



**Briefing Paper  
& Report on Key Findings**

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## **Acknowledgments**

The authors would like to thank the parties and practitioners who contributed to the project and without whom the study would not have been possible. In addition, they would like express their gratitude for the invaluable work of the Advisory Group who gave their time and expertise to help guide the project. Last but not least, our thanks go to the other members of the Research Team for helping to bring the project to fruition.

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## Introduction

The Family Justice System is undergoing radical change and part of the shifting landscape involves the encouragement towards settling Family Law disputes outside court. The Mapping Paths to Family Justice study has been an independent 3-year ESRC-funded academic research project undertaken by the Universities of Exeter and Kent, beginning in July 2011. The project's central aim was to provide much needed evidence about the awareness, usage, experience and outcomes of the different 'alternative' or 'out of court' Family Dispute Resolution processes (FDRs). The refocusing of legal aid for private family law disputes on mediation, following the withdrawal of public funding for legal advice and court representation in such cases (other than in a narrow band of situations) by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), has increased the relevance, importance and topical nature of this research to family policy and practice in this field, alongside academic debates. When the project was designed, the principal methods of resolving disputes without going to court were Solicitor Negotiation, Mediation and Collaborative Law and these are therefore its focus. Against this background, this Briefing Paper sets out the study's aims and methods before reporting on the main findings to its research questions.

### **Background and Aims**

The overall aim of the study was to undertake a 'bottom up' comparative analysis of the most common forms of out of court FDRs, to provide a substantial, up-to-date evidence base. More specifically, its objectives were:

- ▶ To provide an up-to-date picture of awareness and experiences of three forms of out of court family dispute resolution:
  - ▶ solicitor negotiations
  - ▶ mediation
  - ▶ collaborative law
- ▶ To produce a 'map' of family dispute resolution pathways and consider which pathways are most 'appropriate' for which cases and parties
- ▶ To consider which (if any) norms are embedded in these different processes
- ▶ To provide research evidence to inform policy and consider best practice

Since the 1990s, successive governments had promoted mediation as a preferred means of resolving family disputes out of court, yet traditional negotiation between the parties' solicitors with the aim of achieving an agreed solution without going to court, remained the most common way of settling disputes. Although the Family Law Act 1996 Part II (FLA 1996), which was to have made mediated divorce the norm, was never implemented, it prompted important research around the mediation experience (Davis et al, 2000, Walker, 2004). It also triggered an expansion of mediation services and of mediator training offered to lawyers and non-lawyers, and probably prompted legal professional associations to strongly encourage their members to use a non-adversarial approach to family law disputes. The new-style specific Collaborative Law process was introduced to England and Wales in 2003 and was due to become available to legally aided clients in November 2011, although this was reversed prior to implementation. Whilst research on each of these processes existed primarily comparing them with adversarial approaches, little up to date research existed for England and Wales and there was none comparing the three FDR processes which could potentially help avoid court.

### **Research Design and Methods**

An Advisory Group was appointed in 2011 comprising a range of practitioners and academics to ensure the project had interdisciplinary input from relevant stakeholder communities. The study focused on the period after 1996, by which time mediation had become nationally available. It was designed in **three interlinking phases**, described below, to address research questions around awareness and experiences of FDRs from general public, party participant and practitioner participant perspectives.

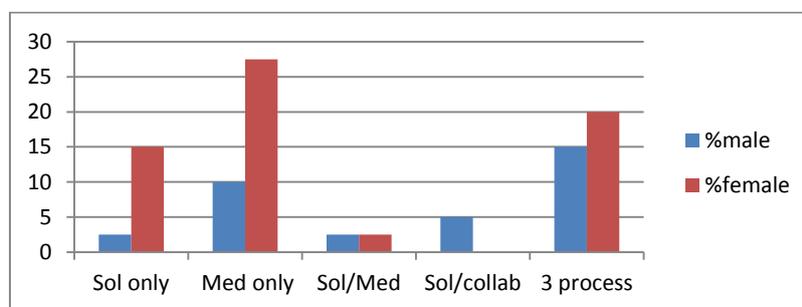
We defined the three FDR processes and explained them to parties in Phases 1 & 2 as follows:

- ▶ **Solicitor negotiation** (in which solicitors engage in a process of correspondence and discussion to broker a solution on behalf of their clients *without going to court*).
- ▶ **Mediation** (in which both parties attempt to resolve issues relating to their separation with the assistance of a professional family mediator).
- ▶ **Collaborative law** (in which each party is represented by their own lawyer; and negotiations are conducted face to face in four-way meetings between the parties and their lawyers, with all parties agreeing not to go to court).

**Phase 1** – To explore questions on Awareness and Experience of FDRs in England and Wales, we conducted a (quantitative) **nationally representative study** using a structured questionnaire as part of the TNS-BMRB Omnibus survey. This comprised 2974 respondents and was completed in January 2012. We asked further questions focused on Experience of FDRs of those Omnibus respondents who had been divorced or separated between 1996-2011 (n=288), including where appropriate those in the process of separation (total n=315). We also supplemented our sample by asking the same Awareness questions as part of the Civil and Social Justice Panel Survey (CSJPS) (3700 respondents) in Spring 2012. This is a national sample of people who are regularly surveyed on legal issues. A summary of our Phase 1 findings have been published (Barlow et al, 2013). We used both national surveys to recruit participants to our second phase.

**Phase 2** – Here we used qualitative research interviews (telephone or face to face) to gain further insights into the three FDR processes and understandings and experiences of these from the party and practitioner perspectives. Interviews were conducted between 2011 and 2013. Our **party sample** comprised 96 parties (45 men & 51 women) who had experienced one or more FDRs since 1996. These were recruited in part from the national surveys and in part from referrals from agencies and practitioners around the country to whom we advertised the project. **56 had experienced Mediation; 44 Solicitor Negotiation and 8 Collaborative Law.** Within this we have a mixture of legally aided and non-legally aided parties for mediation and solicitor negotiation and a spread of representation between mediators accredited with the different mediation agencies – NFM, FMA and Resolution – as reported to us by the parties. There was also a range of successful and unsuccessful attempts at FDR. Our **practitioner sample** comprised 40 practitioners spread over the three processes many of whom were ‘hybrid’ professionals practising across more than one FDR process. They were fairly equally spread across the mediation organisations and between lawyer and non-lawyer mediators.

Figure 1 - Practitioner Sample



The identities of all party and practitioner participants have been anonymised and any names of participants referred to in our Findings below are pseudonyms.

**Phase 3** – In the final phase of the study, we recorded a small number of examples of each FDR process to triangulate with our thematic analysis of the party and practitioner interviews. We recorded five mediation processes (4 concerning children’s matters and one financial; 4 sole and one co-mediation; involving a total of 9 separate sessions) and three collaborative law processes (all concerning divorce and financial matters; involving a total of 11 separate sessions). For solicitor negotiations we made the pragmatic decision only to record lawyer-client first interviews, and we ultimately recorded 5 such interviews: 2 concerning children’s matters, 2 divorce and finances and one focused primarily on divorce. We analysed the transcripts with a view to understanding the dynamics of the process and the interactions between the parties and practitioners, and to identify best practices.

Our **Key Findings** in relation to our research questions are set out in the sections below. They follow the journey taken by parties through FDR processes, beginning with awareness, moving through issues of choice, experience and outcomes, but building in practitioner perspectives. We then consider issues around FDR settlement norms and suitability. We conclude with our thinking on best practice and policy implications based on this study.

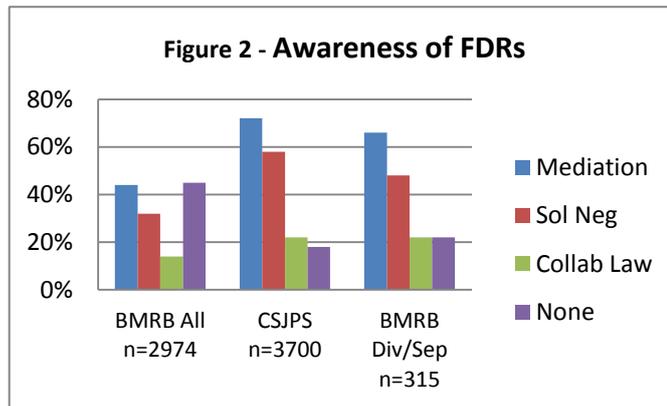
## AWARENESS OF OUT-OF-COURT DISPUTE RESOLUTION

Traditionally, people's first port of call when faced with problems concerning family breakdown was to see a solicitor (Genn 1999). Although the FLA 1996 reform was never implemented, part of its legacy was to establish family mediation as the policy makers' preferred method of dispute resolution for publicly funded disputes, with the requirement for assessment of suitability for mediation a Funding Code pre-requisite for legal aid from 2000 onwards. This encouragement and facilitation of mediation was, as noted above, accompanied by a clear shift in family lawyer behaviour, with many lawyers also training as mediators and both the Law Society's Family Law Protocol and Resolution's Code of Practice advocating non-adversarial approaches to family dispute resolution within solicitor negotiation and collaborative law wherever possible. But how far had these alternatives to court entered public consciousness?

### The National Picture – Key Findings

#### How many people were aware of Alternative Family Dispute Resolution?

In the nationally representative BMRB Omnibus survey (an accurate proxy for the general public), 32% of respondents had heard of Solicitor Negotiation, 44% had heard of Mediation, 14% had heard of Collaborative Law, with 45% indicating they had heard of none of these. In both the CSJPS survey (in which participants were on average older and more legally aware) and the divorced and separated population of the Omnibus survey, there was a higher awareness of alternative processes, but the relative levels of awareness remained the same.



#### Sources of information

For the general population, the main source of information about all of these out of court FDRs was the media/internet, or family/friends. For the divorced or separated population, however, the main source of information about the FDR options was a solicitor.

#### Who was more likely to have heard of each Dispute Resolution Process?

- More women (49%) than men (39%) had heard of Mediation (there was however no gender difference in awareness of Solicitor Negotiation or Collaborative Law).
- People aged 45-54 were most likely to have heard of Mediation and Solicitor Negotiation.
- Those in a higher socio-economic class were more likely to have heard of each FDR.

### Awareness from the Party and Practitioner Perspectives

#### Awareness of solicitor negotiation

Quite a few parties were not aware that solicitors engaged in out-of-court dispute resolution; they thought that going to a solicitor meant going to court. Some people were well informed about the process but others just went along with the solicitor's suggestions without viewing it as a distinct FDR. It seems a more passive decision than mediation or collaborative law but usually involves active desire to avoid court if possible, so it shares that common feature with the other FDRs.

#### Awareness of FDRs: key messages

- The media and internet are key sources of information for the general public about FDRs.
- Levels of awareness were associated with age, gender and class.
- For the divorcing/separating population, solicitors were the major source of information about FDRs, including mediation, prior to LASPO.
- Practitioner awareness of FDRs is critical to explanations and understandings by parties of FDR choice, expectations and engagement with the process.

#### Improving awareness of FDRs: key messages

- Awareness needs to be enhanced both for the general public and in terms of the information available to people at the point of divorce/separation, to avoid constrained and inappropriate choices.
- More could be done to raise the profile of solicitor negotiations and collaborative law as out-of-court resolution options.

### **Awareness of mediation**

A few people informed themselves about mediation, knew about it professionally, or had it recommended by colleagues, and this was more common among those who had separated most recently. The great majority, however, were referred to mediation by their solicitor. Most people knew little about mediation beforehand, but felt they were well informed at the start of the process (by talking to the solicitor or mediator, by information, or by Mediation Information and Assessment Meetings (MIAMs)). Some did, however, have reservations which could have been talked through better.

### **Awareness of collaborative law**

As a relative newcomer to the FDR field, collaborative law is not well known, and not necessarily well understood by people who are not collaborative lawyers. There was some confusion between 'collaborative' in the specialist sense of a particular FDR, and in the general sense of solicitors taking a conciliatory and non-adversarial approach. Those who participated in collaborative law were typically well briefed about all the aspects and there was a lot of information provided, written and verbally, before they signed up. These people tended also to have done their own research or have known people who had been through or provided collaborative law.

### **Awareness of the range of options**

Awareness of the full range of FDRs, and feeling they had a real choice of options was a relatively rare experience in the party interview accounts. More often, parties felt a strong steer from the practitioner providing information, potentially limiting people's awareness and choice -

*"Were you aware there are other methods of resolving the dispute apart from Collaborative Law?"*

Erm, only in court. That was the only thing I was aware of." (Pauline)

Similarly, Lynn, who mediated on legal aid, was unaware of other alternatives to court.

*"My solicitor said, 'You have to go for mediation before you can go to court.'"*

Practitioners were sometimes constrained by legal aid mandates or by an assessment that parties could not afford collaborative law in the choices they offered. It was clear that in a number of cases solicitors had referred legally aided parties directly for mediation (sometimes regardless of suitability) and would only attempt to negotiate if mediation failed.

