's not the case.'

185. Clearly parties make an assessment of the potential for mediation in the light of their own judgement of their case, and whether they believe informal methods carry sufficient weight.

## **STRUCTURE AND MODELS OF MEDIATION PRACTICE**

186. In this section we will start by presenting the mediators' perception of the aims of mediation. This helps to make sense of the structure and models they use, and also the methods which are examined in the next section. Some aspects of this topic will be taken up in the section on Training below.

### **Aims of mediation**

187. When asked what they thought they were trying to achieve through mediation most people commented that the intention was to enable neighbours to live peaceably together even if this meant that they ignored one another: 'Not trying to make people friends. Trying to help them get on with their lives.' One respondent referred to the preventive aspect of mediation: 'Trying to solve problems before they become serious.' Another spoke of 're-instating communication between neighbours', resolving conflict without apportioning blame and trying to achieve a situation where both parties could win. Mediation does not tackle underlying problems, but promotes acknowledgement that the other party 'is undergoing some kind of emotional reaction.'

### **Party visits**

188. We have indicated very briefly an outline of the normal structure for practice at the beginning of this chapter ('Outline of Practice Procedures'). The first part of the process, involving bilateral visits to the parties is identical for both models (shuttle and face-to-face mediation). We will deal with specific aspects of practice in the sections on Methods and Management Issues.

189. The mediators are selected primarily on the basis of availability at the time of receiving the referral, rather than on principles of matching to the case. The amount of information about the dispute available to the mediators is generally fairly sketchy, although on the basis of limited evidence, the Police referrals are succinct and give the names of both parties. The mediators have therefore to establish an approach to dealing with the case after

meeting for the visit itself, often in a car in the vicinity of the party's house. This involves sharing of perceptions of styles, allocation of roles, and setting a deadline for ending the visit.

190. During the visit the mediators have to achieve a number of objectives. They have to establish their credentials and credibility, and convey the purpose of mediation and how it works. They have to gain information about the party's perception of the dispute, and they have to sell the concept of mediation as a possible way of dealing with it. Selling mediation is a complex process, because it requires not only convincing the party of the merits of mediation, but also dealing with their fears and anxieties about meeting their neighbour. In the case of the visit to the second party (Party B) there is the additional task of ensuring that they do not appear to be acting as the messenger of Part A's accusations and lending them credence. These objectives are demanding, not least because, from our observations and our own interviews with parties, the Party is likely to be bursting to tell their story, and it is only with persistence and assertiveness that mediators are able to achieve their ends. In one observation visit to a party in a continuing dispute where mediators had visited before, one of the mediators was able to break into the flow of the story to make the necessary points, whilst at the same time shewing concern for the party and without cutting her off. Nevertheless there is a substantial tension between allowing the party to tell the story, and doing the other work of the visit, which we will refer to below. A key issue for mediators (and researchers) is how to deal with direct appeals by parties for some acknowledgement of their sense of grievance without compromising their own neutrality.

191. After the visit the mediators are expected to de-brief. This involves sharing perceptions of each other's practice, discussing what happened in the visit and deciding how to take forward decisions taken in the meeting. They are then supposed to report back to the scheme office the results of the visit, and to indicate the next part of the procedure which is to be activated.

### **Model 1 - Face-to-face meeting**

192. Persuading both the parties to attend a face-to-face meeting is the main objective of the party visits. These meetings are always held on neutral ground, either at the scheme's office or in a venue nearer to the parties, such as a community hall.

193. We can illustrate the process of preparation from our observation of an abortive face-to-face meeting. The mediators met beforehand. They reviewed the issues for the mediation session, and decided their strategy. They ensured that the room was arranged in such a way that the parties would feel at ease and arranged for coffee and tea to be available. Mediators may sit opposite each other, or side by side. The preparation for the meeting to be observed was thorough, and included sharing of perceptions of their styles and anxieties about the case.

194. Once the parties arrive, the procedure that is to be adopted is that the mediators will welcome the parties and ensure that introductions are made. Ground rules about conduct are set out. Then each of the parties is invited to state their case. The party telling the story is given uninterrupted time. After both sides have spoken, the mediators encourage direct dialogue. The methods used to achieve this will be discussed below.

195. If the parties are able to reach an agreement, this is drawn up on a standard form. The form contains the names of the parties and the mediators. It spells out in simple language, preferably in the words of the parties themselves, the precise terms of the agreement. The

agreement is signed by all present. The form states that the agreement is not a legal document. Copies of the agreement are made after the meeting, and are sent to each of the parties. The original copy of the agreement is held on the file.

196. At the end of the mediation meeting, arrangements for follow up have to be agreed. This involves the scheme contacting the parties to check whether an agreement is 'holding up'.

197. As with the outcome of party visits, the mediators are expected to contact the scheme office to inform the Co-ordinator/administrator of the outcome of mediation.

198. Parties' perceptions of the face-to-face meeting varied. Two were very positive. It had helped them see another side to their adversary. Two thought that the mediators were biased. One felt that they were suggesting that the problem belonged to her, rather than helping the parties find a solution. Another (a male) felt that two female mediators were taking the side of the other (female) party.

## **Model 2 - Shuttle Mediation**

199. In cases where the parties are too uncomfortable about meeting each other face-to-face, the mediators may arrange a shuttle mediation session. This involves proximity discussions or caucus meetings in the same venue. Three mediators would be employed for this procedure. Two mediators are allocated to stay with each of the parties. The third mediator shuttles between the parties.

200. This procedure is seen by mediators as being the second best option for progressing a case. One mediator gave a succinct account of this:

'... we don't really like to offer that as an option because it ... gives parties a get out clause. You know "We don't want to meet our neighbours. Can you not give them a message from us." It's not going to be solved so easily in that way.'

201. Nevertheless, as one mediator put it:

'The very fact that they (the parties) both came here that night showed a real willingness to do something about it (the dispute). But there was so much animosity that they just couldn't bear to sit in the same room.'

202. There was a danger in being drawn into a messenger role. There was a perception that it was more difficult to break impasses than in face-to-face meetings, where at least they were 'facing' each other. Delays in returning to a party in the shuttle process served to make things worse. Mediators were required to be more rigorous in getting the parties to focus on outcomes in this model.

203. It is relevant to note that another model of mediation used by The Academy of Experts which uses caucus meetings as its main method of mediation, starts with a face-to-

face session, and uses further face-to-face sessions for challenging impasses.<sup>6</sup> The agreement is finally formulated in a face-to-face session.

## **METHODS**

204. In this section we examine in closer detail the methods used by mediators and the processes in which they are engaged. Some methods relate to all stages and models of mediation, whilst others do not. They are presented in an order which generally reflects the stage of the process in which they are first employed.

### **Working in pairs**

205. All mediation practice is conducted by pairs of mediators, except shuttle mediation, which is conducted by three mediators. The reasons for this were cited as being for protection of the mediators, providing a different focus on the case jointly worked, and sharing the burden of the work. It was also stated that co-working provided an element of co-supervision in the debriefing process. We saw evidence that de-briefing was occurring, but one mediator suggested that this process is being undermined by only giving positive feedback, whereas critical feedback helps a mediator to avoid getting caught up in the problems of the parties.

206. It was suggested that matching of mediators to cases by gender and age occurred. However, it is not clear that this has been happening recently. As indicated earlier, availability is the practical criterion for allocation of mediators. One mediator did comment that there was an imbalance in the workload of the volunteers but attributed this to variations in availability. Some limited data were produced by the scheme on mediator workload which shows, for example, that in August 1997, the variation ranged from one mediator having no cases to one mediator working on seven active cases. However the reasons for the difference were not recorded.

207. It was usual practice for the same mediators to work on one case, although this was not universal. In some cases there had to be a change because of the availability of the mediator. It was also suggested that continuity was not important because it was argued the process itself not the mediators and their knowledge of the case was what influenced the outcome of the dispute. However, other mediators thought the partnership of the mediators was critical in the process and the outcome of the work. It was easier to work with the same partner. Training together was supposed to create a bonding between mediators, and it was supposed to facility for each mediator to work with all the others. However, in one observation visit the mediators had never met each other before, and had to prepare their work and mediate from a cold start.

208. Preparation for mediation work, for all meetings with parties was seen to be important. Mediators stressed the importance of sharing their 'needs and fears' prior to meeting parties. We saw evidence that this did occur, but one mediator said that this was not happening very much.

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<sup>6</sup> The Academy of Experts holds a register of accredited mediators who have successfully undertaken its training courses in mediation skills.

## **EXPLAINING THE PROCESS OF MEDIATION**

209. The parties' basic understanding of what mediation is, namely as a process involving a third party in a dispute who can help the parties find a solution, was generally accurate amongst our sample. This is not to be confused with their expectations of mediation at the point of referral, or what they thought about the relevance of mediation in their own case.

210. The explanation of how mediation was supposed to work had to be reaffirmed in the face-to-face meeting. In particular, the procedures and ground rules needed to be clearly stated.

### **Selling the process**

211. Selling the process means the work which mediators do to encourage the parties to choose mediation and in particular face-to-face meetings as the best way to settle their dispute. In practice only a tiny minority of cases reach this stage.

'One of the things that we found quite difficult is actually getting the parties to agree. You'll have one party who will immediately say "yes, yes, just tell me where and when and I'll be there" and the other party doesn't really want to do that. They are quite prepared to discuss the problem that they have, they're possibly quite prepared for mediators to do what we call the shuttle mediation which is basically going from house to house but to try to get them to come under the same roof to try and resolve the problem is quite difficult.' (a mediator)

212. Mediators were asked how they tried to persuade parties to meet in the face of this reluctance. Their responses included a mix of exploring the fears of the parties as well as looking at the options available to resolve the dispute. So, for example, mediators would emphasise that a face-to-face meeting would follow a structured format, that the mediators would be there to ensure it remained under control and that parties would not be blamed. The chance of having uninterrupted time when the other party would have to listen was also thought to be an attractive feature of mediation.

