

# Rising to the post-LASPO challenge: How *should* mediation respond?

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## Abstract

Whilst mediation remains the policy makers' Family Dispute Resolution process of choice and the only one directly supported by legal aid, it remains a process designed for low conflict private family law disputes. Post-LASPO, the policy aimed at encouraging more couples jointly to exercise their autonomy to mediate family disputes has had unintended consequences (Family Mediation Taskforce, 2014), with those eligible for legal aid attending the mandatory Mediation Information and Assessment Meetings (MIAMs) falling by 60 per cent and the number attempting mediation reducing by half (Ministry of Justice (MoJ), 2016a: 26). At present, the alternative route being chosen is self-representation in court, with the number of private family law cases taken to court by 'Litigants in Person' (LiPs) having increased by 30 per cent (HC Justice Committee, 2015). It is also suspected that many couples are now letting things drift rather than agreeing arrangements for finances and children. Whilst Rosemary Hunter's article in this collection has concluded that the normal market rules of supply and demand are not being applied here, this article examines whether, given the current policy reality, new models of mediation could and should be developed in order to deal more appropriately with higher conflict cases and a more diverse range of parties. Given it is clear one size does not fit all and drawing on research from ESRC-funded project *Mapping Paths to Family Justice* and its follow-on ESRC-funded Impact

Accelerator Award *Creating Paths to Family Justice*, this article will examine how mediation might now respond better to the post-LASPO challenge. It will consider whether better signposted online information and assistance with separation and divorce, which includes but is not limited to online mediation are options; what hybrid models of mediation incorporating the support of lawyers and other professionals might offer and whether there is still an appetite among professionals in the new but skewed market to collaborate to address the unmet need of separating families trying to reach appropriate agreements out of court.

**Keywords:** family mediation; LASPO; legal aid; online dispute resolution; triage; MIAM; screening

## **Introduction**

The emergence of family mediation as the policy makers' dispute resolution process (DR) of choice in England and Wales should, for a number of reasons, come as no surprise. First, its principles based on family privacy, co-operation and couple empowerment (see e.g. Roberts, 1983, p. 538) fit neatly alongside current neo-liberal ideas favouring autonomy and private ordering. Secondly, mediation, in light of its stated goals and rhetoric, became seen to be better for parties and children. By rejecting an adversarial stance, it aimed to facilitate better communication and co-operation between separating parties leading to mutually acceptable agreements about arrangements for children and finances (Walker et al, 1994). This had the added value of avoiding the expensive paternalism of the courts, where conflict

was considered more likely to be inflamed than quelled (Family Justice Review, 2011a, para. 5.30-5.32). Thirdly and most significantly from a policy perspective, mediation, unlike other forms of out of court dispute resolution, offered the clear potential to reduce costs, both to those parties able to reach agreement through this process, and to the public purse. For it was assumed that if application to court could only be made after suitability for mediation had been assessed (Practice Direction 3A - Pre-Application Protocol for Mediation, Information and Assessment 2011) and legal aid for private family law dispute resolution was restricted to mediation, one (cheaper) family mediator rather than two (more expensive) lawyers could help many more people quickly reach agreement out of court at far lower cost. The attractive combination of features mediation potentially offered – cheaper, quicker, more amicable family dispute resolution - proved irresistible to government in the prevailing climate of financial austerity (Ministry of Justice (MoJ) 2010). Thus, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) withdrew legal aid for advice and representation in all private family law disputes, save where there was prescribed evidence of domestic violence (Practice Direction 3A, para. 20). It was implemented in April 2013 despite warnings available from research that mediation, whilst a welcome addition, could not replace wholesale the role of family lawyers in dispute resolution (Davis 2001 p. 469). Fears expressed from within the mediation sector that withdrawal of legal aid for legal advice may lead to fewer referrals to family mediation (Parkinson 2011) were also ignored. Crucially, lawyers had been judged by government to be part of the problem and no longer part of the solution in publicly funded private family law disputes.

Regardless of the lack of any evidence that mediation on its own was capable of resolving private family law disputes on a large scale and on the assumption that the

separating population would take up legally aided mediation if there were no other out of court options, family mediation was placed centre stage and alone in the new approach to resolving private family law disputes. In contrast to the 2011 Pre-Application Protocol for Mediation Information and Assessment (Practice Direction 3A) which had encouraged mediation by levelling the playing field, preventing parties, whether or not legally aided, from issuing proceedings in a private family law dispute unless they had attended a Mediation Information and Assessment Meeting (MIAM), LASPO widened the gap between those who could and could not afford to pay privately. By withdrawing legal aid for (prior) legal advice (as well as representation at court) and making mediation the only legally aided out of court dispute resolution option, those who could not pay were effectively given the stark choice of mediating an agreement or representing themselves in court. This took the pro-mediation policy to a completely new level. It went beyond the proposals of the Family Justice Review (2011a, 2011b), which had initially aimed to divert private family law disputes away from court wherever possible and appropriate, with a greater, but certainly not exclusive, role for family mediation (Family Justice Review (FJR) 2011a, para. 105, 2011b, paras. 4.69-4.70). Furthermore, by removing other choices, it also challenged the voluntariness of participation in mediation, which is one of the central tenets of the philosophy on which the process is founded. This makes clear that in order to facilitate party autonomy where a mediator has no power to impose an outcome, mediation must be voluntary (see e.g. Roberts 2008, p.10; Family Mediation Council Code of Practice for Family Mediators, September 2016, 5.2).