Most of our sample were 'hybrid' practitioners who were able to make privately funded clients aware of the alternatives. However, some practitioners were more familiar than others with different alternatives, effectively limiting client choice to the practitioner's own comfort zone. Some were passionate about the potential of mediation to improve communication skills and provide a constructive arena for dispute resolution at far less cost than the alternatives and felt it was the right default process. Lorna Denton summarised the majority view:

*"Any decent family lawyer would always refer a client to mediation right from the outset if that client is appropriate."*

Within the MIAM process, many mediators understood their role as "selling" mediation to clients, thus limiting awareness of other possibilities. This did not go unnoticed by some parties we interviewed and raises potential concerns around practitioners' potential vested interests at a MIAM.

- **Independent, impartial information about FDR options would help to overcome feelings of being subjected to a sales pitch, or that there was insufficient opportunity to discuss concerns and reservations.**

## ENTERING FAMILY DISPUTE RESOLUTION PROCESSES

### Choosing an FDR Process

The Omnibus survey confirmed that nationally as many as 47% of couples divorcing or separating between 1996 and 2011 sought no legal advice about their situation, with less than 1% going directly to mediation during this period. This means that almost half of all couples were likely to be resolving matters for themselves. For those who do seek legal advice or assistance from lawyers or mediators, we found from our interviews with parties and practitioners that most guidance given by practitioners to clients included a strong steer to avoid court if possible. Some practitioners stressed the importance of choosing the **appropriate** DR process. As David Leighton maintained, "the answer comes from being in the right process".

In the Omnibus survey, whilst roughly similar proportions (around 30%) of those who had divorced or separated since 1996 were offered mediation and solicitor negotiation, proportionately far fewer took up the offer of mediation (38%) than those offered solicitor negotiation (89%). The most common reasons for not taking up Solicitor Negotiation were that people wanted to settle without outside help or lack of finances. People's reasons for not taking up Mediation were more varied, but ex-partner's refusal to participate, inability to talk to ex, and history or fear of violence or abuse were most commonly cited.

The party interviews yielded many reasons for taking one track rather than another. Some choices were active and positive, such as wanting to "keep solicitors out of it" or desiring the support of a solicitor. The wish to resolve matters as quickly and amicably as possible was also a common theme as was, however, wanting to maintain a clear distance from the other party and have a buffer in between them. Other 'choices' were passive or negative in effect, for example when one party resisted or refused to engage with whatever process their ex-partner wanted to pursue, or when a party felt pressured into Mediation or Collaborative Law by their ex-partner.

### Understanding the options

Some people felt that all the options, or at least the FDR process they undertook, were clearly and appropriately explained at the outset and felt they benefited from this approach. Information on options was generally given in a first meeting with a solicitor or at a mediation intake session or (now) MIAM. Written information might also be given, sometimes in advance, of the available options, more often by solicitors than mediators. However, as noted above, many felt that the full range of options and the implications were not given to them or not well explained. A common feature identified was that people did not feel they were emotionally in a good enough state to take in the information. Several people talked about how they felt confused or "bombarded" with information they could not process.

### Constraints on choice

People on legal aid often felt constrained to try Mediation due to legal aid regulations, and generally did not distinguish between the mandate to attend an information and assessment meeting and the actual engagement in mediation. People using Solicitor Negotiation often talked about lack of choice due to either going to a solicitor and not really being told about alternatives, or due to their ex-partner's refusal to try Mediation or other routes. People talking about Collaborative Law had notably more choice – as we would expect, the Collaborative Law interviewees tended to be better educated, more affluent, and generally have more sense of choice and agency about their routes post-separation.

### Decision to mediate

Many people mentioned cost as a reason for choosing Mediation. In particular, those with legal aid often felt pressured into Mediation, or felt they had no real option to refuse.

"I felt it was my only real choice to get things sorted... Because I basically got told in terms of solicitor's time, it was too expensive; there wasn't enough legal aid to do it." (Sonia)

Many did feel that they had made an informed choice, sometimes based on the cost (perceived as cheaper than the alternatives) but more often based on the desire for a non-adversarial process.

### Choosing FDR processes: key messages

- Choice is linked to awareness and clients need to be guided towards appropriate choices that suit their situation as far as possible.
- Clients' emotional state needs to be factored into information delivery about options.
- There is great frustration around the various constraints on choice, especially cost and legal aid restrictions.
- Other frustrations concern the ex-partner's ability ultimately to block FDR choice.
- It takes two to mediate and four to be collaborative, leaving solicitor negotiation as the only realistic alternative to court in many cases.
- Client choice would be enhanced by greater practitioner knowledge and experience of what different FDRs had to offer.

<p>“It seemed to be quite a good fit because we are quite amicable...and [it] seemed to be perhaps a good thing for us to try and also to have a third party.” (Geraldine) Time was also a consideration. Mediation was seen as a potentially quick way of dealing with the issues in a specified timeframe.</p> <p><b>Decision not to mediate</b> Emotional readiness to engage in Mediation was important. Some people felt too raw at this stage to cope: “That’s why I said I didn’t want to go for Mediation at that point because I just didn’t feel that I could do it.... I didn’t really feel strong enough...” (Tracy) Others chose not to mediate, despite pressure. “His personality can be of a bullying tendency and I just felt that I could be in that room just being kind of talked at... And feeling bullied into backing down. So I was resistant.” (Kim) Some practitioners reported that dominant characters, usually professional men, deliberately chose mediation as they believed that they would be able to control their partners best in this process. It was the mediator's role to screen out such cases as unsuitable.</p> <p><b>Decision to use solicitor negotiation</b> Solicitor Negotiation was often a default option. For some this was because it was the only real choice they were offered (experienced more often by those who separated some time ago). For others, it was their only viable choice when their ex-partner refused alternatives, or because they had tried Mediation unsuccessfully. “And you felt that was right for your situation, did you? It was the only option I was left with.” ( Richard) Others chose Solicitor Negotiation due to not wanting to be in a room with their ex-partner, while some wanted an ally on their side during the negotiations. As with Mediation, many participants experienced the decision to start the Solicitor Negotiation process as extremely emotionally stressful, and some delayed starting as they did not feel that they could cope.</p> <p><b>Decision to use collaborative law</b> In general the choice to attempt Collaborative Law was determined by awareness, access to two collaboratively-trained solicitors, and cost. Those who were given this option typically made a well-informed choice, based on their desire for an amicable process and on having significant assets to discuss, and sometimes the perceived benefit of having their own lawyer involved. “The reason I wanted to do collaborative rather than Mediation...was because I thought I wanted someone in my corner...and I know the lawyers obviously work together, but at the same time you still have someone, essentially, there for you”. (Tracy) A couple of interviewees felt slightly coerced into choosing Collaborative Law, because it had been chosen by their ex-partner and they did not want to argue about it. As with Mediation, some collaborative law practitioners also noted the issue of dominant men choosing collaborative law as they hoped to secure a better outcome.</p> <p><b>Decision not to use collaborative law</b> One reason for rejecting Collaborative Law was similar to Mediation: the discomfort about having to be in the same room as an ex-partner. Women were more likely to mention this as a reason than men.</p>	<p><b>What could be done better?</b></p> <ul style="list-style-type: none"> <li>• Availability of counselling or other therapeutic interventions to support emotionally vulnerable parties.</li> <li>• Greater awareness of potential abuse of mediation and collaborative law for strategic reasons by dominant or controlling partners.</li> <li>• Availability of public funding for other out-of-court FDRs where there is no possibility of mediation.</li> </ul>
<p><b>Screening for Mediation in Cases of Domestic Abuse: Cause for Concern?</b> Despite the attention that has been focused on the need to screen out domestic abuse cases from mediation identified in the late 1990s (Hester et al 1997; Piper &amp; Kaganas 1997) and the embodiment of this requirement in the Legal Aid Funding Code in 2000 and subsequently in the Codes of Practice for all mediation organisations, our study found worrying evidence of cases where screening appeared not to have occurred, or not to have been responded to appropriately.</p>	<p><b>Screening for and response to domestic abuse: key messages</b></p> <ul style="list-style-type: none"> <li>• Enhanced screening and safeguarding procedures are needed to properly assess risks to victims of</li> </ul>

### **Practitioners' views**

We found a divergence of views among practitioners on the use of joint rather than individual MIAMS, and on when domestic abuse cases would or would not be suitable for mediation. Not all mediators see parties separately initially; some rely on support staff to initially screen for abuse on the telephone to determine whether a joint MIAM is appropriate. There are inherent risks in this approach for vulnerable clients. Non-mediators were more likely than mediators to view mediation as inappropriate if domestic abuse is disclosed, while a common theme among mediators was their ability to handle (certain kinds of) domestic violence cases, rather than concern about the risks involved for the victim and children.

### **Parties' experiences**

Whilst practitioners in our sample were all aware of and took seriously the requirement to screen, we found a number of cases (13) in our party sample where on the party's account, effective screening was sidestepped, and a further number of cases where mediation was recommended by solicitors, parties were referred to mediation by a judge or accepted by mediators where there had been violence. These were not confined to older cases and our findings support other research (e.g. Morris, 2013):

- Sara went to a solicitor for divorce and a DV injunction but was told an injunction was not possible because the abuse was not physical. Her solicitor sent her to mediation "to save costs" but told her to ask for separate rooms. At the intake session her ex-husband arrived first and insisted they be seen together; "I was so scared I just said yes". (2010)
- Tilda, whose partner had been violent and recently threatened her with a car jack, was referred to a solicitor by a domestic violence service. The solicitor then referred her to mediation, where she had a joint intake where she felt unable to disclose the violence. (2012)
- Harry, with an emotionally abusive ex-wife, was advised by his solicitor to go to mediation "because the court would look favourably on it". (2012)
- Iris had refused mediation due to physical violence during the relationship. At a review hearing at court, the judge ordered the couple to attend mediation to sort out their financial dispute. (2010)
- Some reported just having around 5 minutes alone with mediator at the start of a joint MIAM. This was not enough time to establish the trust and rapport likely to be needed when disclosing abuse or violence. Raymond described his MIAM: "Yes, that was like a sort of 5 minutes sit down before we sat in the same room". (2013)

For some, such as Kim, mediation worked well despite initial misgivings, with the mediator being proactive and supportive in their interventions, but for others (the majority), they felt as Lorna, that "it was just another arena to be bullied in". There was a clear correlation between failed mediations and cases where there were violence or coercive control issues. As Tilda, who was asked by co-mediators "to say what she wanted" explained, "I couldn't. I didn't know how to say what I wanted. I felt intimidated in the room with him."

### **The impact of LASPO**

The effects of legal aid changes in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) have put added pressure on practitioners to be inclusive rather than exclude borderline violent and coercive control cases, where self-representation at court is seen as a worse fate for such vulnerable parties. Better screening, safer systems and effective triage for all cases are needed, alongside supported alternatives, to avoid the risk of agreements which always favour the 'stronger' party. (These points are discussed further below.)

### **Domestic violence and other FDR processes**

Solicitor Negotiation and Collaborative Law cases are in theory inherently more supportive in cases of domestic violence or coercive control. Solicitors were reported as routinely asking about violence within the relationship and most parties felt readily able to disclose incidents of violence. However, coercive control and emotional abuse are more difficult to identify and there are still risks that unscreened power imbalances can skew both the negotiation process and any settlement, with dissatisfaction sometimes arising from these issues within our sample.

violence and abuse and to any children involved.

- Both physical and emotional and psychological abuse affect a person's ability to participate in mediation.
- Separate rather than joint MIAMs should be the default position.
- There is a need for a more consistent approach to domestic violence and abuse in mediation.
- Lawyers as well as mediators need to be aware of histories of abuse and their effects on clients.
- Practitioners could do more to address the support needs of victims of domestic violence and abuse, including referrals to and working with domestic violence support services and therapeutic interventions.
- Better options need to be developed post-LASPO for victims of domestic violence and abuse who do not have the evidence to obtain legal aid.

## EXPERIENCE OF FAMILY DISPUTE RESOLUTION PROCESSES

### Solicitor Negotiations

#### *Satisfaction with the process of solicitor negotiation*

In the Omnibus survey, 65% of the 70 respondents who had experienced solicitor negotiations were satisfied with the process. Similarly, within the party interview sample, over two thirds of those who had experienced solicitor negotiation were satisfied with it as a process.

#### *What people liked about the process*

People often liked the structure of this process – the formality of letters. People often also liked having someone specifically on their side.

“At the time, I felt he was my only ally. He knew the system and he was the only one that was on my side.” ( Leo)

Efficiency, good advice and professionalism were mentioned as positives. People described their confidence in their practitioner’s skill and knowledge of the system, and their ability to rely on that at a difficult time.

“You lose it there for a while. Which is where my solicitor was good, because she would sit me down and say, ‘Right, this is what happens next. This is what your options are.’” (Stella)

Not having to see the ex-partner or talk to them directly was also a strength, or necessity, for some.

