University of Strathclyde Mediation clinic

Report for the Justice Committee, April 2018

Background

Strathclyde Mediation Clinic was founded in 2012 with the twin goals of enhancing students' skills and providing a useful service to society. The university has always seen itself as the 'place of useful learning' so, when students on the Masters in Mediation and Conflict Resolution sought opportunities to develop their skills, a free service for local people was a perfect fit. The Clinic enables these postgraduates (with backgrounds in law, management, HR and other professions) to work alongside experienced 'Lead' mediators.

Glasgow Sheriff Court invited the Clinic to offer small claims mediation from February 2014. Considerable work went into developing paperwork and systems.[1] In the first year of the project the Clinic conducted 39 mediations; 31 resulted in settlement (79%) and in 94% of these the terms were fulfilled. Nearly all cases involved unrepresented parties on one or both sides.

The Clinic continued to provide small claims mediation during 2015 and 2016, mediating 32 and 22 cases respectively, with settlement rates averaging 70% and compliance running at over 95%.

Simple Procedure

The publication of the new Simple Procedure rules in summer 2016 led to discussions with Sheriffs Principal in Glasgow and Strathkelvin and in North Strathclyde. They asked the Clinic to provide mediation to enable their courts to fulfil the numerous references in the rules to alternative dispute resolution (ADR). No information was provided by Scottish Courts and Tribunal Service (SCTS) or Scottish Government about how ADR might be made available.

The rules allow sheriffs considerable discretion. Different courts planned to take different approaches, as set out below:

- Glasgow: referral to mediation at First Written Orders (meaning parties do not attend court prior to the referral). Parties receive a letter advising them to contact the Clinic, which sets up mediations at its office by arrangement.
- Paisley: referral to mediation at Case Management Discussion. Duty mediators attend weekly court and provide mediation on the spot.
- Falkirk: same as Paisley, with duty mediators attending monthly.
- Kilmarnock, Dumbarton, Airdrie: occasional referral to mediation at Case Management Discussion. These courts cannot provide accommodation, so mediations take place in the Clinic's office in Glasgow.

[1] The Clinic would like to thank former Sheriff Principal Scott and Sheriff Platt for their input.

Given the high volume of cases in Glasgow Sheriff Court, the Clinic also continued to provide duty mediators at the weekly Simple Procedure court.[2] Mediations take place at court most weeks.

Since the first cases came through the new rules in February 2017, the Clinic has received a significantly greater number of referrals:

	Glasgow	Paisley	Falkirk	Kilmarnock	Airdrie	Dumbarton
Referrals	179	28	13	16	2	3
Mediations	52	23	11	11	1	1
Settled	25	13	10	5	0	1

In total, for the first 15 months of Simple Procedure, the Clinic received 241 referrals and provided 99 mediations, of which 54 settled (57%). The average sum sued for was £2,353 and the average settlement was £1,134. We cannot find publicly available information on the cost of running an evidential hearing. It would be surprising if it were less than £1,000 and so the savings to the public purse from 54 evidential hearings no longer required must be considerable, quite apart from savings to individuals and companies.

A broad range of case types has been mediated:

Case type	
Goods and services	20
Landlord/tenant	17
Building work	16
Unpaid bills	11
Property factors	10
Vehicle related	8
Personal property	4
Employment	3
Other	10
Total	**99**

Issues raised

On the positive side, the Mediation Clinic has become a significant provider of ADR under the new Simple Procedure rules. It seems reasonable to assume that those drafting the rules envisaged a much greater use of ADR within the civil justice system. While numbers remain modest compared to the total number of cases it is clear that sheriffs are increasingly taking time to weigh up the most appropriate way to deal with disputes and referring a proportion of matters to mediation.

[2] This court has a mix of Case Management Discussions and Evidential Hearings and includes represented and unrepresented parties.

However, a number of problems have emerged.

- Inconsistency

(i) Resources

No provision was made to contribute to the cost of mediation. The drafters may have assumed that the market would step up. This assumption is flawed. Many of those involved in claims below £5,000 are of modest means; the majority either cannot afford legal representation or choose not to use lawyers because the costs are disproportionate to the sum at stake. ADR is unlikely to achieve much take up in smaller claims if, having raised an action, parties are asked to pay additional costs. Claimants have already paid £100 in court fees and respondents nothing at all. From their point of view, why pay for mediation when an evidential hearing is free?

Current mediation provision across Scotland is as follows:

Edinburgh – the only sheriff court where the state contributes to ADR costs. Scottish Legal Aid Board funds a full-time coordinator; mediators provide their services pro bono.

West Central Scotland – for the six courts listed above the Mediation Clinic relies on University of Strathclyde support and, again, pro bono mediators.

The rest of Scotland – if a sheriff encourages mediation under the Simple Procedure rules parties are referred to the Scottish Mediation Helpline. The recommended fee for mediators under this scheme is £100 per hour (split between the parties).

