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*A critical analysis of family law mediation in England and Wales*

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# **A CRITICAL ANALYSIS OF FAMILY LAW MEDIATION IN ENGLAND AND WALES.**

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A thesis submitted in partial fulfillment of the requirements for the LLM  
by Research.

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## Abstract

The focus for this thesis for the LLM by Research is Family Law Mediation in England and Wales. The research is looking at the system both as it stands currently as well as past changes made by the government. It starts by looking at where mediation stands within alternative dispute resolution and what the history of alternative dispute resolution entails. It then moves on to look at the place of mediation in the family law system. It is mainly looking at four major parts the first one being the introduction of The Family Law Act in 1996 and what impact this had on the stance of mediation. The second part is looking at the introduction of Mediation Information and Assessment Meetings and how successful they were at meeting increasing the mediation intake. Thirdly the research looks at the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and how this changed the legal aid available for family law and what this did for mediation. Finally the research also looks at what stance children have in the mediation process and whether mediation is a beneficial process for them. Throughout the thesis is critique and analysis of these aspects of mediation concluding with whether or not the current system meets the aims the government have for alternative dispute resolution and what the future of mediation holds.

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# **A Critical Analysis of Family Law Mediation in England and Wales.**

## **1. Introduction**

The focus of my research is Family Law Mediation in England and Wales. Within this my main aims are to find out why the Family Law Act 1996 failed to make the improvements that the government wanted. In addition to this another aim is to analyse what impact introducing compulsory MIAM's to family law did for mediation. Furthermore, another aim is to critique LASPO in relation to the cuts it made to family law legal aid and why the changes did not have the expected positive affect on mediation. I also aim to analyse and critique to what extent children are used in mediation and what benefits if any this may bring.

Mediation falls under the category of Alternative Dispute Resolution (ADR). ADR may be defined as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, likely to involve the assistance of a neutral and impartial third party.<sup>1</sup> There are many forms of ADR and there are many formations, some of which are less like the standard court process and some more similar. These often fall into two categories adjudicative and none a adjudicative ADR.<sup>2</sup> Some types of ADR are more established and some are more similar to everyday processes for example simple things such as inter-client discussions and written offers are often classified as ADR.<sup>3</sup> It is however more commonly known that the four main types of ADR are Arbitration, Conciliation, Negotiation and of course Mediation.

### **Types of ADR**

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<sup>1</sup> Henry Brown, Arthur Marriot '*ADR Principles and Practice*' (Sweet & Maxwell Second Edition 2005) 12.

<sup>2</sup> Susan Blake, Julie Browne & Stuart Sime '*A practical approach to Alternative Dispute Resolution*' (Oxford, Third Edition 2014) 25-31.

<sup>3</sup> *ibid* 25

Firstly, is Arbitration, this is arguably the most adjudicative out of the main four types of ADR due to its likeness to the traditional court process<sup>4</sup>. Arbitration is however very different from the court process. ADR is a consideration of a case by a specially appointed impartial third party that leads to a decision about the case being taken by that arbitral tribunal.<sup>5</sup> Similarly the arbitrator acts like how a judge makes a decision in court on behalf of the parties however arbitration differs in the fact that arbitration is a consensual process and a party cannot be compelled to arbitrate unless it has agreed to arbitrate.<sup>6</sup> Often in commercial contracts a clause will be written into the contract and state that if there were to be a disagreement both parties will solve this disagreement by arbitration, these are often known as *Scott v Avery* clauses<sup>7</sup> due to them being a very large part of this case<sup>8</sup>. Arbitration has developed over the years more than other forms of ADR due to the fact that again like the court process the decision made during the arbitration process will more often than not be binding.<sup>9</sup> Before the parties start arbitration they have to enter a written agreement setting out how the arbitration will be conducted ranging from things such as time and cost to how evidence and submissions will be made.<sup>10</sup> In England and Wales arbitration is governed by the Arbitration Act 1996 which sets out the limits as to what can and cannot be done in the process. In some circumstances arbitration decisions can be appealed like a court decision they can do this by either an internal appeal under the provider's institutional rules or can also be done through the high court however this is a last resort if the parties have exhausted the arbitral process of appeal or review.<sup>11</sup> The benefits of ADR are that it is cheaper and quicker than the courts and in terms of specific benefits to arbitration these include things such as the parties can select someone with expert knowledge and experience in the area of dispute, the process is also private unlike an open court and additionally many aspects of

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<sup>4</sup> Susan Blake, Julie Brown & Stuart Slime *'The Jackson ADR Handbook'* (Oxford University Press. Second Edition 2016).

<sup>5</sup> *'A practical approach to Alternative Dispute Resolution'* (citation 2) 31

<sup>6</sup> Phillip Capper *'International Arbitration: A Handbook'* (LLP, Third Edition 2004).

<sup>7</sup> Rebecca Huxley-Binns, *'Unlocking the English Legal System'* (2017 Fifth Edition Routledge) 136.

<sup>8</sup> (1855) 5 HL Cas 811

<sup>9</sup> *'A practical approach to Alternative Dispute Resolution'* (citation 2) 31

<sup>10</sup> *ibid* 32

<sup>11</sup> *ibid* 429

arbitration can be tailored to meet the parties needs unlike the court process. However, Arbitration does come with its faults. One problem with arbitration is that the parties are still bound by a third-party decision and therefore their control over the situation is still somewhat limited. In addition to this although a benefit is that the arbitrator can be selected in order to fit the dispute, if the arbitration is not picked with care this could work against the weaker parties.<sup>12</sup> Arbitration although a strong form of ADR a weakness is that it could be too similar to the court process when comparing it to other forms of ADR which in my opinion could be a deterrent when choosing an ADR process.

Another main type of ADR is Conciliation this is a non-adjudicative approach to ADR. It is a voluntary process and either party can withdraw from the process at any time. The term conciliation has no agreed meaning however it again involves a neutral third party and is governed by the Conciliation Act 1986. The third party facilitates negotiations between parties. The conciliator does take an active role as he will be expected to suggest grounds for compromise and a basis for a settlement. The conciliator may themselves propose possible basis of a settlement<sup>13</sup> if the parties are struggling to agree. There is no expectation for a definite a decision to be made in conciliation however any decision that is agreed by the parties unlike arbitration is not legally binding and therefore as soon as the parties leave the conciliation session any agreements that the parties came to do not have to stand and the parties are free to do as they please. Again conciliation is a cheaper and less time consuming process to the courts however like many forms of ADR there is no guaranteed outcome and even if there is an outcome there is nothing to hold the parties to anything they agreed and so it could almost be seen as a waste of time.<sup>14</sup>

Negotiation is a third type main type of ADR and is the least formal but the most common.<sup>15</sup> This is due to the very open and diverse nature of negotiation for example unlike the previous two types of ADR negotiation does not always require a neutral third party as

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<sup>12</sup> *'The Jackson ADR Handbook'* (citation 4)

<sup>13</sup> *Halsbury's Laws of England* (5<sup>th</sup> Edition, 2018) vol 61 section 16 470.

<sup>14</sup> *'A practical approach to Alternative Dispute Resolution'* (citation 4) 30

<sup>15</sup> *ibid* 17



parties can negotiate amongst themselves without the need of further assistance. Negotiation does not also have to be carried out in the expected face to face meeting style session as negotiation can also be done by emails and letters it does not have to involve the parties meeting directly. Negotiation is a good form of ADR to use if the parties are on good terms with each other and are willing to compromise and come to an agreement. It is essentially the cheapest type of ADR as it on most occasions it does not involve an extra person.<sup>16</sup> The problems with negotiation are that due to the informality of the process negotiation can often lead to confusion which may actually make more issues arise and then may lead to parties attending court in order to solve the further issues. Additionally, a negotiation may lead to a relatively weak outcome if the strengths of the client are not properly exploited. A negotiation may even fail if the parties are too unrealistic.<sup>17</sup> Negotiation seems like a good alternative if the parties need to solve a simple dispute and are both being reasonable however due to the flexibility of the process it isn't suitable for the more complex disputes and where the parties attitudes are more challenging.

Finally, the fourth main type of ADR is Mediation. Mediation is somewhat similar to Conciliation in the fact that the decision made is not legally binding, however it does differ in the fact that the mediator is unable to suggest potential outcomes. The job of the mediator is to initiate a discussion of what issues the parties have and try and attempt to resolve the dispute between them. Mediation also has legal privilege therefore if the parties were to decide that mediation was not for them and would not help them solve the dispute anything that they have discussed will not be repeated in court. A mediator cannot be used as a witness in the court case however this level of confidentiality can be overridden if the mediator feels like there may be an issue where someone may be in danger or if there is illegal activity.<sup>18</sup> The mediator before the actual mediation takes part also assess the parties situation to see how much common ground the parties have and then makes a decision as to

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<sup>16</sup> 'Unlocking the English Legal System' (citation 7) 136

<sup>17</sup> 'The Jackson ADR Handbook' (citation 4)17

<sup>18</sup> Michele Zamboni 'Confidentiality in Mediation' International Arbitration Law Review Int. A.L.R. 2003, 6(5), 175-190.

whether or not the parties are actually able to settle a dispute by mediation. If a dispute does need to go to court after having been through mediation it does often still does work in the parties favour. If the parties have made some progress through mediation this can make the court process shorter, this is of course if they wish to disclose what was discussed in mediation as they do not have to disclose anything due to the confidentiality rules at mentioned previously. It is important that the mediator does not however express their own views on the dispute as the parties need to be in control of making their own decisions on the outcome of the dispute.<sup>19</sup> The parties do also have the ability to pick the mediator that has relevant experience and expertise. Mediation is also a good way at helping each party see the strengths and weaknesses of their case clearly. It is also beneficial due to its flexibility in the fact that the it allows the party to express certain things that may be of significant importance to them that may be overlooked if the case were to be taken through the court process.<sup>20</sup> Mediation does have its faults as generally the results of the mediation often depend partly of the ability and skills of a mediator and therefore if the mediator lacks in certain areas this may have a negative effect on the parties.<sup>21</sup> Mediation seems like a good alternative to court however it seems that many factors determine how well the process actually works.

### **History of ADR**

Different types of ADR have crossed many areas of law and society and have done for a while. ADR has been used in many types of disputes both non legal and legal. ADR often arises in cases such as warfare between nations, areas of international peace, world order, environmental and public policy issues as well stretching even to things such as crime control, schooling and restorative justice.<sup>22</sup> ADR may seem like a modern strategy however the origins of ADR do actually go way back to traditional societies. One example of this

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<sup>19</sup> 'Unlocking the English Legal System' (citation 7) 136

<sup>20</sup> 'The Jackson ADR Handbook' (citation 4) 18

<sup>21</sup> ibid

<sup>22</sup> Albert Fiadjoe 'Alternative Dispute Resolution: Developing world perspective' (Cavendish Publishing, 2004) 1.

would be in ancient Greek times, ADR was used to solve civil disputes amongst the people. In Athens ADR was often used as an alternative process to taking issues to be resolved in a formal court setting, for example elders were often sent out to the villages to arbitrate disputes for fees.<sup>23</sup> It was even used in 350 BC by Plato for contractual disputes. There is evidence to suggest that ADR was the first port of call as references in 'the laws' stated that whenever someone makes a contract and fails to carry it out an action may be brought in the tribunal courts if the parties have been unable to resolve it before arbitrators and neighbours. The above evidence shows that ADR has been looked at as a strong way of solving disputes without the need for getting the courts involved a long time ago.<sup>24</sup> Interestingly there has also been ADR used in disputes over power. As there has been mythological references to arbitration in order to solve power disputes between the gods. Evidence suggests that when there were disputes between two of the gods this would often be submitted to a third party for a decision in the earliest myths. There are many stories which suggest that disputes between most gods were solved in that way.<sup>25</sup> A more modern example of ADR being used to solve world peace disputes would be in 1914 during World War I. ADR was used to resolve labor disputes and establish agreements to aid war effort<sup>26</sup> and it is still used in present day when disagreements between countries arise. As the above evidence shows different forms of ADR have been used for many years across cultures and nations and have been adapting and changing and are still doing so now.

### **Online Dispute Resolution**

ADR has developed so much over the years to even meeting the current technological advances of society. ADR has developed to the online world, usually referred to as Online Dispute Resolution (ODR) which is becoming increasingly popular. ODR is essentially carrying out forms of dispute resolution online. It is a set of tools and techniques supported

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<sup>23</sup> Geddes, William G 'From Athens to AMIC: the history of alternative dispute resolution' Law Now; Edmonton (Apr/May 1997) Vol. 21, Iss. 5, 9.

<sup>24</sup> 'Alternative Dispute Resolution: Developing world perspective' (citation 22) 2

<sup>25</sup> *ibid*

<sup>26</sup> Jerome Barrett 'A History of Alternative Dispute Resolution' (John Wiley & Sons, July 2004).

by technology,<sup>27</sup> aimed at facilitating dispute resolution. Whilst being useful in solving long distance disputes often between countries it has been said that ODR fits the needs of the 21<sup>st</sup> century with the courts overrun by work. Could this be the solution to make the court system more efficient? As well as this many other businesses are moving online so it would make sense that the law is able to do this also.<sup>28</sup> It has been said that ODR could develop so much that in the future it could be used for claims up to the value of £25,000 which is a very large amount if you consider that not all court cases achieve results with money as high as that and it may be possible that you could achieve the same if not a better result and not even have to leave your house to solve a dispute.<sup>29</sup>

Many online portals have been developed in order to deal with the early stages of some civil claims. These include road traffic accident claims, personal injury claims, employer's liability and public liability cases. Although of course there are some things that cannot be managed through an online system it works well giving a standard approach and supporting settlement to cases where if they were to go through the normal court process costs may be disproportionate.<sup>30</sup> ODR is also used in places that you may not think. One type of dispute ODR is used in is consumer disputes. An example of this in practice is the use of ODR when purchasing things online from an online retailer. One retailer who uses this is eBay the online shopping website, this uses ODR when people are disputing over aspects such as the buyer not making a payment or whether an item purchased matched the description. They have a system set up that solves these disputes online without either person having to come into contact face to face and also the courts have no involvement in the issues. They are usually resolved quickly and efficiently with not much cost involved.<sup>31</sup> With this said ODR is obviously a very useful form of dispute resolution that fits in well with the constantly changing

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<sup>27</sup> Davide Carneiro 'Online dispute resolution: An artificial intelligence Perspective' Artificial Intelligence Review 41(2) February 2014.

<sup>28</sup> Civil Justice Council 'Online Dispute Resolution' (www.judiciary.uk, February 2015) <<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> accessed 21/1/19.

<sup>29</sup> 'The Jackson ADR Handbook' (citation 4) 257

<sup>30</sup> *ibid*

<sup>31</sup> Civil Justice Council 'Online Dispute Resolution' (citation 28)

society and it works well when the disputes are small and easily resolved however whether this could progress into one of leading ways to solve more complicated disputes would need to be looked into at more detail as the more complex an issue is the harder it is to fix without a face to face meeting<sup>32</sup>.

### **ADR Developments**

In terms of the current stance of ADR it is now being used in many aspects of the law such as employment, commercial, construction, company and of course family. It has become more popular and included within the English and Welsh legal system with the Arbitration Act 1996 and the Conciliation Act 1986 setting out a clear legislation and giving ADR a more established place. ADR was also formally acknowledged in the Code of Practice in 1998.<sup>33</sup> As well as England and Wales implementing statute on ADR the EU also began to implement law with the EU Mediation Directive in 2008 for civil and commercial disputes. This was introduced in order to encourage member states to use mediation more in their countries. It is up for discussion however as to whether this legislation is useful. The intention for this legislation was to encourage mediation but also to make the outcomes the parties made in mediation binding and make mediation a compulsory part of the legal process. Despite this English representatives insisted that this was not to be the case resulting in Article 6 being added to the directive in order to water the effect of the directive down.<sup>34</sup> Article 6 basically states that any decision made in mediation should be enforceable. The directive caused great issues in England and Wales as the current mediation system stands that any decision made in mediation is not binding and therefore does not have to be enforced. This then led to a clause put into Article 6 which states that Article 6 does not have to be enforced if the member state does not follow if it does not provide for its

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<sup>32</sup> Civil Justice Council 'Online Dispute Resolution' (citation 28)

<sup>33</sup> 'A practical approach to Alternative Dispute Resolution' (citation 2) 3

<sup>34</sup> David Hodson 'The EU Mediation Directive: The European Encouragement to Family Law ADR' [2008] IFL 209.

enforceability.<sup>35</sup> Despite the reservations of compulsory mediation the Judiciary in England and Wales do encourage the use of ADR. Judges are prepared to ask parties what steps they have taken to avoid litigation and will encourage them to take part in ADR. Judges however cannot force parties to take part in ADR. This was established in the case of *Halsey v Milton Keynes General NHS Trust*<sup>36</sup> as this would be a breach of their Article 6 of the European Convention of Human Rights.<sup>37</sup>

### **Aims of ADR**

The Government have many aims in mind when promoting ADR. One being that it will save them and the clients money. The cost of putting a dispute through any form of dispute resolution in the majority of cases is a lot cheaper than taking a case through the courts and therefore one aim of promoting ADR is to keep legal aid to a minimum by encouraging cases to go through ADR process which costs a lot less<sup>38</sup>. This aim may be problematic though as if the government use this to try and push for the increase of ADR this could cause issues as there are many cases where ADR may not be appropriate. For example where there is need for precedent or where an order may be required or the case is complex. If ADR is pushed onto parties that require extra needs however have been told that ADR would achieve that same result and it is cheaper this is essentially ruining this would be counterproductive.<sup>39</sup> This aim, although a very important one is one that needs to be approached with caution to ensure justice is still served.

Another aim of ADR is that if more cases were to go through the ADR process this would take the pressure off the courts as the process does not take as long as the courts.<sup>40</sup> Currently the courts have back log of cases meaning that people are having to wait a long

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<sup>35</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Article 6

<sup>36</sup> [2004] EWCA Civ 576

<sup>37</sup> 'The Jackson ADR Handbook' (citation 4) 257

<sup>38</sup> European Commission: Green Paper on Alternative Dispute Resolution on Civil and Commercial Law ALTERNATIVE DISPUTE RESOLUTION (8336/02)

<<https://publications.parliament.uk/pa/ld200203/ldselect/ldcom/196/19683.htm>> accessed 4/11/18.

