



# **Clients' Views of Family Dispute Resolution**

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Working Group on Comparative Studies of Legal Professions  
Sub-group on Family, Policy and the Law  
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## **MAPPING PATHS TO FAMILY JUSTICE**



# Long term aims of three year study

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- ▶ To provide an up-to-date picture of awareness and experiences of three forms of alternative family dispute resolution:
  - ▶ solicitor negotiations
  - ▶ mediation
  - ▶ collaborative law
- ▶ To produce a 'map' of family dispute resolution pathways and consider which pathway(s) is/are most 'appropriate' for which cases and parties?
- ▶ Which ADR(s) should be supported by public funding?
- ▶ Little recent research to inform this



# Definitions used

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- ▶ Have you heard of (and if so experienced) any of the following forms of Alternative Dispute Resolution for people to use after a couple divorces or separates?
- ▶ **1: 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*).
- ▶ **2: Mediation** (in which both parties attempt to resolve issues relating to their separation with the assistance of a professional family mediator).
- ▶ **3: 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).
- ▶ **4: None of these**



# Methods

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## Study Design

- ▶ **Phase One – Two National Surveys**
  - ▶ 3000+3,700 adults, nationally representative.
  - ▶ 6,700 adults -awareness of ADR processes.
  - ▶ 3000 adults -experiences of ADR processes for those divorced/separated since 1996.
- ▶ **Phase Two – Semi-structured Interviews**
  - ▶ Practitioners: solicitors, collaborators, mediators (c.30).
  - ▶ Parties (c.90).
- ▶ **Phase Three – Transcripts**
  - ▶ Recording and analysing lawyer-client interviews, collaborative meetings, mediation sessions.
- ▶ **Advisory Group appointed**

## Current stage (September 2013)

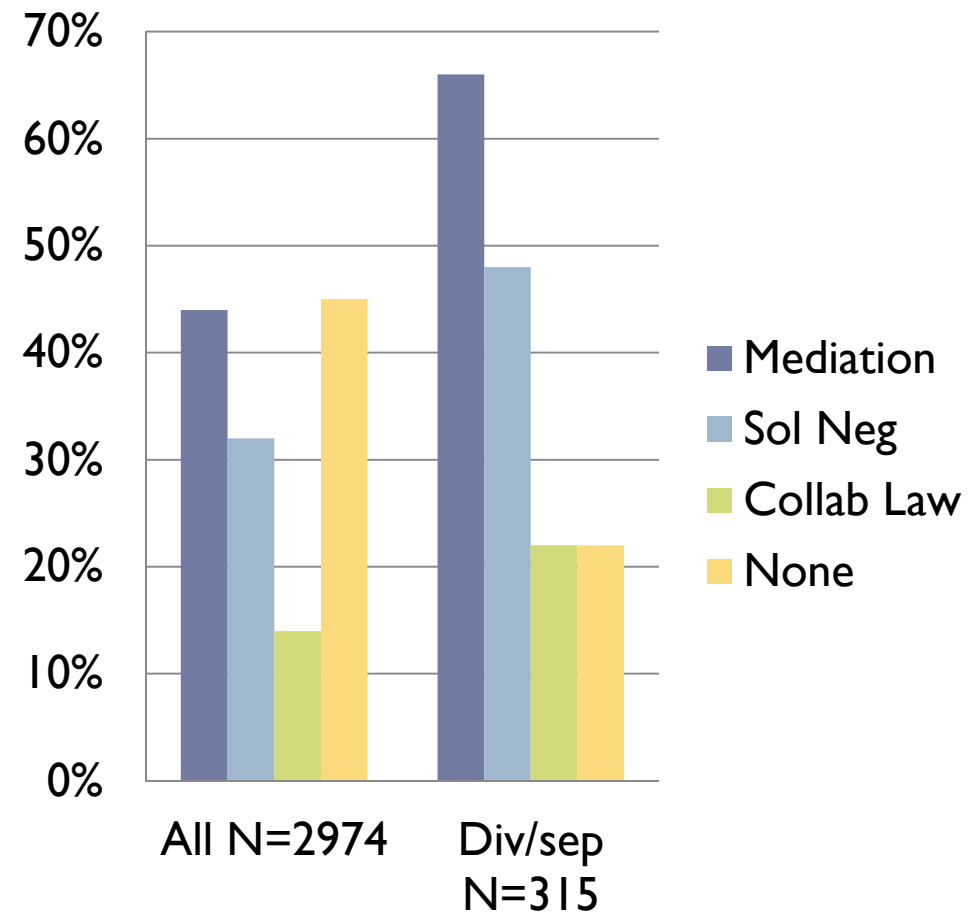
- ▶ **Phase One**
  - ▶ First Omnibus survey completed (n =2974) Jan 2012.
  - ▶ Civil & Social Justice Panel Survey (n = 3,700)
  - ▶ Analysis done
- ▶ **Phase Two**
  - ▶ Interviewing of participants from both surveys and recruited via practitioners complete
  - ▶ Practitioner interviewing complete
  - ▶ Analysis nearing completion
- ▶ **Phase Three**
  - ▶ Database of practitioners constructed, session recording underway.