#### *What people did not like about the process*

Many people mentioned the process leading to high levels of stress. It was fairly common to experience an increase in hostility resulting from the initiation or progression of Solicitor Negotiation.

“I suppose it’s really, just the very formal way that the solicitors correspond with each other, and once my former wife saw the letter that came to her solicitor, as far as she was concerned that was akin to war being declared.” (Joe)

The length of time taken was a major negative for many, and some people felt that the cost was either excessive, or too difficult to anticipate when starting the process. There were particular problems with cost when one party was legally aided or self-representing, while the other was paying for every letter. People often felt that the other party or their solicitor were deliberately delaying the process, by dragging out response time to letters, or responding minimally to requests, and indeed some admitted to using these tactics themselves. Some also suggested that legally aided parties received limited time or a poorer quality service from their lawyers, which did not help in reaching a resolution.

#### *Objectivity in solicitor negotiations*

While lawyers stressed the importance of maintaining an objective stance in giving advice to their clients, a positive feature of solicitor negotiation mentioned by parties was the partiality of having one’s own solicitor, on one’s side, fighting one’s case. Many people found this reassuring, though some felt that their solicitor was too impartial, not involved enough, or perhaps even sympathetic to the other side.

### The Process of Solicitor Negotiation: key findings

- Around two thirds of people were satisfied with the solicitor negotiation process.
- In particular people welcomed the support that it offered them at a traumatic point in their lives.
- There were common criticisms of delay and higher than expected costs, as well as stress and hostility.

### What could be done better?

- More universal adherence among solicitors to a conciliatory approach. A number of practitioners expressed their frustration at some solicitors who take an adversarial, hostile and aggressive approach to negotiations, regardless of professional codes of practice.

## Mediation

### **Satisfaction with the process of mediation**

Only 41% of the 46 respondents to the Omnibus survey who experienced mediation expressed satisfaction with the process. By contrast, almost three quarters of our party sample were satisfied with the process of mediation.

### **What people liked about the process**

People often mentioned that they liked having a structure within which to talk: a managed discussion both in terms of an agenda outlined at the start, and in terms of the mediator keeping the parties on track in working towards solutions. They also appreciated the fact that agreements made in the session were written down so could not be forgotten. Mediation was viewed as quicker and cheaper compared to the alternatives. Some found it an amicable way of resolving a dispute, though this was not universal. Some people appreciated the opening up of communication, the suggestion of new angles, overcoming emotional stalemates, and sometimes the taking of tiny steps forward, (for instance in getting contact re-started).

“I wouldn’t say they gave us anything new. I would say maybe a different angle or a different way of looking at things because we were unable to because of our emotional involvement in that particular topic” (Stan)

Some commented on their confidence in the practitioner’s skill. One aspect of mediation that a few parties commented on favourably was the use of flipcharts to show both parties their financial position and options for property division. Some, like Norah, were satisfied with the process even without achieving a significant outcome: “It helped us step along the way.”

### **What people did not like about the process**

There were a number of aspects of Mediation that people did not like. People found it a hard or uncomfortable to do. Some people found having to sit in the same room as their ex-partner very difficult. For many, the process itself of having to discuss sensitive issues with their ex-partner in this context was very hard, and sometimes unbearable.

“It was extremely traumatic. It’s a very, very unpleasant memory indeed...I remember certain terrible moments in it, you know, some of the worst moments of my life.” (Monica)

People often struggled with power dynamics and power imbalances between the two parties and the mediator, and this was a frequent source of dissatisfaction. Some people felt that the mediator did not adequately support them during the process. Some were upset if the mediator seemed to know one person before the start – especially if the mediator had conducted the MIAM for one party and not the other.

“It was the one that he’d seen when he first went, so I felt like she knew his background, but she’d only really, like, read my background so she didn’t know anything really about me. She’d heard his side of the story, she’d not given me a chance to hear mine.” (Kathy)

Some found the lack of legal context difficult, either in having a counsellor mediator who was not aware of all the legal implications, or simply in the fact that the mediator could not give legal advice when the party felt the need for it. A number of people commented that the main problem for them had been the non-enforceability of agreements reached during the sessions. Some felt that mediation was never going to work, but they had to attempt it for legal aid reasons, or to show willingness with the aim of convincing their ex-partner, solicitors or judges in future about their seriousness in terms of child issues. Occasionally, people felt that their mediator was not acting professionally. For example, one heard her mediator discussing their case with others, audibly, after the session. Some found the cost of mediation prohibitive, especially if a few sessions were required, and this was particularly difficult if only one party was legally aided.

### **Co-mediation**

Whilst many practitioners thought that co-mediation was very useful, particularly in difficult contact disputes, it appears to have become a minority pursuit, essentially because of costs.

### **Shuttle mediation**

Mediators preferred not to use a shuttle model unless strictly necessary (for some domestic violence cases or where the parties are unable to make progress in the same room) as it is less likely that breakthroughs in communication will occur (“the aaha moment”, as Gordon Russell described it) in shuttle mediation.

## The Process of Mediation: key findings

- Almost three quarters of our party sample were satisfied with the process of mediation.
- Those who were not satisfied were most often those who felt pressured into mediation.
- Perceived quality of the practitioner was key.
- Positive features of mediation included the structure it provided, the fact that it was generally quicker and cheaper than other options, and its ability to open communication, present parties with new angles and help them to move forward.
- Some parties found the process difficult, uncomfortable or traumatic, and expressed concerns about power imbalances, perceived lack of mediator impartiality, unenforceability of agreements, and the cost of multiple sessions. Some felt they had to participate even though they did not expect the process to work; and some felt they suffered from a

### ***Child inclusive mediation***

Whilst the majority of the mediators we interviewed were qualified to practise child-inclusive mediation, it was used infrequently. It can help parents view matters from their children's perspective and can be useful for older children but there were concerns that it may place children under undue pressure and risk parents manipulating the children. Child inclusive mediation was very rare in our party sample. A few people had considered and rejected it, with concerns about the possible emotional impact on the children:

"I think [mediator] said, 'Perhaps I could invite [daughter] along to get her involved.' But she didn't want to go. I was trying to make it the least stressful for her as possible. So yeah, that wasn't really good". (Lynn)

One father had experienced child inclusive mediation, and still had reservations:

"I think mediation has to be child focused. Rather than child inclusive. ... I think there's better ways of focusing on the child than actually bringing them to mediation. I think it puts them in a very difficult position" (Ernest)

### ***Impartiality in mediation***

Impartiality is a central tenet of Mediation but our participants' accounts of the process show that this is often difficult to achieve in practice, or at least it can be difficult to convince both parties of impartiality.

"I would say he remained impartial, but I think my ex felt that he was siding with me." (Norah)

Some people felt that the mediator gave more attention to one party than the other.

"He was all for my husband. I felt like a little naughty school kid sat in a corner." (Kathy)

And when impartiality is achieved, parties may feel this is inappropriate and welcome some partiality.

"I find the idea of mediation quite frustrating in that you have an individual permanently sat on the fence. Sometimes people just need a little bit of a poke in a certain direction or a little bit of, 'No, look, that's just wrong, this is what you should be doing'." (Stan)

### ***Gender bias in mediation***

There was a strong and regularly stated perception of gender bias in Mediation. Many men felt that the process was biased against them. Some went into Mediation with this view; others came away feeling that the system, or particular mediators, were biased against them.

"And the mediators sort of work it like that. They seem to stand together with the wife, or with the girl. 'Cos the mediators were all ladies. There weren't any men." (Charlie)

A few women also felt that male mediators were biased against them, or that the system was biased now towards fathers' interests.

"I found that the whole system, the way it worked, was very much geared towards the father now and what the father wants and how much time he wants with the child and all that sort of thing." (Zoe)

These views are strongly held and hard to shift.

### ***Providing information versus advice***

The distinction between information and advice is quite complex in practice and parties may feel they are being advised when mediators think they are informing. Some parties felt that they would have appreciated more advice. In the recorded sessions we observed mediators giving advice about child welfare, while scrupulously avoiding giving legal advice and referring parties to lawyers for that purpose. However, there were also instances where both legal and child welfare information might have been useful for the parties but was not provided.

lack of legal advice.

- Co-mediation, shuttle mediation and child-inclusive mediation each appear to be used relatively rarely.
- A number of parties felt the process was gender biased, either due to the sex of the mediator(s), or the legal information they were given.
- The distinction between legal information and advice appears to be well maintained by mediators but is not always appreciated by parties. In other areas (e.g. child welfare), mediators give both information and advice, but to varying extents.
- All of the parties who were referred to mediation by a solicitor had the benefit of initial legal advice. This will be less common in future.

### What could be done better?

- Avoid the impression of alignment with one party before the first joint session.
- Better screening for abuse and conflict – many complaints about lack of impartiality occurred when there was high conflict between the couple which the mediator could not contain.
- Anticipate and respond to parties' need for legal advice by encouraging them to obtain legal advice before commencing mediation.
- More frequent use of gender-balanced co-mediation would help to address some parties' concerns about partiality.
- Provide greater opportunities for children's voices to be heard in mediation.



## **Collaborative Law**

### ***Satisfaction with the collaborative process***

The numbers in the Omnibus survey who experienced Collaborative Law were too small to be able to speak reliably about their satisfaction rate. However the few people in our party sample who went through Collaborative Law expressed a high degree of satisfaction with the process. As already noted, these parties tended to be better educated and informed, and more affluent with a wider set of options available.

### ***What people liked about the process***

Aspects of Collaborative Law that people particularly liked included the opportunity to resolve problems amicably, but also with personal support.

"I really needed someone to help me because I wasn't in the headspace really to negotiate ... I needed someone on my side, if you like, rather than a mediator". (Marcus)

People talked about good relationships with their solicitor, and how this helped their negotiations with their ex-partner. Others felt that the positive dynamic between the solicitors was conducive to a productive process, as was the fact that the solicitors were working jointly with the parties.

"There was no 'My solicitor, your solicitor' sort of thing and it was all comfortable and jolly in places". (Joshua)

This meant, in some instances, that both solicitors could offer support to a party:

"She was on my side, but, actually, on one particular issue, so was his on my side."  
(Pauline)

The fact that discussions occurred in meetings rather than by correspondence, which meant that any misunderstandings could be ironed out immediately, was a point of contrast with Solicitor Negotiations which people appreciated. Collaborative Law was also seen as relatively quick compared to Solicitor Negotiation.

"I couldn't fault it. It was just so, without having to wait for letters or worrying.... [T]here was no uncertainty and...it was all quick and it was all sorted out together and explained together..." (Joshua)

### ***What people did not like about the process***

Some found it awkward to discuss personal issues in this context. There can be complicated power dynamics and relationships in the four person process. The complexity of working collaboratively yet with a specific client was not always easy to manage. Some felt that their solicitor was too impartial, not involved enough, or perhaps even sympathetic to the other side.

"The thing that bothered me slightly was that I had the impression that [her solicitor] and my husband's solicitor, you see, he'd worked with her, obviously, quite regularly - were almost deciding for themselves how this was going to work, and I think she was influenced by my husband who was quite forceful about what he thought." (Sheila)

The cost was mentioned by several as a negative. Although one party thought it was probably cheaper than alternatives, others felt it was excessive. The lack of mechanisms to enforce financial disclosure in a timely manner could also be an issue.

### ***The disqualification clause***

Most collaboratively trained practitioners saw the disqualification clause as "one of the fundamental building blocks" in the collaborative process (Ed Jamieson). Nevertheless, some practitioners (both collaboratively trained and not) commented that the disqualification clause discouraged people from attempting the collaborative process, and the practice has developed of so-called 'collab lite' or 'co-operative law', in which the participants follow a collaborative process but without a disqualification clause. None of the parties we interviewed, however, chose not to enter collaborative law because of the disqualification clause. And for most who undertook the collaborative process the presence of the disqualification clause was viewed as either inconsequential, a means of ensuring that the parties remained at the negotiation table or a financial incentive to the solicitors to find a solution. In two cases the collaborative process broke down and the parties had to instruct new lawyers, but both were happy with their new representatives and did not appear to have resented the change.

## **The Process of Collaborative Law: key findings**

- The collaborative process attracted a high degree of satisfaction.
- People liked the opportunity to resolve problems in an amicable process, but with personal support if needed.
- The process was seen as more supportive than Mediation, and quicker and less prone to inflame conflict than Solicitor Negotiations.
- The main drawback of the process was cost; the four-way dynamics between solicitors and clients could also misfire.
- While practitioners worried about the effect of the disqualification clause on parties' willingness to participate in the process, it was either seen as a positive or inconsequential by our party interviewees.

## Conflict and Emotions in FDRs

### *Importance of emotional readiness in FDR processes*

In all three processes, the emotional readiness to cooperate and cope with negotiations with the ex-partner was an issue, with some people recognising how they were not able to use the process appropriately, or it broke down, due to lack of emotional readiness. People who felt they had been given time or support to deal with their emotions noted how this aided the successful process. There was variation in how well people felt their practitioner dealt with emotion in all three processes, but some people (both men and women) were keen for emotional issues to be put aside and practical issues dealt with, while others appreciated, or would have appreciated, more emotional support from the practitioner.