Thus in some senses, mediation was always going into the post-LASPO era with one hand tied behind its back. First, whilst the party intending to issue proceedings had to attend the MIAM, there was no compulsion for the other party to do so. This risked

compromising the voluntariness principle whilst failing to ensure that mediation, a process dependant on the participation of both parties, was in fact explained to both people concerned. Second, mediation was having to deal potentially with a larger proportion of cases where people were not voluntarily choosing mediation, given the requirement to attend a MIAM prior to issuing proceedings and the lack of legal aid for legal advice and representation at court. Mediation was therefore likely to become a Hobson's choice for many, a constraint which in itself often militates against a successful mediated outcome (Barlow et al 2017 forthcoming). A further related consequence was that mediation was overnight expected to deal with a far wider range of cases, typically exhibiting higher conflict levels and/or more complex problems such as partners with mental health issues, drug and alcohol abuse or where there were significant power imbalances between the parties. Whereas such couples might previously have chosen partisan lawyers over mediation following the MIAM or if mediation broke down, post-LASPO this was no longer an option. Many couples had also used lawyers alongside mediation to good collaborative effect, and again for those needing legal aid, this was no longer possible. Whereas mediation alone could be successful in some of these more difficult situations, they were also predictors of increased likelihood of mediation failure (Barlow et al 2014). Another immediate post-LASPO issue for mediation was a perceived pressure not to screen out 'unsuitable' cases due to lack of alternatives (Hunter 2014). For, other than where there was the necessary evidence of domestic violence, if a legally aided case was deemed unsuitable for mediation, the couple had to go to court unrepresented. If they could not face such a prospect, things would most likely be left to drift until a crisis point was reached. Either way, there was a temptation almost on humanitarian grounds for mediators to screen in rather than out of mediation in inappropriate cases at the MIAM.

Yet, mediation was expected immediately to adapt to this new climate and the greater diversity of cases without any further public investment in mediation infra-structure, any external support from lawyers or therapeutic interventions or any joined-up plan for compulsory additional training for existing mediation personnel. There was certainly no attempt by government to craft a family mediation service to meet the new needs of the reformed family justice system as had happened in Australia with the introduction of the Australian Family Relationship Centres in 2006 (Parkinson 2013). Rather the approach taken in England and Wales was one of 'make do and mend' despite the known shortcomings of the fragmented mediation services operating under an umbrella structure of a Family Mediation Council (FMC) without regulatory powers identified in the McEldowney Report (McEldowney 2012). The only concession made before LASPO was implemented was acceptance that there should be an enhanced standard-setting role for FMC over the whole the family mediation profession as recommended by McEldowney (2012). This was subsequently endorsed by the government's own Family Mediation Taskforce Report which also stressed the need to monitor the recommended central oversight of the practice of mediation by the FMC (Family Mediation Taskforce 2014).

### **Consequences of LASPO for mediation**

From the government's perspective, LASPO has been a financial success. It has reduced the legal aid budget, with £300 million initial Legal Aid savings immediately achieved (National Audit Office (NAO) 2014). Yet, as Hunter (2017, this volume, p. ??) has demonstrated, we are witnessing a raft of other unintended consequences. By deliberately placing solicitors (previously the principal referral agents to mediation (Barlow et al 2014, pp.4-5) out of their reach, LASPO left those eligible for legal aid for mediation to find their

own way to a MIAM unaided and uninformed about the MIAM and mediation processes. As a consequence, the number of people eligible for legal aid attending the mandatory MIAM has fallen by 60 per cent post-LASPO and the number attempting mediation itself has halved (MoJ 2016a). Thus the removal of publicly funded legal advice prior to mediation has reduced rather than increased demand for mediation. Privately funded mediation clients are not rising either and there is very low provision or take-up of 'Help with Mediation' for legal advice where a mediated agreement is reached. (Hunter 2017, this volume, p.??; Hamlyn et al 2015, p. 20). Conversely, the number of those willing to go to court is rising generally, with a 16 per cent increase in cases started in the second quarter of 2016 compared to 2015 (MoJ 2016a). Those appearing as 'Litigants in Person' (LiPs) has also increased, with most recent figures showing both sides unrepresented in 34 per cent of cases, a rise of 17 per cent from pre-LASPO levels (MoJ 2016a). We also do not know how many couples now do nothing to resolve matters on separation, letting things drift until, anecdotally at least, they now appear as repossession or debt cases at the CAB.

Almost four years on, LASPO has therefore failed to change the culture of family dispute resolution. These unintended consequences have forced a further examination of how mediation alongside other agencies concerned with and about separating families post-LASPO might respond to make the best of the current bad situation and move policy forward in the longer term. The ESRC-funded Mapping Paths to Family Justice project<sup>1</sup> (*Mapping*), a three year mixed methods national study comparing which of the out of court family dispute resolution processes of solicitor negotiation, mediation and collaborative law suited which types of cases and parties, concluded in 2014 that 'one size does not fit all' (Barlow et al 2014 p. 25). Its findings advocated a move away from the mediation-focused MIAM to a more neutral form of triage within a 'Dispute Resolution Information and

Assessment Meeting' (DRIAM) (Barlow et al 2014, p. 32). Here a range of DR options would be explored at a free session with an independent practitioner with expert knowledge of all out of court DR processes, with the aim of finding the most appropriate choice for an individual couple in their circumstances (Barlow et al 2014, p. 32). However, it also concluded that in a post-LASPO context in which mediation is effectively the only out of court dispute resolution choice for many, mediation must itself adapt to provide more tailored and specialised services suited to the needs of the more diverse population it must now cater for (Barlow et al, 2014, p. 25). This is a view also endorsed by the Ministry of Justice's own funded research into MIAMs and mediation immediately post-LASPO (Bloch et al 2014, p. 39).