<sup>39</sup> (citation 36)

<sup>40</sup> ibid

time for their dispute to be resolved. If more cases went through ADR processes this would take the pressure off the courts and increase the efficiency<sup>41</sup> of the legal system as a whole. There would not be as many cases which are pushed back and delayed meaning the court process will be more efficient and cases will only be sent to the courts if ADR is not right for that dispute. This aim however would need to involve a large number of cases going through ADR however in order for it to actually have an impact.

The third aim for ADR is that it by encouraging ADR it will give the parties the ability to decide their own outcome and therefore the more parties that go to ADR the more the control is handed back to them<sup>42</sup> It gives them ability to take charge of what direction they want the outcome to go in. In the courts the judge is mainly making the decision on behalf of the parties and their control over the situation is limited. With ADR it will allow let them solve their own dispute instead of them relying on the courts to make the decision. The relationship of the parties during and after the dispute is also important at making sure it is the best possible. The court process very much encourages the parties to fight against each other in order for there to be a winner and a loser, whereas in ADR the aim is to make sure both parties are winners as they compromise with each other to reach the best decision for both of them. The aim is to make sure that the hostility between parties is kept to a minimum for example in contractual disputes after the dispute is solved the parties may still need to work with each other. In order to make sure that it can happen ADR needs to make sure the relationship between the parties is the best it can be<sup>43</sup>.

### **ADR and the fields of law**

ADR is used across many types of law however it is more favoured in some than others. One major aspect of this is in employment law and employment tribunals, it is often more

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<sup>41</sup> Civil Justice Council 'ADR and Civil Justice ADR Working Group Interim Report' (ww.judiciary.uk, October 2017) < <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>> accessed 20/01/2018.

<sup>42</sup> Lorna McGregor 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' Eur J Int Law (2015) 26 (3): 607.

<sup>43</sup> ibid

common for employment disputes to be settled in a tribunal outside of the court and on many occasions these tribunals can include ADR. Often forms of mediation and arbitration are used in order to solve issues such as unpaid wages, holiday pay, notice pay and redundancy pay, complaints of unfair dismissal, questions arising from transfers of undertakings, and complaints of discrimination brought under the Equality Act 2010<sup>44</sup>. In many of the tribunals it is also common that judicial mediation is used, this is where a trained employment judge acts as a mediator in order to solve the dispute<sup>45</sup> therefore showing ADR's diversity again as it does not have to be done solely by someone who specialises in mediation it can be carried out by alternative parties who are qualified too. Employment tribunals are also largely involved with ACAS (Advisory Conciliation and Arbitration Service). What often happens when a claim is brought forward to the employment tribunal is that a copy of the claim is sent to ACAS in which they then propose to the parties away in which the dispute can be solved without going to tribunal. This has proved to be effective as over half of the disputes raised in employment law are solved this way. In contrast to this however it has been said that people who solve employment disputes in this way often have to settle for a weaker agreement than if they had taken the dispute to court and therefore this does raise issues on whether this is a fair method if it makes the outcome different.<sup>46</sup>

Another two areas of the law in which mediation is used is in commercial and construction law, it is often used as a firsthand resolution before taking disputes to the courts. The reason why this is the case is due to the aim of trying to preserve relationships. Often in these disputes a contract still needs to be carried out and the parties still need to work together even after the dispute has been solved as mentioned above. It is therefore important that the parties are able to end this dispute in the best possible way as if they do have to continue to work together they are able to do that without it being unbearable. If the cases were to go to court this may cause more issues between the parties causing tensions to rise. It may also

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<sup>44</sup> Brian Doyle '*Alternative dispute resolution: the employment tribunal*', ARBITRATION 81(1) 20-21 2015.

<sup>45</sup> *ibid*

<sup>46</sup> 'Unlocking the English Legal System' (citation 7) 136



take longer as mentioned earlier ADR is a cheaper and quicker alternative to solving issues which is important as in many cases like this time is.<sup>47</sup>

One area of law in which ADR is used is family law. Mediation is used in family law due to the issues being rather emotional and often distressing for the parties. Mediation has the skills to reduce the affects that the courts sometimes have for example reducing the amount of hostility towards each other. The court process often makes hostility worse due to the fact that there is a winner and loser after the process however mediation tries to change this so the outcome is better for both parties as well as this in family there are often children involved and therefore it is beneficial for them if this is reduced.<sup>48</sup> Often the issues the parties are having difficulty deciding are rather small for example if the issue is surrounding child arrangements and the issue only arises around one aspect of the agreement in most cases it would seem unreasonable for the parties to go to court over one small issue. It can often be the case that courts will often order parties to take their issue to mediation if they believe the courts should not make a decision on that matter. In the case of *Halsey v Milton Keynes*<sup>49</sup> it established that although the courts cannot force couples into mediation it can encourage it where it feels it mediation would be most beneficial for all parties involved. Family mediation can however only work if consent and mutual respect are present if this is not the case then the parties would not benefit from ADR and therefore this is why mediation way is not suitable for all cases.

### **The Rise of Family Mediation**

Mediation in family law has been around for over 30 years.<sup>50</sup> It began to develop after its endorsement by the finer committee on One-Parent Families in 1974. This then grew when

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<sup>47</sup> Penny Brooker and Anthony Lavers 'Commercial and construction ADR: lawyers' attitudes and experience' C.J.Q. 2001, 20(Oct), 327-347.

<sup>48</sup> Thomas Lindstein and Barry Meteyard 'What Works in Family Mediation' (Russel House Publishing, 1996) 4.

<sup>49</sup> [2004] EWCA Civ 576

<sup>50</sup> Sir James Munby 'Family Mediation in England and Wales: A guide for judges, magistrates and legal advisors' (www.judiciary.uk, 2014) <<https://www.judiciary.uk/wp-content/uploads/2014/06/mediation-guide-for-judges-may2014.pdf> <accessed 22/06/19.

The College for Family Mediators was set up this was built up by the Family Mediation Association (FMA), National Family Mediation (NFM) and Family Mediation Scotland. This set out the competence assessment which basically stated how to assess whether a party were eligible for mediation and the statutory code of practice that mediators need to follow in order to practice. The College however eventually came to an end when the members voted to change its name in 2007 in order to cater for more types of law.<sup>51</sup> In 2010 it then became The College of Mediators.<sup>52</sup> Since then the Family Mediation Council (FMC) set up in 2007 now governs issues specifically for family mediation such as mediator training and the quality of mediation that is provided. The recently approved scheme which does this is called the 'Assessment of Professional competence Scheme' this sets out the steps that mediators must take in order to demonstrate their competence before they can be a qualified mediator.<sup>53</sup> The mediator is assessed and if the checklist is not completed they would be declared as not competent. An FMC accredited mediator needs to have (a) passed the assessments on an FMC-approved initial training course, (b) completed the post-training requirements, and (c) passed the final assessment of professional competence.<sup>54</sup>

The post training requirements include having at least 10 hours one to one time with their professional practice consultant (PPC) outside of observing. The PPC also must have reviews with the candidate to see whether they are ready to mediate and agree certain terms that may be put in place when they do mediate. When they are practicing they must register themselves with the FMC as a mediator who is working toward accreditation and refer to themselves as appropriate. They must also co-mediate and observe the PPC in mediation sessions and write an evaluate report afterwards. The PPC must observe at least one of the candidate's mediation sessions although more than one is often encouraged. The PPC must then provide written feedback. The candidate also needs to have a minimum of 3 cases

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<sup>51</sup> Lorraine Bramwell 'The UK College of Family Mediators' [2008] Fam Law 172.

<sup>52</sup> Mavis Maclean and John Eekelar 'Lawyers and Mediators – The Brave New World of Services for Separating Families' (Bloomsbury Oxford and Portland 2016) 67.

<sup>53</sup> 'A practical approach to Alternative Dispute Resolution' (citation 2) 235

<sup>54</sup> Family Mediation Council 'FMC Manual of Professional Standards Framework' ([www.familymediationcouncil.org.uk](http://www.familymediationcouncil.org.uk)) < [https://www.familymediationcouncil.org.uk/wp-content/uploads/2015/01/fmc\\_standards\\_framework\\_manual.pdf](https://www.familymediationcouncil.org.uk/wp-content/uploads/2015/01/fmc_standards_framework_manual.pdf) > accessed 28/06/19.

written up in order to take forward for assessment. Once this has been completed then as mentioned earlier they must pass the final assessment of competence. This is usually assessed through a portfolio. The portfolio must include the cases in which the candidate has worked on. The portfolio must cover everything on the APC check list. The FMC devised the checklist which ranges from things such as understanding of and ability to recognise when mediation is and is not appropriate to understanding of and ability to provide relevant legal information without advising.<sup>55</sup> Once this has been done the candidate can then achieve FMCA status. Once this has been achieved it needs to be renewed every 3 years if the candidate wishes to still be accredited.<sup>56</sup> The training process seems to be a very in depth one with a lot of areas being covered on paper but the reservations I have about this training process is the lack of practical observation and guidance that the candidate is given or is partaking in as it seems to be very limited. With only 10 hours one on one time with the PPC and also the need for only one compulsory observation throughout the whole process. From an outsider point of view I think it would be hard to establish whether someone was competent enough from one observation especially as in mediation some cases are more challenging than others therefore I am unsure as to whether the training process is sufficient however there does not seem to be evidence to suggest a reform of the process.

General mediation has been recognised in many statutes across England and Wales such as the Family Law Act 1996, Access to Justice Act 1999, Children and Adoption Act 2006, Legal Aid Sentencing and Punishment of Offenders Act 2012 and the Children & Families Act 2014.<sup>57</sup> It has however never actually been made a compulsory part of the family law system or been given its own legislation. As we touched on earlier mediation has many advantages over the courts such as being more cost effective, an example of this would be in 2007 the average cost to resolving property or financial disputes caused by separation

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<sup>55</sup>Family Mediation Council 'APC Portfolio Template' ([www.familymediationcouncil.org.uk](http://www.familymediationcouncil.org.uk))<  
[https://www.familymediationcouncil.org.uk/wp.../fmc\\_apc\\_portfolio\\_template.doc](https://www.familymediationcouncil.org.uk/wp.../fmc_apc_portfolio_template.doc)> accessed 28/06/19.

<sup>56</sup> Family Mediation Council ' FMC Manual of Professional Standards Framework' (citation 54)

<sup>57</sup> 'Family Mediation in England and Wales: A guide for judges, magistrates and legal advisors' (citation 50)

was £1000 for mediation whereas to solve the issue through the courts it would cost £4000.<sup>58</sup> As well as cost it is also a lot quicker with the average time for a mediation case being 110 days whilst one that has gone to courts takes on average 435 days.<sup>59</sup>

The research will be critically analysing many aspects of the current mediation system starting with the Family Law Act 1996 moving on to the compulsory MIAM's that were introduced. As well as this I will also be analysing the LASPO changes and also what effect mediation for children. Overall I will be looking at whether the current system meets the governments aims of ADR and what the future looks like.

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<sup>58</sup> Jonathan Djangoly 'Family mediation - an alternative to courts' (www.gov.uk, 4<sup>th</sup> January 2011) <<https://www.gov.uk/government/news/family-mediation-an-alternative-to-courts>> accessed 24/06/19.

<sup>59</sup> Ibid

## 2. Chapter 1

### The Failure of FLA 1996 and The Introduction of MIAMs

In order to understand how mediation reached its current position it would make sense to start with the major events that have led to its current state so far. This chapter will be looking into what happened when the government attempted to introduce the Family Law Act 1996 in which one of the aims was to look at how mediation could be encouraged in the divorce process. This chapter will also look at what happened when Mediation Information Assessment Meetings (MIAM) were introduced and what impact this had on the stance of mediation.

### The Family Law Act 1996

Mediation has been around for a while however unlike its fellow ADR methods Arbitration and Conciliation it does not have its own statute as mentioned. With this said as an attempt to give mediation a more prominent and broader role the Family Law Act 1996 was introduced. The main purpose of this act was to bring forward potential reform for the current structure on the divorce law.<sup>60</sup> This was due to the fact that there were many problems with the current state of with the law. Law Commission findings prior to the introduction of the act stated that the divorce process is problematic. For example the fact that there must have been a specific reason in order for the breakdown of the marriage in order to conform to one of the five facts was a huge issue. With the current divorce law it could not be that the marriage has just come to an end there needs to be a reason as to why this is. They also found that due to the nature of the current process it encourages unnecessary, bitterness and hostility between the parties. For example even where the couple have agreed that the marriage is beyond saving the divorce process makes things worse by encouraging them to make allegations against each other in order to find a ground for divorce. Another issue that

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<sup>60</sup> Family Law Act 1996, Chapter 27

the Law Commission stated is that the current process does nothing to attempt to save the marriage and can often make things worse for children if there are any involved.<sup>61</sup> Due to these issues plus many more the government created the Family Law Act 1996 as an attempt to solve them and reform the system in order to make the divorce process a better one.

## **Part I**

Part I of the Family Law Act 1996 sets out the general principles that underline the rest of the act. They stated that the rest of the act should have regard to (a) that the institution of marriage is to be supported; (b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage; (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end— (i) with minimum distress to the parties and to the children affected; (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end (d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

The first part shaped the outline of the act essentially illustrating that when someone is enforcing the rest of the act they need to have the highest regard for these principles in order for the act to be implemented the way it was intended<sup>62</sup>. It could be said that some of the above sections could be indirectly encouraging mediation. Part C(III) in particular states that the parties should not have to endure 'unreasonable costs' whilst solving the dispute. With this being slightly ambiguous it hard to know what they actually meant by this. As stated previously part of the governments aims for ADR are to reduce costs and overall increase

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<sup>61</sup> Law Com No 192, HC 636 of 1989/90.

<sup>62</sup>FLA 1996 (citation 60) Part I

the uptake of ADR in general. Taking this into account one interpretation of this part act could be that the parties must consider where possible if there are any alternative ways to solve their dispute that may be cheaper than going through the courts. As we know mediation and ADR process are a lot cheaper<sup>63</sup> and therefore could this be an indirect way of encouraging mediation in the divorce process. Parliament do not directly state this in the act and therefore this could just be what it seems at face value which is a subtle hint at the government being more aware of how much the divorce proceedings currently cost and therefore trying to get the parties to think more in depth about their decisions but given the way the act has been worded it is hard to be certain. In terms of how much of an impact this part of the Family Law Act was we will need to look at the act as a whole, Part I of the Family Law Act 1996 was fully implemented however in the next part of the chapter we will see how this compared to the rest of the act.

In 1995 the government released a policy paper in which it set out the aims and the future of the divorce process<sup>64</sup>. One section of this paper went through how mediation although having their reservations could improve the divorce process due to its advantages and characteristics. It was thought that it could solve the problems that the Law Commission found with the divorce process such as reducing the amount of hostility between the parties by getting them to work with each other instead of against each other and taking away the blame<sup>65</sup> aspect of the divorce process.<sup>66</sup> Overall the consensus from the paper was that mediation would be a good move forward due to its benefits, with the results of a consultation paper stating that 69% of people would be in favor of mediation being implemented into the divorce process.<sup>67</sup> The paper stated the government are very supportive of mediation and are looking at implementing and giving it a bigger role in the divorce process. Although they believed that it should not be compulsory they do believe that

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<sup>63</sup> Jonathan Herring '*Family Law*' (Pearson ,8<sup>th</sup> Edition 2017) 56

<sup>64</sup> 'Looking to the future: Mediation and the ground for divorce the governments proposals' (www.gov.uk ,27<sup>th</sup> April 1995) < <https://www.gov.uk/government/publications/looking-to-the-future-mediation-and-the-ground-for-divorce-the-governments-proposals>> accessed 05/04/19.

<sup>65</sup> Martin Richards '*Children, Parenting and Information Meetings*' [2000] Fam Law 484

<sup>66</sup> 'Mediation and the ground for divorce the governments proposals' (citation 64)

<sup>67</sup> *ibid*

there should be a definite encouragement<sup>68</sup>. It seemed that the government's proposals had a high motivation to make mediation more prominent however the question to be asked is whether the expectations for mediation could become a reality.

## **Part II**

The second part of the Family Law Act 1996 is Part II, this set out new rules for the divorce process. In terms of mediation the involvement in this part of the act came under Section 8. This section of the act states that if a couple want to separate, at least 3 months before making the statement they must attend an information meeting as stated in s8(2)<sup>69</sup>. The idea of the 3 month period was so that the parties have a period of reflection and conciliation to decide whether they actually wanted to through with the divorce. As mentioned earlier a problem with the current divorce system the Law Commission found was that it did not attempt to try to save marriage's and therefore by implementing this 3 month period it gives the chance for parties time to consider whether the marriage can be saved. In the meetings the information given would differ slightly depending on the circumstances however overall the information meetings did include information covering a few things such as advice on marriage counselling which was indeed another way to increase the attempt to save marriages as mentioned previously and of course mediation.<sup>70</sup>

Although increasing mediation was not the only aim of the information meetings Janet Walker a family law academic stated that promoting mediation was an unequivocal objective of the act.<sup>71</sup> It is unclear however as to how big the aim to promote mediation was as information about mediation was not the only thing that they were given information about<sup>72</sup>. The information given in the meetings had to be unbiased and therefore although there were aims behind them to promote mediation and other aspects in order to change how parties went through the divorce process the information given could not pressure or force any of

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<sup>68</sup> '*Mediation and the ground for divorce the governments proposals*' (citation 64)

<sup>69</sup> FLA 1996 (citation 60) Section 8 (2)

<sup>70</sup> Janet Walker '*Information Meetings Revisited*' [2000] Fam Law 330.

<sup>71</sup> Ibid

<sup>72</sup> Ibid



the parties down a certain path. It was still the parties choice in what they partake in when go through the divorce process. An issue when trying to implement the act in this way is it is unclear where the line is between promoting something and pressuring someone into making a decision. It could be subjective as to what extent the provision of information is to be overtly persuasive. How do you ensure that the information given in the meetings will cater to each parties needs and cover all information that they need in order to avoid pressuring the parties into making a decision?<sup>73</sup> It could it be said that this is in fact counterproductive as if they want to make an impact the information given needs to be persuasive so that it can influence the parties or the information meeting could almost be considered as a waste of time. It a very complicated area as for example if the information meetings were to give facts on how the mediation process is improved the effect a divorce or separation has on children,<sup>74</sup> would this be persuasive rather than giving the adults information as it may pressurise them into making a decision as they may feel that if they do not go forward with mediation they will be judged and the children may suffer? Different types of information given to the parties may automatically feel as though they are being pressured into making a decision and therefore this is where there may be an ethical issue with the information meetings as some information may be automatically persuasive without meaning to be.