Many practitioners were mindful of the difficulty of trying to resolve a case when one or both parties were not emotionally ready to do so, and recommended delaying decisions in such cases. Where guilt is a factor it takes around 6 months for "the guilt pendulum" to swing from high to neutral (Ed Jamieson), although some solicitors were prepared to capitalise on the other party's guilt to secure favourable early settlement terms for their client. Several solicitors indicated that they keep emotional readiness to mediate under review throughout the case and may refer matters to mediation later in the process once the parties are emotionally ready to engage in the process.

### *Solicitor negotiations*

Many parties who undertook Solicitor Negotiation reported high levels of conflict at the start of the process – quite a few parties had ruled out Mediation because of this conflict. Almost a third of parties thought the process had directly reduced conflict, but more often people felt that the Solicitor Negotiation process exacerbated conflict, by its nature. Even people who overall were positive about the process often felt that there was conflict inherently involved.

"When the negotiation was going on, I think it was probably facing up to it all that was hard for both of us, really. I think it was the realisation rather than the exacerbation."  
(Yvette)

Whilst one solicitor described his role as a "hired gun" in Solicitor Negotiations, most saw their role as one of trying to minimise conflict, particularly if there were children. Solicitors reported following the Family Law Protocol and Resolution Code of Practice, and took seriously the need to keep letters neutral to avoid inflaming the position. Some recognised, however, that as most family law clients are in a heightened state of anxiety, "a perfectly straightforward dispassionate letter... can be received by someone as an incredibly aggressive opening shot." (Jeremy Hutchings). Particular emotional triggers in the Solicitor Negotiation process included the appointment of a solicitor, which often caused a shock to the party receiving the first letter; the arrival of difficult letters; and the enforced disclosure of financial or business interests.

### *Mediation*

Many people found the process of mediation emotionally upsetting or nerve-wracking, even if in hindsight it was positive.

"I did find that quite helpful, but I also found it just hugely painful as well" (Tilda).

Some viewed the mediation process as a way of starting to deal with emotions:

"It was amicable, it was friendly, it wasn't rushed and it had a therapeutic component, because I felt that you could talk more about what was going on. It helped to get those emotions partially out of the way so you could concentrate on moving forward, and it was less formal than sort of sitting at a solicitor's office." (Malcolm)

Sometimes the tension appears to have been well managed by the mediator:

"It worked really well because if either one of us started getting into an argument or too aggressive in our manner or anything like that, the mediator was really good at calming it down." (Eleanor)

But in quite a few cases Mediation broke down due to conflict:

"My ex-husband was very antagonistic. Didn't provide information, became very aggressive during the Mediation sessions, so I called an end to that." (Lorna).

Specific emotional triggers for the Mediation process included: anxieties about being in the room with an ex, perhaps for the first time in a long time; power imbalance, with one partner more ready emotionally than the other; disputes over child care arrangements; and requirements for disclosure of financial or business interests.

## Conflict and Emotions in FDRs: key findings

- For any process to be successful, parties need to be emotionally ready to cooperate and cope with negotiations
- Despite the efforts of many solicitors to be conciliatory, the Solicitor Negotiation process has an inherent tendency to be emotionally upsetting and to escalate conflict by virtue of being conducted by correspondence.
- Many people found Mediation to be an emotionally fraught process even if in hindsight it was positive.
- Conflict between the parties was a frequent cause of Mediation breaking down.
- People who signed up for Collaborative Law tended to be low conflict, though this did not preclude the need for emotional support in the process.

<p><b>Collaborative Law</b></p> <p>Even though those who signed up for Collaborative Law were mostly low conflict cases, they could also be emotionally fraught.</p> <p>“I was incredibly angry that she had ended the relationship how she had. She wasn’t in conflict at all as she was very calm and level headed and there wasn’t really any conflict from her side, I was just angry and very emotional.” (Marcus).</p> <p>Dealing with emotions in the collaborative process could be tricky.</p> <p>“... it’s one of the most, emotional days that I have ever had in my life, and you are both still walking out the front door together. It just didn’t feel right. And then we had this really awkward moment of, ‘Right, well, erm, I’m going to go here for a coffee,’ ... It was all a little bit jolly for me, to be honest, that day.” (Jane)</p> <p>Some parties felt their collaborative lawyers had dealt well with the emotional aspects.</p> <p>“My wife and her lawyer were just very business-like... I think (solicitor) appreciated that I was in more of an emotional space. ...[W]e had one meeting and then...the day before the next meeting I talked to him and just said that I was struggling and he was the one that just said ‘let’s cancel the meeting’ and ‘you are not in a place to negotiate and move on’.” (Marcus)</p>	<ul style="list-style-type: none"> <li>Given issues around emotional readiness, combining FDR with therapeutic intervention may enhance capacity to reach agreement.</li> </ul>
<p><b>Focus on the child’s welfare in the FDR processes</b></p> <p>All three processes officially espouse a focus on the children’s needs and well-being, both in children’s cases and in financial cases where there are dependent children. Many parties said that the mediator or solicitor did focus on the child’s welfare and put that at the centre of negotiations.</p> <p>“One of my husband’s objectives was to spend as much time with the children as possible and so the mediator said, ‘Well, why don’t we phrase it as to be able to build meaningful relationships with the children?’” (Tracy, Mediation)</p> <p>However a number of parties said that they thought the process they had followed was not child focused, and some thought that the child’s welfare had been conflated with the resident parent’s preferences.</p> <p>“I expected us to be talking about what was best for my son but it turned out to be, in my opinion, what was best for his mum.” (Leo, Mediation)</p> <p>In the recorded sessions we observed mediators in particular using a focus on the child’s welfare as a tool to bring the parties together and encourage them to put their adult dispute aside in order to co-operate as parents. But we also observed how easy it was for the focus on the child to be lost and for children’s interests to recede into the background. Moreover, the voice of the child – direct attention to children’s wishes and preferences from their own perspective – was notably absent from our recorded sessions and in many cases from the parties’ accounts. As indicated earlier, child inclusive Mediation appears to occur relatively rarely, but there is certainly an argument for including children’s voices more systematically both in Mediation and in other FDR processes.</p>	<p><b>Focus on the Child’s Welfare: key messages</b></p> <ul style="list-style-type: none"> <li>All three processes aim to focus on children’s welfare, although such a focus can be difficult to maintain in practice and requires conscious effort.</li> <li>There is an argument for more systematic inclusion of children’s voices in all three processes.</li> </ul>



**MAPPING PATHS TO FAMILY JUSTICE**

**The Other Side**

A strong theme throughout the party interviews was the description of the other side – the other party, and also in Solicitor Negotiation cases the other solicitor. Both parties and practitioners regularly referred to problems with the other side’s solicitor being adversarial, or slow, or unwilling to cooperate. Similarly, parties often represented their ex-partner as the sticking point, the unreasonable person who was to blame for refusing to mediate or lack of resolution, or not prioritising child welfare. While the structure of Solicitor Negotiations makes it difficult to overcome this construction of the other side, both Mediation and Collaborative Law do consciously attempt to counteract polarisation of the parties, by focusing on parties’ common interests: their parenting relationship and their children’s welfare and financial security (in Mediation), or through all four participants working together to find a resolution in the interests of the family as a whole (in Collaborative Law). At the same time, particularly in Mediation and Collaborative Law, it seems that the court becomes the ‘other’, with court proceedings used as a warning or threat and represented by mediators and solicitors as riven with delay, financial and emotional cost and uncertainty, and to be avoided at all costs. As with the construction of the other side as always the problem, the construction of court proceedings as always the worst option seems also to be an exaggeration, which may even prevent some practitioners from recognising when it may be the most appropriate process for some parties.

**Key Finding:**

There is a strong tendency to blame the other side for failures in FDR. While Mediation and Collaborative Law consciously attempt to overcome polarisation of parties, they often engage in polarisation of processes, with a highly negative image projected onto court proceedings.

**Comparing FDR Processes**

A number of parties had experience of both Solicitor Negotiations and Mediation and could compare their experiences. The majority (mainly men) had gone to mediation after initial attempts to negotiate via solicitors. A smaller number (mainly women) had engaged in Solicitor Negotiations after a failed attempt at Mediation. Views were split on which they preferred. Solicitor Negotiation was preferred because it was a more defined and legally consequential process. “It was absolutely hands-down better than mediation because there were logical steps to it, there were contracts in place at the end of it and there should be consequences when these contracts are... So, yes, the solicitor approach is much better.” (Stan) It was also preferred for having more teeth if one partner was not cooperative. On the other hand, Mediation was considered more comfortable, less stressful, and more creative. “It enables you to think outside of the box and enables you to come up with solutions that you wouldn’t have necessarily have sort of come up with if you had sort of gone to a solicitor.” (Malcolm) It was also seen as less invasive of people’s lives. “You open a letter and you read it and you just think: ‘Oh, my God!’ You know? Your stomach turns, you know. You’re crying over the soup! In the mediation it’s more contained.” (Lorna) One party, Sheila, had experienced a mediation intake session, collaborative law (with two different solicitors), solicitor negotiations (with a third solicitor) and a subsequent MIAM before ending up in court. In her account, the constant between all these processes was her ex-husband’s unwillingness to compromise on the arrangements he wanted for both the children and their finances. What had changed had been her own level of awareness, from having been unprepared and unwilling to engage at the beginning to becoming much better informed and empowered. In particular, she noted that while she had been unimpressed by the service provided by her first solicitor, and ultimately sacked him, her second solicitor “was brilliant and explained things really well. She was superb, she communicated really well. So I understood everything at that point. And then the subsequent ones have been very good as well. And I have got better at asking questions.”

**Comparing FDR Processes: key messages**

- It is clear that the different processes have different strengths which suit different parties and cases.
- Failure in one FDR process can put people in a better position to reach a resolution through a different process; but sometimes it was clear that no form of FDR was likely to be successful.

## OUTCOMES OF FAMILY DISPUTE RESOLUTION PROCESSES

### Resolution rates

There were higher resolution rates for financial matters than for children's matters in our party sample, and generally higher resolution rates for Mediation than for Solicitor Negotiations. This is likely to be due to differences in the parties as much as differences in the processes: the parties who went to Mediation were generally more willing and able to reach an agreement than those who chose or found themselves in Solicitor Negotiations.

#### Children's matters

- Overall only 26/61 parties resolved their children's disputes by means of FDR (43%).
- 20 parties attempted Solicitor Negotiations, of whom only 4 resolved by Solicitor Negotiations out of court (20%)
- 38 parties attempted Mediation, of whom 21 resolved by Mediation (55%)
- 3 parties attempted Collaborative Law, of whom only 1 resolved in Collaborative Law
- The majority of unresolved matters ended up in court (19/27 = 70%): 7 were adjudicated, 6 resolved by negotiations and 6 were ongoing at the time of interview.

#### Financial matters

- 51/76 parties resolved their financial disputes by means of FDR (67%)
- 33 parties attempted Solicitor Negotiations, of whom 19 resolved by Solicitor Negotiations out of court (58%)
- 35 parties attempted Mediation, of whom 25 resolved in Mediation (71%)
- 8 parties attempted Collaborative Law, of whom 7 resolved in Collaborative Law
- A smaller proportion of unresolved matters ended up in court (13/22 = 59%): 2 were adjudicated, 8 were resolved by negotiations, and 3 were ongoing at the time of interview.

### Key messages on FDR outcomes: resolution rates

- Financial disputes are easier to settle out of court through any FDR process than children issues.
- In this study, Mediation achieved higher resolution rates than Solicitor Negotiation but has traditionally attracted lower conflict cases.
- The incidence of Collaborative Law was too low to compare statistically, but seems to achieve high resolution rates particularly on financial matters.

### Satisfaction with outcomes

In the Omnibus survey, satisfaction rates with outcomes of the three FDRs mirrored very closely the satisfaction rates with the FDR processes. In the party sample, however, people were able to separate out their satisfaction with process as compared with outcomes, with satisfaction with processes generally rating more highly than satisfaction with outcomes. For Mediation where almost three quarters liked the process, just over half were satisfied with the outcome, with over a third stating they were dissatisfied. For Solicitor Negotiation, under half of parties indicated they were satisfied with the outcome (compared with over two thirds for process). Under a third (29%) considered they were dissatisfied, with almost a quarter being very equivocal. Satisfaction with the outcomes of Collaborative Law, like satisfaction with the process, was predominantly high. For some women, high satisfaction reflected their initially low expectations.

"I didn't know that...he would have to sell our marital home and I would get half of that money... So the outcomes...were far bigger than I thought." (Jenny)

#### Partial outcomes

Some practitioners stressed the positive benefits of partial outcomes in mediation, such as narrowing the issues or reducing conflict levels, making agreement more likely in whatever process the parties pursue post-mediation.