213. Several mediators took a very pragmatic approach and asked parties 'What have you got to lose?'. This question was particularly relevant in cases where a number of other agencies had been involved but the dispute still remained unresolved. In these cases the only other option might be litigation. One mediator said she highlighted the cost of legal action. Others stressed that mediation was a free and quick service. Another offered practical help to get an older party, who was afraid of going out of the house, to come to the meeting venue.

214. Although all the mediators tried to convince parties about the benefits of mediation, how they went about this varied considerably. One mediator contrasted how she had approached parties when newly trained with her current style:

'It's changed. Initially it was very feely. Now I tend to concentrate on the practical aspects.....What's going to happen if you don't (go to face to face meeting)?'

215. Some mediators remarked on differences in the persuasiveness of mediators. However, some mediators felt it was unwise to push the parties too much because the face-to-face might be unsuccessful or the parties' anger would be directed to the mediators:

'I think we have learned that, at least I have learned that, if you put pressure on it's not achieving anything. I think you just keep them talking .... so that they come to a point where they say "Well maybe it's time to try.".'

216. One thought that here was little hope of settling disputes if the parties were not prepared to meet. Another mediator wanted to sell the mediation much harder:

'The biggest thing that I wasn't quite prepared for when I first went out there .....the party visits, is how much you have to sell the process.....Some sell it very well, others back off and are too empathetic in that respect.'

217. Emphasising success rates was seen to be a persuasive technique commented upon by one party.

### **Acknowledging feelings and allaying fears**

218. Mediators emphasised the importance of allaying the fears of parties about the mediation process. In one case a mediator reassured a party that she could have a break any time during a face-to-face meeting. On an observed visit a mediator stressed that the other party would not be allowed to abuse the party in a future mediation session. Another reported that she tried to allay fears by telling parties that mediators were trained to deal with aggression. Parties were not only afraid of being abused, but that they might behave abusively themselves. One mediator stated that it was important to try to understand what it was parties were afraid of, or making them nervous about going to a face-to-face meeting. Perhaps they were afraid of reprisals after the meeting.

219. Acknowledging feelings about the dispute was also seen to be important. However, as one mediator put it, unless the issues are dealt with, the feelings will not be addressed either. The feelings of parties are often very strong, and relate to the impact of the dispute and the stresses which this generates. Stress arose from different sources, some from the dispute itself, others from the mediation process. Although many of the disputes were seen as silly in origin by the parties, they had deteriorated to the point where people were feeling threatened, intimidated, anxious and fearful of going out. Violence and the fear of it featured in a number of cases, and one involved racial abuse. One person had lost his job and hobbies and had developed psychiatric problems. Another felt that the failure of the mediation process had contributed to the collapse of his relationship. In another case, a party became stressed because the behaviour of the other party resembled that of her ex-husband.

220. One mediator referred to a particular problem which may arise when the mediators meet the parties in a face-to-face mediation. There is perceived to be a change in the relationship between the party and the mediator:

'When you do get them face-to-face, it's basically when you dump them in the water, because they are both looking at you as if to say "But we trust you and we believe in you.", and you're turning round and saying "yes, but like I told you before, this is something you've got to sort out yourselves. So off you go.".'

221. This clearly acknowledges a possible anxiety on the part of parties, which mediators need to address.

222. Ensuring that the parties felt that they had been heard could be achieved by summarising the parties' positions in face-to-face mediation.

### **Dealing with safety and power imbalances**

223. Several parties mentioned that the mediators had made ground rules about conduct in face-to-face meetings. One party reported that the mediator stressed that there should be no verbal or physical abuse. Another related the powerful effect of the mediators on her own feelings:

'It was more of a calming presence that I felt with them both and it was safe as well, because I had got to the stage with the neighbour where I felt if she pushed me any more, I was going to hit her. And in that room where we went it was safe.'

224. In this case the mediators had encouraged the parties to make their own ground rules.

225. Mediators were clear about the need for security for the parties in mediation. One emphasised that if the parties feel under duress in the meeting they would not come to an agreement. It was necessary to put them at their ease.

226. Safety is closely related to the question of power imbalances. Mediators saw themselves as having a role in equalising power imbalances between the parties, and gave a number of examples of how this was achieved. These interventions can be distinguished as taking two forms, regulatory and supportive. Regulatory interventions included enforcing ground rules, warning a more powerful party that they should not use bullying tactics, calling a halt to the meeting if there was intimidatory behaviour. Supportive interventions included physically getting closer to the weaker party, asking a question to ensure that the party had an equal opportunity to express herself, and ensuring reciprocity in the written agreement. Such supportive alignment was seen as temporary by one mediator:

'It's not where we take sides, it's where we kind of start leaning over towards the weaker party and making it look like they've got more people on their side ... And while it's only a temporary measure, it brings the stronger party back to the same level that the weaker party's on.'

227. One mediator had the experience of parties bringing in people to support them which she thought was helpful. This is consistent with the approach of family group conferencing, a mechanism by which the parties to the dispute are involved in a meeting with both the coordinator/facilitator and others who might have a contribution to make by supporting or providing suggestions or resources for dealing with the dispute.

### **Promoting communication**

228. It was reported that after the initial exchange of statements in mediation, communication between the parties flowed. One mediator spoke of the need to allow the parties 'to get on with it', and only to intervene if the parties were repeating themselves or if 'things are going off the wall.' However, things did not always proceed so smoothly. One way to intervene if communication did not take off was to use the mediators as chairpersons. Parties in one case spoke of a mediator telling a story which alluded to the problems faced by

one of the parties. In fact this technique miscarried because, although it helped the party to whom the story referred to express herself, it immediately suggested to the other party that the mediator was biased.

### **Clarifying issues and interests**

229. This method was employed in observation visits. However, it is apparent that it is difficult to help to move parties from the story line to a discussion of their interests. One mediator reported using summarising techniques. One party saw the mediators as wanting to get to the root of the problem. It is difficult to identify the issues without the story line. However, one mediator indicated that she was not interested in the story line, but in the process. This issue will be examined in greater detail later.

230. In face-to-face meetings focusing on common interests was critical. It was seen as important not to allow the parties to digress, and to help find the common ground between them. This was echoed by one party who reported that the mediators had made a striking intervention when one of them stated that the parties were in mediation for their children, and that they did not want the Police to be involved.

### **Working towards agreements**

231. Securing acknowledgement that there was a problem was a stepping stone to acknowledging the possibility that a party could change their behaviour. Mediators referred to building on concessions, and one to building up agreements incrementally after breaking a problem into its constituent parts. Mediators needed to 'latch onto really positive contributions of the parties', 'golden nuggets'. Once a point had been agreed in writing it was easier to secure a concession by the other party. One mediator emphasised the need for reciprocity in agreements, especially if there was a weaker and stronger party. Agreements needed to be drafted by the parties, drawn up in simple language, using the terminology or jargon preferred by the parties themselves.

## **PRACTICE ISSUES**

### **Mediation where a party is known to a mediator**

232. This issue was raised with mediators. One scheme had a policy that mediators, some of whom were involved in local issues, would not work with cases in which they knew one of the parties in any way. In the Dundee scheme the practice was that if it became apparent that a mediator knew a party, the parties would be offered the opportunity of having another mediator. However, one mediator indicated that he would take the initiative to withdraw from mediation if it became apparent that there were connections with the party, through for instance, relations with a third party.

### **Style and presentation of mediators**

233. Soft or strong - There were contrasting views about the appropriate style for mediators to adopt. Some saw mediation as a process of setting a scene which allowed the parties to communicate, only intervening rarely in face-to-face meetings. This may be associated with the view of one mediator that '[o]nce you've got them beyond the stage of fighting, to communicating, the job of mediation is over.' Others saw themselves as having a

stronger interventionist role. The softer approach was picked up by one party, who saw it in negative terms. She thought that settling the dispute with her neighbour required more than listening. On the other hand, being seen to want to be helpful was positively appraised, and another party commented: 'Their presence was very much felt, though they did not interfere whatsoever'. The question of mediator style merits further discussion.

234. Mediators have their own natural style which can be modified in training, and complemented in partnership with other mediators. However, the characteristics of individual parties and cases will also determine whether the style of the mediator is helpful or effective.

235. Confidence - Confidence was identified as an important quality in mediators. It was seen as being important to have the confidence to be able to deal with aggression, and to communicate this to parties. Training was seen to play an important part in this. As one mediator put it:

'[T]he biggest thing [we] got from training was to be able to change how people saw you, and how to come across to people - capacity to generate confidence and trust in the parties.'

236. Simplicity in language - One mediator also stressed the need to use simple language. 'Mediation' was seen as being quite a difficult conceptual word, and the emphasis on the voluntary and facilitative nature of mediation may be difficult to convey when parties want an authoritative intervention. It is important therefore that mediation is not presented or perceived as a weak intervention. On two visits of observation a mediator said 'All we can do is try.' in response to anticipated resistance of the other party. There is a danger that this does not convey a sufficiently strong message about confidence in the mediation process.

### **The Primacy of 'Process'**

237. We heard that 'process' had priority over the need for continuity of mediators and hearing the story of the parties. This is a topic which requires further exploration.