In order to address whether the information meetings would be a success the government introduced a pilot scheme. The results of the schemes would then influence whether or not Part II of the act would be implemented. The pilot schemes were implemented by the Lord Chancellor between June 1997 and March 1999 as before committing to anything long term he wanted to know what impact the meetings would have.<sup>75</sup> They were carried out by Professor Janet Walker at Newcastle University. 14 information meeting pilots were implemented across 13 areas of England and Wales which entailed six different models of

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<sup>73</sup> *'Information meetings revisited'* (citation 70)

<sup>74</sup> *'Children, Parenting and Information Meetings'* (citation 65)

<sup>75</sup> *'Information meetings revisited'* (citation 70)

information giving, this was divided amongst the 5522 people that attended. 2460 attended a group presentation, 1468 received a postal pack and 520 attended meetings with a marriage counsellor and the rest were spread across different types of information giving such as watching a DVD.<sup>76</sup> It was then to be decided on the results of these schemes whether or part II of the Family Law Act 1996 would be enforced. The pilot studies were to be carried out for 18 months before the Lord Chancellor had to make a decision.

The results of the pilots were highly anticipated however initially the results were pushed back which many academic and legal professionals found strange due to the fact that the government are not usually known to hesitate before implementing statute and therefore this seemed out of character. When the results eventually did arrive it was reported the Lord Chancellor seemed very uninterested in the results Janet and her team had found and it was said that this could have been due to the fact that the results are not what he wanted. Initially the findings showed that the attendees declared themselves to be better informed about the issues, particularly the impact of divorce on children, and about the services on offer, particularly mediation. The overwhelming majority of people valued information meetings (90%).<sup>77</sup> In particular the second interim report showed that 57% of the attendees said that they would consider going mediation in the future if necessary.<sup>78</sup> However in terms of the uptake the results that came from the pilot studies looked poor with the research stating that only 7% of the parties were diverted to mediation and 39% of parties stating that after the information meeting they were more likely to divert to a solicitor.<sup>79</sup> This seems to be what had disappointed the Lord Chancellor.

The aim of the pilot study however was not to monitor the uptake of mediation but was in fact designed to find ways of providing information and look at how people responded to the information and how they used it and therefore this is what it was designed to do despite

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<sup>76</sup> 'Information meetings revisited' (citation 70)

<sup>77</sup> HC Deb 04 April 2000 vol 347 cc947-56.

<sup>78</sup> *ibid*

<sup>79</sup> Richard Collier 'The dashing of a 'liberal dream'? – the information meeting, the 'new family' and the limits of law' [1999] CFLQ 257.

collecting information on the uptake of mediation. It seems however that the Lord Chancellor had other ideas about what the research was assessing. The Lord Chancellor expressed whilst the research was being carried out that that he had the expectation that the mediation take up from the pilot studies was to be around 40% to 60%<sup>80</sup> and therefore this obviously explains why he was disinterested in the actual results. Although as we established the pilot schemes were never designed to monitor and increase the uptake of mediation it seems that the Lord Chancellor had his own personal expectation that the pilot schemes would increase the uptake.<sup>81</sup> In terms of the results that the pilot schemes were designed for it was found that the 6 ways of giving the information were not sufficient at giving out the information required. The current ways in which the information was given out in the pilot schemes such as the leaflets, groups presentations, meetings with a marriage counsellor etc. were declared by the Lord Chancellor Lord Irvine as unworkable due to the fact that many people wanted information meetings that were more personal to them. Although even the face to face ways of giving information are more flexible in terms of content than the leaflet there are still structures in place.<sup>82</sup> The information meetings were a 'one size fits all' format and obviously not all divorces and relationships are the same. It was said that in order for the information meetings to work they need to be sensitive to an attendee's personal situation, stage in the process of marital breakdown and flexible enough to focus on providing information which is relevant to his or her needs.<sup>83</sup> Due to this it was declared by Lord Irvine that Part II of the Family Law Act 1996 would be repealed and would not be fully implemented. The Government stated that they are not satisfied that it would be right to proceed with the implementation of Part II and propose to invite Parliament to repeal the relevant sections of the Family Law Act 1996 once a suitable legislative opportunity occurs. In the report the Lord Chancellor does state that the information meetings were not the only reason the act was not implemented and it was also down to the fact that they believed part

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<sup>80</sup> HC Deb (citation 77)

<sup>81</sup> *ibid*

<sup>82</sup> HL Deb 16 January 2001 vol 620 cc126-7WA.

<sup>83</sup> '*The dashing of a liberal dream?*' (citation 79)

It could not fulfil part I.<sup>84</sup> This being said I still think that the Lord Chancellors decision to not implement part II was influenced by other factors.

Firstly, I think that the Lord Chancellor despite knowing that the pilot information meetings were not directly made to get parties to go to mediation expected them to prove that telling people about mediation in this way would in fact increase the uptake. This is due to the fact that reports state how he had an unnecessary expectation for the mediation uptake as well as his lack of interest in the results once published. It seems as though the Lord Chancellor expected more from the pilot schemes than what they were set out to do. Looking at this from a different perspective, if this were the case and the Lord Chancellor did base the decision partially on the fact not as many people turned to mediation as he had expected then if the information meetings were actually tailored into to increase mediation could the mediation intake statistics been higher? If they were higher could this have changed the Lord Chancellors decision and part II could have been implemented? Viginia Bottomley said in the Hansard in debated in April 2000 that if it was the Lord Chancellor's intention or wish for the pilot schemes to look at the mediation intake, there would of been no difficulty about altering the framework for information meetings. It seems as though the Lord Chancellor was asking the wrong questions and therefore receiving the wrong answers.<sup>85</sup> If the Lord Chancellors was wanting to find out whether information meetings did increase mediation they may be he should of designed them to do this and if this had been done potentially the outcome for part II could have been different.

Taking this even further we need to look at the bigger picture to see what other potential motives the Lord Chancellor had. At the time the Lord Chancellor decided to extend the awaited report of the information meetings the chairman of the Law Society's family law committee, Hilary Siddle an academic stated that the Lord Chancellors decision was 'clearly at least partially political'.<sup>86</sup> This then raises the question as to how much of this whole

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<sup>84</sup> HL Deb 16 (citation 82)

<sup>85</sup> HC Deb (citation 77)

<sup>86</sup> *ibid*

process was political. In 1996 when the FLA 1996 was first introduced the government in power were the Conservative Government which was led by John Major and at the time the Lord Chancellor was in fact Lord Mackay but 5 years later when the report was finally published it was in fact the Labour government in power led by Tony Blair and the Lord Chancellor had changed to Lord Irvine. Therefore the Lord Chancellor who implemented the pilots was not the same one who published the report. Lord Irvine was the one who wrote the report declaring that part II would not be enforced, he was appointed when the Labour government took over. Due to this change therefore could it be that Lord Irvine and the new government decided that this was not at the top of their priorities as they had other things to deal with. Therefore the results of the information meeting pilots did not matter because they had no interest in implementing the act and wanted to create their own new divorce law but in their own time and therefore this was a simple way to disregard the Conservative government's process. This also contributes to explaining Lord Irvine's lack of interest with the results of the pilot scheme and also why his expectation for the results was slightly confusing. However looking at the other side of this it may not have been the case as in 1998 a year after the Labour government had come into power and half way through the pilot scheme the Labour Party confirmed its commitment to the Family Law Act 1996, and especially to part II. On 2 October 1998, the present Lord Chancellor reaffirmed that commitment in a speech to the closing session of the fourth European conference on family law. He did this by stating that 'support for marriage and the family is at the heart of the Government's strategy for modernising Britain'. Continuing to speak about how the key objective of the act was to provide for couples contemplating divorce to be encouraged to consider whether their marriage is really over and to consider whether marriage counselling might be helpful before they take the final step to divorce. Interestingly Lord Irvine also mentioned how mediation was an important means of achieving this policy and that he was keen to promote the use of mediation in family disputes.<sup>87</sup> This speech assures the people that that the Labour government are in favour of the Family Law Act 1996 by stating that one

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<sup>87</sup> HC Deb (citation 77)

of their main priorities is to improve the family situation and therefore this goes against my theory of how the new government were attempting to get rid of this for their own benefit but does not completely rule it out. This speech does however coincide with the fact that the Lord Chancellor does still have high expectations for mediation as again he mentions how he believes promoting mediation is a major part of meeting the government's aims of improving the family law system. The Lord Chancellor was addressing mediation around the topic of part II of which could be interpreted into him believing that mediation was a large aspect of part II when actually the main intentions of pilot schemes as previously stated were not this. As Lord Irvine was not the one to implement part II this could explain the mix up of intentions of between the aims of the pilot schemes and how much of a part mediation did have in this. It seems that overall in part II due to the switch of governments there was a lot of confusion surrounding what the pilot schemes were actually meant for which it makes it difficult to see how useful they were for mediation. If the pilot schemes were designed to just look at the information techniques, then it would make sense that the mediation uptake was not really great as the information meetings were not designed to increase the uptake. However if the pilot schemes were also supposed to look at how the information meetings would improve the mediation intake as Lord Irvine seems to suggest by his comments then it would be seem that this was not successful and therefore it was the correct decision to not implement part II.

### **Part III**

The next part of the Family Law Act in relation to mediation was part III this was created and enforced but only for a short while as it was later was repealed by parts of the Access to Justice Act 1999. This part of the act was based around legal aid and mediation in family matters<sup>88</sup>. The act states how legal aid is available for mediation however the sections go through the ways in which this is limited. Section 27 stated that mediation may be granted to a person if their financial resources make him eligible however a person will not be granted

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<sup>88</sup> FLA 1996 (citation 60) Part IIIA 13A (1)

mediation if the mediator deems that the issue he is wanting to be mediated is not suitable for mediation.<sup>89</sup> In addition to this Section 28 sets out what a person may have to pay if they are not fully eligible for legal aid for mediation<sup>90</sup>. The main section that essentially helps the government meet their aims in terms of promoting and encouraging mediation is section 29 titled Mediation and Civil Legal Aid.<sup>91</sup> This part of the act essentially states that if a party wants to acquire legal aid on a family matter they need to attend a meeting with a mediator. This is to determine whether mediation may actually be suitable for the dispute rather than going through the court process. This would also take into account whether mediation could take place without either party being influenced by fear of violence or other harm. If mediation does appear suitable to the family matter it may be that they then decide to apply for mediation. However, there are exceptions to this rule if the proceedings are in relation to part IV of the Family Law Act 1996, Section 37 of the Matrimonial Causes Act 1973 or part IV or V of the Children Act 1989. Part IV of the Family Law Act in brief terms essentially states that s29 does not apply if only one of the parties has ownership over the matrimonial home. Section 37 of the matrimonial causes act states that s29 does not apply when proceedings are being taken forward for financial relief and finally part V and IV of the Children Act 1989 essentially means that s29 does not apply when proceedings are in relation to the care and supervision of children and protection of children.

The aims for section 29 of the act were mainly to transfer business and public funds from lawyers to mediators, to reduce legal aid board expenditure overall and to increase the parties satisfaction with both the process and the outcome<sup>92</sup>. If we look back at the aims of ADR, cost is again a frequent reoccurrence. In addition one aim was that the increase of ADR would take the pressure off the courts and therefore this can be linked to the aim of part III as the transfer from lawyers to mediators would in fact take the pressure off the

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<sup>89</sup> FLA 1996 (citation 60) s27 13B (2) (3)

<sup>90</sup> *ibid* s28 13C

<sup>91</sup> *ibid* s29

<sup>92</sup> Gwynn Davis '*Monitoring Publicly Funded Mediation*' [1999] Fam Law 625.

courts, it would also reduce expenditure due to mediation being cheaper. Therefore the aims are very similar.

In order to see whether this section would actually meet these aims such as cost saving and reducing pressure, again the government introduced a pilot scheme. After these schemes were carried out it would then look at the findings and assess whether if implemented section 29 of the Family Law Act 1996 would achieve these aims. The research schemes were carried out by Gwynn Davies and the University of Bristol with the addition of the University of Nottingham and the University of Bradford. The purpose of this research was to find out (a) the relative costs and benefits of contracting for the provision of publicly funded mediation with different suppliers; (b) the most effective quality assurance and contracting arrangements for the delivery of mediation; (c) the level of legal advice necessary to support mediation and the most cost-effective means of arranging for the provision of this advice and (d) the relative costs and benefit, both for the assisted person and the taxpayer, of the provision of publicly funded mediation (plus supporting legal advice) compared with lawyer negotiation and representation.<sup>93</sup>

In order to meet fulfil the purpose of the scheme there were 6 questions that the researchers were asking. These questions were (1) how do mediation suppliers (and different categories of supplier) compare with one another in terms of costs and benefits? (2) What contracting arrangements should underpin the delivery of publicly funded mediation? (3) What level of legal advice needs to be made available in addition? (4) How does mediation (and supporting legal advice) compare with the traditional model of lawyer negotiation and representation in terms of: (a) cost; and (b) benefits? (5) What proportion of the relevant population is prepared to at least attempt mediation? Finally (6) are the mechanisms designed to promote take up of mediation effective? Gwynn stated that in particular question 6 was important. In simple terms the researchers had to analyse the cost-

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<sup>93</sup> 'Monitoring Publicly Funded Mediation' (citation 92)



effectiveness; look at the processes of intake and assessment; analyse the mediation process and environment and give advice on forecasting and contracting.

The study was carried out and at first had a slow start due to the fact that there was a delay in the introduction of section 29 and therefore phase 1 resulted in no cases from the providers being monitored. Eventually section 29 was implemented into 6 areas for the pilot study in September 1998 in which cases were monitored. From this point the study concentrated on 17 providers in which section 29 were implemented for.

Firstly in terms of the intake of mediation the results, intake can be measure in many ways for example the intake of the referrals or the amount of people who reached an agreement would both be intake figures however would both be completely different in which the research found this out. I think that most important figure to concentrate on would be how many people from the section 29 intakes actually progressed to mediation and started the mediation process, this does not necessarily mean reaching an agreement but they at least attended a session with the mediator.

After the pilot schemes were carried out the results of this were that only 20% of the section 29 referrals actually began mediation. In terms of assessing whether this was a success or not we can refer to the earlier comments of Lord Irvine when he was expressing his expectations towards the increase of mediation after the implementation of FLA 1996. He stated that he expected at least a 40 to 60% increase on the uptake of mediation.<sup>94</sup> Comparing these 2 figures it looks like if section 29 were to be fully implemented it would not have the desired effect. However, in contrast to this when the Lord Chancellor did make this statement it was commented on by experts surrounding this mediation sector that in actual fact the Lord Chancellor was being very ambitious with his expectations and they advised that this was wrongly high. In fact they believed that there is a general view that between 15 and 20 per cent would be the best-case expectation of the numbers using mediation if the

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<sup>94</sup> HC Deb (citation 77)

act were implemented in full.<sup>95</sup> So when comparing the 20% from the pilot scheme to this figure it actually seems as though this is a good outcome and expected outcome especially since this is only one part of the act and the predictions were based upon the entire act being implemented. As mentioned in the Hansard report it does not state where the Lord Chancellor got these high expectations from but if we were to go by the latter statistics then it would seem that the pilot scheme results are not as bad as initially thought and although 20% is still a lower percentage the pilot scheme was only carried out for a short amount of time and therefore as an initial figure it could be considered a success.

In terms of whether this meets the aims of part III of the Family Law Act 1996 one of the aims was to move public functions from lawyers to mediators this in a way is at least a starting point at doing so as 20% of the business that would of gone to a solicitor in fact went to a mediator. It is however not a massive break through and therefore this alone would not meet the aim however it was not been a total disaster dependent upon how you value to 20%.

Another large part of the research was the cost effectiveness of enacting section 29. The research findings showed that essentially all of the aims need to be met in order for it to work. For section 29 to be cost effective the uptake of mediation would need to be relatively high. The pilot study showed that there was a huge imbalance to the legal aid board's expenditure and the amount of cases that were actually going to mediation. For example if a party attempted mediation then decided it was not for them they would then go on to the court process. The legal aid board would have to fund both the mediation and the court process and if a lot of parties did this would in fact be raising the expenditure of the legal aid board not reducing it. In order for section 29 to be cost effective there would need to be a huge increase on the uptake on the amount of cases that actually go all the way with the mediation process.<sup>96</sup> Therefore going back the previous mentioned intake of 20% it would

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<sup>95</sup> HC Deb (citation 77)

<sup>96</sup>'*Monitoring Publicly Funded Mediation*' (citation 92)

seem that although this was a good start it would need to be a lot higher in order to make the process cost effective.

As well as cost effectiveness part of the research was to look at whether the section 29 would increase the satisfaction of both the process and the outcome. First of all in terms of solicitor's opinions about whether section 29 was a good process the response was negative. The overall consensus was that section 29 was too rigid and they need to have greater scope for exempting some cases as currently they felt that some cases that are deemed suitable for mediation are not. They believe that it was almost a hurdle that the parties needed to overcome rather than a positive part of the process. In addition to this point the research also found that mediators often felt that the initial mediation meeting was an a waste of time and from the offset it was often the case that it was clear which parties were attending due to the fact they had to and were not willing to attempt the mediation process.<sup>97</sup> Mediators reported that the clientele was different to what they are used to as many of the clients did not understand the mediation process and this was because they had just been referred to mediation due to section 29 because it was part of the process and had none or very little understanding of what it was actually about what it entails. From the client perspective the research found that many of the parties did not understand the point in the mediation meeting as they were more focused on solving their personal problems and just saw the meeting as one part of the process in order to get them to the courts.<sup>98</sup> Overall looking at the evidence from different people in the process it seems that section 29 has only made the mediation process a more complex one. The common theme seems to be that the process is almost a waste of time for the majority of cases and that more needs to be done before the actual meeting essentially to prepare parties and go into detail about what the initial mediation meeting is for. Otherwise it is essentially both a waste of time and money if the parties just see it as essentially a box ticking exercise in order to get legal aid to go to the courts.