"Some progress...some better communication, some better understanding of each other's positions, some interim arrangements, some better understanding of children's needs. So short of... what you might call a successful outcome, I think there are lots of little victories that can be won." (Henry Sanderson)

Experiences within our party sample do reflect this. Of the 17 who attempted Mediation on children issues but failed to resolve, 3 reported such fringe benefits of the process and a

### Key messages on FDR outcomes: satisfaction

- Satisfaction with outcomes is lower than with process for both Mediation and Solicitor Negotiation.
- Satisfaction with Collaborative Law is very high for both process and outcomes, although numbers are small and parties tend to have higher than average resources.
- Partial or subsidiary outcomes ('fringe benefits') were

<p>further 7 reported a partial outcome, with some contact being agreed or an interim arrangement put in place. Of the 16 who attempted Solicitor Negotiation but failed to resolve, 7 reported fringe benefits and 2 reported partial outcomes. Similarly in Collaborative Law, a partial outcome alleviating some concerns was achieved in one of the 2 unresolved children disputes, with other positive benefits being reported in the other unresolved case. However partial outcomes were a frequent source of dissatisfaction for parties. Such outcomes were encountered in all the processes, with other matters either being resolved at court or in some cases through direct negotiation between the parties. Matters were also sometimes left unresolved, with the party with the least incentive to settle often gaining the upper hand through delay and inaction.</p> <p><b><i>The non-binding nature of mediated agreements</i></b></p> <p>Whilst some, such as Andy, saw the non-binding nature of the mediated agreement as a positive, providing flexibility, a larger number of participants were frustrated by the fact that a mediated agreement, unless approved by the court as a Consent Order was not enforceable. Seth had reached an agreement in mediation 9 years earlier but his wife refused to be bound by it when they finally divorced:</p> <p>“At the time, I felt it was a good thing as we came up with something which we could work to. Since then... everything we agreed to at the time has been dismissed... It makes me wonder whether I should have gone to a solicitor and got it confirmed in court but I didn’t do that, it was my mistake.”</p> <p>Raymond, when interviewed, was on tenterhooks as to whether his ex-wife would agree to a Consent Order reflecting the mediated agreement:</p> <p>“If it doesn’t get agreed, it would have been a waste of time and money. That was my initial reluctance for the process ... it may be worthless. So we will have to see.”</p> <p>Another problem was the short-lived nature of some mediated agreements, particularly around arrangements for children. Karl had agreed interim contact with a review in mediation after 6 weeks, at which point his ex-partner denied him further contact and refused to mediate further.</p> <p>“It felt like a pointless exercise...I might as well have just gone straight to court back months and months ago instead of going through all the rigmarole.”</p>	<p><b>identified even where FDR failed, in around half of the cases in each process, although partial outcomes were often a source of dissatisfaction.</b></p> <ul style="list-style-type: none"> <li>• <b>The lack of enforceability of a mediated agreement other than through court order was a source of dissatisfaction by the majority in mediation, as well as a reason to choose court or another FDR.</b></li> </ul>
<p><b>Reasons for settlement</b></p> <p><b><i>Mediation</i></b></p> <p>In mediation, cases which settled divided between those who settled because they thought they had agreed a fair settlement or good settlement from their own perspective; those who just wanted the matter over and done with either to protect their children or so that they could themselves achieve closure and so were prepared to compromise or capitulate; and those who wished to avoid court at any cost. Some like Alison and Ryan settled all issues, felt the outcomes were fair and were full of praise. Generally, financial cases were easier to settle, with the reality of what was possible becoming apparent within the process. Rebecca, who could not agree arrangements for sharing care of the children with her partner, found the financial matters far more straightforward to settle on. Children cases were often a case of taking what was offered as it was better than nothing or being persuaded that the proposal was the best for the children. Eleanor settled because she “managed to get exactly what she wanted.” Charlie thought he should share the care equally with his ex-partner, but agreed 45:55 time split as well as an equal share of the financial assets, which was “better than expected”. Kathy agreed a contact arrangement for her children because it was all that was possible given her ex’s shift-work. Tilda agreed to share care for the children, more than she would have wished, and split the family assets equally as she knew she could not face going to court and was certain her ex would have issued proceedings if she had tried to push for a different settlement.</p> <p>“I feel I got the ...absolute minimum...I didn’t really have a lot of choice in that unless I wanted to go to court...which would cost me more.”</p>	<p><b>Key messages on FDR outcomes: settlement factors</b></p> <ul style="list-style-type: none"> <li>• <b>Agreed fairness of outcome by both parties was the best settlement trigger, but often hard to achieve.</b></li> <li>• <b>There were more levers to achieve financial pragmatism in FDRs than to settle children disputes with shared perceived satisfaction.</b></li> <li>• <b>A process of attrition or general exhaustion and desire for closure, as well as a strong desire to avoid</b></li> </ul>

**Solicitor negotiations**

Within solicitor negotiations, the primary reason for settlement was a perceived ‘good’ outcome or a lower offer taken on the advice of the lawyer. Where matters were settled contrary to such advice, this was often due to reasons of cost or the desire to have closure and move on, especially after lengthy negotiations where court was the only other alternative. Harry accepted limited contact with his baby son on his solicitor’s advice that greater contact was unlikely if the matter went to court, given his son was so young and he lived a long way from his ex. Patty signed over her share of the house and business to her husband to enable her to take her son abroad and is now living in straitened circumstances. She explained, “I was so tired and stressed by the whole thing, I think I allowed it to happen if I am being honest.” On the other hand, Stuart settled after failed mediation and protracted solicitor negotiations, saying “At the end of the day she walked away with almost exactly what I had proposed.”

**Collaborative law**

The majority of parties indicated that they settled because they reached an agreement they viewed as fair. For example, Sebastian indicated that he was intent on treating his wife in a "fair and honourable way" in order to preserve his excellent relationship with his adult children. For some of the women, their notions of what was fair were tinged by feelings of guilt at ending the relationship and a desire to placate their husbands. For example Pauline:

"[Husband] has always behaved as the wounded party... I did feel, 'well, you know, he didn't want this, I've got to be fair and make sure that he's happy'."

In the recorded sessions, one primary carer mother settled for less than half of the liquid capital and no pension because she knew that her husband would not agree to anything more and she "just wanted to get out". Women were also strongly motivated to ensure that any minor children were provided for.

"We have got three children and I want [husband] to be in a nice house where our children are going to be half the week." (Jane)

court or an inability to afford court proceedings, all play a role in settlement for some parties in all FDRs.

**Cases that were not resolved by FDRs**

Where cases were not resolved by FDR, they were either so intractable that they had to be adjudicated or otherwise settled at the door of the court. In some cases, matters were settled against the odds by direct negotiation between the parties.

- Stan, whose ex-partner had been resisting contact, was awarded a shared care arrangement at court and felt totally vindicated that he had not settled for less than substantial contact with his son.
- Lorna settled her financial claim through negotiations between solicitors, finding the door of the court focused her ex-partner’s mind on what sort of financial settlement might be fair, where mediation and solicitor correspondence had failed.

A few cases remained unresolved, with the parties considering further action at the time of the interview and limping along with failed agreements or entrenched positions where they were waiting to see who took further action first. Analysis of these cases shows that where parties have taken entrenched, opposing ideological positions regarding what is best for a child in terms of appropriate levels of shared care or contact, there can be no FDR resolution.

- Terry whose Solicitor Negotiation failed as he would not compromise on anything less than his ultimate goal of equal time shared residence of his children, actively pursued the matter in court and was awaiting a final hearing. He had a clear plan, regardless of whether this approach was right for any individual child and was now acting as a McKenzie friend for other fathers. He explained, "...[O]nce you've got the kids for a few days and again they were still reasonably young, so there's a good chance that within a few years after that you're looking at 50/50 and shared care." He used the welfare principle in an un-nuanced way, casting his ex as implacably hostile to contact because formal equality was not agreed. He advocated the use of cameras to spy on an ex-partner and record all interactions, regardless of how this might affect the children.

Less extreme cases of entrenchment and clashing ideological ‘principles’ came through in some of our recorded sessions data and confirmed that not all cases can deliver settlement through FDR. In one mediation which did not resolve but which was early in the relationship breakdown cycle, the husband wanted and strongly believed that formal equality in terms of shared care was best for their children, whereas the wife was adamant that children needed to have one primary home to anchor their lives. Both worked with children and both could cite

**Key message from cases that did not resolve:**

- Not all cases can be resolved by FDR processes. For some, pursuit of ‘justice’ or what they perceive to be the right outcome is critical and trumps the expediency of a compromise settlement.

<p>examples of why their position was preferable for their own children. Disagreement over the child’s religion was another example of an insoluble dispute where mediation was attempted in a recorded session. Each parent held strong views as to what was best for the child and why and there was no compromise position available. On practical grounds, some cases cannot settle. Where one party wants to take the children abroad to live would be an example, although Patty did achieve this by signing over her interest in their home and business to her husband. The kinds of cases which have a propensity not to settle are discussed further below in the section on ‘Just Settlement’.</p>	
<p><b>Longer-Term Outcomes – Communication</b></p> <p>As noted above, the ‘success’ of FDR processes may be measured both in terms of immediate resolution of the particular dispute(s) and/or in terms of longer term benefits. Overall in our sample, Mediation was seen as improving communication in around 40% of cases, whereas under a quarter of Solicitor Negotiation participants felt they benefitted in this way. Yet in terms of reducing conflict, this was felt to have been achieved in 30% of Solicitor Negotiation cases as compared with a quarter who felt Mediation had had this effect. With Mediation, reported improvements in communication and reduction of conflict were strongly correlated with resolution of the issues in dispute, whereas with Solicitor Negotiations, longer-term benefits were reported just as often when the matter did not resolve – indeed more often in the case of reducing conflict. Comparison is difficult, given the different client bases for Mediation as compared with Solicitor Negotiation, and the fact that the processes whilst sharing the aim of resolving the dispute out of court, also embed different goals.</p> <p><b>After mediation</b></p> <p>One of the goals of Mediation is to improve communication in the longer term, that is, to enhance ex-couples’ ability to negotiate and cooperate in the future, especially concerning parenting decisions. Several mediators cited helping parents to improve their communication with each other as a "key" or "central" aim of mediation: the mediator's "mission statement" (Molly Turner), and while generally leaving the agenda for mediation to be determined by the parties, would often make future communication an agenda item.</p> <p>There was much variation in parties’ views of whether Mediation was successful in this for them. Some (10) experienced the process as a positive way of communicating with support.</p> <p>“Yeah it did basically (improve communication) because it’s a lot easier to sort problems out if you are calmer, and obviously they helped us to understand that.” (Robert)</p> <p>A number who found the process traumatic, stressful or uncomfortable felt that it still helped with communication and negotiation in the longer run.</p> <p>“We still have the odd niggle...but...it’s taught me to... You can’t go over the top having every little minor detail... It’s made it easier. We don’t argue like we used to, and I think it just stems from Mediation.” (Kathy).</p> <p>A minority, however, were emphatic that (failed) Mediation had caused a further breakdown in communication, exacerbating previous tensions.</p> <p><b>After solicitor negotiations</b></p> <p>In general there was less experience of the process of Solicitor Negotiation enabling communication. This is unsurprising, as some commented it was not usually viewed (by parties or practitioners) as a goal of the process. Moreover, many Solicitor Negotiation participants were already in a worse place in terms of communication and tension than those attempting Mediation. Some parties felt that the resolution of issues, through the process, had indirectly improved future communication:</p> <p>“I think when it was all done and dusted it did, yeah. Because then there was no argument really left then. I think it did reach a point where we could both move on.” (Yvette)</p> <p>Nevertheless it does seem clear from our data that Mediation gave a substantial group of participants some strategies and practice in longer term negotiating which was not a feature of Solicitor Negotiation for most.</p>	<p><b>Key messages on improvements in communication following FDRs</b></p> <ul style="list-style-type: none"> <li>• <b>Mediation and Collaborative Law can often improve communication between parties, as can Solicitor Negotiation, although this is less common.</b></li> <li>• <b>Failed Mediation and Solicitor Negotiation can both produce a deterioration of communication and heighten conflict, but there is some evidence that failed Solicitor Negotiation may succeed in providing ‘fringe benefits’ in some cases.</b></li> </ul>

**After collaborative law**

According to Richard Benson, improving the parties' communication was the "essential reason" for using the collaborative process. As with mediation, the collaborative process gives parties a structured environment in which to have difficult conversations and to normalise effective patterns of dealing with each other in future. Some practitioners suggested that the potential to improve the parties' communication is greater in the collaborative process than in Mediation as there are two practitioners assisting the parties and it is easier to incorporate family consultants within the process. The parties who experienced Collaborative Law did not have much to say about longer-term communication outcomes, perhaps because their communication tended to be good in the first place. However Jenny, whose husband had dominated her in the relationship, did feel that the collaborative process had improved communication by empowering her:

"it gave me a lot of confidence that actually I wasn't erm... that I was a reasonable person and an intelligent person and someone who could find things out and act on them and...I suppose for the lawyers to be able to...erm for your ex's lawyer to be able to almost give that kind of vibe too, obviously it was a very positive thing...an on-going positive outcome."



