The Department for Constitutional Affairs (DCA) recently published research into three pilot schemes offering mediation in small claims disputes. It claims that these mediation schemes are 'quicker, cheaper, less adversarial and provide a better outcome for the court user', and proposes to roll out the Manchester model to other court areas across the country during 2007/08.[1] In this article, Val Reid, ADR Policy Officer for the Advice Services Alliance, outlines some concerns.

Small claims – big questions

Background

In December 2006, the DCA published four research reports into three small claims mediation pilot schemes at Exeter, Manchester and Reading County Courts. Each pilot scheme used a slightly different model:

- In Exeter, solicitors who were also qualified as mediators offered free 30-minute mediation appointments to litigants referred by the district judges. An earlier study by Jill Enterkin and Mark Sefton evaluated this scheme during 2003/04, and a later study by Dr Sue Prince and Sophie Belcher covered 2005/06.[2]
- In Manchester, a full-time salaried mediation officer was available in court to give information and advice about mediation, and to provide free one-hour face-to-face mediations to small claims parties. After the start of the pilot period he began to offer telephone mediation as well; this proved very popular.[3]
- The Reading pilot focused on giving advice and information about the small claims process to unrepresented litigants, with a by-product of facilitating some settlement negotiations. The scheme has since been discontinued.[4]

The questions

Headline conclusions do seem to show that mediation is highly successful in resolving small claims, and that the process is popular with the parties. However, a more detailed reading of the research raises serious questions about whether '… too much emphasis is placed on expediting cases and too little on the safety of outcomes in terms of "justice" …'.[5]

There are a number of questions to be asked:

- Does small claims mediation work?
- Are the participants happy with it?
- Does it save time and money?
- Does it add value to the small claims process?
- Is this really mediation?
- Is the DCA policy justified?

Does small claims mediation work?

This depends on what is meant by 'work'. In Manchester, 86 per cent of mediations resulted in a settlement. In Exeter, the figure was between 65 and 69 per cent. There was also little or no problem with enforcement: in Manchester all the mediated settlements were complied with, and in the earlier research at Exeter, only 4 per cent of mediated cases required enforcement action, compared with 19 per cent in the control group of cases where a judicial order was made. However, a closer look at the research findings indicates that this is not necessarily the whole picture. Whether mediation 'works' depends on other factors as well.

Are the participants happy with it?

User satisfaction with the mediation service itself was good at the courts in Manchester and Exeter. The earlier research in Exeter, however, identifies and challenges an assumption that if settlement is reached, parties are satisfied. This is not necessarily true, for a number of reasons.

Getting what you came for

Claimants using mediation can expect to settle for significantly less than those going to court. In Manchester, cases settled at mediation for an average of half of the claim value. The earlier report at Exeter found that the mean value of mediated settlements was 63 per cent of the claim value, and where a judgment was issued it was 83 per cent. In both schemes, some claimants expressed disappointment at what they perceived as low settlements.

Feeling under pressure

A number of parties felt under pressure to settle – partly by the limited time available, partly by the implied threat of 'going to court', and partly by the mediator. In Exeter, in the 2003/04 study, a mediator referred to the mediation process as 'a 30 minute hustle'; one litigant in that pilot called it a 'mild form of bullying' and another 'a form of blackmail'. It is worth noting, though, that in Manchester some parties felt that pressure had a positive effect in reaching settlement.

The effects of ignorance

The Manchester research found that many parties' satisfaction with the mediation process was linked to relief at avoiding what they feared would be a daunting court hearing – but most had no actual experience of this. Other research suggests that the normal small claims process does seem to work well for litigants-in-person, and that parties are often surprised at the informality of small claims hearings.[6] Better information and advice about the

small claims process would help unrepresented parties make more realistic assessments about the best way to resolve their dispute, but this could be costly.

Does it save time and money?

Mediation was free to court users in these pilots, so it cost them no more and no less than a hearing. If there are savings to be made, they must be for the courts. But this requires closer analysis.

How many small claims cases were settled through mediation?

During the Manchester pilot, 27 per cent of the small claims cases at the court were referred to the mediation officer, 41 per cent of these cases went on to mediation, and 86 per cent of these settled. This actually means that fewer than 10 per cent of all the small claims cases at Manchester were resolved through mediation. In addition, the settlement rate for telephone mediations was unreliable for much of the pilot, due to irregularities in recording when a telephone call became a 'mediation' (in effect, only when it resulted in a settlement).

How much judicial time was actually saved?

