

Legal Studies

Research Findings No.38

Supporting Court Users: The In-court Advice and Mediation Projects in Edinburgh Sheriff Court Research Phase 2

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The In-court Advice Project was introduced into Edinburgh Sheriff Court in April 1997, and was the first service to be established in a Scottish court that provided court users with legal and other advice. The Mediation Project was formally linked to the In-court Advice Project in 1998, and the number of clients using its services increased over the period. Phase 2 of the research took up exactly one year from the end of the Phase 1 monitoring period and, like Phase 1 of the research, monitored the Project for a period of nine months. This second phase was conducted to examine the new mediation component of the Project, as well as to assess the Project's continued impact on court users, the sheriff court and the civil justice system.

Main Findings

- The demand for services provided by the In-court Advice Project increased steadily from the time it was first introduced, particularly amongst tenants involved in housing repossession cases as well as those seeking advice about matters related to The Debtors (Scotland) Act 1987. More than 80% of clients faced legally represented opponents.
- The Project was successful in meeting rising demand for its services without significant expansion of its operation.
- This was possible by more clients seeking advice prior to their cases calling in court and seeking advice only once.
- The Mediation Project provided unrepresented disputants in small claims and summary cause cases with an alternative to litigation.
- The Mediation Project helped as many clients settle their disputes by arms-length negotiation as by conducting a mediation hearing.
- Almost all mediation hearings concluded with an agreement, and all agreements appeared to have been honoured.
- Since its introduction into Edinburgh Sheriff Court, the In-court Advice Project has raised its court profile considerably.
- Sheriffs welcomed the In-court Advice Project for helping unrepresented litigants to achieve higher levels of participation, control and understanding of court procedure, and for promoting a level playing field in court.
- Sheriffs and sheriff clerks welcomed the In-court Advice Project for its contribution to the efficient use of court resources and court time. Close working relationships between sheriff clerks and Project workers continued into Phase 2, and this was critical for its success.
- Solicitors endorsed the In-court Advice Project for providing them with an opportunity to seek information from and negotiate with unrepresented litigants, via the In-court Adviser.

Background to the In-court Advice and Mediation Projects

The Edinburgh In-court Advice Project came into operation in Edinburgh Sheriff Court in April 1997 and was the first service of its kind to be established in a Scottish court.

The need for a court based advice service was identified when small claims procedure was first introduced into the Scottish civil justice system, in 1988. The disadvantages that unassisted litigants face in small claims actions, as well as in housing repossession cases, have been well documented since then. In recent years, unassisted litigants have been appearing in court with increasing frequency, since eligibility for legal aid and access to legal representation have become more difficult. Concerns have been raised as to the implications of the rising number of unassisted litigants for access to justice as well as for the efficiency of the sheriff court.

The proposal for a court based advice service was initiated by the Scottish Consumer Council and Citizens Advice Scotland. With support from Scottish Courts Administration, they were successful in securing funding from Directorate-General XXIV of the European Commission for a pilot project, which was to run for one year initially. The establishment of a pilot project in Edinburgh Sheriff Court was triggered by the Sheriff Principal's intimation of his willingness for a court-based advice service to be based there.

Though located in Edinburgh Sheriff Court, the In-court Advice Project is independent of Edinburgh Sheriff Court and managed by Citizens Advice Scotland and the Scottish Consumer Council. The Project is under the guidance of a steering group chaired by the Sheriff Principal of Lothian and Borders, Sheriff Principal Gordon Nicholson QC, and includes representatives of sheriffs and sheriff clerks in Edinburgh Sheriff Court, Scottish Executive Justice Department, Citizens Advice Scotland, the Scottish Consumer Council, Edinburgh Central CAB, Community Help and Advice Initiative (CHAI), Edinburgh Bar Association, Scottish Legal Aid Board and the Scottish Executive Central Research Unit

The Project first opened its door to clients on April 7, 1997 and has employed a full time worker (managed

by Edinburgh Central CAB) ever since. The main remit of the In-court Advice Project is to offer advice to unassisted litigants in small claims, summary cause (including housing) and ordinary cause actions where The Debtors (Scotland) Act 1987 applies, and to refer them on to appropriate agencies when necessary. Court representation is only offered in emergencies.

In the following years, there were important changes to the In-court Advice Project. A mediation service, first established in 1995 and operating out of Edinburgh Central CAB, was formally linked to the In-court Advice Project in 1998 when joint funding was provided by Directorate XXIV of the European Commission. The Scottish Executive Justice Department took over the funding of these linked Projects in 1999. In the meantime, the number of clients consulting both Projects increased significantly.