# Phase 1 National Survey Results: Awareness of ADRs

- ▶ 2 surveys– BMRB + LSRC- varied
  - ▶ BMRB - 2974 respondents
  - ▶ CSJPS – 3700 respondents
  - ▶ 44% BMRB respondents had heard of mediation compared with 72% of CSJPS
  - ▶ 32% BMRB had heard of solicitor negotiations compared with 58% CSJPS
  - ▶ 14% BMRB had heard of collaborative law compared with 22% CSJPS
  - ▶ 45% BMRB had heard of “none of the above”.
- ▶ Sources of information for mediation
  - ▶ Media/internet (36%)(45%)
  - ▶ Family/friends (32%)(38%)
  - ▶ Solicitor (11%)(10%)
  - ▶ Work/education/personal experience (10%)(4%)
  - ▶ CAB or other advice agency (3%)(2%)
- ▶ Note contextual differences

**BMRB Awareness of ADRs**



## National findings: Awareness

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- ▶ The national surveys both show that there is recognition of the various alternatives to court for resolution of family disputes in the general population, though 45% of the BMRB sample had heard of none
  - ▶ Higher recognition among the divorced/separated population, in 45-54 age group and upper classes, as well as in the CSJPS
  - ▶ Mediation has become a (relatively) well-recognised term
  - ▶ Solicitor negotiation is not as widely recognised by people as a dispute resolution process
  - ▶ There is clear confusion over the term 'collaborative law' in both surveys, which seems to be used widely in a general sense alongside the specific; we suspected some conflation of this term with what we would describe as solicitor negotiation and this is coming through in the party/practitioner interviews



## Awareness, Take Up, Satisfaction of ADR among separated and divorced participants

315 (11% of the sample) had separated/divorced since 1996

<b>N=315</b>	<b>Heard of ADR</b>	<b>Offered ADR</b>	<b>Took up the offer (out of those who'd been offered)</b>	<b>Satisfied/very satisfied with this ADR process</b>
<b>Mediation</b>	66%	28% (n=79)	58% (n=46)	41% (n=19)
<b>Solicitor negotiation</b>	48%	31% (n=89)	89% (n=70)	65% (n=45)
<b>Collaborative law</b>	22%	7% (n=19)	80% (n=15)	66% (n=10)
<b>None of these processes</b>	22%			

From this we can see that awareness of Mediation is high, but both take-up and satisfaction with Mediation were lower than for Solicitor Negotiation or Collaborative law.