#### *Continuity of mediators*

238. We were told by a number of mediators that it was not necessary for there to be continuity of mediators in a case. This was justified on the basis that the process of mediation itself would bring people to agreement naturally, and is associated with the view that once parties had overcome blocks to communication, agreement would follow. The personalities of the mediators were irrelevant. In actuality, the practice is rather different, with mediators staying with the same case, if possible.

239. In our view, this approach does not cohere with the emphasis on building the trust and confidence of the parties in the process itself. As one mediator put it, the parties invest their trust and confidence in the mediators. The personalities of the mediators were also seen to be relevant to the effectiveness of the mediation partnership, which is the vehicle for delivering the mediation service.

240. The underlying assumption appears to be that mediation is primarily a process of promoting communication. Whilst that is true, it is also about securing agreements between parties in dispute, who are often in a stressed state and who need to invest in a relationship

with the mediators and in the authority of their role. Continuity of personnel promotes that investment.

### *Hearing the story*

241. Two mediators made reference to it not being important to hear the story (of the dispute) because it was the process which was important. As one mediator put it:

'Letting them tell the story, it's for their own benefit. I mean we really don't care about the story because it doesn't matter to the procedure. You know we can deal with the procedure whether we know it or not....';

and later:

'And obviously they want [us] to listen because they need someone to talk to and they think it's strange if we didn't know anything...'

242. On an observation visit where a statement of this type was made, it was clear that the parties did not really understand what was being said. Although one party in another case made reference to the mediators wanting to get to the root of the problems, another party felt very angry about this approach:

'I just felt they were belittling everything I'd been through, and they didn't want to hear. They were so concerned about not taking sides that I couldn't even explain how I felt or wanted to say.'

243. There is indeed a practical problem which we have observed and experienced as researchers in the danger of being engulfed by the story. However, mediators are going to get the story anyway, because they have to ask what the dispute is about. It may paradoxically assist them to maintain control of the process if mediators actively encourage the parties to state the history of the dispute, as a means of gathering clues about the party's concerns, thus helping to clarify the issues. It also seems necessary to provide an open ear to allow the parties to ventilate their feelings and for the mediators to gain an appreciation of the level of stress the parties are experiencing. Giving such an opportunity to the parties may be one of the unwritten terms of the contract which mediators have with participants in mediation.

### **Truth and the story-line**

244. A problem for mediators and for parties arises when other parties do not tell the truth. Clearly parties have their own account of events which can be partial and self-serving, difficult to reconcile with the story given by the other side in the dispute, but nevertheless true as far as it goes. There also comes a point in a long-standing dispute where the story is so blurred that the truth cannot be found or is so distorted that, in a sense, it does not matter who started it and how it was continued, but rather, how is it to be stopped.

245. Mediators do not interrogate parties or investigate disputes, but they do need to know when there are conflicting versions of events, because these will have a bearing on the way the parties operate in mediation. In one case, a party in a face-to-face meeting perceived that the other party was lying. She did not challenge him in the meeting. Another party said that mediation was a good thing, 'but the two of you have to be telling the truth.' Lies, or the

perception of lying in the mediation process, will undermine the confidence of parties in any agreements made in mediation.

246. In some cases, a party may have a legitimate interest in not disclosing information of a completely innocent nature in mediation, because of a fear that the other side will use it against them. It is not always possible for parties to state their needs and interests directly. This requires a subtle approach on the part of mediators, who must elicit what the true interests of a party are without disclosing them to the other side.

### **Involvement of the relevant parties in process and agreement**

247. Mediation is effective to the extent that the people who are involved in the dispute are tied into the mediation process. In a number of cases (5), relevant parties were not directly included in the mediation process, either because the other party refused to deal with them, or because one party, often a partner, refused to participate, or as in one case, they were represented by others who were party to the dispute. Mediators' response to this varied. In one case, the party reported that the mediators had tried to persuade her to involve her husband, but she had refused. In one case where a party refused to meet the alleged perpetrator of the trouble, the mediator did not challenge this, in order not to upset the party, but suggested that the other family might need family mediation.

248. Two male partners of conflicting female neighbours did meet in face-to-face mediation and agreed to attempt to regulate their partners' behaviour, but the agreement later broke down. In another case, the wife of a party who was involved in a dispute went to the mediation alone but questioned why she had to go 'when it's not really me'. In this case, ratification of the agreement had to be delayed until the husband had read and signed it. In another case, the perpetrator, the adult son of one party, was not involved in the mediation or the agreement. His mother made an agreement with the neighbour which depended on her ability to control the behaviour of a relative, which caused her anxiety. In the event, this led to serious tension within her family.

249. The issue of representation arose in the only multi-party case in our sample involving a dispute over children's behaviour. In this case, some difficulties occurred when some residents who had been represented by neighbours did not fully accept the agreement which had been struck by their representatives. They claimed that they had not agreed to the terms of the agreement. The relative informality of community mediation processes does make it difficult to bind parties to the agreements struck on their behalf. It also raises questions about whether representatives have authority to settle at a mediation meeting. It is sometimes said that in inter-group conflicts a key task for the mediator is to help the separate groups come to an agreement amongst themselves about what they want before meeting negotiating with the other group. However, in this case the agreement had held for some weeks at the time of the study.

### **Agreements**

#### *Durability*

250. The points raised in the previous section touch on the issue of durability of agreements. This issue also relates to the unavailability of sanctions, and a resulting lack of confidence that agreements will last. As one party put it:

'... [T]hey [parties] will agree with this thing in mediation. They will sign the declaration and it will be alright for a wee while, and then they will start all over again, because they know that the Housing can do nothing to them.'

### *Legal status*

251. We note that the statement on the form of agreement that the agreement is not a legal document is contentious, and its status needs to be checked. Although the agreement is not an official document lodged with the court, nonetheless, there may be circumstances in which an agreement would be deemed to be a contract, and would be enforceable at law. Paradoxically, this could be a way of dealing with some of the perceived weakness of voluntary mediation, because such agreements could be lodged in court, and could be thus more easily enforced, albeit at cost to the pursuer.

252. The current form of the agreement may also have an inhibiting effect on parties pursuing their claims through normal legal channels. One party stated that having an agreement was preventing her going to her solicitor (because the agreement specified that she should try to contact the other party rather than have recourse to a solicitor).

### **Sanctions**

253. We have already mentioned the question of whether mediation can go ahead in the face of criminal proceedings or civil action by one of the parties, or administrative and legal action on the part of housing agencies. We have also touched on the perception that community mediation lacks sanctions for the parties. One mediator suggested that it was the lack of sanctions which had led to the low numbers of face-to-face meetings. There appear to be two contrary views which have a bearing here. The first is the view, often held by proponents of mediation, that mediation should be a completely voluntary process. The second is the view that mediation should not supplant access to legal redress. The problem is that the proponents of voluntariness do not have an answer to those who say, as some parties do, that mediation has no teeth; whilst those who support coercion have difficulty in countering the claim that coercion undermines the consent which leads to commitment to mediation.

254. The debate is not helped by the widely held view that even a coercive approach does not appear to deliver relief from anti-social behaviour. Nor is it clear how community mediation, as a species of ADR, articulates with the conventional legal system. Our opinion is that it currently functions primarily as a waiver, sealing off the possibility of normal legal redress, or acknowledging that formal redress is not a realistic option. If Housing only refers cases where there is no evidence for breach of tenancy, it has clearly taken a 'no action' decision, and the parties have no recourse if the referral founders. If the scheme only accepts cases where there is no current court case, the Police may be able to refer effectively only those cases in which they have also taken a 'no action' decision, with the same result. Thus the normal disciplines which operate in other spheres of ADR, namely the fear of the costs of legal action or prosecution, tend not to apply to an offending or anti-social party in community mediation, or do so only weakly. We question whether the offer of mediation without the realistic option of formal action is in the interests of vulnerable parties who are suffering abuse, sometimes of an extreme nature.

255. It was suggested by one mediator that one method of bringing sanctions to bear when mediation did not lead to agreement, was for the mediator to report back to the referral agent what the parties were saying about their case and why they refused to participate in mediation. This would undermine the confidentiality of the process, and would justify the fear expressed by one party that she had to participate, even if she thought that mediation could not help, as a way of avoiding sanctions.

256. It seems important to uphold the distinction that whilst participation in mediation should be voluntary, adherence to standards of legally acceptable behaviour is compulsory and should be backed by sanctions. Mediation is a mechanism for securing compliance in a voluntary manner.

257. There is no inherent difficulty in the concept that mediation may be attempted at any stage of the course of a dispute within the criminal or civil justice process. If a case is so serious that criminal proceedings or action for eviction are necessary, there may still be a case for offering mediation between the affected parties. We would note that the criminal courts have the option of deferring sentence to enable a process of mediation to take place. The civil courts also have powers to refer cases involving matrimonial disputes to family mediation.<sup>7</sup>

### **Confidentiality**

258. In dealing with this topic, we need to take into account the record keeping policy of the scheme. The issue that arises in direct practice with clients is the offer of absolute confidentiality to the parties in the mediation process. Mediators stated that they told clients that nothing would 'go outwith the four walls' in face-to-face mediation. Notes would be torn up. One mediator gave a graphic description of such an act at the end of a face-to-face session:

'So I tore the piece of paper into a many shreds as I could and laid it on the middle of the table. And both parties had taken notes as well, and they did exactly the same without any prompting, which I thought was really good, something visible, and I thought "That's it finished. We're not going to carry anything out of this room that's been talked about."'