Whilst it is still true to say that current policy seems to misunderstand fundamentally both the diverse nature and dynamics of family disputes as well as the acknowledged limitations to the process of family mediation, the aim of this article is to consider how family mediation, alongside other initiatives, might nevertheless rise to the post-LASPO challenge. In reflecting on the way forward, it will now look at a number of innovative responses, particularly in relation to the potential of online information and support, which have emerged from both within and outside the policy making sphere. At two initial workshop meetings in summer 2015 funded by the ESRC to establish a Social Policy Network, the *Mapping* research team brought together a diverse group of family academics, family practitioners, relationship support agencies and policy-makers to discuss how matters may be improved for separating couples post-LASPO. Here it was agreed that, a joined-up approach was essential to any attempts to fill the gaps in access to justice left by the removal of legal aid and that the approach taken should, where appropriate, be informed by research, including the *Mapping* study findings, which had mainly critiqued



experiences pre-LASPO. There was also agreement that development of good online support and information had an important role to play post-LASPO as one of a range of measures needed and achievable, although it should be recognised that this was likely to require novel, different thinking and techniques to those required to deliver individually targeted services face to face. As part of a 12 month follow-on ESRC-funded Impact Acceleration Co-Creation Award project, *Creating Paths to Family Justice (Creating)*<sup>2</sup>, a further set of five themed workshops took place bringing together an extended range of core agencies including Relate, One Plus One, Cafcass, Family Mediation Council, Resolution, the Ministry of Justice and the Department of Work and Pensions, with others such as the Law Society also attending some workshops. These critical collaborators agreed to pool their extensive expertise and assist each other with initiatives they were individually embarking upon relating to future family dispute resolution practice. They also wanted to ensure that any recommendations were research-informed, drew on the relevant experience of a range of family dispute resolution providers and could be fed back directly to policy-makers.

Drawing on some of the discussions and conclusions of the *Creating* project, let us now first assess the post-LASPO dispute resolution market, before going on to consider ways in which mediation can better adapt to the new market, the issues which surround effective online signposting to mediation, the potential and challenges for online tools to undertake pre-mediation screening or preparation as well as to facilitate family mediation itself, given the diverse range of cases.

### **Analysis of reactions to the post-LASPO dispute resolution market**

Mediation had been left in pole position by LASPO yet it has not been able to capitalise on what should have been a captive dispute resolution market, at least within the

not-for-profit sector. It is therefore important to assess reactions to LASPO and the implications of the current state of the market for mediation before reflecting on ways to assist mediation uptake and success in the longer term.

With hindsight, it is clear that government predictions about the likely growth in mediation post-LASPO were based on two fundamental false assumptions. First it was assumed both by government and by mediators that people would easily find all the information they needed about mediation online. The second was the assumption that having done so, people would, in the main, find mediation the most attractive option, given the lack of alternatives.

There was great faith at a policy level in what online information could achieve. The only immediate government response to the new situation created by LASPO was its attempt to improve online information about the help available on separation. The Department of Work and Pensions' (DWP's) *Sorting out Separation* web app (see <https://www.sortingoutseparation.org.uk/>) was launched in November 2012 as an online tool to co-ordinate and join up support services for those seeking information and support. Whilst well-intentioned, it was quickly criticised for a number of things including being difficult to access and, in terms of its content, being too generic to be very useful to people embarking unassisted on resolving family disputes. This was acknowledged in the DWP's own evaluation (DWP, 2014). In one fell swoop, LASPO and the lack of good, clear, accessible online information left people unable to approach a solicitor, yet at a loss about where to turn or who to trust. This situation was exacerbated by the not-for profit mediation sector, at least initially, largely sitting back and waiting for clients to arrive at their door and not anticipating the much faster response of the commercial market to the

vacuum that had been created. Here, in particular, we witnessed an explosion of offerings of online information and of new forms of largely unregulated 'low cost' advice and support (Maclean 2015, Maclean and Eekelaar 2016). This presented a confusing array of choice to people searching the internet for help about their separation situation, with no guidance on how best to navigate it. The online space allowed new brands such as Wikivorce, which was an existing online forum model which offered help and support with divorce through an online community of former clients (Paechter, 2012), to grow rapidly and become trusted. They in turn, though, found themselves challenged by other newcomers to the market advertising, for example, 'online fast divorce', a service likely to appeal to many needing help yet unlikely, given the realities of the current system, to live up to expectations. The Wikivorce website carries a disclaimer that its staff are not qualified to give legal advice and does also now flag mediation information clearly, linking to National Family Mediation's (NFM) 'Find a Local Mediator' tool. Yet the Wikivorce website has itself become crowded with competitor adverts offering other services such as 'managed divorce' or a 'clean break settlement' at fixed prices, without any clarity as to who is providing these, what exactly is included and whether or not they are legally qualified to offer advice. These adverts and sites have sprung up 'Wild West'-style and are of varying quality and authenticity (Maclean 2015; Maclean and Eekelaar, 2016), although this would not necessarily be apparent to those looking for help. Indeed the Wikivorce website now carries the warning that people should be careful about 'Quick Divorce' services from unregulated websites not qualified to give legal advice as 'you have few rights if things go wrong' (see- <http://www.wikivorce.com/divorce/Guide-To-Divorce.html>).

In the general online space of a google search, such adverts appear alongside those from regulated solicitors' firms who also reacted competitively and innovatively to the post-

LASPO market. Many now advertise online, offering 'unbundled packages' which enable clients to select which services (e.g. advice + representation; advice only; representation only) they can afford, where the whole suite of traditional services is beyond their financial reach. In addition, pro-bono work by solicitors' firms, university law clinics and voluntary and fee-charging Mackenzie friends offering lower cost court representation are other emerging phenomena in the vacuum created by LASPO. To add to this crowded market place, new-style regulated private dispute resolution processes such as arbitration of family disputes (see <http://ifla.org.uk/>) are also a possibility for couples seeking to resolve disputes with the guarantee of a final outcome.

As the statistics above have demonstrated, the result is that legally aided clients, in particular, are not finding their way to MIAMs or taking up mediation in the numbers that they had pre-LASPO, despite the mediation monopoly that was created. Let us now consider what might be done in this market in terms of turning the situation around from a mediation perspective.

### **Adapting mediation to the new climate – What needs to change?**

#### ***Advertising strategies and building awareness***

As a first step, it seems important to develop better advertising strategies and more diverse referral mechanisms into the MIAM and then to consider how better conversion rates into mediation where appropriate can be achieved. It should be acknowledged that mediators do have a much more difficult task in attracting clients to use their services than partisan legal advisors, if for no other reason than mediation requires **both** parties to agree to mediate before it can begin. Indeed in *Mapping*, refusal of an ex-partner to participate was one of the most common reasons cited by divorced and separated respondents for not

taking up the offer of mediation, with 20 per cent of the nationally representative sample (n = 315) falling into this category. When you add to this the sector's acknowledged marketing and dual client retention problems (Family Mediation Taskforce 2014) alongside a more challenging client base post-LASPO, with higher conflict levels and poorer communication between the parties (Bloch et al 2014, p. 39), it is clear that there is a steep hill for the sector to climb if it is to succeed in changing the culture and making optimal use of what mediation can offer, particularly as a pivotal part of the legal aid scheme.