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<sup>97</sup> *'Monitoring Publicly Funded Mediation'* (citation 92)

<sup>98</sup> *ibid*

In terms of whether this research met the aims I think the answer is essentially no. In order for section 29 to meet the aims of both the Family Law Act 1996 but also ADR there needs to be more preparation done in terms of explaining to clients the process as I suspect this would have improved a large amount of things. For example if the clients were to have a clear understanding of why this was part of the process to obtain legal aid and if the benefits of mediation were explained to them they would then go into the meeting with a different mindset which may encourage them to go through with the mediation leading to a higher intake of clients. This then could potentially lead to as mentioned above a more cost-effective process with parties actually starting mediation and reaching an agreement. In agreeance with Gwynn stated in her report that she believes that in order for section 29 to work mediation would need to be integrated at the early stages of the dispute solving process and if the longer it the dispute goes without being resolved it may make tensions rise and parties not want to go to mediation and see the courts as the only answer. With the results of the pilot study not being what was expected, although implemented for a short while part III was later repealed by the Access to Justice Act 1999.

In terms of issues surround part III of the FLA 1996. Firstly, it has been said that the researching surrounding this had been inadequate. Mary Winner an academic expressed this in a journal article. She explains that the research carried out by Gwynn and her team do not answer the correct questions that need to be answered in order to assess whether the act is going to work. The research in her opinion fails to answer why the uptake is so low, they fail to explore issues such as why there is a lack of knowledge and understand from the clients when they attend the meetings, whether negative influences from lawyers have an impact and also how there is no generally consensus on how mediators decide whether a case is suitable for mediation. All important factors which if looked into further would give a more detailed and useful report.<sup>99</sup> I think Mary has raised a good point as in my opinion it would be more useful to look at the reasons why the uptake is so low rather than just

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<sup>99</sup> Mary Winner ' *Is the Research on Mediation Providing the Answers?* [2000] Fam Law 138.

assessing whether the uptake is low or not as although it answers the question of whether section 29 will work or not it does not answer the question of how they are going to make it work. As we can see from the research section 29 did have its faults however if questions like Mary suggested were put forward in the research this could have potentially naturally lead to changes being made to solve the flaws and make section 29 more successful.

In term of issues with the act itself it seems the government did take a brave step by encouraging mediation through not enabling parties to have access to legal aid unless they attend a mediation meeting however this did come with its problems. We previously mentioned in relation to the information meetings from part II of the Family Law Act how the government were trying to hold back from pressuring parties into mediation or making a decision regarding a divorce or in this case a 'family matter'. However it seems that part III is almost conflicting with what the information meetings in part II tried to avoid. Part III raised the government's attempts to increase mediation with an element of force added if people wanted to get legal aid, which is pressurising parties and limiting their options. It seems that there is a some cross over here with how far forcing parties into mediation can go.

Looking at the bigger picture another issue that section 29 III of the Family Law Act 1996 could cause in some circumstances a breach of Human Rights. To effectively refuse legal aid to a person who has been assessed as suitable for mediation but who would prefer to use the court system may be a breach of Article 6 of the European Convention on Human Rights as incorporated into the law by the Human Rights Act 1998<sup>100</sup> the right to a fair trial if a party has no other means of being able to access justice and no other way of solving their dispute unless they attended mediation. As we know this act was implemented for a short amount of time and therefore it raises a question of under what circumstances can the government force parties into doing something in order for them to receive legal aid. The government did implement exemptions so that the most vulnerable of society would still have full access to legal aid without having to attend a meeting with a mediator but does this still

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<sup>100</sup> Helen L Conway 'The Human Rights Act 1998 and Family Law – Part Two' [2000] Fam Law 30.

justify a potential breach in someone's human rights? This issue has been recognised by other jurisdictions. An example would be in Italy in which legislation was introduced which stated that parties must engage in mediation before having access to the Italian courts, this was brought out to coincide with the EU Mediation Directive and to reduce the back log of cases in Italy. This did however cause many issues with people stating that it interfered with their human rights. This then led to a case being brought to the ECJ. It was declared in the case of *Rosalba Alassini and Others*<sup>101</sup> that whilst the Italian requirement to undertake ADR before court proceedings might prejudice the implementation of the principle of effective judicial protection, this right is not unconditional. It was a legitimate objective of Italian law, and in the general interest, for parties to pursue less expensive methods of dispute resolution and to lighten the burden on the court system.<sup>102</sup> Therefore essentially stating that although the courts can understand it could be a potential issue, it is essentially in the parties' best interests and does bring many benefits therefore they shall allow it. The question to be asked here is if this arose in the UK would the outcome be the same? If we were to follow previous precedent the case of *Halsey v Milton Keynes General NHS Trust*<sup>103</sup> this gives a contrasting result. In this case it was decided that it would be against Article 6 of the ECHR to compel someone to participate in mediation. When looking at this case it seems that England and Wales had a sterner approach when it comes to this but this has not been reflected in part III or the changes they made which will be addressed in the next part of the chapter.

Overall the Family Law Act 1996 was a good starting point for mediation to get more recognition. Although with part II and III not being implemented or only being implemented for a short while the impact it had was limited. The pilot schemes that the decision of implementation was based around did not meet the aims of ADR or the Family Law Act 1996

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<sup>101</sup> *Rosalba Alassini and Others* (C-317/08 and C-320/08)

<sup>102</sup> Herbert Smith Freehills 'ECJ issues its opinion in support of Italian mandatory mediation rules' (22 September 2010) < <https://hsfnotes.com/adr/2010/09/22/ecj-issues-its-opinion-in-support-of-italian-mandatory-mediation-rules/> > accessed 20/07/19.

<sup>103</sup> [2004] EWCA Civ 576

and therefore it made sense for the Lord Chancellor to make the decisions that he did. Although it almost seems like a step back for mediation in the fact that the act was not implemented I do believe the Lord Chancellor made the right decision in not going forward with the act as there were many flaws and it could be said that it would of potentially caused more problems. We cannot forget that although in terms of mediation it may seem that the act was a failure the main aim for the act was actually to improve the divorce process and therefore it may have been more successful in other areas but due to the lack of implementation this looks unlikely.

## **Mediation Information and Assessment Meetings**

After the Family Law Act 1996 mediation did not progress how the government expected with Part II being repealed and Part III not being as successful and going on to be reenacted in the Access to Justice Act 1999.<sup>104</sup> When the act was re-enacted the framework for part III still stood. Since the Family Law Act 1996 part III clients who have sought legal aid to fund private family law dispute have still had to attend a meeting with a mediator. However from around 2011 a pre-application protocol was introduced this stated that that ANYONE who wanted to make application to court regarding a family law dispute would then have the 'expectation' to attend a Mediation Information and Assessment Meeting (MIAM) therefore increasing the need from not just publicly funded cases but to privately funded cases too<sup>105</sup>. A while later the Family Law Justice Review put forward the suggestion that the 'expectation' should now become a 'requirement'. This was then eventually further set out in Section 10 of the Children and Families Act 2014 where they were made mandatory for those wishing to make an application to the family court.<sup>106</sup> The government had two main aims for MIAM's in family law. The first aim was to convey information to clients so that they can decide whether mediation is for them and secondly assessing what is the suitability subject to what they disclose.<sup>107</sup> Initially if the client had a solicitor the solicitor would then refer the client to a mediator if they deemed this would be appropriate and no exceptions applied. A party however does not necessarily need a solicitor referral however and they can attend a MIAM of their own accord if they were wanting to solve a family dispute.

### **Statute and Exceptions**

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<sup>104</sup> Lisa Parkinson 'The Place of Mediation in the Family Justice System' [2013] CFLQ 200.

<sup>105</sup> Family Procedure Rules Practice Direction 3 3.6 (1) (2a) (b)

<sup>106</sup> Ministry of Justice 'Mediation Information and Assessment Meetings and Mediation in Private Family Law Disputes' *Quantitative Research Findings* 2.1 (www.gov.uk, 2015)  
<https://www.gov.uk/government/publications/mediation-information-and-assessment-meetings-miams-and-mediation-in-private-family-law-disputes-quantitative-research-findings> accessed 15/04/19.

<sup>107</sup> *ibid*



The rules that were initially set out in the Family Procedure Rules stated that MIAM's apply to any application to initiate specified private law proceedings relating to children and specified proceeding for a financial remedy<sup>108</sup>. At all points in the dispute the courts need to decide for each case whether or not non-court dispute resolution is appropriate for this type of dispute<sup>109</sup>. There are however exceptions to the MIAM requirement. These include elements such as domestic violence, child protection concerns more specifically a MIAM would not apply if a child would be the subject of the application and; that child or another child of the family who is living with that child is currently subject of enquiries by a local authority or the subject of a child protection plan put in place by a local authority. A MIAM will also not apply if the application needs to be made urgently and attending a MIAM would delay this from happening<sup>110</sup>. Another reason is if in the four months prior to making the application the person attended a MIAM or participated in another form of non-court dispute relating to the same dispute or if they have filed a relevant family application stating that one of the exemptions applies. If the person is bankrupt they also can apply to be exempt.<sup>111</sup> There are also other exemptions set out in the Family Procedure rules covering regarding the practicality of mediation such as if one of the parties is in prison or if there are no available mediation firms within a 15 mile radius of the parties home.

In the MIAM an authorised mediator must provide information about the principles, process and different models of mediation and information about other methods of non-court dispute resolution. They must also assess the suitability of mediation as a means of resolving the dispute, assess whether there has been or is a risk of domestic violence or whether there's has been or is a risk of harm by a prospective party to a child that would be a subject of the application.<sup>112</sup> If the mediator does find that any of these are present she would then have to inform the client that mediation would not be able to go forward. If a MIAM exemption is not

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<sup>108</sup> Family Procedure Rules (citation 105)

<sup>109</sup> *ibid*

<sup>110</sup> *ibid*

<sup>111</sup> *ibid*

<sup>112</sup> *ibid* 3.8 (1) – (2)

validly claimed the court should order a MIAM to take place and if necessary adjourn proceedings to enable a MIAM to take place. However, the courts can decide in the circumstances of the case that the MIAM should not apply to the application in question<sup>113</sup>. In the meetings what is expected to be covered is the client's perspective of the current situation and the mediator will also provide information and set out the client's expectations and potential outcomes of mediation if it were to go ahead. The mediator will also assess their eligibility for legal aid, the meetings should also last around 30 – 90 minutes.<sup>114</sup>

MIAM's were obviously a step forward from the Family Law Act 1996 but how much is the question. The information meetings in part II of the Family Law Act 1996 are very similar to the MIAM's in the fact that they are just informing people of mediation and there is still no compulsory requirement for them to actually participate in mediation. A change that has been made with the MIAM's is that the meetings are more personal with the MIAM mainly being one mediator and one client whereas the pilot information meetings as mentioned previously ranged from leaflets to group DVD presentations and were more of a 'one size fits all approach'. Due to the one to one meetings this gives the mediator the ability to tailor the meeting slightly more to the client, the client can the ask questions and understand the process much more than being given a piece of information via CD, leaflet or in a group like the information meetings without having the opportunity to ask about anything you do not understand.<sup>115</sup>

## **Research**

In 2013 the Ministry of Justice commissioned for a broad research program to be carried out. This was before they had implemented the Children and Families Act 2014. The government hoped that with the introduction of Legal Aid and Sentencing Act 2012 (which I will talk more about in the next chapter) and introducing a statutory requirement for applicants to attend a

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<sup>113</sup> Family Procedure rules (citation 105) 3.10

<sup>114</sup> Ministry of Justice Report (citation 106)

<sup>115</sup> *'The dashing of a 'liberal dream?'* (citation 79)

MIAM would in fact increase the numbers of people looking to solve their family law issues through mediation. The research was commissioned in order to address the lack of data surrounding the national use of MIAM's and mediation.<sup>116</sup> Phase 1 of the results were published in April 2014. The aims of this research were to essentially to find out 1. The approximate volume of privately funded clients attending MIAMs 2. The rate at which privately funded MIAMs are converted into mediation starts, and factors associated with non-conversion; the routes through which privately funded clients are referred to MIAMs and 3. What proportion of privately funded mediations attended result in agreement and 4. What the basic profile (gender, age, ethnicity, disability) of private clients attending MIAMs and mediations during the snapshot period.

### **The Results**

Firstly, in terms of the research it was found that most couples in sample chosen during the research did actually proceed to mediation which is obviously a positive start. The research stated that the main reasons why the case did not progress was either dissatisfaction with the mediator, not emotionally ready, the court was seen as more effective by the parties or either one or both of the parties were unwilling to pay for mediation. In terms of whether the parties who progressed actually reached an outcome this was positive too with an overall success rate of 68% and at least 50% concluding with a partial agreement.<sup>117</sup> This seems like a huge success for MIAM's as with a sample of 300 cases 68% progressed. This Phase 1 research was carried out before the Children and Families Act 2014 and therefore the question be asked is does the high uptake the Ministry of Justice research suggests still stand or have problems developed.

Since the research was published in 2014 more recent findings have found that in fact MIAM attendance is actually decreasing. One example being that in 2017 between October and

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<sup>116</sup> *'The dashing of a 'liberal dream?'* (citation 79)

<sup>117</sup> *ibid*

December mediation statistics were down by 15% with an intake of only 1500.<sup>118</sup> Although other issues could contribute to this such as LASPO and general austerity leading to people sticking together due to the fact they just cannot afford a divorce but these 2 issues cannot be the only reason and it still shows that MIAM's are not actually increasing the uptake of mediation which shows some issues.

### **Issues with the current process**

In September 2017 the Family Mediators Association met up to discuss the current situation with MIAM's. Judges, Magistrates and Mediators contributed to the discussion of raising issues with the MIAM's.<sup>119</sup> Many issues were raised by the different bodies who all had opinions on how the system could improve. One issue raised is that the mediation process requires both parties in order for it to work. Currently the requirement to attend a MIAM does not continue to the respondent of the application only the applicant<sup>120</sup> therefore meaning that if the respondent is not willing to attend a MIAM then the mediation cannot continue even if one party is willing to move forward.<sup>121</sup> This raises a big issue as a large part of the aim of MIAM's is to encourage parties to go down the mediation route in order to solve their dispute rather the courts. Making the attendance of a MIAM compulsory was a big step forward in doing so however if the requirement only applies to one party then it could be said to make it less effective. The process automatically ends if the respondent party decides that they either do not want to attend a MIAM or after the MIAM decide they do not want to continue with the mediation process. I am agreement that making both parties attend would potentially increase the effectiveness. I am aware however that although this may increase effectiveness it could also potentially bring problems. One issue that this could bring if potentially bring was one mentioned previously in relation to the Family Law Act 1996 is that denying both parties access to the courts if they do not attend a MIAM could potentially be a

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<sup>118</sup> 'Legal Aid Statistics Quarterly, England and Wales, October to December 2017' (www.gov.uk, 29<sup>th</sup> March 2018) < <https://www.gov.uk/government/collections/legal-aid-statistics>> accessed 25/06/2019.

<sup>119</sup> Philippa Johnson '*Mending the MIAM's process*' [2018] Fam Law 909.

<sup>120</sup> Children and Families Act 2014 s10 2(c)(d)

<sup>121</sup> '*Mending the MIAM's process*' (citation 119)

breach the Article 6 of the ECHR. This could apply here as it could be said that forcing a party to participate in a MIAM could be part of disabling them from the right to a fair trial. As mentioned earlier in the case of *Halsey v Milton Keynes General NHS Trust*<sup>122</sup> the English and Welsh court declared that if they do not feel it would not be appropriate to force people to do mediation and this could potentially be reason why they have held back from this.

In contrast to this though it could be said that the fact that even one party is required to attend is a huge step forward. If one party is required to go attend MIAM and then they realise that mediation may be a successful way to solve their dispute this may then lead to them persuading the other party to attend a MIAM. This could then potentially lead to both parties eventually agreeing to attend mediation<sup>123</sup>. This is obviously not guaranteed that each party will persuade each other and therefore looking overall at the aims of the MIAM's although it may be beneficial that one party is required to attend a MIAM to achieve the highest possible amount of cases going to mediation it would need both the respondent and the applicant having to attend a MIAM.

One other point raised at the conference was that in order for the MIAM's to fully work there needs to be consistency within the system for the consequences of not complying with the requirement for attendance at a MIAM before the court.<sup>124</sup> If MIAM's are to be respected amongst the public there needs to be full co-operation from all parts of the legal system. A main factor that needs to be address is that there needs to be consistency in what the consequences will be if the parties refuse to attend as if each court are giving different consequences or if there are no consequences at all this will create a very weak system. Generally speaking people will not take the need to attend a MIAM as seriously as they need to if the justice system itself does not. Statistics from the NFM showed that in 2016 released statistics stating that over 60% of couples ignored the law as out of 90,000 applications only 35,627 attended a MIAM this was 2 years after it was implemented in the Children and

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<sup>122</sup> [2004] EWCA Civ 576

<sup>123</sup> Mary Benham-Hall '*Are there different types of MIAM's?*' [2015] Fam Law 1546.

<sup>124</sup> 'Mending the MIAM's process' (citation 119)

Families Act 2014.<sup>125</sup> With so many couples being able to ignore the requirement it seems there is a huge problem with the lack of consistency.

A proposal from the conference outlined that they should commission researching into what areas of the country the MIAM's are working well in and then take ideas from them in order to compose a structure in which the whole country should follow in order make the process more respected.<sup>126</sup> This could work in terms of trying to improve finding out what the strengths are of the mediation process however it may be difficult to try and get local courts to change the way they treat MIAM's after this amount of time. This raises the question of whether justice could just be a postcode lottery. Andrew Moore and Sue Brookes both family lawyers and mediations published an article in 2018 in the Family Law Week outlining the issues. A major issue is with judges not using their power in order to direct people to attend a meeting with a mediator and instead the courts allow the system to remain clogged up when there are effective alternatives available<sup>127</sup>. The Ministry of Justice looked as part of their further research on MIAMs at 300 cases on file. Out of those cases 176 of those did not have the required FM1 one form as they had not attended mediation before going to the court. When these cases were reviewed it was found that only one of these cases had actually been challenged as to why there was no FM1 form and there was no evidence at all that the judge had used his powder in order to direct the parties to mediation.<sup>128</sup> As well this in cases where an FM1 form had been completed it was evident that only two of them were due to judges' directions. This is positive in the fact that the majority of the cases that had attended mediation were due to other influences such as self-referral, solicitors or things such as citizen's advice. This is not however ignoring the fact that over half of the cases reviewed they had not attended a MIAM and the courts had not used their power to make them do that. Taking into account these figures I would say that in the majority of cases the

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<sup>125</sup>Family Law Week 'National Family Mediation '6 out of 10 separating couples ignore law' (23<sup>rd</sup> June 2017, [www.familylawweek.co.uk](http://www.familylawweek.co.uk)) <<https://www.familylawweek.co.uk/site.aspx?i=ed178331>> accessed 26/02/19.