259. The scheme's approach to confidentiality has not been, however, without difficulties. First, as one party put it, '[h]ow can mediation stay confidential if the parties do not keep silent?'. Second, as Davidson (1995) has pointed out, privilege does not attach to mediation in Scotland, except to Family Mediation. Third, mediators may have to breach confidentiality if they become aware of a serious offence which may have been or is about to be committed by a party (such as child abuse).

260. The policy of confidentiality was buttressed by the scheme's recording policy. From the outset, the scheme took the view that in order to maintain a strong policy of confidentiality, only minimal information about cases would be held on file. One mediator said that it was not easy to access the files even if one was working on them. The personal information in the record amounted only to a note of names and addresses, a brief indication of the nature of the dispute, and a record of contact. There was no continuous written account

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<sup>7</sup> Rule of Court no. 49.23.

of the progress of the case or of the issues which had been identified. However, if the parties reached agreement, the original copy of the agreement was held on the case file.

261. If records are securely held, there is no problem, other issues aside, about what is held on file. If there was a fear that records could be required to be delivered as evidence in a court, it follows those who are concerned about disclosure should also argue that copies of mediation agreements should not be held on file.

262. We understand that changes have been made to recording practice to ensure that fuller information on cases is kept on file.

263. One mediator stated that the ethos on confidentiality had an inhibiting effect upon mediators who wanted to discuss cases with other mediators during support sessions. It might be suggested that what had begun as an attempt to create a watertight policy on confidentiality had developed into a culture of secrecy.

### **Open Access**

264. Mediation work raises a specific difficulty with respect to open access of files to service users. Although this issue is faced by other agencies who may hold family files, it is particularly apparent here. If parties wish to see their files, it is important that they do not have access to information of any type relating to the other party in the dispute. It will be necessary for mediation schemes, like other social service agencies, to review their policies in this area, perhaps instituting sub-files.

265. It was difficult to avoid the conclusion that the requirements of record-keeping were being sacrificed to a confidentiality policy which lacked a strong reasoned justification. We believe that this may have constituted what was tantamount to a breakdown of casework accountability in the early part of 1997. We have been informed that the scheme now sees that information regarding clients is confidential to the scheme, rather than to the individual mediators and the scheme paid staff.

### **Ethnicity**

266. We note an issue about ethnic monitoring the section on 'Records' below. We would also draw attention to a view of one mediator that there was need and scope for the scheme to be pro-active in making contact with ethnic minority groups and to recruit mediators from these groups.

267. There is a danger that being seen to advocate mediation in disputes involving a party from an ethnic minority may be seen as minimising the possibility that racial abuse is taking place. As with any dispute, a referral agent and a scheme has a responsibility to ensure that where serious abuse of any kind is alleged, mediation should not become part of a process of condoning or even of continuing the abuse.

268. Ethnic minority groups often have their own traditions and mechanisms for dispute resolution within their communities. It may be possible to develop collaborative arrangements with particular communities for dealing with disputes involving parties from different ethnic groups.

## **Gender**

269. A number of mediators thought that there was a need to recruit more male mediators. This was associated with a need to help male parties in the process of recruiting them to mediation. It was suggested that this could improve the chances of selling the service to parties. There was a suggestion of perceived bias on the part of one male party in the sample. This type of allegation is often difficult to rebut. It would clearly be impossible for all mediator teams to be of mixed sex, and it would be difficult to predict all the circumstances in which a single sex team would be perceived to be biased. However, there may be ways in which some screening could be done, and choice offered on the make up of a mediator team in advance, although this might induce delay.

## **MANAGEMENT AND TRAINING ISSUES**

270. In the course of the study we have come across a number of difficulties in practice and administration, and some issues which require further consideration on the part of management and trainers. The sources of these appear to lie in problems in the management of the project, coming to a head with the resignation of the first Chair and the subsequent dismissal of the Co-ordinator. We would accept that the staff, volunteers and the management committee are committed to provide a high standard service. However, there remain some areas which require attention.

### **Reliability and delay**

271. A number of parties referred to delays by the scheme in contacting them. This was in one case compounded by breaking a promise to make contact after a delay. In one case mediators did not keep an appointment. Several of these statements were borne out by the case records. In addition our trawl of cases in August and September 1997 shewed that there was still evidence of undue delay in progressing work. This could not simply be attributed to the system of sending out introductory letters inviting the parties to make an appointment. In several cases, it was attributable to the management of the scheme which did not ensure that cases were followed up timeously. In one case a mediator's reluctance to deal with a case because of a particular question about whether legal proceedings were under consideration led to a delay of 10 weeks. The question had in fact been dealt with in the original referral letter.

272. We understand that the scheme has reviewed its system of contacting parties, and that procedures for making appointments and follow up appointments are to be streamlined. We have also seen that the scheme has instituted a case call up diary. This procedure needs to be tested to ensure that it fully captures the work flow.

### **Records**

273. These problems have been exacerbated by the recording practices of the scheme. As we have already indicated, there were no running records of the content of visits. Indeed, it was sometimes difficult in our own attempts to extract data, to establish whether visits have occurred or not. We have been told that mediators have not regularly reported back timeously about the outcome of visits, and this was confirmed by our own observation. The entries in the record are not initialled.

Further to this, much of the data required for statistical purposes are not recorded on the file. The recording of case progress, ethnic monitoring and requirements for reporting back to referrers was generally deficient. We recommend that the scheme reconsiders its position on the use of a computerised database, and that it ensures that relevant data is recorded for statistical and monitoring purposes. These will certainly be needed if the scheme's workload increases.

274. We understand that new procedures are to be put in place to ensure that mediators submit written records of visits. It is worthy of note that the Co-ordinator of the Glenrothes scheme was intending to implement this practice had that service survived.

## **Supervision**

275. We asked mediators about their experience of supervision and support. During the period of the study, the supervision of mediators had been affected by the suspension and dismissal of the Co-ordinator.

276. Support to the mediators was occurring during the mediators' meetings, and during the preparation and de-briefing sessions. One mediator suggested that support meetings were being used for complaint rather than for development

277. Supervision was seen to be concerned with the feelings of the mediator, issues arising from cases and the relationship with the co-mediator.

278. Mediators made a number of comments about supervision, which, because of the general problems with management, are somewhat critical. It was suggested that supervision was not happening, that it was irregular, and that it was voluntary.

279. One mediator thought that she was becoming rather blasé about procedures. She linked this with a desire to undertake the mediation training again. Another commented that there was a danger of complacency in practice, and that there was a constant need to hone skills.

## **Training**

280. The training for the Dundee volunteer mediators is provided by an external trainer based in Bristol and involves a minimum of thirty hours. The programme includes the development of skill and knowledge in handling neighbour disputes, which accounts for 70% of the time and the development of self-awareness which takes 30%. The emphasis is on learning by experience. Participants are taken through each stage of the mediation process from telephone contact with the parties, home visits, face-to-face and shuttle mediation. The content also covers a range of communication skills, managing conflict, showing empathy, safety, confidentiality, acting impartially, self and peer evaluation and working in partnership with co-mediators and the service.

281. All the mediators found the training, totalling 38 hours, useful and three respondents said it was excellent. Many commented that it was very intensive and some felt it had been personally challenging.

'[It] made me realise biases I have.'

'[I] wasn't expecting to have to be so open.'

282. The emphasis during the training on developing self-awareness and improving communication skills was generally felt to be helpful and applicable. For example one mediator felt she had become much more aware of body language and used these as an indicator of how people were feeling. The practice of giving and receiving feedback was also appreciated as a valuable tool when working with a co-mediator. One person thought the training concentrated too much on face-to-face mediation when the bulk of the work involved party visits only. There was a general acknowledgement that much of the learning took place on the job and that the training was only a preparation. Several mediators acknowledged their need for further training and development, especially if the scope of the scheme was to be widened to include, for example, multi-party mediation. One respondent commented that training would also be helpful in working more effectively with parties who have been rehoused as a result of community care policies.

283. It is our view that additional training concerning organisational and structural issues is also required. For example, it would be helpful for mediators to have some basic knowledge of the Law as it relates to anti-social behaviour and of court proceedings. This could be used with the parties to help clarify their options and confirm whether a civil or criminal legal process is already underway.

284. In an attempt to improve the efficiency of the scheme mediators are being asked to keep written records of their contact with the parties. The initial training should therefore include the expectations of the agency with regard to recording to reflect this change in practice.

285. Our data suggest there are considerable differences in how mediators approach the parties and sell the idea of a face-to-face meeting. This is a potential problem when partners have contrasting styles and they may have only met ten to fifteen minutes before visiting Party A. Overcoming resistance is one of the topics covered in the training and may be an issue which could usefully be a subject of further training so a more consistent approach is achieved.

286. We have noted elsewhere the effectiveness of the scheme's recruitment advertisement. In selecting mediators we were informed that a person specification had been drawn up, but it was not clear whether it had been uniformly used. The decision on selection was made by the Co-ordinator in consultation with the trainer by telephone. It is not clear whether any documentation was used in the selection process. We recommend that the scheme develop a clear and auditable procedure for the selection and monitoring of mediators' practice. Mediation UK has been working with the Open College to develop specifications for mediator competencies.

## **CONCLUSION – CHANGES IN PRACTICE**

287. This chapter has raised some important issues for practice and management of mediation schemes. Since the period in which the fieldwork was undertaken, it has been reported that a number of changes have been introduced. Some of these changes have been instituted as a result of this study. Others have been brought about by the new Co-ordinator. We note these here.