# Reasons for not pursuing ADR route

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## ▶ For solicitor negotiation

### ▶ Main reasons given were

- ▶ Wanted to settle without outside help (50%)
- ▶ Lack of finances (24%)
- ▶ Followed by 'chose another ADR' and 'didn't understand how it worked' (each 5%)

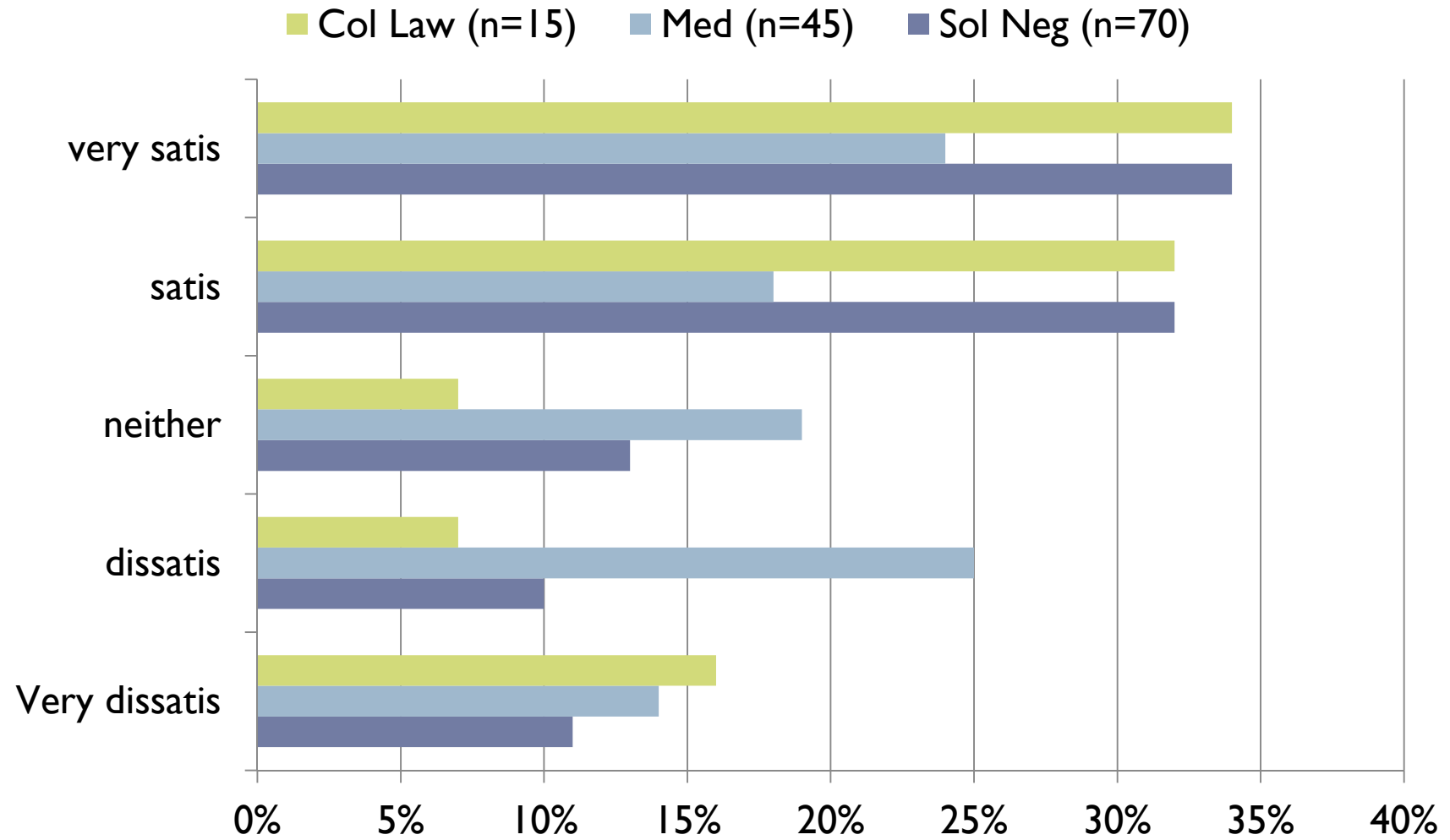
## ▶ For mediation

### ▶ Main reasons given were

- ▶ Wanted to settle without outside help (21%)
  - ▶ Ex partner refused to participate (20%)
  - ▶ Did not feel able to talk to ex partner (19%)
  - ▶ Domestic violence/abuse/fear of ex-partner (17%)
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# National Satisfaction with ADR outcomes