However, there has been some government assistance with advertising mediation and whilst it seems clear that the sector is unlikely to receive any government intervention in the market, there is a commitment to continue a mediation awareness campaign (see <https://www.gov.uk/government/publications/family-mediation>). Despite the surfeit of information on the web, there is still a lack of general awareness of what mediation is which continues to need to be addressed, particularly among men. At the time of the *Mapping* project in 2012, 44 per cent of the nationally representative survey population had heard of family mediation as a dispute resolution process, with far more women (49 per cent) being aware of this option than men (39 per cent) (Barlow et al 2014, p. 4). As Ernest, a *Mapping* participant commented, 'There is a need for clear, unambiguous, easy-to-assimilate information... [so that people can] make an important choice... about whether... [an option] is for them.' Whilst the Ministry of Justice has combined with mediation agencies to launch a Support for Separating Families campaign in January 2016 which included redesigning materials and a Youtube video (<https://www.youtube.com/watch?v=zYhWdwazCZA>), the message needs to be sustained in the public consciousness and better targeted to make mediation a more attractive and trusted option for those different groups in need of a dispute resolution service.

In order to gain market share, not-for-profit mediation needs to adapt both its advertising strategies and its services to attract and retain a client base which research shows are a group instinctively less inclined to mediate. It also needs to avoid being outmanoeuvred by its competitors and gain insights into what attracts people to the court process or to other out of court options to see whether mediation can adjust or combine what it does to cater for those parties' needs. Whilst the whole mediation sector is very good at dealing with what Bloch et al have identified within their study's four category typology of mediation clients as 'engaged' parties, that is those who have chosen mediation on its own merits and voluntarily commit to the process, LASPO has significantly increased the proportion of those they describe as 'compelled' clients (Bloch et al 2014, p.18). Feeling compelled to mediate by lack of finances or as a requirement of legal aid or by the court is a likely predictor of rejection of mediation at a MIAM (Bloch et al 2014) and of later mediation failure (Barlow et al, 2014). On the other hand, achieving emotional and practical readiness of **both** parties for mediation before parties are thrown into the process are factors likely to assist mediation success (Barlow et al, 2014, p. 14).

In terms of how mediation might address this dilemma and develop a more strategic approach, it is important to acknowledge that the success of partisan services is in part due to the tailoring of those services and of the way they are advertised to appeal to likely **individual** needs. Mediation, on the other hand, tries to speak to both members of a couple who are already estranged and where, particularly in higher conflict cases, the level of distrust is high and of communication is low. Whilst mediation is of course trying to attract both members of the former couple, its advertisements for MIAMs could be directed more at individuals or at particular (non-couple) groups in the first instance. At the moment, the targeting is at 'couples' or 'parents', yet why not target 'mothers' and 'fathers', identifying

the sorts of problems that typically emerge from these perspectives and how these can be solved through mediation? Obviously, the other party does also need to be pulled into the process willingly – and there are separate strategies to address this, as discussed below - but as a starting point, attracting people to an individual (rather than a joint) MIAM session where their own perspective can be aired is likely to be an easier step to commit to in higher conflict cases or where people have doubts. Another possible approach is to direct advertising at particular types of case, with examples based on satisfied client reviews of how a mediator was able to help couples reach agreement in unlikely circumstances. The existence of ‘shuttle mediation’, caucassing and co-mediation as techniques which may assist in initially engaging higher conflict couples with the idea of mediation is likely to be unknown to most people separating for the first time. This diversity might well be another feature which could attract the more ‘compelled’ groups, who feel a positive outcome from mediation is impossible, to at least attend the MIAM, although research does indicate that the efficacy of the first two is likely to be limited, whilst co-mediation, which can provide a feeling of greater balance in such cases is increasingly difficult to obtain (Barlow et al 2017 forthcoming).

Developing anonymised online communities of former clients is another strategy that has worked well for both the Family Law in Partnership (FLiP) initiative of ‘Divorce Diaries’ (Ditz 2016) and Wikivorce. Research now shows that people are turning to other online forums such as *Mumsnet* and *Families Need Fathers* for advice on separation (Smith, 2014). Putting these trends together, building online communities linked to each mediation service website and then advertising these as a means of a first step towards contemplating and preparing for mediation is also worthy of consideration. It could, over time, work as a

powerful source of referrals and support locally where trust in the process can be built through ready access to the experience of others, helping to change the culture.

### ***Engaging both clients***

Turning to how better to engage both clients in mediation in a competitive market, there is a growing understanding from research of the triggers which deter people from taking up mediation. Publicity around providing a ‘neutral’ or ‘impartial’ mediator, a cornerstone of mediation rhetoric, is often counter-intuitive to couples who understandably often express the need to have someone ‘on their side’ at such a time (Barlow et al 2014, 2017 forthcoming). Whilst impartiality is of course fundamental to successful mediation, some greater focus and market testing on the language which attracts and deters client engagement both before and after the MIAM stage would be an important step in the right direction. This links well with research by Sikveland and Stokoe (2016) which has demonstrated, for example, that an invitation to participate in mediation from the mediation service asking if they are ‘willing’ to participate rather than indicating they have already been approached by their ex-partner who wants them to mediate is more likely to receive a positive response. This would certainly fit with the *Mapping* project findings that strategies should be adopted to avoid the perceptions of bias by giving the impression that they have a greater level of familiarity with one of the parties than the other (Barlow et al 2014, p. 30).

Thus, given that mediation services need to be ahead and not behind the curve of their partisan competitors, consideration of some often simple tactics on how most effectively to engage couples with the idea of mediation seems highly advisable. Stokoe’s CARM approach to communication skills training – see <http://www.carmtraining.org/> and



based on her research - could for example be used to upskill all mediation service staff (receptionists and mediators), enabling them to persuade rather than inadvertently deter potential clients, by employing approaches which take account of psychology and communication research as applied to conflict resolution situations.