## ‘JUST’ SETTLEMENTS? NORMATIVE COMMITMENTS IN FDR

As indicated above in the discussion of reasons for settlement, some people settled because they thought the agreement they reached was fair – and some refused to settle because they felt they could not reach a fair agreement – while others had more pragmatic motivations for settlement. This section explores the particular notions of fairness (norms) that people brought to the negotiating table, and how those different norms played out in resolutions. When a court decides a particular family law dispute, the norms to be applied are relatively clear. In FDR, however, any number of normative expectations may be brought to the table by the parties, and may be promoted by the lawyers and/or mediators involved. Arguably, the fragmentation and individualisation of life course trajectories associated with reflexive modernisation has intensified the proliferation of normative expectations at the point of family break-up (Beck and Beck-Gernsheim 1995). We set out to determine whether particular family law norms are associated with particular forms of FDR, and how far the ‘shadow of the law’ (Mnookin and Kornhauser 1979; Batagol and Brown 2011) falls on the different FDR processes. Do they just achieve settlements, or do they achieve ‘just’ settlements?

### Norms Brought Into the Process

#### Norms Brought Into the Process

The predominant norms brought into FDR by the parties interviewed and their former partners differed in relation to children and finances, and were clearly gendered.

#### *Children’s matters – mothers*

The predominant norms held by mothers in children’s matters were Child welfare and Primary carer/status quo, for example:

- When Kathy and her partner first separated, they agreed contact amicably “for the sake of our daughter”. But following a “fairly serious family dispute” she stopped contact. Both parties were legally aided and their solicitors directed them to mediation. While Kathy found the first mediation session very unhelpful, she did not consider terminating mediation because her aim was “to sort something for our daughter, so I’d have always gone back”. She wanted to reinstate contact provided her ex-partner would be more reasonable.
- Prior to separation from her husband, Monica had been the primary carer of her two children, aged 5 and 11. She wanted to remain the primary carer, with staying contact for their father.

#### *Children’s matters – fathers*

The predominant norms held by fathers in children’s matters were Formal equality and Rights, for example:

- After Mediation Charlie explained, “I’m still...trying to get 50:50 access for my children. I get 45:55. ... And my solicitor says, ‘Well...you do well to get that much, so....so don’t rock the boat. It’s just going to cost you money for nothing.’... So I still think the access side ... is still put towards the women for the kids and not for the men... In this equal rights world. ... It is difficult. ... I did do really well but, you know, it’d be nice to have an equal share”.
- Karl’s daughter was aged 2 at the time of separation. He sought overnight contact 4/10 nights around his shift pattern, and felt thwarted in mediation: “It felt like I needed somebody to say, ‘Look, he is the father of the child, he is entitled to his child as much as you are...’ but it felt that [the mediator] pandered to [the mother’s] needs.” He referred to “my rights to see my child” and felt strongly that the rights of the father should be given equal weight with the rights of the mother.

A handful of parties were also concerned about issues of fault (guilt or blame), for example Kevin:

“I am a much better father than she is a mother. I didn’t shag anyone else... if she commits adultery she should start on the opposite end of the situation in my view, as she has made the conscious choice to go and do what she did, because I didn’t sleep with anybody else.”

There was no observable difference between the children’s norms brought into Solicitor Negotiations and Mediation (the numbers in Collaborative Law were too small to draw any conclusions).

### Key messages

- The norms which are brought by parties into FDR and drive perceptions of fairness divide along gender lines.
- Different norms apply to children and financial disputes.
- Parties felt more steered towards outcomes in financial disputes as compared with children issues.
- Practitioner interviews indicate that both lawyers and mediators assess proposals in terms of the parameters of what a court might order, but the shadow of the law is more apparent in financial disputes than children disputes in all FDRs.
- Regardless of the norms brought into the process by the parties, their ability to reach a resolution is dependent on either sharing normative views or being able to reach a compromise position.
- Formally equal division of children’s time and of assets were both common

outcomes, but may not objectively be in children's best interests or meet the financial needs of the children and their primary carer. There is an argument for practitioners to subject such proposals to greater challenge.

### **Finances – Wives**

The predominant norm held by wives in financial matters was the desire to meet their Needs, usually (although not always) due to their status as the children's primary carer. For example:

- Brenda had two children aged 3 and 5 at the time of separation, who remained with her. They mediated over finances and reached agreement that she would stay in the house until the children turned 18.
- Ruth has two children aged 8 and 13 living with her. She felt she should retain a larger share of the assets because her needs were greater as the primary carer, and she was receiving meagre child support payments. Solicitor negotiations were ongoing.

Wives were, however, more likely to have mixed feelings and to bring in a range of normative considerations, including feelings of guilt, pragmatism or sacrifice, or concerns about compensation, which were rarely put forward by husbands, for example:

- Kay agreed to the transfer of the former matrimonial home to her husband on payment of a small lump sum. Both the mediator and District Judge expressed reservations about the agreement, but Kay said she "felt so guilty that [she] had left", and agreed her husband's suggestion because: "I always felt guilty and I still do, actually, all these years on... I am still making excuses for everything".
- Patty's house was sold and the equity divided, but all her share was swallowed up in paying jointly acquired credit card bills which were in her sole name. She explained her decision to "give up the house" was made because her ex-husband refused to give up their child's passport to allow her to leave the country. She said "I just wanted to be done and dusted and I caved in..." ... "[A]t that time it was expedient... I just did what I needed to do and got out of it."
- Sonia is aggrieved that she did not receive greater compensation for the fact that she gave up her career to look after their son whilst her former husband has continued to progress in his. She describes their financial settlement as "nothing like what I had hoped for or thought or felt was fair." "I've always felt I've got the worst deal. I do all the hard stuff with my child and my ex has a job with a good pension and career, you know? He's got a great job now which he didn't have to start off with but he's progressed in his career and he's got the money, he's got the time, he's got his hobbies, he can go on holiday. I can't do any of those things."

### **Finances – Husbands**

The predominant norms held by husbands in financial matters were Formal equality and Contributions.

- Victor, for example, held both of these norms. He had brought more capital into the marriage than his ex-wife. He had no objection to his ex-wife retaining family heirlooms provided she did not pursue his pension and he could retain the capital he brought in. Liquid assets were then divided equally.

In relation to finance norms, Formal equality and Contributions were more likely and Needs less likely to be brought into the collaborative process; Needs were slightly more likely to be brought into Solicitor Negotiations, while Formal equality was slightly more likely to be brought into Mediation.

### **Norms Espoused by Practitioners**

The way the shadow of the law was seen to fall was explained differently in relation to the different FDR processes. For Solicitor Negotiations, solicitors said either that their understanding of what a court would be likely to order was the determinative factor in their assessment of what constituted a good outcome, or that they would be concerned to achieve an outcome which was within the parameters of what a court might decide. The majority of mediators (from both lawyer and non-lawyer backgrounds) likewise said that they would check that any agreement reached by the parties was within the parameters of what a court might decide, and if not, they would intervene in various ways. In addition, around a third of the mediators interviewed – mainly lawyer-mediators – said they would inform parties in mediation about the relevant legal principles and how courts tended to decide similar cases. Collaborative practitioners noted that part of their role was to give advice to the parties about the legal principles and how a court might decide the case, but they were more equivocal about the influence of these legal factors on the agreements reached. A number of

practitioners explicitly or implicitly drew a distinction between children and finance cases, suggesting that legal rules and the court's position were more important considerations in relation to the latter than the former.

### Norms Evident in Outcomes

	Children	Finances
<b>Predominant norms in outcomes</b>	Formal equality Primary carer/status quo Child welfare	Formal equality Needs of wife/primary carer [Child welfare]
<b>Norms discarded in outcomes</b>	Rights [Guilt, blame]	Contributions [Guilt, blame, sacrifice, compensation]

In children's matters, outcomes were fairly evenly split between formal equality, primary carer/status quo and child welfare. Most of these outcomes were achieved in mediation, since, as noted above, few children's matters from our party interviews settled in solicitor negotiations or collaborative law. In finance matters, agreements reached in mediation were more likely to be based on formal equality, while those reached in solicitor negotiations were more varied (including child welfare, contributions, guilt and pragmatism), although formal equality and needs still dominated. Outcomes from collaborative law were split between formal equality, needs and contributions. The needs cases included a minority in which the wife received a settlement which met her immediate needs but constituted less than 50% of the assets.

In children's matters, there was very little evidence from parties that they felt themselves steered in a particular direction by either their solicitors or mediators. By contrast, in finance cases, parties described FDR practitioners in all three processes playing a much greater role in invoking legal rules and thereby influencing or steering the outcome.

### The Relationship Between Norms and Resolution

Frequent patterns of norm combinations or norm differences emerged from the party interviews. Where both parties shared norms of formal equality or (for finances) contributions, matters almost inevitably resolved with a formal equality or contributions outcome. Some financial cases settled in one party's favour because the other was animated by guilt, sacrifice or pragmatism. Unless this was the case, financial cases with concerns about non-disclosure tended not to settle. In all other cases, resolution depended not on the particular norms involved but on the ability or willingness of the parties to compromise, or on the DR practitioner steering the outcome. The common patterns are set out in the following table:

Father/Husband	Mother/Wife	Resolved	Unresolved
<b>Formal equality/rights</b>	Primary carer/ Child welfare	Compromise on substantially shared care	One or both entrenched
<b>Primary carer/ Child welfare</b>	Primary carer/ Child welfare	Primary carer	Both want to be primary carer, or leave to remove
<b>Child welfare</b>	Child welfare (different conception)	Reach common understanding of welfare or compromise in child's interests	Entrenched differences re type/amount of contact or appropriateness of shared care
<b>Formal equality/ Contributions/ Own needs</b>	Primary carer's needs/Compensation/ Child welfare	Compromise on formal equality, or needs-based with practitioner intervention	Unable to compromise
<b>Needs/ Child welfare</b>	Needs/Child welfare (different conception)	Needs-based compromise	Entrenched differences in conception of needs

### Justice, Fairness and Formal Equality

Formal equality was a prominent outcome in both children and finance cases. The research evidence suggests that for shared care arrangements to work well parents must be highly co-operative and child focused. Several of our parties agreed substantially shared care as a compromise from positions which were far from child-focused, raising concerns about the welfare of the children concerned. In the finance cases in which a 50/50 split of assets was agreed (generally on a clean break basis), only one could be described as a 'big money' case, and only one also had an equal shared care arrangement for the children. In a number of these cases the equal division of moderate assets is likely to have left the children and their primary carer insufficiently provided for, and in one collaborative case a wife who had been a stay-at-home mother was finding half the assets but no maintenance inadequate to meet her support needs. These cases suggest a need for more consistent practitioner intervention in the interests of children's welfare, and perhaps also a need for more rigorous reality testing of proposed agreements.

## PARTIES AND CASES SUITED TO PARTICULAR FDR PROCESSES

One of the aims of the research was to draw on parties' experience and practitioners' expertise to try to identify in a systematic way which parties and cases are more or less suited to each type of FDR, in order to provide future parties and their advisors with better guidance for decision-making. This section sets out our findings in summary form. It identifies the matters which appear to be suitable for party-interactive processes (either Mediation or Collaborative Law), and those which appear to be suitable for lawyer-led processes (either Collaborative Law or Solicitor Negotiations), and in each case identifies factors which would point to the choice of one of these processes rather than the other. It then goes on to identify matters which appear to be suitable for Solicitor Negotiations only, or which are not suitable for any FDR process. The second part of the section discusses the suitability of particular kinds of cases for mediation, and the conditions under which mediation will and will not be suitable. Finally, it discusses the consequences of the current situation in which parties reliant on legal aid have very limited choices available.

As a preliminary matter to all FDRs, as discussed earlier, parties need to be emotionally ready to negotiate.

