

# SCOTTISH COMMUNITY MEDIATION NETWORK

## Response to 'Scottish Civil Courts Review: A Consultation Paper'

### 1. Introduction

SCMN welcomes the opportunity to comment on the review of civil justice in Scotland. SCMN is a network representing community mediation services from virtually all Scottish local authority areas. Community mediation has an excellent record in Scotland as a tried and tested means of resolving neighbourhood conflict. It is comparatively inexpensive, quick, gets to the root of the problem, and is often successful where all other methods of intervention have failed. Almost all Scottish local authorities now have access to mediation services or are currently planning for such provision, and there are now between 150 and 200 community mediators active in Scotland, dealing with upwards of 3000 conflicts a year.

Different models of service provision have been developed, from independent specialist charities to in-house Local Authority mediation services. All models, however, share a basic requirement that mediators work with the public in a safe, effective and efficient way. Because of this SCMN is in the process of introducing a comprehensive accreditation scheme for mediators, mediation services and training courses. SCMN has been accepted as an 'approved body' for the purposes of the Scottish Mediation Register.

### 2. Justiciable Disputes (Section 5.28)

Community mediators deal with a wide spectrum of conflicts, ranging from disputes involving two neighbours to issues affecting whole communities. These conflicts also range in severity from the seemingly trivial to longstanding and complex issues where feelings run high and there has been extensive police involvement.

Conflicts will normally involve issues that could be construed as potentially justiciable either in a criminal or a civil sense. This is reflected in a Scottish Government research paper of 2004 which found that by far the commonest justiciable issue experienced by the public was 'problems to do with a neighbour'<sup>1</sup>. The same report, however, also shows that a substantial number of these people do not seek to engage with the courts to resolve their problems, a pattern confirmed elsewhere.<sup>2</sup> It is the experience of Scottish community mediation services that most of our clients have very little contact with civil legal processes and can often be wary of enlisting the criminal law in order to resolve problems other than as a last resort. Community mediation is able to offer a service to the public where conflict can be identified and dealt with at a stage well before formal action is considered, and we believe it is crucial to recognise that this form of 'civic' intervention, connected only distantly and indirectly to the courts, has a pivotal role to play in the resolution of justiciable disputes in Scotland. We believe this to be in keeping with the Scottish Government's call for proportionality and early intervention in the resolution of disputes.<sup>3</sup>

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<sup>1</sup> *Community legal service: Assessing Need for Legal Advice in Scotland 2004*

<sup>2</sup> See Hazel Genn and Alan Paterson – *Paths to Justice Scotland* OUP 2001

<sup>3</sup> *Modern Laws for A Modern Scotland: A Report on Civil Justice in Scotland* HMSO 2007

### **3. Specific Points (Section 5.28)**

#### **3.1 Mediatable Disputes**

In our experience mediation *can* be used successfully in a very wide range of disputes. There are, however, at least in a community/neighbour context, a number of indicators which help predict success. Figures from the Scottish Community Justice charity Sacro's mediation services show a success rate of around 80% when these indicators are followed:

- There is no outstanding criminal legal action concerning the dispute
- There is at least some level of 'equality of arms' – i.e. no major power imbalance
- The process is entered into voluntarily by all sides
- There is no history of sustained violent aggression present in the conflict
- Parties to the dispute are capable of committing to a course of action (e.g. they are not prevented by mental illness or drug/alcohol misuse from predicting how they are able to act in the future).

In particular, it is our view that measures which seek to penalise people for refusing to take up mediation would at best result in temporary resolutions to conflicts. Part of mediation's efficacy lies in its informal nature, and part in the mediator's skill in assisting parties to listen to and recognise each others' perspective – neither of these conditions is served by compulsion.

#### **3.2 Quality Assurance**

We believe it is necessary for mediator standards to be assured, and our own developing accreditation scheme requires an assessed portfolio detailing case experience and evidence of knowledge and skills in community mediation in addition to proof of approved training and a commitment to continued professional development: we also require accredited mediators to operate within the Scottish Mediation Network's *Guidelines for the Practice of Mediation*. We do not, however, believe that in most fields of mediation there is a requirement for highly detailed contextual knowledge. In other words the skills of a mediator are predominantly generic and are relatively easily transferable between fields given 2-3 days of additional training in the relevant discipline. We therefore would not consider it necessary or desirable for civil courts to require a formal legal qualification in order to recognize mediators as competent to receive referrals.

We would propose that a balance be struck between the need for standards and the need to avoid unnecessary regulation, and as a starting point would suggest the following:

- Referrals from civil courts should be made to mediators listed in the 'In Court' section of the Scottish Mediation Register.
- In identifying suitable referrals, the courts are aware of the conditions likely to make a conflict suitable for mediation. It may, for instance, be appropriate to screen out cases where agreement is likely to turn on complex points of legal argument.
- A suitable resource is developed for mediators from different fields to gain contextual knowledge of the civil legal system. SCMN member services would be interested in considering this as an option.

- An initiative is developed to inform legal practitioners of the availability of local Community Mediation services (normally free at point of delivery), and to encourage them to refer clients at an early stage where appropriate.

### **3.3 Mediator Independence**

We would not view it as appropriate for the court itself to offer mediation. In our experience the efficacy of mediation depends in no small measure on the parties having confidence that the process is separate from any formal jurisdiction, is informal, and is confidential (within ethical limits) to the parties and the mediators. This confidence is as much to do with public perceptions as it is to do with actual systems, and for this reason in itself, we feel the success of mediation would be endangered by internal court provision.

### **3.4 Costs of Mediation**

We believe it reasonable for parties involved in ordinary Sheriff Court actions to pay for mediation. In small claims actions, however, we believe costs would more appropriately be met through the Scottish Courts Service. We are aware of current provision of in-court mediation schemes in Aberdeen, Edinburgh and Glasgow, and such provision should be extended to all Sheriff Courts. Where there are problems of delivery due to the anticipated scale of business, or lack of availability of suitable mediators, SCMN would welcome discussion on how we could contribute to meeting gaps in provision.

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On behalf of  
Scottish Community Mediation Network  
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