### ***Specialisation within mediation***

Given the increased diversity of the potential mediation client-base, it is suggested there that a different approach to service delivery which allowed for development of specialisms within the mediation sector is called for. To succeed, this would require more solidarity and less direct internal competition among mediators themselves. To achieve this, acknowledged specialisations within mediation practice could be accredited allowing cross-referral between mediators to give clients the most appropriate mediation service possible, thereby delivering a joined-up approach which facilitated targeted, specialist services for the more diverse market. Whilst the pre-LASPO solicitor worked in harmony with mediators in the non-for-profit sector, the game has now changed, with lawyers keen to retain and expand their own market share as solicitors and private mediators. However, building strong referral links between private and not-for-profit mediation services as well as an encouragement of mixed private and not-for profit practices with different specialist skills could be a mutually beneficial way forward. If linked to a neutral triage approach within the MIAM process or even online (as discussed below) aimed at parties finding the right mediation service for their situation, this would both improve the situation for clients, and allow greater cross-subsidy between the services. At the present time, all mediation services tend to claim they are expert in all aspects of mediation practice and can deal equally well with all types of cases. In reality, research tends to show that there is a wide

variation in approaches taken by different mediators and in mediation styles offered. For example, co-mediation, lawyer or counsellor mediators and perhaps initially in some cases shuttle mediation can each be the most appropriate style, depending on the circumstances. Yet it is currently serendipitous which service is approached, which style is chosen and therefore whether this works well for any particular couple (Bloch et al 2014). Added to this, the perceived quality of the practitioner by clients is also key to likely satisfaction with out of court dispute resolution processes (Barlow et al 2014, p.10). Thus a system of specialist accreditation, akin to that currently operated for solicitors by Resolution and the Law Society, where experienced mediators could acquire more specialist skills in particular areas of need, such as high conflict couple mediation, child inclusive mediation or complex financial cases involving assets or debts is likely to assist in both marketing mediation, converting MIAM attendance to mediation and in achieving success in more difficult cases. The type of specialisations called for would need to be thoroughly canvassed and training developed as discussed below, but it is suggested that moving in this direction would enable mediation to adapt to the needs of its clients, rather than expecting clients to adapt to the needs of mediation. It would also act as a quality kite mark of professional expertise, imbuing greater confidence in those considering the mediation option.

Any realisation of such changes is, though, complicated by the competing interests of the different professional family mediation associations which embed different historical mediation ideologies within their practice ethos and to which they are strongly attached. These associations do all now sit under the umbrella of the Family Mediation Council (FMC) whose membership includes National Family Mediation (NFM) who are largely not-for profit and mainly offer mediators with counselling rather than legal backgrounds; the Family Mediators Association (FMA) who have a mix of mediators from legal and non-legal

backgrounds; Resolution who train lawyer mediators exclusively and also the Law Society, who predominantly train legally qualified family mediators plus others who are employed by practices regulated by the Solicitors' Regulation Authority (see further- <http://www.lawsociety.org.uk/support-services/accreditation/family-mediation>). However, it is these individual associations and not the FMC who still oversee the training and general accreditation process for mediators and set up complaints procedures. They remain very much in competition with each other and their approaches and procedures are far from uniform despite their FMC membership. Whilst the FMC does now have a clear standard-setting role for all of its affiliated members following government acceptance of the McEldowney Report recommendations (McEldowney 2012), it still has no power to deal with complaints and currently has no power and only limited other means of achieving a joined-up approach to any initiatives across the sector.

In summary, the mediation sector remains fragmented and in competition with itself as well as an increasing number of other low cost partisan providers. Whilst standards have been developed and accepted across the sector, lack of central regulation means mediation is not set clearly apart from other sections of the post-LASPO market, risking it not having the acknowledged expertise and credibility of regulated solicitors, yet not clearly distinguishing itself from other unregulated providers. Given the intense competition, a more radical approach in the longer term would be to give the FMC greater regulatory powers and move towards a trusted national mediation service within which there was room for different approaches to mediation from which people could choose, reflecting the strengths, specialisation, training and backgrounds of mediators and of different styles of mediation in a more cohesive way. More specifically, there should be a system of specialist accreditation instituted and regulated directly by the FMC which would oversee the training

and practice requirements, with a particular focus on dealing with the more challenging demands of ‘compelled’ and high conflict couples post-LASPO. This in turn should equip the sector, longer term, with the expertise and skills needed to successfully engage both parties and then to mediate the more difficult cases, classically involving higher levels of conflict and poorer communication between the parties, towards appropriate solutions wherever possible. Most importantly, adopting a specialist accreditation approach should avoid large numbers of people being left in limbo – unsuitable for mediation, not wanting to go to court as a LiP, yet unable to afford the services of a solicitor.

### ***Mediation plus? – Hybrid models of mediation***

Alongside greater specialisation, other options for mediation delivery include combining it with other dispute resolution processes in a multi-disciplinary approach. Whereas ‘unbundled packages’ have become a popular way to purchase legal services, it is suggested that mediation should be able and willing to offer ‘bundled packages’ which combine appropriate out of court dispute resolution processes. Indeed, this is already a feature in private mediations, where lawyer-supported mediation is common and other expertise such as financial or child consultants can be brought in, albeit at a cost to the couple. Indeed, the *Mapping* study of the collaborative law process (see Barlow et al 2014, 2017 forthcoming) found that the high degree of satisfaction with that was in part due to its flexibility to ‘buy in’ these additional services and, it is suggested, the mediation sector more widely could learn much from the strengths of the collaborative model in this regard. The key challenge post-LASPO, however, is for the not-for profit mediation sector to gain acknowledgment from policy makers that some parties do need assistance from other experts to enable a couple to resolve their dispute out of court and this expense should