# National findings: Experience

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- ▶ Only 54% of separating/divorcing sought legal advice at all; more emphasis on 'self-help' than formal advice/support
- ▶ There seems to be a fairly even split between the offering of mediation and of solicitor negotiation
- ▶ All but one of those who mediated also took legal advice
- ▶ Satisfaction rates for both process and outcomes are far higher for solicitor negotiations and collaborative law than for mediation
- ▶ Satisfaction rates with mediation (41%) have remained broadly the same as found in Janet Walker's 2004 study (46%)
- ▶ Gender differences in mediation: from preliminary analysis of our national divorced/separated post 1996 sub-sample, women offered mediation less likely to take it up (49%) than men (71%); women more likely to be neutral about the process (40%) while men more likely to be dissatisfied (55%) – with caveat that numbers are small
- ▶ 'Experience' has been further probed in the Phase 2 party interviews, probing why people express satisfaction/dissatisfaction



# In-depth Party Interview Study

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- ▶ 90 parties interviewed (50 women and 40 men) who had each experienced one or more of the three ADR processes to attempt to resolve a family dispute
- ▶ Party interview sample recruited partly from the two national surveys and partly through practitioners
- ▶ Within these, 32 had experienced more than one process
- ▶ Overall, we have the following accounts which provide a mixture of successful and unsuccessful experiences
  - ▶ 60 mediation
  - ▶ 58 solicitor negotiation
  - ▶ 9 collaborative law
- ▶ 70 interviews have been analysed to date.



# Mediation experience – the positives

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- ▶ Generally mediation was well-explained to people, although they were often still not sure what to expect
- ▶ Many found it a good, if emotionally difficult, process –
  - ▶ *‘Having everybody together in a room, as a process, is really helpful. [But] I did feel very alone, I did feel quite alone in there.’* (Tilda, int 040)
- ▶ People liked it *as a process* because it was cheaper, quicker and less formal than alternatives and legal aid was available, even though many were less satisfied with the outcome in their case
- ▶ It could often improve communication and family relations
  - ▶ *‘it facilitates...communication outside of the sessions, it’s therapeutic not only for the individuals involved but ... as a family so it’s beneficial to the children, and it enables you to sort of 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, int 075)
- ▶ Most would recommend it to another



# Mediation experience – the reservations

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- ▶ It does not suit everyone, even if they are both keen to compromise
  - ▶ *‘We tried to set up mediation but then we found me and her couldn’t sit in the same room together. ...I tried, um... For the benefit of the children, I tried my best to have a go at mediation but just- It was a waste of time.’* (Richard, int 002)
- ▶ A number felt pressured into mediation by partners, solicitors and family justice system-
  - ▶ Gloria’s solicitor said it was compulsory even though her husband was abusive. *‘In this city they won’t take a case unless you’ve been to mediation. You are not given a choice.’* (Gloria, int 018)
  - ▶ Rebecca identified inability to withstand pressure when parties are at different emotional stages. *‘I didn’t choose mediation at all to be honest, it was [ex-partner]....She was pushing me into it, but I was such a mess at that point that I wasn’t really in any position to choose ...’* (Rebecca, int 008)
- ▶ It is not felt to suit all cases, such as where there is a threat to snatch a child (Rebecca, int 008), where there are mental health issues (Charlotte, int 015), or abuse or coercive control within the relationship, such as Lorna (int 013), who felt,
  - ▶ *‘it was just another arena in which he could bully me.’*