These changes took place in the context of renewed efforts to promote access to justice while at the same time seeking value from the legal aid fund. Proposals for distributing publicly funded legal services more equitably and rationally were disseminated for consultation through the Scottish Office's *Access to Justice – Beyond the Year 2000: A Consultation Paper on Civil Legal Aid*.¹ It is against this background that two research studies were conducted at different phases in the development and maturity of the In-court Advice and Mediation Projects.

The Two Research Phases

Even as the Project was being introduced into Edinburgh Sheriff Court, research was designed to monitor the operation of the In-court Advice Project over its first nine months (April-December 1997). The study, henceforth referred to as Phase 1 research, was undertaken to assess the demand and need for the Project's services, to evaluate the Project for its capacity to deliver advice and support to unassisted litigants and to explore its impact on the court, court practitioners and the civil justice system. The findings of Phase 1 research were reported in *Supporting Court Users*², and may be briefly summarised, as follows:

- There was a large demand for the services of the In-court Advice Project, with the number of clients increasing dramatically over the first nine months of the Project.

¹ Scottish Office Home Department (1998) *Access to Justice-Beyond the Year 2000: A Consultations Paper on Civil Legal Aid*, Edinburgh

² Samuel, E. (1999) *Supporting Court Users: The In-Court Advice Project in Edinburgh Sheriff Court*, Edinburgh: The Stationery Office. See also *Research Findings 22: Supporting Court Users*, www.scotland.gov.uk/cru/resfinds/1s22—00.htm

- The Project was able to cope with this demand by devising methods that encouraged clients to seek advice outwith court time.
- Clients provided the Project with a powerful endorsement, particularly for the court-related support and assistance that they had received.
- The Project promoted justice and efficiency in the Sheriff Court.
- The close working relationship that had developed between the Sheriff Clerk's Office and the In-court Advice Project was crucial for the success of the Project
- The Project filled a gap in the civil justice system by offering services, which few other agencies were providing. It contributed to the civil justice system by forging links between agencies and by promoting social inclusion through its support of court users.

Phase 2 research was undertaken to monitor the operation of the In-court Advice Project since its establishment in Edinburgh Sheriff Court as well as to provide information on the newly linked Mediation Project. Phase 2 research was more limited in scope than Phase 1 and focused on the volume of business, type of business and type of client dealt with by the In-court Advice and Mediation Projects, as well as the role which both Projects played in the sheriff court. It collected information on the In-court Advice Project relating to the business that it conducted three quarters way through its second year until midway through its third year (1 December 1998 and 31 August 1999), and made comparisons with Phase 1 findings relating to the Project's first nine months in Edinburgh Sheriff Court.

Research Findings: The In-court Advice Project

In the nine-month period covered by Phase 2 of the research, the In-court Advice Project conducted 1648 consultations with 1017 clients. Compared with the Project's first nine months, this represents a 66% increase in consultations and a 50% increase in clients. The increase was particularly marked in housing repossession cases, with consultations increasing by 90% (from 452 to 857) and clients by 61% (from 382 to 615). Consultations and clients

relating to summary cause procedure rose by over 100% (from 70 to 147) and 50% (from 46 to 66) respectively. The most marked increase was in consultations (from 4 to 129) and clients (from 3 to 63) relating to The Debtors (Scotland) Act 1987. The smallest increase between Phase 1 and Phase 2 was amongst consultations and clients relating to small claims procedure (from 326 to 436 and from 211 to 225 respectively).

These figures are reflected in the kinds of disputes brought to the In-court Advice Project. Over the two periods, there was a very marked increase in clients involved in cases brought by local authorities against their tenants and by finance companies against debtors. At the same time, there was a decrease in the number of clients involved in cases brought by consumers against businesses.

Almost two-thirds of Project clients consulted with the In-court Adviser only once and they were mainly defenders involved in housing repossession actions. 80% of all consultations were with defenders, compared with 73% at Phase 1. The proportion of Project clients facing legally represented opponents increased between the two research periods, from 79% (529) in Phase 1 to 83% (834) of all clients in Phase 2. This reflects the increasing number and proportion of clients who were involved in housing repossession cases brought by the City of Edinburgh Housing Department.

