

Kluwer Mediation Blog

A nudge to mediate: new report from England & Wales

Charlie Irvine (University of Strathclyde) · Tuesday, April 18th, 2023

The idea of using insights from behavioural science to achieve desirable policy goals burst into popular consciousness with the publication of *Nudge: Improving Decisions About Health, Wealth, and Happiness* (R Thaler and C Sunstein, Yale University Press, 2008.) It describes the appealing notion that people can be encouraged to make good choices by the way they are framed: “choice architecture”. In 2010 the UK Government set up a [Behavioural Insights Team](#) to apply these ideas here. And in [this 2012 blog](#) I proposed something similar for Scotland’s civil justice system through making mediation default rather than mandatory. I was intrigued, therefore, to read that the next-door jurisdiction of England and Wales has recently experimented with its own nudge to mediate. His Majesty’s Courts and Tribunals Service’s [opt-out mediation evaluation report](#) describes what happened when the offer of free mediation switched from opt-in to opt-out.

The nudge to mediate

For some time HMCTS has referred money claims up to £10,000 to the pithily-named Small Claims Mediation Service (SCMS). Its model is distinctive: trained HMCTS staff provide free, one-hour, telephone shuttle mediation sessions. In 2021 they conducted 20,831 mediations with an overall settlement rate of 55%. Until May 21st 2021 parties had to *opt in* to mediation by ticking a box. HMCTS then flipped this to an *opt-out* approach. Now the scheme automatically registered parties for mediation, with the option to opt out by clicking on a link saying: “I do not agree to free mediation.” This is a classic “nudge”, encouraging rather than mandating behaviour likely to be beneficial. To assess its impact the evaluation took detailed snapshots of participants, five weeks before and five weeks after the change, via interviews, focus groups, a survey and settlement data.

The headline findings seem underwhelming. Mediation take-up rose from 17% to 21% and settlement rates were 29%. During the same period University of Strathclyde Mediation Clinic was offering a similar service across almost half the country’s courts. Despite differences, particularly in scale, our experience provides a useful benchmark. In 2022 the courts referred 314 cases and we provided 167 mediations, a take-up of 53%, with a settlement rate of 75%. What can we learn from the two approaches?

We in Scotland have our own reasons for scrutinising the findings

- The Ministry of Justice (MOJ) is committed to making mediation compulsory in England and Wales
- The Scottish Government has a manifesto commitment to ensuring dispute resolution methods

like mediation(1) are a central part of the justice system; it is not in favour of mandatory mediation

- Critical voices from South of the Border sometimes find a warm reception in Scotland; it would be a shame if this somewhat lukewarm evaluation led policymakers to write mediation off.

I'll touch on three aspects of the scheme: choice architecture, pre-mediation and overoptimism.

1) Choice architecture – “who clicks first?”

It's clear that a great deal of thought has gone into process design. These are important matters for the individuals and businesses involved and there were over 15,000 cases during the 10 weeks of the study. Still, I was surprised to learn that the defendant (respondent in our system) effectively exercises a veto. If the defendant clicks the second line below, the plaintiff has no say and the case defaults straight to a hearing.



I do not agree to free mediation

Defendant First Screen

In fact 69% of defendants DID opt out, down from 73% under the opt-in scheme. This meant that although claimants were less likely to opt out (31%, down from 36%) fewer than one in three ever had the option, leaving only 21% of cases where neither party opted out.

Compare this with what happens under Scotland's Simple Procedure, for money claims of up to £5,000. Referral to mediation is one option for sheriffs (our judges) under rules requiring them to encourage negotiation and “alternative dispute resolution.”(2) When a sheriff refers a case both parties are asked to contact the mediation provider.(3) This increases the likelihood that the person who is more open to the idea is the first to make contact. To put it another way, it reduces the chance of the more sceptical party having the last word (ironically by having the first).

By the time the second party (“Party B”) makes contact they usually know that the other has opted in, adding another dimension to their decision: “social proof,” meaning: “we view a behavior as more correct in a given situation to the degree that we see others performing it.” (4) Party B will know of at least one other who has agreed to take part in mediation: Party A. If the aim is nudging litigants towards mediation the scheme in England and Wales is missing a trick by eliminating the option of the plaintiff being first to respond. I also note, in passing, that the box for opting out seems more inviting than the rather functional “Continue.”

2) Pre-mediation

Many mediators see pre-mediation work as essential. HMCTS study participants had no contact with a person but did receive “some pre-appointment information.” Perhaps those designing the scheme should take a look at what other mediation providers do. Most offer a pre-mediation conversation.

After Scotland's Simple Procedure rules came into force I answered a call to the Mediation Clinic from an irate claimant. He hollered: "What's this mediation?" He wasn't happy about something he'd never heard of blocking his chance to put the sheriff right on a few things. I knew the last thing he needed was a spiel about mediation. Liz Stokoe and her colleagues found that callers are unimpressed by mediation "philosophy."⁽⁵⁾ Much more important is listening and building rapport. I asked this chap what he was looking for, heard about his frustrations with the other party and empathised with the hassle of dealing with the court. Finally, borrowing from the research, I asked: "Would you be willing to take part in mediation?" He said yes.

The HMCTS scheme replaces this step with written information. Little surprise that mediators reported parties coming to mediation unprepared and lacking an understanding of what's involved. The first few minutes of a one-hour session often had to be spent explaining how the process works and correcting false impressions like expecting mediators to make a decision or tell them what they should settle for. This must be challenging. A relatively brief intake call is likely to improve engagement and settlement while filtering out manifestly unsuitable cases including those where one party is at risk from the other.