# Mediation experience – the reservations

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- ▶ Lack of enforceability of the agreement reached was felt as frustrating by some
  - ▶ *. ‘Just because you agree in mediation, doesn’t mean it gets enforced, so it’s a waste of time’. (Stan, int 027)*
- ▶ Lack of mediator control over the other party’s conduct
  - ▶ *There needs to be a respectful environment maintained by the mediator and my mediator wasn’t maintaining that. (Stan int 027)*
- ▶ Lack of impartiality, often linked to gender of the mediator, came through often
  - ▶ *Laura, int 005, recounted - ‘It wasn’t impartial at all. I weren’t satisfied with it at all. ...Oh we discussed the children, but I might as well have not even been in the room, ‘cos they just dealt with it themselves. I felt like a little naughty school kid sat in a corner.’*
- ▶ She and several others like Charlie who had two female mediators suggested two mediators with a gender balance:
  - ▶ *If there was a female and a male, no-one just gets talked across.’ (Laura)*
  - ▶ *You have the option in the NHS to be seen by a male doctor or a male nurse and I just thought that there, you know, there ought to be more- More people available – or anybody available – to be seen by a man. You know, or a... A balance. ‘Cos we had two mediators, obviously. Um. One man and one woman’d have been good.’ (Charlie, int 011)*



# Solicitor negotiation experience – the positives

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- ▶ People felt in control and supported by this process, where it worked well. Alan (int 074) , who liked the empowerment offered by mediation felt solicitor negotiation had its strengths -
  - ▶ *‘Well it was direct and to the point, it was almost sort of like an adult to child rather than adult to adult and that was quite nice. It was “well, these are your options, this is what you can do and this is what will be the result”...So that was sort of quite good in the first instance, and I think that's probably due to emotions and not knowing what's going on, but certainly for being given direct advice at the beginning when there is a confusion, that is sort of quite helpful.’*
- ▶ Leo, (int 012) felt it worked better than mediation as his ex-partner responded better to formal intervention, as did Jim (int 064), who felt it also reduced conflict –
  - ▶ *‘After about a couple of letters everything changed. The arguing stopped and everything.’*
- ▶ Around half of those interviewed were happy with the outcome, and around three quarters would recommend it to another person in a similar situation. Many were very positive about their individual solicitor.





# Solicitor negotiation experience – the negatives

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- ▶ Some felt solicitors exacerbated the situation, such as Yvette (int 017) and Joe (int 052) who commented,
  - ▶ *I suppose it's really, it's 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 and then as far as she was concerned that was akin to war being declared.'*
- ▶ There were a high number of people who felt the costs were excessive and that solicitors delayed matters. Norah (int 37) spoke for many on delay and felt the quality of solicitor was not adequate.
  - ▶ *I felt very bitter about the fact that his solicitor delayed things very much, I think through her incompetence, and probably caused more angst and misunderstanding than there would have been.*
- ▶ Often it seemed to be the other party's solicitor who was delaying,
  - ▶ *In fairness, I know my solicitor was hounding them all the time over the phone and they just didn't pick their phones up, her solicitors.*
- ▶ The tactic of delay by a partner is a process of attrition which eventually leads to agreement but low satisfaction, as in Miranda's case (int 056).
  - ▶ *But as I say, after 18 months you just want to get on with your life, you don't want to be caught in this quagmire, so as long as it gets us something reasonable you end up really just agreeing it.*



# Collaborative Law experience

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- ▶ Overall, experience was very positive, although the extremely high cost was alluded to by a number of those interviewed.
- ▶ Jane (int 029) liked the support without the adversarial risk.
  - ▶ *'I felt like she was on my side, but, at the same time, not at the expense of the other party, definitely not.'*
- ▶ She had chosen collaborative because,
  - ▶ *'I wanted the knowledge. I wanted to be safer in the knowledge that what I was doing wasn't going to cause any problems for me later on down the line.'*
- ▶ Pauline (int 031), liked the support of her own lawyer and the fact that the lawyers could be frank about whether their own client was being reasonable on any particular issue.
  - ▶ *'My lawyer was on my side, but, actually, on one particular issue, so was his on my side.'*
- ▶ Jenny (int 054) described it as 'lifesaver'
  - ▶ *'No, I was satisfied with the process. The fact that it existed was the most important thing and that gave me hope in human nature, the fact that someone had thought of collaborative rather than adversarial.'*