Defenders in housing cases were mainly referred to the Project by information that the City of Edinburgh Housing Department agreed to insert into summonses. As the number and proportion of Project clients involved in housing repossession cases increased, so too did the number of clients referred to the Project by these inserts. Some time after the completion of Phase 1 research, the Ordinary Cause section of the Sheriff Clerk's Office began to insert information about the In-court Advice Project into summonses relating to the Debtors (Scotland) Act 1987. This was the chief source of referral of clients seeking advice on matters relating to the Debtors (Scotland) Act 1987, and made a very considerable impact on the number of these clients. As the first port of call for many persons raising, or thinking of raising, a small claims action, the Sheriff Clerk's Office continued to be the chief source of referral of clients with matters relating to small claims. In contrast with Phase 1, In-court Advice Project workers were more likely to refer clients attending court than

was the Clerk of Court. Improved resourcing provided the Project with an opportunity to approach most party litigants as they entered and departed from court.

The number of consultations conducted prior to cases calling in court and outwith court time doubled between the two research periods (from 409 to 814) and slightly increased as a proportion of all consultations (from 46% to 50%). There was some increase in the proportion of first consultations conducted prior to cases calling in court. This was more noticeable amongst pursuers (increasing from 58% to 66%).

Research Findings: The Mediation Project

In the nine months under review, 151 clients were referred to the Mediation Project. Most of them were referred by the In-court Advice Project (99), almost two thirds of them prior to raising an action or prior to their cases calling in court. The Mediation Coordinator (18) and Edinburgh Central CAB (15) referred some clients and a few were referred by sheriffs (5). The In-court Advice Project referred more than one quarter of its 372 small claims and summary cause clients (not including housing repossession cases) to the Mediation Project.

Referrals to the Mediation Project were typically individuals involved in cases against small businesses (35%), individuals involved in cases against other individuals (26%) and small businesses involved in cases against other small businesses (19%). Only one client referred to mediation was legally represented, though 47 clients (34% of referrals) were involved in cases where the other party was legally represented. The large majority of cases involved monetary claims (over 80%), followed by disputes over products and services (9%), and damages or personal injury claims (9%).

More than half of the 151 clients referred to the Mediation Project agreed to take up mediation while another 10% agreed to arms-length negotiation. Following their agreement, the other or 'second' party was contacted. One half of all 'second' parties contacted agreed either to mediation or arms-length negotiation. Where both parties agreed to involvement, the Mediation Coordinator usually

attempted to facilitate a settlement prior to fixing a hearing date. The Mediation Project was successful in bringing to a conclusion one-quarter of all cases referred to it.

Of the 151 cases referred to the Mediation Project during Phase 2 research, a settlement was negotiated by the Mediation Coordinator in 21 cases and a settlement reached at a mediation hearing in 20 out of the 22 cases that went to a hearing. Most mediation hearings took place in Edinburgh Central CAB and were conducted on a *pro bono* basis by mediators trained by the Centre for Dispute Resolution or by the Law Society of Scotland. A negotiated settlement was more likely to be reached by 'arms-length' negotiation when clients were individuals, and by a mediation hearing when clients were small businesses. Mediation hearings were found to be most appropriate when parties desired to maintain relationships (whether personal or business) over the long term.

The Sheriff Court and Wider Context

Phase 2 research found that In-court Advice Project had raised its profile in the sheriff court, particularly amongst sheriffs. Sheriffs reported that they now had greater confidence in the information that unrepresented litigants put before them. They were also aware of the way in which the Project was helping clients to focus on issues relevant to the case and assisting them in presenting their case in court. The cooperative links established between the In-court Advice Project and the Sheriff Clerk's Office in the first month of the Project continued to thrive and were crucial for the Project's success. At the same time, sheriff clerks and other staff reported that the Project contributed to the streamlining of services provided by Clerks of Court and by the Sheriff Clerk's Office.

The research found some change in the attitude of solicitors facing Project clients. In Phase 1 research, their main response was to hold the Project responsible for time wasted in court. By Phase 2, however, they acknowledged not only that court was proceeding at a quicker pace in view of the substantial number of unrepresented litigants being advised, but that the Project was also of assistance to them at several stages in the proceedings. This was because problems faced by solicitors in dispute with

unrepresented litigants were being addressed by the presence of the Project. The Project provided them with an opportunity to negotiate with unrepresented litigants both prior to cases calling in court and on the day, through the In-court Adviser and Mediation Coordinator. The highest proportion of Project clients faced the City of Edinburgh Council's Housing Department and its in-house legal staff. The Housing Department reported that the Project brought benefits to its work, and this was reflected in the large number of litigants who were contacting the Council for clarification and/or negotiation before their case called in court.