legitimately fall within the legal aid scheme. Alongside the domestic violence exemption, the range of other 'exceptional cases' under s10(2) LASPO where legal aid for advice and representation can be made available should, it is suggested, be widened to explicitly include those where mediation is clearly not suitable. As things stand, exceptional cases need to show that a 'Convention right' under the Human Rights Act 1998 would otherwise be breached and Article 6 of the European Convention on Human Rights provides a right to a fair trial, which includes a hearing within civil proceedings. There are certainly arguments that some of those forced to go to court and represent themselves where mediation is deemed unsuitable will not result in a fair trial unless legal aid is granted (see Miles et al, 2012). In any event, for the state to pretend it is appropriate and safe or even possible to mediate with an ex-partner with serious mental health or addiction issues seems blatantly irresponsible. Additional support for such parties alongside or in the place of mediation may or may not involve the expertise of lawyers, but given the ongoing LiP crisis in the family courts, all avenues to support successful mediation and indeed other out of court dispute resolution processes must be urgently explored and made available to those in need of public funding with a view to achieving appropriate out of court dispute resolution for the vast majority of those separating. Lawyer supported mediation in Ontario, Canada and Collaborative law in Ireland are for example supported by legal aid schemes in those jurisdictions and where appropriate, this could and, it is suggested here, should be funded in England and Wales to achieve out of court dispute resolution where possible, an idea in line with the original intentions of the Family Justice Review (FJR, 2011a, para. 115). This is also in line with the thinking of and conclusions drawn from research by Maclean and Eekelaar (2016) who indicate that it is not only important for both information *and advice* to be provided to mediation clients but argue for the co-location of those services. They go on to

propose (p. 130) the bringing together of 'two key services, those provided by lawyers and mediators, which have so much in common in their working practice, so that clients, particularly those with limited means, can find what they need in one place', plus the option for both clients to seek the advice of just one lawyer. They also argue the FMC and Resolution Codes should make it explicit that couples should be assisted in making mediated decisions which are 'within the principles of the law' (p. 134) rather than facilitate settlement irrespective of the principles of family law.

In terms of other possible delivery innovations, private mediation services have also sought to formally combine mediation with arbitration, introducing a new hybrid out of court process known as 'Med-Arb'. This allows mediation to progress in the normal way but where agreement cannot be reached, it has been accepted by both parties in advance that a binding arbitration will follow, guaranteeing the couple a concrete outcome. Given lack of enforceability of mediated financial agreements remains an issue for mediation and is a key reason for some rejecting the process (Barlow et al 2014, p.18), this may prove attractive but is not currently available for anyone requiring legal aid. However, with fewer lawyers supporting the mediation process post-LASPO, it seems likely that financial mediation agreements are not being converted into enforceable consent orders in great numbers. This means that any agreement reached is not enforceable and that matters can be reopened by either party at a later stage, storing up problems for the parties and indeed the courts in the future. Here, once again, the mediation sector does need to work on a joined up solution with lawyers and policy makers. More realistic funding of the 'Help with Mediation' programme than the current fixed fee may encourage more solicitors to undertake the work of drawing up consent orders following mediation and could be one solution. Alternatively, whilst the controversial use of just one lawyer acting for both parties in this process has

been mooted by Maclean and Eekelaar (2016) (and may be possible currently in some situations as discussed below) and the equally controversial suggested power for mediators to draw up consent orders has also been raised (Braithwaite 2016, Edwards 2016), a simpler system for obtaining court approval of a mediated agreement in a digital age is something that should be developed in the near rather than the distant future.

### **Effective signposting online and online triage – The way forward?**

#### ***Finding trusted information online***

Whilst the internet is a growing source of information about dispute resolution services, revisiting the *Mapping* data as part of the *Creating* project, we found articulation of the frustration felt by some (anonymised) party sample participants with their attempts to use online information even pre-LASPO. The volume of information available was a problem for Robert who felt ‘overwhelmed’ by the extent of it. Annette was clear it could only supplement rather than replace legal advice, whilst Sara also found it disjointed and difficult to access. In response to this situation and in the absence of access to legal advice, it is hardly surprising that people are turning to online lay community forums with whom they identify for support. *Mumsnet* and *Families Need Fathers* are used by people ‘crowdsourcing’ advice and support relating to their family law dispute (Smith 2014), in addition to those formally using a community of divorce experience such as Wikivorce.

As part of the *Creating* workshops, it was concluded that some excellent websites providing information and support on dispute resolution options do exist. The more difficult issue is knowing how to navigate and evaluate them in the context of your own dispute. As things stand, people still feel very uneasy about which sites to trust. Porter, a *Mapping* participant, expressed the frustration well when he reported that he had been ‘struggling

with assessing the credible sources of information'. Generic information also means people cannot judge what constitutes good 'advice' from their perspective. The *Creating* workshop discussion concluded that a key way forward would be for a nationally trusted website to provide initial advice and information on the range of dispute resolution options available, setting out their strengths and weaknesses for different types of cases and parties based on research. This would help avoid the criticised generic nature of support offered by the signposting from the Sorting out Separation web app. However, it is also vital that the initial signposting should lead on to a joined-up and effective signposting to other services which would themselves offer to undertake a nuanced triage process, online or offline, rather than just abandon people at the next landing page. The triage process would in particular need to build in assessments aimed at ensuring both parties are emotionally and practically prepared for mediation before recommending it, as this avoids key reasons why mediation fails according to recent research evidence (Barlow et al 2014). Thus another conclusion of the *Creating* project is that clear and trusted online pathways **to** information followed by clear routes **through** the appropriate dispute resolution options must be made a priority. This is an idea which is now under consideration as part of the Ministry of Justice's digital team's ongoing work for the Out of Court Family Pathway (Harbott 2016, MoJ 2016b).

### **Online neutral triage leading to successful out of court dispute resolution**

As part of the work of the *Creating* project, consideration was given to developments around how online tools, as opposed to online information and advice, might become components for filling the access to family justice gap post-LASPO. The questions we were interested in were whether emotional readiness could be gauged through an online



assessment tool; whether screening people into or out of mediation could be achieved through an online tool; how the online environment might affect people's engagement with each other as compared with being in the same room and whether such an approach could provide a substitute for face to face mediation.