<sup>126</sup> '*Mending the MIAM's process*' (citation 119)

<sup>127</sup> Andrew Moore 'MIAM's; *A worthy Idea, failing in delivery*' P.C.B 2018 1 32-39.

<sup>128</sup> Ministry of Justice Report (citation 106)

judges are not taking the MIAM's as seriously as they need to in order to achieve the results. If judges are not checking for evidence then how many cases are slipping through the net and getting away with not attending the MIAM's. Earlier research shows that this has been a recurrent problem. Statistics from 2017 from the National Family Mediation states that six out of 10 couples ignore the need for a MIAM.<sup>129</sup> Therefore confirming that the requirement for a MIAM is still not taken seriously. The research carried out by Ministry of Justice was only small and therefore it would be unreasonable of me to make the assumption that all courts in England and Wales do not check for FM1 forms of the attendance at MIAM however even with this small study it is clear to see there are issues arising from the lack of pressure from the courts. In order for the MIAM's to actually work and the government meet their aims mentioned previously they need to this to be a smooth process and they particularly need the judges to place their part in this.<sup>130</sup> The judges are essentially ignoring statute and therefore how can the parties wanting to go to the courts be persuaded to attend a MIAM if the judges themselves do not care whether they have attended or not. Not only are they making it harder for mediation to rise but they are also putting more pressure on themselves. Part of the aim to increase mediation was so that the pressure and the back log of the cases would be taken from the courts. With the judges not enforcing the statute or the procedure rules it essentially adding to the pressure that they are currently under as the courts remain clogged up.<sup>131</sup>

Andrew and Sue also raise that another issue with the MIAM's is the exceptions. As mentioned earlier in this chapter there are a lot of exemptions in order to apply to court without attending a MIAM. Of course these are necessary as it can be accepted that mediation is not suitable for every case that evolves into the family law however a question needs to be raised as to how strictly are these exceptions being applied?<sup>132</sup> Are people relying too much on the exceptions and therefore this is why the uptake of mediation is not

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<sup>129</sup> *'MIAM's; A worthy Idea, failing in delivery'* (citation 127)

<sup>130</sup> *'Mending the MIAM's process'* (citation 119)

<sup>131</sup> *'MIAM's: A worthy Idea, failing in delivery'* (citation 127)

<sup>132</sup> *ibid*

as high as expected? It seems solicitors and clients themselves can prejudge the effectiveness of mediation before it has taken place and then they can assess which exemption they will easily be able to get from the courts in order for them not to attend mediation.<sup>133</sup> An article published by the Law Society which was written by Tracey O' Dwyer a family solicitor addressed reasons as to why solicitors do not refer clients to MIAM's. She states that lawyers should have no excuse and that they should be referring clients to MIAM's however she does report that this is not always the case. Although she believes most lawyers have their client's best interests at heart there are some lawyers that still do not recognised the benefits of mediation and therefore essentially it could be a reason why the exemptions are used frequently. Tracey reports that she had often heard clients state that their lawyers had told them to attend a MIAM to 'tick a box'.<sup>134</sup> This could suggest that solicitors also see the exceptions as a box ticking exercise and if they are unable to fit into one of the boxes that is when they would eventually refer clients to a MIAM but they will try to exhaust the exceptions first. In her research Tracey found that there are reasons why solicitors do not have faith in mediation. Firstly, they often believe that their clients are too vulnerable or there may be a power imbalance in relationship which may affect mediation process. Secondly if the finances are complex and one party is not being transparent about their current finances or finally the solicitor thinks that mediation 'would never work' and that the parties 'cannot stand each other'.<sup>135</sup> Although these are genuine and reasonable factors that could affect a successful mediation process Tracey suggests that there are solutions for this and the solicitors should not be too hasty in deciding mediation is not for their client. Solutions she suggests are things such as shuttle mediation if the parties struggle to be in the same room as each other or if there is a slight imbalance of power. In terms of complex finance matters she did agree that mediation may not be suitable for this however things can be put in place for example experts could be appointed in order to carry out the mediation to

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<sup>133</sup> *'MIAM's: A worthy Idea, failing in delivery'* (citation 127)

<sup>134</sup> Tracey O'Dwyer ' *Mediation - why aren't you doing it?*' (www.thelawsociety.org.uk 14<sup>th</sup> January 2016) < <https://www.lawsociety.org.uk/news/blog/mediation-why-arent-you-doing-it/>> accessed 20/07/19.

<sup>135</sup> *ibid*



help this. Therefore, just because the solicitor sees issues this should not automatically mean the solicitor should then try to give them an exemption for this. Looking at this it seems that judges are not the only ones to blame for the lack of intake as solicitors are also keen to weaken the process.

### **The future of MIAM's**

When looking at evidence above I think that the current MIAM process needs to be developed more. MIAM's are currently still part of the family law system and therefore are still being attended by parties just not in large amounts. Despite the initial research done by the MOJ showing a positive response further evidence has gone to suggest that MIAM's are in fact on the decline. The latest statistics published in 2017 showed a 13% decline in the workload of mediators.<sup>136</sup> With such a low number of MIAM's it is clear that the government are not meeting their aims or increasing the uptake. They have also not met the aim of reducing the amount of family law cases that go to court as in the Lord Chancellors 2018 report it was stated that there was still a back log of cases. He expressed his concerns that there are still too few judges to absorb all the increases in case volumes. In order to help the situation the courts have added more family sitting days. The effect of the increase is that it now takes longer for the courts to dispose of cases therefore prolonging the amount of time it takes to process a case.<sup>137</sup> These are all problems that the introduction of the compulsory MIAM's could have fixed if carried out properly and with all the people involved had carried out their part correctly. As MIAM's were essentially introduced in order to improve this problem and this statute currently still stands but the problem has got worse not better this suggests that there is need for reform. Whether this be starting with the judges to ensure that they are actually enforcing the law and that there is consistency across the system, or whether the actual statute needs repealing and something new put in place is up for discussion. One thing that I believe is certain from this research is that the current system is not working and the problems are only getting worse and it is time for change. Although

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<sup>136</sup> Legal Aid Statistics (citation 118)

<sup>137</sup> The Lord Chief Justice's Report 2018

MIAM's were a huge part of the meeting the governments aims legal aid changes were also expected to make a change as I mentioned briefly in this chapter. In the next chapter I will be looking at what impact the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on meeting the government's aims.

### 3. Chapter 2

#### The impact of LASPO and Children in mediation.

As mentioned in the previous chapter the government had attempted to persuade parties going through a separation to turn to alternative methods of solving their family disputes rather than go to the courts. Another way in which the government believed that they could do this was by limiting the legal aid that was available to people who want to solve their disputes through the courts. This then would essentially force them to turn to other methods. Research in a 2007 from the Legal Services Commission report found that a case that is legally funded and goes through the court's costs on average £930 more than a case that is legal aid funded and goes through mediation. This was 12 years ago and therefore I suspect that amount is even more in 2019.<sup>138</sup> In order to solve the issues and reduce expenditure they introduced the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

#### Aims of LASPO in terms of mediation

In 2010 a consultation paper was published stating what LASPO was expected to achieve. The aims that this paper set out were - A to discourage unnecessary and adversarial litigation at public expense; B to target legal aid to those who need it most; C to make significant savings to the cost of the scheme and D to deliver better overall value for money for the taxpayer<sup>139</sup>. In addition to this one other aim for LASPO was to encourage couples wherever possible to use mediation in order to solve their disputes. They wanted to encourage private family law cases to solve their disagreements as early as possible and without recourse to court proceedings and unnecessary legal expense.<sup>140</sup> They had the expectation that with the implementation of this the number of MIAM's would increase by

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<sup>138</sup> House of Commons 'Legal Services Commission: Legal aid and mediation for people involved in family breakdown' Fifty-first report of session 2006-07 9<sup>th</sup> July 2007 HC 396.

<sup>139</sup> Ministry of Justice 'Proposals for the Reform of Legal Aid in England and Wales Consultation Paper CP 12/10 < <https://www.gov.uk/government/publications/proposals-for-reform-of-legal-aid-in-england-and-wales>> accessed 14/02/19.

<sup>140</sup> Ministry of Justice Proposals for the Reform (citation 139)

9000 a year<sup>141</sup> which we know from the previous chapter did not happen. With these intentions this initiated the introduction of LASPO which included many drastic changes that would transform the scope of legal aid for family disputes.

### **Changes LASPO Introduced**

The main change that LASPO introduced was that prior to LASPO a solicitor could undertake significant amounts of out of court work for clients with public funding and could also assist their client with support for the mediation process with any family dispute. However, with the introduction of LASPO solicitors are no longer able to get the same funding for family disputes. They are now only funded for parts of cases that are come under the heading of 'help with mediation' which essentially means that the solicitor can carry out legally funded work for clients who have gone through the mediation process and need assistance with agreements that they have made in the mediation process.<sup>142</sup> This was obviously a massive alteration for the family law courts as the change has stripped back solicitors roles with a large jump from having the ability to take on many legal aid cases to only being able to assist with a small part of a few cases provided the case has been to mediation. In addition to mediation and 'help with mediation' there was still some legal aid available for some areas for example domestic violence cases however evidence is required which in itself causes issues.<sup>143</sup> Aside from this at face value this could be seen as good move forward for mediation and encouraging people to attend a MIAM and consider mediation as there first option rather than turn to the courts to solve their dispute.

If a party meets the criteria for legal aid the government will fund the MIAM and the mediation sessions if the parties choose to go down that route. It will also fund any solicitor's work that falls within 'help with mediation' but would not cover any extra solicitor fees. The parties would have to pay if for example they required additional legal advice from a solicitor regarding matters that the mediator could not advise on. Following on from this in 2014 in

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<sup>141</sup> Ministry of Justice Proposals for the Reform (citation 139)

<sup>142</sup> *ibid*

<sup>143</sup> *ibid*

order to attempt to increase the uptake of mediation even more they introduced the criteria that if one party is eligible for legal aid however the other party is not the government will pay for the MIAM and the first session of the mediation process if they choose to take their dispute forward.<sup>144</sup> The government thought that by introducing this it would give an incentive to the party who did not qualify for legal aid to still agree to participate in mediation.<sup>145</sup>

In order to be eligible for mediation funded by legal aid there are several factors that need to be taken into account. The eligibility criteria for publicly funded mediation is complex. Firstly, it needs to be decided whether the dispute is a 'family dispute' and the mediator must decide whether the costs to solve this dispute can be justified. The most common examples are contract arrangements, residence and parental responsibility, child maintenance, property or finance disputes.<sup>146</sup>

The next part of the eligibility test is financial eligibility. A client may be eligible for legal aid if they have less than £733 per month of disposable income after deductions such as tax and certain living expenses. The client must also have less than £8000 worth of savings (excluding any property). Alternatively if the client is in receipt of contribution based benefits or are on a low income or if they are in receipt of any income support, income related job seekers allowance or income related ESA then they will be eligible for legal aid.<sup>147</sup> The mediator will go through this with the client at the MIAM providing that the client brings documents such as the estimated value of assets such as home etc. and outstanding mortgage balance, a bank statement covering one month prior to the MIAM, if employed pay slips, if receiving benefits or tax credits a letter confirming entitlement , proof of housing cost

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<sup>144</sup> Legal Aid Agency 'Family Mediation Guidance Manual' Version 5.0 (www.gov.uk, September 2018) < <https://www.gov.uk/guidance/legal-aid-family-mediation> > accessed 15/07/19

<sup>145</sup> ibid

<sup>146</sup> ibid

<sup>147</sup> Legal Aid Agency 'Guide to determining financial eligibility for controlled work and family mediation' (www.gov.uk, 1<sup>st</sup> June 2014) < <https://www.gov.uk/guidance/civil-legal-aid-means-testing>> accessed 15/07/19

and proof of childcare fees. Once the mediator has documents stating all this information, they can then see whether a client is eligible for legal aid or not.<sup>148</sup>

### **The effect of the changes**

The results of the changes to the scope made in LASPO are not what were expected in terms of improving the mediation process however it seems they may have been successful in meeting some other aims. First of all when looking at whether the government's aims were met the first aim was to discourage unnecessary and adversarial litigation at public expense.<sup>149</sup> In terms of whether the governments have done this would depend upon whether the amount of cases that have chosen a different route have increased and the people attending court to solve their dispute has decreased. One way in which the government expected to meet this aim was of course through mediation. The government believed that they would be able to achieve this and had predicted an increase of 9000 MIAM's per year<sup>150</sup>.

Statistics shown in a report by the Ministry of Justice found however that LASPO in fact had the opposite effect. It was found that in 2013-14 attendance at MIAM's decreased by 17,246, this was a 53% decrease from 2012-13. In addition cases starting mediation had fell by 38% from the previous year.<sup>151</sup> LASPO has also created more issues, due to the changes there has also been an increase in the amount of litigants in person therefore more people are representing themselves in court. There has been a 30% increase every year since LASPO in family's where both parties had no legal representation.<sup>152</sup> This therefore shows that nothing has actually changed in terms of reducing the amount of disputes that get taken to court as parties are still going to court they are just representing themselves and although this may help the legal aid budget, in terms of reducing the courts time this aim has certainly

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<sup>148</sup> Guide to determine financial eligibility (citation 147)

<sup>149</sup> Ministry of Justice Proposals for the Reform (citation 139)

<sup>150</sup> National Audit Office 'Implementing reforms to civil legal aid' HC 784 Session 2014-15 20. November 2014

<sup>151</sup> *ibid*

<sup>152</sup> *ibid*

not been met. Even when we look at the bigger picture in terms of how many cases attended the family courts the most recent statistics from January to March 2019 show that from last year there has been a 5% increase in family cases.<sup>153</sup> Going back further, statistics from January to March 2017 show that there was also a 4% increase from the previous year.<sup>154</sup> Taking into account this as well as the still ongoing back log of cases<sup>155</sup> I addressed in my previous chapter it seems that LASPO has not had the desired reducing effect. Interestingly however in 2014 statistics show that there was a 7% decrease in the amount of cases going to the family courts<sup>156</sup> therefore potentially LASPO did have the desired effect at the beginning however the most recent statistics confirm that this did not last.

Shortly after LASPO was implemented the National Family Mediation (NFM) carried out a small survey from 1<sup>st</sup> June 2013 to the 1<sup>st</sup> July 2013 this was carried out and was completed by practicing mediators at the time. The information collected was collected anonymously. It was found that out of 175 people 56% did not know that there was legal aid still available for mediation after the recent changes<sup>157</sup>. This statistic seems to be quite alarming, if over half of the people that have attended a MIAM do not know that there is legal aid available to them for mediation. Although this is only a small study and was done over a short period of time it would be unreasonable to suggest this was the case on a bigger scale however it does initiate concerns about people's awareness. This could also be linked to why parties are also now 'letting things drift' rather than agreeing arrangements for finances and children due to the changes that LASPO has made. They are unaware that publicly funded mediation

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<sup>153</sup> Ministry of Justice 'Family Court Statistics Quarterly England and Wales, January to March 2019' ([www.gov.uk](http://www.gov.uk), 27<sup>th</sup> June 2019) < <https://www.gov.uk/government/collections/family-court-statistics-quarterly>> accessed 10/08/19.

<sup>154</sup> *ibid*

<sup>155</sup> LCJ Report (citation 138)

<sup>156</sup> Ministry of Justice 'Family Court Statistics Quarterly England and Wales, July to September 2014' ([www.gov.uk](http://www.gov.uk), 18<sup>th</sup> December 2014) < <https://www.gov.uk/government/collections/family-court-statistics-quarterly>> accessed 10/08/19.

<sup>157</sup> National Family Mediation '*Legal Aid and Mediation*' [2013] Fam Law 1110(2)

could still be an option for them<sup>158</sup> and if they do not have the money themselves to fund the process then it may seem like that is the only choice they have.

### **Meeting aims**

Taking this into account in terms of whether the changes in LASPO have met the first aim it seems that it has not. When looking at the statistics mentioned above in one way LASPO has discouraged the participants to either completely avoid solving their issues via a formal process and just let them dissolve naturally or it has made parties turn to court process but face it alone as they cannot afford legal advice and there is no funding therefore they have no choice but to turn to attending court without support. It seems that there is a gap in the legal aid process in which the government expected mediation to fill however this hasn't gone to plan and therefore reducing the legal aid has done more harm than good.

The second aim the government wanted to meet with LASPO was to make sure that the legal aid available was targeted to those who need it.<sup>159</sup> The government felt strongly about this aim as the government believed that the current system was not working as legal aid was often used to support lengthy and intractable family cases which funding were not available and could be solved through out of court settlements such as mediation.<sup>160</sup> They believed too much legal aid was going towards cases that only needed practical advice rather than professional expertise offered by a lawyer.<sup>161</sup> In terms of what cases the government did believe should have legal aid funding they did state that they were committed to supporting victims or domestic violence and arranged marriages.<sup>162</sup> They believe that these cases need legal aid as they state they recognise that the state has a role to play in helping claimants to obtain protection and consider that those in abusive

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<sup>158</sup> Anne Barlow 'Rising to the post-LASPO challenge: How should mediation respond?' J. Soc. Wel. & Fam. L. 2017, 39(2), 203-222.

<sup>159</sup> Ministry of Justice Consultation Paper (citation 141)

<sup>160</sup> Ministry of Justice 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012' February 2019 CP 37 ([www.gov.uk](http://www.gov.uk)) <<https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>> accessed 19/4/19.