- Initial procedures for engaging with clients have been streamlined, and timescales for client contact set.
- Continuity of mediators working on cases has been established.
- Clearer statements about the limits of confidentiality around allegations of child sexual abuse and threats of violence.
- Times for visits have been extended so that parties have a full opportunity to disclose the issues in the dispute and to 'tell their story'.
- Mediators are encouraged to give parties the message that they need to be open with the mediator and the other party to ensure the success of mediation.
- Mediators should ensure that the real parties to a dispute are actively involved in the process of mediation, rather than represented by proxies. (This may not apply to multi-party actions where representation is inevitable.)
- If it is clear that a party is the subject of abuse, and that mediation is unable to assist, mediators will support the party in seeking an alternative way to deal with the problem, including seeking official investigation of the abuse.
- Mediators now have clear guidelines about reporting back and consultation with the co-ordinator about mental health issues.
- The arrangements for shuttle mediation have been changed to include mediators holding separate meetings moving between people's homes rather than setting up bi-lateral meetings at a different venue.
- Tighter procedures for recording and reporting on cases have been instituted.
- Workload expectations of mediators have also been regularized to a limit of three cases at any one time.
- Matching of cases and mediators has been introduced, taking into account interests and capabilities, rather than age or sex.
- The arrangements for supervision and continuous training have been changed. Self-assessment of mediators and de-briefing has been enhanced by the use of self-assessment forms and on-the-spot requirements for case recording. The mediators' group meets monthly. It discusses cases anonymously in group supervision. External speakers are also invited on alternate months to provide contributions to continuous training for mediators. More depth supervision takes place individually with the Co-ordinator every two months.
- Selection procedures for mediators have strengthened by the implementation of a person specification, criteria for selection in interview and recording of decisions.
- Training is provided by the Co-ordinator in-house with external assistance. The basis of the training is broader.

288. Reports of these wide ranging changes to practice, supervision and training suggest that the management of the scheme has dealt with difficulties and has set out to tackle problems effectively.

## **5 – METHODOLOGICAL AND FUTURE RESEARCH ISSUES**

289. In this chapter we will consider methodological issues that have arisen in this study which have a general bearing on the development of research in this field. We will also explore the possible areas for future research in Community Mediation.

### **METHODOLOGY**

#### **Research strategy**

290. A major problem encountered by the research project was that the availability of research time was severely constrained by the fact that the funding for one scheme was of short duration. The availability of funding for the schemes presented severe problems generally, but the two year limit on urban aid funding for the Dundee scheme meant that a research project had to be developed very quickly if it was to capture any fieldwork operations. Urban aided funding has no mechanism for tying in research with the planning and implementation of schemes. We recommend that the expectation of research is built into the discipline of funding and implementing projects, particularly if they involve new forms of practice.

#### **Availability of data**

291. It is difficult to see how schemes can conduct their own management function of case tracking and monitoring without clear information about case progress, and case content. Schemes need to ensure that there is adequate baseline information on which both internal monitoring and external evaluative studies can be mounted. As we have indicated, there is a danger that concern for confidentiality will lead to a failure of accountability. There are three specific points which arise from this general issue:

291.1 In its concern to enable community mediation schemes to demonstrate their effectiveness, Mediation UK has developed a computerised programme for managing data on cases. We strongly urge that all community mediation projects adopt this measure. This is relevant to the development of comparative studies of projects, and meta-analysis of community mediation as a practice.

291.2 We also urge that community mediation schemes specifically record data connected with gender and ethnicity of parties, mediators, staff and management committee members.

291.3 We suggest that when purchasers are setting up specifications for schemes they ensure that arrangements are set up in advance with research funding bodies for evaluative and other studies to be implemented, and that co-operation with research and collection of baseline data are made conditions of contract.

#### **Access and selection of samples**

292. Although schemes may be willing in principle to permit access for research, there can be difficulties when it is stated that a researcher may not have access to observe practice for fear that this may affect a party's willingness to continue to work with the scheme. It is extremely difficult for researchers to counter such a statement, particularly in the light of the

known observer influence factor in social research. However, there is a danger that this may reflect self-protectiveness on the part of practitioners, or a too protective attitude to parties. Certainly, parties should have the right to decline to take part in a research study, but it is questionable whether the decision should be left to the scheme itself. If a party is too vulnerable to participate in research, it begs the question whether they are able to participate in mediation. The selection of cases for sampling should be governed by the research design subject to the willingness of the respondents to participate.

### **Reliability of qualitative data**

293. It is a feature of disputes that there are conflicting accounts of events. Sometimes accounts of the process of mediation can also be influenced by the perceptions and the interests of individual parties. Just as the mediator has to find a process for dealing with conflictual realities of parties, so too does the researcher need to find measures for triangulation to evaluate the evidence presented. Discrepancies between parties' accounts may be due to the natural fallibility of the human witness, or to self-interest in the way they present themselves to researchers. Accounts of practice by practitioners and parties cannot themselves provide a clear picture of what happens in mediation.

294. Observation of practice presents the standard problems of observer participation. A significant problem is ensuring that the study is able to sample a broad range of cases with variations in type of referral, process and outcome. The realisation of a sample may be biased by the willingness of parties to participate in a study and by the nomination of cases by the agency under research. Particular attention should be paid to the possible inhibiting effect of observers upon the parties. It is also necessary to consider whether the practice of mediators is modified by the presence of observers. However, unless practice is to become a secret activity, some form of observation is necessary. We have considered different forms of observation by researchers and mechanical recording of practice. Where mediation is occurring at the scheme premises, it seemed to incur the least intrusion to use pre-set video recording, with the researcher remaining outside the session. Keeping the researcher out of the session is more difficult where mediation is occurring in an unknown location such as a community hall, when the mediators themselves may not know the layout and have to concentrate on setting up and managing the meeting. Video-taping of visits to parties' homes might be thought to be somewhat intrusive; audio-tape recording may be less so. Audio-tape recording of visits to individual parties can be done without the researchers being present, but the taped evidence is not verifiable. In addition, the non-verbal behaviour and interaction is lost. We therefore recommend that observation of individual visits is made by researcher observation and audio-taped recordings, and that face-to-face mediation is video-taped, with the presence of researchers determined by the least level of intrusiveness consistent with verifiability of data.

### **Research instruments**

295. Further work is required to develop research instruments for analysing observed data, and linking this type of data with analysis of other data sets within studies.

### **Research focus**

296. In the course of this study it has become apparent that practice is a product of a wide variety of activity: development, management, supervision, administration, and training.

Effectiveness or weaknesses in performance in any of these areas has a bearing upon practice. A full account of practice needs to be based in a strong understanding of these contextual activities. This holds good whether one is seeking to evaluate the performance of a scheme or to analyse particular issues in practice. We recommend therefore that future studies build on the broad exploratory base that we have attempted to set out in this study, making use of pluralistic, comparative and evaluative techniques. We believe that this approach can provide useful tools for explaining outcomes.

## **RESEARCH QUESTIONS**

297. In the course of the study we identified a number of topics which merit further examination. The development of new forms of practice creates challenges for those who wish to promote them, those who give funding, provide referrals, and not least those who will provide the service and those who make use of it. These challenges require those engaged in the process to think and operate in new and sometimes unfamiliar ways. There is a strong tendency for people to attempt to assimilate the new concept to some existing practice or frame of reference, sometimes to the detriment of development of the new practice. We have identified a number of distinct areas in which research could be usefully carried out.

### **Policy and Development**

#### *How agencies develop aims and objectives*

298. The development of community mediation has shewn how groups and individuals have somewhat different motivations for attempting to set up a mediation scheme (Harrington and Merry, op cit). These differing motivations are likely to have a bearing on the aims which the agency adopts, and also on the scope and remit of its operations.

299. In two of the schemes in this study the primary focus of the developers was initially on quite small parts of communities, for instance a parish, or the effect on a particular neighbourhood of one case. In all cases, the developers had personal knowledge of the communities which were to be the focus of mediation. Each of the schemes moved to a position of wanting to serve a wider territory within a local authority. However, starting with a small-scale neighbourhood is not always how development proceeds, and it is relevant to notice that where Sacro, a larger agency, developed schemes it was in relation to a wider area within a local authority. Whether community mediation agencies should be developed on a neighbourhood or authority wide basis is an open question for research. It closely relates to the question of whether community mediation should be developed from the grass-roots up, or whether it should be developed and implemented by established agencies, or some combination of both approaches. These questions give rise to a number of points in respect of practice and management.

300. An agency which adopts aims from the 'social transformation' model is likely to set aims and objectives which present difficulties in providing quantifiable data which will satisfy funders. It could be argued that Community Mediation Dundee found itself in that position, even though the local authority had accepted its statement of aims and objectives in its urban aid application. In fact, the 'transformatory' objectives had been couched in the criteria for the urban aid programme.

301. More detailed study is therefore needed of the way in which agencies draw up their aims and objectives in relation to the dominant paradigms of community mediation, and in relation to the agendas of funding and sponsoring bodies. The identification of aims and objectives has clear implications for the development criteria for assessment in evaluative studies.

302. It is important to examine how projects define the scope of their activities and maintain conceptual coherence and integrity from the outset. We have drawn attention already to the issue of whether agencies operate on a small-scale or local authority wide basis, but there also needs to be consideration of the range of referral sources, and whether referrals should be unconstrained by conditions from referral agencies.