However, these tools are still in the relatively early stages of development and just how well online programmes can be used effectively and appropriately to triage and screen parties looking for support with their dispute resolution or indeed be used as an environment in which to conduct mediation is something which time will tell. There are currently some very interesting ideas around how technology can be developed for the future to assist in these tasks and different forms of screening, including online assessments, seem likely to provide a way forward longer term.

We worked with both OnePlusOne, who were working on a tool to assess a how emotionally ready each party was to engage in mediation, given that 'emotional unreadiness' by one partner was a likely predictor that mediation would be unsuccessful (Barlow et al 2014, p. 14) and also Relate, who were ambitiously looking at the feasibility of introducing online mediation along the lines of the Dutch 'Rechtwijzer' model (Smith 2013, Smith and Paterson 2013,). Together with the other collaborating agencies, we explored what might be possible to transfer to the online space and where best practice might lie.

### ***Assessing emotional readiness for mediation online***

OnePlusOne, the relationship education and research agency, already have a significant online portfolio of educational programmes aimed at helping couples resolve conflict. Both their 'Strengthening Relationships' and the 'Parent Connection: Splitting Up? Put Kids First' online education programmes aim to help people resolve issues better. Their

approach here was to assess emotional readiness, using an online tool which analysed their responses to questions informed by research on relationship psychology and conflict resolution about their view of the situation and that of their partner. These are then processed and the couple are then advised how ready they are emotionally to resolve their conflict or attempt agreement using a traffic light indicator – red, amber and green. This in turn can be used by the parties or mediators or advisers to inform whether and if so how to approach dispute resolution at that moment in time. Typically, where one partner has moved on but the other is in denial about the relationship breakdown, mediation or any negotiation is likely to fail. However, if one party was assessed as ‘emotionally unready’ (red) or only partially ready (amber), this would act as an indicator that a party needs counselling, time or other support before they can make real progress. It would flag to them as a couple that they might attempt to agree short term arrangements, with a timetable agreed for further discussions and other support to decide longer term issues. Whilst initially designed to feed into OnePlusOne’s existing programmes aimed at couples themselves, it is thought this could also provide key information for the mediator conducting a MIAM or a substantive mediation. It could indicate whether mediation should be attempted at that stage or inform how the process might best be conducted in such circumstances and enable them to judge when it is appropriate to move on from smaller to bigger issues. It was thought that this could therefore be used as part of a system of online self-assessment leading to triage and referral to appropriate dispute resolution where possible. It would enable people to gauge for themselves whether they and their partner are emotionally ready to move forward and perhaps assist them in deciding which, if any, approach to resolving their dispute should be taken. Small decisions for a short period may be all that is possible where the parties are at different emotional stages but explaining this

to both parties, it was felt, could prevent conflict escalating at the outset and ensure both parties are able to progress matters in due course. The online tool is still under development but should be available in 2017 and would seem to offer an important addition to what is already available and could potentially help to prevent emotionally unready cases from entering mediation prematurely, at a time when they would be almost bound to fail.

### ***The online family mediation trial***

Relate, on the other hand, were working with their partners HiiL on development of a comprehensive online mediation and have trialled a modified version of the Dutch Rechtwijzer programme (see further Smith 2013, Smith and Paterson, 2013), known as the beta version of 'Relate Rechtwijzer' or RR (see <https://relate.modria.com/>). This begins with a 'diagnose' intake phase where one party completes the details and gives their view of the situation and their ex-partner is invited to join the programme to work together on a separation plan. Once their details have been entered, they are able to progress to the 'negotiate' stage where they attempt to agree a plan for their children and finances. Depending on what you are trying to agree, there are defined aspects of the plan which must be agreed around, communication, children, housing, properties and income. There is a help bar on each page providing further information on topics such as domestic violence and relationship support with links to other tools such as the Money Advice Divorce and Separation Calculator. Each partner is asked about their expectations for the agreement and these can be seen by the other partner. However, if domestic abuse is disclosed, that is not revealed to the other partner, although on the beta version we trialled, it was not clear to the victim that was definitely the case, a matter that is being addressed. Another clear

concern expressed was that allegations of domestic violence on this version, did not trigger automatic rejection from the system, although the trial undertaken by Relate had already screened out such cases offline. There is a live chat facility for discussion between partners and for assistance as well as a diary which can be completed to keep track of things. Each partner puts forward proposals online and they are there for the other partner to see. The aim is that the parties reach agreement by amending each other's proposals until they are both happy with the arrangements. No fee is charged if agreement is reached at this stage. This model can, though, progress to mediation if the parties cannot agree direct, at which point a fee will be charged for the online service. Each partner chooses two out of three mediators whose credentials are displayed, to ensure that there is always a common choice. The mediation could then take place online or offline and any agreement reached through direct negotiation or mediation would then be reviewed, it is anticipated, by just one lawyer through the online system and a consent order recommended. A potential stumbling block is the fact that one lawyer cannot as a matter of professional conduct act for both parties, unlike the situation in the Dutch system. This has sparked discussions with the Law Society and Resolution about how that might be addressed, although it was thought at the *Creating* workshop that it may be possible for the parties to jointly instruct one lawyer 'as a joint expert' in this context.

The ability to refer people to other agencies and for couples to come into and out of the process where they need to seek help and support is in principle an exciting way to approach to 'blended practice', particularly given Relate's national relationship counselling network. However, the reality of how good such support can be and how well it is experienced when delivered online is not clear.

### ***Online screening for mediation***

In terms of screening, the RR 'diagnose' phase does ask some quite general questions with multiple choice answers which are a rather basic attempt at looking at the parties' states of emotional readiness. This aspect is still a work in progress. In addition, there is no ability in the beta version to pause the process once started, other than by walking away. It is suggested a pause facility must be an important feature of recognising the gaining emotional and practical readiness may take each party different amounts of time and should be included in the programme. To date, no attempt has been made to screen for or distinguish approaches between lower and higher conflicted couples, other than those involving domestic violence. Indeed, the feedback from the *Creating* project was that the questions around domestic abuse were too blunt and likely to risk non-disclosure. Overall, it was concluded that screening in this RR beta version is as yet underdeveloped but is being worked on both by Relate and by the MoJ digital team in their longer term plans for developing the out of court pathway. The agreed principle of referring identified domestic violence cases away from online mediation to lawyers was welcomed as good practice and displayed an important recognition that there are some cases which are not suitable for mediation, even though much more work was clearly needed to finesse the approach to online screening of these and other issues which make mediation inappropriate.