<sup>161</sup> Ministry of Justice Consultation Paper (citation 141)

<sup>162</sup> *ibid*



relationships need assistance in tackling their situation. Resulting from this they reported that private law family cases that do not involve domestic abuse should be tackled with a more direct approach at solving issues such as mediation and therefore this is why legal aid still remains for mediation.<sup>163</sup> The changes did take away a large amount of legal aid for family disputes that was previously available and it almost seems that the government believed that only a few people needed legal aid and all other family disputes could be solved by mediation. The government thought that by taking away the majority of the legal aid but having mediation as the fall back for the cases other than domestic violence they were essentially doing what was best in order to meet the aim, however again it seems to create more issues as the government forgot how important the solicitors are in terms of promoting mediation. The Ministry of Justice report which I referred to in the previously also looked at what happened to the referrals of MIAM's after LASPO. They found that after LASPO was introduced solicitor referrals dropped. The researchers stated that they believe that the drop was reflected from the loss of clients on low incomes who after the introduction of LASPO do not have access to legal aid because they were unaware that it was available for mediation. This is because they were being turned away from solicitor due no available legal aid. If the parties did have legal aid then they would have informed the parties about publicly funded mediation as an alternative option to litigation.<sup>164</sup> Although statistics show that referrals from other places did increase after the introduction of LASPO for example self-referrals have gone from 10% to over half this is still not enough to make up for the drop in solicitor referrals.<sup>165</sup> In the MOJ report the National Family Mediation obviously recognised this mistake as they expressed that

'the promotion of the availability of legal aid for family mediation has been at best very poorly managed and, even today four years later, there is confusion and misinformation about precisely what legal aid is available for family cases'<sup>166</sup>

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<sup>163</sup> Ministry of Justice Consultation Paper (citation 141)

<sup>164</sup> *ibid*

<sup>165</sup> 'Post-Implementation Review of Part 1 of legal aid' (citation 160)

<sup>166</sup> Post-Implementation Review of Part 1 of legal aid' (citation 160)

The NFM are aware of the mistakes that have been made due to the drop in both MIAM's and mediation however it is unclear how they are going to take this forward as this report was published in 2015 and it is now 4 years later and the same problematic law still stands.

In terms of whether or not aim two was met it can be said that legal aid has not been targeted at the people who need it due to the process having rather large gaps. LASPO has still left parties who have suffered/ are suffering from domestic violence or a situation involving a marriage (these being the parties that the government essentially believed were the ones who should have priority to legal aid) with access to legal aid and to a solicitor. The issue arises however with the rest of the people wanting legal aid who do not meet these requirements. Before LASPO solicitors were essentially the bridge that got clients to attend MIAM's. LASPO however took away this bridge leaving behind many issues. Due to the lack of access to solicitors many parties are now left not knowing what options they have as usually a solicitor would be the one to inform them on what paths they can take. Even parties that are aware of the legal aid available for mediation often do not use it as without the guidance and support of a solicitor helping them understand the mediation process the legal aid available for mediation is no use.<sup>167</sup> Due to the above mentioned imbalance in the drop of solicitor referrals and the increase in self-referrals to mediation it seems that a lot of people are getting lost in the process therefore going without any legal aid or means of solving their dispute. Although it could be said that LASPO has made legal aid for the people who the government see as a priority more accessible in terms of the making the whole legal aid process more accessible it has clearly not done that.

The next two aims of government are similar in the fact that they are attempting to save money with the aims being to make significant savings to the cost of the legal aid but also to deliver better overall value for money for the taxpayer. In terms of cutting the cost of the legal aid bill the government achieved this as they managed to reduce the bill by 30 million

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<sup>167</sup> *ibid*

pounds.<sup>168</sup> This is obviously a very large amount of money that could be used to alternative things however with this amount of money being cut problems have arose from this. With a change this big it can be said that it is inventible that issues would arise. One issue that did arise from the LASPO was some people are now going through mediation who if the changes had not of happened would have been deemed not suitable. With legal aid being so limited mediation providers feel that they have to provide mediation to parties who in any other circumstances would not be suitable. They feel like they have to do this as they have no other option due to the lack of funding available<sup>169</sup>. One issue that stands out is that this could potentially be dangerous for vulnerable people. Although legal aid is available for domestic violence cases this requires proof and therefore if a party cannot reach this requirement then they would be left with mediation as the only option. In order to prove you are eligible legal aid due to domestic violence you need to show that you are or your children are at risk of harm from an ex-partner. In order to show this you would need a evidence from either the police, courts, social services, domestic violence services or someone similar to these sectors.<sup>170</sup> The issue with this is that not all domestic violence claims are reported to the authorities with women's aid reporting at last year that only 28% of women who used community based services actually reported the domestic abuse<sup>171</sup> and therefore depending on the threshold for the evidence there could be a lot of women that don't meet the requirement for legal aid despite being vulnerable and therefore having to turn to mediation. A lot of women also think that reporting the behavior could essentially make problems worse and therefore will take any opportunity they can get to solve the issue quickly. This then creates a situation where a vulnerable person is put in a dangerous situation where they have to be in the same environment as some who has abused them because they have no other choice due to LASPO. This then puts the mediator in a difficult position as if they reject

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<sup>168</sup> Post-Implementation Review of Part 1 of legal aid' (citation 160)

<sup>169</sup> *ibid*

<sup>170</sup> Legal Aid - Domestic Abuse or Violence ([www.gov.uk](http://www.gov.uk)) < <https://www.gov.uk/legal-aid/domestic-abuse-or-violence>> accessed 03/08/19

<sup>171</sup> Women's Aid (2018) Survival and Beyond: The Domestic Abuse Report 2017. Bristol: Women's Aid ([www.womensaid.org.uk](http://www.womensaid.org.uk), 2017) < <https://www.womensaid.org.uk/survival-beyond-report/>> accessed 04/08/19

clients it may make the situation worse with their issues going unresolved but also if they do accept the client it is going against the rules of suitability and potentially the codes of practice. This could also reduce mediations credibility as it is putting out the message that mediators will essentially accept any case if funded by legal aid. Of course, the government have to save money however it seems that maybe said the government are focusing too much on the money saving aim. Essentially ignoring the balance needed to be found between saving money but still making sure the system is fit for purpose and does not put vulnerable people in dangerous situations.

### **The next step forward**

When looking at whether the aims of LASPO in terms of mediation were met it seems to be that this was not the cause. It cannot be denied that the government did save a lot of money from implementing LASPO. However, the steps which they have put in place in order to make this happen have not been sustainable in the long term for diverting couples to mediation rather than the courts. With the 56% decrease of mediation assessments and 38% decrease in mediation starts the year after LASPO was introduced it is clear something went wrong.<sup>172</sup> The Law Society produced a report in 2017 looking at the impact of LASPO 4 years later. They addressed the hopes that the government had as mentioned previously the expected 9000 increase of MIAM's. They agreed that one of the main reasons this happened was due to the lack of involvement from solicitors as without this the number of cases being referred will continue to stay low. They went on to put forward reforms in which they believe would solve the issues that LASPO has created. Firstly, one suggestion is that the government should fund all MIAM's as they believe that if this is done this may encourage behavioral change essentially making it the norm for couples to go to mediation rather than the courts straight away. The second reform is the government should monitor the use of mediation closely in order to and then consider what actions need to be taken in

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<sup>172</sup> The Law Society 'LASPO Four Years on: A Law Society Review' (www.thelawsociety.org.uk June 2017) < <https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/> > accessed 12/08/19.

order to increase the uptake. Finally the Law Society recommended that the government re-implement the early legal aid stage of mediation therefore people can still have access to a solicitor for the early stages of their dispute therefore the solicitors would then be able to refer clients to mediation again which would potentially increase the uptake. The estimated cost for this would be £14 million pounds therefore almost half of what the government saved by implementing LASPO.<sup>173</sup> 2 out of the 3 reforms the law society suggested involve the government spending money which would essentially go against one of the aims of LASPO and therefore the government may be less likely to follow this advice. It does seem from the report that if the government do want to undo the issues caused by LASPO they will need to spend money. The overall feeling from this is that the government are very focused on saving money however judging by the results it was all a little too much too fast and too soon hence why problems have arisen and mediation has received no benefit. It seems that a more gradual process may be needed with the involvement of solicitors to be brought back in order to make this a better process.

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<sup>173</sup> The Law Society Report (citation 172)

### **Children in the Mediation Process**

Children are often central to divorce and separation cases. It is often disputed about whether children's voices and opinions should be taken into account in the process<sup>174</sup>. Many laws have been implemented in terms of the rights of children that could be adapted to be taken into account when children are involved in dispute resolution. The United Nation's Convention on The Rights of the Child enforced in 2<sup>nd</sup> September 1990 under international law but was ratified in December 1991 and came into force in January 1992 to the UK.<sup>175</sup> The convention set out what every child needs to have for a safe, happy and fulfilled childhood<sup>176</sup>. Article 12 of the convention sets out that a child who is capable of forming a view shall have the right to express those views on all matters affecting the child and the article separately states that the child in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>177</sup> The question to be raised here is how far Article 12 is taken into consideration in family law in particular in family law mediation.

### **The Courts and Children**

First of all looking at the courts and how much involvement the children have there it seems this is limited. Children in public law cases are often represented by a solicitor or CAFCASS however in private law cases this is not the case. If children are involved in section 8 of the Children Act 1989 they do not always have party status and the representation that accompanies it. One person who expressed this was Baroness Hale. She expressed in a lecture in 2011 that in cases where children are involved it has always been the case that

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<sup>174</sup> J Howe and H Mclsaac '*Finding the balance: Ethical challenges and best practices for lawyers representing parents when the interests of children are at stake*' (2008) 46(1) Family Court Review 78-91.

<sup>175</sup> Janet Walker '*How can we ensure that children's voices are heard in mediation?*' [2013] Fam Law 191.

<sup>176</sup> Ibid

<sup>177</sup> The United Nations Convention on the Rights of the Child, Article 12

they are always fought on the ground by selective adults and that no one has ever been appointed to consider the rights of the children involved separately from the adults in the supreme court or below.<sup>178</sup> In this instance Baroness Hale was making a generalised statement about cases involving children however this can be drawn into children whose parents are going through a separation. It is very rare for the children whose parents are going through a divorce to be able to have a say as decisions are usually made for them. Often in regard to who they are going to live with and also if and how much contact they are to have with the non-resident parents which almost seems unfair for someone to make them decisions for them especially if the child is capable of forming their own decisions. In 2014 Simon Hughes then Justice Minister made a speech at the voice of the child conference giving a proposal that all children over the age of 10 will have the opportunity to speak to the judge. He then further went on to explain

‘Children and young people must by law have their views heard before decisions are made about their future, and where decisions are made that will impact them. At the moment, it is still too often that their views are not heard.’<sup>179</sup>

This speech was made in 2014, it is now 2019 and still no changes have been made. On the rare occasion that children’s opinions do reach the court the judges are often reluctant to take their views into consideration as they often believe this places too much responsibility on the child or often judges believe that children’s views are often influenced by their parents.<sup>180</sup> A 2017 case illustrated this perfectly *Re A (Letter to a Young Person)*<sup>181</sup> in this case a child wrote to Justice Peter Jackson as he was not happy with the outcome of his parents trial in which they were disputing custody. The judge responded to the child explaining that he understands how the child is not happy with the outcome and that he was impressed with the way in which he gave evidence as he is at an age where the views carry a lot of weight however due to the influences that he is under he is unable to change the

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<sup>178</sup> Baroness Hale ‘*Can you hear me, your honour?*’ [2012] Fam Law 30

<sup>179</sup> Ministry of Justice ‘Simon Hughes’ speech at the voice of the child conference (www.gov.uk July 2014 < <https://www.gov.uk/government/speeches/simon-hughes-speech-at-the-voice-of-the-child-conference>> accessed 20/08/19.

<sup>180</sup> Sarah Phillimore ‘*How are children’s voices heard in the family justice system?*’ [2017] Fam Law 1396.

<sup>181</sup> [2017] EWFC 48

decision. This judgement says a lot in terms of whether children's voices should be heard. One way in which this can be seen is that it is unfair on the child as now he has to live under this agreement which he is unhappy. Justice Peter Jackson does however raise a rather strong argument that children can often be influenced by the parent's views and therefore this is a reason why children's views are not included in the court process as much as they should or as much as people would like. Previously I referred to the UN's convention of the rights of the child article 12. Looking back at that it seems that the current system in which the England and Wales have does not comply with this. The child in case was 14 and therefore capable of forming his own views however the judge said this was not enough. It could be said that all children's views and opinions are influenced in one way or another as that is how opinions and views are formed so where is the line in which the child's views are too influenced to be used in court? It seems hard to achieve a balance and it very subjective as to when should children's views should be heard. With this being said is there a similar stance in mediation or do they have more of an input?

### **Mediation and Children**

Children are often the centre of mediation disputes and therefore the question to be asked of how much say do they get in these disputes? The Family Mediation Code of Practice sets out that under section 6.6 the mediator must encourage the participants to consider the children's wishes and feelings. The code also states that all children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during mediation. Where the mediator and the participants agree that it is appropriate to consult children directly, the consent of those children must first be obtained. The mediator must also explain that the child has confidentiality as to anything that the child has said to the mediator. However if the mediator believes that a child is suffering or is likely to suffer significant harm they must advise the participants to seek help from the appropriate agency



and also must advise the participants to seek help from that appropriate agency.<sup>182</sup> The code sets out a clear position for mediation however in terms of how much the code is complied with is up for discussion.

In November 2014 the Minister of State for Justice and Civil Liberties Simon Hughes MP, established the Voice of the Child Dispute Resolution Advisory Group to ensure that the necessary steps are taken to promote child inclusive practice in out of court dispute resolution processes and that the voices of children and young people are heard in all private family law proceedings which impact on them.<sup>183</sup> In this report one of the recommendations was that the government should adopt a new Framework for Child Inclusive Mediation which presupposes that where a mediator undertakes mediation relating to child issues, the mediator must have arrangements in place at the start of the process to provide child inclusive mediation either them self or through contractual arrangements with another mediator or child practitioner appropriately qualified to work with children.<sup>184</sup> Following on from this recommendation set out in the report the Family Mediation Council were then asked to form requirements for Child Inclusive Mediation (CIM). The Family Mediation Council set out requirements for CIM. Paper 1 it sets out the conduct for CIM, in section 5 the first section states that each parent/carer should first attend an initial meeting that includes assessment of and screening for domestic abuse, child protection issues, safeguarding concerns and the mediator should also check whether any other professionals are/have been involved with the child or family. Before a child is to participate directly in mediation, parents should have committed to the mediation process by signing an agreement to mediate. Also, if there is a parent or guardian who is not a participant in the mediation consideration needs to be given to consulting this party before the mediation begins. Confidentiality and its limits need to carefully explained and understood. The parent

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<sup>182</sup> Family Mediation Council 'Code of Practice for Family Mediators' Section 6.6 (www.familymediationcouncil.org.uk, November 2018) <  
<https://www.familymediationcouncil.org.uk/us/code-practice/>>accessed 08/08/19

<sup>183</sup> ibid

<sup>184</sup> ibid

should not also brief the child beforehand on what the child should or should not say nor should they question the child or young person afterwards. Mediators should also offer a range of options for CIM this meaning the variation of mediators or whether siblings attend mediation together or separately. It must also be made clear to everyone involved that they can accept or decline an invitation to mediate freely. CIM should be process rather than a one off meeting and therefore there must be careful regard to time scales for children and young people, arranging dates and scheduling follow up meetings are important.<sup>185</sup> The Family Mediation Council also released 3 other papers in which it set out further aspects such as competencies, requirements for course providers and ongoing professional development. After the papers were written they were then sent to the Family Mediation Standards Boards (FMSB) who then were to decide whether or not they should be implemented. In May 2018 the FMSB implemented some of the recommendations of the FMC currently stand for mediators to follow. These were implemented last year and therefore it is difficult to say how effective these were. However, there is one issue that stands out, this issue being that in the standards it sets out that the parents of the child should not brief the child outside or mediation. This although being a very good requirement is difficult to implement. It would be reasonable for a child to ask questions and speak to their parents about the mediation process and therefore it seems as though it would be difficult for parents to disregard the subject completely. In addition to this the standards do not set out what would happen if this were to be the case and the parents did speak to the children about the process? Would this make the child's opinion invalid or would the mediation process have to stop altogether? It seems that although the idea that all communication regarding to mediation outside of the sessions should be stopped the practicality of enforcing this is low.

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<sup>185</sup> Family Mediation Council 'Child Inclusive Mediation' Paper 1 CIM Principles and Requirements Section 5 ([www.familymediationcouncil.org.uk](http://www.familymediationcouncil.org.uk), 2017) < <https://www.familymediationcouncil.org.uk/2017/06/09/child-inclusive-mediation/>> accessed 07/07/19.

CIM despite being present for some years has only come to the front recently after the voice of the children report. As mentioned earlier as the importance of CIM is only coming to light recently it is difficult to see whether the adjustments have made a difference as there are limited to no statistics surrounding this. In terms of what impact CIM has had on the actual outcome of the process it seems that the research is also very limited. This could be due to the fact that until the voice of the child report CIM had taken a back seat and therefore there was not much interest surrounding this. Another reason that this could be is due to the fact that despite the framework being in place it is not being used. One study that was carried out before the changes were implemented was the study entitled 'Mapping Paths to Family Justice Project' which was funded by the Economic and Social Research Council. They collected information regarding the family justice system in which the use of children in mediation was looked over.<sup>186</sup> Academic's Jan Ewing, Rosemary Hunter and Anne Barlow then produced a journal article explaining the results. The research was carried out in 3 stages looking at solicitor negotiations, mediations and collaborative law. First a survey was given to the participants. Secondly interviews with 44 men and 51 women who had participated in family dispute resolution in the past 15 years prior to the interview and in-depth interviews with solicitors and mediators were carried out. Thirdly and finally recordings of the sessions of each type of dispute resolution were also taken to use as part of the research.<sup>187</sup>

### **The Results**

The overall finding was that children's rights set out in the Family Mediation Code of Practice<sup>188</sup> are not being heard and that essentially the emphasis on hearing the voice of the child is more rhetorical than real.<sup>189</sup> It was seen that child consultation is not routinely

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<sup>186</sup> Jan Ewing, Rosemary Hunter, Anne Barlow & Janet Smithson 'Children's voices: Centre-stage or sidelined in out of court dispute resolution in England and Wales? [2015] CFLQ 43.

<sup>187</sup> Ibid

<sup>188</sup> 'Code of Practice for Family Mediators' (citation 182)

<sup>189</sup> Ibid

offered. Despite this the NFM made a claim that they provide CIM in 25% of their cases<sup>190</sup> however this claim is arguably very vague and 25% is still a very low percentage. In the interview stage of the study mediators who were qualified to carry out CIM stated that although qualified this is not very regular occurrence one even said that although being qualified for 10 years they have never had any experience with CIM.<sup>191</sup> This is obviously a massive issue as the children in these cases are not able to exercise their rights that they should have. An academic in family law Lucinda Ferguson backed the research and even went on to say that the children do not have a right. Stating a right is not a right if it is not accessible and as the results show that even though there is a right in place for the children they have no way of exercising this.<sup>192</sup> This essentially means that the Code of Practice and the other rules put in place to give children are useless and meaningless if the children have no access to enforcing their rights.