#### *How agencies are constituted*

303. The model of development which has been adopted or projected in all three schemes was that of a steering group seeking funding and incorporation, followed by the establishment of a management committee with paid employees. Although Livingston did not proceed as far as this, there were indications that this was the way they were heading. However, there were distinct differences between Livingston and the other schemes in that they did contemplate taking cases before receiving funding for paid staff, and their management committee did not include representatives from potential sponsoring agencies. Dundee had great difficulty attracting and retaining members of the local community in its steering and management committees. The composition of a scheme's governing committee (in relation to the profile of its members) has a direct bearing upon the nature of the project. It is understood that Sacro has adopted a hybrid model involving policy contribution from local agencies and community interests, whilst the scheme itself operationally managed as part of a national voluntary agency.

304. The model which Livingston adopted, at least temporarily as a pilot, that is, taking referrals without paid staff and a management committee of volunteers without external agency representation, is one which has operated successfully in Lambeth (London).

305. It would be important to explore the impact of these different models upon the way in which policies are developed in different community mediation schemes, and the advantages and disadvantages of different approaches to project management.

#### *The institutional location of community mediation schemes*

306. Apart from the issues about how schemes are constituted, there is the question of whether work in the community mediation field should be conducted by agencies independent of those which refer cases for mediation, or by agencies which have an interest in the outcome, by virtue of a statutory or other legal interest, for instance, a local authority housing provider. We are aware that local authorities are developing schemes in this area. On one model, a housing authority is providing a mediation service through a particular unit. In another, it is proposed that housing officers should undertake mediation as part of their normal duties.

307. We regard it as being essential that variations in models of community mediation provision are examined and evaluated.

### *Aims and objectives of funders, sponsors and referrers*

308. A major issue for the schemes in this study has been the limits placed upon them by the funding mechanisms of the Priority Partnership Approach (PPA). The PPA is clearly seen by local authorities as an appropriate mechanism for funding community mediation. However, this association of mediation with social priority is one which needs to be examined further. There are two perspectives on this. The first is the view that areas of social priority have a disproportionate share of neighbourhood disputes, as suggested by the Police respondent in Dundee. The second is that neighbourhood disputes are not a function simply of social priority, and occur everywhere within a community. Indeed, one hypothesis for the greater incidence of such disputes has nothing to do with the characteristics of the population, but the quality of the built environment, which mediation between neighbours may ameliorate at best, but cannot resolve. More data are required about the distribution of neighbour disputes within communities, their level of seriousness, and how they are dealt with currently.

309. This raises a general question about the discipline of PPA funding, but it also presents issues in relation to referral policy which will be dealt with below. The potential differences in agendas between the proponents of community mediation schemes and those who fund and sponsor them, and the ways in which these are negotiated and managed merit examination.

### *How schemes develop protocols and understandings with sponsors and referrers*

310. The outcome of a successful application for funding is itself an object of study. How some projects achieve this whilst others do not, should not simply be considered to be the results of chance or of inscrutable political and bureaucratic forces. Decisions are the product of a variety of factors involving some or all of the following: the quality of the submission; the relevance of the application to the criteria for funding; the policies of relevant agencies; the perception of sponsors and funders of the calibre of the application and the applicants; and a judgement about whether funders can achieve their own strategic aims.

311. The judgement of sponsors and funders may well be determined by the way in which discussions and contacts are conducted in the stages of developing a proposal. It is here that the critical decisions are made, and where assumptions about the futures of projects are sown. Inevitably, it is also where the seeds of misunderstanding and misdirection may also be laid. The quality of communication, particularly in respect of clarity and openness, is capable of being examined. With hindsight, it is often possible to trace difficulties in projects to such early stages of development. However, it is rare to examine their evolution from the outset. Particular attention needs to be paid to the relationships between local government departments and between local government and other agencies.

### *Relationship between schemes and their publics*

312. In order to develop and maintain support from funders and sponsors, agencies have to adopt strategies for marketing themselves, and developing and sustaining credibility. Some of this may be achieved by having and implementing a Quality Assurance process, but even where such a process embraces development and implementation of projects, work has to be done in selling the concept both to other agencies and to the public including individual users of the service.

313. The evidence from the schemes in this study shows that activity in this area by itself will not achieve the objective of developing and sustaining credibility. What is required are clear strategies for promoting the aims of mediation which can themselves be subject to monitoring and evaluation both by the agency itself and by external researchers. Thus an evaluation of performance in this area would examine the quality of proposals and briefing documentation, the way in which agencies make use of the media, interaction and relationship building within the policy community, and with the community of citizens.

#### *How models of practice are developed*

314. The growth of a project from being a gleam in the eye to an operational service entails the development of a model of practice. This can happen in a number of ways. Ideally, such a development incorporates (1) the adoption of a set of standards of practice consistent with the aims of the project and (2) a model or framework for the work which encompasses a set of prescribed skills which mediators are expected to develop in the course of training and accreditation. Training will be dealt with separately below.

315. It would be useful, therefore, to study how agencies set about developing a model of practice. Implicit in a model of practice are a range of assumptions, for instance about the voluntariness of processes, or the use of face-to-face mediation, which may or may not be attuned with the environment in which the scheme operates. A key question, therefore, is whether the model can produce outcomes which are consistent with the expectations of stakeholders in the scheme.

#### *How principles and standards are developed*

316. Mediation UK is about to produce a definitive statement of Practice Principles for mediation. This should provide benchmarks for practice and for evaluation. There are three research questions that can be posed about the development of standards: (1) how are practice standards incorporated into schemes? (2) how can practice standards be translated into benchmarks for evaluation? and, (3) how are practice standards adhered to in practice?

#### *Collaborative development of practice between community mediation schemes*

317. A theme which future research may wish to pursue is the way in which schemes co-operate in furthering the development of community mediation, and the role played by such organisations as Mediation UK and the Scottish Community Mediation Network.

#### *Incidence and nature of neighbourhood disputes*

318. There is a need for further research into the incidence and nature of neighbourhood disputes. This is necessary to throw light upon the on appropriateness of referrals for community mediation. It is necessary to discover the extent to which particular cases come to the attention of one or more agencies, and the implications of this for inter-agency co-operation.

#### *The place of community mediation in the framework of formal legal proceedings*

319. A major theme to emerge from this study is the uncertainty of the place of community mediation within the framework of formal legal intervention in the area of neighbourhood

disputes. It is apparent that more work needs to be done in this area to establish a coherent relationship between formal and informal processes.

320. In this context, we believe there is scope for a limited experiment in implementing a Mediation Centre, which could act as a clearing house for enquiries about the appropriateness of referrals for mediation, and acting as a signpost for potential referrers and personal enquiries to relevant mediation services. This could operate either in a local area in which mediation services are already well developed, or within Scotland as a whole. Such a service could provide the base for comprehensive and comparative studies of mediation practice. It could also be linked to the idea of developing a Community Legal Service (Labour Party, op cit).

### **Mediation process**

321. There are a range of questions which follow on from the increasingly important enquiry into what mediation is. Although the basic idea of mediation is reasonably clear, its implementation as a practice is not, and in order to unpack this further we need to examine a wide range of topics which have a bearing on the that enquiry.

#### *Referrals*

322. We have observed that referrals are an outcome of the process of negotiation of scheme objectives between the scheme and sponsor agencies (referrer/funder), and of the promotion of the scheme in the eyes of the public (self-referrers and ultimate funders).

323. We need to generate data on a number of aspects of referrals. These include:

- a. referral agent
- b. other agencies involved
- c. geographical locus
- d. nature of tenure
- e. nature of dispute (type, history)
- f. seriousness of dispute
- g. legal status of dispute
- h. gender of parties
- i. ethnic background of parties

324. Data of this level of specificity will serve evaluations of effectiveness of referral policies, and to promote the development of referral criteria. It is recognised that the categories of seriousness and legal status are complex, and that they present problems for codification. Nevertheless, work needs to be done to develop typologies which can be used in comparative studies in the future.

325. It is also necessary to examine the liaison functions between schemes and referrers. The expectations of referrers in respect of what is to happen to cases and about the feedback they receive on outcomes are critical to the effectiveness of relationships between schemes and their sponsors, and also the effectiveness of the service to parties.

### *Mediator activity*

326. Under this heading there is a range of themes which may be explored.

327. Mediators' perceptions - What mediators believe about the purpose and function of mediation is critical to their practice. This is coupled to the question of how their own values are attuned to the values and principles of the mediation scheme. Mediators hold a variety of views about how mediation works, what it should stand for, and how it could work in different ways, for instance in the use of sanctions, and in how the principle of voluntariness should influence the amount of persuasion they use with parties. These perceptions and beliefs will have a strong bearing upon the working relationship between mediator partners, which is itself seen as an important factor in the effectiveness of the work.

328. Mediator style - A closely related factor in practice is the style of the individual mediator. Mediators in the Dundee scheme held different views about how pro-active they should be in selling the process of mediation or in securing agreements. Differences of personality will lead to varieties in practice, and circumstances will require different types of approach by the mediators. It would be useful to be able to evaluate whether mediator partners are able to use a variety of styles and approaches in their work, and to establish which approaches are likely to work in what circumstances.

329. Models of practice - The model of choice adopted by many community mediation schemes is that of separate party meetings followed at a later date by a face-to-face meeting. In reality a very small number of cases in the Dundee scheme are dealt with in this fashion. From the Mediation UK survey of schemes in UK (Mediation UK, 1995, op cit) the proportion of cases reaching this stage is also small. It is necessary therefore to establish why this is the case, and the reasoning on the part of schemes for maintaining this model as the ideal-typical approach to mediation. There are a number of other models for mediating disputes, of which shuttle mediation is one. It would, therefore be useful to undertake comparative studies of different models.