3) Over-optimism

A key reason for opting out of the HMCTS scheme was parties' desire to have their "day in court," although this could also act as a reason to mediate: some found the prospect of appearing before a judge highly daunting. Many, though, "felt that they were completely in the right" and "the Judge would agree with them, and rule in their favour." These comments speak of another distinct challenge for unrepresented people: overoptimism.

This is no different in Scotland. Many of those without legal advice (and quite a few who have it) find it hard to believe that the judge will not listen empathetically to their story, be won over by its glaring good sense and vindicate them entirely. Watkins suggests those proposing mediation: "must provide evidence that mediation is not just better than adjudication in reality, but better than adjudication in the optimistic fantasy world from which the parties derive their expectations of success."

The system that has evolved around Simple Procedure seems to include at least two moments when such views are challenged. First is a Case Management Discussion, where sheriffs often set out their preliminary thinking and, on occasion, disabuse overoptimistic parties. This can be a bracing experience as people discover that proving their case may be trickier they thought.

Second, mediators themselves seem to feel less constrained about providing information and insight, often walking parties through the consequences of various courses of action including not settling. While some in the HMCTS scheme did the same, other participants complained that "the mediator appeared to be little more than a messenger between the 2 parties." I've written before about the evolution of the [activist mediator](#) in court-referred mediation. It is likely to become more common as mediators gain experience in both settings. Given the goal of maintaining party choice, any nudge to mediate is more likely to succeed when people have a clear understanding of the alternative.

A warning

The HMCTS Report should act as a salutary warning to anyone advocating greater use of mediation. Busy people, like policymakers and senior judiciary, may not get beyond the headlines. Reading that a large-scale opt-out scheme only increased take-up from 17% to 21% could lead them to question mediation's viability for system-wide reform.

There's a serious point here. First impressions last. Mediation has been characterised as "fragile," (6) meaning people's overall opinion of mediation was disproportionately influenced by their most recent experience. I wonder how many claimants in the HMCTS scheme have written mediation off simply because the defendant vetoed its use? Or because they expected more than a one-hour shuttle telephone call?

I'm not at all critical of the mediators. By all accounts they are impressive: listening, clarifying, and steering uncertain parties towards resolution. But they can only play the hand they are dealt. More concerning is the model, with its assembly-line approach and inbuilt assumption that mediation's only virtue is providing cheap justice for low value claims: "poor justice to the poor." (7) My own research found that small claimants were deeply concerned about the quality of the mediation process and the justice of the outcome.(8)

If policymakers in England and Wales are serious about making a success of mediation they may want to consider borrowing from their northern neighbour. Despite its flaws (including judicial and geographical inconsistency) Simple Procedure fulfils some important "nudge" principles (9):

- Helpful choice architecture (improving the chances of first contact coming from the party more open to mediation, then leveraging their agreement as social proof)
- Pre-mediation calls (allowing for empathic listening)
- Input from sheriffs and mediators (helping to reduce overoptimism).

It is worth adding that Simple Procedure mediations last around two hours, are provided by experienced mediators rather than trained court staff, and (most importantly of all) use Zoom to enable both shuttle and face-to-face negotiation.

Conclusion: three unsolicited proposals

I finish with three unsolicited proposals to improve the effectiveness of the HMCTS scheme:

- 1) After registering parties for mediation, send the opt-out invitation to both at the same time. The box for continuing should match the look of the opt-out box and say "I agree to continue with free mediation."
- 2) Offer initial 20-minute "intake" calls. As well as improving mediation take-up and settlement the variation in workload could help reduce the risk of burnout for mediators.
- 3) Increase the time allocated to mediation and roll out the use of Zoom or other video technology. This will expand the mediators' range to include face-to-face conferences while retaining the option of shuttle mediation via breakout rooms.

There will be costs. Like most mediators I hope cost-cutting is not the only motivation for increasing the use of consensual methods in the justice system (what about pragmatic, tailored resolutions, reduced stress and high rates of compliance?) However, even that limited aim will be thwarted if mediation's credibility is reduced. This will simply drive tens of thousands of

disputants back into the adversarial system, defeating the cost-saving purpose.

Events in England and Wales cast a long shadow, not only in Scotland but further afield. That jurisdiction's commitment to mediation has been an inspiration to many. With some relatively simple changes the current scheme could offer a more effective nudge to mediate.

A version of this piece was written for Mediation Matters, Strathclyde Mediation Clinic's in-house newsletter.

ENDNOTES

- 1) Wherever possible I avoid using the term "alternative dispute resolution" when referring to mediation. For a fuller explanation see [this blog](#)
- 2) Act of Sederunt (Simple Procedure) 2016. Scottish Statutory Instruments, Edinburgh
- 3) The Mediation Clinic provides a free mediation service for 18 courts in the West and South of Scotland. Edinburgh Sheriff Court Mediation Service covers 4 courts in and around Edinburgh. In the rest of the country parties do not receive free mediation and can access a mediator through Scottish Mediation.
- 4) Cialdini, R. B., *Influence: The Psychology of Persuasion* (Revised Edn.) Harper Collins, 2007, 116.
- 5) Sikveland, R., & Stokoe, E. (2016). Dealing with resistance in initial intake and inquiry calls to mediation: the power of "willing." *Conflict Resolution Quarterly*, 33(3), 235–254, 237.
- 6) Latreille, P. (2010) Mediation at work: of success, failure and fragility. *ACAS Research Paper* 06/10.
- 7) Abel, R. (1982) cited in Cappelletti, M. (1993) Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to- Justice Movement. *The Modern Law Review* 56(3) 282–296, 288, fn. 19.
- 8) Irvine, C. (2020) What do 'lay' people know about justice? An empirical enquiry. *International Journal of Law in Context* 16(2) 146–164.
- 9) Service, O. et al. (2014) [EAST Four simple ways to apply behavioural insights](#).

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