## Collaborative Law experience

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- ▶ Some negatives were that it wasn't for everyone. Ruth's lawyer (in int 044) agreed that her ex-husband was not *'the right sort of person to do it'* after an initial 4-way meeting.
- ▶ Pauline (int 031) did voice concern that the lawyers assumed she and her ex-husband were of friendlier terms than they were, suggesting they went for a coffee together while the two lawyers tidied up the agreement.



# Messages from combined experiences

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- ▶ Of those who had experienced more than one ADR (around a third) some liked the way in which mediation and partisan legal advice can combine to facilitate a good outcome trusted by both parties, which leads us to question the wisdom of restricting legal advice to *after* mediation for legally aided parties.
- ▶ As David A (int 051) said,
- ▶ *'I thought it was useful to have the one-on-one time of having a lawyer who was acting for yourself, that you could talk candidly to ... and thereafter, appointing a joint mediator. If there is something which you are uncertain about which is suggested by the mediator and you can actually go back to your solicitor, just check back in with the person who is mostly on your side.'*
- ▶ It does take two to mediate or be collaborative, as Monica (int 028) indicated. She had tried mediation which failed and then her husband was deliberately dragging his feet in a collaborative approach to solicitor negotiation. She thinks they are likely to end up in court despite her best efforts. She mused:
- ▶ *'Well, my major criticism of [ADR] is... it depends on both parties being reasonable and you cannot mandate that. And just because a legal form is forced on people, doesn't mean that they won't treat it as adversarial. I mean, my ex-husband came into it with all guns blazing, determined to destroy me. Now that is not what mediation is about but you were never going to stop him feeling like that....I wanted a collaborative solution but I realised it just wasn't possible because he saw it as a venue to try to destroy me.'*



# Messages from combined experiences

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- ▶ Sheila (int 069) had experienced all three of these alternative processes but ended up having to go to court. She does not seem to regret having tried to avoid court but does bring out how parties need to be better prepared for the dispute resolution process – she felt her husband who initiated the split had read up on the legal position, unlike her - and how prepared you feel often goes to the quality of the initial advice given and the stage each party is at emotionally at the outset. As she explains,
  - ▶ *‘I think at the start of all these different bits, I found, particularly right at the beginning at that first mediation appointment, I found it all a bit difficult to take in and I think the two things for me was getting the solicitor that I got after the one I sacked 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.’*



# Provisional conclusions

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- ▶ Mediation as a process is often received very positively by those who have experienced it, whether or not they reach an agreement.
- ▶ Mediation does not suit everyone, particularly where the parties are at different emotional stages in their separation and/or have low prospects of communication and compromise.
- ▶ Screening for domestic violence and other power imbalances within mediation needs to be improved and styles of mediation considered and training enhanced for high conflict cases.
- ▶ Where parties express dissatisfaction with mediation it appears more likely to be with the outcome than with the process?
- ▶ Mediation probably does improve communication between the parties more than solicitor negotiation as a whole.
- ▶ The lack of legal advice prior to mediation may be problematic and may mean people make agreements inappropriate to their circumstances and not in the shadow of the law.



## Provisional conclusions

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- ▶ Solicitor negotiation can provide people with confidence and good supportive advice prior to mediation or lead to agreement in its own right if handled well.
- ▶ Solicitor negotiation is criticised for delay and cost.
- ▶ Collaborative law is almost universally praised as a process, but is prohibitively expensive for many.
- ▶ Quality of the training and the practitioner themselves is key across all three processes.
- ▶ Parties are not always given a choice as to which ADR they might use for their dispute, yet different parties and cases seem likely to suit different processes, which should ideally be explored.