All the studies used a fairly crude analysis of judicial time savings. The Manchester researcher estimated that 172 hours of judicial time were saved over 12 months, but readily admits that this is a 'broad-brush' figure created by simply adding up the time allocated to cases which settled at mediation. Her rough estimate does not allow for cases which might not have led to a hearing anyway, or for judicial time spent on allocating cases to mediation or granting consent orders where an agreement was reached. The earlier Exeter report concluded, on the same 'broad-brush' basis, that 216 judicial hours had been saved in a year, but also stated that it was hard to say how much of this was a 'true' saving, given that just over half of non-mediated cases in the control sample did not result in a hearing either. Neither report takes the cost of the mediators into account.

Does it add value to the small claims process?

One of the claims made for mediation is that it can offer creative settlements that are not available through court orders – apologies, changes in policies and procedures and donations to charity. However, in both the Manchester and Exeter pilots, there was little evidence of this. In Manchester, for example, only 12 per cent of mediated settlements included an outcome that could not have been ordered by the court, and several parties felt that the focus was on compromise and bartering rather than achieving a win/win solution.

Is this really mediation?

Small claims mediation runs the risk of falling between two stools. It does not appear to meet some of the key criteria for mediation such as voluntariness and neutrality, nor does it meet the users' expectations of a legal process.

Voluntary or compulsory?

A key element of mediation is its voluntary nature, and the judgment in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, 11 May 2004 stressed that mediation should not be a compulsory part of the court process. But compulsion can be a matter of perception. In the earlier Exeter report, although the scheme was nominally a voluntary one, interviews reveal a worrying lack of clarity: two-thirds of the participants felt they had no choice, as they thought the judges might penalise them if they refused to try mediation. In addition, at least three of the ten mediators in the scheme were unclear about just how voluntary it was. Following the report, changes were made to the scheme to make it more apparent to the parties that it was voluntary; however, the 2005/06 research still found confusion about this.

What is the role of the mediator?

Another key principle of mediation is the neutrality of the mediator. In both pilots, researchers questioned whether the mediators appeared impartial. In the earlier Exeter report there was evidence that the mediators sometimes slipped into their familiar role as solicitors and gave advice to the parties or negotiated on their behalf. The researchers also found a competitive element among the Exeter mediators, who saw failure to achieve a settlement as a slight on their reputation. James Rustidge, the mediation officer in the Manchester scheme, has claimed that his past experience with the CID 'may have something to do with his attitude and success'.[7] As the Manchester researcher comments: 'If parties perceive that [the mediation officer's] job is to obtain mediated settlements, it might affect their perception of his impartiality.'

Is this justice?

In the earlier Exeter report, some of the parties felt aggrieved that no legal arguments were accepted in mediation, and that often the mediators did not seem to know anything about their case. They felt that it was not 'fair' if rights and wrongs were not taken into account. The researchers make the point that 'the streamlined nature of these proceedings and their lack of internal checks leave litigants with little or no recourse to challenge, appeal or simply complain about procedures or outcomes'.

Is the DCA policy justified?

These research reports do not really provide adequate evidence to support the DCA's enthusiastic plans to roll out the Manchester small claims mediation model throughout the court system. They also raise a serious question about whether such court-based settlement negotiations should really be called mediation. Some claimants may be happy to settle for less in order to benefit from a quicker procedure with fewer enforcement problems, but this is not what is traditionally meant by the mediation process. There needs to be much greater clarity about what is being offered, and enough information and advice for parties to make an informed decision about what they are choosing, and why. The researchers recommend changes to the process that would improve transparency and accountability, and provide greater safeguards for parties using an unfamiliar and unscrutinised process. More advice and better protection for participants could make these schemes a valuable alternative to court, but they might cost more, not less, than the present small claims procedure.

1 See: www.dca.gov.uk/civil/adr/.
2 *An evaluation of the Exeter small claims mediation scheme*, DCA research series 10/06, Jill Enterkin and Mark Sefton, December 2006, p86, available at: www.dca.gov.uk/research/2006/10_2006.htm. See also *An evaluation of the small claims dispute resolution pilot at Exeter County Court*, Dr Sue Prince and Sophie Belcher, September 2006, available at: www.dca.gov.uk/civil/adr/small-claims-exeter-full.pdf.
3 *Evaluation of the small claims mediation service at Manchester County Court*, Margaret Doyle, September 2006, available at: www.dca.gov.uk/civil/adr/small-claims-manchester.pdf.
4 *Evaluation of the small claims support service pilot at Reading County Court*, Craigforth, September 2006, available at: www.dca.gov.uk/civil/adr/small-claims-reading.pdf.
5 See *An evaluation of the Exeter small claims mediation scheme* at note 2.
6 *Monitoring the rise of the small claims limit: Litigants' experiences of different forms of adjudication*, LCD research series 1/97, John Baldwin, 1997, available at: www.dca.gov.uk/research/1997/197esfr.htm.
7 'Smooth talker', *Law Society Gazette*, 11 January 2007, p26.