### **Reasons for the lack of participation**

With the study showing such low uptake on CIM it seemed that there were issues with the process or some people still have reservations about mediation that involves their child. The main four reasons that the study found were that 1. Neither or only one parent would consent to the process 2. The child was not willing to participate 3. The parents believe it places pressure on the child and 4. The cost.<sup>193</sup> As you can see apart from cost the other top 3 reasons were mainly due to reservations either from the child or the parents about the process. Firstly, parents not consenting could potentially be resolved by removing the requirement for parents to consent and leaving the decision purely up to the child. Although a simple change it would cause some issues. An issue would be that at what age would the

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<sup>190</sup> National Family Mediation 'National Family Mediation Responds in full to government task force recommendations' (www.familylaw.co.uk, 11 July 2014) <  
[https://www.familylaw.co.uk/news\\_and\\_comment/national-family-mediation-responds-in-full-to-government-task-force-recommendations](https://www.familylaw.co.uk/news_and_comment/national-family-mediation-responds-in-full-to-government-task-force-recommendations)> accessed 11/07/19.

<sup>191</sup> Ibid

<sup>192</sup> Lucinda Ferguson '*Not merely rights for children but children's rights*' (2013) 21 International Journal of Children's rights 177.

<sup>193</sup> University of Exeter Law School 'Mapping Paths to Family Justice' <  
<http://socialsciences.exeter.ac.uk/law/research/groups/frs/projects/mappingpathstofamilyjustice/#a2>>  
accessed 11/8/19.

child have full control over whether or not they can decide whether they would like to attend as all children differ on development of maturity and so therefore it may be difficult to decide when a child is capable of making an informed decision. Sarah Phillimore an academic addressed this in a journal article stating that there are always going to be issues surrounding at what point does a child become a young adult and what weight this carries in decision making. She also confirms the fact that all children are not the same and therefore it would be hard to make a rule in which all children would follow.<sup>194</sup> In the journal article for the study the academic's discussed the reasons why parents often do not consent. One of the reasons raised was parents often believe that they are able to adequately represent the voice of their children.<sup>195</sup> Although this may be true in some circumstances especially for younger children however this is not always the case. Often parents assume that they know but it can often be the case that the children have different views and therefore this is why the United Nations reports states that children's views have a right to be heard and therefore parents are not always right.<sup>196</sup> Another reason that is that parents could potentially be reluctant for people to find out what goes on behind closed doors. For example, the children may tell the mediator something the parents may not want to people to know. An example of this would be domestic violence that had not been disclosed or other things personal things that perhaps the parties did not want to share with the mediator.<sup>197</sup> So in fact it is not that they are worried about the children and what effect it may have on them but they are more worried about what may be exposed.

The second reason most popular reason for the lack of uptake of CIM is the children do not consent themselves to attending. Now in terms of solutions for this it could be said to be rather difficult. To a force a child into CIM would essentially going against the UN convention of making sure that children's view and opinions are heard and therefore this would not be

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<sup>194</sup> *'How are children's voices heard in the family justice system?'* (citation 180)

<sup>195</sup> *'Children's voices: Centre-stage or sidelined in out of court dispute resolution in England and Wales?'* (citation 186)

<sup>196</sup> The United Nations Convention on the Rights of the Child, Article 12

<sup>197</sup> Gillian S McDonald, *'Child Abuse & Neglect'* Volume 65, March 2017, Pages 1-13.

the best way. The best approach would be to educate the child and make sure they have enough information about the process and give them the opportunity to ask any questions about the process therefore they can then make a very informed decision. As it could be the case that children are often scared about what mediation entails and not that they do not want or care if their views are heard. In fact research has stated that child often are very happy to express their wishes and so therefore it is not the case that they do not want to be heard it could be that they are worried about how they are going to be heard but with education on the matter this could potentially solve this issue<sup>198</sup>.

### **Impact of Child Inclusive Mediation**

The above study is one of very few surrounding CIM in England and Wales and therefore without alternative research it is difficult to say what should be done to solve these issues. However, I think that a starting point would be to increase the awareness of CIM and inform parents and children about the effects that CIM can have. However, this would also require research.

The studies are very limited in the English and Welsh system on the impact of CIM however in Australia a study did look into this. This study looked into the effects of CIM and child-focused mediation. The study was carried out by Jennifer McIntosh, Caroline Long and Lawrie Moloney. The aim of their study was to explore comparative outcomes for separated children through different forms of family law mediation.<sup>199</sup> The study was carried out in 2004 for a period of 12 months. In terms of the number of participants there were 150 altogether, 75 for each type of mediation. The two types of mediation to be compared were child-focused mediation this essentially is where the child is not directly involved in the process however is the focus of the sessions. The second type is the above mentioned CIM which in this case is where the children meet with a child consultant so that their responses

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<sup>198</sup> Jennifer McIntosh, Caroline Long & Lawrie Moloney 'Child Focused and Child Inclusive Mediation: A comparative study of outcomes, *Journal of Family Studies*, 10.1 87-95.

<sup>199</sup> *ibid*

are heard and get put across in the decisions being made.<sup>200</sup> The job of a child consultant is to talk to the child, not necessarily to ascertain the wishes of children but more to gain the child's perspectives and experiences of the current situation that they are in and what their hopes are for the future, this could be through drawings or through statements about how they are feeling. In order to collect the data the researchers contacted the parties a few months or weeks after the mediation had taken place. The recruitment criteria stated that the parents had to be separating, their dispute included child-related matters and at least one of the children in the dispute was between 5 and 16 years. For the results the children were divided into two age groups 4 to 10 years old and 10 to 16 years old. The way in which they were assessed differed depending on their age for example at one stage the younger children told the interviewer their story whilst the older children were to write a report book.<sup>201</sup> In order to obtain data from the parents a structured survey interview was designed this was completed by with participants as a pencil and paper measure and then was also completed as a personal interview. Data on the children was collected by a structured one to one play style interview at intake and then at three months and a final interview a year after mediation.<sup>202</sup>

## **The Results**

Data was calculated at two points in the study. The first being 3 months after the mediation and the second being a year after the mediation. In which results were published for both. At 3 months it was seen that overall each group reported that there were significant gains in terms of conflict management. In addition to this, children in both groups also perceived lower conflict between parents. Despite the overall positive results, it seemed that the extent

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<sup>200</sup> *ibid*

<sup>201</sup> Jennifer McIntosh & Caroline Long 'A Prospective Study of outcomes from Child Focused and Child Inclusive post separation family dispute resolution' Final Report October 2006 50-55 ([www.ag.gov.au](http://www.ag.gov.au)) <  
<https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/Report1.>> accessed 14/05/19.

<sup>202</sup> Jennifer McIntosh, Caroline Long & Yvonne Wells 'Child-Focused and Child Inclusive Family Law Dispute Resolution: One Year findings from a prospective study of outcomes' 'Journal of Family Studies' Vol 13 Issue 1 (May-June 2007).

for the two groups did differ. The child inclusive group was seen to have significant impacts that the child focused group did not. The child inclusive group reported from both mothers and fathers that they had better parental alliances 3 months after the intervention compared to the child focused group who despite the overall positive results had a decline. The child inclusive group also had better results in terms of satisfaction with things such as living arrangements. In terms of the affect that this had on children it was reported that the children from the child inclusive group's mental health had improved. At the beginning of the study it was reported by mothers that 29% of the children were on the borderline for showing clinical signs of mental health issues and 3 months after this had reduced to 19% seeing a 10% decrease.<sup>203</sup>

The next data collected was 12 months after the intervention. Firstly, overall data from both groups still showed that after a year there had been reduced conflict between parents still. In terms of alliance and acrimony after 12 months for mothers the levels were very similar for both groups therefore showing no difference. Interestingly however this did differ for the fathers who in child inclusive group reported that they still had high levels and acrimony. As well as this after one year the child inclusive group still reported significantly greater satisfaction for living and visiting arrangements. In terms of the affect after a year on children the child inclusive data showed that the children reported that a year after the intervention they felt that they had a better relationship with their mother, perceiving her to be more understanding, interested and more able to help than at the beginning of the year. There was a similar affecting for fathers as well with reports showing that children in the child inclusive group felt more closer to their father. In terms of mental health there was also still a better result for child inclusive children showing lower anxiety, clinging behavior and fewer depressive and somatic fears.<sup>204</sup>In terms of the results of the impact of the actual process of child inclusive mediation data from 60 of the children that participated was collected on how they felt the process went. 86% of the 60 children asked stated that they believed that the

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<sup>203</sup> A Prospective Study of outcomes (citation 201)

<sup>204</sup> *ibid*



process was 'good, great or helpful', only 6% stated that the process was not needed and 8% stated that they did not find the process helpful.<sup>205</sup> An example of a success story are one party who stated to the child consultant that they did not like it when their parents fought in front of them, the consultant then addressed this to the parents and the parents then made a conscious effort to act on this the child then reported back to the researchers that this made them feel better about the situation and they were thankful of the process.

Overall from this study is showed that both child inclusive and child focused mediation are positive ways of reducing conflict for families going through child related disputes however it seems child inclusive mediation did have some significant advances over child focused mediation in some areas. The question to be asked is why was this? Firstly, one main reason that researchers suggest is due to the fact that due to the immediacy and intimacy of the information that is given to them this essentially acts a wake-up call to the parents. Researchers often reported that parents were often moved when the information is reported back to them from what their children have said.<sup>206</sup> The research did also show that child inclusive mediation did have a significant impact on fathers. The researchers believe that this was because the narrative of child inclusive mediation removes the mother from the typical 'gatekeeper' of information about the children and therefore it puts the father in a position in which its more a level playing field. This then makes the father keener and have the ability to listen to view that conflicts with their own as the view is coming from their own children rather than from the mother.<sup>207</sup> Although these reasonings may be true to some extent the process is not perfect.

The first issue is that despite the initial 3 months being very positive for alliances and acrimony between parents it seems that for the mother this wore of after this time and despite it still being higher for fathers this also had a decrease. Therefore this raises this

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<sup>205</sup> Jennifer McIntosh, Caroline Long & Lawrie Moloney 'Child Focused and Child Inclusive Mediation: A comparative study of outcomes, *Journal of Family Studies*, FAMILY COURT REVIEW, Vol. 46 No. 1, January 2008 105–124.

<sup>206</sup> A Prospective Study of outcomes (citation 201) 123

<sup>207</sup> *ibid* 124

issue that without the constant reminding of how the conflict between the parents is having an effect on the children then they are more likely to resort to the behavior before the intervention therefore are the effects of CIM only temporary and they do not work long term?

Another issue that may be appropriate to raise is that it was reported in the research findings that not all participants had the same extent of success. It was actually found that the parents who had the worse relationships to begin with actually benefited the most from CIM.<sup>208</sup> This is positive as it is important that bad relationships improve for the sake of the children involved however this does raise other questions. If the parties that achieve the most benefit from this are the parents with the worst relationships, then could it be said that CIM should really only be used in worst case scenarios? Despite the fact that the process is done in a way that causes minimum distress to the children it can be said that any process involving the children's lives and emotions is going to cause some inconvenience and disruption for the child. Therefore, should it only be used in cases where the parents relationship is at its worst? Although in practice this could potentially be a complicated process as the relationship of each parent would have to be assessed at the beginning of the process and then it would be need to be evaluated as to whether the potential benefits of the parents and children going through CIM outweighs the inconvenience that the child may suffer from this process. Although this may not be practicable it does help conclude that CIM does not have the same effect for everyone.

In terms of how much we can rely on the study does also have some issues. The study had a very small intake when compared to the size of Australia. There were only 75 families for each group broken down into 25 from 3 different cities which seems a very small amount. In addition to this there was no control group in this study who did not have any mediation and therefore although it seems that child focused mediation did not have as much of positive effect as child inclusive mediation if we compared it to families that went to the courts for example could this give us different perspective on how positive it was?

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<sup>208</sup> A Prospective Study of outcomes (citation 201)

Another issue is that this approach is very much a one size fits all system. Although some of the data collecting methods changed slightly for the different age groups the majority of the process very much remained the same. In the feedback a few of the older children did report to the researcher that they found the process to be pointless. Therefore, it seemed that this method worked best for young children. If there were to be different methods of child inclusive mediation this could perhaps be more beneficial, for example would older children find it more beneficial if they were actually in the room with their parents and got to tell them their thoughts directly they may feel this would be a better approach for them? Although this would need more thought about how this would be carried out it can be said that for CIM to work to its full potential it does need to be able to adapt to the different age ranges. This study was useful at showing child inclusive mediations potential however for it to progress more research is needed in order to get a bigger picture.

Despite the need for more research it cannot be ignored that CIM does seem to have a positive impact on both the parents and the children. Not only this but it does comply Article 12 of the UN convention of human rights of the child mentioned earlier as the process does allow children to express their feelings and hopes.<sup>209</sup> As mentioned earlier in England and Wales there is a method of child inclusive mediation however it is not frequently used. This due to many reasons ranging from the parents not consenting to the child not consenting as they do not believe it to be beneficial for their children. A potential suggestion could be that using data from studies such as the McIntosh et al study in MIAM's it could encourage families in England and Wales to go to child inclusive mediation as it may be a better way of solving their dispute and in fact could make the outcome better for both them and the children. Although the current system does differ to the Australian one in the fact that it does not have a 'child consultant' the process is usually carried out by a mediation who is qualified in dealing with child issues we can still take points from this. The research is still very limited and the different systems in the both countries does mean that we cannot make the

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<sup>209</sup> The United Nations Convention on the Rights of the Child, Article 12

assumption that if the uptake in England and Wales was larger we could see the same results it is however a good starting point to try and encourage the use of CIM.

### **Mediation in comparison to The Courts**

Earlier in this chapter it was established that in the English and Welsh court system children's views are not often heard. We have also established that despite the framework in place children's do not have much involvement in the mediation process when their parents are solving family disputes. What I would like to look at is whether there is any evidence that suggests that children whose parents go through the court system are affected more than the those who go through mediation. The McIntosh et al study compared the effects of 2 types of mediation however did not compare this to the court system. Some research has stated that in terms of children mediation can provide many benefits that the court process cannot.<sup>210</sup> Firstly with the court process it often encourages more hostility between the parents of the family due them doing against each other for the better settlement. Mediation however does the opposite of this in the fact that it makes the parties communicate and work together in order to get them to come to an agreement that benefits them both this therefore reduces the hostility and the tension the parties have towards each other. This does not necessarily mean that they must like each other but it means that they can be civil enough to respond and approach each other in a positive way which is beneficial for the children. Mediation is a less tense process and therefore the children can feel at ease knowing that their parents do not hate each other and can be in the same room. This can benefit the child as it will make things less stressful for them and they will not have to worry about whether there is going to be a conflict between the parents when they cross paths.<sup>211</sup> Research which supports this is a study carried out in the USA by Robert Emery. The study was a follow up to an investigation that he had started 12 years prior in which he looked at participants who went to the courts to solve child custody disputes and participants who

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<sup>210</sup> Ministry of Justice 'Mediation – the best option for children' (www.gov.uk, 26<sup>th</sup> November 2013) <<https://www.gov.uk/government/news/mediation-the-best-option-for-children>> accessed 17/4/19.

<sup>211</sup> Marion Stevenson 'Children's issues in mediation: cultivating co-operation or settlement seeking?' [2013] Fam Law 218

solved their issues with mediation. There were 71 families 35 of which mediated and 36 that used litigation to solve their issues. The study was originally carried out between 1983 and 1986 and the participants were selected from a list of people who had applied for child custody hearings in the in this time period.<sup>212</sup> After 12 years Robert went back to look at whether or not using the different processes had made a difference to the aftermath of the separation.

The results stated that overall the couples who went through mediation had the better outcomes. For the children it was found that nonresidential parents who mediated had more contact and involvement than those who litigated meaning better relationships with their parents.<sup>213</sup> Robert stated that the reasons for this were because when parties decide through mediation it is much more than just making a decision. Mediation has the ability to

‘recognise grief and how it causes anger; give parents a voice; increase learning about children's needs and co-parenting; help people take the long view; and assist parents in working together’.<sup>214</sup>

All these things then have an impact on the child as mediation gives the parents an opportunity to work on the emotion in the situation as well as the practical side and therefore this in the long term reduces the amount that the child suffers as if the parents are comfortable and happy with the situation then this makes it easier for the child to adapt to the new changes.

Robert's research also found that in the long-term mediation is more beneficial for children when it comes to changes in their life. Children throughout their childhood have situations in which parents must make decisions together for example what school they are going to attend. If the parent's relationship has been improved due to mediation they may be able to make decisions about the changes unassisted without the need to go to the courts in order

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<sup>212</sup> Robert E Emery 'Child Custody Mediation and Litigation: Custody, Contact, and Co-parenting 12 Years After Initial Dispute Resolution' *Journal of Consulting and Clinical Psychology* 2001. Vol. 69, No. 2. 323-332

<sup>213</sup> *ibid*

<sup>214</sup> 'Children's issues in mediation: cultivating co-operation or settlement seeking?' (citation 211)

to get an order or return to mediation. However, if they still feel as though they need some assistance mediation would be a much quicker and cost-effective smooth approach than taking it to the courts. In Roberts research he found that couples who used mediation as a way to solve their dispute made more changes between in the arrangements showing that they felt more comfortable and were more flexible about changing decisions.<sup>215</sup> This therefore makes changes for the child smoother and easier to adapt without them having to worry about potential tensions between both parents. Although this is a benefit for the child Robert also found that the parents being flexible in changing decisions could actually cause problems as if the parents keep changing the children's arrangements this could cause issues for the child in terms of stability. In the study Robert reported that 18% of the families who participated in mediation made four or more changes to the child's agreements which could create issues for the child as this may cause confusion for the child and this is unlikely to serve the best interests of the child.<sup>216</sup> Therefore providing the right balance or flexibility and stability and both equally as important for the child.

Although this study does confirm that children whose parents go through mediation do have better outcomes there are other factors we need to consider before we generalise that the effect would be in the same in England and Wales. Firstly, the study was carried out in the USA and therefore the family courts are different which obviously will affect results. In addition to this the study was carried out a long time ago and therefore as society has changed and mediation has developed this could also be factors to consider. The study does not consider the effects of child inclusive mediation either only child focused and therefore we do not know how the courts look in comparison to child-inclusive mediation. What we can however take from this study is that mediation has shown to have a more positive effect than the courts. However, in order to build on this more research is needed through both jurisdictions.