### Key messages:

- **One size does not fit all. In particular, some cases are not suited to mediation but may be suited to other FDRs; and some cases are not suited to any FDR.**
- **Suitability for FDRs depends very largely on the disposition of the parties rather than the nature of the case.**
- **In a context in which mediation is effectively the only choice, mediation needs to adapt to provide more tailored and specialised services.**

### Matters Suitable for Mediation or Collaborative Law

Parties:

- willing to engage in the process
- element of trust and respect between them
- relatively amicable/low conflict/want to remain cordial
- want to achieve best outcome for children
- committed to financial transparency, willing to make full disclosure
- on relatively equal footing in terms of resources, information, power
- communicate well or wish to improve communication
- willing and able to listen to and appreciate the other's point of view
- not starting from widely divergent positions
- open-minded and willing to compromise
- past anger/denial stage of separation and accept relationship is over

### Factors Affecting Choice

- dispute about children/all issues → mediation
- dispute about finances only → mediation or collab
- complexity of financial issues
- eligibility for legal aid
- cost considerations
- need help communicating and generating options → mediation
- need ongoing legal advice → collab

### Matters Suitable for Solicitor Negotiations or Collaborative Law

One or both parties need the support, advice and guidance of a lawyer through the process because:

- significant disparity between parties in psychological terms (e.g. one stuck in the past/one moved on)
- significant power imbalance between parties (e.g. intellectual capacity, bullying, domination)
- one party vulnerable in some way (e.g. guilty, unable to make decisions, overwhelmed by financial information, very uncomfortable with ex)

Complex financial cases:

- with technical legal issues
- significant imbalance in knowledge and understanding of finances

### Factors Affecting Choice

- both lawyers collaboratively trained
- parties otherwise fit indicia for collaborative law
- cost considerations
- weaker/vulnerable party able to face the other in the same room and speak in their presence, or needs to be shielded from direct contact
- weaker/vulnerable party able to make rational decisions
- helpful for the more powerful party to hear the advice being given to the weaker/vulnerable party
- does power imbalance create risk that collaborative process will break down?

<p><b>Solicitor Negotiations Only</b> One or both parties:</p> <ul style="list-style-type: none"> <li>• unwilling to listen to the other party or to understand their position</li> <li>• very controlling</li> <li>• with fixed ideas of what they want to achieve, entrenched in their position, not prepared to compromise, clinging to their rights, seeking vindication of their position</li> <li>• prepared to fight to the bitter end on principle</li> <li>• seeking vengeance, determined to defeat the other party</li> <li>• intent on securing the best deal for themselves in negotiations</li> <li>• unwilling to make full financial disclosure</li> </ul> <p>Cases involving third party disputes</p>	<p><b>No Prospects for Out-of-Court Resolution</b> Parties:</p> <ul style="list-style-type: none"> <li>• refusing to make financial disclosure</li> <li>• refusing to accept relationship is over</li> <li>• not prepared to take responsibility for decision-making</li> <li>• entrenched in a strategic position with nothing to gain by compromise</li> </ul> <p>Cases:</p> <ul style="list-style-type: none"> <li>• need for an emergency injunction</li> <li>• child abduction</li> <li>• child abuse or neglect with police or social services involvement; serious child safety concerns</li> <li>• absolute conflicts of fact</li> <li>• leave to remove disputes</li> </ul>
<p><b>Suitability of Mediation for Other Specific Case Types</b></p>	<p><b>Conditions</b></p>
<p><b>High conflict children’s cases</b> – mediation can potentially help to reduce conflict and improve communication between the parties.</p>	<p>Requires a high level of skill and experience on the part of the mediator; better suited to co-mediation</p>
<p><b>Factual disputes over paternity or drug/alcohol misuse</b> – can be dealt with and costs covered as disbursements in mediation.</p>	<p>If the relevant party is willing to undergo voluntary testing prior to mediation; otherwise require court proceedings.</p>
<p><b>Complex financial cases</b> – can be handled in mediation.</p>	<p>By specialist financial mediators, or by co-mediation with an IFA mediator.</p>
<p><b>Domestic violence cases</b> – raise questions of risk to the adult party and/or children which need to be identified and addressed. Evidence suggests this is not currently done sufficiently rigorously or consistently.</p>	<ul style="list-style-type: none"> <li>• Fully explore the nature of the violence/abuse and its effects on those concerned →</li> <li>• Has perpetrator acknowledged violence/abuse, expressed contrition and sought to make amends, and does victims accept this as genuine? → mediation appropriate</li> <li>• Are allegations denied and is their truth central to issues in dispute? → adjudication</li> <li>• Does alleged perpetrator pose a risk to children’s safety? → court proceedings (if unknown or unable to assess, requires a Cafcass report)</li> <li>• Is there an ongoing threat of harm to the victim or children, or ongoing controlling behaviour? → lawyer support needed</li> <li>• Has the violence/abuse created a significant power imbalance between the parties which affects the victim’s ability to participate effectively? → lawyer support needed</li> <li>• Does the victim of violence/abuse nevertheless wish to attempt mediation? → still necessary to independently assess the nature of the violence, its effects, the nature of any ongoing risk to the victim and children, and the likely effectiveness of available safety measures.</li> </ul>
<p><b>Parties with mental health issues</b> – 17 of the 96 parties we interviewed mentioned mental health issues for themselves or their ex-partners or both. In some cases this was reactive depression, for which a few received counselling, but in the majority of cases the issues were more serious and chronic. Here, a similar form of screening and risk assessment needs to occur.</p>	<ul style="list-style-type: none"> <li>• What is the nature of the condition and its effects for the party?</li> <li>• Is the person able to participate safely and effectively in the process (because their condition is controlled or they have sufficient professional support)? → still necessary to consider any risks to the other party or children</li> <li>• Are there concerns about child safety arising from the person’s condition? → court proceedings</li> <li>• Are the severity and consequences of the condition in dispute? → court proceedings</li> </ul>

### **After LASPO**

Despite the suitability factors set out above, the reality post-LASPO is that many parties have a choice only between legally aided mediation and self-representation in court. There is a view that mediation will always be the best option and court proceedings would always be much worse in this context. However this focuses only on the process and ignores the potential for unfair or unjust agreements (see 'Just Settlements' above). Moreover, even as a process, it may not be markedly preferable: some of the parties we interviewed who had been in violent or abusive relationships found the experience of mediation traumatic and felt they had lacked any control in the process. We suggest that this is a challenge to which mediation can respond by becoming more differentiated. This might include both the development of mediator skills and specialisations, and the development of new models of mediation, including hybrid models incorporating the support of lawyers and other professionals. Some creative thinking and precedents exist both in England & Wales and in other jurisdictions, which can provide a foundation for such developments.



## BEST PRACTICES

Through our interviews with parties and practitioners and our analysis of recorded sessions we identified a number of best practices in FDR, many of which have been highlighted in previous sections of this Briefing Paper. This section provides a consolidated summary of the best practices identified.

### Enabling Informed and Appropriate Choice

- **Clients should receive clear, accurate, neutral information and advice on available FDRs and their strengths and disadvantages, tailored to their situation, and with sufficient opportunity to discuss concerns and reservations.**

"They [mediation service] were very good – they checked sort of every step of the way that we were happy with it, and what the limitations were, just to make sure that we had no false expectations, and very much emphasised that it was to help us sort things out" (Norah, who mediated)

- **Practitioner knowledge and experience of what different FDRs have to offer is a key factor in this context.**

Practitioners who have undergone training in each process are better placed to explain the full range of options than those who have not. More training in the various FDR options – e.g. the availability of DVDs of each process – would go some way to filling this gap.

- **Clients' emotional state needs to be factored into information delivery about options.**

Good practitioners recognise when clients are not emotionally capable of absorbing information and making effective choices and slow the pace and/or refer clients for professional assistance accordingly.

- **Clients should be given sufficient time to inform themselves and prepare for the FDR process.**

"As soon as [lawyer] had suggested the collaborative divorce process he sent me away with literature on the different possibilities and then I did my own research online of what that meant." (Marcus, Collaborative Law).

- **Effective screening for client and case suitability is needed in all processes, combined with appropriate responses to the situation.**

As well as screening for risk in domestic abuse and child abuse cases, practitioners should be alert to: drug and alcohol and mental health issues; power imbalances and the potential strategic use of Mediation or Collaborative Law by a dominant or controlling partner; high levels of conflict between the parties; the strength of the parties' normative commitments and their willingness or otherwise to compromise; reluctance to provide financial disclosure; and whether the dispute raises intractable factual issues. Separate rather than joint MIAMs should be the default position. The previous section on Parties and Cases Suited to Particular FDR Processes provides a compendium of best practices in identifying appropriate processes and screening for and responding to domestic violence and other potentially contra-indicated matters in mediation.

- **Clients would be best served by an attitude of mutual respect between FDR and family courts.**

FDR, and mediation in particular, are frequently 'sold' by demonising the court process. However, overstating the scope of judicial discretion and the uncertainty of court outcomes restricts practitioners' ability to bring the shadow of the law to bear in FDR, and undermines respect for the law more generally. The demonisation of court proceedings also puts parties under undue pressure to settle on terms which may be unfair, and creates additional stress and anxiety if they do have to go to court. While an FDR process is very often the best option, sometimes court proceedings are necessary. There are enough *positive* reasons for parties to engage in FDR, and these should be the focus of practitioners' representations and marketing campaigns, rather than scare stories about going to court.

### Providing 'Joined Up' Support

- **Rather than thinking in terms of discrete FDR processes, some practitioners focus on tailoring creative combinations of processes to meet the needs of individual cases.**

"So I think that whenever you have got issues which need right-based dialogue, I am tending towards collaborative, although what I may do is do a collaborative starter to get that information out there and then to send them off to mediation to fine tune the deal." (David Leighton)

Although this kind of tailoring is invariably for the benefit of privately paying clients, there is scope for legally aided mediation also to become more creative to meet particular needs, as suggested in the previous section.

- **Given issues around emotional readiness and emotional vulnerability, combining FDR with counselling or other therapeutic intervention may enhance capacity to reach agreement.**

The role of the counsellor in the collaborative sessions was that of, "ironing out some of the emotional language, helping us maybe to rephrase things so we didn't push each other's buttons, basically". (Marcus, Collaborative Law)

- **Practitioners could do more to address the support needs of victims of domestic violence and abuse, including referrals to and working with domestic violence support services.**
- **Referrals for financial advice were well handled by both lawyers and mediators.**  
When at least one of the parties is legally aided in mediation, the LAA allows the cost of pension valuations to be covered as a disbursement.
- **Supporting parties in mediation can include encouraging them to obtain legal advice before commencing the mediation process.**  
"People will not be brave and will not reach out and won't do a deal unless they understand the parameters of outcomes they would get, i.e. their rights." (David Leighton)
- **Referral of parties to voluntary 'parent education' programmes can also be useful in children's disputes.**  
Available programmes include Cafcass's Getting it Right for Children communication skills programme, Dispute Resolution Separated Parents Information Programme (DR SPIP) and Parenting Plan; and One Plus One's Getting it Right for Children when Parents Part.
- **The ability to provide joined up support is enhanced by the establishment of co-operative relationships between mediators, lawyers, counsellors, financial advisors and child consultants.**

### **Child Focus and Facilitating the Voice of the Child**

- **Where there is a dispute involving children, good practice involves ensuring the agenda is driven by their needs and welfare, not by the 'rights' of the adults, and is carefully steered by the practitioner.**  
"The reality is as you have said, you have got kids and they are at the heart of the solution". (Solicitor-Client Interview 203)  
"Because you have both accepted that you do want [child] to have a relationship with his dad, so how can we reintroduce contact in a way that would be sensitive for [child]?" (Mediation 209(1))
- **There is an argument for more systematic inclusion of children's voices in all three processes.**  
Although the research yielded insufficient data on parties' experiences of child inclusive mediation to be able to make an assessment of its value, parties did report in some cases how, after prolonged dispute, consulting the children had helped to resolve the issue. For example Sheila's ex-husband proposed in Collaborative Law an arrangement whereby the children would spend more time with him, which Sheila resisted because she did not think it would be in the children's best interests at that particular time. This was one of the reasons the collaborative process broke down, after which:  
"I actually spoke to the kids... and I said, 'Look, part of the reason things were difficult was because we were about to make these new arrangements. What do you think?' And they said, 'Fine, we'll try it'."  
It would appear that consulting children may be an effective mechanism for dealing with some difficult cases, particularly where parties have fixed and incompatible conceptions of child welfare.
- **Good practitioners in all FDR processes provided information to parties on the courts' focus on children's welfare (in both children and financial matters), and also on social science evidence about child development.**
- **There is a particular need for practitioners to focus on children's needs and welfare where proposals are made for equal or substantially shared care, or for equal division of assets where one of the parties will be the children's primary carer.**

### **Maintaining a Conciliatory Approach**

- **Taking a non-adversarial approach, and in particular ensuring that correspondence is calm, measured and conciliatory, was recognised as good practice in Solicitor Negotiations.**
- **Good examples of reframing of 'loaded' statements or replacing antagonistic words within a neutral or mutual frame were observed in all three processes.**  
"Sorry, I didn't hear that, necessarily. What I heard was the thought being thrown in, the suggestion that...you disagree or agree, obviously disagree, this idea of having, of valuing the time you have for yourselves when you are not with the children. (Mediation 207(1)).  
"If something came up [the lawyers] would back down on something or agree to defer something or go about it a different way or just word it in ways that my ex could actually hear. They certainly were able to be very positive to get my ex on board and to keep him on board, for his own sake too." (Jenny, Collaborative Law)  
"I would tend to move away from 'respect me' and I would try to create principles that are mutual, so it's about respect for each other, because you know what we are trying to do is to create a calm relation you know,

working relationship, business, and it's that kind of idea." (Solicitor-Client Interview 201)

- **Dealing with rather than sidestepping parties' emotions was appreciated and helped to contain conflict.**

"So she recognised that when the emotions were running high, she would try and calm things and suggest maybe if somebody did take a bit of time or need to leave the room, then they could do." (Stuart, Mediation)

- **In Collaborative Law, the anchor statements made by the parties and lawyers at the outset appeared to work well to set a conciliatory tone, and in some cases effective team work between all participants meant that it was easy to forget, on reading the transcript, which lawyer was representing which party.**

### **Best Practices in Solicitor Negotiations**

- **Best practices observed in the recorded solicitor-client interviews included: allowing the client to tell their story, providing clear legal advice, setting out and explaining process options, providing reassurance where the client had anxieties, engendering confidence in the practitioner's skill, knowledge and understanding, and providing a clear plan for what would happen next.**

Less successful interactions included the solicitor not responding to the client's concerns; being very directive or, conversely, inconclusive; and being overly committed to a non-adversarial approach, to the point of failing to recognise when the client's situation required a more robust response.

