



**Awareness and Experiences of Alternative
Family Dispute Resolution in England
and Wales**

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Delegalization of Family Justice

- ▶ Cost of the legal aid budget for private Family Law disputes has placed this aspect of the Family Justice System under scrutiny since 1996, with mediation increasingly seen as the solution, despite lack of coordinated professional regulation
- ▶ Government response to 2011 Family Justice Review combined with withdrawal of Legal Aid for most private family law disputes places mediation, rather than the family courts, centre stage in England and Wales, as the only publicly funded means of family dispute resolution
- ▶ Little research informs this choice over other 'appropriate' out of court dispute resolution processes such as solicitor negotiation and collaborative law





MAPPING PATHS TO FAMILY JUSTICE



Methods

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 (March 2013)

- ▶ **Phase One**
 - ▶ First Omnibus survey completed (n =2974) Jan 2012.
 - ▶ Civil & Social Justice Panel Survey (n = 3,700) results received Aug 2012
 - ▶ Initial analysis done
- ▶ **Phase Two**
 - ▶ Interviewing of participants from both surveys and recruited via practitioners (75 of 90 done).
 - ▶ Further recruitment and interviewing of men to party sample on-going.
 - ▶ Practitioner interviewing complete.
- ▶ **Phase Three**
 - ▶ Database of practitioners constructed, recording underway.



Key messages from national surveys

- ▶ Only 54% of those separating/divorcing since 1996 sought legal advice at all – there is already more emphasis on delegalized ‘self-help’ than formal advice/support
- ▶ Mediation is the best recognised out of court dispute resolution process in England and Wales – internet is a key awareness source
- ▶ But mediation also achieves the least satisfaction on both process and outcomes nationally - (41%) - compared with the partisan solicitor negotiation (65%) and collaborative law (66%); this has remained static since Janet Walker’s 2004 study of mediation demonstrating (46% satisfaction rate)
- ▶ Of those who opted for mediation, 99 per cent also sought legal advice
- ▶ There are notable gender differences in mediation: 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 be to dissatisfied (55%)



Phase 2 of study - themes emerging on dissatisfaction with mediation experience

- ▶ 75 party interviews to date: 49 women, 26 men
- ▶ We looked at how people came to enter mediation (or not) and what their experiences were if they did
- ▶ Most people find mediation extremely difficult psychologically
- ▶ People complain about not knowing where they stand given lack of advice- shadow of law not always obvious
- ▶ Gender of mediator and whether ex- partner suggested mediation can affect view of satisfaction with process/outcome
- ▶ Whilst we have many accounts of positive experiences of mediation, some troubling themes around pressure put on people to try mediation and a lack of appropriate screening for domestic violence or mental health issues also emerged in more recent cases, raising the issue of how mythical the voluntary nature of mediation is



Phase 2 of study – increasing pressure to mediate?

- ▶ Where mediation was freely chosen (throughout the period), reasons included –
 - ▶ Wish to be amicable or avoid animosity
 - ▶ Desire to avoid going to court
 - ▶ Desire to save costs (of both court and solicitors)
 - ▶ Professional knowledge or connections with mediation
 - ▶ Positive experiences by friends
- ▶ Also, accounts throughout period of referrals by pro-mediation solicitors (even if mediation may not have been objectively appropriate) –
 - ▶ ‘My solicitor was very pro-mediation and said it was a good starting point, although my ex had mental health issues.’ (Charlotte, who mediated in 2003, and who was happy with process)
- ▶ ‘Hybrid’ practitioners are now common



Increasing recent pressure to mediate?

- ▶ From 2005 onwards, reports from legally aided parties that solicitors referred them directly to mediation, no alternatives offered:
 - ▶ Solicitor said it was compulsory even though H was abusive. 'In this city they won't take a case unless you've been to mediation. You are not given a choice.' (Gloria, 2005)
- ▶ A number of participants felt their partners put them under pressure to mediate. Sometimes it was used successfully, against the odds:
 - ▶ Mediation was presented as compulsory by my partner but I went to see the mediator and a solicitor as well. I wasn't ready at the time. I was still in shock...In hindsight, mediation was a good thing, but it was forced on me too early.' (Rebecca, 2010)

But more often this pressure made mediation feel unevenly balanced:

- ▶ 'My ex-partner opted for mediation. I felt I had no real choice but to go and then felt the (male) mediator was very pro-husband.' (Laura, 2005)
- ▶ Into the MIAM era, we have examples of courts ordering parties to mediate-
 - ▶ Iris had refused mediation due to physical violence during the relationship. Yet at a review hearing at court, the judge ordered the couple to attend mediation to sort out their financial dispute.



Screening for domestic violence in mediation

- ▶ In a number of recent cases the parties have either not been seen separately during the intake session, or if seen separately, they have not been screened for domestic violence
 - ▶ Tilda, in 2012, with a serious history of abuse, was referred by a domestic violence agency to a solicitor who referred her to mediation. She was only offered a joint intake session with the mediator. She was not asked if there had ever been abuse and she did not feel able to mention it. During the mediation her ex-husband was very specific with his demands and the mediators told her she also had to be clear about what she wanted, but she says –
 - ▶ ‘I couldn’t. I didn’t know how to say what I wanted. I felt intimidated in the room with him.’
 - ▶ Lorna, in 2006, was recommended to mediation by her solicitor, despite her husband’s emotional abuse. The mediator finally terminated the sessions but Lorna felt,
 - ▶ ‘it was just another arena in which he could bully me.’



Emerging themes in solicitor negotiation

- ▶ Generally people felt well supported by having their own solicitor and felt it allowed them to 'know where they stood' on finances or in relation to children
- ▶ Cost of solicitor services is highly criticised
- ▶ Many people felt more in control with solicitor negotiation (although not over the time it took)
- ▶ Others felt as a process, it gradually slipped out of their control over time, with delay as a tactic by the other side's lawyers highly criticised
- ▶ Some felt, as a process, it did exacerbate hostility



Emerging themes in collaborative law

- ▶ Those (few) who experienced collaborative law generally were very positive indeed about the process- some concern that lawyers risk regarding parties as more amicable than they are
- ▶ Cost of this process was a big issue, but is generally felt to be worthwhile to avoid court, remain on good terms with ex and feel supported throughout the process
- ▶ Mainly but not exclusively 'higher asset' cases used this process
- ▶ It is not yet 'mainstream' and not as widely offered as mediation or solicitor negotiation
- ▶ May raise professional ethical issues?



Conclusions

- ▶ There is a surprisingly high amount of pressure on parties to mediate from solicitors, the courts, relationship counsellors and partners even in cases which we would have expected to have been screened out
- ▶ Separate intake sessions/MIAMS are not undertaken in all cases and this is a contributory factor to failure to screen properly and for a lack of confidence in the subsequent mediation process for some people
- ▶ Other types of dispute resolution are frequently not offered, especially where the party is legally aided
- ▶ These factors are not necessarily a recipe for the failure of mediation, but there is a clear correlation and raises training issues. As from April 1st these problems risk being magnified



Conclusions

- ▶ Adjustment to greater practitioner hybridity has been made by lawyers but mediation practitioners still quite wedded to their own mediation regulator – criticised by McEldowney report
- ▶ Quality of practitioner is absolutely critical to satisfaction with process and outcome

- ▶ National survey findings now published by Barlow et al in *Family Law* [2013] 306



Questions on delegalized notions of justice

- ▶ For couples involved in family disputes who do not go to any form of dispute resolution (46%), does family law matter?
- ▶ Have we replaced individual justice with average justice in mediation, where information not advice is given?
- ▶ How much does that matter and who does it affect most?