Having looked at the development of these online tools, it does seem that they could offer a different form of triage to the MIAM. Relate's model would in essence sidestep the applicant's compulsory MIAM, where mediation was conducted online and agreement reached without the need to go to court. This makes the development of far better screening in an out of online mediation even more crucial if vulnerable parties are to be

protected. The advantages of both online tools is the fact that both online processes are potentially well supported with access to counselling or educational programmes with recognition of the need in some situations to refer on for other advice. They are both low cost solutions aimed at those unable to agree unaided yet unable afford legal advice and could be adapted to provide a more neutral form of triage where mediation was not the most appropriate dispute resolution to pursue. Whether the online mediation was a safer space for mediations was not clear and was not tested in the Relate trial of its beta version. The *Creating* workshop concluded that using the online space in which to negotiate or mediate could in some situations make the process more remote and less uncomfortable than sitting in a room with an ex-partner, but would not necessarily, ensure that parties, particularly where there was a controlling relationship, felt freer to express their concerns about any proposed agreement than in the face to face context.

### ***Voice of the child***

The online approaches to assessing emotional readiness and agreeing child arrangements also fit well with and draw on the use of the Cafcass parenting plan, although the availability of access to counselling or educational programmes such as SPIPs (Separated Parents Information Programmes) through an online forum may also be something which the future could and indeed should hold. One of the *Creating* workshops went on to explore the views of some members of the Family Justice Young People's Board who expressed concern that children's voices were in effect excluded from child-focused mediation, whether online or offline. However, whilst how exactly their voice could be heard using online possibilities needs further consideration, they held a clear view that information directed at children of separating parents should also be available online. It

should be accessible to children of all ages in an easy to understand but age appropriate format from a trusted online source, which also contained other information directed at their age group. Whilst they wanted to find such information, they did not want their parents to worry that they had accessed it and suggested it could be placed on, for example, the BBC's or other commonly used educational website to achieve this end.

## **Conclusion**

Mediation undoubtedly needs to step up to the post-LASPO challenges it is facing and needs to unite as a profession to provide a joined-up service across the private and not-for-profit sectors. Some indications of how it might better advertise itself and target its client base more smartly have been made. Initiatives such as the recent BBC television documentary series *Call the Mediator* shows a willingness to respond innovatively by the sector and this is likely to have raised awareness of what family mediation attempts to do. However, the series also exposed its flaws and limitations and revealed a need for better training for and specialisation in the more challenging types of family dispute. To survive in the not-for-profit-sector, mediation needs to find a way to deal with higher conflict cases effectively and to minimise the reluctance of 'compelled' clients to try mediation where appropriate and these have been identified as the crucial and urgent next steps. High quality training for experienced mediators which draws on research and multi-disciplinary knowledges of how to deal with conflict should be designed without delay. The specialist accreditation model adopted by the legal profession provides a good template for this and is one the FMC should adapt for this purpose. These would be wise investments for the profession which should aid its continued professionalisation and its economic survival.

However, it is also imperative for the mediation profession to remember that there are still lines that should not be crossed and that there will still be many cases that are inappropriate for mediation that do not fall within the domestic violence exemption. As a profession, consistent proper screening, risk assessment and triage to an **appropriate** generalist or specialist mediation service or to another form of DR or pro-bono support is vital if confidence in the process of mediation is to grow among the separating public. Some of the original practices within mediation based on its original ideals do need to adapt to the new climate to take account of the higher conflict cases it must now deal with. A joint MIAM, cannot facilitate proper screening, for example, and priority needs to be given to safeguarding.

It is also clear that mediation cannot continue to be charged with filling the LASPO gap alone. Effective online and offline signposting to mediation services is needed and responsibility for this falls to government alongside mediation providers themselves to enable better navigation by those separating of the confusing array of online information and services. There will also always be limits to what mediation can achieve, for it is a process which cannot by its nature guarantee an outcome of resolution. Similarly, it must be recognised and accepted that mediation is not suitable for all cases. Policy makers and government cannot go on trying to wish mediation into achieving something of which it is inherently not capable. As Gwynn Davis warned back in 2001, in his assessment of the Family Mediation Pilots undertaken to test the viability of the scheme envisaged in Family Law Act 1996:

‘It does not follow ... that were mediation to be applied to a range of issues and a range of disputants who do not, at present, volunteer for this way of tackling their problems, the same happy outcomes would result. Good outcomes may be expected to follow where the form meets the need.’ (Davis, 2001, p.471).



To make the form of mediation meet the needs of its new client base as far as possible, it should be combined with therapeutic, protective and advice-focused services where appropriate. Counselling and/or legal support should as a minimum be made available as part of a mediation plus package available to all. While developments in the digital technologies may in the future vastly improve the capabilities for online screening, emotional and practical preparation for mediation and even a safer forum for mediation itself, these are not yet sufficiently developed to provide an immediate solution but are perhaps not that far off. However, all technology has limitations and the experience of the *Creating* project is that it is a useful addition to the tool-kit but can never entirely replace face to face services for the majority. Awareness of the need for emotional and practical readiness, though, are matters that can also be addressed off-line through the MIAM and some re-pacing of mediation to facilitate time for readiness to be achieved. Adopting this consistently, within current practice would be another important step in the right direction.

Mediation has, to its credit, already embraced new ideas such as Med-Arb and multi-disciplinary working with child consultants and financial and other experts. However, to succeed in meeting the post-LASPO challenge mediation now needs a combination of evolution and revolution within its structures, practice and ideologies to enable it to serve the needs of those separating as well and as far as it possibly can in the new DR landscape.

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## NOTES

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