



LAW RESEARCH BRIEFING #3

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Getting it right

MIAMs and Court-based mediation in Scotland



Professor Bryan Clark

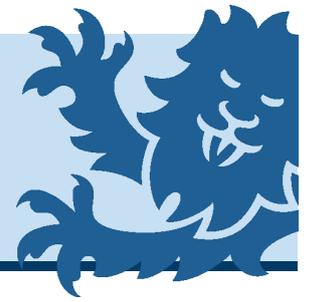


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MIAMS are Mediation Information and Assessment Meetings, a chance for would-be mediation users to find out about the process and assess the suitability of their case for mediation.



1. Introduction

Mediation has been present in Scotland since the 1980's, first taking root in family and community disputes but since extended to a wide range including employment, education, civil, commercial and construction matters. Despite initial reluctance in developing mediation further, the Court Reform (Scotland) Act 2014 introduced the new 'simple procedure' for low value civil claims. This procedure is designed to be flexible, informal and quick, and it places an obligation on parties to seek the possibility of mediation or negotiation.

This to be welcomed but mediation practice in this area needs reformed to guarantee informed participatory and outcome consent of participants. Therefore, it is suggested that introducing uniform referral practices to mediation (e.g. MIAMs), and marshalling lay advisors to assist parties, are necessary to ensure a fair balance between goals of formal civil justice, the assertion of individual legal rights and the negotiation of interests.

2. Limitations of the 'simple procedure' for mediation

The satisfaction rates of parties who have engaged in mediation in Scotland tend to be high and outstrip that of those parties whose cases are resolved through traditional civil court proceeding. A high percentage of mediated outcomes are reportedly honoured, and claimants are able to seek a number of other remedies beyond the gift of the court, including apologies.

Parties in mediation may be willing to sacrifice a particular legal entitlement to attain an agreement that better reflects their underlying interests. Critics suggest, however, that participants in mediation run the risk of being short-changed in justice terms even when they express subjective satisfaction with the process. Settlement rates and party satisfaction are no proxies for justice where legitimate legal entitlements are compromised and recrafted as mere disagreements.

To ensure fairness of mediation parties must therefore provide participatory and outcome informed consent.

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Parties may prefer to sacrifice legal rights in favour of other interests, but should do so in the full knowledge of those rights.

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3. Participatory and Informed Outcome Consent

Informed consent is necessary to ensure a fair balance between goals of formal civil justice, assertion of individual legal rights and negotiation of interests.

There are two aspects of **informed consent**:

1. the explanation to the party and ensuring their understanding of the consequences of participating in a process (participatory consent);
2. to ensure that the party fully understands the nature of any agreement reached through a process (outcome consent).

For informed participation consent to mediation to be achieved, parties need to be made aware of exactly what it is they are signing up to and then consent to their involvement in that process. It is essential that in gaining participatory consent parties are painted an accurate picture of the

process and the role of the mediator that will unfold.

This is not simple to achieve, particularly for litigants in person (LiPs) unfamiliar with the mediation process and being brought into mediation currently through different routes

For informed outcome consent, the Scottish Mediation code of practice for mediation makes no reference stressing instead mediator impartiality and respecting the self-determination of the parties. Removing this responsibility from the mediator does not mean that other safeguards around informed outcome consent should not be build into mediation.

Current practice does not protect the crucial aspect of litigants' informed consent to both participation in mediation (participatory consent) and in respect of outcomes brokered within the process (outcome consent).

4. Charting a way ahead for meditation in Scottish Simple Procedure

In order to achieve the aim of proportionate justice, balancing speed and efficiency of mediation, **compulsory reference to mediation information, possibly through a Mediation Information and Assessment (MIAMs), is desirable**

Evidence arising from the use of MIAMs in England and Wales in family actions suggests a conversion rate from MIAM to mediation around 66.75%.

Moreover, compulsory mediation information referral holds the potential to allow informed consent of parties in the process by providing 'warts and all; information about mediation allowing parties to take a measured view as to whether it is for them,

While external legal assistance may be instrumental in promoting informed outcome consent, **making greater use of lay advisors to assist LiPs provides a more realistic remedy.** Evidence suggests that non-lawyer representation aids LiPs significantly in a range of contexts. Lay advisors already operate in certain Scottish in-court advice schemes or *oq̄ anm̄* through University law clinics, law centres and CABs. Providing appropriate training in mediation to lay advisors and extending the court advisory service to other sheriff courts may help ensure that mediation in simple procedure is rolled out in way that is both efficient and cost effective but also helps ensure that settlements brokered are just,



RECOMMENDATIONS

- ◆ There should be a **consistent mechanism by which litigants are channelled into mediation** in simple procedure in Scotland, possibly through a Mediation Information and Assessment Meeting to ensure the informed consent of users to participate in the process.
- ◆ To help ensure that all parties can give informed consent to outcomes rendered within mediation, **party representation should be made available to all in mediation**. It is suggested that it is proportionate to develop the provision of lay advisers for litigants in person in simple procedure mediation.

Professor Bryan Clark



Bryan is a Professor of Law and Civil Justice at the University of Newcastle Law School where he teaches and researches civil justice, mediation and aspects of commercial law. Over the past decade he has worked with a range of organisations in the field of mediation including Scottish Mediation, the Civil Mediation Council and Relationships Scotland.

✉ bryan.clark@ncl.ac.uk

🐦 [@clarkbryan71](https://twitter.com/clarkbryan71)

🖱 www.ncl.ac.uk/nuls



Clark B, 'Some reflections on "I won't see you in court"' (2019) 2 Juridical Review 182-189.

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