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<sup>215</sup> 'Child Custody Mediation and Litigation' (citation 213)

<sup>216</sup> Ibid

It seems that overall mediation and more specifically child-inclusive mediation does have positive effect however it is not perfect. There are issues with mediation involving children. One being that although mediation can improve the relationship between parents it could also make it worse. For mediation to work to its full potential it requires the parents to actually come to an agreement, but this is not always the case. It could be said that in situations where the parties do not reach agreements it could make things worse. If an agreement cannot be reached in mediation the next step is for the parties to take matters to the courts. Having already been through the mediation process however could potentially exacerbate hostility between parties and therefore causing further issues. This could also have an indirect effect on the children. Another issue with mediation is that although child-inclusive mediation is carried out in a way that is thought to minimise any distress caused to children there is no guarantee that children will not be affected by the process. Every child reacts differently to certain things and some may be affected more than others. An example of this was that in the McIntosh et al study. A report back from one of the parents showed that her daughter was left in tears after one of the interviews and stated that the issues were too raw for her daughter to deal with.<sup>217</sup> With this happening it could be said that child-inclusive mediation is not such a positive thing and in extreme cases could potentially worsen a child's mental health if the child is not suitable for the process. Despite these issues however mediation both child-focused and child-inclusive does seem to be beneficial to children whose parents are going through disputes according to the research. In terms of the English and Welsh system it seems that the government currently do not have any plans to take further steps to implement child-inclusive mediation further and considering that the uptake on general mediation is low it may be sensible to say that this would not be their focus point. Despite this I think that the studies from other jurisdictions do act as good evidence to suggest that CIM could be beneficial to the English and Welsh court system going forward it would also help comply with the UN convention of the rights of the child

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<sup>217</sup> A Prospective Study of outcomes (citation 201)

given that evidence suggests this is not currently happening. One thing that is certain is that more research does need to be done in order for anything to progress.



#### **4. Conclusion**

When looking overall at the research there is no denying that the current family mediation system in England and Wales is flawed. The purpose of this research was to find out what had gone wrong with the implementation of the Family Law Act 1996 in terms of mediation, look at how successful the current MIAM's are and whether they are actually improving the intake of mediation, and look how LASPO changed the way people access mediation. In addition to this I also wanted to look at the current stance of children in mediation and how well the process works. In order to achieve this it involved looking at whether different aspects of mediation met certain aims the government has for ADR. These aims were cost saving, resolving the back log of cases in the courts and finally to give back the power to the clients when solving their disputes.

#### **Aims**

Firstly, as mentioned in previously the government do have general aims for ADR for the legal system. The first aim was that they believed increased introduction of ADR would save money.<sup>218</sup> This was a common theme throughout my research and the areas I explored. It seemed that the government strongly believe that ADR and in this case mediation in the family law system could save them a lot of money mainly in terms of legal aid. For family law they expected LASPO to be the main way in which they would achieve this but also with the compulsory MIAM's and the introduction of the Family Law Act it seems that cost saving was always an indirect aim. So has this been achieved? At face value through LASPO the government did save money, £30 million initially.<sup>219</sup> There is no doubt that this is a huge saving, but this was only the effect of LASPO. Both the Family Law Act 1996 and the MIAM's were supposed to increase mediation which would then also indirectly cut down the cost of legal aid. This failed however as both changes never really made the breakthrough in intake as was expected. This then resulted in no money being saved. LASPO seems to be the only

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<sup>218</sup> The EU Mediation Directive (citation 34)

<sup>219</sup> Ministry of Justice Proposals for the Reform (citation 139)

success when it comes to meeting this aim. This however did not come without its problems as mentioned in a previous chapter LASPO did cause numerous issues for the family law system in general and therefore whether it can be called a success is up for dispute. The issues that LASPO created are still happening now in 2019 and it does not seem that the government have any intentions in the near future of changing this. When looking at the evidence I think that mediation does have the potential to save money but not as much as the government are wanting. People are always going to need legal aid for the courts and solicitors in family disputes and therefore there needs to be more flexibility where legal aid is given for the process to work. Cutting the solicitors out of the legal aid process was a very bold move and therefore if this was done gradually this could have boosted the publicity of mediation through solicitors meaning that although the government would not save as much money in time same time frame in the long term it would have had a better effect and reduce the damage to the family law system. So, in terms of meeting this aim it can be said that LASPO did single handily however there is argument to suggest that the damage done means that not much credibility can be given.

The second aim of ADR was the government believed that ADR and mediation increasing would take the pressure off the courts and therefore there would be no back log of family law cases.<sup>220</sup> Diverting more people to use ADR would mean that the cases that need to go to court would not have to wait such a long time to be resolved. The intention was that to some extent the changes the government made over the years with mediation they would increase the uptake. However, as the research found out however this was not the case. The Family Law Act 1996 did not increase the uptake of mediation as expected. Although this was obviously a disappointment it must be said that the Family Law Act 1996's main focus was to improve the divorce system overall. Although they did see mediation as part of that the improvements the act was not purposely designed to increase mediation and therefore it cannot be blamed too much for not meeting the aim. In contrast to this however was that the

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<sup>220</sup> ADR and Civil Justice ADR Working Group Interim Report (citation 41)

MIAM's were designed to increase the uptake of mediation in fact one of the main aims was to spread information about mediation in order for clients to be more aware of what it consists of and how beneficial it could be in the hope that they would take the mediation path instead of opting for taking their issues to the courts. With the MIAM's not increasing the uptake this had a detrimental effect on meeting the aim and therefore there is still in fact a back log of cases currently. Finally, LASPO was also another attempt at increasing the uptake of mediation as cutting of all legal aid to families for the courts unless they had attended mediation essentially meant that they would have no other choice but to turn to mediation or leave their issues unresolved. As stated earlier this did not however go to plan as there was in fact an increase in the number of litigants in person that attended the courts. Therefore, it was not that LASPO had decreased the amount of people going through the courts, but they have just made people go through the court system without legal representation. With all 3 of the government's changes failing to increase uptake it was inevitable that the aim was not met and the same situation still stands.

The final aim of ADR is that it would put the decision making in family law back into the client's hands. When looking at all types of ADR mediation is one of the types that has the most potential to do this in comparison to arbitration for example. I think this the hardest aim to achieve as to achieve this aim it is reliant on the intake to increase and for mediations to be successful and for parties to be reaching an agreement. For this aim to be met a chain of other factors need to be increased. As we know from the research mediation has not really improved since the government implemented the Family Law Act 1996, the MIAM's or LASPO and therefore I would confidently say that this aim has not been met. The intake has not increased which essentially means that successful mediations have not increased and therefore it is highly unlikely that more parties are now in control of their disputes. In order for the government to achieve this aim I think they need to focus on other aims especially the aim to increase the intake of mediation. I think if this is done then naturally the power will shift.

It can be said that currently family law mediation is not meeting any of the ADR aims the government have without issues. When looking back at the research it seems that many other aims regarding the specific ones that the government had in mind when implementing changes to the mediation process were also not met. With so many aims not being met in regard to mediation it does raise questions of whether it is not that the government are failing with implementing this, but it is that their expectations for mediation are just too high. When researching a source written by Howard Irving an academic raised an interesting point. It was published in 1995 so before the governments changed had come into place. In the text Irving makes statements and predictions about the future of mediation.<sup>221</sup> Interestingly once statement he made was that he predicted that family mediation was likely to become an increasingly important mechanism for dealing with divorcing families. The reason he gave for this was that he believed that due to the limitations of the legal system over the next decade mediation would increase. He believes this is because the court's rulings are based upon 'reasonable person' whereas mediation is designed to deal with dysfunctional clients.<sup>222</sup> Despite agreeing with Irving to some extent that mediation is more suited to complex clients that are far from the 'reasonable person' it has now been over two decades since he made this statement and the breakthrough he predicted has still not happened. This therefore raises the suspicion that maybe mediation is not the hero of family law the government seems to think it is. If mediation has all these benefits and seems to fit the modern society more effectively then why has it not taken over family law already given the opportunities made by the government?

I think one of the main reasons that mediation has not had its breakthrough is one we have previously explored, this is that mediation just does not get the publicity that it needs in order to have a more prominent place in family law. As research showed in previous chapters some people are clueless about what mediation is about<sup>223</sup> as this was evident in the

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<sup>221</sup> H J Irving 'Family Mediation Contemporary Issues' (SAGE Publications 1995) 442.

<sup>222</sup> *ibid*

<sup>223</sup> 'Monitoring Publicly Funded Mediation' (citation 93)

research surrounding the Family Law Act 1996 that when the pilot information meetings were put forward many people just used them as a tick box exercise in order to get their dispute to court rather than actually using it to benefit them in regards to potentially using mediation as a way to solve their dispute. Although we established earlier the information meetings had problems of their own it is clear from this and other aspects that people are often mistaken when it comes to understanding the mediation process.

There also seems to be issues with the mediation process itself that is holding it back from progressing. One being that often people are scared to attend mediation sessions due to the fact there may be a power imbalance within the parties which could potentially cause issues. This was raised as early as 1986 by R Ingleby in a journal article he published about out of court settlements.<sup>224</sup> He stated that if mediators are completely neutral then this gives existing inequalities between the parties to be reinforced. Therefore, essentially stating that due to the fact the mediator cannot take either of the parties sides when it comes to reaching an agreement this means that the more dominant party is able to continue taking the lead in the situation. This also causes further issues such as when the parties actually reach an agreement this may have been due to being steered into an unbalanced settlement or an unsatisfactory compromise due to the imbalance between the parties. Four years earlier than this Abel an academic also raised a similar concern stating that he believes that informal institutions claim to render parties more autonomous when in reality they actually engage in subtle manipulation in their process.<sup>225</sup> This is a very bold statement from Abel and I personally think he is very vague by saying 'informal institutions' and therefore it is wrong from him to generalise that every process other than essentially the formal court process is in some way manipulative towards his clients. That being said however in terms of mediation I do feel like this statement could potentially fit the theory as to why mediation is not as popular as it should be. It may be that a lot of people going through disputes share

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<sup>224</sup> R Ingleby, 'Out of court settlements: policy, principle and practice, procedure' (1986) 11 *Mediation Quarterly* 57, at p 67.

<sup>225</sup> R L Abel, *The Politics of Informal Justice* (Academic Press, 1982), Vol 1, at p 9.

the view that the outcome of 'informal institutions' in this case mediation does leave parties more vulnerable and at risk of a worse deal than if they were to go to the courts. In contrast this however there are arguments against this view. One being that a situation like this can be avoid providing that the mediation performing the sessions is adequately trained then they should have the skills in order to stop this situation from occurring and if the mediator feels that this is an issue they cannot resolved then they must stop the mediation immediately.<sup>226</sup> Also this a very valid point and mediators are trained to avoid situations like this there is no guarantee than this can be 100% avoided and if the mediator is in adequately trained then this could do more damage than good. Looking at this although potentially not the main reason why mediation is not as successful as the government want it to be it does show that the mediation system is not perfect and therefore there are flaws within the system which may make people going through a family dispute choose against the mediation process and it is not just that the government's attempts are failing.

Despite the fact that many people believe that mediation is a good alternative to the courts others do have reservations. Lord Neuberger stated in the annual Bentham lecture in 2011 that was later published in the Law Society Gazette that despite the fact that he believes that mediation is valuable he does think that it cannot be a replacement for the courts. His speech focused around if mediation were to become the norm and therefore access to the courts was limited. He believes that this could never happen as if there is no effective access to the courts, the fundamental underpinning to all forms of dispute resolution systems, such as mediation falls away.<sup>227</sup> Lord Neuberger is essentially stating that the courts are needed as a back bone and if they are not accessible then there would be no point in the mediation either. He stated that the only reason he believes people mediation and take part in arbitration currently is because they know that they are protected by the courts as without the court's justice would essentially not be served. Now although Lord Neuberger I think

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<sup>226</sup> 'The Place of Mediation in the Family Justice System' (citation 105)

<sup>227</sup> Rachel Rothwell 'News: Mediation 'cannot be the norm' - (2011) LS Gaz, 10 Mar, 4 (1).

could possibly be exaggerating that if mediation were to become the norm the courts would be completely inaccessible however I do think the process of the courts and the nature of the courts does in fact seem more appealing as it has characteristics that mediation does not. For example, even if the mediation process works out for the parties and they reach an agreement and everything seems to have gone to plan there is nothing to say that once the mediation is over with both parties have to completely stick to that agreement. The courts however do have the security that some parties may think is essential. Especially if the parties are separating and trust issues may have been part of this. Although of course if this does happen then parties can of course go to courts for a settlement that is binding. This again however is more money and time and therefore if people have the slightest doubt that the mediation settlement may not work for them then for the sake of their own time and money will probably choose against it.

There are a few problems with the mediation system which could potentially be what is holding it back from progressing and therefore when looking at all the evidence it could potentially be that no matter what strategies the government put in place in order to give it a boost these will never work as the actual structure of mediation is something that is holding it back. If changes were made to mediation it may mean that it would no longer be mediation but perhaps closer to another form of ADR or even the court process. Overall when looking at the current history of mediation and where it is today, I think that it would be very surprising if mediation were to have to breakthrough that the government so desperately want. If they are wanting to meet the aims, I believe that mediation is not necessarily the answer and particularly in terms of cost saving I would suggest that they would need to loosen the emphasis on mediation being this solution because nothing else has worked other than LASPO. This was not however without the damage to the family law system.

### **Children in mediation**

In terms of children in mediation I think CIM does have the potential to work and be very beneficial in the English and Welsh system. Looking at the evidence from other jurisdictions there is no denying that it does have a positive effect on the results of the dispute for both parents and the children. The issue is that without the research performed in the England and Wales system we do not know what impact CIM would have. It is however not just as simple as carrying out research as in order to gather research CIM would actually need to be taking place, which as we established earlier is currently happening despite the framework being in place and some mediators being trained the intake is very limited. Although this would make sense as in order to have intake in child inclusive mediation there needs to be an intake in general mediation with as we know it currently limited. As we explored earlier there are potential reasons why parents do have reservations around CIM and therefore without the research as evidence to show that it would be beneficial it could be said that it may never be used more frequently. I think this is a shame as the studies did show positive results that could if used and performed well be beneficial for children especially in terms of mental health and how divorce and separation agreements can affect them. There is however no guarantee that this effect would be the same for every child and therefore if more research were to be done maybe we would have more of an idea of what the different effects are and what type of child would achieve the most benefit however again without the reason child inclusive mediation is at a stalemate.

### **The future and other jurisdictions**

As stated above it seems that potentially mediation could have reached its peak already in England and Wales. This being said however there are other jurisdictions where it seems that mediation may be working more favourably, one of these jurisdictions being Hong Kong. Judges and scholars in Hong Kong have recognised that litigation may not necessarily



guarantee natural justice.<sup>228</sup> In 2002 Hong Kong released an interim report of the pilot scheme for family mediation that they had released 2 years earlier on 2000. The results were actually very positive with 97.8% of the people who participated in the final survey stating that mediation should be promoted.<sup>229</sup> Amongst other popular results it seemed that family mediation had made a good impression on the people of Hong Kong so much so that this then resulted in Practice Direction 15.10 being implemented. The practice direction stated that practitioners in Hong Kong must pursue mediation prior to filing a case to court. The practice direction sets out what is meant by 'pursue', it goes on to say that a practitioner should inform the parties of the availability of mediation and how it may assist. As well as this they should also be given a leaflet which states information about the process. Once this has been done the client will then go back to the practitioner and inform them of their interest or not. If the parties do express willingness to mediation the practitioner will then sign a Respondent's Certificate to Family Mediation. When this has been signed the referral should then begin and the process for mediation should start. If a party fails to engage in mediation and does not have an excuse that the court feels is reasonable then adverse costs could then be presented to them by the courts as a consequence.<sup>230</sup>

As we can see from above it seems that family mediation in Hong Kong is seen as a valuable thing. With this being the case this raises the question again of why is mediation failing in England and Wales if it seems to be working well in Hong Kong? Firstly, it seems one thing that stands out is that unlike the English and Welsh system in Hong Kong there are consequences for failure to engage in mediation in the form of costs. As we saw earlier it seemed that the judges were rather lenient when it came to enforcing consequences for the failure to attend a MIAM or in fact even checking whether clients had been to one. It seems to be the opposite in Hong Kong where it may be that the fear of having to pay costs makes them comply with the practice direction and therefore they go through with the mediation

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<sup>228</sup> Yuk Ki Lee 'The Case for Mandatory Mediation to Effectively Address Child Custody Issues in Hong Kong' Int J Law Policy Family (2012) 26 (3): 327

<sup>229</sup> *ibid*

<sup>230</sup> Hong Kong Practice Direction 15.10

process. Perhaps if England and Wales had strict consequences then things would be different.

Another factor that could explain why mediation is more effective in Hong Kong is cultural differences. It could be that Hong Kong as a society are more accepting of mediation than England and Wales as it fits better with their culture as it could be seen that mediation is more consistent with their culture's beliefs. For example mediation is very relationship orientated and child focused which are very much highly priorities in Hong Kong society. Although of course it would be wrong to say that England and Wales do not have these beliefs but I think that as a society they have stronger presence in Hong Kong.<sup>231</sup> Due to mediation being more focused around those beliefs it seems that this is why it has been more accepted in Hong Kong. Unfortunately, culture is something that is unable to be changed easily and so therefore it may just be that family mediation is just more easily adapted in Hong Kong and there is not much that England and Wales can take from this.

When looking at the wider picture of mediation I think that despite the fact it has failed to make the imprint in the family law system it is a very good process at accompanying the current system and providing alternative routes to the courts that I think is definitely needed. Considering the failure of the Family Law Act 1996, LASPO and the MIAM's at increasing the intake of mediation I think that unless something happens soon that would make a drastic change to the process mediation will only ever be an accompaniment to the courts. Looking at the evidence of the attempts of the government and the current situation it would seem that the only thing left for the government to do that would have a drastic effect would be to make mediation compulsory. I do not believe that this would be the correct thing to do and given the precedent on compulsory mediation I imagine that the government are also reluctant in doing so. I think that mediation will always be a good addition to the family courts however in terms of it having a very prominent role in the system is very ambitious. Despite the government's previous efforts having many issues I think that if mediation were to have a

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<sup>231</sup> Practice Direction (citation 230)

bigger role the changes the government implemented would have had a bigger impact and therefore I do not see mediation taking centre stage in family law in the near future.

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