The reliance on unpaid mediators cannot be a sustainable model. The Clinic has begun to experience difficulty in recruiting sufficient numbers of experienced practitioners to act as Lead Mediators and to mentor students. Without them it cannot continue to operate. Other professionals are not expected to provide indefinite free services to support the justice system. Some longer term solution needs to be found.

(ii) Procedure and communication

New rules take time to bed in. The Clinic is in a good position to witness the courts' approach as it develops.

Some sheriffs strongly encourage parties to speak to the mediators; others appear unaware of the option and make no mention of it.

Some pause the action to allow mediation to take place; others set a date for a further Case Management Discussion. When an action has been paused it is up to the parties to apply to have it restarted.

As described above, some courts have a duty mediator scheme; others place the initiative on the parties to make contact with the Clinic.

Where duty mediators are present, the most effective approach is for the sheriff to invite the parties to talk to the mediators. Mediation is not mandatory and if, having spoken to the

mediators, they do not wish to take part the sheriff will arrange an evidential hearing. Once parties have met the mediators and established a degree of rapport they tend to be more open to attempting to settle matters that day.

When it comes to written referral to mediation, the Clinic has worked closely with Glasgow Sheriff Court on the wording of the letter that goes to litigants. It is important that parties understand the options available to them, including saying no to mediation without penalty. Having said this, a good number of parties believe that they need to attend mediation in order to appear cooperative to the sheriff. There is a risk that such people will be mediating simply to 'tick a box.'

(iii) Expenses

The expenses rules under Simple Procedure are anything but simple. The Clinic regularly encounters parties unaware of the risks they run in raising or defending claims for over £3,000, where the old Summary Cause rules on expenses apply. This means unsuccessful parties can be liable for the other side's legal fees, a potential source of oppression for unrepresented people. Even below £3,000 the rules are contradictory, providing for both caps and reductions. Many parties believe, wrongly, that if successful, they will recover *all* their costs, including their Solicitor's fees, from the other side. The Clinic has therefore had to produce a guide to expenses in an attempt to help parties make informed decisions.

- Challenging cases – unrealistic expectations and limited resources

It is clear that the settlement rate has come down since the advent of Simple Procedure. There could be a number of reasons but Clinic mediators often report one or both parties being unwilling to compromise because they believe they will be 100% successful in court. While some may be, clearly at least half will be disappointed.

This may account for the higher settlement rate for cases mediated on the day at court (70%) compared to those being referred in writing (48%). At Case Management Discussions the sheriff generally comments on the legal issues and the practical and procedural challenges of proving a claim. This 'dose of reality' can help parties make more informed decisions about what is an acceptable settlement.

This problem is particularly acute in Glasgow, where a large number of cases are referred to mediation at First Written Orders. Parties often have limited understanding of mediation or the sheriff's reasons for suggesting it. The Clinic has had to create a system of 'intake' where mediators speak to parties on the telephone, gaining an understanding of the issues and explaining what is involved in mediation. If one party makes contact, the Clinic will attempt to contact the other party; if both parties agree to participate the Clinic sets up a meeting. As the figures illustrate, in almost 50% of cases neither party contacts the Clinic. All of this requires considerable additional work by pro bono mediators and by administrative staff who do this work over and above their other university duties.

Recommendations

The first 15 months of Simple Procedure can be viewed with cautious optimism. Many more parties have been made aware of the possibility of resolving their disputes by mediation. A significant proportion have reached a resolution. If the promise of the new rules is to be sustainable in the longer term, we recommend the following steps:

- Use a proportion of the £100 court fee to fund regional mediation services throughout Scotland. This funding would contribute to a service akin to the Edinburgh Sheriff Court model, with a salaried mediation coordinator.

- Where mediation services are available, publicise the mediation option from the moment someone considers litigation. The new online portal will provide an excellent opportunity to divert a number of cases to mediation before parties even raise an action.

- Provide additional training in ADR for sheriffs and summary sheriffs, to enhance consistency between courts.[3]

- Reform the rules on expenses. It should be clear to unrepresented parties how much they risk in defending their claim against companies and others with legal representation, and the same rules should apply up to the £5,000 limit.

- Turning to the problem of unpaid mediators, two solutions may be considered (these are not alternatives and may complement one another).

    - The Clinic and Edinburgh Mediation Service stop providing free mediation above a certain value-band; for example in cases for more than £1,000. They use a proportion of the fee to remunerate Lead Mediators while still providing pro bono mediation for lower-value cases.

    - Reform the Ordinary Cause rules to feature the same ADR encouragement as the Simple Procedure rules. This will enable experienced mediators to charge a realistic fee for their services in cases with a value of over £5,000. Such mediators will be more willing and financially able to undertake pro bono work in lower value cases. Others would start out providing pro bono mediation in Simple Procedure as a way of gaining experience.[4]

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https://www.strath.ac.uk/humanities/lawschool/mediationclinic/

[3] For an Australian perspective, see http://mediationblog.kluwerarbitration.com/2018/04/22/court-referred-adr-view-bench/

[4] This is the model in use in a number of US state; for example, Illinois small claims courts.