Most small claims and summary cause cases were dealt with by the Project without referring clients to other agencies. Clients referred on by the In-court Advice Project were mainly involved in housing repossession cases. Some were defenders with other debt problems. There were variations between advice agencies as to the quality and consistency of their information on the 'take-up' of referrals. There was almost universal agreement between agencies that higher take-up rates could be achieved through more directive referrals and appointments systems.

Discussion

The In-court Advice Project continued to provide services designed to assist unrepresented court users, many of who were facing legally represented opponents in court. The Project was successful in reaching a large number of court users and assisting them in understanding the issues that had brought them to court, the options that were now available to them, the ways in which they could present their case most effectively in the court, the implications of their court hearings and what actions they were now required to take. The In-court Advice Project therefore contributed to the promotion of active and inclusive citizenship in the population served by Edinburgh Sheriff Court.

The In-court Advice Project addressed problems raised for the court by the presence of unrepresented court users. The Project contributed to the performance of judicial duties by assisting unrepresented litigants in presenting their cases to the court. There was therefore greater confidence that judicial decisions were being made on the basis

of accurate and relevant information. The In-court Advice Project also appeared to optimise court resources by smoothing the passage of unrepresented litigants through the sheriff court, by helping them to get quickly and accurately to the disputed issues and by diverting some cases from the court.

The In-court Advice Project augmented its services to persons without legal assistance by introducing a mediation component through its links to the Mediation Project. While the In-court Advice Project assisted unrepresented litigants in court, the Mediation Project was instrumental in assisting unrepresented litigants and claimants outside the court. Its mediation service provided them with a non-litigating option for resolving their disputes and assisted them in taking this option either by 'arms-length' negotiation or at a mediation hearing. The success of the mediation service highlights a need that is less visible than the needs of unrepresented litigants appearing in court, namely the needs of claimants for assistance in initiating and conducting negotiation. Indeed, unrepresented litigants may often choose litigation over negotiation because negotiation is not perceived to be available to them. This perception is occasionally inaccurate and very often accurate. Thus, lawyers who usually opt for litigation only once negotiation has failed, often find it difficult and inappropriate to negotiate with unrepresented litigants. This explains why solicitors representing parties in dispute with Project clients often welcomed the opportunities for negotiation that the In-court Adviser and Mediation Coordinator offered them.

Many of the research findings reported here of relevance to issues identified in the Scottish Office consultation³ paper *Access to Justice: Beyond the Year 2000*.³ In particular, the research provides a basis for discussion about the provision of community legal services in Scotland and the arrangements that may be made for improving and strengthening the provision of accessible advice and assistance on legal problems within communities. The In-court Advice Project in Edinburgh Sheriff Court piloted new arrangements for targeting unmet need and delivering legal services in Scotland. With its new mediation component, these services related not only to assistance in court and assistance with litigation, but also to assistance in resolving disputes through negotiation.

³ Scottish Office Home Department (1998) *Access to Justice-Beyond the Year 2000: A Consultation Paper on Civil Legal Aid*, Edinburgh

About the study

Phase 2 of the research relates to the In-court Advice Project in the last quarter of its second year and the first half of its third year (1 December 1998 and 31 August 1999) in Edinburgh Sheriff Court. The study was conducted between September 1999 and April 2000 by Elaine Samuel at the Department of Social Policy, University of Edinburgh, and was commissioned by the Central Research Unit (Legal Studies Research Branch) on behalf of the Scottish Executive Justice Department. Information was collected from In-court Advice Project records relating to 1648 consultations conducted in the nine-month period up to 31 August 1999. Comparisons were then made with information collected in the initial research and relating to 893 consultations conducted in the first nine months of the Project. Phase 2 research also collected detailed information of mediation services provided by the Project between 1 December 1998 and 31 August 1999. Information on all In-court Advice Project clients referred to the mediation service was collected from the Project's client records. Information was also collected from separate client records maintained by the Mediation Coordinator. In addition, 23 interviews were conducted with project workers (In-court Advice and Mediation Projects); sheriffs; sheriff court employees; sheriff court practitioners (solicitors and City of Edinburgh Council Housing Department); representatives of advice agencies and mediation clients.

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