330. Methods - There is still much work to be done to understand how mediators work in the field. It is also necessary to discover how effective are the methods adopted in the component activities of the mediator's task. We have made a number of observations on methods in the previous chapter. We therefore wish here to outline the topics in which study of methods are particularly relevant:

- i. working in pairs
- ii. engagement with the parties in selling and explaining mediation
- iii. acknowledgement of feelings and allaying fears
- iv. dealing with safety and power imbalances
- v. conveying a position of impartiality and neutrality
- vi. promoting communication
- vii. clarifying issues and interests for the parties
- viii. working towards agreements.

331. Practice standards - Adherence to practice standards established by Mediation UK will be an important topic for research. In addition to the question of whether compliance is occurring, it will also be necessary to discover whether the standards are helpful for the development of good practice.

332. Ethical issues - As well as needing to understand how mediators fulfil practice standards, we also need to examine how they make sense of issues such as impartiality, neutrality and power imbalances. It is also necessary to examine issues such as voluntariness and coercion, the place of sanctions in community mediation, and when to discontinue mediation.

#### *Party activity*

333. A major component of the mediation process is the behaviour of the parties, shaped by their own experience of the dispute, their hopes for the outcome, and their strategy for achieving goals. Mutual suspicion is a common feature of engagement in mediation, and may prove a bar to agreement. Involvement in mediation may be a means of avoiding punitive consequences, or strengthening a position against the other party. Insofar as mediation is assisted negotiation, we need to build up more data on how parties approach mediation, how they conduct themselves in the process, and how they use mediation strategically to achieve objectives.

### **Service related activities**

#### *Supervision and support*

334. This study has identified gaps in the provision of supervision. Supervision is necessary not only for the mediators but also for paid staff, including the Co-ordinator. Supervision raises issues which are common to all aspects of social service activity. It is essential for staff to know the purpose of supervision, the expectations upon them and upon their supervisors of the supervisory process. There is little written about this area, and it merits further study. In respect of evaluation of mediation schemes it will be necessary to know whether supervision takes place, the purposes of supervision, how it is carried out, and the perceptions of those involved in it of its usefulness.

#### *Training*

335. Our study did not directly address training issues, but a number of issues emerged which have been addressed earlier. Research is now needed on the function of training within mediation. It should be pointed out that comments on training are not a reflection on the training which has been offered in respect of the schemes we have studied. Rather they should be taken as general observations, which need to be taken into account when evaluating training programmes.

336. Relationship with agency aims, objectives and practices – In examining a programme of training, the first point is whether there is a fit between the training programme and the tasks of the scheme. The choice of trainer will be critical for the development of an agency's practice. In effect, the choice of a trainer is inextricably bound up with the choice, conscious or unconscious, of a model of practice. A trainer will doubtless wish to ensure that the scheme specifies what it needs in training for its mediators. However, it is possible that new schemes may not know what they need, although advice may readily be sought from other schemes and from Mediation UK. Evaluative studies will need to be concerned with this fit. However, we suggest that training programmes need not only to enable future mediators to practice in the model of the scheme in which they are to work, but also to understand the variety of mediation practice models, and their strengths and weaknesses. We are aware that

trainers can only provide training in proportion to the ability of schemes to pay for it. Nevertheless, in negotiation over the content of training packages, trainers should have an obligation to point up the limits of what they can provide, and what else may be needed to provide adequate training for beginning mediators.

337. Training and standards – Training programmes may be evaluated against the extent to which they address standards and expectations of competence in mediation set out for the Open College NVQ (Mediation, 1996b). The extent to which programmes embody and promote practice standards developed by Mediation UK may also be taken as an evaluative indicator.

338. Measuring outcomes of training – It is important that schemes and research studies are able to evaluate outcomes, particularly in respect of skills gained and changes in attitude on the part of mediators. Since mediators do not practice before they are trained, it will not be possible to measure these in relation to changes in practice, but pre- and post-training questionnaires and observation of trainees in sessions will provide data on the effect of training. Outcome measures for training, together with supervision and other forms of practice monitoring will provide an agenda for continuing training of mediators.

#### *Management, Administration and Audit*

339. Schemes will need to have established systems for record keeping and collecting data for their own internal monitoring and audit for quality assurance, as well as for external research purposes.

340. Evaluation of schemes will need to address whether administrative procedures are fit for the tasks of operational management and quality assurance monitoring.

341. Evaluation will need to address the question of the fitness of management structures for delivering mediation services with integrity and effectively.

#### **Outcomes of practice**

342. Evaluation should be made against performance of stated objectives. These will be in respect of agency function (eg. to establish an outreach office or institute new procedures) or practice outcome (eg, improve success rates, increase numbers of face-to-face meetings) or process (eg, adherence to practice standards). Agency function and practice process have been dealt with to a large extent above.

343. Evaluation of practice outcome is an area which generates much debate. It is clear that the measure of numbers of agreements reached through mediation is an unreliable measure. This is because (1) disputes may be diminished through the intervention of mediators even though no formal agreement is reached, and (2) agreements may not hold up. Measures which address the durability of agreements are likely to be more reliable.

344. It is often advocated that mediation brings benefits to the parties even if there is no agreement reached, through help in dealing with the problem in other ways. However, the measurement of these secondary benefits of mediation is problematic. A party may claim that the problems associated with a dispute have abated since the intervention of a mediator, but it

may be difficult to ascribe responsibility for this to the mediator. A typical bogus reason for 'improvement' is that one party has quitted the area.

345. Nor can it be concluded that the practice of a scheme is unsuccessful if it is found that it has a high proportion of cases referred which are unsuitable for mediation. Such an outcome may be the result of poor referral criteria, or poor liaison arrangements with referrers, or dumping.

346. Judgements about whether mediation has made a difference or not are prone to subjectivity on the part of both the researcher and the respondent. However, in qualitative research methods, respondent accounts should be taken seriously. Researchers may test the reliability of respondent claims about the effectiveness of mediation in their own case.

347. Another approach to seeking non-mediated benefits is to take into account other measures of help, such as referral on to other appropriate agencies. The difficulty here is that referral is a benefit only if an effective or appropriate referral has been made. A referral may be proposed on the basis of inadequate knowledge of the agency (inappropriate), or appropriately to an agency which does not have sufficient resources to respond to a legitimate request (ineffective). The effectiveness of such a research approach needs once again a judgement to be made on individual cases, and suggests the need for research to test claims of effectiveness in this area.

348. Satisfaction measures are often seen as an attractive measure for evaluators. These present problems in mediation, because it is extremely likely that parties in dispute will have different levels of satisfaction with outcomes. A 50% satisfaction rate will be evaluated very differently according to the distribution of the sample of the satisfied and the unsatisfied. Focused measures and careful analysis may strengthen the usefulness of these measures.

349. Of particular interest is whether mediation is perceived as being fair by the parties, whether it has improved relationships, and whether mediators inspire confidence and are perceived as effective neutrals. Allied to this is consideration of the value of generalising judgements made by parties about whether mediation is likely to be of value in cases other than their own. The danger here is that the type of response which indicates dissatisfaction in their own case and is qualified by a statement that it might work for other people, may be taken as an endorsement of mediation, when in fact it may reflect scepticism.

350. An important evaluative criterion for external funders is the workload of a scheme. There is no absolute measure of what should represent a realistic workload for a small-scale project. Realised work, that is the number of referrals generated, is a product of the constraints placed upon referrals by referrers as well as the opportunities created by them, taken together with the competence and capacity of the scheme to process the work. Judgements have to be made against the stage of the project's life. However, in a major centre of population there should in theory be no perceived shortage of referrals, and it reasonable to make comparisons with schemes in other places which have a proven track record of competent performance.

## **CONCLUSION – FUTURE RESEARCH DIRECTIONS**

351. In this chapter we have suggested a number of focuses for future research. In particular we have drawn a broad distinction between the need for enquiry into the

development and the implementation of schemes. We also draw a distinction between evaluative and analytic studies, and in both cases we suggest the need for examine issues in the context of the totality of a scheme's operations. Thus, practice issues cannot be divorced from training or supervision, or from the policies of sponsor agencies and those of the agency itself.

352. We believe there is particular merit in focusing upon four specific aspects of community mediation: the nature and extent of demand for community mediation services, the process of mediation, evaluation of practice outcomes and potential for further implementation. This could be done by further studies of existing schemes in Scotland and of future policy implementation.

*1 Demand for mediation*

We need further data on the incidence, intensity and characteristics of neighbourhood disputes. More work needs to be done on the feasibility and suitability of these types of dispute to be dealt with by community mediation.

*2 Mediation process*

Further work is needed in two areas: the expectations, motivations and participation of parties to disputes in mediation; and, the interventions of mediators.

*3 Mediation outcomes*

It is important to examine the outcomes of mediation, and to explore the possible range of beneficial results of mediation.

*4 Implementation*

We believe that the idea of developing community law services provides a useful opportunity to test the feasibility of introducing community mediation in a planned and integrated way within the strategy for promoting safe communities. There is a need to examine the appropriateness of locating mediation services in in-house local authority or independent schemes.

## **6 – SUMMARY AND RECOMMENDATIONS**

353. In this study we have examined the history and development of three community mediation schemes. We have examined the practice of one scheme in depth. We have identified a number of key research issues for the future.

### **DEVELOPMENT**

354. We have identified a number of general issues for the development of community mediation schemes.

#### **Funding**

355. Funding is precarious within this sector, primarily because it is not a statutory requirement. Community mediation is heavily dependent on funding for regeneration. This places significant limitations on schemes' spheres of operation. In the one example of a scheme seeking funding initially from a private source, its inability to match this with regeneration funding contributed to its failure to develop.