### **Best Practices in Mediation**

- **Various strategies can be adopted to avoid perceptions of bias.**

Ideally, the MIAM for both parties should be conducted by the same mediator, to avoid the concerns that arose where the mediator for the substantive sessions was felt to have a better knowledge of and rapport with one party than the other. Mediators also need to be careful not to be seen to be establishing a greater level of familiarity with one of the parties in any other way. In co-mediation, a gender balance between mediators is desirable to avoid perceptions of gender bias by the party whose sex is not represented.

- **Laying out the parties' respective positions visually on a flip chart is considered very helpful.**

This occurred most frequently and effectively in financial cases, but could also be a useful tool in children's matters.

"The mediator just put down on the board that she had sort of what [my ex] would want and what I was wanting, so that we could see it visually. And I thought it was a really great way of sort of showing both of us the actual time that we were talking about" (Eleanor).

- **Assisting the parties to generate options is a valuable element of the mediator's role.**

In many cases parties were capable of generating their own options for moving forward, but where parties lacked the resources to do so, the recorded sessions made it clear that it is very useful for the mediator(s), particularly in children's cases, to give options and suggest ways forward rather than leaving the parties to flounder. This could include, for example, suggesting small, incremental increases in contact between mediation sessions to help build trust between the parties.

- **The flexibility of the process is a potential asset.**

The fact that mediation can be a flexible process was demonstrated, for example, in Rebecca's case:

"There was one occasion where [ex-partner] had done something terrible the day before and I just didn't want to be in the same room as [ex-partner], so they did parallel shuttle..."

Our findings would suggest, however, that there is more scope for flexibility than is currently being exploited, in terms of child inclusive mediation, co-mediation, and hybrid mediation models to support vulnerable parties. In our observation of co-mediation in a high conflict case, the mediators appeared to speak with similar voices and to back to each other up, but did not offer anything noticeably different to the parties, whereas co-mediating with mediators from different backgrounds bringing different perspectives and expertise to the process would be another form of flexible offering.

- **Specific attention to communication issues is a strength of mediation.**

We observed good examples of mediators adding the issue of future communication to the agenda for mediation, reinforcing and supporting instances of effective communication between the parties, and offering strategies for future communication over parenting issues.

- **Solicitors have an effective role to play in supporting clients in mediation.**

Mediators agreed that solicitors could play an important role in providing advice and support to parties during the mediation process, and solicitors obviously also play a role in converting financial agreements reached in mediation into consent orders. In this context, best practice for the solicitor is clearly to give independent and objective advice on how the proposed agreement is likely to be regarded by the court, and then to allow the client to decide how they wish to proceed.

## Best Practices in Collaborative Law

- **Signing up to the collaborative process from the outset engenders confidence in the process.**

As discussed earlier, a number of collaborative practitioners had worries about the effects of the disqualification clause in Collaborative Law. In some cases this led to the practice of 'collab lite', where the disqualification clause was dispensed with altogether. Other practitioners preferred to wait until the end of the first meeting before asking parties to sign the collaboration agreement, to ensure they were fully 'bought in'. However we were impressed by the way the agreement was introduced and signed at the beginning of one of our recorded sessions. Here, the lawyers first explained their well-established working relationship, how the collaborative process was different from traditional Solicitor Negotiations, and why they preferred using it. The parties next were invited to give their anchor statements, and the lawyers reinforced their commitment to the collaborative approach. One of the lawyers then proceeded:

*L1* - Ok so the next bit is the kind of formal bit of signing up to the collaborative process. ...it's the sort of commitment that we all share really to working to find solutions and supporting each other and doing that. I think it enables us to get creative if we need to because we don't have the kind of 'Let's all go rushing off down to court then option', and in a way that's...the kind of disqualification of not being able to go to court is actually what makes it work, because it requires people to think beyond the kind of knee jerk reaction and requires...

*L2* - And works through it.

*L1* - Yes and work through things. So if you have got any questions then shout out. This isn't the last time you can ask those questions, but since this is the point where you enter the process, it's best to think about it carefully now. Have you got any concerns or questions?

*H* - No.

*W* - Nope.

*L1* - Shall we all sign then?" (Collaborative Law 214(1))

- **'Weaker' or more vulnerable parties may need support from both lawyers.**

In most of the collaborative processes observed in recordings and reported by parties, there was a clear power imbalance between the parties, with the wife invariably in the weaker or more vulnerable position. In these circumstances, the structure of the process is such that there is a risk that the interests of the weaker party will be subordinated to the broader goal of maintaining amicable relations between the participants. This was evident in some of the formal equality outcomes discussed earlier. To achieve an outcome in such cases which is fair to both parties and in the interests of the family as a whole, it appears necessary for both lawyers to contribute to managing the expectations of the dominant party and supporting and empowering the weaker party.



**MAPPING PATHS  
TO FAMILY JUSTICE**

## POLICY IMPLICATIONS

This final section draws out the implications of our findings for government policy on family justice. These include the policy changes that would be necessary in order to support fully the best practices identified in the previous section.

### Fault-Based Divorce

In FDR parties are encouraged and supported to be as cooperative and conciliatory as possible. Yet in every FDR process dealing with divorce, there comes a jarring moment when the lawyer(s) or mediator(s) have to broach the issue of the grounds for divorce, and the fact that if the parties want to resolve financial issues and move forward now rather than waiting for two years, one of them will have to accuse the other and the other will have to accept the accusation of either adultery or unreasonable behaviour. We saw the capacity for this legal requirement to upset and antagonise parties and to disturb the equilibrium of the dispute resolution process. Government's promotion of non-adversarial approaches to family disputes needs to be underpinned by a non-adversarial – i.e. no fault – divorce regime.

### Appropriate Dispute Resolution

Government has a legitimate interest in encouraging people to resolve family disputes out of court, and in minimising public expenditure on private family disputes. In addition, it should have an interest in promoting and maximising the well-being of children affected by parental separation. Beyond that, however, its role in the 'market' for dispute resolution services should be facilitative and supportive rather than directive or partisan. This would entail:

- Clearly recognising solicitor negotiations as a form of out-of-court dispute resolution, which may be more appropriate than mediation in some circumstances (see above) and may be freely chosen at least by non-legally aided parties.
- Encouraging and supporting the Law Society and Resolution to promote the message of non-adversarial, out-of-court family dispute resolution among their members.
- Supporting and encouraging collaborative work between lawyers and mediators, and in particular supporting and encouraging solicitor referrals to mediation, and mediator referrals for legal advice.
- Revising the way MIAMs are conducted (see below)
- Revising public information materials on family mediation (see below)

### The Role of Family Courts

While court proceedings should indeed be seen as a last resort for most separating couples, it also needs to be recognised that they are the first and most appropriate resort in some categories of cases, as identified above. Further, the realistic ability to commence court proceedings is an important 'bargaining chip' for some weaker parties, in particular to bring a reluctant opponent to the negotiating table. It also needs to be recognised, therefore, that lawyers sometimes issue court proceedings as an *aid* to settlement rather than as an end to settlement (e.g. where a party is refusing to respond to correspondence, doing so unreasonably slowly, or resisting financial disclosure). The policy image of court proceedings as inevitably constituting bitter, drawn-out, expensive and destructive battles is exaggerated and unnecessary. A more balanced understanding and portrayal would be welcome.

### Promotion of Mediation

The Ministry of Justice and the Family Mediation Council have recently released new public information materials on family mediation. However, these materials still rely on anti-lawyer and anti-court stereotypes, e.g. referring to 'big legal fees' and 'long drawn-out court battles'. Although the materials also note that people can seek legal advice alongside mediation if they feel the need for it, and that some cases (e.g. involving domestic violence or child abuse) may need to go to court, the messages on lawyers and courts are mixed. It seems to us that there are enough *positive* reasons to promote mediation without having to rely on negative stereotypes. Lawyers and courts should be acknowledged as having different but necessary roles in the FDR system.

### MIAMs to DRIAMs

Based on our findings, we suggest that MIAMs should explain the full range of dispute resolution options to those experiencing family breakdown, and offer a genuine choice of processes, guided by the suitability criteria we have identified. For this reason, MIAMs should be renamed DRIAMs (Dispute Resolution Information and Assessment Meetings). In order to encourage attendance and not deter non-legally-aided parties they should be free (i.e. publicly funded) for everyone. And they should be provided independently of substantive dispute resolution services. This would remove the conflict of interest created by the fact that the MIAM provider has a material stake in the party's choice of FDR options, which may result in inadequate screening, inadequate explanation of alternatives, and clients feeling they are being subjected to a 'hard sell'. DRIAMs might therefore be offered by a range of accredited providers. They should be offered individually by default. For legally aided clients the DRIAM should incorporate initial legal advice, given either

by the DRIAM provider if they are qualified, or by a co-operating legal advisor. Non-legally-aided clients wishing to enter mediation should be encouraged to seek initial legal advice and referred to a co-operating legal advisor if they do not have their own solicitor.

### **Closing the 'LASPO' Gap**

Following the LASPO Act, parties whose cases are not suitable for mediation but who are not eligible for legal aid are left in limbo. Either they are taken into mediation regardless, their problem remains unaddressed, or they are compelled to represent themselves in court. Each of these options poses risks for the parties and for any children concerned. The elimination of this gap should be a policy priority. There are a number of ways in which this might be done, and we would suggest a combination of strategies should be pursued.

- A lawyer-assisted and supported model of mediation should be developed, tailored to the specific needs of domestic abuse cases (where there is a history of controlling behaviour but the evidence required to obtain legal aid is lacking) and of other vulnerable parties.
- Where a party has attended a DRIAM and the DRIAM provider certifies that the party is below the means threshold but the matter is unsuitable for mediation, that party should have access to public funding for out-of-court solicitor negotiations or collaborative law. (Public funding in this context needs to be sufficient to provide a good quality service with a view to resolving the matter out of court, bearing in mind that the matter is considered unsuitable for mediation.)
- Where a party has attended a DRIAM and the DRIAM provider certifies that the party is below the means threshold but the matter is unsuitable for any form of out-of-court dispute resolution, that party should have access to public funding for court proceedings.

In this way, the public funding system will support and direct appropriate avenues of dispute resolution, while minimising recourse to court proceedings because viable out-of-court alternatives are fully available.

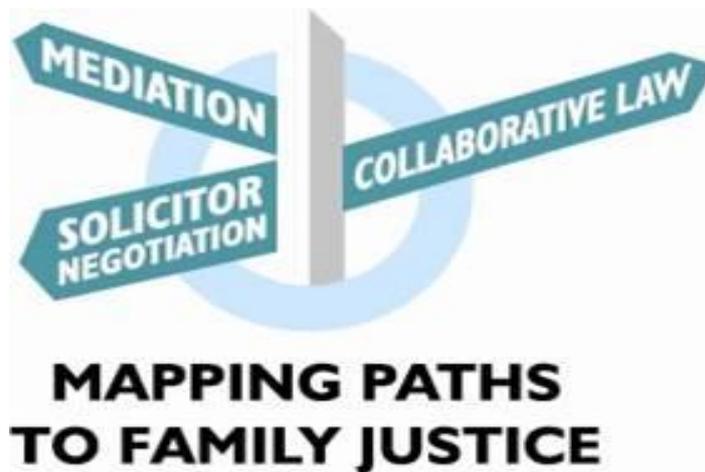
### **Regulation of Mediation**

Finally, we endorse the recommendations of the McElDowney Report for the regulation of mediation, which we suggest should include the development of an accredited specialisation scheme for mediators along the lines currently operated for family lawyers by Resolution and the Law Society. Continuing Professional Development requirements for all mediators should also be put in place to ensure that best practice is updated and regularly shared by all.



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**Published & Printed: University of Exeter, June 2014**

**ISBN 978-0-902746-34-0**