#### **Perceived needs of referral agents**

356. It is necessary for schemes to ensure that they sell the value of community mediation to referral agents at the development stage. Funders should consider more use of feasibility studies to ensure that markets for new products are accurately identified. Agencies should consider a wider range of potential referral sources.

#### **Promoting an awareness of community mediation**

357. Schemes have to dedicate considerable resources into ensuring that referral agents and the general public know about the service. This has to be done in a way which conveys a positive image of community mediation.

#### **Location of community mediation in statutory or voluntary agencies**

358. Consideration needs to be given to whether key service agencies should conduct their own in-house mediation schemes or whether community mediation is best conducted by independent agencies. Some would argue that the advantage of agencies such as housing authorities conducting mediation is that outcomes can be linked directly to management issues, such as questions about sanctions against tenants. Others would suggest that the disadvantages are that public sector agencies are limited in their remit within the community; they may not have any power in relation to residents; and, they may not be seen to be impartial by their clients. Furthermore, too close a relationship between mediation and agencies able to impose sanctions may inhibit participation. On the other hand, independent agencies may be able to take up a wide range of cases from different agencies, thus benefiting from economies of scale. However, independent agencies require to be clear about the limitations of enforceability of agreements, with the costs that this can present to service users.

## **Empowering communities**

359. There is a tension between the desire on the part of mediation schemes to contribute to regeneration by promoting collective action as an aim, and the requirement to deliver direct mediation services in collaboration with key service agencies. Schemes need to be clear about the priority they attach to each of these aims and how they translate into management structures and practice.

## **Management**

360. We have concurred with the findings of the Dundee City study about the management issues in the Dundee scheme. We see that there is a need to ensure that the membership of management committees reflects the aims of the scheme (service and community orientation), and its needs for particular types of expertise.

361. Volunteer management committees throughout the voluntary sector face difficulties with the level of commitment which individual members are able to offer. We recognise that this is a general issue affecting the voluntary sector.

## **Policy development**

362. It is necessary to examine how community mediation sits alongside government policy to promote civility in neighbourhoods and access to justice. Mediation may be used as a form of diversion or as an alternative measure when considering an ASBO. It may be able to play a part in the promotion of access to justice within the framework of community legal services, by providing non-adversarial dispute resolution services in appropriate cases.

## **THE PRACTICE OF MEDIATION**

### **Criteria for referral**

363. The study shews that there is need for further debate about criteria for referral, particularly in relation to whether community mediation can be conducted in the face of possible or actual criminal or civil proceedings in the case, and where there are significant mental health difficulties.

364. There was a consensus that early referral may well pre-empt escalation of disputes, and referrers may need to work out the best ways to identify nascent disputes.

365. We found that certain problems such as insulation between dwellings and facilities for children may need to be dealt with by measures beyond intervention by community mediation.

### **Structures and models of practice**

366. Although face-to-face mediation is seen as the ideal model of mediation, in fact it is rarely encountered in practice. This is partly because parties do not want this, but also results from mediators helping parties to deal with conflicts unilaterally, and from a natural wastage of referrals. Community mediation schemes will need to re-consider the way they make sense

of their practice, re-focusing on aims and outcomes, such as conflict reduction, rather than on particular approaches to the work.

## **Practice**

### *Promoting mediation*

367. Mediators need to attend to selling mediation to the parties.

### *Party security*

368. Mediators were very sensitive to the need to ensure that parties felt safe in the mediation process, and that they had adequate opportunity to state their views in face-to-face mediation.

### *Mediator style*

369. There is a variety of mediator styles. Mediators have to be sufficiently assertive to engage parties not only in the idea of involvement in mediation, but also in working on the dispute. This may involve challenging parties about their behaviour and stimulating them to work on seeking solution.

### *Process, continuity of mediators and hearing the story*

370. The view that the process of mediation was itself more important than continuity of mediators in casework and than hearing the story of the parties is one that we strongly challenge. However, we recognise that it is difficult to assess the truth of what is told to mediators by the parties, and that parties' motivation to settle the dispute is a paramount factor in the outcome of the case. Nevertheless, parties have the right to tell their stories.

### *Involvement of parties in mediation*

371. We found in a number of cases that those involved as parties in the mediation process were proxies for those who were actually in dispute. Whilst proxies may play a critical part in the process of resolving conflict, mediation, by definition, requires the direct involvement of the actors in the dispute.

### *Legal status of mediated agreements*

372. We strongly recommend that schemes seek legal advice about the status of agreements made in mediation, and whether these constitute contracts in Scots Law under certain circumstances. We also recommend that schemes consider the utility of agreements being set out as contracts, or agreements submitted to the court, in order to facilitate enforceability.

### *Sanctions*

373. Schemes need to give further consideration to issues connected with voluntariness of participation, the use of sanctions, enforceability and concurrent legal proceedings. There is a need to counteract the perception that community mediation has no teeth. There is no

inherent reason why mediation cannot be offered in conjunction with either civil or criminal proceedings.

### *Confidentiality*

374. Schemes need to clarify their policies on confidentiality. Particularly they need to consider (1) the legal limitations upon confidentiality and privilege in Scots Law, (2) the need to balance accountability of practice in recording and confidentiality, and (3) open access.

### *Ethnic minority involvement*

375. We recommend that schemes make approaches to minority ethnic communities to consult about how best to facilitate involvement of their members in community mediation processes both as mediators and parties in dispute.

### *Gender*

376. Although there are many issues connected with gender and mediation, the main issue arising from this study was the need to recruit more male mediators.

## **Service related activities**

### *Management*

377. We have identified a number of issues connected with service delivery and recording, which the Dundee scheme has taken on board. The appointment of a new Co-ordinator should deal with issues connected with supervision and support of mediators.

### *Training*

378. The amount of training hours purchased by schemes from trainers, limits the scope of external training. In addition to the training purchased by the Dundee scheme, we recommend that additional basic training should be provided in the following areas:

- a. the legal context of neighbour disputes, including relevant processes and types of complaint;
- b. administrative requirements, including recording;
- c. how to sell mediation effectively in party visits.

379. There also needs to be a negotiated programme of follow up training for experienced mediators.

380. We recommend that the scheme reviews its person specification for mediators and develops a clear and adaptable procedure for the selection and monitoring of mediators' practice.

## **Conclusion**

381. We note that the Dundee scheme has reported the introduction of a large number of changes in its way of working since the completion of the fieldwork for this study and the appointment of a new co-ordinator.

## **FUTURE RESEARCH**

### **Methodological issues**

#### *Integrating research and programme planning*

382. We recommend support for involvement of researchers at the earliest possible stage of project planning, and making this part of the discipline of development for all new practice initiatives.

#### *Establishing comparative data-bases*

383. We recommend that schemes make use of data bases, such as that of Mediation UK, which lend themselves for comparative and meta-analytical studies.

#### *Ethnic minorities and gender*

384. We recommend that schemes record relevant data on the ethnicity and gender of participation in mediation, and involvement of staff, mediators and management committees.

#### *Access and selection of samples*

385. The selection of cases for sampling should be governed by the research design subject to the willingness of the respondents to participate.

#### *Reliability of qualitative data*

386. We recommend that studies should attempt to gather observational data on practice, using a variety of techniques to achieve triangulation, balancing minimal intrusiveness and optimal verifiability.

#### *Research focus*

387. We recommend that future studies pay attention not only to direct service activities, but also to other relevant activities such as development, management, supervision and support, administration and, training.

### **Research questions**

388. We identify a number of research questions in respect of a number of general headings and topics:

#### *Policy and Development:*

- How agencies develop aims and objectives
- How agencies are constituted
- The institutional location of community mediation schemes
- Aims and objectives of funders, sponsors and referrers

- How agencies develop protocols and understandings with sponsors and referrers
- Relationship between agencies and their publics
- How models of practice are developed
- How principles and standards are developed
- Collaborative relationships between community mediation schemes
- Incidence and nature of neighbourhood disputes
- The place of community mediation in the framework of formal legal proceedings

### *Mediation process*

#### Referrals

- Issues connected with appropriateness of referral categories.

#### Mediator activity

- Mediators' perceptions
- Mediator style
- Models of practice
- Methods
- Practice standards
- Ethical issues

#### Party activity

- Party motivation in mediation
- Strategic behaviour: the extent to which parties use mediation in disputes, and how they do this

### *Service related activities*

#### Supervision and support

- purpose, contact and outcomes of supervision and support

#### Training

- Relationship with agency aims, objectives and practices
- Training and standards
- Measuring outcomes of training

#### Management, Administration and Audit

- effectiveness and integrity of administrative and auditing structures; quality assurance
- effectiveness and integrity of management structures

### *Outcomes of practice*

- Designing tools for measuring outcomes.

### **Priorities for research**

389. Studies relating to practice of existing schemes and future policy implementation:

389.1 **Demand for mediation** - We need further data on the incidence, intensity and characteristics of neighbourhood disputes. More work needs to be done on the

feasibility and suitability of these types of dispute to be dealt with by community mediation.

389.2 **Mediation process** - Further work is needed in two areas: the expectations, motivations and participation of parties to disputes in mediation; and, the interventions of mediators.

389.3 **Mediation outcomes** - It is important to examine the outcomes of mediation, and to explore the possible range of beneficial results of mediation.

389.4 **Implementation** - We believe that the idea of developing community law services provides a useful opportunity to test the feasibility of introducing community mediation in a planned and integrated way within the strategy for promoting safe communities. There is a need to examine the appropriateness of locating mediation services in in-house local authority or independent schemes.



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